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NOTES AND COMMENTS

HEALTH CARE & RETIREMENT CORP. OF AMERICA: A POTENTIAL BROADENING OF THE TEST FOR SUPERVISORY STATUS UNDER THE NLRA

I. INTRODUCTION

The Supreme Court's May 1994 decision in *NLRB v. Health Care and Retirement Corp. of America*¹ was a major victory for health care employers, and conversely a huge setback for health care labor unions and employees. The Supreme Court held the National Labor Relations Board's (NLRB) test for determining whether nurses are supervisors within the meaning of section 2(11) of the National Labor Relations Act (NLRA) was invalid.² This decision reversed a 20-year-old NLRB policy that a nurse was not a supervisor if the "supervisory conduct of the . . . nurse [was] the exercise of professional judgment incidental to patient care" and therefore not "supervisory authority in the interest of the employer."³

The Supreme Court determined the NLRB's test for supervisory status of nurses was inconsistent with the NLRA and the Court's precedents.⁴ In so ruling, the Court held against the majority of circuit courts which had previously held nurses were not supervisors when their discretion was exercised in accordance with professional judgment as to the best interest of the patient rather than a managerial decision in the employer's best interest.⁵ The Court took a very narrow view of the definition of a "supervisor" and looked only to its prior precedents construing one phrase of section 2(11): "in the interest of the employer." It refused to consider the policy and rationale

1. 114 S. Ct. 1778 (1994).

2. *Id.* at 1785.

3. *See Northcrest Nursing Home*, 313 N.L.R.B. 491, 493 (1993).

4. *Health Care*, 114 S. Ct. at 1785.

5. *See discussion infra* section III(B).

behind the NLRB's test and, in effect, broadened the test for supervisory status of nurses under section 2(11). In consequence, the test for "professional employee" found in section 2(12) of the NLRA may be similarly broadened in the future. The decision is contrary to the legislative history of section 2(11)⁶ and the 1974 Amendment to the NLRA including nonprofit hospitals under the NLRA. Consequently, this note will contend the Supreme Court should reconsider its decision on this extremely important issue.

II. HISTORY OF THE NLRA AS APPLIED TO SUPERVISORS

What is generally known as the National Labor Relations Act is in fact three separate statutes enacted by Congress in 1935, 1947, and 1959.⁷ The NLRA, popularly known as the Wagner Act, was enacted in 1935⁸ and ended the debate which had raged for more than a century over employees' rights to join unions and to participate in collective bargaining.⁹ Under the Wagner Act, any worker fitting the definition of "employee" was covered under the NLRA and supervisors were not expressly excluded by this definition.¹⁰ Supervisors were thus free to join unions of their choosing and participate in collective bargaining.¹¹ Employers complained that allowing supervisors these rights created an imbalance of power between management and

6. See *infra* note 31.

7. FRANK W. McCULLOCH & TIM BORNSTEIN, *THE NATIONAL LABOR RELATIONS BOARD 16* (1974). The 1959 amendment to the National Labor Relations Act, the Labor Management Reporting and Disclosure Act of 1959, popularly known as the Landrum-Griffin Act, did not affect the definition or exclusion of supervisors in any way. See Stuart H. Bompey & Carolyn S. Schwartz, *When Confidential Employees Are Not Considered "Confidential" - A Review of the Supreme Court's Decision in NLRB v. Hendricks County Rural Electric Membership Corp.*, 13 SETON HALL L. REV. 490, 492 (1983). The most significant change made by the Landrum-Griffin Act was to provide additional protection for union members against acts that have the potential to disregard their rights such as corruption by union leaders. *Id.*

8. National Labor Relations Act of 1935, Pub. L. No. 198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1988)). The popular name for the Act came from its main sponsor in the Senate, Senator Robert Wagner. McCULLOCH, *supra* note 7, at 17.

9. McCULLOCH, *supra* note 7, at 3.

10. 29 U.S.C. § 152(3) (1988). The original definition of employee stated:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular or substantially equivalent employment, but shall not include any individual employed . . . by his parent or spouse.

National Labor Relations Act § 2(3).

11. See 29 U.S.C. § 157 (1988).

labor.¹² Nevertheless, the Supreme Court refused to make an exception for supervisors and exclude them from coverage when the NLRA did not specifically do so.¹³ The Court maintained it was “for Congress, not for us, to create exceptions or qualifications at odds with the plain terms” of the NLRA.¹⁴ Accordingly, in *Packard Motor Car Co. v. NLRB*, the Supreme Court held foremen could organize as a unit of a labor union.¹⁵ The next year, Congress did exclude supervisors from the NLRA’s coverage when it amended the definition of “employee”¹⁶ and added section 14(a)¹⁷ in enacting the Labor Management Relations Act of 1947, popularly known as the Taft-Hartley Act.¹⁸ The statute’s definition of employee now states that an “‘employee’ . . . shall not include . . . any individual employed as a supervisor.”¹⁹ Section 14(a) exempts employers from the duty to acknowledge supervisors as employees for the purpose of laws that relate to collective bargaining.²⁰ A supervisor is defined in section 2(11) of the NLRA as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or 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.²¹

12. *NLRB v. Health Care and Retirement Corp. of Am.*, 114 S. Ct. 1778, 1780 (1994).

13. *Id.*

14. *Id.* (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947)).

15. 330 U.S. at 490-92. The foremen, who were responsible for ensuring the quality and quantity of products made at the plant, wanted to join a union. *Id.* at 487. The Company refused to recognize the Union. *Id.* at 488. The Court held the intention of Congress was not to keep foremen from unionizing. *Id.*

16. See *Bompey & Schwartz*, *supra* note 7, at 493-94; see also *Labor Management Relations Act of 1947*, Pub. L. No. 101, 61 Stat. 136-38 (codified as amended at 29 U.S.C. § 152(3) (1988)).

17. Section 14(a) provides that:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

29 U.S.C. § 164(a) (1988).

18. *The Developing Labor Law, The Board, The Courts, and the National Labor Relations Act*, (Patrick Harden et al. eds., 3d ed. 1992), 2 A.B.A. SEC. LAB. EMPLOY. L. REP. 1608 [hereinafter *Developing Labor Law*].

19. 29 U.S.C. § 152(3) (1988).

20. *Developing Labor Law*, *supra* note 18, at 1608.

21. 29 U.S.C. § 152(11) (1988).

III. NLRB'S PATIENT CARE ANALYSIS TEST AND ITS STATUS IN THE CIRCUIT COURTS PRIOR TO *HEALTH CARE*

A. *The NLRB's Patient Care Analysis*

In 1974, Congress extended the NLRB's jurisdiction to nonprofit hospitals by enacting the 1974 Health Care Amendments.²² Concerns arose at that time that all professional health care employees would automatically be found to be supervisors by the NLRB.²³ However, since 1974, the NLRB has used what it calls the "patient care" analysis to determine whether a nurse is a supervisor within section 2(11) of the Act "to ensure that they are not excluded from coverage simply because of their professional responsibility."²⁴ The NLRB has applied this test to both registered nurses (RNs), who are deemed professional employees under the NLRA, and to licensed practical nurses (LPNs), who are "if not full-fledged professionals, . . . at least sub professionals."²⁵ The patient care analysis inspects whether nurses' supervisory work "is the exercise of professional judgment incidental to patient care or the exercise of supervisory authority in the interest of the employer."²⁶

B. *Conflict in the Circuit Courts of Appeals*

1. Circuits Upholding the NLRB's Patient Care Analysis

The first circuit to examine the rationale behind the NLRB's patient care analysis was the Ninth Circuit in *NLRB v. Doctors' Hospital of Modesto, Inc.*²⁷ in 1973. This case was the beginning of the NLRB's patient care analysis. The NLRB held alleged supervisory nurses were not supervisors because their duties and authority were incidental to their professional skills and stated that without more, this authority was not supervisory authority in the interest of the employer.²⁸

22. National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (current version at 29 U.S.C. § 152(14) (1988)); *Northcrest Nursing Home*, 313 N.L.R.B. 491, 492 (1993).

23. *Northcrest*, 313 N.L.R.B. at 492.

24. *Id.* at 493.

25. *Id.* at 493 n.10 (quoting *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983)). See also *Centralia Convalescent Ctr.*, 295 N.L.R.B. 42 (1989) (discussing RNs); *Waverly-Cedar Falls Health Care*, 297 N.L.R.B. 390 (1989) (discussing LPNs).

26. *Northcrest*, 313 N.L.R.B. at 493.

27. 489 F.2d 772 (9th Cir. 1973), *enforcing* 193 N.L.R.B. 833 (1971).

28. *Doctors' Hosp. of Modesto*, 183 N.L.R.B. 950, 951 (1970), *enforced by* 489 F.2d 772 (9th Cir. 1973).

Conversely, nurses who additionally had authority to recommend action as to the job status and pay of other employees were supervisors.²⁹ The NLRB found other nurses were not supervisors because, as skilled professionals, their independent judgement and direction was used for patients in their care and not for supervisory authority on behalf of their employer.³⁰

In upholding the NLRB's findings in *Doctors' Hospital*, the Ninth Circuit did not adopt the exact language of the NLRB but instead used language from the legislative history of the definition of supervisor in the NLRA.³¹ It analogized nurses to leadmen and straw bosses whose authority to give minor directives or orders to others does not make them a part of management, which would lead to supervisory status under the NLRA.³² Accordingly, because nurses are highly trained professionals who may use some independent judgment, this does not always make them part of management or a supervisor.³³

29. *Id.*

30. *Id.* at 951-52. The two propositions, that authority as a product of professional skills and independent judgment and direction primarily being of patients instead of authority on behalf of the employer does not equate supervisory authority, together state the NLRB's patient care analysis. See *Northcrest Nursing Home*, 313 N.L.R.B. 491, 492 (1993). The NLRB's began using its patient care analysis in full force a year later after it was endorsed by the Senate Committee on Labor and Public Welfare. *Id.* at 493.

31. *Doctors' Hosp.*, 498 F.2d at 776. The Senate Committee Report accompanying the amendment excluding supervisors from the NLRA states:

The committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion [within the protections of the Act]. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action.

S. REP. NO. 105, 80th Cong., 1st Sess. 3-4 (1947), reprinted in 1947 U.S.C.C.A.N. 1130, 1135, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 425 (1948) [hereinafter S. REP. NO. 105].

32. *Doctors' Hosp.*, 489 F.2d at 776. See also *Ross Potra-Plant, Inc. v. NLRB*, 404 F.2d 1180, 1182 (5th Cir. 1968) (holding crew members or department heads not to be supervisors because they did not have actual authority effectively to direct other employees); *NLRB v. Security Guard Serv.*, 384 F.2d 143, 149 (5th Cir. 1967) (finding a security guard was at most a leadman, unidentified with management, and therefore not a supervisor); *North Virginia Steel Corp. v. NLRB*, 300 F.2d 168, 171-72 (4th Cir. 1962) (finding a 'dock chief' not to have supervisory status because he exercised no discretion or independent judgment and was really a subforeman or no more than a 'gangleader'); *NLRB v. Swift & Co.*, 240 F.2d 65, 66-67 (9th Cir. 1957) (finding plant clerks' work was merely routine and thus they were not supervisors); *NLRB v. Parma Water Lifter*, 211 F.2d 258, 261 (9th Cir. 1954), cert. denied, 348 U.S. 829, (1954) (finding a latheworker who gave minor direction to other workers was merely a 'room boss' and not a supervisor).

33. *Doctors' Hosp.*, 489 F.2d at 776. See also *NLRB v. St. Francis Hosp. of Lynwood*, 601 F.2d 404, 420-21 (9th Cir. 1979), enforcing 232 N.L.R.B. 32 (1977) (upholding the NLRB's patient care analysis and agreeing with *Doctors' Hospital*).

The Second, Seventh, Eighth, and Eleventh Circuit Courts of Appeals have also upheld the NLRB's application of its patient care analysis.³⁴ However, the Sixth Circuit has repeatedly rejected the NLRB's test³⁵ and the Fourth Circuit has been unclear about its position.³⁶ The Second Circuit, in reviewing an unfair labor practice claim against a hospital, upheld the NLRB's finding that a head nurse "did not possess or exercise any of the statutory indicia of supervisory status" after reviewing the job tasks of the nurse as compared to the NLRB's patient care analysis.³⁷

The Seventh Circuit Court of Appeals has approved the NLRB's patient care analysis, while applying additional factors.³⁸ It has stated supervision is not within the meaning of section 2(11) if it is exercised in conformity with professional norms instead of business norms.³⁹ However, in reaching its conclusions, this circuit generally focused on the policies behind the supervisor exclusion by weighing the nurse's duties in light of the balance of power and conflict of interests between employees and employers.⁴⁰ This circuit emphasized two considerations in this respect. First, it looked at the balance of power issue by examining the ratio of supervisory to non-supervisory employees under the competing positions of the parties.⁴¹ Second, it looked at the conflict of interest concern by examining the disciplinary authority of alleged supervisors.⁴²

34. *Northcrest*, 313 N.L.R.B. at 495. See generally *id.* (providing an excellent summary of the NLRB's patient care analysis including its history and treatment in the courts).

35. *Id.* The Sixth Circuit's decisions have created a problem of venue shopping by alleged supervisory nurses. *Id.* at 495-96. The venue provisions of the NLRA allow decisions of the Board to be reviewed in circuits other than the circuit where the unfair labor practices occur. *Id.* at 496. Recognizing this venue provision, the NLRB has found that the NLRA "does not contemplate that the law of a single circuit [will] exclusively apply in any given case." *Arvin Industries*, 285 N.L.R.B. 753, 757 (1987).

36. *Northcrest*, 313 N.L.R.B. at 495.

37. *Misericordia Hosp. Medical Ctr. v. NLRB*, 623 F.2d 808, 816 (2d Cir. 1980), enforcing 246 N.L.R.B. 351 (1979). First, the court found that the NLRB was correct in finding that in practice and in theory the head nurse's authority was primarily focused on providing patient care and not on supervising employees for management. *Id.* Second, the court found the NLRB correctly held that although the nurse directed the employees' work in her unit, that direction was a circumstance of her professional authority to treat patients. *Id.* at 817. Therefore, the nurse was not a supervisor. *Id.* at 818.

38. *Children's Habilitation Ctr., Inc. v. NLRB*, 887 F.2d 130, 134 (7th Cir. 1989), enforcing 289 N.L.R.B. No. 109 (July 28, 1988).

39. *Id.*

40. *Id.* at 131-32.

41. *Id.* at 132.

42. *Id.* Using this refined test in its most recent case on the issue of the supervisory status of nurses, the Seventh Circuit Court of Appeals found head nurses not to be supervisors. *Id.* at 134. The ratio of supervisory to non-supervisory employees would have been seven to forty-eight if the nurses were not classified as supervisors or twelve to forty-three if the nurses were

The Eighth Circuit has upheld the patient care analysis by following the Seventh Circuit's lead in *NLRB v. Res-Care*.⁴³ The Eighth Circuit cited to this decision and agreed that although LPNs traditionally keep authority to assign nurse aides, the exercise of that authority is within "tight constraints" and any discretion is conferred in "accordance with professional judgment" in the "best interests of the patient rather than a managerial judgment" in the interest of the employer.⁴⁴ This circuit also noted, in accord with *Res-Care*, that being the highest ranking employee at some time during work hours does not automatically make an LPN a supervisor.⁴⁵ In applying these principles to LPNs who were classified by their employer as supervisors, the Eighth Circuit found the LPNs did not exercise independent judgment⁴⁶ and had limited disciplinary authority that was not sufficient to equate supervisory status.⁴⁷

The Eleventh Circuit has upheld the NLRB's patient care analysis and used it as the primary criterion for determining the supervisory status of nurses.⁴⁸ The circuit focused on whether nurses are responsible for primary personnel decisions such as disciplining, hiring, firing,

counted as supervisors. *Id.* at 132. The first ratio would make one supervisor for every six to seven employees, a ratio the Seventh Circuit found to be appropriate for non-supervisory status because the balance of power would not create a problem. *Id.* at 133. As for the second prong, disciplinary authority, the court found the charge nurses' responsibility to discipline "not so great as to make serious problems of divided loyalties inevitable." *Id.* Although the "nurses issue[d] . . . warnings to employees [for] violations of the employer's rules, and the warnings [were] put in the employees' files, [they] had no responsibility for recommending discipline" and decisions to discipline were made by conceded supervisors of the center. *Id.*

43. 705 F.2d 1461 (7th Cir. 1983). See *Waverly-Cedar Falls Health Care Ctr., Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991), enforcing 297 N.L.R.B. 390 (1989).

44. *Waverly*, 933 F.2d at 630 (quoting *Res-Care*, 705 F.2d at 1468).

45. *Id.* The hospital in *Waverly* argued if the LPNs were not supervisors, the hospital was not supervised during many of its hours of operation. *Id.* The Court rejected this argument and instead found that while in charge the LPNs followed routine procedures and were therefore not supervisors. *Id.*

46. Although the LPNs could call in replacements in cases of emergency, the court found the LPNs were only carrying out the policies of management based on the hospitals longstanding procedure of using a call-in list. *Id.* If an LPN could not find replacements the director of nursing or the assistant director of nursing was called to handle the matter. *Id.*

47. *Id.* The LPNs had authority to issue written and oral warnings; however, warnings alone did not affect job status and the DON handled all disciplinary action. *Id.* In addition, the court noted a previous holding of the NLRB that "for the issuance of reprimands or warnings to constitute statutory supervisory authority, the warning must not only initiate, or be considered in determining future disciplinary action, but also it must be the basis of later personnel action without independent investigation or review by other supervisors." *Id.* (quoting *Passavant Health Ctr.*, 284 N.L.R.B. 887 (1987)). The court also looked at the ratio of supervisors to employees, as the Seventh Circuit does, but found the ratios to be unreasonable and therefore did not use this criterion for determining supervisory status in this case. *Id.*

48. See *NLRB v. Walker County Medical Ctr., Inc.*, 722 F.2d 1535, 1542 (11th Cir. 1984), enforcing 260 N.L.R.B. 862 (1982).

and transferring employees.⁴⁹ The NLRB and the Eleventh Circuit have recognized that determining whether nurses are supervisors under the NLRA is difficult because nurses traditionally exercise independent judgment as professionals which can be viewed as similar to judgment exercised by a supervisor.⁵⁰ With these principles in mind, the Eleventh Circuit in *NLRB v. Walker County Medical Center, Inc.* found alleged supervisory nurses not to be supervisors because they engaged mainly in direct patient care.⁵¹

2. Circuits Partially Accepting the NLRB's Patient Care Analysis

The Fourth Circuit has recognized the NLRB's patient care analysis by agreeing that in some areas supervisory factors need to be applied flexibly because of the uniqueness of the employment.⁵² Thus, this circuit has noted that in the nursing profession, a nurse normally exercises independent judgment in giving direct patient care; therefore, the NLRB has held that the "independent judgment" part of section 2(11) depends upon whether the conferment of judgment is merely "an *incident* of professional service or is in *addition* to professional services."⁵³ However, this circuit emphasized that a high level of skill and competence is not needed to find authority that is not "clerical" or "routine."⁵⁴ This circuit also weighed heavily the fact the NLRB has been inconsistent in applying the supervisory definition and the factors used in determining such application.⁵⁵ Therefore, the Fourth Circuit carefully scrutinized the record in the case and the NLRB's findings.⁵⁶

49. *Id.*

50. *Id.*

51. *Id.*

52. *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1066 (4th Cir. 1982), *denying enforcement in relevant part of* 258 N.L.R.B. 1024 (1981) (agreeing with the NLRB's patient care analysis).

53. *Id.* at 1066-67 (noting also that the NLRB's holding has generally been accepted in the courts and by Congress).

54. *Id.* at 1067.

55. *Id.* (noting inconsistencies in the supervisory application outside long term health care as well). The Court noted one commentator has observed that "the Board has inconsistently applied the definition 'of supervisor as to cause one necessarily to speculate' that the pattern of Board decisions on supervisory status [is a] bias on the part of the Board's employees" as shown by its practice of using the definition of supervisor that "most widens the coverage of the Act, the definition that maximizes both the number of unfair labor practice findings it makes and the number of unions it certifies." *Id.* (quoting Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 HARV. L. REV. 1712, 1714-14, 1721 (1981)).

56. *St. Mary's*, 690 F.2d at 1067.

Using this strict stance, the Fourth Circuit, in two separate cases, has found nurses to be supervisors.⁵⁷ In *Riverchase Health Care Center v. NLRB*,⁵⁸ the Fourth Circuit noted that on similar facts other circuits have found nurses to be "employees."⁵⁹ However, the court still found the nurses to be supervisors, stating it was bound by its prior decision in *NLRB v. St. Mary's Home, Inc.*, where on similar facts it found a nurse to be a supervisor because forty percent of the time she had full responsibility of the nursing home's operation in which care for patients was only one of her responsibilities.⁶⁰

3. Circuits Rejecting the NLRB's Patient Care Analysis

The Sixth Circuit has vigorously dismissed the patient care analysis and has instead based its findings of supervisory status on the plain meaning of the statute.⁶¹ In *NLRB v. Beacon Light Christian Nursing Home*,⁶² this circuit found that, as a matter of law, direction and assignment of aides by nurses using independent professional judgment is in the interest of the employer.⁶³ Additionally, the court stated that "patient care . . . is the business of a nursing home."⁶⁴ The NLRB has essayed on the disagreement between its view and the Sixth Circuit's view of supervisory status.⁶⁵ The NLRB sees the disagreement as focused on whether the direction and assignment of aides, in performance of patient care functions, creates statutory supervisory status.⁶⁶ Despite the Sixth Circuit's view, the NLRB has continued to apply its patient care analysis reasoning that it is true to the statute as shown by its legislative history and as explained by case law.⁶⁷ In *Health Care*, the Supreme Court finally addressed this conflict between the circuits.

IV. STATEMENT OF THE CASE

Ruby Wells, an LPN, was employed by Health Care and Retirement Corporation of America (HCR) in a nursing home in Urbana,

57. *Id.* at 1067-68; *Riverchase Health Care Ctr. v. NLRB*, 976 F.2d 725 (4th Cir. 1992), denying enforcement of 305 N.L.R.B. No. 141 (Dec. 26, 1991). *But see* *Methodist Home v. NLRB*, 596 F.2d 1173 (4th Cir. 1979), enforcing in relevant part 234 N.L.R.B. 535 (1978).

58. *Riverchase*, 976 F.2d at 725.

59. *Id.*

60. *Id.*; see *St. Mary's*, 690 F.2d at 1067-68.

61. *Northcrest Nursing Home*, 313 N.L.R.B. 491, 495 (1993).

62. 825 F.2d 1076 (6th Cir. 1987).

63. See *id.* at 1079-80.

64. *Id.* at 1079.

65. *Northcrest*, 313 N.L.R.B. at 496.

66. *Id.*

67. *Id.* at 497.

Ohio.⁶⁸ She filed a charge with the NLRB asserting she and two other employees had been discharged from HCR for participating in activities protected by the NLRA.⁶⁹ Included in the charge was also an allegation that she and two other employees had been warned by HCR for participating in protected activities.⁷⁰ The NLRB then issued a complaint alleging HCR had violated section 8(a)(1)⁷¹ of the NLRA by disciplining several LPNs, and firing three of them, "for engaging in concerted protected conduct for the purpose of collective bargaining and other mutual aid and protection."⁷²

A hearing was then held before an administrative law judge (ALJ)⁷³ where HCR asserted that because of their work activities, the staff nurses were supervisors and thus not protected under the NLRA.⁷⁴ When the suit was brought, HCR employed one Director of Nursing, nine to eleven staff nurses consisting of both LPNs and RNs, and fifty to fifty-five nurses' aides.⁷⁵ On the weekends and during the week after five p.m., the staff nurses were the senior ranking employees.⁷⁶ Staff nurse responsibilities included monitoring the nurses' aides' work, disciplining and counseling the aides, ensuring there was proper staffing, resolving grievances and problems of the aides, reporting to management, and evaluating the aides' performances.⁷⁷

The ALJ found that the nurses were not supervisors and were thus "employees" entitled to protection under the NLRA.⁷⁸ The ALJ stated the staff nurses' supervisory work focused on the well-being of

68. *Health Care and Retirement Corp. of Am.*, 306 N.L.R.B. 63, 63 (1992), *rev'd*, 987 F.2d 1256 (6th Cir. 1993), *aff'd*, 114 S. Ct. 1778 (1994).

69. *Health Care and Retirement Corp. of Am. v. NLRB*, 987 F.2d 1256, 1258 (6th Cir. 1993), *aff'd*, 114 S. Ct. 1778 (1994). The National Labor Relations Board asserts its jurisdiction over nursing homes that have at least \$100,000 in gross annual revenue. *Developing Labor Law*, *supra* note 18, at 1646.

70. *Health Care*, 987 F.2d at 1258.

71. This section provides: "It shall be an unfair labor practice for an employer . . . to interfere with restrain or coerce employees in the exercise of rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1) (1988). Section 157 states in pertinent part: "Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157 (1988).

72. *Health Care*, 987 F.2d at 1258; *Health Care*, 306 N.L.R.B. at 68.

73. *Health Care*, 987 F.2d at 1258. Under the Rules and Regulations of the NLRB, formal hearings on unfair labor practice claims issued by the General Council are heard by ALJs appointed by the NLRB. *Developing Labor Law*, *supra* note 18, at 1776. These judges' duties are much like those of trial court judges in hearing witnesses, deciding on admissibility of evidence, and making initial decisions and findings of fact. *Id.*

74. *Health Care*, 987 F.2d at 1258.

75. *Health Care*, 114 S. Ct. at 1781.

76. *Id.*

77. *Id.*

78. *Health Care*, 987 F.2d at 1258.

the nursing home's patients rather than that of the employer; therefore, the nurses' supervisory tasks did not "equate to responsibly directing the aides in the interest of the employer."⁷⁹ However, the ALJ reasoned HCR had not committed any unfair labor practices in discharging the nurses or in disciplining them because HCR's actions had been based on justified considerations.⁸⁰

The General Council⁸¹ of the NLRB disputed the finding that no unfair labor practices had been committed by HCR and filed exceptions to the decision.⁸² HCR challenged the decision the nurses were not supervisors as defined by the NLRA by filing cross-petitions.⁸³ The NLRB issued a Decision and Order upholding the ALJ's findings that the nurses were not supervisors, but found the ALJ had incorrectly held HCR had not committed any unfair labor practices.⁸⁴ Instead, the NLRB found HCR had violated section 8(a)(1) of the NLRA and ordered HCR to rehire the nurses with back pay and to cease and desist from engaging in any further unfair labor practices.⁸⁵

HCR petitioned for review of the NLRB's decision and the NLRB filed a cross-petition for enforcement.⁸⁶ The Sixth Circuit Court of Appeals reversed the ALJ's holding as to the non-supervisory status of the nurses and therefore concluded a review of the merits of the unfair labor practice claims was unnecessary because the nurses were not covered by the NLRA.⁸⁷ The court followed its previous decisions, such as *Beverly California Corp. v. NLRB*,⁸⁸ and held the NLRB's test for determining the supervisory status of nurses was inconsistent with the statute.⁸⁹ In *Beverly*, the court found "the notion

79. *Health Care*, 114 S. Ct. at 1781 (quoting *Health Care and Retirement Corp. of Am.*, 306 N.L.R.B. 68, 70 (1992)).

80. *Health Care*, 987 F.2d at 1258.

81. The General Council of the NLRB has the final authority to investigate charges, issuances of complaints, and the prosecution of complaints before the NLRB. *Developing Labor Law*, *supra* note 18, at 1774.

82. *Health Care*, 987 F.2d at 1258. Any party who disputes the ALJ's decision may file exceptions to it along with a supporting brief. *Developing Labor Law*, *supra* note 18, at 1799.

83. *Health Care*, 987 F.2d at 1258.

84. *Id.*

85. *Id.* NLRB orders are not self executing; they only prescribe the steps necessary to redress and remedy unlawful actions. *Developing Labor Law*, *supra* note 18, at 1877.

86. *Health Care*, 987 F.2d at 1258. The NLRB must apply to the appropriate U.S. Court of Appeals to gain enforcement of its cease and desist orders when a party refuses to obey. *Developing Labor Law*, *supra* note 18, at 1877. Likewise, when a final order is issued against a respondent, they are entitled to petition for immediate review in the Court of Appeals. *Id.* at 1881. A respondent cannot be penalized for disobeying the order until after there is enforcement by the appellate court. *Id.* at 1877.

87. *Health Care*, 987 F.2d at 1261.

88. 970 F.2d 1548 (6th Cir. 1992).

89. *Health Care*, 987 F.2d at 1261.

that direction given to subordinate personnel to ensure that the employer's nursing home customers receive 'quality care' somehow fails to qualify as direction given 'in the interest of the employer' makes very little sense to us."⁹⁰ The court then went on to apply the language of the *Beverly* test that "an employee is considered a supervisor if any one of the enumerated job tasks are undertaken, provided the authority is exercised in the interest of the employer and requires the use of independent judgment," to the job duties of the Heartland LPNs.⁹¹ Based on the LPNs' job duties, the court found the nurses to be supervisors.⁹²

V. THE ISSUE AND DECISION OF *HEALTH CARE*

A. *The Issue*

The United States Supreme Court granted certiorari⁹³ in order to resolve the conflict among the Courts of Appeals over the validity of the NLRB's test.⁹⁴ The Court framed the issue as whether the NLRB's test for deciding if nurses are supervisors "is consistent with the statutory definition."⁹⁵ To determine whether an employee is a supervisor under section 2(11) of the NLRA, three questions must be answered in the affirmative.⁹⁶ First, does the employee have the authority to perform one out of the twelve listed activities in section 2(11)?⁹⁷ Second, is the exercise of that authority not of a "routine or clerical nature," but requires "the use of independent judgment?"⁹⁸ Third, does the employee exercising this authority do so "in the interest of the employer?"⁹⁹ The Supreme Court narrowed its inquiry to the third question based on its decision that the NLRB's test relied on an industry wide interpretation of "in the interest of the employer."¹⁰⁰ As a result, the Court's decision turned on what it felt to be the proper interpretation of this statutory phrase.¹⁰¹

90. *Beverly*, 970 F.2d at 1552.

91. *Health Care*, 987 F.2d at 1261.

92. *Id.*

93. *NLRB v. Health Care and Retirement Corp. of Am.*, 114 S. Ct. 56 (1993). Judgments under the NLRA made by the Courts of Appeals may be reviewed by the Supreme Court as provided by § 10(e,f). *Developing Labor Law*, *supra* note 18, at 1878.

94. *NLRB v. Health Care and Retirement Corp. of Am.*, 114 S. Ct. 1778, 1781 (1994).

95. *Id.* at 1780.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 1780, 1785.

101. *Id.* at 1780.

B. *The Decision*

The Supreme Court, in a five-to-four decision, held invalid the NLRB's test for determining the supervisory status of nurses,¹⁰² under which "a nurse's direction of less skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised 'in the interest of the employer.'"¹⁰³ Relying on *Fall River and Dying Corp. v. NLRB*,¹⁰⁴ the Court stated it reviewed the NLRB's test to see if it was "rational and consistent with the Act" and agreed with the Sixth Circuit Court of Appeals that it was not.¹⁰⁵

1. Statutory Language and Supreme Court Precedents

The Court began by looking at the approach of the NLRB's test and compared it with the NLRB's approach in *NLRB v. Yeshiva University*.¹⁰⁶ The Court determined, as in *Yeshiva*, that the NLRB's test created a false dichotomy.¹⁰⁷ The Court found the dichotomy between acts done in conjunction with patient care and acts done in the interest of the employer to make no sense.¹⁰⁸ According to the Court, the NLRB's position that supervisory authority exerted in conjunction with patient care is not in the interest of the employer was incorrect because the business of a nursing home is patient care.¹⁰⁹ Following this reasoning then, attending to nursing home patients is always in the interest of the employer.¹¹⁰ Especially important to the Court in supporting this conclusion was its prior holding in *Packard Motor Car Co. v. NLRB*, where it had found the ordinary meaning of "in the interest of the employer" to be any acts authorized by the employer or any acts within the scope of employment.¹¹¹

The Court next rejected the NLRB's argument it should be given ample room to apply certain statutory phrases such as "independent judgment" and "responsibility to direct" because they are ambiguous.¹¹² Even though the Court agreed these phrases are ambiguous, it refused to look at this argument stating that those phrases were not

102. *Id.* at 1779-80.

103. *Id.*

104. 482 U.S. 27 (1987).

105. *Health Care*, 114 S. Ct. at 1781.

106. 444 U.S. 672 (1980).

107. *Health Care*, 114 S. Ct. at 1782.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (citing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-89 (1947)).

112. *Id.* at 1783.

used as the basis of the NLRB's test.¹¹³ Furthermore, the Court held that the NLRB's argument made parts of the definition in section 2(11) meaningless.¹¹⁴ The Court viewed the NLRB's rule as stating that "[o]nly a nurse who in the course of employment uses independent judgment to engage in one of the activities related to another employee's job status or pay . . . [is] a supervisor."¹¹⁵ As a result, the Court concluded that the NLRB had "read[] the responsible direction portion of § 2(11) out of the statute in nurse cases."¹¹⁶

2. Non-Statutory Arguments

Once again in reaching its decision, the Court focused on its prior case law. Relying on *Yeshiva*, it rejected the NLRB's position that conflicting loyalties, which the exclusion of supervisors was designed to avoid, would not be presented by giving organizational rights to nurses when their supervisory authority focuses on patient care.¹¹⁷ The Court concluded that this argument was rejected in *Yeshiva* when the NLRB stated there was no need for the managerial exclusion because there was no danger of divided loyalties.¹¹⁸ As in *Yeshiva*, the Court rejected any policy argument on the basis of divided loyalty.¹¹⁹ It assumed that the statute does not permit consideration of the potential for divided loyalties, and disagreed with the NLRB that there was no danger of divided loyalty in the instant case.¹²⁰ With this assumption in mind, the Court refused to consider the divided loyalties issue.¹²¹

The Court next rejected the NLRB's argument that the phrase "in the interest of the employer" should be given a limited reading so that the phrase would not override Congress' intent to provide protection to professional employees under the NLRA.¹²² It again looked at *Yeshiva* and found the NLRB's argument analogous to the one rejected in that case.¹²³ Lastly, the Court refused to defer to the NLRB's test by finding legislative history to 1974 amendments of

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* (citing *Yeshiva*, 444 U.S. at 684).

119. *Health Care*, 114 S. Ct. at 1784.

120. *Id.*

121. *Id.*

122. *Id.*; see 29 U.S.C. § 152 (11) (1988) (defining "supervisor"); see 29 U.S.C. § 152 (12) (1988) (defining "professional employee").

123. *Health Care*, 114 S. Ct. at 1784.

other sections of the NLRA unauthoritative on the issue.¹²⁴ In conclusion, the Court held the patient care analysis test “inconsistent with the statute and [this Court’s] precedents.”¹²⁵

VI. ANALYSIS OF *HEALTH CARE*

A. *Lechmere, Inc. v. NLRB and Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*

In rendering its decision in *Health Care*, the Court relied on its own previous interpretation of “in the interest of the employer.” Without stating as much, the Court seems to be relying on its 1990 decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*¹²⁶ and its 1992 decision in *Lechmere, Inc. v. NLRB*.¹²⁷ Both of these cases generally hold that the Supreme Court will defer to its own previous interpretations of administrative statutes rather than defer to administrative agencies’ interpretations of statutes.¹²⁸ The *Lechmere* decision is a continuation of the standard set out in *Maislin* where the Court held that “[o]nce we have determined a statute’s clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency’s later interpretation of the statute against our prior determination of the statute’s meaning.”¹²⁹ Thus, *stare decisis* may prevail over judicial deference to administrative agencies if the Supreme Court has previously determined the clear meaning of a statute.¹³⁰

Applying this interpretation of *Maislin* and *Lechmere* to the present case, the majority was correct to look at its prior holdings in *Yeshiva* and *Packard* to interpret the phrase “in the interest of the employer.” The Court determined it had found the clear meaning of this phrase in *Packard* and *Yeshiva*.¹³¹ Therefore, because the Court

124. *Id.*

125. *Id.* at 1785.

126. 497 U.S. 116 (1990).

127. 502 U.S. 527 (1992).

128. *Maislin*, 497 U.S. at 131; *Lechmere*, 502 U.S. at 536-37.

129. *Maislin*, 497 U.S. at 131.

130. Several commentators have written about the effect of *Lechmere* and *Maislin* on the “traditional” two-step approach for deciding when to accept an agency’s interpretation of a statute under *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Rebecca Hanner White, *The Stare Decisis “Exception” To The Chevron Deference Rule*, 44 FLA. L. REV. 723 (1992); Jahan Sharifi, Comment, *Precedents Construing Statutes Administered By Federal Agencies After The Chevron Decision: What Gives?*, 60 U. CHI. L. REV. 223 (1993); Susan K. Goplen, *Judicial Deference To Administrative Agencies’ Legal Interpretations After Lechmere, Inc. v. NLRB*, 68 WASH. L. REV. 207 (1993).

131. See *Health Care*, 114 S. Ct. at 1782-83.

limited its review to this phrase, the *Lechmere* and *Maislin* holdings show that the Court's prior case law construing this part of section 2(11) outweighs the NLRB's interpretation.¹³²

B. *The Patient Care Analysis is Rational and Consistent with the NLRA*

As stated previously, the majority took a very narrow view of the issue in *Health Care* and looked only to the phrase "in the interest of the employer." The majority began its review by stating it would determine if the NLRB's test was "rational and consistent with the Act;" however, it never went back to this standard.¹³³ The Court seems to have viewed the issue as a pure question of law because it refused to look at the policy behind the NLRB's test and the NLRA.¹³⁴ In contrast, the dissent framed the issue more broadly in resolving this recurring question. The dissent framed the issue as whether the NLRB's test, as an attempt to carry out the task Congress gave it to separate the definition of "supervisors" excluded from the NLRA from "professionals" sheltered by the NLRA, is rational and consistent with the NLRA.¹³⁵

The dissent was correct to consider the tension between the definitions of "supervisor" and "professionals" as framed by its statement of the issue.¹³⁶ The Court in other instances has looked at the application of a rule of the NLRB and what the consequences would be if

132. However, it can also be said that the Court did its own analysis under *Chevron*. Under *Chevron's* two step approach a court must first determine whether there is a clear congressional intent governing the interpretation of the statute. *Chevron*, 467 U.S. at 842. If Congress has spoken on the issue, the court must give effect to Congress' intent. *Id.* at 842-43. Next, the court must defer to the agency's interpretation if Congress has not "directly addressed the precise question at issue." *Id.* at 843-44. Thus, when the Court in *Health Care* stated that "[t]here is no indication that Congress intended any different meaning when it included the phrase in the statutory definition of supervisor later in 1947," *Health Care*, 114 S. Ct. at 1782, it was stating that the intent of Congress was clear and that it must give effect to this intent.

133. *Health Care*, 114 S. Ct. at 1781. The rational basis test originated in *Gray v. Powell*, 314 U.S. 402, 413 (1941), under which courts will uphold an agency's statutory findings if they are reasonable.

134. The Court in *Packard* declined to look at policy considerations when deciding the "naked question of law" whether the NLRB's interpretation of "in the interest of the employer" was within the terms of the NLRA. *Packard*, 330 U.S. at 493. Indeed, in one post-*Health Care* case, the court cited *Health Care* for the proposition that "legislative history and policy arguments may not be employed where their use would distort the plain meaning of the statute." *Stark v. Advanced Magnetics, Inc.*, 894 F. Supp. 555, 560 (D. Mass. 1995).

135. *Health Care*, 114 S. Ct. at 1786 (Ginsburg, J., dissenting).

136. See, e.g., *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500-01 (1978) where the Supreme Court emphasized that the NLRB has the primary responsibility for applying and developing national labor policy. Additionally, the Court stated:

that rule was not upheld, such as in *NLRB v. Curtin Matheson Scientific, Inc.*¹³⁷ In *Curtin Matheson*, the NLRB used a test in which “it would not apply any presumption regarding striker replacements’ union sentiments,” but instead used a case-by-case determination in deciding whether striker replacements oppose a union.¹³⁸ The Court looked at the policy of why the no-presumption rule was correct.¹³⁹ It found an “antiunion presumption might chill employees’ exercise of their statutory right to engage in ‘concerted activities.’”¹⁴⁰ The overwhelming factor for the Court in upholding the NLRB’s rule in *Curtin Matheson* was therefore that employees might lose this right if the NLRB had held to the contrary.¹⁴¹ For this reason, the Court concluded that the NLRB can “adopt rules restricting conduct that threatens to destroy . . . collective-bargaining . . . or that may impair the employee’s right to engage in concerted activity.”¹⁴²

The dissent looked at the consequences which could arise if the NLRB’s test, which construes the category of supervisors narrowly, was not upheld. The dissent recognized that the reading given to the definition of “supervisor” decides the extent to which “professionals” are covered by the NLRA.¹⁴³ Thus, the dissent felt the definition of

Because it is to the Board that Congress entrusted the task of “applying the Act’s general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,” that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.

Id. (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945)).

137. 494 U.S. 775 (1990).

138. *Id.* at 781-82.

139. *Id.* at 794.

140. *Id.* at 795.

141. *See id.*

142. *Id.* at 796. Several other Supreme Court cases have also found this policy argument to be determinative in upholding a rule of the NLRB. *See Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 412, 418-19 (1982) (upholding a rule of the NLRB disallowing an employer’s unilateral withdrawal from a multiemployer bargaining unit during an impasse because the rule advanced the ultimate goal of stability in the bargaining process); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34-35 (1967) (upholding a rule of the NLRB that prohibited employer’s payment of vacation benefits to crossovers, replacements, and nonstrikers but not to strikers because of the “potential for adverse effect upon employee rights,” namely concerted activity); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230-31 (1963) (upholding a decision of the NLRB that prohibited employers from giving super-seniority to strike replacements and strike crossovers because super-seniority would damage future bargaining relationships and concerted activity).

143. *Health Care*, 114 S. Ct. at 1786 (Ginsburg, J., dissenting). A professional employee is defined as:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced

supervisor had to be read narrowly, as the NLRB had, so that it would not exclude all employees that have authority to use "independent judgment to assign and responsibly direct the work of other employees," because most professionals have some authority in this respect and they would be stripped of their coverage of the NLRA in contradiction to Congress' intent.¹⁴⁴ Therefore, the dissent was correct to look at this tension and hold the NLRB's patient care analysis "rational and consistent with the Act"¹⁴⁵ because the NLRB's rule protects professionals' statutory right to engage in concerted activity.

C. *Divided Loyalty*

The Court should not have assumed that the NLRA does not allow an interpretation that permits consideration of the potential for divided loyalties.¹⁴⁶ The Court stated that to do so would allow a unique interpretation in the health care field.¹⁴⁷ However, as the dissent correctly pointed out, the Court in *Yeshiva* found faculty members to be managers and thus, excluded from the NLRA specifically based on their alignment with management which would present problems of divided loyalty if the faculty were allowed to unionize.¹⁴⁸ The faculty members in *Yeshiva* had authority to decide the courses to be offered, when they would be taught, and to whom they would be taught.¹⁴⁹ They decided who would be admitted to the University and who would graduate.¹⁵⁰ The faculty had authority to decide what

type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12) (1988).

144. *Health Care*, 114 S. Ct. at 1786 (Ginsburg, J., dissenting). "[T]he Board has a duty . . . to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the [A]ct is intended to protect." *Westinghouse Elec. Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970); see also *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932, 936 (9th Cir. 1981).

145. *Health Care*, 114 S. Ct. at 1786 (Ginsburg, J., dissenting).

146. See *id.* at 1784.

147. *Id.*

148. *Id.* at 1792 (Ginsburg, J., dissenting); *Yeshiva*, 444 U.S. at 682, 686.

149. *Yeshiva*, 444 U.S. at 686.

150. *Id.*

grading system would be used as well as teaching methods.¹⁵¹ Accordingly, the Court found the faculty was essential in creating and implementing their employer's managerial interest.¹⁵²

Furthermore, the Court in *Yeshiva* stated that "even if union membership arguably may involve some divided loyalty," employees whose authority is limited to the discharge of professional duties in tasks they have been assigned should not be excluded from coverage.¹⁵³ The Court made this statement to curb the fear that the managerial exclusion could sweep all professionals outside the NLRA in direct conflict with Congress' intent to include them.¹⁵⁴ The Court in *Yeshiva* specifically endorsed the NLRB's test and reasoning based on the divided loyalties issue. The Court should not have been so quick to dismiss this issue when it has been the basis for its own argument to exclude managers and include professional employees under the NLRA.

D. *Legislative History to the 1974 Amendment Including Nonprofit Hospitals Under the NLRA*

The Court should have looked at the legislative history from the 1974 amendments to the Labor Management Relations Act which included non-profit hospitals under the NLRA.¹⁵⁵ In response to health care organizations urging an amendment to section 2(11) of the NLRA to exclude health care professionals from the definition of supervisor, the committee found an amendment unnecessary. It was unnecessary, the committee found, because the "Board has carefully avoided applying the definition of 'supervisor' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer."¹⁵⁶ The Court in *Health Care*

151. *Id.*

152. *Health Care*, 114 S. Ct. at 1792 (Ginsburg, J., dissenting) (citing *Yeshiva*, 444 U.S. at 686). See also *Yeshiva*, 444 U.S. at 686 (finding the "faculty determine[d] . . . the product to be produced, the terms upon which it will be offered, and the customers who will be served.").

153. *Yeshiva*, 444 U.S. at 690.

154. *Id.*

155. This amendment gave NLRA protection to employees of non-profit hospitals to the same extent that employees of nursing homes and proprietary hospitals had enjoyed by removing the exemption on section 2(2) of the NLRA. S. REP. NO. 766, 93d Cong., 2nd Sess. 6 (1974), reprinted in 1974 U.S.C.C.A.N. 3946, 3948 [hereinafter S. REP. NO. 766].

156. *Id.* at 3951.

stated that the 1974 amendment did not change the test for supervisory status in the health care field and therefore gave it no consideration.¹⁵⁷ This is no doubt true; however, the Court failed to recognize it has held the construction of a statute by an administrative agency should especially be followed "where Congress has refused to alter the administrative construction."¹⁵⁸ Indeed, in *NLRB v. Bell Aerospace Co.*,¹⁵⁹ where the Supreme Court interpreted the term "managerial," it stated:

In examining these authorities, we draw on several established principles of statutory construction. In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.¹⁶⁰

The Court cited *American Hospital Ass'n v. NLRB*¹⁶¹ to point out it had rejected the petitioner's contention in that case that this 1974 Senate Report addressed the intentions of Congress as to a provision within the 1935 version of the NLRA.¹⁶² In *American*, the Supreme Court dismissed this argument because they found the committee report did not have "the force of law" as applied to the case.¹⁶³ However, the situation in *American* is not analogous to *Health Care*. The petitioner in *American* was trying to use legislative history to show that Congress *changed* an existing administrative interpretation, whereas the petitioner in *Health Care* was using legislative history to show that Congress *endorsed* the NLRB's existing practices.

Moreover, the Court in *Yeshiva* endorsed the NLRB's test by citing to this committee report. The Court in *Yeshiva* stated that "[i]n the health-care context, the Board asks in each case whether the decisions alleged to be . . . supervisory are 'incidental to' or 'in addition to' the treatment of patients, a test Congress expressly approved in

157. *Health Care*, 114 S. Ct. at 1784.

158. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 (1981) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)). See also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

159. 416 U.S. 267 (1974).

160. *Id.* at 274-75.

161. 499 U.S. 606 (1991).

162. *Health Care*, 114 S. Ct. at 1784.

163. *Id.* (citing *American*, 499 U.S. at 616).

1974.”¹⁶⁴ Therefore, it is clear this Congressional endorsement should have carried greater weight.¹⁶⁵

VII. IMPLICATIONS FOR THE FUTURE

The Supreme Court's decision in *Health Care* only determined that the NLRB's patient care analysis was incorrect. It did not change the overall law regarding section 2(11). As the Court stated: “[O]ur 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.’”¹⁶⁶ Thus, the Court merely told the NLRB that it could not rely on an industry-wide interpretation of “in the interest of the employer” but must apply the same rationale to nurses that it does to similar employees when determining their supervisory status.

The NLRB now has the task of determining how to apply the other parts of section 2(11) to the function and responsibilities of nurses. To provide a structure for analyzing these parts of the statute in nurse cases, the NLRB scheduled oral argument for October 28, 1994 in two cases, *Providence Hospital & Alaska Nurses Ass'n*¹⁶⁷ and *Ten Broeck Common Nursing Home & United Industrial Workers Local 424*,¹⁶⁸ in which the supervisory status of nurses is in issue.¹⁶⁹ The NLRB asked interested parties to address (1) the impact of *Health Care* on the supervisory status of nurses, (2) “how the [Board] should interpret the relevant provisions of Section 2(11) . . . especially the terms ‘assign,’ ‘responsibility to direct,’ ‘routine,’ and ‘independent

164. *Yeshiva*, 444 U.S. at 690 n.30 (citing S. REP. No. 766, *supra* note 155). The circuit courts have also acknowledged the Supreme Court's approval of the NLRB's test in *Yeshiva*. See *Misericordia Hosp. Medical Ctr. v. NLRB*, 623 F.2d 808, 818 (2d Cir. 1980).

165. The circuit courts have viewed these amendments as authoritative and looked to them when dealing with bargaining unit determinations under § 9(b), even though this section was not amended in 1974. See *NLRB v. Res-Care*, 705 F.2d 1461, 1470 (7th Cir. 1983). The Seventh Circuit has stated:

Congress did change the law in 1974 - it put nonprofit health care institutions under the National Labor Relations Act . . . and maybe the committee's statements should be viewed as a source of guidance to the courts in interpreting the impact of the amendment on the whole Act; by changing the coverage of [the] statute, you can also change its meaning. In any event, the circuits including ours have treated the statements as authoritative.

Id. See, e.g., *NLRB v. HMO Int'l/Calif. Medical Group Health Plan, Inc.*, 678 F.2d 806 (9th Cir. 1982); *Mary Thompson Hosp., Inc. v. NLRB*, 621 F.2d 858 (7th Cir. 1980); *NLRB v. Mercy Hosp. Ass'n*, 606 F.2d 22 (2nd Cir. 1979); *NLRB v. West Suburban Hosp.*, 570 F.2d 213 (7th Cir. 1978).

166. *Health Care*, 114 S. Ct. at 1785.

167. *Providence Hosp. & Alaska Nurses Ass'n* (NLRB 1994) (No. 19-RC-12866).

168. *Ten Broeck Common Nursing Home & United Indus. Workers Local 424* (NLRB 1994) (No. 3-RC-10166).

169. 147 Lab. Rel. Rep. (BNA) 129 (Oct. 3, 1994).

judgment", and (3) how the provisions of section 2(11) should be harmonized with section 2(12).¹⁷⁰ Thus, until these two cases are resolved by the NLRB, the full impact of *Health Care* will not be known.

A. *Impact Outside the Health Care Field*

The Court stated in *Health Care* that its decision would have almost no effect outside of nurse cases because the NLRB's patient care analysis was for the most part confined to those cases;¹⁷¹ however, it is too soon to tell what its impact will be outside the health care field. In post-*Health Care* cases regarding the supervisory status of professionals, the NLRB has taken advantage of dicta from *Health Care* to limit its application.¹⁷² For example, in *Greenspan*¹⁷³ the NLRB began its analysis by acknowledging that the Court in *Health Care* "did not change the overall law regarding 2(11) supervisors;" therefore, it would determine the supervisory status of professionals based on the "traditional" criteria of section 2(11).¹⁷⁴ The NLRB cited the Court's endorsement of

results reflecting a distinction between authority arising from professional knowledge and the authority encompassing front-line management prerogatives if it does not result from manipulation of the statutory phrase "in the interest of the employer," but instead from a finding that the employee in question had not met the other requirements of supervisory status under the Act, such as the requirement that the employee exercise one of the listed activities in a non-routine manner.¹⁷⁵

With these principles in mind, the NLRB looked to its prior decisions regarding professionals and determined the professionals were

170. *Id.*

171. *Health Care*, 114 S. Ct. at 1785.

172. Cf. Patty Reinert, *NLRB Rejects Legal Aid Officials' Bid to Void Union Election Results*, DAILY RECORD (Baltimore), July 25, 1994, at 3 (Legal aid office tried to void union election results stating lawyers and legal aides were supervisors in light of *Health Care*. However, the Regional Director of the NLRB stated the "courts ruling was limited to the question of the supervisory status of nurses. In fact, . . . the court made a point of saying its decision would have 'almost no effect' in other cases.").

173. *Greenspan*, 318 N.L.R.B. No. 5, 1995 WL 455372 (July 31, 1995). Respondent, Robert Greenspan D.D.S., withdrew recognition of a union representing dentists contending that the dentists were supervisors based on *Health Care*. *Id.* at *2. He contended that the dentists responsibly directed dental assistants and had the authority to "effectively recommend the hire, transfer, suspension, assignment, or discipline of the dental assistants." *Id.* at *11.

174. *Id.*

175. *Id.* at *14 (quoting *Health Care*, 114 S. Ct. at 1785).

not supervisors. It cited one of its previous findings that "an 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."¹⁷⁶ Thus, the NLRB found the professionals' authority to direct others was routine and that their authority to recommend transfer was exercised too infrequently.¹⁷⁷ The NLRB concluded with: "Most professional employees employed in a commercial setting have some authority over their subordinates pursuant to their training and positions. A finding that the [professionals] herein are supervisors within the meaning of the Act would severely limit the applicability of Section 2(12) of the Act."¹⁷⁸

B. *Impact on the Health Care Industry*

The primary concern of health care unions will be that the Supreme Court's decision in *Health Care* will increase litigation because employers can use it to divest nurses of their NLRA rights. Several health care institutions charged with a violation of sections 8(a)(5) and (1) of the NLRA for refusing to bargain with unions after certification have attacked the validity of bargaining unit certifications by claiming that the unit is inappropriate because some of the unit employees are now supervisors under *Health Care*.¹⁷⁹ In addition, several health care institutions, which had previously stipulated that certain nurses were employees and not supervisors, withdrew this stipulation in light of *Health Care*.¹⁸⁰

The primary concern of those in the health care industry who oppose the decision in *Health Care* is its impact on quality patient

176. *Id.* (citing *Golden West Broadcasters*, 215 N.L.R.B. 760 n.4 (1974)).

177. *Id.* at *12-13.

178. *Id.* at *14.

179. *Hirsch v. Konig*, No. 95-CV-2832JBS, 1995 WL 471897 (D.N.J. 1995) (alleging three LPNs were supervisors and could not be in the unit and that it had no obligation to bargain in light of *Health Care*); *Desert Hospital*, 316 N.L.R.B. No. 190 (April 17, 1995) (claiming alleged supervisory participation in the unit); *Heartshare Human Services*, 317 N.L.R.B. No. 94 (May 25, 1995) (claiming that certain instructors who voted in the election are supervisors under *Health Care*).

180. *Service Employees Int'l Union, Local 627*, 315 N.L.R.B. 1210 (1994) (demanding record be reopened to present evidence of supervisory status in light of *Health Care*); *Michael Konig*, 318 N.L.R.B. No. 31, 1995 WL 490326 (August 15, 1995) (arguing that LPN was a supervisor; therefore, nursing center was not liable for discharging the LPN); *Opportunity Homes, Inc.*, 315 N.L.R.B. 1210 (1994) (arguing *Health Care* articulated a new standard for supervisory status in the health care field).

care.¹⁸¹ As they view the decision, it in effect means nurses who have authority to direct other employees could be fired for questioning management decisions or job conditions which put quality patient care at risk.¹⁸² Others, however, do not see the decision as being detrimental to nurses or quality patient care.¹⁸³ As one attorney has pointed out, nurses still have significant protection under the public policy exceptions to the employment at will doctrine at the state level.¹⁸⁴ Therefore, they will still have protection individually, but it will come from a different source.¹⁸⁵

As for nurses themselves, many may lose their NLRA rights. Nurses have ethical and legal obligations under their state nursing practice acts to be an advocate for their patients.¹⁸⁶ By their professional licensure and ethical standards, nurses are required to make independent judgments¹⁸⁷ and use discretion which may divest them of their NLRA rights without the patient care analysis to protect them. However, the impact of *Health Care* on nurses awaits the NLRB's decisions in *Providence* and *Ten Broeck*.

C. *Resolution to the Conflict in the Circuit Courts of Appeals?*

As stated previously, the Supreme Court's decision in *Health Care* focused only on the phrase 'in the interest of the employer.' Thus, the Court was not presented with the task of analyzing the facts in the record to determine if the NLRB's application of the other parts of section 2(11) were correct.¹⁸⁸ The NLRB's patient care analysis alone was not the reason for conflict in the circuit courts. There was not just a conflict over the validity of the patient care analysis, but also what criteria to focus on in applying other parts of section 2(11) to nurses.¹⁸⁹

181. Stuart Silverstein, *Washington State Nurses Association Disturbed By Supreme Court Decision On Nurses As Supervisors*, PR NEWSWIRE, May 27, 1994, available in Global-Search, Access No. 199405270045PR.

182. *Id.* Indeed, this was exactly the case in *Health Care*. The LPNs who were discharged were let go several months after they had gone to HCR management to discuss problems such as short staffing, disparate enforcement of HCR's absentee policy, and HCR's switch from one pharmacy to another whose service was not adequate. *Health Care*, 306 N.L.R.B. at 63.

183. See Laura Bruck, *Can Nurses Be Fired For Complaining? Conflicting Views on a Recent Supreme Court Decision*, NURSING HOMES, July-August 1994, at 38.

184. *Id.*

185. *Id.*

186. *Are You a Supervisor?*, THE OKLAHOMA NURSE, Oct.-Dec. 1994, at 12-13.

187. *Supreme Court Decision Challenges RN Patient Advocacy Role*, CALIFORNIA NURSE, June 1994, at 1.

188. See *Health Care*, 114 S. Ct. at 1785.

189. See *supra* text accompanying notes 21-67.

Each circuit reviewing the supervisory status of nurses has focused on and given different weight to criteria found to constitute supervisory status. The NLRB and the circuit courts are still left with a free rein to apply whatever criteria they feel answer the question before them.¹⁹⁰ The determination of supervisory status is highly fact based and usually depends on the activities of the nurses and the structure of the nursing home or hospital.¹⁹¹ Accordingly, some flexibility must be given.¹⁹²

As a suggestion, the Seventh Circuit's review of the policies behind the exclusion of supervisors is a good starting point.¹⁹³ The two criteria on which the Seventh Circuit focuses, the ratio of non-supervisory employees to supervisory employees and disciplinary authority, have been widely used by other circuits.¹⁹⁴ Additionally, by starting at the "grass roots," the decision over supervisory status can properly focus on the intent of Congress in excluding supervisors. Justice Ginsburg's dissent in *Health Care* would agree with this conclusion.¹⁹⁵ The dissent looked to the intent of Congress in adopting the supervisory exclusion which was to exclude from protection those persons "vested with . . . genuine management prerogatives."¹⁹⁶ By focusing on the

190. The NLRB is of the view that only Supreme Court decisions bind it in future cases. Rebecca Hanner White, *Time For a New Approach: Why The Judiciary Should Disregard The "Law Of The Circuit" When Confronting Nonacquiescence By The National Labor Relations Board*, 69 N.C. L. Rev. 639, 644 (1991). The NLRB regards circuit court decisions only as "the law of the case" and has instructed its ALJs to follow the law as laid down by the Board. *Id.* at 642, 644. The circuit courts of course are not bound by precedents from other circuits and may review Board decisions applying the law of their circuit.

191. See *Waverly-Cedar Falls Health Care Ctr. v. NLRB*, 933 F.2d 626, 629 (8th Cir. 1991); *Misericordia Hosp. Medical Ctr. v. NLRB*, 623 F.2d 808, 818 (2d Cir. 1980).

192. See *Waverly*, 933 F.2d at 629; *NLRB v. St. Mary's Home, Inc.*, 690 F.2d 1062, 1066 (4th Cir. 1982).

193. See *Children's Habilitation Ctr. v. NLRB*, 887 F.2d 130, 131-32 (7th Cir. 1989).

194. See *Beverly Calif. Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992) (utilizing disciplinary and ratio criteria in the Sixth Circuit); *Riverchase Health Care Ctr. v. NLRB*, 976 F.2d 725 (4th Cir. 1992) (utilizing the disciplinary criterion in the Fourth Circuit); *NLRB v. Res-Care*, 705 F.2d 1461 (7th Cir. 1983) (utilizing the disciplinary and ratio criteria in the Seventh Circuit); *NLRB v. Walker County Medical Ctr., Inc.*, 722 F.2d 1535 (11th Cir. 1984) (utilizing the disciplinary criterion in the Eleventh Circuit); *Waverly*, 933 F.2d at 626 (utilizing the disciplinary and ratio criteria in the Eighth Circuit); *St. Mary's*, 690 F.2d 1062 (utilizing the ratio criterion in the Fourth Circuit). Jerry Hunter, General Counsel for the NLRB, has said that he "believes the [B]oard will continue to look at 'ratios' in determining supervisory status. For instance . . . in a unit of five nurses where there are three that direct the work, it is unlikely those three would be found to be supervisors." *Justices Find Nurses Who Direct Other Employees Are Supervisors*, DAILY LAB. REP., May 24, 1994, at 4.

195. *Health Care*, 114 S. Ct. at 1785 (Ginsburg, J., dissenting).

196. S. REP. NO. 105, *supra* note 31. See also H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 35 (1947), reprinted in 1947 U.S.C.C.A.N. 1130, 1135, and in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 539 (1948).

balance of power and conflict of interest concerns, only those employees who have "genuine management prerogatives" will be found to be supervisors and excluded from coverage of the NLRA based on the intent of Congress.

VIII. CONCLUSION

The Supreme Court's decision in *Health Care* has a positive impact on the NLRA as a whole but a negative impact on nurses. By rejecting a special industry wide test, the Court created greater uniformity within the NLRA and clarified the test for the supervisory status of nurses. However, the majority failed to take into account the work nurses do, and as a result, many nurses may lose their NLRA rights. As for professionals outside the health care field, the impact of *Health Care* may have been minimized or neutralized by both the Court's narrowing of the issue to an interpretation of "in the interest of the employer" and its explicit dicta. The NLRB and the courts now have the task of defining and applying all sections of 2(11) in determining the supervisory status of employees.

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