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

CCLA 9, LLC, d/b/a RIVERVIEW HEALTH AND REHABILITATION CENTER NORTH[1]

Employer

and **Case 07-RC-089352**

SEIU HEALTHCARE MICHIGAN

Petitioner

APPEARANCES:
Grant T. Pecor, Attorney, of Grand Rapids, Michigan, for the Employer.
Matt Carpenter, Attorney, of Detroit, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer operates a 160-bed nursing home and rehabilitation center in Detroit, Michigan.

Petitioner seeks to represent the certified nursing assistants (CNAs) employed at the Employer's Detroit facility.

The Employer maintains that the only appropriate unit should include all service employees.

Petitioner argues that under ***Specialty Healthcare and Rehabilitation Center of Mobile***, 357 NLRB No. 83 (2011), the petitioned-for unit is appropriate based on traditional community of interest standards, and the Employer has not met its burden of proof to demonstrate that an overwhelming community of interest is shared between the petitioned-for employees and the employees in the larger unit proposed by the Employer.

The Employer argues that ***Specialty Healthcare*** was wrongly decided**,** including the placement of the burden of proof on the party asserting that a larger unit is appropriate. In this regard, the Employer argues that the petitioned-for unit is inconsistent with the parties' bargaining history and disenfranchises employees who were included in the unit previously sought by Petitioner, and the petitioned-for unit will result in a proliferation of bargaining units in the Employer's facility.

[1] The name of the Employer appears as amended at the hearing.

As discussed below, based on the record and relevant Board law, I find that Petitioner's proposed unit of CNAs, only, is appropriate. The Employer has not met its burden of proof to demonstrate an overwhelming community of interest is shared between the petitioned-for employees and the disputed employees. The parties' previously stipulated election agreement for a larger unit does not create any history of collective bargaining, and the Employer has not established that a unit of CNAs only will cause undue proliferation of bargaining units at its Detroit facility.

Board Law

It is well established that a certifiable unit need only be an appropriate unit, not the most appropriate unit. ***International Bedding Company***, 356 NLRB No. 168, slip op. at 2 (2011), citing ***Morand Bros. Beverage Co***., 91 NLRB 409, 418 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). See also ***Boeing Co***., 337 NLRB 152, 153 (2001) ("If [the petitioned-for] unit is appropriate, then the inquiry into the appropriate unit ends.")

In ***Specialty Healthcare***, supra, the Board affirmed the Regional Director's Decision that a petitioned-for bargaining unit of CNAs only was appropriate under a traditional community-of-interest analysis. The Board rejected the employer's argument therein, based on ***Park Manor Care Center***, 305 NLRB 872 (1991), that the only appropriate unit consisted of the CNAs plus all other nonprofessional service and maintenance employees employed at the employer's nursing home facility. In overruling ***Park Manor***, the Board clarified that if a party contends that a petitioned-for unit of employees who are readily identifiable as a group and share a community of interest is inappropriate because it does not contain additional employees, the burden is on that party to demonstrate that the excluded employees share an overwhelming community of interest with the employees in the petitioned-for unit. ***Specialty Healthcare***, supra, slip op. at 1.

The Board looks to a variety of factors to determine whether a community of interest exists, including, inter alia, the degree of functional integration of operations, the differences in the types of work and the skills of employees, the extent of centralization of management and supervision, the extent of interchange and contact between groups of employees, general working conditions and fringe benefits, and bargaining history. ***International Bedding Company***, supra, slip op. at 2; ***Boeing Co***., supra at 153; ***NLRB v. Paper Mfrs. Co***., 786 F.2d 163, 167 (3rd Cir. 1984); ***Rinker Materials Corp***. 294 NLRB 738, 738-739 (1989). The petitioner's position regarding the scope of the unit is also a relevant consideration. ***International Bedding Company***, supra, slip op. at 2, citing ***Marks Oxygen Co***., 147 NLRB 228, 230 (1964); ***E.H. Koester Bakery & Co***., 136 NLRB 1006, 1012 (1962). However, as noted by the Employer, that issue is not dispositive with regard to what constitutes an appropriate unit, and certain proposed units, such as those based on an arbitrary, heterogeneous, or artificial grouping of employees will be found to be inappropriate. See, ***Moore Business Forms, Inc***., 204 NLRB 552, 553 (1973).

Application of Board Law to this Case

In reaching the conclusion that the proposed unit of CNAs is appropriate and the Employer has not met its burden of proof to demonstrate an overwhelming community of interest between the petitioned-for employees and the disputed employees, I rely on the following analysis and record evidence.

(1) Common Supervision

Administrator Christine Petrik oversees the entire facility. Director of nursing (DON) Barbara Johnson is in charge of the nursing department. The facility has three floors: two rehab units on the first floor housing about 24 residents, one large long-term care unit on the second floor housing about 60 residents, and one large Alzheimer/ dementia unit on the third floor housing about 41 residents. Each unit is staffed with a unit manager, assigned nurses[2] and CNAs. The CNAs report to nurses on each unit who have been designated as charge nurses. Nurses in turn report to the unit managers, who report to the DON. In addition to the unit managers, the following employees also report directly to the DON: staffing coordinator nurse Tyronda Trimble; staff development coordinator/in-service/infection control nurse Marian Wilson; medical records employee April Montgomery; and the central supply employee. The three unit secretaries report directly to Montgomery.

In addition to the nursing department, the Employer operates the following departments under the direction of the named individuals: environmental/laundry/ housekeeping – James Maloney; dietary – Ivery Calhoun; admissions – Yvette Lee; business office – Karen Roznowki; social services – Michelle Smith; activities – Jennifer Muszall; human resources, Dawn Paczkowski; and minimum data set (MDS) department – Nancy Harriman.[3] There are about 58 employees working in these departments whom the Employer asserts should be included in the bargaining unit.[4]

The department heads report to the Administrator, but there is no common direct supervision among the employees in the various departments. Rather, employees report to the managers of their respective departments. Although the unit secretaries work within the nursing department, unlike the CNAs, they directly report through medical records and April Montgomery.

(2) Similarity of Skills and Functions[5]

CNAs primarily engage in patient-care duties, including assisting residents with such daily functions as grooming, hygiene, bathing and dressing, and incontinence care; taking residents' vital signs, and monitoring their daily food and fluid intake and output; transferring and lifting residents in their beds, moving residents to their wheelchairs, assisting with ambulation for short distances, and assisting residents in getting around the facility, such as to the dining room or activity room; accompanying residents to appointments outside the nursing home; and assisting residents with eating, both in the dining room and in resident rooms. CNAs are the only employees, other than nurses, who are certified to perform hands-on patient care, including transferring, positioning, and feeding residents.

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[2] There are 28 registered nurses (RNs) and 20 licensed practical nurses (LPNs).

[3] The parties stipulated, and I find, that Christine Petrik, Barbara Johnson, Nancy Harriman, James Maloney, Ivery Calhoun, Karen Roznowski, Jennifer Muszall, Dawn Paczkowski, and Tyronda Trimble are supervisors within the meaning of Section 2(11) of the Act, based on their authority to hire, discipline, and discharge employees.

[4] The parties also stipulated that the following employees should be excluded from any unit found appropriate: LPNs, RNs, business office-clerical employees, social services director, social workers, admissions director, admissions assistants, accounts-payable employees, registered dieticians, medical records employees, central supply employees, resident representatives, tech nutrition services employees, and spiritual care assistants. The record is unclear as to which departments employ the resident representatives and tech nutrition services employees.

[5] The parties stipulated that the employees within each classification perform the same duties and share the same responsibilities.

The record indicates that the Employer has designated two CNAs as "restorative CNAs." One restorative CNA is assigned to the long-term care unit on the second floor, and the other one is assigned to the Alzheimer/dementia unit on the third floor, and each works throughout the facility as well. The restorative CNAs are responsible for performing routine monthly resident weight checks, handling all splint care for residents, and assisting residents in post-therapeutic restorative training designed to maintain functions such as walking or to increase range of motion. Restorative CNAs also perform non-restorative CNA duties when necessary, including filling in for non-restorative CNAs about two to three times per week.

The disputed employees do not engage in any direct patient-care duties. Rather, the housekeeping employees are responsible for cleaning resident rooms and the common areas of the facility; the laundry aides are responsible for processing all laundry (linens and resident clothing) at the facility, and delivering processed laundry to the units; the cooks prepare meals for residents; the food service assistants/dietary aides assist cooks, and deliver prepared food to the dining room and the nursing floors; the floor care employees are responsible for maintenance and care of the floors; the activity aides design and lead individual resident and group recreational activities; the resident transport drivers transport residents to outside medical appointments; and the unit secretaries transcribe physician orders, maintain a physician logbook for resident medical appointments within the facility, and schedule outside medical appointments for residents.

(3) Contact Among Employees

While all of the facility employees work as part of an integrated process with a common goal of caring for the residents, the record evidence demonstrates that the contact between the CNAs and disputed employees is limited and unspecific. In this regard, the CNAs may be present in a resident's room as the housekeepers are cleaning the room, or may alert the housekeepers and/or floor care employees as to when the dining room and common areas are free of residents and can be cleaned. Likewise, the CNAs may bag dirty laundry on the units for pick-up by the laundry aides, or contact laundry aides to supply additional linens to the units, or to assist in finding lost resident clothing items. The CNAs may also see the activities aides when they transport residents to the activities, and see the transport drivers when they accompany residents' outside medical appointments. In this regard, the CNAs might communicate with the activities aides and transport drivers regarding coordination of timing of a resident's appointment. There is limited record evidence regarding CNA contact with unit secretaries; it appears that they communicate regarding arrangements for outside medical appointments for residents, and any questions the CNAs might have regarding transcription of physician orders.

Additionally, the cooks and nursing staff will occasionally communicate regarding individual resident diets. For example, a CNA or nurse may forward information concerning a resident's dietary plan and restrictions to the cooks in the kitchen via a dietary aide, or might contact a cook in the kitchen directly to provide a special dietary request or an alternate meal for a resident who is dissatisfied. Likewise, a dietary aide or cook may contact a CNA if there is a question about specific dietary items that a resident under that CNA's care may need. However, the registered dieticians are primarily responsible for dietary plans and are consulted by kitchen staff on a regular basis regarding resident dietary issues. CNAs may also contact a dietary aide or cook if there is a shortage of necessary dietary supplies or snacks on the floor. CNAs occasionally go to the

kitchen to pick up a necessary item, such as thickened water or a requested snack, from the kitchen refrigerator.

In all of this contact between the CNAs and the disputed employees, as described above, there is little overlap of duties.

(4) Functional Integration

Regarding functional integration, the departments remain distinct, as are the job duties. Although CNAs occasionally perform some cleaning in the dining room or sweep floors when they believe it is necessary, bag dirty laundry on the units for pick-up by the laundry aides, ensure residents' participation in activities, assist dietary aides in the delivery of food, or accompany residents who are transported to outside medical appointments by transport drivers, the record does not indicate that any of the other department employees help the CNAs in performance of their functions. The record does not indicate significant functional integration. See ***Casino Aztar***, 349 NLRB 603, 605 (2007) (significant functional interchange and integration found when employees regularly worked side by side, performing same functions, wearing same uniforms, receiving same pay, and answering to the same supervisors).

(5) Interchange of Employees

There is little evidence of interchange of employees. The CNAs and disputed employees do not substitute for each other. The CNAs have specific skills, as discussed above, which are not possessed by any of the disputed employees. As such, the disputed employees do not engage in any patient-care duties. Thus, interchange would not be possible. Regarding transfers, one dietary aide recently transferred to a CNA position, and one CNA transferred to a staffing coordinator position at some time before current staffing coordinator Trimble assumed her position. Other than these transfers, there have been no transfers of employees into the CNA classification, or CNAs into other classifications.

(6) Similarity of Working Conditions and Fringe Benefits

The CNAs are the only employees in the larger unit proposed by the Employer who work a three-shift schedule: the day shift, 7:00 a.m. to 3:00 p.m.; the afternoon shift, 3:00 p.m. to 11:00 p.m.; or midnight shift, 11:00 p.m. to 7:00 a.m. Housekeeping employees generally work during the day shift. Laundry aides are assigned work during the day and midnight shifts. Cooks and dietary aides typically work either of two shifts to cover the three daily meals, with the first shift starting at 5:30 a.m. and covering breakfast and lunch, and the later shift covering lunch and dinner. One activity aide works a day shift from 9:00 a.m. to 4:30 p.m., while the other staggers her time to accommodate residents' after-dinner activities which can run as late as 7:30 p.m. Floor care techs are assigned to the midnight shift. One of the three transport drivers works a set day shift, while the other two are scheduled weekly based on resident appointments. The record is unclear as to the assigned schedules for unit secretaries.

All employees are hourly. The CNA wage rates are different from the other employees. The starting wage rate for non-restorative CNAs varies, from $11.25 per hour for a CNA with no prior experience, to $12.50 per hour for a CNA with 15 plus years of experience. The starting wage rate for restorative CNAs is $12.00 per hour, regardless of prior years of experience. According to

the Employer, the starting wages rates for the disputed employees are: housekeepers, laundry aides, dietary aides, cooks, floor care employees - $10.00 per hour; activity aides - $12.00 per hour; resident transport drivers - $14.25 per hour; and unit secretaries - $16.50 per hour. The CNAs wear burgundy scrub uniforms, and the nurses wear blue scrubs. The dietary and laundry aides wear different-colored scrubs; the activities aides and transport drivers wear Employer-logoed polo shirts; and the floor care employees wear a navy shirt and work pants.[6]

There are no formal education requirements for the CNAs. However, both State and Federal regulations require that all CNAs be certified. For certification an individual must complete 90 hours of instruction and pass a CNA exam. CNAs are required to attend specialized training to maintain their certification, as well as attend periodic in-service training sessions conducted by either the staff development coordinator, Unit Manager, or DON.

Some of the dietary staff are certified through the Gordon's "ServSafe" program, which provides 90 hours of dietary instruction. Such certification is not required by the Employer to work in the dietary department. Transport drivers are required by Federal regulation to possess a class B CDL license to operate the Employer's transport bus. Any training sessions offered to employees are separately conducted in each department.

While all employees complete the same employment application, each department head reviews applications for his/her department and is responsible for all hiring decisions within the department. The Employer schedules orientation for all new employees about one to two times per month. Staff development coordinator Wilson and the DON conduct the first day of general orientation with all new employees, after which the employees break out to their separate departments for specific on-the-job orientation and training by more experienced employees in the department.

Employees use the same restrooms, break rooms, and staff parking lot. All employees are eligible for the same benefits, such as health and life insurance, retirement and profit-sharing plans, and sick and vacation leave. All employees are subject to the same personnel policies and receive the same employee handbook, which is issued during new employee orientation. All employees attend periodic recognition events sponsored by the Employer such as employee appreciation lunches.

(7) Bargaining History

The Employer argues that the petitioned-for unit is inconsistent with the parties' bargaining history and disenfranchises employees who were historically included in the unit. The Employer relies on a February 2011, stipulated election agreement signed by the parties in Case 07-RC-023364, in which the Petitioner stipulated to a larger bargaining unit including the petitioned-for and disputed employees herein. The Petitioner withdrew the petition on March 8, 2011. I find that the parties' previous stipulated election agreement does not create any history of collective bargaining for any of the employees, and especially where such agreement became null and void as a result of the withdrawal of the underlying petition. The parties otherwise stipulated that there is no history of collective bargaining in any unit of the Employer's employees.

[6] The record is unclear regarding the uniforms worn by housekeepers, cooks, and unit secretaries.

(8) Undue Proliferation

The Employer argues that under ***Specialty Healthcare***, the petitioned-for unit of CNAs is "fractured" and inappropriate because it represents an arbitrary segment of the Employer's service employees. However, the Board specifically noted that a "proposed unit of CNAs is in no way a fractured unit simply because a larger unit containing the CNAs and other employee classifications might also be an appropriate unit or even a more appropriate unit." ***Specialty Healthcare***, supra, slip op. at 18. Moreover, the Board has provided that when its traditional criteria leads to the conclusion that a proposed unit is appropriate, the health care employer could nevertheless respond by "providing a reasonable basis for finding an increased risk [of undue proliferation] that is substantial." Supra, at 19, citing ***Manor Healthcare Corp.,*** 285 NLRB 224, 226 (1987). The Employer provides no such basis.

The 83 CNAs in this case constitute over 50 percent of the Employer's employees. The Employer has not offered any evidence showing that organizing and representation in units other than those defined in the acute care hospital unit rule has led to adverse consequences for residents of nursing homes, nursing home operators, or the general public. Nor is there any showing of undue proliferation, or even a risk of undue proliferation specific to the Employer.

Conclusion Regarding Community of Interest:

I find that the Employer has not met its burden under ***Specialty Healthcare***. Due to the differences in the required skills and supervision, limited contact among the employee groups, and lack of interchange among employees, I find that the employees the Employer seeks to include in the petitioned-for unit do not share an overwhelming community of interest with the CNAs.

CONCLUSIONS AND FINDINGS

Based on the foregoing discussion and on the entire record,[7] I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

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

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

[7] Both parties timely filed briefs, which were carefully considered.

All full-time and regular part-time certified nursing assistants (CNAs) employed by the Employer at its facility located at 18300 E. Warren, Detroit, Michigan; but excluding all housekeepers, laundry aides, food service assistants/dietary aides, cooks, floor care employees, activity aides, resident transport drivers, unit secretaries, licensed practical nurses (LPNs), registered nurses (RNs), business office-clerical employees, social workers, resident representatives, spiritual care assistants, tech nutrition services employees, registered dieticians, admissions assistants, accounts-payable employees, central supply employees, medical records employees, and guards and supervisors as defined in the Act.

Dated at Detroit, Michigan, this 18th day of October 2012.

(SEAL)

/s/ Terry Morgan

Terry Morgan, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SEIU HEALTHCARE MICHIGAN.** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

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 quit or 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 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.). 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 on or before **October 25, 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.nlrb.gov**,[8] by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since 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 facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

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 **November 1, 2012**. The request may be filed electronically through the Agency's website, **www.nlrb.gov**,[9] but may **not** be filed by facsimile.

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[8] To file the eligibility list electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Regional Office**, and follow the detailed instructions.

[9] To file a Request for Review electronically, go to the Agency's website at **www.nlrb.gov**, select **File Case Documents**, enter the NLRB Case Number, select the option to file documents with the **Board/Office of the Executive Secretary** and follow the detailed instructions.