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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

OLEANDERS HOLDINGS, LLC D/B/A SACRAMENTO SUB-ACUTE, Employer, and. SEIU -- UNITED HEALTHCARE WORKERS WORKERS WEST CTW, CLC, Union -Petitioner.	)))))))))))))	Case 20-RC-074337

EMPLOYER'S SUPPLEMENTAL BRIEF AND REQUEST FOR ADMINISTRATIVE NOTICE

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I. PRELIMINARY STATEMENT

By Order dated April 3, 2012, the Board granted the Request for Review filed by Oleanders Holdings, LLC, d/ba/ Sacramento Sub-Acute (hereinafter "Sacramento Sub-Acute" or "Employer"") in this representation case. Pursuant to Section 102.67 (g) of the Board's Rules and Regulations, the Employer files this Supplemental Brief to briefly address the legal and factual arguments that it anticipates that Petitioner SEIU-UHW might assert. Accordingly, this Supplemental Brief will not reiterate the factual statement contained in the Employer's Request for Review.

As previously noted, whether Petitioner SEIU-UHW is entitled to an *Armour-Globe* election depends on whether the Respiratory Therapists ("RTs") -- acknowledged technical employees -- working at the Employer's Sacramento, California healthcare facility share a "community of interest" with the existing "service and maintenance" employee unit. In turn, whether a community of interest exists requires the Board to analyze the eight factors enumerated in *Specialty Healthcare*, 357 NLRB No. 83, slip op. p. 9 (2011).

In addition, since the filing of the Request for Review, a development occurred that concerns this matter. The Employer requests the Board to take administrative notice of its own records, and specifically of the fact that on April 16, 2012, this same Petitioner filed an "RC" petition with Region 20 seeking to represent the Licensed Vocational Nurses ("LVNs)" at the Employer's Sacramento, California facility. This newly filed petition has been designated as Case No. 20-RC-0779011. Significantly, the SEIU-UHW seeks to represent a unit limited to the LVNs.

II. SUPPLEMENTAL ARGUMENT

A. WHETHER THE RTs CONSTITUTE AN APPROPRIATE BARGAINING UNIT IS IRRELEVANT.

Petitioner has flatly stated that it has *no interest* in representing the RTs in a separate bargaining unit. (Tr: 10-11, 249.)[1] Petitioner will only represent the RTs if the RTs choose to be included in the Union's existing service and maintenance bargaining unit, consisting of Certified Nursing Assistants, Housekeepers, Cooks, Dietary and Laundry employees, and a few other miscellaneous employees.

Nonetheless, the Union argued to the Regional Director and will probably now argue that under *Specialty Healthcare*, *supra*, the Board's inquiry need only be focused on whether the RTs constitute an appropriate bargaining unit, regardless of whether other units may also be appropriate. (Union's Post-Hearing Brief, p.3.) Such an argument is a total distortion of *Specialty Healthcare.*

In *Specialty Healthcare*, the Board was addressing whether a sought-after unit of Certified Nursing Assistants constituted an appropriate bargaining unit when the petitioning unit did *not* seek to simultaneously represent the other "service and maintenance" employees working in the nursing home. *Specialty Healthcare* did not change the law concerning *Armour-Globe* elections which requires a petitioning union to prove that the employees it seeks to *add* to an existing unit *share a community of interest with the already represented employees.*

Accordingly, the Union's argument is relevant only if it sought a unit consisting solely of the RTs who work at the facility (and excluded the other technical employees, such as the

[1] "Tr." refers to the hearing transcript.

LVNs).[2] But, inasmuch as the Union stated that it does not want to represent the RTs in a separate unit, the Union's attempt to use *Specialty Healthcare* to circumvent the "community of interest" test must be rejected.

B. THE EIGHT "COMMUNITY OF INTEREST FACTORS COMMAND THE CONCLUSION THAT THERE IS NO COMMUNITY OF INTEREST BETWEEN THE RTs AND THE EXISTING "SERVICE AND MAINTENANCE" UNIT EMPLOYEES.

The Employer's Request for Review exhaustively analyzes the Board's eight factor community of interest test and demonstrates that, when applied, it is obvious that there is no community of interest between technical employees -- the RTs -- and the service and maintenance employees. However, in its argument, the Union will probably focus on three factors: (1) shared supervision; (2) degree of functional integration; and (3) contact among employees.[3] Accordingly, a few additional comments regarding these three factors is warranted.

(1) THERE IS NO SIGNIFICANT SHARED SUPERVISION.

As the Request for Review demonstrated, there is almost no shared supervision between the RTs and the existing bargaining unit employees, and to the extent that there is any overlap (1) it is minimal in nature (i.e., the RT Supervisor only oversees a few Certified Nursing Assistants and *none of the other bargaining unit employees*); and (2) there is *no record evidence* whether this

[2] In light of the Union's position, the Employer has taken no position with respect to whether a stand-alone unit of RTs would be appropriate under *Specialty Healthcare*, *supra*, and did not litigate the issue at the hearing. (Tr: 10.) Similarly, the Board has no need to address the issue in this proceeding.

[3] The Union might also seek to rely on the fact that the the RTs share the same employee "fringe benefit" package as the service and maintenance employees. But, as the Employer's Request for Review demonstrates, this is an irrelevant factor where a*ll the employees in the facility* have the identical benefit package. There are no benefits that *only* the RTs and the service and maintenance employees *share,* thus establishing a commonality. Moreover, as the Request for Review also demonstrates, while there are no commonalities between the two employee groups, there are *numerous differences in working conditions.*

one supervisor (Clinical Manager Holly Everts) exercises any meaningful supervisory authority over these bargaining unit employees (i.e., such as imposing discipline on them) while she clearly does exercise such power over the RTs.

However, the Union may also argue that there is common supervision *at night*. RTs work two shifts: 6 am to 6:30 pm and 6 pm to 6:30 am. (Tr: 144.) During the day, the RTs are under the direct supervision of the Clinical Manager, Holly Everts. At night, when the Clinical Manager is absent, the senior management official in the facility is a Charge Nurse who has nominal supervision over the RTs. (Tr.: 172.) Here, again, the record is devoid of any evidence that this Charge Nurse ever exercised any supervisory authority over the RTs other than being nominally "in charge" of the facility.

Indeed, the record evidence demonstrated that although the Clinical Manager was not physically present, the RTs continued to look to her for supervision and assistance and she remained the "Go To" supervisor. On average the Clinical Manager receives one or two telephone calls a week from a night RT when the RT "doesn't know what to do.". (Tr.: 174.)

Davis, the Union's witness, also demonstrated the "nominal" nature of the Charge Nurse's supervision over the RTs. Davis testified that on several occasions when she worked the night shift she went to the Charge Nurse with an issue. The Charge Nurse was *unable to assist her*. (Tr.: 221-222.) Other than testifying that she was told that the Charge Nurse was her night shift supervisor, Davis did not testify to a single incident where the Charge Nurse exercised *actual* supervisory authority over her or any RT. (Tr.: 226-227.)

In sum, while the Union can point to what appears to be some limited overlap of supervision between the two employee groups, when analyzed, that overlap is minimal and insignificant. Appointing an individual to be a supervisor does not make them a supervisor. The Board has long required an individual to exercise *actual and meaningful* supervisory authority to

be found to be a supervisor for purposes of the community of interest test. *E.g. Hilander Foods*, 348 NLRB 1200 (2006) This record is devoid of any evidence of such supervisory overlap between the RTs and the bargaining unit employees.

(2) <u>THERE IS NO MEANINGFUL FUNCTIONAL INTEGRATION</u>.

As noted in the Request for Review, the RTs provide medical care to the facility's patients while the service and maintenance employees provide no such care. Nonetheless, taking care of patients requires coordination between all employees. As a result, the Union can point to the minimal assistance that the RTs might provide the Certified Nursing Assistants (CNAs) when the CNAs assist the RTs' patients. But, as the Request for Review proves, the Union's own witness demonstrated that such assistance is (1) infrequent (2) mainly limited to CNAs (and not other bargaining unit employees), and (3) usually done by other facility employees (such as RNs and LVNs).

The RTs are highly skilled technical employees earning $25 to $40 per hour. It makes no logical sense that they would be routinely used to perform the work of the lower paid service and maintenance employees, and clearly, the service and maintenance employees lack the skills or the legal qualifications to perform RT work. Any overlap that occurs is purely the result of the fact that in a healthcare facility, there is only one product: the care of the patient. As a result, there is some coordination and overlap. However, to exalt, as the Union does, this minimal overlap into a shared community of interest would mean every employee in a healthcare setting would share a community of interest with every other employee. Functional integration requires much more.

(3) <u>THERE IS NO MEANINGFUL EMPLOYEE CONTACT BETWEEN THE THE RTs AND THE BARGAINING UNIT EMPLOYEES</u>.

The RTs work in the same facility as the service and maintenance employees. However,

as the Employer's Request for Review shows, the Union's own witness proved that the RTs spend 94% of their time in only 20 of the facility's 96 rooms -- the twenty rooms assigned to "trach" patients. The Union will attempt to make it appear that although the RTs' work area is limited, the contact between the two groups is much greater. However, when the facts are analyzed, the truth is that the contact is minimal.

Depending on the time of day, there are 3 to 4 CNAs on duty in these 20 designated RT room. (Tr: 99.) The RTs have no or almost no contact with the CNAs working in the other 76 facility rooms. The day shift RTs have some contact with the housekeeping staff or janitors while the night shift RTs (half the RT work force) have no contact whatsoever with the housekeepers or janitors. (Tr: 216-217.) And here again, as the Union's own witness demonstrated, neither the day shift nor night shift RTs have any meaningful contact with laundry or dietary employees. (Tr.: 188, 216-217.) Indeed, cooks, dietary employees, and laundry workers have no work reason for being in patients' room where they would interact with an RT. (Tr.: 133.)

For the Union to assert that this contact is meaningful distorts the factual record and makes it appear that these employees are constantly "running into" each other in patient rooms. But the record evidence does not support such a characterization or conclusion. Once, again, what the Board is left with is the fact that all of these employees work in the same *healthcare facility*, and as a result, there necessarily has to be some contact. The contact is minimal and insignificant - not the type of contact that establishes a community of interest.

C. THE FILING OF THE "RC" PETITION FOR LVNs DEMONSTRATES THE FALLACY OF THE UNION'S POSITION.

This same Petitioner, SEIU-UHW, has now filed a petition to represent the LVNs at this facility in a separate bargaining unit. The Petition "excludes" all other employees from the sought after unit. LVNs, like RTs, are technical employees. In essence, the Union is claiming

that some technical employees, the RTs, share a community of interest with the service and maintenance employees while others, the LVNs, are apparently entitled to separate representation. This is pure nonsense. The Board's community of interest rule, now interacting with the Board's holding in *Specialty Healthcare*, is being manipulated without any concern for the real interest of these employees or their community of interest. The Board should not allow this type of manipulation.

III. CONCLUSION.

Healthcare facilities are in the business of providing integrated care. By itself, this integrated care model is not sufficient to establish a community of interest between the RTs and the service and maintenance employees.

To find the necessary community of interest to order this *Armour-Globe* election, the Union, and then the Regional Director, have relied upon rare instances of commonality that result from the very nature of the integrated healthcare model. Both distort the evidentiary record to ignore the insignificance of the "facts" they rely upon, or they make up facts that the record does not contain.

To the extent that any of the "community of interest" factors exist, those factors are not unique to these two groups but exist with respect to all of the other unrepresented employees in the facility -- here, again, because of the very nature of integrated healthcare. The plain truth is that *there are many more differences, and significant differences at that, then there are similarities* between the RTs, technical employees, and the service and maintenance employees -- a truth historically recognized by Board. *E.g., Children's Hospital of Pittsburgh*, 222 NLRB 588, 593 (1976).

Dated: April 17, 2012

Respectfully Submitted,

s/HENRY F. TELFEIAN

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<u>CERTIFICATE OF SERVICE</u>

This is to certify that on this date I have served a true and correct copy of EMPLOYER'S SUPPLEMENTAL BRIEF AND REQUEST FOR ADMINISTRATIVE NOTICE in Case No. 20-RC-074337 via electronic mail, on the Regional Director of Region 20 as follows:

Joseph F. Frankl
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The EMPLOYER'S SUPPLEMENTAL BRIEF AND REQUEST FOR ADMINISTRATIVE NOTICE was also served, via electronic mail, upon counsel of record for the Petitioner, as follows:

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This 17th day of April 2012.

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