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NLRB Clarifies Standards For Determining Supervisory Status

The National Labor Relations Board ("Board") has issued a trilogy of decisions which clarify the definition of "supervisor" under the National Labor Relations Act ("Act"). *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006); *Golden Crest Health Care Center*, 348 NLRB No. 39 (Sept. 29, 2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (September 29, 2006). These decisions offer guidelines as to which employees can be classified as supervisors excludable from union representation. Section 2(11) of the Act was added by Congress in 1947 specifically to exclude supervisors from the Act's definition of "employee." Under the Act a supervisor is defined as:

any individual having the 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 merely routine or clerical nature, but requires the use of independent judgment.

Thus, employees are statutory supervisors if (1) they hold the authority to engage in any one of the 12 supervisory functions (e.g. "assign" and "responsibility to direct"), (2) their exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer.

The Board in *Oakwood Healthcare Inc.*, by a 3-2 majority, clarified the terms "assign", "responsibility to direct," and "independent judgment" as set forth in

the definition of supervisor under Section 2(11) of the Act. The Board construed the term "assign" to refer to a supervisor's control of the place, time, and work of another employee. Providing some insight into its definition, the Board stated that, "the assignment of an employee to a certain department or to a certain shift or to certain significant overall tasks would generally qualify." These supervisory acts were contrasted with the non-supervisory directive to employees as to the order they were to perform discrete tasks (e.g. restocking fruit before vegetables). Thus, under the Board's definition, the term "assign" hinges on the supervisory employee's designation of significant overall duties to other employees and not merely instructions concerning the other employee's performance of a discrete task.

The Board also addressed the term "responsibility to direct." It found that in order to be "responsible," the person directing 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 directions if the tasks performed by the employee are not performed properly." Thus, to meet this definition under the Act, the employer must show that it delegated putative authority to the supervisor to direct the work and to take corrective action if necessary. Additionally, the employer must show that the supervisor faces adverse consequences for not taking the appropriate steps.

Responding to the Supreme Court's criticism of its previously narrow interpretation of "independent judgment" in *NLRB v. Kentucky River Community Care*, 532 US 706 (2001), the Board clarified the term to include professional or technical judgments that involve one of the twelve supervisory functions of Section 2(11) of the Act. Further explaining its interpretation, the Board stated "we find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." Still, the mere

existence of a company policy does not remove independent judgment if the policies allow for discretionary choices.

Applying the newly minted definitions, the Board decided that charge nurses in *Oakwood Healthcare Inc.* who spent at least 10%-15% of their time independently assigning staff to patients on a unit based on their judgment as to such things as patients' conditions, were supervisors and exempt from union representation. The Board found that the charge nurses did not perform the supervisory function of "responsibility to direct" because there was no evidence presented concerning their accountability for the poor performance of the staff members to whom they gave the specific duties. The Board, however, did find evidence that permanent charge nurses on patient care units did "assign" nursing staff to specific patients for the duration of their shift. The Board, however, ruled the emergency room charge nurses were not "supervisors" because they merely assigned employees to geographic areas and did "not take into account employee skill or the nature or severity of the patient's condition when making the assignment." After finding the 12 charge nurses at Oakwood held the authority to engage in a supervisory function (*i.e.*, assign), the Board turned its analysis to whether the charge nurses exercised independent judgment in making their assignments. The Board found that charge nurses did "assess the quantity of work to be assigned, the relative difficulty of the work involved, and the competence of the staff available to do the work when making patient assignments to other employees." Therefore, the Board held the charge nurses did exhibit "independent judgment" under its newly established guidelines.

In the two other cases decided by a unanimous three member panel, the Board found that nurses at a nursing home and lead persons at a manufacturer were not supervisors because the nurses did not have the authority to "assign" other workers, and the lead persons followed company policies in a routine manner when they "responsibly directed" other workers. In *Golden Crest Healthcare Center*, the Board found that although charge nurses had the authority to direct certified nursing assistants, they were not held accountable for the CNAs actions. Even though the charge nurses filled out job evaluation forms rating the CNAs, there was still no "prospect of adverse

consequences" for the CNAs poor performance. As the charge nurses were not held accountable for the job performance of the nurses they directed they were held not to be supervisors. The Board also ruled that the charge nurses did not have the actual authority to assign employees, finding that the assistant director did the actual assignments. Accordingly, since the charge nurses could only assign employees to stay beyond their shift only if an admitted superior authorized it, the Board ruled the charge nurses were not to be supervisors under the Act.

In *Croft Metals* the Board found that lead persons did not use enough independent judgment to qualify them as supervisors. In this case the Board determined that even though the lead persons were held accountable for the shortcomings of their crew and had the "responsibility to direct," they were not supervisors because any direction exhibited did not rise above the "merely routine or clerical." Although they did perform one of the twelve indicia of supervisory authority, the lead persons could not satisfy the second prong of the definition because they did not exercise any independent judgment. Accordingly, the Board found the lead persons were employees and subject to the protections of the Act.

The Board's clarification of the statutory definition of "supervisor" under the Act provides guidance for employers in determining who is a supervisor. Employers can now more readily determine who are supervisors, and use the guidelines to create supervisory positions that can be excluded from union representation. Whether employers can now exclude employees from established bargaining units who fall within the newly clarified definition of a supervisor under the Act, must be decided upon the facts, on a case by case basis. Generally, the Board will not process a unit clarification petition during the term of an existing collective bargaining agreement. However, depending upon bargaining history and the language of the exclusion clause in the collective bargaining agreement, there may be limited opportunities to seek unit clarifications prior to the termination date of the collective bargaining agreement. Employers must proceed cautiously in this area and need to be guided by labor counsel.

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