

**Vencor Hospital-Los Angeles and United Nurses Association of California, National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees, AFL-CIO.** Case 31-RC-7181

August 5, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND LIEBMAN

Pursuant to a Stipulated Election Agreement, a secret-ballot election was conducted on July 15, 1994, in a unit of all professional employees.<sup>1</sup> The tally of ballots shows that of approximately 65 eligible voters, 56 cast ballots, of which 4 were in favor of Petitioner, 7 were cast against the Petitioner, and 45 were challenged. The challenged ballots are sufficient in number to affect the results of the election.

On July 28, 1994, the Regional Director issued a report of Challenged Ballots, Order Directing Hearing and Notice of Hearing wherein he found that the challenged ballots raised substantial and material factual and legal issues that can best be resolved by a hearing.

Pursuant to the Regional Director's Order, a hearing was held on August 19, September 7, and September 14, 1994. On October 14, 1994, Hearing Officer Andrea P. Beaubien issued a report recommending that the Petitioner's challenges to 10 ballots based on supervisory grounds be overruled, but that the Employer's challenges to the 33 ballots cast by the registered nurse team leaders on the ground they are statutory supervisors be sustained.<sup>2</sup> The Petitioner filed exceptions and a supporting brief.

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

The Board has reviewed the record in light of the exceptions and brief, and adopts the hearing officer's rulings, findings, and conclusions only to the extent consistent with this decision. The hearing officer recommended that the Petitioner's challenges be overruled because the record contains no evidence that those 10 employees possess any supervisory indicia within the meaning of Section 2(11) of the Act. We agree with that recommendation for the reasons stated by the hearing officer. Contrary to the hearing officer's recommendation,

however, we find for the reasons stated below that the Employer's challenges to the ballots of the 33 registered nurses should also be overruled because the record fails to establish that these employees are statutory supervisors.

FACTS

Vencor Hospital-Los Angeles (Vencor) is an 81-bed licensed facility specializing in the treatment of medically complex acute patients. Most of these patients have been transferred to Vencor from intensive care units at other hospitals. Vencor consists of three medical surgical wings, an intensive care unit, a radiology department, an operating room, a laboratory and a pharmacy; it does not have an emergency room. Vencor employs about 225 employees including approximately 175 clinical employees. Vencor's clinical staff works 12-hour shifts to cover a 24-hour period, from 7 a.m. to 7 p.m. and from 7 p.m. to 7 a.m. Most of the nonclinical staff works five 8-hour days, with three 8-hour shifts to cover a 24-hour period.

Vencor's administrative staff is composed of an administrator, who is responsible for the overall operation of the hospital, an assistant administrator of clinical operations, a director of nursing, a respiratory manager, and a quality review manager. Under the director of nursing there are five house supervisors, one of whom is on duty every 12-hour shift. The house supervisors are all registered nurses and function as onsite administrators with overall responsibility for the hospital's operation during their shift.

Vencor uses a team concept in its approach to patient care. One of the primary responsibilities of the house supervisor is to schedule and staff the teams which provide direct patient care. On each 12-hour shift, there are usually five or six teams functioning in the hospital. The teams normally consist of a registered nurse (RN), who serves as team leader, a respiratory therapist (RT), a licensed vocational nurse (LVN), and a certified nursing assistant (CNA). Each team is assigned a group of 8 to 12 patients by the house supervisor. Depending on the number and acuity of the patients, the house supervisor may assign more than one CNA or LVN to a team.

The RN team leaders are responsible for assigning to team members the tasks that need to be performed for each patient. These assignments are based on the needs of the patient, the number of patients assigned to the team, the patient's plan of care, and the background, skill and experience of the team members. For example, if a patient needs a level of care that an LVN can give, but not a CNA, then the LVN is assigned those tasks. RN team leaders also perform direct patient care, and consequently, assign themselves those tasks which only an RN

<sup>1</sup> The unit is described as follows:

Included: All professional employees including registered nurses, social workers, medical technologists, registered dietitians, registered pharmacists, case managers, registered physical therapists, quality review employees, director of patient referral, and biomedical engineer.

Excluded: All other employees, guards and supervisors as defined in the Act.

<sup>2</sup> The two other employees whose ballots were challenged were found by the hearing officer to be ineligible to vote based on stipulations by the parties.

can perform.<sup>3</sup> No team member has the sole responsibility for any one patient; instead, each team member performs various tasks for a number of different patients and, as a group, the entire team is responsible for all of its assigned patients.

The RN team leader also makes rounds of all the patients assigned to the team and regularly receives reports from team members on the condition of the patients. During the course of a shift, the RN may have to adjust the team members' assignments if a new patient is admitted, if a particular patient requires a special procedure, or if a patient's condition deteriorates. In the latter case, the RN may need to replace a CNA with an LVN because a higher level of skill is needed. The RN team leader also determines when team members can go on breaks.

If a team member does not show up for work or additional staff is needed because of patient acuity or the number of patients assigned to the team is greater than anticipated, the RN team leader contacts the house supervisor who provides the additional staff. Similarly, when a team has too many staff members due to low patient count and/or high acuity, the RN notifies the house supervisor so that they can be reassigned to other areas of the hospital where needed. The duties of the house supervisors also include making rounds and authorizing overtime for nursing staff employees who work 1 hour or more in excess of their 12-hour shift. The house supervisors also approve vacations and conduct in-service training.

It is the responsibility of the RN team leader to see that appropriate care is given to each patient. To accomplish this, the RN tells each team member what tasks need to be done. For example, a CNA's duties may include such tasks as bed baths and recording vital signs; LVNs would be directed to perform specific procedures and/or administer medications. At times, patients need special procedures such as a bronchoscopy or a surgical procedure and in those instances the RN gives directions to the team members as to what procedures they are to follow. If a team member is not caring for patients in accord with hospital protocol or policy or the case is substandard, the RN gives the employee proper directions and instructions.

In the spring of 1994, the Employer implemented a 7-step "Disciplinary Process" which includes the following: (1) tell employees what kind of performance is expected, (2) talk with the employee to see if the employee understands what is expected, (3) verbal counseling: tell the employee that performance is not up to expectations, (4) verbal warning to the employee that if poor performance continues, a written warning will follow; the verbal

warning is documented and put in the employee's file, (5) written warning, (6) suspension, and (7) termination.

RN team leaders are authorized to initiate and implement steps 1 through 4 without input from the house supervisor or the director of nursing. An RN can issue a written warning, step 5, only if it is reviewed and signed by the house supervisor or the director of nursing. This is done to assure that the issuance of a written warning is done properly and that it is fair for the employee.<sup>4</sup> A suspension (step 6) must be approved by the assistant administrator of clinical operations or the administrator. These managers have input into any decision to suspend. Termination (step 7) must have administrative involvement and approval.

The record describes an incident in which an RN team leader documented verbal counseling (step 3) given to an LVN for failing to administer medicine to a patient as scheduled and for failing to make proper and accurate entries on patients' charts.<sup>5</sup> This report was sent to the director of nursing, who spoke with the RN and then placed the report in the employee's file.

The record also contains an example of a written warning (step 5).<sup>6</sup> The RN team leader in a written report to the house supervisor recited that a CNA was not turning the patients properly and when this problem was called to the CNA's attention, the CNA responded using obscene language. The house supervisor wrote on the report that the supervisor reminded the CNA to turn the patients every 2 hours and not to use improper language. The CNA responded on the document that she turns her patients every 2 hours and that she did not say anything vulgar. The report was reviewed by the director of nursing who then investigated it by talking to all the people involved. Ultimately, the DON issued a written warning to the CNA.

The record contains no evidence that the RN team leaders have ever recommended that employees be suspended (step 6) or terminated (step 7). In any event, the Employer's disciplinary process handout states that suspension must be preapproved by the assistant administrator of clinical operations or the administrator and termination "[m]ust have administrative involvement and approval." There is record testimony by the DON that when she was an RN team leader she could send a CNA home if the CNA was unable to perform the assigned

<sup>3</sup> The hearing officer found that RNs spend more than 50 percent of their time performing nonpatient care duties such as reassessing patient needs and assigning responsibilities to other team members.

<sup>4</sup> Contrary to the findings of the hearing officer, RN team leaders cannot issue a step-5 written warning without input from the house supervisor or director of nursing. Indeed, the hearing officer even noted in her report that a written warning must be reviewed and signed by the house supervisor or the director of nursing.

<sup>5</sup> The hearing officer characterizes this example as a written warning (i.e., step 5). The record is unclear as to this point: the Employer's director of nursing describes this written report as a *verbal counseling* (step 3), but under the Employer's discipline schema, a verbal counseling would not be sent to the director of nursing.

<sup>6</sup> The hearing officer mischaracterized this example as a documented oral warning.

tasks and thereby endangered the health or safety of the patients. She testified that she would document the problem and immediately forward it to the DON, who then discussed the incident with both the RN and the CNA.

The house supervisor and the RN team leader together evaluate the work performance of the RN's team members. When a CNA is being evaluated, the LVN member of the team also has input in the evaluation. The evaluation also considers other factors such as attendance, work performance, and disciplinary actions, as well as any employee reports, such as a documented verbal warning, that are contained in the employee's file. The evaluations have no effect on employee wages.

#### Supervisory Authority

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny 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.

The possession of any one of the above-listed criteria will render a person a statutory supervisor so long as the exercise of that authority is not routine but requires the use of independent judgment.

As recognized by the hearing officer, the Supreme Court in *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571 (1994), examined the application of Section 2(11) in the health care field. In doing so, the Court rejected the Board's "patient care analysis" for determining the supervisory status of charge nurses<sup>7</sup> and found that the Board's use of the phrase "in the interest of the employer" was "inconsistent with both the statutory language and this Court's precedents." (Id. at 1783.)

Subsequently, but not until after the hearing officer issued her report in this case, the Board in *Providence Hospital*, 320 NLRB 717 (1996),<sup>8</sup> and *Ten Broeck Commons*, 320 NLRB 806 (1996), analyzed the supervisory status of health care employees and found in both instances that the disputed nurses were not statutory supervisors. In these cases, the Board decided that it would henceforth analyze the supervisory status of nurses under the Board's traditional test, whether the nurses in question possess any Section 2(11) authority and whether the

<sup>7</sup> The Board's "patient care analysis" was described in *Northcrest Nursing Home*, 313 NLRB 491, 493-497 (1993), as: "a nurse's assignment and direction of other employees does not involve the exercise of supervisory authority because it stems from the nurse's professional or technical judgment in the interest of patient care and is not "in the interest of the employer."

<sup>8</sup> Enfd. sub nom. *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997).

performance of that authority requires the exercise of independent judgment.<sup>9</sup> Under that test, the burden of proving supervisory status rests with the party asserting that status. *Youville Health Care Center*, 327 NLRB 237, 238 (1998); *Bennett Industries*, 313 NLRB 1363 (1994). Moreover, in applying this test, the Board is cautious in finding supervisory status because supervisors are excluded from the protections of the Act. As the Court of Appeals for the District of Columbia Circuit stated in approving the Board's approach:

when a worker is found to be a "supervisor" within the meaning of the Act, she is excluded from the NLRB's collective bargaining protections. In light of this, the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organization rights. Because of the serious consequences of an erroneous determination of supervisory status, particular caution is warranted before concluding that a worker is a supervisor despite the fact that that the purported supervisory status has not been exercised.

*East Village Nursing & Rehabilitation Center v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999).

Applying this test here, we find that the Employer has failed to carry its burden of demonstrating that the RN team leaders are statutory supervisors.

#### A. Assignment and Direction

The RN team leaders have no authority to assign staff employees to teams; that is done by the RN house supervisor. Although the RNs have the authority to assign tasks to members of the team, such authority is limited in that assignments are based primarily on the patients' acuity and health care needs and are given to the team member who is qualified to perform the required task, e.g., LVN or CNA. The RN's determination of when team members can go on breaks also appears to be governed by patient needs, especially in view of the overriding responsibility of every team member for the well being of each patient. In view of the limited nature of the RN's assignment authority, especially the fact that assignments

<sup>9</sup> We point out that the Board's approach to the charge nurse supervisory issue has been upheld by the Seventh, Eighth, Ninth, and District of Columbia Circuits. *NLRB v. Audubon Health Care Center*, 170 F.3d 662 (7th Cir. 1999); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997). In contrast, the Third, Fourth, and Sixth Circuits have denied enforcement of the Board's orders in similar cases, rejecting the Board's distinction. *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999); *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 242 (3d Cir. 1998); *Mid-America Care Foundry v. NLRB*, 148 F.3d 638 (6th Cir. 1998). We shall continue to adhere to our decision in *Providence Hospital*, supra, and we respectfully decline to follow the latter circuits' opinions. We also note that this case arises within the geographical jurisdiction of the Ninth Circuit.

are dictated by which team member has the obvious required skill, we find that the team leader's assignments do not require the exercise of independent judgment. *Providence Hospital*, supra at 727; *Clark Machine Corp.*, 308 NLRB 555 (1992).

The record also fails to show that the RN team leaders use independent judgment in directing the work of their team members. The directions given by the RNs vary from simple tasks, such as giving the patient a bed bath, to more complicated procedures, such as a bronchoscopy, and may also include instructions on the proper methods to be used in performing the procedure. In addition, when the RN sees that patients are not being attended to properly, the RN will give appropriate instructions. This type of direction, however, does not require the independent judgment of Section 2(11). *Ten Broeck Commons*, supra at 811. Rather, such directions are based on the RN's greater professional skill and experience, and the communication of such directions to a lesser skilled employee does not make the RN a supervisor. *Providence Hospital*, supra at 729.

RN team leaders are not responsible for obtaining substitute nurses when needed or for reassigning nurses on those occasions when the team has too many staff members. Nor do RNs authorize overtime or approve vacations. All of this is done by the house supervisors.

#### B. Discipline

We also find, contrary to the hearing officer, that the record evidence does not establish that the RN team leaders either discipline team members or effectively recommend disciplinary action. The Employer relies on the ability of the RN team leaders to issue oral warnings and to recommend discipline as demonstrating supervisory status.

As to the oral warnings, the evidence introduced by the Employer indicates that RNs issue oral warnings, which are then reduced to writing and placed in the employee's personnel file. These reports describe incidents of unacceptable work performance or behavior. There is no evidence that RNs make any recommendations as to discipline when making such reports. Moreover, there is no evidence as to what role these reports play in any discipline that may be imposed. The reports are reviewed by the house supervisor or the Director of Nursing when a written warning (step 5 under the disciplinary procedure), suspension (step 6), or termination (step 7) is involved.

The two specific incidents cited by the Employer do not demonstrate that RN team leaders utilize independent judgment in exercising disciplinary authority, or effectively recommend discipline. The first incident involved a CNA's failure to turn a patient and the CNA's use of foul language, as described above. The RN reported the incident to the house supervisor, and neither imposed actual discipline or made a specific recommendation to

her superiors as to discipline.<sup>10</sup> It was the DON who issued a warning to the CNA after a full investigation. The second incident involved an RN's verbal counseling of an LVN in which the RN described the LVN's deficiencies in administering medication, patient charting, and tardiness. This report, which contained no recommendation for further action, was sent to the DON, who spoke with the RN and then placed the report in the employee's file.

There is no evidence that such reports submitted by RNs automatically lead to the imposition of suspension or termination or otherwise affect job tenure or status. The ability to issue oral warnings in itself does not demonstrate supervisory authority.<sup>11</sup> Accord: *Ohio Masonic Home*, 295 NLRB 390, 393-394 (1989).

We find that the Employer also failed to carry its burden of showing that the RN team leaders' authority to recommend employee suspension or termination under the disciplinary procedure demonstrated statutory supervisory authority. The record contains no evidence of any instance in which such a recommendation was made and, accordingly, no evidence with respect to what resulted from such a recommendation. The record evidence therefore does not suffice to demonstrate that the team leaders had the authority to effectively recommend suspension or termination. See *Ryder Truck Rental, Inc.*, 326 NLRB 796, 796 (1998) (finding no supervisory authority where technician would report instances where employee was doing a poor job or behaved badly, but did not make recommendation as to what should happen to employee).

Although there was testimony that the RN team leaders have the authority to send an employee home, such authority is limited to situations involving egregious misconduct, i.e., behavior which endangers the health or safety of the patients. Such authority when limited to flagrant employee conduct is typically found by the Board not to constitute statutory supervisory authority. *Washington Nursing Home*, 321 NLRB 366 (1996).

#### C. Evaluations

Although the Board has consistently found supervisory status when nurses independently perform employee evaluations which lead directly to personnel actions, the Board just as consistently has declined to find supervisory status when nurses perform evaluations that do not, by themselves, directly affect other employees' job status. See *Ten Broeck Commons*, supra at 813; *Hillhaven Rehabilitation Center*, 325 NLRB 202 (1997), enf. denied in relevant part 161 LRRM 2128 (6th Cir. 1999) (unpublished).

<sup>10</sup> The RN wrote in her report, "Request further action by Administration," but did not make any recommendation as to discipline.

<sup>11</sup> Although these written reports are considered when the employee is being evaluated, as discussed supra, the reports are only one of several factors considered and there is no evidence as to how much weight is given to these reports.

Although the RN team leaders participate in the preparation of employee evaluations, and their prior written reports which were placed in the employee's file are also considered, the evaluations are not the sole product of the RN team leaders. The evaluations are also prepared by the house supervisor, who is on the hospital floor making patient rounds and thus has the opportunity to observe employees at work. LVNs also contribute to the process when CNAs are being evaluated. Other factors have a bearing on evaluations, such as employee attendance. Consequently, although RN team leaders may have some effect on the employee's evaluation through their comments at the time the evaluation is written and through their prior written reports, there is no evidence as to how much weight is given to these reports in determining the appropriate evaluation.

Moreover, the extent of the RN team leader's participation is unknown. The record is silent as to the nature of the RN's input, as well as the weight given to the RN's opinions or comments. In addition, there is no evidence that these evaluations have any, let alone a direct, effect on employees wages. Accordingly, the Employer has failed to carry its burden to establish that RN team leaders use independent judgment to complete evaluations which have a direct correlation to the evalu-

ated employee's pay or retention, or to make effective recommendations regarding wage increases or continued employment. See *Hillhaven Rehabilitation Center*, supra.

#### CONCLUSION

Based on the above, we find that the Employer's RN team leaders are not statutory supervisors since they do not assign, direct, discipline, or evaluate using independent judgment within the meaning of Section 2(11) of the Act. We also find, as stated above, that the 10 individual employees challenged by the Petitioner are not statutory supervisors. Accordingly, the challenges to the ballots of these employees are overruled, and we shall remand this proceeding to the Regional Director to open and count the challenged ballots and to take further appropriate action.

#### ORDER

This proceeding is remanded to the Regional Director with directions to open and count the challenged ballots of those employees found eligible to vote, to prepare a revised tally of ballots, and to issue the appropriate certification.