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Case at a Glance

Under the National Labor Relations Act, supervisory employees cannot be included in a bargaining unit with employees. The statute defines supervisors as, *inter alia*, individuals who responsibly direct the work of others through the use of "independent judgment." The National Labor Relations Board has determined that an employee's exercise of ordinary professional judgment in directing less skilled employees does not constitute "independent judgment" within the meaning of the statute.

With All Due Deference: What Constitutes the Exercise of "Independent Judgment" in the Workplace?

by *Barbara J. Fick*

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ISSUES

This case raises two interrelated questions: What is the appropriate interpretation of the statutory phrase "independent judgment" as used in § 2(11) of the National Labor Relations Act in defining which individuals are supervisors; and who has the burden of proving that an employee meets the definition of supervisor?

FACTS

In early 1997, the Kentucky State District Council of Carpenters (hereinafter "the union") began an organizing drive among the professional and nonprofessional employees—including rehabilitation counselors, registered nurses, licensed practical nurses, rehabilitation assistants, and recreational assistants—employed by Kentucky River Community Care (hereinafter "the employer"). The union eventually won a representation election and was certified by the National Labor Relations Board (hereinafter "the Board") as the bargaining representative for the employees in the above-described bargaining unit. The employer refused to bargain with the union, however, claiming that the bargaining unit was inappropriate under the National Labor Relations Act (hereinafter "NLRA") because it included certain nurses who were supervisory employees. The employer asserted that these nurses directed the work of other employees and therefore met the definition of "supervisor," which includes individuals having the authority responsibly to direct other employees "if ... the exercise of such authority ... requires the use of independent judgment." NLRA § 2(11).

The Board held that the employer's refusal to bargain with the union violated § 8(a)(5) of the NLRA, rejecting the employer's argument that the work of these nurses required the use of independent judgment. The Board determined that the nurses' work in directing other employees regarding issues of

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Docket No. 99-1815

Argument Date:
February 21, 2001
From: The Sixth Circuit

patient care involved the use of professional knowledge, which was not the same as "independent judgment" within the meaning of § 2(11). *Kentucky River Community Care,* 323 NLRB No. 209 (1977).

The employer filed a petition with the Sixth Circuit Court of Appeals to review the Board's decision regarding the supervisory status of the nurses in question. The Sixth Circuit reversed the Board's conclusion, holding that the Board's interpretation of "independent judgment" was not entitled to deference and found that the nurses were supervisors. *Kentucky River Care Community, Inc. v. NLRB,* 193 F.3d 444 (6th Cir. 1999).

The Board asked the Supreme Court to review the Sixth Circuit's decision, and the Court granted the petition for a writ of certiorari. 121 S.Ct. 27 (2000).

Case Analysis

In *NLRB v. Health Care & Retirement Corp.,* 511 U. S. 571 (1994) (hereinafter *HCR*), the Court noted that several of the phrases used in § 2(11) are ambiguous, such as the phrase "independent judgment," so the Board "needs to be given ample room to apply them to different categories of employees." *Id.* at 579. When statutory language is ambiguous, the Supreme Court has held that "the question for the court is whether the [administrative] agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1995). Therefore, the crux of the present case revolves around the question of whether or not the Board's interpretation of "independent judgment" is a permissible construction of § 2(11) of the NLRA.

The Board argues that it has traditionally held that an employee's exercise of ordinary professional judgment in directing less skilled employees does not amount to the use of independent judgment. Advising less experienced workers how to deal with specific work problems involves technical judgment based on the employee's professional training. This judgment is based on learned skills, not significant individual discretion beyond this special learned competence.

The Board reasons that this interpretation is consistent with both the text and legislative history of § 2(11). The purpose behind the inclusion of the "independent judgment" requirement in defining supervisory status was to differentiate between true supervisors and employees with minor authority over co-workers. Congress intended to formulate a narrow exclusion with the aim of identifying those individuals vested with genuine managerial prerogatives. The legislative history shows that Congress understood the supervisory exclusion to apply to employees who did not work at a trade but instead supervised those who did, as opposed to excluding skilled employees who instruct and guide other workers and who themselves work at a trade.

The interpretation of ambiguous terms often requires the agency empowered to enforce the statute to accommodate conflicting policies. In this case the Board says that, in arriving at its interpretation, it was attempting to accommodate the policy favoring broad coverage of the NLRA versus the policy of giving an employer unfettered discretion over its labor relations agents.

The Board's interpretation takes into account the statute's express inclusion of "professional" employees as employees who are entitled to union representation. Congress expressly indicated its understanding that professional employees ordinarily direct the work of less skilled colleagues and yet are still entitled to be protected under the coverage of the statute.

The Board contends that its interpretation is rational and consistent with the language and the legislative history of the NLRA and has been consistently applied by the Board in cases involving both the health-care industry and in non-health-care settings. Therefore, its interpretation is entitled to deference by the reviewing courts and the Sixth Circuit erred in rejecting the Board's interpretation.

The employer responds that the Board's distinction between "independent" judgment and "professional" judgment is merely an attempt to revive the patient-care analysis already expressly rejected by the Supreme Court in *HCR.* The *HCR* case also involved a question concerning the supervisory status of certain employees in the health-care industry. The phrase at issue in that case was whether a nurse's authority was exercised "in the interest of the employer," another requirement under § 2(11) in order for an employee to be considered a supervisor. In *HCR* the Board had argued that a nurse is not exercising authority in the interest of the employer if the exercise is incidental to the treatment of patients. The Court rejected that argument, reasoning that the business of a health-care institution is patient treatment and therefore authority exercised in relation to patient treatment is exercised in the interest of the employer. According to the employer, the Board's forced distinction between professional judgment and independent judgment in the

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instant case is similarly flawed. Independent judgment means that a decision is based on the thought processes of the individual rather than on an outside force. Using professional judgment to direct other employees on how to handle patients requires the employee to make decisions based on her own thought processes.

Moreover, the employer argues, the Board's false distinction between independent and professional judgment will make it virtually impossible for a professional employee to ever be considered a supervisor. Last, the employer contends that the Board's interpretation is also flawed because it is based on a policy bias in favor of finding employers liable for violating the NLRA, which is not an appropriate basis for choosing among competing statutory policies.

On the issue of who has the burden of proving whether an employee meets the definition of a supervisor, howsoever that definition is interpreted, the Board treats a claim of supervisory exclusion as an affirmative defense that must be proven by the proponent of the exclusion. The NLRA defines an employee as "any employee ... but shall not include ... any individual employed as a supervisor." Section 2(2). The statutory language frames the issue as an exception to the general rule that an employee is "any employee." A basic tenet of statutory construction holds that a party claiming the benefit of an exception to a generally applicable rule bears the burden of proving that the exception applies.

The employer argues that the Board should have the burden of proving that an employee is a supervisor because as a matter of litigation theory, the burden of proof is on the party alleging that a statute has been violated. Here the Board is arguing that the employer has refused to bargain with the union in violation of the statute. In order to prove that such a refusal violates the NLRA, the Board is required to prove that the bargaining unit for which the union was certified as the representative is an appropriate bargaining unit. It is inappropriate to include supervisors in a bargaining unit. Thus, since the appropriateness of the bargaining unit is an element of the violation, the Board bears the burden of proving that the employees included in the unit are not supervisors.

SIGNIFICANCE

A nondeferential standard of review invites parties to routinely contest Board decisions on supervisory status, which is a contested issue in many representation cases. Moreover, these determinations involve highly fact-intensive situations concerning the specific tasks and duties of the contested employees, not allowing for readily transferable results from one case to the next. Nondeference, therefore, would have the effect of prolonging the representation process, undermining the statutory policy in favor of peaceful and expeditious resolution of representation disputes. This case provides a prime example of such delay: The union was certified as the bargaining representative on April 7, 1997, and now, almost four years later, the issue of representation is still not settled.

Nurses work under stressful conditions, often at low wages and with high rates of injuries, conditions that can often be ameliorated through the collective bargaining process. To interpret "independent judgment" as including the use of discretion based on professional training could have the effect of depriving many nurses of the right to organize, since most nurses provide guidance to co-workers on issues relating to patient treatment.

On the other hand, in view of both the nursing shortage and the increased cost pressures faced by the health-care industry, employers are increasingly depending on nursing staff not only to perform their own professional duties but also to supervise others in the performance of their nursing duties. In order to deliver quality care more efficiently, health-care providers rely on their nursing staff to ensure quality performance by other workers in providing patient care. It is vital that these nurses' undivided loyalty rest with the employer; placing them in bargaining units with the employees they supervise could lead to lax oversight of health-care workers and endanger the safety of the patients under their care.

ATTORNEYS FOR THE PARTIES

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For Kentucky River Community Care, Inc. et al. (Michael W. Hawkins (513) 977-8200)

For Kentucky State District Council of Carpenters (Thomas J. Schulz (502) 875-7474)

AMICUS BRIEFS

In Support of the NLRB

Service Employees, International Union, American Federation of Teachers, American Federation of State, County and Municipal Employees, and United Food and Commercial Workers (Judith A. Scott (202) 898-3455)

In Support of Kentucky River Community Care, Inc. et al.

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