

**Harborside Healthcare, Inc. and Teamsters Local 20,
International Brotherhood of Teamsters, AFL-
CIO, Petitioner.** Case 8-RC-15774

April 24, 2000

DECISION ON REVIEW AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 17, 1998, the Regional Director for Region 8 issued a Decision and Direction of Election in the above-entitled proceeding, in which he found that the Employer's charge nurses (CNs) are statutory supervisors within the meaning of Section 2(11) of the Act. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision. By order dated September 17, 1998, the Board granted the Petitioner's request for review. The election was conducted as scheduled on September 17, 1998, and the ballots were impounded.

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

Having carefully reviewed the record and the Petitioner's and Employer's briefs on review,¹ we find, contrary to the Regional Director, that the CNs' authority to evaluate and call in employees fails to establish that CNs are statutory supervisors.

A. Background

The Petitioner seeks to represent a unit consisting of 15 registered nurses (RNs), 18 licensed practical nurses (LPNs) (both RNs and LPNs are referred to as CNs), and 35 state tested nursing assistants (STNAs) at the Employer's long-term care nursing facility located in Swanton, Ohio.²

The Regional Director found that the RNs and LPNs are statutory supervisors based on their authority to evaluate STNAs³ and call in replacements for STNAs. Specifically, the Regional Director found that the evaluations prepared by the CNs determine whether to retain or effectively recommend the retention of employees and determine or effectively recommend whether employees receive raises. The Regional Director also found that the CNs use independent judgment sufficient to render them supervisors within the meaning of Section 2(11) of the Act when they determine which employees will be called

¹ The Petitioner's motion to strike those portions of the Employer's brief on review which seek to raise issues not presented in any timely filed request for review is granted. See Sec. 102.67(g) of the Board's Rules.

² The administrator, the director of nursing, the assistant director of nursing, and the two unit managers are stipulated statutory supervisors. The Regional Director's decision finding the 33 CNs to be statutory supervisors renders a ratio of 38 supervisors to 35 employees at the Employer's facility.

³ CNs also evaluate newly hired CNs; however, the Employer does not contend that CNs possess supervisory authority based on their evaluation of newly hired CNs.

in to work, and thereby determine which employees will be offered premium pay and overtime.⁴ For the reasons that follow, we disagree with the Regional Director.

B. Analysis

1. The CN's evaluations of STNAs

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of 'employee.'" Section 2(11) of the Act defines "supervisor" as:

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.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *NLRB v. Provident Nursing Home*, 187 F.3d 133 (1st Cir. 1999), enf. 324 NLRB No. 46 (1997) (not reported in Board volumes); *Telemundo de Puerto Rico*, 113 F.3d 270, 273 (1st Cir. 1997). Further, the burden of proving supervisory status is on the party alleging that such status exists. See, e.g., *Bennett Industries*, 313 NLRB 1363 (1994).

Section 2(11) does not include "evaluate" in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. See *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999).

In the instant case, the Employer issues performance appraisals to new employees after their initial 90-day probationary period and annually thereafter. Probationary evaluations are prepared for STNAs by at least one CN, and often by three CNs. Separate evaluations are completed by unit managers (uncontested statutory supervisors). Annual evaluations are completed for STNAs by both CNs and unit managers after the STNAs' probationary periods are successfully completed. Both CNs and unit managers use identical evaluation forms. Unit managers distribute the forms to the CNs to fill out, and the CNs return the forms to the unit managers. Once

⁴ The Regional Director found that the CNs do not have the authority to assign and direct or discipline employees. There was no request for review of these findings.

completed, the evaluations are presented to the employees and placed in their personnel files.⁵

a. Wage increases

The Regional Director found that the petitioned-for nurses' evaluations of STNAs determine wage or merit increases, and therefore establish their supervisory authority. The evidence, however, fails to support this finding. Significantly, the RNs and LPNs make no recommendation on their evaluations of the STNAs that the STNAs receive any wage increase. Rather, the director of nursing (DON) makes decisions regarding raises and in doing so, she merely takes the STNAs' evaluations "into consideration."⁶ There is no showing that any employee evaluated by the CNs has ever been denied a "step" increase.⁷ Further, there is no indication that any STNA has received a merit wage increase.

Moreover, unit managers prepare evaluations for the same STNAs as do the CNs, and there is no indication how any conflict in the numerical ratings of the separate evaluations would be dealt with by the DON. Indeed, the DON may not see CN evaluations of STNAs that conflict with the evaluations prepared by unit managers. In that regard, unit managers can and have returned evaluations to the CNs for revision before the evaluations are reviewed by the DON.⁸ There is no evidence that CN evaluations of STNAs ultimately presented to the DON are the product of the CNs' independent judgment, or reflect a collaborative effort between equals. Compare *Harbor City Volunteer Ambulance Squad*, 318 NLRB 764 (1995). Thus, the evidence fails to establish that there is a direct link between the CNs' evaluations and pay increases.⁹ See *Elmhurst Extended Care Facilities*,

supra; *Provident Nursing Home v. NLRB*, *supra* (the Board's interpretation of "effectively recommend" in Section 2(11) of the Act to require a "direct correlation" is to be given deference); *Children's Farm Home*, 324 NLRB 61 (1997). Instead, the nurses' role is more akin to that of more experienced lead employees, who submit to higher authority their opinions on the abilities of the employees that they evaluate. See *Elmhurst*, *supra*; cf. *Bayou Manor Health Center*, 311 NLRB 955 (1993).

b. Continued employment

The Regional Director found that the RNs' and LPNs' recommendations in their evaluations concerning an employee's continued employment establish their supervisory authority. Again, the evidence does not support the Regional Director's finding. Notably, as indicated above, evaluations are sometimes completed by more than one RN or LPN, as well as by unit managers, and there was no testimony concerning how the DON would weigh conflicting recommendations of two or more of the nurses who contribute to an evaluation, or conflicting recommendations of CNs and unit managers. Moreover, as also indicated above, the DON may not see the evaluations (and thus the recommendations) independently completed by CNs since unit managers may have required changes in evaluations submitted by CNs before the DON has reviewed them. Significantly, no employee has been terminated based on an evaluation. Further, no CN has recommended that the employment of an STNA not be continued. The DON testified that she would take into "consideration" such recommendations and it would be "possible" that the recommendations would be followed. However, the DON's testimony as to the weight that would be afforded a CN's recommendation concerning continued employment is thus not only speculative, but also lacks specificity. Such evidence is insufficient to show that the CNs' evaluations affect the status of the employees being evaluated. See *Elmhurst*, *supra*.

The Employer thus failed to demonstrate that the CNs' recommendations of continued employment or their ratings in connection with employee evaluations are directly correlated with either job retention or wage increases, and are thereby effective. *Elmhurst*, *supra*; *Crittenton Hospital*, 328 NLRB 879 (1999); *Custom Mattress Mfg.*, 327 NLRB 111 (1998).¹⁰

⁵ The evidence is unclear as to who presents the evaluations to the employees.

⁶ Contrary to our dissenting colleague, the DON testified that she takes evaluations "into consideration" in determining step wage increases; that if an evaluation was extremely low, and the employee's employment was continued, the employee "may not receive the same step increase" (emphasis added) as other employees.

⁷ Indeed, the Employer's step rate compensation chart indicates that an employee's step increase is based on his or her years of service and is silent with respect to evaluations.

⁸ On at least two occasions, unit managers have returned the evaluations for revision. On one such occasion, the unit manager required that the evaluating CN revise the appraisal of a probationary employee because "the evaluation was too high." On the other occasion, a unit manager returned for revision a nurse's evaluation which recommended against continued employment, because the unit manager felt that the evaluation was "unfair."

⁹ To the extent the Regional Director suggests that the numerical ratings provided by the nurses on evaluations determine employee percentage pay increases, we note that evidence of any such practice is lacking. The director of nursing has not provided for any compensation awards to be issued to employees beyond the step increase indicated above. The DON has stated that she has not provided for any compensation awards, and the documents submitted by the Employer fail to show any merit percentage pay determination. Indeed, the record contains only three salary change forms. Two of these documents conform to the salary increase employees receive based on their years of service as indicated in the step rate compensation chart and not based on their

evaluations. The other form is dated a year prior to the other two salary forms and has a base and increase pay level different from that of the other two forms. However, the amount of increase is the same as that of the other two salary forms. Although the evaluations have numerical scores assigned to performance items covered by the evaluation, contrary to the Regional Director, there is no showing of any correlation between these scores and a merit or percentage increase. The Regional Director's reliance on *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997), and *Bayou Manor Health Center*, 311 NLRB 955 (1993), is thus inapposite.

¹⁰ The Regional Director also found that because the nurses' evaluations are presented to the evaluated employees, those employees are aware that the nurses evaluate them. To the extent the Regional Direc-

2. The nurses' call-in authority

We also find, contrary to the Regional Director, that the CNs' authority to call in employees is routine and does not require the exercise of independent judgment necessary to establish statutory supervisory authority. When a unit manager is not present, it is the CNs' responsibility to replace employees who are absent.¹¹ Employees called in to work on a shift for which they were not previously scheduled are eligible for a \$3 per hour premium pay and overtime pay, if applicable. CNs sign "edit slips" to indicate that an employee is eligible for the extra pay in these circumstances. These slips are also then signed and approved by the unit manager. However, the CNs' authority to call in employees is limited since staffing levels are dictated by the State of Ohio and by the Employer. The CNs who testified stated that they do not have the authority to exceed these staffing levels by calling in extra STNAs without approval from management. For example, in one instance in which a CN recommended that an STNA be called in to work an entire shift, the DON authorized the call-in for a partial shift only because, according to the DON, staffing laws required only seven employees after a specific hour in non-acuity situations. Further, CNs have no authority to require any employee to come in to work, but are limited to seeking volunteers. In the one instance described in the record where a CN could not find an employee to volunteer for an extra shift, the CN did not have authority to take further action without contacting upper management.

Finally, although the DON testified that CNs are not given any set order to follow in calling employees to offer overtime, there is no record evidence that establishes what procedures CNs use to call in STNAs or how they decide which STNAs to call.¹² In these circum-

tor relied on this finding in concluding the nurses are statutory supervisors, we note that the possession of secondary indicia of supervisory status is not dispositive in the absence of evidence indicating the existence of any of the primary indicia of such status. *Billows Electric Supply*, 311 NLRB 878 fn. 2 (1993).

¹¹ However, not all the CNs who testified were aware of this authority.

¹² Our dissenting colleague argues that the CN shift supervisor's authority to reassign nurses among different departments also confers supervisory authority because he contends that, in temporarily reassigning nurses to ensure coverage and patient care, a CN uses his or her independent judgment to assess the skills of the nurses and match them to the needs of the facility. The Regional Director did not find this function to constitute a basis for finding Sec. 2(11) authority and no request for review of this decision was timely received. In any event, the Board has found that the authority to transfer employees to other wings of a facility that are short staffed, without more, is routine and not supervisory. See *Northern Montana Health Care*, 324 NLRB 752 (1997) enfd. in relevant part 178 F.3d 133 (9th Cir. 1999); *Provident Nursing Home v. NLRB*, supra (reassignment of employees that involved the matching of skills to requirements found to be routine). The dissent offers no example of a CN's reassignment that required the independent judgment necessary to confer Sec. 2(11) supervisory authority.

stances, we find that the CNs' authority to call in replacement employees is limited and has not been shown to involve statutory supervisory authority. See *Washington Nursing Home*, 321 NLRB 366 (1996); *Green Acres Country Care Center*, 327 NLRB 257 (1998); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997); *Providence Hospital*, 320 NLRB 717 (1996), enfd. 121 F.3d 548 (9th Cir. 1997).

Thus, we find, contrary to the Regional Director, that the CNs at issue here do not possess supervisory authority to determine STNAs' terms and conditions of employment or pay, or to effectively recommend such changes as a result of their evaluations of STNAs or their call-in authority.

Further, we note that if the nurses were found to be statutory supervisors, the resulting supervisor-to-employee ratio of 38 supervisors to 35 employees would be impracticable and unreasonable. See *North Miami Convalescent Home*, 224 NLRB 1271, 1272 (1976).

Accordingly, we reverse the Regional Director's decision to the extent that it finds the petitioned-for CNs to be supervisors within the meaning of Section 2(11) of the Act.

ORDER

This proceeding is remanded to the Regional Director for further appropriate action consistent with this decision.

MEMBER HURTGEN, dissenting.

Contrary to the majority, I agree with the Regional Director that the registered nurses (RNs) and licensed practical nurses (LPNs)—collectively termed charge nurses (CNs)—are supervisors.¹ In particular, I rely on the fact that CNs—when designated as shift supervisors—have authority to call-in RNs, LPNs, and STNAs, and the authority to reassign those nurses and assistants in order to meet staffing needs. I further find that the CNs are supervisors based on their role in evaluating STNAs.²

Authority to Call in Staff

As found by the Regional Director, during the evenings and on weekends, when higher management is not working, a CN is designated as shift supervisor and is in charge of the entire facility.³ During these hours, one of the CN shift supervisor's responsibilities is ensuring that

¹ The Union sought a unit of RNs, LPNs, and STNAs (state tested nursing assistants) at the Employer's Swanton, Ohio nursing care facility.

² The Employer had additionally argued that the CNs were supervisors based on their authority to discipline and direct other nurses. The Regional Director rejected these arguments, and no exceptions were filed. Accordingly, I do not reach these additional alleged indicia of supervisory status.

³ Indeed, the evidence establishes that higher management is not even on-call during this period. The director of nursing testified that she does not even carry a pager.

each department is properly staffed.⁴ Accordingly, when there are staff shortages—due to illness, call-ins (i.e., scheduled employees who do not report for work), employees leaving early (which CNs can authorize), etc.—the CN is responsible for selecting additional staff to meet the staffing needs. Indeed, the CNs receive an additional 25-cent-per-hour pay premium specifically for performing these duties.

Further, when arranging for additional staff, the CN can decide to call in unscheduled employees, ask scheduled employees to report early, or request that current staff stay over.⁵ Moreover, the CN decides which personnel to request.⁶ There is no list, seniority provision, or other set criteria that the CN is required to follow. It is the CN's choice.

The DON testified that she knew of no instance when the CN's authorization of shift differential or overtime had not been accepted by upper management. This choice directly affects the wages of the selected personnel. Those selected by the CN receive an additional \$3 premium for each hour of unscheduled shift time. In addition, called-in staff who exceed their regular full-time weekly hours also receive overtime pay. Thus, as found by the Regional Director, the shift supervisor CN who exercises this call-in authority can and does substantially affect pay. Clearly, this is an indicium of supervisory status.

My colleagues assert that there is no evidence concerning what procedures CNs use to call in STNAs. In my view, the absence of procedures is consistent with the discretion reposed in the CNs.

The CNs' staffing authority is not limited to selecting additional staff to fill particular vacancies. The CN shift supervisor additionally decides how to divide the staff throughout the facility.⁷ Thus, when calling in additional personnel, the CN shift supervisor can reassign

staff among the different departments in order to ensure coverage and patient care.⁸ In making these reassignments, the CN uses his/her independent judgment to assess the skills of the staff and to match them to the needs of the facility and individual units. In my view, this is a quintessential exercise of supervisory authority.

Role in the Evaluation Process

I further find that the CNs are supervisors based on their evaluation of STNAs. It is well settled that individuals are statutory supervisors where their evaluations of employees lead to personnel actions affecting the appraised employees, such as the grant of merit increases, or the determination that the rated employees will be retained, discharged, or placed on probation. *Northcrest Nursing Home*, 313 NLRB 491, 498 fns. 36, 37 (1993). The determinative factor in assessing the evaluator's supervisory status is whether the evaluations impinge on the rated employee's job status. *Manor West, Inc.*, 311 NLRB 655, 663 (1993). Under this standard, I agree with the Regional Director that the CNs are supervisors.⁹

The record establishes that STNAs are evaluated after 90 days of employment and, thereafter, annually. They are assessed on forms that measure their performance in the categories of quality and quantity of work, dependability, cooperation, initiative, self-improvement and personality.¹⁰ Based on the ratings given the STNAs in these categories, they receive overall ratings of outstanding, above average, average, or below average. The evaluator also recommends on the form whether or not the appraised STNA should be retained.

The record establishes that CNs fill out these evaluation forms for the STNAs. A second set is also filled out by a unit manager. Based on uncontradicted testimony, the director of nursing (DON) uses both sets when deciding whether to retain an employee. Indeed, the DON testified that she particularly relies on the CNs' recommendations because they work directly with the STNAs.

I am unpersuaded by my colleagues' attempt to minimize the CN's authority to evaluate, by stating that the DON "merely" takes the CNs' evaluations into consideration. As noted above, the DON testified that she particularly relies on the CNs' recommendations because they (unlike the unit managers) are in a position to directly assess the STNA's performance. Indeed, DON Burno testified that she relies on the CNs' recommendations "because they are the ones that work closely with the nursing assistants, not me."

Based on the above, the CNs have an effective role in the recommendation process.

⁴ Although the State prescribes minimum staffing levels, and the Employer additionally specifies its own level of nurses, the CN decides how those nurses are to be divided among the various departments of the facility.

⁵ I have used the term "call in" to include all of these arrangements.

⁶ In arguing that the shift-supervisor CNs are not supervisors, my colleagues rely on the fact that they can offer additional hours to nurses, but cannot compel them to accept. I do not find that fact determinative. *Washington Nursing Home*, 321 NLRB 366, 367 (1996) (Member Cohen's dissent); *Hillhaven Rehabilitation Center*, 325 NLRB 202 (1997) (Member Higgins' dissent) enf. denied in unpublished decision (Case 97-6462, 98-5165) (6th Cir. 1999). As noted, *infra*, by offering additional hours, the CN offers opportunities for overtime, and decides who may receive it.

⁷ Although the majority argues that the Regional Director did not rely on the CNs' authority to reassign employees when determining that they were supervisors, they concede that the CNs reassign staff based on the skills of the staff and the needs of the residents. In my view, such reassignments are "sensitive and nuanced" decisions that are "inseparable from the exercise of independent judgment." *Beverly Enterprises v. NLRB*, 165 F.3d 290, 298 (4th Cir. 1998); *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 342 (4th Cir. 1999). See also *NLRB v. Attleboro Associates*, 176 F.3d 154, 166 (3d Cir. 1999).

⁸ As found by the Regional Director, the CN independently decides during evening hours if nurses need to be moved to other areas.

⁹ See also my dissenting opinion in *Mount Sinai Hospital*, 325 NLRB 1136 (1998).

¹⁰ The forms additionally provide for written comments by the evaluator.

The CN's evaluation can also affect an STNA's rate of pay. According to the DON, where the STNA receives at least an average rating on the appraisal form, that employee receives a wage increase based on a set wage scale.

The DON further testified that if an employee were rated "below average," he/she may not receive this same increase. In this regard, my colleagues have chosen to emphasize the word "may." I could just as easily emphasize the word "not," i.e., if the CN's evaluation were low, it would be impermissible for the STNA to receive a step increase. It is not necessary to resolve this matter. The critical fact is that the DON, in deciding the step increase issue, relies heavily on the CN's evaluation.

My colleagues also note that there is no evidence that a step increase has ever been denied. However, as Section 2(11) makes clear, supervisory status exists even if there is only the *authority* to recommend.

Thus, contrary to the majority, I find that there is a direct correlation between STNAs' evaluations and their rates of pay. Accordingly, the CN exercises supervisory authority when evaluating a STNA, because the decision as to whether that employee gets a raise is based on the

employee's experience and evaluation. As found by the Regional Director, "the evaluation filled out by the CN is retained in the employee's personnel file and is used to determine the employee's retention and whether the employee is to receive a raise."¹¹

My colleagues further argue that the CNs should not be found to be supervisors because it would result in a disproportionate ratio of supervisors to employees. Certainly, to the extent that the CNs are supervisors based on their shift supervisor status, this is not the case. Only one shift supervisor is assigned per shift. That shift supervisor, in turn, supervises the several STNAs working that shift. Although the ratio is roughly one to one in the evaluation process, this is less relevant than the reasonable ratio concerning day-to-day operations.

In sum, based on the CNs' authority, when acting as shift supervisors, to call in nursing employees and based on their evaluation of STNAs, I find that the CNs are 2(11) supervisors. Accordingly, I would sustain the challenges to their ballots.

¹¹ Decision and Direction at p. 19.