

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

APPALACHIAN REGIONAL HEALTHCARE, INC.

Employer

and

Case 9-UC-119730

UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL UNION,  
AFL-CIO-CLC

Petitioner

**REGIONAL DIRECTOR'S DECISION AND  
ORDER DISMISSING PETITION**

**I. INTRODUCTION**

The Employer operates non-profit acute care hospitals and other ancillary medical facilities in nine geographically-defined regions located in eastern Kentucky and southern West Virginia. The Union is recognized by the Employer as the exclusive collective-bargaining representative for certain employees at designated facilities in its nine regions, including facilities in its Beckley, West Virginia region (Beckley ARH), only one of which, the Southern West Virginia Clinic (SWVC), is involved herein.<sup>1/</sup> The Union filed a petition initially seeking to clarify the bargaining unit at the SWVC to include two newly-hired licensed practical nurses (LPNs) and three newly-hired physician office/medical assistants working at the SWVC under physicians Richard Wiseman and Jacob McNeel, who are also employees of the Employer. At the hearing, the Union clarified its position, asserting that it does not seek to accrete these positions to the unit employed at the SWVC, but rather maintains that the employees already belong to the established bargaining unit by virtue of their unit classifications and work location at the SWVC facility.<sup>2/</sup> Contrary to the Union, the Employer asserts that the plain language of the parties' Agreement defines the unit at the SWVC by medical group, i.e. Beckley Medical

---

<sup>1/</sup> Historically, separate locals of the Union represented the various bargaining units that existed within each of the nine regions. Since 2004, based on the parties' mutual agreement, the units in all nine regions have been contained under a single master collective-bargaining agreement.

<sup>2/</sup> Article 3, Section B of the most recent agreement, effective from April 1, 2013 through March 31, 2016, defines bargaining unit employees as, all "full-time and regularly employed part time maintenance, service, LPN, clerical, and technical employees," at designated "locations" listed in Section A of the Article. Section A lists the Beckley, West Virginia locations as, "Beckley ARH [short for Appalachian Regional Hospital], Beckley ARH Home Health Agency, Beckley Home Health Care Store, [and] Beckley Medical Associates (f/k/a Southern West Virginia Clinic)." Appendix A of the agreement further delineates the various classifications and includes the classification of medical assistant.

Associates, and not by facility, and that Wiseman and McNeel are a separate, newly-created, medical group of the Employer, albeit housed in the SWVC, whose employees can only be included in the existing unit by accretion.<sup>3/</sup> It maintains that accretion is improper in that the disputed employees in the Wiseman/McNeel group do not share a sufficient community of interest with the employees in the existing unit at the SWVC to constitute an accretion to the unit.

For the reasons set forth in detail below, I conclude that the employees who the Union seeks to include in the Unit by this unit clarification proceeding are already in the Unit by the terms of the agreement and the past practice of the parties. In explaining my conclusion, I will first provide a factual overview of the history and structure of the Employer's operations and the practice of the parties. I will then provide a legal analysis to support my findings.

## II. FACTUAL OVERVIEW

### A. History/Structure of the SWVC:

Each of the Employer's nine regions is headed by a Community Chief Executive Officer (CCEO), who reports directly to its Chief Executive Officer. Beckley ARH is headed by CCEO Rocco Massey. Assistant Administrator Andrew Dye, hired in October 2012, is responsible for the oversight and day-to-day operation of the SWVC, and reports to Massey. The SWVC is a two-level, freestanding facility located across the street from the Beckley ARH Hospital. The history of the SWVC partially accounts for the "facility versus medical group" dichotomy underlying the dispute over the unit placement of employees in the Wiseman/McNeel group.

The Employer purchased the facility in 1995. At that time, it was occupied entirely by a group of private physicians and their staff of over 50 employees, which was also known, inseparably, as the SWVC. The SWVC group also came under the Employer's ownership with the purchase. Thereafter, the Employer changed the name of the SWVC group, but not the name of the facility itself, to Beckley Medical Associates (BMA). The current unit was formed in 2001, when the BMA staff chose the Union's Local representative for the Beckley ARH region as their representative. The unit was initially covered by its own contract, as were the various other units that already existed in the Beckley ARH region. In 2004, the Employer and Union joined the units in all nine of its regions under the single master agreement format that still exists today. At some point between 2004 and 2007, the record is not clear, the Employer closed BMA based on its decision to divest itself of physician office practices, and laid off all of its employees, both unit and non-unit. In 2007, the Employer reversed its strategy and began to rebuild the SWVC physicians' group, which it purportedly renamed the "*New ARH Southern West Virginia Clinic*," (emphasis added) in order to distinguish the group from the SWVC facility.<sup>4/</sup> When it undertook this new course in 2007, the SWVC also housed several independent physician

---

<sup>3/</sup> For ease of reference, the disputed employees will be collectively referred to as the "Wiseman/McNeel group." By referring to them as such I do not suggest that they constitute a separate appropriate unit for collective bargaining.

<sup>4/</sup> The title "*New ARH Southern West Virginia Clinic*" does not appear on any documents in the record, except for the timeline that CCEO Massey prepared for the hearing. The record is silent as to why the Employer did not keep the Beckley Medical Associates name.

practices; i.e. tenants not affiliated with the Employer, as well as the Employer's laboratory drawing station.

In addition to the SWVC group, which now includes 12 physicians and approximately 30 staff, the SWVC houses the Employer's Cardiac Rehabilitation unit; 3 of the Employer's ancillary departments - the Laboratory, Radiology and Rehabilitation; and, 1 of its medical spas, called the Rejuvenation Center. The SWVC physicians practice specialties that include cardiology, ENT surgery, gynecology, orthopedics and dermatology, with each specialty being physically grouped together in its own suite named by its specialty. Each suite has its own bathrooms and break rooms and there are no common break or dining areas. All of the Employer's employees working in unit classifications in the foregoing operations at the SWVC are in the bargaining unit.<sup>5/</sup> Additionally, with the exception of the unit employees in the three ancillary departments, who are directly supervised by their respective department heads in the hospital, all of the unit employees fall under Dye's authority concerning such matters as scheduling, discipline and getting leave approved. Finally, there are three independent physicians in the SWVC who lease office space and have no affiliation with the Employer. Neither party claims that the employees of these independent physicians belong in the unit represented by the Union.

#### B. The Wiseman/McNeel Group

The Employer characterizes Wiseman and McNeel, alternatively, as its own practicing group, clinic or "business unit," independent of the SWVC group. In the spring of 2013, the Employer hired Wiseman and McNeel, after their former employer, the Med-Surg Group, a multi-specialty practice located near the hospital but having no affiliation with the Employer, dissolved due to the death of its president and primary owner. Massey testified that the Employer sought to migrate Wiseman's and McNeel's Med-Surg practice intact into a newly-created separate Employer clinic, purportedly referred to as Primary Care Associates.<sup>6/</sup> Wiseman and McNeel are the only two primary care physicians in the SWVC and their suite is located on the second floor, along with suites of some of the other SWVC physicians and two of the independent physicians.<sup>7/</sup> They have employment contracts with the Employer that contain such terms as their benefits, compensation, job description and code of conduct; as do all of the Employer's physicians that work in the SWVC. Among many other terms, both Wiseman's and McNeel's contracts include a provision stating that the Employer, "will supply Physician with

---

<sup>5/</sup> The Rejuvenation Center is a retail operation of the Employer, whose staff is classified as sales representatives, a non-unit classification. Neither party claims that they belong in the unit. However, there are two unit employees from Dermatology who spend a portion of their time – the record does not state the amount - performing scheduling and assisting with procedures in the Rejuvenation Center.

<sup>6/</sup> There are no documents in the records showing the existence of a "Primary Care Associates," although Wiseman and McNeel are coded as "Beckley ARH Primary Care" in the Employer's internal system. Promotional materials announcing Wiseman's arrival as a new doctor with the Employer connect him to "ARH Southern West Virginia Clinic."

<sup>7/</sup> Other SWVC physicians are located on the first floor, along with Cardiac Rehabilitation, the three ancillary departments and the third independent physician.

the space, equipment, supplies, and support personnel necessary for Physician to perform the Services in the sole discretion of ARH.”

The Wiseman/McNeel group contains a physician’s assistant or PA (Ashley Thomas), a nurse practitioner (Marnie Moose), the two disputed part-time LPNs (Azure “Blue” Spain and Lisa Ballard) and the three disputed medical assistants (Kaitlyn Bower, Misty O’Neal and Kacie Shadrick). Thomas and Moose work in non-unit classifications, and their unit placement is not at issue. There is no evidence, nor does any party contend, that the duties of the Wiseman/McNeel group LPNs and medical assistants are materially distinguishable from those duties performed by undisputed unit LPNs and medical assistants. Indeed, regarding the medical assistants, the record affirmatively establishes that they perform essentially the same duties and function as medical assistants whose unit placement is undisputed.

All Wiseman/McNeel group employees in dispute, except Shadrick, previously worked under Wiseman and McNeel at Med-Surg, and accompanied them to become employed by the Employer. It is not clear from the record whether the Employer required them to submit to a pre-screening process, such as an interview. Spain, Ballard, and O’Neal joined the Employer first, along with Wiseman. Bower entered into employment with the Employer about a month later along with McNeel. Shadrick was subsequently hired after Wiseman and McNeel requested an additional staff person through Massey. During Shadrick’s hiring process, Wiseman says that he “spoke to her briefly;” however, her interview and background clearance were conducted by Dye and the Employer’s human resources department. <sup>8/</sup>

Spain, Ballard, O’Neal, Bower and Shadrick received written offers of employment from the Employer describing, among other things, their title, department and/or location, and rate of pay. LPNs Ballard’s and Spain’s offers stated that they would be based in “Medical Associates,” with pay rates of \$13.62 an hour, which is the minimum starting rate for LPNs as set forth in Appendix A of the master agreement. O’Neal, Bower and Shadrick were all offered jobs as a “physician office assistant,” at a rate of \$12.50 an hour, which is 30 cents higher than the minimum start rate for medical assistants as set forth in the master agreement. <sup>9/</sup> Bower’s and Shadrick’s offers stated that they would be, “based in the Clinic,” while O’Neal’s offer stated that she would be, “based in Internal Medicine.” All of their offers state that their position, “reports to Andrew Dye.”

---

<sup>8/</sup> Before hiring Spain and Ballard, the Employer posted bids for two LPN vacancies in the SWVC, and then removed the bids. There was conflicting record testimony regarding whether the jobs were inadvertently posted for no more than a couple hours or for at least a couple of days. Before it filed the instant petition, the Union filed a grievance protesting the Employer’s failure to post the disputed positions for bid under the parties’ contractual bidding procedure. The Employer denied such grievance on the basis that the jobs were in a different “business unit.” The parties disagree over whether the Union subsequently withdrew the grievance. I have made no finding regarding this dispute as it is not relevant to my decision.

<sup>9/</sup> Although these three employees appear to possess the title of “physician office assistant,” the Employer does not rely on their title as a basis for excluding them from the unit. Nor does it contend that they work in a newly-created classification. Rather, the undisputed record testimony, including the testimony of Wiseman, reflects that they are medical assistants and perform the duties of employees in this unit classification.

The record shows that the Wiseman/McNeel group practice is identified in the Employer's centralized system by its own site code as well as unique codes used for billing, scheduling, and maintaining records, such as process and department codes. In the same vein, the various specialties in the SWVC also have unique department codes designating their particular specialties. It is not clear from the record whether the physicians within the SWVC group share the same site code. In any event, the parties stipulated, and the record reflects, that these codes are used for accounting purposes to track expenses and revenues. The Employer compares the Wiseman/McNeel group to three other freestanding clinics or practice groups which are located at separate facilities at least several miles from the SWVC and employ employees in unit classifications who are not in the bargaining unit - Beckley ARH Cardiology Associates, Beckley ARH Surgical Associates and Beckley ARH Urology Clinic. None of these facilities are listed in the unit definition in the parties' agreement. Finally, the record shows that the Employer is in the process of acquiring clearance from the West Virginia Health Authority to open an office in an adjoining county out of which McNeel will work part-time, along with one of the group's physician/medical office assistants, to serve his existing patients in that area. There is conflicting evidence in the record regarding which assistant will work in that office and how that employee's time will be apportioned. Massey claims that Bower will relocate to the office full time and Wiseman testified that he and McNeel have not yet identified the specific assistant or determined how the assistant's time will be apportioned between the two offices.

### III. LEGAL FRAMEWORK AND ANALYSIS

The framework for analyzing a petition for unit clarification is well-established. Such petitions are "appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly-established classification of disputed unit placement, or within an existing classification which has undergone recent and substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category - included or excluded - that they occupied in the past." *Union Electric Co.*, 217 NLRB 666, 667 (1975). Questions concerning clarification are typically answered by applying a traditional accretion analysis, i.e., examining community of interest factors to determine whether the employees at issue may constitute a separate appropriate unit or an accretion to the existing bargaining unit. *Developmental Disabilities Institute, Inc.*, 334 NLRB 1166, 1168 fn. 1 (2001); *Towne Ford Sales*, 270 NLRB 311 (1984). However, where the facts establish "that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion," thus obviating the need to examine community of interest. *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001); *Developmental Disabilities*, supra. On the other hand, unit clarification is "not appropriate for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent." *Union Electric Co.*, supra. Consequently, "where a position or classification has historically been excluded from or included in the unit, and there have not been recent, substantial changes that would call into question the placement of the employees in the unit, the Board generally will not entertain a petition to clarify

the status of that position.” *Bethlehem Steel Corporation*, 329 NLRB 243 (1999), citing *Plough Inc.*, 203 NLRB 818, 819 fn. 4 (1973).

Within this framework, I conclude there is no proper basis for clarifying the unit placement of the LPNs and medical assistants working at the SWVC under doctors Wiseman and McNeel as they are already employed in a defined unit classification at a defined unit location, i.e., the SWVC. As a threshold matter, I find that the unit at the SWVC is facility-based rather than being limited to any physicians’ group, meaning that it encompasses all contractually-delineated unit classifications working at the facility. Such finding is supported by Article 3, Section B of the parties’ master agreement, which, in defining the unit, plainly refers to the SWVC, and its interim incarnation, Beckley Medical Associates, as a “location.” This interpretation is illuminated by the fact that, with the exception of Wiseman and McNeel, all of the Employer’s physicians’ offices in the SWVC - as well as the three ancillary departments - have unit staff. Indeed, the record reflects that, historically, all of the Employer’s physicians working in the SWVC, including at least one primary care physician, have been a part of the SWVC group in its various incarnations and there is no record evidence purporting to show that any employee working in a delineated classification in the SWVC has ever been excluded from the unit.<sup>10/</sup> Thus, both the contractual language and the parties’ practice since 2001, when the unit at the SWVC was first organized, demonstrate that the unit at the SWVC has been viewed as a facility-wide unit, without any demarcation between medical or practice groups. It necessarily follows that the disputed employees in the Wiseman/McNeel group fall squarely within the defined unit. Under these circumstances, it would be improper to clarify their unit placement absent a claim that their particular jobs have undergone recent, substantial changes in duties and responsibilities. *Union Electric Co.*, 217 NLRB at 667. Neither party makes this assertion. Rather the Employer relies on its unsupported claim that, on its face, the defined unit is limited to unit classifications who work for the SWVC group or what was formerly known as BMA.

The record evidence does not substantiate the Employer’s argument that Wiseman/McNeel are a separate clinic or business entity of the Employer for purposes of determining the unit placement of the five disputed employees. While the evidence establishes that the Employer made special accommodations to draw the physicians to its employ, including hiring some of their former Med-Surg staff, Wiseman/McNeel are otherwise similarly situated to other physicians practicing in the SWVC. In this regard, they are subject to employment contracts with the Employer that govern how they operate within their practice. Moreover, their recordkeeping, billing and scheduling are handled through the same centralized billing and scheduling systems used by the other physicians and their staff in the unit. The unique system codes assigned to Wiseman/McNeel do not identify this group as constituting a separate clinic, as argued by the Employer, but rather identifies it in the Employer’s system for accounting and scheduling purposes in the same way that other departments and facilities are identified in this system. The existence of the three non-unionized clinics within the Beckley ARH region does not alter my finding in this matter as the contractual recognition clause does not include those clinics as “locations” employing the unit classifications and the question concerning their placement in the unit is not before me in this proceeding. Similarly, the fact that one of the medical assistants in the Wiseman/McNeel group might, at some future time, spend most or all of her time at a different location, i.e., McNeel’s second office, is irrelevant to resolving her

---

<sup>10/</sup> The SWVC group formerly included primary care physician Gunter, who left in 2012.

current unit placement. The impact of such move on the employee's job duties and responsibilities, and any consequential diminishment in community of interest shared with employees in the unit, is speculative and not ripe for consideration.

Based on the foregoing, and the record as a whole, I am dismissing the Petitioner's unit clarification petition on the basis that the employees who the Union seeks to include in the unit are already included both by definition and based on the past practice of the parties.

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

Based upon the foregoing and entire record in this matter, I conclude and find as follows:

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 in this case. <sup>11/</sup>
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner proposes to clarify the existing bargaining unit to include two LPNs and three physician office assistants (medical assistants) who work for Dr. Richard Wiseman and Dr. Jacob McNeel.

The bargaining unit currently represented by the Petitioner shall not be clarified as requested by the Petitioner.

#### **V. ORDER**

IT IS HEREBY ORDERED that the petition herein is dismissed.

#### **VI. REQUEST FOR 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 14<sup>th</sup> Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by April 7, 2014. The request may be filed

---

<sup>11/</sup> The parties stipulated at the hearing and I find that the Employer is engaged in the operation of a non-profit acute care hospital and other ancillary medical facilities in Beckley, West Virginia. During the past 12 months, a representative period, the Employer had gross revenues in excess of \$250,000 and has purchased and received goods valued in excess of \$50,000 at its Beckley, West Virginia hospital directly from points located outside the State of West Virginia.

electronically through E-Gov on the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>12/</sup> but may not be filed by facsimile.

Dated at Cincinnati, Ohio this 24<sup>th</sup> day of March 2014.

  
Gary W. Muffley, Regional Director  
Region 9, National Labor Relations Board  
Room 3003, John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

---

<sup>12/</sup> To file the request for review electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the E-Gov tab. Then click on the E-Filing link on the menu, and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, [www.nlr.gov](http://www.nlr.gov).