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SUPREME COURT OF THE UNITED STATES

No. 99–1815

NATIONAL LABOR RELATIONS BOARD, PETITIONER
v. KENTUCKY RIVER COMMUNITY
CARE, INC., ET AL.

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

[May 29, 2001]

JUSTICE SCALIA delivered the opinion of the Court.

Under the National Labor Relations Act, employees are deemed to be “supervisors” and thereby excluded from the protections of the Act if, *inter alia*, they exercise “independent judgment” in “responsibly . . . direct[ing]” other employees “in the interest of the employer.” 29 U. S. C. §152(11). This case presents two questions: which party in an unfair-labor-practice proceeding bears the burden of proving or disproving an employee’s supervisory status; and whether judgment is not “independent judgment” to the extent that it is informed by professional or technical training or experience.

I

In Pippa Passes, Kentucky, respondent Kentucky River Community Care, Inc., operates a care facility for residents who suffer from mental retardation and mental illness. The facility, named the Caney Creek Developmental Complex (Caney Creek), employs approximately 110 professional and nonprofessional employees in addition to roughly a dozen concededly managerial or supervisory

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employees. In 1997, the Kentucky State District Council of Carpenters (a labor union that is co-respondent here, supporting petitioner) petitioned the National Labor Relations Board to represent a single unit of all 110 potentially eligible employees at Caney Creek. See National Labor Relations Act (Act) §9(c), 49 Stat. 453, 29 U. S. C. §159(c).

At the ensuing representation hearing, respondent objected to the inclusion of Caney Creek's six registered nurses in the bargaining unit, arguing that they were "supervisors" under §2(11) of the Act, 29 U. S. C. §152(11), and therefore excluded from the class of "employees" subject to the Act's protection and includable in the bargaining unit. See §2(3), 29 U. S. C. §152(3). The Board's Regional Director, to whom the Board has delegated its initial authority to determine an appropriate bargaining unit, see §3(b), 29 U. S. C. §153(b); 29 CFR §101.21 (2000), placed the burden of proving supervisory status on respondent, found that respondent had not carried its burden, and therefore included the nurses in the bargaining unit. The Regional Director accordingly directed an election to determine whether the union would represent the unit. See §9(c)(1), 29 U. S. C. §159(c)(1). The Board denied respondent's request for review of the Regional Director's decision and direction of election, and the union won the election and was certified as the representative of the Caney Creek employees.

Because direct judicial review of representation determinations is unavailable, *AFL v. NLRB*, 308 U. S. 401, 409–411 (1940), respondent sought indirect review by refusing to bargain with the union, thereby inducing the General Counsel of the Board to file an unfair labor practice complaint under §§8(a)(1) and 8(a)(5) of the Act, 29 U. S. C. §§158(a)(1), (5). The Board granted summary judgment to the General Counsel pursuant to regulations providing that, absent newly developed evidence, the

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propriety of a bargaining unit may not be relitigated in an unfair labor practice hearing predicated on a challenge to the representation determination. 29 CFR §102.67(f) (2000); see *Magnesium Casting Co. v. NLRB*, 401 U. S. 137, 139–141 (1971) (approving that practice); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U. S. 146, 161–162 (1941) (same).

Respondent petitioned for review of the Board’s decision in the United States Court of Appeals for the Sixth Circuit, and the Board cross-petitioned. The Sixth Circuit granted respondent’s petition as it applied to the nurses and refused to enforce the bargaining order. It held that the Board had erred in placing the burden of proving supervisory status on respondent rather than on its General Counsel, and it rejected the Board’s interpretation of “independent judgment,” explaining that the Board had erred by classifying “the practice of a nurse supervising a nurse’s aide in administering patient care” as “‘routine’ [simply] because the nurses have the ability to direct patient care by virtue of their training and expertise, not because of their connection with ‘management.’” 193 F. 3d 444, 453 (1999). We granted the Board’s petition for a writ of certiorari. 531 U. S. 1304 (2000).

II

The Act expressly defines the term “supervisor” in §2(11), which 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.” 29 U. S. C. §152(11).

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The Act does not, however, expressly allocate the burden of proving or disproving a challenged employee's supervisory status. The Board therefore has filled the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor. For example, when the General Counsel seeks to attribute the conduct of certain employees to the employer by virtue of their supervisory status, this rule dictates that he bear the burden of proving supervisory status. See, e.g., *Masterform Tool Co.*, 327 N. L. R. B. 1071, 1071–1072 (1999). Or, when a union challenges certain ballots cast in a representation election on the basis that they were cast by supervisors, the union bears the burden. See, e.g., *Panaro and Grimes*, 321 N. L. R. B. 811, 812 (1996).

The Board argues that the Court of Appeals for the Sixth Circuit erred in not deferring to its resolution of the statutory ambiguity, and we agree. The Board's rule is supported by "the general 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." *FTC v. Morton Salt Co.*, 334 U. S. 37, 44–45 (1948). The Act's definition of "employee," §2(3), 29 U. S. C. §152(3), "reiterate[s] the breadth of the ordinary dictionary definition" of that term, so that it includes "any 'person who works for another in return for financial or other compensation.'" *NLRB v. Town & Country Elec., Inc.*, 516 U. S. 85, 90 (1995) (quoting *American Heritage Dictionary* 604 (3d ed. 1992)). Supervisors would fall within the class of employees, were they not expressly excepted from it. See *Sure-Tan, Inc. v. NLRB*, 467 U. S. 883, 891 (1984); cf. *Packard Motor Car Co. v. NLRB*, 330 U. S. 485 (1947). The burden of proving the applicability of the supervisory exception, under *Morton Salt*, should thus fall on the party asserting it. In addition, it is easier to prove an employee's authority to exercise 1 of the 12 listed supervisory functions than to disprove an

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employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status. We find that the Board's rule for allocating the burden of proof is reasonable and consistent with the Act, and we therefore defer to it. *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 402–403 (1983).

Applying its rule to this case, the Board placed on respondent the duty to prove the supervisory status of its nurses both in the §9(c) representation proceeding, where respondent sought to exclude the nurses from the bargaining unit prior to the election, and in the unfair labor practice hearing, where respondent defended against the §8(a)(5) refusal-to-bargain charge. Respondent challenges the application of the rule to the latter proceeding where, it correctly observes and the Board does not dispute, “the General Counsel carries the burden of proving the elements of an unfair labor practice,” *id.*, at 401, which means that it bears the burden of persuasion as well as of production, see Administrative Procedure Act, 5 U. S. C. §556(d); *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U. S. 267, 276–278 (1994) (rejecting statement to contrary in *NLRB v. Transportation Management Corp.*, *supra*, at 404, n. 7). Supervisory status, however, is not an element of the Board's claim in this setting. The Board must prove that the employer refused to bargain with the representative of a unit of “employees,” §8(a)(5), 29 U. S. C. §158(a)(5), that was properly certified; the unit was not properly certified (as the respondent contends) only if the respondent successfully demonstrated, at the certification stage, that some employees in the unit were also supervisors. In the unfair labor practice proceeding, therefore, the burden remains on the employer to establish the excepted status of these nurses. Insofar as the Court of Appeals held otherwise, it erred. It remains to consider whether the court's other holding that is challenged here

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suffices to sustain its judgment.

III

The text of §2(11) of the Act that we quoted above, 29 U. S. C. §152(11), sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “in the interest of the employer.” *NLRB v. Health Care & Retirement Corp. of America*, 511 U. S. 571, 573–574 (1994). The only basis asserted by the Board, before the Court of Appeals and here, for rejecting respondent’s proof of supervisory status with respect to directing patient care was the Board’s interpretation of the second part of the test— to wit, that employees do not use “independent judgment” when they exercise “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.” Brief for Petitioner 11. The Court of Appeals rejected that interpretation, and so do we.

Two aspects of the Board’s interpretation are reasonable, and hence controlling on this Court, see *NLRB v. Town & Country Elec., Inc.*, *supra*, at 89–90; *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844 (1984). First, it is certainly true that the statutory term “independent judgment” is ambiguous with respect to the *degree* of discretion required for supervisory status. See *NLRB v. Health Care & Retirement Corp. of America*, *supra*, at 579. Many nominally supervisory functions may be performed without the “exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding” of supervisory status under the Act. *Weyerhaeuser Timber Co.*, 85 N. L. R. B. 1170,

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1173 (1949). It falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies. Second, as reflected in the Board's phrase "in accordance with employer-specified standards," it is also undoubtedly true that the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer. So, for example, in *Chevron Shipping Co.*, 317 N. L. R. B. 379, 381 (1995), the Board concluded that "although the contested licensed officers are imbued with a great deal of responsibility, their use of independent judgment and discretion is circumscribed by the master's standing orders, and the Operating Regulations, which require the watch officer to contact a superior officer when anything unusual occurs or when problems occur."

The Board, however, argues further that the judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion is not "independent judgment" if it is a particular *kind* of judgment, namely, "ordinary professional or technical judgment in directing less-skilled employees to deliver services." Brief for Petitioner 11. The first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence. The text, by focusing on the "clerical" or "routine" (as opposed to "independent") nature of the judgment, introduces the question of degree of judgment that we have agreed falls within the reasonable discretion of the Board to resolve. But the Board's categorical exclusion turns on factors that have nothing to do with the degree of discretion an employee exercises. Cf. *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 481 (2001) ("[T]he agency's interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear"). Let the judgment be significant and only loosely constrained by the employer; if

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it is “professional or technical” it will nonetheless not be independent.¹ The breadth of this exclusion is made all the more startling by virtue of the Board’s extension of it to judgment based on greater “experience” as well as formal training. See Reply Brief for Petitioner 3 (“professional or technical skill or experience”). What supervisory judgment worth exercising, one must wonder, does not rest on “professional or technical skill or experience”? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate “supervisors” from the Act. Cf. *NLRB v. Yeshiva Univ.*, 444 U. S. 672, 687 (1980) (Excluding “decisions . . . based on . . . professional expertise” would risk “the indiscriminate re-characterization as covered employees of professionals working in supervisory and managerial capacities”).

As it happens, though, only one class of supervisors would be eliminated in practice, because the Board limits its categorical exclusion with a qualifier: Only professional judgment that is applied “in directing less-skilled employees to deliver services” is excluded from the statutory category of “independent judgment.” Brief for Petitioner

¹The Board in its reply brief in this Court steps back from this interpretation and argues that it has only drawn distinctions between degrees of authority. Reply Brief for Petitioner 3. But the opinions of the Board that developed its current interpretation of “independent judgment” clearly draw a categorical distinction. See, e.g., *Providence Hospital*, 320 N. L. R. B. 717, 729 (1996) (“Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee’s experience, skills, training, or position”). It is those opinions that were cited in the Regional Director’s opinion resolving the representation dispute, see App. to Pet. for Cert. 52a–53a, which was accepted without further review by the Board and was unreviewable in the unfair labor practice proceeding. “We do not, of course, substitute counsel’s *post hoc* rationale for the reasoning supplied by the Board itself.” *NLRB v. Yeshiva Univ.*, 444 U. S. 672, 685, n. 22 (1980) (citing *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947)).

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11. This second rule is no less striking than the first, and is directly contrary to the text of the statute. *Every* supervisory function listed by the Act is accompanied by the statutory requirement that its exercise “requir[e] the use of independent judgment” before supervisory status will obtain, §152(11), but the Board would apply its restriction upon “independent judgment” to just 1 of the 12 listed functions: “responsibly to direct.” There is no apparent textual justification for this asymmetrical limitation, and the Board has offered none. Surely no conceptual justification can be found in the proposition that supervisors exercise professional, technical, or experienced judgment only when they direct other employees. Decisions “to hire, . . . suspend, lay off, recall, promote, discharge, . . . or discipline” other employees, *ibid.*, must often depend upon that same judgment, which enables assessment of the employee’s proficiency in performing his job. See *NLRB v. Yeshiva Univ.*, *supra*, at 686 (“[M]ost professionals in managerial positions continue to draw on their special skills and training”). Yet in no opinion that we were able to discover has the Board held that a supervisor’s judgment in hiring, disciplining, or promoting another employee ceased to be “independent judgment” because it depended upon the supervisor’s professional or technical training or experience. When an employee exercises one of these functions with judgment that possesses a sufficient degree of independence, the Board invariably finds supervisory status. See, e.g., *Trustees of Noble Hospital*, 218 N. L. R. B. 1441, 1442 (1975).

The Board’s refusal to apply its limiting interpretation of “independent judgment” to any supervisory function other than responsibly directing other employees is particularly troubling because just seven years ago we rejected the Board’s interpretation of part three of the supervisory test that similarly was applied only to the same supervisory function. See *NLRB v. Health Care & Retire-*

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ment Corp. of America, 511 U. S. 571 (1994). In *Health Care*, the Board argued that nurses did not exercise their authority “in the interest of the employer,” as §152(11) requires, when their “independent judgment [was] exercised incidental to professional or technical judgment” instead of for “disciplinary or other matters, *i.e.*, in addition to treatment of patients.” *Northcrest Nursing Home*, 313 N. L. R. B. 491, 505 (1993). It did not escape our notice that the target of this analysis was the supervisory function of responsible direction. “Under §2(11),” we noted, “an employee who in the course of employment uses independent judgment to engage in 1 of the 12 listed activities, including responsible direction of other employees, is a supervisor. Under the Board’s test, however, a nurse who in the course of employment uses independent judgment to engage in responsible direction of other employees is not a supervisor.” 511 U. S., at 578–579. We therefore rejected the Board’s analysis as “inconsistent with . . . the statutory language,” because it “rea[d] the responsible direction portion of §2(11) out of the statute in nurse cases.” *Id.*, at 579–580. It is impossible to avoid the conclusion that the Board’s interpretation of “independent judgment,” applied to nurses for the first time after our decision in *Health Care*, has precisely the same object. This interpretation of “independent judgment” is no less strained than the interpretation of “in the interest of the employer” that it has succeeded.² Cf. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U. S. 359, 374 (1998) (an

² JUSTICE STEVENS argues in this case, see *post*, at 4–5 (opinion concurring in part and dissenting in part), as the Board argued in *NLRB v. Health Care & Retirement Corp. of America*, 511 U. S. 571, 579 (1994), that the strain is eased by the ambiguity of a different term in the statute, “responsibly to direct.” That argument is no more persuasive now than when we rejected it in *Health Care*: “[A]mbiguity in one portion of a statute does not give the Board license to distort other provisions of the statute,” *ibid.*

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agency that announces one principle but applies another is not acting rationally under the Act).

The Board contends, however, that Congress incorporated the Board's categorical restrictions on "independent judgment" when it first added the term "supervisor" to the Act in 1947. We think history shows the opposite. The Act as originally passed by Congress in 1935 did not mention supervisors directly. It extended to "employees" the "right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing" Act of July 5, 1935, §7, 49 Stat. 452, and it defined "employee" expansively (if circularly) to "include any employee," §2(3). We therefore held that supervisors were protected by the Act. *Packard Motor Car Co. v. NLRB*, 330 U. S. 485 (1947). Congress in response added to the Act the exemption we had found lacking. The Labor Management Relations Act of 1947 (Taft-Hartley Act) expressly excluded "supervisors" from the definition of "employees" and thereby from the protections of the Act. §2(3), 61 Stat. 137, as amended, 29 U. S. C. §152(3) ("The term 'employee' . . . shall not include . . . any individual employed as a supervisor"); Taft-Hartley Act §14(a), as amended, 29 U. S. C. §164(a) ("[N]o employer [covered by the Act] shall be compelled to deem individuals defined herein as supervisors as employees for the purposes of any law, either national or local, relating to collective bargaining").

Well before the Taft-Hartley Act added the term "supervisor" to the Act, however, the Board had already been defining it, because while the Board agreed that supervisors were protected by the 1935 Act, it also determined that they should not be placed in the same bargaining unit as the employees they oversaw. To distinguish the two groups, the Board defined "supervisors" as employees who "supervise or direct the work of [other] employees . . . , and who have authority to hire, promote, discharge, discipline,

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or otherwise effect changes in the status of such employees.” *Douglas Aircraft Co.*, 50 N. L. R. B. 784, 787 (1943) (emphasis added). The “and” bears emphasis because it was a true conjunctive: The Board consistently held that employees whose only supervisory function was directing the work of other employees were not “supervisors” within its test. For example, in *Bunting Brass & Bronze Co.*, 58 N. L. R. B. 618, 620 (1944), the Board wrote: “We are of the opinion that, while linemen do direct the work of [other] employees, they do not exercise substantial supervisory authority within the usual meaning of that term.” See also, *e.g.*, *Duval Texas Sulphur Co.*, 53 N. L. R. B. 1387, 1390–1391 (1943) (“As to the chief electrician, motor mechanic, plant engineers, and drillers, . . . [t]he fact that they work with helpers, and perforce direct and guide the work of their helpers, does not, of itself, elevate them to such supervisory rank that they must be excluded from the broad production and maintenance unit”).

When the Taft-Hartley Act added the term “supervisor” to the Act in 1947, it largely borrowed the Board’s definition of the term, with one notable exception: Whereas the Board required a supervisor to direct the work of other employees *and* perform another listed function, the Act permitted direction alone to suffice. “The term ‘supervisor’ means any individual having authority . . . 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.” Taft-Hartley Act §2(11), as amended, 29 U. S. C. §152(11) (emphasis added). Moreover, the Act assuredly did *not* incorporate the Board’s current interpretation of the term “independent judgment” as applied to the function of responsible direction, since the Board had not yet developed that interpretation. It had had no reason to do so, because it had limited the category of supervisors more directly, by requiring functions *in addition* to responsible direction. It

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is the Act's alteration of precisely that aspect of the Board's jurisprudence that has pushed the Board into a running struggle to limit the impact of "responsibly to direct" on the number of employees qualifying for supervisory status—presumably driven by the policy concern that otherwise the proper balance of labor-management power will be disrupted.

It is upon that policy concern that the Board ultimately rests its defense of its interpretation of "independent judgment." In arguments that parallel those expressed by the dissent in *Health Care*, see 511 U. S., at 588–590 (GINSBURG, J., dissenting), and which are adopted by JUSTICE STEVENS in this case, see *post*, at 5–6, the Board contends that its interpretation is necessary to preserve the inclusion of "professional employees" within the coverage of the Act. See §2(12), 29 U. S. C. §152(12). Professional employees by definition engage in work "involving the consistent exercise of discretion and judgment." §152(12)(a)(ii). Therefore, the Board argues (enlisting dictum from our decision in *NLRB v. Yeshiva Univ.*, 444 U. S., at 690, and n. 30, that was rejected in *Health Care*, see 511 U. S., at 581–582), if judgment of that sort makes one a supervisor under §152(11), then Congress's intent to include professionals in the Act will be frustrated, because "many professional employees (such as lawyers, doctors, and nurses) customarily give judgment-based direction to the less-skilled employees with whom they work," Brief for Petitioner 33. The problem with the argument is not the soundness of its labor policy (the Board is entitled to judge that without our constant second-guessing, see, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 786 (1990)). It is that the policy cannot be given effect through this statutory text. See *Health Care*, *supra*, at 581 ("[T]here may be 'some tension between the Act's exclusion of [supervisory and] managerial employees and its inclusion of professionals,' but we find no authority for 'suggesting that that tension can be

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resolved' by distorting the statutory language in the manner proposed by the Board") (quoting *NLRB v. Yeshiva Univ.*, *supra*, at 686). Perhaps the Board could offer a limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as §152(11) requires. Certain of the Board's decisions appear to have drawn that distinction in the past, see, *e.g.*, *Providence Hospital*, 320 N. L. R. B. 717, 729 (1996). We have no occasion to consider it here, however, because the Board has carefully insisted that the proper interpretation of "responsibly to direct" is not at issue in this case, see Brief for Petitioner 21–22, n. 9; Reply Brief for Petitioner 7–8, n. 6.

What is at issue is the Board's contention that the policy of covering professional employees under the Act justifies the categorical exclusion of professional judgments from a term, "independent judgment," that naturally includes them. And further, that it justifies limiting this categorical exclusion to the supervisory function of responsibly directing other employees. These contentions contradict both the text and structure of the statute, and they contradict as well the rule of *Health Care* that the test for supervisory status applies no differently to professionals than to other employees. 511 U. S., at 581. We therefore find the Board's interpretation unlawful. See *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U. S., at 364 ("Courts must defer to the requirements imposed by the Board if they are 'rational and consistent with the Act,' and if the Board's 'explication is not inadequate, irrational or arbitrary'" (citations omitted)).

* * *

We may not enforce the Board's order by applying a

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legal standard the Board did not adopt, *NLRB v. Bell Aerospace Co.*, 416 U. S. 267, 289–290 (1974); *SEC v. Chenery Corp.*, 318 U. S. 80, 87–88 (1943), and, as we noted above, *supra*, at 6, the Board has not asked us to do so. Hence, the Board’s error in interpreting “independent judgment” precludes us from enforcing its order. Our decision in *Health Care*, where the Board similarly had not asserted that its decision was correct on grounds apart from the one we rejected, see 511 U. S., at 584, simply affirmed the judgment of the Court of Appeals denying enforcement. Since that same condition applies here, see Brief for Petitioner 14; *id.*, at 42, and since neither party has suggested that *Health Care*’s method for determining the propriety of a remand should not apply here, we take the same course.³ “Our conclusion that the Court of Appeals was correct to find the Board’s test inconsistent with the statute . . . suffices to resolve the case.” *Health Care*, *supra*, at 584. The judgment of the Court of Appeals is affirmed.

It is so ordered.

³Our decision in *Health Care* cannot be distinguished, as JUSTICE STEVENS suggests, see *post*, at 8, n. 10, on the ground that there we found that the Court of Appeals had not erred in any respect. The basis for remand to an agency is the *agency*’s error on a point of law, not the reviewing court’s. (That the reviewing court erred is irrelevant in light of “the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct ‘although the lower court relied upon a wrong ground or gave a wrong reason,’” *SEC v. Chenery Corp.*, 318 U. S. 80, 88 (1943) (quoting *Helvering v. Gowran*, 302 U. S. 238, 245 (1937))). And in *Health Care*, as here, the Board erred in interpreting the test for supervisory status.