Oakwood Healthcare, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL–CIO. Case 7–RC–22141

September 29, 2006

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

On February 4, 2002, the Acting Regional Director for Region 7 issued a Decision and Direction of Election (pertinent portions of which are attached as an appendix) finding that the Employer's charge nurses, whose supervisory status is in dispute, should be included in the petitioned-for unit of all registered nurses (RNs) working for the Employer at its Oakwood Heritage Hospital located in Taylor, Michigan. In accord with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review. By Order dated March 5, 2002, the Board granted review solely with respect to the issue of whether the Employer's charge nurses are supervisors under the Act.[1] The Employer and the Petitioner filed briefs on review.

On July 25, 2003, the Board issued a notice and invitation to the Employer, the Petitioner, and interested amici curiae to file briefs addressing the supervisory issue in this case in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).[2] The Board sought, inter alia, comments relating to (1) the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act; and (2) an appropriate test for determining the unit placement of employees who take turns or "rotate" as supervisors. In response, the Employer, the Petitioner, and a number of amici curiae[3] filed extensive briefs on these subjects and urged various analytical methods for interpreting the terms of Section 2(11).

Having considered the record and briefs of the parties and amici, and the Supreme Court's decision in *Kentucky River*, we refine the analysis to be applied in assessing supervisory status. That refined analysis honors our responsibility to protect the rights of those covered by the Act; hews to the language of Section 2(11) and judicial interpretation thereof, most particularly the guidance provided by the Supreme Court in *Kentucky River* and other decisions; and endeavors to provide clear and broadly applicable guidance for the Board's regulated community. Applying that analysis in the instant case, we reverse the decision of the Acting Regional Director and find that certain charge nurses[4] should be excluded from the unit[5] as statutory supervisors.

I. FACTS

The Employer has approximately 181 staff RNs who provide direct care to patients in 10 patient care units at Oakwood Heritage Hospital, an acute care hospital with 257 licensed beds.[6] The patient care units are behavioral health, emergency room, intensive care, intermediate care, medical/surgical east, medical/surgical west, operating room, pain clinic, post-anesthesia care/recovery, and rehabilitation. The RNs report to the on-site nursing manager, clinical managers, clinical supervisors, and assistant clinical managers—all stipulated supervisors. In providing patient care, RNs follow the doctors' orders

[1] On March 8, 2002, the Region conducted the election and impounded the ballots.

[2] In this same notice, the Board extended an identical invitation for the filing of briefs in two other cases raising similar supervisory status issues. They are *Croft Metals, Inc.*, 348 NLRB No. 38 (2006), and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006). However, the Board did not consolidate these three cases for decision.

[3] American Federation of Labor and Congress of Industrial Organizations; American Commercial Barge Line; American Hospital Association, et al.; American Nurses Association; American River Transportation Co.; Associated Builders and Contractors; Building and Construction Trades Department, AFL–CIO; Covenant Healthcare System; Croft Metals; the General Counsel of the National Labor Relations Board; Golden Crest; Human Resources Policy Association; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO; International Brotherhood of Electrical Workers, Local 4, AFL–CIO; Mariner Health Care Management Co., et. al.; Massachusetts Nurses Association; Physicians for Responsible Negotiation; Salt Lake Regional Medical Center, Inc.; Shorefront Jewish Geriatric Center and Metropolitan Jewish Geriatric Center (a division of MJG Nursing Homes, Inc.); United Steelworkers of America, AFL–CIO, et. al.; and the Chamber of Commerce of the United States.

[4] We find supervisory status for Linda L. Bennett (behavioral health unit), Valerie Christensen (behavioral health unit), Kimberly Clark (behavioral health unit), Pat Conley (medical/surgical east), Elizabeth Daupan (behavioral health unit), Susan H. Dey (behavioral health unit), Vicky Lowe (intermediate care unit), Leo Moises (intensive care unit), Suzannee Mudge (medical/surgical west), Deborah L. Murphy (behavioral health unit), Lourdes Pacot (behavioral health unit), and Liza E. Saclayan (behavioral health unit).

[5] The appropriate unit is:

> All full-time and regular part-time contingent and in house flex registered nurses at the Employer's facility, Oakwood Heritage Hospital, located in Taylor, Michigan; but excluding all physicians, technical employees, other professional employees, business office clerical employees, support service employees, skilled maintenance employees, confidential employees, director of surgical services, nursing site leader, nurse externs, graduate nurse externs, and all managers, guards, and supervisors as defined in the Act.

[6] An additional 55 RNs work out of Heritage's central staffing office.

and perform tasks such as administering medications, running blood tests, taking vital signs, observing patients, and processing admissions and discharges. RNs may direct less-skilled employees to perform tasks such as feeding, bathing, and walking patients. RNs may also direct employees to perform tests that are ordered by doctors for their patients.

Many RNs at the hospital serve as charge nurses. Charge nurses are responsible for overseeing their patient care units, and they assign other RNs, licensed practical nurses (LPNs), nursing assistants, technicians, and paramedics to patients on their shifts.[7] Charge nurses also monitor the patients in the unit, meet with doctors and the patients' family members, and follow up on unusual incidents. Charge nurses may also take on their own patient load, but those who do assume patient loads will sometimes, but not always, take less than a full complement of patients. When serving as charge nurses, RNs receive an additional $1.50 per hour.

Twelve RNs at the hospital serve permanently as charge nurses on every shift they work,[8] while other RNs take turns rotating into the charge nurse position. In the patient care units of the hospital employing permanent charge nurses,[9] other RNs may serve as charge nurses on the permanent charge nurses' days off or during their vacations. Depending on the patient care unit and the work shift, the rotation of the charge nurse position may be worked out by the RNs among themselves, or it may be set by higher-level managers. The frequency and regularity with which a particular RN will serve as a "rotating" charge nurse depends on several factors (i.e., the size of the patient care unit in which the RN works, the number of other RNs who serve as rotating charge nurses in that unit, and whether the unit has any permanent charge nurses). However, some RNs do not serve as either rotating or permanent charge nurses at the hospital. Most individuals who fit in this category are either new employees at the hospital[10] or those who work in the operating room or pain clinic units. There are also a handful of RNs at the hospital who choose not to serve as charge nurses.

The Petitioner, joined by several amici, would include all the charge nurses in the RN unit. The Employer, joined by other amici, seeks to exclude the permanent and the rotating charge nurses from the unit on the basis that they are supervisors within the meaning of Section 2(11) because they use independent judgment in assigning and responsibly directing employees.[11] The Acting Regional Director found that none of the charge nurses are 2(11) supervisors and directed an election in the RN unit including them.

II. LEGAL PRINCIPLES

A. Introduction

In 1947, the Supreme Court held in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, that supervisors were included in the definition of "employee" as used in Section 2(3) of the Act. In response, Congress amended the National Labor Relations Act that same year, adding Section 2(11) to specifically exclude supervisors from the Act's definition of "employee."

Section 2(11) defines "supervisor" as

> any individual having the 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.

Pursuant to this definition, individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (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."[12] Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the

[7] The charge nurses do not assign employees to the shifts; that function is done by a staffing office at the hospital.

[8] In his decision, the Acting Regional Director inadvertently misstated the number of permanent charge nurses. Emp. Exh. 12 identifies 12, not 11, permanent charge nurses: Linda L. Bennett, Valerie Christensen, Kimberly Clark, Pat Conley, Elizabeth Daupan, Susan H. Dey, Vicky Lowe, Leo Moises, Suzanne Mudge, Deborah L. Murphy, Lourdes Pacot, and Liza E. Saclayan.

[9] Behavioral health, intensive care, intermediate care, medical/surgical east, and medical/surgical west are units with both permanent and rotating charge nurses. Most of the permanent charge nurses work in the behavioral health unit. Emergency room, post-anesthesia care/recovery, and rehabilitation units only have rotating charge nurses, while operating room and pain clinic units do not have any charge nurses.

[10] After approximately 1 year, new RNs are usually deemed eligible to serve in the charge nurse role.

[11] The Employer also argues that the charge nurses have the authority to adjust employee grievances within the meaning of Sec. 2(11). We adopt the Acting Regional Director's finding that no evidence of such authority exists.

[12] *Kentucky River*, supra at 713.

same. The burden to prove supervisory authority is on the party asserting it.[13]

Both the drafters of the original amendment and Senator Ralph E. Flanders, who proposed adding the term "responsibly to direct" to the definition of supervisor,[14] agreed that the definition sought to distinguish two classes of workers: true supervisors vested with "genuine management prerogatives," and employees such as "straw bosses, lead men, and set-up men" who are protected by the Act even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)).[15] Thus, the dividing line between these two classes of workers, for purposes of Section 2(11), is whether the putative supervisor exercises "genuine management prerogatives." Those prerogatives are specifically identified as the 12 supervisory functions listed in Section 2(11) of the Act.[16] If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment.

Whether an individual possesses a 2(11) supervisory function has not always been readily discernible by either the Board or reviewing courts. Indeed, in applying Section 2(11), the Supreme Court has recognized that "[p]hrases [used by Congress] such as 'independent judgment' and 'responsibly to direct' are ambiguous."[17]

As a general principle, the Board has exercised caution "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995) (internal quotations omitted). However, in applying that principle, the Board has occasionally reached too far. Indeed, on two occasions involving the healthcare industry, the industry at issue in this case, the Supreme Court rejected the Board's overly narrow construction of Section 2(11) as "inconsistent with the Act."[18] Accordingly, although we seek to ensure that the protections of the Act are not unduly circumscribed, we also must be mindful of the legislative and judicial constraints that guide our application and interpretation of the statute. Thus, exercising our discretion to interpret ambiguous language in the Act,[19] and consistent with the Supreme Court's instructions in *Kentucky River*, we herein adopt definitions for the terms "assign," "responsibly to direct," and "independent judgment" as those terms are used in Section 2(11) of the Act.

In interpreting those statutory terms, we do not, as the dissent maintains, blindly adopt "dictionary-driven" definitions. Rather, we begin our analysis with a first principle of statutory interpretation that "in all cases involving statutory construction, our starting point must be the language employed in Congress, . . . and we assume that the legislative purpose is expressed by the ordinary meaning of the words used." *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (citations and internal quotation marks omitted).[20] Thus, we eschew a results-driven approach and we start, as we must, with the words of the statute. We thereafter consider the Act as a whole and its legislative history, applicable policy considerations, and Supreme Court precedent. In so doing, our goal is faithfully to apply the statute while providing meaningful and predictable standards for the adjudication of future cases and the benefit of the Board's constituents. We do not, as the dissent contends, ignore potential "real-world" consequences of our interpretations. Rather, we simply decline to engage in an analysis that seems to take as its objective a narrowing of the scope of supervisory status and to reason backward from there, relying primarily on selective excerpts from legislative history.

B. Assign and Responsibly to Direct

Possession of the authority to engage in (or effectively recommend) any one of the 12 supervisory functions listed in Section 2(11) is necessary to establish supervisory status. Since the Act delineates 12 separate func-

[13] Id. at 711–712.

[14] NLRB, Legislative History of the Labor Management Relations Act of 1947, 1304.

[15] Senate Rep. No. 105 stated that the committee took "great care" that employees excluded from the coverage of the Act "be truly supervisory." NLRB, Legislative History of the Labor Management Relations Act of 1947, 410.

[16] See the Report by the Senate Committee on Labor and Public Welfare cited at S. Rep. No. 105, 80th Cong., 1st Sess., 4–5 (1947), reprinted in NLRB, Legislative History of the Labor Management Relations Act, 1947, 410–411 (1985).

[17] See *NLRB v. Healthcare & Retirement Corp. of America*, 511 U.S. 571, 579 (1994).

[18] *Kentucky River*, supra at 721–722 (holding that the Board erred in finding no "independent judgment" where nurses use ordinary professional or technical judgment in directing less-skilled employees); *Healthcare & Retirement Corp.*, 511 U.S. at 576, 584 (holding that the Board erred in finding a nurse's supervisory activity that was incidental to patient care was not exercised "in the interest of the employer").

[19] "It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies." *Kentucky River*, supra at 714.

[20] See also 2A Sutherland Statutory Construction, § 47.28, at 354 (6th ed. 2000) ("Dictionaries, however, do provide a useful starting point for determining what statutory terms mean, at least in the abstract, by suggesting what the legislature could have meant by using particular terms.").

tions, and since canons of statutory interpretation caution us to eschew a construction that would result in redundancy, we start from the premise that each supervisory function is to be accorded a separate meaning.[21] That the terms "assign" and "responsibly to direct" were not intended to be synonymous is also readily apparent from the legislative history of the 1947 amendment to the Act. Senator Flanders, who offered the amendment adding the phrase "responsibly to direct" to Section 2(11), believed that the amendment addressed an element of supervisory status missing from an earlier amendment, which included "assign" as 1 of 11 supervisory functions. NLRB, Legislative History of the Labor Management Relations Act of 1947, 103–104. Consequently, consistent both with the text of the Act and its legislative history, we ascribe distinct meanings to "assign" and "responsibly to direct."

1. Assign

The ordinary meaning of the term "assign" is "to appoint to a post or duty." *Webster's Third New International Dictionary* 132 (1981). Because this function shares with other 2(11) functions—i.e., hire, transfer, suspension, layoff, recall, promotion, discharge, reward or discipline—the common trait of affecting a term or condition of employment, we construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment. In the health care setting, the term "assign" encompasses the charge nurses' responsibility to assign nurses and aides to particular patients. It follows that the decision or effective recommendation to affect one of these—place, time, or overall tasks—can be a supervisory function.

The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as "assign" within our construction. However, choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to "assign." To illustrate our point in the health care setting, if a charge nurse designates an LPN to be the person who will regularly administer medications to a patient or a group of patients, the giving of that overall duty to the LPN is an assignment. On the other hand, the charge nurse's ordering an LPN to immediately give a sedative to a particular patient does not constitute an assignment. In sum, to "assign" for purposes of Section 2(11) refers to the charge nurse's designation of significant overall duties to an employee, not to the charge nurse's ad hoc instruction that the employee perform a discrete task.

Our dissenting colleagues take the view that, for purposes of Section 2(11), an assignment is an act that must affect "basic" terms and conditions of employment or an employee's "overall status or situation." That assertion is supported neither by precedent nor the language of the statute, and we see no basis for superimposing a unique and heightened standard on the supervisory function of assigning. It is enough that the assignment affect the employment of the employee in a manner similar to the other supervisory functions in the series set forth in Section 2(11). For example, there can be "plum assignments" and "bum assignments"—assignments that are more difficult and demanding than others. The power to assign an employee to one or the other is of some importance to the employee and to management as well. Certainly, in the health care context, the assignment of a nurse's aide to patients with illnesses requiring more care rather than to patients with less demanding needs will make all the difference in the work day of that employee. It may also have a bearing on the employee's opportunity to be considered for future promotions or rewards. From the employer's perspective, matching a patient's needs to the skills and special training of a particular nurse is among those factors critical to the employer's ability to successfully deliver health care services. In short, we do not find the dissent's interpretation of "assign" to be in accord with the statutory language.

The dissent responds that the authority to assign employees to "more onerous or more desirable" tasks should be "considered in relation to the Section 2(11) authority to 'discipline' or 'reward.'" We disagree. The purpose behind assigning an employee to a more demanding job may be to see if that employee is up to the challenge. Far from an imposition of discipline, it could well be a prelude to advancement. By the same token, assigning an employee to comparatively easy overall tasks is not necessarily a reward. It could signal lack of confidence in the employee's ability to accomplish anything more challenging. And, quite apart from any of the foregoing considerations, the assignment of "plum" and "bum" jobs may well reflect nothing more than the fact that both sorts of jobs must be done, and somebody must do them. The fact remains that the authority to deter-

[21] *Ruiz v. Estelle*, 161 F.3d 814, 820 (5th Cir. 1998) (citing *Crist v. Crist*, 632 F.2d 1226, 1233 fn. 11 (5th Cir. 1980) (stating that courts must "give effect, whenever possible to all parts of a statute and avoid an interpretation which makes a part redundant or superfluous.").)

mine which kind of overall tasks an employee will perform affects the employee's terms and conditions of employment in a significant way that is distinct from the concepts of "reward" or "discipline."

The dissent says that our interpretation of "assign" to include the assignment of employees to significant overall tasks violates the canon against redundancy by failing to draw a line between assigning and directing. That is not so. As discussed below, direction may encompass ad hoc instructions to perform discrete tasks; assignment does not.

Our dissenting colleagues also criticize our interpretation of "assign" as somehow inconsistent with the way the term is used in everyday speech, despite the fact that the Board has construed the term in precisely this way.[22] In their view, "it must be the *employees* who are being assigned, not the tasks." (Emphasis in original.) Thus, while the dissent takes issue with us first drawing upon the ordinary meaning of the statutory words used, it relies on overly subtle and debatable grammatical distinctions to interpret the statutory terms. The term "assign" encompasses the assignment of employees to significant overall tasks; and the mere fact that, in common usage, speakers refer interchangeably to assigning employees to tasks and tasks to employees does not persuade us to adopt the dissent's definition of "assign." And, contrary to the dissent, the Supreme Court's *Kentucky River* decision does not support their position in this regard.[23] In any event, debating linguistic niceties does little to realistically assist in formulating workable definitions that fit both the language of Section 2(11) and the overall intent of the provision.[24]

Our dissenting colleagues would interpret "assign" to apply to a determination of an employee's (1) position, i.e., his or her job classification, (2) designated work site, i.e., facility or departmental unit, or (3) work hours, i.e., shift. While that interpretation overlaps in part with ours, it does not adequately differentiate between the other related supervisory functions of Section 2(11). For example, instead of interpreting "assign" to include, as we do, assigning overall tasks, the dissent would require that the assignment be to an overall job classification. However, the dissent does not explain where the 2(11) function "assign" ends and the other supervisory function "transfer" begins. In the dissent's view, to "transfer" means, inter alia, to "reassign . . . to a different [job] classification." On this view, however, "transfer" becomes merely a subset of "assign," rendering "transfer" redundant.[25]

Finally, the dissent also criticizes our interpretation of "assign" on the ground that it "threatens to sweep almost all staff nurses outside of the Act's protection." As we stated above, however, we decline to start with an objective—for example, keeping all staff nurses within the Act's protection--and fashioning definitions from there to meet that targeted objective. We have given "assign" the meaning we believe Congress intended. We are not swayed to abandon that interpretation by predictions of the results it will entail.[26] We also do not prejudge what the result in any given case will be. We shall continue to analyze each case on its individual facts, applying the standards set forth herein in a manner consistent with the Congressional mandate set forth in Section 2(11).

2. Responsibly to Direct

We now address the term "responsibly to direct." The phrase "responsibly to direct" was added to Section 2(11) after the other supervisory functions of Section 2(11) already had been enumerated in the proposed legislation. Senator Flanders, who made the proposal to add "responsibly to direct" to Section 2(11), explained that the phrase was not meant to include minor supervisory functions performed by lead employees, straw bosses, and

[22] Indeed, our colleagues in fn. 15 of the dissent acknowledge that our definition of "assign" comports with prior Board precedent, which defined the term to encompass the assigning of tasks. The prior inclusion of such assignments did not lead to the exclusion of all professionals or all charge nurses as statutory supervisors, and there is no reason to believe it will now.

[23] The only portion of the *Kentucky River* decision our colleagues cite in support of their position that the word "employees" must serve as the "grammatical object" of "assign" does not deal with the statutory function of assigning, but rather addresses the separate function of responsibly directing other employees. See *Kentucky River*, supra, 532 U.S. at 720.

[24] Oddly, the dissent would rely, for purposes of statutory construction, not only on debatable syntax generally, but specifically on the sentence structure of the Employer's assignment policy, despite the fact that the Board has long held that job titles and descriptions prepared by employers are not controlling; rather the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor. See, e.g., *Heritage Hall*, 333 NLRB 458, 458–459 (2001) ("It is well settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor.").

[25] The dissent does differentiate "promote" from "assign" and "transfer," but unconvincingly. According to the dissent, "promote" differs from "assign" and "transfer" in that it entails "a *permanent* elevation in rank" (emphasis added). Thus, in the dissent's stated view, employees are never demoted, and transfers are never temporary.

[26] The dissent criticizes our results-neutral approach to interpreting "assign," saying the Board "must . . . calculate the possible consequences of its reading of the Act and . . . weigh them against the evidence of Congressional intent." In our view, what the Board must do, and what we have done, is interpret the statutory term "assign," to the best of our ability, as we believe Congress intended. If Congress disapproves of the results it believes our interpretation might entail, it lies with Congress to amend the Act accordingly.

set-up men. Rather, the addition was designed to ensure that the statutory exemption of Section 2(11) encompassed those individuals who exercise basic supervision but lack the authority or opportunity to carry out any of the other statutory supervisory functions (e.g., where promotional, disciplinary and similar functions are handled by a centralized human resources department). Senator Flanders was concerned that the person on the shop floor would not be considered a supervisor even if that person directly oversaw the work being done and would be held responsible if the work were done badly or not at all.[27] Consequently, the authority "responsibly to direct" is not limited to department heads as the dissent suggests. The "department head" may be a person between the personnel manager and the rank and file employee, but he or she is not necessarily the only person between the manager and the employee. If a person on the shop floor has "men under him," and if that person decides "what job shall be undertaken next or who shall do it," that person is a supervisor, provided that the direction is both "responsible" (as explained below) and carried out with independent judgment. See footnote 19, supra. In addition, as the statute provides and Senator Flanders himself recognized, the person who effectively recommends action is also a supervisor.[28]

Since the enactment of Senator Flanders' amendment, the Board rarely has sought to define the parameters of the term "responsibly to direct." In *Providence Hospital*,[29] the Board majority summarized past efforts on the part of several courts of appeals, namely the First,[30] Fifth,[31] Sixth,[32] Seventh,[33] and Ninth[34] Circuits, to ascertain the limits of this term. The Board majority in *Providence Hospital* concluded that these courts endorsed, for the most part, an accountability definition for the word "responsibly" that was consistent with the ordinary meaning of the word.[35] The majority cited to the Fifth Circuit's interpretation, which is set forth in *NLRB* v. *KDFW-TV, Inc*., supra at 1278, as follows:

> "To be responsible is to be answerable for the discharge of a duty or obligation." . . . In determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is "held fully accountable and responsible for the per-

[27] In proposing his amendment adding the phrase "responsibly to direct," Senator Flanders commented:

> The definition of "supervisor" in this act seems to cover adequately everything except the basic act of supervising. Many of the activities described in [Section 2(11)] are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department or other work instead of discharging, disciplining or otherwise following the recommended action.
>
> In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have a personal judgment based on personal experience, training, and ability. He is charged with the responsible direction of his department and the men under him. He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees" as enumerated in the report. Their essential managerial duties are best defined by the words "direct responsibly," which I am suggesting.
>
> In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men. The top management may properly be judged by its success or failure in picking them out and in backing them up when they have been properly selected.

See NLRB, Legislative History of the Labor Management Relations Act of 1947, 1303. Nothing in the text of the amendment passed by Congress is at variance with Senator Flanders' remarks.

[28] Our colleagues argue that our "expansive" definition of responsible direction will convert any worker who instructs a person to perform a task, no matter how minor, into a supervisor. We disagree. The de minimis principle obviously applies. For example, if a charge nurse gives a single ad hoc instruction to an employee to perform a discrete task, that would not, without more, establish supervisory status. Moreover, even if the instruction is more general and it is repeated, supervisory status will only be found if the party asserting supervisory status also demonstrates that the purported supervisor is "responsible" for the directed employees' performance, and that the exercise of that authority is not of a merely routine or clerical nature, but requires the use of "independent judgment," as those terms are defined herein. The dissent looks at each term in isolation; we read them together as set forth in the Act. When considered in context, our definitions cannot fairly be said to "dramatically increase the number of potential statutory supervisors." See, e.g., *Croft*, supra, and *Golden Crest*, supra (decided today under the *Oakwood Healthcare* standard and finding lead persons and charge nurses respectively not to be statutory supervisors).

[29] 320 NLRB 717 (1996). To the extent that *Providence Hospital* is inconsistent with any aspect of our decision in this case, *Providence Hospital* and those cases relying on it are overruled.

[30] See *Northeast Utilities Service Corp. v. NLRB*, 35 F.3d 621 (1st Cir. 1994); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 361 (1st Cir. 1980).

[31] See *NLRB v. KDFW-TV, Inc*., 790 F.2d 1273, 1278 (5th Cir. 1986).

[32] See *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387-388 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949).

[33] See *NLRB v. Adam & Eve Cosmetics, Inc*., 567 F.2d 723, 728 (7th Cir. 1977).

[34] See *NLRB v. Fullerton Publishing Co*., 283 F.2d 545, 549–550 (9th Cir. 1960).

[35] *Providence Hospital*, 320 NLRB at 728–729. *Webster's New World Dictionary, Fourth College Edition* (1999), defines "responsible" as "expected or obliged to account; involving accountability." See also *American Heritage Dictionary of the English Language, Fourth Edition* (2000) ("responsible" means "liable to be required to give account").

> formance and work product of the employees" he directs. . . . Thus, in *NLRB v. Adam [&] Eve Cosmetics, Inc*., 567 F.2d 723, 727 (7th Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department.

The majority in *Providence Hospital*, however, found it unnecessary to pass on the courts' accountability definition.[36] We have decided to adopt that definition.

We agree with the circuit courts that have considered the issue and find that for direction to be "responsible," the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. This interpretation of "responsibly to direct" is consistent with post–*Kentucky River* Board decisions that considered an accountability element for "responsibly to direct."[37]

Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Our dissenting colleagues express the concern that our definition of "responsibly to direct" will result in supervisory authority being extended to "every 'person on the shop floor.'" In our view, however, the emphasis on accountability contained in the definition will prevent such an occurrence.

Significantly, the concept of accountability creates a clear distinction between those employees whose interests, in directing other employees' tasks, align with management from those whose interests, in directing other employees, is simply the completion of a certain task. In the case of the former, the dynamics of hierarchical authority will arise, under which the directing employee will have, if and to the extent necessary, an adversarial relationship with those he is directing. The directing employee will rightly understand that his interests, in seeing that a task is properly performed, are to some extent distinct from the interests of those under his direction. That is, in directing others, he will be carrying out the interests of management – disregarding, if necessary, employees' contrary interests. Excluding from coverage of the Act such individuals whose fundamental alignment is with management is at the heart of Section 2(11).[38]

C. Independent Judgment

In *Kentucky River*, supra at 713, the Supreme Court took issue with the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." That is, in the Board's then-extant view, even if the Section 2(11) function is exercised with a substantial degree of discretion, there was no independent judgment if the judgment was of a particular kind, namely, "ordinary professional or technical judgment in directing less-skilled employees to deliver services." While recognizing that the Board has the discretion to resolve ambiguities in the Act,[39] the Supreme Court found that the Board had improperly inserted "a startling categorical exclusion into statutory text that does not suggest its existence." The Court said that the Board had gone "beyond the limits of what is ambiguous and contradicted what in our view is quite clear." Id. at 714. The Court held that it is the *degree* of discretion involved in making the decision, not the *kind* of discretion exercised—whether professional, technical, or otherwise—that determines the existence of "independent judgment" under Section 2(11). Id. We are guided by these admonitions.

Consistent with the Court's *Kentucky River* decision, we adopt an interpretation of the term "independent judgment" that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. In short, professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11). Thus, for example, a registered nurse who makes the "professional judgment" that a catheter needs to be changed may be performing a supervisory function when he/she responsibly directs a nursing assistant in the performance of that work. Whether the registered nurse is a 2(11) supervisor will depend on whether his or her responsible direction is

[36] *Providence Hospital*, supra at 729.

[37] See *American Commercial Barge Line Co.*, 337 NLRB 1070, 1071 (2002); *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002).

[38] We further note that, as discussed below, our interpretation of "independent judgment" is fundamentally equivalent to prong (c) of the dissent's definition of "responsibly to direct." Thus, in our view, for an individual "responsibly to direct" under the Act with "independent judgment," that individual would need to exercise "significant discretion and judgment in directing" others.

[39] See fn. 19.

performed with the degree of discretion required to reflect independent judgment.

To ascertain the contours of "independent judgment," we turn first to the ordinary meaning of the term.[40] "Independent" means "not subject to control by others." *Webster's Third New International Dictionary* 1148 (1981). "Judgment" means "the action of judging; the mental or intellectual process of forming an opinion or evaluation by discerning and comparing." *Webster's Third New International Dictionary* 1223 (1981). Thus, as a starting point, to exercise "independent judgment" an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. As more fully explained below, however, these requisites are necessary, but not in all instances sufficient, to constitute "independent judgment" within the meaning of the Act. As we said above, although we start with the "ordinary meaning of the words used," *INS v. Phinpathya*, supra, 464 U.S. at 189, we also consider the Act as a whole, its legislative history, policy considerations, and judicial precedent. Here, we must interpret "independent judgment" in light of the contrasting statutory language, "not of a merely routine or clerical nature." It may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical. We will expand upon and illustrate this point below, after a fuller explanation of the meaning of "independent."

In our view, and that of the Supreme Court, actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as "independent" under the Act lies somewhere in between these extremes. As the Court indicated in *Kentucky River*, supra at 713–714, there are, at one end of the spectrum, situations where there are detailed instructions for the actor to follow. At the other end, there are other situations where the actor is wholly free from constraints. In determining the meaning of the term "independent judgment" under Section 2(11), the Board must assess the *degree* of discretion exercised by the putative supervisor.

Consistent with the Court's view, we find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.[41] Thus, for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio. Similarly, if a collective-bargaining agreement required that only seniority be followed in making an assignment, that act of assignment would not be supervisory.[42]

On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.[43] Thus a registered nurse, when exercising his/her authority to recommend a person for hire, may be called upon to assess the applicants' experience, ability, attitude, and character references, among other factors. If so, the nurse's hiring recommendations likely involve the exercise of independent judgment. Similarly, if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment. As Senator Flanders remarked, the supervisor determines "who shall do [the job]" and in making that determination the supervisor makes "[a] personal judgment based on personal experience, training, and ability."[44]

As stated above, Section 2(11) contrasts "independent judgment" with actions that are "of a merely routine or clerical nature." Thus, the statute itself provides a baseline for the degree of discretion required to render the exercise of any of the enumerated functions of 2(11) supervisory. The authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the "routine or clerical." See, e.g., *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994) (quoting *Bowne of Houston*, 280 NLRB 1222, 1223 (1986)) ("[T]he exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status."). If there is only one obvious and self-evident choice (for example, assigning

[40] See *U.S. v. Ripa*, 323 F.3d 73, 81 (2d Cir. 2003), citing *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001) (statutory language should be interpreted according to its plain meaning).

[41] See, e.g., *Dynamic Science, Inc.*, 334 NLRB 391, 391 (2001); *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998); *NLRB v. Meenan Oil Co*., 139 F.3d 311, 321 (2d Cir. 1998).

[42] We do not suggest, however, that so long as detailed instructions do not dictate or control specific action, that it necessarily follows that the requisite degree of independence for Sec. 2(11) purposes will have been established. There may be instances where instructions do not strictly dictate a sequence of actions, but nonetheless constrain the exercise of discretion below the statutory threshold.

[43] See, e.g., *NLRB v. Quinnipiac College*, 256 F.3d 68, 78 (2d Cir. 2001); *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 341 (4th Cir. 1998); and *B & B Insulation, Inc*., 272 NLRB 1215 fn. 1 (1984).

[44] NLRB, Legislative History of the Labor Management Relations Act of 1947, 1303.

the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data. By contrast, if the hospital has a policy that details how a charge nurse should respond in an emergency, but the charge nurse has the discretion to determine when an emergency exists or the authority to deviate from that policy based on the charge nurse's assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment.

The dissent portends that our analysis in assessing supervisory status under Section 2(11) may exclude "most professionals" from coverage under the Act. We disagree. An individual is a professional employee under Section 2(12) of the Act if he/she, inter alia, consistently exercises discretion and judgment in the performance of "predominantly intellectual and varied" work.[45] On the other hand, an individual has the status of a supervisor under Section 2(11) if he/she exercises independent judgment in connection with one or more of the 12 specific functions listed by that provision of the Act. For example, in the case of assignment and direction, even if the charge nurse makes the professional judgment that a particular patient requires a certain degree of monitoring, the charge nurse is not a supervisor unless and until he or she assigns an employee to that patient or responsibly directs that employee in carrying out the monitoring at issue. Thus, a charge nurse is not automatically a "supervisor" because of his or her exercise of professional, technical, or experienced judgment as a professional employee. And it is equally true that his or her professional status does not prevent the charge nurse from having statutory supervisory status if he or she exercises independent judgment in assigning employees work or responsibly directing them in their work. To hold otherwise would come dangerously close to recommitting the very error the Supreme Court corrected in *Kentucky River*.

D. Persons Who Are Supervisors Part of the Time

Where an individual is engaged a part of the time as a supervisor and the rest of the time as a unit employee, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions.[46] Under the Board's standard, "regular" means according to a pattern or schedule, as opposed to sporadic substitution.[47] The Board has not adopted a strict numerical definition of substantiality[48] and has found supervisory status where the individuals have served in a supervisory role for at least 10–15 percent of their total work time.[49] We find no reason to depart from this established precedent.

III. THE CASE AT BAR

It is well established that the "burden of proving supervisory status rests on the party asserting that such status exists." *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); accord *Kentucky River*, 532 U.S. at 711–712 (deferring to existing Board precedent allocating burden of proof to party asserting that supervisory status exists). The party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Dean & Deluca*, 338 NLRB at 1047; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

As discussed below, we find that the Employer has failed to establish that its charge nurses possess the authority to "responsibly to direct" employees within the meaning of Section 2(11). However, we also find that the Employer has adduced evidence sufficient to establish that certain of its permanent charge nurses are supervisors based on their delegated authority to assign employees using independent judgment. Finally, we find that the Employer has failed to establish that its rotating charge nurses, as opposed to the 12 permanent charge

[45] Sec. 2(12) of the Act provides:

> The term "professional employee" means—
>
> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

[46] See, e.g., *Brown & Root, Inc*., 314 NLRB 19, 21 (1994); *Gaines Electric Co*., 309 NLRB 1077, 1078 (1992); and *Aladdin Hotel*, 270 NLRB 838 (1984).

[47] Cf. *Rhode Island Hospital*, 313 NLRB 343, 349 (1993) (employee serving as supervisor every fourth weekend is a supervisor) with *St. Francis Medical Center West*, 323 NLRB 1046, 1046–1047 (1997) (employee who does not serve as supervisor according to a schedule is not a supervisor).

[48] See, e.g., *Rhode Island Hospital*, supra.

[49] See *Archer Mills, Inc*., 115 NLRB 674, 676 (10 percent is sufficient); *Swift & Co*., 129 NLRB 1391 (1961) (15 percent is sufficient).

nurses we find to be supervisors, spend a regular and substantial portion of their work time performing supervisory functions. Consequently, we exclude only the 12 permanent charge nurses from the unit.

A. Responsible Direction

The Employer alleges that its charge nurses responsibly direct nursing staff by directing them to perform certain tasks. As part of their duties, the charge nurses are responsible for checking the crash cart, taking an inventory of narcotics, and providing statistical information to Heritage's administrative staff for their shifts. The charge nurses may undertake these tasks themselves or delegate them to another staff member working that shift. The delegation of these charge-nurse specific tasks is the sole basis for the Employer's claim that the charge nurses responsibly direct the nursing staff.[50]

We find that the Employer failed to carry its burden of proving that the charge nurses responsibly direct the nursing staff within the meaning of Section 2(11). As explained above, to constitute "*responsible*" direction the person performing the oversight must be held accountable for the performance of the task, and must have some authority to correct any errors made. The Employer has not demonstrated that the charge nurses meet this accountability standard. The record reveals no evidence that the charge nurses must take corrective action if other staff members fail to adequately check the crash cart, take the narcotics inventory, or provide the statistical information to management. There is no indication that the charge nurses are subject to discipline or lower evaluations if other staff members fail to adequately perform these charge nurse-specific tasks. Instead, the Employer points to an instance in which it disciplined a charge nurse for failing to make fair assignments. This evidence, however, shows that the charge nurses are accountable for their *own* performance or lack thereof, not the performance of *others*, and consequently is insufficient to establish responsible direction.

B. Assignment

The record establishes that charge nurses assign nursing personnel to patients. At the beginning of each shift,[51] and as new patients are admitted thereafter, the charge nurses for each patient care unit (except the emergency room) assign the staff[52] working the unit to the patients that they will care for over the duration of the shift.

In the emergency room, the process of assigning work operates differently. There, the charge nurses have primary responsibilities to "triage" the incoming patients and keep the other patient care units in the hospital informed about possible admissions from the emergency room. The charge nurses do not assign nursing personnel to patients in this department. Rather, the charge nurses assign employees to geographic areas within the emergency room. In making these assignments, the charge nurses do not take into account employee skill or the nature or severity of the patient's condition. After these initial assignments, the employees then rotate geographical locations within the emergency room among themselves on a periodic basis.

The charge nurses' assignment of patients to other staff and assignment of nurses to specific geographic locations within the emergency room fall within our definition of "assign" for purposes of Section 2(11). In patient care units other than the emergency room, the actions of the charge nurses involve assigning nurses to patients in rooms and "giving significant overall tasks to an employee." The charge nurses in the emergency room designate employees to a particular place. The charge nurses' assignments determine what will be the required work for an employee during the shift, thereby having a material effect on the employee's terms and conditions of employment. Unlike the case of Senator Flanders' "straw bosses, leadmen, and set-up men," the charge nurse's duties of assignment are not "incidental" to the charge nurse's own nursing duties. The charge nurse has his or her own patients, but independently of that, he or she will assign other nursing personnel to other patients.

Having found that the charge nurses hold the authority to engage in one of the supervisory functions of Section 2(11), our next step is to determine whether the charge nurses exercise independent judgment in making these assignments.

C. Independent Judgment

The charge nurses at the hospital make their assignments by choosing between or among the members of the staff available on each shift. In addition to the charge nurse, there are two to six RNs on each shift, depending on the time of day and the unit, and many of the units also have licensed practical nurses or other licensed staff working each shift. In the health care context, choosing among the available staff frequently requires a meaningful exercise of discretion. Matching a nurse with a patient may have life and death consequences. Nurses are professionals, not widgets, and may possess different levels of training and specialized skills. Similarly, pa-

[50] The Employer has expressly disavowed any contention that RNs in general are supervisors.

[51] The clinical managers are responsible for the scheduling of all nursing staff to a shift.

[52] Depending on the unit, the staff could include RNs, licensed practical nurses, nursing assistants, technicians, mental health workers, and paramedics.

tients are not identical and may require highly particularized care. A charge nurse's analysis of an available nurse's skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the condition and needs of a particular patient, involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen. As discussed below, the record evidence establishes that a number of the Employer's charge nurses exercise independent judgment in assigning other staff to patients and therefore possess supervisory authority under Section 2(11) of the Act.

Employer witnesses Brenda Theisen, Carolyn Carney, Sue Caines, and Nicholas Paul Mikaelian Jr., and Petitioner witness Nancy Coffee principally testified about how charge nurses at the hospital make their selections of staff for patient assignments in units other than the emergency room. The testimony of Employer witness Deborah Vogel and Petitioner witness Carol Welch focused on the charge nurses' assignments in the emergency room.[53]

As the nursing site leader and director of patient care services at the Hospital, Brenda Theisen has overall responsibility for nursing care delivered within the hospital. She has been associated in various nursing positions with the hospital since 1985, and is very familiar with the assignment duties of charge nurses throughout the hospital, particularly the intermediate care unit based on her 10 years of service working as a staff nurse and later as nurse manager in that unit. According to her testimony, the Employer's general patient care policy guides the charge nurses in making the patient care assignments at the hospital. On its face, this written policy is not so detailed or thorough as to be outcome determinative, but rather the policy permits the charge nurses, in making assignments, to take into account "the ability of the patient to do self care, degree of illness, complexity of nursing skills required, and the competency and qualification of the staff." Theisen testified that the charge nurses can choose personnel for assignments based on judgments as to the particular condition and medical needs of a given patient and the skill sets or specialized training of the available staff. Theisen testified, for example, that a charge nurse would select a nurse "who is particularly good [at peritoneal dialysis] to take care of [a] patient who requires [such treatment]" or assign a nurse with a proficiency in "vasoactive drug monitoring" to take care of a patient requiring such attention. Theisen also testified that charge nurses take into account a host of other factors in making assignments, including the amount of time required to perform specific patient care functions (which, in turn, would limit a nurse's availability to attend to other patients), competence levels, licensing, personalities, and compatibility of staff members.

Like Theisen, Carolyn Carney has a long history of working at the hospital, with 13 years of service as a mental health staff nurse. As the assistant clinical manager for the mental health unit, Carney has the opportunity to observe new nurses perform charge nurse duties during their training period. Carney testified that based on her observations she determines when the new nurses are ready to assume the role of charge nurse on their own. As did Theisen, Carney testified that charge nurses are required to make informed judgments about their patients and staff in order to make patient care assignments. As an example, she testified that if a patient in the behavioral health unit had medical as well as psychiatric problems, the charge nurse could exercise her discretion to assign an RN rather than a mental health worker to that patient. Similarly, Carney testified that charge nurses would take into account a myriad of factors, such as the aggressiveness of the patient and a care giver's ability to respond to the same, in making assignment decisions. Carney further testified that there is no written document that would tell a charge nurse which particular staff to assign to which patients on any given day.

Sue Caines, the assistant clinical manager for the medical/surgical east and medical/surgical west units since 2000, testified that charge nurses consider specific patient conditions and needs, staff's special training or certifications, the continuity of care, and geographic location of the patient's room[54] in making assignments. She testified, for example, that if a chemotherapy, orthopedic, or pediatric patient is involved, the charge nurse considers whether the staff to be assigned has the special training and can perform the necessary care for that type of patient before making the assignments. She further testified that a nurse is not consistently assigned to patients in a certain set of rooms on either the medical/surgical east or west units.

Nicholas Paul Makaelian Jr., the assistant clinical manager for in-patient rehabilitation since 2000, testified about his experience and knowledge relating to charge nurse's assignments in his unit. He has made staff assignments in his unit. He testified that the charge nurse takes several factors—such as the nature and severity of

[53] The testimony of Employer's witness Jenna Lynn Ash and Petitioner's witness Marie Angela Nagel dealt with charge nurse rotation and grievance-handling issues.

[54] Caines testified that the medical/surgical west unit is a physically large unit with two halls with capacity for 25 patients per hall.

the patient's condition, patients' gender-based sensitivities, patient population number and length of stay,[55] and staff licensing—into consideration when making assignment decisions.

Nancy Coffee has worked as an RN in the intermediate care unit for 10 years prior to the hearing. She worked a part-time schedule allowing her to rotate into the charge nurse position in her unit about one day per week. She testified that the charge nurse in her unit makes staff assignments based on several factors. She explained that the charge nurse considers such factors as the patient's condition, continuity of care, gender and personality of the staff and patients, and specific skills and abilities (especially if flex nurses are temporarily assigned to her unit). She testified that as charge nurse she reassessed patient care assignments during a shift because of personality clashes between a patient and a nurse.

Deborah Vogel, the assistant clinical manager of the emergency room, and Carol Welch, an emergency room RN, gave testimony about the assignment authority exercised by the emergency room charge nurses. They testified that the initial staff assignments in the emergency room are geographically based. According to their consistent testimony, the emergency room, unlike other inpatient units of the Hospital, is arranged into three divisions and the charge nurse assigns staff to a division (i.e. room) on a rotational basis to equalize the workload. Their testimony reveals that if one area of the emergency room becomes particularly busy during the shift, the charge nurse directs the RN assigned to the section for noncritical patients to assist the RN in the busy section of the emergency room.

The Employer provided evidence that the charge nurses at the hospital relied upon their assessments of the patients' conditions and needs, the nursing personnel's ability, and other factors they deemed relevant depending on their unit. Witnesses repeatedly testified that the charge nurses' assignments are based on "informed judgments" about the patients and staff. For example, there was testimony that charge nurses take other nurses' individual expertise into account, such as assigning a nurse who is particularly proficient in administering dialysis to a kidney patient. In addition, other testimony shows that in making patient care assignments, the charge nurses look to whether the available staff has particular skill or training in dealing with certain kinds of patients, such as chemotherapy, orthopedic, or pediatric patients. There was further testimony that the charge nurse tries to assign the same patients to the same staff if possible, to ensure continuity of care and familiarity with particular patient needs.

The Employer demonstrated that the charge nurses exercise discretion in deciding how to allocate the resources available for the shift. For example, there was testimony that if a charge nurse assigned a patient who needed a blood transfusion to an RN, the charge nurse would not assign that RN to any other seriously ill patients or a newly admitted patient, because of the close monitoring required of a patient receiving blood. The record also shows that in the behavioral health unit, the charge nurses had to make decisions about how to allocate the differently licensed staff. For example, the charges nurses in the behavioral health unit had to assess whether an RN should be assigned to a psychiatric patient who also had medical problems, as opposed to assigning a mental health worker. In addition, the witnesses testified that charge nurses had to determine for themselves whether to take a patient load and how many patients to take.

While in the past the Board has found that mere equalization of workloads does not require the exercise of independent judgment, here the Employer's evidence shows that the charge nurses make assignments that are both tailored to patient conditions and needs and particular nursing skill sets, and a fair distribution based upon as assessment of the probable amount of nursing time each assigned patient will require on a given shift. Equalizing workloads requires only that the putative supervisor be able to assess the *quantity* of work to be assigned. Here, the charge nurses assess the quantity of work to be assigned, the relative difficulty of the work involved, and the competence of the staff available to do the work. Thus, the charge nurse can decide that a particular task is very difficult for a given nurse to perform, and that fact must be taken into account when deciding whether to assign that nurse to other work. Thus, the charge nurses assign each member of the nursing staff the number and type of patients that each staff member is capable of handling during the shift. In this context, contrary to the dissent's assertion, the process of equalizing work loads at the hospital involves independent judgment. Witnesses Theisen, Carney, Caines, and Makaelian testified that the charge nurse considers a variety of factors in making a particular assignment and must use his or her own independent judgment in weighing those factors. Their testimony was corroborated by the Petitioner witness Coffee's testimony showing that a balancing of several factors occur and no one factor dictates the staff selections made by the charge nurse.

[55] The rehabilitation unit generally treats patients who have had strokes or orthopedic problems over an approximate 2-week hospital stay.

The Employer also has a written policy for assigning nursing personnel to deliver care to patients. The policy statement provides that the charge nurses, in making assignments, should take into account, i.e., "the ability of the patient to do self care, degree of illness, complexity of nursing skills required, and the competency and qualification of the staff." While this statement guides the charge nurses' decision-making process, it is not so detailed as to eliminate a significant discretionary component involved in matching nursing personnel to patients. First, the policy statement does not prescribe a formulary approach that must be followed by the charge nurses. Rather, the policy identifies factors that permit individual input or evaluation based on a given charge nurse's perspective of the situation. That is, the charge nurses draw on their own training and experience to assess such things as patient acuity, skills complexity, and staff competency, and they make certain judgments using these assessments. The charge nurses have considerable latitude in weighing such factors in reaching a final decision on how to assign nursing personnel. Based on this cognitive process, an assignment on that shift will be made. Second, the policy statement does not articulate all the factors frequently considered by the charge nurses in making assignments. For example, the charge nurses typically take into account continuity of care, even though that factor is not specified in the Employer's written policy statement on assignments. Thus, the Employer has shown that, despite the existence of the policy statement, the charge nurses still must exercise a substantial degree of discretion in making assignments. Phrased differently, the Employer has shown that charge nurses exercise a degree of discretion sufficient to constitute independent judgment, as that term is used in Section 2(11). In our view, where the charge nurse makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patients, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function "requir[ing] the use of independent judgment."[56]

At the hearing, the parties stipulated that all the charge nurses at the hospital have the same authority. However, we are unwilling to accept such a broad stipulation where, as here, the specific evidence is to the contrary. The record shows that the charge nurse role in the emergency room unit is structured in such a way as not to necessitate the exercise of independent judgment. The evidence shows that the role of the charge nurse differs in significant respects from the role of the other charge nurses. Most significantly, the emergency room charge nurses do not take into account patient acuity or nursing skill in making patient care assignments. Whereas the record contains evidence of situations in other units in which the charge nurses must assess individual professional or personal attributes of the nursing staff, there is no similar evidence for the charge nurses in the emergency room unit. Instead, the charge nurses in the emergency room assign the nursing staff to geographic areas of the emergency room. Furthermore, a charge nurse in the emergency room testified without contradiction that the staff nurses rotated assignments, without input from the charge nurse. This evidence does not show discretion to choose between meaningful choices on the part of the charge nurses in the emergency room.

Therefore, we find that the Employer failed to demonstrate that the charge nurses in the emergency room unit exercise independent judgment in making patient care assignments. Although making patient care assignments is a primary function of the charge nurse in the rest of the facility, the emergency room charge nurses' primary functions are to perform a triage and to keep other units within the facility informed of possible admissions from the emergency room. A comparison of the assignments made by charge nurses in the rest of the facility with the

[56] Member Kirsanow agrees with his colleagues' interpretations of "assign," "responsibly to direct," and "independent judgment." Additionally, he joins in their finding, and their analysis in support of the finding, that the Employer's charge nurses have not been shown to be Sec. 2(11) supervisors by virtue of any authority "responsibly to direct." He also agrees with their conclusion that the Employer's permanent charge nurses are statutory supervisors by virtue of their authority to assign nursing staff to patients based on the exercise of independent judgment. In finding the element of "independent judgment" met here, however, Member Kirsanow relies on a narrower range of evidence than do his colleagues. Specifically, he bases his finding of independent judgment solely on evidence that the charge nurses' assignments sometimes involve matching the nurses' special training or particular skills with the particular medical needs of patients. Assistant Clinical Manager Sue Caines testified that charge nurses consider whether any of the available shift nurses have had special training when deciding which nurses to assign to pediatric, orthopedic, or "chemo" patients. Similarly, Brenda Theisen, the nursing site leader and director of patient care services, testified that charge nurses consider individual nurses' skills and abilities in making assignments, stating that a charge nurse would, for instance, select a nurse "who is particularly good [at peritoneal dialysis] to take care of [a] patient who requires peritoneal dialysis," or assign a nurse with a proficiency in "vasoactive drug monitoring" to take care of a patient with that particular medical need. In Member Kirsanow's view, such determinations clearly rise above the level of the routine or self-evident. A charge nurse's analysis of an available nurse's skill set and level of proficiency at performing certain tasks, and her application of that analysis in matching that nurse to the needs of a particular patient, involves a meaningful act of discretion and a reasoned determination that goes beyond the obvious or routine. Accordingly, Member Kirsanow finds that this evidence satisfies the Employer's burden to establish that the charge nurses at Oakwood Heritage Hospital exercise independent judgment in assigning other nurses to patients and therefore possess supervisory authority under Sec. 2(11) of the Act.

assignments made by the emergency department charge nurses serves to emphasize that the former perform supervisory functions with independent judgment and the latter do not. Because, as discussed above, the exercise of independent judgment is a necessary element of establishing supervisory status, we find that the Employer has failed to prove that the charge nurses in the emergency room are supervisors, despite the parties' stipulation. We shall include the emergency room charge nurses in the unit.

D. "Rotating" Charge Nurses

As with other aspects of establishing supervisory status, the burden is on the Employer who asserts supervisory status to prove regularity and substantiality, i.e., the charge nurse spends a regular and substantial portion of his/her work time performing supervisory functions. We find that the Employer has carried its burden of proof with respect to the 12 permanent charge nurses that are assigned to the following 5 units: behavioral health, intensive care, intermediate care, medical/surgical east, and medical/surgical west. The Employer offered uncontradicted testimony that the permanent charge nurses in those units serve in that capacity on every shift they work. Indeed, the permanent charge nurses do not really fit the definition of a "rotating" supervisor. They serve full-time as supervisors on a regular basis. These RNs are Linda L. Bennett, Valerie Christensen, Kimberly Clark, Pat Conley, Elizabeth Daupan, Susan H. Dey, Vicky Lowe, Leo Moises, Suzanne Mudge, Deborah L. Murphy, Lourdes Pacot, and Liza E. Saclayan. Accordingly, we shall exclude these individuals from the unit.

In contrast, the Employer has failed to demonstrate regularity for the "rotating" charge nurses assigned to behavioral health, intensive care, intermediate care, medical/surgical east, medical/surgical west, post-anesthesia care/recovery, and rehabilitation units. The Employer offered only superficial evidence as to the regularity with which these 112 nonpermanent or "rotating" charge nurses serve in the charge nurse role. The record reveals that none of the units involved have an established pattern or predictable schedule for when and how often RNs take turns in working as charge nurses.[57] In those units where the RNs decide among themselves who will serve as charge nurses, the record does not demonstrate any pattern for these selections. In those units where the managers are in charge of making assignments, the managers likewise do not use any particular system or order for assigning charge nurses.

[57] See, e.g., RN Nancy Coffee's testimony about the unpredictability of the charge nurse rotation process in the intermediate care unit.

The following examples illustrate this lack of regularity. Most RNs work one of three shifts—day, afternoon, or midnight. In intermediate care unit, a permanent charge nurse serves in that capacity for 10 out of 14 days each 2-week pay period on the midnight shift and the other RNs rotate into the charge nurse position for the remaining 4 days. On the day shift in intermediate care unit, the RNs rotate the charge nurse position when the assistant nurse manager, a stipulated supervisor who usually does the charge nurse duties, is not there. In the behavioral health unit, the RNs on the day shift decide among themselves at the beginning of each shift who will be the rotating charge nurse for that day, but there is no information as to whether they follow any particular pattern in making these designations. In medical/surgical east unit, the RNs on the day shift keep a log of who served as charge nurse to determine the rotation, and on the night shift the RNs decide among themselves who will be charge nurse for that night. In medical/surgical west unit, the day shift nurses decide among themselves who will be charge nurse for that day. On the afternoon shift in that same unit, two RNs generally trade shifts as charge nurse, unless they ask one of the other RNs to fill in when they want a break. In the rehabilitation unit, the assistant clinical manager, a stipulated supervisor, chooses in no particular order who will serve as charge nurse for each shift. Likewise, for the remaining shifts and units not mentioned above, no further evidence of a pattern or structured schedule was offered by the Employer.

In the absence of a sufficient showing of regularity for assigning the "rotating" charge nurses, we need not decide whether these RNs possess the "rotating" charge nurse duties for a "substantial" part of their work time. Accordingly, we shall include in the unit, as nonsupervisors, the 112 RNs who are not permanent charge nurses but rather irregularly rotate through the charge nurse position at the hospital.

CONCLUSION

In interpreting the statutory terms "assign," "responsibly to direct," and "independent judgment" as set forth in this decision, we have endeavored to provide clear and broadly applicable guidance for the Board's regulated community. Our dissenting colleagues predict that our definitions will "create a new class of workers" who are excluded from the Act but do not exercise "genuine prerogatives of management." We anticipate no such sea change in the law, and will continue to assess each case on its individual merits. In deciding this case, moreover, we intentionally eschewed a results-oriented approach; rather, we analyzed the terms of the Act and derived definitions that, in our view, best reflect the meanings in-

tended by Congress in passing Section 2(11) and would best serve to effectuate the underlying purposes of the Act. If our adherence to the text of and intent behind the Act should lead to consequences that some would deem undesirable, the effective remedy lies with the Congress.

In this particular case, we have concluded that Linda L. Bennett (behavioral health unit), Valerie Christensen (behavioral health unit), Kimberly Clark (behavioral health unit), Pat Conley (medical/surgical east), Elizabeth Daupan (behavioral health unit), Susan H. Dey (behavioral health unit), Vicky Lowe (intermediate care unit), Leo Moises (intensive care unit), Suzanne Mudge (medical/surgical west), Deborah L. Murphy (behavioral health unit), Lourdes Pacot (behavioral health unit), and Liza E. Saclayan (behavioral health unit) are statutory supervisors. Accordingly, we shall remand this case to the Regional Director for further processing in accordance with this decision.

ORDER

The National Labor Relations Board orders that this proceeding be remanded to the Regional Director to open and count the ballots of all eligible voters, to prepare a tally of ballots, and to issue the appropriate certification or take other appropriate action in accord with this Decision and Order.

Dated, Washington, D.C. September 29, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS LIEBMAN AND WALSH, dissenting in part and concurring in part in the result.

Today's decision threatens to create a new class of workers under Federal labor law: workers who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees. Into that category may fall most professionals (among many other workers), who by 2012 could number almost 34 million, accounting for 23.3 percent of the work force.[1] "[M]ost professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on."[2]

If the National Labor Relations Act required this result—if Congress intended to define supervisors in a way that swept in large numbers of professionals and other workers without true managerial prerogatives—then the Board would be dutybound to apply the statute that way. But that is not the case. The language of the Act, its structure, and its legislative history all point to significantly narrower interpretations of the ambiguous statutory terms "assign . . . other employees" and "responsibly to direct them" than the majority adopts. The majority rejects what it calls a "results-oriented approach" in interpreting the Act. But the reasonableness of the majority's interpretation can surely be tested by its real-world consequences. Congress cared about the precise scope of the Act's definition of "supervisor," and so should the Board. Instead, the majority's decision reflects an unfortunate failure to engage in the sort of reasoned decisionmaking that Congress expected from the Board, which has the "primary responsibility for developing and applying national labor policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).[3]

I.

This case involves the interpretation of three terms incorporated in Section 2(11) of the Act, the statutory definition of a "supervisor": (1) "assign . . . other employees;" (2) "responsibly to direct them [other employees];" and (3) "independent judgment."[4] There would seem to be no dispute that these terms are ambiguous and thus open to interpretation, as the Supreme Court has observed.[5]

[1] Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Projections and Training Data, 2004–2005 Edition* (Table III-1) 72, available at http://www.bls.gov/emp/optd/home.htm.

[2] *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983) (opinion by Circuit Judge Posner).

[3] Repeatedly, the majority accuses us of seeking to analyze the statute in service of a predetermined objective: narrowing the scope of "supervisor" and preserving the employee status of staff nurses. We reject the accusation. As stated above, our interpretation is based on the language of the Act and its legislative history, and it preserves the essence of decades of common understanding of the terms "employee" and "supervisor." Not surprisingly, therefore, our conclusion is essentially a conservative one. Our colleagues, by contrast, define the statutory terms in an expansive manner unmoored to history.

[4] Sec. 2(11) provides that:

> The term "supervisor" means 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 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.

[5] See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713, 717 fn. 2 (2001) (noting ambiguity of "independent judgment" and "responsibly to direct"); *NLRB v. Health Care & Retirement Corp. of*

Where statutory language is ambiguous, it is not enough to consult the dictionary. As the Supreme Court has recently explained:

> The definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. U.S. Postal Service, ___ U.S. ___, 126 S.Ct. 1252, 1257 (2006). See, e.g., *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288–289 (1957) (articulating similar principles with respect to interpretation of National Labor Relations Act).

In this case, a narrow focus on dictionary definitions of individual words in isolation leads the majority astray.[6] If we read the whole statutory text, consider the context and purpose of the National Labor Relations Act, and consult authoritative legislative history, then the majority's statutory interpretation is revealed as untenable. Despite its claim to the contrary, the majority proceeds as if the "ordinary meaning of the words used" in Section 2(11) can dictate a choice among potential alternative interpretations. But where the words of a statute are ambiguous, the text alone cannot tell us which interpretation is best and why. The majority never offers a clear and carefully reasoned explanation of its choices.

Certainly, we are constrained by the decisions in *Kentucky River* and *Health Care & Retirement*, supra, where the Supreme Court rejected the Board's prior attempts to devise an approach to supervisory issues under the Act, which focused on the statutory phrases "in the interest of the employer" (*Health Care & Retirement*) and "independent judgment" (*Kentucky River*).[7] The Court's decisions require respect for the text and structure of Section 2(11), which the Board's interpretation may not contradict. But the Court did not dictate the largely dictionary-driven approach taken by the majority. Nor did it hold that the Board may not be guided by the structure of the Act as a whole, by its legislative history, or by policy concerns.[8] Indeed, in the words of one academic commentator, *Kentucky River*

> has reopened, rather than settled, the issue of where and how to draw the line between "employees" and "supervisors". . . . At the least, it will entail a change in the Board's analytical methodology. . . .

Weiss, *Kentucky River at the Intersection*, supra, at 395.

As will become clear, the majority's interpretations of "assign . . . other employees" and "responsibly to direct" are flawed purely with reference to the text and structure of the statute. Those interpretations violate the syntax of Section 2(11), as well as the canons of statutory construction.

The majority fails, as well, to take account of the Act's explicit recognition that professionals, and certain persons who perform work under the supervision of professionals, may be statutory employees[9]—a factor that surely weighs against a broad interpretation of supervisory functions as defined in the statute, given the general oversight that professionals typically exercise over less-skilled employees.[10]

In turn, the majority gives little, if any, weight to the context and purpose of the Act's definition of a supervisor, as reflected in the legislative history of the Taft-Hartley Act, which overruled the Supreme Court's decision in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), and added Section 2(11) to the statute.[11] The definitive report of the Senate Committee on Labor and Public Welfare explained that:

> A recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process has been the successful efforts of labor organizations to in-

America, 511 U.S. 571, 579 (1994) (same). See also *Providence Hospital*, 320 NLRB 717, 727 (1996) (discussing alternative interpretations of "assign").

[6] As Judge Learned Hand remarked, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress of the dictionary; but to remember that statutes always have some purpose or object to accomplish." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

[7] For a critical history of the development of the law in this area, see Marley S. Weiss, *Kentucky River at the Intersection of Professional and Supervisory Status—Fertile Delta or Bermuda Triangle?* in *Labor Law Stories* 353 (Laura J. Cooper & Catherine L. Fisk, eds. 2005).

[8] In *Kentucky River*, for example, the Court observed that the:

> problem with the [Board's] argument is not the soundness of its labor policy (the Board is entitled to judge that without our constant second-guessing . . .). . . . It is that the policy cannot be given effect through this statutory text.

532 U.S. at 720 (citation omitted).

[9] Sec. 2(3) provides that the "term 'employee' shall include any employee." 29 U.S.C. § 152(3). Sec. 2(12), in turn, defines "professional employee." 29 U.S.C. § 152(12). Under Sec. 9(b), finally, professional employees are granted the right to vote on whether, as a group, they wish to be included in a bargaining unit with non-professional employees. 29 U.S.C. § 159(b).

[10] Cf. *NLRB v. Yeshiva University*, 444 U.S. 672, 690 (1980) (disavowing broad exclusion of managerial employees "that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them").

[11] See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275–283 (1974) (discussing historical development of Sec. 2(11), including legislative history).

> voke the Wagner Act for covering personnel, traditionally regarded as part of management, into organizations composed of or subservient to the unions of the very men they were hired to supervise.
>
> . . .
>
> In drawing an amendment to meet this situation, the committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion in that act. It therefore distinguished between *straw bosses, leadmen, set-up men, and other minor supervisory employees*, on the one hand, and the *supervisor vested with such genuine management prerogatives* as the right to hire or fire, discipline, or make effective recommendations with respect to such action.
>
> . . .
>
> It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its *foremen*.

S. Rep. No. 105, 80th Cong., 1st Sess. 4-5 (1947) (emphasis added), reprinted in National Labor Relations Board, *Legislative History of the Labor Management Relations Act, 1947* 410-411 (1985) (cited as *Legislative History*).[12]

The legislative history explains that Congress "exercised great care, desiring that the employees . . . excluded from the coverage of the act be *truly* supervisory." *Legislative History*, supra at 425 (Senate Report No. 105) (emphasis added). The Board must be sensitive, then, to the distinction between "minor supervisory employees" (persons Congress intended to treat as employees) and the equivalent of "foremen" (persons Congress intended to exclude from statutory coverage).[13] That distinction is especially significant with respect to the supervisory function of "assign[ing] ... other employees." With respect to the statutory phrase "responsibly to direct," in turn, there is authoritative legislative history that is directly on point, illuminating a phrase that was added to the bill by a floor amendment in the Senate and that must be regarded as the sponsor's own term of art and interpreted in that light.

As we will explain, our disagreement with the majority on the interpretation of "assign" focuses on the treatment of task assignments made to employees, which we view as a quintessential function of the minor supervisors whom Congress clearly did *not* intend to cover in Section 2(11). As to responsible direction, we differ principally concerning the scope and scale of the authority required to satisfy the statutory test. In our view, the phrase "responsibly to direct" was intended to reach persons who were effectively in charge of a department-level *work unit*, even if they did not engage in the other supervisory functions identified in Section 2(11). Our differences with the majority might seem arcane and insignificant. But the real-world consequences of the competing interpretations, in terms of who is (and is not) a statutory supervisor, could prove dramatic.

II.

The majority's approach seems based on the premise that *any* statutory interpretation that does not contradict the text and structure of the Act is sufficient, even if competing interpretations more accurately reflect original Congressional intent and better serve the policy interests underlying the Act. More is required to satisfy an administrative agency's obligation to engage in reasoned decision-making.[14] As we explain next, the majority's reading of the key terms is both inconsistent with the statutory text and structure and inferior to alternative interpretations, if other indications of Congressional intent are considered.

A. "Assign . . . other employees"

"The Board has never fully resolved whether 'assignment' is limited to assigning individual workers to shifts, departments, and job classifications, or whether it also reaches assigning individual tasks to a worker." [15] To-

[12] The Senate committee report represents the sort of authoritative legislative history that the Supreme Court traditionally has consulted. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 209 fn. 16 (2003).

[13] See *Legislative History*, supra at 1537 (Congressional Record statement of Senator Taft, principal sponsor, observing that bill "confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank").

[14] See, e.g., *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational").

[15] Weiss, supra, *Kentucky River at the Intersection* at 365.

We recognize that the Board has on occasion treated the assignment of tasks, including the assignment of patients to health care employees, as "assignments" within the meaning of Sec. 2(11). But the earlier cases offer little discussion and no rationale for this result. Mostly, the Board just assumed that "assign" covers such task or patient assignments, and actually resolved the alleged supervisor's statutory status on other grounds, more recently the "independent judgment" requirement. See, e.g., *Nurses United for Improved Patient Healthcare*, 338 NLRB 837, 837 fn. 1, 839 (2003) (finding that a clinical coordinator who assigned patients to nurses was not a supervisor because the assignments were "routine"); *Youville Health Care Center*, 326 NLRB 495, 496 (1998) (finding charge nurses who held authority "to assign staff to patients, to assign tasks to staff" not to be supervisors because they did not exercise "independent judgment"); *Northcrest Nursing Home*, 313 NLRB 491, 504-505 (1993) (finding that charge nurses came within the scope of Sec. 2(11), citing their authority "to assign aides to specific tasks" but that it was not done "in the interest of the employer"), abrogated on other grounds by *NLRB v. Health Care & Retirement Corp. of America*, supra. Cf. *Doctors' Hospital of Modesto*, 183 NLRB 950, 951

day, the majority endeavors to resolve that question, by holding that assignment does reach at least some task assignments. Careful consideration demonstrates that the majority's interpretation of the statutory phrase "assign . . . other employees" is flawed in several respects, at least insofar as it addresses task assignment. The majority's interpretation violates the syntax of Section 2(11), it is inconsistent with the canon of statutory construction against redundancy, and it leads to treating "minor supervisory employees" as statutory supervisors, a result Congress disclaimed. Depending on its application, the majority's interpretation threatens to exclude almost all hospital nurses—as well as countless professionals and others who oversee less-skilled coworkers—from the protection of the Act.

1.

The majority begins by observing that the "ordinary meaning of the term 'assign' is 'to appoint to a post or duty.'" It then interprets the term in its context, as one of a series of supervisory functions listed in Section 2(11) that share the "common trait of affecting a term or condition of employment." Accordingly, it construes "assign" to refer to the act of:

> designating an employee to a place (such as location, department, or wing); appointing an employee to a time (such as a shift or overtime period); or giving significant overall duties, i.e., tasks, to an employee.

With respect to task assignments, the majority distinguishes between a "designation of significant overall duties" and an "ad hoc instruction that the employee perform a discrete task." But the majority's decision makes clear that even a single assignment of daily duties—in contrast, for example, to designating the employee's job classification, which entails the expected performance of certain tasks during the employee's tenure—would satisfy its test. (Moreover the majority holds that, for purposes of defining the supervisory function responsible direction, "direction may encompass ad hoc instructions to perform discrete tasks."[16]

Contrary to the majority, Section 2(11) cannot properly be read to encompass task assignments, whether the assignment of discrete individual tasks or of significant overall tasks (in the majority's broad sense).

Using the dictionary definition of "assign" adopted by the majority ("to appoint to a post or duty"), the more natural reading would limit the phrase "assign employees" to a significant employment decision on the order of determining (1) an employee's position with the employer (in most settings, identified by job classification); (2) designated work site (i.e., facility or departmental unit), or (3) work hours (i.e., shift). This limited reading better fits the idea of appointing an employee to a post or duty.

It is further supported by the syntax of the whole statutory phrase: "assign . . . other employees." As the Supreme Court's *Kentucky River* decision confirms, the word "employees" serves as the grammatical object of each of the verbs identifying supervisory functions in Section 2(11).[17] In short, it must be the *employees* who are being assigned, not the tasks. In common speech, one generally refers to assigning *tasks to* employees. In the healthcare sector, for example, nursing tasks are commonly distributed by assigning patients *to* individual nurses and other direct care staff. In the present case, notably, the Employer's written assignment policy states that "[a]n RN must *assign* the care of each patient *to other members of the healthcare team*" (E. Exh. 7; emphasis added). Its listing of charge nurse responsibilities similarly indicates that charge nurses "make daily pt [patient] assignments *to* RNs, LPNs and NA [nursing assistant] and Secretary" (E. Exh. 5; emphasis added).

2.

Reading the phrase "assign . . . other employees" in its statutory context confirms that it contemplates something beyond mere task assignment. The majority recognizes the need for such a contextual interpretation, but its actual reading misses the mark. The majority asserts that each of the supervisory functions listed in Section 2(11)—"hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, or discipline"—"affect[s] a term or condition of employment." In fact, the listed functions do more. The terms in this series speak either to altering employment tenure itself ("hire," "suspend,"

(1970) ("assign" as denoting an assignment to work in a particular department or unit).

The Board's past reluctance to authoritatively define the scope of "assign" is not surprising in light of the Board's prior recognition that the term is ambiguous and its prior view that other terms in Sec. 2(11) were often dispositive of supervisory status. See *Providence Hospital*, 320 NLRB 717, 727 (1996).

[16] Thus, what the majority gives with one hand (limiting, somewhat, the definition of one supervisory function, "assign"), it takes away with the other (expansively defining another function, "responsibly direct"). The majority provides an example in discussing the statutory phrase "independent judgment," where it says that a "registered nurse who makes the 'professional judgment' that a catheter needs to be changed may be performing a supervisory function when he/she responsibly directs a nursing assistant in the performance of that work."

[17] See *Kentucky River*, supra, 532 U.S. at 720 (observing that "[p]erhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees, as § 152(11) requires*") (emphasis added in part).

"lay off," "recall," "discharge") or to actions that affect an employee's overall status or situation ("promote," "reward," "discipline," "transfer").[18]

Viewed as a member of this series, "assign" must denote authority to determine the *basic* terms and conditions of an employee's job, i.e., position, work site, or work hours. Indeed, no other Section 2(11) duty in the series addresses this elementary supervisory function. "Assign" is the corollary to the authority to "transfer" employees (i.e., to *reassign* them to a different classification, location, or shift).[19] By contrast, the act of assigning tasks—whether on a daily basis or task-by-task[20]—from among those already included within an employee's overall job responsibilities effects no real change in basic terms and conditions of employment. That employees may perceive certain tasks to be more onerous or more desirable is a fact that appropriately is considered in relation to the Section 2(11) authority to "discipline" or "reward."

3.

As a matter of statutory construction, treating task assignments as a supervisory function leads to unacceptable results.

First, it violates the canon against redundancy.[21] *Assigning* tasks to an employee is essentially the same thing as *directing* the employee to do them. As the Board has observed, the "distinction between assignment and direction in these circumstances is unclear." *Providence Hospital*, 320 NLRB 717, 727 (1996). "Certainly there are times when the assignment of tasks overlaps with direction. For example, ordering a nurse to take a patient's blood pressure could be viewed as either assigning the nurse to that procedure or directing the nurse in the performance of patient care." Id. By defining "assign" to mean the assignment of tasks, the majority makes the statutory term "direct" (for which it never offers a specific definition) superfluous. Indeed, if every worker who could assign tasks to an employee were a statutory supervisor, then (as discussed below) Senator Flanders would surely have felt no need to close the perceived loophole in Section 2(11) by adding the phrase "responsibly direct."[22] Senator Flanders observed that in some workplaces, many of the other supervisory functions listed were performed by personnel officials. But it is hard to imagine a workplace where a personnel manager, away from the shop floor, made mere task assignments. The majority's interpretation, then, subverts the clear intent of Congress to base supervisory status on only an assignment to a position, work site, or shift and/or on a limited kind of direction, as reflected in the phrase "responsibly to direct."

Second, the majority's construction is inconsistent with the Congressional intent to define "supervisor" to include "foremen," but to exclude "straw bosses, leadmen, set-up men, and other minor supervisory employees," as the Senate committee report explained. As evidenced in the Board's pre-Taft-Hartley Act case law (including decisions cited positively in the Senate report), distributing the day's work and assigning tasks to a crew of employees was typical of the type of responsibility held by those "minor supervisors" who were to remain within the Act's protection.[23] The defining characteristic

[18] Contrary to the majority's assertion, we are not "superimposing a unique and heightened standard on the supervisory function of assigning." As does the majority, we seek to construe "assign" as one member of a series of terms (the other Sec. 2(11) supervisory functions) that have a common nature.

We differ from the majority in our view of how to describe what the terms have in common. For the majority, the "common trait" is merely "affecting a [i.e., any] term or condition of employment." As we point out below, our contrasting focus on the authority to affect employee tenure or status is consistent with the Board's traditional approach in defining supervisors, which the Taft-Hartley Congress endorsed.

[19] "Promote," in turn, is distinct from "assign" and "transfer" in entailing a permanent elevation in rank.

[20] Common sense belies the majority's apparent suggestion that a statutory line may be drawn between making general task assignments at the beginning of the day (e.g., designating an LPN to regularly administer medications to a group of patients) and making discrete assignments one at a time as the day goes by (e.g., the order to give a sedative to a particular patient). Whether a nurse or nursing assistant ends up administering medicine to patients as a result of being assigned the task at the beginning of the day, or does so as a result of receiving several discrete task assignments during the course of the day, the distinction has no practical difference, from either the perspective of the person assigning the tasks or the person to whom they are assigned.

[21] See, e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (applying canon).

[22] The majority acknowledges the canon against redundancy, and, in that connection, recognizes the significance of Senator Flanders' rationale for his amendment. It nevertheless offers an interpretation of "assign" that leads to just the problem it purports to avoid.

[23] See, e.g., *Bethlehem-Sparrows Point Shipyard, Inc.*, 65 NLRB 284, 286 (1946) (timekeeper leaders not supervisory although "[e]ach assigns work to the timekeepers under him"); *Richards Chemical Works, Inc.*, 65 NLRB 14, 16 (1945) (department foremen not supervisory where they "merely serve as conduits for the transmittal of orders to their men and beyond that, their sole responsibility is to see that the work is gotten out"); *Rockford Screw Products Co.*, 62 NLRB 1430, 1432 (1945)(working foremen who set up machines and assign work to employees are not supervisors); *Charlottesville Woolen Mills*, 59 NLRB 1160, 1162 (1944) (assistant foremen whose "function is, while doing regular production work, to assist the foremen in expediting the work" are not supervisors).

The Senate committee report positively cited *Bethlehem* and *Richards Chemical*. It observed that the committee has "adopted the test which the Board itself has made in numerous cases when it has permitted certain categories of supervisory employees to be included in the same bargaining unit with the rank and file." *Legislative History*, supra at 410. For a contemporaneous statement of the Board's test, see, for

of such minor supervisors, in turn, was that their supervisory duties were incidental to their production duties, in contrast to foremen. A contemporary reference work, for example, defined "straw boss" as:

> A term applied to a worker who takes a lead in a team or gang, usually small in number, including himself, performing all the duties of the other workers in the gang. His supervisory functions are incidental to the production duties he performs.

U.S. Employment Service, *Dictionary of Occupational Titles* 1506 (1949). Workers who have no supervisory duties except for assigning tasks necessarily will spend the overwhelming part of their workday engaged in other, nonsupervisory work—as is true of the charge nurses here.[24] They can hardly be regarded as the equivalent of foremen, supervisors who, when the Taft-Hartley Act was passed, were "expected to perform manual work only in emergency and training situations." G. Gardiner & R. Gardiner, *Vitalizing the Foreman's Role in Management* 59 (1949).

Finally, and significantly, the majority's interpretation of "assign" as encompassing the daily assignment or distribution of tasks (or, in the healthcare context, patients) threatens to sweep almost all staff nurses outside of the Act's protection. Presumably, most nurses—as well as other professionals who work with assistants or as team leaders—routinely play a role in assigning out the day's work. The record in this case, for example, indicates that all hospital staff nurses have authority to give task assignments to other team members, such as nursing assistants and mental health workers. This is not an anomaly. It is commonplace in institutional health care settings for staff nurses to work with assistive personnel, such as nursing aides, to whom they assign and delegate work.[25] As of 2004, there were 2.2 million registered nurses, of whom 50 percent are employed in private sector hospitals, and another 6.5 percent are employed in nursing homes. Another 370,000 licensed practical nurses ("LPNs") are employed in hospitals and nursing homes.[26] It seems highly unlikely, to say the least, that Congress would take away with one hand (the definition of "supervisor") what it gave with another (the explicit statutory coverage of "professional employees"). And even if the statutory text permitted such a drastic result, what reasons of federal labor policy would support it? Denying the Act's protection to workers who have only minor supervisory responsibilities, and who are closely aligned not with management but with rank-and-file employees, is both contrary to Congressional intent and a recipe for workplace discord. The majority says that it is "not swayed to abandon [its] interpretation by predictions of . . . what the result in any given case will be." But the Board's proper function in this case, one of the most important in its history, must be to calculate the possible consequences of its reading of the Act and to weigh them against the evidence of Congressional intent. Nothing in the legislative history of the Taft-Hartley Act suggests that Congress intended to greatly broaden the scope of supervisory status, as it was understood at the time. Rather, as explained, it sought to exclude from statutory coverage an already well-recognized segment of supervisory employees, foremen and their equivalents. The majority's interpretation threatens to go much farther.

B. "Responsibly to direct"

It is because the "gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed

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example, *Douglas Aircraft Co.*, 50 NLRB 784, 787 (1943) ("As a general rule, it is our policy to exclude from the appropriate unit employees . . . who have authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of such employees, or whose official recommendations concerning such action are afforded effective weight").

[24] At the Employer's facility, charge nurses generally complete the shift assignments of patients to nurses in the half hour before the change in shift occurs. The vast majority of the charge nurse's day is spent doing rank-and-file duties, not supervising the other staff.

[25] A recent study by the Institute of Medicine indicates that

> 2.3 million unlicensed health care workers . . . supplement the work of licensed nurses by performing basic patient care activities under the supervision of an RN [registered nurse] or LPN/LVN [licensed practical nurse/licensed vocational nurse]. These unlicensed health care personnel hold a variety of job titles, including nurse assistants, nurse aides, home health aides, personal care aides, ancillary nursing personnel, unlicensed nursing personnel, unlicensed assistive personnel, nurse extenders, and nursing support personnel.

Institute of Medicine, *Keeping Patients Safe: Transforming the Work Environment of Nurses* 66 (2004). According to this study, registered nurses ("RNs")

> supervise other nursing personnel—LPNs/LVNs and NAs [nurse aides], as well as other RNs. Supervision activities include assigning and scheduling work, collaborating with staff to make patient care decisions, overseeing nursing staff performance and patient care quality, resolving problems, and evaluating performance. In addition, as non-nursing patient care services have been decentralized and located at the nursing unit as part of hospital reengineering initiatives, nurses have taken on responsibility for supervising non-nursing personnel (McCloskey et al., 1996).

Id. at 79.

[26] Bureau of Labor Statistics, U.S. Department of Labor, *2004-14 National Employment Matrix, detailed industry by occupation* (industry codes 622000 & 623000) at http://www.bls.gov/emp/empiols.htm. It is estimated that, by 2014, approximately 1.7 million RNs and 403,000 LPNs will be employed in private hospitals or nursing and other residential care facilities.

discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.'" *NLRB v. Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961). The majority fails to exercise that discretion adequately here.

1.

The majority's discussion of the statutory phrase "responsibly to direct" narrowly focuses on the meaning of the word "responsibly." It proposes a statutory test that rests on finding (1) that "the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly;" and (2) that the individual in question has "the authority to take corrective action, if necessary."[27] This test, the majority explains, is derived from federal appellate court decisions and is "consistent with the ordinary meaning of the word ['responsibly']."

The majority's approach is puzzling given its recognition of the origin of the statutory phrase: a floor amendment in the Senate, made by Senator Ralph Flanders of Vermont. He explained what the language was intended to accomplish:

> [T]he definition of "supervisor" in this act seems to me to cover adequately everything except the basic act of supervising. Many of the activities described in paragraph (11) are transferred in modern practice to a personnel manager or department. The supervisor may recommend more or less effectively, but the personnel department may, and often does, transfer a worker to another department on other work instead of discharging, disciplining or otherwise following the recommended action.
>
> In fact, under some modern management methods, the supervisor might be deprived of authority for most of the functions enumerated and still have large responsibility for the exercise of personal judgment based on personal experience, training, and ability. *He is charged with the responsible direction of his department and the men under him.* He determines under general orders what job shall be undertaken next and who shall do it. He gives instructions for its proper performance. If needed, he gives training in the performance of unfamiliar tasks to the worker to whom they are assigned.
>
> *Such men are above the grade of "straw bosses, lead men, set-up men, and other minor supervisory employees" as enumerated in the report* [the report of the Senate Committee]. *Their essential managerial duties are best defined by the words, "direct responsibly,"* which I am suggesting.
>
> In a large measure, the success or failure of a manufacturing business depends on the judgment and initiative of these men. The top management may properly be judged by its success or failure in picking them out and in backing them up when they have been properly selected.

Legislative History, supra, at 1303; 93 Cong. Rec. 4804 (May 7, 1947) (emphasis added).

In light of this legislative history, the concededly ambiguous phrase "responsibly to direct" must be recognized as a term of art and interpreted in light of Senator Flanders' statement on the floor. That statement (and not the dictionary or later judicial decisions) provides the best guide to Congressional intent.

2.

What Senator Flanders' statement demonstrates, in turn, is that the phrase "responsibly to direct" refers to the general supervisory authority delegated to foremen overseeing an operational department and the accountability that goes with it, in contrast to the kind of one-on-one task direction (mistakenly covered by the majority's interpretation of "assign") that would be given by minor supervisory employees (persons who themselves answered to the foreman) to other employees. What is missing from the majority's interpretation, then, is the recognition of the scope and scale of the supervisory function that "responsibly to direct" was intended to capture. More than simply the responsible oversight of another worker's performance of a task is involved.

Rather, the test proposed by the General Counsel in this case accurately captures the intent of Congress in articulating the analytical factors for determining the existence of "responsibly to direct" authority:

> An individual responsibly directs with independent judgment within the meaning of Section 2(11) when it is established that the individual:
>
> a. has been delegated substantial authority to ensure that a work unit achieves management's objectives and is thus "in charge";

[27] This prong of the test presumably means something less than the authority to discipline, or effectively recommend discipline, because such authority would be enough, in itself, to establish supervisory status under Sec. 2(11), which explicitly refers to the authority to "discipline other employees." On the other hand, if the test refers only to the authority to report and correct the errors of staff members, then it conflicts with longstanding Board authority. See, e.g., *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999); *Ryder Truck Rental, Inc.*, 326 NLRB 796, 796 (1998); *Ohio Masonic Home*, 295 NLRB 390, 394 (1989); *Eventide South*, 239 NLRB 287, 288 (1978).

b. is held accountable for the work of others; and

c. exercises significant discretion and judgment

in directing his or her work unit.

This test differs crucially from the majority's construction in requiring oversight with respect to a work unit.[28]

3.

Contrary to the majority's apparent suggestion, the aim of the Flanders amendment was *not* to cover every "person on the shop floor" with any sort of supervisory authority, but rather to insure that *foremen* would be treated as statutory supervisors, even if they lacked the types of supervisory authority listed in the bill when it came to the Senate floor. The acknowledged purpose behind the Taft-Hartley Act's express exclusion of supervisors was to overturn the result of the Supreme Court's decision in *Packard Motor Car*, supra, which had upheld the rights of foremen to organize under the provisions of the Wagner Act. Replete in the legislative history are statements demonstrating that it was "unions of foremen" that Congress was intent on addressing. See *Legislative History*, supra, at 299, 304–307, 410–411, 539, 603–604, 1008–1009, and 1496. Senator Flanders' statement echoed the Board's own contemporaneous description of the authority and duties of foremen in the *Packard Motor Car* case, which emphasized the foreman's reduced authority over personnel matters such as hiring, firing, and discipline, coupled with his critical oversight role in the production process. See *Packard Motor Car Co.*, 61 NLRB 4, 10-12 (1945), enfd. 157 F.80 (6th Cir. 1946), affd. 330 U.S. 485 (1947).[29]

The Flanders amendment, then, clearly sought to capture the essential elements of the manufacturing foreman's authority and responsibility, with regard to "responsible direction of his *department* and the men under him." *Legislative History*, supra, at 1303 (emphasis added). A contemporary treatise described the foreman as "a manager of a business within a business," observing that "[i]n his department he is responsible for a considerable investment in equipment, work space, material, and labor." *Vitalizing the Foreman's Role in Management*, supra, at 4. Similar descriptions were commonplace at the time. See, e.g., U.S. Dept. of Labor, Div. of Labor Standards, *The Foreman's Guide to Labor Relations (Bulletin No. 25)* 3–4 (1944).

The foreman, in turn, was distinct from the "minor supervisory employees" referred to in the Senate committee report. As explained, such workers may have directed certain other employees in the performance of their tasks—and might well have been held accountable in that connection. But their supervisory duties were incidental to their own productive work, and they were not in charge of a work unit, nor did they exercise (in Senator Flanders' words) "essential managerial duties," in the same sense as the foreman, their superior.[30]

As the legislative history makes clear, the statutory phrase "responsibly to direct" was premised on the management model then common in manufacturing. The Board's task, of course, is to apply the Act today and to all economic sectors. It is not free, for example, to hold that the responsible-direction test can be satisfied only in workplaces that are indistinguishable from the automobile-manufacturing plants of the 1940s. But, in determining whether a putative supervisor has the authority "responsibly to direct" other employees, the Board must consider that person's place in the supervisory hierarchy of the workplace and determine whether her function is analogous to that of the traditional foreman. The majority's narrow test fails to do so and thus fails to capture the intent of Congress.[31]

The majority's interpretation of responsible direction eliminates the Congressionally intended distinction between individuals with "essential managerial duties" and those with only "minor supervisory" duties. Under the majority's test, any worker who instructs another to per-

[28] The majority observes that "prong (c)" of this test is consistent with its interpretation of "independent judgment." We do not disagree. The General Counsel's test, which we endorse, is intended to integrate the concepts of responsible direction and independent judgment.

[29] In a 1944 paper, one industry representative explained that a foreman "was responsible for everything that took place within his department, but . . . his range of authority was very limited" because the foreman had "no final control over hiring or a voice in discharge, discipline, promotion, transfer and handling of grievances." F.J. Van Poppelen, *The Foreman's Privileges and Authority*, reprinted in American Management Association, *The Foreman in Labor Relations (Personnel Series No. 87)* 21 (1944). See generally Peter Cappelli, "Market-Mediated Employment: The Historical Context," in *The New Relationship: Human Capital in the American Corporation* 77–78 (Margaret M. Blair & Thomas A. Kochan, eds. 2000).

[30] See, e.g., *Vitalizing the Foreman's Role*, supra, at 5; Nelson Lichtenstein, "The Man in the Middle": A Social History of Automobile Industry Foremen, in *On the Line, Essays in the History of Auto Work* 157 (N. Lichtenstein & S. Meyer, eds. 1989) (discussing roles and relationships of foreman and lead man, set-up man, and straw boss). See also U.S. Employment Service, *Dictionary of Occupational Titles*, supra, at 1506 (definition of "straw boss"); *Roberts Dictionary of Industrial Relations* 114, 121, 219, 407 (1st ed. 1966) (definitions of "foreman," "leadman," "straw boss," and "gang boss").

[31] Recognizing that the scope of "responsible direction" is an entire department or operating unit is consistent with the Supreme Court's statement in *Kentucky River*, noted above, that Sec. 2(11) may contemplate a distinction between "employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*. . . ." *Kentucky River*, supra, 532 U.S. at 720. This reading, moreover, maintains the internal consistency of Section 2(11): "responsible direction," like each of the other enumerated functions, reflects a management prerogative with the capacity to materially affect employees' basic employment terms.

form a task, no matter how minor it may be, would be a statutory supervisor, if he exercises independent judgment and is held accountable by the employer in connection with that instruction. Thus, in *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), issued today, the majority's application of its test leads to a conclusion that nurses who tell certified nursing assistants "to clip residents' toenails and fingernails, to empty catheters, or to change an incontinent resident" would be supervisors, so long as the responsibility and independent judgment elements of the majority's definition were satisfied—and employers eager to take nurses out of the Act's protection might well choose to hold them accountable for such minor matters. By taking such an expansive approach to the interpretation of responsible direction, the majority dramatically increases the number of potential statutory supervisors. Indeed, it is difficult to see who would be left in the category of minor supervisory employees that Congress clearly intended to protect.

C. "Independent Judgment"

Under Section 2(11), the exercise of supervisory authority must "require[] the use of independent judgment" before a person will be deemed a statutory supervisor. We agree with the majority's view that, in the wake of the Supreme Court's decisions in this area, the Board must apply a uniform test with respect to "independent judgment,"

> irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise.

The majority's proposed test, in turn, is a reasonable one. First, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Second, even if this standard is met, the individual's action or effective recommendation must not be "of a merely routine or clerical nature" (in the words of the Act).

The difficulty here lies not in the statement of a general test, but in the application of that test to specific cases. What does it mean, for example, for a putative supervisor to act "free of the control of others"? We agree with the majority that "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." The very existence of policies, rules, and instructions surely demonstrates that a putative supervisor *is* subject to the control of others, insofar as he is neither the author of those standards or the final arbiter of their meaning. And because rules are rarely self-executing—apart from applying mathematical formulas—it seems inevitable that there will often be some room for judgment in interpreting them. The question is how much and what measure of discretion is sufficient. The majority properly acknowledges that "[t]here may be instances where instructions do not strictly dictate a sequence of actions, but nonetheless constrain the exercise of discretion below the statutory threshold."

We see no way to resolve these issues except on a case-by-case basis, rather than through hypothetical examples. The Board's determinations in specific cases should be guided not by the dictionary or abstract considerations, but by practical realities viewed in light of the Congressional intent to exclude foremen and their equivalent, but not minor supervisory employees, from the Act. We take no view, then, on the specific examples offered by the majority, except to disagree that, in the health care setting, assigning patients to nursing personnel or making other task assignments confers supervisory status, even if it is done using independent judgment.

III.

Applying our interpretations of "assign . . . other employees" and "responsibly to direct," none of the charge nurses whose status is at issue in this case are statutory supervisors. This case illustrates well the gradations of supervisory authority possible in a workplace and why the Board must carefully take them into account, if it wants to be faithful to Congressional intent.

A.

In each of the Employer's hospital units, there exists an established hierarchy of admitted supervisors.

At the top level in the hospital is the nurse site leader, a position comparable to a director of nursing in other hospitals.

Below this position are clinical supervisors who rotate serving as the principal nursing supervisor and highest-ranking administrative officer during holidays, weekends and off-hour shifts when the nurse site leader is not present. These clinical supervisors make daily rounds of all the units and are responsible for ensuring adequate unit staffing and, as described by the hospital's nurse site leader, "keeping the hospital open and running."

Each unit is then directly overseen by a clinical manager who develops the budgets, finalizes schedules, develops policy for the unit and does the hiring, firing and disciplining of employees. These managers generally are responsible for more than one nursing unit. They perform no clinical nursing work. The clinical managers are listed as the designated supervisors for staff nurses on

job descriptions and serve as the Employer's first step representative under its written grievance procedure. In all but two departments, the clinical managers are assisted by assistant clinical managers who are part of the management team, substitute in the absence of the clinical manager, assist the clinical manager in evaluations, scheduling staff, handling patient, physician and employee complaints, and directly oversee the individual unit to which they are assigned. The assistant clinical managers also have no bedside patient care responsibilities.

In contrast, charge nurses spend the vast majority of their time in line work—a fact that strongly tends to establish their status as minor supervisory employees. Charge nurses, among other duties: (1) monitor patients in the unit; (2) check doctor's orders for each patient; (3) respond to requests and questions from the patients' doctors and family members; (4) take inventory of the "crash" carts and restricted narcotic medications; (5) report acute changes in a patient's status or unit problems to the clinical manager; (6) gather factual information and fill out incident reports; and (7) provide statistical information to the Hospital's administrative staff. It is also common for charge nurses to take on individual patient assignments, engaging in the same direct patient care work as other staff nurses. Charge nurses have no formal role in the employee grievance process and do not otherwise serve as management representatives on matters that impact employee status.

B.

With respect to assignment authority, the charge nurses have no authority to determine an employee's job classification, designated nursing unit, or work shift. Rather, nurse managers and nursing supervisors assign the staff nurses to the particular units and work shifts.

As demonstrated earlier, the authority of charge nurses to assign patients to staff nurses, or generally to assign tasks already within the basic job duties of staff employees, is not a supervisory function under Section 2(11), properly interpreted.[32]

Job descriptions define the staff nurses' essential job responsibilities and reflect that each staff nurse "[u]nder general direction, provides direct care to patients utilizing the nursing process." Under the Employer's evaluation system, bedside staff nurses are held expressly accountable for meeting a basic set of competencies, which includes "knowledge of the special needs and behaviors of specific patient age groups and the ability to produce the results expected from clinical interventions" (E. Exhs. 16 & 15). In short, once assigned to a particular unit, staff nurses are expected to be able to care for any unit patients. That a unit staff nurse is tasked on one day to provide nursing care to unit patients in rooms "A", "B" and "C" and on another day to care for unit patients in rooms "D", "E", and "F" does not affect the nurse's overall status or situation, much less alter her tenure or other basic terms and conditions of employment. Such an assignment is simply a means of distributing the day's work among peers and/or other staff.

C.

With respect to responsible-direction authority, charge nurses do not have basic operational responsibility for their units: they do not decide staffing, scheduling or budgets that determine the overall direction and functioning of the unit. They are not held accountable for the overall performance of their unit. Indeed, as the majority correctly recognizes, charge nurses are not even accountable for the performance of assigned tasks by other employees. In no real sense, then, are the charge nurses *in charge* of their units, despite their titles. That status, rather, belongs to the clinical managers. In the Employer's workplace, these clinical managers—not the charge nurses—are the equivalent of foremen.

D.

In sum, none of the charge nurses whose status is at issue are supervisors within the meaning of Section 2(11) of the Act. We accordingly concur in the result reached by the majority with respect to the emergency room charge nurses and the rotating charge nurses.[33][34] We

[32] Accordingly, it is immaterial whether or not performing this function requires the use of independent judgment. However, we observe that there is much evidence in the record that the Employer's charge nurses make assignments to staff nurses on a rotating basis or simply to equalize the workload among them, rendering it unlikely that making such assignments requires the exercise of independent judgment. See *Ten Broeck Commons*, 320 NLRB 806, 810 (1996); *Providence Hospital*, supra, 320 NLRB at 727.

[33] The majority asserts that under current Board law, nurses who rotated into a supervisory position might be deemed supervisors if the "employees have served in a supervisory role for as little as 10–15 percent of their total work time." We disagree. A supervisory position that is filled by *rotation* among a group of employees into a supervisory position requires a different analysis than *substitution* by an individual employee for a regular supervisor. See *Providence Hospital*, supra, 320 NLRB at 733 ("Statutory supervisory authority is not shown by the limited authority of a charge nurse team leader on one day to 'supervise' coequal RNs, some of whom may on another day 'supervise' their equals including the charge nurse"), citing *General Dynamics Corp.*, 213 NLRB 851, 859 (1974).

More generally, to the extent that supervisory functions are now defined more broadly than ever before, the Board should not find supervisory status unless supervisory duties require a significant percentage of a putative supervisor's worktime. The Board's approach in this area is ripe for reconsideration. See generally *Detroit College of Business*, 296 NLRB 318, 320–321 (1989) (rejecting earlier Board view that supervi-

dissent from the majority's finding that the permanent charge nurses are statutory supervisors.

IV.

The consequences of today's decision, among the most important in the Board's history, will take time to play out. They depend, in some measure, on how the Board applies in practice the principles announced here, on whether the federal appellate courts uphold those principles, and on the extent to which employers seek to take advantage of the Board's decision. In our view, the majority has followed a mistaken approach to statutory interpretation that, not surprisingly, leads it far beyond what Congress contemplated in 1947 when it addressed the unionization of foremen. The result could come as a rude shock to nurses and other workers who for decades have been effectively protected by the National Labor Relations Act, but who now may find themselves treated, for labor-law purposes, as members of management, with no right to pursue collective bargaining or engage in other concerted activity in the workplace. Indeed, supervisors may be conscripted into an employer's anti-union campaign, while their pro-union activity is now strictly limited.[34] The majority's decision thus denies the protection of the Act to yet another group of workers, while strengthening the ability of employers to resist the unionization of other employees. Accordingly, we dissent.

Dated, Washington, D.C. September 29, 2006

Wilma B. Liebman, Member

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

. . .

The Employer, Oakwood Healthcare, Inc. (OHI) owns and operates a large network of hospitals and related health care enterprises. Its Oakwood Healthcare System (OHS) operates four acute-care hospitals;[4] neighborhood and occupational health care centers; specialty care centers for mammography, cardiac rehabilitation, sports medicine, and adolescent health; numerous foundations; and various ancillary services such as laboratories and pharmacies. The Petitioner seeks to represent a unit of approximately 220 registered nurses (RNs) employed at a single acute-care hospital, Heritage.

. . .

Heritage Hospital is an acute-care hospital with 257 licensed beds. Heritage has medical surgical areas, intensive care and intermediate care, ER and OR services, rehab services, and psychiatric/behavioral health services. These services are divided into the following units within the hospital: Medical/surgical west (MSW), medical/surgical east (MSE), behavioral health (BH), post anesthesia care unit/recovery (PACU); rehab, intermediate care unit (IMU), intensive care unit (ICU), emergency department (ER), and operating room/anesthesia department (OR). The pain clinic at Heritage is an outpatient clinic for patients who are being treated for chronic pain.

. . .

The chief administrative officer at Heritage is Rick Hillbom, who reports to [Joseph] Diedrich, the chief operating officer of OHI. Brenda Theisen, nursing site leader and director of patient care services at Heritage, reports to Hillbom regarding daily operations at Heritage. Theisen also reports to Barb Medvec, the chief nursing officer of OHS. The nursing site managers at Seaway, OHMC, and Annapolis also report to Medvec.[5] Medvec and Diedrich do not work on site at the Heritage facility. As the nursing site leader at Heritage, Theisen is responsible for anything having to do with nursing care that is delivered by the hospital, although she does not directly supervise nurses on a day-to-day basis.

Reporting to Theisen at Heritage are clinical supervisors (also known as nurse supervisors or house supervisors) and clinical managers (also known as nurse managers).[6] Clinical supervisors generally work on off shifts, such as afternoon shifts, midnights, holidays, and weekends. When they work they cover the entire hospital, nursing as well as every department within the hospital. Only one clinical supervisor works on a particular shift at a given time. The clinical supervisors do not spend too much time in a particular unit because they are overseeing the entire hospital. They spend considerable time in the ER, because they have to attend to any code (code

sory status requires finding that supervisory duties consume 50 percent or more of individual's time).

[34] See *Harborside Healthcare, Inc.*, 343 NLRB 906, 917–918 (2004) (dissent).

[4] The hospitals include Oakwood Heritage Hospital (Heritage); Oakwood Hospital and Medical Center (OHMC); Oakwood Annapolis Hospital (Annapolis); and Oakwood Seaway Hospital (Seaway).

[5] The parties stipulated at the hearing that Hillbom, Theisen, Medvec, and Deidrich are all statutory supervisors within the meaning of the Act based on their authority to discipline and independently direct employees.

[6] The parties stipulated, and I find, that clinical supervisors and clinical managers are supervisors as defined in Sec. 2(11) of the Act based on their authority to discipline and independently direct employees.

blue, respiratory or cardiac arrest of a patient) that occurs. They also look at staffing for the next shift, call agencies or additional staff if needed, and document call-offs if someone is calling in sick. They also address any problems that may arise during their shift (i.e., fire alarm going off, flood). When on duty, the clinical supervisor is the highest ranking administrative officer in the facility.

Clinical managers are responsible for several units in distinct geographical areas within the hospital. Clinical managers are all RNs. They normally work the day shift, and they oversee the units that they are responsible for as far as developing a unit budget, finalizing schedules, and drafting schedules that have been submitted by the nursing staff. They work on development of policy for their units, and attend meetings, corporate as well as site meetings and department meetings. They are not regularly engaged in actual clinical work/nursing functions. They each have an office located within one of their units. They are on call 24 hours a day, and address the day-to-day issues and problems that arise within their units, assuming such problems cannot be addressed at a lower level. Clinical supervisors and clinical managers are salaried positions.

There are eight assistant clinical managers (also referred to as assistant nurse managers or ACMs) who report to the nurse managers.[7] The ACMs are part of the management team and as such attend meetings, assist with schedules, and cover the clinical manager's responsibilities when the clinical manager is not in the building doing administrative functions. Not every unit has an ACM. The clinical managers direct the duties of the ACMs. They work various shifts, determined by the clinical manager with whom they work. The position was created to enable the clinical manager to cover multiple units. The ACMs also handle day-to-day issues and problems if needed.

All registered nurses at the hospitals report directly to on-site nursing supervisors. With the recent advent of "service line" reporting configurations, however, the upper reach of supervisory hierarchy for nurses in certain specialties includes individuals who oversee that nursing specialty at more than one site. Nonetheless, the development of "service lines" has not erased the primacy of first-line supervision nor diminished the authority of the nursing site leader. A communication chain of command is contained in several written directives issued by the corporate human resources department and approved by the acute-care nursing operations council. These policies specify that a nurse or charge nurse encountering any sort of patient, operational, or ethical problem is expected to notify a clinical manager or clinical nurse supervisor. The latter contacts the nursing site leader, who consults with the site administrator, service line leader, or risk manager as deemed necessary. (Footnote omitted.)

Staffing and scheduling guidelines emanate from the corporate human resources department. These precepts are further refined by the acute-care nursing operations council. The work schedule for nurses on each nursing unit must be posted for 4 weeks. The corporation has adopted what is considered a standard work day, and also offers nurses the option of working alternative schedules. Within these parameters, specific choices of unit shifts (days, evenings, midnights, or rotation) and hour patterns (4-hour, 8-hour, 10-hour, or 12-hour) are established by the unit's clinical manager. Requests for shift changes must be made in writing and submitted to the clinical manager. Employees may adjust their schedules by trading with colleagues, but all trades must be requested of and approved in advance by the clinical manager. The amounts of allotted vacation time, sick leave, and personal time are centrally prescribed, but specific requests for vacation time and other leave are submitted to and acted upon by the nurse's immediate site supervisor. In particular, the clinical manager sets the limit on the number of simultaneous vacations that she will allow.

OHS enforces an across-the-board policy forbidding mandatory overtime, but overtime will be scheduled and offered in emergencies. The clinical manager or clinical nurse supervisor determines whether an emergency exists, and all overtime must be approved in advance by those individuals. The corporation has a uniform attendance program that correlates discipline with the number of unexcused absences. The clinical manager has discretion to characterize an "emergency" absence as excused and an undocumented absence as unexcused.

Staffing guidelines are centrally determined, and are based on prescribed criteria such as patient census and acuity. The clinical nurse supervisor is responsible for assuring that adequate staff is available and for initiating the use of overtime, system or in-house flex pool nurses, or outside agency nurses to cover staffing shortages. Each hospital's nursing site leader maintains 24-hour accountability and availability to assure that appropriate staffing levels are continuous.

An inter-site nursing leadership council has devised detailed job descriptions for each nursing position. As noted above, each job has a set wage range from which site managers may not vary. A newly hired or transferred nurse is assigned a wage rate within the range

[7] The parties stipulated, and I find, that ACMs are supervisors as defined in Sec. 2(11) of the Act based on their authority to discipline and independently direct other employees.

based upon her level of experience, in accordance with a centrally determined grid. How years of experience for this purpose are counted or weighted is not disclosed in the record. The wage ranges for each job classification are uniform across the four acute-care hospitals.

All employees subject to the handbook receive periodic performance appraisals, prepared by immediate site supervisors on centrally prescribed forms. The supervisor assigns a numerical rating in specific areas, and the individual ratings are converted, in accordance with a predetermined formula, into an overall score. As stated in the handbook, all employees with a final score of 100 or more are entitled to whatever across-the-board pay increase that the Employer chooses to implement. Any applicable pay increase will be the same for all eligible employees, regardless of the exact appraisal score.

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At Heritage, there is some variability with the staff nurse position depending on the department, but in general, there is one written job description that generally applies to RNs working throughout the hospital. The description states that RNs are responsible for providing direct care to patients utilizing the nursing process under general direction, guiding and supervising nursing personnel, collaborating with other health care professionals, and coordinating ancillary staff.

The clinical manager reviews the job description with the nurses when they have their annual performance appraisals. Among other things, the RNs are evaluated in their performance appraisals on their ability to act as a resource person for trouble-shooting, contributing to the professional growth of peers, colleagues, and others; precepting and mentoring; and ability to perform as a charge RN.

The type of work performed is basically what is dictated by their profession, based on the education and experience of an RN. They follow doctor's orders, which are usually written instructions as to what type of treatment is needed, including administering blood tests, passing medications, and observing patients more closely. For every task performed by a nurse, there is a very specific policy and procedure in writing. However, long-time RNs generally do not need to refer to the policy and procedure manuals because of their experience, and many of the RNs working at Heritage have worked for the Employer for over 10 years.

The employees working with the RNs are typically employees such as mental health workers, who assist in the behavioral health department; licensed practical nurses (LPNs), who are licensed to perform certain nursing tasks but not the full duties of an RN; nursing assistants, who generally work with and assist RNs with daily tasks; desk secretaries, who answer telephones, answer call lights from patients, and enter orders for patients; nurse externs, who are nursing students who have not yet graduated; graduate nurse externs, who are nursing students who have graduated but have not yet passed their exams or received their license; or techs and surgical techs, who assist staff nurses with the care of a patient undergoing surgical intervention, and ER techs and paramedics, who work in the emergency department to assist the staff working in the ER.[10] The job descriptions of the majority of these positions state that they work under the direction of the RN. Most are also evaluated on whether they follow directions appropriately to meet the demands of the unit and the staff. The RNs are responsible for anyone else working under the RN level. This responsibility of "guiding and supervising nursing personnel" and/or "demonstrat[ing] effective leadership and professional development" is a criterion under which RNs are evaluated during their performance appraisals.

RNs may assign mental health workers, nursing assistants, techs, or other less-skilled employees to do certain tasks that are within their ability. For example, they may assign a mental health worker to work with a group of patients, or they may instruct a nurse assistant to give a patient a bath, walk a patient to the bathroom, or give a patient a meal. They assign these tasks to the nurse assistants because that is what a nursing assistant's job is—to assist the staff. If something more important comes up, the RN may interrupt that task and assign the nurse assistant to something else. Nursing assistants and techs are also aware of certain jobs they can do and will take it upon themselves to do these jobs, without first being told. It would be insubordination if a nurse assistant refused to listen to the RN, and the RN could go to a superior to intervene. However, it could be proper for an assistant to refuse a task for good reason, such as if they were busy on a different assignment. Regardless, no situation has arisen where an assistant or other worker refused to perform a task. If this did occur, RNs do not believe that they have the authority to do very much about it other than going to the clinical manager, as they have no role in disciplining employees.

The RNs do not rotate shifts. They work straight shifts; day, afternoon, or midnight, or 12-hour shifts, which are ordinarily day shifts (7 a.m. to 7 p.m.) or midnight shifts (7 p.m. to 7 a.m.). However, they do take turns rotating the responsibility of charge nurse. On every shift in each unit, except the pain clinic, there is one RN assigned to work as a charge nurse. At times,

[10] The nursing assistants are the only employees mentioned in this group that are represented by a Union, Local 79.

however, assistant clinical managers have filled in as charge nurses. In particular, in late 2001, assistant managers filled in as charge nurses to decrease agency nurse hours.

Rotating charges are individuals who occasionally take charge nurse responsibilities in a unit. The frequency with which it happens depends on the size of the unit and the number of RNs that occasionally rotate. A permanent charge is a person who has requested to and agreed to be in permanent charge; each time they work, they work as a charge nurse. The duties of a charge nurse, whether rotating or permanent, are the same. RNs are paid hourly. They earn $1.50 more per hour when they are working as a charge nurse.

In the IMC department, if the assistant nurse manager is not there to take charge, they rotate the responsibility of charge nurse. Sometimes it is assigned by the clinical manager on the schedule, and sometimes it is not. If it is not assigned, then they take turns. RN Coffee testified that she is a charge nurse approximately one to two times during a 2-week schedule.[11] Similarly, RN Welch testified that her work schedule in the ER indicates when she is assigned to the charge nurse responsibility. The schedules come out in a 4-week timeframe. As with Coffee, in a 2-week timeframe, she is usually in charge once or twice.

RNs must have at least 1 year of nursing experience to act as charge nurses. RNs learn the responsibilities of a charge nurse through their education, and by initially working with a preceptor, or mentor. Preceptors will work along with the RNs as charge nurses until the RNs are able to perform the job on their own.

Some RNs choose not to be in charge at all and there is not necessarily a permanent charge on each unit. However, a review of Employer's Exhibit 12 reflects that a majority of RNs, with the exception of those working at the pain clinic and in the operating room, take turns rotating as charge nurse. It appears from the record that most of the RNs who are not rotating are newer employees who are not yet ready to take on the charge nurse responsibilities. Also shown by Exhibit 12 is that only approximately 11 nurses are permanent charges.[12] In the behavioral health unit, every RN is a rotating charge or a permanent charge. Where there is a permanent charge on a particular shift, the rotating charges on that shift take turns acting as a charge nurse on the days when the permanent charge is not working.

Charge nurses are responsible for overseeing the unit for the shift that they are working, with the staff who are working the unit that day. They do the assignments of all the staff that are working on that shift. They monitor in general all the patients that are in the unit that day, and meet with physicians if a physician has an issue with a nurse or with a patient. They also meet with patients or family members who have a complaint. Some responsibilities vary within each unit. If a variance occurs during a shift, such as a medication error, patient fall, or any other incident, a form called a "quality assessment report" is filled out. The charge nurse is responsible for following up with the incident by examining the patient, and signing the report as the "person in charge." If necessary, the charge nurse will call a physician to evaluate the patient.

RNs are sometimes pulled to work in other units, but not if they are assigned to work on charge duty. If it is a nurse's turn to be pulled, and she is on charge duty, she will stay on that shift and go the next time. When RNs are pulled to work in other units, it usually happens at the start of the shift. The charge nurse is informed that a nurse is needed in another department, and is given the names of the nurses who are to be pulled by the clinical supervisor from the previous shift. Charge nurses can also be called in the middle of the shift—a supervisor may inform the charge nurse that one of her nurses is needed in another unit. The charge nurse cannot refuse that request. If the charge nurse refused to send someone, there would be disciplinary action. The charge nurse does not assign employees to shifts; that is done by a staffing office. When the charge nurse comes in, she is handed a list (prepared by the supervisor on the previous shift) of the nurses who are supposed to be working that day on her shift. If nurses on the list do not show up, the charge nurse calls the staffing office to find out where that person is.

OHS has a policy for the assignment of nursing personnel to provide adequate numbers of licensed staff and other personnel to deliver care to patients. Under this policy, assignments are to be made in accordance with the patient's need. In making assignments, the charge nurse must determine the acuity of the patient and determine the level of skill required to care for the patient—i.e., RNs can perform certain tasks that cannot be performed by LPNs, etc. Level of experience of the nurse, determining which nurses work well together as a team, as well as other activities that a particular nurse may also be responsible for, are also considered. On occasion, assignments will be changed mid-shift; for example, if there is a change in a patient's condition such that different care is warranted. The charge nurse also assigns

[11] Coffee works part-time, which is 5 days out of every 2 weeks. As such, she is charge nurse approximately 2 out of every 5 days that she works.

[12] The majority of the permanent charges work in the behavioral health unit.

nursing assistants or mental health workers either to particular patients or to work alongside specific RNs. After receiving their general assignment, the RN and/or the charge nurse may assign them more specific tasks such as giving a patient a bath, etc. Charge nurses are also responsible for assigning breaks and lunches to other employees. However, they do this by asking the other nurses when they would like to take their break, and their main goal in assigning breaks is to make sure the unit is covered at all times.

At times RNs may complain about particular assignments. The charge nurse can reevaluate and make changes in assignments if appropriate. This could occur if a patient requires more work than expected, or if a patient's condition changes which requires more treatment or attention. However, the record does not indicate any instances of a serious conflict based on job assignments. Furthermore, RNs usually work together to help each other out, as a common courtesy of their profession. If RNs need help with a patient, they may go directly to another nurse and ask rather than going to the charge nurse. Many of the tasks handled by the charge nurse, including complaints of family members, can be handled by any RN. One RN testified that she does not interact any differently with other RNs on staff when she is a charge nurse compared to when she is not.

Some charge nurses may take patient assignments in addition to their other responsibilities. Whether or not a charge nurse takes an assignment typically depends on what department they work in and on what shift they work. Charge nurses on each shift are responsible for deciding whether or not they take assignments. Charge nurses frequently do take patients, although they will often take fewer patients than the other staff nurses on duty.

The assignment of staff nurses to patients is much more perfunctory in practice than the Employer's written assignment policy indicates. The assignment of work is generally rotated, or based on where a person worked the previous day. When making assignments as a charge nurse, reference is made to a staffing sheet showing where everyone worked the day before. It usually takes only a few minutes to do the assignments. There was testimony that the main responsibility of the charge nurses is to be familiar with what is going on in their particular units, and to basically be the go-to person for questions or issues that arise. For example, in the ER the charge nurse has to answer the clinical supervisor's or manager's inquiries about whether there will be patient admissions. This will determine whether extra staffing is needed for a particular unit, such as ICU.

When the nurses arrive for their shifts in the IMU, they all listen to the report from the charge nurse of the previous shift. Then the charge nurse makes the assignments by asking who knows which patients have the highest acuity (these patients are referred to as the "completes"). They get a slip from the staffing office showing who is supposed to be there that day. The charge nurse then makes out the assignments. First, the completes are divided up evenly. After that, they look at who was there the day before, and try and give them the same assignment they had in order to maintain continuity. In IMU, nurse assistants make out their own assignments.

The charge nurse in IMU is also responsible for assigning beds to new patients or transfers from ICU. When determining where to assign the new patient as far as the staff is concerned, the charge nurse will go by who did an admission the day before—or, who currently has three patients instead of four. If necessary, the charge nurse may assign the patient to herself. If everyone had a full load, she would go to the manager. It also becomes necessary to reassign patients to different staff, if, for example, there is a personality conflict between a nurse and a patient. This could be handled by asking another nurse if she would take the patient. It is questionable whether the charge nurse has the authority to force another nurse to take another patient.

Generally, it is the clinical manager who hires, fires, and handles conflicts within the unit. They also handle performance evaluations, finalize schedules, and handle staffing issues and patient complaints. The assistant manager also does these things. Charge nurses do not make the decision to hold someone past the end of their shift if they are short staffed, nor do they authorize overtime. Charge nurses can be, and have been, disciplined by clinical managers.

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Section 2(3) of the Act excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "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 merely of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted 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); *Allen Services Co.*, 314 NLRB 1060 (1994).

On May 29, 2001, the Supreme Court issued its decision in *NLRB v Kentucky River Community Care*, 532 U.S. 706, 121 S.Ct. 1861 (2001), wherein the Court upheld the Board's longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. See *Ohio Masonic Home*, 295 NLRB 390, 393 fn. 7 (1989); *Bowne of Houston, Inc*., 280 NLRB 1222, 1223 (1986). However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." 121 S.Ct. at 1863. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. See *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001). However, the Court did agree with the Board in that the term "independent judgment" is ambiguous as to the *degree* of discretion required for supervisory status and that such 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." 121 S.Ct. at 1867. In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." 121 S.Ct. at 1871. See *Majestic Star Casino*, 335 NLRB 407 (2001).

For instance, direction as to a specific and discrete task falls below the supervisory threshold if the use of independent judgment and discretion is circumscribed by the superior's standing orders and the employer's operating regulations, which require the individuals to contact a superior when anything unusual occurs or when problems occur. *Dynamic Science, Inc.*, 334 NLRB 381 (2001); *Chevron Shipping Co*., 317 NLRB 379, 381 (1995).

In the instant case, there is no evidence that the RNs, whether acting as a charge nurse or a staff nurse, have independent authority with respect to the hire, promotion, demotion, layoff, recall, reward, or discharge of employees. They do not make staffing decisions, and they do not authorize overtime. The Employer rests its claim of supervisory authority primarily upon other indicia, i.e., the alleged ability to adjust grievances, and the alleged authority to assign and direct the work of less-skilled employees.

There is no evidence that the charge nurses are empowered to adjust any formal employee grievances. Charge nurses are not part of the grievance process outlined in the Local 79 contract covering other members of the nursing staff. For the most part, complaints or disputes brought by the nursing staff to the charge nurse that cannot be resolved quickly in an informal manner are relayed to supervision. See *Ken-Crest Services*, 335 NLRB 777 (2001). Furthermore, there is a lack of evidence that RNs have actually adjusted grievances. The limited authority exercised by charge nurses to resolve interpersonal conflicts among employees does not confer supervisory status. *St. Francis Medical Center-West*, 323 NLRB 1046, 1047–1048 (1997).

For every task performed by an RN, there is a very specific policy and procedure in writing. These procedures are available for review by the RNs in their work area; however, some of the more experienced RNs do not need to refer to the policies and procedures on a regular basis due to their length of experience. The limited authority of RNs to assign discrete tasks to less-skilled employees, based on doctor's orders, hospital policy and procedures or standing orders, or what is dictated by their profession, does not require the use of independent judgment in the direction of other employees. *Ferguson Electric Co.*, 335 NLRB 142 (2001). The RNs do not evaluate the work of the less-skilled employees or ensure that they have completed a task or done so correctly.

The Employer asserts that charge nurses exercise independent judgment when they assign staff nurses to particular patients or beds, by matching the level of experience of the employee with the level of acuity of the patient. However, the Employer has a very detailed written policy for the assignment of patients by charge nurses or assistant clinical managers. Pursuant to this policy, it is the responsibility of clinical managers or assistant clinical managers to ensure adequate staffing levels and the composition of staff as to skill level when it comes to caring for the patients in a particular unit. Direction as to specific and discrete tasks and even the assignment of employees detailing when and where they are to carry out their duties falls below the supervisory threshold if the use of independent judgment and discretion is supervised by the superior's standing orders and the employer's operating regulations. *Dynamic Science, Inc.*,

supra, 334 NLRB at 381; *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Furthermore, the weight of the evidence suggests that in practice, the assignments are routine in nature, and are based mainly on principles of fairness and the even distribution of work. *Byers Engineering Corp.*, 324 NLRB 740 (1997); *Providence Hospital*, supra; *Ohio Masonic Home*, supra. For the most part, the schedule is based on the schedule from the previous day, and providing continuity for the patients. Finally, the RNs work together to resolve any problems with patient assignments, based on the very nature of the rotating charge nurse position. A charge nurse assigning a patient to a staff nurse one day can the next day be assigned a patient from that same staff nurse when the roles are reversed. A charge nurse also assigns break times for other employees. However, the charge nurse generally sets up the break times in order to ensure coverage on the floor, and receives input from the nursing staff as to when they would like to take their break.

The Employer submits that if RNs are not supervisors, the ratio of nursing supervisors to nursing staff would be preposterous. However, on the other hand, if all staff nurses are found to be supervisors, the ratio of nursing supervisors to nursing staff would be one supervisor for less than every two employees. *Naples Community Hospital*, 318 NLRB 272 (1995); *Essbar Equipment Co.*, 315 NLRB 461 (1994); *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1550 fn. 3 (6th Cir. 1992). Furthermore, clinical supervisors, assistant clinical managers and/or clinical managers are present or on call 24 hours a day to handle any problems that may arise. Consequently, I find that the RN staff nurses/charge nurses are not statutory supervisors.[14]

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[14] Due to the rotating nature of the charge nurse position, the frequency with which each RN serves as a charge nurse varies. Some are permanent charges; some spend nearly half of their time as a charge nurse, and some are hardly ever in charge. Because I find that the charge nurses, whether permanent or rotating, do not exercise statutory supervisory authority, the frequency with which a particular nurse may serve as a charge nurse is not controlling.