

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**BARSTOW COMMUNITY HOSPITAL – OPERATED  
BY COMMUNITY HEALTH SYSTEMS, INC.**

and

**Case 31-CA-26057**

**UNITED NURSES ASSOCIATION OF CALIFORNIA,  
UNION OF HEALTH CARE PROFESSIONALS,  
NUHHCE, AFSCME, AFL-CIO**

**Nikki N. Cheaney, Atty.**, Los Angeles, California,  
Counsel for the General Counsel

**Don T. Carmody, Atty.**, Woodstock, New York  
Counsel for Respondent

**Cynthia L. Hernandez, Atty.**, Gilbert & Sackman,  
Los Angeles, California, Counsel for the  
Charging Party

**SUPPLEMENTAL DECISION**

Remand Order

By Order dated September 30, 2006, the National Labor Relations Board (the Board) remanded this matter for further consideration in light of its recent decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Croft Metals, Inc.*, 348 NLRB No. 38 (2006); and *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006), which addressed the meaning of terms “assign,” “responsibly to direct,” and “independent judgment,” as used in Section 2(11) of the Act, under the framework of the Supreme Court’s decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).

The Respondent’s Motion for Reconsideration  
Of Motion to Reopen the Record

The Board’s Order allowed the parties to file briefs on the remand issues and, if warranted, directed reopening the record to obtain evidence relevant to the principles enunciated in *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest*. By Motion to Reopen Record dated November 20, 2006, Respondent sought to reopen the record to present additional testimony and documentary evidence regarding alleged supervisory responsibilities of Lois Sanders (Ms. Sanders) whose supervisory status is at issue. By order dated November 27, I denied Respondent’s motion as unwarranted and set a date for the filing of briefs.<sup>1</sup> All parties have filed timely briefs herein concerning the issue of whether Ms. Sanders is a supervisor within the meaning of Section 2(11) of the Act. Although titling its submission as

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<sup>1</sup> The original due date of January 4, 2007 for the filing of briefs was extended upon Respondent’s request to January 16, 2007.

a Brief on Remand and Motion for Reconsideration of Motion to Reopen the Record, Respondent has presented argument only on its Motion for Reconsideration. Respondent asserts that the filing of a brief based upon the record presently developed is pointless:

5           Thus, inasmuch as the hospital never undertook during the Trial...to prove, let  
alone argue...that Ms. Sanders' responsibilities strictly as a Registered Nurse,  
irrespective of her role as a Clinical Coordinator, involved the performance of  
"supervisory" functions, the Record is barren of evidence of Ms. Sanders'  
supervisory status strictly in her capacity *qua* Registered Nurse—that is to say,  
10           the Record already developed instead only contains evidence and legal  
argument of Ms. Sanders' supervisory status as Clinical Coordinator.  
Consequently, there is no basis, let alone an insufficient basis, for Barstow to  
argue from the existing Record that, under the principles articulated by the Board  
in *Oakwood*, Ms. Sanders' status as a Registered Nurse, alone, was supervisory.

15           While it is true, as the Respondent contends, that the primary focus of the parties'  
examination in the underlying hearing was on Ms. Sanders' duties as relief CC, it is not true that  
the record is silent regarding Ms. Sanders' responsibilities as an RN. The record provides  
pertinent information regarding Ms. Sanders' RN duties in the ER.

20           During the relevant period, core staffing in the emergency room (ER) of the  
Respondent's 40-50 bed acute-care facility consisted of two registered nurses (RN), an ER  
technician, and two additional staff members who worked part of the daytime ER shifts. The ER  
manager and a clinical coordinator (CC) had overall responsibility for nursing activities on the  
25           ER day shift. On the night shift, a CC provided ER oversight. The CC insured that the hospital  
ran efficiently and smoothly, dealt with interpersonal employee conflicts, gathered supplies, and  
handled staffing. In making staffing decisions and assignments, the CC took into account the  
acuity of patients and the relative skills, experience, and trustworthiness of the available staff.  
The CCs gave no patient care, although they might fill in as needed for an absent RN. On  
30           occasion, the ER registered nurses were called upon to fill in as relief clinical coordinator on the  
night shift.

          At all times relevant, Ms. Sanders worked as an RN in the ER. The position title noted  
on her Position Description/Evaluation of May 6, 2002 was "Registered Nurse...Emergency  
35           Room," and her position description was summarized as follows: "The Registered Nurse shall  
be responsible for planning, supervising and evaluating the nursing care of patients and for  
correlating the nursing process, the medical plan of care and policies." Ms. Sanders usually  
worked the ER night shift from 7 p.m. to 7 a.m., and her duties included triaging patients,  
40           carrying out doctor orders, and transferring or discharging patients as directed. In fulfilling her  
duties as an RN, Ms. Sanders did not make assignments to other workers, evaluate their  
performance, or discipline them; her only involvement with corrective action was to report  
problems to the CC or ER manager. Beginning a month or two after employment, Ms. Sanders  
filled in as CC once or twice a week.

45           Regarding Ms. Sanders' work as an RN, the following is clear from the record: (1) at all  
relevant times, the Respondent's ER had a complement of only two RNs who were overseen by  
a CC; (2) the CC had full oversight responsibility for the ER; (3) the CC was responsible for  
staffing in the ER; (4) as an RN, Ms. Sanders had no responsibility for making work  
assignments to other employees; and (5) as an RN, Ms. Sanders had no responsibility for  
50           evaluating the work performance of other employees or disciplining them.

The Board's decision in *Oakwood Healthcare, Inc.*, supra, deals with the issue of whether certain charge nurses are supervisors within the meaning of the Act. In arriving at its conclusions, the Board adopted definitions for the terms "assign," responsibly to direct," and "independent judgment," as used by Section 2(11) of the Act in denoting supervisory authority.

5 As to the term "assign," the Board construed it to mean designating an employee to perform significant overall duties. Directing an employee to perform discrete tasks within such an assignment, as in giving an ad hoc instruction, is not, in the Board's view, indicative of supervisory authority to "assign."<sup>2</sup> With regard to the term "responsibly to direct," the Board concluded that for an individual's action to be so described, the directing person "must be  
10 accountable for the performance of the task so as to fundamentally align the person with management."<sup>3</sup> Finally, the Board considered that "independent judgment" is exercised when an individual acts or recommends action free of the control of others, which action rises above the merely routine or clerical.<sup>4</sup>

15 With the Board's definitions in mind, it is apparent that Ms. Sanders' performance of RN functions, in and of itself, does not fit the Board's denotation of supervisory status. The Respondent ceded oversight responsibility in its ER to a CC. The CC, not Ms. Sanders, was responsible for staffing the ER, making work assignments, and evaluating the work performance of ER employees. In such a limitedly staffed department as the Respondent's ER, it is highly  
20 improbable that two individuals would possess Section 2(11) authority to exercise independent judgment in assigning and directing employees. Since clearly the CC possessed such authority, a fortiori, Ms. Sanders, when functioning as an RN, did not. Accordingly, the Respondent's Motion for Reconsideration of Motion to Reopen Record in order to adduce evidence of Ms. Sanders' RN responsibilities, irrespective of her role as a relief CC, is denied.

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#### Consideration of Underlying Decision in Light of *Oakwood Healthcare, Croft Metals, and Golden Crest.*

30 While the Respondent's brief on remand appears to concede that the Board's decisions in *Oakwood Healthcare, Inc.*, *Croft Metals, Inc.*, and *Golden Crest Healthcare Center* would not alter the findings in the underlying decision, the Board's Order to reconsider those findings dictates further review. In the recent decisions, the Board reiterated that the burden of proving supervisory status rests on the party asserting it. After reconsideration of the underlying findings of fact in light of *Oakwood Healthcare, Inc.*, *Croft Metals, Inc.*, and *Golden Crest  
35 Healthcare Center*, I find that the Respondent has failed to meet its evidentiary burden.

40 The question of Ms. Sanders' supervisory status rests on her work as a relief CC. In *Oakwood Healthcare, Inc.*, supra at slip op. 11, the Board addressed the status of individuals who are engaged part of their work time in supervisory roles and held to its established legal standard that determination of supervisory status in such situations depends on whether the individual spends a regular and substantial portion of work time performing supervisory functions. As the Board did not modify its standard for assessing the regularity and  
45 substantiality of part-time performance of supervisory functions, there is no basis for revising the earlier finding that Ms. Sanders served as a relief CC only on an ad hoc basis and did not have any regular, established assignment as such.

<sup>2</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. 4-5.

<sup>3</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. 8.

50 <sup>4</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. 9-10. The concepts detailed in *Oakwood Healthcare, Inc.* are echoed in *Croft Metals, Inc.*, supra, and *Golden Crest Healthcare Center*, supra.

Even assuming Ms. Sanders spent a regular and substantial portion of her work time as relief CC, utilizing the Board's definitions set forth in *Oakwood Healthcare, Inc.*, and reiterated in *Croft Metals, Inc.*, and *Golden Crest Healthcare Center*, the evidence fails to establish that Ms. Sanders exercised independent judgment in assigning or responsibly directing any employee when she served as relief CC. In *Oakwood Healthcare, Inc.*, the Board construed the authority "to assign" to involve the act of designating an employee to a specific place in which to perform his or her work, appointing an employee to a particular time during which to perform that work, or giving an employee significant overall duties or tasks to perform. The authority "responsibly to direct" involves deciding which job shall be undertaken and who shall do it, provided that the direction is both responsible and given with independent judgment. For the direction to be responsible, the person giving the direction must be accountable for the performance of the task under penalty of adverse consequences for improper execution. "Independent judgment" does not exist if directions are dictated or controlled by detailed instructions that do not allow for discretionary choices.<sup>5</sup>

During the periods she filled in as CC, Ms. Sanders spent the bulk of her work time performing nursing duties and was instructed to contact management regarding any nonroutine issues. As relief CC, Ms. Sanders was expected to follow a staffing book prepared by higher authority, which contained detailed staff guidelines, staffing grids, master schedules, daily assignment sheets, and other pertinent administrative information and instructions. Ms. Sanders assigned admitted ER patients to the nursing staffs of two medical-surgery floors by alternating between the two floors. Any disagreement over patient placement was referred to upper management. Ms. Sanders could request help as needed from other departments or call in unscheduled employees but had no authority to affix consequences to any refusal to comply and was not accountable for other employees' performance of tasks. Any employee misconduct was to be referred to upper management. Clearly, when functioning as a relief CC, Ms. Sanders was not free from the control of others but followed the detailed instructions and policies provided in the staffing book and formed no opinions or evaluations by discerning and comparing data. In such circumstances, following the instruction of *Oakwood Healthcare, Inc.*, I find that Ms. Sanders did not responsibly direct other employees' work. While Ms. Sanders may, in a broad sense, have assigned work to employees by requesting help, calling in unscheduled employees, and making bed assignments for patients admitted to the hospital from the ER, she did not exercise independent judgment in doing so. Any judgment exercised by Ms. Sanders was dictated or controlled by detailed instructions and policies established by a higher authority that did not allow for discretionary choices and, thus, was not "independent."

Accordingly, having reviewed the evidence in the light of the Board's recent decisions construing Section 2(11) of the Act, I find the evidence does not establish that Lois Sanders was a supervisor within the meaning of that section on August 31 and/or September 26, 2002, when Respondent respectively suspended and fired her.

Based on these findings and the findings of fact and conclusions of law contained in the decision herein issued on August 29, 2003, and the entire record, I issue the following recommended<sup>6</sup>

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<sup>5</sup> *Oakwood Healthcare, Inc.*, supra, at slip op. 4-10

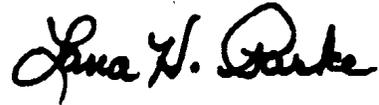
<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

5 The Respondent, Barstow Community Hospital – Operated by Community Health  
Systems, Inc., Barstow, California, its officers, agents, successors, and assigns, shall comply  
with the Order issued herein on August 29, 2003.

Dated, Washington, D.C., February 23, 2007.

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Lana H. Parke  
Administrative Law Judge

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