Elmhurst Extended Care Facilities, Inc. *and* New England Health Care Employees Union, District 1199, AFL–CIO, Petitioner. Case 1–RC–20080

September 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On March 11, 1994, the Regional Director for Region 1 issued a Decision and Direction of Election in the above-entitled proceeding,[1] in which the Petitioner sought to represent an overall unit of employees at the Employer's 189-bed nursing home, including the approximately 32 registered nurses (RNs) and licensed practical nurses (LPNs) employed as charge nurses. The Employer contended that the charge nurses are statutory supervisors within the meaning of Section 2 (11) of the Act because they have the authority to evaluate and discipline the Employer's certified nursing assistants (CNAs), as well as to assign and responsibly direct them in the performance of their duties. The Regional Director found that the charge nurses are statutory supervisors because the evaluations they complete affect the CNAs' wages and job status, and that, therefore, they must be excluded from the bargaining unit.[2]

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision, asserting that the Regional Director erred by misapplying and/or improperly extending the principles set forth in *Bayou Manor Health Center*, 311 NLRB 955 (1993). By Order dated April 7, 1994, the Board granted the Petitioner's request for review. The election was conducted as scheduled on April 8, 1994, and the ballots were impounded.

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

The Board has considered the entire record in this case, including the parties' briefs on review, and concludes, contrary to the Regional Director, that the charge nurses' role in the Employer's evaluation procedure does not establish that the charge nurses are supervisors within the meaning of Section 2(11) of the Act.

Charge nurses evaluate the CNAs at the end of a 3-month probationary period and then annually on the CNAs' anniversary dates. On the probationary evaluations, the aides are rated 0, 1, or 2 (fails to meet, meets, or exceeds the standard) in seven general categories. The categories that the charge nurses assess include: job knowledge, quality of work, team relations, resident relations, observing regulations, attendance, safety, and potential for the job. After the successful completion of the 90-day probationary period, the aides receive an additional 25 cents per hour. There is no space specifically reserved on the form for recommendations; however, the charge nurse may write narrative comments including recommendations for continued employment, transfers to other units, or termination.[3] Joyce Corsi, the Employer's director of nursing services, makes the decision to retain or terminate an aide or to extend a probationary period. Although Corsi testified that she has never rejected the recommendation of a charge nurse, she further stated that terminations were rare, and that she could recall only one termination of a probationary employee. Corsi also stated that, at the time of the hearing, one aide was under an extension of her probationary period on the recommendation of a CN.

Annual evaluation forms contain six general categories,[4] and the charge nurses again assign numerical ratings (0, 1, or 2) in each category. In addition, there are sections on the forms where the charge nurses may make comments or attach supportive documentation. Although Corsi testified that she does not review the portions of the evaluations completed by charge nurses, one LPN testified, without contradiction, that her shift supervisor (a stipulated supervisor) changed a few items on one evaluation and unilaterally lowered a mark on another from a "2" to a "1." Further, Corsi noted that she adds numerical ratings for tardiness and absenteeism to the evaluations, notes whether the aide has completed the Employer's "First Impressions" program, fills in point totals for all categories if the charge nurse has not done so, and computes the overall numerical rating for each CNA.

In 1993, all CNAs received an across-the-board increase of 3 percent; however, Corsi reduced the increases of an unspecified number of aides by a small amount for excessive absenteeism or tardiness. Also, an aide who had received a score of less than half of the possible points did not receive any wage increase and was placed on probation. In November 1993, the Employer notified its employees that wage increases for 1994 would be based on performance and would amount to a 3 to 4 percent raise. Corsi testified during the early 1994 hearing, however, that she did not yet know whether the Employer would use the same system for its 1994 merit reviews as it had used in the 2 previous years.[5]

[1] As amended by Erratum issued March 21, 1994.

[2] The Employer did not request review of the Regional Director's determination that its charge nurses do not possess or exercise any other statutory indicia. Accordingly, we have not considered those other indicia.

[3] None of the evaluations submitted into evidence by the Employer contain a specific recommendation.

[4] With the exception of "potential for the job" category, these general categories are the same as those on the probationary evaluation forms.

[5] In the latter part of 1992, the Employer began using the forms described above and awarded increases of up to 7 percent. Corsi testified that the exact amount any aide received was based on a mathematical formula which directly correlated to the CNA's numerical performance

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of "employee." Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *NLRB v. Provident Nursing Home*, 187 F.3d 133 (1st Cir. 1999), enfg. 324 NLRB No. 46 (1997) (not published in Board volume). *Telemundo de Puerto Rico*, 113 F.3d 270, 273 (1st Cir. 1997).[6] Further, the burden of proving supervisory status is on the party alleging that such status exists. See, *e.g.*, *Bennett Industries*, 313 NLRB 1363 (1994).

Section 2(11) does not include "evaluate" in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.[7]

In the instant case, the Regional Director concluded that the Employer's charge nurses are supervisors because the evaluations performed by them directly affect the job status of the aides, inasmuch as the evaluations determine whether probationary employees are retained, whether aides receive merit increases, and the amount of any such increases. We disagree. As explained below, we find that on this record the Employer has not met its burden of establishing that the charge nurses perform a supervisory function in evaluating employees.

The Regional Director concluded that the Employer's charge nurses are supervisors, in part, because she found that they effectively recommend the retention of employees after their 3-month probationary period. Contrary to the Regional Director, we find that the evaluations completed by the charge nurses at the end of the newly hired CNA's probationary period do not evidence statutory supervisory authority.

Although management asks the charge nurses to evaluate the new CNAs after 3 months of employment, the record shows that this merely involves the more experienced employee, i.e., the charge nurse, assessing (or expressing an opinion) as to the CNAs' knowledge of the requirements of the job, potential for performing the job competently, ability to interact with other employees and residents, and ability to comply with various regulations and employer policies regarding such things as attendance and safety precautions.[8] When the charge nurse rates a probationary CNA "0, 1, or 2" in these categories, she is doing so in a manner similar to that of the more experienced employee who conducts tests and grades the skills of new hires against recognized standards or guidelines.[9]

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total. Thus, if an employee received 81 points out of possible 132 (or 61 percent), that aide would receive an increase equal to 61 percent of the maximum 7-percent raise—a 4.27-percent increase. However, for the first 5 months of that year, CNAs were being evaluated on a form which required only that the charge nurses check the appropriate box to indicate whether each CNAs' performance was "above average, average, or below average" in 15 areas. During that period, although it appears that CNAs received wage increases of between 5 to 6.3 percent, there is no indication how the varying percentages were assigned.

[6] Our dissenting colleague accuses us of using "a stringent conception" of the statutory term "independent judgment." Our interpretation of that statutory phrase is based on Congress' concern that supervisory findings must not be lightly made. As the Court of the Appeals for the District Circuit recently stated:

> Supervisory status determinations carry important consequences for workers whose status is in question. . . . Thus when a worker is found to be a "supervisor" within the meaning of the Act, she is excluded from the NLRB's collective bargaining protections. In light of this, the Board must guard against construing supervisory status too broadly to avoid unnecessarily stripping workers of their organizational rights. Because of the serious consequences of an erroneous determination of supervisory status, particular caution is warranted before concluding that a worker is a supervisor.

East Village Nursing & Rehabilitation Center v. NLRB, 165 F.3d 960, 962 (D.C. Cir. 1999). See also *NLRB v. Provident Nursing Home*, supra (Board's interpretation of the phrase "independent judgment" entitled to deference as a "permissible construction" of ambiguous language).

[7] See *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 498 fns. 36 & 37 (1993).

[8] Contrary to our dissenting colleague, we do not question whether the CNs exercise independent judgment in filling out the evaluations. We assume, arguendo, that the nurses use some professional or technical judgment based on their greater skills and expertise during the evaluation process. Whether the use of such judgment is supervisory independent judgment is, of course, a different question. But the essential question here is whether the nurses effectively recommend a reward or other personnel action concerning other employees. Since the answer to this question is that they do not, they are not statutory supervisors. See, e.g., *NLRB v. Provident Nursing Home*, supra.

Contrary to the dissent's suggestion, the burden is on the party claiming supervisory status to establish such authority within the meaning of the statute. Thus, any lack of evidence in the record is construed against the party asserting supervisory status. Given this, the issue here is not, as Member Brame states, whether there is record evidence that the nurses do not use independent judgment when preparing evaluations. Rather, the burden is on the Employer to establish that the role played by the nurses in preparing evaluations involves the use of supervisory independent judgment.

[9] See, e.g., *Hogan Mfg., Inc.*, 305 NLRB 806, 807 (1991) (such a role represents neither a delegation of authority or an effective recommendation to hire or promote). See also *The Door*, 297 NLRB 601 (1990).

Significantly, the evidence does not establish that there is a direct link between the probationary evaluations and a decision to retain a probationary employee or to extend an aide's probationary period. The only example given of an aide who was terminated at the end of her probationary period, was an aide who, according to Corsi's testimony, received all zeros on the written probationary evaluation.[10] It is undisputed that the aide was terminated after Corsi personally recommended to the Employer's administrator that she be dismissed. However, it is unclear from Corsi's testimony what role any recommendation from the charge nurse who evaluated the aide may have had in that decision. According to Corsi's testimony, the charge nurse included in her probationary evaluation of the aide a written recommendation that the aide be transferred to another unit. Corsi testified that notwithstanding that written recommendation of a transfer, the charge nurse also verbally recommended to her that the aide be dismissed, but it is not clear from Corsi's testimony when this verbal recommendation was made and whether it was before or after Corsi herself had recommended the aide's dismissal. Similarly, although Corsi testified that on one other occasion she had followed the recommendation of a charge nurse in extending an aide's probationary period, no explanation was offered regarding the basis for or length of the extension, or other circumstances surrounding the extension. We find Corsi's limited and inconclusive testimony regarding these two incidents to be insufficient to establish that charge nurses have been given the authority to effectively recommend changes in status for the probationary employees.[11]

Moreover, we note that the small wage increase all probationary employees receive at the end of 3 months is not based upon any numerical score in the evaluation, but is automatically given upon completion of probation. We therefore conclude that the Regional Director erred in relying, in part, on this aspect of the charge nurses' role in the evaluation process to conclude that they are supervisors. *Provident*, supra.[12]

Similarly, and again contrary to the Regional Director, we find that the annual evaluations completed by the charge nurses do not govern the granting of merit increases to the permanent CNAs. The Regional Director concluded that the charge nurses' role in determining whether aides received merit increases and the amount of any such increases, is comparable to the role of the charge nurses found to be supervisors in *Bayou Manor*, supra. In that case, where the Board found that the annual evaluations completed by the employer's LPNs directly affected the CNAs' wages, there was a direct correlation between the evaluations completed by the LPNs and the specific merit increases (or occasional departmental bonuses) awarded to the employees. The LPNs there assigned numerical ratings to several categories relating to work performance and personal characteristics (using the numbers 1 to 10 on each of 16 items), and an overall average score was computed for each CNA. There was no review of the numerical scores by any higher ranking individual. Thereafter, a maximum departmental increase was determined and specific percentage increases corresponding to the various average scores were awarded to the CNAs. In each of the 3 years preceding the hearing, the same procedure was followed and the employer consistently allocated merit increases based solely upon the charge nurses' numerical assessment of the aides' skills and performance.

In the instant case, however, it is clear that the portions of the evaluations completed by the charge nurses (i.e., the general categories noted above) do not govern either the granting of merit increases or the determination of the amount of any increase awarded. Rather, the record shows that the Employer has neither an established practice of awarding raises based on performance, nor one of directly correlating evaluation scores to specific merit increases. This inconsistency is demonstrated in the evidence offered by the Employer which showed the varying manner and amounts in which wage increases were awarded. As detailed previously, in 1992, the Employer used different appraisal forms during portions of the same year, and gave varying percentage increases. Sometimes the increases were based on the number of points received on the form, and at other times, it was not clear how the percentages were assigned.[13] In 1993, all

Contrary to the dissent, we have not stated that there are "recognized standards and guidelines" for the CNs to follow when doing their evaluations, and thus we have not invented standards from "whole cloth." We simply have noted that the record fails to show that the role of the CN in filling out a numerical form on matters such as whether a CNA is able to use required equipment, do vital signs, apply restraints properly, or observe employee parking rules is anything more than that of an experienced employee informing the employer of the skill levels of a lesser employee, which is not supervisory in nature.

[10] The evaluation was not entered into the record.

[11] Contrary to our dissenting colleague, we are not precluded from assessing Corsi's testimony in making our determination of the allegedly supervisory status of the nurses. The Petitioner broadly challenged the Regional Director's finding that the nurses' role in evaluations established that they were statutory supervisors. This was the only evidence on which the Regional Director relied in reaching her determination, and the Petitioner asserted that the Regional Director's decision was incorrect. In any event, even assuming that CN Lambert made the recommendation to terminate a probationary employee and Corsi followed that recommendation, we note that not only is this the only CNA ever to be terminated after a probationary period, but that Lambert gave two inconsistent recommendations. Thus, we cannot find on this record that decisions whether to terminate or extend probationary employees are made on the basis of charge nurse recommendations.

[12] See also *Health Care & Retirement Corp. (Valley View Nursing Home)*, 310 NLRB 1002 (1993).

[13] In 1992, the Employer awarded merit raises of 0 to 7 percent. Corsi testified that she calculated the percentage of possible points awarded to each aide, and then recommended an increase amounting to the same percentage of the potential raise. Thus, if an employee received 50 percent of the points possible on the evaluation, that em-

aides received a small, across-the-board increase (and some had their increase reduced slightly by excessive tardiness and absences).[14] Additionally, at the time of the hearing in early 1994, it was not clear how employees would be evaluated that year or on what basis merit increases, if any, would be awarded. The Employer's witness stated that she did not yet know what "system" would be used to assign increases that year.[15] Further, the record shows that the overall numerical rating for each CNA is determined not only by the scores given by the charge nurses, but also by the ratings Corsi assigns for absenteeism and tardiness. In addition, on or at least one occasion the numbers assigned by the LPN were reviewed and changed by the shift supervisor.

In these circumstances, we find that the Employer's charges nurses are distinguishable from the LPNs who were found to be supervisors in *Bayou Manor*.[16] See *Ten Broeck Commons*, 320 NLRB at 813. The Employer has not met its burden of establishing that the annual evaluations completed by these charge nurses lead directly to personnel actions which affect either the wages or the job status of the CNAs, and the mere completion of such evaluations alone does not confer supervisory status. Accordingly, we conclude the charge nurses are not statutory supervisors.

ORDER

The Regional Director's exclusion of the charge nurses from the unit found appropriate for collective bargaining is reversed. The case is remanded to the Regional Director to further appropriate action consistent with this Decision.[17]

MEMBER BRAME, dissenting.

The Regional Director found that the Employer's 32 charge nurses are statutory supervisors within the meaning of Section 2(11) of the Act based on their authority to evaluate the Employer's certified nurse assistants. This finding is solidly grounded on the record evidence in this case and on established precedent, and I would adopt it. Accordingly, I dissent from the majority's decision reversing the Regional Director.

Factual Background

The Employer operates a 189-bed nursing home in Providence, Rhode Island. Administrator Richard Fishpaw has overall responsibility for the operation of the facility. The nursing department is headed by Director of Nursing Services (DNS) Joyce Corsi, who reports directly to Fishpaw. Below Corsi are shift supervisors, who report directly to the DNS, and an in-service coordinator who substitutes as DNS in Corsi's absence.[1] The nursing department consists of about 106 certified nurse assistants (CNAs), 4 unit aides and medication technicians, and about 32 registered nurses (RNs) and licensed practical nurses (LPNs), all of whom serve as charge nurses.

The Petitioner seeks to represent a wall-to-wall unit consisting of all full-time and regular part-time charge nurses (CNs), registered nurses (RNs), licensed practical nurses (LPNs), certified nurse assistants (CNAs), medication technicians, unit aides, cooks, dietary techs, dietary aides, housekeepers, laundry aides, activities workers, receptionists, social workers, and maintenance workers. The sole issue before the Board is whether the CNs are statutory supervisors.

The nursing department provides around the clock nursing coverage in three shifts. Each shift is overseen by a shift supervisor, and on each shift there is one CN for each unit in the facility. The CNs oversee the work of the aides assigned to their units. At the beginning of each shift, the incoming CN for each unit receives a report from the outgoing CN concerning the status of the residents, staffing issues, and any other unit issues. The CNs' shifts end half an hour later than the aides so that they can give these reports. Following the status report, the incoming CN makes out the daily assignment sheet for the unit, which specifies the duties required that day for each resident and assigns a CNA (or a medication technicians or unit aide) to perform those duties.[2]

CNAs are evaluated by the charge nurses at the end of their 3-month probationary period and then annually on their anniversary date using a form instituted by the Employer in 1992.[3] For probationary evaluations, the CN rates the CNAs on a scale of 0, 1, or 2 on seven broad categories: job knowledge, quality of work, team relations, resident relations, observing regulations, attendance, safety, and potential for the job. In some cases, the CN also writes narrative comments on the form before sending it to the DNS who decides, based on the CN's assessment, whether to retain, terminate, or extend

ployee would receive 50 percent of the possible increase or a 3.5-percent raise.

[14] Although the Employer used the same evaluation form and procedure as in 1992, the numerical scores had no impact on merit increases, as all CNAs received a 3-percent increase.

[15] Corsi testified that although the maximum increase would be 4 percent (and the minimum 3 percent), it had not been decided what "system" would be used to determine how the increases would be awarded.

[16] We are not, as suggested by the dissent, silently overruling *Bayou*. Rather, as stated above, we simply find the instant facts distinguishable from those in that case. Indeed, the Board recently applied *Bayou* in a case where the facts supported finding that nurses were supervisors based on their role in evaluating employees. *Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997).

[17] See also *Health Care & Retirement Corp.*, supra.

[1] The parties stipulated that the DNS, in-service coordinator, and shift supervisors are statutory supervisors.

[2] Charge nurses have complete discretion in assigning residents and duties to the aides, and take into consideration the aides' experience and skills and the needs of the residents in making the assignments.

[3] The medication technicians and unit aides are evaluated separately. I find it unnecessary to address the CNs' role in these employees' evaluations in light of my finding that the CNs evaluate CNAs.

the probationary period of the CNA.[4] If the CNA has successfully completed their probation, the DNS recommends that they receive a 25-cent-an-hour raise.[5]

The CNs play a similar role in the subsequent annual evaluations of CNAs. Thus, the CN completes a nine-page form by rating the CNA on a scale from 0 to 2 on the following six criteria: job knowledge, quality of work, team relations, resident relations, observing regulations, attendance, and safety. Some CNs add up the points awarded to the CNA, others do not. Likewise, some CNs make narrative comments on the form, while others do not. After the CN completes the form, they sign it on the supervisor's line and submit it to the DNS. Working from attendance and other corporate records, the DNS adds ratings for absenteeism and tardiness, and notes whether the CNA has attended the Employer's "First Impressions" program.[6] The DNS then totals the CNA's evaluation points, and fills in the "Action Recommended" section, including the recommended wage increase. The form is then forwarded to the CNA's shift supervisor, who meets with the CNA to present the evaluation.

In 1992, the Employer awarded merit increases of 0 to 7 percent to CNAs based on a mathematical formula which directly correlated to the CNA's numerical evaluation score.[7] In 1993, the Employer used the same evaluation process, but all CNAs with satisfactory scores received a 3-percent raise. Those CNAs who received less than half the possible points on their evaluation that year were placed on probation and received no raise. One employee was placed on probation for this reason in 1993.[8] At the time of the hearing in early 1994, the Employer had not completed its 1994 evaluations. However, in November 1993 the Employer advised employees that they would receive increases of 3 to 4 percent in 1994, that the increases would be "based on performance," and that no increase would be less than 3 percent. DNS Corsi testified at the hearing that she did not know at that time whether or not the Employer would use the same system for its 1994 merit reviews that it had used in 1992 and 1993.

The Regional Director found that the CNs were statutory supervisors because they evaluate CNAs and those evaluations affect the CNAs' wages and job status.[9] Citing *Bayou Manor Health Center,* 311 NLRB 955 (1993), the Regional Director found that the CNs independently evaluate the CNAs working in their units, and that those evaluations were used to determine the wage increases and probationary status of the CNAs. The Regional Director found that there was no evidence that the Employer had abandoned the evaluation process, as the Employer had evidenced its intention to use the same process and evaluation form in 1994.

The majority reverses the Regional Director and finds that the CNs are not supervisors. According to the majority, the CNs do not perform a "supervisory function" when they evaluate probationary employees, and in any event the evaluations are not, in the majority's opinion, directly linked to the decision to retain or extend the probationary period of a CNA. With regard to the annual evaluations, the majority asserts that the evaluations completed by the CNs do not determine wage increases because DNS Corsi adds ratings for absenteeism and tardiness, and because the Employer does not have an "established" practice of granting wage increases based on performance or of directly correlating evaluation scores to "specific" merit increases.

Discussion

Section 2(11) defines "supervisor" to mean:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, an individual will qualify as a supervisor if: (1) they are authorized to perform or recommend at least 1 of the 12 duties enumerated above; (2) their authority is exercised in the interest of the employer; and (3) the exercise of that authority requires the use of independent judgment. *NLRB v. Health Care & Retirement Corp. of America,* 511 U.S. 571, 573–574 (1994). The individual "need not actually perform an enumerated duty . . . so long as the employee has the authority to do so, 'for it is the power and not the frequency of its use which is dispositive.'" *Beverly Enterprises, Virginia v. NLRB,* 165 F.3d 290, 294 (4th Cir. 1999) (en banc) (quoting *NLRB v. St. Mary's Home, Inc.,* 690 F.2d 608, 612 (4th Cir. 1981). See also *Maine Yankee Atomic Power Co. v. NLRB,* 624 F.2d 347, 360 (1st Cir. 1980) (recognizing that question under Section 2(11) is

[4] Some CNs also make written or oral recommendations to the DNS to retain, terminate, or continue the probation of a CNA. The DNS has followed those recommendations in all cases.

[5] The Regional Director found that CN Debbie Lambert gave a probationary CNA zeros on all of her performance criteria, the lowest possible score. Lambert wrote on the evaluation a recommendation to transfer the CNA to someone else's unit, and subsequently orally recommended to Corsi that the CNA be terminated. Corsi followed Lambert's recommendation and terminated the CNA's employment. Likewise, Corsi followed CN Martha Wall's recommendation to extend a CNA's probationary period.

[6] In determining the CNA's attendance rating, the DNS merely notes whether tardiness or absences exceed 5 percent.

[7] That is, the DNS calculated the percentage of possible points that the CNA had received on their evaluation and recommended a wage increase equal to the same percentage of the maximum raise.

[8] No employees received a score below 50 percent in 1992.

[9] The RD found that the CNs did not possess any other indicia of supervisory status. In the absence of a request for review of this finding, I do not pass on it.

whether supervisory authority exists, not how frequently it is exercised). And "when an employer grants to an employee the authority to use judgment in the management or evaluation of other employees, that judgment is independent judgment under the NLRA, not the exercise of professional expertise." *Beverly Enterprises v. NLRB,* supra, 165 F.3d at 295.

Prior to 1994, the Board took the position in the health care field that charge nurses were not supervisors because they did not exercise their authority over other employees "in the interest of the employer," but instead were acting in the interest of the patient. *NLRB v. Health Care & Retirement Corp. of America,* supra, 511 U.S. at 574. That position was rejected by the Supreme Court as a "strained interpretation" of Section 2(11). Id. at 583. Thereafter, the Board has substituted the a stringent conception of the statutory term "independent judgment" under which the Board generally continues to find that charge nurses are not supervisors. *Beverly Enterprises v. NLRB,* supra, 165 F.3d at 295–296.

However, in *Bayou Manor,* supra, a pre-*Health Care & Retirement Corp.* case, because the employer's LPNs prepared evaluations which were used by the employer to determine employees' merit wage increases, the Board found that they were statutory supervisors. The *Bayou Manor* LPNs annually rated the employer's CNAs' performance in 16 areas on a scale of 1 to 10.[10] An overall average score was computed from the ratings, without review by anyone else, and the results were shown to the individual CNA and then placed in the employee's personnel file. Thereafter, the employer's administrator awarded wage increases to the CNAs corresponding to the CNA's average score. In the 3 years prior to the hearing in that case, the maximum percentage increase was 5 percent and the minimum was zero.[11] Based on these facts, the Board recognized that the evaluations completed by the LPNs affected the CNAs' salaries, as "there is a direct correlation between the evaluations and the merit increases or occasional departmental bonuses awarded." *Bayou Manor,* supra. Accordingly, the Board found that the LPNs were supervisors.

Applying the foregoing principles, it is evident that the CNs in this case are statutory supervisors as well. Like the LPNs in *Bayou Manor,* they prepare annual evaluations of the CNAs using numerical scores for the various performance criteria. Those scores are then added up and used by the Employer to determine the CNA's wage increase, if any, for the year. Thus, the evaluations prepared by the CNs, like those in *Bayou Manor,* "directly determine the amount of the merit increase [the CNAs] received." Id. Moreover, the CNs also prepare probationary evaluations, which directly determine whether a probationary employee is terminated, retained, or their probationary period is extended. Related to this determination, of course, is the employee's entitlement to a wage increase in the event they are retained—thus, the evaluation directly determines whether the CNA will receive that wage increase as well. Id.

The majority's purported grounds for distinguishing *Bayou Manor* are wholly unpersuasive. Initially, the majority questions whether the CNs exercise independent judgment when they complete the probationary and annual CNA evaluations. Thus, the majority states, on the one hand, that they assume that the CNs use some "technical or professional" judgment during the evaluation process, while, on the other hand, analogizing this function to the role of experienced employees who have been found not to use independent judgment when they conduct tests and grade the skills of new hires against "recognized standards and guidelines."

There is absolutely no support in the record or in the case law for my colleague's apparent belief that the evaluations prepared by the CNs do not require the use of independent judgment. There is no factual basis for the majority's assertion that there exist "recognized standards and guidelines" against which the CNs are to measure the CNAs' performance on the evaluation criteria.[12] The majority invents these standards from whole cloth.[13]

Controlling precedent clearly establishes that the CNs do use independent judgment when they evaluate the CNs. As noted above, the Board held in *Bayou Manor* that the completion of virtually identical evaluations by the LPNs in that case established that they were supervi-

[10] The areas for evaluation included work performance (specific procedures, routine care, and nursing station tasks), and personal characteristics (relationships, communication skills, appearance, and responsiveness to supervision).

[11] The administrator also relied on CNAs' annual evaluation scores to determine the amount of a bonus.

[12] In addition to the evaluation criteria mentioned by the majority, I note that the CNs assess the CNA's work quality and their actual observance of regulations during the rating period. It seems clear to me, as it was to the Regional Director, that such assessments necessarily involve the use of independent judgment.

The majority asserts that I have misunderstood the burden of proof in supervisory determinations. This is a mischaracterization of my position. As shown below, *Bayou Manor* compels the conclusion that the CNs use independent judgment in completing the evaluations and the majority does not dispute this fact. However, the majority attempts to deprecate the independent judgment involved by saying that the CNs' evaluations are "similar" to those of employees who follow "recognized standards and guidelines" in evaluating an applicant's qualifications. Especially in light of the Board's holding in *Bayou Manor,* the majority is not entitled to rely on any presumption or burden of proof regarding supervisory status in making such findings; instead, such findings must be based on record evidence. No such evidence has been cited in this case. To the contrary, the record evidence shows that the CNs' evaluations are indistinguishable from those completed by the LPNs in *Bayou Manor.*

[13] It is ironic that the majority would find that the CNs, who complete the only portion of the evaluation which requires subjective and independent judgment, are not supervisors, while (as discussed below) relying on DNS Corsi's clerical role in calculating the CNAs' final evaluation score as a basis for divesting the CNs of supervisory authority.

sors. This conclusion necessarily encompassed a finding that conducting the evaluations required the use of independent judgment, as the presence of independent judgment is a predicate for supervisory status in all cases. The majority utterly fails to justify its conclusion that the LPNs who evaluated CNAs' "work performance" on a scale of 1 to 10 in *Bayou Manor* used independent judgment in doing so, while the CNs here, who, inter alia, evaluate CNAs' "work quality" on a scale of 0 to 2, do not.[14]

Likewise, the majority's focus on whether CNs specifically recommended termination, retention, or raises for probationary employees is contrary to the teaching of *Bayou Manor.* There, the Board found supervisory status solely on the basis of the numerical evaluations prepared by the LPNs and used by the Employer in awarding raises. There was no finding that the LPNs made any specific recommendation regarding raises; the Board found that the evaluation itself *was* the recommendation. Here, too, the Employer has shown that it relies on the CNs' evaluations as the basis for the decision to retain or terminate probationary employees and for the purpose of granting wage increases.[15]

With regard to the CNs' role in annual evaluations and raises, the majority asserts that the evaluations do not govern the granting of merit increases or the determination of the amount awarded. They note that the Employer's procedures varied in the 2 years prior to the hearing, and that Corsi adds ratings for absenteeism and tardiness to the evaluations.

The changes to the employer's evaluation practices do not establish that the CNs do not effectively recommend raises for the CNAs. Thus, in 1992, the CNAs' raises, if any, were based entirely on their numerical evaluation.[16] While the evaluations did not determine merit increases for employees with satisfactory ratings in 1993, they continued to be the basis for the Employer's decisions to place CNAs with unsatisfactory ratings on probation.[17] Thus, as of the date of the hearing, the evidence is entirely consistent that the CNs, through their role in the annual evaluation process, effectively recommended whether CNAs would receive increases and/or be placed on probation and receive no raise.[18]

The majority also attempts to deprecate the relationship between the CNs' evaluations and the decision to retain probationary employees. They assert that the only example of a CNA who was terminated at the end of her probationary period is inconclusive on the issue of supervisory status, as the CN's written recommendation was to transfer the CNA to someone else's unit and, while the CN orally recommended termination, the record does not show when that recommendation was made.

Contrary to the majority, the evidence is clear that the CNs prepare evaluations of probationary CNAs and that those evaluations are the basis for the Employer's decision whether to retain the CNA. In this regard, the "small" wage increase that successful probationary CNAs receive is awarded solely to employees who receive satisfactory evaluations from their CN. Accordingly, the majority's claim that the raise is not based on the score received in the evaluation misses the mark. Those CNAs who receive a satisfactory evaluation get the raise; those whose evaluations are unsatisfactory do not. As noted above, the Employer also terminated a probationary CNA on the basis of CN Lambert's evaluation of her performance. This decision was consistent with Lambert's oral recommendation that the CNA be terminated.[19] In addition, a CNA's probationary period was extended based on the recommendation of CN Wall.

The majority discounts these undisputed facts because, in their view, the surrounding circumstances were not

[14] In support of their apparent finding of no independent judgment, the majority cites *Hogan Mfg. Co.,* 305 NLRB 806, 807 (1991), and *The Door,* 297 NLRB 601 (1990). These cases are plainly inapposite. Thus, in *Hogan Mfg. Co.,* the Board found that an employee who watched job applicants complete a welding test, checked the welds against established criteria, and reported to the hiring authority whether the applicant had passed was not a supervisor because he did not use independent judgment in evaluating the welding tests and did not effectively recommend any one's hiring. Likewise, in *The Door*, a laboratory director who interviewed job applicants and evaluated their technical ability was found not to be a supervisor, inasmuch as she evaluated the applicants' technical ability against established criteria and there was no evidence her hiring recommendations were given any weight at all. These cases involve an entirely different supervisory indicia—the authority to hire—which is not at issue in this case. That individuals with a minor role in the hiring process in a completely different factual setting have been found not to be supervisors says nothing about the nature of the CNs' authority, on the facts of this case, to recommend rewards.

NLRB v. Provident Nursing Home, 187 F.3d 133 (1st Cir. 1999), is also distinguishable. The charge nurses there were found not to effectively recommend rewards for employees through the evaluation process because the employees' merit increases were not directly connected to their evaluations. Instead, some employees with the same evaluations received different wage increases, while other employees with different evaluations received the same wage increase, and the employer reduced wage increases late in its fiscal year for budgetary reasons. No evidence of this character is present in this case.

[15] As noted below, the Employer has also provided actual examples of specific recommendations by CNs that were followed.

[16] That Corsi adds objective ratings for absenteeism and tardiness does not affect the obvious mathematical fact that the merit increases still depended on the ratings issued by the CNs.

[17] As noted above, in 1993 a CNA was placed on probation and denied a raise for this very reason.

[18] Corsi's testimony concerning possible future plans is not entitled to any weight in determining the CNs' status, as it is clearly insufficient to show either that they did not have supervisory authority at the time of the hearing, or that the Employer had definite plans to divest them of that authority in the future.

[19] The majority's speculation that Lambert may have made this recommendation after the fact is misguided. The Regional Director found that "Corsi followed Lambert's recommendation to terminate [the CNA's] employment." The Petitioner does not dispute this finding in its request for review or its brief on review. Under these circumstances, I see no basis for the Board to do so now.

sufficiently explained. The majority's complaint that "it is not clear from Corsi's testimony when this verbal recommendation [for termination] was made," and that "no explanation was offered regarding the basis for or the length of the extension" of the other CNA's probation begs the point. The evidence was unchallenged and the Regional Director found that it was sufficient to demonstrate the CNs' supervisory authority.[20] It seems clear to me, as well, that the facts before us show on their face that the CNs' evaluations and recommendations have real-world consequences for CNAs. The majority offers no principled basis for their requirement that these additional details be provided, at this late date, more than 5 years after the close of the hearing, before they will give this evidence determinative weight.[21]

[20] Unlike the majority, the Regional Director found nothing confusing about Corsi's testimony. Neither do I.

[21] In faulting the Employer for failing to provide what the majority considers to be an adequate explanation for the evaluation and merit increase decisions, the Board engages in what Thomas Sowell has called the "precicional fallacy": "the practice of asserting the necessity of a degree of precision exceeding that required for deciding the issue at hand. Ultimately, there is no degree of precision—in words or numbers—that cannot be considered inadequate by simply demanding a *higher* degree of precision." Thomas Sowell, *Knowledge and Decisions* at 291 (Harper Collins, 1980, 1996) (emphasis in original).

Conclusion

Plainly uncomfortable with the Board's holding in *Bayou Manor,* the majority attempts in this case—without explanation or justification—to overrule it sub silentio. In their pursuit of this objective, the majority rejects the Regional Director's careful analysis of the supervisory status of the CNs, and substitutes their own version of the factual record for hers. The majority offers no explanation for why their version of the facts should be more credible. In light of the Supreme Court's rejection of the Board's former "in the interest of the employer" test, it is essential that the Board, in applying its understanding of the statutory term "independent judgment," fully explain its course of action and accurately assess the record evidence, lest we be accused of simply applying the previously disapproved test in another guise. See *Note, The NLRB and Supervisory Status: An Explanation of Inconsistent Results,* 94 Harv. L. Rev. 1713 (1981). The majority's misuse of the facts of this case, and its unwillingness to respect established precedent which stands in its way will, I fear, be viewed as another "end run" around a controlling Supreme Court decision and our own precedent. Accordingly, I dissent.