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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

**OAKWOOD HEALTHCARE, INC.**

**Employer**

**and**

**Case 7-RC-22141**

**INTERNATIONAL UNION, UNITED AUTOMOBILE,  
AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW), AFL-CIO**

**Petitioner**

**BEVERLY ENTERPRISES-MINNESOTA, INC.,  
d/b/a GOLDEN CREST HEALTHCARE CENTER**

**Employer**

**and**

**Cases 18-RC-16415  
18-RC-16416**

**UNITED STEELWORKERS OF AMERICA,  
AFL-CIO, CLC**

**Petitioner**

**CROFT METALS, INC.**

**Employer**

**and**

**Case 15-RC-8393**

**INTERNATIONAL BROTHERHOOD  
OF BOILERMAKERS, IRON SHIP  
BUILDERS, BLACKSMITHS, FORGERS  
AND HELPERS, AFL-CIO**

**Petitioner**

**BRIEF *AMICUS CURIAE* OF THE HR POLICY ASSOCIATION  
IN RESPONSE TO THE BOARD'S NOTICE AND  
INVITATION TO FILE BRIEFS**

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IN RESPONSE TO THE BOARD'S NOTICE AND  
INVITATION TO FILE BRIEFS**

The HR Policy Association ("HR Policy" or the "Association") respectfully submits this brief as *amicus curiae* in response to the Board's Notice and Invitation to File Briefs, dated July 25, 2003, in the above-captioned cases. The brief addresses the

Board's application and interpretation of the terms "supervisor" and "independent judgment" as used in Section 2(11) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, in light of the U.S. Supreme Court's ruling in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001).

### **INTEREST OF THE *AMICUS CURIAE***

The HR Policy Association is an organization of the senior human resource officers of more than 200 of the nation's largest private sector employers, collectively employing nearly 13 million Americans, more than 12 percent of the private sector workforce. Since its founding in 1939, the Association's principal mission has been to ensure that the laws and policies affecting labor relations are sound, practical, and responsive to the realities of the modern workplace.

All of HR Policy's members are employers subject to the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* Many employ union-represented workers and are subject to collective bargaining obligations pursuant to Sections 8(a)(5) and 8(d) of the Act. As business enterprises in a competitive economy, HR Policy's members also have important obligations to maintain productivity, efficiency of operations and workplace discipline in their day-to-day operations.

In doing so, HR Policy members look to their management personnel to exercise sound, independent business judgment in enforcing workplace rules and overseeing operations in a manner that is consistent with the employer's desire and best interests. HR Policy members thus have a strong interest in the issues raised in this case regarding the meaning and interpretation of "independent judgment" as that term is used in the context of determining supervisory status under Section 2(11) of the Act.

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the U.S. Supreme Court held that the Board's narrow interpretation of the term "independent judgment" constitutes an impermissible construction of the Act and therefore is invalid. 532 U.S. at 714. In view of the Court's decision in *Kentucky River*, the Board has invited interested persons to submit briefs addressing, among other things, the meaning of the term "independent judgment" in the context of determining supervisory status under Section 2(11) of the Act. Notice and Invitation to File Briefs, at 2.

Specifically, the Board has asked parties and other *amici* to comment on a list of enumerated questions relating to the concept of independent judgment, including "what definition, test or factors [it] should consider" in applying the term to assess whether an employee is a supervisor under Section 2(11) and therefore is excluded from coverage under the Act. The Association's brief seeks to address the issues raised by the Board from a uniquely practical business perspective, focusing on those questions the resolution of which are most likely to impact the constituency it represents.

## STATEMENT OF THE CASE

These cases center around the Board's interpretation of the term "independent judgment" as it is applied to determine an employee's supervisory status under Section 2(11) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, in light of the U.S. Supreme Court's ruling in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). On July 25, 2003, the Board issued a Notice and Invitation to File Briefs, inviting the parties and other interested *amici* to weigh in on the issue in the context of the underlying cases. The facts and circumstances of each case are discussed more fully below.<sup>1</sup>

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<sup>1</sup> Each brief, the Board notes, should address the following ten questions as they relate to the underlying cases being reviewed:

- 1) What is the meaning of the term "independent judgment" as used in Section 2(11) of the Act? In particular, what is "the degree of discretion required for supervisory status," i.e., "what scope of discretion qualifies"? *Kentucky River* at 713 (emphasis in original). What definition, test, or factors should the Board consider in applying the term "independent judgment"?
- 2) What is the difference, if any, between the terms "assign" and "direct" as used in Sec. 2(11) of the Act?
- 3) What is the meaning of the word "responsibly" in the statutory phrase "responsibly to direct"?
- 4) What is the distinction between directing "the manner of others' performance of discrete tasks" and "directing other employees"? *Kentucky River* at 720 (emphasis in original).
- 5) Is there tension between the Act's coverage of professional employees and its exclusion of supervisors, and, if so, how should that tension be resolved? What is the distinction between a supervisor's "independent judgment" under Sec. 2(11) of the Act and a professional employee's "discretion and judgment" under Sec. 2(12) of the Act? Does the Act contemplate a situation in which an entire group of professional workers may be deemed supervisors, based on their role with respect to less-skilled workers?
- 6) What are appropriate guidelines for determining the status of a person who supervises on some days and works as a non-supervisory employee on other days?
- 7) In further respect to No. 6 above, what, if any, difference does it make that persons in a classification (e.g., RNs) rotate into and out of supervisory positions, such that some or all persons in the classification will spend some time supervising?
- 8) To what extent, if any, may the Board interpret the statute to take into account more recent developments in management, such as giving rank-and-file employees greater autonomy and using self-regulatory work teams?
- 9) What functions or authority would distinguish between "straw bosses, lead men, set-up men, and other minor supervisory employees," whom Congress intended to include within the Act's protections, and the supervisor vested with "genuine management prerogatives"? *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting Senate Report No. 105, 80th Cong., 1st Sess., 4 (1947)).
- 10) To what extent, if at all, should the Board consider secondary indicia—for example, the ratio of alleged supervisors to unit employees or the amount of time spent by the alleged supervisors in performing unit work, etc.—in determining supervisory status?

*Oakwood Healthcare, Inc.*

In *Oakwood Healthcare, Inc.*, 7-RC-221412, the union sought to represent a unit of approximately 220 registered nurses at Oakwood Heritage Hospital (“Heritage”), an acute-care facility operated by the employer, Oakwood Healthcare, Inc. (“Oakwood”). *Oakwood Healthcare, Inc.*, 7-RC-221412, at 2. It filed a representation petition with the Board and a hearing was held to determine whether the single facility unit comprised of all RNs at Heritage was appropriate. *Id.* at 3.

At hearing, Oakwood claimed that the bargaining unit proposed by the union was inappropriate, arguing that the only appropriate bargaining unit was a system-wide unit of all RNs employed at Heritage and three other healthcare facilities it operates. *Ibid.* The company also contended that the RNs which the union sought to represent are statutory supervisors under Section 2(11) of the Act and thus are precluded as a matter of law from inclusion in the proposed bargaining unit. *Ibid.*

On the question of supervisory status, the Acting Regional Director determined that the RNs employed at the Heritage facility did not exercise the degree of discretion required to establish their status as supervisors under Section 2(11) of the Act. He thus concluded that the proposed bargaining unit was appropriate and on February 4, 2002, issued a Decision and Direction of Election. Consequently, Oakwood filed a Request for Review, which the Board granted on March 5, 2002.

*Golden Crest Healthcare Center*

As in *Oakwood Healthcare*, the central issue in *Golden Crest Healthcare Center*, 18-RC-16415 and 18-RC-16416, revolves around the determination of whether the employer’s RNs and licensed practical nurses (“LPNs”), when serving in the capacity of

charge nurse, exercise independent judgment such that they should be considered supervisors under Section 2(11) of the Act. In his Decision and Direction of Election dated March 9, 1999, the Regional Director concluded that the RNs and LPNs employed by Golden Crest Healthcare Center (“Golden Crest”) were not supervisors and thus properly were included in the bargaining unit. 18-RC-16415, at 2.

On July 29, 1999, the Board’s General Counsel filed an unfair labor practices complaint against Golden Crest, alleging that the company refused to bargain with the union pursuant to its obligations under Section 8(a)(5) and (1) of the Act. *Beverly Enters.-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 329 NLRB No. 22 (Sept. 17, 1999), *review granted, enf. denied*, 266 F.3d 785 (8th Cir. 2001). While admitting its refusal to bargain with the union, Golden Crest affirmatively stated that it had no obligation to do so because the employees included in the bargaining unit are statutory supervisors and thus are not entitled to the protections of the Act. *Ibid.*

The Board determined that “all representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding,” and the employer “does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would required the Board to reexamine the decision made in the representation proceeding.” *Ibid.* It thus concluded that the bargaining unit was appropriate and ordered Golden Crest to cease and desist from refusing to bargain with the union. *Id.* at 3. Golden Crest successfully filed a petition for review before the U.S. Court of Appeals for the Eighth Circuit, which held that the Board “employed an improper legal standard in finding that the nurses were not statutory supervisors.” *Beverly Enters.-Minnesota, Inc., d/b/a Golden Crest Healthcare*

*Center v. NLRB*, 266 F.3d 785 (8th Cir. 2001). Accordingly, it granted the petition and “remanded the case to the Board for reconsideration in light of the Supreme Court’s decision in [*Kentucky River*].” *Golden Crest Healthcare Center*, 266 F.3d at 789.

On remand, the Board vacated its final order and remanded the case to the Regional Director for further consideration. In his Supplemental Decision, dated August 20, 2002, the Regional Director stood by his original findings, concluding that the March 1999 Decision and Direction of Election was consistent with the Supreme Court’s rationale in *Kentucky River* and thus did not require reversal. On October 18, 2002, the Board granted review of the Regional Director’s Supplemental Decision.

*Croft Metals, Inc.*

In *Croft Metals, Inc.*, 15-RC-8393, the union sought to represent a unit of “all production and maintenance employees” employed by Croft Metals, Inc. (“Croft”) at its McComb, Mississippi location, “including plant clerical employees, the inter-plant driver, and lead persons.” 15-RC-8393, at 6. It filed a representation petition with the Board and, following a hearing, the Board’s Acting Regional Director for Region 15 issued a Decision and Direction of Election. *Id.* at 1. Croft requested Board review of the Decision, asserting, among other things, that the Acting Regional Director improperly concluded that the employer’s lead persons and lead supervisors were not statutory supervisors within the meaning of Section 2(11) of the Act. *Id.* at 2.

In his Supplemental Decision dated May 1, 2002, the Regional Director reaffirmed the earlier unit determinations, concluding that Croft Metals failed to sustain its burden of demonstrating that the lead persons exercised independent authority and

thus qualified as supervisors under Section 2(11) of the Act. On October 24, 2002, the Board granted the company's request for review of the Supplemental Decision.

### SUMMARY OF ARGUMENT

The National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151 *et seq.*, protects the right of covered employees to organize, bargain collectively, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Supervisors are expressly excluded from the definition of "employee," and thus are not entitled to the protections of the Act. "Supervisor" is defined in the Act as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11). Any employee who possesses one or more of the enumerated powers therefore will be considered a "supervisor" under the Act so long as his or her exercise of authority is undertaken "in the interest of the employer and "requires the use of independent judgment."

The NLRA confers upon the Board the authority to administer and enforce the Act. 29 U.S.C. § 160. In carrying out its enforcement duties, the Board has promulgated various rules of statutory interpretation. In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the U.S. Supreme Court held that the Board's "categorical exclusion" of "ordinary professional or technical judgment in directing less skilled employees to deliver services" from its interpretation of the kind of independent judgment required to establish statutory supervisory status impermissibly conflicted with

the plain language of Section 2(11) and therefore was unlawful. *Kentucky River*, 532 U.S. at 714 (citation omitted). The Court also determined, however, that the term “independent judgment” as used in Section 2(11) of the Act “is ambiguous with respect to the *degree* of discretion required for supervisory status,” and thus the question “falls clearly within the Board’s discretion to determine, *within reason*, what scope of discretion qualifies.” *Id.* at 713 (emphasis added).

In developing a reasonable interpretation of the scope and degree of independent judgment required to confer supervisory status, the Board must take into account management’s legitimate expectation of undivided loyalty from those of its employees vested with legitimate authority to act on its behalf. In the end, whatever standards are selected, they must respect, and be shaped by, the plain meaning, spirit and intent of the Act.

## ARGUMENT

### I. THE BOARD’S “INDEPENDENT JUDGMENT” ANALYSIS FOR DETERMINING SUPERVISORY STATUS NECESSARILY MUST BE GUIDED BY THE PLAIN LANGUAGE, MEANING AND INTENT OF THE ACT

The National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. §§ 151 *et seq.*, affords covered employees “the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.” 29 U.S.C. § 157. When it first was enacted, the NLRA defined “‘employee’ expansively (if circularly) to ‘include *any* employee’.” *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 718 (2001) (emphasis added). Congress subsequently amended the Act in 1947 to expressly exclude “supervisor” from the

collective bargaining protections of the Act in an effort “[t]o ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union.” *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 687-88 (1980).

The legislative history of the 1947 amendments confirms that Congress, in excluding supervisors from coverage under the Act, “was concerned that if supervisors were allowed to affiliate with labor organizations that represented the rank and file, they might become accountable to the workers, thus interfering with the supervisors’ ability to discipline and control the employees in the interest of the employer.” *Id.* at 695 n.3 (Brennan, J., dissenting) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess., 14 (1947)) (“The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act.”); *see also NLRB v. Retail Clerks Int’l Ass’n*, 211 F.2d 759, 763 (9th Cir. 1954) (“A primary objective of Sec. 2(11) of the Act ... was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers”). As the U.S. Supreme Court observed in *Beasley v. Food Fair, Inc.*, “[t]his history compels the conclusion that Congress’ dominant purpose in amending [the Act] was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests.” 416 U.S. 653, 661-62 (1974).

Since the NLRA “does not grant [collective bargaining] rights to supervisory employees ... the statutory definition of supervisor becomes essential in determining which employees are covered by the Act.” *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 572-3 (1994). Section 2(11) of the NLRA, as amended, defines “employee” to include “any employee ... *but shall not include* ...any individual

employed as a supervisor ....” 29 U.S.C. § 152(3) (emphasis added). The term

“supervisor, in turn,” is defined as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11).<sup>2</sup>

It is well established that the definition of “supervisor” as set forth in Section 2(11) of the Act “uses the disjunctive ‘or’ in listing the numerous indicia of supervisory status.” *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 485 (2003). Thus, any employee who possesses *any one* of the enumerated powers will be considered a supervisor under Section 2(11) of the Act, provided the power is exercised using independent judgment and in the interest of the employer. *Ibid.*

In determining the scope and degree of “independent judgment” required to establish supervisory status under Section 2(11), the possession of any of the enumerated powers therefore must be viewed as presumptively conclusive of supervisory status. As the Fourth Circuit observed in *Glenmark Associates, Inc. v. NLRB*, “[s]uch decisions are, in our view, inseverable from the exercise of independent judgment ....” 147 F.3d 333, 342 (4th Cir. 1998).

The NLRA authorizes the Board to administer and enforce the Act. 29 U.S.C. § 160. In carrying out its enforcement duties, the Board has promulgated various rules of

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<sup>2</sup> While the issue is not raised in the instant cases, it should be noted that to the extent that the exercise of any one of the enumerated Section 2(11) powers necessarily advances the employer’s business objectives, it almost inherently is done “in the interest of the employer.”

statutory interpretation, including those concerning the meaning of “independent judgment” as it is used to determine supervisory status under Section 2(11) of the Act.

In *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court set forth a two-part standard to be applied by courts in assessing the validity of an administrative statutory interpretation:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43 (1984) (footnotes omitted). To what extent an agency interpretation will be entitled to judicial deference will depend on whether (1) the statute “is silent or ambiguous with respect to the specific issue,” and, if so, (2) the agency’s interpretation “is based on a permissible construction of the statute.” *Ibid.*

**II. THE U.S. SUPREME COURT IN *KENTUCKY RIVER* EXPRESSLY REJECTED THE BOARD'S ARBITRARY INTERPRETATION THAT "ORDINARY PROFESSIONAL OR TECHNICAL JUDGMENT" CATEGORICALLY IS EXCLUDED FROM THE MEANING OF "INDEPENDENT JUDGMENT" FOR PURPOSES OF ESTABLISHING SUPERVISORY STATUS UNDER SECTION 2(11) OF THE ACT**

In *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), the U.S. Supreme Court considered the question of whether the Board's interpretation of "independent judgment" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, constitutes a permissible construction of the Act. Writing for the majority, Justice Scalia first determined that the term independent judgment "is ambiguous with respect to the *degree* of discretion required for supervisory status," and that "[i]t falls clearly within the Board's discretion to determine, within reason, what scope of discretion qualifies." *Kentucky River*, 532 U.S. at 713.

He squarely rejected the Board's contention, however, "that the judgment even of employees who are permitted by their employer to exercise a sufficient *degree* of discretion is not 'independent judgment' if it is a particular *kind* of judgment, namely, 'ordinary professional or technical judgment in directing less-skilled employees to deliver services.'" *Id.* at 714. Justice Scalia observed:

The first five words of this interpretation insert a startling categorical exclusion into statutory text that does not suggest its existence. ... The breadth of this exclusion is made all the more startling by virtue of the Board's extension of it to judgment based on greater "experience" as well as formal training. ... What supervisory judgment worth exercising, one must wonder, does not rest on "professional or technical skill or experience"? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate "supervisors" from the Act.

532 U.S. at 714-15 (citations omitted). The Court thus concluded that the Board's interpretation of what kind of independent judgment is sufficient to trigger a finding of supervisory status under Section 2(11) impermissibly conflicts with the Act and therefore is invalid.

### **III. INDEPENDENT JUDGMENT CANNOT BE CONSTRUED SO NARROWLY BY THE BOARD AS TO FRUSTRATE MANAGEMENT'S LEGITIMATE EXPECTATION OF UNDIVIDED LOYALTY FROM THOSE OF ITS EMPLOYEES VESTED WITH LEGITIMATE MANAGEMENT AUTHORITY**

The *Kentucky River* decision provides the Board with useful guidance and instruction regarding the scope of its authority in formulating an administrative interpretation of the term "independent judgment" as it is used in Section 2(11) of the Act. The Court in that case confirmed that the Board's narrow interpretation of "independent judgment" simply is incompatible with the plain language of the Act. Significantly, however, while concluding that the question of scope and degree of independent judgment falls within the Board's authority to resolve, the Court also imposed a reasonableness standard with which the Board must comply in exercising that authority. *Kentucky River*, 532 U.S. at 713 ("It falls clearly within the Board's discretion to determine, *within reason*, what scope of discretion qualifies.") (emphasis added).

A reasonable interpretation of independent judgment must take into account management's legitimate interest in vesting its supervisors with the authority to make business decisions, enforce workplace rules, and direct the workforce without fear that those same individuals will abandon their responsibilities to seek protections to which they are not, and never were intended to be, entitled. In addition, it must recognize that "independent authority" means something far short of unreviewable power, but instead

refers to the exercise of that authority which enables a business operation to run smoothly and efficiently, in accordance with the employer's policies and procedures.

In response to its inquiry as to what constitutes "independent judgment," we thus urge the Board to adopt a test that is both reasonable and flexible, one that will ensure the protections of the Act are preserved only for those workers whom Congress intended to protect. The Board should avoid adopting an arbitrary rule, for instance, that disqualifies an employee from supervisory status simply because his or her workplace decisions may be subject to review by a higher-ranking member of senior management, or are guided by an employer's established written policies and procedures. *See NLRB v. Quinnipiac Coll.*, 256 F.3d 68, 75 (2d Cir. 2001) ("the existence of governing policies and procedures and the exercise of independent judgment are not mutually exclusive").

Nor should supervisory status arbitrarily be denied simply because the employee in question exercises Section 2(11) powers only on a part-time or rotating basis, or also performs bargaining unit work. *See In re American Commercial Barge Line Co.*, 337 NLRB No. 168 (2002) (where tugboat pilot and captain rotated six-hour shifts and pilot was highest ranking official when captain was off duty, pilot exercised independent judgment in directing work to be performed and assignment of additional staff where needed); *In re Sheet Metal Workers Int'l Assn.*, 2003 WL 21273871 (2003) (job site foreman on construction site exercised independent judgment sufficient to confer supervisory status where he developed plans and layouts and exercised full discretion as to "how, when and by whom his plans and layouts were effected"). In addition, the Act places *no* limitations on the number of supervisors so designated in a workplace compared to other non-supervisory workers. As long as an employee possesses at least

one of the Section 2(11) powers and uses independent judgment in the exercise of that authority, he or she ought to be considered a “statutory supervisor,” regardless of the number of other supervisors present at the establishment. There is a distinction between to “assign” and “responsibly to direct” as those terms are used in Section 2(11) of the Act. “The authority to assign workers constitutes the power ‘to put [the other employees] to work when and where needed,’” *Glenmark Assocs.*, 147 F.3d at 335 (citation omitted), whereas “‘responsibly to direct’” means “to be answerable for the discharge of a duty or obligation.” *Quinnipiac Coll.*, 256 F.3d at 77. As the Second Circuit observed, “[i]n determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.” *Id.* (citation omitted).

Thus, where an employee has the authority to direct the work performed by other employees and ultimately may be held responsible for nonperformance or malfeasance, that employee ought to be considered a statutory supervisor under Section 2(11) of the Act. As noted above, however, an employee need not possess *both* the authority to assign *and* reasonably to direct in order to be considered a statutory supervisor; the possession of only one such power will suffice to remove the employee from coverage under the Act.

While the Supreme Court in *Kentucky River* acknowledged that there “may be ‘some tension between the Act’s exclusion of [supervisory and] managerial employees and its inclusion of professionals,’” 532 U.S. at 720 (citation omitted), professionals who also possess at least one of the enumerated powers under Section 2(11) may be excluded from the Act’s coverage as supervisors. There is nothing in the text or legislative history

of the Act that suggests that “dual status” employees – i.e. those who are considered “professionals” but who also possess supervisory authority – somehow magically lose their supervisory status as a result. Similarly, nothing in the Act precludes exclusion of an entire unit of professional employees who also are considered supervisors based on their relationship to other lower-ranking employees.

Indeed, “[t]hese contentions contradict both the text and structure of the statute, and they contradict as well the rule of *Health Care* that the test for supervisory status applies no differently to professionals than to other employees.” *Kentucky River*, 532 U.S. at 721; *see also NLRB v. Yeshiva Univ.*, 444 U.S. 672, 681-682 (1981) (“professionals, like other employees, may be exempted from coverage under the Act’s exclusion for ‘supervisors’ who use independent judgment in overseeing other employees in the interest of the employer”) (footnote omitted). Therefore, it would be inappropriate and inherently unreasonable for the Board to adopt an arbitrary rule that denies supervisory status to one or more employees simply by virtue of their dual status as a “professional.”

“Despite the unambiguous origins of the exclusion, the definition of supervisor has spawned an immense amount of litigation, generating controversy in hundreds of cases before courts and thousands of cases before the National Labor Relations Board.” Note, *The NLRB and Supervisory Status: An Explanation of Inconsistent Results*, 94 Harv. L. Rev. 1713 (1981) (footnote omitted); *see also Glenmark Assocs.*, 147 F.3d at 338 (Board’s inconsistent interpretation of supervisor is “manifest”); *Beverly Enters., Virginia, Inc. v. NLRB*, 165 F.3d 290, 295 (4th Cir. 1999) (“In applying the definition of supervisor in 29 U.S.C. § 152(11), the Board has, we believe, manifested an irrational

inconsistency”). This inconsistency has been evident particularly, but not exclusively, in cases involving the supervisory status of nurses and other healthcare professionals. *In re Beverly Health and Rehab. Servs., Inc.*, 335 NLRB No. 54, at \*15 n.3 (2001) (LPNs direction to lower-ranking CNAs was “routine” and did not require exercise of independent judgment sufficient to confer statutory supervisory status), *review granted/denied in part, enf. granted/denied in part*, 317 F.3d 316 (D.C. Cir. 2003); *Glenmark Assocs., Inc.*, 322 NLRB No. 29 (1996) (LPNs do not exercise independent judgment in performance of assignments), *review granted and enf. denied*, 147 F.3d 333 (4th Cir. 1998); *Multimedia KSDK, Inc.*, 330 NLRB No. 114 (2000) (television producers not supervisors within meaning of § 2(11)), *vacated*, 303 F.3d 896 (8th Cir. 2002); *but compare In re Sheet Metal Workers Int’l*, 2003 WL 21273871 (2003) (job site foreman on construction project exercised independent judgment as to how, when and by whom tasks were to be carried out). Courts have not hesitated to refuse enforcement in cases in which the Board’s interpretation of “supervisor” perpetuates this inconsistency. *Ibid.*

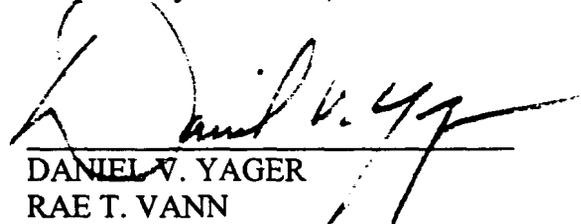
In *Multimedia KSDK, Inc. v. NLRB*, for instance, the Eighth Circuit refused to enforce the Board’s order that television news producers were not statutory supervisors because their assignment and direction of other employees was based on their own “experience, skills, training, or position” and thus did not require the use of independent judgment. 303 F.3d at 899 (citations omitted). The court concluded that the Board’s independent judgment analysis was flawed and impermissibly conflicted with the holding in *Kentucky River*. It observed, “[t]he Board’s decision in this case rests upon a categorical exclusion similar to that rejected in *Kentucky River*. Section 2(11) of the Act

does not exclude judgment based on an employee's 'experience, skills, training, or position' from the definition of independent judgment." *Id.* at 900.

### CONCLUSION

Adopting a reasonable, consistent approach guided by clear, but flexible, principles would enable the Board to focus its enforcement efforts on ensuring the protections of the Act are preserved for employers, as well as employees, thus promoting greater productivity in the workplace. It also would provide stakeholders with guidance they actually are able to use and apply in distinguishing between nonmanagerial employees, who are protected by the Act, and supervisory personnel, who are not.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 2003, a true and correct copy of the foregoing Brief *Amicus Curiae* of The HR Policy Association in Response to the Board's Notice and Invitation to File Briefs was served by U.S. first-class, postage prepaid to the following parties, addressed as follows:

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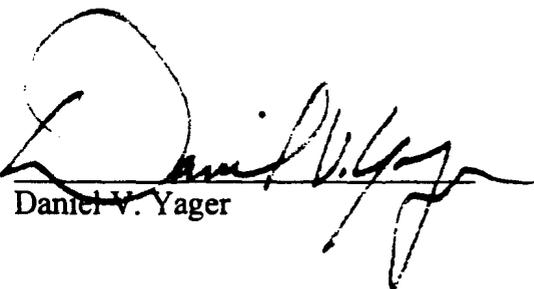
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