Beverly Enterprises-Minnesota, Inc., d/b/a Golden Crest Healthcare Center *and* United Steelworkers of America, AFL–CIO, CLC. Petitioner
Cases 18–RC–16415 and 18–RC–16416.

September 29, 2006

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

Introduction

In *NLRB v. Kentucky River Community Care*,[1] the Supreme Court rejected the Board's interpretation of "independent judgment" as that term is used in Section 2(11) of the Act. On July 25, 2003, the Board issued a notice and invitation to the Employer, the Petitioner, and interested amici curiae to file briefs in light of the Court's decision in *Kentucky River*. The Board extended an identical invitation for the filing of briefs in two other cases: *Oakwood Healthcare, Inc.*, 7–RC–22141, and *Croft Metals, Inc.*, 15–RC–8393. The Board sought, inter alia, comments relating to the meaning of the Section 2(11) terms "assign," "responsibly to direct," and "independent judgment." In response, the parties and a number of amici curiae filed briefs.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In our recent decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (September 29, 2006), we set forth our definitions of "assign," "responsibly to direct," and "independent judgment." Applying those terms, thus interpreted, to the permanent charge nurses employed at Oakwood Heritage Hospital, we found that those individuals are statutory supervisors based on their authority to exercise independent judgment in assigning nursing personnel to patients. *Oakwood Healthcare*, supra.

In the instant case, we are again presented with the question of whether an employer's charge nurses exercise supervisory authority under Section 2(11) of the Act by virtue of possessing authority to exercise independent judgment in assigning and/or responsibly directing employees. Having considered the record and briefs of the parties and amici, and applying the standards set forth in *Oakwood Healthcare*, we find that the Employer has failed to meet its burden to show that its charge nurses are statutory supervisors. Accordingly, for the reasons set forth below, we find that the Employer's charge nurses are employees, not supervisors, under Section 2(11) of the Act.

Procedural History

On January 27, 1999, the United Steelworkers of America, AFL–CIO, CLC (Union or Petitioner) filed two representation petitions seeking to represent, in separate units, the registered nurses (RNs) and licensed practical nurses (LPNs) employed by Beverly Enterprises—Minnesota, Inc., d/b/a Golden Crest Healthcare Center (Employer). The Employer opposed the petition on the ground, inter alia, that its RNs and LPNs acting as charge nurses are supervisors under Section 2(11) of the Act. On March 9, 1999, the Regional Director issued a Decision and Direction of Election, finding that the Employer's RNs and LPNs acting as charge nurses were employees, not supervisors, under the Act. The Board denied the Employer's Request for Review on April 6, 1999. On April 8, 1999, an election was held in which the Union obtained a majority of votes to represent the Employer's RNs and LPNs. The Regional Director issued a certification of representative on April 14, 1999.

Seeking to test the certification, the Employer refused to bargain with the Union. The Union filed an 8(a)(5) refusal-to-bargain charge, and the General Counsel issued a complaint. The Respondent filed an answer, in which it admitted its refusal to bargain but disputed the validity of the Union's certification. The General Counsel filed a motion for summary judgment, which was granted by the Board on September 17, 1999.[3]

Thereafter, the Employer filed a petition for review of the Board's Order in the United States Court of Appeals for the Sixth Circuit, and the General Counsel cross-petitioned for enforcement of the Board's Order. The Union intervened. Upon the Union's motion, the Sixth Circuit issued an order transferring the case to the United States Court of Appeals for the Eighth Circuit.

[1] 532 U.S. 706 (2001).

[2] American Federation of Labor and Congress of Industrial Organizations; American Commercial Barge Line; American Hospital Association; American Nurses Association; American River Transportation Co.; Associated Builders and Contractors; Building and Construction Trades Department, AFL-CIO; Covenant Healthcare System; Croft Metals; the General Counsel of the National Labor Relations Board; Golden Crest; Human Resources Policy Association; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO; International Brotherhood of Electrical Workers, Local 4, AFL-CIO; Mariner Health Care Management Co. et al.; Massachusetts Nurses Association; Physicians for Responsible Negotiation; Salt Lake Regional Medical Center, Inc.; Shorefront Jewish Geriatric Center and Metropolitan Jewish Geriatric Center (a division of MJG Nursing Homes, Inc.); United Steelworkers of America, AFL-CIO et al.; and The Chamber of Commerce of the United States.

[3] 329 NLRB No. 22 (1999) (unpublished).

On May 29, 2001, while the 8(a)(5) test-of-certification case was pending in the Eighth Circuit, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, supra. On October 2, 2001, the Eighth Circuit issued an order granting the Employer's petition for review and denying the Board's cross-petition for enforcement. *Beverly Enterprises—Minnesota, Inc. v. NLRB*, 266 F.3d 785 (8th Cir. 2001). The Eighth Circuit held that, in light of *Kentucky River*, the Board had applied an improper legal standard in finding the Employer's RNs and LPNs to be employees rather than statutory supervisors. Id. at 787. The Eighth Circuit remanded the case to the Board for reconsideration in light of *Kentucky River*. Id.

On remand from the Eighth Circuit, the Board vacated its Decision and Order in the unfair labor practice case and remanded the two underlying representation cases to the Regional Director for further consideration of whether, in light of *Kentucky River*, the Employer's RNs and LPNs "'assign' and 'responsibly direct' other employees," and for further consideration of "the scope or degree of 'independent judgment' used in the exercise of that authority." Both parties agreed to resubmit the representation cases to the Region upon the existing record. On August 20, 2002, the Regional Director issued a Supplemental Decision, finding that the Supreme Court's holding in *Kentucky River* did not necessitate a reversal of his original finding that the Employer's RNs and LPNs are not statutory supervisors. On September 11, 2002, the Employer filed a Second Request for Review, which the Board granted on October 18, 2002.[4] As stated above, on July 25, 2003, the Board invited additional briefing from the parties and amici curiae.

Background Facts

The Employer operates an 80-bed nursing home, comprised of two floors, in Hibbing, Minnesota. Each floor is divided into a number of sections, and each section consists of a specific set of rooms. In general, those residents of the nursing home requiring a higher degree of care are housed on the second floor of the facility.

The nursing home's nursing department is headed by five stipulated supervisors: the director of nursing (DON), the assistant director of nursing (ADON), and three RNs who serve as resident care managers. At least one of the five admitted supervisors is present at the facility from 6 a.m. to 6 p.m. on weekdays as well as on alternate weekends. At those times when an admitted supervisor is not at the facility, the DON and the ADON are reachable by telephone.

The Employer employs 8 additional RNs, who work as charge nurses; 12 LPNs, 11 of whom work at least occasionally as charge nurses;[5] and 36 certified nursing assistants (CNAs). The record supports a finding that the non-resident care manager RNs, all of whom work part-time schedules, work solely as charge nurses. The record does not establish how frequently the 11 putative LPN supervisors work as charge nurses.

The schedules for RNs, LPNs, and CNAs are set by an administrative assistant, with the final approval of ADON Jacie Marchetti, who is responsible for the overall day-to-day operations of the facility. The floor and section assignments for each CNA are also set by ADON Marchetti, pursuant to a procedure set forth in the collective-bargaining contract for the CNAs, which permits them to bid for their shift, floor, and section based on their seniority.

Discussion

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 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.

This provision is to be read in the disjunctive; thus, any of these enumerated powers is sufficient to confer supervisory status, so long as the authority is held "in the interest of the employer" and exercised with the use of "independent judgment." *Kentucky River*, supra, 532 U.S. at 713. The burden of proving supervisory status rests on the party asserting that such status exists. *Oakwood Healthcare*, supra, slip op. at 9 (citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)).

The Employer contends that its RNs and LPNs, when serving as charge nurses, exercise supervisory authority under Section 2(11) of the Act in both "assigning" CNAs and in "responsibly directing" them. We will address these contentions in turn.

Assignment of CNAs

In *Oakwood Healthcare*, the Board interpreted the Section 2(11) term "assign" to mean 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." Id. at 4. To "as-

[4] Member Liebman dissented from the Board's grant of review.

[5] The Employer does not challenge the statutory employee status of the one LPN who does not serve as a charge nurse at the nursing home.

sign" for purposes of Section 2(11) "refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task." Id. at slip op. 4. The first question presented is whether the Employer has met its burden to establish that its charge nurses have the authority to "assign" employees under the foregoing definition. As explained below, we find that the Employer has not met this burden.

The Employer argues that its charge nurses "assign" employees in several ways, including the following: ordering CNAs to go home early; assigning first-floor CNAs to work on the second floor if that floor is understaffed; ordering CNAs to stay past the end of their shifts; and mandating that CNAs come in to work from home. The record, however, establishes that the charge nurses do not, in fact, have the authority to require the CNAs to undertake any of these actions.

To begin, the record establishes that ADON Marchetti has specifically instructed charge nurses that they are *not* allowed to send CNAs home early. The record also shows that a charge nurse was reprimanded for sending home early a CNA who appeared to be intoxicated. Thus, it is clear that the charge nurses do not have the authority to send CNAs home early.

Similarly, DON Kepler testified that she had issued a directive *against* second-floor charge nurses calling first-floor CNAs up to work on the second floor. Thus, the charge nurses do not, in fact, possess the authority to reassign CNAs to the second floor.

The record establishes that charge nurses do, on occasion, request that CNAs stay past the end of their shifts[6] or ask CNAs to come in from home.[7] It is well established, however, that the party seeking to establish supervisory authority must show that the putative supervisor has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken. See, e.g., *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 459 (2001) (LPNs found not to exercise supervisory authority where they had no authority to require off-duty employees to fill a particular shift); accord *Lynwood Health Care Center, Minnesota v. NLRB*, 148 F.3d 1042, 1047 (8th Cir. 1998) (supervisory status not established where individual merely seeks "off-duty volunteers to help out when the facility is short handed").

Here, the Employer has not met its burden to establish that the charge nurses have the authority to require CNAs to stay past the end of their shifts or come in from home. As to the former, there is no evidence that charge nurses possess the authority to require CNAs to stay past the end of their shifts. As to the latter, there is evidence that the charge nurses will, on occasion and as authorized, telephone a CNA at home and "mandate" that employee to come in to work.[8] The power to authorize a "mandate" is held, however, only by the Employer's admitted supervisors. Moreover, the de minimis consequence of refusing such a mandate persuades us that a "mandate" is such in name only and thus does not reflect a genuine requirement that the mandated CNA report for work.

The "mandating" process works as follows. When the facility is understaffed, and when no admitted supervisors are on site, the first-floor charge nurse will call CNAs at home to request that they come in. Such calls are placed in reverse order of seniority, as dictated by the CNAs' collective-bargaining agreement. Should the first-floor charge nurse exhaust the call list without finding volunteers, the first-floor charge nurse would then call one of the admitted supervisors at home. At that point, the admitted supervisor might authorize the charge nurse to "mandate" that employees come in. In fact, the charge nurses only make the "mandating" phone calls when authorized to do so by an admitted supervisor. Thus, in placing such calls, the charge nurses exercise a merely ministerial function; they do not exercise independent judgment in determining that such "mandating" calls are appropriate. Moreover, it is widely recognized—both by staff and by management—that the consequences of noncompliance with a "mandate" are de minimis. Pursuant to the CNAs' collective-bargaining agreement, CNAs refusing a "mandate" to report from off-duty are penalized one-third of an "absenteeism point." The record does not show whether this penalty has ever been imposed and what effect, if any, it has on the CNAs' terms and conditions of employment. Thus, we find that the "mandating" process is actually a mandate in name only and does not reflect a genuine requirement that CNAs come in to work from off-duty status.

The Employer also contends that the charge nurses exercise supervisory authority by altering CNAs' section assignments to compensate for absent employees or to balance workloads. The record establishes, however, that, in such circumstances, the decision of how to redistribute the workloads is often made by the CNAs them-

[6] The record does not establish how frequently the charge nurses made such requests.

[7] The record establishes that the responsibility for placing telephone calls to off-duty CNAs fell entirely to the first-floor charge nurses; the second-floor charge nurses were not expected to make such calls.

[8] Again, the record does not establish how frequently the charge nurses are given permission to place such "mandate" telephone calls.

selves, not by the charge nurses. Furthermore, even assuming, as the Employer contends, that charge nurses play some role in altering CNAs' section assignments, the record does not establish that the charge nurses have any authority to *require* CNAs to change their work assignments; there is no evidence that any adverse consequences would befall a CNA if she chose not to alter her work assignment at the suggestion of a charge nurse. Thus, because the Employer has not established that the charge nurses possess the authority to require that CNAs shift their assignments, we find that the Employer has not established that the charge nurses exercise supervisory authority in this regard.[9]

For the foregoing reasons, we find that the Employer has failed to establish that the charge nurses exercise supervisory authority in assigning CNAs.[10]

[9] Even if the charge nurses possess the authority to shift CNAs' section assignments, there is no evidence that the charge nurses exercise independent judgment in that regard. The record establishes that such reassignments are made to balance only the quantity of work, without regard to individualized assessments of CNAs' skills in relation to residents' needs, or other factors. Assignments made solely to equalize the quantity of workloads are routine and do not require independent judgment. *Oakwood Healthcare*, supra, slip op. at 8-9, 12.

The Employer asserts that, in addition to balancing workloads, the charge nurses possess the authority to make reassignments based on individual CNAs' skills and experience. The testimony of DON Kepler, however, establishes that any such reassignments would be highly unusual events. Further, there is no evidence that the charge nurses were informed that they possessed such authority. The Board has declined to find individuals to be supervisors based on alleged authority that they were never notified they possessed, where its exercise is sporadic and infrequent. See, e.g., *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Greenspan, D.D.S., P.C.*, 318 NLRB 70, 76 (1995), enfd. mem. 101 F.3d 107 (2d Cir. 1996).

[10] The Employer raises two additional arguments in support of its position that the charge nurses "assign" employees under the Act, neither of which has merit. First, the Employer asserts that the charge nurses exercise supervisory authority by "okaying" or "initialing" changes to the CNAs' computerized time clock entries. The Board has consistently held, however, that the authority to verify employees' time cards is routine and clerical and does not indicate supervisory authority. See, e.g., *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1234 (2003). The Employer also asserts that the charge nurses should be found to possess supervisory authority because they are "in charge" of the facility during the night shifts and every other weekend. The status of being the highest ranking employee on site falls within the category of secondary indicia of supervisory authority. See, e.g., *St. Francis Medical Center-West*, 323 NLRB 1046, 1047 (1997). It is well established that where, as here, putative supervisors are not shown to possess any of the primary indicia of supervisory status enumerated in Sec. 2(11), secondary indicia are insufficient to establish supervisory status. See, e.g., *Ken-Crest Servs.*, 335 NLRB 777, 779 (2001). Moreover, this factor is even less probative where management is available after hours. See *St. Francis Medical Center-West*, supra. That is the case here: DON Kepler testified that if nurses have questions about resident care after hours, they contact herself or ADON Marchetti; and RNs Jaglowski and Jensen testified that they were instructed to call the DON or the ADON when problems arise after hours.

Responsible Direction of CNAs

In *Oakwood Healthcare*, the Board interpreted the Section 2(11) phrase "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' (as explained below) and carried out with independent judgment." *Oakwood Healthcare*, supra, slip op. at 6 (internal quotations omitted). The Board, in agreement with several U.S. courts of appeals, held that, for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. Id. at 6-7. The Board defined the element of "accountability" as follows:

> [T]o establish accountability for purposes of responsible direction, 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. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id. at 7.

We will first address the question whether the Employer established that its charge nurses *direct* other employees within the meaning of Section 2(11). Should that question be answered in the affirmative, we will then inquire whether the Employer established that the charge nurses are *accountable* for their direction of other employees.[11]

We find that the Employer established that its charge nurses have the authority to direct the CNAs. The record shows that charge nurses oversee the CNAs' job performance and act to correct the CNAs when they are not providing adequate care. For instance, a charge nurse will correct a CNA if she perceives that the CNA is not using proper procedures in giving a resident a bath. The record also establishes that charge nurses will direct the CNAs to perform certain tasks when the charge nurse determines that such tasks are necessary. For instance, the charge nurses will direct CNAs to clip residents' toenails and fingernails, to empty catheters, or to change an incontinent resident. We find that this evidence is sufficient to establish that the charge nurses "direct" the CNAs within the meaning of the definition set forth in *Oakwood Healthcare*.

[11] Of course, when there is no showing of "direction," the Board need not reach the issue of "accountability," just as when there is no showing of "accountability," the Board need not reach the issue of "direction." Here, however, we will apply both elements to more fully illustrate the Board's interpretation of each.

The next question, then, is whether the Employer has established that the charge nurses are accountable for their actions in directing the CNAs. We find that the Employer has not met this burden. The Employer has not presented any evidence that any charge nurse has experienced any material consequences to her terms and conditions of employment, either positive or negative, as a result of her performance in directing CNAs. Nor has the Employer presented any evidence that a charge nurse was ever informed that any such material consequences might result from her performance in directing CNAs. Thus, the Employer has not established "a prospect of adverse consequences." *Oakwood Healthcare*, supra, slip op. at 7.

The Employer's evidence that its charge nurses are accountable for their performance in directing CNAs consists of evaluation forms used by the Employer to assess the performance of its charge nurses. On these forms, which are contained in the record, the charge nurses were rated for their performance on the factor, "Directs CNAs to ensure quality of care." The forms contained in the record establish that various charge nurses did receive different ratings on this factor. Some were rated "Exceeds Expectations," and others "Meets Expectations." No charge nurse received a rating of "Needs Improvement."

There is no evidence, however, that any action, either positive or negative, has been or might be taken as a result of the charge nurses' evaluation on this factor. The Employer does not award merit increases or any other type of bonus. In fact, DON Kepler testified that the only effect of a positive evaluation is that the employee gets to keep working at the facility.[12] Further, the Employer did not introduce any evidence that any adverse action might be taken against a charge nurse as a result of a "Needs Improvement" evaluation on the "Directs CNAs" performance factor (or any other performance factor, for that matter), nor did the Employer ever inform the charge nurses that any adverse action might result from a negative rating on the "Directs CNAs" performance factor.

The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue. See, e.g., *Volair Contractors*, supra, 341 NLRB at 675; *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991). Consistent with this requirement, in determining whether accountability has been shown, we shall similarly require evidence of actual accountability. This is not to say that there must be evidence that an asserted supervisor's terms and conditions of employment have been actually affected by her performance in directing subordinates. Accountability under *Oakwood Healthcare* requires only a *prospect* of consequences. But there must be a more-than-merely-paper showing that such a prospect exists. That is, where accountability is predicated on employee evaluations, there must be evidence that a putative supervisor's rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person's terms and conditions of employment.[13]

Here, the Employer asks us to find that the charge nurses are held accountable for their performance in directing CNAs simply because the job evaluation forms suggest that such accountability exists. In the absence, however, of any evidence of actual or prospective consequences to charge nurses' terms and conditions of employment resulting from a rating on the "Directs CNAs" performance factor, the Employer has shown only "paper" accountability. See *Training School at Vineland*, 332 NLRB 1412, 1416 (2000) ("Job descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority."). Put another way, the mere fact that charge nurses were rated on this factor does not establish that any adverse consequences could or would befall the charge nurses as a result of the rating. Thus, we find that the "prospect of adverse consequences" for the charge nurses here is merely speculative and insufficient to establish accountability. Accordingly, applying our *Oakwood Healthcare* test for responsible direction, we find that the Employer's charge nurses do

[12] Indeed, at least with respect to CNAs, Kepler's testimony establishes that even those who receive negative evaluations get to keep working at the facility. She testified that CNAs who receive "Needs Improvement" ratings do not lose their jobs; rather, they are counseled on how to improve their job performance.

[13] Such an effect may be positive—such as, for example, a merit increase, bonus, or promotion—or negative—such as, for example, the denial of one or more of the foregoing, or some form of counseling or discipline.

We emphasize that the effect on employment terms may flow from a putative supervisor's performance rating for direction of subordinates in combination with other performance factors. Performance on direction need not by itself result in a changed term or condition of employment. For example, where (unlike here) an employer's performance appraisal system is shown to affect wages, bonuses, promotions, or other terms and conditions of employment, if a putative supervisor would be rated "outstanding" overall if rated "outstanding" on all performance factors *except one*, the fact that a "needs improvement" rating on direction of subordinates would not affect an employee's overall "outstanding" rating would not by itself defeat a showing of accountability.

not possess the authority to responsibly direct the CNAs.[14]

Conclusion

For the reasons set forth above, we find that the Employer's charge nurses do not possess authority to "assign" or "responsibly to direct" employees within the meaning of Section 2(11) and, therefore, are not statutory supervisors.

CERTIFICATION OF REPRESENTATIVE

The certification of representative issued by the Regional Director on April 14, 1999, is hereby reaffirmed.

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Steelworkers of America, AFL–CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its Hibbing, Minnesota facility; excluding guards and supervisors as defined in the Act, and all other employees.

Dated, Washington, D.C. September 29, 2006

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

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Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[14] Accordingly, because we find that the charge nurses do not "responsibly" direct employees, it is unnecessary to address the issue whether they exercise independent judgment in this context.