

West Florida Hospital, Inc. and William M. Hicks.
Case 15-CA-8213

14 January 1985

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 17 September 1982 Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a memorandum in support of the judge's decision.

The 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,¹ and conclusions only to the extent consistent with this Decision and Order.

The Respondent admittedly discharged William Hicks because he was involved in union activity; the only issue is whether Hicks was an employee within the meaning of the Act or a supervisor. We find that he was a supervisor, and accordingly we will dismiss the complaint.

Hicks was "Evening Coordinator" in the Respondent's operating room, a position equivalent in the Respondent's organization to assistant head nurse; from 5:30 to 11 p.m. each day, he was the person of highest authority assigned to the operating room on a full-time basis. Above Hicks in the hospital hierarchy, only the house supervisor was present in the hospital, and she was responsible for the Respondent's entire division of nursing services, with 400 beds, in which the operating room was only 1 of 24 units. By Hicks' admission, the house supervisor stopped in the operating room on her rounds no more than twice in an evening, for no more than 10 or 15 minutes altogether; in essence, Hicks testified, she might stop to chat over a cup of coffee. The General Counsel's witnesses maintained that Hicks would consult with higher supervision if a "serious" problem arose, but the only examples of such problems they were able to cite involved conflicts between the operating room and other departments. Thus Hicks was effectively in charge of the 15 evening shift employees in the operating room; this alone is strong evidence that he was a supervisor.²

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² See *Northwoods Manor*, 260 NLRB 854 (1982); *Emory Convalescent Home*, 260 NLRB 540 (1982); *Wright Memorial Hospital*, 255 NLRB 1319 (1981); *Jeffrey Mfg. Division*, 248 NLRB 33, 61 fn. 123 (1980).

The evening coordinator also scheduled any surgery called in during the evening shift, and assigned employees—both professional and technical—to it. In assigning employees, Hicks needed to assess their skills and to consider their preferences and availability, thus exercising independent judgment in the interest of the Respondent. While Hicks testified that other registered nurses sometimes substituted for him, he also admitted that this generally occurred when a nurse was feeling ill indicating that this did not happen regularly. Although the judge found that Hicks regularly assigned work, he minimized the significance of Hicks' authority because it only occupied 10 to 15 percent of Hicks' time. We view the amount of time spent as substantial especially considering that this authority is regularly exercised.³

The record demonstrates that Hicks, as evening coordinator, had substantial influence in the evaluation of other employees. We note the written evaluations of two employees in the record, including recommendations for salary increases; while the record does not show that those recommendations were adopted ultimately, it is nonetheless significant that Hicks' opinion was sought. The same is true of the "assessment" of a part-time registered nurse: that Hicks made only positive comments about this employee does not detract from the evidence that he was in a position to affect the employee's status.⁴ We note that Hicks not only completed the evaluation forms in each case but discussed them with the affected employees before submitting the evaluations to higher supervision; this is further evidence that Hicks performed as a supervisor and was regarded as one. We do not see any relevance in the judge's observations that two of the employees involved were "a mere orderly and a technician completing his probationary period." Nor do we see any basis for the judge's conclusion that Hicks must not have made other evaluations because only these two were introduced. Someone who supervises lower-level employees is a supervisor, and evaluation is no less a form of supervision when it occurs at such times as completion of an employee's probationary period.

Beyond the written evaluations in evidence, the record shows that Hicks had continuing oral input into the evaluation of evening shift employees. While the judge attempted to minimize the importance of this input, the Respondent's former operating room supervisor, testifying for the General

³ Compare *Northwoods Manor*, *supra*, in which the charge nurses spent 20 percent of their time in supervisory duties.

⁴ Cf. *ITT Corp. v. NLRB*, 712 F.2d 40 (2d Cir. 1983), and cases cited (authority of prounion supervisors considered with respect to election objections).

Counsel and credited by the judge, admitted that she evaluated these employees with little or no direct knowledge of their ongoing performance and development, thus necessarily relying on Hicks' recommendations.

Hicks admitted that he exercised other authority over employees. For instance, he testified that, if he noticed an employee overstaying a break or not working, he would warn that employee to get back to work. Also, employees who wished to leave work early sought permission from Hicks who, in the exercise of his judgment, sometimes granted such requests and other times did not. Likewise, Hicks authorized overtime when he believed it was needed and, although he informed the operating room supervisor afterwards that overtime had been worked, the record does not show that his decisions in this regard were ever questioned.

In sum, as evening coordinator William Hicks assigned employees, evaluated their performance, and directed or authorized them in returning from breaks, leaving work early, and working overtime. That is, he had authority to assign employees, responsibly to direct them, and effectively to recommend that they be disciplined, rewarded, or promoted. Each of these responsibilities required, and Hicks exercised, independent judgment to ensure that employees carried out the Respondent's requirements of them. Moreover, during most of the evening shift the evening coordinator was the person of highest authority in the operating room; if he was not a supervisor, this crucial department of the Respondent's operation, with 15 employees, was unsupervised for about 6 hours each day—an unlikely situation. These facts establish that Hicks was a supervisor, and we need not discuss any secondary indicia of supervisory status.⁵ Because Hicks was a supervisor, not an employee within the meaning of the Act, we will dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER DENNIS, dissenting.

I would find that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging William Hicks because of his union activity. I agree with the judge, for the reasons he stated, that Hicks is an employee rather than a supervisor within the meaning of the Act.

⁵ We note that the judge erred in finding that Hicks had less vacation than any admitted supervisors, the record indicates that the head nurse, like Hicks, had 2 weeks of vacation

DECISION

STATEMENT OF THE CASE

PHILIP P MCLEOD, Administrative Law Judge. On June 18, 1981, a charge was filed in this proceeding against West Florida Hospital, Inc. (Respondent) by William M. Hicks. On July 15, 1981, a complaint and notice of hearing issued alleging that Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by creating the impression of surveillance of employee union activities by telling an employee (Hicks) that Respondent was aware of his attendance at a union meeting and by terminating Hicks because of his membership in and activities on behalf of District 1199, International Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (the Union). In its answer to the complaint, Respondent admits all facts alleged regarding its business operation, but denies the legal conclusion that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admitted that at all times material Barbara Thames occupied the position of director of special services, but denied the legal conclusion that Thames was a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. In its answer, Respondent admits that about June 8, 1981, Respondent terminated Hicks, but denies it did so because of Hicks' membership in or activities on behalf of the Union. Respondent denies having engaged in any conduct which would constitute an unfair labor practice.

A trial was held before me on June 7, 1982, in Pensacola, Florida, at which all parties were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the close of the trial, the General Counsel availed himself of the opportunity to argue orally. Thereafter, the General Counsel and Respondent both filed briefs which have been duly considered.¹

On the entire record in this case, and from my observation of the witnesses, I make the following

¹ Following receipt of briefs from both parties, Respondent filed a motion to strike the brief of the General Counsel because, at the conclusion of the trial, the General Counsel did not specifically request of the judge the opportunity to file a brief and because counsel for Respondent did not receive a copy of the brief filed by the Counsel

In its statement in opposition to Respondent's motion, the General Counsel points out that it did attempt to serve a copy of the brief on counsel for Respondent, but that the brief was inadvertently mailed to the wrong address. Another copy of the brief was served along with the statement in opposition to Respondent's motion. Since briefs are filed simultaneously and there is no opportunity for a reply brief, I conclude that no harm has been done by the delay experienced by counsel for Respondent in receiving the brief of the General Counsel.

I also note that neither party herein specifically requested permission to file a brief with me. I inquired and was informed by counsel for Respondent that he intended to file a brief. I thereafter set a due date for the receipt of briefs. The General Counsel did not waive the right to file a brief herein, and the briefs received were timely filed by both parties. Accordingly, the briefs of both parties have been accepted by me and have been given due consideration.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation engaged in the operation of a hospital facility in Pensacola, Florida, where it provides nursing and health care services. During the past 12 months, a representative period, Respondent derived gross revenues in excess of \$250,000 and purchased and received goods and materials valued in excess of \$50,000 directly from points located outside the State of Florida.

I find that Respondent is, and has been at all times material herein, a health care institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO is, and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Allegations and Issues*

The General Counsel contends that on June 8, 1981, Respondent created the impression of surveillance of employee union activities by telling Hicks that Respondent was aware of Hicks' attendance at a union meeting. He also contends that Hicks was discharged during that same conversation for having attended the union meeting in question.

At the trial Respondent admitted having discharged Hicks because of his activities on behalf of the Union. However, it denied doing so because of any meeting Hicks attended. Rather, according to Respondent, the activities on behalf of the Union which Hicks engaged in and which led to his termination were his support of the Union and his encouragement of other employees to join and support the Union.

The real issue in this case relates to Hicks' status. Respondent contends that Hicks' position with Respondent was that of a supervisor and that, as such, Hicks is not entitled to the protection of the Act. Although this affirmative defense was not raised in its answer to the complaint, the General Counsel did not claim surprise when Respondent raised this issue at the trial. The issue of Hicks' supervisory status was fully litigated, and in fact took up the greater portion of this trial. Accordingly, that issue is considered on its merits.

B. *Facts Regarding Hicks' Status as a Supervisor*

Respondent is a 400-bed hospital facility in Pensacola, Florida. Hicks worked for Respondent from May 1977 until his discharge on June 8, 1981. During that time, Hicks worked as a graduate registered nurse from the time he was hired in May 1977 until August 1977 when he passed the state medical board examinations and became a staff nurse. In December 1978, Hicks was promoted to the position of evening coordinator in the oper-

ating room. Hicks held this position until the time of his discharge. The duties of that position are considered at length below.

Within Respondent's hospital there are several departments, one of which is the division of nursing services headed by a person entitled "Director of Nursing Services." Below the director of nursing services are several assistant directors of nursing services, one of whom is responsible for a defined area of the hospital which includes the operating room. Below them are administrative assistants, also known as house supervisors who are responsible for the overall functioning of the shift to which they are assigned. Below house supervisors are department supervisors who, in turn, are assisted by head nurses and assistant head nurses.

The operating room supervisor, a department supervisor, is responsible for the overall supervision and operation of the operating room 24 hours a day. The operating room supervisor, hereafter called the O R supervisor, is assisted on the day shift by a head nurse and on the evening shift, which runs from 3 until 11 p.m., by the evening coordinator. At the time of his discharge, Hicks filled the position of evening coordinator.

The O R supervisor, charged with the overall supervision of the operating room, is responsible for coordinating the surgery schedule and handling all personnel-related matters. The O R supervisor works until approximately 5:30 p.m. and consequently has a normal workday which overlaps the beginning of the evening shift for about 2-1/2 hours. The O R supervisor is responsible for correlating the surgery schedules for both the day and evening shifts. The O R supervisor has authority to hire and fire employees. Neither the head nurse nor the evening coordinator possesses such authority. Even the O R supervisor would have to confer with the assistant director of nursing services before terminating an employee. In addition to correlating surgery schedules, the primary functions of the O R supervisor are to make out work schedules of employees, assign vacation times, conduct performance and merit evaluations of employees, and take disciplinary actions against employees where necessary. In addition, the O R supervisor makes budget recommendations to her superiors regarding the operating room.

As previously indicated, the O R supervisor is assisted on the day shift by a head nurse and on the evening shift by the evening coordinator. The authority and functions of the O R supervisor described above are exclusive to her and are not shared with nor exercised by either the head nurse or the evening coordinator, except as noted below. Further, while both the head nurse and evening coordinator assist the O R supervisor, their functions and authorities are also different from one another. The head nurse does not generally scrub and circulate among patients. Rather, because there are more employees assigned to the operating room on the day shift and because the operating room is generally busier during the day shift than it is on the evening shift, most of the head nurse's time is spent making work assignments to employees and providing overall direction in the department. The head nurse does conduct performance and

merit evaluations of employees who work in the operating room on the day shift, including staff nurses. She participates in counseling and disciplining of employees to the extent of making recommendations to the O R supervisor. The head nurse reviews and approves the time-cards of all employees below her in the operating room, including employees who work on the evening shift, and the evening coordinator himself.

There is no head nurse in the operating room on the evening shift. Rather, the operating room is under the direct supervision and control of the O R supervisor from 3 until approximately 5:30 p.m. After 5:30 p.m. the evening coordinator is the person of highest authority assigned to the operating room on a full-time basis.

Respondent points to the job description of the evening coordinator as one of the primary bases for finding that position to be a supervisor within the meaning of the Act. That job description describes the specific duties of the evening coordinator in part as follows:

In addition to the duties of the operating room staff nurse, the evening coordinator will:

1. Coordinate the completion of scheduled procedures which extend beyond the day shift.

2. Make shift assignments for evening personnel.

...

5. Supervise and provide guidance to all evening personnel.

6. Assist with counseling and guidance when needed; document and communicate outcomes.

7. Assist in evaluating staff members, identifying needs, recommending appropriate interventions and supporting strengths, leading toward the fulfillment and unit goals.

It is primarily these enumerated functions to which Respondent points in support of its position that the evening coordinator is a supervisor. Reliance on the job description, however, tends to beg the question. A job description prepared by management stating that the evening coordinator shall exercise supervisory functions does not establish that the evening coordinator is, in fact, a supervisor. The determination of that question turns on what functions Hicks as evening coordinator actually performed. *Valley Hospital*, 226 NLRB 309, 312 (1976). Respondent argues that, as evening coordinator, Hicks exercised five indicia of supervisory authority which warrant a conclusion that he was a supervisor within the meaning of the Act. These five indicia are: making work assignments to employees; evaluating employees; disciplining employees; granting employees time off; and, finally, the absence of other supervisors in the operating room on the evening shift.

With regard to Hicks' actual duties, the record reflects the following

As evening coordinator, Hicks had no authority to hire or discharge, suspend or transfer, lay off, or recall, nor promote or demote employees. Hicks had no authority to alter the work schedules of employees established by the O R supervisor, and he played no part in the assignment of vacation times.

As evening coordinator, Hicks spent approximately 85 to 90 percent of his time performing routine staff nursing

functions, including scrubbing and circulating cases, setting up equipment for surgical procedures, and stocking surgical supplies for the operating rooms. In addition to his base wage rate, Hicks received an hourly shift differential which was received by all employees working on the evening shift. In addition, he received 50 cents per hour more than a staff nurse for his duties as evening coordinator. Unlike the head nurse or the O R supervisor, Hicks was required like other staff nurses to make himself available on-call from 11 p.m. to 7 a.m. on 5 out of every 10 workdays during which he was subject to being called back to the hospital by the house supervisor to assist physicians in emergency operations. Also, unlike the head nurse and the O R supervisor, both of whom received 3 weeks' paid vacation per year, Hicks received only 2 weeks.

As evening coordinator, Hicks correlated some of the surgery to be scheduled on the evening shift, sometimes with the help of the O R supervisor prior to her leaving in the evening and sometimes on his own. The 10 to 15 percent of Hicks' time not spent in the actual performance of routine staff nursing functions was spent primarily assigning work to other employees in the operating room on the evening shift. The record is clear that Hicks did regularly assign work to such employees and that these assignments called for the use of at least some independent judgment. I credit Hicks, however, that these assignments were routinely made on the basis of various nurses' known special skills and preferences. Thus, employees with specialized skills in these areas were routinely assigned to cardiac, neurological, and orthopedic cases. The remaining employees were then assigned to surgery cases based on their availability. Thus, most assignments were the same night after night with little variance. I also credit Hicks that if he was busy performing routine nursing functions himself, thus not behind the desk to make an assignment at a time when the need arose, other registered nurses on the shift regularly took it on themselves to make the necessary assignments.

Regarding Hicks' role in the performance evaluation of employees, Respondent introduced two evaluations of employees in which Hicks had a direct part. The first involved an orderly named Timothy Cremshaw. This evaluation was dated November 23, but undated as to the year. The evaluation was filled out by Hicks and signed by him as "RN-evening coordinator." Below Hicks' signature are also the signatures of Frances Traynon as "O.R. Supervisor" and Barbara Thames as "Director of Special Services." Prior to July 1980, Traynon was head nurse under O R supervisor Faye Lewis. In July 1980, Lewis left and Traynon took over as O R supervisor, a position she still holds. In the section of this evaluation entitled "recommendation," Hicks checked one of five available options indicating that Cremshaw should receive a salary increase. The record is silent as to whether Cremshaw, in fact, got that increase.

The second evaluation introduced by Respondent involved an operating room technician named Stephen Nichols. It is dated August 14, 1980. The front page of this evaluation indicates that it is one conducted at the end of an employee's first 90 days of employment. The

evaluation is signed jointly by Traynon as "O.R. Supervisor" and by Hicks as "evening coordinator." Traynon's name appears above Hicks. Below their joint signatures, Traynon's signature appears again on the line denoted "department supervisor." Below Traynon's second signature appears the signature of Barbara Thames as "director of special services." In the "recommendations" section of this evaluation, the choice "salary increase" is also checked. Apparently to show they were effective, Respondent asked Traynon whether Hicks' recommendations for salary increases were followed. Traynon answered that they were, but failed to provide any specific instance to support her assertion and failed to mention either Nichols or Cremshaw as having received raises based on Hicks' recommendation. On cross-examination, Traynon admitted that the only recommendation she could recall was that of Nichols and that Nichols was not given the recommended wage increase.

I conclude that the evaluations of Cremshaw and Nichols were the only evaluations actually completed by Hicks for if there were others Respondent would surely have introduced them. Traynon testified that, in addition to completing these evaluations, Hicks was consulted by her before she evaluated other employees on the evening shift. Traynon asserted that she relied heavily on Hicks' reports since Traynon was not on the evening shift past 5:30 p.m. Traynon, who became rather unnerved and upset under cross-examination, struck me as a biased witness whose testimony is largely unworthy of belief. Regarding Hicks' real degree of authority, I find it significant that the two evaluations actually completed by Hicks involved a mere orderly and a technician completing his probationary period. All other employees on the shift, including nurses, were evaluated by the O R supervisor. I found the testimony of former O R Supervisor Faye Lewis, who is no longer employed by Respondent, to be much more candid and straightforward regarding Hicks' actual duties than the testimony of any of Respondent's current supervisors. I credit Lewis, and on the basis of her testimony I conclude that, while Hicks did have some input into employees' annual evaluations, it was substantially more limited than suggested by Traynon and was not independently relied upon. I believe the degree of Hicks' actual authority was well exemplified by Lewis' testimony that, if Hicks thought an employee was not performing properly, Hicks could report it to the head nurse or the O R supervisor, who would investigate the matter.

Regarding Hicks' role in assessing discipline, Respondent introduced one "behavior assessment" form completed by Hicks regarding part-time registered nurse Alphonso Vacarro dated November 5, 1980. The reason Hicks had occasion to fill out this form is not clear from the record. Hicks testified without contradiction that a "behavior assessment" form such as that introduced by Respondent is not the same as an employee reprimand. According to Hicks, a reprimand involved adverse action being taken against an employee. The evening coordinator clearly had no authority to issue reprimands. A behavior assessment, as near as I can tell from Hicks' testimony, was more in the nature of a notice to an employee that he/she was engaging in some behavior which re-

quired correction. Thus, it was more in the nature of a preliminary warning.

The behavior assessment form itself contains the following direction to the person completing it:

Please make comments on the individual's performance in the following areas:

Twelve areas of professional and generalized skills are enumerated and listed. The lower right hand corner of the form contains a signature line which is designated "head nurse signature." As indicated, the testimony of all witnesses suggests that "behavior assessment" forms of this type play some role in the discipline of employees. The remarks of Hicks, however, on the form in question are all positive comments such as "good," "satisfactory," or "excellent." Thus, it would appear that on the one occasion when Hicks completed such a form it served more as an evaluation of the employee than as part of discipline imposed on the employee. I find the "behavior assessment" form introduced by Respondent to be of little probative weight regarding Hicks' role in imposing discipline on employees for that reason and for an additional reason. In the lower left hand corner of the form, there is a signature line on which the employee is expected to place his/her signature. The form introduced by Respondent is unsigned by the employee in question. This is the only such form introduced by Respondent signed by Hicks. There is no indication the employee in question received, or was intended to receive, this particular form which Hicks completed. These facts and the additional fact that all of the comments by Hicks on the form are positive lead me to believe that on this occasion the form was not used regarding the discipline of an employee, but rather was used in some preliminary way with regard to an employee evaluation. Its use in this manner is consistent with the evidence discussed above concerning Hicks' role in the evaluation of employees, and is considered as such. It reveals little about Hicks' role in the discipline of employees, and I rely instead on the testimony of former O R Supervisor Faye Lewis, which I credit, regarding that subject. I credit Lewis that, as evening coordinator, Hicks could independently take care of only minor disciplinary matters, such as reminding people to return from coffeebreak or pointing out to a person the fact that they were breaking sterile techniques.

Whenever problems of a more serious nature arose, Hicks would be expected to contact the head nurse, the O R supervisor, or the house supervisor. If Hicks reported such a problem to one of his superiors, the superior would first conduct an independent investigation before meting out discipline. All witnesses agree that Hicks never attempted to send someone home for the day as a disciplinary action. I discredit the assertion of some of Respondent's witnesses, particularly Traynon, that even though he never exercised it, Hicks possessed such authority. Rather, I credit Lewis that Hicks did not have such authority and that if such a serious situation arose Hicks would be expected to contact the house supervisor or to telephone the O R supervisor at home. Lewis testified credibly that whenever problems of any major con-

sequence arose, including even scheduling problems in the operating room, Hicks would be expected to and did call in the house supervisor. I credit Lewis that the house supervisor on the evening shift was very often involved in resolving matters related to the operating room.

Regarding Hicks' authority to grant time off, the record reflects that Hicks did possess such authority under certain circumstances. Hicks played no part in establishing the work schedules of employees. Schedules were established by the O R supervisor, and Hicks had no authority to alter the established work schedule. Hicks did possess authority to allow employees on the evening shift to clock out and go home early when the workload was slack and there was no need for staff personnel. I note, however, that Hicks was limited to granting a request to go home initiated by an employee. Hicks had no authority to make an independent judgment that employees were no longer needed and direct them to clock out. I also note that the timecards of all employees on the evening shift, including Hicks, had to be approved by the head nurse. In view of all the above, I find that the circumstances under which Hicks could exercise the authority to grant time off were so limited and circumscribed that Hicks had little real authority.

Finally, Respondent argues that Hicks should be found to be a supervisor because he is the person of highest authority in the operating room during the evening shift. I must note, however, that Respondent concedes the O R supervisor is responsible for the overall supervision of the operating room 24 hours per day. Further, I am convinced that it is by no means accidental that while the day shift ends at 3 p.m., the O R supervisor works a schedule which overlaps the beginning of the evening shift for approximately 2-1/2 hours. While Hicks correlated some of the surgery to be scheduled on the evening shift, it was most often with the help of the O R supervisor prior to her leaving and only sometimes on his own. The overlap in work schedules of the O R supervisor allowed her to oversee coordination of the surgery scheduled for the evening shift and to assure herself that everything was functioning smoothly before she left, and would continue to do so in her absence. As I have found above, Hicks' authority vis-a-vis other employees was limited. Whenever a problem of any serious nature arose, Hicks was expected to contact the house supervisor on duty or, if necessary, to even telephone the O R supervisor at home. As I have found above, the house supervisor was in fact very often involved in seeing to it that the operating room functioned smoothly on the evening shift.

In conclusion, my review of all the evidence leads me to the conclusion that Hicks' role in evaluating employees was primarily advisory. There is nothing on which to base a finding that his recommendations were followed and, in fact, the evidence is to the contrary. Further, any negative remarks or recommendations made by Hicks would be investigated independently by his superior before being acted on, and contrary to Respondent's claim, I conclude Hicks did not play any effective role in the discipline of employees. Hicks' authority to grant time off was circumscribed and could be exercised only

when an employee requested to go home Hicks had no authority to independently determine that employees were not needed and send them home. Hicks played no part in establishing work schedules and had no authority to change the established schedule. Hicks possessed no real authority vis-a-vis other employees, and whenever a problem of any serious nature arose, he was expected to contact the house supervisor or, if necessary, the O R supervisor. Hicks had no authority to hire, discharge, suspend, transfer, lay off, recall, promote, demote, or reprimand employees. Hicks spent 85 to 90 percent of his time performing routine staff nursing functions. The only authority really exercised by Hicks which might be supervisory in nature was his assignment of work to other employees on the evening shift. Even this, however, was minimal, requiring no more than 10 to 15 percent of his time. Respondent concedes that Hicks possessed no more authority than, and that his title as evening coordinator was interchangeable with, assistant head nurse. Hicks' assignment of work to other employees, while involving the use of some independent judgment, tended to be routine, made primarily on the basis of various nurses' known special skills and preferences. Accordingly, I conclude and find that Hicks was not a supervisor but rather was an employee within the meaning of the Act. *Milwaukee Children's Hospital*, 255 NLRB 1009 (1981); *Mount Airy Psychiatric Center*, 253 NLRB 1003 (1981); *Victor Valley Hospital*, 227 NLRB 513 (1976), *Valley Hospital*, supra. Cases cited by Respondent are inapposite for in each of those cases the individual found to be a supervisor possessed significantly greater authority than that exercised by Hicks.

C. Hicks' Discharge

The General Counsel and Respondent do not disagree that Hicks engaged in proumon activities. Respondent in fact admits that these activities led to Hicks' discharge and does not contend that the activities are, in any way, unprotected by the Act when engaged in by a statutory employee. As noted, Respondent simply argues that Hicks' discharge was unprotected because he was a supervisor within the meaning of the Act. Nevertheless, testimony was introduced both by the General Counsel and the counsel for Respondent regarding the conversations between Director of Special Services Thames, O R Supervisor Traynon, and Hicks during which Hicks was discharged. Some of Hicks' testimony is disputed by Thames and Traynon. The reason testimony was introduced regarding this conversation is because the General Counsel alleges that during the conversation Thames created the impression that Hicks' union activities were under surveillance by stating that Respondent was aware of Hicks' attendance at a union meeting. This was also specifically alleged in the complaint.

I credit the testimony of Hicks over that of Thames and Traynon where there is direct conflict. For example, Thames testified that during the conversation, she asked Hicks if he considered himself to be a part of management, and Hicks stated that he did. Hicks denied this. Hicks testified that during the meeting Thames asserted Hicks was a supervisor, but denied he, too, said he con-

sidered himself to be a part of management. I credit Hicks.

It is undisputed that when Thames told Hicks he was being discharged because of his prounion activities and his alleged status as a supervisor, Hicks offered to resign his position as evening coordinator and remain a staff nurse. Thames informed Hicks that was not an option available to him and that he was being discharged. Following the conversation with Thames, Hicks asked and was allowed to meet with Personnel Director Kenneth Korff. Korff also informed Hicks that resigning as evening coordinator was not an available option and that he was being discharged.

The General Counsel argues that in the conversation between Thames, Traynon, and Hicks, Thames stated that Hicks had broken the law as a first line supervisor by going to a union meeting. Thames and Traynon testified that it was Hicks who first raised the subject of the union meeting. More specifically, they testified that Hicks stated he had not been told that his actions or activities on behalf of the Union "would get him into this kind of trouble, even at the meeting he attended." Traynon and Thames testified that they did not bring up the subject of union meetings and that neither of them was aware Hicks had attended a meeting. In Hicks' cross-examination, he candidly admitted that in the conversation with Thames and Traynon he may well have been the one to begin the discussion regarding the union meeting by saying he had not been told that as a supervisor he could not attend the meeting. Accordingly, I do not believe there is a direct conflict between the testimony of Hicks and that of Thames and Traynon. Rather, I conclude that counsel for General Counsel's argument regarding the facts is not clearly supported by the record. Accordingly, I find that the General Counsel has not established by a preponderance of the evidence that Thames made the alleged remark. Therefore, while

Hicks clearly was discharged because of his support for and activities on behalf of the Union, itself in violation of Section 8(a)(1) and (3) of the Act, I do not specifically find that Respondent otherwise created the impression of surveillance of employee union activities.

CONCLUSIONS OF LAW

1. The Respondent, West Florida Hospital, Inc., is a health care institution within the meaning of Section 2(14) of the Act and an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. William M. Hicks, prior to and at the time of his discharge on June 8, 1981, was an employee within the meaning of the Act.

4. Respondent discharged Hicks because of his support for and activities on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]