

Children's Farm Home and Oregon Public Employees Union, SEIU Local 503, AFL-CIO, CLC, Petitioner. Case 36-RC-5570.

July 25, 1997

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On August 26, 1994, the Regional Director for Region 19 issued a Second Supplemental Decision and Order overruling Objections and to Count Ballots. He affirmed therein the prior finding in both the Acting Regional Director's Decision and Direction of Election and his own Supplemental Decision and Direction of Election that the Employer's treatment team leaders (TTLs) are not supervisors within the meaning of Section 2(11) of the Act.¹ Thereafter, pursuant to Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Second Supplemental Decision. By order dated April 30, 1996, the Board granted the Employer's request for review.

On careful consideration of the entire record in this case, the Board affirms the Regional Director's determination in his Second Supplemental Decision, concluding that the Employer did not sustain its burden of proving that the TTLs are statutory supervisors.

In affirming the Regional Director's findings concerning the TTLs' lack of statutory authority to assign or direct employees, we note that the analyses in his Supplemental Decision and Direction of Election are consistent with the Board's decisions in *Providence Hospital*, 320 NLRB 717 (1996), and *Ten Broeck Commons*, 320 NLRB 806 (1996). Further, in the absence of any significant evidence of the use of independent judgment in the direction of employees, we find it unnecessary to rely on the Regional Director's interpretation in his Supplemental Decision of the statutory term "responsibly to direct." See *Providence Hospital*, supra at 729.

With regard to the asserted statutory authority to discipline employees, the Regional Director considered in his Supplemental Decision two writeups, issued by TTL Teresa Wilson at the Employer's Albany Youth Care Center facility, which warned of the possibility of "further disciplinary action, including immediate termination" in the case of future inappropriate conduct. He concluded that these were insufficient to establish supervisory status. In addition to the Regional Director's analysis, we note that the Employer did not show that either of these warnings affected the subject employee's job status, or constituted evidence that Wilson possessed the authority to discipline within the mean-

ing of Section 2(11). See, e.g., *Ten Broeck Commons*, supra at 812; *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993) (see fn. 29 and cases cited there). Cf. *Biewer Wisconsin Sawmill*, 312 NLRB 506, 507 (1993) (specific factual circumstances, especially the presence and apparent acquiescence of a top management official, made clear the authoritative nature of Supervisor Kaser's warning that one more mistake would cost the employee his job).

Finally, contrary to our dissenting colleague, we affirm the Regional Director's determination that the Employer did not satisfy its burden of showing that the TTLs use independent judgment in evaluating employees or make effective recommendations regarding merit increases. As the Regional Director found, the record indicates that the clinical unit supervisors, who are undisputed statutory supervisors, rather than the TTLs, have final authority with respect to evaluations and use their own independent judgment in evaluating employees; the role of the TTLs in the evaluation process is "merely advisory and preliminary." Moreover, to the extent that the TTLs make recommendations in their evaluations with respect to raises, the record establishes that the clinical unit supervisors conduct their own independent investigation to determine if merit increases are warranted. Such evidence weighs strongly against a finding that the individual making the recommendation has the authority required by Section 2(11) for supervisory status. The Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). Accord: *Brown & Root, Inc.*, 314 NLRB 19, 23 (1994); *Polynesian Hospitality Tours*, 297 NLRB 228, 234 (1989), enfd. 920 F.2d 71 (D.C. Cir. 1990); *Ball Plastics Division*, 228 NLRB 633, 634 (1977); *Risdon Mfg. Co.*, 195 NLRB 579, 581 (1972).

Accordingly, pursuant to the discussion above, the Regional Director's determination that the TTLs are not statutory supervisors is affirmed.

ORDER

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

MEMBER HIGGINS, dissenting.

Contrary to my colleagues, I conclude that the Employer established that its treatment team leaders (TTLs) are supervisors under the Act.

The TTLs write evaluations that affect employee terms and conditions of employment. Although TTLs may not be *obligated* to evaluate employees, the sig-

¹ Pertinent portions of all three regional decisions are attached as an appendix.

nificant point, from the standpoint of Section 2(11), is that they have the *authority* to evaluate.¹

These evaluations, according to the Employer's witnesses, are uniformly followed in deciding whether or not employees will receive merit increases.² In this regard, I do not agree with the Regional Director's observation that the testimony was "conclusionary." The issue of whether recommendations are followed is one of fact, and the Employer's witness answered that question in the affirmative. There was no evidence to rebut that testimony.

My colleagues also argue that the recommendations are not effective. In my view, they are and the record supports this view. The fact that a deciding official independently thinks about a recommendation does not mean that it is not an effective one.

Accordingly, I conclude that the TTLs are supervisors.

¹ Similarly, the fact that some TTLs may not have *exercised* the authority is not dispositive, under the language of Sec. 2(11).

² In light of this un rebutted testimony, I do not agree with my colleagues that the role of TTLs in the evaluation process is "merely advisory and preliminary." Similarly, the fact that the decision-maker conducts an independent investigation does not mean that the recommendation is not effective. It simply means that the decision-maker adds his/her own views to that of the TTL. Significantly, as noted above, the views of the TTLs are uniformly followed.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Employer provides psychiatric services for adolescents. There are four residential programs—Mallett Cottage, Cummings Cottage, Powers Cottage, and Frances Elizabeth (FE) Cottage—located at the Employer's main facility. There are also two community centered group homes, Albany Youth Care Center (AYCC) and Hawthorne, each located about five or six miles from the main facility, and a crisis intervention program, Lakeside Shelter Care, also located away from the main facility. At the main facility, each cottage is supervised by a clinical unit supervisor (CUS), as is Lakeside Shelter. Under the CUS are two treatment team leaders (TTLs), about six residential treatment specialists (RTSs), and about one residential treatment assistant (RTA). AYCC and Hawthorne are under one CUS, and there are two TTLs, four RTSs, about two house parents, and one RTA night attendant at each. Lakeside Shelter has two TTLs, five RTSs, and about one RTA. In addition, each program has a community and family therapist (CFT), stipulated by the parties to be a professional employee and excluded from the unit. At issue is the supervisory status of the TTLs. Also at issue is the unit placement of on-call employees, and the confidential status of Kathy O'Neal, the secretary to Kimble Scott, the associate director of program services. The Employer contends that TTLs are statutory supervisors, and that on-call employees should be excluded from the unit on the basis of lack of community of interest, although the Employer would agree to the *Trump Taj Mahal*, 306 NLRB 294 (1992), eligibility formula should on call employees be found to be included. Petitioner contends that Kathy O'Neal, sec-

retary to Associate Program Director Kimble Scott, should be excluded as a confidential employee.

The parties stipulated that, based on authority to hire and fire or to effectively so recommend, the following are statutory supervisors: total quality manager, development director, executive director, human resources director, program supervisor, facilities supervisor, clinical services supervisor, community services coordinator, clinical unit supervisors, dietary services coordinator, program supervisor, recreation therapist, center supervisor, lead residential treatment assistant, health services coordinator, admissions or intake coordinator, and medical director. In addition, the parties stipulated that executive assistant Julia Webster is excluded from the unit as a confidential employee on the basis that she assists the executive director, who formulates labor relations policies; that human resources assistant Tiffany Pegg is likewise excluded as a confidential employee on the basis that she assists the human resources director; and that the health services coordinator Marge Schantz is excluded because she is a registered nurse.

Treatment Team Leaders:

In the recent past, the Employer embarked on the path to become accredited. As part of that process, the position of TTL was created to provide accountability for policy and procedure adherence and to provide oversight, that is, to assure that cottage activities, goals, and objectives were being followed consistent with Employer policy and procedures. The TTLs are responsible for laying out the expectations around treatment decisions and ensuring that treatment interventions and other matters relevant to treatment plans are effectively carried out by the employees. RTSs are assigned "primaries," that is, specific children for whose care and treatment, including a treatment plan, the RTSs are responsible. Generally, TTLs are not assigned primaries, but TTLs do spend from about 50 or 60 percent to as much as 80 or 90 percent of their time working directly with the children, and the remainder of their time attending meetings, planning, and overseeing the care and treatment of children by RTSs. The CUS for AYCC and Hawthorne, whose office is located in the main facility away from the two programs he supervises, testified that he spends about 25 percent of his time working directly with children. Unlike RTSs and other employees, TTLs are paid on a salary, rather than hourly, and do not receive overtime. TTLs receive from \$1919 to \$2784 per month, equal to \$11.07 to \$16.06 per hour while the next lower position, RTS-2, receives \$9.51 to \$13.79 per hour, and the next higher position, CUS, is paid \$2057 to \$2983 per month, equal to \$11.87 to \$17.51 per hour. In addition, RTSs fill out timecards, while TTLs do not.

Hiring is done by a process which includes an interview of applicants by a panel of three, who are given a prepared list of questions, which they ask in rotation. They are also given a prepared scoring sheet to use in scoring the applicant's replies. At the conclusion of the interview, the scoring sheets and any recommendations which the panel has arrived at by consensus are forwarded to the human resources department. Each panel member has an equal voice, and there is testimony that each panel member has "veto" power, but other evidence establishes that no panel member has power to outright reject an applicant and that objections to an applicant are discussed by the panel and a consensus is reached before the panel's recommendations are handed on. TTLs

often serve on such interview panels, as do CUSs. Occasionally, an RTS will serve on a panel, and at least one RTS was on a panel interviewing for the position of CUS. In addition, a TTL in Powers Cottage recommended that a certain on-call employee be hired as full time, and that employee was so hired, but the record does not establish whether the employee was hired as full time on the basis of the TTL's recommendation or if other criteria were also applied. A TTL in FE Cottage expressed objections to the hire of an RTS, but the person was hired.

With respect to employee evaluations, in the cottages at the main facility, all employees are given a form to give numerical ratings to the employee being evaluated. The CUS then reviews those forms with the affected employee and/or prepares a written evaluation based on the responses on those forms. A TTL in Powers Cottage testified that she makes weekly notes about the employees and discusses her notes with the CUS before the CUS does the employee's evaluation. The same TTL said that in the past she had filled out a draft evaluation form for an employee and the CUS rewrote it but did not alter the substance. At Lakeside Shelter, the process of employee evaluations includes a staff meeting in which the overall staff give verbal "feedback" to the employee being evaluated. At AYCC and Hawthorne, it is not the normal practice for all employees to be given a form for evaluating a peer. Written evaluations are drafted by TTLs, then discussed by the TTL and the CUS who may make changes, and then the evaluation is signed by the CUS. In evidence are evaluations of various individual employees in which TTLs made recommendations that employees receive a wage increase, or that an employee's pay be frozen in place on the wage scale, but there is no evidence with respect to whether such recommendations were followed and not all TTLs regularly make such recommendations. One TTL recommended that an employee be given a larger than normal raise, and the employee himself also spoke to the relevant CUS about a raise; the CUS determined that, based on the employee's level of education and client skills, the employee indeed deserved a significant raise and the raise was given. On-call employees are evaluated each day they work, usually by the TTL, but sometimes by an RTS.

Serious employee performance problems are rare. TTLs have authority to give verbal reprimands. A TTL in AYCC has issued written warnings on a few occasions. One such warning was to an RTS who had used fire drills as a disciplinary device, and stated that the TTL and the RTS would be meeting each week to discuss the RTS' performance. Another such warning concerned a conflict between an employee and one of the children and included the statement that, "[A]ny further instances of unprofessional, inappropriate statements, or other instances of poor judgment may result in further disciplinary action, including immediate termination." However, the CUS for AYCC testified that termination is not a decision made by any one person, and that the Employer's process for termination is rather complex. On one occasion at Lakeside, an employee arrived for work wearing a T-shirt bearing an inappropriate insignia and the TTL sent the employee home to change shirts. On one occasion, a TTL in Mallett Cottage decided that an employee was unfit physically and emotionally to work, and sent that employee home. The TTL also recommended to the CUS that the employee be given some days off. The CUS spoke to the

employee at home by telephone, and then the employee was given 3 days' paid leave.

Employees' work schedules are more or less fixed. When an employee calls in sick, the first response is to seek an on call employee as a replacement, if budgetary constraints do not intervene. The call may be made by a TTL without other authorization, but RTSs also make such calls without other authorization. A regular employee may be asked to work extra time if necessary, but a TTL has no authority to order an employee to work overtime. Frequently, overtime hours are "flexed," that is, the employee is given equal time off within the next few days. TTLs have authority to arrange such "flexing" without having to consult the CUS. On some occasions, employees work overtime because a crisis situation with the children is occurring and rather than walk out on a crisis, they later arrange to "flex" the time. TTLs in separate cottages can arrange between themselves to temporarily "trade" or transfer an employee, but TTLs have no authority to permanently transfer an employee. Employees' timecards are signed by CUSs.

There are various tasks, most of which are routine and recurring, which must be performed on any shift. At the beginning of each shift, the oncoming employees are briefed by the departing employees, and then the TTL usually discusses the tasks for the day with the employees and they decide as a group who will take which task, which include such things as giving medications, providing transportation, and leading recreational activities. Some employees have a preference for one or another activity. If there are no volunteers, the TTL can assign a task. A TTL has authority to make temporary changes in an RTS's schedule, such as to provide coverage by an experienced employee for a relatively short period when the TTL will be absent.

Section 2(11) of the Act defines a supervisor 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 direct them, or to adjust their grievances, or effectively 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 duties and responsibilities of the TTLs herein are somewhat analogous to those of charge nurses in hospitals and nursing homes. Typically, such charge nurses are responsible for seeing that the work is done, that medicines are administered to the patients, that proper charts are kept, and that the patients receive whatever treatment has been prescribed. The charge nurse assigns tasks to those nurses and aides working in her or his area on her shift and also directs the work of those other employees. *Northcrest Nursing Home*, 313 NLRB 491 (1993). In determining the supervisory status of charge nurses, the Board uses the "patient care" analysis, that is, the authority on the part of more skilled and experienced employees to assign and direct other employees in the interest of providing high quality and efficient service generally is not found to confer supervisory status, whereas the authority to promote, demote, award raises, or discipline (or to effectively recommend these actions) is invariably found to confer supervisory status. *Northcrest Nursing Home*, supra at 493.

With respect to the role of TTLs in the hiring process, the evidence does not support a conclusion that TTLs effectively recommend hiring. Their role in the process is limited to participating in recommendations arrived at by the consensus of the panel as a whole. RTSs on occasion participate on such panels to the same extent as do TTLs, and there is no evidence that such panels make any direct comparisons among multiple candidates for a single position or that the final hiring decision is made by the panel members. The CUSs have final authority with respect to evaluations and appear to use their own subjective judgment in doing so. In those programs, in which all employees in the program are invited to evaluate or rate a particular employee, either verbally or in writing, the TTLs play no more significant role in the evaluative process than do RTSs or other subordinate employees. In those programs in which the TTLs draft the evaluation for the approval of the CUS, the CUS retains final authority and may or may not follow the TTL's recommendations. Thus the role of TTLs overall in the evaluation process is merely advisory and preliminary. There is no evidence that any employee was granted or denied a wage increase on the basis of a TTL's recommendation, without further independent investigation by the CUS. The role of TTLs in calling in on call employees and evaluating on call employees does not establish supervisory status, as RTSs, who are concededly not supervisors, also call in on call employees and evaluate on call employees in the same manner as do TTLs. Moreover, this practice is accepted as necessary when done; it involves precious little discretion other than whether the Employer needs extra help to properly care for the children.

TTLs have authority to make minor alterations in employees' work schedules in order to assure the presence of an experienced employee or to adequately deal with a crisis situation, but they do not have authority to significantly alter the regular work schedule of employees, or to transfer employees. The judgment exercised by the TTLs with respect to employees' schedules is a matter of making "professional" decisions in the best interests of the children under their care.

The evidence does not establish that TTLs exercise any significant degree of independent judgment in the assignment of tasks to be performed on a shift. Most such decisions are based on the expressed preferences of the employees involved or are reached by a consensus of the employees on the shift.

With respect to discipline, TTLs clearly have authority to give verbal reprimands and to take immediate action as necessary to deal with employee conduct which has or may have an adverse impact on the children, as the examples in the record demonstrate. However, the evidence establishes that any disciplinary action beyond immediate response in the best interests of the children's care and treatment is determined by the CUS, who engages in independent investigation of the misconduct. These circumstances are parallel to those found in *Northcrest*:

[T]he charge nurses are not supervisors because their warnings, either individually or in the aggregate, do not lead to personnel action; or, if they do, such action is not taken without independent investigation or review by others. Accordingly, their warnings are merely reprimand and not an indicium of supervisory authority. [At 497.]

Similarly, the Board has declined to find that authority to suspend employees for flagrant violations such as drunkenness or abuse of patients alone establishes supervisory status because no independent judgment is involved, as the offenses are obvious violations of the employers' policies and speak for themselves. *Northcrest*, supra at 497. An anomaly here is the written warning authored by a TTL at AYCC in which "immediate termination" was threatened should the misconduct persist. The threat of "immediate termination" seems to be in conflict with the statement by the TTL's own supervising CUS that termination is a complex process and not a decision made by any one person. In any event, the threat itself, without more, does not prove that the TTL has independent authority to discharge or to effectively recommend discharge. The Board found in *Northcrest* that the essential inquiry is whether warnings or suspensions constituted effective recommendation of disciplinary action. Supra at 498. Where, as here, such disciplinary actions do not constitute effective recommendation because such actions are subject to the independent investigation or review of others, supervisory status is not established.

The Employer offered evidence that TTLs are evaluated with respect to their leadership skills, that they attend supervisory training, and that they are held out to other employees to be supervisors. This type of evidence is held by the Board to be derivative, that is, evidence which emanates from the employment setting or from subjective feelings about employment matters, and does not support a finding of supervisory status in the face of insufficient statutory indicia of supervisory status. *Northcrest*, supra at 508.

The burden of proving supervisory status rests on the party claiming the existence of such status. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979); *Midland Transportation Co.*, 304 NLRB 4 (1991). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least not on the basis of those indicia. *The Door*, 297 NLRB 601 (1990).

On the basis of the foregoing, and the record as a whole, I conclude that the TTLs herein are not supervisors within the meaning of the Act.

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION

5. The Employer provides psychiatric services for adolescents. There are four residential programs—Mallett Cottage, Cummings Cottage, Powers Cottage, and Frances Elizabeth (FE) Cottage located at the Employers main facility. There are also two community centered group homes, Albany Youth Care Center (AYCC) and Hawthorne, each located about 5 or 6 miles from the main facility, and a crisis intervention program, Lakeside Shelter Care, also located away from the main facility. At the main facility, each cottage is supervised by a clinical unit supervisor (GUS), as is Lakeside Shelter. Under the CUS are two treatment team leaders (TTLs), about six residential treatment specialists (RTSs), and about one residential treatment assistant (RTA). AYCC and Hawthorne are under one program supervisor, and there are two TTLs, four RTSs, about two house parents, and one RTA night attendant at each. Lakeside Shelter has two TTLs, five RTSs, and about one RTA. At issue is the supervisory status of the TTLs. The Employer contends that TTLs are

statutory supervisors. In my earlier decision, I relied heavily on *Northcrest Nursing Home*, 313 NLRB 491 (1993), in finding TTLs not to be supervisors. Inasmuch as the Supreme Court's recent decision in *NLRB v. Health Care & Retirement Corp. of America*, 510 U.S. 1037 (1994), has overturned the underlying premise of the Board's *Northcrest* decision, it is necessary for me to reconsider my findings with respect to the supervisory status of TTLs.

The position of TTL was created in the relatively recent past to provide accountability for policy and procedure adherence and to provide oversight, that is, to assure that cottage activities, goals, and objectives were being followed consistent with Employer policy and procedures. The TTLs are responsible for laying out the expectations around treatment decisions and ensuring that treatment interventions and other matters relevant to treatment plans are effectively carried out by the employees. RTSs are assigned "primaries," that is, specific children for whose care and treatment, including a treatment plan, the RTSs are responsible. Generally, TTLs are not assigned primaries, but TTLs do spend from about 50 or 60 percent to as much as 80 or 90 percent of their time working directly with the children, and the remainder of their time attending meetings, planning, and overseeing the care and treatment of children by RTSs. The program supervisor for AYCC and Hawthorne, whose office is located in the main facility away from the two programs he supervises, testified that he spends about 25 percent of his time working directly with children. Unlike RTSs and other employees, TTLs are paid on a salary, rather than hourly, and do not receive overtime. TTLs receive from \$1919 to \$2784 per month, equal to \$11.07 to \$16.06 per hour, while the next lower position, RTS-2, receives \$9.51 to \$13.79 per hour, and the next higher position, CUS, is paid \$2057 to \$2983 per month, equal to \$11.87 to \$17.51 per hour. In addition, RTSs fill out timecards, while TTLs do not.

Section 2(11) of the Act defines a supervisor 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 direct them, or to adjust their grievances, or effectively 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.

In examining what the Fifth Circuit has described as "the infinite and subtle gradations of authority which determines who, as a practical matter, falls within the statutory definition of 'supervisor,'" the Board and the courts have, over the years, elucidated certain basic precepts. The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *Warner Co. v. NLRB*, 365 F.2d 435, 437 (3d Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985). While the possession of any one of the functions enumerated in Section 2(11) is sufficient to establish supervisory status, Section 2(11) requires that a supervisor must perform those functions with independent judgment as opposed to in a routine or clerical manner. *Bay*

Area-Los Angeles Express, supra, and cases cited therein. Independent judgment cannot be found where decisions are strictly regulated by specific employer policy. *Western Union Telegraph Co.*, 242 NLRB 825, 827 (1979). Further, absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); *Quadrex Environmental Co.*, 308 NLRB 101 (1992). In determining whether "direction" in any particular case is "responsible," the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs. *NLRB v. KDFW-TV, Inc.*, supra. Authority to effectively recommend "generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation is ultimately followed." *ITT Lighting Fixtures*, 265 NLRB 1480 (1982). Isolated and infrequent incidents of supervision do not elevate a rank-and-file employee to supervisory level. *NLRB v. Doctors' Hospital of Modesto*, 489 F.2d 772, 776 (9th Cir. 1973), cited in *Bay Area-Los Angeles Express*, supra. The burden of proving supervisory status rests on the party contending that such status *Tucson Gas & Electric Co.*, 241 NLRB 181(1979); *Midland Transportation Co.*, 304 NLRB 4 (1991). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least not on the basis of those indicia. *The Door*, 297 NLRB 601 (1990). With the foregoing precepts in mind, I adhere to my earlier finding that the record herein does not establish that TTLs are supervisors within the meaning of the Act, for the reasons set forth below.

Hiring is done by a process which includes an interview of applicants by a panel of three, who are given a prepared list of questions, which they ask in rotation. They are also given a prepared scoring sheet to use in scoring the applicant's replies. At the conclusion of the interview, the scoring sheets and any conclusions which the panel has arrived at by consensus are forwarded to the human resources department. Each panel member has an equal voice, and there is testimony that each panel member has "veto" power, but other evidence establishes that no panel member has power to outright reject an applicant and that objections to an applicant are discussed by the panel and a consensus is reached before the panel's conclusions are handed on. TTLs often serve on such interview panels, as do CUSs. On at least one occasion, a panel consisted solely of two TTLs. Occasionally, an RTS will serve on a panel, and at least one RTS was on a panel interviewing for the position of CUS. In addition, a TTL in Powers Cottage recommended that a certain on-call employee be hired as full time, and that employee was so hired, but the record does not establish whether the employee was hired as full time on the basis of the TTL's recommendation or if other criteria were also applied. A TTL in FE Cottage expressed objections to the hire of an RTS, but the person was hired. The program supervisor for AYCC and Hawthorne testified that "there are occasions where TTLs would pull a panel together, perform the interviews and actually hire the person, and I would sign off on it as would the community services coordinator" but other than his testimony that such an event most recently occurred within the past

²*NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986), enf. 274 NLRB 1014 (1985), exists.

year, or so he believed, there is no supporting evidence in the record regarding this event or whether it actually occurred more than once, and the record otherwise establishes that it is the usual practice for someone higher in authority than TTLs to appoint panel members, and the record is silent with respect to the circumstances which led to the occasion cited. Typically the role of TTLs in the hiring process is limited to participation in rating candidates and in arriving at a consensus with other panel members on those occasions in which there is serious disagreement. RTSs on occasion participate on such panels to the same extent as do TTLs. There is no evidence that such panels make any direct comparisons among multiple candidates they have interviewed for a single position or that the final hiring decision is made by the panel members. Even if TTLs at AYCC or Hawthorne instituted a panel and made a final hiring decision, as inferred by testimony without supporting evidence, the event can only be viewed here as an isolated exception to the general practice and not in itself sufficient to establish supervisory status of TTLs. Thus the foregoing evidence falls short of establishing that TTLs effectively recommend hiring, inasmuch as the evidence does not go beyond mere inference that the interview panels actually select a candidate who is then hired without any further assessment by others. Nor does the role of TTLs in calling in on call employees establish supervisory status, inasmuch as RTSs, who are concededly not supervisors, also independently call on call employees, and the decision to do so involves little discretion other than whether the Employer needs extra help to properly care for the children.

In the cottages at the main facility, each employee is evaluated by his or her peers, in that each of the other employees in the cottage is given a form to give numerical ratings to the employee being evaluated. The CUS then reviews those forms with the affected employee and/or prepares a written evaluation based on the responses on those forms. A TTL in Powers Cottage testified that she makes weekly notes about the employees and discusses her notes with the CUS before the CUS does the employee's evaluation. The same TTL said that in the past she had filled out a draft evaluation form for an employee and the CUS rewrote it but did not alter the substance. At Lakeside Shelter, the process of employee evaluations includes a staff meeting in which the overall staff give verbal "feedback" to the employee being evaluated. At AYCC and Hawthorne, it is not the normal practice for all employees to be given a form for evaluating a peer. Written evaluations are drafted by TTLs, then discussed by the TTL and the program supervisor who may make changes, and then the evaluation is signed by the program supervisor. In evidence are evaluations of various individual employees in which TTLs made recommendations that employees receive a wage increase but there is no evidence that such recommendations are relied on without any independent determination by the relevant CUS or program supervisor, and not all TTLs regularly make such recommendations. One TTL recommended that an employee be given a larger than normal raise, and the employee himself also spoke to the relevant CUS about a raise; the CUS determined that, based on the employee's level of education and client skills, the employee indeed deserved a significant raise and the raise was given. On-call employees are evaluated each day they work, usually by the TTL, but sometimes by an RTS. The CUSs

have final authority with respect to evaluations and appear to use their own subjective judgment in doing so. In those programs in which all employees in the program are invited to evaluate or rate a particular employee, either verbally or in writing, the TTLs play no more significant role in the evaluative process than do RTSs or other subordinate employees. In those programs in which the TTLs draft the evaluation for the approval of the CUS, the CUS retains final authority and may or may not follow the TTL's recommendations. "Authority simply to evaluate employees without more is insufficient to find supervisory status. *Passavent Health Center*, 284 NLRB 887, 891 (1987), cited in *Quadrex Environmental Co.*, supra. There is no specific evidence that any employee was granted or denied a wage increase on the basis of a TTL's recommendation without further independent investigation by the CUS. Conclusive testimony by CUSs or program supervisors that they "always" follow the recommendations of TTLs is not sufficient to establish that TTLs make effective recommendations. *Sears, Roebuck & Co.*, supra; *Quadrex Environmental Co.*, supra.

Serious employee performance problems are rare. TTLs have authority to give verbal reprimands. There is no evidence that any systematic record of such reprimands is kept or that such verbal reprimands lead to any further disciplinary action. The power to discipline is not established where there is no evidence that an oral reprimand has any effect on an employee's employment status. *Bay Area-Los Angeles Express*, supra at 1077. A TTL in AYCC has issued written warnings on a few occasions. One such warning, apparently issued in January 1994, was to an RTS who had used fire drills as a disciplinary device. Another such warning, apparently issued in July 1993, concerned a conflict between an employee and one of the children. Both warnings included the statement that, "[A]ny further instances of unprofessional, inappropriate statements, or other instances of poor judgment may result in further disciplinary action, including immediate termination." However, the CUS for AYCC testified that termination is not a decision made by any one person, and that the Employer's process for termination is rather complex. In any event, the threat itself, without more, does not prove that the TTL has independent authority to discharge or to effectively recommend discharge. Moreover, both of the aforementioned warning letters follow the same format and use identical language, such as that cited above, as well as:

We also discussed the probability that this occurrence is symptomatic of the difficulties that you are experiencing making the transition that accompanies the recent schedule changes. . . . Previously we had discussed this issue and I stated that I had observed a change in. . . . It is my expectation that we continue to address these issues in our weekly supervision meetings. . . . I appreciated your candor when acknowledging the difficulties you are having . . . and your recognition of your personal issues interfacing with your professional responsibilities. I encourage you strongly to continue to work on your detachment skills, and personal issues that may effect [sic] you relationships with our clients. [W]e will be meeting each week to review your work performance and discuss issues. I have also included with this letter the CFH policy governing

staff/student relations (10.6). I am confident this will further clarify expectations of your relationships with our clients.

There is no evidence with respect to the source of what appears to be standardized language. Without such evidence, I decline to rely on the warning letters as evidence that the TTL who wrote them or TTLs as a group possess independent authority to discipline employees. In this regard, I note that a "corrective action plan" for a specified employee, signed by a TTL in Hawthorne, was written at the behest of the program supervisor and the program supervisor testified that with respect to this or another such corrective action plan he discussed it with the TTL and gave his approval prior to issuance. On one occasion at Lakeside Shelter, an employee or an on-call arrived for work wearing a T-shirt bearing the image of Spuds McKenzie (presumably the well-known mascot/spokesperson of a certain alcoholic beverage) and the TTL sent the employee home to change shirts. There is no evidence with respect to what effect, if any, this action had on the employees wages or hours of work. On one occasion, a TTL in Mallett Cottage decided that an employee was unfit physically and emotionally to work, and sent that employee home. Such incidents do not establish supervisory authority, inasmuch as the Board has found that in cases of flagrant offenses, the offenses are obvious violations of the employer's policies and speak for themselves, no independent judgment is involved. *Loffland Bros. Co.*, 243 NLRB 74, 75 fn. 4 (1979). The Mallett Cottage TTL also recommended to the CUS that the employee be given some days off. The CUS spoke to the employee at home by telephone, and then the employee was given 3 days' paid leave.

Employees' work schedules are more or less fixed. When an employee calls in sick, the first response is to seek an on call employee as a replacement, if budgetary constraints do not intervene. The call may be made by a TTL without other authorization, but RTSs also make such calls without other authorization. A regular employee may be asked to work extra time if necessary, but a TTL has no authority to order an employee to work overtime. Frequently, overtime hours are "flexed," that is, the employee is given equal time off within the next few days. TTLs have authority to arrange such "flexing" without having to consult the CUS. On some occasions, employees work overtime because a crisis situation with the children is occurring and rather than walk out on a crisis, they later arrange to "flex" the time. TTLs in separate cottages can arrange between themselves to temporarily "trade" or transfer an employee, but TTLs have no authority to permanently transfer an employee. Employees' timecards are signed by CUSs. TTLs have authority to make minor alterations in employees' work schedules in order to assure the presence of an experienced employee or to adequately deal with a crisis situation, but they do not have authority to significantly alter the regular work schedule of employees, or to transfer employees. The Board has declined to find supervisory status based on scheduling of employees where, as here, there is no evidence that employees' work schedules or availability changed significantly from week to week or that in writing out a schedule the alleged supervisor regularly had to resolve conflicts or problems concerning the availability of employees. *Sears, Roebuck & Co.*, supra at 194. There is evidence that on one occasion an RTS made

a request to the appropriate TTL, on short notice, for an unspecified amount of time off, and the request was denied. However, the record is silent with respect to whether the TTL independently denied the request.

There are various tasks, most of which are routine and recurring, which must be performed on any shift. At the beginning of each shift, the oncoming employees are briefed by the departing employees, and then the TTL usually discusses the tasks for the day with the employees and they decide as a group who will take which task, which include such things as giving medications, providing transportation, and leading recreational activities. Some employees have a preference for one or another activity. If there are no volunteers, the TTL can assign a task. A TTL has authority to make temporary changes in an RTS's schedule, such as to provide coverage by an experienced employee for a relatively short period when the TTL will be absent.

The evidence does not establish that TTLs exercise any significant degree of independent judgment in the assignment of tasks to be performed on a shift. Most such decisions are based on the expressed preferences of the employees involved or are reached by a consensus of the employees on the shift. A TTL testified that, in assigning work, "The process that I would go through to distribute work is to assess what needs to be done and what are the priority needs to determine the strengths of the employees and where their strengths could best be utilized within the unit at that time and to match the strengths up with the areas of need in the unit." However, there is no evidence that the "needs" change significantly from day to day or that TTLs regularly have to resolve conflicts or problems with respect to those needs or the skills or strengths of the employees, a circumstance analogous to that found above with respect to scheduling employees. Thus the evidence does not establish that the assignment of work by TTLs is anything other than a routine function.

As noted above, in determining whether "direction in any particular case is responsible," the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he/she directs. TTLs are evaluated on their leadership skills, their training functions, and their provision of what the Employer chooses to call "supervision." The mere possession of a supervisory title is not sufficient to establish supervisory status. *John N. Hansen Co.*, 293 NLRB 63 (1989); *Waterbed World*, 286 NLRB 425 (1987). Likewise, vague statements in evaluative forms such as "provides supervision" do not establish responsible direction. Statutory supervisory status is not defined as "leadership" and, indeed, the Board has often found that employees who provide leadership are leaders without being supervisors. See, e.g., *Print-O-Stat, Inc.*, 247 NLRB 272 (1980). There is also considerable evidence that TTLs serve a training function, both with respect to new employees and experienced employees. However, training of other employees is not an indicia of statutory supervisory status. Moreover, I have found above that TTLs do not exercise independent judgment or make effective recommendations. In these circumstances, there is no sufficient basis for finding that TTLs responsibly direct other employees.

Based on the foregoing, I affirm my earlier determination that TTLs are not supervisors within the meaning of the Act, and, in conclusion, I find that the following employees con-

stitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and direct an election in the following unit:

All full-time, regular part-time, and on-call employees employed by the Employer at its Corvallis, Oregon, facilities, excluding all management employees, confidential employees, temporary employees, therapists, nurses, guards and supervisors as defined by the Act, and all employees represented by another labor organization.

There are approximately 105 employees in the unit.

SECOND SUPPLEMENTAL DECISION AND ORDER OVERRULING OBJECTIONS AND TO COUNT BALLOTS

On May 6, 1994, Acting Regional Director Terry C. Jensen issued a Decision and Direction of Election in which he determined inter alia that the Treatment Team Leaders (TTLs) were not supervisors as defined in Section 2(11) of the Act.

On May 26, 1994, the Employer filed a request for review.

On June 21, 1994, I issued a Supplemental Decision and Direction of Election in which the supervisory status of the TTLs was reconsidered in light of the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America*, 510 U.S. 1037 (1994). The Supplemental Decision found that the TTLs were not supervisors as defined in Section 2(11) of the Act. On July 5, 1994, the Employer filed a request for review of the Supplemental Decision. On July 18, 1994, the Board issued an Order amending the Supplemental Decision to allow the TTLs to vote by challenged ballot.

On July 20, 1994, an election was held pursuant to the Supplemental Decision and Direction of Election in the following unit:

All full-time, regular part-time, and on-call employees employed by the Employer at its Corvallis, Oregon, facilities, excluding all management employees, confidential employees, temporary employees, therapists, nurses, guards and supervisors as defined by the Act, and all employees represented by another labor organization.

Upon conclusion of the election a copy of the tally of ballots, showing the following results, was duly sensed upon each of the parties:

Approximate number of eligible voters	103
Void Ballots	0

Votes cast for Petitioner	38
Votes cast against participating labor organization	34
Valid votes counted	72
Challenged ballots	22
Valid votes counted plus challenged ballots	94

On July 27, 1994, the Employer filed timely Objections to Election.

The parties entered into a Stipulation Resolving Challenged Ballots which I approved on August 26, 1994. This stipulation resolves all challenged ballots except for the 13 TTL challenged ballots. These TTL challenged ballots are sufficient in number to effect the results of the election.

The parties in the Stipulation Resolving Challenged Ballots also agreed that if the TTLs are found by the Board not to be supervisors under Section 2(11) of the Act, then the Employer's Objections to Election will be overruled.

The Region, having considered this matter on two prior occasions, continues to find that the TTLs are not supervisors as defined in Section 2(11) of the Act.

Accordingly the challenged to the ballots of the 13 TTLs are overruled.

Additionally, based on the parties stipulation, because the TTLs are not supervisors, the Employer's Objections to Election are overruled.

Accordingly,

DECISION AND ORDER

I order that the Employer's Objections to Election be overruled because the TTLs are not supervisors as defined in Section 2(11) of the Act.

I further order that the challenges to the ballots of Tiffany Pegg, Maria Kelley, and Matt Klevue are sustained.

Additionally, I order that the ballots of Keith Dempsey, Dawn Sly, Toni Swope, Dale Porter, Kim Hicks, and Teresa Kaiser; and the ballots of the following TTLs: David Frankle, Wendy Trudell, Mark McIntire, Torri Lynn, Teresa Wilson, Donna Houston, Denies Phillips, Sam Felty, Marcia Babel, Robert Koenig, Tom Schaffer, Jane O'Donnell, and Pamela Stewart, be opened and counted, a revised tally of ballots be issued and the appropriate certification issue thereafter.