

N.L.R.B. v. Grancare, Inc.

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Licensed practical nurses (LPNs) at a long-term nursing care facility are “supervisors” within the meaning of the Labor Management Relations Act, the Seventh Circuit recently ruled. In *N.L.R.B. v. GranCare* (No. 97-3431), decided September 4, 1998, the Seventh Circuit refused to enforce a National Labor Relations Board order to bargain with a unit of LPNs who direct and discipline Certified Nurse Assistants (CNAs). *GranCare* makes it clear that health care employees can be supervisors, even though their duties involve patient care. The case also illustrates the importance of independent judgement and discretion in determining supervisory status.

Facts

GranCare is a 282-bed nursing home in Bayside, Wisconsin. The GranCare Nursing department consists of a Director of Nursing, an Assistant Director of Nursing, 19 registered nurses (RNs), 38 LPN’s, and 90 CNAs. LPN charge nurses, like the CNAs, have patient care duties. In addition to patient care duties, charge nurses perform some supervisory duties. Charge nurses can be either RNs or LPNs, and one charge nurse is assigned to a unit for each shift. Charge nurses assign duties and direct the work of the CNAs. Although a RN schedules CNAs daily, LPNs assign CNAs to specific patients within the unit. LPNs can also reassign a CNA from one resident to another and schedule CNA breaks. LPNs can instruct a CNA to do a task again if the LPN believes the task is being carried out improperly. Finally, LPN charge nurses can effectively discipline CNAs or send CNAs home.

The United Food and Commercial Workers Union, Local 1444 sought certification as the exclusive bargaining representative of a collective bargaining unit including charge nurse LPNs. *GranCare* contended that the LPN charge nurses were not employees under the Act, and were prohibited from unionizing as § 2(11) supervisors. The Board’s Regional Director issued a Decision and Direction of Election, finding that the LPNs were employees under the Act because their assignment and direction of the CNAs was not done in the interest of the employer. GranCare sought review of the Director’s decision.

Supervisory Duty or Activity Incidental to Patient Care?

Prior to 1994, the Board’s practice in the health care industry was to disregard supervisory authority that was incidental to patient care. Thus, health care employees, even those who directed the work of others, tended to be “professional employees,” who use professional or technical judgment rather than supervisory independent judgment. The Board’s position made it very difficult to prove the supervisory status of any health care professional who also had patient care duties.

While GranCare's petition for review was pending, the United States Supreme Court decided *N.L.R.B. v. Health Care & Retirement Corp. of America* (No. 92-1964, 5/23/94). In *Health Care & Retirement Corp.*, the Supreme Court held that the LPNs at issue were statutory supervisors under the Act, even though they performed patient care duties. The Court held that health care professionals could be supervisors, even though they might use professional or technical judgment in supervising other patient care workers.

The Board remanded the *GranCare* case back to the Board's Regional Director to reconsider in light of *Health Care & Retirement Corp.* Despite the Supreme Court decision that a patient care professional could assign and direct work in the interest of the employer, the Regional Director reaffirmed the conclusion that the LPNs were not supervisors. The Director reasoned that the LPNs did not exercise independent judgment in the assignment and direction of CNAs, but performed these activities in a "routine or clerical way." The Board denied GranCare's petition for review of the Supplemental Decision, but GranCare still refused to bargain with the Union, which brought unfair labor practice charges.

The Seventh Circuit Gives Board Little Deference

The Seventh Circuit reversed the Board, finding that the GranCare LPNs engaged in many supervisory activities and were excluded from the Act's coverage. The court gave the Board very little judicial deference, stating that the Board, in its "well-attested manipulateness," had forfeited the deference it normally was accorded by ignoring the *Health Care & Retirement Corp.* case. The court applied the twelve-factor test usually used to determine supervisory status, and concluded that the LPNs did engage in assignment, direction, and discipline of CNAs. The court further found that these activities required independent judgment because the LPNs consider the needs of patients, the skill and expertise of the CNA, and the staff available for specific tasks in carrying out their duties.

Bottom Line for Health Care Employers

In *GranCare*, the Seventh Circuit reiterated that the same test for supervisory status should be used in the health care setting as in other industries. When determining whether an employee is a supervisor, three questions must be asked:

- Does the employee have the authority to engage in one of the twelve supervisory activities (e.g., direction, discipline, assignment, etc.) or have the authority to recommend such action?
- Is independent judgment used in these activities?
- Does the employee hold the authority in the interest of the employer?

If the answer to each question is "yes," the employee is a supervisor and is excluded from the Act's coverage. Because the Supreme Court has held that health care supervisors hold authority in the interest of their employer, the Board and courts now often focus on the independent judgment portion of the test. For instance, in *GranCare*, the court looked to the many factors the LPNs had to consider in scheduling and assigning employees to particular patients.

When creating and classifying new positions, list the ways in which the employee will exercise independent judgment and discretion in his or her job duties. In addition to looking at the employee's independent judgment, the Board and courts also examine the frequency with which supervisory activities are exercised and whether discipline actually results in adverse personnel action. Finally, the ratio of supervisors to employees is also an factor in determining supervisory status.

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