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Hospital's RNs held not supervisors under NLRA**By Lawrence Peikes**

Registered nurses were not supervisors ineligible to vote in a union election because they did not exercise independent judgment, did not supervise patient care and had a limited role in evaluating and reprimanding lower-level employees, the 1st U.S. Circuit Court of Appeals recently held.

In addition, the court held that the union's distribution of marked-up sample ballots did not invalidate the election results.

The Federacion Central de Trabajadores, UFCW, Local 481, AFL-CIO filed a petition with the National Labor Relations Board (NLRB) seeking to represent a bargaining unit comprising Hospital General Menonita's registered nurses. The hospital opposed the petition on the ground that the registered nurses were supervisors under the National Labor Relations Act (NLRA). After various procedural steps, the NLRB ultimately rejected the hospital's claim. The union prevailed in a close vote.

Just before the scheduled election, union organizers standing near the only entrance and exit from the polling area had distributed leaflets displaying the official NLRB sample ballot, marked with an "X" in the "Yes" box, indicating a vote in support of the union. This leaflet, though identical in content to the NLRB's official notice of election, was printed on yellow paper. The NLRB's official notice was printed on blue.

The hospital filed a post-election objection to the union's clever use of the sample ballot, claiming it was confusing and had an undue influence on the vote. Again, the NLRB found no merit to the hospital's position, and certified the election results. The dispute eventually made its way to the 1st U.S. Circuit Court of Appeals.

On the threshold issue of whether the registered nurses were employees eligible for union representation, the court restated the three-part test for determining supervisory status under the NLRA, namely, whether an individual:

- Engages in any one of 12 supervisory functions.
- Exercises authority requiring the use of independent judgment.
- Holds authority in the interest of the employer.

The hospital argued that the registered nurses performed three distinct supervisory functions: assigning work to subordinates, supervising the care of patients, and evaluating and reprimanding employees.

Because work was doled out through a cooperative process, rather than by directives of the registered nurses, the court concluded that the independent judgment requirement was not met.

The court also rejected the hospital's position that the registered nurses supervised patient care. Attending physicians were the true supervisors of patient care, as their orders set forth patient treatment protocols. Essentially, the court held, the nurses were merely a conduit between the physicians and the appropriate technicians or subordinate employees. Moreover, nurses were not held accountable for the work of those technicians. A significant body of precedent supported the conclusion that nurses exercise no independent judgment where their activities are constrained by attending physicians' detailed orders.

Finally, the court observed that the nurses' role in evaluating and reprimanding employees was limited in scope, and simply involved oral reporting to area supervisors. To effectively demonstrate supervisory status on such a theory, the hospital would have to show that the area supervisors routinely relied on the nurses' recommendations in the exercise of their disciplinary power. No such showing was made.

Regarding the marked-up sample ballots, the court disagreed with the hospital's contention that the leaflets gave the impression that the NLRB favored the union. The leaflets were distributed by known union

organizers and printed on paper that was a different color than the official notice of election, which were displayed in prominent places throughout the hospital. Moreover, a disclaimer on the NLRB official notice notified employees that it was the Board's only official notice, thereby making confusion unlikely.

Hospital General Menonita v. National Labor Relations Board, 1st Cir., No. 03-2734, Dec. 23, 2004.

Professional Pointer: Few hospitals have succeeded in arguing that registered nurses are supervisors, and this decision is illustrative of why that is so: Registered nurses typically lack the degree of authority and autonomy that is the hallmark of supervisory status. Beyond the health care industry, this case provides a roadmap for determining whether a particular employee is indeed a supervisor and thus ineligible to participate in a union election. Caution is the watchword, however, as the NLRB and the courts will carefully probe the duties actually performed in determining supervisory status. This case also illustrates the difficulty of overturning the results of a union election. Unions, and to a lesser extent employers, have substantial latitude in soliciting votes for their cause. Consequently, an effective pre-election campaign is the key to an employer's success.

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Editor's Note: This article should not be construed as legal advice.

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