

**Beverly Enterprises-Massachusetts, Inc., d/b/a Cape Cod Nursing & Retirement Home and Hospital Workers Union, Local 767, SEIU, AFL-CIO, Petitioner.** Case 1-RC-19926

September 24, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN  
AND BRAME

On April 23, 1993, the Regional Director for Region 1 issued a Decision and Direction of Election in the above-entitled proceeding, in which she found that the Employer's licensed practical nurses (LPNs) are not statutory supervisors. The Employer contended that the LPNs are supervisors as they have the authority to evaluate and discipline the Employer's nursing assistants (NAs), as well as to assign and responsibly direct them in the performance of their duties.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, asserting that the Regional Director erred in finding that its LPNs are not statutory supervisors. By Order dated May 24, 1993, the Board granted the Employer's request for review. The election was conducted as scheduled on May 20, 1993, and the ballots were impounded.

On June 21, 1996, by Order Correcting and Remanding, the Board remanded the case to the Regional Director for reconsideration pursuant to the Supreme Court's decision in *NLRB v. Health Care & Retirement Corp.*, 511 U. S. 571 (1994), and the Board's decisions in *Ten Broeck Commons*, 320 NLRB 806 (1996), and *Providence Hospital*, 320 NLRB 717 (1996).<sup>1</sup>

On August 6, 1996, the Regional Director issued an Order to Show Cause why she should not decide this matter on the existing record in light of the above cases. Thereafter, the Employer and the Petitioner filed timely responses to the Order to Show Cause. On November 21, 1996, the Regional Director issued a supplemental decision.<sup>2</sup> Having considered the responses of the parties to the Order to Show Cause, the Regional Director found it unnecessary to conduct any further hearing in this case; thus, she reexamined her original decision in light of the Board's June 21, 1996 Order, and again concluded that the Employer's LPNs are not statutory supervisors within the meaning of Section 2(11) of the Act. On December 4, 1996, the Employer filed a request for review of the Regional Director's supplemental decision contesting the

Regional Director's finding that the Employer's LPNs are not statutory supervisors.<sup>3</sup>

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

The Board grants the Employer's request for review as it raises substantial issues concerning the LPNs' role in evaluating employees that warrant review.<sup>4</sup> Having carefully considered the entire record in this case with respect to the issue on review, the Board concludes, contrary to the Regional Director, that the LPNs are statutory supervisors based on their authority with respect to their role in the Employer's evaluation process. Thus, while we agree with the Regional Director that the LPNs do not possess or exercise any of the other indicia necessary to a finding of supervisory status, the Board finds that the LPNs are statutory supervisors within the meaning of Section 2(11) of the Act because they exercise independent judgment in completing evaluations of the NAs on an annual basis, and these evaluations are the basis on which the Employer awards specific merit increases. See *Bayou Manor Health Center*, 311 NLRB 955 (1993).

As the Regional Director found, the NAs are evaluated at the end of their 90-day probationary period and annually thereafter by the charge nurse (CN) on the unit, either a registered nurse (RN) or an LPN.<sup>5</sup> Using a form which lists various performance qualities and skills, the CN assigns a numerical rating (from 1 to 5) for each of eight categories, and then fills out the written comments section of the form. After computing an overall score from the individual ratings given, the CN assigns the appropriate overall rating—i.e., outstanding, very good, satisfactory, needs improvement, and unsatisfactory. An "outstanding" overall rating equates with an overall score rating of five, "very good" with a four, "satisfactory" with a three, etc. After the evaluation is completed, the CN signs it and sends it to Director of Nursing Martha Monaghan, or to the Employer's administrator, Jeffrey Aframe.

Monaghan or Aframe review the evaluation by checking to see that ratings have been entered in each category, that the overall score has been computed, and that an overall rating has been checked. The record shows that Monaghan looks at the comments on "any really major things," and that, on occasion, she has added up the scores herself and filled in an overall rating where the

<sup>3</sup> The Employer did not request review of the Regional Director's determination that it was unnecessary to reopen the record as to this issue.

<sup>4</sup> We deny review regarding the Employer's LPNs who act as "float" nurses, as the record establishes that they do not complete evaluations of NAs. Thus, we find that they are not supervisors in this or any other respect. However, Member Brame would also grant review of the unit placement issues involving the LPNs who act as "float" nurses.

<sup>5</sup> The director of nursing testified that, on at least one occasion, she completed a CN's evaluation of an aide; and, that in three instances, she filled out an entire evaluation where "[F]or some reason or other, there [was] nobody to fill it out."

<sup>1</sup> In the Order Correcting and Remanding, the Board noted that the sole issue as to which review was granted was that of the alleged supervisory status of the LPNs, and that review was denied in all other respects.

<sup>2</sup> Amended by erratum issued November 26, 1996.

CN has neglected to do so. Monaghan testified that the evaluations are “totally what I go by” in assigning the specific percentage increases awarded. For example, a NA obtaining an overall evaluation of “outstanding” will receive a 6-percent wage increase, while one getting a “very good” evaluation will receive a 5-percent wage increase. If the overall score is in-between two of the choices, the increase awarded will reflect that, e.g., an overall score which falls between “outstanding” and “very good” will result in a 5.5-percent wage increase.<sup>6</sup>

In *Bayou Manor*, supra, the Board found that the employers’ LPNs were statutory supervisors because the evaluations they completed affected the salaries of the certified nursing assistants (CNAs), i.e., there was a direct correlation between those evaluations and the merit increases or occasional departmental bonuses awarded. In a procedure similar to that used by the Employer here, the LPNs evaluated CNAs by assigning numerical scores from 1 to 10 to each of 16 items covering their work performance and personal characteristics, and an overall average score was computed. Unlike the instant case,

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<sup>6</sup> Although the record contains evidence which suggests that, in some cases, the percentage wage increase awarded did not directly equate with the numerical rating that had been assigned (e.g., in one instance, a 5-percent increase was awarded where the aide was rated “very good.” a rating which, according to Monaghan, would receive a 5-percent increase), and while Monaghan was uncertain as to the circumstances, it appears that those evaluations were completed during the tenure of the previous administrator who, for a time, made all wage determinations himself.

however, there was no review of the numerical scores awarded by the LPNs. The employer’s administrator determined the maximum available increase and allocated specific percentage increases corresponding to various average scores. Thus, the scores that the CNAs received on their evaluations directly determined the amount of any merit increase.

We find the role of the LPNs in the instant case basically indistinguishable from that of the LPNs in *Bayou Manor*. Although a review of the completed evaluations is made by Aframe or Monaghan before merit increases are assigned, this review is merely ministerial in that it is only concerned with checking to see that all categories have been rated and computing the overall score and rating, if necessary. It is undisputed that only the CNAs assign the individual ratings and that these ratings are the sole basis for the overall rating on which the specific percentage increase is awarded. As there is a direct correlation between the evaluations and the merit increases awarded, we conclude that the Employer’s LPNs, except those working as “float” nurses, are statutory supervisors within the meaning of Section 2(11) of the Act.<sup>7</sup>

Accordingly, the Regional Director’s supplemental decision is reversed, the Direction of Election is vacated, and the case is remanded to the Regional Director for further appropriate action consistent with the findings here.

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<sup>7</sup> See also *Health Care & Retirement Corp.*, 310 NLRB 1002, 1006–1007 (1993).