

The Buffalo General Hospital and American Federation of State, County and Municipal Employees, County and Municipal Council 66 of New York, AFL-CIO. Case 3-RM-552

June 30, 1975

DECISION AND DIRECTION OF ELECTIONS

BY CHAIRMAN MURPHY AND MEMBERS
JENKINS AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Charles J. Donner. Following the close of the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, the Regional Director for Region 3 transferred the above-entitled proceeding to the National Labor Relations Board for decision. Thereafter, the Employer-Petitioner and the Union filed briefs which have been duly considered.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the Board finds:

1. The Employer is a voluntary, nonprofit hospital incorporated under the laws of the State of New York. The parties stipulated that the Employer had gross revenues in calendar year 1974 in excess of \$31 million, including approximately \$1.9 million for its Community Mental Health Center, and during that same period of time, received in excess of \$50,000 in goods and services from outside the State of New York.

The parties agreed that the bargaining unit be limited to employees at the Employer's Community Mental Health Center (herein the Center), an unincorporated division of the Employer engaged in providing mental health services.¹ In 1974, the

¹ The Employer originally provided mental health services for its psychiatric inpatients at its main hospital facility. Recently, the service has been expanded and the Community Mental Health Center now has full responsibility for the provision of such services to both inpatients and outpatients.

² At the time of the hearing, no contract had been entered into for 1975.

³ The issue was initially brought before the Board on the Employer's request for review of the Regional Director's decision dismissing the instant petition on the grounds that the Board could not assert jurisdiction over the Employer because it was a joint employer with the county. On December 31, 1974, a majority of a Board panel found that this issue could best be

Employer entered into a contract with the county of Erie to supply such services (for specified county residents) through the Center, on a specified budget basis, in exchange for monetary contributions by the county.² A question arose whether certain terms of that contract gave the county, which is exempt from the Board's jurisdiction under Section 2(2) of the Act, such control over the Employer's operations and labor policies so as to make the Employer a joint employer with the county.³ At the hearing, both parties were in agreement that the contract did not create a joint employer relationship between the Employer and the county and that the Employer was and is the sole employer of the petitioned-for employees. For the reasons hereinafter contained, we agree with the positions of the parties.

The Board's determination of joint employer issues generally turns on the extent of control exercised by the undisputedly exempt governmental authority over the operations and labor relations of the Employer.⁴ We find that the evidence in the instant case does not establish the existence of any such control by the county over the operations or labor relations of the Employer.

The contract in question basically provided for deficit funding by the county of particular services provided by the Center to county residents. Pursuant to the contract, the county reimbursed the Employer for the difference between the cost of such services and the amount obtained by the Employer from other income sources for the performance of such services. We note that the county was not, nor is it, the sole source of funding for the Center. To the contrary, the Center receives substantial funds from the Buffalo General Hospital as well as from various Federal and state agencies. And since the 1974 contract has not been renewed, virtually all of the current funding for the Center is provided by or through the Employer.

Under the terms of the contract, the Employer was required to submit for approval by the county the minimum credentials and salary ranges for "ungraded" positions at the Center,⁵ to obtain county approval of its personnel policies and procedures, to utilize prescribed recordkeeping and reporting requirements, and to notify the county in advance of any revisions or modifications in wage and salary

resolved after a hearing at which the relevant facts could be fully developed and thus remanded the case to the Regional Director to conduct a hearing on that and any other issue that might exist.

⁴ See, e.g., *Ja-Ce Company, Inc.*, 205 NLRB 578 (1973); *Ohio Inns, Inc.*, 205 NLRB 528 (1973); *Servomation Mathias Pa., Inc.*, 200 NLRB 1063 (1972); *Slater Corporation*, 197 NLRB 1282 (1972).

⁵ "Ungraded" positions are the management, supervisory, and professional positions at the Center. The county has no authority to review credentials or salary ranges for any employees in "graded" positions which include all of the nonsupervisory and nonprofessional classifications in the petitioned-for unit.

programs or of any pending labor negotiations concerning the Center. The record establishes, however, that, notwithstanding such requirements, the independence of the Employer's enterprise and its control over labor relations were never materially affected by any of the terms of the contract.

Thus, the record establishes that the Employer has at all times material hired employees at the Center as employees of Buffalo General Hospital and that it has exercised exclusive control over the hiring, firing, and disciplining of its employees, both at the hospital and the Center, and has formulated salary ranges for all of them regardless of the installation at which they may work. Furthermore, the Employer fixed the salary ranges for all "ungraded" positions, interviewed all applicants for those jobs, and reviewed their respective qualifications, before submitting their credentials and salary levels to the county for approval, which, in all cases, has been extended.⁶ Thereafter the Employer determined which, if any, of the applicants it would hire for a particular position. Indeed, the Employer's only obligation under the contract with respect to salary ranges for "ungraded" positions was to maintain a certain salary range to the extent that it sought reimbursement from the county for services funded by the county. To that extent the Employer was free to hire any individual, notwithstanding that the county may have disapproved an individual's credentials or salary range.⁷ In addition, the contract, as noted previously, contained no restrictions on the hiring of "graded" employees, which make up the bulk of the Employer's work force, and the Employer hired individuals for "graded" jobs without obtaining the county's approval of their credentials or salaries.

The record further establishes that all labor-management relations and the determination of all labor relations policies were, and are, handled by the Employer's personnel department. Employees hired to work in the Center are subject to the same rules and regulations as apply to the hospital employees. And these rules and regulations have always been promulgated and maintained solely by the Employer, and distributed by it in an employee handbook to all its employees, regardless of where they work. The handbook covers such terms and conditions of employment as job descriptions, job classifications, recruitment and selection of employees, benefits, wage increases, discipline, discharges, and leaves of absence. The Employer provided a copy of this handbook to the county in satisfaction of the past

⁶ On one occasion, the county initially disapproved the credentials of an applicant for a management position, but approval was subsequently given after the executive director of the Center clarified for the county the Employer's interpretation of the job description for the position involved.

⁷ Likewise, the Employer could hire individuals for ungraded positions not connected with county services, without seeking county approval of

contract's requirement to submit its personnel policies and procedures to the county for approval; however, the county merely stamped its approval on the handbook and returned it to the Employer.

All physical facilities, equipment, and real property used by the Center are owned by the Employer. The county had no right to inspect the Employer's premises or to police any purchases of supplies or equipment by the Employer. The recordkeeping and reporting requirements in the contract were satisfied by the submission of copies of parts of the Employer's normal records to the county, and the Employer has never maintained separate records for the county.

Based on the above evidence, it is clear that the Employer alone was, and is, responsible for the hiring, disciplining, and discharging of employees, directing them in their work, and setting, enforcing, and maintaining their terms and conditions of employment. Consequently, the Employer at all times material herein has been in the position to exercise full and exclusive authority over any collective-bargaining relationship that might be established concerning the employees employed at the Community Mental Health Center. At most, the 1974 contract with the county required the county to be "advised" of any changes in wage ranges of "ungraded" personnel or of pending collective-bargaining negotiations, but the county had no control over the substance of such negotiations should they have occurred. Nor did the 1974 contract give the county any control over the Employer's labor relations policy or over the day-to-day conditions under which the Employer's employees worked. At best, the county's control over "ungraded" personnel, who occupied primarily managerial and professional positions, was perfunctory, merely assuring that the individuals eventually chosen by the Employer to run its mental health programs possessed the sufficient educational and professional qualifications which the county deemed essential to assure for its residents that the highest standards of health care would be provided them at the Center.

As discussed above, the Employer was never bound to apply exclusively the salary ranges approved by the county but was and is free to implement its own salary ranges without diminishing the amount of the county's overall contribution, if any, to the Center.⁸ Furthermore, the absence of any contract with the county for 1975 indicates that the

their credentials. Furthermore, the Employer was able to institute programs and services not approved or contracted for by the county if such programs and services were funded from sources other than the county.

⁸ On March 24, 1974, the Employer unilaterally implemented a general wage increase for all of its employees, including the employees at the Community Mental Health Center, which did not diminish the county's

Employer is able to continue its full operation of the Center without financial support from the county.

Accordingly, we find that the Employer retains effective control over its operations and labor relations policy and is therefore not a joint employer with the county.⁹ Since the Employer is a health care institution within the meaning of Section 2(14) of the Act and is engaged in commerce within the meaning of the Act, we find that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.

4. The parties stipulated that the bargaining unit should include the following classifications of nonsupervisory and nonprofessional employees: senior pharmacy technician, pharmacy technician, coordinator of volunteers, environmental services aide, wall washer, groundskeeper, maintenance engineer, admission and credit clerk, medical records technician, secretary, receptionist/typist, activity generalist, counselor, senior counselor, and alcoholism trainee.¹⁰ The parties also stipulated to include in the unit the classifications of registered nurse, clinical psychologist, psychiatrist, and pharmacist, all of whom were stipulated to be professional employees, and to permit such professional employees to vote in a *Sonotone*-type¹¹ election on whether they wished to be included in the same unit as the nonsupervisory and nonprofessional employees.

The parties could not agree on the placement in the unit of several individuals who the Employer contends are either supervisors or professional employees.

The *medical records supervisor* is responsible for maintaining psychological records for patients at the Center. The incumbent in this position works in the medical records department along with one medical records technician, who was included in the unit by stipulation of the parties. The record establishes that she does not work in a separate office but performs the same basic work, which consists of the preparation of reports and other statistical work, as the medical records technician. The record further shows that the medical records supervisor screens candidates for the position of medical records technician. However, the record indicates that this screening

contributions to the Mental Health Center. The testimony establishes that the Employer's contract with the county had no bearing on the wage increase. Likewise, in the early part of 1975, the Employer instituted improvements in its employee's health and group life insurance benefits.

⁹ *Ja-Ce Company, Inc., supra.*

¹⁰ The parties agreed to exclude from the unit the executive director; administrative coordinator; director, consultation and education; commu-

process consists merely of reviewing applicants' qualifications, interviewing them, and establishing priority ratings of qualified applicants. These priority ratings are submitted through the director of research and evaluation, who is responsible for the overall operation of the medical records department, to the employment and personnel committee which makes its own evaluation of the candidates and selects an applicant for hiring. There is also testimony that the medical records supervisor trains the medical records technician, but the drift of the evidence establishes that such "training" is limited to explaining the peculiarities of the Employer's recordkeeping system to a newly hired medical records technician and does not continue once the technician learns the system. Similarly, while there is testimony that the medical records supervisor can recommend that a medical records technician be counseled to correct particular job weaknesses, it is clear from the record that such counseling is far removed from the actual firing of a medical records technician, which is done by the director of research and evaluation after an independent investigation, and has never led to the discharge of any employees. In sum, therefore, the evidence establishes that the medical records supervisor possesses none of the indicia of supervisory authority as defined in the Act, and that she does not responsibly direct the work of any employees since such instructions she may give the medical technicians are routine in nature. Rather, the evidence establishes that the medical records supervisor performs the same work under the same conditions as the medical records technician. Accordingly, we find that the medical records supervisor is not a supervisor within the meaning of Section 2(11) of the Act and we shall include the medical records supervisor in the unit.

The *activity consultants* are responsible for the planning and implementation of psychological programs. They work with the activity generalists, activity volunteers, and counselors, all of whom were included in the unit by agreement of the parties, giving advice on the handling of particular cases. In addition, the activity consultants directly handle individual caseloads. The record does not establish that the activity consultants assign work directly to the other employees with whom they work. The record did indicate that the activity consultants screen candidates for the positions of activity generalists or activity volunteers, much the same as

unity mobilization director; director, research and evaluation; team manager, 24-hour services; team manager, community based services; administrative assistant, 24-hour services; accountant; clinical director; pharmacy supervisor; chief supervising psychologist; program coordinator; program director; and confidential employees including the executive secretary and personnel coordinator.

¹¹ *Sonotone Corporation, 90 NLRB 1236 (1950).*

the medical records supervisor screens candidates for positions in her department, but they, like the medical records supervisor, have no direct role in the hiring of such candidates, which is vested in the employment and personnel committee. Nor do activity consultants effectively recommend the firing of employees. Again, like the medical records supervisors, they merely can recommend that a particular employee be counseled to correct work deficiencies. Accordingly, on the basis of the above evidence, we find that the activity consultants do not effectively participate in the hiring, firing, discharge, scheduling of work, or direction of employees and are, therefore, not supervisors within the meaning of the Act. We shall therefore include the activity consultants in the bargaining unit.

The *assistant head nurse*¹² is a registered nurse who performs mainly nursing, counseling, and psychological functions. She works on the day shift, and there is some indication in the record that she directs the work of the other registered nurses, counselors, and senior counselors who work on that shift. However, the record is inadequate for us to determine the extent of the supervisory authority, if any, exercised by the assistant head nurse. Thus, the record does not establish with clarity the role of the assistant head nurse in the hiring, firing, disciplining, and training of other employees or the extent to which she directs the work of other employees. Accordingly, under the above circumstances, while we find that the assistant head nurse is a professional employee, we are unable on the record before us to make a determination as to her supervisory status, if any, and we shall therefore permit the assistant head nurse to vote subject to challenge.

The *counselor consultants*¹³ spend most of their time seeing clients on a continuing basis. They are also responsible for overseeing the client-related work of counselors and senior counselors, and for offering them necessary assistance. All assignments of particular clients to particular counselors, senior counselors, or counselor consultants are made by the program coordinator who has overall responsibility for their work. The record establishes that the role of the counselor consultants is consultatory and ministerial, assuring that a particular counselor or senior counselor has followed through on a particular program. The record further establishes that the counselor consultants do not direct the work of the counselors or senior counselors on a day-to-day basis and have no role in the hiring, firing, disciplining, training, scheduling, or promotion of counselors or

senior counselors or the resolution of their grievances. Accordingly, in view of the above evidence, we find that the counselor consultants are not supervisors within the meaning of the Act and we shall therefore include them in the bargaining unit.

However, the record reveals that a counselor consultant is required to have a master's degree in psychology or psychological social work, or a bachelor's degree with 2 years of experience, including experience as a senior counselor. The record further establishes that the counselor consultants exercise discretion and informed independent judgment in overseeing counselor-client activities. Accordingly, we find that the counselor consultants are professional employees within the meaning of Section 2(12) of the Act, and they should be permitted to vote in the professional employee voting group.

The Employer contends that the *community program facilitator* is a professional employee. The record indicates that the community program facilitator must have a master's degree and 3 years' experience in community relations, and that whoever holds that position is responsible for organizing community educational programs, including lectures, and for fostering political support for the Mental Health Center. However, inasmuch as the record indicates that there is no incumbent in this position, we shall not pass upon the question of whether the occupant of this position would be a professional employee within the meaning of the Act.

The Employer also contends that the *administrative assistant* to the director of research and evaluation is a professional employee. The record establishes that the administrative assistant is responsible for preparing surveys, writing reports, and compiling statistical analyses for the director of research and evaluation. The position also requires a bachelor's degree and 3 years' experience in administration in a research, educational, or health agency. Based on the evidence before us, the work of the administrative assistant appears to be routine in nature and more or less standardized, not requiring a consistent exercise of discretion and judgment or any advanced knowledge in a specialized field. Nor does the evidence indicate that the administrative assistant performs her work under the direction of a professional person in order to herself qualify to become professional. Accordingly, we find that the administrative assistant to the director of research and evaluation is not a professional employee within the meaning of Section 2(12) of the Act. However, inasmuch as the record establishes that the administrative assistant works

with various degrees of severity of client problems. These levels are promotional steps within the classification of counselor consultants and the work performed by employees in each level is not significantly different.

¹² There is no one in the head nurse position and the record indicates that the Employer has no present plans to fill such a position.

¹³ There are three levels of counselor consultants, labeled I, II, and III, which correspond to successive degrees of experience required in dealing

alone and apart from employees who are included in the unit and has no contact with unit employees, we find that she lacks sufficient community of interest with said employees to be included in the unit. We shall, therefore, exclude the administrative assistant from the unit.

Accordingly, we find in this case that a unit of all registered nurses, clinical psychologists, psychiatrists, pharmacists, counselor consultants, senior pharmacy technicians, pharmacy technicians, coordinator of volunteers, environmental services aides, wall washers, groundskeepers, maintenance engineers, admission and credit clerks, medical records supervisor, medical records technicians, secretary, receptionist/typists, activity consultants, activity generalists, counselors, senior counselors, and alcoholism trainees, but excluding the executive director; administrative coordinator; director, consultation and education; community mobilization director; director, research and evaluation; team manager, 24-hour services; team manager, community based services; administrative assistant, 24-hour services; accountant; clinical director; pharmacy supervisor; chief supervising psychologist; program coordinator; program director; executive secretary; personnel coordinator; guards, and supervisors as defined in the Act, *may* constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. However, this unit includes professional and nonprofessional employees, which the Board cannot join in a single unit without the desires of the professional employees being determined in a separate vote. Accordingly, we shall direct separate elections in voting groups A and B as follows:

Group A: All professional employees employed at The Buffalo General Hospital Community Mental Health Center, Buffalo, New York, including registered nurses, clinical psychologists, psychiatrists, pharmacists, and counselor consultants; excluding all other employees, guards, and supervisors as defined in the Act.

Group B: All nonprofessional and nonsupervisory employees employed at The Buffalo General Hospital Community Mental Health Center, Buffalo, New York, including senior pharmacy technicians, pharmacy technicians, coordinator of volunteers, environmental services aides, wall washers, groundskeepers, maintenance engineers, admission and credit clerks, medical records supervisors, medical records technicians, secretary, receptionist/typist activity consultants, activity generalists, counselors, senior counselors, alcoholism trainees; excluding the executive director; administrative coordinator; director,

consultation and education; community mobilization director; director, research and evaluation; team manager, 24-hour services; team manager, community based services; administrative assistant, 24-hour services; accountant; clinical director; pharmacy supervisor; chief supervising psychologist; program coordinator; program director; and confidential employees including the executive secretary and personnel coordinator.

The employees in voting group B will be asked whether they desire to be represented by the Petitioner. The employees in voting group A will be asked two questions on their ballot: (1) Do you desire to be included in the same unit as other employees employed by the Employer at its Buffalo, New York, facility for the purpose of collective bargaining? (2) Do you desire to be represented for the purposes of collective bargaining by Petitioner?

If a majority of the professional employees in voting group A vote yes to the first question, indicating their desire to be included in a unit with the nonprofessional employees, they will be so included. Their votes on the second question will then be counted with the votes of the nonprofessional employees voting in group B to decide the representative for the entire combined bargaining unit (professionals and nonprofessionals). If, on the other hand, a majority of the professional employees in voting group A do not vote for inclusion, they will not be included with the nonprofessional employees and their votes on the second question will then be separately counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

Our ultimate unit determination is based in part then on the result of the election among the professional employees. However, we now make the following findings in regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in a unit with the nonprofessional employees, we find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All registered nurses, clinical psychologists, psychiatrists, pharmacists, counselor consultants, senior pharmacy technicians, pharmacy technicians, coordinator of volunteers, environmental services aides, wall washers, groundskeepers, maintenance engineers, admission and credit clerks, medical records supervisor, medical records technicians, secretary, receptionist/typists, activity consultants, activity generalists, counselors, senior counselors; and alcoholism trainees,

employed at The Buffalo General Hospital Community Mental Health Center, Buffalo, New York; but excluding the executive director; administrative coordinator; director, consultation and education; community mobilization director; director, research and evaluation; team manager, 24-hour services; team manager, community based services; administrative assistant, 24-hour services; accountant; clinical director; pharmacy supervisor; chief supervising psychologist; program coordinator; program director; executive secretary; personnel coordinator; guards; and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, we find the following two units to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Unit A: All professional employees employed at The Buffalo General Hospital Community Mental Health Center, Buffalo, New York, including registered nurses, clinical psychologists, psychiatrists, pharmacists, and counselor consultants; excluding all other employees, guards, and supervisors as defined in the Act.

Unit B: All nonprofessional and nonsupervisory employees employed at The Buffalo General Hospital Community Mental Health Center, Buffalo, New York, including senior pharmacy technicians, pharmacy technicians, coordinator of volunteers, environmental services aides, wall washers, groundskeepers, maintenance engineers, admission and credit clerks, medical records supervisors, medical records technicians, secretary, receptionist/typist, activity consultants, activity generalists, counselors, senior counselors, alcoholism trainees; excluding the executive director; administrative coordinator; director, consultation and education; community mobilization director; director, research and evaluation; team manager, 24-hour services; team manager, community based services; administrative assistant, 24-hour services; accountant; clinical director; pharmacy supervisor; chief supervising psychologist; program coordinator; program director; and confidential employees including the executive secretary and personnel coordinator.

[Direction of Elections and *Excelsior* footnote omitted from publication.]