

EXHIBIT 6



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Region 20

901 Market Street, Suite 400
San Francisco, California 94103-1735

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August 9, 2012

MISSION NEIGHBORHOOD HEALTH
CENTER
240 SHOTWELL ST
SAN FRANCISCO, CA 94110-1323

MISSION NEIGHBORHOOD HEALTH
CENTER
4434 MISSION ST
SAN FRANCISCO, CA 94112-1927

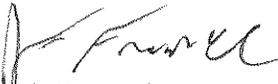
MISSION NEIGHBORHOOD HEALTH
CENTER
1647 VALENCIA ST
SAN FRANCISCO, CA 94110-5012

Re: Mission Neighborhood Health Center
Case 20-RC-085529

Dear Gentilepersons:

Enclosed please find a Decision and Direction of Election in the above-entitled case. In a subsequent mailing you will receive copies of the Notice of Election. Upon receipt of these Notices, please post these Notices immediately in a conspicuous place or places, easily accessible to all employees involved. Pursuant to Board Rule 103.20, these Notices must be posted at least 3 full working days prior to 12:01 a.m. of the day of the election.

Very truly yours,


Joseph F. Frankl
Regional Director

dg
Enclosure

cc: TYLER M. PAETKAU
HARTNETT, SMITH & PAETKAU
777 MARSHALL ST
REDWOOD CITY, CA 94063-1800

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

MISSION AREA HEALTH ASSOCIATES d/b/a
MISSION NEIGHBORHOOD HEALTH CENTER¹

Employer

and

NATIONAL UNION OF HEALTHCARE WORKERS

Case 20-RC-085529

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION,
UNITED HEALTHCARE WORKERS WEST

Incumbent/Intervenor

DECISION AND DIRECTION OF ELECTION

Mission Area Health Associates d/b/a Mission Neighborhood Health Center (Employer) is a California non-profit health organization, which operates healthcare centers/community clinics at multiple locations in San Francisco, California. By its petition, National Union of Healthcare Workers (Petitioner) seeks to represent employees in a mixed professional/nonprofessional historical contractual unit that has been represented by the Service Employees International Union, UHW-West

¹ The Employer's name was amended by the parties' stipulation at the hearing.

(Incumbent/Intervenor).² There are approximately 52 employees in the petitioned-for unit.

The Employer raises several contentions. It argues that it was denied due process because it was not given adequate notice of the issues to be addressed at the hearing and because its request for a continuance of the hearing to enable it to provide additional evidence to support its arguments was denied. As discussed below, I find this argument without merit.

Secondly, the Employer contends that the pharmacist-in-charge and charge nurses are statutory supervisors who must be excluded from the unit. Petitioner and Incumbent/Intervenor take a contrary view as to the supervisory status of the pharmacist-in-charge. As to the charge nurses, Petitioner argues that the issue of their supervisory status is irrelevant because the charge nurse classification is merely another name for the “staff RN,” classification included in the historical unit that Petitioner seeks to represent. Incumbent/Intervenor contends that the charge nurses are not statutory supervisors and should be included in the unit. Based on the record evidence and for the reasons set forth below, I find that the Employer has not carried its burden to establish the supervisory status of the pharmacist-in-charge or the charge nurses and I am not excluding them from the unit or units found appropriate herein.

Third, the Employer and Petitioner contend that individuals in the following classifications are professional employees who, if not otherwise excluded from the unit as statutory supervisors, must be accorded a *Sonotone*³ election: pharmacist-in-charge, pharmacist, charge nurse, staff RN, RN (on call), nurse practitioner, and physician

² The petitioned-for contractual unit includes the following employees: All full-time and regular part-time employees employed by the Employer at its San Francisco, California facilities, including med records clerks, nurses aide/medical assistants, X-ray aides, cashiers, clerk typists, janitors, intake serv clerks, purchasing clerks, OB/GYN receptionists, pharmacy helpers, assistant intake serv, supervisors, laboratory aides, family health workers, registration specialists, family planning counselors, third party billing clerks, LVNs, nutritionists, health ed aides, medical records supervisor asst, third party billing specialists, utility workers, staff RNs, RNs (on call), lab techs, nurse practitioners, physician assistants, pharmacists and pharmacy techs; and excluding all physicians, optometrists, dentists, guards and supervisors as defined by the Act.

³ *Sonotone Corp.*, 90 NLRB 1236 (1950).

assistant. Incumbent/Intervenor takes a contrary view as to all of these classifications. Based on the record and for reasons set forth below, I find that the pharmacists-in-charge, charge nurse, staff RN, RN (on call) and family nurse practitioner are professional employees under the Act and they will be accorded a *Sonotone* election. For the reasons discussed below, I find that the record evidence does not establish that the physician assistant, a currently vacant position in the petitioned-for mixed professional/nonprofessional historical unit, is that of a professional employee. Accordingly, I find that this position is not that of a professional employee under the Act.

At the hearing, Petitioner also asserted that the nutritionist position was that of a professional employee and the Employer and Incumbent/Intervenor took a contrary view. Petitioner did not raise this argument in its post-hearing brief. The nutritionist position is included in the petitioned-for historical mixed professional/nonprofessional historical unit, but was vacant at the time of the hearing, and the record evidence is insufficient to establish that this position is professional. Accordingly as with the physician assistant position, I find that the nutritionist position is not that of a professional employee under the Act.

Fourth, the Employer contends that changes in the unit should not be ignored. Specifically, it contends that the following classifications contained in the most recent collective-bargaining agreement between the Employer and the Incumbent/Intervenor no longer exist and/or are described by different job titles, and should be removed from the unit: x-ray aide, typist, clerk typist, janitor, OB/GYN receptionist, asst intake service supervisor, health ed aide, medical records supervisor asst, and utility worker.⁴ Both Petitioner and Incumbent/Intervenor take a contrary view, and argue that for purposes of the election, the unit should be the same as the historical contractual unit. For the reasons discussed below, I have decided not to exclude these positions from the unit. However, I am modifying the unit to include job titles currently used by the Employer for

⁴ At the hearing, the Employer also initially asserted that the position of laboratory aide no longer existed and should be excluded from the unit, but as discussed below, it conceded during the hearing that there was an employee in this classification who should be included in the unit.

classifications in the contractual historical unit: building maintenance, nurse practitioner, medical assistant and pharmacy tech. Furthermore, I have decided not to omit the historical job titles of these positions from the unit.⁵

Stipulation on Unit Exclusions. The parties stipulated, and I find, that the following classifications are excluded from the unit: physicians, optometrists, dentists, guards and supervisors, as defined by the National Labor Relations Act.

Hearing Officer & Witness at Hearing. The Hearing Officer was Lana Pfeifer. The only witness at the hearing was the Employer's Human Resources (HR) Director Becky Hucke.

FACTS

The Employer operates several clinics in San Francisco that provide comprehensive healthcare services primarily to Spanish-speaking communities.⁶ The parties stipulated, and I find, that the Employer and Incumbent/Intervenor have had a series of collective-bargaining agreements over several years, the most recent of which was effective from March 1, 2008, through February 28, 2011 (the Agreement). The Agreement was extended and then terminated by letter dated June 6, 2011. The parties have stipulated, and I find, that there is no contract bar to the petition herein.

Facts Regarding Supervisory Issues.

Pharmacist-in-Charge

The Employer contends that the pharmacist-in-charge is a statutory supervisor, and should therefore be excluded from the unit. Petitioner and Incumbent/Intervenor take a contrary position.

The Employer's only witness, Human Resources (HR) Director, Becky Hucke, testified that there is only one pharmacist-in-charge and the same person had held that

⁵ I note in this regard that Petitioner sought the inclusion of one of the classifications I am including in the unit called "building maintenance," and the Employer agrees that this position should be included.

⁶ Contrary to the assertion by the Employer in its brief, the parties did not stipulate that the Employer is a non-profit hospital but rather a "non-profit healthcare/community clinic." The record does not support that the Employer operates an acute care hospital facility, and it is not being considered as such in the unit determination made herein. However, the record supports that the Employer is a "health care institution," as that term is defined in Section 2(14) of the Act.

position for a long time. According to Hucke, the “pharmacist-in-charge,” position replaced the “pharmacist” position, which is in the petitioned-for/historical unit, and the Employer currently employs no regular pharmacists. According to Hucke, the pharmacist-in-charge supervises three or four pharmacy techs, but the list of employees in the petitioned-for/historical unit introduced by the Employer indicates that there is only one pharmacy tech currently employed by the Employer.

According to Hucke, the change in the job title for this position was accompanied by changes in job duties and the addition of supervisory authority. The job description for the pharmacist-in-charge position, dated September 6, 2011, indicates that the pharmacist-in-charge reports to the medical director and is responsible for the day-to-day operation of the in-house pharmacy and the supervision of the preparation and dispensing of pharmaceuticals to patients and the education of patients regarding pharmaceuticals prescribed for them. The duties and responsibilities of the position include dispensing prescribed drugs; advising patients of drug side-effects and interactions; purchasing all pharmaceuticals; maintaining pharmacy records; acting as the pharmacy representative on the Employer’s quality control committee; supervising pharmacy employees, professional and non-professional, in maintaining a high standard of patient care; and responsibility for pharmacy staffing, including pharmacists and pharmacy technicians in conjunction with supervisor. Qualifications for the position include a bachelor’s degree from an accredited school of pharmacy and a State pharmacist license. No reference to prior supervisory experience as a qualification for the position is set forth in the job description.

Hucke testified that the job description accurately sets forth the job duties and qualifications for the position.

Direction of Work. Hucke testified that the pharmacist-in-charge gives directions to pharmacy techs regarding the filling of prescriptions and stocking of shelves. However, she testified that she had no direct knowledge as to whether such directions required the exercise of independent judgment.

Disciplining. Hucke testified that the pharmacist-in-charge has no independent authority to discipline, suspend or terminate an employee without consulting her. According to Hucke, in about early February 2012, the pharmacist-in-charge had verbally counseled a pharmacy technician for not providing break relief, but had done so only after obtaining Hucke's approval and having this action reviewed by the medical director.

Evaluations. According to Hucke, the pharmacist-in-charge is responsible for filling out evaluations on pharmacy techs, but no evaluations had been filled out in the six months that Hucke had been employed by the Employer.

Evidence Regarding Other Indicia of Supervisory Authority. Hucke testified that there has been no hiring in the pharmacy department since she has been employed. She further testified that she had no knowledge regarding whether the pharmacist-in-charge schedules any employees. According to Hucke, the pharmacist-in-charge has no authority to lay off employees or to increase employee wages and/or benefits and had not been involved in handling any grievances during her tenure.

Charge Nurses

The Employer contends that charge nurses should be excluded from the unit as statutory supervisors. Incumbent/Intervenor takes a contrary position and Petitioner takes no position, arguing that the issue is irrelevant to this proceeding since the charge nurse position is not in the petitioned-for/historical unit and is encompassed by the staff RN title, which is in the historical petitioned-for unit.

The Employer employs five charge nurses, all of whom are RNs. Although there is no position of charge nurse in the petitioned-for/historical unit, the unit does include staff RNs and RNs (on call). However, Hucke testified that the Employer employs no staff RNs other than charge nurses, and there is no evidence as to whether the Employer currently employs any on-call RNs. Nor is there evidence that the Employer currently employs any LVNs, which is also a classification included in the unit.

The charge nurses report to the director of nurses (DON). Hucke testified that the charge nurses directly supervise medical assistants in the Employer's clinics, such as the women's clinic and pediatric clinic. The record shows there are a total of about 19

medical assistants employed by the Employer, whose duties are to act as a receptionist; to take patients' vital signs; and to check-out patients at the end of their clinic visits.⁷

Hucke testified generally that the charge nurses have authority to hire and fire, evaluate, schedule and direct the medical assistants. According to Hucke, the duties and responsibilities of the charge nurse in the women's clinic are accurately described in the January 2012 job description for that position contained in the record. According to Hucke, there are separate job descriptions for charge nurses in other clinics, which may have "small" differences from each other depending upon the clinic, but the job duties are basically the same.

The job description for the charge nurse in the women's clinic indicates that the charge nurse reports to the director of nurses (DON) and to quality management. The job duties for the position include: triaging and providing medical care to patients as ordered and in accordance with nursing protocol; providing leadership, evaluation and direct supervision to the medical assistants; and the supervision and preparation of patients for medical evaluation and after medical evaluation to ensure that appropriate medical plans are enacted. The job description further indicates that the charge nurse sets the agenda for monthly departmental meetings; attends and participates in nursing staff meetings; and performs other duties as assigned. Qualifications for the position include a current California RN license and at least two years of experience leading teams and "supervising staff."

Hiring. Hucke testified that she does not participate in recruitment functions and has not participated in hiring interviews or decision-making involving the hire of medical assistants. However, she testified generally that charge nurses had hired on-call medical assistants within the past six months and as recently as two weeks prior to the hearing. She did not know how many on-call medical assistants had been hired, but she identified

⁷ In the petitioned-for/historical unit, the position of medical assistant is referred to as "nurses aide/medical assistant." For purposes of the decision herein, the position is referred to as "medical assistant," with the understanding that the two terms are synonymous. As indicated below, I am modifying the unit to include the "medical assistant" classification, but not removing the "nurses aide/medical assistant" classification from the petitioned-for/historical unit.

a charge nurse in the pediatric clinic, Alma Hernandez, as having been involved in such hiring. Hucke testified that the hiring process operates as follows: job applicants submit their resumes to the Employer's Human Resources (HR) Coordinator who sets up interviews; such interviews are conducted collectively by the HR Coordinator, the DON and a group of some but not all of the charge nurses; the same group of interviewers collectively makes a preliminary decision about who to hire; and the HR Coordinator then checks the applicants' references prior to extending job offers.

Disciplining. Hucke testified that charge nurses can verbally warn and counsel medical assistants. According to Hucke, the week prior to the hearing, the DON and a charge nurse had issued a counseling notice and a verbal warning to a medical assistant. Hucke testified that the charge nurse had previously counseled the same medical assistant on multiple occasions. The charge nurse recommended that the employee improve her behavior and that a verbal warning notice be issued and this was done. The record contains no other evidence regarding specific instances where the charge nurses have been involved in disciplining employees.

Evaluations. Charge nurses fill out written annual evaluations for medical assistants and make comments on them appraising such performance factors as safety and attendance. The charge nurse discusses the evaluation with the medical assistant; both the medical assistant and charge nurse sign the evaluation; and the evaluation is then submitted to the HR department. According to Hucke, the Employer had reinstated the practice of issuing annual evaluations in May 2012, and charge nurses had evaluated about half the medical assistants since that time. According to Hucke, evaluations do not affect the wages of employees in the petitioned-for/historical unit. Although she testified that evaluations sometimes include recommendations regarding improvements in employee performance and can result in the implementation of performance improvement plans (PIPs), the record contains no evaluations filled out by charge nurses nor does it include any evidence showing that a charge nurse's evaluation has ever led to a PIP or other negative or positive consequence for an employee.

Scheduling and Assignment and Direction of Work. Hucke testified that the charge nurses create the schedules for the medical assistants, deciding who will work on what days; vacations; time off; and coverage for absent employees. According to Hucke, no higher level manager reviews scheduling decisions by charge nurses unless a complaint is made. She further testified that she has seen time off requests by medical assistants that charge nurses have signed off on that have been turned into the payroll department. According to Hucke, when medical assistants are ill, they are supposed to call a phone-in service prior to their shift and later notify the charge nurse.

Hucke testified that the medical assistants have a job description that sets forth their job duties. Charge nurses decide where the medical assistants will work (i.e., at the front desk, with which physician, or in the back of the office) and medical assistants rotate through these positions on a daily or weekly basis.

Accountability. According to Hucke, the charge nurses are not disciplined or otherwise held accountable for the performance of the medical assistants; rather, according to Hucke, it is the medical assistant who is held accountable for his or her performance.

Facts Regarding Professional Employee Issues

As indicated above, the Employer and Petitioner contend that persons in the following classifications are professional employees who must be provided a *Sonotone* election: pharmacist-in-charge, pharmacist, charge nurse, staff RN, on-call RN and nurse practitioner. The Intervenor takes a contrary position. A description of the relevant evidence with regard to the pharmacist-in-charge and charge nurse positions has been set forth above. The other disputed positions are addressed below.

Staff RNs and On-Call RNs

The petitioned-for/historical unit includes staff RNs and RNs (on call). However, Hucke testified that the Employer employed only charge nurses and did not employ any staff RNs; there is no evidence as to whether any on-call RNs are currently employed. Hucke testified that she was unfamiliar with the duties of the staff RN or RN (on-call)

positions, but that both would be required to be licensed RNs in order to be employed by the Employer.

Nurse Practitioner

The record includes job descriptions for the position of “family nurse practitioner” (herein called nurse practitioner)⁸ dated in 1992, 2002 and 2008. Hucke testified that the 2008 job description accurately reflects the current duties, responsibilities and qualifications of nurse practitioners. The record reflects that there are about five nurse practitioners employed by the Employer. The 2008 job description indicates that the nurse practitioners report to the Employer’s medical director and their responsibilities include providing primary and urgent care to patients; providing health care education to patients; collaborating with a multi-disciplinary team; making referrals to community agencies; and maintaining medical records. Qualifications for the position include a California nursing license, a California nurse practitioner license, one year of experience as a nurse practitioner, and experience with de-escalation and crisis-intervention strategies.

Hucke testified that the primary differences between the family nurse practitioner and other RNs are the additional training and licensing required for the nurse practitioner position and the ability of nurse practitioners to write prescriptions for patients, which other RNs are not authorized to do. However, Hucke further testified that at the Employer’s clinics, physicians review the prescriptions written by nurse practitioners. She also testified that nurse practitioners handle fewer patients than do physicians working in the Employer’s clinics.

Physician Assistant

The Employer and Petitioner contend that the physician assistant is a professional employee and the Intervenor takes a contrary position. The Employer did not employ any physician assistants at the time of the hearing and Hucke did not know how long it had been since the Employer employed a physician assistant. Nor does the record indicate if

⁸ This classification is referred to in the petitioned-for historical unit as “nurse practitioner,” and the record supports that “family nurse practitioner” refers to the same classification.

or when a physician assistant will be employed in the future. Hucke testified that she was unfamiliar with the specific educational requirements for the position, but testified that the physician assistant must be state-licensed. According to Hucke, the educational and training requirements are similar to, but not quite as high as, those of a nurse practitioner. She testified that a physician assistant works under the direction of a physician, providing primary health care to patients. According to Hucke, any orders issued by a physician assistant must be reviewed by a physician. Hucke did not know whether a physician assistant would be allowed to see patients alone or had to have a physician in attendance.

Nutritionist

As indicated above, at the hearing, Petitioner also asserted that the nutritionist position, which is included in the historical unit but was vacant at the time of the hearing, is a professional employee, but did not make this contention in its post-hearing brief. Employer and Intervenor took a contrary view on this issue. At the hearing, Hucke testified that the nutritionist position was vacant; if someone was employed in the position they “could” have a master’s degree, and be “trained in nutrition,” but would “still work under the direction of a registered dietitian.” In response to the question of whether a master’s degree was required for the position, Hucke further testified that the nutritionist “could be just trained in nutrition.” She testified that she did not know what the nutritionist’s duties would be or whether such duties would include the exercise of discretion or independent judgment.

Evidence Regarding Whether Certain Classifications Should Be Removed from the Unit Because they No Longer Exist

As indicated above, the Employer contends that the following classifications should be removed from the unit because they no longer exist: x-ray aide, typist, clerk typist, janitor, OB/GYN, receptionist, asst intake service supervisor, health ed aide, medical records supervisor asst and utility worker. Petitioner and Intervenor take a contrary view.

In support of its position, the Employer offered into evidence a list of petitioned-for historical unit classifications, which Hucke testified had been annotated by the Employer’s Executive Director, Brenda Storey, to indicate which positions no longer

existed. On this list, next to the above-listed classifications, are handwritten notations stating: “does not exist.” Executive Director Storey did not testify at the hearing. Hucke testified that the Employer did not currently employ persons in these positions but she did not know when the Employer had eliminated these positions and/or had last employed any employees in these classifications.⁹ The classifications annotated as no longer existing included “laboratory aide,” “janitor” and “utility worker.” At the hearing, the Employer had also introduced another list of what it considered to be current unit classifications with the name of employees currently occupying those positions. This list included employees in the classifications of “laboratory aide” and “building maintenance.” When Hucke was questioned about the apparent inconsistency between her testimony that the position of laboratory aide no longer existed and the other list of current unit employees containing the name of a laboratory aide currently employed by the Employer, she responded that this could have been an “oversight,” and she agreed that the laboratory aide position should be included in the unit. Likewise, the Employer agreed that the “building maintenance” position is included in the unit, despite its argument that the similarly titled positions of “janitor” and “utility worker” in the petitioned-for/historical unit, no longer exist.

ANALYSIS

DUE PROCESS ISSUE

As indicated above, the Employer contends that it was denied due process because it was not given a timely and clear statement of the issues to be addressed at the hearing and because its request during the hearing for a continuance to enable it to provide additional evidence to support its arguments was denied.

⁹ Hucke testified that the functions of certain positions were being handled by other employees in the petitioned-for/historical unit. For example, she testified that the work of the OB/GYN receptionist was being performed by medical assistants who rotated through that position. She further testified that the petitioned-for/historical unit position of “pharmacy helper” is currently called “pharmacy tech,” but she did not know when that job title had been changed.

The record shows that the Employer was timely notified of the hearing in the instant case held on July 26, 2012, by Notice of Hearing dated July 18, 2012. The Employer raised the issues to be addressed at the hearing (i.e., the supervisory, professional employee, and exclusion of classifications issues). Indeed, the Employer presented its Human Resources Director to testify at the hearing, and she responded to questions by counsel and the Hearing Officer concerning such issues. The Employer also introduced into evidence job descriptions and other documents in support of its position. Plainly, the Employer was well aware of the issues to be addressed at the hearing, which it had raised.

I have carefully reviewed the email communications between the Hearing Officer and the parties attached to the Employer's brief in support of its denial of due process argument, and I find nothing in them to support that the Hearing Officer committed prejudicial error by her handling of this proceeding. Indeed, such emails reflect that the Hearing Officer made diligent efforts to identify all substantive issues and procedural matters, including applicable burdens of proof, and to ensure that all parties were fully apprised of such matters. Under such circumstances, I do not find that the Employer was denied due process either by not being adequately apprised of the issues prior to the hearing or by the denial of its request for a continuance to enable it to produce additional evidence to support its case.

SUPERVISORY ISSUES

As indicated above, the Employer contends that the pharmacist-in-charge and the charge nurses are statutory supervisors. Incumbent/Intervenor takes a contrary view and Petitioner takes no position on the issue.

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Pursuant to this definition, individuals are statutory supervisors if they hold the authority to engage in any one of the twelve supervisory functions listed in Section 2(11); their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and, their authority is held “in the interest of the employer.” Supervisory status may be shown by demonstrating that a putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); *Beverly Enterprises-Minnesota, Inc. d/b/a Golden Crest Healthcare Center*, 348 NLRB 747 (2006).

Whether an individual is a supervisor is to be determined in light of the individual’s actual authority, responsibility and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). The Act requires “evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.” *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C.Cir. 1971); *Chevron, USA*, 309 NLRB 59, 62 (1992). Mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Chevron, supra*; *Sears Roebuck & Co.*, 304 NLRB 193 (1991). Although a supervisor may have “potential powers . . . theoretical or paper power will not suffice.” Finally, the burden to prove supervisory status is on the party asserting it. See *Oakwood, supra*; *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

In the instant case, the record does not establish that the pharmacist-in-charge or charge nurses are statutory supervisors.

Pharmacist-In-Charge. Hucke testified that that the “pharmacist-in-charge” position replaced the position of “pharmacist,” which is included in the petitioned-for/historical unit. According to Hucke, the person in this position had not been involved in hiring or evaluating any employees during Hucke’s tenure. Further, Hucke testified that she had no direct knowledge as to whether his direction of the work of pharmacy techs involved independent judgment. The only evidence of discipline by a pharmacist-

in-charge was a verbal counseling of a medical assistant, done only after the pharmacist-in-charge had obtained Hucke's approval and the action had been reviewed by the medical director. Lastly, Hucke had no knowledge as to whether the pharmacist-in-charge was involved in scheduling employees. In sum, the Employer failed to carry its burden to establish that the pharmacist-in-charge is a statutory supervisor. Accordingly, given the assertion by the Employer that it has replaced the pharmacist position in the petitioned-for historical unit with the pharmacist-in-charge position, I am including the pharmacist-in-charge position in the unit.

Charge Nurses. As indicated by applicable legal precedent cited above, the job description of the charge nurse is insufficient standing alone to support a finding of supervisory status in the absence of other tangible evidence of such authority. While Hucke testified that the charge nurses are involved in hiring medical assistants, she conceded having no direct involvement in the hiring process or having any knowledge of how hiring decisions are made. Further, she testified that the HR Coordinator and the DON participate in hiring interviews and that hiring decisions are made collectively by a group that includes those higher level managers. In sum, the record evidence shows that the charge nurses do not independently make hiring decisions and does not establish that they make effective hiring recommendations.

The only evidence in the record regarding the charge nurses' authority to discipline employees is one instance of a counseling notice issued jointly by a charge nurse and the DON. Again, the record evidence does not establish that the charge nurses make independent disciplinary decisions or make effective recommendations to discipline. Further, even assuming that the charge nurses possess authority to counsel employees, such authority is insufficient to establish supervisory authority in the absence of evidence that such counseling has led to or supported more serious forms of discipline. See *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989); *Rahco, Inc.*, 265 NLRB 235, 247-248 (1982); *Aircraft Displays, Inc.*, 262 NLRB 1233, 1234-1235 (1982). Moreover, it is also well established that an isolated exercise of

purported supervisory authority is insufficient to establish the possession of such authority under the Act. *Station Casino, Inc.*, 368 NLRB No. 38 slip op at 15 (April 27, 2012).

Although Hucke testified that charge nurses have filled out evaluations for medical assistants, there is no evidence that such evaluations have had any effect on the terms and conditions of employment of the medical assistants.

While Hucke gave conclusory testimony that the charge nurses have authority to schedule medical assistants, the record evidence does not include any tangible evidence to establish whether such scheduling involves the exercise of discretion or independent judgment.

Similarly, the conclusory testimony by Hucke regarding the charge nurses' authority to assign and direct the work of medical assistants is also insufficient to establish supervisory authority. Again, there is no showing that such authority involves the exercise of discretion or independent judgment by the charge nurses or that their direction is "responsible direction." Thus, there is no showing that the charge nurses possess authority to take corrective action if their directions are not followed or to show that they are held accountable for such direction or the work performance of the medical assistants. See *Croft Metals, Inc.*, *supra*, 348 NLRB at 721; *Oakwood*, *supra*, 348 NLRB at 692.

In sum, the Employer has failed to carry its burden to prove that the charge nurses are statutory supervisors. Accordingly, I find that they are properly included in the unit, particularly given the Employer's position that they are the Employer's only "staff RNs," which is a classification included in the petitioned-for/historical unit.

PROFESSIONAL EMPLOYEE ISSUES

The Employer and Petitioner contend that individuals in the following classifications are professional employees who must be accorded a *Sonotone* election: pharmacist-in-charge, pharmacist, charge nurse, staff RNs and RNs (on call), nurse practitioner, and physician assistant. Incumbent/Intervenor takes a contrary view.

Section 9(b)(1) of the Act precludes that Board from finding appropriate a unit that includes professional employees with nonprofessional employees unless a majority of the professional employees vote to be so included. Section 2(12)(a) of the Act defines a professional employee as:

“(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes. . . .”

Section 2(12) defines a professional employee based on work performed rather than qualifications. *Aeronca, Inc*, 221 NLRB 326 (1975). In order for an individual to qualify as a professional employee, all four of the requirements of the section must be met. See *Arizona Public Service Co.*, 310 NLRB 477, 482 (1993); *The Express-News Corp*, 223 NLRB 627, 630 (1976).

Pharmacist-In-Charge and Pharmacists. For purposes of this analysis, I view the “pharmacist-in-charge” and the “pharmacist” as being the same classifications since the Employer asserts that the pharmacist-in-charge position has replaced the position of pharmacist, which is included in the petitioned-for/historical unit. The record establishes that both positions are professional employees under the Act. Both prescribe medications and teach patients about drug interactions and drug side effects. Both are required to possess the same advanced training in a specialized field of study at a pharmacy school and both have State pharmacist licenses. In sum, their work plainly fulfills the four requirements of Section 2(12) of the Act. See *Drug Fair-Community Drug Co., Inc.*, 180 NLRB 525, 527 n. 5 (1969); *Long’s Stores, Inc.*, 129 NLRB 1495, 1498 (1961); *Sam’s, Inc.*, 78 NLRB 826, 829 (1948). Accordingly, the pharmacist-in-charge and pharmacists, if any are employed, will be given a *Sonotone* election.

Charge Nurses, Staff RNs, RNs (on call), and Family Nurse Practitioners.

The Employer's charge nurses, staff RNs, RNs (on call), and family nurse practitioners are all required to be licensed by the State as RNs, and the family nurse practitioner is required to have not only an RN license but also additional licensing and training. The clinical work of the family nurse practitioner and charge nurses, as described in their job descriptions and confirmed by Hucke's testimony, plainly meets the requirements for a professional employee set forth in Section 2(12). Thus, they evaluate patients, review medical charts for current medications, consult with doctors, review prescriptions, and provide health education to patients. Further, at the time of the hearing, the only "staff RNs" employed by the Employer were charge nurses and it is therefore reasonable to conclude that both positions perform substantially similar clinical functions.

Accordingly, I conclude, based on the nature of their work, that the charge nurses, staff RNs, RNs (on call) and family nurse practitioners meet the statutory definition of a professional employee contained in Section 2(12) of the Act, and they will be accorded a *Sonotone* election. See *Centralia Convalescent Center*, 295 NLRB 42 (1989), citing *Mercy Hospitals of Sacramento*, 217 NLRB 765 (1975).

Physician Assistant and Nutritionist. With regard to the professional employee status of the physician assistant and nutritionist positions, the record shows that there were no employees in these positions at the time of the hearing. Hucke provided only general testimony that persons in the physician assistant position provide primary care to patients under a doctor's supervision and the record discloses little about their educational and training requirements or the functions they have performed for the Employer. As shown above, she was likewise unable to give evidence to establish that the nutritionist position was that of a professional employee under Section 2(12) of the Act.

Accordingly, I find that these two positions are not professional employees under the Act.

**WHETHER CERTAIN CLASSIFICATIONS SHOULD BE REMOVED FROM
THE UNIT BECAUSE THEY NO LONGER EXIST**

As indicated above, the Employer contends that certain classifications¹⁰ should be removed from the petitioned-for/historical unit because they no longer exist and Petitioner and Intervenor take a contrary view. Because I find the evidence in the record insufficient to establish that these positions no longer exist, I decline to remove them from the unit. Thus, Hucke was unable to testify as to how or when such classifications were eliminated or when employees were last employed in any of them. The primary evidence relied on by the Employer as to this issue was a list annotated by a manager other than Hucke who did not testify at the hearing. The unreliability of the Employer's evidence was further demonstrated by the fact that the Employer initially asserted that the classification of "laboratory aide" no longer existed, but was later forced to reverse this position during the hearing when the existence of an employee in that position on its own list of eligible employees was brought to its attention. Further, the Employer contended that the position of "janitor" and "utility worker" in the petitioned-for/historical unit no longer existed, yet its list of current unit employees included an employee in a job classification called "building maintenance," which could reasonably be construed to subsume one or both of these positions.

In sum, even assuming that these classifications are currently vacant, they are nevertheless positions that have been historically included in the unit and the Employer has failed to establish by reliable evidence that the Employer will not hire anyone in such positions or into equivalent positions in the foreseeable future. For this reason, I decline to disturb the unit by removing them.

MODIFICATIONS TO THE UNIT

I am modifying the unit to include certain job titles currently used by the Employer, where the record supports that they have either replaced or are synonymous with classifications historically included in the unit. Specifically, these include the

¹⁰ Specifically, the classifications which the Employer seeks to have removed from the petitioned-for/historical unit are: X-ray aide, typist, clerk typist, janitor, OB/GYN receptionist, asst intake service supervisor, health ed aide, medical records supervisor asst, and utility worker.

position of “building maintenance,” as requested by Petitioner; the addition of “medical assistant,” which the parties do not dispute is included in the unit and which apparently is the same position as that of “nurses aide/medical assistant,” included in the petitioned-for/historical unit; the “nurse practitioner” position, which appears to be the same as the classification “family nurse practitioner,” contained in the historical petitioned-for unit; and the “pharmacy tech” position, which the Employer asserts is the current job title for the “pharmacy helper” classification included in the petitioned-for historical unit. I am also including the “pharmacist-in-charge” and “charge nurse” positions in the unit for the reasons discussed above. I am not removing any existing classifications from the petitioned-for historical unit and, instead, I am only adding the additional titles the Employer asserts it uses in place of some historical titles.

CONCLUSIONS AND FINDINGS

Based upon the record, I conclude and find as follows:

1) The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are affirmed.¹¹

2) The Employer is an employer as defined in Section 2(2) of the Act, and is engaged in commerce within the meaning of Sections 2(6), (7) and (14) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3) The Petitioner is a labor organization within the meaning of the Act.

4) A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5) **Unit Findings.** As indicated above, I have concluded that the pharmacist-in-charge, pharmacists, charge nurses, staff RNs and RNs (on call) and family nurse practitioners (also called nurse practioners) are professional employees entitled to a *Sonotone* election.

I find that the employees determined to be professional employees, including the pharmacist-in-charge, pharmacists, charge nurses, staff RNs, RNs (on call) and family

¹¹ My decision regarding this conclusion is addressed above.

nurse practitioners (also called nurse practioners) can constitute an appropriate unit as part of the petitioned-for/historical unit as modified herein, if they choose to be represented in such a unit. Thus, a petitioned-for/historical unit of employees is presumptively appropriate in the absence of record evidence that provides a basis for altering it. See *Canal Carting, Inc.*, 339 NLRB 969, 969 (2003). On the other hand, if the professional employees choose to be represented in a separate unit of professional employees, I also find that such a unit can constitute an appropriate unit.¹² However, my ultimate determination of the appropriate unit or units in this case will be based on the outcome of the *Sonotone* election to be conducted under the procedures set forth below:

The following employees constitute the proper Voting Groups for conducting a *Sonotone* election in this case:

VOTING GROUP A

All full-time and regular part-time professional employees, including pharmacists-in-charge, pharmacists, charge nurses, staff RNs, RNs (on call) nurse practitioners and family nurse practitioners employed by the Employer at its facilities in San Francisco, California; excluding all other non-professional employees, physicians, optometrists, dentists, guards and supervisors, as defined by the National Labor Relations Act.

VOTING GROUP B

All full-time and regular part-time non-professional employees employed by the Employer at its San Francisco, California facilities, including med records clerks, medical assistant, nurses aide/medical assistants, X-ray aides, cashiers, clerk typists, janitors, building maintenance, intake serv clerks, purchasing clerks, OB/GYN receptionists, pharmacy techs, pharmacy helpers, assistant intake serv, supervisors, laboratory aides, family health workers, registration specialists, family planning counselors, third party billing clerks, LVNs, nutritionists, health ed aides, medical records supervisor asst, third party billing specialists, utility workers, lab techs, physician assistants, and pharmacy techs; and excluding all professional employees, pharmacists-in-charge, pharmacists, staff RNs, RNs (on call), nurse practitioners, family nurse practitioners, physicians, optometrists, dentists, guards and supervisors as defined by the Act.

¹² See e.g., *Family Doctor Medical Group*, 226 NLRB 118, 120-121 ((1976).

The employees in Voting Group A will be asked two questions: (1) Do you desire to be included with the employees in Voting Group B in a single unit for the purposes of collective bargaining?

(2) By which of the following unions, if any, do you wish to be represented for the purposes of collective bargaining?

National Union of Healthcare Workers

or

Service Employees International Union,
United Healthcare Workers West

or

By No Union

If a majority of the employees in Voting Group A vote “yes” to the first question, indicating their desire to be included in a unit with employee in Voting Group B, they will be so included. Their vote on the second question will then be counted with the votes of the nonprofessional employees in Voting Group B to decide which union, if any, shall be the representative for the entire combined unit. If, on the other hand, the professional employees in Voting Group A do not vote for inclusion, their votes on the second question will be separately counted to decide whether they want either of the Unions on the ballot to represent them in a separate professional unit. Similarly, the votes of the nonprofessionals in Voting Group B would be separately counted to decide whether they want either of the Unions on the ballot to represent them in a separate nonprofessional unit.

My unit determination is thus based, in part, on the results of the vote by the professional employees in Voting Group A. However, I make the following findings with regard to what constitutes an appropriate unit or units in this case depending on the results of the vote of the professional employees:

1. If a majority of the professional employees vote for inclusion in the unit with nonprofessional employees, I find that the following unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time professional and nonprofessional employees employed by the Employer at its facilities in San Francisco, California, including pharmacists-in-charge, pharmacists, charge nurses, staff RNs, RNs (on call), nurse practitioners, family nurse practitioners, med records clerks, medical assistant, nurses aide/medical assistants, X-ray aides, cashiers, clerk typists, janitors, building maintenance, intake serv clerks, purchasing clerks, OB/GYN receptionists, pharmacy techs, pharmacy helpers, assistant intake serv, supervisors, laboratory aides, family health workers, registration specialists, family planning counselors, third party billing clerks, LVNs, nutritionists, health ed aides, medical records supervisor asst, third party billing specialists, utility workers, lab techs, physician assistants, and pharmacy techs; and excluding physicians, optometrists, dentists, guards and supervisors as defined by the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with nonprofessional employees, I find that the following two groups of employees will constitute separate units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT A

All full-time and regular part-time professional employees, including pharmacists-in-charge, pharmacists, charge nurses, staff RNs, RNs (on call), nurse practitioners and family nurse practitioners, employed by the Employer at its facilities in San Francisco, California; excluding all other non-professional employees, physicians, optometrists, dentists, guards and supervisors, as defined by the National Labor Relations Act.

UNIT B

All full-time and regular part-time nonprofessional employees employed by the Employer at its facilities in San Francisco, California, including med records clerks, medical assistants, nurses aide/medical assistants, X-ray aides, cashiers, clerk typists, janitors, building maintenance, intake serv clerks, purchasing clerks, OB/GYN receptionists, pharmacy tech, pharmacy helpers, assistant intake serv, supervisors, laboratory aides, family health workers, registration specialists, family planning counselors, third party billing clerks, LVNs, nutritionists, health ed aides, medical records supervisor asst, third party billing specialists, utility workers, lab

techs, physician assistants, and pharmacy techs; and excluding all professional employees, pharmacists-in-charge, pharmacists, staff RNs, RNs (on call), nurse practitioners, family nurse practitioners, physicians, optometrists, dentists, guards and supervisors as defined by the Act.

DIRECTION OF ELECTION¹³

The National Labor Relations Board will conduct a secret ballot election in the above voting groups at a time and place to be set forth in the notice of election to be issued by the undersigned, subject to the Board's Rules and Regulations.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may 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

¹³ If Petitioner or Intervenor does not wish to represent the professional employees in a separate unit, they must notify the Regional Office of their desire not to be included on the ballot for this purpose within seven (7) days of the issuance of this decision.

access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 20, 901 Market Street, Suite 400, San Francisco, CA 94103, on or before **August 16, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlr.gov,¹⁴ by mail, or by facsimile transmission at (415) 356-5156. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Because the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted by electronic filing, facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

¹⁴ 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.

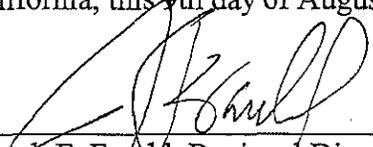
C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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 **August 23, 2012**. The request may be filed electronically through the Agency's web site, www.nlr.gov,¹⁵ but may not be filed by facsimile.

DATED AT San Francisco, California, this 9th day of August 2012.



Joseph F. Frank, Regional Director
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735.

¹⁵ 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.