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OCTOBER 2006

In a highly-publicized decision, the NLRB has refined its supervisory status test by providing new definitions of key terminology. This ASAP provides a summary of the *Kentucky River* cases, as well as suggestions for employers in applying the new standard.

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## Labor Management

A Littler Mendelson Newsletter

### NLRB Clarifies and Expands Key Aspects of Supervisory Status Test

By Kenneth C. Kurtz and Ellen M. Bronchetti

The National Labor Relations Board has issued a much-anticipated group of decisions that help to clarify central aspects of the test for supervisor status under the National Labor Relations Act. While the true scope and practical effect of these decisions will not be known for some time, the Board's new definitions do provide helpful guidance on an historically ambiguous issue and should prompt both unionized and non-unionized employers to examine the issue of supervisory status within their organizations.

The cases, known collectively as the "*Kentucky River cases*," are *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Golden Crest Healthcare*, 348 NLRB No. 39 (2006), and *Croft Metals*, 348 NLRB No. 38 (2006). In *Oakwood Healthcare*, the Board defined three key statutory terms that are used in determining whether particular individuals are deemed "supervisors" and thus excluded from the Act's definition of "employee." In all three cases – two concerning health care employers and one concerning a manufacturing facility – the Board applied the new definitions in analyzing whether the employees could properly be excluded from the bargaining units at issue.

#### Background

An individual is excluded from the NLRA's definition of "employee" if he or she is a "supervisor." A "supervisor" is defined by Section 2(11) of the Act as someone who has the authority, in the interest of the employer, to perform and/or effectively recommend at least one supervisory action that indicates alignment with management interests. The list of supervisory tasks to be considered includes hiring, promoting, discharging, assigning, disciplining and responsibly

directing employees. Additionally, in order to be deemed a supervisor, the individual must exercise "independent judgment" that is "not of a merely routine or clerical nature" when performing one or more of these tasks.

Ambiguous Board interpretations of the Act's definition of a supervisor, coupled with the practical challenge of analyzing and distinguishing between numerous job classifications with arguable "lead" duties, has led to confusion among both employers and unions. Further adding to the uncertainty in this area, the United States Supreme Court in 2001 rejected the NLRB's then-existing interpretation of the term "independent judgment" as excluding nurses' use of "ordinary professional" or "technical" judgment in the direction of less-skilled employees. *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). Instead, the Court held, it is the degree of discretion involved in making the decision, not the *kind* of discretion exercised – professional, technical, or otherwise – that determines the existence of "independent judgment." Primarily in response to the Supreme Court's decision in *Kentucky River*, the 3-2 Board majority in *Oakwood* has now refined the supervisory test.

#### The Board's Refined Analysis

The three terms in Section 2(11)'s definition of supervisor that have been newly defined by the Board are:

- "Assign" means 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."

The Board also stated that the “ad hoc instruction that [an] employee perform a discrete task” does not constitute an assignment under the supervisory test.

- “Responsibly to direct” means having the delegated “authority to direct [other employees’] work [using independent judgment] and the authority to take corrective action, if necessary,” against the directed employees. In addition, the individual must be held accountable for the performance of the task, such that there exists the prospect of “adverse consequences” if he or she fails to direct employees properly.
- “Independent judgment” is defined as non-routine and non-clerical judgment free of control by others and not “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.” This standard is applied regardless of whether or not professional or technical expertise is instrumental in the judgment.

## Application of the New Test

In *Oakwood*, the Board applied this refined analysis, first finding that permanent charge nurses at an acute care hospital did not “responsibly direct” other nurses because they were not held accountable for their delegation of discrete tasks to other nurses. Nonetheless, the Board deemed such charge nurses supervisors because they “assigned” work using “independent judgment,” as set forth in Section 2(11). On a daily basis, such nurses assigned “significant overall duties” to nursing personnel by pairing the personnel with specific patients. The Board concluded that this task involved “independent judgment” primarily because it required the charge nurses, on their own, to assess (1) various patients’ conditions and nursing needs; (2) nurses’ particular skill sets in relation to patients’ conditions and needs; and (3) the quantity of work that should be assigned to each nurse, based on patients’ needs and the nurse’s ability. The Board also found that the employer’s policy outlining some of the criteria charge nurses were to apply in making assignments was “not so detailed as to eliminate a significant discretionary

component involved” in the task.

The Board separately concluded that permanent charge nurses working solely in the emergency department of the hospital did not exercise the necessary independent judgment to be supervisors because they were not required to assess nursing skill or patient acuity when they made nursing assignments. Finally, the Board also excluded rotating charge nurses from supervisory status because the hospital failed to show that such nurses performed the charge nurse role with any regularity or in accordance with a set schedule.

Applying the definitions articulated in the *Oakwood* decision, the Board concluded in *Golden Crest Healthcare* and *Croft Metals* that charge nurses at a nursing home and employees classified as “leads” in a manufacturing plant, respectively, did not qualify as supervisors.

Concluding that the charge nurses in *Golden Crest Healthcare* were not supervisors, the Board reasoned that the nurses did not have the independent authority to make “assignments” to nursing assistants using “independent judgment,” because (1) most assignments were mere requests rather than mandates; and (2) the only mandates communicated by charge nurses to nursing assistants were in fact exercised only upon direction from one of the charge nurses’ supervisors. The charge nurses also were deemed lacking in the authority to “responsibly direct” other employees because the hospital could not establish the “accountability” prong of the new definition.

In *Croft Metals*, the Board found that leadpersons at a window and door manufacturer did not “assign” according to the new definition, because their sporadic rotation of tasks among other employees did not constitute the “designation of significant overall duties” to such employees. Further, while the leads did “responsibly direct” other employees, they did not exercise “independent judgment” in doing so, because their decisions were governed by pre-determined delivery schedules and established procedures that did not allocate any real discretion to the leads.

## Organized Labor’s Response

Even before the decisions in *Oakwood* and its companion cases were issued, organized

labor interests had begun to decry what they anticipated to be pro-employer determinations. Despite the fact that these decisions resulted in only 12 employees – and only 3 out of 4 potential employee classifications – being deemed supervisors, the negative rhetoric has continued unabated. Leaders of unionized nurses throughout the country have vowed to strike rather than capitulate if hospitals seek to enforce these rulings against nurses already included in bargaining units. AFL-CIO President John Sweeney has commented in the press that *Oakwood* “welcomes employers to strip millions of workers of their right to have a union by reclassifying them as ‘supervisors’ in name only.”

## Practical Recommendations

As noted above, the precise impact of these decisions will become more evident as additional cases are decided using the new definitions. One thing is certain: employers now have clear guidelines with which to assess whether or not an employee qualifies as a supervisor by virtue of having the authority to assign or responsibly direct other employees.

Unionized employers should exercise caution and consult legal counsel when applying the new supervisory definitions to individuals in existing bargaining units, as there are significant restrictions on when and how a bargaining unit may be changed, especially when a collective bargaining agreement is in place. Employers also should consider related practical concerns, including the potential for a strike, prior to taking action based on the standards set forth in *Oakwood*.

Non-unionized employers covered by the NLRA who are concerned about whether certain classifications of employees will be considered supervisors under the new standards should closely examine such employees’ job responsibilities, as well as any policies that may affect the analysis. For example, employers should:

- consider whether such employees possess the authority to make the assignments identified by the Board as conferring supervisory status;
- determine whether work rules leave room for the employees’ exercise of independent discretion with regard to the performance of supervisory functions;

- review performance evaluation and discipline policies to determine whether or not the employees are held accountable for direction that they provide other employees; and
- scrutinize the scheduling process for temporary supervisors/leadpersons in light of the Board's direction that employees must "regularly" perform supervisory functions in order to be considered supervisors under the Act.

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