

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

EXTENDICARE HOMES, INC., d/b/a TEXAS
TERRACE CARE CENTER¹

Employer

and

SERVICE EMPLOYEES INTERNATIONAL
UNION (SEIU) HEALTHCARE MINNESOTA

Petitioner

Case 18-RC-070382

DECISION AND DIRECTION OF ELECTION

Petitioner seeks to represent a unit of all full-time and regular part-time Nursing Assistants (also referred to throughout the record as “Nursing Assistants Registered” and herein referred to as “NARs”) and Trained Medical Aides (also referred to throughout the record as “Trained Medication Aide” and herein referred to as “TMAs”) employed by the Employer at its St. Louis Park, Minnesota facility. The Employer maintains that the unit sought by Petitioner is not appropriate and that the only appropriate unit would also include the Cooks and Dietary Assistants (“DAs”) employed by the Employer at its St. Louis Park, Minnesota facility. Based on the record and the relevant Board cases, including its recent decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), I find that the petitioned-for unit limited to the Employer’s full-time and regular part-time NARs and TMAs is appropriate.

¹ The Employer’s name appears as amended at the hearing.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.²
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. This decision first provides an overview of the Employer's operations and staff, highlighting job descriptions and reviewing daily duties. It then examines evidence concerning the community of interest among the job descriptions at issue. Finally, it will analyze Board precedent and its applicability to the facts of this case.

I. FACTS

A. The Employer's Operations and Staff

The Employer operates a nursing home in St. Louis Park, Minnesota. It offers skilled nursing services to the elderly and those who require "skilled lead," in a facility

² The Employer, Extencicare Homes, Inc., d/b/a Texas Terrace Care Center, a corporation with an office and place of business located in St. Louis Park, Minnesota, is involved in the business of providing long-term nursing care. Within the past 12 months, a representative period, the Employer received gross revenue in excess of \$100,000 and purchased goods valued in excess of \$5,000 from points located directly outside the State of Minnesota.

with 131 beds. The facility is comprised of three levels called “units,” and each unit has its own nurses’ station and staff, a lounge for residents, and two dining rooms.

The lower level is referred to as the Garden Terrace Level. It has two rows of resident rooms (36 beds) for general long-term care, a nurses’ station, two dining rooms, and a resident lounge. The facility’s maintenance office, business office, staffing coordinator office, social services office, medical records office, employee locker room, a storage room, boiler room, employee break room, housekeeping, and laundry are also contained on the lower level.

The first floor is called the Transitional Care Unit (“TCU”). It also has a nurses’ station, dining rooms, and resident lounges. The kitchen is on the first floor, along with the registered dietitian/food service manager’s office, the therapy room, reimbursement office, a large coffee room, lobby and reception desk, and the office for the Director of Social Services.

The second floor has three hallways of resident rooms, a nurses’ station, resident lounge, and two dining rooms. It has offices for the education director, nurse manager, social worker, life enrichment department (activities), and admissions department, and also hosts the residents’ beauty shop.

B. Supervisory Hierarchy

Administrator Jennifer Kuhn oversees this facility, which has employees divided into 12 departments: nursing, dietary, business, social services, medical records, reimbursement services, life enrichment or activities, admissions, housekeeping and laundry, maintenance, therapy, and education and training. A department head oversees each department and each one, except the heads of therapy and housekeeping and laundry, reports directly to Kuhn.

Donald Dennison is the Director of Nursing. He is a Registered Nurse (“RN”). Three Unit Managers report directly to the Director of Nursing. The Unit Managers’ general responsibility is to run their respective units. This includes making sure there is appropriate staffing, and creating care plans and assessments, among other things. The Unit Managers typically work the day shift Mondays through Fridays. When the Unit Managers are not in the building, the Employer has one RN or Licensed Practical Nurse (“LPN”) house supervisor on duty per shift.³ When a house supervisor is on shift, there is typically no other nursing management in the facility. There are approximately 32 RNs and LPNs who report directly to the Unit Manager assigned to their floor. There are 62 NARs and 9 TMAs who are part of the nursing department and who report to RNs, LPNs, and Licensed Vocational Nurses (“LVNs”). TMAs report only to LPNs.

NARs work a first shift from either 6 a.m. to 2 p.m. or 6:30 a.m. to 2:30 p.m. The TMAs’ first shift is from 6:30 a.m. to 3 p.m. The evening and night shifts are the same for both: 2:30 p.m. to 11 p.m. and 10:30 p.m. to 7 a.m. The shifts are the same for all three floors of the facility.

Depending on “census,” the number of residents in the facility, there are anywhere from one to three nurses working in each unit. TMAs work day and evening shifts only on the second floor and Garden Terrace; there are no TMAs in the TCU except during the night shift, when there is one TMA on duty. There are one to three NARs on duty at any time in the Garden Terrace and two to three in the TCU, but five to six on the second floor during the day and evening shifts and either two NARs or one NAR and one TMA during the night shift.

³ This means that house supervisors work the 2:30 p.m. to 11 p.m. evening shift and the 10:30 p.m. to 6 a.m. night shift during the week, and those shifts plus the 6:30 a.m. to 3 p.m. day shift on weekends.

Tamara Lundstrom is department head for the dietary department. She also has the titles of registered dietitian and food service manager. Lundstrom is responsible for the nutrition needs of the residents and for the staff in the kitchen. Her office is on the first floor between the dining room and kitchen. The Cooks and DAs report to her. They work primarily in the kitchen and dining areas.

There are four Cooks employed by the facility. They work on two of the three shifts: the morning Cook works from 5:30 a.m. to 3 p.m., and the afternoon Cook works from 12 p.m. to 8:30 p.m. Both get a 30-minute lunch break.

The facility has ten DAs. Like the Cooks, the DAs work on two of the three shifts: three DAs work the 6:30 a.m. to 3 p.m. morning shift, one works from approximately 2 p.m. to 8:45 p.m., and two work from 4:45 p.m. to 8:45 p.m.

C. Job Duties

1. NARS and TMAs

NARs provide direct resident care on a day-to-day basis. NARs are not permitted to pass medications to residents; instead, they assist residents with incontinence care, bathing, dressing, oral hygiene, feeding, and medical appointments outside the facility. NARs also monitor and record daily functions of the residents. NARs are regularly exposed to blood and urine and other bodily fluids. NARs must be certified, pass a Certified Nursing Assistant exam, and undergo periodic training in addition to the Employer's annual training. Incidents involving neglect and abuse by NARs are recorded in the state registry database.

NAR/TMA Justin McCulloh testified that to become an NAR, he took a 90-day class; completed a series of 36 tests; and completed clinicals, which included a physical exam of a dummy. After passing clinicals, he received a certificate (a Nursing Assistant

Certification) that became valid once he registered with the State. To register, he had to pay a fee and pass another evaluation administered by the State. All of this took place in the State of Michigan; before he could work at Employer's St. Louis Park facility, McCulloh transferred his license to Minnesota. He testified that to maintain a valid certification, an NAR must do at least eight hours of in-services each year. It is not possible to get a job at the Employer's facility as an NAR without both receiving the certification and registering with the State of Minnesota.

McCulloh, whose name tag says "TMA/NAR," worked first as an NAR, and then received a TMA certificate so that he can also work as a TMA. TMAs are required to have the Nursing Assistant Certificate like the NARs, as well as a TMA certificate.

TMAs spend the majority of their shifts passing medication to the residents. RNs and LPNs can also pass medications, but as stated above, NARs cannot. All TMAs can also work as NARs; thus, both TMAs and NARs provide direct resident care and perform the above-described tasks of an NAR. McCulloh testified that as an NAR and TMA, he spends most of his time working in or near the residents' rooms.

TMAs working the day and evening shifts work only as TMAs, but those on the night shift also work as NARs. It is unclear in the record whether TMAs assigned to the night shift *a/ways* also work as NARs, or if they do so only when circumstances require it. The starting wage rate for NARs and TMAs is \$10.50/hour, and it increases based on years of experience.

2. Cooks and DAs

The Cooks' primary job duty is preparing and serving food for the residents; they cook the food and load it onto carts for the DAs to transport to the dining rooms. If the facility is short on DAs, the Cooks will help serve residents. The starting wage for

Cooks is anywhere from \$12.50 to \$13.40, depending on experience. Cooks must have a “Food Handler’s Card” and go through state-mandated training, but the record does not detail what these requirements entail. They do not have to be registered with the State for having engaged in neglect or abuse.

The DAs’ primary responsibility is to serve food to the residents on the floors and in the dining rooms during meal times. Thus, before meals,⁴ the DAs collect all necessary items (plates, bowls, adaptive equipment, and cold items such as milk, desserts, and salads) and load them onto carts to take to the dining rooms. The starting wage for DAs is from \$9.50/hour to \$10.40/hour, depending on experience. DAs are not required to be certified through the State, and do not have to take an exam or go through training like NARs and TMAs must.

The State has an “infection control policy” that the Employer must effectuate, and it precludes Cooks and DAs from going into resident rooms and/or physically handling residents. Thus, Cooks and DAs do not engage in the direct patient-care activities that NARs and TMAs do.

D. Interactions Among NARs, TMAs, Cooks, and DAs

NARs, TMAs, Cooks, and DAs interact at each meal time. There are two dining rooms on each floor, and the interaction is similar in each dining room. The NARs’ responsibilities for meal service are outlined in the NAR job description and were discussed by witnesses. For example, on the second floor, the dietary staff comes out of the elevator with carts of food. The NARs help bring the carts to the dining rooms, where the DAs dish out the hot food from behind the steam tables and the NARs add

⁴ The facility serves three meals and two or three snacks a day.

the cold items and carry the food to the residents. NARs and DAs also interact during the meal service if, for example, residents want additional or different food during the meal. Such interaction might also occur if a resident needs an early or late meal because of an off-site doctor's appointment. In this situation, the NAR will convey the information to the DA and arrange for a tray to be prepared for the resident. The early and late trays are assembled just as the meals are: the DA puts on the hot food and the NAR adds the cold food and takes it to the resident. If the NAR is too busy to go to the kitchen to get the tray, the DA will bring it to the nurses' station on the unit, and the NAR will pick it up and deliver it to the resident. NARs are also responsible for going to the kitchen to pick up snacks prepared by the DAs and taking them to the residents, and for going to the kitchen to refill residents' water pitchers.

The Cooks and DAs fulfill multiple requests from the NARs (on behalf of residents) during each shift; they respond to the kitchen doorbell and hand over requested items or bring them to the units. The doorbell rings from four to six times an hour, and about 50 percent of the time, the person ringing the doorbell is an NAR or TMA. It is unclear whether the other 50 percent of the time the person is a resident or another category of employee. NAR/TMA McCulloh testified that the tray-passing interaction between NARs and DAs and Cooks lasts one to two hours during the day and evening shifts.

TMA's are present in the dining rooms during meal time as well, but they are passing medication, not carrying food trays. If a resident needs a particular food or beverage with their medication, the TMA will ask the DA for it.

During meals, Cooks are occasionally in the dining rooms. If they are present and a resident asks for something, the Cook will fulfill the request by retrieving

something from the kitchen and delivering it to the dining room or to NARs or DAs on the unit. Registered Dietitian/Food Service Manager Lundstrom testified that the NARs and DAs split the task of delivering special request items to the units about 50/50. Cooks also interact with NARs and TMAs when the employees purchase and eat the facility food; the Cooks are often the ones who dish up the employee trays.

E. Wages and Working Conditions Enjoyed by NARs, TMAs, Cooks, and DAs

Raises for full-time NARs, TMAs, Cooks, and DAs are handled in the same manner; and raises for part-time NARs, TMAs, Cooks, and DAs are handled in the same manner. The same is true for bonuses.

NARs, TMAs, Cooks, and DAs have the same employee benefits. For example, BOB points (points earned based on the number of hours worked) operate the same for all hourly employees, including each of these four categories. The program is different for department heads, and RNs and LPNs are permitted to earn BOB points at a faster rate.

All employees go through the same hiring process: an application, reference checks, interview, drug test, background test, and tuberculosis test. All hourly employees have an identical first day of orientation, and they share an employee handbook. All employees attend a shared monthly in-service.

NARs, TMAs, Cooks, and DAs are paid hourly and receive paychecks every two weeks. They are all eligible for the same discounted meal served in the facility's kitchen and have the same name tag. They all wear scrubs, park in the same place, swipe in and out on the time clock the same way, share a break room and locker room, and have a 30-minute break during their shifts. They can take their breaks at the same time, and they share a smoking area on the loading dock outside the building. All four categories

of employees are expected to review management posts on the same bulletin boards. It is unclear whether these details are true for all other hourly employees.

The four positions also are all invited to participate in the facility's safety committee; among others, the committee is composed of an NAR and/or TMA or nurse and a Cook and/or DA.

Administrator Kuhn previously worked at two other Twin Cities locations of the Employer: Park Health and Rehab in St. Louis Park, and Robbinsdale Rehab and Care Center. At the St. Louis Park location, NARs, TMAs, and the dietary department, including Cooks and DAs, compose a bargaining unit. However, according to Kuhn and SEIU Assistant Organizing Director Mike Kramer, the unit is not represented by the Petitioner. NARs, TMAs, Cooks, DAs, and housekeepers are also included in a bargaining unit at the Robbinsdale facility, and this unit *is* represented by the Petitioner. Housekeeping and laundry employees are subcontracted to a third-party. Maintenance and housekeeping functions are also contracted out at the facility involved in this proceeding.

F. Differences Between NARs, TMAs, Cooks, and DAs

As described above, employment as an NAR or TMA requires exams and registration with the State, whereas employment as a Cook or DA does not. NARs and TMAs do not work as Cooks or DAs, and Cooks and DAs may not work as NARs or TMAs, but TMAs may work as NARs. NARs and TMAs work shifts that cover 24 hours a day, seven days a week, and Cooks and DAs do not.

Because of infection control regulations, NARs and TMAs are not allowed in the kitchen, and Cooks and DAs are not allowed in resident rooms. While NARs and TMAs

spend almost all of their work time providing direct care for residents, Cooks and DAs primarily interact with residents in the dining area.

II. ANALYSIS

In determining whether a unit is “appropriately grouped” under Section 9(b) of the Act, the Board has broad discretion, “reflecting Congress’ recognition ‘of the need for flexibility in shaping the bargaining unit to the particular case.’” *Specialty Healthcare*, slip opinion at 9, quoting *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985). The Board’s focus is whether the employees share a “community of interest.” To make its determination, the Board weighs various factors, including:

Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, slip opinion at 9, quoting *United Operations Inc.*, 338 NLRB 123, 123 (2002).

It is well-settled that there may be more than one way in which employees of a given employer may be appropriately grouped for purposes of collective bargaining. *Overnight Transportation Co.*, 322 NLRB 723, 723 (1996). It is also well-settled that “the Board need find only that the proposed unit is *an* appropriate unit, rather than the most appropriate unit, and that there might be multiple sets of appropriate units in any workplace.” *Specialty Healthcare*, slip opinion at 7. The Board first considers the petitioned-for unit and whether it is appropriate. If it is appropriate, the inquiry is essentially over. *Id.* at 8.

However, even if the employees in the petitioned-for unit share a community of interest, the Board will nonetheless consider whether that unit is inappropriate because the smallest appropriate unit includes additional employees. *Specialty Healthcare*, slip opinion at 10. In this regard, “the proponent of the larger unit must demonstrate that employees in the more encompassing unit ‘share an overwhelming community of interest’ such that there ‘is no legitimate basis upon which to exclude certain employees from it.’” *Id.* at 11, quoting *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 429 (D.C. Cir. 2008). As explained below, I conclude that the employees in the petitioned-for unit, consisting of NARs and TMAs, are a clearly identifiable group of employees and share a community of interest. I further conclude that the Employer has failed to demonstrate that the Cooks and DAs share such an overwhelming community of interest with these employees that there is no legitimate basis for their exclusion.

A. NARs and TMAs Share a Community of Interest

In concluding that the employees in the unit sought by the Petitioner are a clearly identifiable group of employees and share a community of interest, I rely particularly on the facts that the NARs and TMAs enjoy the same starting wages, and work shifts that cover 24 hours a day, seven days a week. They have the same employee benefits; are within the nursing department; have common nursing department supervision; must undergo training and achieve certification and State registration; have a primary job function of providing direct patient care; and are interchangeable, in that TMAs can and do also work as NARs. Thus, the Employer’s argument that “there is no evidence that the TMAs are functionally integrated with the NARs or have frequent contact,” is not supported by the record.

B. The Smallest Appropriate Unit Need Not Include DAs and Cooks

In concluding that a unit limited to the NARs and TMAs is appropriate, I am mindful that there is evidence tending to establish that the broader unit advocated by the Employer is also appropriate: NARs, TMAs, Cooks, and DAs all undergo the same job application process and first day of orientation; attend in-services hosted by the facility; use the same parking lot, break room, locker room, and smoking area; follow the same employee handbook; wear scrubs; pay the same price for facility-served meals; and receive hourly wages. The Employer argues in its post-hearing brief that there is functional integration between NARs and TMAs and Cooks and DAs because NARs and TMAs are present in the dining room during meals, making requests, helping residents, and passing medication. Although, as noted above, the record supports the Employer's contention that there is some interaction and integration among these four categories of employees, the record fails to establish, for the reasons set forth below, that the NARs, TMAs, Cooks, and DAs share an overwhelming community of interest.

Employees in the petitioned-for unit and the unit advocated by the Employer have similar wage structures but different wage rates (Cooks are paid higher starting hourly rates and DAs are paid lower); work hours (Cooks and DAs do not work all three shifts); supervision (Cooks and DAs are separately supervised at the department level); qualifications and training (NARs and TMAs must take a series of evaluations, whereas the record is silent on the requirements a Cook must meet to receive a Food Handler's Card); skills (NARs and TMAs are not trained for kitchen work, and Cooks and DAs are not trained in patient care); job functions (Cooks and DAs do not provide direct resident

care);⁵ and are not integrated or interchangeable (Cooks and DAs are not permitted in resident rooms and NARs and TMAs are not permitted in the kitchen). Even if the facts were sufficient to establish that the broader unit is *an* appropriate unit, the facts are insufficient to establish that the Cooks and DAs share such an overwhelming community of interest as to *require* their inclusion in the unit. *Specialty Healthcare*, slip opinion at 14.

The following employees of Extendicare Homes, Inc., d/b/a Texas Terrace Center, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time nursing assistants and trained medical aides; excluding registered nurses, licensed practical nurses, cooks and dietary aides, office clerical employees, managerial employees, and guards and supervisors, as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.

A. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date below, and who meet the eligibility formula set forth above. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to

⁵ In its post-hearing brief, the Employer describes how food service works at special dining events. When food is served buffet-style, wheelchair-bound residents are pushed through the line, and NARs and DAs fill their plates. On occasion, a DA might push the resident's chair. In no way does this counter-balance the rest of the record evidence; the dietary staff does not engage with residents or provide direct care in a manner substantial enough to demonstrate an overwhelming community of interest.

vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are persons who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁶

Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by **Service Employees International Union (SEIU) Healthcare Minnesota**.

B. Employer to Submit List of Eligible Voters

To file the eligibility list electronically, go to the Agency's website at www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

⁶ To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that two copies of an election eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, this list must be received in the Minneapolis Regional Office, 330 South Second Avenue, Suite 790, Minneapolis, MN 55401-2221, on or before close of business **January 6, 2012**. No extension of time to file this list may be granted by the Regional Director except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **January 13, 2012**. *The request may be filed electronically through the Agency's website, www.nlr.gov,⁷ but may not be filed by facsimile.*

Signed at Minneapolis, Minnesota, this 30th day of December, 2011.

/s/ James L. Fox

James L. Fox, Acting Regional Director
National Labor Relations Board – Region 18
330 South Second Avenue, Suite 790
Minneapolis, MN 55401-2221

⁷ To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.