Northern California Visiting Nurses Association *and* American Federation of Nurses Social Services Union, Local 535, Service Employees International Union, AFL–CIO, Petitioner. Case 32–RC–3109

September 27, 1990

DECISION AND DIRECTION

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held November 9, 1989, and the hearing officer's report recommending disposition of them The election was conducted pursuant to a Stipulated Election Agreement The tally of ballots shows 39 for and 36 against the Petitioner, with 7 challenged ballots, a sufficient number to affect the results

The Board has reviewed the record in light of the exceptions and brief, and adopts the hearing officer's findings[1] and recommendations,[2] as modified

In determining whether on-call nurse Mary Veuve was eligible to vote, the hearing officer found appropriate the formula utilized in *Marquette General Hospital*, 218 NLRB 713 (1975) Applying this formula, the hearing officer found that Veuve was not eligible to vote because she did not work 120 hours in either of the two quarters preceding her leave[3] The Employer excepts, arguing that *Marquette*, supra, should not be applied, and the proper standard is whether Veuve averaged 4 hours a week prior to her leave

We find merit in the Employer's exceptions The parties do not dispute that Veuve was an employee on the eligibility date and on the date of the election In determining the eligibility of on-call employees who have been on leave, the Board examines their employment record as of the eligibility date excluding the period they were on leave[4] Because Veuve was on leave on the eligibility date, we must look at the period prior to her leave to determine if she is eligible to vote Veuve worked 72 2 hours during the quarter immediately preceding her leave[5] Because Veuve worked on a regular basis prior to her leave, and there is no evidence of a significant disparity in the number of hours worked by all the on-call nurses, as existed in *Marquette*, supra, we find that the appropriate standard is whether Veuve regularly averaged 4 hours or more of work per week during the quarter prior to her leave *Sisters of Mercy Health Corp*, 298 NLRB 483 (1990) Veuve averaged approximately 5 55 hours for the quarter prior to her leave and, therefore, was eligible to vote Accordingly, we overrule the challenge to her ballot[6]

DIRECTION

It is directed that the Regional Director for Region 32 shall, within 10 days from the date of this decision, open and count the ballots cast by Marianne Poppas,[7] Cheryl Davis, Karen Loos, and Mary Veuve, and prepare and serve on the parties a revised tally in Case 32–RC–3109, and take further appropriate action

[1] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations that the challenge to the ballot of Georgia Kellers be sustained and the challenge to the ballot of Cheryl Davis be overruled

[2] We adopt the hearing officer's recommendation to overrule the challenge to the ballot of Karen Loos and the recommendation to sustain the challenge to the ballot of Gary Appell We agree that Appell is not a professional employee under Sec 2(12) of the Act Accordingly, we find it not necessary to determine if Appell shares a community of interest with the unit employees

The Petitioner has excepted to some of the hearing officer's credibility findings The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect *Stretch-Tex Co*, 118 NLRB 1359, 1361 (1957) We find no basis for reversing the findings

[3] The relevant portion of the hearing officer's report is attached

[4] *Pat's Blue Ribbons*, 286 NLRB 918 (1987) Veuve was paid for attending three team meetings while on leave However, she did not perform any patient care on these occasions

[5] Veuve worked 4 5 hours on April 9, 8 hours on April 21, 7 5 hours on April 28, 6 hours on May 5, 3 hours on May 19, 2 5 hours on May 20, 1 hour on May 23, 1 2 hours on May 25, 6 75 hours on June 3, 9 hours on June 9, 2 hours on June 23, 9 5 hours on June 30, 8 25 hours on July 1, and 3 hours on July 2 Thus Veuve worked a total of 72 2 hours during that quarter and averaged 5 55 hours per week

[6] Member Oviatt agrees with the hearing officer's recommendation to sustain the challenge to the ballot of Mary Veuve Under the facts of this case, he would require on-call nurse Veuve "to regularly average 8 hours or more of work per week during the quarter prior to the eligibility date (104 hours) in order to be eligible to vote" *Sisters of Mercy*, supra, fn 8 As Veuve only averaged approximately 5 55 hours for the quarter prior to her leave, she does not meet this requirement

[7] The Regional Director previously recommended that the challenge to the ballot of Elizabeth Berdge be sustained and the challenge to the ballot of Marianne Poppas be overruled In the absence of exceptions, on January 10, 1989, the Board adopted the Regional Director's recommendations in an unpublished Order

APPENDIX

Mary Veuve

Petitioner challenged Veuve's ballot on the basis that she works only occasionally for the Employer, and therefore, is not a regular on-call employee The record reflects that Veuve was employed by the Employer for approximately two years as an on-call nurse[4] There is undisputed testimony that Veuve was also employed at

[4] Veuve terminated her employment effective November 15, notice was given by letter dated October 31

Kaiser Hospital during the time she was employed by the Employer

The 1989 time and pay record for Veuve shows that during the first quarter of 1989, Veuve worked 16 25 hours in January, 21 50 hours in February, and 20 50 hours in March, for a total of 58 25 hours During the second quarter, she worked 29 hours in April, 13 7 hours in May, and 35 5 hours in June, for a total of 78 20 hours During the third quarter of 1989, when she took an extended three-month vacation, Veuve worked only 4 5 hours—3 hours on July 2 and 1 5 hours on September 19 The record reveals that she did not perform patient care on September 19, rather, she was paid for attending a team meeting Gloria Sipes, Team Supervisor, testified that when Veuve returned from her vacation, she was granted the month of October off to prepare for her son's wedding The time and pay record also shows that Veuve was paid for 1 5 hours on October 10 and 1 hour on October 31 for her attendance at team meetings The time and pay record further shows that after July 2, Veuve did not actually perform work (e g , see patients) again until November 5, when she worked 6 hours On November 7, Veuve was again paid for 1 5 hours for her attendance at a team meeting, and on November 9, she was paid for 1 75 hours for the time it took her to vote in the election [5] The last day on which Veuve performed work for the Employer was on November 11, when she worked 3 25 hours

[5] There is undisputed testimony that everyone was paid for the time it took to vote in the election

In *Marquette General Hospital, Inc*, 218 NLRB 713 (1975), the Board devised an eligibility formula for determining the eligibility of on-call employees in a hospital setting The Board determined that on-call employees who worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the issuance of a Decision and Direction of Election were eligible to vote in the election directed Even if the quarter(s) in which Veuve was on leave are not used to determine the regularity of her employment, it is clear that she did not work 120 hours in either of the two quarters preceding her leave Therefore, Veuve is ineligible to vote in the election

In support of its position that Veuve is a regular on-call employee, the Employer cites *Pat's Blue Ribbons*, 286 NLRB No 94 (slip op , Nov 19, 1987), in which the Board found that an employee who resumed work approximately one month prior to the eligibility cutoff date, after being absent on a nine-month maternity leave, was eligible to vote in the election That case, however, is distinguishable from the instant case In *Pat's*, supra, the employee's preleave and reemployment hours indicated she was a regular employee Specifically, during the first month in which she returned from maternity leave, she worked 43 hours In addition, in the two months preceding her leave, she worked 140 and 108 hours, respectively In the instanst case, it is clear that Veuve worked less than 40 hours in any month in 1989

Accordingly, I recommend that the challenge to her ballot be sustained