Avanti Health System, LLC; CHHP Holdings II, LLC; and CHHP Management, LLC *and* Service Employees International Union, United Healthcare Workers-West and California Nurses Association/National Nurses Organizing Committee, International Nurses United, AFL–CIO. Cases 21–CA–39264 and 21–CA–39268

December 12, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On June 14, 2011, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Acting General Counsel also filed cross-exceptions and a supporting brief. The Charging Party adopted the Acting General Counsel's answering brief, cross exceptions, and supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent Avanti Health Systems, LLC, CHHP Holdings II, LLC, and CHHP Management, LLC, Los Angeles, California, its officers, agents, successors and assigns, shall take the actions set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> *Included*: All full-time, part-time, and per diem Registered Nurses, including those who serve as relief charge nurses;
>
> *Excluded*: All other Registered Nurses, including confidential Registered Nurses, office clerical Registered Nurses, all other professional Registered Nurses (including without limitation physicians and residents), registry nurses, Registered Nurses of outside registries and other agencies supplying labor to the Employer, traveling nurses, regularly assigned charge nurses, guards, managers, supervisors, as defined in the Act, and already represented Registered Nurses."

2. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its Los Angeles, California facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 21, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2010."

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[1] Chairman Pearce and Member Becker agree with the judge that, under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 47 (1987), a substantial and representative employee complement existed on March 26, 2010, during the first payroll period (March 26 to April 5, 2010), despite the Respondent's need to supplement the permanent staff of RNs with temporarily hired nurses. They further agree that a substantial and representative complement continued to exist during the second payroll period, (April 5 to 19, 2010). Member Hayes agrees that a substantial and representative employee complement existed no later than the second payroll period. He finds no need to pass on whether it existed during the first payroll period.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

At the Acting General Counsel's request, we correct the judge's description of the collective-bargaining unit set forth in sec. III.B.2 of his decision and in the recommended Order and notice. The appropriate unit includes: All full-time, part-time, and per diem Registered Nurses, including those who serve as relief charge nurses.

[3] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 12, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with California Nurses Association/National Nurses Organizing Committee, National Nurses United, AFL–CIO as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment:

Included: All full-time, part-time, and per diem Registered Nurses, including those who serve as relief charge nurses;

Excluded: All other Registered Nurses, including confidential Registered Nurses, office clerical Registered Nurses, all other professional Registered Nurses (including without limitation physicians and residents), registry nurses, Registered Nurses of outside registries and other agencies supplying labor to the Employer, traveling nurses, regularly assigned charge nurses, guards, managers, supervisors, as defined in the Act, and already represented Registered Nurses.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, bargain collectively with the Union as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if agreement is reached, embody such agreement in a signed document.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed on March 26, 2010, and retroactively restore terms and conditions of employment, including wages, that existed on March 26, 2010.

AVANTI HEALTH SYSTEMS, LLC, CHHP HOLDINGS II, LLC, & CHHP MANAGEMENT, LLC

Lisa McNeil, Esq., for the General Counsel.
Richard W. Kopenhefer, Esq. and *Paul Berkowitz, Esq. (Sheppard Mullin Richter & Hampton LLP),* of Los Angeles, California, for the Respondents.
Jane Lawhon, Esq., of Oakland, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Los Angeles, California, on March 14, 15, 16, and 17, 2011. The captioned charge in Case 21–CA–39264 was filed by Service Employees International Union, United Healthcare Workers-West on March 9, 2010.[1] The captioned charge in Case 21–CA–39268 was filed by California Nurses Association/National Nurses Organizing Committee, National Nurses United, AFL–CIO (Union) on March 11, 2010. On December 27, 2010, the Regional Director for Region 21 of the National Labor Relations Board (Board) issued a complaint and notice of hearing alleging violations by Avanti Health System, LLC; CHPP Holdings II, LLC; and CHHP Management, LLC (Respondents) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). The Respondents, in their answer to the complaint, duly filed, deny that they have violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent; and the Union filed a statement adopting in full the General Counsel's brief. Upon the entire record, and based upon my observation of the

[1] Prior to the hearing in this matter those portions of the consolidated complaint pertaining to Case 21–CA–32964 were withdrawn; therefore the remaining complaint allegations pertain only to Case 21–CA–39268 filed by the Union.

witnesses and consideration of the briefs submitted, I make the following.

FINDINGS OF FACT

I. JURISDICTION

The Respondent CHHP Holdings II, LLC, admits that CHHP Management, LLC is its wholly owned subsidiary, and that the two entities own, and operate, respectively, the Community Hospital of Huntington Park, an acute care hospital, located in Los Angeles, California. It is admitted that CHHP Management, LLC, in operating the hospital, derives gross revenues in excess of $250,000 and purchases and receives at the hospital goods valued in excess of $5000 directly from points outside the State of California. It is further admitted, and I find, that CHHP Management, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and, as the operator of the hospital, is a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act,

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the three named Respondents conduct the business operations of the hospital as a single or, in the alternative, as joint employers; and whether all or any of them have violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union in accordance with established Board successorship principles.

B. Facts, Analysis, Conclusions

1. Status of Avanti Health System, LLC

Avanti Health System, LLC (Avanti) intended to purchase, own and operate Community Hospital of Huntington Park (CHHP), owned by an entity named Karykeion, Inc., through a bankruptcy sale. However, due to the last-minute refusal of Avanti's lender to provide financing, various investors of Avanti established CHHP Holdings II, LLC, and that entity, in turn, established CHHP Management, its wholly owned subsidiary. While Avanti was therefore no longer the legal purchaser of CHHP, it became the guarantor of certain loans to CCHP Holdings II, LLC, thus enabling that entity to purchase CHHP. Thereupon, CHHP Holdings II, LLC purchased CHHP. Because, according to the Respondents, CHHP Holdings II, LLC currently owns CHHP, and CHHP Management, LLC currently operates CHHP, it is argued that Avanti should therefore not be a party to this proceeding as it is neither the owner nor manager of CHHP, and is only tangentially involved as the guarantor of the aforementioned loans.

The printout of Avanti's website, www.avantihospitals.com, under various home-page headings, introduced into evidence in this proceeding, states, inter alia:

> Avanti Health System owns and operates acute care hospitals.
>
> Through our subsidiaries, we own and operate acute care hospitals and related healthcare businesses.
>
> Avanti and its' affiliates currently own and operate three acute care hospitals, East Los Angeles Doctors Hospital, Memorial Hospital of Gardena, and our sister hospital, Community Hospital of Huntington Park, all located near Los Angeles, California.

The Respondents provided no evidence to explain the apparent inconsistency between Avanti's purported tangential relationship simply as loan guarantor of CHHP Holdings II, LLC, and the degree of its ownership and control of CHHP as set forth in its website.

East Los Angeles Doctors Hospital (Doctors Hospital) is located some seven miles from CHHP, and is considered a sister hospital to CHHP. Araceli Lonergan is CEO of Doctors Hospital. Doctors Hospital is owned and operated by Avanti; there is no separate management entity that operates the hospital. Lonergan testified that Steve Dixon, then CEO of Avanti, told her that her Doctors Hospital management group would be going to go over to CHHP and run it. Thus, at all times material herein, Lonergan and her Doctors Hospital management team have been in charge of the daily operations of Doctors Hospital as well as of CHHP, and divide their time between the two hospitals. Lonergan and her management team receive their paychecks from Doctors Hospital, but Lonergan testified she signs the payroll checks "and things like that" on behalf of CHHP Management, LLC. The management team applied the Doctors Hospital policies, practices and employee rules to the CHHP employees from the time of the acquisition of CHHP.

Carmelo James is chief nursing officer (CNO) at both Doctors Hospital and CHHP. He is responsible for all nursing care and staffing. He and his staff of Doctors Hospital managers who report to him were responsible for hiring the RNs at CHHP both prior to and after the acquisition of CHHP. James agreed that upon the acquisition of CHHP the Doctors Hospital policies regarding wages, all employment rules, sick leave, vacation, and benefit packages and all other rules and policies were instituted at CHHP as a result of instructions from "Steve" (apparently Avanti CEO Steve Dixon) "that we had to mirror [at CHHP] what we have at East LA [Doctors Hospital] . . . It's just fair."

Steve Lopez is chief financial officer (CFO) of both Doctors Hospital and CHHP and spend his time at both locations. Lopez testified that he was involved in setting wage rates for the employees who were to be hired at CHHP. The rates are the same for employees at both hospitals because, as Lopez testified, "we can't disenfranchise employees at East LA (Doctors Hospital), so I wanted to make sure that comparable jobs were paid equally."

On the basis of the foregoing I find, that Avanti, CHHP Holding II, LLC and CHHP Management, LLC constitute a single employer under well established Board precedent as set forth in the cases cited by the General Counsel in her brief: Radio *& Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc.*, 380 U.S 255, 256 (1965); *Proctor Express, Inc.*, 322 NLRB 281, 289–290 (1996); *NLRB*

v. Browning, 691 F2d 1117 (3d Cir. 1982); *Hydrolines, Inc*., 305 NLRB 416, 417 (1991). Centralized control of labor relations is "critical" and "a single-employer relationship will be found only if one of the companies exercises *actual* or *active* control over the day-to-day operations or labor relations of the other." (Original emphasis; footnote omitted.) *Dow Chemical Co.*, 326 NLRB 288 (1998). There is common overlapping ownership between the entities, and, most importantly, it is clear that Avanti, through its Doctors Hospital management staff, exercises actual and active day-to-day control over CHHP.

2. Successorship

Prior to the acquisition of CHHP by the Respondents the Union had been the collective bargaining representative of certain CHHP employees in the following unit as set forth in the January 1, 2007 to June 30, 2010 collecive-bargaining agreement between the Union and CHHP:

> Included: All full-time and per diem Registered Nurses, including those who serve as relief charge nurses;
>
> Excluded: All other Registered Nurses, including confidential Registered Nurses, office clerical Registered Nurses, all other professional Registered Nurses (including without limitation physicians and residents), registry nurses, Registered Nurses of outside registries and other agencies supplying labor to the Employer, traveling nurses, regularly assigned charge nurses, guards, managers, supervisors, as defined in the Act, and already represented Registered Nurses.

On March 6, 2010,[2] prior to the acquisition, during a time when the Respondents' Doctors Hospital managers were interviewing and preparing to hire a new complement of employees for the operation of CHHP, the Union, by letter, requested recognition as the collective-bargaining representative of the Respondents' RNs in the aforementioned bargaining unit. The Respondents' operation of CHHP commenced at 12:01 a.m. on March 26. On March 27, Respondents' counsel replied to the Union's letter acknowledging that the demand for recognition was a continuing one, and further stating that the Union "does not presently represent a majority of our employees in an appropriate bargaining unit under the principles established by the U.S. Supreme Court in *NLRB v. Burns Int'l Security Services,* 406 U.S. 272 (1972)"; the Respondents declined to recognize the Union until such time as it was certified pursuant to an NLRB election.

The Respondents continue to refuse to recognize the Union, maintaining that the Union has never represented a majority of RNs at CHHP at any time subsequent to the acquisition of the hospital.

The Respondents in their brief assert, "This is a simple case involving dueling *Burns* "headcounts" under *NLRB v. Burns Security Services*, 406 U.S. 272, 280–281 (1972), and *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987). The General Counsel and Union agree. What the parties do not agree upon, however, is the date on which the Respondents first employed a "substantial and representative complement" of RNs, and whether, on and after that date, the Respondents employed a majority of the predecessors' RNs (sometimes referred to as "incumbents").

Steve Lopez, CFO of both Doctors Hospital and CHHP testified that as of March 26, when the Respondents began operating CHHP, it was fully staffed and there was adequate staffing level to run the hospital successfully.[3] Further, Lopez testified that about a week after the initial takeover of operations, CHHP received a California Health Department review including the auditing of staffing levels. CHPP passed the audit and it was found the hospital was adequately staffed.

A comparison of record evidence from the General Counsel and the Respondents shows that on March 26 there were a total of 47 nonsupervisory RNs employed by CHHP, and that of this number 30 nonsupervisory RNs had been employed by the predecessor on March 25; accordingly, the Union represented a majority of 63.8 percent of unit employees.[4] The Respondents contend, however, that although Lopez stated there were enough RNs initially employed to run the hospital, the complement of 47 RN's did not constitute a "substantial and representative" complement of RNs sufficient to run the hospital; rather, it had been determined that a staff of 65 nonsupervisory RNs would have reasonably met contemplated staffing requirements. Indeed, as Respondent's witnesses testified, offers of employment were made to 65 RNs. Further, Lopez testified that what he meant by his assertions that the hospital was fully or adequately staffed as of March 26, is not that it was fully and adequately staffed with 47 RNs, but that it was fully and adequately staffed because on and after March 26 some 10 RNs were "borrowed" or "migrated" or "floated" from Doctors Hospital to CHHP, and many other RN registry nurses, who worked for outside agencies, had to be brought on board to supplement the inadequate RN staffing.

The Respondents agree 65 nonsupervisory RNs would constitute adequate staffing, and that 47 RNs were employed on March 26. It follows that 72.3 percent of the contemplated RN work force was employed on March 26. This percentage would, I believe, under the circumstances, constitute a substantial and representative complement of employees under *Burns*. However, the Respondents also maintains that the aforementioned presumptively appropriate RN unit[5] set forth in the collective-agreement between the Union and successor employer is not appropriate in that it includes per diem RNs who, because

[2] All dates or time periods hereinafter are within the year 2010, unless otherwise indicated.

[3] Lopez also makes this same statement both in a Board affidavit and in a sworn declaration submitted by the Respondents to the District Court in a related 10(j) proceeding.

[4] The Respondents maintain that two of these 30 RNs were in fact supervisors, infra; therefore, although they were hired by CHHP as nonsupervisory RNs, they were not formerly bargaining unit employees and may not be counted in determining the Union's majority under *Burns*. However, even if these two individuals were excluded and 28 rather than 30 of the predecessor's nonsupervisory RNs began working for CHHP on March 26, the Union's majority support, 56.2 percent is nevertheless established.

[5] See Sec.103.30, Appropriate Bargaining Units, of the Boards Rules and Regulations.

of their limited benefits and sporadic employment, have an insufficient community of interest with the other RNs.

In this regard, the aforementioned collective-agreement specifies as follows:

> C. Per Diem Registered Nurse
>
> A Per Diem Registered Nurse is a Registered Nurse who has executed the Facility's Per Diem Agreement and who is not a regular full-time or regular part-time1 Registered Nurse. Per Diem Registered Nurses do not receive any insurance, retirement or other fringe benefits under this agreement . . . except that Per Diem nurses shall be eligible for participation in the 401(k) Retirement Savings Plan as allowed under the Plan. Per Diem nurses shall be eligible for the new Retiree Medical Benefit contained in Article 15B, subject to the eligibility requirements set forth in Article 15B.

The Per Diem Agreement referred to in the above paragraph is a one-page agreement, signed by the RN, and specifies the following criteria: Per Diem nurses must be available to work at least one day per week; must be available to work a minimum of one weekend per month; must submit their available days to Nursing Administration prior to the posting of the next work schedule; and must work at least one of five specified holidays.

Union Representative Dinorah Williams testified she was involved in negotiating the aforementioned contract and the terms of the per diem agreement with the predecessor employer, Karykeion, Inc. Williams testified that per diem nurses enjoyed various contract benefits: weekend, evening, and nightshift differential rates; and bonuses. Regarding work schedules, Williams testified that under certain circumstances per diem RNs who were on the schedule to work would be called in to take the place of a full-time RN who was on overtime. Regarding discipline of per diem nurses, Williams testified that if a per diem nurse did not meet the requisite requirements spelled out in the per diem agreement prior to the posting of each staffing schedule, that is, by submitting their availability, they would be automatically "plugged in" to a date, and if they did not show up to work on that date they would be subject to discipline including termination.

On the basis of the foregoing, and in the absence of any case authority to the contrary, I find that per diem RNs were appropriately included within the RN bargaining unit under the contract between the Union and the predecessor.

The Respondents in their brief assert that a substantial and representative complement of RNs was working for CHPP as of April 19, the ending date of the Respondents first full 2-week pay period, April 5 to 19, after its takeover, and that the *Burns* successorship count should be conducted during or after, but not before, that pay period. According to a detailed chart constructed by the Respondents in their brief, the Respondents conclude that there were a total of 63 nonsupervisory RNs[6] employed during that pay period, 31 of whom were unit employees of the predecessor; thus, according to the Respondents, the Union represented only 49.2 percent of the CHHP RNs, and therefore did not enjoy majority support.

In order to arrive at this number of 63 RNs the Respondents included 6 individuals, allegedly RNs, infra, who are not customarily considered staff nurses. The Respondents maintain that the predecessors' bargaining unit would have included such individuals had the predecessor employed them. In this regard, the Respondents elicited from Juliet Miranda, chief nursing officer and chief operating officer for the predecessor, the following response to a hypothetical question:

> Q. By Respondent's counsel: If you had an individual who was a licensed RN working in another non-supervisory classification, they would have been included in the unit?
>
> A. Yes.

While this appears to be Miranda's opinion, whether an employee who is not an RN staff nurse, but who happens to have RN licensure, would or would not be included in the RN unit is not a decision for Miranda alone to make. Rather, inclusion or exclusion of such individuals would be subject to agreement of the parties, or, if no agreement could be reached, to Board determination. It appears that Miranda's testimony on this point is mere speculation. In fact, this was never an issue between the predecessor and Union as the predecessor, insofar as the record shows, had employed no such individuals; further, the unit description, as set for above, directly contradicts Miranda's testimony as it specifically excludes, "All other Registered Nurses. . . ." Accordingly. I find no merit to the Respondents' contention.

Carmelo James, chief nursing officer (CNO) at both Doctors Hospital and CHHP, is responsible for all nursing care and staffing. James testified that utilization review employees, also known as case management employees, are responsible for the "constant movement of the patients." While it is not required that utilization review personnel be RNs, and while LVNs were initially doing this work at CHHP both before and shortly after its takeover by the Respondents, James testified it is his preference to hire RNs for such positions as RN training for utilization review personnel, who act as "middlemen" between the nurses and the physicians," lends itself to better, more accurate, communication and therefore is more expedient. These individuals work with the nursing staff, including RNs, to determine what is needed for the well being of the patient according to accepted standards of practice for treating each particular patient. According to James, these case managers "will basically ask our nurses on the floor what's going on with this patient, things like that." They also work with the social worker for discharge planning, including financial classes for patients to help them cope with financial difficulties after they are discharged.

James testified that CHHP hired two RNs to perform this work, namely *Maggie Vargas* and *Arturo Ponce*. However,

[6] In this regard, given the fact the Respondents agree that 63 RNs, rather than 65, comprised a substantial and representative complement of RNs necessary to run the hospital, the complement of RNs on March 26, 2010 (47) would be 74.6 percent of the RN employee complement needed to run the hospital.

while the Respondents' payroll records do list Ponce as a "RN Case Manager" in the Utilization Review department, these records do not contain the name of Vargas. Therefore, I find that Vargas was not on the payroll of CHHP during that April 5 to 19 payroll period. Moreover, it is the Board's practice to exclude case managers from a RN unit, even if the case managers are RNs, in the "absence of a [hospital] requirement for RN licensure for the Employer's case manager position." *Salem Hospital*, 333 NLRB 560 (2001). Here, neither James' testimony nor the Respondents' payroll records show that Marisela Gonzalez, lead case manager in utilization review,[7] has RN licensure. Therefore, I find that the Respondents have not demonstrated that individuals occupying the case manager position are required to be licensed RNs; accordingly, I find that Ponce should not be included within the RN unit.

Further, the chart in Respondents brief lists Erika Ramirez as a unit member with the title "RN Utilization Review Coordinator." James did not discuss Ramirez, her name was not mentioned at the hearing, and Respondents' payroll lists her as "UR Coordinator," rather than, "RN Utilization Review Coordinator." Therefore, there is no record evidence showing she is a RN.

James testified that an individual, Jeremias Azuela, who is no longer employed by the Respondents, was a RN whose job description was Performance Improvement/Risk Management (PI/RM) in the Risk Management department. This position falls under the jurisdiction of the chief operating officer (COO) rather than James' jurisdiction. Azuela occupied the same position or Karykeion, Inc., the predecessor, but was not included in the predecessors' RN bargaining unit. James testified that Azuela:

> [W]orks with us related to performance improvement.
>
> We look at certain indicators that we would like to improvement [sic] and with [sic] gather data and analyze it as a team to see how we can come up with interventions to correct or to make things much smoother . . . within the regulations as well.
>
> He did a lot of great things for us with core measures and everything else. He worked hand in hand with my nurses to try to change our basically our habit and to make it more compliant with the joint commission and AOA standards.

There is no documentary evidence that Azuela was in fact a RN, his duties do not appear to be closely related to the direct, daily care of patients, and, most significantly, he was not under the supervision of Chief Nursing Officer James. I find he should not be included in the RN unit.

James testified that *Suzanne Zemer* is an RN educator. She educates all staff employees, including the nursing staff, as follows:

> . . . get into compliance and any standards that change she's in charge of that or we have other schools. There's schools of nursing that actually come and do that. She's in charge of making sure those students fall within the guidelines that we set forth.

Suzanne Zemer is not listed in the Respondents' April 5 to 19 payroll records. Therefore she was not employed during the relevant time period in question.

James testified that *Barbara Edmonds* is "a contract person" who occupies the position of an RN infection control nurse.

> She predominantly deals with all of the bugs that come around and work diligently with the ID doctor, Dr. McNamara and with the committee and comes up with all of this—the plan to make sure that infection in the hospital is minimized.

Barbara Edmonds, a contract person, is not listed in the Respondents' April 5 to 19 payroll records. Therefore she was not employed during the relevant time period in question.

The Respondents maintain that *Judith Morgan* and *Bozena Owens*, both charge nurses, should be included in the unit as James' rather lengthy testimony on this point demonstrates that they are not supervisors. I agree. Further, the General Counsel appears to agree that these individuals are properly within the unit. They will be included.

The Respondents maintain that two RNs, *Ki Kim* and *Lillian Pascua*, who are claimed by the Union and General Counsel to be incumbents, are in fact not incumbents as they were RN clinical supervisors while working for the predecessor and therefore should not have been included in the predecessor's RN unit. In support of this contention, the Respondents introduced a Personnel Change Notice for Ki Kim, dated March 17, 2006, showing that she had been a current clinical supervisor and received an incentive salary increase; and that Lillian Pascua apparently was promoted to the position of clinical supervisor on January 6, 2006.[8]

However, the predecessor's payroll document, introduced into evidence by the General Counsel, shows that on March 25, the day preceding the takeover of CHHP by the Respondents, neither Kim nor Pascua are listed as clinical supervisors; rather they are listed as RNs in the surgery unit and the emergency room, respectively, and are included in the RN unit. Further, eight other individuals who are identified in the predecessor's payroll document as "clinical supervisors" are not included in the RN unit. Accordingly, I conclude that the most current documentary evidence shows that Kim and Pascua are appropriately included in the RN unit as incumbents.

The Respondents maintain that an all-RN unit is not appropriate and that 7 non-RN healthcare professionals should also be included in the unit. Thus, the Respondents would include two social workers, four pharmacists, and the registered dietician, who, according to the Respondents, all hold bachelor degrees and state licenses, and share a close community of interest with the RNs. It is argued that the exclusion of this

[7] Marisela Gonzalez is not listed in the chart in the Respondents brief as a unit member.

[8] The Respondents subpoenaed these files from the predecessor sometime prior to the hearing herein, and were permitted to look through the files and copy documents from the files, but not retain the files. Therefore, the files were not available at the hearing.

"small residual unit of 7 non-RN healthcare professionals" would likely cause them to remain unrepresented for the purposes of collective bargaining, or, in the alternative, if they sought union representation, would conflict with Board policy to minimize the undue proliferation of bargaining units in the healthcare industry. The problem with this argument is that, according to the Respondents' payroll information, the Respondents employed during the April 5 to 19 payroll period many other individuals who could likely be included in a separate unit of healthcare professionals such as case managers, utilization review employees, lab assistants, phlebotomists, radiology technicians, pharmacy technicians, surgical technicians, ultrasound technicians, licensed vocational nurses (LVNs), and perhaps others, numbering, roughly, in the neighborhood of 100 or more individuals. The record evidence does not support the Respondents' argument that the seven individuals selected by the Respondents would not be appropriately included in a larger unit. I find no merit to the Respondents' argument.

From the foregoing, I conclude that the RN unit on April 19 consisted of a total complement of 59 RNs, 33 of whom were incumbents. Therefore, on that date, the Union represented a majority of 55.9 percent of the bargaining unit.[9]

The Respondents agree that a sufficient number of RNs to run the hospital were employed during the April 5 to 19 pay period, and I have found that 59 RNs were employed during that period. The complement of 47 RNs on March 26 constitutes 79.6 percent of that number. Clearly this significant percentage, particularly given the fact that, as Respondents managers testified, the number of RNs required at any given time is a difficult number to accurately assess as a result of the ever-changing daily patient population, constitutes a substantial and representative complement of RNs. I so find.

I therefore find that the Union has represented a majority of unit employees beginning on March 26 and continuing thereafter, as alleged in the complaint, and that the Respondents have violated and are violating Section 8(a)(5) and (1) of the Act as alleged by failing and refusing to bargain with the Union as the representative of the unit RNs on and after March 26.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

1. The Respondents Avanti Health Systems, LLC, CHHP Holdings II, LLC and CHHP Management, LLC constitute a single employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents have violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

THE REMEDY

Having found that the Respondents have violated and are violating Section 8(a)(5) and (1) of the Act, I recommend that they be required to recognize and bargain with the Union in the collective-bargaining unit described below, and, on request of the Union, rescind and retroactively restore any departures from terms and conditions of employment, including wages, that existed on March 26, 2010.

I shall also recommend that the Respondents be required to cease and desist from in any other like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

ORDER[10]

The Respondents Avanti Health Systems, LLC, CHHP Holdings II, LLC and CHHP Management, LLC, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of employees in the unit described below.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act

(a) Bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> Included: All full-time and per diem Registered Nurses, including those who serve as relief charge nurses;
>
> Excluded: All other Registered Nurses, including confidential Registered Nurses, office clerical Registered Nurses, all other professional Registered Nurses (including without limitation physicians and residents), registry nurses, Registered Nurses of outside registries and other agencies supplying labor to the Employer, traveling nurses, regularly assigned charge nurses, guards, managers, supervisors, as defined in the Act, and already represented Registered Nurses.

(b) On request of the Union, rescind any departures from terms and conditions of employment that existed on March 26, 2010, and retroactively restore terms and conditions of employment that existed on March 26, 2010.

(c) Within 14 days after service by the Region, post at its CHHP facility copies of the attached notice marked "Appen-

[9] The arithmetic is as follows: The Respondents list a total unit complement of 63 individuals. I have found, for reasons set forth above, that six of these individuals should be excluded from the unit (Maggie Vargas, Arturo Ponce, Erika Ramirez, Jeremias Azuela, Suzanne Zemer, and Barbara Edmonds), and two RNs should be added (Judith Morgan and Bozena Owens). Further, the Respondents list a total of 31 incumbent RNs. I have found that two RNs (Ki Kim and Lillian Pascua) were nonsupervisory incumbents of the predecessor and should be counted as such.

[10] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

dix."[11] Copies of the notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondents' representative, shall be posted immediately upon receipt thereof, and shall remain posted by Respondents for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Regional Office, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 14, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Goverment

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with California Nurses Association/National Nurses Organizing Committee, National Nurses United, AFL–CIO as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment:

Included: All full-time and per diem Registered Nurses, including those who serve as relief charge nurses;

Excluded: All other Registered Nurses, including confidential Registered Nurses, office clerical Registered Nurses, all other professional Registered Nurses (including without limitation physicians and residents), registry nurses, Registered Nurses of outside registries and other agencies supplying labor to the Employer, traveling nurses, regularly assigned charge nurses, guards, managers, supervisors, as defined in the Act, and already represented Registered Nurses.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, bargain collectively with the Union as the exclusive representative of the employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if agreement is reached, embody such agreement in a signed document.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed on March 26, 2010, and retroactively restore terms and conditions of employment, including wages, that existed on March 26, 2010.

AVANTI HEALTH SYSTEMS, LLC, CHHP HOLDING II, LLC AND CHHP MANAGEMENT, LLC

[11] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing and Order of the National Labor Relations Board."