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**NLRB ISSUES LEAD CASE ADDRESSING SUPERVISORY STATUS
IN RESPONSE TO SUPREME COURT'S DECISION IN *KENTUCKY RIVER***

The National Labor Relations Board has set forth guidelines for determining whether an individual is a supervisor under the National Labor Relations Act. In a major decision made public today, with a 3-2 vote, the Board held that the permanent charge nurses employed by the Employer, Oakwood Heritage Hospital, an acute care hospital, exercised supervisory authority in assigning employees within the meaning of Section 2(11) of the Act. *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006).

The Board found that the charge nurses, as a regular part of their duties, assigned nursing personnel to the specific patients for whom they would care during their shift. The Board found that such assignments, which consisted of giving "significant overall duties" to an employee, met the statutory definition of "assign" under the Act. The Board further found that the Employer met its burden to show that its charge nurses exercised independent judgment in making such assignments. Finally, the Board found that the Employer failed to establish that the rotating charge nurses exercised supervisory authority for a "substantial" part of their work time. As a result, the Board found that only the Employer's permanent charge nurses were supervisors, rather than employees, under the Act. The majority opinion is signed by Chairman Robert J. Battista and Members Peter C. Schaumber and Peter N. Kirsanow. Members Wilma B. Liebman and Dennis P. Walsh dissented. The decision is posted on the Board's website at www.nlr.gov.

In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court criticized the Board's extant interpretation of the Section 2(11) term "independent judgment." As a result, the Board endeavored in today's *Oakwood Healthcare* decision to reexamine and clarify its interpretations of the term "independent judgment" as well as the terms "assign" and "responsibly to direct," as those terms are set forth in Section 2(11). The Board proffered the following definitions.

The Board defined "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." Further, to "assign" for purposes of the Act, "refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task."

The Board then defined the statutory term “responsibly to 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.” The Board held that the element of “responsible” direction involved a finding of accountability, so that it must be shown that the “employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary” and that “there is a prospect of adverse consequences for the putative supervisor” arising from his/her direction of other employees.

Finally, consistent with the Supreme Court’s decision in *Kentucky River*, the Board adopted an interpretation of the term “independent judgment” that applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. The Board defined the statutory term “independent judgment” in relation to two concepts. First, to be independent, the judgment exercised must not be effectively controlled by another authority. Thus, where a judgment is dictated or controlled by detailed instructions or regulations, the judgment would not be found to be sufficiently “independent” under the Act. The Board further found that the degree of discretion exercised must rise above the “routine or clerical” in order to constitute “independent judgment” under the Act.

In dissent, Members Liebman and Walsh disagreed with the majority’s definitions of the statutory terms “assign” and “responsibly to direct,” and further disagreed with the majority’s finding that the employer’s charge nurses exercise supervisory authority in “assigning” other employees.

The dissent contends that the majority erred in defining the term “assign” to include the act of assigning overall tasks to employees. In the dissent’s view, the assigning of tasks to employees is a “quintessential function of the minor supervisors whom Congress clearly did not intend to cover in Section 2(11).” Accordingly, the dissent would define “assign” under the Act as the act of determining “an employee’s position with the employer,” an employee’s “designated work site,” or an employee’s “work hours.”

The dissent also disagrees with the majority’s definition of “responsibly to direct,” contending that the drafters of Section 2(11) only intended the phrase to include “persons who were effectively in charge of a department-level work unit, even if they did not engage in the other supervisory functions identified in Section 2(11).” As a result, the dissent would require the following showing to establish that a putative supervisor has the authority to “responsibly direct”: The individual has been delegated substantial authority to ensure that a work unit achieves management’s objectives and is thus “in charge”; the individual is held accountable for the work of others; and the individual exercises significant discretion and judgment in directing his or her work unit.

The Board also released today its 3-0 decision in *Golden Crest Healthcare Center*, 348 NLRB No. 39 (Sept. 29, 2006), signed by Chairman Battista and Members Schaumber and Kirsanow. Applying the definitions for “assign” and “responsibly direct” set forth in *Oakwood Healthcare*, the Board found that the Golden Crest’s charge nurses at a nursing home did not exercise supervisory authority under the Act.

First, the Board found that the charge nurses at issue lacked the authority to “assign” other employees under the Act, emphasizing that Golden Crest failed to establish that the charge nurses possessed the authority to require other employees to stay past the end of their shifts, to come in from off-duty status, or to shift section assignments.

The Board further found that the charge nurses at issue lacked the authority to “responsibly direct” other employees under the Act, insofar as Golden Crest failed to establish that the charge nurses were actually held accountable for the job performance of other employees. The Board found that the “accountability” requirement set forth in *Oakwood Healthcare* was not satisfied by Golden Crest’s evidence that it had a practice of rating charge nurses in their annual evaluations on their performance in directing other employees. The Board found that this evidence constituted merely “paper” accountability and was insufficient to establish that there was an actual prospect that the charge nurses’ terms and conditions of employment could be affected, either positively or negatively, as a result of their performance in directing other employees. Accordingly, having found that the charge nurses at issue neither “assigned” nor “responsibly directed” other employees within the meaning of Section 2(11) of the Act, the Board found that the Golden Crest charge nurses were statutory employees, not supervisors.

The Board issued another decision using the *Oakwood Healthcare* test for supervisory status, in *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006), signed by Chairman Battista and Members Schaumber and Kirsanow. In *Croft*, the Board applied the definitions for “assign” and “responsibly to direct” set forth in the *Oakwood Healthcare* decision to find that the lead persons at the manufacturing facility at issue did not exercise supervisory authority under the Act.

After finding that the lead persons did not possess the authority to “assign” under the Act, the Board then found that the lead persons responsibly directed their line or crew members. The Board found that the lead persons were required to manage their assigned teams, to correct improper performance, to shift employees, and to decide the order in which work was to be performed in order to achieve production goals. The Board further found that the lead persons were held accountable for the performance of their crew or line members.

The Board then found that the Croft failed to meet its burden to establish that the lead persons exercised independent judgment in directing their crew or line members. The Board found that the lead persons’ exercise of judgment was either fundamentally controlled by pre-established guidelines, such as delivery schedules, or was simply routine. Accordingly, the Board found that the lead persons did not exercise supervisory authority under the Act.