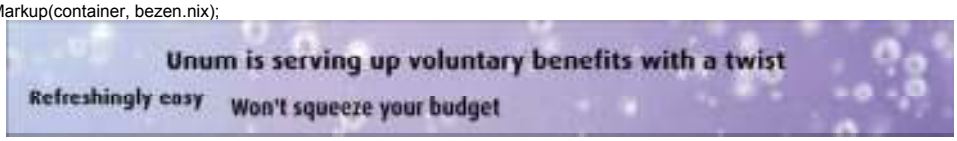

Licensed Practical Nurses Ruled Ineligible for Union Representation

10/25/2012 By Eileen Christina Zorc

An employer did not violate the National Labor Relations Act (NLRA) in refusing to bargain with a union representing licensed practical nurses (LPNs), because the LPNs were supervisors under the NLRA and, therefore, ineligible for union representation, the 11th U.S. Circuit Court of Appeals held.

Lakeland Healthcare Associates LLC is a nursing home and long-term-care facility that employs LPNs, RNs and certified nursing assistants (CNAs). Whether Lakeland violated the NLRA turned on whether its LPNs were regarded properly as "employees" or "supervisors." LPNs are guaranteed the right to unionize only if they are "employees." An individual is a "supervisor" under the NLRA if 1) he or she has the authority to perform one of the 12 supervisory functions described in the NLRA (for example, hiring or disciplining); 2) the exercise of that authority requires the use of independent judgment; and 3) such authority is held in the interest of the employer. The dispute between Lakeland and the National Labor Relations Board (NLRB) focused on what level of authority the LPNs possessed.

Lakeland uses a progressive discipline system that involves "level-one" (for minor infractions) or "level-two" coaching (for serious violations) for employees who engage in misconduct or fail to meet performance expectations. LPNs coach CNAs either on their own or at management's discretion.

In ruling that the LPNs had the authority to perform one or more of the 12 supervisory functions described in the NLRA, the court pointed to the written job description for the LPNs that stated that their primary purpose included supervising the CNAs' day-to-day nursing activities. The court also cited testimony explaining that LPNs were authorized to coach or suspend a CNA, and would be held responsible if a CNA failed to perform his or her job properly, even though the director of nursing had not actually seen that happen.

The court rejected the board's argument that "sporadic" examples of LPNs conducting level-two coachings did not make the LPNs supervisors. The court said it assumed that serious violations were rare; thus, the key issue was not how many times the LPNs exercised authority, but whether they held the authority. The court highlighted the uncontradicted testimony of a manager and former LPN who testified that she had disciplined CNAs on her own, without involving a supervisor.

The court also discarded the board's argument that the LPNs were merely reporting misconduct or performance problems. The court reasoned that LPNs had to exercise their judgment in deciding whether CNAs had engaged in "negligent conduct," "harassment," or "fraudulent activity," among other violations.

The NLRB's regional director held a hearing and issued a decision finding that the LPNs were not supervisors. After the NLRB denied review of the decision, the union filed an unfair labor practice charge with the NLRB, which then granted a summary judgment ruling that the LPNs were not supervisors.

In overturning the board's decision, the court emphasized that the NLRB had "meticulously excluded or disregarded record evidence, which, when taken into account, compels a different result." For example, the NLRB ignored testimony that LPNs issued and solely handled approximately 70 percent of the coaching.

The court concluded that the evidence as a whole establishes that the LPNs' interests are aligned with management and that they are supervisors. The court noted that its decision is in line with decisions by the 4th and 6th circuits, but in conflict with decisions in the 1st and 2nd circuits.

Lakeland Health Care Associates LLC v. NLRB, 11th Cir., Nos. 11-12000, 11-12638 (Oct. 2, 2012).

Professional Pointer: If employees are given clear authority to discipline other employees and engage in other supervisory functions spelled out in the NLRA, they may be considered supervisors, even if they exercise such authority infrequently.

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