

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-05

April 10, 2007

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Guideline Memorandum Concerning Oakwood
Healthcare, Inc., 348 NLRB No. 37 (2006), and
related cases

I. Introduction

This memorandum is intended to provide casehandling guidance in unfair labor practice proceedings regarding the Board's definitions, in Oakwood Healthcare, Inc. ("Oakwood")¹ and related cases,² of two indicia of supervisory status in Section 2(11) of the Act³ -- to "assign" and "responsibly to direct" employees -- as well as the relationship of these critical terms with the Section 2(11) requirement that they be exercised with "the use of independent judgment." Detailed below are: (1) general guidance regarding the quality of evidence necessary to meet the burden of proof to establish Section 2(11) status; (2) a summary of the definitions discussed in the Oakwood cases and the evidence relevant to each; and (3) issues regarding rotating supervisors that warrant further consideration.

¹ 348 NLRB No. 37 (2006).

² Croft Metals, Inc. ("Croft"), 348 NLRB No. 38 (2006); Golden Crest Healthcare Center ("Golden Crest"), 348 NLRB No. 39 (2006).

³ Section 2(11) provides:

[t]he term 'supervisor' means 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.

II. Burden of Proof

The Board reiterated in the Oakwood cases that the burden of proving supervisory status rests on the party asserting that such status exists, and that the assertion must be established by a preponderance of the evidence.⁴ That evidentiary burden, the Board made clear, is significant and substantial. "Purely conclusory" evidence is not sufficient to establish supervisory status; a party must present evidence that the employee "actually possesses" the Section 2(11) authority at issue.⁵ A "paper showing" alone -- job titles, descriptions, or evaluation forms -- is insufficient.⁶ Similarly, testimony merely asserting as a general matter that individuals exercised particular supervisory duties is insufficient; rather, to meet the burden of proof, testimony must include specific details or circumstances making clear that the claimed supervisory authority exists.⁷ Further, asserted supervisors will not be found to have such authority if they were not told that they possess it and if they exercised it only sporadically.⁸

⁴ Oakwood, 348 NLRB No. 37, slip op. at 9.

⁵ Golden Crest, 348 NLRB No. 39, slip op. at 5. See also Avante at Wilson, Inc., 348 NLRB No. 71, slip op. at 2 (2006) (finding no supervisory status where the testimony was "utterly lacking in specificity" and the employer failed to show that the individuals at issue actually possessed the authority asserted); Chevron Shipping Co., 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority); Sears Roebuck & Co., 304 NLRB 193, 193 (1991) (same).

⁶ Golden Crest, 348 NLRB No. 39, slip op. at 5; Avante at Wilson, 348 NLRB No. 71, slip op. at 2-3.

⁷ See, e.g., Avante at Wilson, 348 NLRB No. 71, slip op. at 2-3 (testimony regarding staff nurses' authority to discipline insufficient where it lacked specifics regarding asserted incidents of exercise of such authority such as time, identity of those involved and details of circumstances; job descriptions and other documents asserting staff nurses had a role in grievance processing insufficient to show supervisory status where staff nurses denied having been notified they had such authority and employer's "generalized" testimony did not establish specifically what staff nurses did).

⁸ Golden Crest, 348 NLRB No. 39, slip op. at 4 fn. 9. See also Avante at Wilson, 348 NLRB No. 71, slip op. at 2 (although possession of supervisory authority - even without actual exercise of authority - is sufficient to

These explications of the type and quantum of evidence that satisfies the burden of proof underscore the importance of fully investigating all factors relevant in determining supervisory status, and evaluating whether the evidence is sufficiently specific to demonstrate that the claimed indicia have been shown.

III. Section 2(11) elements discussed in Oakwood

A. Assignment

The authority to "assign" refers to "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant over-all duties, i.e., tasks, to an employee . . ." ⁹ These are designations of an employee's "significant overall duties," not an "ad hoc instruction that the employee perform a discrete task."¹⁰ Thus, the designation 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 qualify as "assignment," while merely choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not.¹¹ A lead person's "sporadic" rotation of tasks among employees in a work group in order to finish projects or achieve production goals is not "assignment" because it is not the designation of significant overall duties.¹² Similarly, in a health care setting, "assignment" encompasses the designation of nursing personnel to patients they will care for over the duration of a shift, i.e., "significant overall tasks," or assigning employees to geographic areas within an emergency room, i.e., assignment to a particular place.¹³ Designating a nursing staff person to regularly administer medications to a patient or group of patients would constitute a significant overall task, but a one time

show supervisory status, "the evidence still must suffice to show that such authority actually exists."

⁹ Oakwood, 348 NLRB No. 37, slip op. at 4.

¹⁰ Ibid.

¹¹ Ibid.

¹² Croft, 348 NLRB No. 38, slip op. at 6.

¹³ Oakwood, 348 NLRB No. 37, slip op. at 10.

directive to give a medication to a specific patient would not be "assignment."¹⁴

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 the action be taken.¹⁵ Even if an asserted supervisor purportedly has the authority to require action, if the consequences to the employee of refusing to take such action are de minimis, the claimed authority is such in name only and does not reflect a genuine authority to require the requested action.¹⁶

Lead persons who have responsibility to see that their work group completes projects or meets production goals, and who sometimes switch tasks among employees to accomplish these tasks, do not have the authority to assign, where the leads do not prepare the posted work schedules for employees, do not appoint employees to the production lines, departments, shifts, or any overtime periods, or give significant overall duties to employees, and where they have no choice or flexibility concerning the personnel assigned to them.¹⁷

B. Responsible direction

The authority "responsibly to direct" employees is not limited to department heads. It is exercised by persons below the department head who have rank and file employees under them and who decide what job shall be undertaken next or who shall do it, provided that the direction is "responsible."¹⁸ Direction is "responsible" if the person performing the oversight is accountable for others' performance of the task, such that some adverse consequence

¹⁴ Ibid.

¹⁵ Golden Crest, 348 NLRB No. 39, slip op. at 3-4.

¹⁶ Id., slip op. at 3. The Board also rejected arguments that the charge nurses were supervisors because they "OK'd" or "initialed" changes to nursing assistants' computerized timeclock entries or because they were the highest ranking employee on site during the night shift and every other weekend, citing long-standing Board precedent that these are insufficient bases for supervisory status. Id., slip op. at 4 fn. 10.

¹⁷ Croft, 348 NLRB No. 38, slip op. at 5-6.

¹⁸ Oakwood, 348 NLRB No. 37, slip op. at 6.

may befall the one providing the oversight if the tasks performed are not performed properly.¹⁹ That consequence may be positive, such as a merit increase, bonus, or promotion, or negative, such as the denial of one of these (or some form of counseling or discipline).²⁰ This concept of accountability creates a distinction between those employees whose interest in directing other employees' tasks aligns with management, from those whose interest in directing other employees is simply the completion of a certain task. The former envisions, to the extent necessary, an adversarial relationship with those the supervisor is directing, in that the supervisor will be carrying out the interests of management in directing others even if they are contrary to employees' interests.²¹

Thus, direction includes authority to manage an assigned team to ensure timely completion of projects by deciding the order in which work is to be performed and telling employees to follow that order, instructing employees how to perform jobs properly, correcting improper performance, and moving employees, when necessary, to do different tasks.²² In the health care setting, "direction" may be established by evidence that charge nurses oversee nursing assistants' job performance and act to correct them when they do not follow proper procedures or provide adequate care, or that the charge nurses direct assistants to perform certain tasks such as to clip residents' toenails and fingernails, empty catheters, or change an incontinent resident.²³

For such authority to be "responsible direction," however, the asserted supervisors must be held accountable for the job performance of the employees assigned to them. That is, the asserted supervisors must be subject to discipline or other adverse consequence because of the failure of their crews to meet production goals or because of other shortcomings of their crews.²⁴ The accountability

¹⁹ Id., slip op. at 7.

²⁰ Golden Crest, 348 NLRB No. 39, slip op. at 5 fn. 13. The consequence need not flow from an evaluation of the putative supervisor's direction of others alone; the consequence may result from accountability for the performance of others in combination with other performance factors.

²¹ Oakwood, 348 NLRB No. 37, slip op. at 7.

²² Croft, 348 NLRB No. 38, slip op. at 6.

²³ Golden Crest, 348 NLRB No. 39, slip op. at 4.

²⁴ Croft, 348 NLRB No. 38, slip op. at 6.

must be more than a mere paper showing of prospective adverse consequences. For example, if the cited accountability is that the purported supervisor's performance is reflected in his or her evaluation, evidence must show that the rating for direction of subordinates may affect the putative supervisor's terms and conditions of employment.²⁵ The evidence must also indicate that the purported supervisors have been informed that they will experience material consequences to their terms and conditions of employment as a result of their crew's deficiencies.²⁶ Delegation of tasks to another staff member is not responsible direction if there is no evidence that the purported supervisors are required to take corrective action, or are subject to discipline or lower evaluations, if the other staff members fail to adequately perform these tasks.²⁷ Similarly, purported supervisors are not engaged in responsible direction when they themselves undertake to perform tasks for which they are responsible, such as a charge nurse's checking the "crash cart," taking an inventory of narcotics, or providing statistical information to administrative staff for their shifts.²⁸

Finally, for the prospect of adverse consequences to establish "responsible direction," the consequences must flow from the other employees' performance failures, not the purported supervisors' own performance in their direction. Thus, discipline of a charge nurse for failing to make fair assignments merely shows that the charge nurses are accountable for their own performance or lack thereof. Only if the charge nurse is accountable for the performance of others is responsible direction established.²⁹

C. Independent judgment

Only if the record establishes that the asserted supervisor satisfies the definition of assigning or responsibly directing other employees (or one of the other Section 2(11) indicia), does the analysis proceed to determining whether he or she does so using "independent judgment."³⁰ For one or more of the supervisory indicia to

²⁵ Golden Crest, 348 NLRB No. 39, slip op. at 5.

²⁶ Ibid.

²⁷ Oakwood, 348 NLRB No. 37, slip op. at 10.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid. It is important to note that "independent judgment" is indicative of supervisory status only when

be exercised with "independent judgment," the authority must be "independent," that is, "free of the control of others," it must "involve a judgment," that is, it requires "forming an opinion or evaluation by discerning and comparing data," and the judgment must involve a "degree of discretion that rises above the 'routine or clerical.'"³¹ The touchstone is the degree of discretion exercised by the purported supervisor.

Actions form a spectrum between the extremes of completely free actions and completely controlled ones; the degree of discretion necessary to constitute "independent" judgment lies somewhere in between those extremes. Judgment is not independent if dictated or controlled by detailed instructions, whether set forth in company policy or rules, by the verbal instructions of higher authority, or by the provisions of a collective bargaining agreement. But the mere existence of company policies does not eliminate independent judgment if the policies allow for discretionary choices.³²

Persons exercising authority to recommend a person for hire do so with independent judgment, if they are called upon to assess the applicants' experience, ability, attitude, and character references. A charge nurse's assignment of staff to patients involves exercise of independent judgment if the charge nurse analyzes an available nurse's skill set and level of proficiency and weighs it against the condition and needs of a particular patient.³³

used in exercising one of the Section 2(11) indicia. Exercising professional judgment (see Section 2(12)) will not automatically result in supervisory status, absent some exercise of supervisory authority. Thus, a charge nurse's professional judgment that a patient requires a certain degree of monitoring does not alone confer supervisory status; it does so only if the charge nurse assigns an employee to that patient or responsibly directs an employee in carrying out the monitoring at issue while, in either case, using independent judgment. Id., slip op. at 9.

³¹ Id., slip op. at 8.

³² Ibid.

³³ Id., slip op. at 7-8, 13. In Oakwood, Member Kirsanow based his finding that charge nurses assigned with independent judgment on a "narrower range of evidence" than that relied on by Chairman Battista and Member Schaumber -- namely, that the charge nurses matched the nurses' special training or particular skills with the particular medical needs of patients. See id., slip op. at 13 fn. 56. In finding the requisite exercise of discretion to establish

In contrast, assignment decisions are not made with independent judgment if a decision to staff a shift with a certain number of nurses is determined by a fixed nurse-to-patient ratio or assignments are made solely by seniority as required by a collective-bargaining agreement.³⁴ Similarly, staff assignments that involve merely the equalization of work loads do not involve independent judgment.³⁵

The mere existence of company policies does not eliminate independent judgment from decision-making, however, if the policies allow for discretionary choices.³⁶ Likewise, a policy that details how a charge nurse should respond in an emergency does not preclude the exercise of independent judgment where the charge nurse has the discretion to determine when an emergency exists or the authority to deviate materially from that policy based on the charge nurse's assessment of the particular circumstances.³⁷

independent judgment, Chairman Battista and Member Schaumber also noted evidence that charge nurses consider other factors such as "continuity of care," "the temperament of other nursing personnel" (id., slip op. at 13). Other factors disclosed in the record included the amount of time required to perform specific patient care functions and the personalities and compatibility of staff members (id., slip op. at 11).

Regions should submit to Advice cases in the health care industry that present the issue of whether a charge nurse's consideration of factors other than the training or skills of the health care provider and the acuity of the patient demonstrates the use of independent judgment.

³⁴ Id., slip op. at 8.

³⁵ Id., slip op. at 13 (emergency room charge nurses did not exercise independent judgment in assigning emergency room staff to a geographically-based location on a rotational basis, where charge nurses did not take into account patient acuity or nursing skill in making assignments, and the staff nurses subsequently rotated assignments during shift without input from the charge nurse).

³⁶ Id., slip op. at 8. Thus, in Oakwood, despite a written employer assignment policy, the 12 permanent charge nurses were found to be supervisors based on their exercise of a substantial degree of discretion in making assignments. Id., slip op. at 12-13.

³⁷ Id., slip op. at 9.

Conversely, if there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.³⁸ Similarly, there is no exercise of independent judgment in responsible direction where lead persons follow a pre-established delivery schedule and generally employ a standard loading pattern that dictates the placement of different products in trucks. Their instructions to crew members consisting of matters such as "where to put it and how to put it," and directions to retrieve loading bands or missing items slated for delivery are insufficient to show the exercise of independent judgment, particularly where production and maintenance employees generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance. Such a limited degree of discretion does not rise above the routine or clerical.

IV. Part-time and rotating supervisors

Finally, individuals who work part time in supervisory positions and the remainder as unit employees will be found to be Section 2(11) supervisors if they spend a "regular and substantial" portion of their work time performing supervisory functions. By "regular," the Board means according to a pattern or schedule, as opposed to sporadic substitution. The Board has not adopted a strict numerical definition of "substantiality," but individuals have been found to be supervisors where they have served in a supervisory role for as little as 10-15% of their total work time.³⁹

The first issue to determine in evaluating the status of putative part-time supervisors is whether the individuals act as supervisors when they hold those positions. One cannot assume that rotating supervisors

³⁸ Ibid. See also Golden Crest, 348 NLRB No. 39, slip op. at 3-4, 4 fn. 9 (no exercise of independent judgment in assignments where charge nurses can telephonically "mandate" assistants to report to work when the facility is understaffed, but "mandate" has to be authorized by an admitted supervisor -- indicating that the "mandate" is merely a ministerial function, and that the charge nurses do not exercise true independent judgment).

³⁹ Oakwood, 348 NLRB No. 37, slip op. at 9.

have the same authority as a permanent supervisor, simply because they hold the same job title or position description. As the Board noted in Oakwood, it "has long held that job titles and descriptions prepared by employers are not controlling; rather the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor."⁴⁰ The very part-time status of the individual may alter the nature of the job such that, although a permanent incumbent "assigns" or "responsibly directs" employees using "independent judgment," the part-time individual does not.

Inherent in the "part-time supervisor" situation is the possibility that the employer has not given supervisory authority to the part-time supervisor, but rather retained that authority in the "part-time supervisor's" superiors. Accordingly, when faced with a case involving part-time supervisors, Regions should investigate whether the authority of the part-time supervisor may be more circumscribed than that of a permanent supervisor. For example, a part-time supervisor may be less likely to be held accountable for the work of others. Or, because the job is rotated among unit employees, it is more likely that assignment or direction is done by group consensus. Further, even if there is responsible direction of employees, it may be more likely that the direction is constrained by established rules and procedures, or there is a requirement to call upon higher authority rather than exercising independent judgment.⁴¹ Particularly where all employees in a classification rotate into a position in which they purportedly supervise each other, the investigation must probe whether these individuals possess true supervisory authority.

⁴⁰ Id., slip op. at 5, fn. 24.

⁴¹ See, e.g., NLRB v. St. Francis Hosp. of Lynwood, 601 F.2d 404, 421 (9th Cir. 1979) (assistant head nurses were not supervisors where they filled in for head nurses when they were absent from shifts; insufficient evidence that the hospital had a "consistent and established" policy empowering the individuals to act as supervisors); Meharry Med. College, 219 NLRB 488, 490 (1975) (registered nurses who rotated on a daily or weekly basis into a charge nurse position were held not to be statutory supervisors in part because clinical supervisors continued to have 24-hour responsibility for the nursing service divisions; charge nurse could not grant time off or excuse employees for reasons other than immediate illness without checking with the clinical supervisor and only reported disciplinary problems).

Although the Board found no reason in Oakwood to depart from established precedent regarding the "regular and substantial portion of work time" test for determining supervisory status of part-time "supervisors," the outcome in any particular circumstance under this test is not certain. For example, the Board found none of the rotating charge nurses at issue in Oakwood were Section 2(11) supervisors, even though some rotating charge nurses arguably spent a substantial amount of their work time as charge nurses. It found the evidence was insufficient to show the rotating charge nurses were assigned with "regularity."⁴²

In Oakwood the Board did not specifically focus on the crucial issue of how the part-time nature of the rotating supervisor's duties affects their authority. It may be that this factor can and should be expressly incorporated into the test, because a rotating supervisor assuming that role with more limited "regularity" and "substantiality" may indicate that the individual has more limited authority. At bottom, the question is whether the individual should be seen as aligned with management or with rank-and-file employees. In excluding supervisors from the protection of the Act, "Congress was gravely concerned lest rank-and-file employees be interfered with or dominated by their supervisors, and lest employers lose the loyalty of, and control over, their supervisors."⁴³ Both management and unions must have agents and representatives whom they can trust. Finding part-time supervisors who truly serve in that capacity to be 2(11) supervisors solves the conflict of interest problem: management can demand their loyalty, and employees and labor unions do not have to fear supervisory involvement in their organizations. But individuals who may work substantial periods as employees are also thereby excluded from the protection of the Act. Such a result is legally justifiable only where the record evidence establishes that the part-time supervisor is vested with sufficient Section 2(11) authority. "To put the issue in homely terms, do the other employees feel, assuming the alleged supervisor is one who reasonably respects his duties, 'Here comes that so-and-so, get to work,' or is he, basically, but one of the gang who merely gives routine instructions?"⁴⁴

⁴² Oakwood, 348 NLRB No. 37, slip op. at 14, 28.

⁴³ Great W. Sugar Co., 137 NLRB 551, 555-556 (1962) (citing H.R. Rep. No. 245 on H.R. 3020, 409-411, 1 Leg. Hist. 304-308; S. Rep. No. 105 on S. 1126, 1 Leg. Hist. 409-411; 2 Leg. Hist. 1008-1009 (Sen. Taft)).

⁴⁴ Stop & Shop Cos. v. NLRB, 548 F.2d 17, 19 (1st Cir. 1977).

Accordingly, Regions should submit all unfair labor practice cases involving the supervisory status of rotating supervisors to the Division of Advice in order to determine whether any alternate or additional legal standard should be put forward for the Board's consideration.

V. Conclusion

Any questions regarding the implementation of this memorandum should be directed to the Division of Advice.

/s/
R. M.

cc: NLRBU
Release to the Public

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