

# LEGAL SERVICES BULLETIN



Henry E. Farber, Carol J. Bernick and Robin Kobayashi  
Labor and Employment Lawyers with Davis Wright Tremaine LLP

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## NLRB Clarifies Definition of Supervisor in *Kentucky River* Cases

### Introduction

On Oct. 3, 2006, the National Labor Relations Board (NLRB) released long-awaited decisions that clarified the definition of “supervisor” under the National Labor Relations Act (NLRA or “the Act”) for charge nurses.<sup>1</sup>

### Recommendations

In light of the decisions discussed in detail below, we are recommending that employers who have lead positions or charge nurses should review both the job descriptions and actual duties of such employees. If the employer believes that the employees should be supervisors, the employer should:

- Review the duties and authority of charge/lead nurses (or other putative supervisors) to determine whether these positions currently qualify as supervisory positions.
  - Determine if the charge/lead nurse or (other putative supervisor) has the ability to require that certain tasks be accomplished.
  - Carefully evaluate whether the charge/lead nurse (or other putative supervisor) may wield authority to take corrective action, and understands that s/he could suffer adverse consequences if assignments are not conducted properly.
  - Analyze whether the charge/lead nurses (or other putative supervisors) must exercise discretion based on ability, training, or experience, and may not simply execute policies mandated by policy, higher authority, or procedure.
- Specifically reference supervisory responsibilities and authority in job descriptions of permanent charge/lead nurses (or any other putative supervisors).
- Keep a record of management decisions made by each charge/lead nurse (or any other putative supervisor).

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<sup>1</sup> *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006)

- Keep a record of any adverse consequences taken against a charge/lead nurse (or any other putative supervisor) for failure to take appropriate management action.
- Provide permanent charge/lead nurses (or any other putative supervisors) with supervisory authority, increased compensation, and skills associated with management-level employees, such as including charge/lead nurses (or any other putative supervisors) in management training or trainings. Remember, if they are supervisors, the employer is responsible for their actions.
- If your charge/lead nurses (or any other putative supervisors) are currently represented, we recommend that you consider whether you should seek to remove them from the unit when your collective bargaining agreement expires.

It will be important to take these steps prior to any union organizing activity or contract negotiations.

### **The NLRA – Section 2(11)**

Section 2(11) of the Act defines supervisor as:

[A]ny individuals 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 a merely routine or clerical nature, but requires the use of independent judgment.

In interpreting Section 2(11), the Board has long held that an employee is a supervisor if he or she holds the authority to do any one of the listed functions, provided the exercise of that authority (a) requires the use of independent judgment; and (b) is exercised in the interest of the employer.

In *NLRB v. Healthcare & Retirement Corp. of America*, 511 U.S. 571-579 (1994), the U.S. Supreme Court held, contrary to the NLRB, that when charge nurses assign other nurses to patients, that authority was being exercised in the interest of the employer (rather than solely in the interest of the patient). In 2001, the Supreme Court considered a second part of the test—whether the charge nurses were exercising independent judgment. *NLRB v. Kentucky River Comm. Care*, 532 U.S. 706 (2001). Again, the Supreme Court reversed the NLRB, and held that registered nurses exercise independent judgment when they use discretion based on professional experience or technical skill in directing less-skilled workers. For this reason, the Board sought to revisit its definition of supervisors by specifically examining the terms “independent judgment,” “assign,” and “responsibly to direct” as set forth in Section 2(11).

### **The Decision**

The Board interpreted the term “assign” as directing others in significant and general matters, “The assignment of an employee to a certain department (e.g. housewares) or to a certain shift (e.g. night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within our construction.” However, the Board rejected, as supervisory

authority to “assign,” the power to determine which order to perform discrete tasks within those significant overall tasks.

The term “responsibly direct” was defined as taking accountability for “the performance and work product of the employees” that the putative supervisor directs. The Board described “accountability” as the ability to take necessary corrective action to ensure that an assignment is performed correctly and completely, and the “prospect of adverse consequences for the putative supervisor is he/she does not take these steps.”

Finally, the Board interpreted “independent judgment” as more than making decisions as dictated by rule, policy, or instructions of a higher authority, but “must involve a degree of discretion that rises above the ‘routine or clerical.’” A putative supervisor exercises independence when decisions may be made without control from the employer, and judgment when discretion is based on “experience, training, or ability.”

The Board also addressed the issue of persons who act as supervisors on a part-time basis. On this point, the Board held that individuals who relieve supervisors on a sporadic, random, or rotational basis would not qualify as statutory supervisors:

“Where an individual is engaged a part of the time as a supervisor and the rest of the time as a unit employee, the legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions. Under the Board’s standard, ‘regular’ means according to a pattern or schedule, as opposed to sporadic substitution. The Board has not adopted a strict numerical definition of substantiality and has found supervisory status where the individuals have served in a supervisory role for at least 10-15 percent of their total work time. We find no reason to depart from this established precedent.”

Applying these concepts to the facts presented in *Oakwood Healthcare, Inc.*, the Board found that all of the permanent charge nurses qualified as supervisors, except those who worked in the emergency room and who served as rotating charge nurses. The Board found that the duties of the emergency room charge nurses lacked the requisite use of independent judgment. Whereas the primary function of the other permanent charge nurses involved making patient care assignments, the emergency room charge nurses mainly performed triage and other task-driven duties. The Board further found that Oakwood Healthcare failed to meet its burden in proving that rotating charge nurses performed supervisor duties with sufficient regularity. No evidence was presented to demonstrate that rotating charge nurses had a set schedule or could otherwise anticipate when and how often they would serve in a supervisory capacity. For this reason, the Board passed on the determining the second part of the test – whether rotating charge nurses performed supervisory duties for a “substantial” part of their time.

In *Golden Crest Healthcare Ctr.* and *Croft Metals, Inc.*, the Board held that both employers failed to meet its burden that the disputed employees qualified as supervisors. In *Golden Crest Healthcare Ctr.*, the Board found that the charge nurses lacked the requisite ability to assign tasks because they could not “require” that certain actions be taken. Additionally, although the charge nurses directed employees, the putative supervisors were not accountable for directing others.

In *Croft Metals, Inc.*, the Board found the employer failed to prove that leads at a manufacturing facility qualified as supervisors under Section 2(11) of the Act. The leads possessed the authority to responsibly direct crew members because they were held accountable for managing their crews, and were responsible for poor performance and deciding how work would be performed to meet production goals. However, the leads lacked any authority to assign tasks because they did not prepare schedules, appoint employees to production lines or locales, authorize overtime, or assign any overall significant duties. Finally, Croft Metals failed to provide any evidence that the leads demonstrated any degree of independent judgment that amounted to more than clerical or routine activities.