



May 21, 2007

The Honorable John P. Kline
Ranking Member
Subcommittee on Health, Education, Labor and Pensions
Committee on Education and Labor
2181 Rayburn House Office Building
Washington, DC 20515

Dear Representative Kline:

The American Hospital Association (AHA), on behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our 37,000 individual members, and the American Organization of Nurse Executives (AONE), representing professional nurses in executive practice, would like to take this opportunity to clarify any concerns that National Labor Relations Board (NLRB) decisions have not provided sufficient clarity for hospitals to determine when charge nurses function as supervisors. We believe that existing NLRB guidance provides clear, practical assistance to hospitals for determining whether the role and function of their charge nurses meet the criteria for supervisory status. Legislation to clarify the essential characteristics of supervisory status is unnecessary, and we therefore oppose H.R. 1644, which would amend the National Labor Relations Act (NLRA) to reverse the existing NLRB guidance in this area.

Charge nurses assess the acuity of a patient's illness, as well as which staff have the skill sets to best care for the patient. When serving in that role, the charge nurse acts on behalf of the hospital, providing a management/leadership voice to patients, families and other employees. Existing NLRB guidance correctly recognizes that charge nurses exercise significant independence and discretion in making critical judgments about patient care. The NLRB has clearly established that hospital charge nurses who regularly assign nursing personnel to specific patients and make the assignments based upon "the skill, experience, and temperament of other nursing personnel, and on the acuity of the patients" meet the test for supervisor.

NLRB guidance defines each of the terms characterizing such supervisory status - "assign," "responsibly directs" and "independent judgment" - and then applies them in the health care context using fact patterns as illustrations.

- To “assign” refers to the act of designating an employee to a place (such as location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties (tasks) to an employee.
- “Responsible to direct” means that the employee overseeing another employee is accountable for the other employee’s performance of the task.
- “Independent judgment” involves the exercise of significant discretion in making decisions that are not routine or clerical in nature.

In the health care setting, the NLRB specifically interpreted the term “assign” to encompass the charge nurse’s responsibility to assign nurses and aides to particular patients. NLRB guidance distinguishes between a charge nurse’s designation of significant overall duties to an employee (e.g., designating a licensed practical nurse (LPN) to regularly administer medication to a patient or group of patients) and an ad hoc instruction that the employee perform a discrete task (e.g., ordering an LPN to immediately give a sedative to a particular patient). Permanent charge nurses in a hospital who assign nursing personnel to the specific patients for whom they would provide care during their shift, and who make the assignments based upon “the skill, experience, and temperament of other nursing personnel, and on the acuity of the patients,” meet the test for supervisor. In contrast, permanent charge nurses who assign employees to particular locations within the emergency department, rather than to particular patients, are not supervisors.

Under the NLRB’s interpretation of “responsible to direct,” there must be some adverse consequence for the supervising employee if the task performed was not performed properly. This means that the charge nurse must be subject to lower performance evaluations or disciplinary action if the other staff members fail to adequately perform their assigned tasks.

In considering whether charge nurses exercise sufficient discretion to meet the test for “independent judgment,” the NLRB responded specifically to the Supreme Court’s criticism of its previous interpretation of independent judgment. The NLRB’s response focused on the *degree* of discretion exercised by the charge nurse, recognizing that the unique needs of each patient must be taken into account and that matching a nurse with a patient may have significant consequences for the health of the patient. The NLRB distinguished assignment decisions implementing detailed instructions (e.g., a staffing decision based on a fixed nurse-to-patient ratio, or pursuant to a bargaining agreement requiring that seniority be followed) from company policies that allow for discretionary choice (e.g., a policy that details how a charge nurse should respond in an emergency, but the charge nurse determines when an emergency actually exists or may deviate from that policy based on his or her assessment that a significant change is needed).

The NLRB guidance strikes a reasonable balance for hospitals in setting the criteria for when charge nurses function as supervisors. A charge nurse who rotates into the role on a regular basis, for example, may qualify as a supervisor, but will not meet the NLRB criteria for designation as a supervisor in the absence of an established pattern or predictable schedule. Additionally, charge nurses who delegate the performance of certain tasks to other nursing staff may meet the test for “responsible direction,” but only if they have accountability for the way the task is carried out. Criticisms that the NLRB guidance is unclear seemingly are more about

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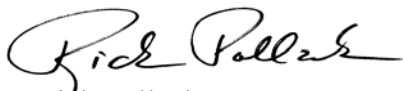
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dissatisfaction with this reasonable balance that the NLRB guidance has struck than any lack of clarity in the NLRB's criteria for determining when charge nurses function as supervisors.

We urge members of the committee to reject H.R. 1644.

Sincerely,



Rick Pollack
Executive Vice President
AHA



Pamela A. Thompson, MS, RN, FAAN
Chief Executive Officer
AONE