

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SIX

THE WASHINGTON HOSPITAL

Employer

and

Case 06-UC-075305

SEIU HEALTHCARE PENNSYLVANIA  
CTW, CLC

Petitioner

**REGIONAL DIRECTOR'S DECISION AND ORDER**

The Employer, The Washington Hospital, (also herein referred to as "Hospital") operates an acute care hospital in Washington, Pennsylvania, where it employs nearly 2000 employees. The Petitioner, SEIU Healthcare Pennsylvania, CTW, CLC (also herein referred to as "Union"), filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to clarify an established bargaining unit of certain service and maintenance employees to include the job classification of "Sitter." A hearing officer of the Board held a hearing and the parties filed timely briefs with me.<sup>1</sup>

As evidenced at the hearing and in their briefs, the parties disagree as to whether the job classification of "Sitter" should be included in the existing bargaining unit, which is defined in Article II, Section 2 of the current contract between the parties. The Petitioner contends that the Sitter classification is recently created and performs functions historically performed by bargaining unit members. In the alternative, the Petitioner asserts that there has been a significant and substantial change in the Sitter position, and, therefore, it is appropriate to clarify the bargaining unit to include the Sitter at this time. The Employer contends that the Sitter position has been in existence at the Hospital since 1999, and has not changed substantially

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<sup>1</sup> Employer exhibits are referenced as EX and Petitioner exhibits are referenced as UX.

over the years or since the most recent contract negotiations. The Employer further contends that the Sitter has never been included in the recognition clause of the parties' contracts which define the bargaining unit by specific job classifications. In the alternative, the Employer contends that the Sitter position does not share a community of interest with the other job classifications in the bargaining unit. Neither party contends that the Sitter position was placed at issue during the most recent contract negotiations by either party.

I have considered the evidence and the arguments presented by the parties on the issues raised. As discussed below, I have concluded that the unit should not be clarified to include the Sitter position since the unit clarification petition filed by the Petitioner is inappropriate for consideration at this time. Accordingly, I am issuing an Order dismissing the petition.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. Then, I will present in detail the facts and reasoning that supports each of my conclusions on the issues.

## **I. OVERVIEW OF OPERATIONS**

The Employer, a Pennsylvania corporation with offices and a place of business in Washington, Pennsylvania, is an acute care hospital engaged in providing in-patient and out-patient medical care. The Employer's facility consists of one main building with eight wings which houses approximately 70 to 80 departments. The Employer also has about 15 satellite locations but the employees at issue herein are employed only at the main Hospital building. The Employer employs about 1950 employees, about 425 of whom are in the bargaining unit represented by Petitioner. The Employer and Petitioner have had a collective bargaining relationship since prior to 1975 and the parties have entered into more than 15 collective bargaining agreements since then. The parties' collective bargaining relationship predates the Board's current Rule regarding bargaining units in healthcare facilities. The bargaining unit involved here has never been certified by the Board.

The parties have a current collective bargaining agreement which is effective by its terms for the period beginning February 1, 2010, until January 31, 2013.<sup>2</sup> Section 2.2 of that Agreement describes the bargaining unit as "...all full-time and regular part-time service and maintenance employees of the Washington Hospital, including only:..." A three-page listing of almost 100 job classifications follows, some of which are active and some that are currently inactive. Specifically excluded are "all other non-professional employees, temporary employees, management level employees, supervisors, first level supervisors, confidential employees and guards."

Section 2.2 as well as testimony contained in the record reveals that the list of job classifications represented by the Union has changed over time, although the reasons for these changes are not explained. While some of the classifications in Section 2.2 appear to be the type of positions which have traditionally been considered service and maintenance jobs, others would appear to fall into different categories. The duties of the job classifications themselves are not defined or described in the contract. As a result of the negotiations for the 2010-2013 Agreement, there were some changes made in the job classifications included in the bargaining unit.<sup>3</sup> Therefore, it appears that over the years the parties have negotiated the inclusion and exclusion of job classifications as part of the bargaining unit for reasons known only to them. Due to the agreements of the parties over the years, it appears that the existing nonconforming "service and maintenance" bargaining unit contains not only certain service and maintenance employees but some nonprofessional employees, and possibly some business office employees as well. In this regard, the record also indicates that some additional non-professional job classifications exist at the Hospital which are not included in the bargaining unit. The result of this collective-bargaining history is a recognized unit that does not conform to any of the eight

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<sup>2</sup> EX 1.

<sup>3</sup> There is no evidence or contention that the Sitter was discussed at that time.

presumptively appropriate units set forth in the Board's Rule regarding bargaining units in acute healthcare institutions.<sup>4</sup>

The overall operations of the Employer are the responsibility of its President and CEO, Gary Weinstein. Reporting directly to Weinstein is, among others, Executive Vice-President/COO Brook Ward. Vice-President of Patient Services Karen Bray, who reports to Ward, has the ultimate responsibility for all nursing and patient care services and the staffing of those positions, many of which are in the bargaining unit. It also appears that there are bargaining unit employees, such as the housekeeping staff, who report up through other chains of authority within the management hierarchy.

The Employer utilizes several different designations to reflect its employees' working status. In addition to full-time bargaining unit employees, the Employer employs regular part-time employees who are defined in the parties' collective bargaining agreement at Section 2.2(a) as those employees who regularly work thirty-two or more hours per pay period but less than forty hours per week or eighty hours per pay period.

The Employer has a PRN staffing office which is a separate department of the Hospital. The staffing office manages and assigns a pool of PRN employees who work specific shifts and may be assigned anywhere they are needed in the facility. The Employer defines PRN employees by their department assignment. PRN employees work in many job classifications, both bargaining unit and non-unit. While there are many types of PRN employees, unit clerks, RN's and nursing assistants are the only categories of PRNs which exist within the nursing department. PRNs report administratively to the staffing office and to the respective unit nurse manager for patient-care issues.

The Employer also employs per diem employees. "Per diem" is not a job classification in itself but, as used by the Employer, identifies employees who work less than sixteen hours per

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<sup>4</sup> These units are: physicians; registered nurses; all other professionals; technical employees; skilled maintenance employees; business office clericals; guards; and all other nonprofessional employees. See 29 CFR Section 103.30(a) (1990).

week and no more than thirty-two to forty hours per month. Per diem employees do not work a regular schedule. They may be called at the last minute to fill a vacancy and they may refuse work.<sup>5</sup> They receive an hourly wage but no benefits. The Employer has per diem RN's, LPN's and staffing coordinators, as well as other job classifications in departments other than nursing. Per diem employees may also work in job classifications which are included in the bargaining unit, such as nursing assistant. However, no per diem employees are currently included in the bargaining unit as Section 2.2(a) of the parties' contract prevents the Employer from scheduling bargaining unit employees to less than thirty-two hours per pay period and requires that they be laid off instead. Per diem employees report to the staffing office for evaluation purposes, and to the managers of their respective work units for patient-care issues.

All of the Employer's employees, both bargaining unit and non-unit, receive the same benefits after completing 60 days of employment. All employees must satisfactorily complete Annual Competency reviews which are done by the appropriate departments or the staffing office in the case of PRNs and per diems. Full-time bargaining unit personnel are covered by a contractual provision which guarantees them thirteen hours of rest between shifts. Full-time bargaining unit employees are also on a cyclical schedule known as a rotation by virtue of another contractual provision, which enables them to predict exactly what their work schedule will be in the future. The Employer is not required to apply these scheduling factors to other employees, such as the part-time bargaining unit employees and all non-unit employees.

## **II. THE HISTORY OF THE SITTER**

At its inception, the sitter assignment was performed by non-bargaining unit employees, primarily security guards, in the emergency department (ED). They sat with violent or suicidal patients, who usually had some type of psychiatric diagnosis and were considered at risk of harm to themselves or others. At some point, those same patients were admitted to the

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<sup>5</sup> There is a requirement that a per diem employee must work at least one shift per month to remain active.

behavioral health unit (BHU) but still needed to be watched to prevent any dangerous conditions from developing. Over the years, “sitting” progressed to providing this type of service on other units in the Hospital. For many reasons, employees were required, by physician’s orders, to stay with a patient to observe them and/or to make sure that they were not a threat to themselves or that they did not injure themselves. As it evolved, the Sitter position also became used for patients with dementia and with elderly patients as part of a fall-prevention program so that elderly or confused patients did not fall trying to get out of bed or while walking around their rooms. Therefore, the need for sitters increased as the function moved from the ED and BHU to the entire Hospital and the hospice, which is housed in a separate building.

Over the years, the Employer has staffed this position by utilizing many different classifications of employees. As mentioned above, originally, the security guards, who are non-union, acted as sitters. BHU orderlies, who were in the bargaining unit,<sup>6</sup> were also utilized as sitters. The Employer also assigned regular full-time and part-time employees to this function. This position, under the various names of One to One Sitter, One on One Sitter, One to One Observer, and now known as Sitter, has existed as a formal job description within the Hospital since about 2000. While the Employer had hired only per diem employees into the sitter job classification prior to 2012, it has continued to assign any available employee, bargaining unit or non-unit, to sit when the need for sitters is greater than the number of available per diem sitters. It appears that nursing assistants, who are in the Petitioner’s bargaining unit, were frequently required by the Employer to perform this function.

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<sup>6</sup> The classification is currently listed as “inactive.”

Pursuant to several agreements with Petitioner over the years,<sup>7</sup> the Employer also offered any employee the opportunity to perform sitter duties in addition to their regular shifts in order to supplement their hours. Both bargaining unit and non-unit employees, student nurses and some retirees, signed volunteer lists to be contacted to perform these assignments, which they were also permitted to refuse. The per diem sitters, like all per diem employees, received only an hourly wage. Regular employees, whether bargaining unit or non-unit, received their regular rate while performing this function but the regular employees were expected to perform additional duties within the scope of their respective job classifications while acting as a sitter, as they were being compensated in their normal manner.

The 2009 job description One to One Sitter (EX 15) was the pertinent description at the time of the negotiations for the parties' current contract in 2010. The position was classified as non-exempt and non-union, as it had been consistently, with minor changes in duties, since 2000. However, the need for sitters continued to increase and the per diem employees and volunteer pool were proving insufficient to meet the need. In late 2011, the Employer budgeted and approved the hiring of 4.2 full-time equivalent employees (FTEs) as sitters, which equated to three full-time and three part-time positions. These positions were posted internally and advertised externally to the Hospital. At the time of the hearing, one full-time and two part-time sitters had been hired and the other positions are still under consideration.<sup>8</sup> Additionally, the Employer continues to employ per diem sitters and the volunteer list still exists. Regular employees are still required to act as sitters if there is sufficient need, based on the physician's

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<sup>7</sup> While the record indicates the sitter function was discussed by the parties at contract negotiations and various labor-management meetings in conjunction with these staffing issues, the Petitioner never proposed that the sitters be included in the bargaining unit. The record further indicates that although historically there were certain per diem employees in the bargaining unit there have not been any since about 2001.

<sup>8</sup> The Union filed a grievance when the first three sitters were hired. The Employer denied it and apparently the Union's appeal to arbitration was untimely.

orders. The Employer hopes that when all budgeted positions are filled, those employees, along with the per diem sitters and the volunteers, will be able to meet the need for sitters.

The terms and conditions of the per diem sitters are unchanged. They do not have a regular schedule and receive their hourly wage and no benefits. They are also paid a 75 cent per hour shift differential which is standard for the Employer's non-bargaining unit employees. The newly-hired regular sitters have regular schedules and receive their hourly wage plus benefits. As previously mentioned, all employees of the Employer, whether bargaining unit or non-unit, receive the same benefits. These new employees are hired, assigned and supervised by the staffing office and are subject to the policies outlined in the Employer's Employee Handbook. All sitters undergo Orientation and are evaluated annually.

In January, 2012, when the first regular sitters were hired, the Employer reissued the job description for the Sitter position. Under Major Duties and Responsibilities, Point 2 which read "Assists or provides activities of daily living if within general job description" was removed. Also removed was a requirement to complete Basic Life Support (CPR) training and added was a requirement to participate in the Sitter education program. All other duties of the sitter remain essentially the same, which is to maintain observation of the patient and inform the nursing staff of issues that may arise. However, the Petitioner asserts that there were substantial changes to the Sitter position which justify clarifying the Unit to include the Sitter by means of the instant petition.

### **III. ANALYTICAL FRAMEWORK**

The threshold issue to be determined is whether the petition herein may appropriately be utilized to modify the parties' bargaining unit. The Board described the purpose of unit clarification proceedings in Union Electric Company, 217 NLRB 666, 667 (1975), as follows:

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties

and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category - excluded or included - that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals....

See also Massachusetts Teachers Association, 236 NLRB 1427, 1429 (1978).

The Board has traditionally refused to entertain a unit clarification petition filed during the term of an existing collective bargaining agreement where the bargaining unit is clearly defined and the party filing the petition has not reserved its right during the course of bargaining to file the petition, if warranted, shortly after the execution of the subsequent contract. Wallace-Murray Corporation, 192 NLRB 1090 (1971).<sup>9</sup>

The Board has held that to permit clarification during the course of a contract specifically dealing with a disputed classification would mean that one of the parties would be able to effect a change in the composition of the bargaining unit during the contract term after it agreed to the unit's definition. Edison Sault Electric Co., 313 NLRB 753 (1994); San Jose Mercury and San Jose News, 200 NLRB 105, 106 (1972); Monongahela Power Company, 198 NLRB 1183 (1972). Moreover, where the disputed classification is not specifically dealt with in the unit description, but for some time has been treated as excluded from the bargaining unit, the Board has further explained that:

The limitations on accretion...require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.*

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<sup>9</sup> Thus, the Board recognizes a limited exception in cases where parties cannot agree on whether to include or exclude a disputed classification "but do not wish to press this issue at the expense of reaching an agreement." St. Francis Hospital, 282 NLRB 950, 951 (1987). In such a case, the Board will process a unit clarification petition filed "shortly after" the contract is executed so long as the party filing the petition did not abandon its position in exchange for bargaining concessions. In this case, as there is no evidence that the Union raised the subject of the Sitter position in negotiations or reserved its right to pursue the matter of the inclusion of the Sitters in the Unit with the Board, it does not fall within the limited exception permitted by St. Francis.

Robert Wood Johnson University Hospital, 328 NLRB 912, 914 (1999), quoting United Parcel Service, 303 NLRB 326, 327 (1991).

In Robert Wood Johnson University Hospital, supra, the Board found that per diem nurses had been historically excluded from the unit and could not be added to a unit of full-time and regular part-time registered nurses by means of unit clarification. The Board so concluded notwithstanding the increase in the number of per diem nurses utilized or the increase in the number of hours worked by individual per diem nurses. The Board noted that, as here, the evidence clearly indicated that the parties had historically declined to extend the provisions of the collective-bargaining agreement to the position at issue. While I note that the parties came to several agreements over the years regarding the temporary staffing of the sitter position by bargaining unit employees, these agreements did not address including the sitters into the bargaining unit set forth in the parties' collective bargaining agreement.

In Swedish Medical Center, 325 NLRB 683 (1998), the Board found that the newly created position of managed care home health coordinator was substantially the same as home care coordinator, a position historically included in the unit. Consequently, the Board declined to exclude the position from the unit notwithstanding the further argument that the duties of the position had changed. Inasmuch as the basic responsibilities remained the same, the Board determined that there was insufficient evidence to establish that the duties changed in a substantial or significant way.

In Bethlehem Steel Corp., 329 NLRB 243 (1999), the Board declined to entertain a petition to clarify the status of positions which had been excluded from the unit for at least eight years. The Board noted that the positions at issue had been historically excluded from the bargaining unit, and that employees in the disputed positions retained basically the same job functions as they had before the execution of the parties' most recent collective-bargaining agreement. Thus, the Board concluded that the positions had undergone no substantial changes, and that a unit clarification proceeding was not appropriate to resolve the matter.

It is undisputed that the positions of One to One Sitter, One on One Sitter, and One on One Observer have evolved to the position which is now known as Sitter. It is also beyond dispute that the referenced positions have historically been excluded from the bargaining unit. Therefore, based on the record as a whole, I find that the Sitter position is not a new position and is essentially the same now as it was when it was historically excluded from the unit as well as prior to the execution of the parties' current collective bargaining agreement. In so finding, I note Petitioner's argument that only per diem sitters existed earlier and not full-time or part-time sitters but do not find it persuasive as this is primarily a characteristic of administrative scheduling. It is the duties and functions of the position at issue which must be evaluated, not the numbers of hours worked.<sup>10</sup>

I also note, but am not deterred by, Petitioner's argument that clarification is appropriate as the Sitter function was historically performed by bargaining unit employees. The overwhelming evidence on record is clear that all types of the Employer's employees, including guards, RNs, students, retirees, and other bargaining unit and non-unit employees have performed this function over time on an as-needed basis. As these employees are both included and excluded from the bargaining unit and the Petitioner was clearly aware of this fact, I cannot conclude that the sitter function was ever exclusively within the province of the bargaining unit so as to make the sitter work bargaining unit work. Cf. Premor, Inc., 333 NLRB 1365 (2001).

I further find that there have not been recent, substantial changes in the *duties and responsibilities* of the Sitter so as to warrant the conclusion that a real doubt exists as to whether the position should continue to be excluded from the bargaining unit, as it has been historically. In so doing I note that the staffing of the position has been changed from solely per

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<sup>10</sup> See, Robert Wood Johnson University Hospital, 328 NLRB at 915, wherein the Board declined to rely on an increase in the number of hours worked by per diem nurses as a significant change in their job duties and responsibilities.

diem status to a combination of full-time, part-time and per diem employees. However, it is clear from the record that the duties and responsibilities of the position are fundamentally unchanged. Robert Wood Johnson University Hospital, supra. While the Petitioner offers the two amendments to the official job description as evidence of change, I find that these do not substantially or materially alter the duties and responsibilities of the position. The basic responsibility of the Sitter has been and still remains to watch patients so that no harm comes to them. Some employees performed additional duties because they were qualified to perform those duties and they were being paid to perform those duties, in addition to watching the patient.

Therefore, as I have found that the Sitter has historically been excluded from the bargaining unit and that the position has not undergone recent or substantial changes in its duties and responsibilities, a finding that the employees occupying this position must be included in the bargaining unit through the instant clarification proceeding is unwarranted.

Based upon the above, and the record as a whole, I find that the bargaining unit involved herein cannot be clarified to include the Sitters through the petition filed in this proceeding. Therefore, I shall dismiss the instant petition. Accordingly, I need not reach the issue of whether or not the Sitter position shares a community of interest with the other job classifications in the bargaining unit.

#### **IV. FINDINGS AND CONCLUSIONS**

Based upon the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer, The Washington Hospital, is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, SEIU Healthcare Pennsylvania, CTW, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner currently represents certain employees of the Employer in a service and maintenance unit. The Petitioner claims to also represent certain other employees of the Employer.

For the reasons set forth above, I shall dismiss the petition herein.

#### V. ORDER

**IT IS HEREBY ORDERED** that the petition filed herein be, and it hereby is, dismissed.

#### VI. 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 **May 29, 2012**. The request may be filed electronically through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>11</sup> but may not be filed by facsimile.

Dated this 15<sup>th</sup> day of May, 2012.

/s/Robert W. Chester

Robert W. Chester, Regional Director

NATIONAL LABOR RELATIONS BOARD  
Region Six  
William S. Moorhead Federal Building  
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#### **Classification Index**

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<sup>11</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov), select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.