

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 24**

HPM FOUNDATION d/b/a
HEALTH PROMED FOUNDATION, INC.,

Employer

and

VIVIAN VELILLA-MIRABAL,
an Individual,

Case 12-RD-120237

Petitioner

and

UNIDAD LABORAL DE ENFERMERAS
(OS) Y EMPLEADOS DE LA SALUD,

Union

DECISION AND DIRECTION OF ELECTION

HPM Foundation d/b/a Health ProMed Foundation, Inc. (the Employer) provides primary health care services at its San Juan, Puerto Rico location.¹ On January 8, 2014, the Petitioner filed a petition seeking an election to decertify Unidad Laboral de Enfermeras (os) y Empleados de la Salud (the Union) which has been the exclusive collective-bargaining representative of the following unit since on or before January 11, 2011:

All full-time and regular part-time registered nurses, practical nurses, social workers, health educators, and case managers employed by the Employer at its facility located in Barrio Obrero, Santurce, Puerto Rico; excluding all other employees, other professional employees, managerial employees, guards, and supervisors as defined in the Act.

¹ The parties stipulated that the Employer is a Puerto Rico corporation with a place of business in San Juan, Puerto Rico, and is engaged in the business of providing primary care services. During the past 12 months, it has derived gross revenues exceeding \$250,000, and has purchased and received materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Puerto Rico. I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated to this description of the petitioned-for unit.

According to the petition, the unit consists of approximately 18 employees.

A collective-bargaining agreement between the Employer and the Union covering this unit, which was effective by its terms from January 11, 2011, to December 31, 2013, expired before the filing of the petition herein.

Pursuant to the filing of the petition herein, a hearing officer of the Board conducted a hearing on January 21, 2014, at which the Employer, the Union, and the Petitioner were given the opportunity to present evidence, including witnesses. The parties raised no issues and they did not present any witnesses or other evidence.

It appears that the current bargaining unit includes both professional employees within the meaning of Section 2(12) of the Act² (registered nurses, social workers, health educators and case managers) and non-professional employees (practical nurses). Section 9(b)(1) of the Act prohibits the Board from including professional employees in a unit with employees who are not professional employees, unless a majority of the professional employees vote for inclusion in such a unit. *Sonotone Corporation*, 90 NLRB 1236 (1950); *Pratt & Whitney*, 327 NLRB 1213, 1217-1218 (1999). I am directing a self determination election to permit the professional employees in the unit to first determine whether or not they wish to be included in the same unit with the nonprofessional practical nurses.

² Section 2(12) of the Act defines professional employees 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; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

It is well established that registered nurses are professional employees within the meaning of the Act. *Centralia Convalescent Center*, 295 NLRB 42 (1989); *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765, 766-768 (1975); see also *Collective-Bargaining Units in the Health Care Industry*, 29 CFR Part 103, 284 NLRB 1516, 1521-1522 (proposed June 26, 1987). The Board has also found social workers, health educators and case managers to be professional employees within the meaning of Section 2(12) of the Act. *Mt. Airy Psychiatric Center*, 253 NLRB 1003, 1005 (1981) (social workers and educators); *St. Mary's Hospital, Inc.*, 220 NLRB 496, 497 (1975) (health instructors); *Salem Hospital*, 333 NLRB 560 (2001) (case managers).

Practical nurses, often referred to as licensed practical nurses are not considered professional employees within the meaning of the Act. Rather the Board has determined that practical nurses are technical, nonprofessional employees. *Trinity Memorial Hospital of Cudahy*, 219 NLRB 215, 216 (1975); *The Presbyterian Medical Center*, 218 NLRB 1266, 1267 (1975); see also *Collective-Bargaining Units in the Health Care Industry*, 53 Fed. Reg. No. 170, 284 NLRB 1528, 1555 (proposed September 1, 1988).

I take official notice of the fact that pursuant to a secret ballot election conducted by the Board, the Union was certified as the representative of a unit of all registered nurses, social workers, health educators, and case managers employed by the Employer at its facility located in Barrio Obrero, Santurce, Puerto Rico; excluding all other employees, other professional employees, managerial employees, municipal employees, guards, and supervisors as defined in the Act (Unit A) in the matter of Junta del Centro de Salud Comunal, Dr. Jose Belaval, Inc., Case 24-RC-7847 on January 30, 1997. It appears that Junta del Centro de Salud Comunal, Dr. Jose Belaval, Inc. was a predecessor employer to the Employer. The election in Case 24-RC-7847 was conducted pursuant to a Decision and Direction of Election issued by the then-Regional

Director of Region 24. As indicated above, the certified unit appears to have consisted of professional employees within the meaning of Section 2(12) of the Act.

I also take official notice of the fact that the unit described in the parties' stipulation herein, which includes practical nurses in addition to the job classifications included in Unit A in Case 24-RC-7847, is virtually identical to the unit described in the Notice of Election in the matter of HPM Foundation d/b/a Health Pro Med, Case 24-UD-081702, in which a union security deauthorization election was conducted on June 22, 2012, and in which a Certification of Results of Election issued on July 11, 2012. Thus, it appears that sometime between January 30, 1997 and mid-2012, practical nurses were added to the existing unit of professional employees that chose to be represented by the Union in Case 24-RC-7847. The record is silent as to when that occurred or any other details. There is no evidence that the professional employees in the unit have ever had an opportunity to vote on their inclusion in a unit with non-professional employees pursuant to Section 9(b)(1) of the Act.

The Board's general rule is that a decertification election should be conducted in a bargaining unit that is coextensive with the recognized unit. *Campbell Soup Co.*, 111 NLRB 234 (1955); *Westinghouse Electric*, 115 NLRB 530 (1956). However, the Board has determined that if a decertification election is held in a mixed unit of professional employees and non-professional employees, and the professional employees never had the opportunity to vote on their inclusion in such a mixed unit, they should have such an opportunity. *Utah Power & Light Company*, 258 NLRB 1059 (1981).

Based upon the foregoing, and the record as a whole, I shall therefore direct an election in the following two voting groups:

Voting Group A

All full-time and regular part-time registered nurses, social workers, health educators, and case managers employed by the Employer at its facility located in Barrio Obrero, Santurce, Puerto Rico; excluding all other employees, other

professional employees, practical nurses, managerial employees, guards, and supervisors as defined in the Act.

Voting Group B

All full-time and regular part-time practical nurses employed by the Employer at its facility located in Barrio Obrero, Santurce, Puerto Rico; excluding all other employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

The employees in voting group A will be asked two questions on their ballot:

1. Do you wish to be included with all full-time and regular part-time practical nurses in a single unit for purposes of collective bargaining?
2. Do you wish to be represented for the purposes of collective bargaining by Unidad Laboral de Enfermeras (os) y Empleados de la Salud?

If a majority of the professional employees in Voting Group A vote "yes" to the first question indicating their wish to be included in a unit with non-professional employees, they will be so included. Their vote on the second question will then be counted together with the votes of the non-professional employees. If the professional employees in Voting Group A vote against their inclusion with the nonprofessional employees in Voting Group B, their vote on the second question will then be separately counted to determine whether or not they wish to be represented by the Union.

I. Conclusions and Findings

1. The Hearing Officer's rulings made at the hearing 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 in this case.
3. The Union 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 2(7) of the Act.

5. In accordance with Section 9(b) of the Act, I make the following unit determinations:

(a) If a majority of the full-time and regular part-time registered nurses, social workers, health educators, and case managers in Voting Group A vote for inclusion in the same unit with practical nurses in Voting Group B, the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses, practical nurses, social workers, health educators, and case managers employed by the Employer at its facility located in Barrio Obrero, Santurce, Puerto Rico; excluding all other employees, other professional employees, managerial employees, guards, and supervisors as defined in the Act.

(b) If a majority of the full-time and regular part-time registered nurses, social workers, health educators, and case managers in Voting Group A do not vote for inclusion in the unit with practical nurses in Voting Group B, the following units will each constitute appropriate units 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 registered nurses, social workers, health educators, and case managers employed by the Employer at its facility located in Barrio Obrero, Santurce, Puerto Rico; excluding all other employees, other professional employees, practical nurses, managerial employees, guards, and supervisors as defined in the Act.

Unit B: All full-time and regular part-time practical nurses employed by the Employer at its facility located in Barrio Obrero, Santurce, Puerto Rico; excluding all other employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

II. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting groups set forth above. The employees in Voting Group A will vote whether or not they wish to be included in a unit with the employees in Voting Group B and the employees in both voting groups will vote whether or not they wish to

be represented for purposes of collective bargaining by Unidad Laboral de Enfermeras (os) y Empleados de la Salud. 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 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.

Those in military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) 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 (3) employees engaged in an economic strike which commenced 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 have the opportunity to be informed of the issues in the exercise of the 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); N.L.R.B. 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 separate election eligibility lists containing the full names and addresses of all eligible voters in Voting Group A and all eligible voters in Voting Group B. North Macon Health Care Facilities, 315 NLRB 359 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized. Upon receipt of the lists, I will make them available to all parties to the election.

To be timely filed, the lists must be received in the National Labor Relations Board Subregion 24 Office, La Torre de Plaza, Suite 1002, 525 F.D. Roosevelt Avenue, San Juan, Puerto Rico 00918-1002, on or before February 13, 2014. No extension of time to file these lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file these lists. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the lists will be made available to all parties to the election, please furnish two copies of the lists.³

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper

³ The lists may be submitted electronically through the Agency's website at www.nlr.gov, or by facsimile transmission to (813) 228-2874, as well as by hard copy. To file the lists 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. Only one copy of the lists should be submitted if they are filed electronically or by facsimile.

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.

III. 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, D.C. 20570-0001. This request must be received by **February 20, 2014**. The request may not be filed by facsimile, but may be filed electronically.⁴

DATED at Tampa, Florida this 6th day of February, 2014.


Margaret J. Diaz, Regional Director
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⁴ See www.nlr.gov for instructions about electronic filing and the Board's Rules and Regulations with respect to filing requirements generally.