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**FROM THE STEELWORKERS'
TRILOGY TO THE KENTUCKY
RIVER TRIFECTA: WILL THE
NLRB'S DEFINITION OF
INDEPENDENT JUDGMENT
TRICKLE DOWN TO PUBLIC
EMPLOYEE LABOR
RELATIONS LAW?**

By JACQUELINE CLISHAM

On September 29, 2006, the National Labor Relations Board (NLRB)¹ issued a decision in *Oakwood Healthcare, Inc.*,² that will affect private employees across the country. Many of the employees affected by *Oakwood* will eventually lose the protections of the National Labor Relations Act (NLRA) after years of status as union members. Whether or not public employees will be affected depends on the public labor law of the individual states.

There are two major concerns regarding the *Oakwood* decision, as voiced in the dissenting opinion. The first is that a new class of employees will be created “who have neither the genuine prerogatives of management, nor the statutory rights of ordinary employees.”³ The second is that professionals, who are expressly provided coverage of the NLRA, may fall into this newly created class.⁴

Oakwood Healthcare is one of three cases, dubbed the *Kentucky River* cases, in which the NLRB reviewed three terms included in section 2(11) of the NLRA.⁵ Section 2(11), in conjunction with section 2(3), excludes “supervisors” from the protection of the NLRA and defines them 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 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.”⁶

The purpose for excluding supervisors from the protections of the NLRA is to avoid the conflict of interest created by a supervisor’s authority to take or cause action to be taken in an area of employment covered by a collective bargaining agreement of a fellow bargaining unit employee.⁷ Where the supervisor is acting within the interest of the employer regarding a fellow employee’s terms and conditions of employment, areas where the interest of the employer and employee are likely to diverge, such a conflict exists.⁸

The NLRB’s review of the terms ‘assign,’ ‘reasonably to direct,’ and ‘independent judgment’ was a result of the U.S. Supreme Court’s 2001 decision in *Kentucky River Community Care, Inc.*⁹ In *Kentucky River*, the Supreme Court rejected the NLRB’s interpretation of part two of the three-part supervisory test used by the NLRB. The test, based on § 2(11), excludes employees from NLRA protection if they are “statutory supervisors,” who “(1) [] hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their

'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'¹⁰

Specifically, the Supreme Court rejected the NLRB's interpretation of independent judgment, which according to the Court, offered a blanket exclusion from the test, where the employee's decision had a basis in professional or technical skill or experience.¹¹ The Supreme Court rejected this interpretation, reasoning that it would virtually eliminate 'supervisors' from the Act's express exclusion.¹² In response, the NLRB asserted that this application of the test would be limited to the 'reasonably to direct' function.¹³ The Supreme Court rejected this argument as an unjustifiable distinction, contrary to the text of the statute, and because the other eleven functions may also require the same basis, professional or technical expertise, for judgment.¹⁴ The Court reaffirmed prior direction to the NLRB that the supervisory exclusion applies to any individual, not just non-professionals.¹⁵ The private sector had been awaiting the NLRB's interpretation of independent judgment since.

The labor sector has been vocal in its opposition to the NLRB taking a position that labor considers pro-employer. Prior to the NLRB's September 29, 2006 decision, the Economic Policy Institute estimated that nearly 8 million workers nationwide could be affected by the NLRB's decision.¹⁶ One major public employees' union expressed concern about the *Oakwood* decision's effects on the nursing sector in particular: "The ruling created a new definition of supervisor allowing workers who serve as charge nurses to be classified as supervisors despite the fact that they do not have any genuine managerial or supervisory authority. In this women-dominated industry, the new ruling put many women in a new class of worker — and without a union."¹⁷

The impact of the NLRB's September 29, 2006 rulings in *Oakwood*, *Golden Crest*,¹⁸ and *Croft Metals*¹⁹ are not limited to the nursing sector. Nine cases remanded by the NLRB on September 30, 2006 in light of *Oakwood* et. al., include nurses,²⁰ service and maintenance workers,²¹ a working foreman,²² engineers,²³ and electricians.²⁴ At current count, the NLRB remanded 46 representation cases after the *Oakwood* decision.²⁵

Certain NLRB members indicated that they do not think that the impact of *Oakwood* will be so devastating.²⁶ In an interview earlier this year, "Chairman Battista emphasized that only 12 of the 236 employees challenged as putative

supervisors in *Oakwood* and its companion cases²⁷ were excluded as supervisors”.²⁸ Member Liebman added, regarding impact, that much will depend on how the Board actually applies *Oakwood* going forward.²⁹ Speaking directly to the Economic Policy Institute’s 8 million worker impact claim, Member Kirsanow stated that he doubts that that many workers will be impacted.³⁰ Chairman Battista criticized the same estimate on the basis that it was made before the NLRB’s decision was published.³¹ Furthermore, some health care providers have assured unions that they will not exclude current bargaining unit members who are now considered supervisors.³²

These effects, or lack thereof, only take private industry and services into consideration. The question yet to be asked is whether the NLRB’s interpretation of independent judgment will be adopted by public labor relations boards.

ILLINOIS PUBLIC LABOR RELATIONS ACT

State labor relations acts extend the protections of the NLRA to public employees, and in many respects mirror the language and intent of the NLRA. For example, § 3(n) of the Illinois Public Labor Relations Act, like the NLRA, excludes supervisors from the protections of the IPLRA.³³ Section 3(r) of the IPLRA defines a supervisor as:

“...an employee whose principal work is substantially different from that of his or her subordinates and who has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend any of those actions, if the exercise of that authority is not of a merely routine or clerical nature, but requires the consistent use of independent judgment.”³⁴

One key difference between § 3(r) of the IPLRA and § 2(11) of the NLRA lies in the opening sentence of the IPLRA’s definition of a supervisor. The ILPRA requires that for a public employee to be deemed a supervisor, the employee’s principal work must be either visibly or by its nature substantially different from that of his or her subordinates.³⁵ This requirement alone speaks to the NLRB’s concern about catching the “lead lineman” in the supervisory net.³⁶

The IPLRA not only requires that the majority of a supervisor’s work be different, but the IPLRA adds an element to the NLRB test that requires an em-

ployee spend a preponderance of his or her time engaging in supervisory duties.³⁷ The IPLRA test for exclusion as a supervisor requires that the employee “(1) has principal work substantially different from that of his subordinates; (2) has authority to perform one or more of the 11 enumerated supervisory functions, or to effectively recommend such performance; (3) consistently exercises independent judgment in the interest of the employer in connection with his or her supervisory activity; and (4) spends a preponderance of his or her employment time engaged in supervisory activities.”³⁸

Another difference between the two acts is that the NLRA includes ‘assign’ within its twelve supervisory functions, whereas the Illinois Act does not.³⁹ Also, the NLRA language includes ‘reasonably to direct’ as opposed to the IPLRA’s ‘direct.’⁴⁰ But how substantial are these differences where the NLRB’s latest interpretation of ‘independent judgment’ is concerned?

The term ‘independent judgment,’ as interpreted in *Oakwood*, applies to all twelve supervisory indicia, without regard to whether the judgment is exercised using professional or technical experience.⁴¹ To be ‘independent,’ the judgment exercised must not be effectively controlled by detailed instructions, whether included in company rules or policies, verbal instructions from a superior, or requirements of a collective bargaining agreement.⁴² However, the trap door opens if the source of authority allows for discretionary choices.⁴³ The degree of discretion recognized must rise above the ‘routine or clerical’ to constitute independent judgment.⁴⁴

The independent judgment definition as construed under the IPLRA is as follows: An employee exercises independent judgment whenever he or she must choose between two alternatives and the choices are not routine or clerical in nature or made on the basis of the alleged supervisor’s skill, experience, technical expertise or knowledge.⁴⁵ Ministerial-type functions, also referred to as ‘routine and clerical,’ generally do not require the use of independent judgment.⁴⁶ Even though performing such functions may *occasionally* entail the use of discretion or independent judgment, it is not sufficient to satisfy the independent judgment prong of the supervisory definition under the IPLRA.⁴⁷

Although both Acts seek the same goals, the way they go about it is not always the same. The Illinois Labor Relations Board frequently borrows from seminal U.S. Supreme Court and NLRB cases interpreting the NLRA.⁴⁸ However, the supervisory exclusion is an area where the Illinois Board and the Illinois Courts

have made little to no mention of NLRA-related cases.⁴⁹ One reason for not looking to NLRA cases is that the IPLRA's definition of supervisor is narrower than the NLRA's.⁵⁰ In fact, the Illinois Board and courts have consistently relied upon *City of Freeport* as a seminal Illinois case.⁵¹ *Freeport* recognizes that NLRB precedent is useful in determining whether an individual performs any of the enumerated supervisory functions with independent judgment.⁵² However, the Illinois preponderance hurdle requires a much greater showing of time spent exercising independent judgment than does the NLRA.⁵³ Note that the IPLRA's purpose for excluding supervisors from the protections of the IPLRA is the same as that of the NLRA.⁵⁴

It would seem that the 'skill, experience and knowledge' referred to by the ILRB is that which is typically thought of as the exercise of 'professional judgment,' and sounds like what the NLRB urged the U.S. Supreme Court to use as a preclusion to supervisory status in *Kentucky River*. Like the NLRA, the IPLRA includes 'professionals' as employees within the protection of the Act.⁵⁵ The question becomes, will public employers in Illinois eventually urge the Illinois Board to apply the NLRB's latest holding, that decisions based on professional judgment do not preclude a finding that an employee is a supervisor, and if so, is the NLRB's concern relevant considering the preponderance requirement under the IPLRA?

NOTES

1 The NLRB is the executive agency charged with the enforcement of the NLRA, the act governing employer-employee-union relations in the private sector. The Board members are appointed by the President for five-year terms and act as a quasi-judicial body, deciding cases brought before it on an exception (appeal) filed from the decision of an administrative law judge. 29 U.S.C. § 153(a) and 160(c) (2006).

2 Oakwood Healthcare, Inc., 348 NLRB No. 37, 2006 WL 2842124 (Sept. 29, 2006).

3 Oakwood Healthcare, Inc., 348 NLRB No. 37, 2006 WL 2842124, *20 (Sept. 29, 2006).

4 *Id.*; See 29 U.S.C. §§ 152(12) and 159(b) (definition of and inclusion of professionals).

5 Oakwood Healthcare, Inc., 348 NLRB No. 37, 2006 WL 2842124

6 29 U.S.C. §§ 152(3) and (11) (2006).

7 See *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983).

8 *Id.*

9 *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 712-13 (2001). See also *Passavant Ret. & Health Center v. NLRB*, 149 F.3d 243 (3rd Cir. 1998) (discussing the ongoing struggle between the NLRB and the Supreme Court regarding application of section 2(11) of the NLRA).

- 10 NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. at 713, *citing* NLRB v. Health Care & Ret. Corp. of America, 511 U.S. 571, 573-74 (1994).
- 11 *Id.* at 714-15.
- 12 *Id.* at 715.
- 13 *Id.* at 715-16.
- 14 *Id.* at 716.
- 15 *See* Health Care & Ret. Corp. of America, 511 U.S. at 581.
- 16 ROSS EISENBREY AND LAWRENCE MISHEL, ECONOMIC POLICY INSTITUTE, SUPERVISOR IN NAME ONLY, Issue Brief #225, (July 12, 2006), <http://www.epi.org/content.cfm/ib225.pdf>.
- 17 Shannon Garrett and Karen Swift, *Union Women Under Attack*, Newsletter: AFSCME WomENews, November 2006, <http://www.afscme.org/issues/12862.cfm>.
- 18 Golden Crest Health Care Center, 348 NLRB No. 39 (2006).
- 19 Croft Metals, Inc., 348 NLRB No. 38 (2006).
- 20 *See* Barstow Community Hospital, 348 NLRB No. 58 (Sept. 30, 2006); Bellaire General Hospital, LP, 348 NLRB No. 57 (Sept. 30, 2006); Loyalhanna Health Care Assoc., 348 NLRB No. 54 (Sept. 30, 2006).
- 21 *See* Talmadge Park, Inc., 348 NLRB No. 52 (Sept. 30, 2006).
- 22 *See* RCC Fabricators, Inc., 348 NLRB No. 56 (Sept. 30, 2006) (railroad equipment production industry).
- 23 *See* GFC Crane Consultants, Inc., 348 NLRB No. 51 (Sept. 30, 2006) (crane maintenance and repairs).
- 24 *See* Bay Harbour Elec., Inc., 348 NLRB No. 59; ADB Util. Contractors, Inc., 348 NLRB No. 53 (Sept. 30, 2006).
- 25 Susan McGolrick, *Effects of NLRB's Landmark Ruling on Supervisory Status Should Become Clearer*, BNA Daily Labor Report, 10 DLR S-9, 2007 (January 17, 2007).
- 26 *Id.*
- 27 Golden Crest Health Care Center, 348 NLRB No. 39 (2006); Croft Metals, Inc., 348 NLRB No. 38 (2006). Note that these three cases were not consolidated, rather they were decided on the same day.
- 28 Susan McGolrick, *supra* note 25.
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 *Id.*; Tom Gilroy, *Health Care Employees: New Contract Covers Nurses, Other Workers at Four Tenet Hospitals in Southern California*, BNA Daily Labor Report 45 DLR A-3, 2007 (March 8, 2007).
- 33 5 ILCS 315/3(n) (2006).
- 34 5 ILCS 315/3(r) (2006).
- 35 Metro. Alliance of Police v. Illinois Labor Relations Board, 839 N.E.2d 1073, 1080, 362 Ill.App.3d 469 (Ill. App. Ct. 2005).
- 36 *See* Health Care & Retirement Corp. of America, 511 U.S. 571, 592-93, (Ginsburg, J., dissenting).
- 37 *See* City of Freeport v. Illinois State Labor Relations Board, 554 N.E.2d 155, 171, 135 Ill.2d 499, 532 (Ill. 1990); County of Cook, 16 PERI 3009 (IL LLRB 1999); Peoria Housing Authority, 10 PERI 2020 (IL SLRB 1994).

- 38 County of Cook, 16 PERI 3009.
39 29 U.S.C. § 152(11)(2006); 5 ILCS 315/3(r) (2006)
40 *Id.*
41 Oakwood Healthcare, Inc. 348 NLRB No. 37 at 9.
42 *Id.* at 10.
43 *Id.*
44 *Id.*
45 City of Freeport, 554 N.E.2d at 171; City of Naperville, 20 PERI 184 (IL SLRB 2004)
46 City of Freeport, 554 N.E.2d at 166.
47 *Id.*
48 The Illinois State Labor Relation Board effects bargaining balancing test is based on the balancing test that the NLRB adopted and the Supreme Court affirmed in *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686-87, 101 S. Ct. 2573, 2580 (1981). *See AFSCME v. State Labor Relations Board*, 546 N.E.2d 687, 692-93, 190 Ill.App.3d 259 (Ill. App. Ct. 1989). *AFSCME* also noted that regarding Illinois public labor cases “. . .the rulings of the NLRB and the Federal courts when these bodies construe the NLRA are persuasive authority for similar provisions in the State Act,” *Id.* at 690-91.
49 *See City of Freeport*, 554 N.E.2d 155; *Village of Bolingbrook*, 19 PERI 125 (IL SLRB 2003).
50 *County of Cook v. Illinois Labor Relations Board*, 813 N.E.2d 1107, 1121 n.3, 351 Ill.App.3d 379 (Ill. App. Ct. 2004), *citing City of Freeport*, 554 N.E.2d at 159.
51 *See Metropolitan Alliance of Police*, 839 N.E.2d 1073.
52 *City of Freeport*, 554 N.E.2d at 159.
53 *Id.* at 166.
54 *Id.* at 159.
55 5 ILCS 315/9(b) (2006).