

Management Alert

NLRB Issues New Guidelines For Determining Supervisory Status

On October 2, 2006, the National Labor Relations Board (Board) published three decisions that set forth new guidelines for determining the supervisory status of employees under the National Labor Relations Act (Act). The Board re-evaluated its position with respect to the supervisory status of employees in its three decisions -- *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sept. 29, 2006), *Golden Crest Healthcare Center*, 348 N.L.R.B. No. 39 (Sept. 29, 2006), and *Croft Metals, Inc.*, 348 N.L.R.B. No. 38 (Sept. 29, 2006) -- as a result of the finding by the United States Supreme Court in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), that the Board misapplied its supervisory test with respect to professional employees.

Background Regarding The Supervisory Status Of Professional Employees

Section 2(11) of the Act defines supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in conjunction with the foregoing the exercise of such authority is not of

a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). Thus, under Section 2(11), if an individual: (1) has any one of the 12 specified authorities; (2) uses "independent judgment" in the exercise of any of those authorities; and (3) exercises this authority in the "interest of the employer," that individual is considered a "supervisor" for representation purposes under the Act. At all times, the burden rests with the party asserting supervisory status to establish these three requirements.

When interpreting Section 2(11) of the Act, the Board previously relied in large part on the Supreme Court's decision in *NLRB v. Health Care and Retirement Corp.*, 511 U.S. 571 (1994), in which the Court held that nurses at a private nursing home facility who "directed" nurses aides and other nonprofessionals in the provision of patient care were supervisors under the Act. In that case, however, the parties stipulated that the nurses in question utilized "independent judgment" in undertaking this responsibility. Thereafter, the Board routinely relied upon the "independent judgment" requirement of Section 2(11), in rejecting efforts by employers, particularly healthcare employers, who argued that nurses and other healthcare professionals were acting in a supervisory capacity.

The Supreme Court's *Kentucky River* Decision

In 2001, the Supreme Court in *Kentucky River*, in a 5-4 decision authored by Justice Scalia, criticized the Board's analytical approach in determining supervisory status, particularly the Board's interpretation of the term "independent judgment" as used in Section 2(11) of the Act. The Court found that the Board's "independent judgment" test improperly focused on whether an employee (e.g., nurse or physician) uses ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. In *Kentucky River*, the Supreme Court affirmed the Sixth Circuit's refusal to enforce the Board's decision that six registered nurses working for Kentucky River Community Care Inc. were not supervisors. In the past, nurses and physicians, who direct other less-skilled employees in providing patient care services, routinely have been *included* in the bargaining unit on the grounds that the alleged supervisor was using ordinary professional or technical judgment in directing less-skilled employees. Under the test articulated by the Supreme Court in *Kentucky River*, the test for supervisory status applies no differently to professionals than other employees.

Over the years, the Board has struggled with adequately defining the terms "assign," "responsibly to direct," and "independent judgment" as those terms are used in Section 2(11) and applying them in a consistent fashion. As a result of its repeated failures to articulate a sustainable position, as noted in the *Health Care and Retirement Corp.* and *Kentucky River* cases, the Board, in an attempt to secure further guidance and re-examine its guidelines for determining whether an individual is a

supervisor under the Act, in July, 2003, requested amicus briefs from any interested parties. The parties were asked to address ten particular supervisory questions raised by the Board. After three years, the above decisions are the Board's attempt to establish with some finality an approach to resolving issues regarding supervisory status which will withstand judicial scrutiny.

The Board Provides Further Guidance Regarding the Supervisory Status Of Employees

In *Oakwood Healthcare*, the Employer sought to exclude from a petitioned-for unit of registered nurses a group of "permanent" and "rotating" charge nurses. In determining the supervisory status of these nurses, the Board clarified its position with respect to three terms used in the statutory definition of supervisor – the meaning of "assign," "responsibly to direct," and "independent judgment."

Assign and "Responsibly to Direct"

In *Oakwood Healthcare*, the Board (Battista, Schaumber and Kirsanow with Liebman and Walsh dissenting) defined the term "assign" as the act of "designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee." Moreover, "assign" refers to the "designation of significant overall duties to an employee, not ... the ad hoc instruction that the employee perform a discrete task." For example, the Board distinguished between "assigning" a nurse the responsibility for caring for particular patient or group as opposed to telling that nurse to give a sedative to a particular patient.

The Board defined the term “responsibly direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” In particular, Board majority specified that the person directing the work must be held accountable if the directives are not properly carried out. As the Board stated, “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.”

Independent Judgment

With respect to “independent judgment” the Board in *Oakwood Healthcare* found that “independent judgment” regarding supervisory authority is different from “professional” judgment. To establish that an employee exercises “independent judgment,” the judgment exercised must not be controlled by another authority. The determination whether a putative supervisor exercises independent judgment depends on the “degree” of discretion exercised by the employee rather than the “kind of discretion exercised -- whether professional, technical, or otherwise.” Thus, where an employee’s work is controlled or dictated by “detailed instructions,” company manuals or guidelines, “instructions from a higher authority,” or provisions contained in the collective bargaining agreement, the Board does not consider the employee’s actions sufficiently “independent.” The degree of discretion exercised must be more than merely “routine or clerical.”

Particularly useful are examples given by the Board regarding the exercise of independent judgment. For example, a nurse may exercise independent judgment in making hiring recommendations if during the process, the nurse is asked to assess the applicant’s experience, ability, attitude, and character references. Similarly, the Board explained that if the nurse weighs the individualized conditions and needs of a patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.

The Board further stated that the mere existence of company policies “does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” For instance, if the hospital has a policy that details how a nurse responds in an emergency, but the nurse has the discretion to “determine when an emergency exists” or has the authority to “deviate from that policy based on the charge nurse’s assessment of the particular circumstances, those deviations, if material, would involve the exercise of independent judgment.” The key factor in determining whether the “judgment” is “independent” is the amount of discretion allowed.

The Board ultimately held in *Oakwood Healthcare* that the employer’s permanent charge nurses (excluding emergency room charge nurses) were supervisors based on their “delegated authority to assign employees using independent judgment.” The employer demonstrated that charge nurses made staffing assignments both “tailored to patient conditions and needs and particular nursing skills sets” and made patient assignments based upon their own assessment of the probable amount of nursing time each patient would require during the shift.

Part-Time Supervisors

The Board also examined the supervisory status of the employer's "rotating" charge nurses in *Oakwood Healthcare*. The Board held that putative supervisors must spend a "regular and substantial" part of their work day performing supervisory functions. The Board noted that "regular" means "according to a pattern or schedule, as opposed to sporadic substitution." Although not setting a specific standard for determining what constitutes "substantial," the Board noted that it has found supervisory status where putative supervisors spend only 10 to 15 percent of their work time performing supervisory functions. The Board determined that the employer's rotating charge nurses were not supervisors because they did not rotate with any particular "regularity."

Application of the Board's Standards in Golden Crest and Croft Metals

Applying the standards articulated in *Oakwood*, the Board (Battista, Schaumber and Kirsanow) in *Golden Crest*, 348 N.L.R.B. No. 39 (Sept. 29, 2006), determined that Golden Crest's charge nurses, who worked at a nursing home, did not "assign" or "responsibly direct" employees. In particular, the employer failed to establish that the charge nurses at issue were held accountable for the work performance of other employees and, thus, the charge nurses did not "responsibly direct" employees. The Board found that charge nurses did not "assign" work to a group of certified nursing assistants (CNAs) where the charge nurses lacked the authority to require the CNAs to work past the end of their shift, to call-in CNAs when short-staffed or to change assignments during the course of the shift. In terms of "responsible direction to CNAs," although the Board found that the charge nurses "direct"

the work of CNAs, the Board determined that the employer did not hold the charge nurses "accountable" for their actions in directing the CNAs. Specifically, the employer failed to provide any evidence that charge nurses experienced any "material consequences" to their terms and conditions of employment – positive or negative – as a result of their performance in directing the CNAs. As such, the employer's charge nurses were not supervisors.

In *Croft Metals Inc.*, 348 N.L.R.B. No. 38 (Sept. 29, 2006), the same Board panel found that lead persons at a manufacturing plant were not supervisors because the employer failed to establish that the lead persons "assigned" work or exercised "independent judgment" when performing their purported supervisory functions. Here, the lead persons worked along side their regular line or crew members and performed the same task or job on the line or in their department every day. The Board did find that the lead persons "responsibly direct" their line or crew members. Lead persons have been disciplined by the employer if their crew failed "to meet production goals or because of other shortcomings of their crews." The record, however, reflected that the lead persons' actions were largely governed by the employer's policies and that the lead persons exercised little or no discretion and that any judgment they exercised were merely routine in nature.

Implications Of The Board's Decisions

Union's Reaction To The Decisions

Based on our experiences, unions will likely take the following actions in response to the Board's decisions:

- Unions will seek to mitigate the potential impact of the decisions by attempting to negotiate collective bargaining agreement which will prevent the

employers from assigning duties that indicate supervisory status.

- Unions will seek to have issues regarding supervisory status resolved by arbitration rather than Board proceedings and to broaden contractual arbitration provisions accordingly.
- Unions, if they fail, to have the decisions reversed judicially will seek legislative relief.
- Unions will have an additional reason to attempt to make greater use of voluntary recognition agreements, *i.e.* to avoid NLRB review of supervisory status issues.

Next Steps For Employers

The Board's decision provides additional guidance to employers to determine whether employees, *e.g.*, charge nurses or lead persons, qualify as statutory supervisors under the Act. Employers can draw a number of conclusions from these three decisions:

- The Board majority in a much clearer fashion has delineated the functions and responsibilities an employer must assign an individual in order for the Board to conclude the individual is a supervisor.
- An employer has better guidance in determining which individuals are statutory supervisors.

The Board's decisions present an opportunity for employers and we would recommend the following next steps in response to the decisions:

- Employers should review current supervisory positions to ensure compliance with the Board's decisions.

- Where appropriate employers may wish to consider filing unit clarification petitions to have current members of the bargaining unit declared supervisors by the Board and, thereby, excluded from the bargaining unit.

If you have any questions regarding the Board's new guidelines and its implications with respect to your employees, please contact the Seyfarth Shaw attorney with whom you work, or any Labor & Employment attorney on our website, www.seyfarth.com

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