

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HUDSON A PROFESSIONAL CORPORATION
Employer

and

HIPR PACSOFT TECHNOLOGIES, INC.
Employer

Cases 06-RC-280280
06-RC-281239
06-RC-281254

and

HUDSON A PROFESSIONAL CORPORATION/HIPR PACSOFT
TECHNOLOGIES, INC, A COMMON EMPLOYER
Employer

and

UNITED ELECTRICAL, RADIO & MACHINE
WORKERS OF AMERICA
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied.¹

¹ Contrary to the contention of our dissenting colleague, review is not warranted with respect to the authority of the Team Leads, Team Lead Assistants, and Floating Team Lead Assistants (collectively "TLs") to evaluate employees. "Section 2(11) does not include 'evaluate' in its enumeration of supervisory functions." *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 (1999). Thus, the Board has consistently held that the preparation of evaluations confers supervisory status only if the evaluation, by itself, directly affects the wages and/or job status of the individuals being evaluated. *Id.*; see also *Williamette Industries*, 336 NLRB 743, 743-744 (2001); *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1334 (2000).

The record indicates that TLs complete a project feedback form for each project completed by a writer, rating the project as either exceptional, excellent, satisfactory, or unsatisfactory. Each rating is turned into a number, and that number is mathematically factored into the Employer's "key performance index" (KPI) system, which is used to determine monthly bonuses for employees. However, the record does not detail the process by which the KPI is calculated, the weight the ratings on project feedback forms are given in the calculation, or what other factors are taken into consideration. Thus, the evidence adduced by the Employer fails to

establish a direct relationship between the project feedback forms and the bonuses, wages, and/or job status of the individuals being evaluated.

At most, the record shows that the ratings on the project feedback forms play a role in the Employer's KPI system. As the Regional Director correctly observed, it is not enough for the evaluation to "play a role" or be "one of the criteria considered" in a decision regarding wages or job status: rather, the party alleging supervisory status must "establish a direct correlation" between the evaluations and the decision, including demonstrating "what weight evaluations are given in the decision." *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889-890 (2014).

Contrary to the dissent's suggestion, the lack of evidence is properly construed against the Employer. See *Brusco Tug & Barge Co.*, 359 NLRB 486, 490 (2013), incorporated by reference at 362 NLRB 257 (2015), *enfd.* 696 Fed. Appx. 519 (D.C. Cir. 2017). It is well established that the "'burden of proving supervisory status rests on the party asserting that such status exists.'" *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006), accord *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). "Mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 1 (2017) (citing *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006)). Accordingly, the absence of detailed evidence establishing how the ratings on the project feedback forms translate to specific rewards or bonuses or otherwise directly correlate to the wages and/or job status of the individuals being evaluated precludes a finding of supervisory status. The requisite evidence is not supplied by the equivocal testimony of the Employer's managing partner that the points generated by the feedback forms "will be taken into consideration" and that if a writer gets the lowest score as opposed to the highest score on a project it "could make a difference up to 17 percent" on the KPI. (Emphasis supplied.) See *Modesto Radiology Imaging*, *supra*, 361 NLRB at 889-890 (employer failed to prove supervisory status based on team leaders' role in preparing evaluations where the record failed to establish a direct correlation between the evaluations and wage increases or the weight the evaluations were given in the decision to award wage increases); *Williamette Industries*, *supra*, 336 NLRB at 743-744 (employer failed to prove direct link between probationary evaluations and changes in job status where there was no evidence indicating what weight the evaluation forms carried in the employer's personnel decisions).

We reject the attempt by the dissent to distinguish *Modesto Radiology Imaging* and *Williamette Industries*. The decisive factor in each case was the employer's failure to demonstrate a direct correlation between the evaluations and the wages or job status of the individuals being evaluated, including the weight the evaluations were given in the decisions. *Modesto Radiology Imaging*, *supra*, 361 NLRB at 889-890; *Williamette Industries*, *supra*, 336 NLRB at 743-744. See also *Harborside Healthcare*, *supra*, 330 NLRB at 1335 (employer failed to establish a "direct link" between evaluations and pay increases). The Employer in this case has also failed to identify such evidence. The dissent acknowledges that the Employer has not supplied detailed evidence concerning the KPI methodology and its effect on wages. The dissent's position that the Board should grant review in order to search for the lacking evidence – where the Employer has failed to identify it – does not comport with the governing burdens and standards applicable here.

GWYNNE A. WILCOX,

MEMBER

DAVID M. PROUTY,

MEMBER

Dated, Washington, D.C., March 24, 2022.

MEMBER RING, dissenting.

I would grant the Employer's Request for Review with respect to the authority of the Team Leads, Team Lead Assistants, and Floating Team Lead Assistants (collectively "TLs") to reward employees.² The TLs lead teams of writers who prepare documents for clients represented by the Employer who are seeking employment visas or applying for American citizenship. The Regional Director found that the TLs independently issue a project/performance feedback form for each project completed by a writer and that those forms include a rating that affects the amount of the quarterly bonus a writer receives because the rating is factored into a numerical "key performance index" (KPI), which determines whether the writer will receive a bonus.

The Regional Director nevertheless found that the TLs' issuance of the feedback forms did not establish supervisory status. The Regional Director faulted the Employer for not providing detailed information about the KPI methodology and found that, in any event, the TLs did not use independent judgment in issuing the forms because they were governed by a detailed "rubric" that determined how the writers' work was to be evaluated. Contrary to my colleagues, the Employer's Request for Review raises substantial issues warranting review with respect to these findings.

First, the Regional Director failed to provide any valid justification for requiring specific details about the KPI methodology when, as here, the evidence that is in the record established to the Regional Director's satisfaction that "project feedback forms do impact the amount of the

We also reject the dissent's contention that review is warranted with regard to the Regional Director's finding that TLs do not exercise independent judgment in completing project feedback forms. We find it unnecessary to reach that issue because the record fails to establish a direct correlation between the feedback forms and the wages and/or job status of the individuals being evaluated.

In denying review, we do not rely on the Regional Director's citations to *Loparex LLC*, 353 NLRB 1224, 1238 (2009), a two-member Board decision, or *G4S Regulated Security Solutions*, 358 NLRB 1701, 1703 (2012), a recess-Board decision. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010); *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

² The Regional Director stated that the Team Leads (TLs) and Team Lead Assistants (TLAs) complete the project evaluation forms. The Regional Director also found that the role of the Floating Team Lead Assistants (FTLAs) is to fill in for the TLs and TLAs, sometimes for long periods of time, and that in doing so the FTLAs essentially possess all the duties of the TLs and TLAs. Accordingly, the Request for Review raises substantial issues warranting review with regard to the TLAs' and FTLAs' authority to reward as well.

quarterly bonus a writer receives.” Because the Regional Director found that the project feedback forms impact the quarterly bonuses based on the current record, his determination that even more information was required regarding the Employer’s KPI system, which the majority affirms, warrants review.³

Second, the Request for Review also raises substantial issues warranting review with regard to the Regional Director’s finding that completion of the forms does not require independent judgment because of the detailed instructions in the rubric. The rubric, which is in the record, does provide instructions on how writers’ work should be evaluated, including specific point deductions for various types of errors. However, the rubric also includes provisions that do appear, on their face, to call for the use of discretion. For example, the rubric states that “A major error should also be recorded for [recommendation letters] that are too short (below 800 words with no extenuating circumstances), particularly egregious and/or repeated grammatical errors, plagiarized passages from the Soc/outside sources, use of templated language, and significant differentiation issues.” In addition, the rubric states that TLs have the discretion to count minor errors “more heavily” if they are repeated after feedback, without providing any standards for applying that proviso. The Regional Director did not mention, much less analyze, these elements of the rubric. Finally, the rubric states that TLs have the discretion to handle consistent name or pronoun errors either as a major error or by dropping the project a rank. Although the Regional Director briefly mentioned this provision in her statement of facts,

³ *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889-890 (2014), cited by my colleagues, is readily distinguishable. There, the evidence established only that evaluations prepared by team leads played “some role” in determining merit increases and there was no evidence that any higher authority independently investigated employees’ work before wage increases were granted. Here, however, the Regional Director found that each assignment receives a score (“EE”, “E”, “S”, “U”) that is converted to a number that impacts the bonus. Additionally, the Respondent’s managing partner testified that the difference between the highest score and the lowest score on the writer’s feedback form could make a difference of up to 17 percent of their KPI. Further, here there is affirmative evidence, rather than a lack of evidence, as in *Modesto*, that no higher authority reviews the writers’ underlying work product to verify the accuracy of the grade given by the TLs.

Nor does the majority gain any ground by citing *Williamette Industries*, 336 NLRB 743, 743-744 (2001). In that case there was no evidence of what weight, if any, the purported supervisors’ evaluations of probationary employees carried in the employer’s personnel decisions. Further, the purported supervisors’ evaluations of permanent employees had no effect on wages—employees in the same classifications earned the same wage regardless of the results of their evaluations. Here, however, the Regional Director found that project feedback forms *do* impact the amount of the quarterly bonus a writer receives.

Finally, in *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1334 (2000), evaluations of nursing assistants were independently prepared by charge nurses, whose supervisory status was disputed, and by unit managers, the director of nursing determined whether to issue wage increases to the nursing assistants, and the evidence showed only that she took the evaluations of the nursing assistants “into consideration” in making that determination, with no indication how any conflict in the numerical ratings of the separate evaluations would be dealt with by the director of nursing. These facts are also not present here.

she similarly failed to analyze its significance. Under these circumstances, the Employer's contention that the Regional Director's discussion of the rubric was inaccurate and that the TLs do exercise discretion in completing the feedback forms raises substantial issues warranting review.

JOHN F. RING,

MEMBER