

RD # 11-12
Clifton, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

JAWANIO, NJ¹

Employer

and

CASE NO. 22-RC-084183

LOCAL 888, UNITED FOOD & COMMERCIAL WORKERS²

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

On June 29, 2012 the Petitioner filed a petition in this matter seeking to represent a unit of all full-time and regular part-time direct support professionals, direct staff workers and licensed practical nurses employed by the Employer at five group homes located in Bergen and Passaic counties. The Employer contends that the unit should include per-diem direct support professionals and per-diem licensed practical nurses, as they perform the same work and share a community of interest with the other employees in the petitioned-for bargaining unit. On July 20, 2012 a hearing was conducted in this matter. As described

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

² The name of the Union appears as amended at the hearing.

more fully below, I will direct an election in the Employer's proposed unit, as I find that the per-diem Direct Support Professionals, herein "DSPs," perform the same function as the full-time and regular part-time DSPs and that they share an overwhelming community of interest with the other bargaining unit employees.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.⁴
3. The labor organization involved claims to represent certain employees of the Employer.⁵
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act.
5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows:

³ Briefs filed by the parties have been reviewed and carefully considered.

⁴ The parties stipulated, and I find, that the Employer is a 501(c)(3) not-for-profit New York State corporation and a health care institution within the meaning of Section 2(14) of the Act, has an office and place of business located at 1033 Route 46 East, Clifton, NJ 07519 and five facilities located in the counties of Bergen and Passaic, New Jersey, the sole facilities involved herein, at which it provides day and residential care and other services for developmentally disabled adults. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$250,000 and purchases and receives at its New Jersey facilities goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New Jersey.

⁵ The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

All full-time, regular part-time and per-diem DSPs and all full-time and regular part-time LPNs employed by the Employer in its residential and day programs located at: 99 De Groff Place, Park Ridge, NJ 07636; 9 Eagle Drive, Emerson, NJ 07630; 80 Village Road, Clifton, NJ 07013; 24-10 Ellington Road, Fairlawn, NJ 07410 and 429 S. Riverview Drive, Totowa, NJ 07512, excluding all other employees, including office clerical employees, and professional employees, guards and supervisors as defined by the Act.⁶

II. CONTENTIONS OF THE PARTIES

The Petitioner seeks to represent a unit of approximately 40 full-time and regular part-time DSPs and LPNs employed by the Employer at the above-referenced New Jersey locations, excluding all other employees including office clerical employees, professional employees, guards and supervisors as defined in the Act. The Employer contends that its per-diem DSPs do the same work as its full-time and regular part-time DSPs and therefore should be included in the Unit. The Petitioner contends that the per-diem employees do not share a community of interest with the petitioned-for individuals, they have not sought to represent the per-diem employees and that they should not be included in an appropriate bargaining unit with the petitioned-for employees. The Petitioner has expressed its desire to proceed to an election in any unit found appropriate.

⁶While the record indicated the Employer has employed per-diem Licensed Practice Nurses, herein "LPNs," at some undetermined time in the past, the Employer employs none presently. The record contained no other evidence regarding per-diem LPNs. Therefore, I will not include them in the unit.

III. FACTS

1. The Employer's Operations

The Employer provides day, residential and other services to individuals with cognitive and physical disabilities and complex medical needs in five group homes in Bergen and Passaic Counties in New Jersey.

Robert Gzrigliano is the Employer's Director of New Jersey Services. The Employer's witness at the hearing, Donna Ouimettee, is its Director of Human Resources, overseeing a team of 10 individuals. Each of the group homes, listed *supra*, has a House Manager and a House Coordinator who supervise all the DSPs, regardless of their schedule or status.⁷ House Managers train, schedule, delegate responsibilities and assignments to, and assess the performance of DSPs. House Managers handle low level disciplinary matters of the DSPs. The Human Resources Department and Quality Assurance Department handle more sensitive issues, such as allegations of neglect and abuse. The Employer employs a Director of Nursing who supervises all of the Employer's LPNs. The Employer also has a psychologist who provides services at each of the group homes and an Office Manager who works in its main office.

2. DSPs

The Employer's DSPs assist with all aspects of daily living for what the Employer refers to as the "consumers" in their care, including cooking, eating, bathing and transportation depending on the consumer's functional abilities. DSPs can also dispense medication, under the oversight of LPNs. The Employer's goal, and the DSPs' task, is to assist all of its consumers in achieving as much independence as possible. The duties and

⁷ The Employer had two vacancies for House Coordinators at the time of the hearing.

job functions of DSPs are identical, whether they are full-time, part-time or per-diem. All DSPs, regardless of their status are hired at \$10.82 an hour. State guidelines allows the Employer to pay DSPs with at least five years' experience a higher starting salary (\$11.36 an hour) and the Employer does so, again regardless of their status. The Employer employs 55 DSPs; about 33 are full-time, 6 are regular part-time and 16 work as per-diems.⁸

3. LPNs

The Employer's LPNs dispense medication to the consumers, oversee DSPs when they dispense medication, make medical appointments, when necessary attend medical appointments with the consumers and assess the consumers' basic health information. The base wage rate for LPNs is \$18.00 per hour, although the Employer may increase an LPN's starting wage based on his or her experience. The Employer currently employs 2 LPNs. As previously noted, while the Employer has had per-diem LPNs in the past, at the time of the hearing none were on staff.

4. The similarities and differences between full-time, part-time and per-diem DSPs

Full-time, regular part-time and per-diem DSPs are all supervised by their House Managers. Full-time, regular part-time and per-diem DSPs work side-by-side, performing the same work with the same job description and are employed in the same locations. The DSPs, no matter what their status, are subject to the same policies and receive the same employment manual and "new hire packets."

The Employer's witness, Donna Ouimette, testified that the Employer hires per-diem DSPs with the intention of giving them full-time or regular part-time employment. In the

⁸ Three of the part-time DSPs work more than 32 hours per week and three work less than 32 hours per week.

past, the Employer arranged through staffing agencies to have per-diem DSPs cover shifts for absences or vacations. In September 2011, in an effort aimed at retaining the per-diem workers, the Employer began hiring its own per-diem DSPs. When the Employer changed this practice, it started paying the per-diems the same starting salary as full-time and part-time DSPs. The qualifications, skills, education, experience and training that the Employer seeks in per-diem employees are the same that it seeks in its full-time and regular part-time employees. Since September 2011, the Employer has not hired full-time or regular part-time employees. Instead, they have hired employees as per-diems with the idea towards converting them to regular work. The Employer now has 20 DSPs who were hired as per-diems; 7 have accepted full-time or part-time employment. For a per-diem employee to receive regular work, the Employer must have an opening for a full-time or part-time position.

Full-time DSPs work 40 hours per week. For employees to receive major benefits, they must work at least 32 hours per week. Thus, to receive tuition assistance or medical, dental, vision, life or long term disability insurance, an employee must work at least 32 hours a week. Per-diem employees are not eligible for these benefits. Also, full-time and regular part-time employees who work at least 32 hours per week receive vacation, holiday and sick pay. Per-diem employees do not. Per-diem employees are entitled to the same statutory benefits as any other employee: Social Security, Workers' Compensation, short term disability and time and a half pay for work over 40 hours in a week. Full-time, part-time and per-diem employees are all eligible for some benefits from the Employer: military leaves of absence, a defensive driving course, an employee assistance plan, a legal services plan and flu shots.

Full-time and regular part-time employees have specific houses in which they work. They can however, be transferred to a different site or to a different shift. In contrast, per-diem employees do not have a regularly assigned shift or location in which they work. Since the Employer's goal is to get the per-diems acclimated to the Employer's business, they offer per-diems as many hours as possible and encourage them to work at different homes and shifts until they find "the right fit." Full-time and part-time employees can cover vacancies in an emergency or work extra hours in any of the five homes as well.

Any DSP is eligible for promotion to either House Coordinator or House Manager. Two of the Employer's three current House Coordinators were promoted from its complement of DSPs. One of the DSPs was promoted to House Manager, did the job for a few months and then requested to be a DSP again.

All DSPs, regardless of their status, go through a six month probationary period in which they receive intensive training to acclimate to the workplace. Prior to starting work, all DSPs go through the same pre-service training that is mandated by State regulation. All DSPs are also required to take training within the first 120 days of their employment on topics such as first aid, CPR, administering medication and a review of developmental disabilities. The Employer conducts performance appraisals and reviews and devises development plans for all of its employees, including all DSP's. All employees are subject to the Employer's progressive discipline policy.

The five House Managers have lists of DSPs and their desired job status. To cover vacationing employees, as a last minute fill-in or to cover shifts or times that are difficult to cover, the House Managers first call per-diem employees. Since the hours and schedules are posted at the facilities, per-diems can also make requests of the Managers. After the per-

diems are called, the House Managers can call a part-time or full-time employee to cover a shift. While per-diems can refuse a shift, House Managers can assign shifts to the full-time and part-time DSPs. The State mandates ratios of DSPs to consumers; as a last resort House Managers can ask an employee to stay past their shift and work overtime to maintain the proper ratio. Per-diem DSPs are included in the staff to consumer ratio.

The record reveals that 16 per-diem DSPs worked, on average, between 6.25 and 41.6 hours per week from April 6, 2012 to June 29, 2012. As fully half of the per-diem DSPs were not hired until June 20, 2012, the record also showed that those per-diem DSPs worked between 19 and 49 total hours from June 29, 2012 until July 19, 2012, the day before the hearing.

At the hearing, the Petitioner called Union Organizer Claudia Rhodes. Ms. Rhodes testified that the Petitioner did not intend to organize the Employer's per-diem employees and does not usually include per-diems in the bargaining units for which they petition. She stated that the Union represents seven other similar "homes" none of which includes per-diems. The Petitioner's position is that per-diems generally have other jobs at which they obtain benefits. However, Rhodes stated that it was common in the Employer's business for an Employer to hire employees as per-diems and convert them to regular employment as positions become available. Rhodes testified that since their hours are variable, the Petitioner cannot ask per-diems to pay dues if it does not know how many hours they work.

While there is no bargaining history in the petitioned-for unit, the Petitioner filed a similar petition for the Employer's New York operation. There, as in this matter, the

Petitioner did not include per-diem employees in the unit it was seeking. However the parties stipulated to include the per-diems in the unit.⁹

IV. ANALYSIS:

1. General Principles

It is well settled that the Act does not require that a unit for bargaining be the only appropriate unit or even the most appropriate unit. Rather, the Act requires only that the unit be *an* appropriate unit. *American Hosp. Ass'n. v. NLRB*, 499 U.S. 606, 610 (1991); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1998); *Morand Bros. Beverage*, 91 NLRB 409, 418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). The Board has broad discretion in this area, reflecting Congress' recognition of the need for flexibility in shaping the bargaining unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996).

Thus, the Board's procedure for determining an appropriate unit under Section 9(b) is first to examine the petitioned-for unit. While the general principle is that if the Board finds the petitioned-for unit appropriate, it will end its inquiry, the general principle is not without exceptions. *Specialty Healthcare and Rehabilitation of Mobile*, 357 NLRB No. 83 (2011); *Overnite Transportation Company*, 322 NLRB 723 (1996). For example, when a party can show that a petitioned-for unit excludes employees that share an overwhelming community of interest with employees in the petitioned-for unit, the exclusion is not appropriate. *Specialty Healthcare and Rehabilitation of Mobile*, *supra*. Moreover, the Board's long-held practice is to find per-diem or on-call employees who work at least four hours per week and who do the same work as individuals in the petitioned-for unit as eligible for inclusion in the

⁹ The New York unit consists of more than 300 eligible employees, only 5 of whom are per-diems.

unit. *Brattleboro Retreat*, 310 NLRB 615, 627 (1993); *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990).

2. Community of Interest

In making the determination of whether the proposed unit is an appropriate unit, the Board's focus is on whether the employees share a community of interest. In determining whether employees in a proposed unit share a community of interest, the Board examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. at 9 (2011).

I find that the full-time, part-time and per-diem DSPs clearly share a community of interest with one another and I see insufficient reason to create a residual unit of per-diem employees.

As cited in the Employer's brief, in *Odawalla, Inc.*, the Board applied the principles announced in *Specialty Healthcare*, where a party contends that the smallest appropriate bargaining unit must include additional employees beyond those in the petitioned-for unit. *Odawalla, Inc.*, 357 NLRB No. 132 (2011). The Board in *Odawalla* first analyzed whether the petitioned-for unit is appropriate. If the petitioned-for unit is appropriate, the Board found that the burden falls to the proponent of the larger unit to show that the additional employees it seeks to include share an "overwhelming community of interest" with the petitioned-for employees such that there "is no legitimate basis upon which to exclude certain employees" from the larger unit because the traditional community of interest factors

“overlap almost completely.” *Odawalla, Inc.*, 357 NLRB slip op. at 4, citing *Specialty Healthcare* at 11-13 and fn. 28. In the instant matter, I find that the Employer, the proponent of the larger unit, has clearly met this burden.

It cannot be disputed that all DSPs work in the same facilities, have the same supervision, and interact with each other. All DSPs, regardless of their status, are hired based on the same criteria of skill, experience and training. They receive the same training by the Employer. The Employer’s practice allows per-diem employees to change their status to regular full-time and also allows regular part-time and full-time employees to change to per-diem status. Most critically, all DSPs, per-diem, part-time or full-time, perform the same work, have the same job descriptions, perform the same function *vis a vis* the consumers, have the same duties and work side-by-side with each other.

Record evidence shows the same supervisory channel for DSPs, regardless of their status. Day-to-day immediate supervision and control of matters that are of interest to the DSPs (such as training and scheduling) are handled by the same House Managers and Coordinators. House Managers handle low-level discipline of DSPs. Significant disciplinary matters, such as allegations of neglect and abuse by any DSP, are handled by the Human Resources and Quality Assurance Departments with input by the House Managers. Per-diem, part-time and full-time DSPs are all subject to the same progressive discipline policy and the Employer’s policies and procedures as laid out in its employment manual. Thus, the petitioned-for unit is not structured along the lines of supervision. *Odawalla, Inc.*, 357 NLRB slip op. at 5.

Nor is the petitioned-for unit drawn in accordance with methods of compensation. *Odawalla, Inc.*, 357 NLRB slip op. at 5. The Employer pays all DSPs, with one exception, the same starting hourly wage. The exception is that DSPs with at least five years’ experience

receive a higher starting wage rate. The higher starting wages are given to all DSPs with the requisite experience regardless of whether they are full-time, part-time or per-diem. The Employer does not give merit raises to any DSP. The only wage rate changes come in response to State mandates; all DSPs receive those raises.

The Petitioner argues that since the benefits received by full-time and part-time employees working more than 32 hours per week are different from those available to per-diem DSPs they do not share a community of interest. Petitioner correctly points out that per-diem DSPs are not eligible for life, vision, long-term disability, medical or dental insurance, nor are they eligible for the Employer's tuition assistance plan. However, per-diems are eligible for military leaves of absence, a defensive driving course, an employee assistance plan, a legal services plan and flu shots, as are full-time and regular part-time DSPs. The fact that certain benefits are not available to the per diem DSPs does not, in my view, undermine the otherwise overwhelming community of interest that the groups share. The significant interchange, significant degree of daily contact, common management and supervision, overlap of hours and functional integration outweigh the differences that the two groups of workers may have.

In similar circumstances the Board held that the lack of identical benefits is not determinative of an individual's employment status so as to exclude the individuals as a casual employee. *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 fn. 5 (1994), citing *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981). Rather than focusing on the on-call employees' failure to receive the same benefits as other employees, the Board looked to the similarity of work performed and the regularity and continuity of their employment.

Here, the per-diem DSPs perform the exact same work as their co-workers. As discussed *infra*, they also satisfy the test regarding the regularity and continuity of their employment.

The Petitioner points out that per-diem DSPs can turn down the offer of a shift while full-time and part-time employees cannot. It is well settled Board law that an employee's ability to reject work when offered and the lack of identical benefits are not determinative of an individual's employment status so as to exclude the individuals as a casual employee. *In re Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003,) citing *Tri-State Transportation Co., Inc.*, 289 NLRB 356 (1988); *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 fn. 5 (1994), citing *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981).

Based on the foregoing, the evidence establishes that the community of interest factors "overlap almost completely," and there is therefore "no legitimate basis upon which to exclude" the per-diem DSPs based on a community of interest argument. *Odawalla, Inc.*, 357 NLRB slip op. at 4-5.

3. The regularity and continuity of per-diem employees' employment

The Board has long held that per-diem employees should be included in a bargaining unit where they are regularly employed and share a community of interest with other unit employees. *Brattleboro Retreat*, 310 NLRB 615, 627 (1993); *Trump Taj Mahal Casino*, 306 NLRB 294 (1992); *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990).

Where, as here, there is no evidence of a significant disparity among the per-diem employees in the hours they worked, the Board, applying the standard set forth in *Davison-Paxon, Co.*,¹⁰ has found that per-diem employees are eligible to vote if they regularly average four hours or more of work per week during the quarter prior to the election

¹⁰ 185 NLRB 21, 24 (1970).

eligibility date. *Holliswood Hospital*, 312 NLRB 1185, 1197 (1993); *Sisters of Mercy Health Corp.*, 298 NLRB 48, 483-84 (1990). The record evidence shows that half of the Employer's per-diem DSPs satisfy this requirement.

Eight of the Employer's per-diem DSPs were hired June 20, 2012. Thus, they worked only ten days during the second quarter. In circumstances where part-time employees worked only a brief period of time prior to an election, the Board has calculated the employees' hours from their hire date until the election date. *In re Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003); *Stockham Valve & Fittings, Inc.*, 222 NLRB 217 (1976). In the instant matter, the record evidence demonstrates that the eight per-diem hired in June worked at least four hours per week from their hire date through the date of the hearing, enough to satisfy the Board's criteria for inclusion in the unit.¹¹

V. CONCLUSION

Based upon the foregoing and the record as a whole, I find that the Employer's per-diem DSPs share an overwhelming community of interest with the Employer's full-time and regular part-time DSPs and should be included in a bargaining unit with those employees. I also find that they are eligible to vote if they regularly average four hours or more of work per week during the quarter prior to the eligibility date, or if they have been hired only shortly before the date of hearing, if they regularly average four hours or more of work per week from their date of hire to the date of the election. I will therefore direct an election in such a unit.

¹¹ In concluding that the eight employees hired on June 20, 2012 are eligible for inclusion in the unit, I note that the "four hours per week average" must be maintained up until the date of the election. To the extent that there is a question as to whether a particular per diem has satisfied this formula on the date of election, the parties may avail themselves of the Board's challenge procedure.

IV. DIRECTION OF ELECTION:

It is hereby directed that at a time and place to be determined by the undersigned an election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 888, United Food & Commercial Workers.**

V. LIST OF VOTERS

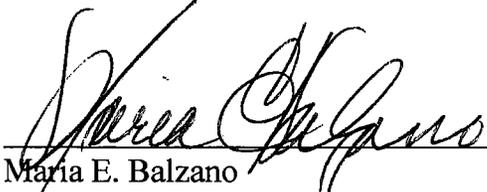
In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have

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 seven (7) days of the date of this Decision, two (2) copies of an election eligibility list for the voting groups found appropriate above, containing the full names and addresses of all the eligible voters in each voting group, shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before **August 16, 2012**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provision 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, D.C. 20570-0001. This request must be received by the Board in Washington by **August 23, 2012**.

Signed at Newark, New Jersey this 9th day of August, 2012.



Maria E. Balzano
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