Franklin Hospital Medical Center d/b/a Franklin Home Health Agency *and* New York State Nurses Association, Petitioner. Case 29–RC–9819

July 19, 2002

ORDER DENYING REVIEW

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The National Labor Relations Board, by a three-member panel, has carefully considered the matter at issue and, for the reasons set forth in the Regional Director's Decision and Direction of Election, a copy of which is appended as an appendix, has decided that the Employer's request for review raises no substantial issues warranting review.[1]

The Employer's request to stay the election is denied as moot.

MEMBER BARTLETT, concurring.

I concur in the result.

APPENDIX

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act (the Act), a hearing was held before Paul Richman, a hearing officer of the National Labor Relations Board (the Board).

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

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.[2]

2. The parties stipulated that Franklin Hospital Medical Center d/b/a Franklin Home Health Agency (the Employer or Franklin) with its principal office and place of business located at 14 Brooklyn Avenue, Valley Stream, New York, a certified home health agency and long-term health agency licensed under the laws of the State of New York, provides home health care and long-term care to individuals at their residences. It is an organizational component of the Franklin Hospital Medical Center, located at 900 Franklin Avenue, Valley Stream, New York, which provides hospital care and nursing care for elderly residents. During the past 12 months, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross annual revenues in excess of $250,000 and, during the same period, purchased and received at its Valley Stream, New York facilities, medications, goods, supplies, and materials valued in excess of $5000, directly from points outside the State of New York. The Employer is an acute care facility within the meaning of Section 103.30 of the Board's Rules and Regulations, and a healthcare institution within the meaning of Section 2(14) of the Act.

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

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

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

5. The New York State Nurses Association (the Petitioner or the Union) seeks to represent a unit of all full-time, regular part-time, and per diem registered nurses (those per diem registered nurses who perform an average of at least four patient visits per week in the 13-week period immediately preceding the Direction of Election) in the classifications of registered nurse (RN)-field, RN-case manager, RN-managed care coordinator, and RN-performance improvement, employed by the Employer in its Home Care Division at and out of its 14 Brooklyn Avenue, Valley Stream, New York location, but excluding all other employees, guards, confidential employees, and supervisors as defined in the Act.

Positions of the Parties

In Case 29–RC–9808, the Employer took the position that its staff nurses are statutory supervisors and not employees under Section 2(3) and (11) of the Act, even though they supervise home health care aides employed by outside vendors. In the instant case, the Employer attempted to reintroduce this argument. However, Board precedent is clear on this issue. "It is well established that an individual must exercise supervisory authority over employees of the employer at issue, and not employees of another employer, in order to qualify as a supervisor under Section 2(11) of the Act." *Crenulated Co.,* 308 NLRB 1216 (1992) (shift security supervisors oversaw security guards employed by outside contractor);[3] see also *North Gen-*

[1] In the absence of a request for review regarding the unit description, Member Cowen adopts, pro forma, the Regional Director's denial of the Employer's request to amend the unit description to reflect that only those per diem nurses who meet the eligibility formula have a sufficient community of interest to be included in the unit. Member Cowen agrees that the formula itself should not be in the unit description, and notes that the adjective "regular" is frequently used to describe those employees in a particular category (e.g., regular part time) who are to be included in the unit.

[2] The hearing officer correctly rejected, and placed in the rejected exhibit file, the Employer's offer of proof regarding unit employees' alleged "supervision" of nonemployees of the Employer. Thereafter the hearing officer reconsidered his decision, remarked the Employer's exhibit as a Board exhibit and accepted it. Upon review of the record herein, I find that the hearing officer's initial ruling was correct and remark the Employer's offer of proof as the Employer's exhibit and place it in the rejected exhibit file.

[3] The Employer urges that *Crenulated* be overruled, relying, in part, on *M.B. Sturgis*, 331 NLRB 1298 (2000). Brief of Employer at 24. However, the Board in *Sturgis* "address[ed] the question of whether and under what circumstances employees who are jointly employed by a 'user' employer and a 'supplier' employer can be included for representational purposes in a bargaining unit with employees who are solely employed by the user employer." Id. In the instant case, by contrast, the Petitioner is seeking a bargaining unit consisting solely of employ-

eral Hospital, 314 NLRB 14 (1994) (attending physicians supervised interns and residents, whom the Board deemed non-employees at time of decision); *Fleet Transport Co.,* 196 NLRB 436 (1972) (driver-trainer effectively recommended the hiring of drivers who were all either independent contractors or the employees of independent contractors); *Fordham University*, 193 NLRB 134 (1971) (faculty members directly employed researchers to work on grants); *Westinghouse Electric Corp.*, 163 NLRB 723 (1967) (steam engineers had authority over workmen employed by Employer's customers); *El Mundo, Inc*., 167 NRLB 760 (1967) (newspaper dealers hired their own carrier boys); *Eureka Newspapers, Inc*., 154 NLRB 1181 (1965) (same). Accordingly, the Employer's argument lacks merit and must be rejected.

The Employer further contends that even if the nurses in the petitioned-for unit are not 2(11) supervisors of the vendor-supplied aides, they all, nonetheless, supervise the seven in-house staff aides directly employed by the Employer. In addition, the Employer takes the position that the RN-performance improvement should be excluded from the bargaining unit because she is a confidential employee. In support of its positions, the Employer called two witnesses: Ruth Kahl (Kahl), the Employer's director of patient services and administrator of care services, and Elvera Werner (Werner),[4] a clinical nursing supervisor in the Employer's Certified Home Health Agency (CHHA). In response, the Union offered the testimony of two field nurses, Joseph Frumento (Frumento) and Jeanne Kaskel (Kaskel).

The parties further stipulated, and I find, that the petitioned-for RNs are professional employees, that the Employer is not a joint employer with the outside vendors that contract with it to provide aide services, and that the eligibility formula for per diem registered nurses should enfranchise all those who performed an average of at least four patient visits per week in the 13-week period immediately preceding the Direction of Election, if an election is directed. The Employer submits that this eligibility formula should be specifically set forth in any certification of the Union, but its brief provides no basis for this innovation.

Facts

The Employer provides patients in their home settings with a range of health-related services, including nursing, physical therapy, social work, and aide services. Franklin administers two programs: a long-term home care program, and a Certified Home Health Agency (CHHA) program. The latter provides patients with relatively short-term followup care after their hospital stays. It appears from the record that each of these programs currently treats between 220 and 250 patients.

Ruth Kahl, the Employer's director of patient services (DPS) and administrator of care services, testified that she is in charge of running the Employer's day-to-day operations. Her responsibilities include overseeing four nursing supervisors, and the staff RNs, and aides who report to them. Other than the aides, all of these personnel are RNs.

The Employer utilizes two types of aides, personal care Aides (PCAs), who are assigned to patients in the long-term program only, and Home Health Aides (HHAs), whose training and experience enables them to administer care to patients in both programs. The PCAs perform custodial skills such as housework, bathing, and dressing patients, whereas the HHAs are also qualified to perform more complex, health-related tasks, such as catheterization, ostomy care, and helping patients with splints and braces. Both are required to be New York State certified. For the HHAs, this entails the successful completion of a Certified Home Health Aide training program and an additional 12 hours of in-service training per year. The Employer promulgates guidelines setting forth the tasks an HHA can and cannot perform.

The Employer's witnesses estimated that between 100 and 156 aides (both HHAs and PCAs) take care of approximately 118 of the long-term patients, and about 70 HHAs care for approximately 82 of the CHHA patients, for a total of 170 to 226 aides.[5] Of these, all but seven of the aides are supplied by 16 outside vendor agencies, with whom the Employer contracts for its aide services.

The Employer directly employs just two per diem HHAs and five full-time HHAs, most of whom work with patients in the short-term CHHA program. According to Kahl, the seven staff aides "are much more seasoned," "have worked for a very long time," are "well versed" in their duties, and are "of excellent quality." All are former "vendor aides" who were brought in-house prior to Kahl's tenure with the Employer, which began 2 years before the hearing. Kahl claimed that the Employer hired them on the recommendation of the Employer's field nurses, but did not identify the nurses who made the recommendations or provide any further information about the hiring procedure. Kaskel and Frumento denied having any authority to hire or interview employees.

Kahl indicated that the nurses in the petitioned-for unit include 6 RN-case managers, 1 RN-managed care coordinator, 1 RN-performance improvement, 14 per diem RN-field nurses, 12 to13 full-time and regular part-time RN-field nurses who are assigned to the long-term program, and 12 to 13 full-time and regular part-time RN-field nurses who are employed in the CHHA program.[6] Kahl acknowledged that the RNs in the first three of these classifications—the RN-case managers, RN-managed care coordinator, and RN-performance improvement—work in "the office," and normally have no interaction with aides. Although she claimed that the RN-managed care coordinator and RN-case managers sometimes serve as RN-field nurses, there is no evidence that these individuals have

ees of Franklin. Moreover, the Employer takes the position that it is not a joint employer with the outside contractors which supply it with aides.

[4] Werner testified in Case 29–RC–9808. Her testimony is part of the record in the instant case.

[5] Elsewhere in the record, Kahl estimated that 40 percent of the patients on the CHHA side have aides, and that only 20 patients on the long-term side do not have aides.

[6] Initially, Kahl testified that there were 18 RNs in the long-term program and 18 RNs in the CHHA, for a total of approximately 36 RNs. The Employer's professional field staff also includes eight per diem physical therapists, two social workers, and one nutritionist, one occupational therapist, and one speech therapist. Each patient's care is overseen by a physician.

ever supervised the Employer's seven staff aides, or any other employee of the Employer.

With respect to the RN-Field nurses (also referred to as "field nurses" or "visiting nurses"), Joseph Frumento, a field nurse in the CHHA program, testified that his job entails attending to patients, assessing their needs, assisting them over an acute illness, arranging for services, and giving instructions on their medication and diet. Jeanne Kaskel, a field nurse in the long-term program, stated that her duties include evaluating patients, performing physical assessments, reviewing their medications, and instructing aides, the patient and his or her family, and other care-givers, on tasks to be performed for the patient. This testimony is consistent with the Employer's official "Job Description/ Competency Assessment/Performance Appraisal," which states that a field nurse in the Employer's home care programs "assesses patient appropriateness for home care services, establishes a plan of care, provides direct patient care and offers instructions and guidance on health practice for individuals and families." It includes a 6-page checklist of the field nurses' patient care responsibilities, but contains no mention of any supervisory duties.

Several documents generated by the Employer indicate that the field nurses "supervise" the aides. In addition, Federal and State regulations make the field nurses responsible for the ongoing "supervision" of HHAs in the home. From a practical standpoint, however, the field nurses' supervision of the seven staff aides appears to be sporadic or intermittent in nature. There is no dispute that field nurses are only required to make "supervisory visits" to HHAs a minimum of once every 2 weeks. The length of each visit may range from 20 minutes to 1-hour long, depending on the patient's needs, and some "supervisory meetings" are conducted over the telephone. Kahl was unable to approximate how often the RNs interact with the staff aides, and Kaskel asserted that out of a total caseload of about 20 patients, she currently has 1 patient who has been assigned an HHA employed by Franklin. Kaskel visits the aide twice per month, for about 45 minutes per visit.

Physical therapists may also "supervise" the aides. For example, the physical therapists might teach them how to transfer difficult patients. Additionally, they may ask the aides to assist with walking patients, or to remind patients to follow their home exercise programs.

The record reflects that within 24 hours after being assigned a new home care patient, the field nurse visits the patient, conducts a physical examination, and documents all aspects of the patient's medical condition, using the Employer's 22-page "Start of Care or Resumption of Care Assessment" form. The nurse, in consultation with the physician, then fills out a three-page "Home Certification and Plan of Care" form, including a page for referrals to physical therapy, speech therapy, occupational therapy, medical social work, and aide services. The physician is required to sign and certify the plan of care. Lastly, the field nurse completes a one-page "Aide Plan of Care" form, which involves checking off items on a preprinted list of standard tasks performed by aides. A copy of this form is kept in the home for the aide's use.

Another copy of the "Aide Plan of Care" form is submitted to the aide coordinator, a clerical employee who acts as a liaison between the Employer's field nurses and the vendors who provide aides. Before contacting outside vendors to request the services of an aide, however, the coordinator first ensures that the Employer's seven in-house staff aides have assignments, except in the few limited circumstances in which vendor aides are given a preference over staff aides. For example, if a patient needs a 24-hour aide, vendor-supplied aides are given priority since the in-house aides normally work a 40-hour week. Vendor-supplied aides are also used if the patient needs an aide who speaks a foreign language other than those spoken by the available staff aides. On one occasion that Kahl recalled, it was the RN who recommended that a staff aide be replaced by a bilingual aide who could communicate with the patient. Finally, vendor aides hired privately by a patient's family are generally retained, if the Employer has a contract with that vendor.

In requesting aide services, a field nurse may indicate a preference for a particular in-house staff aide, or for an aide who has experience in a particular skill. However, Kahl acknowledged that the Employer cannot accommodate such requests if the in-house staff aides, and/or the more experienced aides, are needed in their existing assignments. The decision to reassign a staff aide is made by a nursing supervisor, by the aide coordinator, or by Kahl herself.

Kaskel and Frumento testified that they have no involvement in scheduling staff aides' hours. They may request that an aide start early, or in the a.m. or p.m., but such requests can not always be honored. Kahl acknowledged that the staff aides' vacation leave and personal days are approved by the nursing supervisors. A staff aide who needs to take a sick day contacts the aide coordinator, who dispatches a substitute and informs the nurse handling the case.

After the aide coordinator assigns an aide to a new patient, the field nurse meets with the aide in the patient's home. At this initial meeting, the nurse orients the aide to the patient and the plan of care, and answers any questions the aide may have. At subsequent meetings with the aide, the field nurse reviews the plan of care, and ensures that the aide is carrying it out. This includes observing the aide perform a task, assessing the patient's condition and appearance, and asking the patient and family whether they are satisfied with the aide's performance. The nurse also checks the aide's recordkeeping, with regard to such matters as the patient's daily weight and fluid intake and output. If the aide is unfamiliar with tasks, procedures or equipment included in the care plan, the nurse may have to instruct or train the aide. However, there is no evidence that a staff aide has ever needed such instruction or training.

During followup visits, the nurse's examination of the patient may disclose a new medical problem, or a change in the severity of the patient's condition. The field nurse discusses possible changes in the care plan with the patient, his family, and his physician. The latter must sign off on any such change. The field nurse then goes over any new procedures with the aide, family members, and other caregivers. If the amended plan includes a change in the aide's schedule, it is effectuated by the aide coordinator, who would try to retain the same aide in the interest of continuity.

After a patient visit, the nurse generally completes a "Nursing Visit Report, " which become part of the patient's chart. A few lines of this form are allocated to the nurse's interaction with the aide. The remainder of the form documents the condition and treatment of the patient. Kaskel testified that her notations regarding the aide tend to be very brief, for example, "patient is satisfied," "family is satisfied," "reviewed plan of care," or "assist with transfers." In addition, the nurse may fill out a "Wound/Pressure Ulcer Assessment/Revisit," which includes a space for indicating the aide's name, agency, hours, and whether or not a "supervision" was conducted.

If the visit was solely for the purpose of monitoring or observing an aide, the nurse uses a "Home Health Aide/Personal Care Aide/Non-Billable Supervision Visit" form, according to Kahl. This form rates the aide in various competencies, and goes into the patient's permanent file. At different points in her testimony, Kahl estimated that either 10 or 20 to 25 percent of patients have received such nonbillable visits. However, Kaskel and Frumento testified that they had never seen this form. The Employer did not offer into evidence an example of a "Non-Billable Supervision Visit" report filled out by an RN in the petitioned-for unit.

The forms generated by the Employer also include an annual "HHA/PCA Supervision Competency Tool," which rates the aides as "satisfactory" or "unsatisfactory" with respect to 18 basic skills. Competency in these skills is required by the New York State Department of Health for the aides to maintain their certifications. According to Kahl, this form can be completed and signed by a nursing supervisor, a field nurse, or a combination of both. She stated that normally, aides ask the field nurses to mark off the competencies they have seen the aide perform.

According to Kahl, the nursing supervisors also give the aides annual performance appraisals, which are used to "evaluate overall the performance of the Home Health Aide for continued employment." The appraisal incorporates anecdotal information collected throughout the year from the RNs in the field, as well as the physical therapists. The HHAs' annual performance appraisal forms contain two signature lines at the bottom, indicating that they are signed by "Department Head" and by "Human Resources."

However, Kaskel and Frumento testified that they never evaluated their staff aides nor reported on their performance, nor did they ever see an HHA/PCA Supervision Competency Tool. The record does not include any examples of forms marked off or signed by any field nurse, or evidence that a field nurse's evaluation has ever affected an aide's wages or job status. The performance appraisal submitted into evidence by the Employer was not filled out, other than the signature of Kahl as department head, and a human resources official's illegible signature.

Further, the record is devoid of evidence that any nurse in the petitioned-for unit has either disciplined other employees or recommended disciplinary action. Kaskel and Frumento denied having disciplinary authority, and Kahl conceded that nursing supervisors, rather than staff RNs, are responsible for initiating disciplinary or "corrective action" against aides. In fact, Kahl recalled only two instances when field nurses criticized any aspect of staff aides' performance. In the first of these incidents, which occurred about 2 years prior to the hearing, a field nurse reported that a staff aide had smoked in a patient's home. Kahl testified that either a nursing supervisor gave the aide a verbal warning, or Kahl herself gave her a verbal warning and informed a nursing supervisor. Kahl did not remember the identity of the staff RN who reported the incident, and there is no evidence that the RN made any disciplinary recommendation. The second incident occurred about 1 year prior to Kahl's testimony. It involved another unidentified field RN who spoke to Kahl about a Franklin aide's inappropriate attire, but without making a disciplinary recommendation. Kahl was not aware of any instances in which a staff aide's incompetence or misconduct had necessitated a remediation plan, disciplinary action, dismissal, or the staff aide's removal from the home to avoid endangering a patient.

Discussion

The burden of proving that an employee is a statutory supervisor is on the party alleging such status. *Kentucky River Community Care, Inc*., 532 U.S. 706 (2001). In light of the exclusion of supervisors from the protection of the Act, this burden is a heavy one. See *Chicago Metallic,* 273 NLRB 1677, 1688, 1689 (1985); see also *Boston Medical Center Corp.*, 330 NLRB 152, 201 (1999). It can not be satisfied by "general, conclusory claims" or by proof of "paper authority" *Crittenton Hospital*, 328 NLRB 879 (1999) (written job description; state nurse practice laws which require nurses to "supervise" employees with lesser skills, but "do not purport to in any way track the NLRA's definition" of the term "supervise"); see also *Brusco Tug & Barge Co.,* 247 F.3d 273, 276 (D.C. Cir. 2001); *Beverly Health & Rehabilitative Services*, 335 NLRB 635 (2001). Moreover, since "the issue of supervisory status is heavily fact-dependent and job duties vary, per se rules designating certain classes of jobs as always or never supervisory are generally inappropriate." *Brusco*, 247 F.3d at 276 (citing *Kentucky River Community Care, Inc*., 193 F.3d 444, 453 (6th Cir. 1999).

In enacting the statutory definition of "supervisor" set forth in Section 2(11) of the Act, Congress "distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men, and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947), quoted in *Providence Hospital,* 320 NLRB 717, 725 (1996). This distinction is embodied in the statutory requirement that supervisors employ "independent judgment."

The Board and federal courts have observed that the Act "sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" E.g., *Kentucky River*, 532 U.S. 706. The exercise of "some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner," or through giving "some instructions or minor orders to other employees," does not confer supervisory status. *Chicago Metallic*, 273 NLRB at 1689.

Turning to the issue of whether Franklin's staff nurses are supervisors, there is no record evidence that they are authorized to transfer, suspend, lay off, recall, promote, discharge or reward employees, or to adjust their grievances, or to effectively recommend any of the aforementioned personnel actions. The testimony regarding their authority to effectively recommend the hiring of staff aides amounts to little more than conclusionary testimony by a witness who was not associated with Franklin at the time the hiring decisions were made.

Discipline

As for the petitioned-for nurses' authority to discipline staff aides, or to recommend disciplinary action, the power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." *Crittenton Hospital*, 328 NLRB at 879 (citing *Passavant Health Center*, 284 NLRB 887, 889 (1987). Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. *Schnurmacher,* 214 F.3d at 265 (citing *Meenan Oil Co*., 139 F.3d 311 (2d Cir. 1998)); *Ten Broeck Commons*, 320 NLRB 806, 812 (1996); *Illinois Veterans Home at Anna L.P*., 323 NLRB 890 (1997). To confer 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel. *Beverly Health & Rehabilitation Services,* 335 NLRB 635 (2001).

In the instant case, there was testimony regarding two past reports of staff aide misconduct by unnamed field nurses. These reports did not result in discipline and were not accompanied by any disciplinary recommendations. Accordingly, the evidence does not establish unit nurses' authority to discipline other employees, or effectively recommend discipline.

Assign

Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. See *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985).

In *Crittenton Hospital*, supra, the Employer argued that charge nurses were supervisors because they had the power to make mandatory overtime assignments or call in substitutes, based on their assessment of whether staffing was adequate. However, there was "no evidence showing how mandatory overtime or additional staffing needs are determined, or the process by which employees are selected for overtime or call-in. Thus, the Employer . . . failed to demonstrate that RNs utilize independent judgment." *Crittenton*, 328 NLRB at 879. Similarly, in *Harborside Healthcare, Inc*., 330 NLRB 1334 (2000), charge nurses were not given any set order to follow in offering overtime to potential replacement employees. Nonetheless, the nurses' call-in authority was not supervisory in the absence of evidence disclosing how they decided which employees to call. *Harborside*, 330 NLRB at 1336. Moreover, the nurses' reliance on volunteers and lack of authority to compel overtime work underlined the absence of supervisory power. See *Harborside*, 330 NLRB at 1336; see also *Hilliard Development Corp*., 187 F.3d 133, 146 (1st Cir. 1999)); *Illinois Veterans Home at Anna L.P*., 323 NLRB 890, 891 (1997).

The Board and federal courts "typically consider assignment based on assessment of a worker's skills to require independent judgment and, therefore, to be supervisory," except where the "matching of skills to requirements [is] essentially routine." *Brusco*, 247 F.3d at 278 (citing *Hilliard Development Corp*., supra). In this regard, *Ten Broeck Commons*, 320 NLRB 806 (1996), held that charge nurses' assignment of work to certified nursing assistants (CNAs) did not require the use of independent judgment, because all the CNAs had the same skills, and were routinely rotated on a monthly basis. *Ten Broeck*, 320 NLRB at 810.

In the instant case, the field RNs and physicians complete patients' care plans before an HHA is assigned. This procedure appears to be based on the assumption that any HHA can perform the work, inasmuch as there is a standard list of tasks which all HHAs are expected to be able to perform. The actual assignment of an aide is generally done by the aide coordinator, a clerical employee. Her decisions are based on a routine set of guidelines, such as whether the patient needs a 24-hour aide, or an aide who speaks a foreign language. In some instances, staff aides are reassigned by Kahl, or by a nursing supervisor. There is no evidence that assignment or reassignment decisions are ever made by a staff nurse. Although a field nurse may request a particular staff aide, and/or a particular skill, the evidence does not establish how often such requests are granted. Moreover, the field nurses do not have the authority to set the aides' hours, to grant vacation leave, personal days and sick leave, or to assign a substitute when an aide is out sick. Thus, the Employer has failed to show that the nurses in the petitioned-for bargaining unit have the authority to assign employees.

Direct

In *Kentucky River Community Care, Inc*., 532 U.S. 706 (2001), the Supreme Court, in determining that the RNs at issue in that case were supervisors, held that "independent judgment" and judgment based on "ordinary professional or technical skill or experience in directing less-skilled employees to deliver services in accordance with employer-specified standards" are not mutually exclusive. *Kentucky River*, 532 U.S. at 712–720. Nevertheless, the Court acknowledged that:

> [T]he statutory term "independent judgment" is ambiguous with respect to the degree of discretion required for supervisory status. . . . Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of…judgment or discretion . . . as would warrant a finding' of supervisory status under the Act. . . . [I]t falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies. . . . [T]he degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer.

Kentucky River, 532 U.S. at 712–714 (internal citations omitted).

In a recent Board decision involving a home care provider similar to the Employer, *Meridian Home Care Services,* Case 22–RC–12098 (2002) (review denied in an unpublished decision), the Board found a unit of RNs to be statutory employees. In that case, the personal care plans prepared for Meridian Home Care's HHAs by RNs in the petitioned-for unit were found to be "a recipe of discrete tasks to be performed by an aide who is adequately trained in performing the work defined in the recipe"; the care plan was a mere "check list" of routine job duties. *Meridian*, p. 7, 8. Preparing a care plan and directing other employees to carry it out does not usually require the use of 2(11) independent judgment. *Illinois Veterans Home at Anna L.P*, 323 NLRB 890, 891, 891 fn. 5 (1997); *Ten Broeck Commons*, 320 NLRB 806, 811, 811 fn. 10 (1996). The degree of independent judgment is reduced when directing employees in the performance of routine, repetitive tasks. *Loyalhanna Health Care Associates*, 332 NLRB 933, 935 (2000); *Ten Broeck Commons*, 320 NLRB at 811; *Maui Medical Group, Inc.,* 2002 WL 561329, 37–RC–3982 (ALJD 2002). Generally, showing other employees the correct way to perform a task does not confer supervisory status. *Beverly Health & Rehabilitation Services,* 335 NLRB 635 (2001).

The degree of independent judgment exercised by the staff RNs employed by Franklin is no greater than that exercised by the RNs in *Meridian Home Care Services,* supra, or *Ten Broeck Commons,* supra. Moreover, the Employer has failed to show that the RNs' direction of the seven Franklin HHAs is "responsible direction," which depends "on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs." *Schnurmacher Nursing Home*, 214 F.3d 260, 267 (2d Cir. 2000). In *Schnurmacher*, the record contained disciplinary warnings and evaluations specifically holding nurses accountable for their failure to direct and delegate work to subordinates. *Schnurmacher,* 214 F.3d at 266–267. For example, one warning letter stated that "[O]n or about June 24, 1997 . . . there had been no directive from you to take any action regarding the patient's condition. . . . If the resident was in a condition that required immediate medical attention . . . it is your responsibility to make this assessment and to delegate the responsibility to your staff." *Schnurmacher,* 214 F.3d at 267. *Schnurmacher,* 214 F.3d at 266, 269. There is no such evidence in the instant case, and the staff RNs' performance appraisals do not rate them with respect to their supervisory ability.

"Evaluate"

Although there was testimony that the staff RNs have some input into the evaluations or appraisals of the Employer's seven HHAs, 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." *Harborside Healthcare*, 330 NLRB at 1334; *see Beverly Health & Rehabilitation Services,* 335 NLRB 635 (2001). Given that Franklin has not identified or documented any specific instances in which RNs' evaluations had such an effect, evidence of the staff RNs' "feedback" is insufficient to constitute them statutory supervisors.

Ratio of Staff RNs to Staff Aides

The Board and Federal courts have held that an unbalanced ratio of alleged supervisors to subordinates militates against a 2(11) finding. E.g., *Highland Superstores*, 927 F.2d 918 (6th Cir. 1991) (16 supervisors overseeing 40 bargaining unit employees); *Health Care Logistics*, 784 F.2d 232 (6th Cir. 1986) (three supervisors to seven or eight employees); *Ohio River Co.*, 303 NLRB 696, 719 (1991) (three supervisors, four dock crew members). If Franklin's staff RNs are deemed to be the statutory supervisors of the Employer's seven in-house HHAs, there would be a ratio of more than five supervisors for each aide—surely an unrealistic ratio, comporting with Kaskel's testimony that she devotes 1-1/2 hours per month to "supervising" a staff aide.

In light of the record herein, I find that the Employer has failed to establish that its staff RNs exercise any of the supervisory indicia enumerated in Section 2(11) of the Act, and therefore they are not supervisors as defined in the Act.

. . . .

In view of my conclusion that the Employer's staff RNs are employees within the meaning of the Act, and since the parties stipulated that the petitioned-for unit is otherwise appropriate, I find the following bargaining unit to be appropriate for the purposes of collective bargaining:

> All full-time, regular part-time, and per diem[7] registered nurses in the classifications of Registered Nurse ("RN")-Field, RN-Case Manager, RN-Managed Care Coordinator, and RN-Performance Improvement, employed by the Employer in its Home Care Division at and out of its 14 Brooklyn Avenue, Valley Stream, New York, location, but excluding all other employees, guards, confidential employees and supervisors as defined in the Act.

[7] The parties stipulated that those per diem registered nurses meeting the following formula shall be eligible to vote: all per diem nurses who perform an average of at least four patient visits per week in the 13-week period immediately preceding the Direction of Election.