

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

PRISON HEALTH SERVICES, INC.

Employer

and

Case No. 29-RC-10300

NEW YORK STATE NURSES ASSOCIATION

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Nancy Reibstein, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. Prison Health Services, Inc. (Employer), a domestic corporation with its principal office and place of business at 19-40 Hazen Street, East Elmhurst, New York, is engaged in providing complete medical nursing, dental and mental health services for New York City Department of Correction facilities located at 15-15 Hazen Street, East Elmhurst, New York, and at 125 White Street, New York, New York, under contract to the City of New York. During the

past 12 months, which period is representative of its annual operations, the Employer, in the course and conduct of its business operations, provided services valued in excess of \$50,000 to the City of New York, which entity is directly engaged in interstate commerce.

Based on the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. Petitioner seeks to represent all Quality Improvement Registered Nurses (QIRNs) employed by the Employer as part of the existing unit of registered nurses it presently represents. The Employer contends that all the employees in this classification are supervisors within the meaning of Section 2(11) of the Act and therefore the petition should be dismissed. In support of this contention, the Employer primarily relies on the fact that QIRNs prepare deficiency forms, to be described below, and that such forms are used in the Employer's disciplinary process. The Employer does not argue, nor does the record reveal, that these employees have the authority to hire, fire, promote, transfer, layoff, assign, reward or recall employees, or effectively recommend any of these actions. For the reasons set forth below, I find that the record does not

establish that QIRNs possess and exercise any statutory supervisory authority and therefore the continued processing of the petition is warranted.

The Employer is under contract with the City of New York to provide medical, nursing, dental and mental health services to the prison population at the nine prison facilities on Riker's Island, New York and one correctional facility formerly known as the Tombs and now known as BBKC. The contract is a cost plus arrangement whereby the City of New York will reimburse the Employer for all labor and non-labor costs plus a margin for the services provided by the Employer. The prison population consists of approximately 14,000 individuals and the Employer is responsible for providing complete health care for this group 24 hours a day, seven days a week. The Employer 's operations are broken down into various departments, each addressing a different facet of the health care program: medicine, nursing, mental health, utility management, pharmacy, dentistry and quality improvement. Overall responsibility for the functioning of each department vests with a director for each discipline. Each of the nine sites on Rikers Island has a separate management team which oversees the operation of that facility on a daily basis: Site Medical Director (2 facilities also have Assistant Medical Directors), Mental Health Unit Chief, and Director of Nursing. QIRNs are supervised by Dr. Nkem Ene, the Director of Quality Improvement. To provide this care, the Employer employs approximately 120 physicians, 80 physician assistants, 4 nurse practitioners, 9 senior psychiatrists, 37 psychiatrists, 120 mental health clinicians, 150 RNs, 80 LPNs, 25 nursing assistants, 9 QIRNs and an indeterminate number of patient

care coordinators. The record reflects that the Petitioner currently represents all RNs.

QIRNs employed by the Employer are nurses licensed by the State of New York and who have clinical experience. The record reveals that one QIRN is assigned to each of the nine facilities located at Rikers Island. One or her predecessor made these assignments. QIRNs do not work in tandem with any other employees or other QIRNs. No employees report to them. The City of New York, by contract, requires the Employer to maintain records to demonstrate that health care standards are being met among the prison's population. In this regard, the City and the Employer have designated checkpoints, known as Performance Indicators (PIs), which can chart whether proper medical care and treatment is being maintained. Under the current contract, there are forty PIs which cover the panoply of services the Employer provides. (According to the record, under the new contract, which is scheduled to take effect on January 1, 2005, the number of PIs will be increased.) It is the responsibility of QIRNs to review patients' charts to see if practitioners (i.e., physicians, RNs, etc.) are complying with the various PIs. Typically, a QIRN randomly selects patients' charts five to seven days after admission, and reviews them for compliance with all PIs. If a PI deficiency is uncovered, the reviewing QIRN completes a form provided by the Employer and approved by the City, wherein the name of the patient and the deficiency is set forth. The QIRN's name appears on the form but the practitioner's does not. The form does not provide for the QIRN to recommend any action, disciplinary or otherwise, that should be administered

against the practitioner. The completed form is submitted to Ene who forwards a copy to the practitioner's supervisor. Thus, by way of example, if a physician had failed to enter a required PI, the completed deficiency form would be submitted to Dr. Ene who in turn would fax it to the Site Medical Director. The Site Medical Director then meets with the physician and it is that Director's responsibility to determine what corrective action should be taken. Such action may be to correct the PI, counseling or some form of discipline. There is no evidence in the record that QIRNs participate in this procedure. In fact, Dr. Ene is not involved in this process, aside from providing a department head with a copy of the deficiency report. According to Ene, immediate supervisors and regional management determine what, if any, corrective action should be taken. Neither Ene nor the QIRNs have access to the personnel files of any of the Employer's employees. If a practitioner is counseled as the result of a deficiency report, Ene receives a copy of the report. There is no evidence that QIRNs also receive a copy. The record contains no evidence that any practitioner has been disciplined because of the information provided in a deficiency report prepared by a QIRN. It also appears that if a QIRN notices that after reviewing a chart, a procedure was not performed, that omission can be noted on the PI form. In making this call, QIRNs rely on their clinical experience as registered nurses.

QIRNs regularly participate in site and employer-wide meetings. In attendance at these meetings are members of management and department heads. According to record testimony provided by QIRNs Stacey Whaley and Valerie Brooks-Campbell, QIRNs role in these meetings is to take minutes on

forms provided by the Employer, and to provide facts that have been culled from deficiency reports. While it appears that policy matters have been discussed at these meetings, there is no evidence that QIRNs have played any role, let alone a significant one, in the formulation or modification of any operating policy. In addition to the deficiency forms that are filled out when a PI deficiency is found, QIRNs compile weekly statistics based on these forms and submit these reports to Ene. Ene uses these in preparing reports to be submitted to the City of New York. The Employer is vigilant in maintaining compliance with the PIs as breaches therewith can result in financial penalties being imposed by the City. The record further reveals that QIRNs have participated in one or two projects in the past few years. However, their participation in these programs appears to have been limited to the gathering of facts or the typing up of a proposed project. There is no evidence that any QIRN has ever spearheaded a project or submitted a proposal that was adopted by management.

With respect to secondary indicia of supervisory status, the record contains no evidence regarding the pay and benefits enjoyed by QIRNs. With respect to hours of work, the sole record evidence was provided by QIRN Whaley who testified that she works 8:00 A.M. to 4:30 P.M, forty hours a week. She testified that she has the ability to work a different schedule but usually works those hours. There is no evidence whether Whaley may change her hours without the prior approval of the Employer or whether any other QIRN may unilaterally alter their work schedule. The record reveals that QIRNs do not

receive any training regarding human or labor relations matters and their evaluations do not refer to their performance in these areas.

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River*, 121 S.Ct. at 1866. In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. See *Chicago Metallic*, 273 NLRB 1677, 1688, 1689 (1985). Accordingly, when “there is inconclusive or conflicting evidence on specific indicia of supervisory authority, the Board will find that supervisory status has not been established with respect to those criteria.” *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 7 (2003). Based on the facts and reasoning set forth below, I have concluded that the Employer has not met its burden with respect to establishing that the QIRNs are Section 2(11) supervisors.

In enacting Section 2(11) of the Act, Congress intended to distinguish “between true supervisors who are vested with ‘genuine management prerogatives,’ and ‘straw bosses, lead men, and set-up men’ who are protected by the Act even though they perform ‘minor supervisory duties.’” *S. Rep. No. 105, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess., 4 (1947), quoted in Providence Hospital*, 320 NLRB 717, 725 (1996). Accordingly, employees are statutory supervisors only if (1) they hold the authority to engage in one of the twelve supervisory functions set forth in the Act, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of *independent judgment*,” and (3) their authority is held “in the interest of the employer.” See *Kentucky River Community Care, Inc.*, 121 S.Ct. 1861, 1867 (2001)(emphasis added). Secondary indicia of supervisory

status, which are not specifically set forth in the Act, “are insufficient by themselves to establish statutory supervisory status. *Property Markets Group, Inc.*, 339 NLRB No. 31, slip op. at 7 (2003).

In light of the criteria set forth above, it is clear that that the Employer has failed to meet its burden under *Kentucky River*, 121 S.Ct. at 1866. that QIRNs are statutory supervisors. The Employer’s primary, and virtually sole argument in support of its position is that QIRNs play a role in the Employer’s disciplinary process. The record does not bear this out. QIRNs are responsible for reviewing patient’s charts to determine whether the practitioner/practitioners who completed the chart have addressed all Performance Indicators. The Performance Indicators have been determined by the City of New York in conjunction with the Employer, and are not subject to modification in any manner by the QIRN. The review of the charts **must** address the PIs; the QIRNs have no discretion in this regard. If a deficiency is found, the QIRN fills out a deficiency form and submits it to Dr. Ene, the Director of Quality Improvement. The form does not reveal the identity of the practitioner involved nor does it provide for a recommendation by the QIRN as to any corrective or disciplinary action to be administered. The form sets forth the name of the QIRN and the patient and the deficiency. Likewise, Dr. Ene, upon forwarding the form to the department supervisor of the practitioner, makes no recommendation as to any corrective action. That decision lies with the immediate supervisor and /or the site director. The QIRNs never make any recommendation for disciplinary action. In fact, the record contains no evidence that any of the Employer’s employees have ever

been disciplined as a result of a deficiency report. Thus, the Employer's argument rings hollow.

The work of the QIRNs appears, at most, to be reportorial. The Board has addressed this issue and concluded that such responsibility does not warrant a finding of supervisory status. In *Lollyhanna Care Center*, 332 NLRB 934, (2000), the employer asserted that certain registered nurses were Section 2(11) supervisors, in part, because of their role in the disciplinary process. The nurses there, pursuant to the direction of an admitted supervisor, recorded facts, on a preprinted disciplinary form, involving alleged disciplinary conduct. The form, which included the term "warning" in its title, was signed by the nurse as "the person who prepared the warning". The nurse then submitted the form to the employee's supervisor. The record there contained no evidence that a nurse had ever made a disciplinary recommendation in any case. In rejecting the employer's argument, the Board stated:

"The nurses' role is limited to recording the facts surrounding a potential disciplinary incident, as observed or presented to them, without further inquiry or recommended disposition. Thus we find that the nurses' role is merely reportorial and is not indicative of supervisory status."

In *Illinois Veteran's Home at Anna L.P.*, 323 NLRB 890 (1997), the Board rejected the employer's argument that filling out personnel forms by registered nurses was sufficient to bestow supervisory status upon these employees. A registered nurse would discuss the conduct in issue with the employee who would then sign the form. The form provided a place for the nurse's signature but did not provide for a recommendation by the nurse for any disciplinary action.

The nurse would then submit the form to the director of nursing who was solely responsible for determining what action should be taken. The director did not consult with the nurse in making her determination. The employer argued that the form itself is a warning and the basis for subsequent discipline and therefore warranted a finding of supervisory status. The Board was not persuaded by this argument. It concluded that

“...that the forms are merely reportorial. The RNs sign the forms and deliver them to the DON, who is solely responsible for making all decision on discipline. Despite the printed word “warning” at the top of the forms, the purpose of the forms is to report incidents, not to impose discipline. The RNs do not recommend the imposition of discipline or what discipline should be imposed or make any recommendations at all. Section 2(11) requires an individual to use independent judgment in exercising the authority either to “discipline” or “effectively to recommend” discipline. The evidence here fails to show that the RNs either impose or recommend such discipline. “

In *Nymed, Inc. d/b/a Ten Broeck Commons*, 320 NLRB 806 (1996), the employer contended that LPNs' role in the employer's disciplinary process rendered them 2(11) supervisors. The LPNs there reported incidents of unacceptable work performance or behavior. The LPNs made no recommendation as to discipline and submitted the reports to a supervisor for review. In concluding that the employer failed to meet its evidentiary burden, the Board held that inasmuch as the reports contained no recommendation from the LPNs they did not constitute a meaningful role in the disciplinary process within the context of the statutory definition. Therefore, the Board concluded that such responsibility did not confer supervisory status.

These cases involve employees who were present on the work floor, witnessed questionable conduct, prepared reports containing the facts of this conduct and which reports potentially formed the basis of possible discipline. Nonetheless, the Board consistently held that such responsibility was not supervisory, as the reports did not contain a recommendation as to the imposition of discipline. The QIRNs conduct does not even rise to this level. The work by themselves, and do not witness the work of the practitioners which are memorialized in the charts they review. They examine the chart to determine if there is compliance with the pre-determined Performance Indicators and note on an employer-provided form if there have been any omissions. The form does not set out the name of the practitioner and the reviewing QIRN makes no recommendation whatsoever. Finally, there is no evidence that any employee has been disciplined as a result of a form submitted by a QIRN. Clearly, the work of QIRNs is reportorial and does not warrant a finding of supervisory status. The cases cited by the Employer, e.g. *NLRB v. Quinnipiac College*, 256 F.3<sup>rd</sup> 68 (Second Circuit, 2001), *Schnurmacher Nursing Home v. NLRB*, 214 F.3<sup>rd</sup> 260 (Second Circuit, 2000), et al, are factually inapposite and therefore do not compel a contrary result. I note that the Employer's reliance on *Schnurmacher* is misplaced. In that case, while the Circuit Court agreed with the employer, contrary to the Board's holding, that charge nurses were supervisors, it held that the charge nurses' role in the disciplinary process was not supervisory. The Court concluded that even though charges nurses referred employee misconduct to a nurse manager, that referral was never accompanied by a recommendation.

The Court upheld the Board's view that such referrals, by themselves, do not establish disciplinary authority as a matter of law.

Based on the record evidence, I conclude that the following group of employees should be allowed to vote whether they wish to be included in the existing unit of registered nurses employed by the Employer:

All full-time and regular part-time quality improvement registered nurses employed by the Employer; excluding all other employees, guards and supervisors as defined in the Act.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the group set forth above. The employees will vote whether they wish to be included in a bargaining unit of registered nurses employed by the Employer and represented by the New York State Nurses Association. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged

in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or

by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, One MetroTech Center North, 10th Floor, Brooklyn, New York 11201, on or before **December 23, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579 or by electronic transmission at Region29@NLRB.gov. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile or E-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

#### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **December 30, 2004**. The request may be filed by electronic transmission through the Board's web site at NLRB.Gov but **not** by facsimile.

Dated: December 16, 2004, Brooklyn, New York.

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