

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

THE ARC OF SOUTH NORFOLK
Employer

and

Case 01-RC-213174

AMERICAN FEDERATION OF STATE,
COUNTY & MUNICIPAL EMPLOYEES,
COUNCIL 93

Petitioner

BRIEF OF THE PETITIONER FOLLOWING PARTIAL GRANT
OF REQUEST FOR REVIEW

TABLE OF AUTHORITIES

Craft Metals, 348 NLRB at 721 5

Oakwood Healthcare, 394 NLRB 692, 695 5

Introduction

Review has been granted by the majority as to whether the Acting Regional Director may have disregarded relevant evidence and thereby clearly erred in finding the Program Coordinators did not exercise statutory supervisory authority with respect to the assignment and responsible direction of case managers' work. At present, the majority expresses "no view with respect to whether Program Coordinators are statutory supervisors," and will engage in a full review of the record.

The Petitioner suggests such review should result in the affirmation of the determination of the Acting Regional Director, as his decision was free from error, and was the result of the Acting Regional Director having taken into account and having properly considered all relevant evidence.

The Petitioner will address the concerns articulated by the majority *seriatim*.

Argument

1. Testimony of Employer Witness as to "Assignment"

The Petitioner suggests the testimony of the witness identified by the Employer and referenced in this Order was properly determined by the Acting Regional Director to be non-dispositive.

That witness was one of five Program Coordinators who provided testimony, and that witness' testimony as identified by the Employer was singular among the testimony of the four other Program Coordinators, including the testimony of the other Program Coordinator called as an Employer witness.

The Petitioner suggests the record evidence reflects the following as to Direction of Work and Staff Assignments.

One or more of the Petitioner's witnesses were asked to comment upon the statement in the Employer Position Statement ("EPS") that "[E]ach Group Room is managed by a PC who has the ultimate authority to do the following: (1) assign the CM or ACM to oversee participants based upon an assessment of the participant's clinical need and the Case Manager's and Assistant Case Manager's skill sets."

The Petitioner suggests that the record testimony of the Petitioner witnesses supports the conclusion that PC's are told by management who they have to assign to certain clients. See, for example, direct testimony of Ms Furlong, who suggested assignment was "out of her hands," and was based on the decision of Ms Knox and Ms DeMeritt. The Petitioner suggests the testimony of its other two witnesses was consistent with Ms Furlong's position. The Petitioner also suggests the witnesses acknowledged their role in making suggestions as to assignment, but were clear that the decision rests with Ms Knox and Ms DeMeritt.

*2. Testimony as to Decisions Made by Program Coordinators
as to What Occurs in Day Rooms*

Certain facts established in the record support the conclusion that the PC's do not exercise independent judgment, at least to the "regular and substantial" level required of Section 2(11) supervisors.

One such fact is the existence and role of both the ISP and the DHSP. Those plans provide the framework of goals to be achieved by the client, and the means to achieve those goals. There is no record evidence that the PC's (or anyone else) can divert from those plans. The very fact they are called "plans" supports this premise, and augers

against any argument that there is room for or ability to engage in the regular or substantial exercise of independent judgment on the part of the PC.

Another such fact is the well-established and defined daily “routine” spoken of in the testimony of the Petitioner’s witnesses on direct examination, which establishes that there is a set daily routine followed in each of the Group Rooms, consistent with the Individual Service Plans (hereafter “ISP”) and Day Hab Service Plan (hereafter “DHSP”) for each client. The routine roughly consists of: greeting clients, toileting clients, engaging in activity consistent with Plan(s), preparing for meals, clients consuming meals, toileting, engaging in activity consistent with Plan(s), and preparation for client departure.

The only segment within that routine that may arguably lend itself to the exercise of independent judgment is the activity phase.

Again, choice of activity needs to be consistent with the Plan(s).

In addition, for three days of the week, there is universal activity common to all Group Rooms (dancing one day, drumming another, and exercise the third).

As for the choice of remaining activity unique to each Group Room, the uncontroverted testimony of the three PC on direct examination that the choice of activity is for the most part the result of collaboration among the Group Room staff, including both the PC and the CM’s and ACM’s.

Finally, the record establishes that the PC’s engage in direct care of certain clients, having the same responsibility to toilet, adjust, and care for individual clients as the Case Manager (hereafter “CM’S”) and Assistant Case Managers (hereafter

“ACM’s”). The PC’s are included in the care-giver-client ratio, to the same extent their fellow employees in each Group Room are.

3. *Testimony as to Accountability of Program Coordinators*

The term “responsibly to direct” means that the person providing oversight would face adverse consequences if the other’s tasks are not performed properly.

Through cross examination of Ms DeMeritt, a twenty-five-year employee of the ARC, it was established that there has been only one instance of a PC being disciplined because of something related to poor performance of one or more subordinates.

The Union suggests the record supports the conclusion that the PC was disciplined, not because of the poor performance of the subordinates, but because of her failure to have properly trained the subordinates.

The Acting Regional Director discussed this singular record referenced to a Program Coordinator being dealt with in this context, and correctly determined it was:

“ . . . difficult to discern whether the program coordinator was being held accountable for her own performance as opposed to the performance of a case manager. If she is being held accountable for her own performance, she was not being held accountable as a supervisor within the meaning of the Act. *Oakwood Healthcare*, 348 NLRB at 695”

Save for that singular incident, the record contains no reference to any evidence of a Program Coordinator having been disciplined because of the failure of a subordinate to meet a certain performance standard. In fact, the Acting Regional Director correctly noted that “ . . . the Employer’s vice president, Daniel Sullivan, testified on cross examination that a program coordinator had never been held accountable for a case manager or assistant case manager’s failure to follow the service plan during his tenure.”

The Petitioner suggests the Acting Regional Director was correct in his determination that “[T]he weight of the evidence therefore suggests that program coordinators do not suffer adverse consequence for case managers’ poor performance such that they do not ‘responsibly direct’ them under the Act. *Croft Metals*, 348 NLRB at 721; *Oakwood Healthcare*, 348 NLRB at 692.” (Decision at p. 7)

4. *Burden of Proof*

As to burden of proof, that burden is borne by the party asserting supervisory status. The Petitioner suggests the record evidence supports the conclusion reached by the Acting Regional Director that the Employer has failed to meet its burden to establish that the Program Coordinators are Section 2(11) supervisors.

Conclusion

As to the role and function of the Program Coordinators, the Petitioner suggest the most succinct description is found at page 8 of the Decision:

“In addition, program coordinators do not appear to regularly exercise independent judgment with respect to case managers following service plans or documenting participants’ progress. To the extent they direct case managers in these respects, their responsibility is limited to simply implementing and documenting the plan according to specific and objective criteria. *Oakwood Healthcare*, 348 NLRB at 693 (employees must ‘form an opinion or evaluation by discerning and comparing data’ and exercise ‘a degree of discretion’ for supervisory status to exist).”

As to the word that best describes the role of the Program Coordinator *vis a vis* activities and staff interaction within the day rooms, the petitioner suggests that word is “collaborative.”

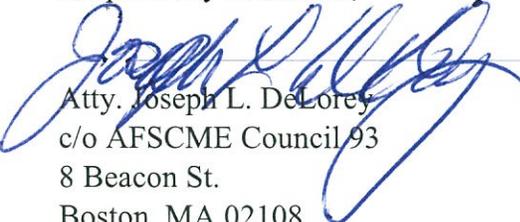
That word was used by Petitioner witnesses to reflect their view of their role in work working environment in which they spend their day.

The Acting Regional Director correctly embraced that word at the conclusion of section (2) of the Decision, the section entitled “Program Coordinators Do Not Assign Work to Case Managers:”

“Thus, the preponderance of the evidence demonstrates that program coordinators are primarily engaged in balancing workload among case managers, ensuring that they follow pre-set schedules and detailed instructions, and collaborating with them to provide care and activities to program participants.” (Decision, p. 14) (emphasis supplied)

The Petitioner suggests that upon review of the record, the majority will conclude that the Acting Regional Director had not disregarded relevant evidence and thereby clearly erred.

Respectfully submitted,



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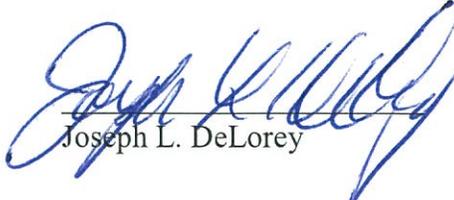
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August 27, 2018

Certificate of Service

I certify that I have this 27th day of August, 2018 served a copy of the foregoing on Atty. Andrew Eisenberg and Atty. John Duke, counsel of record for the Employer by mailing the foregoing via USPS first class mail to Constangy, Brooks, Smith & Prophete, 535 Boylston St., Suite 902, Boston, MA 02116.

I also certify that I have served a copy of the foregoing with Paul J. Murphy, the Acting Regional Director for Region 1.



Joseph L. DeLorey