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**The Arc of South Norfolk and American Federation of State, County & Municipal Employees, Council 93.** Case 01–RC–213174

July 31, 2019

DECISION ON REVIEW AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

The issue presented in this case is whether the Acting Regional Director properly found that the Employer’s program coordinators are not supervisors for the purposes of the Act.

On February 9, 2018, the Acting Regional Director issued a Decision and Direction of Election in which he found that the program coordinators are not supervisors and therefore were properly included in the petitioned-for unit. An election was held on February 28, 2018, and the Acting Regional Director issued a Certification of Representative on March 23, 2018.<sup>1</sup> Thereafter, in accordance with Section 102.67 of the Board’s Rules and Regulations, the Employer filed a timely request for review of the Decision and Direction of Election.<sup>2</sup> The Petitioner filed an opposition to the request.

On August 15, 2018, the Board granted the Employer’s request for review in part and invited briefing on whether the Employer’s program coordinators possess the authority to assign or responsibly direct employees within the meaning of Section 2(11) of the Act.<sup>3</sup> Thereafter, the Employer and Petitioner filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Having carefully considered the entire record in this proceeding, including the briefs on review, we find, for the reasons stated below, that the program coordinators possess the authority to assign, or effectively recommend assignment of, significant overall duties using independent judgment insofar as they assign clients to case managers.

<sup>1</sup> The Acting Regional Director also overruled objections filed by the Employer.

<sup>2</sup> The Employer did not seek review of the Acting Regional Director’s overruling of its objections or issuance of the Certification of Representative.

<sup>3</sup> The request for review was denied in all other respects.

<sup>4</sup> Accordingly, we find it unnecessary to address whether the program coordinators possess the authority to assign in any other respect, as well as whether they responsibly direct employees.

<sup>5</sup> All the Employer’s clients have a Day Habilitation Service Plan, or DHSP, prepared by an interdisciplinary team of the Employer’s staff and subject to approval by Knox or DeMerritt. The DHSP includes “concrete

We therefore reverse the Acting Regional Director and find that the program coordinators are supervisors within the meaning of Section 2(11).<sup>4</sup>

I. FACTS

The Employer operates programs for individuals with developmental and intellectual disabilities, including the day habilitation program at issue here, out of a facility in Westwood, Massachusetts. The American Federation of State, County, and Municipal Employees, Council 93 (the Petitioner) is seeking to represent a unit of all relief staff, assistant case managers, case managers, licensed practical nurses, physical therapy assistants, and program coordinators employed by the Employer.

Director Lisa Knox oversees the overall administration of the day habilitation program. Along with Senior Associate Director Diane DeMerritt, Knox supervises a resource manager, a health care supervisor, and the 10 Program Coordinators at issue in this case. Within the day habilitation program, clients with physical and mental disabilities come to the Westwood facility between the hours of 9 a.m. and 3 p.m. on multiple days during the week. The program is designed to help clients progress towards certain “goals,” or levels of functioning. To accomplish this, the clients are divided into different “group rooms” of 10 to 14 clients who have similar levels of functioning and similar support needs. Each “group room” is staffed by one program coordinator, who oversees the room every day; a few case managers, who are assigned a particular number of individual clients (their caseload) by the program coordinator; and one or two assistant case managers, who have no caseload. Depending on the size of the group room, case managers usually have a caseload of four to six clients. The program coordinators and case managers work with the clients to help them reach the goals specified in their service plans,<sup>5</sup> document the clients’ progress toward those goals using objective criteria, and assist clients with their personal care throughout the day, such as toileting and feeding. Assistant case managers generally assist all clients in a group room with personal care matters and do not take part in documentation.

measurable goals,” such as saying “good morning” four times a day or spending a certain amount of time in a social community. DHSPs are distinct from Individual Service Plans, or ISPs, which are state-imposed plans that also outline goals and guidelines for a given participant. ISPs are tied specifically to individuals with certain types of funding from the state. Unlike DHSPs, ISPs are not generated by the Employer. Thus, only some of the employer’s clients have an ISP while all have a DHSP. We do not believe these service plans limit the program coordinators’ exercise of independent judgment in making caseload assignments because the service plans specify habilitation goals but do not circumscribe authority with respect to caseload assignments.

Program coordinators are responsible for choosing which clients are assigned to each case manager. The program coordinator for each group room tells Knox and DeMerritt which clients should be assigned to each case manager in the group room, and either Knox or DeMerritt then fills out and signs the “form letters,” which are required by state regulations, officially “assigning” those clients to the case manager. Knox and DeMerritt both testified that their role in assigning clients to case managers is limited to filling out the form letter, and that they have never overruled or modified a program coordinator’s caseload suggestions. The program coordinators who testified similarly stated that they could not recall any instance in which their recommendations with respect to caseloads were not approved. Aside from making these initial caseload assignments, program coordinators may also reassign clients from one case manager to another within their group room without needing to seek approval from Knox or DeMerritt.

Program coordinators take several factors into account when making caseload decisions, including determining whether a case manager has the experience to handle a particular client and making a judgment about which case manager might have the best relationship with that client going forward. Knox described the caseload assignment process, observing that she and DeMerritt rely on the program coordinators to “look at the whole person, to look at the individual holistically and look at their interest, their capabilities, how they would respond to a particular staff person.” DeMerritt identified reasons that a program coordinator might make or modify a caseload assignment: for example, a program coordinator might transfer a client from one case manager to another if the client’s family member had a problem with the assigned case manager, or if the case manager was having difficulty working with that client.

The program coordinators themselves offered examples of specific caseload assignment decisions that corroborated Knox and DeMerritt’s testimony. Program coordinator Udemagwuna described how he determined the first client he should assign to a new case manager who had been placed in his group room. Udemagwuna stated that he wanted to evaluate the new case manager’s skills and experience level before making the assignment; more particularly, he wanted to gauge whether she would be able to have a productive relationship with a parent or guardian who might be more demanding than others. Program coordinator Furlong similarly described how she decided to make caseload assignments when two new clients were reassigned to her group room from another room. Furlong stated that she engaged in a “collaborative” discussion with the case managers in her group room to determine

who had the “best relationships” with the two clients at issue before making suggestions to Knox and DeMerritt. Likewise, program coordinator Wall testified that she made caseload suggestions based on “who might fit with whom.” She identified a specific occasion when a case manager requested to have a client reassigned because of an unidentified “issue” with that client, and stated that she “rearranged” that case manager’s caseload in response to the request.

In addition to their role in assigning caseloads, program coordinators identify themselves as “supervisors” when signing off on time-off requests, performance evaluations, and community outing approval forms; participate in meetings with management and supervisory training programs that other group room staff do not attend; and are paid more than other group room staff.

## II. THE ACTING REGIONAL DIRECTOR’S DECISION

In his decision, the Acting Regional Director found that, even if program coordinators possess the authority to assign clients to case managers, the record is insufficient to meet the Employer’s burden to prove that the program coordinators exercise independent judgment in doing so. The Acting Regional Director characterized DeMerritt’s testimony as “conclusory” because it did not provide specific examples of the factors that program coordinators take into account when assigning caseloads; the Acting Regional Director did not, however, address or acknowledge the additional testimony provided by Knox, Udemagwuna, Furlong, and Wall. The Acting Regional Director further found that, even if the program coordinators did make assignments on the basis of a particular client’s personality and abilities, this would not constitute independent judgment, because the clients are arranged into group rooms based on similar levels of functioning, and as such there is no need to analyze the particular client in relation to the case manager’s skill set once the client is in a particular group room. Finally, the Acting Regional Director observed that any “secondary indicia” of supervisory status, such as the higher pay of program coordinators and the fact that they participate in supervisory training programs, were insufficient to prove supervisor status standing alone.

## III. ANALYSIS

“[I]ndividuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., ‘assign’ and ‘responsibly to direct’) listed in Section 2(11); (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.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (internal quotations omitted).

The burden of establishing that a given employee is a supervisor lies with the party asserting supervisor status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001). Purely conclusory evidence does not satisfy that burden, and supervisory status is not proven where the record evidence “is in conflict or otherwise inconclusive.” See *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); see also *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). However, a party seeking to prove supervisory status need only establish it by a preponderance of the evidence. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

For the purposes of Section 2(11), “assign” refers 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.” See *Oakwood Healthcare*, supra, at 689. Even where a putative supervisor does not engage in the actual assignment of employees, supervisory status may be found where the putative supervisor engages in “effective recommendation” with respect to assignment (or any of the other supervisory functions). *Id.* at 687. A putative supervisor engages in “effective recommendation” where his or her recommendations are routinely or usually followed without independent investigation. See, e.g., *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 7 (2016); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474–1475 (2004); *Berger Transfer & Storage*, 253 NLRB 5, 10 (1980), enf. 678 F.2d 679 (7th Cir. 1982).

As is the case with all supervisory functions, the putative supervisor must exercise independent judgment in making such assignments. *Oakwood Healthcare* at 692–693. To exercise independent judgment, “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* A judgment is not independent if “it is dictated or controlled by detailed instructions” or if there is “only one obvious and self-evident choice.” *Id.* at 693. Nor is a judgment independent if it is made on the basis of well-known employee skills or solely with respect to whether the employee is capable of doing the job. See *KGW-TV*, 329 NLRB 378, 381–382 (1999); *GS4 Government Solutions*, 363 NLRB No. 113, slip op. at 3 (2016).

In the healthcare context, the Board has held that assignment encompasses the responsibility to assign employees to care for particular patients. See *Oakwood Healthcare*, supra, at 689. The Board has also commented that, in this setting, independent judgment is probably involved if a putative supervisor weighs the “individualized condition and needs of a patient against the skills or special training

of available nursing personnel,” and has found that putative supervisors exercised independent judgment by matching a “nurse’s skill set and level of proficiency at performing certain tasks . . . [to the] needs of a particular patient.” *Id.* at 693, 695.

We find that the Program Coordinators assign, or at least effectively recommend assignment, within the meaning of Section 2(11). First, assigning clients to Case Managers constitutes assignment of “significant overall duties.” In *Oakwood Healthcare*, the Board found that charge nurses engaged in the assignment of significant overall duties where “[a]t the beginning of each shift, and as new patients are admitted thereafter, the charge nurses for each patient care unit (except the emergency room) assign the staff working the unit to the patients that they will care for over the duration of the shift.” *Id.* at 695. The Board observed that “[t]he charge nurses’ assignments determine what will be the required work for an employee during the shift, thereby having a material effect on the employee’s terms and conditions of employment,” and therefore constituted “giving significant overall tasks to an employee.” *Id.* Similarly, the program coordinators here assign clients to case managers, and in doing so determine the required work for each case manager. Moreover, the Program Coordinators here assign caseloads on a semi-permanent basis, not just for individual shifts, further illustrating that these types of assignments involve significant overall duties.

Furthermore, although Knox and DeMerritt sign the form letters that document the assignment of a client to a particular case manager, they testified that they do not make independent caseload decisions, but rather that they always accept the program coordinator’s recommendation to assign a specific client to a particular case manager. Likewise, none of the program coordinator who testified identified any occasion on which their caseload recommendations were not followed. Thus, even if Knox and DeMerritt’s documentation of the assignment via the form letter constitutes the formal “assignment” of the caseloads, the program coordinators effectively recommend the assignments, which is sufficient to confer supervisory status. *Id.* at 689 (“It follows that the decision or effective recommendation to affect one of these—place, time, or overall tasks—can be a supervisory function.”) Accordingly, we find that the program coordinators here “assign,” or at least “effectively . . . recommend” the assignment of, significant overall duties within the meaning of Section 2(11).

Second, the evidence establishes that the Program Coordinators also exercise independent judgment in assigning caseloads. Although the clients in each group room are placed in group rooms with other clients of similar

basic needs and functional abilities, and every Case Manager has the basic job proficiencies and skills to perform their duties with respect to any given client in the group room, the Program Coordinators do not simply assign new clients to any Case Manager who is available, or to the Case Manager with the smallest caseload at the time the client is placed in the room. Rather, the record demonstrates that Program Coordinators engage in a more substantive analysis—the nuanced question of which Case Manager has the best “fit” or “chemistry” with a client, as well as which Case Manager will be able to form the best relationship with that client’s parents or guardians.

These considerations are analogous to the considerations that established the exercise of independent judgment in *Oakwood Healthcare*. There, the Board found that the putative supervisors utilized independent judgment in assigning nurses to patients in part because they would “take other nurses’ individual expertise into account, such as assigning a nurse who is particularly proficient in administering dialysis to a kidney patient,” and would “look to whether the available staff has particular skill or training in dealing with certain kinds of patients, such as chemotherapy, orthopedic, or pediatric patients.” 348 NLRB at 697. The Board further highlighted testimony that indicated that the putative supervisors would make determinations based on personal relationships between patients and clients, such as considering “patients’ gender-based sensitivities,” “the aggressiveness of the patient and a care giver’s ability to respond to the same,” “personalities,” and, as one putative supervisor testified, “reassess[ing] patient care assignments during a shift because of personality clashes between a patient and a nurse.” *Id.* at 696–697.

The relevant testimony makes clear that Program Coordinators make “informed judgments” in assigning caseloads to Case Managers, considering the individualized strengths and weaknesses of the Case Managers and the personalities of the Case Managers, the clients, and the clients’ parents or guardians. Indeed, the record contains scant contradictory evidence. Instead, the testimonies of Knox and DeMerritt, both of whom discussed the types of factors that Program Coordinators take into account when assigning caseloads, were corroborated by the testimony of Program Coordinators Udemagwuna, Furlong, and Wall, who all testified to concrete and identifiable instances in which they assigned or reassigned clients to Case Managers based on the expertise and experience of the Case Manager (Udemagwuna) or the “relationships” or “chemistry” between the Case Manager and the client (Furlong and Wall). We therefore find that the Program Coordinators supervisory status is established.

Secondary indicia of the Program Coordinators’ supervisory status further buttress this conclusion. Such indicia may be relevant where, as here, at least one of the primary indicia set forth in Section 2(11) is present. See, e.g., *Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007). In this regard, the Program Coordinators are paid a higher salary than the other individuals in their group rooms. See *American River Transportation Co.*, 347 NLRB 925, 927 (2006). They also attend training for supervisors. See *McClatchy Newspapers, Inc.*, 307 NLRB 773, 773 (1992). And they sign off on forms as “supervisors.” The Employer accordingly treats and holds out the Program Coordinators to others as supervisors. *Sheraton Universal*, *supra*, at 1118. Having found that the Program Coordinators possess supervisory authority with regard to assignment, we find that this secondary evidence corroborates our determination of their 2(11) status.

#### CONCLUSION

For the foregoing reasons, we find that the Employer’s Program Coordinators possess the authority to assign clients to Case Managers, as well as secondary indicia, and therefore are supervisors within the meaning of Section 2(11) of the Act. Accordingly, we remand this case to the Acting Regional Director for further action consistent with this Decision.

#### ORDER

The case is remanded to the Acting Regional Director for further appropriate action.

Dated, Washington, D.C. July 31, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

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