

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

A AND G INC., d/b/a ALSTYLE APPAREL

and

Case 21-CA-37029

UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL NO. 324, UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION

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Counsel for the Charging Party, Los Angeles, California.

SUPPLEMENTAL DECISION

Remand Order

LANA H. PARKE, Administrative Law Judge. By Order dated March 19, 2007, the National Labor Relations Board (the Board) remanded this matter for further consideration of the supervisory status of Shift Leader Kiet Ly (Mr. Ly) 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).¹

Consideration of the Underlying Decision in Light of
Oakwood Healthcare, Croft Metals, and Golden Crest

In *Oakwood Healthcare, Inc.*, supra, under the framework of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), 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. The Board reiterated that the burden of proving supervisory status rests on the party asserting it.² See also *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1866-1867 (2001); *Dean & Deluca of New York, Inc.*, 338 NLRB 1046, 1047 (2003). Thus the Respondent bears the burden of proving its

¹ 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 Order dated April 2, 2007, the parties were given until April 9, 2007 to seek to reopen the record. No party responded. By order dated April 13, 2007, the date for filing briefs was set for May 8, 2007. All parties have filed briefs.

² *Oakwood Healthcare, Inc.*, supra, at slip op. 3.

contentions that Mr. Ly possessed authority to assign work to and responsibly direct the work of knitting department machine operators, or effectively to recommend such actions, and that he exercised his authority with independent judgment and not in a merely routine or clerical manner.³

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The question of Mr. Ly's supervisory status rests on his authority as a knitting department shift leader in which position he oversaw the work of production employees on a given shift, each of whom operated as many as five machines at a time. Machine operation varied in complexity and difficulty, and Joaquim Orriols (Mr. Orriols), the Respondent's general manager, trained the shift leaders on how to work with employees, how to find out which machine employees felt comfortable with, and how to make machine assignments, as appropriate assignment was crucial to production. According to Mr. Orriols, he "spent a lot of hours every day teaching...the area of the assignment." Given the frequency and duration of Mr. Orriols' training, an inference can reasonably be drawn that the training included detailed and comprehensive guidelines for determining employee capacity and experience.

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On a daily basis, Mr. Orriols determined which machines would be operated by assessing production needs and machinery operational availability. Prior to the beginning of each shift, Mr. Orriols provided the shift leaders with preprinted forms entitled "Machine Assignment Form" on which were listed the machines to be run that shift. The shift leaders utilized the form and their knowledge of the capabilities of each worker to assign the machines. According to Mr. Orriols, once a shift leader knew his coworkers' experience, machine assignment was an easy matter. If an employee complained that the machine assignment was onerous, the shift leader reduced the number of machines assigned and discussed the matter with Mr. Orriols the next day. In the last three years, five or six employees have complained to Mr. Orriols about their machine assignments. On those occasions, Mr. Orriols met with employee and shift leader to resolve the problem.

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In addition to assigning machines, the shift leaders oversaw the production employees' work, instructed and assisted other employees in operating machines, and monitored safety compliance and productivity. As needed, they filled in for absent machine operators. It can be inferred that shift leaders bore some responsibility for meeting production goals by the fact that the Respondent, in August 2005, transferred Mr. Ly to the first shift with the object of improving production. However, it is unclear what, if any, consequences attended failure to meet production goals.

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Mr. Orriols determined when overtime would be worked, which machines would be used, and the number of employees required. When notified by Mr. Orriols that overtime workers were needed, the shift leaders chose those employees capable of running the designated machines. There is no evidence as to whether employees could decline or protest overtime; at times, overtime was assigned on a voluntary basis, but the record is unclear as to the frequency or circumstances of voluntary versus involuntary overtime.

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The shift leaders were expected to report to management such employee infractions as not keeping the work station clean or safety breaches. Mr. Ly's signature appears along with those of admitted supervisors on certain documented disciplinary actions for knitting department employees. However, Mr. Ly had no authority to issue oral or written warnings and was not

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³ All of the Respondent's shift leaders exercised the same degree of authority. References to shift leaders' authority comprehend that of Mr. Ly.

consulted before imposition of such.⁴ Should a disciplinary issue arise, Mr. Orriols expected Mr. Ly to make a note of the situation and leave it on his desk. In unusual situations, Mr. Ly could send an employee home and review the matter with Mr. Orriols the next day. Mr. Ly could also permit an employee to leave early, following the same notification procedure.

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In *Oakwood Healthcare, Inc.*, the Board construed the authority “to assign” to involve the act of designating an employee to a specific place (such as a location, department, or wing), to a time (such as a shift or overtime period), or to perform significant overall duties. Directing an employee to perform discrete tasks within such an assignment, as in giving an ad hoc instruction, was not, in the Board’s view, indicative of supervisory authority to “assign.”⁵ Here, the Respondent’s shift leaders did not designate the place or time in which the production employees would work or the overall duties they would perform. A managerial level above shift leader determined which employees would work in knitting production, the shifts they would work, and what overall work they would perform. The machines utilized in the knitting department were discrete components of the overall work assignment. The shift leaders did not determine which machines would operate, and their assignments of employees to specific machines were dictated solely by machine availability and employee capability, the determination or guidelines for which rested elsewhere. The shift leaders’ machine assignments are analogous to the rotation of different tasks described in *Croft Metals*, which, in the Board’s view, more closely resembles ad hoc instruction than work assignment and does not reflect the authority to “assign” as described in *Oakwood Healthcare, Inc.* See *Croft Metals, Inc.*, 348 NLRB No. 38, slip op. 7 (2006). Accordingly, I find Mr. Ly had no authority to “assign” employees.

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The authority “responsibly to direct,” arises when an individual decides “what job shall be undertaken next or who shall do it, ... provided that the direction is both ‘responsible’ ... and carried out with independent judgment.”⁶ “[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly... Thus, to establish accountability for purposes of responsible direction, 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 also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”⁷

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⁴ No examples were given of Mr. Ly’s handling any employee discipline, but Martin Bui cited the following example of how, as a shift leader, he would handle a disciplinary matter: “...if that employee [left early], I would write a note and give to [Grace Au, Human Resources Representative] and it depends on her decision. She would inquire how often would this person do that...she would say, today or tomorrow, get that person to come up to the office and talk to her.”

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⁵ *Oakwood Healthcare, Inc.*, supra, at slip op. 4-5.

⁶ *Croft Metals, Inc.*, supra at slip op. 7, quoting *Oakwood Healthcare, Inc.*, supra, at slip op.

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⁷ Id. slip op. at 8.

Here, the shift leaders selected employees for specific machines, instructed employees on proper machine operation, oversaw the operators' work, and corrected improper performance, all to achieve production goals.⁸ Although unclear to what extent, it appears the shift leaders were accountable for the job performance of the employees assigned to them from which can be inferred that "some adverse consequence [might befall the shift leaders] if the tasks performed [were] not performed properly." See *Oakwood Healthcare*, supra at slip op. 7-8; *Croft Metals*, supra at slip op. 8. Accordingly, the preponderance of the evidence supports a finding that the shift leaders "responsibly directed" the machine operators.

It remains to determine whether the Respondent has met its burden of proving that the shift leaders' responsible direction of employees is exercised with independent judgment. The Board considers that "independent judgment" is exercised when an individual "act[s] or effectively recommend[s] action, free of the control of others and form[s] an opinion or evaluation by discerning and comparing data," which action rises above the merely routine or clerical.⁹ "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company rules or policies, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement."¹⁰ Purely conclusory evidence is insufficient to establish supervisory status. *Austal USA, L.L.C.*, 349 NLRB No. 51 (2007), FN 6.

In overseeing the machine operators' work, there is no evidence Mr. Ly independently devised work plans or control procedures or did other than follow the guidelines and requirements prescribed by Respondent. Rather, the evidence shows that Mr. Orriols assessed production needs, daily specified which machines would be operated, and spent "a lot of hours every day" providing extensive training to shift leaders regarding their machine assignment duties. Once a shift leader knew his production workers' experience—knowledge obtained through Mr. Orriols' extensive training—machine assignment was an "easy" matter. Moreover, resolution of assignment disputes did not rest with a shift leader; rather, employee assignment complaints resulted in direct management intervention, i.e., discussion among the employee, the shift leader, and Mr. Orriols. Machine operators generally performed repetitive tasks on those machines for which they demonstrated capability and required minimal guidance. Although the shift leaders had work oversight accountability, they only had reportorial responsibility for employee infractions and were not authorized to deal with misconduct independently.¹¹ Other than assessing employee capability (which entailed implementation of detailed and comprehensive managerial guidelines), little evidence was adduced of factors the shift leaders might have considered in directing employees, preventing a conclusion that the degree of discretion involved rose above the routine or clerical. See *Golden Crest*, supra at slip op. 8.

After reconsideration of the underlying findings of fact in light of *Oakwood Healthcare, Inc.*, *Croft Metals, Inc.*, and *Golden Crest Healthcare Center*, I find that the Respondent has failed to meet its evidentiary burden. Accordingly, having reviewed the evidence in the light of

⁸ Some overlap in the concepts of "assign" and "responsibly direct" necessarily occurs in this analysis. As noted by the Board, the terms are not to be considered in isolation but read together as set forth in the Act. *Oakwood Healthcare, Inc.*, supra, at FN 28.

⁹ *Oakwood Healthcare, Inc.*, supra, at slip op. 9-10.

¹⁰ *Oakwood Healthcare, Inc.*, supra, at slip op. 10.

¹¹ Even in circumstances warranting the unusual action of sending an employee home, Mr. Ly was expected to review the matter with Mr. Orriols the next day.

the Board's recent decisions construing Section 2(11) of the Act, I find the evidence does not establish that Mr. Ly was a supervisor within the meaning of that section on August 31 and/or September 26, 2002, when Respondent respectively suspended and fired him.

5 Based on these findings and the findings of fact and conclusions of law contained in the decision herein issued on July 12, 2006, and the entire record, I issue the following recommended¹²

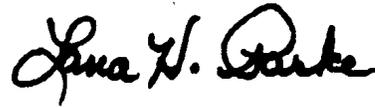
ORDER

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The Respondent, A AND G Inc., d/b/a Alstyle Apparel, Anaheim, California, its officers, agents, successors, and assigns, shall comply with the Order issued herein on July 12, 2006.

Dated, at Washington, DC, June 26, 2007.

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Lana H. Parke
Administrative Law Judge

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¹² 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.