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Fourth Circuit Finds Nurses Are Not Supervisors – Could Unionize

Article By:

John T.L. Koenig

In a decision issued Nov. 1, the U.S. Court of Appeals for the *Fourth Circuit* ruled that registered nurses (RNs) and licensed practical nurses (LPNs) at a nursing home in South Carolina were not supervisors and could therefore lawfully unionize. The decision reversed several prior cases from the Fourth Circuit which held otherwise, but the court explained the reversal was due to intervening action by the U.S. Supreme Court and the NLRB.

The nursing home had a director of nursing, an assistant director of nursing, and three unit managers. There was no dispute they were supervisors under the National Labor Relations Act. The home also employed six RNs, 17 LPNs and 40 certified nursing assistants (CNAs). The RNs and LPNs assessed patients, answered call lights, administered medications, and performed general patient care duties. The CNAs assisted residents with daily tasks, such as helping them bathe, repositioning them in bed, and aiding them in using the restroom. The nursing home's handbook described the nurses as the CNAs' "first line of authority," and placed the RNs and LPNs above the CNAs on its organizational chart.

In January 2015, the Steelworkers filed an election petition seeking to represent the RNs, LPNs and CNAs. The employer argued the RNs and LPNs were supervisors and should be excluded from voting or being included in a bargaining unit. In prior cases, including *Glenmark Associates, Inc. v. NLRB*, the same court held that similar nurses were supervisors that should be excluded. The Fourth Circuit found otherwise in this case.

The court noted that after its prior decision in *Glenmark* (and other cases), the Supreme Court issued its *Kentucky River* case outlining a three-part test for whether employees are supervisors. Employees are supervisors if they (1) have the authority to perform any one of the 12 functions listed in § 152(11) of the Act or effectively recommend such action, (2) exercise that authority in a manner that is not merely clerical or routine but requires the use of independent judgment, and (3) hold that authority in the interest of the employer. The Fourth Circuit focused entirely on part two, whether the nurses used independent judgment.

After the Supreme Court decided *Kentucky River*, the NLRB explained that to exercise independent judgment, "an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." The NLRB found that

“a judgment is not independent if it is 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.”

After applying the Supreme Court’s test, as further explained by the NLRB, for the first time, the Fourth Circuit held that the RNs and LPNs lacked such independent judgment. The court held that, at most, the evidence established that the nurses “exercise not independent, but heavily constrained, judgment.” Indeed, the court found the employer had “extensive policies on all these matters and on virtually all CNA duties. It has training, instructions, and policies on everything from handwashing and bathing residents to dealing with patient abuse” and “specific instructions to Nurses and CNAs on such topics as repositioning residents, properly clothing residents, taking breaks, clocking in and out, attending to residents’ hygiene, and providing meal service.”

The court ultimately concluded, “In every case, the nurses’ responsibility seems to amount to the same thing: making sure the CNAs follow the written instructions. This suggests that the Nurses serve merely as conduits for these instructions.”

The employer attempted to argue that the RNs and LPNs often worked at nights and on weekends when the directors and unit managers were not present. But, the court found that the nurses still followed the detailed instructions even when their supervisors where gone, noting, “When the Managers go home at night or for the weekend, they do not take their instructions with them.” With this ruling, the RNs and LPNs were required to be part of the bargaining unit represented by the Steelworkers.

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