

Rite Aid Corporation and United Food and Commercial Workers Union, Local 400, Petitioner.
Case 5-UC-262

April 30, 1998

SUPPLEMENTAL DECISION ON REVIEW
AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HURTGEN

On December 16, 1987, the Regional Director issued a Decision and Order Clarifying Bargaining Unit. On March 18, 1988, the Board granted the Employer's request for review. By Order dated February 21, 1990, the Board remanded this proceeding to the Regional Director for further consideration consistent with *Detroit College of Business*, 296 NLRB 318 (1989). On February 27, 1991, the Regional Director issued a Supplemental Decision and Order Clarifying the Bargaining Unit to include the position of pharmacy manager in a unit comprised of all pharmacists and interns employed by the Employer at various geographic locations. On July 15, 1991, the Board granted the Employer's request for review as it raised substantial issues regarding the supervisory status of the Employer's pharmacy managers.

Based on a careful review of the record, for the reasons set forth below, we reverse the Regional Director in part and clarify the unit to include the position of pharmacy manager at stores in which no pharmacy technicians are employed and to exclude the position of pharmacy manager at stores which employ pharmacy technicians.

The Employer is engaged in the retail sale and distribution of pharmaceutical products and health and beauty aids from its approximately 2000 stores. In 1987 the Employer purchased approximately 175 stores from Drug Fair, Inc. Since 1969 the Petitioner has represented a unit of pharmacists and interns employed at the stores purchased from Drug Fair, Inc. After purchase of the stores, the Employer recognized the Petitioner as the exclusive collective-bargaining representative of all pharmacists and interns at certain of its stores in five states.¹ The Petitioner seeks to clarify the unit by the specific inclusion of the position

¹ The unit description is as follows:

All pharmacists and interns employed by the employer at all its stores located in Washington, D.C.; Maryland; Delaware; West Virginia; the State of Virginia; and except those located 30 miles west or 30 miles south of Lynchburg, Virginia and except those located 30 miles south of a straight line drawn from Lynchburg, Virginia to Franklin, Virginia, unless such stores were in operation as of October 22, 1979, in which event, pharmacists and interns employed at such stores shall be included in the bargaining unit; and all its stores existing at the time of the execution date of this Agreement located in the State of Pennsylvania.

titled "pharmacy manager" which was created by the Employer after its purchase of the stores in which the unit employees are employed.²

In each of the Employer's stores at issue, there is a bifurcation between the *front-end* or general merchandise operations and the pharmacy and there is both a front-end manager and a pharmacy manager. The front-end manager has general responsibility for the nonpharmacy operations of the store and the pharmacy manager has general responsibility for the operations of the pharmacy. The front-end manager has no authority over pharmacy personnel, and the pharmacy manager exercises no authority over front-end employees. Depending on a number of factors, a pharmacy may be staffed by a pharmacy manager, one or more professional staff pharmacists, pharmacy technicians, and interns. The parties stipulated that all pharmacists and interns are professionals. It is the Employer's policy to staff each pharmacy so that there is little or no overlap of pharmacists' work hours in a particular store.

A pharmacy manager's duties include filling prescriptions, taking physician's orders, ringing up sales, and dealing with customers. In addition, the pharmacy manager is also responsible for ordering merchandise, implementing price changes, and submitting reports. The pharmacy manager also exercises the authority to hire, fire, discipline, evaluate and schedule pharmacy technicians, and effectively recommends pay increases for them. The pharmacy managers do not possess any supervisory authority with respect to the other pharmacists or interns.

The pharmacy technicians (also clerks or cashiers) wait on customers and ring up sales on the register. The pharmacy technicians can ring up not only pharmacy items but also front-end merchandise from the nonpharmacy portions of the store on a separate register key. The pharmacy technicians/cashiers also assist the pharmacist on duty, whether the pharmacy manager or a staff pharmacist, in taking prescriptions and typing labels. The number of technicians varies in each store, with some facilities having none and others employing as many as six. The record indicates that pharmacy technicians are employed at approximately 65 of the 175 stores within the unit. Individual pharmacy technicians work in a single store "99% of the time" rather than splitting their hours between two or more stores. Because of rotating pharmacist schedules, a technician may be working at various times with either the pharmacy manager or a staff pharmacist.

The issue here is whether the pharmacy managers should be excluded from the unit because they exercise supervisory authority over pharmacy technicians. In his

² At the time of the hearing, the Employer employed approximately 145 pharmacy managers, approximately 40 percent of the pharmacists employed by the Employer.

February 27, 1991 Supplemental Decision and Order Clarifying Bargaining Unit, the Regional Director, applying *Detroit College of Business*, 296 NLRB 318 (1989), found that the pharmacy managers' exercise of supervisory authority over the pharmacy technicians is "an ancillary part of the pharmacy managers' primary, professional duties of filling and selling prescriptions" and that the pharmacy technicians "do not perform work that is 'part and parcel' of the pharmacy managers'" "primary work product.'" Accordingly, the Regional Director found that the pharmacy managers share a community of interest with the other unit members and issued an order clarifying bargaining unit to include the position of pharmacy manager.

In its request for review, the Employer requests the Board to reverse the Regional Director's supplemental decision that the unit be clarified, or, alternatively, to remand the matter to the Regional Director for reopening of the record to receive information on changes in the supervisory role of the pharmacy manager and the parties' bargaining history since the 1987 hearing. The Employer contends that the Regional Director failed to apply *Detroit College* properly, asserting that supervising technicians is not simply an ancillary part of the job of pharmacy manager, but part of their *primary work product*. In addition, the Employer contends that the inclusion of the pharmacy managers in the unit would create a conflict of interest because, unlike the sporadic or infrequent supervision exercised in *Adelphi University*, 195 NLRB 639 (1972), and analogized by the Board in *Detroit College*, the pharmacy managers are called upon to exercise their supervisory functions on a daily basis.

In the 65 stores in which pharmacy managers supervise pharmacy technicians, we find merit in the Employer's contentions, and, contrary to the Regional Director, find that the pharmacy managers are properly excluded from the unit under the standard set forth in *Detroit College*. The Board must evaluate in professional settings whether the supervisory functions being exercised by a professional employee over nonunit employees "so allied the individuals with management as to establish a differentiation between them and other employees in the unit." *Detroit College*, 296 NLRB at 320 (quoting *Adelphi*, supra at 644). Such an evaluation is necessary due to the relative imprecision of the supervisory question in professional settings and the fact that professional employees frequently require the "ancillary services" of nonprofessional "support personnel" in order to carry out their professional duties. *Id.* (quoting *New York University*, 221 NLRB 1148 at 1156 (1975)). See also *Legal Aid Society of Alameda County*, 324 NLRB No. 135 (Oct. 21, 1997).

In this case, there are two distinct aspects to a pharmacy manager's job, and his relationship vis-a-vis the pharmacy technicians with regard to each aspect must

be separately examined. First and foremost, a pharmacy manager is a pharmacist who spends his time dealing with doctors and customers in relation to his primary task of filling prescriptions. As to this aspect of his job, the pharmacy technicians assist the pharmacy manager by taking the prescription orders from doctors and customers on the telephone or in person, typing labels, and ringing up the sales. In this regard, there is no distinction in the interaction between the pharmacy technicians and the pharmacy manager than between the pharmacy technicians and the staff pharmacists. Under these circumstances, we find that, as to this aspect of the pharmacy manager's job, the supervision of the pharmacy technicians is analogous to the supervision by the admissions director in *Adelphi* and the librarians in *New York University* of clerical employees. All of the pharmacists, whether pharmacy manager or staff pharmacists, require the "ancillary services" of the pharmacy technicians to perform their own professional duties, and the work of the pharmacy technicians in this regard is "merely adjunct to that of the professional."

An examination of the second aspect of the pharmacy manager's job, however, leads to a different result with regard to the supervision of the pharmacy technicians. As manager of the pharmacy's operations, the pharmacy manager, unlike the staff pharmacists, hires, fires, disciplines, evaluates, and schedules pharmacy technicians and effectively recommends pay increases for them. This supervision encompasses not only the pharmacy technicians' performance of their duties assisting pharmacists in filling prescriptions but also in performance of their duties in assisting customers and ringing up sales with regard to nonprescription items. These latter duties of the pharmacy technicians are not "merely adjunct" to that of the pharmacists' role in filling prescriptions. Further, like the coordinators in *Detroit College*, the pharmacy managers were hired both to perform pharmaceutical work *and* to manage the pharmacy, including hiring, firing, disciplining, evaluating, and scheduling pharmacy technicians. These supervisory duties constitute regular and frequent portions of the pharmacy managers' responsibilities. Therefore, we find that the pharmacy managers have two "primary work products"—one of them having to do with their work as pharmacists, and the other one having to do with their work as managers of the pharmacy. The supervision of the technicians includes supervision of their performance of duties which are not directly related to the pharmacists' role of filling prescriptions. In sum, supervision is "part and parcel" of the pharmacy managers' role as managers, and that supervision extends to technician duties that are beyond those that are "merely adjunct or ancillary" to the pharmacy managers' professional duties as pharmacists. In these circumstances, we con-

clude that these pharmacy managers are “so allied with management as to establish a differentiation between them and other employees in the unit.” *Adelphi*, 195 NLRB at 644.

However, in the 110 stores in which there are no pharmacy technicians, the pharmacy managers possess no supervisory authority which would warrant their exclusion from the unit of pharmacists and interns, nor does the Employer contend that there is any basis to exclude them from the unit. Accordingly, we clarify the unit to include the position of pharmacy manager at stores which do not employ pharmacy technicians and to exclude the position of pharmacy manager at stores which employ pharmacy technicians.

ORDER

The Petitioner’s bargaining unit, as set forth in the current collective-bargaining agreement, is clarified to include the position of pharmacy manager at stores in which no pharmacy technicians are employed and to exclude the position of pharmacy manager at stores which employ pharmacy technicians.

CHAIRMAN GOULD, concurring and dissenting.

For the reasons set forth in my concurrence and dissent in *Legal Aid Society of Alameda County*, 324 NLRB No. 135, slip op. at 3 (Oct. 21, 1997), I would, contrary to my colleagues, clarify the unit of pharmacists to include pharmacy managers at all of the Employer’s stores in which unit employees are employed. Consistent with my position in *Legal Aid*, in my view, even assuming that pharmacy managers at stores which employ pharmacy technicians possess statutory supervisory authority over such employees, the unit should be clarified to include them because

their supervision extends only to nonunit support personnel.

Thus, pharmacy technicians are part of a separately organizable and differently oriented group of employees who are wholly outside of the scope of the unit. They assist the pharmacist on duty by taking prescription orders from doctors and customers over the telephone or in person, typing labels, and ringing up sales. In so doing, they are clearly providing support to the pharmacists as they perform their professional duties of filling prescriptions, taking prescription orders, ringing up sales and dealing with customers.

The majority relies on the fact that technicians occasionally ring up sales of nonprescription items using a separate register key in support of their conclusion that the technicians perform duties which are not merely adjunct to that of the pharmacists role in filling prescriptions. Even in this aspect, however, the technicians are supporting the pharmacists on duty since the pharmacists are required to ring up these sales if there are no technicians available, just as they ring up sales of prescription items when there are no technicians available. Further, there is no showing that these duties are more than incidental to their duties as support personnel for the pharmacists. Although the technicians provide services to both pharmacy managers and staff pharmacists, and thus do not work exclusively for the managers who supervise them, this does not remove the technicians from the definition of support personnel. As I noted in *Legal Aid*, the critical factor is that the technicians provide support to pharmacists as they perform their professional duties. Accordingly, I would affirm the RD and clarify the unit to include the position of pharmacy manager at all of the Employer’s stores in which unit employees are employed.