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

ALLINA HEALTH D/B/A UNITY HOSPITAL Employer and SEIU HEALTHCARE MINNESOTA Petitioner	Case 18-UC-125131

DECISION AND ORDER CLARIFYING THE UNIT

Petitioner seeks to include in its existing technical employee unit the pulmonary rehabilitation outpatient coordinator (PRO Coordinator). The Employer contends that the PRO Coordinator does not share an overwhelming community of interest with the existing technical employee unit as required when applying accretion standards and that in any event the PRO Coordinator is a professional employee. Based on record evidence I conclude that the PRO Coordinator is clearly not a professional employee. I also decline to apply accretion standards to this case, but instead conclude that because the PRO Coordinator is a technical employee, the position is already included in the existing technical employee bargaining unit represented by Petitioner.

In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. After thorough consideration of the record and relevant Board precedent, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; and

2. Allina Health d/b/a Unity Hospital is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[1]

THE EMPLOYER'S OPERATION AND THE UNIT INVOLVED HEREIN

The Employer is an acute care hospital and part of a large health care provider known as Allina Health. Allina Health owns and operates numerous hospitals and medical clinics, primarily in the State of Minnesota. The Employer is located in Fridley, a suburb of Minneapolis, Minnesota. There are about 1,300 employees located at the Employer's facility. About 670 of the 1,300 employee are represented by various unions. Of the 670 employees who are represented by unions, about 125 technical employees are represented by Petitioner. The current collectively-bargained contract covering the technical employee unit is effective from March 1, 2012 through and including February 28, 2015.

The parties stipulated that the unit currently represented by Petitioner is:

> All full-time and regular part-time technical employees, including cardiac sonographer I and II, CT techs, CV techs, licensed practical nurses, MRI techs, multi-modality techs, neurodiagnostic techs, OB techs, occupational therapy assistants-certified, physical therapy assistants, respiratory therapists, special imaging I, surgical techs, x-ray special procedures, and x-ray techs employed by the Employer at its 550 Osborne Road, Fridley, Minnesota facility; excluding business office clerical employees, skilled maintenance employees, registered nurses, professional employees, physicians, managerial employees, and guards and supervisors as defined by the Act.

[1] Allina Health d/b/a Unity Hospital is a Minnesota corporation with an office and place of business in Fridley, Minnesota, where the Employer operates an acute care hospital. During the year preceding the filing of the petition, a representative period, the Employer derived annual gross revenues in excess of $250,000 and purchased and received at its facilities within the State of Minnesota goods, supplies and materials valued in excess of $50,000 directly from points located outside the State of Minnesota.

One of the classifications of employees currently represented by Petitioner is the respiratory therapists. The respiratory therapists are supervised by [redacted] whose title is Manager of Respiratory Care, Patient Transport and Pulmonary Rehabilitation. The department supervised by [redacted] consists of 22 respiratory therapists, 9 transport employees, who are not represented by any labor organization, and the PRO Coordinator, whose unit status is in dispute. While the record contains little information regarding the nine transport employees, because they are involved in transporting patients and equipment from one area of the hospital to another, they do not appear to fall within the definition of technical employees. No party contended at the hearing or in post-hearing briefs that the transport employees are technical employees.

The primary role of respiratory therapists is to assess, diagnose, treat and educate hospitalized patients with respiratory impairments, in accord with directions from physicians. The patients treated by respiratory therapists are those with cardio-pulmonary diseases, including cystic fibrosis and chronic obstructive pulmonary disease (COPD). The respiratory therapists assess and diagnose the conditions of patients, manage ventilators and perform general treatment modalities, and are skilled at arterial puncture and blood analysis, basic pulmonary function testing, CPR and patient education. Respiratory therapists work primarily with acute-care patients who are hospitalized. Thus, they are scheduled 24 hours per day, 7 days per week. However, respiratory therapists provide some outpatient services, including drawing arterial blood gases or sputum inductions (testing to determine whether pulmonary secretions are infected with bacteria). While these outpatient services are performed relatively rarely, respiratory therapists also perform bronchoscopies 2-3 times each week on an out-patient basis. Further information regarding the jobs, educational experience, and qualifications of

respiratory therapists is provided later herein when comparing their positions to the PRO Coordinator.

THE EMPLOYER CREATES THE PRO COORDINATOR POSITION

The Employer began to consider creating the PRO Coordinator position in the fall of 2013, created it in January or February of 2014, and filled the position on March 17, 2014.[2] The employee hired for the position will see her first patients on May 12, 2014. In creating the position, the Employer's goal is to provide pulmonary care without admitting patients to the hospital by working with medical clinics and physicians to identify viable patients for enrollment in a program to improve the patients' quality of life and medical outcomes through education, exercise and nutrition. Both parties agree that the PRO Coordinator does not and will not have direct reports, and that the job is not managerial.

At the hearing Employer counsel repeatedly suggested through leading questions that the PRO Coordinator would deal with different patients than the respiratory coordinators. This suggestion is true in the sense that respiratory coordinators deal primarily with patients who are in the hospital while the PRO Coordinator deals only with outpatients and not with patients who are hospitalized. However, the record is very clear that the whole point of the program the PRO Coordinator is responsible for is to lessen incidents of repeated hospitalizations. Thus, through referrals by physicians and even by respiratory therapists, the PRO Coordinator will see patients

[2] Not considered by me in deciding this matter is any record testimony concerning any alleged Employer agreement at one point in time that the PRO Coordinator position would be a unit position.

who might have been (or might in the future be) patients in the hospital.[3] Thus, I reject any suggestion that the PRO Coordinator sees different patients than the respiratory therapists. Both care for individuals with respiratory impairments, albeit in different settings.

THE PRO COORDINATOR IS NOT A PROFESSIONAL EMPLOYEE

I begin with the question of the PRO Coordinator's professional status because the Employer has not suggested what unit the PRO Coordinator is in if not the technical unit already represented by Petitioner, except that the Employer argues that the PRO Coordinator is most appropriately included in a residual unit of professional employees. Obviously the Employer's contention rests on its argument that the PRO Coordinator is a professional employee.

Section 2(12) of the Act defines a professional employee as (a) any employee engaged in work (i) predominately 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 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.

To begin with, the PRO Coordinator is not required to have an advanced degree. On the contrary, both the PRO Coordinator and the respiratory therapists employed by the Employer are required to have graduated from an AMA approved program in respiratory therapy, and both

[3] Of course the program managed by the PRO Coordinator is not limited to patients of the Employer.

must be certified by the National Board of Respiratory Care. Both positions are licensed by the Minnesota Board of Medical Practice and both positions need to update their basic life support certificates. The current PRO Coordinator has a two-year college degree, is a registered respiratory therapist, is certified as an asthma educator and as a NIOSH spirometry trainer. The current PRO Coordinator is qualified to teach (and does teach) spirometry, which is a simple breathing test and is a diagnostic test for COPD, and the most common breathing test that is performed.

While the Employer argues that a formal college or other advanced degree is not required to be considered a professional employee by the Board (citing *St. Barnabas Hospital*, 283 NLRB 472, 473 (1987)), I find it significant that the education and certifications required for the PRO Coordinator are nearly identical to those required of respiratory therapists. Moreover, while the Board has stated that formal education is not a prerequisite for finding professional status, on the other hand the Board has also stated that in lieu of formal education the question is whether the work being performed is normally attributable to professionals. *Robbins & Myers, Inc*., 144 NLRB 295 (1963). There is no record evidence that the work performed by the PRO Coordinator is normally attributable to professionals. On the contrary, in at least one hospital owned by Allina Health, a similar position is included in a technical unit currently represented by Petitioner.

The Employer maintains that an examination of the PRO Coordinator's background and the character of the work performed demonstrate "knowledge of an advanced type" required to be a professional employee. In this regard, according to the Employer, the fact that the incumbent has extensive experience in performing the functions expected of her as the Employer's PRO Coordinator means that she is a professional employee. I reject this rather

circular reasoning, which in essence is that because she has unique experience which respiratory therapists employed by the Employer do not have, therefore the PRO Coordinator is a professional employee. It is not the individual's qualifications but the character of the work required that is determinative of professional status. *Avco Corp/Textron Lycoming Div*., 313 NLRB 1357 (1994); *Western Electric Co*., 126 NLRB 1346 (1960).

Thus, key to the question of whether the PRO Coordinator is a professional employee is the work performed by the position. *Aeronca, Inc*., 221 NLRB 326 (1975). Both the PRO Coordinator and her supervisor who testified at the hearing responded affirmatively to leading questions that the position involves a great deal of discretionary decision-making. However, when the PRO Coordinator testified more specifically about her duties and responsibilities, it became clear that in fact the position involves limited discretion.

The role of the PRO Coordinator is to help outpatients with lung diseases understand their disease, to ensure that they follow their prescribed medications, and to educate them on nutrition and exercise programs that may improve their quality of life. The Employer emphasizes that in providing this assistance, the PRO Coordinator will establish an individual treatment plan for each outpatient.

The first step in the process of enrolling outpatients in the program headed by the PRO Coordinator is to evaluate them. The questionnaire used for the evaluation is standard for the industry, and was not created by the PRO Coordinator. Another part of the evaluation is to review medications taken. In addition, the PRO Coordinator observes outpatients on a six-minute walk (presumably using a treadmill), and she determines what they know about their disease. Following the evaluation, each outpatient meets with the PRO Coordinator for one hour each week, and in addition the outpatients participate in a two-hour group session once per

week. The total length of the program is six weeks, although with an additional referral from a physician an outpatient could be extended beyond six weeks if they have not reached desired outcomes.

One of the goals of the PRO Coordinator is to develop an exercise program for each outpatient in order to improve his/her quality of life and as part of the overall goal of reducing hospitalizations. While the Employer contends that in developing the exercise program the PRO Coordinator exercises discretion, in fact there are very few options from which to choose. The PRO Coordinator will decide whether the outpatient's exercise program should include walking on a treadmill or with a walker. Most outpatients also exercise on a recumbent bicycle (the circumstances where they would not are not explained on the record). In addition, all outpatients need to use an arm ergometer (a device to pedal with arms, which helps with breathing muscles). The record contains no other discussion of variables in the exercise program. In addition, an exercise physiologist – and not the PRO Coordinator – explains to the outpatients the safest ways to exercise.

Another goal of the PRO Coordinator is to develop a nutrition program for each outpatient, again for the purposes of improving quality of life and to decrease repeat hospitalizations. However, it does not appear that the PRO Coordinator decides on the nutrition program herself. Rather, a dietician or the hospital's dietary department employees provide information, including directly to the outpatients in the program. While the PRO Coordinator will share nutrition information with outpatients, in the single example given the PRO Coordinator shares information already "out there" on what a patient with COPD should eat.

As part of the program's goal of educating outpatients with lung problems, the PRO Coordinator gathers articles and handouts from various sources. There is no evidence that the

PRO Coordinator writes the articles or handouts, although she "might" rewrite them to make them more understandable for outpatients in her program. In addition, the materials require constant updating, but the updating is performed by an industry association and the PRO Coordinator merely watches for the updates and then includes them in the manual she creates for outpatients.

The PRO Coordinator's role in the budget for her area is fairly limited. The PRO Coordinator's supervisor – and not the PRO Coordinator – establishes the budget, although the PRO Coordinator is responsible for staying within budget. Purchases made by the PRO Coordinator must be approved by her supervisor. The Employer, and the PRO Coordinator when testifying, emphasized the importance of correctly billing outpatients, which requires correctly coding various services. According to the PRO Coordinator, coding is complex. However, respiratory therapists are also responsible for correctly coding services they perform so that patients are properly billed. Unexplained by the Employer or the PRO Coordinator is what about the coding completed by the PRO Coordinator is unique or complex enough to suggest professional employee status.

Another important aspect of the PRO Coordinator's job is marketing the outpatient program, including engaging in outreach. With regard to brochures and other marketing materials, the PRO Coordinator and the Employer's marketing department are working together to put together materials. While the record is clear that the PRO Coordinator is involved in writing some or perhaps most of the brochure, the record contains little additional evidence regarding the precise role of the marketing department. On the other hand the record is clear that the PRO Coordinator will spend considerable time on outreach. Patients for the program will come largely from referrals; therefore, ensuring that physicians and medical clinics are aware of

the program and its benefits is important to the program's long-term viability. The PRO Coordinator's supervisor estimated that outreach will require 10 percent of the Coordinator's time once the program is up and running (and even more time initially).

Finally, the PRO Coordinator is expected to ensure that the program conforms to all regulatory requirements and obtains certifications. For example, the Employer's goal is that the program be certified by the American Association for Cardiovascular and Pulmonary Rehabilitation within one year, and it is the PRO Coordinator's job to obtain the certification. In addition, the effectiveness of the program, as well as the effectiveness of the PRO Coordinator will be measured by whether those participating in the program have reduced hospital admissions and readmissions, and more particularly whether patients in the program are admitted to the hospital within 30 days of discharge. In addition, the PRO Coordinator will be assessed on staying within budget and obtaining certifications for the program.

In reaching the conclusion that the PRO Coordinator does not meet the definition of a professional employee as defined in Section 2(12) of the Act, I emphasize that the position does not require knowledge of an advanced type in a field of science customarily acquired by a prolonged course of special instruction. On the contrary, the Employer spent much of the hearing emphasizing how the current PRO Coordinator essentially learned her skills by holding similar jobs with a variety of employers. This evidence suggests that on-the-job training and experience suffices to hold the position, akin to the experience an apprentice would gain prior to becoming a journeyman. Moreover, the position involves far less exercise of discretion and judgment than the Employer argues. The PRO Coordinator is not diagnosing diseases; she is not deciding which medications patients should take; she is not determining when or whether they require hospitalization; and she is not engaged in psychotherapy. Rather, she is attempting to

improve quality of life through exercise, nutrition and education, with the ultimate goal of reducing hospitalizations. *West Oakland Home d/b/a Lincoln Child Center*, 307 NLRB 288 (1992) (discussion of non-credentialed teachers); *Community Health Services, Inc*., 259 NLRB 362 (1981); *Lakeshore Manor, Inc*., 225 NLRB 908 (1976). Most telling that the PRO Coordinator is not a professional employee is the fact that the Employer intends to measure performance in a standardized fashion over a given period of time. The key performance measures are whether the program is certified within one year, whether the PRO Coordinator stays within budget, and whether hospitalizations of participants are reduced. These are objective standards, and are standards that will be measured in a given period of time.

THE PRO COORDINATOR IS APPROPRIATELY INCLUDED IN THE EXISTING TECHNICAL EMPLOYEE UNIT

The Employer correctly points out that when considering unit clarification petitions, the standard for accreting a position or positions to an existing bargaining unit is restrictive. Or as the Board stated in As the Board stated in *CHS, Inc*., 355 NLRB 914, 916 (2010), "the accretion doctrine's goal of promoting industrial stability places it in tension with the right of employees to freely choose their bargaining representative" (citation omitted). Therefore "only when the employees have little or no separate group identity . . . and when the additional employees share an overwhelming community of interest with the pre-existing unit to which they are accreted," should unit clarification be granted. See, *Super Valu Stores*, 283 NLRB 134, 136 (1987); *Towne Ford Sales*, 270 NLRB 311 (1984).

On the other hand, the Employer ignores other Board cases which hold that accretion analysis is not appropriate once it is established that a new classification is performing the same basic function as a unit classification historically has performed. When that is established the

new classification is properly viewed as belonging in the unit rather than being added to the unit by accretion. *Developmental Disabilities Institute,* 334 NLRB 1166 (2001); *Premcor, Inc*., 333 NLRB 1365 (2001).

A fundamental question of the Board in cases involving classifications which belong in the bargaining unit, rather than being added to the unit by accretion, is whether the established bargaining unit encompasses employees in the specific classification in dispute. If the bargaining unit encompasses the employee, then employees hired into the classification are included in the unit. *Tarmac America*, 342 NLRB 1049 (2004); *Gourmet Award Foods, Northeast*, 336 NLRB 872 (2001). I have already concluded that the PRO Coordinator is not a professional employee. Moreover, based on a comparison of her education, licensing, certification, and job duties when compared to respiratory therapists, it is clear that she is a technical employee. Since the unit represented by Petitioner encompasses technical employees employed by the Employer at its Fridley facility, and since the PRO Coordinator is a technical employee working at the Employer's Fridley facility, it necessarily follows that she is properly viewed as belonging in the unit.

While the Employer attempts to distinguish the two classifications based on the status of patients assisted, the Employer's Director of Human Resources acknowledged that a review of the job descriptions for both classifications reveals that the core function for both is to assess and assist patients with respiratory impairments. Both classifications collaborate with physicians, both classifications document interventions, both classifications develop and refine care plans and educate patients, both classifications are expected to adhere to billing procedures, and both classifications are required to maintain their status through continuing education credits. The goals of both classifications are to improve the quality of life of patients with chronic respiratory

problems. The difference is respiratory therapists are generally called on to do so when patients are in an acute phase of their chronic illness, while the PRO Coordinator assists non-acute patients in coping with the chronic nature their respiratory diseases.

Consistent with my conclusion that the PRO Coordinator is performing work historically performed by unit respiratory therapists are a number of other factors. First, the education, certification and licensure requirements are exactly the same for both respiratory therapists and the PRO Coordinator (this does not take into account that the current PRO Coordinator has additional certifications and experience not required for the position). Second, both classifications are commonly supervised, suggesting that the Employer views the two positions as closely related to one another. Finally, the PRO Coordinator works at the unit facility.

I acknowledge that the PRO Coordinator position has responsibilities not explicitly assigned to respiratory therapists, including assisting in marketing the program through creation of brochures and through outreach. However, the record is also clear that marketing and outreach are a means to an end. That is, the core function of the PRO Coordinator is assisting individuals with respiratory problems. However, because that assistance is performed on an outpatient basis, the Employer has also asked the PRO Coordinator to market the program.

The Employer emphasizes that there are differences in working conditions between the PRO Coordinator and respiratory therapists, but the differences are both minor and do not negate the conclusion that the PRO coordinator is performing work with the same basic functions historically performed by respiratory therapists. Moreover, the differences are less significant than portrayed by the Employer. For example, the Employer contends that the PRO Coordinator has a longer and more intense relationship with patients than respiratory therapists, but the evidence in this regard is inconclusive. The PRO Coordinator will normally see an individual

outpatient a total of six weeks, one hour each week individually and two hours each week as part of a group. This compares to average hospitalizations of 3.2 – 3.6 days for patients with respiratory problems; however, the record does not explain how much time respiratory therapists spend with hospitalized patients on a daily basis. The Employer also maintains that there will be no interchange between the PRO Coordinator and the respiratory therapists and little work-related contact. However, contrary to the Employer's argument, there is functional integration of the work of the PRO Coordinator and the respiratory therapists even if they do not work with one another on a daily basis. Both physicians and respiratory therapists will refer appropriate candidates to the outpatient program. If the program achieves its objectives the Employer's respiratory therapists will see certain patients less due to decreased hospitalizations. While there is no evidence that the PRO Coordinator will work directly with respiratory therapists, at a minimum the PRO Coordinator will review the notes of respiratory therapists and the notes will be part of the PRO Coordinator's consideration in meeting with and developing plans for outpatients. Thus, the evidence is clear that the PRO Coordinator is essentially providing the same hospital-based services of the respiratory therapists to an additional group of patients.

Finally, I conclude that the facts of the instant case are very similar to the facts in *Developmental Disabilities Institute*, cited above. In *Developmental Disabilities*, the employer sought to exclude from a unit of instructional employees a newly created classification of therapy assistant/psychology. The Board found it inappropriate to perform an accretion analysis, and instead concluded that the newly-created classification performed the same basic functions historically performed by members of the bargaining unit. The fact that the therapy assistant/psychology employees were physically in different space from instructional employees; the fact that they had somewhat greater autonomy than instructional employees; the fact that they

provided one-on-one instruction while instructional employees taught in a classroom setting; and the fact that they applied behavior analysis methods to modify individual behavior, did not convince the Board that they were not unit employees. The Board emphasized that both classifications worked with the same children, both classifications applied the same techniques to modify behavior and to attain educational goals, and both classifications had the same ultimate goals. Based on these considerations, the Board concluded that the therapy assistant/psychology employees were performing the same basic functions as the instructional employees. As is clear from the above, a similar analysis applies in this matter when comparing the jobs of the respiratory therapists and the PRO Coordinator.

ORDER

The contractual collective-bargaining unit covering all technical employees at Allina Health d/b/a Unity Hospital located in Fridley, Minnesota represented by SEIU Healthcare Minnesota is clarified to include the position of PRO Coordinator.

Right to Request Review. Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 - 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

Procedures for Filing a Request for Review. Pursuant to the Board's Rules and Regulations, Sections 102.111–102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by

close of business on May 21, 2014, at 5:00 p.m. Eastern Time, unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on File Case Documents, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could

not be accomplished because the Agency's website was offline or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Minneapolis, Minnesota, this 7th day of May, 2014.

/s/ Marlin O. Osthus

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