No. 99-1815

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

KENTUCKY RIVER COMMUNITY CARE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes the employee a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).

2. Whether the Board permissibly requires the party who alleges that an employee is excluded from the rights and protections afforded by the Act as a supervisor to bear the burden of proving the individual's supervisory status.

3. Whether, applying its interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the Board reasonably concluded that respondent's registered nurses are "employees," rather than supervisors, and thus entitled to the rights and protections afforded by the Act.

PARTIES TO THE PROCEEDINGS BELOW

The petitioner here, which was the respondent/cross-petitioner in the court of appeals, is the National Labor Relations Board. The respondents here are Kentucky River Community Care, Inc., which was the petitioner/cross-respondent in the court of appeals, and Kentucky State District Council of Carpenters, AFL-CIO, which was an intervenor in the court of appeals in support of the Board's cross-application for enforcement of the Board's order against respondent.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-25a, is reported at 193 F.3d 444. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding, App., *infra*, 26a-33a, are noted at 323 N.L.R.B. No. 209 (Table). The decisions of the Board in the underlying representation proceeding, App., *infra*, 34a-60a, are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 61a-63a) was entered on January 27, 2000. A petition for rehearing was denied on March 23, 2000 (App., *infra*, 64a-65a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), provides in relevant part:

> The term "employee" shall include any employee, * * * but shall not include * * * any individual employed as a supervisor.

Section 2(11) of the Act, 29 U.S.C. 152(11), provides:

> 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 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.

STATEMENT

1. To be deemed a supervisor under Section 2(11) of the National Labor Relations Act (NLRA or Act), an employee must have authority to engage in one of 12 specified supervisory functions and must exercise that authority "in the interest of the employer," using "independent judgment," and not judgment "of a merely routine or clerical nature." 29 U.S.C. 152(11). In

NLRB v. *Health Care & Retirement Corp.* (*HCR*), 511 U.S. 571 (1994), this Court considered the validity of the Board's approach at that time to determining whether a nurse is a "supervisor" within the meaning of Section 2(11). Under that approach, "a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients," was not authority exercised "in the interest of the employer." *HCR*, 511 U.S. at 574, 576. The Court held that the Board's interpretation of "in the interest of the employer" was inconsistent with the ordinary meaning of that phrase and with prior decisions of the Court, and improperly created a special test of supervisory status for the health-care industry. *Id.* at 574, 576-584. The Court explained, however, that other "phrases in §2(11) such as '*independent judgment*' and 'responsibly to direct' are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees." *Id.* at 579 (emphasis added). The Court did not pass on the proper interpretation of any statutory element other than "in the interest of the employer." *Id.* at 583.

The principal issue presented by this case is whether the Board's current approach to determining whether a nurse is a "supervisor" under Section 2(11) of the Act—which the Board developed after *HCR* and which turns on the statutory term "independent judgment," rather than the phrase "in the interest of the employer"—is reasonable and entitled to deference from the courts. The Board developed its current approach in two cases in which it heard oral argument and considered the submissions of numerous amici. See *Providence Hosp.*, 320 N.L.R.B. 717 (1996), enforced, 121 F.3d 548 (9th Cir. 1997); *Nymed, Inc., d/b/a Ten Broeck Commons*, 320 N.L.R.B. 806 (1996). As we discuss pp. 12-16, *infra*,

after carefully examining the structure of the Act, the legislative history of Section 2(11), and the relevant case law, including *HCR*, the Board decided to apply to nurses its "traditional analysis for determining the supervisory status of employees in other occupations." See *Providence Hosp.*, 320 N.L.R.B. at 717. That analysis entails an inquiry into whether the employee at issue exercises "independent judgment" in connection with one (or more) of the functions listed in Section 2(11). In the Board's view, an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards is not the exercise of "independent judgment" that makes an employee a "supervisor" under Section 2(11). See *Providence Hosp.*, 320 N.L.R.B. at 725-730; *Ten Broeck Commons*, 320 N.L.R.B. at 809-812. See also *Rest Haven Living Ctr.*, 322 N.L.R.B. 210, 211 (1996).

This case also presents the question whether the Board's rule regarding the allocation of the burden of proving supervisory status is reasonable and entitled to judicial deference. As we discuss *infra*, pp. 12, 21-23, the Board has long placed the burden of proof on the party asserting that the employees at issue are supervisors. See, *e.g.*, *St. Alphonsus Hosp.*, 261 N.L.R.B. 620, 624 (1982), enforced, 703 F.2d 577 (9th Cir. 1983) (Table).

2. a. Respondent is a nonprofit organization that operates mental health facilities in Kentucky. This case involves the Caney Creek Rehabilitation Center, a transitional residential center for mentally ill individuals who are seeking to develop skills necessary for independent living. Respondent operates Caney Creek under contracts with the Commonwealth of Kentucky Department for Mental Health and Mental Retardation.

The contracts, which incorporate by reference certain provisions of Kentucky law, set forth eligibility restrictions for residents, facility staffing requirements, and other guidelines that govern the services that respondent provides. App., *infra*, 2a, 5a, 37a-39a.

Caney Creek is organized into two wings, each of which is divided into two units that each accommodate 20 residents. The facility operates 24 hours a day, seven days a week. App., *infra*, 45a. Overall responsibility for the operation of Caney Creek is vested in an administrator and assistant administrator. Caney Creek also employs two unit coordinators, as well as a nursing coordinator, a recreational counselor, a manager for housekeeping and maintenance, and a kitchen supervisor. *Ibid.* Those individuals are stipulated to be Section 2(11) supervisors. *Id.* at 54a. The supervisory status of Caney Creek's registered nurses (RNs) and rehabilitation counselors is, however, in dispute.

Caney Creek employs 20 rehabilitation counselors, 40 rehabilitation assistants, six RNs, and three licensed practical nurses (LPNs). App., *infra*, 45a; Tr. 158. Each of the four treatment units is staffed with five rehabilitation counselors and ten rehabilitation assistants. App., *infra*, 6a, 45a. The RNs and LPNs provide medical services to residents throughout the units. *Id.* at 45a, 50a. Two RNs and one LPN work on each of three shifts (7 a.m. to 3:30 p.m., 3 p.m. to 11:30 p.m., and 11 p.m. to 7:30 a.m.). *Id.* at 50a; Tr. 224, 260. Rehabilitation assistants work on each shift, and rehabilitation counselors primarily work on only the first shift. App., *infra*, 47a; Tr. 138.

For each resident, Caney Creek establishes a treatment plan that contains rehabilitative goals and specifies activities designed to accomplish those goals. App., *infra*, 46a. The treatment plan also has a medical

component, because all residents receive some form of medication. The rehabilitation counselors and RNs participate in the formulation of the plans, but each resident's treatment plan must be approved by the unit coordinator and the resident's psychiatrist. *Id.* at 19a-20a, 46a, 47a; Tr. 111, 183. Both the rehabilitation counselors and the RNs direct less-skilled employees to deliver services in accordance with the employer-specified standards expressed in the treatment plans.

The non-medical component of the treatment plans is implemented on a daily basis by the rehabilitation assistants. Each morning, the rehabilitation counselors meet with the rehabilitation assistants, who volunteer for particular tasks. App., *infra*, 20a, 47a-48a. The rehabilitation assistants ensure that the residents wake up on time, are properly bathed and dressed, attend scheduled classes, and keep their doctors' appointments. *Id.* at 47a-48a; Tr. 124.

The medical component of the treatment plans is implemented on a daily basis by the RNs and LPNs. App., *infra*, 17a, 45a, 46a; Tr. 158, 183. The LPNs pass medications to the residents. The RNs ensure that the correct medication is passed to the correct resident at the correct time, handle any necessary documentation, and provide direct medical care to the residents. App., *infra*, 17a, 50a; Tr. 141, 158. The RNs also work with the rehabilitation assistants: the assistants bring the residents' health problems to the RNs' attention and assist the RNs in administering medication "if * * * a resident [is] really acting out." Tr. 331-332.

During part of the second and all of the third shift, neither the administrator nor any other stipulated supervisor is physically present at Caney Creek. However, a stipulated supervisor is always "on call" at those times. When the stipulated supervisor is "on call"

rather than on site, the RNs on duty are designated by respondent as "building supervisors." App., *infra*, 16a, 50a; Tr. 200. As "building supervisors," the RNs have some additional duties. The building supervisors are "in charge of the facility and all rehabilitation staff." R. Exh. 13. When the building supervisors "come on duty," they are "[to] visit the units to check the coverage," and "[i]f necessary, pull from one unit to another." R. Exh. 14. However, the minimum number of employees necessary to cover a given shift is set by management. Tr. 149-150. The building supervisors transfer employees from one unit to another for the particular shift simply "to make sure the head count is there." *Id.* at 155.

The building supervisors also handle staff shortages when employees telephone that they are unable to report for their scheduled shift. App., *infra*, 16a, 51a; R. Exh. 13. In those situations, the building supervisors first seek a volunteer from the preceding shift to stay over. If no one volunteers, the building supervisors, using a list, attempt to reach by telephone an off-duty employee who lives nearby to come in to work. In no case, however, do building supervisors have authority to compel an employee to work under threat of discipline. App., *infra*, 16a, 51a.[1]

b. In January 1997, the Kentucky State District Council of Carpenters (Union) filed a petition with the Board seeking to represent an appropriate bargaining

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[1] Respondent has contended that the building supervisors are authorized to "write up" an employee who does not "comply" with a decision "to shift staff between units" and to "send an employee home" in some circumstances. App., *infra*, 16a-17a. There is no evidence in the record, however, that the building supervisors have ever exercised that purported authority in either respect. See pp. 8-9, *infra*.

unit of employees employed by respondent at Caney Creek. Respondent contended that the RNs and the rehabilitation counselors should be excluded from any bargaining unit as Section 2(11) supervisors.[2] After a hearing, the Board's Regional Director (RD) rejected that contention. App., *infra*, 50a-53a. The RD explained that, after this Court's decision in *HCR*, "the Board determined to apply the same test to registered nurses as is applicable to all other individuals in determining supervisory status." *Id.* at 52a. The RD also noted that *HCR* did not "alter[]" the Board's "well settled" rule that "the burden of proving that an individual is a supervisor within the meaning of Section 2(11) of the Act rests with the party asserting supervisory status." *Ibid.*

Applying those principles, the RD concluded that respondent had "not met its burden of establishing that the RNs, even when serving as 'building supervisors,' are supervisors within the meaning of Section 2(11) of the Act." App., *infra*, 53a. The RD found that "the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives." *Id.* at 51a. He found that "the RNs, including when they are serving as 'building supervisors,' for the most part, work independently and by themselves without any subordinates." *Id.* at 52a. Although respondent contended that "RNs can 'write-up' employees," the RD found that "there is no evidence in the record that they have ever done so." *Id.* at 51a. In

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[2] Respondent also contended that it is exempt from the Board's jurisdiction as a "political subdivision" of the Commonwealth of Kentucky. Both the Board and the court of appeals rejected that contention. App., *infra*, 8a-13a, 37a-44a.

fact, in the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. *Ibid.* The RD further found that "[t]he 'building supervisors' do not have any authority * * * to compel an employee to stay over or come in to fill a vacancy under threat of discipline." *Ibid.* He concluded that "[t]he fact that the RNs may request employees to perform routine tasks and, pursuant to established policy, call in replacements or seek volunteers to stay over does not establish supervisory status." *Id.* at 53a.

The RD also found that the rehabilitation counselors do not possess any indicia of supervisory authority over the rehabilitation assistants. App., *infra*, 49a. "They do not have the authority to hire, fire, discipline, promote or evaluate employees and any assignment or direction which they may give other employees is routine in nature." *Ibid.* Nor does "[t]he fact that the counselors formulate treatment plans which are administered in part by rehabilitation assistants * * * make the rehabilitation counselors supervisors within the meaning of Section 2(11) of the Act." *Ibid.*

c. Respondent filed a request for review of the RD's decision with the Board. Insofar as relevant here, the Board denied the request for review. App., *infra*, 34a. On March 20, 1997, the Board conducted an election among the employees at Caney Creek, which the Union won. Accordingly, the Board certified the Union as the bargaining representative of the employees, including the RNs and the rehabilitation counselors. *Id.* at 28a-29a.

Respondent refused to bargain with the Union. App., *infra*, 29a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that respondent's refusal to bargain with the Union

violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). App., *infra*, 26a.[3] On summary judgment, the Board found that respondent had violated the Act and ordered it to bargain with the Union. *Id.* at 26a-33a.

3. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the Sixth Circuit. The court of appeals sustained the Board's finding that the rehabilitation counselors are not supervisors under Section 2(11) of the Act but held, by a divided vote, that "the registered nurses [that respondent] employs are supervisors." App., *infra*, 2a. The court therefore denied enforcement of the Board's order "insofar as it includes the registered nurses in the bargaining unit." *Ibid.*

The court explained that its task in this case was to determine whether the RNs' responsibilities "call for the exercise of 'independent judgment' under section [2(11)]." App., *infra*, 17a. The court stated:

> Unfortunately, the NLRB has continuously interpreted "independent judgment" in a manner that is inconsistent with this circuit's precedent. According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve "independent judgment." The NLRB classifies these activities as "routine" because the nurses have the ability to

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[3] Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]" of the Act, 29 U.S.C. 157, among which is the right of employees "to bargain collectively through representatives of their own choosing."

> direct patient care by virtue of their training and expertise, not because of their connection with "management."

Ibid.

The court of appeals observed that it "has repeatedly rejected this interpretation" of "independent judgment" and has instead "found that nurses are supervisors when they direct assistants with respect to patient care, rectify staffing shortages, fill out evaluation forms, and serve as the highest ranking employee in the building during off-peak shifts." App., *infra*, 17a (citing *Mid-America Care Found.* v. *NLRB*, 148 F.3d 638 (6th Cir. 1998)). The court also faulted the Board for "ignor[ing] our repeated admonition that '[t]he [NLRB] has the burden of proving that employees are not supervisors.'" *Id.* at 15a (quoting *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 375 (6th Cir. 1998)).

Applying its own understanding of "independent judgment" and the burden of proof, the court of appeals reasoned that the Caney Creek registered nurses are supervisors because they "direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments." App., *infra*, 18a-19a. The court concluded that those duties "involve independent judgment." *Id.* at 19a.

The court upheld, however, the Board's finding that the rehabilitation counselors are not supervisors. The court explained that the rehabilitation counselor's primary function of designing a patient treatment plan "does not, of itself, involve any supervisory authority."

App., *infra*, 21a. Moreover, the fact that the assistants "carry out the provisions of the treatment plans designed by the counselors does not suggest that the counselors are supervisors." *Ibid.*

Judge Jones dissented in part. Although he agreed with the panel majority's holding as to the rehabilitation counselors, he would have sustained the Board's conclusion that the RNs are not statutory supervisors. App., *infra*, 22a-25a.

REASONS FOR GRANTING THE PETITION

After this Court's decision in *NLRB* v. *Health Care & Retirement Corp.* (*HCR*), 511 U.S. 571 (1994), the Board undertook to address anew how to apply, in the health care context, the Act's express exclusion of "supervisors" from its protections. The Board concluded that no special rule was required and that it should apply to nurses and other health care workers its traditional analysis for determining the supervisory status of employees in other occupations. See pp. 3-4, *supra*. Consistent with that traditional analysis, the Board concluded that an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" that makes the employee a "supervisor" under Section 2(11) of the Act. Further, the Board has long held that the party alleging that an individual is a supervisor bears the burden of proving that claim. In this and similar cases, the Sixth Circuit has "repeatedly" rejected the Board's position on both of those issues. App., *infra*, 17a; see also *id.* at 15a.

The decision of the court of appeals squarely conflicts with decisions of other courts of appeals on both issues.

Those issues cut across all industries subject to the Board's jurisdiction and are of recurring importance to the proper administration of the Act. This Court's review is warranted in order to resolve the double conflict in the circuits presented by this case and to reaffirm that judicial deference is owed the Board's interpretation of the NLRA when, as in this case, that interpretation is rational and consistent with the Act.

1. a. Under Section 2(11) of the NLRA, an employee is not a supervisor merely because he has authority to assign, responsibly to direct, or to exercise one of the other listed supervisory functions with respect to other employees. An employee is a supervisor only if he exercises that authority using "independent judgment," and not if his exercise of that authority is "of a merely routine or clerical nature." 29 U.S.C. 152(11). As we have explained, in the Board's view, an employee's exercise of ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards does not constitute the exercise of "independent judgment" within the meaning of the Act. *Providence Hosp.*, 320 N.L.R.B. at 725-730; *Ten Broeck Commons*, 320 N.L.R.B. at 809-812.

The Board's view comports with the statutory text. The text makes clear that an employee may exercise some supervisory authority without being a supervisor. Indeed, it makes clear that an employee may exercise supervisory authority that requires the use of "judgment" without being a supervisor. To be classed a supervisor, an employee must exercise supervisory authority using "independent" judgment and not judgment that is "routine" or "clerical." The Board interprets those qualifiers to exclude ordinary professional or technical judgment of the type we have described.

That interpretation is not only consistent with the statutory text but rational because it properly effectuates Congress's purpose in excluding supervisors from the coverage of the Act. As this Court has explained, in framing the definition of "supervisor" in Section 2(11), Congress intended to exclude from the coverage of the Act only those employees who are vested with "genuine management prerogatives," but to retain coverage for "minor supervisory employees," such as "straw bosses, leadmen, [and] set-up men." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). "[M]inor supervisory employees," such as leadmen, often exercise routine technical judgment in directing the work of less-skilled employees. Nonetheless, the Board has traditionally held such skilled individuals to be employees, not supervisors.[4]

The Board's post-*HCR* interpretation of "independent judgment" brings its Section 2(11) standard for nurses into harmony with its longstanding view respecting leadmen and other minor supervisory employees. Under that view, the exercise of circumscribed

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[4] See, *e.g.*, *NLRB* v. *Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958) (distinguishing "a superior workman or lead man who exercises the control of a skilled worker over less capable employees" from "a supervisor who shares the power of management"), cert. denied, 359 U.S. 911 (1959); *Golden West Broadcasters-KTLA*, 215 N.L.R.B. 760, 762 n.4 (1974) ("[A]n employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor. * * * This is so even when the more senior or more expert employee exercises some independent discretion where * * * such discretion is based upon special competence or upon specific articulated employer policies."). See also *Ten Broeck Commons*, 320 N.L.R.B. at 809-810.

discretion based on professional or technical skills and experience is not independent judgment that triggers supervisory status. See note 4, *supra*. A nurse's articulating the meaning of an established health care routine to an aide—like an electrician's giving directions on the basis of a reading of a wiring diagram or blueprint[5]—may well involve the exercise of some degree of judgment. Without more, however, a nurse delegated such limited authority over other employees is not exercising independent judgment, but only making a routine professional or technical judgment and giving directions based on that judgment.[6]

That interpretation is also consistent with the principle that the Board has long applied to determine whether individuals with professional training in other industries exercise the requisite degree of judgment to vest them with supervisory authority. The Act expressly covers "professional employees," who, by definition, engage in "the consistent exercise of discretion

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[5] See *Adco Elec., Inc.*, 307 N.L.R.B. 1113, 1122-1126 (1992) (journeyman electrician's directing work of apprentice on the basis of superior knowledge insufficient to establish supervisory status where job blueprints and progress reports provided by management dictated what work should be done and when), enforced, 6 F.3d 1110, 1117-1118 (5th Cir. 1993).

[6] See *Rest Haven Living Ctr.*, 322 N.L.R.B. at 211 (where "the LPNs' directives to [nurse's aides] are narrowly circumscribed and involve giving general, routine directions to lesser skilled employees consistent with established employer policies in order to maintain the quality of care * * * this type of direction does not involve the independent judgment required by Section 2(11)"); *Ten Broeck Commons*, 320 N.L.R.B. at 807, 809-812 & nn. 9-11 (LPNs' "narrowly circumscribed" assignment and direction of aides is routine when based on detailed individual health care plans that reflect the LPNs' expert technical judgment and are reviewed and approved by a registered nurse).

and judgment." 29 U.S.C. 152(12). See *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Professional employees, such as the registered nurses involved in this case, often direct less-skilled employees with whom they work. See *NLRB* v. *Res-Care, Inc.*, 705 F.2d 1461, 1465 (7th Cir. 1983). However, as this Court has recognized, the Board has traditionally held that "employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty." *NLRB* v. *Yeshiva Univ.*, 444 U.S. 672, 690 (1980). Rather, "[o]nly if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." *Ibid.*[7]

b. The court of appeals erred in substituting its own interpretation of the phrase "independent judgment" for the Board's interpretation. This Court has repeatedly held that the Board's interpretations are "entitled to deference from the courts" if "rational and consistent" with the Act. See, *e.g.*, *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990). See also *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Because the Board's interpretation

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[7] The Court in *Yeshiva* described the Board's decision in *Skidmore, Owings & Merrill*, 192 N.L.R.B. 920 (1971), as "accurately captur[ing] the intent of Congress." 444 U.S. at 690. In that case, the Board found that professional architects in charge of projects who had "some discretion in assigning work and [were] professionally responsible for the quality of work performed," were not supervisors "but merely provide[d] professional direction and coordination for other professional employees." 192 N.L.R.B. at 921.

of "independent judgment" is a reasonable construction of an ambiguous statutory term and is entirely consistent with the Act, the court of appeals should have deferred to that interpretation.[8]

The court refused to defer to the Board's interpretation because "the NLRB has continuously interpreted [that term] in a manner that is inconsistent with th[e] circuit's precedent." App., *infra*, 17a. Thus, the Sixth Circuit has held that "the Board erred as a matter of law when it endorsed the view that the evidence regarding the nurses' scheduling, assignment, and break approval duties was insufficient" to indicate supervisory status because those duties "simply flowed from the nurses' professional knowledge and training." *Integrated Health Servs.* v. *NLRB*, 191 F.3d 703, 711 (6th Cir. 1999). Quoting from *Beverly California Corp.* v. *NLRB*, 970 F.2d 1548, 1553 (6th Cir. 1992), a decision that predated this Court's decision in *HCR*, the court of appeals stated: "It is perfectly obvious that the kind of judgment exercised by registered nurses in directing . . . nurses' aides in the care of patients occupying skilled and intermediate care beds in a nursing home is not 'merely routine.'" *Ibid.* Accord *Caremore, Inc.* v. *NLRB*, 129 F.3d 365, 370 (6th Cir. 1997); *Grancare, Inc.* v. *NLRB*, 137 F.3d 372, 376 (6th Cir. 1998); *Mid-*

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[8] As this Court has noted, courts have accorded the Board "a large measure of informed discretion" in determining when the "authority 'responsibly to direct' the work of others" requires a finding of supervisory status. *Marine Eng'rs Beneficial Ass'n* v. *Interlake S.S. Co.*, 370 U.S. 173, 179 n.6 (1962) (quoting *NLRB* v. *Swift & Co.*, 292 F.2d 561, 563 (1st Cir. 1961)). See also *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (courts must "recognize the Board's special function of applying the general provisions of the Act to the complexities of industrial life").

America Care Found. v. *NLRB*, 148 F.3d 638, 641 (6th Cir. 1998).

The Sixth Circuit's refusal to defer to the Board's interpretation of "independent judgment" is based on the court's belief that the Board's interpretation replicates the same "false dichotomy" that this Court rejected in *HCR* between "acts taken in connection with patient care and acts taken in the interest of the employer." *Integrated Health*, 191 F.3d at 711 (quoting *HCR*, 511 U.S. at 577). As discussed pp. 2-3, *supra*, *HCR* rejected only the Board's "in the interest of the employer" test for determining the supervisory status of nurses. 511 U.S. at 574, 576. The Court made quite clear the limited reach of its holding: "our decision casts no doubt on Board or court decisions interpreting parts of §2(11) other than the specific phrase 'in the interest of the employer.'" *Id.* at 583. Indeed, the Court acknowledged that the statutory phrase "independent judgment" is "ambiguous" and, therefore, that the Board is entitled to "ample room" in applying it to "different categories of employees." *Id.* at 579. The Court also recognized (without any indication of disapproval) that, in other industries, the Board has applied "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives" in deciding whether employees exercise "independent" judgment. *Id.* at 583. Thus, the Sixth Circuit erred in concluding that the Board's construction of "independent judgment" is foreclosed by *HCR*.[9]

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[9] The court of appeals also erroneously concluded that the Board's interpretation is not entitled to judicial deference under this Court's decision in *Allentown Mack Sales & Serv., Inc.* v. *NLRB*, 522 U.S. 359 (1998). App., *infra*, 18a. In *Allentown Mack*,

c. The Sixth Circuit's rejection of the Board's interpretation of "independent judgment," although consistent with decisions of the Third and Fourth Circuits, directly conflicts with decisions of the D.C., First, Seventh, Eighth and Ninth Circuits, which have accepted the Board's interpretation. See *NLRB* v. *Attleboro Assocs., Ltd.*, 176 F.3d 154, 163 (3d Cir. 1999) (noting conflict); *Integrated Health Servs.*, 191 F.3d at 713 (Jones, J., concurring) (same).

Thus, in *Beverly Enterprises-Pennsylvania, Inc.* v. *NLRB*, 129 F.3d 1269 (1997) (per curiam), the D.C. Circuit agreed with the Board that "the question of independent judgment under section 2(11) is one of the degree of discretion exercised," and the court of appeals upheld the Board's conclusion that nurses who "assign[ed] and monitor[ed] the performance of discrete patient care tasks * * * and sometimes assign[ed] [aides] to particular patient rooms within a wing" were not supervisors. *Id.* at 1270. Similarly, in *NLRB* v. *Hilliard Development Corp.*, 187 F.3d 133, 142-143 (1999), the First Circuit deferred to the Board's interpretation, explaining that it "harmonizes the Act's definitions of 'supervisor' and 'professional employee' in a sensible way, consistent with Congress' intent to exclude as supervisors only those employees with 'genuine management prerogatives.'"

In *NLRB* v. *Grancare, Inc.*, 170 F.3d 662 (1999) (en banc), the Seventh Circuit held that, when nurses exercise their power "in fairly routine, preordained

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this Court, unlike the court of appeals here, afforded deference to the Board rule at issue. 522 U.S. at 363-366. The Court was critical of the Board for "in practice its divorcing of the rule announced from the rule applied." *Id.* at 376. In this case, however, the Board has not applied a rule different from the one that it has formally enunciated.

ways," it is reasonable for the Board to conclude that "the 'judgment' of [nurses] in exercising their incidental supervisory authority over [aides] is not the 'independent judgment' concerned with management prerogatives contemplated by §2(11) [but] [r]ather, it is more properly viewed as 'professional judgment' exercised in getting their assigned work done with [aides] employed for that purpose." *Id.* at 668. And, in *Beverly Enterprises, Minnesota, Inc.* v. *NLRB*, 148 F.3d 1042 (1998), the Eighth Circuit agreed with the Board that, given the employer's system of protocols, its nurses did not exercise "independent judgment" in reassigning aides and reprioritizing their work when necessitated by "changes in patient condition, changes in personnel, and other circumstances." *Id.* at 1047. Finally, in *Providence Alaska Medical Center* v. *NLRB*, 121 F.3d 548, 554 (1997), the Ninth Circuit upheld the Board's conclusion that, "[b]y exercising her professional judgment in [a] routine manner while working alongside and guiding less experienced employees, the charge nurse is not transformed into a supervisor."

However, like the court of appeals below, the Third and Fourth Circuits have rejected the Board's interpretation. In *Beverly Enterprises, Virginia, Inc.* v. *NLRB*, 165 F.3d 290 (1999) (en banc), the Fourth Circuit held that "independent judgment" is authority "exercised in a non-ministerial way to achieve management goals." *Id.* at 295. In that court's view, the exercise of authority is "ministerial" (and thus non-supervisory) only if it is so highly regimented by the employer's standards that the standards leave no room for thought. See *Glenmark Assocs., Inc.* v. *NLRB*, 147 F.3d 333, 341 (4th Cir. 1998). See also *Beverly Enterprises, Va.*, 165 F.3d at 303 (Phillips J. dissenting). Similarly, in *Attleboro Associates,* the Third Circuit concluded that nurses

exercise "supervisory judgment" in directing aides when the nurses "hold a superior rank to them and are entrusted by [the employer] to ensure the quality of care that residents receive." 176 F.3d at 169; see also *id.* at 167 (holding that "decisions to assign workers are 'inseverable from the exercise of independent judgment'") (quoting *Glenmark Assocs.*, 147 F.3d at 342).

The different holdings of the courts of appeals turn, in significant part, on whether or not the courts believe that the Board's interpretation is foreclosed by *HCR*. Like the court of appeals here, the Third and Fourth Circuits have characterized the Board's interpretation as an "end run" around *HCR*, but the Seventh and First Circuits have rejected that characterization.[10] The disagreement among the courts of appeals on the proper interpretation of "independent judgment" prevents uniform administration of the Act on a significant issue of coverage. With en banc decisions on both sides of the conflict, there is no likelihood that the courts of appeals will reach consensus on this important issue absent this Court's intervention.

2. The holding of the court of appeals that the Board has the burden of proving that an employee is not a supervisor also warrants this Court's review. That

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[10] Compare *Beverly Enterprises, Va.*, 165 F.3d at 296 (Board's interpretation is "an end run around an unfavorable Supreme Court decision" and reflects a "policy bias"), and *Attleboro Associates*, 176 F.3d at 168 (Board's interpretation "may be a false dichotomy intended to avoid the Supreme Court's rejection of the 'patient care' dichotomy in [*HCR*]"), with *Grancare*, 170 F.3d at 666 (declining "to conjecture about whether the Board has tried to do an end run around [*HCR*]"), and *Hilliard Development Corp.*, 187 F.3d at 137 (finding "no reason not to apply our usual standard of deference to the Board's interpretations of ambiguous portions of the Act").

holding conflicts with the decisions of other courts of appeals, which have, both within and outside of the health care field, accepted the Board's rule that the burden of proving supervisory status falls "on the party alleging that such status exists." *St. Alphonsus Hosp.*, 261 N.L.R.B. at 624.

The Board's rule applies regardless whether the employer, the union, or the Board's General Counsel is the party asserting supervisory status. Thus, an employer must carry the burden when it defends against an unfair labor practice complaint by claiming that the employee against whom it allegedly discriminated is a supervisor. See, *e.g.*, *Ahrens Aircraft, Inc.*, 259 N.L.R.B. 839, 842 (1981), enforced, 703 F.2d 23 (1st Cir. 1983). Likewise, a union must carry the burden when it challenges a ballot by claiming that the voter who cast the ballot is a supervisor. See, *e.g.*, *Bowne of Houston, Inc.*, 280 N.L.R.B. 1222, 1223 (1986). And the General Counsel must carry the burden when he alleges an individual's supervisory status as part of his case. See, *e.g.*, *Hydro Conduit Corp.*, 254 N.L.R.B. 433, 441 (1981). Furthermore, the Board applies the same rule to all industries subject to its jurisdiction. See, *e.g.*, *Commercial Movers, Inc.*, 240 N.L.R.B. 288, 290 (1979); *Thayer Dairy Co.*, 233 N.L.R.B. 1383, 1387 (1977).

As we have explained at p. 14, *supra*, Congress intended that the Act's exclusion of supervisors from coverage would be limited. The Board's rule effectuates that intention by placing the burden of proving supervisory status upon those invoking the exemption. "In contrast, placing the burden of proof on the Board presumes that all employees simply asserted by employers to be supervisors are exempt from the Act's coverage until proven otherwise." *Grancare,* 137 F.3d at 378 (Moore, J., concurring).

The Board's rule also accords with general principles governing the interpretation of statutory exemptions, including exemptions from the NLRA. See *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 399 (1996) ("[A]dministrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach."); *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (noting "rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits").

The decision of the court of appeals rejecting the Board's method of allocating the burden of proof conflicts with decisions of other courts of appeals, which have accepted the Board's method, both within and outside of the health care field. See *Beverly Enterprises, Mass., Inc.* v. *NLRB*, 165 F.3d 960, 962 (D.C. Cir. 1999); *New York Univ. Med. Ctr.* v. *NLRB*, 156 F.3d 405, 412-413 (2d Cir. 1998); *Schnuck Markets, Inc.* v. *NLRB*, 961 F.2d 700, 703 (8th Cir. 1992); *NLRB* v. *Bakers of Paris, Inc.*, 929 F.2d 1427, 1445 (9th Cir. 1991). See also *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393 (1983) (upholding as reasonable Board's allocation of burden of proof in another context).

3. If the court of appeals had accepted the Board's interpretation of "independent judgment" and its allocation of the burden of proving supervisory status, the court would have sustained the Board's finding that the RNs working at Caney Creek are not supervisors. The RNs "are responsible for medical services, particularly when there are no doctors in the building, which is frequently the case." App., *infra*, 17a. In that capacity, RNs sometimes give directions to other employees: for

example, the RN may direct an LPN to pass a particular medication to a particular resident at a particular time or direct a rehabilitation assistant to assist her in treating a resident who is "really acting out"; or (when acting as building supervisor) she may direct a rehabilitation assistant to work his shift on a unit that would otherwise be understaffed. See pp. 6-7, *supra*. However, in issuing such directions, the discretion exercised by the RN is based on her special professional competence and is circumscribed by the requirements of the resident's treatment plan and respondent's staffing policies. The Board thus reasonably concluded that the nurses do not exercise "independent judgment" in discharging those functions. See pp. 8-9, *supra*.

As the court of appeals found, when they serve as building supervisors, the RNs have authority to "call employees into work" or "ask employees to remain on duty" but have no "authority to force an employee to work." App., *infra*, 16a. The RD found that, in carrying out those functions, the RN follows a procedure established by respondent that circumscribes any discretion exercised by the nurse. See p. 9, *supra*; App., *infra*, 53a. The Board therefore reasonably concluded that the judgment exercised by a nurse is more "routine" than "independent," particularly as she cannot compel an employee to work. See, *e.g.*, *Providence Alaska Med. Ctr.*, 121 F.3d at 552-553.

The court of appeals also found it significant that the building supervisor "is the highest ranking employee in the building" for "almost two thirds of the day." App., *infra*, 16a, 18a. However, that circumstance, standing alone, does not compel a finding that the nurses are statutory supervisors. See *Res-Care*, 705 F.2d at 1467.

Finally, because the court of appeals incorrectly placed the burden of proof on the Board, the court gave

undue weight to a memorandum stating that RNs have authority as building supervisors to "write up" employees who do not "comply" with requests that they work their shifts on units that would otherwise be understaffed. App., *infra*, 16a. Similarly, the court placed undue reliance on a company official's assertion that the RNs, when acting as building supervisors, have authority "[to] send an employee home, but the nurse would then need to inform that employee's immediate supervisor." *Id.* at 17a.

The RD discounted the significance of the RNs' putative authority to write up employees because there was "no evidence in the record that they have ever" done so, and, in the only instance in the record in which "an RN made a complaint about another employee it was apparently ignored" by management. App., *infra*, 51a. Moreover, the record evidence also established that the nurses had never exercised their purported authority to send employees home. See Tr. 151-152, 153, 279.

If the court of appeals had placed the burden on respondent to prove that the nurses are supervisors by virtue of their alleged authority to "write-up" employees and to send employees home, the court would have upheld the Board's conclusion, on this record, that respondent had failed to sustain its burden. See, *e.g.*, *OCAW* v. *NLRB*, 445 F.2d 237, 243-244 (D.C. Cir. 1971) (Board reasonably concluded that "naked designations of 'paper power'" by employer are negated by "the nearly total lack of evidence of authority actually exercised"), cert. denied, 404 U.S. 1039 (1972); *Beverly Enterprises, Mass.*, 165 F.3d at 963 ("[A]bsent exercise, there must be other affirmative indications of authority. Statements by management purporting to confer authority do not alone suffice.").

Accordingly, under long-established principles applied by the Board and the courts in the administration of the Act in a wide variety of employment contexts, the Board's determination that the nurses in this case are covered by the Act should have been upheld.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 97-5885, 97-5983

KENTUCKY RIVER COMMUNITY CARE, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

KENTUCKY STATE DISTRICT COUNCIL
OF CARPENTERS, AFL-CIO, INTERVENOR

Argued Nov. 5, 1998
Decided Oct. 4, 1999

OPINION

RYAN, Circuit Judge.

This is another in an increasing number of cases involving the question whether nurses are supervisors within the meaning of the National Labor Relations Act, 29 U.S.C. § 152(11), in which we are required to direct the National Labor Relations Board to apply the

law as this court has announced it, and not as the Board would prefer it to be.

The petitioner, Kentucky River Community Care, Inc. (KRCC), seeks to avoid union certification, claiming that (1) it is a political subdivision and therefore not an "employer" subject to the National Labor Relations Act, and (2) even if it is an employer for purposes of the NLRA, its registered nurses and rehabilitation counselors are "supervisors" and, therefore, exempt from the collective bargaining unit.

The National Labor Relations Board cross petitions, seeking enforcement of its order requiring KRCC to bargain with the union. We hold that KRCC is not a political subdivision, and that while the registered nurses KRCC employs are supervisors, the rehabilitation counselors are not. We therefore enforce the NLRB's order except insofar as it includes the registered nurses in the bargaining unit.

I.

KRCC is a nonprofit organization operating numerous mental health facilities throughout an eight-county region of Kentucky. One such facility is the Caney Creek Rehabilitation Center, which is the subject of this appeal. These facilities are transitional residential centers whose mission is to help patients become self sufficient.

Because we first address the issue whether KRCC is a political subdivision, our review of the facts entails an inquiry into the KRCC corporate structure.

A.

The then-Chairman of the East Kentucky Health Planning Council, C. Vernon Cooper, Jr., filed the articles of incorporation for KRCC on May 21, 1979. Cooper signed the articles as "a citizen of the Commonwealth of Kentucky," and there is no indication from the articles or the manner in which Cooper signed his name that he was acting in any official capacity. The articles enumerate various purposes of the corporation. Principal among them is that KRCC was formed to provide mental health care; to serve as a regional mental health-mental retardation board; and to apply for, receive, and administer public and private funds. The articles are silent as to whether KRCC is to operate as an arm of the state or local government.

According to the minutes of KRCC's first board of directors meeting, "the [eight] County Judges . . . file[d] names for new mental health board members." Subsequent vacancies have been filled by a vote of the remaining directors. The minutes also offer an insight into the reason KRCC was organized. Prior to KRCC's incorporation, the Upper Kentucky River Regional Mental Health/Mental Retardation Comprehensive Care Center was responsible for providing mental health care to people living in the affected communities. Unnamed "local agencies" expressed concerns about the quality of mental health services being provided in the area due to staffing and personnel difficulties within the Board. In order to rectify the situation, the Kentucky Cabinet for Human Resources sent in a caretaker/administrator to run Upper Kentucky. In due course, Upper Kentucky dissolved, and KRCC was formed.

At KRCC's first meeting, the Deputy Commissioner for Mental Health of the Bureau for Health Services, "assured [the KRCC directors of] support from the [Kentucky] Cabinet for Human Resources." Within a few weeks, the Cabinet for Human Resources issued an administrative order stating:

> WHEREAS, Kentucky River Community Care, Inc. has submitted a request to the [Cabinet] for Human Resources to be recognized as a regional community mental health-mental retardation board pursuant to the provisions of KRS 210.370 to 210.480; and
>
> WHEREAS, Kentucky River Community Care, Inc. has expressed its intention to bring its board composition, by-laws, articles of incorporation and operations into compliance with all [Cabinet] for Human Resources standards as rapidly as possible;
>
> NOW, THEREFORE, by the authority vested in me by KRS 210.370 to 210.480 and 902 KAR 6:030(2) relating to regional mental health-mental retardation boards, I, Peter D. Conn, Secretary of the [Cabinet] for Human Resources, do hereby recognize Kentucky River Community Care, Inc. as the regional mental health-mental retardation board for the counties of Breathitt, Knott, Lee, Leslie, Letcher, Owsley, Perry, and Wolfe, contingent upon full compliance with all applicable laws, regulations and policies within one hundred and twenty days (120) from the effective date of this Order.

KRCC's bylaws refer to the provisions of the Kentucky Revised Statutes addressing mental health and mental retardation services. The bylaws require the board of directors to "[r]eview and evaluate mental health and mental retardation services provided pursuant to KRS 210.370 to 210.480, and report thereon to the Secretary for Health Services. . . ." In addition, KRCC's board of directors must ensure that its programs comply with the regulations issued under Kentucky Revised Statutes sections 210.370 to 210.480. The bylaws also contain a provision requiring the board of directors to be representative of the counties KRCC serves as specified in Kentucky Revised Statutes section 210.380. Although referring to the statutory scheme, the bylaws, like the articles of incorporation, are silent as to whether KRCC was formed to act as an administrative arm of the state.

KRCC and the Kentucky Cabinet for Health Services, Department for Mental Health and Mental Retardation Services entered into a contract in which KRCC agreed to provide mental health services within its eight-county region. A separate contract governed the operations of the Caney Creek Rehabilitation Center. These contracts incorporated by reference the statutory scheme found in Chapter 210 of the Kentucky Revised Statutes. The contracts contained guidelines for the services KRCC provides and eligibility restrictions for patients. For example, KRCC must meet certain staffing requirements, submit budget proposals, and develop personnel policies. KRCC must comply with these provisions in order to receive state funding.

B.

Early in 1997, the Kentucky State District Council of Carpenters, AFL-CIO, an intervenor in this suit, petitioned the NLRB for certification as the collective bargaining representative for Caney Creek's 110 employees. There are four, 20-bed units at the facility, and each is staffed with five rehabilitation counselors and 10 rehabilitation assistants. Caney Creek employs six registered nurses and a licensed practical nurse to provide care throughout all the units. The facility is staffed 24 hours per day, with a full staff in place only on the first shift.

At the NLRB representation hearing, KRCC objected to union certification, claiming that it was a "political subdivision" within the meaning of section 2(11) of the NLRA, and therefore not an employer whose employees could be organized. KRCC also argued that even if it were not a political subdivision, its registered nurses and rehabilitation counselors could not be included in any proposed bargaining unit because these employees were supervisors. The NLRB conducted a hearing on the issues.

After the hearing, but before a decision was issued, KRCC moved to reopen the record, seeking to introduce certain evidence that had been excluded by the hearing officer. The additional evidence comprised information concerning the control or potential control by state agencies of KRCC's operations. The NLRB denied this request, concluding that the evidence at issue "went merely to the financial or administrative governmental control or potential control over its

operations," and that the decision of the hearing officer to exclude the proffered evidence was not prejudicial error.

The NLRB Regional Director then issued a decision and direction of election, rejecting KRCC's claim that it was a political subdivision and its claim that the registered nurses and rehabilitation counselors were supervisors. KRCC requested review of the Regional Director's decision, but the NLRB denied the request.

Shortly thereafter, an election was held, and the employees voted in favor of union representation. The Regional Director certified the Union as the exclusive collective-bargaining representative, but KRCC refused the Union's requests to bargain. The NLRB then issued a complaint alleging that KRCC's refusal to bargain violated sections 8(a)(1) and 8(a)(5) of the NLRA. KRCC responded that the union certification was invalid because it is not an employer within the meaning of section 2(2) of the NLRA. The NLRB upheld the union certification, and found that KRCC's refusal to bargain was an unfair labor practice. The NLRB ordered KRCC to bargain with the Union. It is from this decision and order that KRCC now appeals.

II.

In an appeal from an NLRB decision, we review the board's legal conclusions *de novo* and its factual findings under a substantial evidence standard. *See NLRB v. Good Shepherd Home, Inc.*, 145 F.3d 814, 816 (6th Cir. 1998). We must consider the entire record to determine whether the NLRB's findings are supported by

substantial evidence. *See Grancare, Inc. v. NLRB*, 137 F.3d 372, 375 (6th Cir. 1998).

III.

First, we must decide whether KRCC is a political subdivision: if it is, it is not an employer subject to the NLRA. 29 U.S.C. § 152(2). KRCC argues that the NLRB's decision that KRCC is not a political subdivision is not supported by substantial evidence. KRCC claims the NLRB incorrectly applied the test to determine whether it qualified as a political subdivision, and also that the hearing officer erroneously excluded evidence that would have helped KRCC substantiate its claim that it is an arm of the government.

A.

Section 2(2) of the NLRA excludes from the definition of employer "any State or political subdivision thereof." 29 U.S.C. § 152(2). The Supreme Court has held that an entity is exempt from the NLRA if it is either "(1) created directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 604-05, 91 S.Ct. 1746, 29 L.Ed.2d 206 (1971).

In its decision and direction of election, the NLRB Regional Director applied the test articulated in *Natural Gas* and concluded that KRCC was not created as an arm of the state, and that KRCC was not administered by individuals who are responsible to public officials or the general electorate.

1.

To satisfy the first prong of the Natural Gas test, KRCC must show that it was created directly by the state, *and* that the state intended KRCC to operate as an arm of state government. KRCC claims it was created directly by the state, thus satisfying the first part of the test. In support, KRCC maintains that both state and county officials actively participated in creating KRCC; that a public official filed the articles of incorporation; that local government agencies requested the dissolution of KRCC's predecessor; and that county judges assisted in selecting KRCC's initial board of directors. KRCC argues that it would not exist but for the initiative of the various public officials involved.

In *Crestline Memorial Hospital Association v. NLRB*, 668 F.2d 243 (6th Cir. 1982), the hospital claimed exemption from the NLRA under the political subdivision exception. The city of Crestline leased facilities to Crestline Memorial Hospital on the condition that Crestline Memorial operate these facilities as a municipal general hospital. *See id.* at 244. This court rejected the hospital's contention, noting that the hospital could not have been "created by the state" because "it was and remains a private, nonprofit corporation . . . operating certain facilities leased from the City." *Id.* at 245.

The facts in *Crestline* are analogous to the situation we address here. KRCC is a private, nonprofit corporation, operating mental health and mental retardation facilities pursuant to contracts. There is nothing in KRCC's articles of incorporation to support its claim

that it was created by the state. Cooper filed the articles of incorporation as an individual, and the Commonwealth of Kentucky took no government action to create KRCC. Only after the corporation was formed did the Cabinet for Human Resources "recognize" it as a mental health-mental retardation board. We are satisfied that KRCC was not formed directly by the state, as required by the first prong of the *Natural Gas* test, and because we find it was not, it is unnecessary to address KRCC's next series of arguments that purport to show that the state intended KRCC to serve as an arm of the Kentucky government.

2.

We turn next to the alternative basis announced in *Natural Gas* for determining whether KRCC is a political subdivision of the state: whether, as KRCC claims, it is "administered by individuals who are responsible to public officials or to the general electorate." *Id.*

KRCC argues, first, that because the Secretary of the Cabinet for Human Resources has significant control over KRCC's operations, KRCC is an organization run by individuals responsible to public officials. Specifically, the Secretary has authority to appoint a caretaker for KRCC and make personnel changes without the consent of the corporation's board. In addition, the Secretary has authority to review and disapprove of the board's personnel policies and compensation plans. The Cabinet for Human Resources also dictates the services KRCC will provide and how many employees KRCC will need. Therefore, KRCC claims, it is responsible to the Secretary of the Cabinet for Human Resources.

To be sure, the Secretary of the Cabinet for Human Resources exercises significant oversight of KRCC's operations. The oversight arises because KRCC has sought recognition as a local mental health-mental retardation board, but it does not necessarily follow that such oversight means that the individuals in charge at KRCC are responsible to public officials. We find nothing in the oversight authority of the Cabinet for Human Resources or in the internal structure of the KRCC that makes the individuals in charge at KRCC responsible to the Cabinet for Human Resources.

Second, KRCC argues that the state controls the composition of KRCC's board of directors, and, therefore, the directors are answerable to the state, thus satisfying the second prong of the *Natural Gas* test. KRCC selects its board members in the fashion required by Kentucky law governing mental health-mental retardation boards. The statute specifies that the board of directors must be representative of the community the corporation serves. See Ky. Rev. Stat. § 210.380. The law also provides that the "appointing authority" may remove a board member for certain misconduct. See Ky. Rev. Stat. § 210.390. In the event of a vacancy on the KRCC board of directors, the remaining board members select a replacement.

In *Pikeville United Methodist Hospital of Kentucky, Inc. v. United Steelworkers of America, AFL-CIO-CLC*, 109 F.3d 1146 (6th Cir. 1997), this court addressed this second prong of the political subdivision test of *Natural Gas*, requiring responsibility to public officials. We concluded that the hospital administrators in *Pikeville* were not responsible to public officials, noting that "[n]o law or ordinance . . . requires that the

board of directors . . . be elected by the general populace or requires that those board members be public officials. . . ." *Id.* at 1151. We noted also that the city could not control the composition of the board of directors. *See id.*

Contrary to KRCC's assertions, neither any Kentucky public official nor the general public control the composition of KRCC's board of directors. KRCC complies with the state law requiring the board to be representative of the community served, but this is only because KRCC seeks to operate as a local mental health-mental retardation board.

Section 210.390 of the Kentucky Revised Statutes provides:

> . . . Any member of a board may be removed by the appointing authority for neglect of duty, misconduct or malfeasance in office, after being given a written statement of charges and an opportunity to be heard thereon.

Ky. Rev. Stat. § 210.390. KRCC asks us to read that provision as giving the state the power to remove directors. Considering that vacancies on the board are filled by a vote of the remaining board members, it is unlikely that the state is the "appointing authority." It is more likely that the board of directors itself is the appointing authority. However, we need not answer this question. Assuming *arguendo* that the state can remove a director for misconduct, we are not persuaded that KRCC is run by individuals responsible to public officials or to the general electorate. KRCC chose to subject itself to this regulation by becoming a local

mental health-mental retardation board. If KRCC ceased operating as a local board, the state would no longer have any influence over the board of directors.

Therefore, we conclude that substantial evidence supports the NLRB conclusion that KRCC was not created by the state and is not administered by individuals that are responsible to public officials or to the general electorate, as required by *Natural Gas*, 402 U.S. at 604-05, 91 S.Ct. 1746.

B.

KRCC next argues that the hearing officer should have permitted the introduction of evidence which would have helped establish that KRCC was created for a public purpose and show that the state retained control of its operations.

The proffered testimony spoke to the following points: the state's ability to effectuate change in personnel policies at KRCC; the state's authority to appoint a caretaker/administrator in emergency situations; the state's past appointment of caretakers; the requirement that the state review any collective bargaining agreement; and testimony from a legislator about the initial legislative rationale behind creation of the local boards. KRCC also proffered an affidavit from a former governor of Kentucky containing his thoughts and opinion that the boards are agencies of the state.

We review for an abuse of discretion the decision to exclude evidence. *Dayton Hudson Dep't Store Co. v. NLRB*, 79 F.3d 546, 552 (6th Cir. 1996). Insofar as the evidence the ALJ excluded relates to the state's

authority to effectuate change in personnel policies and to appoint a caretaker in emergencies, the record already contained the statutes and regulations supporting these. See Ky. Rev. Stat. § 210.440(3); 908 Ky. Admin. Regs. 2:020.2. Therefore, the decision to exclude this cumulative evidence cannot be said to have unfairly prejudiced KRCC. *See Segal v. Cook*, 329 F.2d 278, 280 (6th Cir. 1964).

The former governor's opinion as to whether KRCC is a political subdivision as defined by federal law, is manifestly an opinion on a matter of law, and therefore not competent evidence on the question. *See Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 n.*, 107 S.Ct. 1038, 94 L.Ed.2d 112 (1987). Testimony from a drafter of the Kentucky statutory scheme sheds no light on whether the Commonwealth of Kentucky formed KRCC to act as an arm of the government; nor is it instructive as to whether the individuals running KRCC are responsible to public officials or to the general electorate. All the testimony might have provided is one legislator's understanding of the meaning of the statute. Therefore, we reject KRCC's contention that the ALJ abused his discretion in excluding the proffered evidence.

IV.

KRCC maintains that even if it is an employer subject to the NLRA, the registered nurses and rehabilitation counselors it employs are supervisors and therefore exempt from the collective bargaining unit under 29 U.S.C. § 152(11). The NLRA applies to "employees." 29 U.S.C. § 152(3). Individuals employed

as supervisors are specifically excluded from the definition of employee. *See id.*

The NLRA defines "supervisor" as:

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

29 U.S.C. § 152(11). Thus, an employee is a supervisor if he (1) has the authority to engage in one of the activities enumerated in section 152(11), (2) uses independent judgment in that activity, and (3) does so in the interest of the employer. *See Grancare*, 137 F.3d at 375. This definition is a substantively binding rule of law in this court that is no longer open to question.

In concluding that KRCC's registered nurses and rehabilitation counselors are not supervisors, the NLRB assigned the burden of proving supervisory status to KRCC. This ignores our repeated admonition that "[t]he [NLRB] has the burden of proving that employees are not supervisors." *Id.* KRCC claims the registered nurses and rehabilitation counselors exercise independent judgment in directing other employees, and do so in the interest of the employer. The Board found that they do not.

Although we have issued a number of opinions in the last year finding that nurses are supervisors, and rejecting the NLRB's stubborn insistence that they are not, we acknowledge that whether an employee is a supervisor is a highly fact-intensive inquiry, and therefore, each case must be scrutinized carefully.

A. Nurses

During some of the second and all of the third shift at Caney Creek—almost two thirds of the day—the registered nurses act as building supervisors. Although a registered nurse is the highest ranking employee in the building throughout these periods, an administrator is always "on call." According to Caney Creek's procedures, the registered nurses acting as building supervisors are "in charge of the facility and all rehabilitation staff." The building supervisor is responsible for patient care and must ensure adequate staffing. According to an internal memorandum in the record, the nurses acting as building supervisors at Caney Creek are authorized to shift staff between units and must "write up anyone who does not comply with the request immediately." In addition, the nurses have authority to call employees into work early or ask employees to remain on duty beyond the normal end of shift in the event of staff shortages, although the nurses do not have authority to force an employee to work in these situations. The registered nurses do not retain keys to the facility, although they have access to a set of keys that they must give to the security guard when he comes on duty.

The registered nurses are responsible for medical services, particularly when there are no doctors in the building, which is frequently the case. The registered

nurses are also responsible for ensuring that the licensed practical nurses properly dispense patient medications. The registered nurses do not make the initial work schedules, but they are expected to deal with situations in which the facility might become shorthanded for any reason. A nurse, acting as building supervisor, could send an employee home, but the nurse would then need to inform that employee's immediate supervisor.

Our task is to decide whether these responsibilities call for the exercise of "independent judgment" under section 152(11). Unfortunately, the NLRB has continuously interpreted "independent judgment" in a manner that is inconsistent with this circuit's precedent. According to NLRB interpretations, the practice of a nurse supervising a nurse's aide in administering patient care, for example, does not involve "independent judgment." The NLRB classifies these activities as "routine" because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with "management." This court, however, has repeatedly rejected this interpretation, and found that nurses are supervisors when they direct assistants with respect to patient care, rectify staffing shortages, fill out evaluation forms, and serve as the highest ranking employee in the building during off-peak shifts. *See Mid-America Care Foundation v. NLRB*, 148 F.3d 638, 641 (6th Cir. 1998).

In *Mid-America*, we addressed the NLRB's argument that this court should defer to the board's interpretation of "independent judgment." In reversing the NLRB's conclusion that nurses are not supervisors, we

held that the NLRB interpretation was not entitled to the normal deference given to agency interpretations of ambiguous provisions because the rule announced differed from the NLRB's actual application of this rule. *See id.* at 642.

> [W]hen an agency's *application* of a statutory interpretation (which itself ordinarily would be entitled to deference) frustrates judicial review by "subtly and obliquely" revising the stated interpretation to impose a more stringent definition or a higher standard of compliance in certain factual contexts, *Chevron* deference is inappropriate.

Id. (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 118 S.Ct. 818, 827-28, 139 L.Ed.2d 797 (1998) and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). This court has continued to overturn NLRB decisions finding that nurses are not supervisors even though the nurses direct others in providing patient care, address scheduling shortages, and have some evaluative role with respect to other employees. This court, not the NLRB, is the ultimate interpreter of this statutory provision, and we again reject the NLRB's wooden and narrow definition of the term "independent judgment."

The registered nurses at KRCC direct the LPNs in the proper dispensing of medication, regularly serve as the highest ranking employees in the building, seek additional employees in the event of a staffing shortage, move employees between units as needed, and have the authority to write up employees who do not cooperate with staffing assignments. These duties involve inde-

pendent judgment which is not limited to, or inherent in, the professional training of nurses. These duties are supervisory in nature, and there can be no doubt that these activities are conducted in the interest of the employer. *See NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 577, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994). After a careful examination of the record, we conclude that the evidence readily establishes that Caney Creek's registered nurses are supervisors, and does not support the NLRB's decision to include them in the bargaining unit.

B. Rehabilitation Counselors

We turn finally to KRCC's claim that the rehabilitation counselors at Caney Creek are supervisors because they supervise the rehabilitation assistants. The job titles for the positions in question—rehabilitation counselor and rehabilitation assistant—would suggest, without more, some supervisory role for a counselor over an assistant. But it is the record evidence concerning their respective functions and their relationship to one another that is determinative.

When a patient enters the facility, a rehabilitation counselor evaluates the patient's needs and develops a comprehensive treatment plan, with the ultimate goal of helping the patient to become self-sufficient. This plan and any changes made to it must be approved by a psychiatrist. If the plan is approved, it is carried out on a daily basis primarily by the rehabilitation assistants.

The job description for rehabilitation counselors does not explicitly reference supervisory responsibilities;

however, it states that the counselors "[m]ay provide direction to assigned Rehabilitation Assistants and service provision to residents." Counselors must hold a bachelor's degree in a human services field; or an LPN certificate, together with 2 to 4 years of experience; or an associate's degree in nursing without licensure.

Rehabilitation counselors do not have any hiring responsibilities. If a counselor observes an assistant acting inappropriately, the counselor discusses the matter with the assistant and tries to resolve the issue without resort to any formal procedures. If that approach fails, in order to resolve the issue the counselor prepares an incident report, but the counselors do not have any disciplinary authority beyond the incident report. The rehabilitation counselors do not have the authority to transfer assistants between units, and have no authority to address a rehabilitation assistant's grievances.

The rehabilitation counselors do not schedule the assistants. Each morning, the counselors meet with the assistants and the assistants volunteer for particular tasks. A counselor may also ask an assistant to work for a shorthanded unit. The assistants report to the counselors at "informal team meetings" as to how a patient is progressing or participating in the program.

The job description form for rehabilitation assistants specifies that they report to a Treatment Assistant or a Treatment Coordinator. If a rehabilitation assistant has a problem with a patient, he contacts the counselor, and after a "back and forth" discussion, the counselor tells the assistant what to do. An assistant might also handle a problem with a patient on his own and then notify the proper person after the fact. The only

educational requirement is a high school diploma or GED.

The standards we have applied to the registered nurses apply with equal force to the rehabilitation counselors for determining whether the counselors are supervisors. The rehabilitation counselors must (1) have the authority to engage in one of the activities enumerated in section 152(11), (2) use independent judgment in that activity, and (3) do so in the interest of the employer. *See Grancare*, 137 F.3d at 375.

At KRCC, the primary function of the rehabilitation counselor is to design a patient treatment plan. This does not, of itself, involve any supervisory authority. Neither does the working relationship between the counselors and assistants imply any supervision of the work of the assistants by the counselors. The counselors do not hire or fire the assistants, and they do not assign the assistants to particular units or patients. The fact that the assistants carry out the provisions of the treatment plans designed by the counselors does not suggest that the counselors are supervisors. The record reflects more of a cooperative relationship between the rehabilitation counselors and rehabilitation assistants, with each performing a distinct but complementary function. Therefore, we hold that substantial evidence supports the NLRB's decision that the rehabilitation counselors are not supervisors and therefore to include them in the bargaining unit.

V.

For all of the foregoing reasons, we hold (1) that KRCC is not a "political subdivision" within the mean-

ing of the NLRA; (2) that the registered nurses are supervisors within the meaning of the NLRA; and (3) that the rehabilitation counselors are not supervisors within the meaning of the NLRA.

KRCC's petition for review is GRANTED in part and DENIED in part, and the NLRB's petition for enforcement is GRANTED in part and DENIED in part.

NATHANIEL R. JONES, Circuit Judge, dissenting.

I concur with the majority's holding in all respects but one: that the registered nurses at KRCC are "supervisors" and thus exempt from coverage under § 2(11) of the NLRA, 29 U.S.C. § 152(11). Because I believe that the NLRB's conclusion to the contrary is supported by substantial evidence (*i.e.*, that the registered nurses are "employees" within the meaning of § 2(3) of the Act, 29 U.S.C. § 152(3)), I would vote to enforce the NLRB's Order. Accordingly, I respectfully dissent.

The majority correctly notes that the NLRB's factual findings must be affirmed if they are supported by substantial evidence. See *ante* at 455. But the majority fails to articulate precisely what "substantial evidence" is. As we have frequently held in Social Security disability cases—cases of agency review where the "substantial evidence" standard likewise controls—substantial evidence is more than a mere scintilla, but less than a preponderance of the evidence. *See Cutlip v. Secretary of Health & Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994) (per curiam); *Brainard v. Secretary of Health & Human Servs.*, 889 F.2d 679, 681 (6th Cir. 1989) (per curiam); *see also Consolidated Edison Co. v.*

NLRB, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.*, 305 U.S. at 229, 59 S. Ct. 206; accord *Medical Rehabilitation Servs., P.C. v. Shalala*, 17 F.3d 828, 831 (6th Cir.1994) (*citing Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420, 28 L.Ed.2d 842 (1971)); *Brainard*, 889 F.2d at 681. If we determine, after reviewing the administrative record as a whole, that the NLRB's factual findings are supported by substantial evidence, those findings must be affirmed, even if substantial evidence exists in the record to support an opposite decision. *See Mullen v. Bowen*, 800 F.2d 535, 545 (6th Cir. 1986) (en banc). A finding of substantial evidence thus mandates affirmance. *See Kirk v. Secretary of Health & Human Servs.*, 667 F.2d 524, 535-37 (6th Cir. 1981).

Having conducted the "highly fact-intensive inquiry" required by the majority, *ante* at 453, I would find the NLRB's determination—that the six registered nurses employed at KRCC are not supervisors—supported by substantial evidence. The NLRB found, in relevant part, as follows:

> The RNs do not receive any extra compensation for serving as "building supervisors" and do not have keys to the facility.
>
> * * *
>
> [T]he only extra responsibility assumed by the RNs when serving as "building supervisors" is to

obtain needed help if for some reason a shift is not fully staffed. In the event a shift is understaffed, the RNs on duty will first attempt to find a volunteer to stay over from among the employees on the proceeding [*sic*] shift. If a volunteer cannot be obtained from the employees on the preceding shift, the "building supervisor," using a list containing the names, telephone numbers and addresses of the employees, will attempt to reach an off- duty employee who lives nearby to come in and cover the shift. The "building supervisors" do not have any authority, however, to compel an employee to stay over or come in to fill a vacancy under threat of discipline.

It appears that the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives. The RNs may also complete incident reports, but so can any other employee. All incident reports are independently investigated by the nursing or unit coordinators to determine if any disciplinary action is warranted and it does not appear that these management officials seek any input from the RNs involved. Although [KRCC] asserts . . . that RNs can "write-up" employees, there is no evidence in the record that they have ever done so. . . .

* * *

> The RNs in their normal capacity or as "building supervisors" do not have the authority to hire, fire, reward, promote or independently discipline employees or to effectively recommend such action. They do not evaluate employees or take any action which would affect their employment status. Indeed, the RNs, including when they are serving as "building supervisors," for the most part, work independently and by themselves without any subordinates.

J.A., vol. II, at 297-98 (quotations in original). In my view, these well-reasoned findings unquestionably constitute "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" that the six RNs at KRCC are "employees" within the meaning of 29 U.S.C. § 152(3).

I would therefore hold that the collective bargaining unit at KRCC includes the six registered nurses, and vote to enforce the NLRB's July 10, 1997 Order in its entirety.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Case 9-CA-34926

KENTUCKY RIVER COMMUNITY CARE, INC. AND KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL—CIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Dated, Washington, D.C. July 10, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

Pursuant to a charge filed on May 20, 1997, the General Counsel of the National Labor Relations Board issued a complaint on May 22, 1997, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 9-RC-16837. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 11, 1997, the General Counsel filed a Motion for Summary Judgment. On June 13, 1997, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 27, 1997, the Respondent filed a response.

Ruling on Motion for Summary Judgment

In its answer and response, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's determination in the representation proceeding that the Respondent is an employer within the meaning of Section 2(2) of the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[1]

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[1] In the underlying case, Member Higgins, without passing on the correctness of *Management Training Corp.*, 317 NLRB 1355 (1995), would have granted review with respect to the hearing officer's exclusion of testimony concerning the extent of control exercised by the state over the Respondent. See his dissenting opinion in *Aramark Corp.*, 323 NLRB No. 26 (Feb. 28, 1997).

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a private non-profit corporation, has been engaged in mental health care and rehabilitation at its Hazard, Kentucky facility. During the 12-month period preceding the issuance of the complaint, the Respondent in conducting its business operations described above, derived gross revenues in excess of $250,000 and purchased and received at its Hazard, Kentucky facility, goods valued in excess of $2000 directly from sources outside the Commonwealth of Kentucky. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held March 20, 1997, the Union was certified on April 7, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

However, he agrees with his colleagues that no new matters are appropriately raised in the instant "technical" 8(a)(5) case and that summary judgment is therefore appropriate.

> All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Respondent at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since April 24, 1997, the Union has requested the Respondent to bargain, and, since May 15, 1997, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after May 15, 1997, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Kentucky River Community Care, Inc., Hazard, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Kentucky State District Council of Carpenters, AFL—CIO, United Brotherhood of Carpenters and Joiners of America, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following

appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Respondent at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Hazard, Kentucky, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current

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[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees and former employees employed by the Respondent at any time since May 20, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 10, 1997

_____

William B. Gould IV Chairman

_____

Sarah M. Fox Member

_____

John E. Higgins, Jr. Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Kentucky State District Council of Carpenters, AFL—CIO, United Brotherhood of Carpenters and Joiners of America as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by us at our Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

KENTUCKY RIVER COMMUNITY CARE, INC.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-RC-16837

KENTUCKY RIVER COMMUNITY CARE, INC., EMPLOYER

AND

KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, PETITIONER

ORDER

Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

WILLIAM B. GOULD IV, CHAIRMAN

SARAH M. FOX, MEMBER

JOHN E. HIGGINS, JR., MEMBER

Dated, Washington, D.C., March 21, 1997.

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[1] Member Higgins agrees to deny review on the issue of whether the Employer is a "political subdivision" within the meaning of Section 2(2) of the Act. However, without passing at this time on the correctness of *Management Training*, 317 NLRB 1355, Member Higgins would grant review with respect to the hearing officer's exclusion of testimony concerning the extent of control exercised by the state over the Employer. See *Aramark*, 323 NLRB No. 26 (dissenting opinion).

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CASE 9-RC-16837

IN THE MATTER OF
KENTUCKY RIVER COMMUNITY
CARE, INC.,[1] EMPLOYER

AND

KENTUCKY STATE DISTRICT COUNCIL OF
CARPENTERS, AFL-CIO, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA,
PETITIONER

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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[1] The name of the Employer appears as amended at the hearing.

1. In a posthearing motion, the Employer objected to the conduct of the hearing and moved to reopen the record. At the hearing and in its motion, the Employer contends that the hearing officer erred by refusing to permit it to introduce evidence in support of its position that it is a political subdivision of the Commonwealth of Kentucky. Specifically, the Employer maintains that the hearing officer refused to allow it to introduce evidence, through witnesses and affidavits, with respect to its relationship to, and the control exercised over its operations by, the State.

The hearing officer ruled that the only relevant evidence was whether the Employer was a governmental entity or a political subdivision. Thus, she precluded certain evidence which went to the issue of the control or potential control of various agencies of the Commonwealth of Kentucky over the Employer's operations and limited the Employer to an offer of proof. I find that the hearing officer's ruling rejecting such evidence does not constitute prejudicial error. In reaching this conclusion, I note that the State statutes under which the Employer was established as well as the contracts between the Employer and the relevant State agencies are in the record and that the Employer's offer of proof went merely to the financial or administrative governmental control or potential control over its operations.

In *Management Training Corporation*, 317 NLRB 1355 (1995), the Board, in overruling *Res-Care, Inc.*, 280 NLRB 670 (1986), held that in determining whether to assert jurisdiction over an employer with close ties to a governmental entity it would consider only whether the employer meets the definition of "employer" under

Section 2(2) of the Act and the applicable monetary jurisdictional standards. The Board specifically held that it would no longer consider the control or potential control by a governmental department or agency over the operations of an employer in determining whether such employer was excluded from the term "employer" as defined in Section 2(11) [*sic*] of the Act as a governmental entity or political subdivision thereof. *Management Training Corporation*, 317 NLRB at 1358. Accordingly, the hearing officer properly rejected evidence on the control or potential control of the Employer's operations by various State agencies and her rulings on this issue and in all other respects are hereby affirmed and the Employer's motion to reopen the record is denied. See, *Mariah, Inc.*, 322 NLRB No. 114 (1996).

2. The Employer, a private nonprofit corporation with its principal office in Hazard, Kentucky, provides mental health care services to Kentucky residents at 25 separate sites throughout an 8-county region in the eastern portion of the State. The only facility involved in this proceeding is the Caney Creek Developmental Complex located at Pippa Passes, Kentucky which provides long-term care for severely ill mental residents. Contrary to the Petitioner, the Employer contends that it is exempt from the Board's jurisdiction as a governmental entity or political subdivision of the Commonwealth of Kentucky.

The record discloses that the Employer was incorporated on May 21, 1979 by Vernon Cooper, Jr. who was, at the time, chairman of the East Kentucky Health Planning Council. Cooper incorporated the Employer at the suggestion of the Secretary of the Cabinet of Hu-

man Resources. The Employer was incorporated pursuant to Chapter 273, et seq., of the Kentucky Revised Statutes (KRS). The Employer's operations appear to be, for the most part, governed by KRS Chapter 210, et seq., which authorizes the Cabinet of Human Resources to establish regional mental health and retardation boards to plan and administer grants for all local programs relating to mental health, mental retardation and alcohol and drug abuse. The enabling statute requires that the board of directors of any employer, which can apparently be either private or nonprofit, operating pursuant to KRS 210 be representative of the area served.

At the time the Employer was incorporated, the county judges for each of the eight counties covered by the Employer's jurisdiction appointed two members which made up the Employer's original board of directors. There are currently 20 board members, consisting of 2 individuals from each of the 8 counties served by the Employer and 4 at-large members. The board members serve a 4-year term and after the selection of the original board, vacancies on the board have been filled by applicants who are nominated and approved by current board members. The board members are not elected and are not responsible to any State official or entity. The board of directors appoints an executive director who has overall responsibility for directing the Employer's operations. The current executive director is Dr. Louise Howell, whose office is located at the Employer's headquarters in Hazard, Kentucky.

The Employer contracts with the Commonwealth of Kentucky (Department for Mental Health and Mental

Retardation) to provide the mental health services required by statute. The Employer currently has two contracts with the State. Its basic contract for all operations is effective July 1, 1996 through June 30, 1997. In addition, the Employer has a "price contract" to provide the mental health services required by the State at the Caney Creek Rehabilitation Complex. In this connection, I find noteworthy the fact that when the State initially sought an employer to provide services at Caney Creek, it solicited bids from several entities, including both private and nonprofit corporations.

The contracts between the Employer and the State provide specific guidelines with respect to the type of services to be provided and the individuals entitled to treatment by the Employer. In addition, the contracts mandate that the Employer meet certain staffing requirements and comply with certain employment guidelines. The Employer is required to submit a budget and a detailed staffing pattern to the State describing expenditures and employee benefits package, including employee health insurance, unemployment insurance, retirement plan, holidays, vacations and sick leave. The Employer is also required to develop and implement a personnel policy for its employees. Finally, the State performs periodic audits and investigations and apparently can even remove a member of the board of directors for malfeasance in office.

The Employer's operational plan and budget must be approved by the applicable State agency before the Employer can apply for State grants or receive any monies from the State Department of Health Services. In this connection, the record discloses that a sub-

stantial portion of the Employer's budget is comprised of State grants and monies. However, the Employer receives various Federal grants and some of its operational funds are obtained through Medicare, Medicaid and private reimbursement.

Although the Employer must meet various State imposed requirements and its budget and operational plan must be approved by applicable State agencies, the Employer is apparently free to recruit, hire, discharge and discipline its employees. The Employer also has the apparent freedom to establish its own job classifications and pay rates as long as they are within its overall budget. Finally, the Employer is administered by an independent board of directors. Although the board members apparently can be removed by the State for malfeasance in office, the current members of the board are not elected by the general public and are not responsible to any public official.

In determining whether to assert jurisdiction over an employer with close ties to an exempt government entity, the Board, for several years, applied principles enunciated in *Res-Care, Inc.*, supra. Under the *Res-Care* standards, the Board examined the control over essential terms and conditions of employment retained by both the employer and exempt entity to determine whether an employer was capable of engaging in meaningful collective bargaining. In *Management Training Corporation*, supra, the Board noted that the approach taken in *Res-Care* in determining whether to assert jurisdiction over employers with a relationship to exempt entities had resulted in confusion and lack of uniformity. Thus, in *Management Training Corporation*, supra, the Board overruled *Res-Care* and held that

in determining whether to assert jurisdiction over an employer with close ties to an exempt entity it would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act and whether such employer meets the applicable monetary jurisdictional standards."

The record discloses that the Employer meets the definition of "employer" under Section 2(2) of the Act. In this connection, the Supreme Court has held that an employer is an exempt political subdivision under Section 2(2) of the Act if it is either (1) created as a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or the general public. *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971). Although the Employer was established pursuant to a State statute and its budget, operational plan and staffing pattern must be approved by the applicable State agency, the Employer, contrary to its assertion at the hearing and in its brief, does not constitute a department or administrative arm of the State. The cases cited by the Employer in its brief in support of its position that the Employer was created as an administrative arm of the State, *Fayette Electric Co-Op, Inc.*, 308 NLRB 1071 (1992); *Western Paper Products, Inc.*, 321 NLRB No. 118 (1996); and *Madison County Mental Health Center, Inc.*, 253 NLRB 258 (1980), are clearly distinguishable. In *Fayette*, the Board found that the employer's governing board of directors, unlike here, was responsible to the general electorate. In *Western Paper*, the Board found that a state receiver was not a department or administrative arm of the state and asserted jurisdiction. The holding in *Western Paper* in no way

supports the Employer's position. Finally, in *Madison County*, the county established the employer and, unlike here, governed its entire operation, including its labor relations.

Moreover, the Employer is not administered by individuals who are responsible to public officials or the general electorate. The Employer is administered by an independent board of directors whose members are appointed for 4-year terms by the other board members. Although members apparently may be removed by the State for malfeasance in office, there is no evidence that they are directly responsible to any State agency or official. The cases cited by the Employer in its brief do not support its position that the Employer is administered by individuals responsible to public officials or the general public. The primary cases relied on by the Employer, *Lima and Allen County Community Action, Inc.*, 304 NLRB 888 (1991); *Woodbury County Community Action Agency*, 299 NLRB 554 (1990); and *Economic Security Corp.*, 299 NLRB 562 (1990), are inapposite. In all three of these cases, unlike here, the majority of their boards of directors were responsible by law to public officials or the general electorate. In *Fayette*, the other Board case cited by the Employer, as previously noted, the employer's board of directors was directly responsible to the general electorate. Finally, the Supreme Court's decision in *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, supra, cited by the Employer, merely sets forth the criteria for an employer to qualify as a political subdivision of a governmental entity and has no relationship to the facts in the instant case.

At the hearing and in its posthearing brief, the Employer contends that the law in this area is still unsettled and that the Board has changed its position on the issue at least three times in recent years. Thus, the Employer maintains that the control exercised by the State, particularly the State Cabinet of Human Resources, over its operations should be considered in determining whether to assert jurisdiction over its operations. However, the Employer has not cited, and I am not aware of, any case in which the Board has indicated that it may be considering revisiting the standards established in *Management Training Corporation*, supra, for determining whether to assert jurisdiction over an employer with a close relationship to an exempt entity. Finally, the Employer contends in its brief that if *Management Training* requires that jurisdiction be asserted over its operation it should be overruled. I am bound by Board law and do not have the authority, as suggested by the Employer in its brief, to overturn Board precedent.

Based on the foregoing and the entire record, I find that the Employer is an "employer" within the meaning of Section 2(2) of the Act. *NLRB v. The Natural Gas Utility District of Hawkins County, Tennessee*, supra; *Management Training Corporation*, supra; *Resident Home for the Mentally Retarded of Hamilton County, Inc.*, 239 NLRB 3 (1978). Moreover, the parties stipulated that the Employer has gross annual revenues in excess of $250,000 and, during the past 12 months, purchased and received at its Kentucky facilities goods valued in excess of $2,000 directly from points outside the Commonwealth of Kentucky. Accordingly, the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to

assert jurisdiction herein. *Management Training Corporation*, supra; *Resident Home for the Mentally Retarded of Hamilton County, Inc.*, supra.

3. The parties stipulated, and the record shows, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and it claims to represent certain employees of the Employer.

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

5. The Employer's Caney Creek Rehabilitation Complex, herein called Caney Creek, is located at Pippa Passes, Kentucky and provides a wide range of services for residents who are suffering from severe mental illness. The Caney Creek facility employs approximately 110 professional and nonprofessional employees in a variety of job classifications. There is no history of collective bargaining affecting any of these employees.

The Petitioner seeks to represent essentially all professional and nonprofessional employees employed by the Employer at its Caney Creek facility in any unit or units found appropriate. The Employer is in apparent agreement that a unit of all professional and nonprofessional employees at the Caney Creek facility is appropriate for the purposes of collective bargaining. Contrary to the Petitioner, however, the Employer would exclude the 20 rehabilitation counselors and 6 registered nurses from the unit as supervisors within the meaning of Section 2(11) of the Act.

Caney Creek is an 80-bed facility consisting of two wings, each of which is divided into two 20-bed units. The 4 units are equally staffed with 5 rehabilitation counselors and 10 rehabilitation assistants. There are apparently no physicians or psychiatrists employed directly by the Employer and such medical services are apparently obtained through a contract arrangement. However, Caney Creek employees, six registered nurses (RNs) and a licensed practical nurse (LPN), provide various medical services for the entire facility. There are also three recreational assistants employed by Caney Creek who are responsible for providing the residents with recreational therapy. In addition to the employees engaged in direct resident care, the facility also employs an unknown number of kitchen, dining room, housekeeping and maintenance employees. The Caney Creek facility is staffed 24 hours per day, 7 days per week, but apparently is fully staffed only on the first shift.

The overall administrative responsibility for the Caney Creek is vested in the administrator, Leonard Echols, who reports to the Employer's executive director, Dr. Louise Howell who is located at the Employer's office at Hazard, Kentucky. Reporting to Echols is the assistant administrator, Peggy Mason; the two unit coordinators, one position being currently vacant and the other being filled by Mark Stone; the nursing coordinator, Alicia Cook; the medical records custodian, Lavenia Wright; the recreational counselor, Nathan Fugate; the department manager of housekeeping and maintenance, Edward Jacobs; and the kitchen supervisor, Deborah Beverly. In addition, the human resources director, Sharon Harris and accountant supervisor, Alisha Craft, and her assistant,

Elizabeth Pennington, who work out of the Employer's Hazard, Kentucky office, perform managerial, supervisory or clerical duties for Caney Creek as well as other facilities operated by the Employer.

The residents at Caney Creek are adult mentally handicapped individuals who are received from throughout the Kentucky psychiatric hospital system. The treatment provided at Caney Creek is based on a psychiatric rehabilitation activity program developed by Boston University and is designed to help the mentally retarded develop skills necessary to live independently and perhaps move into a normal community setting. Upon being accepted at Caney Creek, residents are assigned to one of the four units. After a resident is assigned to a unit, a rehabilitation counselor reviews the resident's medical history and, with input from family members, the rehabilitation assistant involved and medical and psychiatric personnel, prepares a detailed treatment plan which is submitted to the unit coordinator for approval. The individual treatment plan includes the goals to be achieved and the method of accomplishing the desired results. The treatment plan consists of an activity based program, including living care, social activity, money management and other activities designed to assist the resident perform to the maximum of his/her capabilities. The treatment plans are administered by the rehabilitation counselors along with the rehabilitation assistants in conjunction with medical and psychiatric personnel.

Rehabilitation Counselors:

The Caney Creek facility employs 20 rehabilitation counselors. There are five counselors on each of the four

treatment units and each counselor is assisted by two rehabilitation assistants. The counselors work primarily on the first shift and report to the unit coordinators. The parties stipulated that the rehabilitation counselors are professional employees. Although there is some record testimony that an LPN could, with training and experience, become a rehabilitation counselor, all current counselors have at least a batchelor's [*sic*] degree and some have or are currently pursuing a master's degree. Further, the treatment plans formulated by the rehabilitation counselors require the exercise of independent discretion which can only be obtained through a course of study in an institution of higher learning. Accordingly, I find, in agreement with the parties, that the rehabilitation counselors are professional employees.

Contrary to the Petitioner, the Employer contends that the rehabilitation counselors exercise supervisory authority over the rehabilitation assistants and are supervisors within the meaning of Section 2(11) of the Act. The rehabilitation counselors, as previously noted, develop and primarily administer the treatment plans for the residents. Each rehabilitation counselor is assigned to a specific number of residents for whom they are responsible. In addition to formulating and administering treatment plans, the rehabilitation counselors are responsible for conducting classes covering a wide range of subjects from living care and cooking to money management. Each rehabilitation counselor is assisted by two rehabilitation assistants. The rehabilitation assistants not only assist the counselors in administering treatment plans but are responsible for making sure residents are awakened on time, attend

scheduled classes, keep doctor's appointments and are bathed and dressed.

The rehabilitation counselors meet each morning and discuss the day's schedule. During these morning meetings, the counselors determine what services need to be performed during the day and how best to accomplish the necessary tasks. The rehabilitation counselors apparently designate certain tasks which can be performed by the rehabilitation assistants. Such assignments appear to be routine in nature and do not involve the exercise of independent judgment. In addition, rehabilitation counselors will occasionally ask a rehabilitation assistant to perform specific tasks during the day such as making sure a resident goes to class or keeps a doctor's appointment. However, there is no record evidence that the rehabilitation counselors in making such requests have any authority to compel that the assignments be completed.

The rehabilitation counselors do not have the authority to hire, fire, discipline or reward employees. Although they can note any problem they observe on an incident report, the record shows that any employee may complete such a report. All incident reports are independently investigated by a unit coordinator who determines what, if any, disciplinary action is warranted. The counselors do not evaluate the rehabilitation assistants and their input is not sought by the unit coordinator responsible for appraising the rehabilitation assistants. The rehabilitation counselors are evaluated on leadership qualities but apparently so are all other employees. Finally, the job description for the rehabilitation counselors contains a reference to supervisory responsibilities which is marked not applicable.

The records fails to establish that the rehabilitation counselors process any indicia of supervisory authority within the meaning of Section 2(11) of the Act. They do not have the authority to hire, fire, discipline, promote or evaluate employees and any assignment or direction which they may give other employees is routine in nature. The fact that the counselors formulate treatment plans which are administered in part by rehabilitation assistants does not make the rehabilitation counselors supervisors within the meaning of Section 2(11) of the Act. See, *Ten Broeck Commons*, 320 NLRB 806 (1996); *Providence Hospital*, 320 NLRB 717 (1996). In *Providence Hospital*, the Board specifically found that the mere authority to coordinate the work of similarly situated employees did not make an individual a supervisor. The Supreme Court's decision in *NLRB v. Health Care and Retirement Corp.*, 114 S. Ct. 1778 (1994), cited by the Employer in its brief, does not require a contrary finding. In *Health Care*, the Supreme Court merely repeated [*sic*] the Board's "in the interest of the employer" test applied in the health care industry, but did not disturb the Board's trademark analysis in determining supervisory status. I also note that if the rehabilitation counselors were found to be supervisors within the meaning of the Act, there would be 20 supervisors for 40 employees. Such a supervisory/employee ratio is totally unrealistic and militates against finding the rehabilitation counselors to be supervisors. *Manor West, Inc.*, 313 NLRB 956 (1994); *First Western Building Services, Inc.*, 309 NLRB 591, 603 (1992); *Bay Area Los Angeles Express*, 275 NLRB 1063 (1985).

Based on the foregoing and the entire record, I find that the rehabilitation counselors are not supervisors

within the meaning of Section 2(11) of the Act. Accordingly, I shall include them in the unit.

Registered Nurses (RNs):

Caney Creek employs six RNs whom the Employer, contrary to the Petitioner, would exclude from the unit as supervisors within the meaning of Section 2(11) of the Act. There are two RNs on each of the three shifts. The RNs are responsible for dispensing medication to the residents and for providing any other medical services ordered by a resident's physician or psychiatrist.

The two RNs on duty during each shift are responsible for servicing the entire facility. The RNs assigned to the second and third shift also serve as "building supervisors" and the first shift RNs occupy this position on weekends. The RNs do not receive any extra compensation for serving as "building supervisors" and do not have keys to the facility. There are two somewhat conflicting undated documents setting forth the duties of the "building supervisors." The memorandum which all the RNs have apparently seen provides only that the "building supervisors" in the absence of all management officials, will call a "local" replacement employee in the event of a staff shortage utilizing "a list of employees with local employees highlighted." The memorandum relied on by the Employer in its brief, which at least some of the RNs have apparently never seen, provides that the "building supervisors," in addition to securing replacement employees, will be the first person contacted when on duty concerning "the building, staff, staffing and residents . . . and [are] ultimately responsible for quality patient care."

A careful review of the record and the briefs of the parties discloses that, regardless of which memorandum is now in effect, the only extra responsibility assumed by the RNs when serving as "building supervisors" is to obtain needed help if for some reason a shift is not fully staffed. In the event a shift is understaffed, the RNs on duty will first attempt to find a volunteer to stay over from among the employees on the preceding shift. If a volunteer cannot be obtained from the employees on the preceding shift, the "building supervisor," using a list containing the names, telephone numbers and addresses of the employees, will attempt to reach an off-duty employee who lives nearby to come in and cover the shift. The "building supervisors" do not have any authority, however, to compel an employee to stay over or come in to fill a vacancy under threat of discipline.

It appears that the RNs may occasionally request other employees to perform routine tasks, but they apparently have no authority to take any action if the employee refuses their directives. The RNs may also complete incident reports, but so can any other employee. All incident reports are independently investigated by the nursing or unit coordinators to determine if any disciplinary action is warranted and it does not appear that these management officials seek any input from the RNs involved. Although the Employer asserts in its brief that RNs can "write-up" employees, there is no evidence in the record that they have ever done so. Indeed, the only record evidence where an RN made a complaint about another employee it was apparently ignored. In this connection, one of the RNs reported that the LPN, with whom she worked, was abusive and had countermanded one of her orders. The

record does not disclose that any corrective action was taken against the LPN.

The RNs in their normal capacity or as "building supervisors" do not have the authority to hire, fire, reward, promote or independently discipline employees or to effectively recommend such action. They do not evaluate employees or take any action which would affect their employment status. Indeed, the RNs, including when they are serving as "building supervisors," for the most part, work independently and by themselves without any subordinates.

It is well settled that the burden of proving that an individual is a supervisor within the meaning of Section 2(11) of the Act rests with the party asserting supervisory status. See, *Northcrest Nursing Home*, 313 NLRB 491 (1993); *Ohio Masonic Home*, 295 NLRB 1390, 1393 (1989). This burden was not altered, when considering the status of registered nurses, by the Supreme Court's decision in *NLRB v. Health Care and Retirement Corp.*, supra. In *Health Care*, which the Employer relies on its brief to support its position, the Supreme Court merely rejected the Board's finding that supervisory authority exercised in connection with patient care is not in the interest of the employer. However, the Supreme Court left intact the Board's traditional analysis of an individual's duties to determine whether the person possesses any indicia of supervisory authority within the meaning of Section 2(11) of the Act. After considering the Supreme Court's directives set forth in *Health Care*, the Board determined to apply the same test to registered nurses as is applicable to all other individuals in determining supervisory status. *Providence Hospital*, supra; *Ten*

Broeck Commons, supra. This analysis is consistent with the congressional intent in enacting Section 2(11) of the Act. In this connection, Congress emphasized that its intention was that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985).

Based on the foregoing, the entire record and careful review of the Employer's brief and cases cited therein, I find that the Employer has not met its burden of establishing that the RNs, even when serving as "building supervisors," are supervisors within the meaning of Section 2(11) of the Act. The fact that the RNs may request employees to perform routine tasks and, pursuant to established policy, call in replacements or seek volunteers to stay over does not establish supervisory status. *Ten Broeck Commons*, supra; *Northcrest Nursing Home*, supra; *Phelps Community Medical Center*, 295 NLRB 486 (1989). The other duties performed by the RNs relate merely to providing typical medical services. Finally, I note that the RNs here have far less authority than the nurses in *Providence Hospital*, supra, and *Ten Broeck Commons*, supra, who the Board found not to be supervisors. Accordingly, I find that the RNs, including the "building supervisors," are not supervisors within the meaning of Section 2(11) of the Act. I shall, therefore, include them in the unit.

In agreement with the position of the parties, I find that the licensed practical nurse and the recreational assistants share a sufficient community of interest with

the other employees to warrant their inclusion in the unit. Accordingly, I shall include them in the unit.

The parties stipulated and the record shows, that the executive director, *Dr. Louise Howell*; the administrator of the Caney Creek facility, *Leonard Echols*, the assistant administrator of Caney Creek, *Peggy Mason*; the unit coordinator, *Mark Stone*; the nursing coordinator, *Alicia Cook*; the recreational coordinator, *Nathan Fugate*, the department manager for housekeeping and maintenance, *Edward Jacobs*; the kitchen supervisor, *Deborah Beverly*; the human resources manager, *Sharon Harris*; and the accountant supervisor, *Alisha Craft*, have the authority to hire, fire or discipline employees or direct their work in a manner requiring the exercise of independent judgment and are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit.

The parties also stipulated that Elizabeth Pennington, an assistant to the accountant supervisor, Alisha Craft, should be excluded from the unit. The record discloses that Pennington is located at the Employer's Hazard, Kentucky office but performs some work for Caney Creek. However, there is no record testimony that she has any interest in common with any of the Caney Creek employees. In agreement with the stipulations of the parties, and as she lacks a community of interest with the other Caney Creek employees, I shall exclude *Elizabeth Pennington* from the unit.

Based on the foregoing and the entire record, including the agreements and stipulations of the parties, I find that a wall-to-wall unit of the Employer's professional and nonprofessional employees employed at

its Caney Creek Rehabilitation Complex may be appropriate for the purposes of collective bargaining. The Board, however, is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with employees who are not professionals unless a majority of the professional employees vote for inclusion in such unit. *Sonotone Corporation*, 90 NLRB 1236 (1950). Accordingly, to ascertain the desires of the professional employees as to inclusion in a unit with nonprofessional employees, I shall direct separate elections in the following voting groups:

VOTING GROUP A

All employees, including the licensed practical nurse, recreational assistants and rehabilitation assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all professional employees, guards and supervisors as defined in the Act.

VOTING GROUP B

All professional employees, including rehabilitation counselors and registered nurses employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all other employees, and all guards and supervisors as defined in the Act.

The nonprofessional employees in Voting Group A will be polled to determine whether or not they desire to be represented for collective-bargaining purposes by the Kentucky State District Council of Carpenters, AFL-CIO, United Brotherhood of Carpenters and Joiners of America.

The professional employees in Voting Group B will be asked two questions on their ballot:

> (1) Do you wish to be included with nonprofessional employees in a single unit for purposes of collective bargaining?
>
> (2) Do you wish to be represented for purposes of collective bargaining by Kentucky State District Council of Carpenters, AFL-CIO, United Brotherhood of Carpenters and Joiners of America?

If a majority of the professional employees in Voting Group B vote "Yes" to the first question, indicating their wish to be included in a unit with nonprofessional employees, they will be so included. Their votes on the second question will then be counted together with the votes of the nonprofessional employees in Voting Group A to decide the representative issue for the entire unit. On the other hand, if a majority of the professional employees in Voting Group B do not vote for inclusion, they will not be included with the nonprofessional employees and their votes on the second question will then be separately counted to determine whether they desire to be represented by the Kentucky State District Council of Carpenters, AFL-CIO, United Brotherhood of Carpenters and Joiners of America in a separate professional unit.

Although my final unit determination is based, in part, on the results of the elections in the two voting groups, I now make the following findings in regard to the appropriate unit: (1) if a majority of the professional employees vote for inclusion in a unit with nonprofessional employees, I find that the following employees constitute a unit appropriate for the purposes

of collective bargaining within the meaning of Section 9(b) of the Act:

> All professional and nonprofessional employees, including rehabilitation counselors, registered nurses, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act.

(2) if a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, I find that the following groups of employees constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All employees, including the LPN, rehabilitation assistants and recreational assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all professional employees, guards and supervisors as defined in the Act.
>
> (b) All professional employees, including rehabilitation counselors and registered nurses employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all other employees, and all guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned among the employees in the voting groups described above at the time and places set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision *2* copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before *February 28, 1997*. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by *March 7, 1997*.

Dated at Cincinnati, Ohio this 21st day of February 1997.

/s/ RICHARD L. AHEARN
RICHARD L. AHEARN, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-5885/5983

KENTUCKY RIVER COMMUNITY CARE, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

KENTUCKY STATE DISTRICT COUNCIL OF
CARPENTERS, AFL-CIO, INTERVENOR

[Filed: Jan. 27, 2000]

JUDGMENT

BEFORE: JONES, RYAN, and BATCHELDER, Circuit Judges

On October 4, 1999, we issued our decision enforcing in part and denying in part the National Labor Relations Board's order requiring Kentucky River Community Care, Inc. ("KRCC") to bargain with a union purporting to represent various KRCC employees. In

conformance with our October 4 opinion, we hereby ORDER AND ADJUDGE that:

1. KRCC is not a political subdivision; it is an employer subject to the National Labor Relations Act pursuant to 29 U.S.C. § 152(2).

2. The registered nurses employed by KRCC are supervisors as defined under 29 U.S.C. § 152(11) and, therefore, are not employees under the Act. Because the registered nurses are not employees, they are not proper members of the collective bargaining unit certified by the Board.

3. The rehabilitation counselors employed by KRCC are not supervisors as defined under 29 U.S.C. § 152(11) and, therefore, are employees under the Act. The rehabilitation counselors are proper members of the collective bargaining unit certified by the Board.

4. Upon request, KRCC, its officers, agents, successors, and assigns, shall bargain with the Kentucky State District Council of Carpenters, AFL-CIO, as the exclusive representative of the employees in the bargaining unit defined as follows:

> All professional and nonprofessional employees, including rehabilitation counselors, the licensed practical nurse, rehabilitation assistants and recreational assistants employed by the Employer at its Caney Creek Rehabilitation Complex, excluding all guards and supervisors as defined in the Act

(including, but not limited to, registered nurses).

5. The parties shall bear their respective costs, including attorney fees.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

97-5885/5983

KENTUCKY RIVER COMMUNITY CARE, INC.,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

KENTUCKY STATE DISTRICT COUNCIL OF
CARPENTERS, AFL-CIO, INTERVENOR

[Filed: Mar. 23, 2000]

ORDER

BEFORE: JONES, RYAN AND BATCHELDER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Jones would grant rehearing for the reasons stated in his dissent.

Further, petitioner/cross-respondent's motion for this court to consider new evidence relevant to the petition for rehearing en banc is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, Clerk