

**Lakeshore Manor, Inc., Employer-Petitioner and
United Employees of Lakeshore Manor, Local 711.
Case 30-UC-103**

August 13, 1976

DECISION ON REVIEW

BY CHAIRMAN MURPHY AND MEMBERS JENKINS
AND WALTHER

On December 17, 1975, the Regional Director for Region 30 issued a Decision and Order Granting Petition for Unit Clarification in the above-entitled proceeding in which he granted the Employer-Petitioner's request to clarify the union's certified unit of nonprofessional employees by specifically excluding therefrom certain recently created classifications on the grounds that they are professional employees. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Union filed a request for review of the Regional Director's decision alleging that he made findings of fact which are clearly erroneous in granting the Employer's clarification request.¹ The Employer filed opposition thereto.

By telegraphic order dated March 25, 1976, the request for review was granted.

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 considered the entire record in this case with respect to the issues under review, and makes the following findings:

The Employer is engaged in the operation of a nursing home at 3100 Lake Mendota Drive, Madison, Wisconsin. At an earlier period the facility provided care for geriatric residents. However, at the present time it has approximately 220 residents who are, generally, mentally retarded adults. The Union is certified for the following unit:

All employees . . . including part-time employees, but excluding registered nurses, licensed practical nurses, managerial employees, confi-

dential employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

Its latest contract covering that unit was executed April 14, 1975, for a 2-year term, effective February 14, 1975. One of the specific classifications for wage rate purposes, listed on Exhibit A attached to the contract, is rehabilitation assistant (skills, activities, workshop aides), for which the starting hourly wage rate is \$2.60, increasing to \$3.10 for those with 5 years' service. The Employer filed the instant petition on September 9, 1975, seeking to clarify the existing unit by specifically excluding, as professional employees, the following job classifications:

Vocational counselor, adaptive physical education teacher, psychological perceptual motor contractor, dance therapist, art therapist, special education teacher, and occupational therapist, registered and unregistered.²

The parties, pursuant to section 1.2 of their contract, engaged in negotiations concerning the disputed job classifications and on October 22, 1975, reached agreement on a new job description for the position of rehabilitation assistant. The new description stated, *inter alia*, that the position "may or may not include, but is not limited to the following job titles: dance therapy, workshop assistant, vocational counselor, independent living skills teacher, perceptual motor trainer and adaptive physical education." The desired experience and special skills for the position were stated to be: "Experience and/or further education after high school in working with the developmentally disabled. Would also prefer some relevant training after high school." We are unable to find that the parties' agreement as to the job description of the position of rehabilitation assistant resolved the unit placement issues raised in this proceeding, and no party so contends.

With regard to the unit placement issues, the record reveals that in early October 1974, when negotiations for the current contract commenced, the Employer created a new educational and rehabilitation services department and retained Ms. Patricia Beebe as its director. Both the facility administrator and Ms. Beebe testified that the purpose of the new department was to upgrade the quality of services rendered for the Employer's mentally retarded residents. The number of employees involved in providing

¹ Contrary to the Employer's contention, we find the Union's request for review, filed without benefit of counsel, to have been timely. The request was due December 30. It was mailed to the Board December 29, with an accompanying telegram of notification received by the Board that same day. Though under the Board's Rules the Union should have served a copy of its request immediately on the Employer, it did not until advised by the Board to do so on February 5. In the circumstances, including (a) the Union's lack of counsel and (b) the Union's prompt service upon being notified by the Board of this requirement, we find the request to have been timely.

² The parties stipulated that two of the Employer's occupational therapists who are registered are professional employees and properly excluded from the unit. As a third occupational therapist who was not registered would complete her educational requirements for registration in December 1975, and would therefore have fulfilled the requirements to obtain registration, we find, in accord with the parties' stipulation, that the Regional Director properly clarified the unit to exclude all three occupational therapists as professional employees.

these services was increased from 6 to 16. In recruiting employees for the new classifications created by the Employer, we note that in its newspaper advertisements Employer did not specify that an advanced degree was an educational requirement for any of the positions.

The record reveals that all the individuals employed in the education and rehabilitation services department were hired after Beebe became director of the institution. Despite Beebe's testimony that she was trying to upgrade these job classifications at that time, she hired a dance therapist on April 1, 1975, who would not receive her degree in this field for another 6 months. Moreover, although special education teacher Judy Fryback possesses a master's degree in reading, the other employees presently working in the department merely possess college degrees in their specific work areas. Furthermore, of the six job categories at issue in this proceeding, only Fryback and the art therapist are not paid in accordance with the starting hourly wage rate contained in the collective-bargaining agreement and set forth above.³

Section 2(12) of the Act defines a "professional employee" as follows:

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

In finding these employees to be professionals, the Regional Director emphasized that they prepare a curriculum for their specific field, develop training programs, and evaluate the progress of residents par-

ticipating therein. However, the functions performed by such individuals do not seem to require the specialized education or knowledge of an advanced type as defined by the Act. For example, the art therapist teaches colors and finger dexterity and makes residents aware of their arms and legs so that they may learn how to dress themselves. The adaptive physical education teacher's duties consist of organizing physical activities and the special olympics program, where residents engage in swimming, bowling, basketball, and track competition. With respect to the psychological perceptual motor instructor, the record shows that she instructs residents in functional reading, coloring, and speech communication. She also teaches them how to shop at retail stores. In addition, the vocational counselor teaches work habits and attitudes, work tolerance, social skills for work, grooming, and how to get to work and back, while the dance therapist works with residents' gross and fine motor movements as well as self-concepts and utilizing rhythm and music. Finally, Fryback teaches mathematics, budgeting, and skills of proper socialization to higher functioning residents.

Although the Employer's administrator and Director Beebe have testified that they are implementing a policy decision to improve the services provided the mentally retarded adults residing at the nursing home, it is conceded by them that the process of effecting this change of policy is still in the developmental stage. With the exception of the special education teacher, who also has a master's degree, we observe that the classifications in question are filled by employees whose formal educational background does not go beyond an undergraduate degree. Moreover, it does not appear from the record that any of these employees are on an education track which will lead them to an advanced degree in an area which includes their specialized employment activities, or that they are now, or are in the process of becoming, certified, registered, or licensed as professionals in such an area by any organization established for such purpose. We are not persuaded, therefore, in view of the limited educational and/or experiential backgrounds of the employees filling the newly created classifications in question, and in the light of the relatively low level of compensation received by them for their work, that they constitute professional employees under the statutory definition which we must apply. We therefore find, contrary to the Regional Director, that the employees in the newly created classifications of vocational counselor, adaptive physical education teacher, psychological perceptual motor instructor, special education teacher, art therapist, and dance therapist are properly within the certified unit as further defined in the existing contract.

³ Unit employees in these job classifications receive a wage increase to \$2 70 per hour following 90 days of employment at Lakeshore Manor

Accordingly, the unit is hereby clarified specifically to include the employees in these classifications in the unit. Also, in accord with the parties' stipulation

and our finding above, the unit is clarified specifically to exclude the occupational therapists, both registered and unregistered.