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Professional Employee or Supervisory Employee: Are Nurses Protected by the NLRA? An Analysis of NLRB v. Health Care & Retirement Corp.

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Professional Employee or Supervisory Employee: Are Nurses Protected by the National Labor Relations Act?

by Barbara J. Fick

National Labor Relations Board
v.
Health Care & Retirement Corporation of America
(Docket No. 92-1964)

Argument Date: February 22, 1994
From: The Sixth Circuit

ISSUE

Are nurses who direct aides and orderlies in the performance of patient-care duties excluded from the protection of the National Labor Relations Act because they are acting as supervisors in the interest of the employer?

FACTS

Three staff nurses who worked at the Heartland nursing home operated by Health Care and Retirement Corporation of America ("Health Care") discussed with fellow employees certain problems they were experiencing at work, such as short staffing, low wages and management's failure to communicate with the employees. When the Director of Nurses at Heartland refused to meet with the nurses to discuss these problems, the nurses went to corporate headquarters and met with the Director of Human Resources and the Vice President of Operations. Subsequently, these nurses received disciplinary warnings, allegedly for work mistakes and absenteeism. Eventually they were discharged.

The nurses filed a charge with the National Labor Relations Board (the "NLRB" or the "Board"), alleging that the discipline and discharge was in retaliation for their group action of discussing working conditions with their fellow nurses and with management. Such group action is protected from employer retaliation by the National Labor Relations Act (the "NLRA" or the "Act").

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Case at a Glance

The National Labor Relations Act protects employees' right to unionize and their actions aimed at improving working conditions. The Act does not, however, protect supervisory employees on the premise that employers deserve the undivided loyalty of their agents. In this case, the Court is asked to decide if nurses who direct the work of aides and orderlies are employees protected from discharge in their efforts to improve working conditions, or are supervisors who can be fired for such conduct.

Health Care responded that its actions were unrelated to the nurses' complaints but, rather, were based on their absenteeism and violations of nursing home procedures. Moreover, even if the action was retaliatory, Health Care argued that these nurses were supervisors and, therefore, not entitled to the protection of the Act.

At the hearing before an administrative law judge ("ALJ"), the duties of staff nurses at the Heartland facility were examined in detail. It was found that the nurses had the authority to assign aides to different wings of the Heartland nursing home, to assign patient-care duties to the aides, and to direct the aides in performing patient-care duties. The ALJ also found that the nurses were required to report problems about an aide's work to the Director of Nurses. However, the nurses did not have any authority to hire, fire, promote, discipline, or give pay increases; neither could they effectively recommend such action to management. Based on these findings, the ALJ determined that staff nurses at Heartland were not supervisors but employees entitled to protection under the NLRA. However, the ALJ found that their discipline and discharge was not in retaliation for their complaints about working conditions.

On appeal to the NLRB, the Board affirmed the ALJ's finding that the nurses were employees but overruled the finding that the discharge was not caused by the work complaints. 306 N.L.R.B. 63 (1992). The Board ordered Health Care to reinstate the nurses with back pay.

Health Care appealed to the Sixth Circuit; that court refused to enforce the Board's order. 987 F.2d 1256 (6th Cir. 1993). The Sixth Circuit held that the duties of the nurses relating to assigning and directing the aides' work were supervisory in nature, removing the nurses from the protection of the Act. Because the nurses were not protected by the Act, it was unnecessary for the court to determine the reasons for their discharge. The Supreme Court granted the Board's petition for certiorari to decide the issue of the status of staff nurses under the Act.

BACKGROUND AND SIGNIFICANCE

This case involves the interpretation of a specific statutory provision contained in the NLRA. This federal law protects

private-sector employees but excludes, *inter alia*, supervisors. Section 2(11) of the Act defines supervisors 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 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.

Congress' intent in excluding supervisors from the Act's protection was to ensure the undivided loyalty of an employer's managerial agents. Congress did not intend, however, to exclude employees with only minor supervisory duties. A distinction was intended between true supervisors and straw bosses, leadmen, and foremen.

It is also clear that an individual does not have to possess all the different types of authority listed in Section 2(11) in order to be considered a supervisor; so long as an individual exercises authority in *any one* of the listed areas, he or she is a supervisor. The facts of this case focus specifically on two of these listed duties: the authority of staff nurses to assign work to aides and to responsibly direct aides in performing that work.

The NLRB found that, since all the aides are able to perform each other's work and the nature of the aides' work is not highly technical, the task of assigning work did not require independent judgment by the nurse but, rather, was routine in nature. The court of appeals, on the other hand, determined that, since the assignment was based on an assessment of the patients' needs as well as an attempt to rotate work, independent judgment was involved.

The crux of the disagreement in this case, however, revolves around the application to nurses of the phrase "having authority, in the interest of the employer . . . responsibly to direct" other employees. In interpreting this phrase, the NLRB notes that the NLRA specifically includes professional employees within the definition of protected employees. Professional employees are defined as individuals whose work involves the exercise of discretion and judgment. Thus, the NLRB argues that it must distinguish between supervisors who direct work in the interest of their employers and professional employees whose work direction is based on the customary duties of his or her profession.

In the case of nurses, the NLRB distinguishes between a nurse's direction of aides which directly relates to patient care, and a nurse's direction coincident with authority to affect aides' job status or pay. In the former case, the nurse is employed as a professional employee, using skill and training to provide good patient care consistent with professional norms. In the latter case, the nurse is acting "in the interest of the employer" by implementing managerial policies aimed at furthering the employer's business interests.

The Sixth Circuit, however, in earlier cases, has rejected the Board's distinction between acting in the interest of patient care and acting in the interest of the employer. Where the employer is a health-care institution, providing good patient care *is* the employer's business interest. If a nurse uses independent judgment in directing the aides' work, the fact that the judgment is informed by professional training and standards does not mean it is not being exercised in the interest of the employer. The authority of a nurse to direct other employees is conveyed by the employer; an employee has no authority to direct others solely by virtue of having a professional education. As the language of Section 2(11) makes abundantly clear, the possession of only one indicia of supervisory authority is sufficient to render an employee a supervisor.

How the Court resolves this case will impact thousands of nurses as well as every private-sector hospital and nursing home in the country. Many nurses routinely direct the work of aides and orderlies. If such direction makes them supervisory personnel, they will lose the right to join labor organizations for purposes of collective bargaining and will lose the protection of the Act from employer retaliation when, as a group, they seek to improve their working conditions. On the other hand, if nurses performing these duties are not supervisors, health-care institutions fear they will lose the ability to control their first-line supervisors and will lose the loyalty of their supervisory nursing personnel, thus interfering with their ability to do business.

ARGUMENTS

For National Labor Relations Board *(Counsel of Record: Drew S. Days, III, Solicitor General, Department of Justice, Washington, DC 20530; (202)514-2217):*

1. The Court should defer to the expertise of the administrative agency charged with interpreting the NLRA. In this instance, the NLRB must weigh the competing interests of the employer to the undivided loyalty of its supervisory employees against the interests of protecting employees who exercise minor supervisory authority and professional employees.
2. The NLRB's rule of distinguishing between supervisors who exercise authority over personnel in the interest of the employer and employees whose direction of others is an incident of patient care is a rational and consistent interpretation of the NLRA and has been endorsed by Congress.
3. Applying the NLRB's standards to the facts of this case results in a finding that the staff nurses are not supervisors.

For Health Care & Retirement Corporation of America *(Counsel of Record: Cary R. Cooper; Cooper, Straub, Walinski & Cramer, 900 Adams Street, P.O. Box 1568, Toledo, OH 43603; (419) 241-1200):*

1. The Court should not defer to the NLRB's interpretation of the word supervisors because its interpretation conflicts with the statutory language. The NLRA defines a supervisor as someone who has authority responsibly to direct other employees. While staff nurses may use professional

standards in deciding how to direct other employees, the authority to direct those employees is given to the nurses by the employer to be exercised in the employer's best interests.

2. The NLRB's interpretation is not supported by legislative history. When Congress amended the Act in 1974 to extend its jurisdiction to non-profit, health-care institutions, it declined to amend the definition of supervisor to specifically exclude nurses who do not have personnel authority over subordinates. Congress did endorse the Board's pre-1974 interpretation of supervisory status in the health-care context, but that interpretation found nurses to be supervisors based on their authority to direct the work of orderlies and aides.
3. The Court of Appeals correctly determined that, based on the facts of this case, staff nurses are supervisors.

AMICUS BRIEFS

In Support of the National Labor Relations Board

AFL-CIO *(Counsel of Record: Laurence Gold, 815 16th Street, NW, Washington, DC 20006; (202) 637-5390);*

American Nurses Association *(Counsel of Record: Barbara J. Sapin, 600 Maryland Avenue, SW, Washington, DC 20024; (202) 554-4444).*

In Support of Health Care & Retirement Corporation of America

American Health Care Association *(Counsel of Record: Andrew A. Peterson; Jackson, Lewis, Schnitzler & Krupman, 1 North Broadway, White Plains, NY 10601; (914) 328-0404);*

Council on Labor Law Equality *(Counsel of Record: Gerard C. Smetana; Smetana & Avakian, 333 West Wacker Drive, Suite 1015, Chicago, IL 60606; (312) 644-0250);*

U.S. Home Care Corporation of Hartsdale, New York *(Counsel of Record: William H. DuRoss, III, 1255 23rd Street, Suite 500, NW, Washington, DC 20037; (202) 857-2948).*