I.H.S. Acquisition No. 114, Inc. d/b/a Lynwood Manor *and* Local 79, Service Employees International Union. Case 7–CA–49482

July 31, 2007

DECISION AND ORDER

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

This is a refusal-to-bargain case in which the Respondent is contesting the Board's unit determination in the underlying representation proceeding. Pursuant to a charge filed on May 1, 2006, the General Counsel issued the complaint on October 31, 2006, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to bargain with, and withdrawing its recognition of, the Union as the exclusive collective-bargaining representative of the employees in the unit following the Respondent's filing of the unit clarification petition in Case 7–UC–597. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 30, 2006, the General Counsel filed a Motion for Summary Judgment. On December 4, 2006, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, a cross-motion to dismiss, and a brief in opposition to the General Counsel's motion and in support of its cross-motion. The General Counsel filed a brief in answer to the Respondent's response and in opposition to the Respondent's cross-motion. The Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent argues that it is pursuing legal action to vindicate its position, raised and rejected by the Board in the representation proceeding in Case 7–UC–597, that the registered nurses (RNs) and licensed practical nurses (LPNs) in the unit are supervisors, and that it therefore has no duty to bargain.

The Respondent filed the unit clarification petition in the underlying matter on April 12, 2006. On June 16, 2006, the Regional Director issued a Decision and Order denying the Respondent's request to clarify the bargaining unit by excluding the RN and LPN staff nurses, and dismissing the petition in Case 7–UC–597. The Respondent filed a request for review, and on September 6, 2006, the Board issued an Order denying the request, finding that it raised no substantial issues warranting review.

The Respondent contends that the Board's decisions in *Oakwood Healthcare, Inc*., 348 NLRB 686 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), which issued shortly after the Board's denial of review in the representation proceeding, create special circumstances warranting reexamination of the Board's affirmance of the Regional Director's Decision and Order. In *Oakwood Healthcare* and *Golden Crest,* the Board addressed the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act. The Respondent maintains that the decision in Case 7–UC–597 is inconsistent with the "new framework" for determining supervisory status that was articulated in those cases. The Respondent argues that the RNs and LPNs at issue here are supervisors because they have the authority "responsibly to direct" the certified nurse aides (CNAs) in the performance of their duties, and that the RNs and LPNs assign work to aides through the exercise of independent judgment.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence. With respect to the Respondent's contention that the Board's decisions in *Oakwood Healthcare* and *Golden Crest* constitute special circumstances, we find, for the reasons set forth below, that the record in the underlying representation proceeding supports the determination that the Respondent has not met its burden of establishing that the RNs and LPNs are supervisors under the standards articulated in those cases.

Assignment of CNAs

In *Oakwood Healthcare*, supra, the Board interpreted the term "assign" as referring to "the act of 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 overall duties, i.e., tasks, to an employee." 348 NLRB 686, 689. In the instant case, the record establishes that the nurses at issue have the authority to assign the CNAs to perform certain duties. A nurse writes in the name of the CNA who is to perform the pre-assigned duties on the master schedule, which includes wing and unit assignments. The nurse may add routine assignments to the pre-printed assignment sheet based on resident needs and medical conditions, such as bathing, feeding, ambulating, and transporting. On occasion, a nurse may reassign a CNA pursuant to the specific request of a patient. In addition, the nurses may subsequently reassign the CNAs, reschedule breaks, or temporarily detail them to another unit or wing.

Having found that the RNs and LPNs have the authority to assign significant overall duties to the CNAs, we must next consider whether the nurses exercise independent judgment in making these assignments. *Oakwood Healthcare*, supra, slip op. at 10. We find that they do not. "[T]o 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." Id., slip op. at 8. In addition, "[t]he authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" Id. (citations omitted).

Here, the Respondent maintains that the nurses use independent judgment because they must determine the acuity needs of residents, which may be different from shift to shift and day to day, and must determine changes in the staffing schedule required by these differences, weighing various factors to determine staff assignments beyond merely equalizing the quantity of work. The Respondent further asserts that under Federal law, it must provide "sufficient nursing and related services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident"[1] and that determination of sufficient staffing needs to meet this requirement necessarily requires the exercise of independent judgment because staffing is not prescribed by any regulation or management policy.

In support of its position, the Respondent refers to the testimony in the record of an LPN who stated that she had to determine staffing needs based on her assessment of patient acuity, the oral report of the prior shifts, and the 24-hour report. However, the Respondent adduced little evidence regarding the factors weighed or balanced by nurses in determining the staffing needs. Specifically, the record fails to reveal any evidence that nurses "make assignments that are both tailored to patient conditions and needs and particular [CNA] skill sets, and a fair distribution based upon [an] assessment of the probable amount of [CNA] time each assigned patient will require on a given shift." *Oakwood Healthcare,* supra, at 697. The Board has held that purely conclusory evidence is not sufficient to establish supervisory authority. *Golden Crest,* supra at 731; *Austal USA, L.L.C*., 349 NLRB 561, at fn. 6 (2006); *Avante at Wilson, Inc*., 348 NLRB 1056, 1056–1057 (2006). Thus, this conclusory testimony by an LPN is not sufficient to establish that nurses exercise independent judgment.

In addition, the Respondent has not established that the reassignment of a CNA from one nursing unit that is overstaffed to another that is understaffed involves anything more than the "mere equalization of workloads," which the Board has found does not require the exercise of independent judgment. *Oakwood Healthcare*, supra, at 693–694, 697. Further, there is no evidence that would allow us to conclude that the nurses exercise judgment that involves a degree of discretion that rises above the "routine or clerical." *Croft Metals, Inc.,* 348 NLRB 717, 721 (2006). Accordingly, we find that the nurses at issue do not exercise independent judgment in the assignment of significant overall duties to the CNAs.

Responsible Direction of CNAs

In *Oakwood Healthcare*, the Board interpreted the phrase "responsibly to direct" as follows: "If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both 'responsible' (as explained below) and carried out with independent judgment." *Oakwood Healthcare*, supra at 691 (internal quotations omitted). The Board then held that for direction to be "responsible," the person directing the performance of a task must be accountable for its performance. Id. at 691–692. Further, the Board held that to establish accountability, "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. at 7.

In the case before us, the Respondent has established that the nurses at issue monitor the assignments given to the CNAs, including correcting their work and initialing the CNA assignment sheets as they complete their assigned tasks. Thus, we find that the nurses have the authority to direct the work of the CNAs. The next question is whether the Respondent has established that the nurses are accountable for their actions in directing the CNAs. *Golden Crest*, 348 NLRB 727, 731(2006).

The Respondent relies on the testimony of the Director of Nursing that nurses are held accountable for the care that the residents are given, and the testimony of an LPN that nurses are held accountable for the care on their floor and that "anything they [the aides] do wrong falls back on my shoulders."[2] However, the Respondent fails to refer to any specific evidence in the record, or proffer to show any specific evidence, that nurses may be disci-

[1] Citing 42 CFR Sec. 483.30.

[2] Respondent's brief in opposition to the General Counsel's Motion for Summary Judgment, citing Tr. 188–189.

plined, receive a poor performance rating, or suffer any adverse consequences with respect to their terms and conditions of employment due to a failure in a CNA's performance of these routine functions. Thus, the Respondent has not established that the nurses face "a prospect of adverse consequences" and thus are held accountable for their actions in directing CNAs. *Golden Crest*, supra at 731, quoting *Oakwood Healthcare*, supra, at 692. Accordingly, we find that the Respondent's nurses do not possess the authority to responsibly direct the CNAs.[3]

CONCLUSION

For all of the above reasons, we find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[4]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with a facility in Adrian, Michigan, has been engaged in the operation of a skilled care nursing home. During calendar year 2005, the Respondent, in conducting its operations described above, derived gross revenues in excess of $250,000 and purchased and received at its Adrian facility goods and materials valued in excess of $50,000 directly from points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following a representation election, the Union was certified on October 6, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time registered nurses and licensed practical nurses employed by Respondent at its facility located at 730 Kimole Lane, Adrian, Michigan; but excluding professional employees, MDS Coordinators, Case Managers, Restorative-Rehabilitation employees, confidential employees, office clerical employees, guards, nursing assistants, housekeeping employees, laundry employees, dietary employees, cooks, maintenance helpers and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On about February 2, 2006, the Union, by letter, requested the Respondent to bargain, and, since April 28, 2006, the Respondent, by its agent Susan Stoddard, has refused to do so, and has withdrawn its recognition of the Union as the exclusive collective-bargaining representative of the unit. We find that this refusal constitutes an unlawful withdrawal of recognition and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after April 28, 2006, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and withdrawing its recognition of the Union as the exclusive collective-bargaining representative of the employees in the unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[5]

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, I.H.S. Acquisition No. 114, Inc. d/b/a Lynwood Manor, Adrian, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[3] Accordingly, because we find that the nurses do not "responsibly" direct the CNAs, it is unnecessary to address the issue of whether they exercise independent judgment. See *Golden Crest*, supra at 732, fn. 14.

[4] The Respondent's cross-motion to dismiss is therefore denied.

[5] The Respondent denies the complaint allegations that it has failed and refused to bargain with the Union, and that it has withdrawn recognition from the Union. We find that the Respondent's denials do not raise an issue warranting a hearing in this proceeding. The Respondent admits that the Union has requested bargaining, and the Respondent does not contend that it has offered or agreed to meet and bargain with the Union since April 28, 2006. Rather, it is clear from the Respondent's submissions that it is in fact refusing to bargain with the Union in order to obtain Board reconsideration or court review of the Board's determination that its RNs and the LPNs are not supervisors within the meaning of Sec. 2(11).

(a) Refusing to recognize and bargain with Local 79, Service Employees International Union, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time registered nurses and licensed practical nurses employed by Respondent at its facility located at 730 Kimole Lane, Adrian, Michigan; but excluding professional employees, MDS Coordinators, Case Managers, Restorative-Rehabilitation employees, confidential employees, office clerical employees, guards, nursing assistants, housekeeping employees, laundry employees, dietary employees, cooks, maintenance helpers and supervisors as defined in the Act, and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Adrian, Michigan, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2006.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted ByOrder of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with Local 79, Service Employees International Union, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time registered nurses and licensed practical nurses employed by us at our facility located at 730 Kimole Lane, Adrian, Michigan; but excluding professional employees, MDS Coordinators, Case Managers, Restorative-Rehabilitation employees, confidential employees, office clerical employees, guards, nursing assistants, housekeeping employees, laundry employees, dietary employees, cooks, maintenance helpers and supervisors as defined in the Act, and all other employees.

I.H.S. ACQUISITION NO. 114, INC. D/B/A LYNWOOD MANOR