



worked at the Flatbush Avenue store for a finite period on a specific task assigned by CVS's District Manager and had no substantial expectation of returning to the Flatbush Avenue store.

Moreover, there is nothing in the record that supports the Employer's contention that Chow would be disenfranchised by the Regional Director's decision.

### RELEVANT FACTS

The August 7, 2015 representation election concerned only the employees at CVS's Flatbush Avenue store. See p. 3 of the Decision, attached hereto as Exh. A.

The Agreement sets forth the unit description as follows:

Included: All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors.

Excluded: All floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, managers and supervisors as defined in the Act.

See par. 5 of the Agreement (Joint Exhibit 9), attached hereto as Exh. B.

Eligible voters were those who were employed during the payroll period ending July 18, 2015. Id.

Chow's home store is Store No. 549 on Metropolitan Avenue in Ridgewood, Queens,<sup>1</sup> not the Flatbush Avenue store, which is Store No. 2812. See p. 205 of the transcript ("Tr.") (the cited portions of the transcript are attached hereto as Exh. D).

Chow has worked in at least "12 or 14" different CVS store locations during his tenure with CVS. Tr. 208. During the thirteen weeks before the election, he worked at seven different CVS stores. See Joint Exhibit 3, attached hereto as Exh. E.

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<sup>1</sup> Each store number corresponds to a specific store. See Joint Exhibit 1, attached hereto as Exh. C.

Chow's last stint at the Flatbush Avenue store was during the week ending May 30, 2015. Id. After the week ending May 30, 2015, Chow testified that he returned to the Flatbush Avenue store twice, once for the August 7, 2015 representation election and another time he could not remember. Tr. 215-216. He did not expect to return to the Flatbush Avenue store until sometime in October or November of 2015, and thereafter not for another three months. Tr. 225-227.

### DISCUSSION

I. THE REGIONAL DIRECTOR DID NOT DEPART FROM BOARD LAW IN FINDING THAT CHOW LACKED A COMMUNITY OF INTEREST WITH THOSE IN THE PETITIONED-FOR UNIT

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The Employer's request for review must be denied because the Regional Director correctly found that Chow lacked a community of interest with those in the petitioned-for unit. The Regional Director addressed the four-hour formula set forth in Davison-Paxon Co., 185 NLRB 21 (1970), but distinguished it from this case by finding that any regularity of work that Chow may have had at the Flatbush Avenue store ceased completely in the week ending May 30, 2015. See Exh. A., p. 11.

The Regional Director's analysis of Chow's relationship to the Flatbush Avenue store finds support in Board cases concerning the temporary nature of one's employment. The Board has held, "As a general rule, a temporary employee hired for a finite, ascertainable term likely will not have a community of interest with unit employees sufficient to qualify him to vote. A temporary employee hired for an indeterminate term, who is working during the voting eligibility period, is generally more likely to be a qualified voter." Catholic Healthcare West Southern California, 339 NLRB 127, 128 (2003). In Northwestern Univ. & College Athletes

Players Ass'n, 362 NLRB No. 167, the Board held, "where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries." Northwestern, 362 NLRB No. 167, 2015 NLRB LEXIS 613, \*88 (2015).

Here, by focusing on Chow's work at the petitioned-for shop rather than Chow's general relationship with the larger CVS company, the Regional Director correctly concluded that he did not share a community of interest with those who regularly work at the Flatbush Avenue store. For this analysis, it is irrelevant whether Chow worked at other CVS stores – the attention is correctly on his tenure at the Flatbush Avenue store because the question concerns his relationship with the employees there.

The undisputed evidence establishes that, after the week ending May 30, Chow returned to the Flatbush Avenue store on only two occasions (one of which was to vote at the August 7 election upon the District Manager's instruction). Tr. 215-216. Moreover, Chow testified that he did not expect to return to the store until October or November, and thereafter not for another three months. Tr. 225-226.

At the Flatbush Avenue store during the eligibility period, Chow had only one job, which was to clean up the basement and set up the plan-o-gram. Tr. 212. He was assigned to work there by CVS's District Manager. Tr. 209. Once he was done, he moved on to another store. Tr. 212-213. Chow barely interacted with other employees at the Flatbush Avenue store, and knew only the Store Manager and one supervisor. Tr. 211-212.

The Regional Director correctly concluded that Chow did not share a community of interest with the other employees because Chow's work at the Flatbush Avenue store was for a finite term and he had no substantial expectation of continued employment there. See Catholic

Healthcare, 339 NLRB 127; Northwestern Univ. & College Athletes Players Ass'n, 362 NLRB No. 167.

Accordingly, the Employer's request for review must be denied because the Regional Director did not depart from Board law.

II. COMPELLING REASONS FOR RECONSIDERATION DO NOT EXIST AS THERE IS NO EVIDENCE IN THE RECORD THAT CHOW IS DISENFRANCHISED

The Employer's request for review must also be denied because there is no evidence in the record that Chow would be disenfranchised.

The evidence in the record pertains only to Chow's work at the Flatbush Avenue store. The Regional Director correctly pointed out that "the evidence is insufficient to support a finding that he would be ineligible to vote no matter when or for which store a representation is filed[.]" See Exh. A, p. 12.

The Employer mistakenly refers to the Flatbush Avenue location as Chow's home store. See p. 10 of Employer's Request for Review. The record clearly shows that Chow's home store is Metropolitan Ave – Ridgewood, and not the Flatbush Avenue store. Tr. 205.

In any event, the record is devoid of any relevant fact concerning the employees at the Metropolitan Ave – Ridgewood store or the main District Office where Chow receives his assignments. The only issue clearly addressed in the record is that Chow does not share a community of interest with those in the Flatbush Avenue location.

Accordingly, the Employer's request for review must be denied as to whether compelling reasons exist to overturn the Regional Director's decision.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board deny the Employer's request for review in its entirety.

Dated: New York, New York  
January 8, 2016

\_\_\_\_\_/s/\_\_\_\_\_  
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# EXHIBIT A

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**CVS ALBANY, LLC D/B/A CVS  
Employer**

**And**

**Case No. 29-RC-155927**

**LOCAL 338 RETAIL, WHOLESALE AND  
DEPARTMENT STORE UNION (RWDSU),  
UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION (UFCW)  
Petitioner**

**DECISION AND DIRECTION TO COUNT TWO DETERMINATIVE  
CHALLENGED BALLOTS**

Pursuant to Section 102.69 of the Board's Rules, I have considered the exceptions filed by both CVS Albany, LLC, d/b/a CVS, herein called the Employer or CVS and Local 338, Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW), herein called the Petitioner or the Union, to the Hearing Officer's report recommending disposition of the determinative challenges in an election held on August 7, 2015. The election was conducted pursuant to a Stipulated Election Agreement. The Tally of Ballots shows 4 ballots cast for and 3 ballots cast against the Petitioner, with 3 challenged ballots, a sufficient number to affect the results.<sup>1</sup>

On September 30, 2015, the hearing officer issued a report in which he recommended that the Petitioner's challenges to the ballots of Debra Ellsmore and Debbie Henry-Aughton be overruled and that their ballots be opened and counted. Further, the hearing officer recommended that the challenge to the ballot of Kane Chow be sustained. As described more fully below, the Petitioner filed exceptions to the hearing officer's findings underlying the basis for his recommendations to overrule the challenges to the ballots of Ellsmore and Henry-Aughton and the Employer filed exceptions to the hearing officer's recommendation to sustain the challenge to the ballot of Chow. Each of the parties filed an answering brief in response to the other's exceptions.

More specifically, the Petitioner's exceptions contend that the hearing officer erred in

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<sup>1</sup> The Petitioner timely filed three objections to conduct affecting the results of the election. On August 19, 2015, I issued a Report on Objections and Challenges and Notice of Hearing. The August 19 Report directed that a hearing be held before a hearing officer for the purpose of receiving evidence to resolve the issues raised by the three challenged ballots. The August 19 Report also overruled the Petitioner's objections in their entirety. Pursuant to the August 19 Report on Objections and Notice of Hearing, a hearing was held before a hearing officer on September 3 and 10, 2015 regarding the three challenged ballots. On September 14, 2015, the Board issued a Decision and Order adopting the findings and recommendations in the August 19 Report.

ruling that: (1) the Stipulated Election Agreement is facially ambiguous; (2) the extrinsic evidence establishes that the parties did not have a meeting of the minds on the meaning of a floater; and, (3) that Debra Ellsmore shares a community of interest with the other employees in the stipulated unit.<sup>2</sup>

The Employer's exceptions contend that the hearing officer erred in ruling that: (1) the challenge to the ballot of Kane Chow be sustained; (2) Chow does not share a sufficient community of interest with other eligible voters to be an eligible voter; (3) Chow had separate supervision from other eligible voters; (4) Chow did not have a "sufficient regularity of work to demonstrate a community of interest with the remaining employees in the unit;" (5) by failing to find that Chow was a regular part-time employee; (6) by deviating from the formula for determining voter eligibility set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970); (7) by failing to follow Board holdings that the *Davison-Paxon* formula for determining whether a challenged voter is a regular part-time employee eligible to vote must not be deviated from unless there are "special circumstances" supporting the abandonment of such formula; (8) by finding that there were special circumstances justifying the abandonment of the *Davison-Paxon* formula; and (9) by disenfranchising Chow by ruling, in effect, that there is no unit in which Chow would be an eligible voter.

After a review of the record in light of the exceptions and the parties' briefs and answering briefs, and for the reasons described below, I agree with the Hearing Officer's recommendations to overrule the challenges to the ballots of Debra Ellsmore and Debbie Henry-Aughton, and to open and count those two ballots, to sustain the challenge to Kane Chow's ballot, and that a revised Tally of Ballots issue.

### **The Petitioners Exceptions**

As noted above, the Petitioner contends that the hearing officer erred in ruling that the Stipulated Election Agreement is facially ambiguous; that the extrinsic evidence establishes that the parties did not have a meeting of the minds on the meaning of a floater and that Debra Ellsmore shares a community of interest with the other employees in the stipulated unit.

The Board has adopted a three-prong approach, set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), when resolving whether a challenged voter is properly included in or excluded from the stipulated unit. Under this three prong test, "the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal

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<sup>2</sup> In its exceptions, the Petitioner requests that the undersigned find Chow, Ellsmore and Henry-Aughton ineligible to vote. I note that while the Employer, in its Answering Brief in Opposition to the Petitioner's Exceptions, contends that the Petitioner did not except to the Hearing Officer's determination to overrule Debbie Henry-Aughton's challenge and therefore abandoned its challenge. In this regard, I note that while the Petitioner does not except to the Hearing Officer's community of interest finding related to Henry-Aughton, it clearly excepted to the Hearing Officer's findings that the stipulation was ambiguous and that the parties' intent could not be discerned. A finding that the stipulation is unambiguous or that the parties' intent was clear would obviate the need for the Board's traditional community of interest analysis.

methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community of interest test." *Id.* at 1097. To determine whether the stipulation is clear or ambiguous, the Board compares the express language of the stipulated bargaining unit with the disputed classification. *Northwest Community Hospital*, 331 NLRB 307 (2000); *Bell Convalescent Hospital*, 337 NLRB 191 (2002). "The Board will find that the parties have 'a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description.'" *Los Angeles Water & Power Employees Association*, 340 NLRB 1232, 1235 (2003).

Thus, in determining whether the three employees are properly included or excluded from the unit, the first step is to determine whether the stipulation is ambiguous by comparing the express language of the stipulated unit with the disputed classification/employee. Here, the Petitioner challenged the three employees at the election on two grounds—that they are floaters and that they are ineligible because they are not regular employees. The Petitioner did not file exceptions to the Hearing Officer's finding that Henry-Aughton and Ellsmore are regular employees. As noted above, the Employer has filed an exception to the hearing officer's finding that Chow is not a regular employee. I find, in agreement with the hearing officer, that the stipulated unit is subject to differing reasonable interpretations which cannot be resolved by reference to the language of the stipulated election agreement or the extrinsic evidence and resort to the Board's community of interest test is necessary, as more fully described below.

#### Intent of the parties in connection with the disputed category/employees

The Stipulated Election Agreement describes employees in the following unit as those eligible to vote in the election:

All regular full-time and part-time retail employees, including Clerk/Cashiers, Shift Supervisor Bs and Photo Lab Supervisors, but excluding all floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists and pharmacy technicians, and guards, managers and supervisors as defined in the Act.

Initially, I note that although the Employer has multiple stores and the Flatbush Avenue store is not specified in the unit description, the commerce section of the Stipulated Election Agreement states that the Flatbush Avenue store is the only store involved herein. Moreover, the parties stipulated at the hearing that the bargaining unit encompasses employees employed by the Employer at the Flatbush Avenue store. Thus, the intent of the parties that the bargaining unit consists of employees of the Employer at the Flatbush Avenue store is clear. The issues raised in the parties' exceptions involve whether the disputed employees are floaters at the Flatbush Avenue store.

Applying the *Caesar's Tahoe* analysis to the instant case, I note that the exclusion of "floaters" in the stipulated unit is subject to more than one interpretation. The exclusion could reasonably be interpreted to apply only to employees in a floater job classification, i.e.,

pharmacist-floaters.<sup>3</sup> Under this view, the disputed employees would not be excluded inasmuch as their job classification is clerk/cashier. On the other hand, as argued by the Petitioner, the term floater could reasonably be read more expansively to refer to a general understanding of floater, i.e., employees who move from store to store, without regard to the regularity of their employment at the Flatbush Avenue store.<sup>4</sup> Under this view, the three disputed employees, whose home stores are other than the Flatbush Avenue store, would be excluded from the unit. Yet another reasonable interpretation is that the exclusion of floaters was meant to apply only to employees who move from store to store who are not regular full-time or part-time retail employees at the Flatbush Avenue store. In support of this view, I note that the stipulated unit includes *all* regular part-time retail employees, including clerk/cashiers, and two of the three disputed employees have been found to be regular, part-time retail employees at the Flatbush Avenue store.

Upon a review of the unit description to determine the objective intent of the parties, I have considered the arguments raised by the parties. With regard whether the word floater was meant to refer to a job classification or a general understanding of the word, as indicated in the Petitioner's exceptions and supporting arguments, the terms "Clerk/Cashiers, Shift Supervisor B and Photo Lab Supervisors" are capitalized in the unit description, indicating they are titles; whereas the word "floaters" is not capitalized, indicating that it does not correspond to any title, but rather to the general understanding of that word. However, the pharmaceutical titles set forth in the exclusions, i.e., pharmacists and pharmacy technicians, are not capitalized either. Further, in considering the arrangement of the stipulated unit, I note that record evidence shows that the Employer maintains one floater classification, a non-retail position, the pharmacist-floater.<sup>5</sup>

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<sup>3</sup> Where a stipulation expressly excludes a classification, the Board will find a clear intent to exclude it. See, e.g., *Butler Asphalt, LLC*, 352 NLRB 189 (2008) (where the stipulated unit unambiguously excluded all laborers, employees classified as laborers were excluded under the first step of the Caesar's Tahoe analysis); *White Cloud Products*, 214 NLRB 516, 517 (1974) (where the stipulated unit unambiguously excluded leaders, employees classified as leaders were excluded).

<sup>4</sup> The Petitioner states employees classified as pharmacist-floaters may be floaters under the general understanding of the word.

<sup>5</sup> The Employer does not maintain any retail floater classifications; the Pharmacist-floater is the only floater classification. This evidence could arguably indicate that the parties did not intend the term floaters to apply to any retail employees. In this regard, I note that the Board has an expectation that parties are knowledgeable as to employees' job titles, and intend their descriptions in the stipulation to apply to those job titles. See e.g., *Cardinal Health Care Inc.*, 352 NLRB 104 (2008) (where the Board found the use of the abbreviated term "coordinators" to refer to several classifications unambiguously included those classifications within the stipulation); *Halsted*, 347 NLRB 225 (2006) (where the intent to exclude classification of "contractor technician supervisors" was found clear). See also, *Royal Sonesta*, 277 NLRB 820 (1985) (inasmuch as the stipulated unit contained the classification of "valet" the Board found irrelevant evidence that the petitioner entered into the stipulation in the belief that the designation referred to employees who work in the valet (dry-cleaning) area of the employer's laundry facility and that it was not aware of the existence of employees called "valets" who are assigned to the hotels serviced by the employer). With regard to the fact that no employee matches the specific one-word title "floater," it is reasonable to read the reference to "floaters" in the stipulation as all job classifications that include the word floater, i.e., pharmacist-floater. See e.g., *Butler Asphalt, LLC*, 352 NLRB 189 (2008) (where the stipulation referred to "heavy equipment operators," rather than breaking down the classifications according to which type of heavy equipment each operator operates, inasmuch as no employee had the specific title of "heavy equipment operator," the Board held it was reasonable to read the stipulation as including employees whose job titles include the word "operator," combined with the name or names of a piece of pieces of heavy equipment); *USF Reddaway*, 349 NLRB 329 (2007) (where the Board considered whether to include an individual with the classification "parts/mechanic" in a unit of "all mechanics," in light of the fact that the classifications in the stipulation did not match the actual

However, if the reference to floaters was intended to apply only to employees in a floater job classification, and the only such floater is a pharmacist-floater, it is unclear why the parties would specifically list floaters separate and apart from the reference to “pharmacy employees, including pharmacists, pharmacy interns. ” Indeed, in view of the exclusion of pharmacy employees, it would appear that the separate reference to floaters would be unnecessary if the only individual who fit the description of floater was the pharmacist-floater. Thus, the language of the stipulation casts some doubt on the view that the parties intended to exclude only pharmacist-floaters.<sup>6</sup>

With regard to the other interpretations, assuming a general understanding of the word floater was intended by the parties and it is read to apply to any employee who moves from store to store, regardless of whether they work regularly at the Flatbush Avenue store, the language of the stipulated unit would be ambiguous when compared to disputed employees who are regular part-time retail employees at the Flatbush Avenue store. More specifically, under this view of the stipulated unit, where disputed employees are regular part-time retail employees at the Flatbush Avenue store and are also floaters inasmuch as the Flatbush Avenue store is not their home store and they work in more than one store, the language of the stipulation is unclear as to whether they would be included as regular part-time retail employees or excluded as floaters. Indeed, it is unclear whether the inclusion of “all” regular part-time retail employees was meant to be limited by the exclusion of “all” floaters; or vice versa. Thus, it would appear more likely that if the parties intended on a general understanding of the term floater, that the exclusion of floaters was meant to apply only to employees who move from store to store who are not regular full-time or part-time retail employees at the Flatbush Avenue store. However, the matter is not wholly free from doubt and I agree with the hearing officer that the stipulation itself is unclear. Accordingly, whether the word floater was meant to refer to a job classification or a general understanding of the word cannot be determined from the express language of the stipulation and extrinsic evidence must be considered under the second step of the *Caesar’s Tahoe* analysis. See e.g. *Columbia College and Illinois Education*, 346 NLRB 726 (2006) (where the Board found stipulated unit exclusions of “independently contracted tutors” and “faculty” were ambiguous).

The express intent of the parties concerning the definition of job classifications sought to be included or excluded in the stipulated unit may be determined by reference to the employer's regular use of the classifications in a manner known to its employees, industry practice, and the Board's established definitions of the classifications *National Public Radio, Inc*, 328 NLRB 75 at fn 2 (1999) (wherein the Board found the language of the stipulated unit was controlling and sustained the challenges to the ballots of three temporary broadcast/recording technicians inasmuch as they did not fit the employer's definition of regular part-time employees). The record evidence herein does not conclusively establish that the Employer regularly used the term floaters to refer to retail employees who worked at different stores or that the employees knew

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classifications used by the employer, it indicated that it would be reasonable to read the stipulation as unambiguously including all job classifications that included the word “mechanic”).

<sup>6</sup> See e.g., *USF Reddaway*, supra (In considering the unit placement of a parts/mechanic in a stipulated unit that included “[a]ll mechanics, fuelers, truck washers, truck inspectors, trailer mechanics and tire persons,” where the stipulation did not mirror the precise classification titles utilized by the employer, i.e., mechanic/fueler, mechanic/floater, parts/mechanic, fuel/tire/trailer employee, and equipment washer/general helper, the Board concluded that the unit description was unclear because it specifically included trailer mechanics, an inclusion that would have been unnecessary if “all mechanics” meant what it said).

that the term was used by the Employer in that way. In this regard, I note that the evidence includes testimony of: the Senior advisor of Human Resources explaining that management commonly referred to pharmacist-floaters as floaters; several employees who never heard managers use or define the term floater; an employee who heard reference only to a floater in the pharmacy; a former employee who heard a manager refer to floaters in about January 2015; and, another employee who heard a manager (from a store other than the Flatbush Avenue store) refer to floaters about four years ago. Such testimony is somewhat conflicting and not conclusive as to the parties' intent when they entered into the stipulation. Additionally, while the Petitioner contends that the term floater is used to refer to an employee who goes from store to store in courts and by the Board, I note that there is no specific Board definition of a "floater" and Board cases reveal different applications of the word "floater."<sup>7</sup> Furthermore, since the term "floater" is not a legal term or word of art, reference to a technical meaning for clarification is unavailable. Nor does extrinsic evidence consisting of the Employer's submission of an *Excelsior* list, which included the three disputed employees, resolve the matter. The *Excelsior* list submitted by the Employer "is of little help in determining the intended scope of a pre-election stipulation. The submission of the list has never been held to preclude union ballot challenges since it is required for the Union's benefit." *Caesar's Tahoe, supra*, at 1099-1100, citing *NLRB v. Speedway Petroleum*, 768 F.2d 151, 157 (7<sup>th</sup> Cir. 1985).

In the circumstances of this case, I agree with the hearing officer that the language of the stipulation is ambiguous, that there is insufficient extrinsic evidence to discern the parties' intent and that resort to the Board's community of interest test was proper.

The Petitioner excepted only to the hearing officer's community of interest determination related to Debra Ellsmore. Thus, the hearing officer's finding that Debbie Henry-Aughton shares a community of interest with unit employees is not at issue here. Accordingly, the challenge to Henry-Aughton's ballot should be overruled and her ballot counted. The hearing officer's community of interest determination in connection with Kane Chow will be discussed in the section on the Employer's exceptions below.

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<sup>7</sup> In this regard many Board cases, including two cited by the Petitioner in its exceptions, i.e., *Flagstaff Medical Center*, 357 NLRB No. 65 (2011) ("Relief housekeepers or "floaters," are employees who do not have regularly assigned areas to clean"); and *Continental Group, Inc.*, 353 NLRB 348, 363 (2008) (where the Board noted the employer offered an individual a position as a floater who would work at various properties managed by the employer as needed), contain references to employees classified as floaters and do not provide a definition of the term. See also, *Shoa, Inc.*, 140 NLRB 1379 (1963) (in addition to its regular workforce, the employer, maintained a labor pool of about 146 employees known as floaters, who provided additional help throughout its store, whenever the need arose. The employer classified approximately 100 of the floaters as "regularly scheduled" floaters, and the remainder, as "on-call" floaters); *Professional Janitorial Service of Houston, Inc.*, 353 NLRB 595 (2008) (where floaters who covered for the housekeepers who are out sick, on vacation, or are absent for any other reason, were found not to share community of interest because the floaters do not work in any one location, and replace absent employees); *Allied Mechanical*, 349 NLRB 1327 (2007) (where the Board refers to an employee who was rehired to "a day-shift "floater" position, i.e., an employee who is not assigned to a specific machine but instead works on different machines as needed when other employees are out or when "hot jobs" come up."); *Allegany Aggregates, Inc.*, 327 NLRN 658 (1999) (involving among other things, a challenge to the ballot of an employee in a floater position, there is reference to the employee being hired as "a "floater," i.e., to work in whatever capacity he may be needed at a given time," and the record established that the employee performed numerous unit jobs, on an as needed basis, from dispatching to quality control testing to operating heavy equipment); *Everite Door Corp.*, 171 NLRB 56 (1968) (where the trial examiner indicated that the employer maintained "a position called a "floater," i.e., not attached to any particular crew or department but working wherever needed at the moment.")

## Debra Ellsmore- Community of Interest Analysis

The Petitioner excepts to the hearing officer's finding that Debra Ellsmore shares a community of interest with the other employees in the stipulated unit. As noted by the hearing officer, typical factors to be considered in determining whether certain employees share a community of interest with others include the degree of functional integration, common supervision, the nature of the employee skills and functions, interchangeability and contact among employees, work situs, and commonality of wages, hours and working conditions. *Publix Super Markets*, 343 NLRB 1023, 1024 (2004).

Initially, I note that the Petitioner does not except to the hearing officer's finding that Ellsmore is a regular part-time retail employee at the Flatbush Avenue store. Record evidence shows that Ellsmore is classified as a clerk/cashier and that she worked an average of four to five hours a week at the Flatbush Avenue store during the thirteen weeks prior to July 18, 2015 (the eligibility cut-off date). While Ellsmore's duties are narrower than the other retail employees, she performs the same kind of work by stocking and maintaining the Hallmark cards. Ellsmore assists customers in connection with Hallmark cards and when she is not at the Flatbush Avenue store, a cashier can provide that assistance to customers.

With regard to the Petitioner's assertion that Ellsmore works under separate supervision, the evidence shows that she receives potential work assignments from the district manager and other store managers; she is evaluated by her home store manager; and, she receives her wage increases from her home store manager. However, Ellsmore reports to the Flatbush Avenue store manager if she has any issues with a customer. She advises the Flatbush Avenue store manager if she needs to take a day off on a day that she is scheduled to work there and she also reports her schedule at the Flatbush Avenue store to the store manager.<sup>8</sup> While the Petitioner contends that Ellsmore has the option to accept or refuse a potential work assignment from the district manager, the evidence shows that Ellsmore already accepted the assignment at the Flatbush Avenue store and that she is expected to continue to regularly work there.<sup>9</sup> Thus, I do not find that the areas of separate supervision in the record are determinative of her bargaining unit status.

Record evidence shows that Ellsmore interacts with employees at the Flatbush Avenue store and she is invited to and occasionally attends store-wide meetings. In arguing that Ellsmore's contact with other employees at the Flatbush Avenue store is too minimal to support sharing a community of interest with them, the Petitioner notes that during her testimony, Ellsmore was only able to name five of her co-workers at the Flatbush Avenue location. While

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<sup>8</sup> The evidence shows that Ellsmore regularly works two days a week at the Flatbush Avenue store.

<sup>9</sup> I also note that the Board has found that an employee's ability to decline work is not determinative of employment status so as to exclude him/her from the unit. See e.g. *Arlington Masonry Supply Inc.*, 339 NLRB 817 (2003) (wherein the Board found the fact that a part-time driver can turn down work or is unscheduled is not determinative); *Mercury Distribution Carriers, Inc.*, 312 NLRB 840 (1993) (wherein even assuming the employee does not call in every day seeking work and he has declined work on more than one or two instances, he was properly found to be included in the unit as a regular part-time employee); *Tri-State Transportation Co.*, 289 NLRB 356 (1988) (spare drivers' ability to reject work is not determinative of their employment status so as to exclude them from the unit).

being able to name employees one works with is not determinative of interaction, I recognize that according to the tally of ballots and the voter eligibility list, there are only approximately 10 eligible employees in the unit and Ellsmore listed half of them in her testimony.

With regard to wages, hours and working conditions, the Petitioner admits that Ellsmore has similar hours and wages as employees in the stipulated unit, which is more significant than the evidence that Ellsmore does not have a locker at the Flatbush Avenue store and that she needs a manager override when she clocks in to work. The Petitioner also admits that Ellsmore is functionally integrated with employees in the stipulated unit.

In these circumstances, I find in agreement with the hearing officer that Ellsmore shares a community of interest with other employees in the stipulated unit. Accordingly, I find that the challenge to the ballot of Debra Ellsmore should be overruled and her ballot counted.

### **The Employer's Exceptions**

As noted above, the Employer excepts to the hearing officer's finding that the challenge to Kane Chow's ballot should be sustained.

#### **Kane Chow -- Community of Interest**

The hearing officer found that Kane Chow does not share a sufficient community of interest with other unit employees to be an eligible voter. In this regard, the hearing officer found that after May 30, 2015 (and before the election took place), Chow ceased to work with sufficient regularity at the Flatbush Avenue store to share a community of interest with the remaining unit employees. The hearing officer also found that Chow worked under separate supervision, noting that he reported directly to the district manager for his job assignments and his schedule.<sup>10</sup> The Employer excepts to the above findings and asserts that the hearing officer erred by deviating from the formula for determining voter eligibility set forth in *Davison-Paxon Co.*,<sup>11</sup> and by finding that there were special circumstances justifying the abandonment of the *Davison-Paxon* formula.

In determining whether an employee is a regular part-time employee or a casual employee with intermittent and irregular employment, the Board considers factors such as regularity and continuity of employment, tenure of employment, and similarity of work duties. The individual's relationship to the job must be examined to determine whether the employee performs unit work with sufficient regularity to demonstrate a community of interest with the

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<sup>10</sup> Chow reported to both the district manager and the store managers when he needed to take off for more than one day.

<sup>11</sup> 185 NLRB 21 (1970)

remaining employees in the bargaining unit.<sup>12</sup> Similarly, with regard to unit placement of floaters, the Board has indicated factors of length, regularity, and currency of their employment are at issue. See e.g., *Shoa, Inc.*, 140 NLRB 1379 (1963).<sup>13</sup> I note that regularity does not require a fixed schedule; rather this requirement can be satisfied by evidence that an employee has worked a substantial number of hours during the relevant period prior to the eligibility date and there is no showing that such work has been only on a sporadic basis. *Pat's Blue Ribbons, supra* at fn. 6.<sup>14</sup> Further, while the Board looks to the expectancy of continued employment as a factor in determining whether an employee is a regular part-time employee,<sup>15</sup> it is well settled that: “[T]he test as to whether part-time employees should be included is not based on the expectancy of permanent employment but is based on the part-time employees' relationship to the job--whether they perform unit work and whether they have a sufficient regularity of work to give them a community of interest with full-time employees with respect to wages, hours, and other working conditions.” See e.g., *System Auto Park & Garages, Inc.*, 248 NLRB 948 (1980).

With the exception of certain employees whose exclusion is required by established Board policy such as temporary or seasonal employees, any contingent or extra employee who regularly averages 4 or more hours per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the unit and may vote in the election. *Davison-Paxon Co., supra*.<sup>16</sup> In *Davison-Paxon*, the Board considered that the employees who worked on an irregular basis performed the same work as regular employees and were under the same supervision. It also considered the employees' benefits before applying the above formula to determine that they had a sufficient community of interest for inclusion in the unit. *Id* at 23-24.

As noted above, the language of the stipulation has been found ambiguous as applied to

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<sup>12</sup> See e.g., *Continental Winding Co.*, 305 NLRB 122 (1991) (where the Board found that while the disputed employees worked in unit jobs, the burden of showing that the employees worked continually and regularly for the employer with expectations of continued employment had not been met and thus they were excluded as casual employees); *Pat's Blue Ribbons*, 286 NLRB 918 (1987) (where the Board reasoned that because the disputed employee worked a substantial number of hours between her date of hire and the end of the eligibility period and because during that period she performed the same work under the same supervision and received a rate of pay equivalent to the rate received by full time employees, it found, contrary to the hearing officer, that she shared a community of interest with the full time employees with regard to wages, hours and other terms and conditions of employment and was eligible to vote).

<sup>13</sup> Further, even in *Trump Taj Mahal Associates*, 306 NLRB 294 (1992), cited in the Employer's exceptions in arguing that the hearing officer erred in deviating from the Davison-Paxon formula, the Board specifically found that the disputed employees performed unit work in determining whether or not on-call employees should be included in the bargaining unit.

<sup>14</sup> See also, *Newton-Wellesley Hospital*, 219 NLRB 699, 703 (1975) (where on-call nurses who did not work pursuant to a prearranged schedule shared a strong community of interest with the nurses in the unit as they worked on a regular, though unscheduled, basis most pay periods, performing the same tasks, in the same areas).

<sup>15</sup> See, e.g. *Munice Newspaper, Inc.*, 246 NLRB 1088 (1979).

<sup>16</sup> In *Davison-Paxon*, the employer was unable to furnish precise information as to the work schedules of employees in the disputed categories.

the disputed employees herein and the intent of the parties cannot be discerned.<sup>17</sup> Thus, in determining the voting eligibility of Chow, I note that there is an issue of unit inclusion, and the community of interest analysis is required by the third step of the Caesar's Tahoe test. *Compare, Woodward Detroit CVS, LLC*, 355 NLRB 1115 (2010) (where unit inclusion was not at issue, and the parties stipulated that if the disputed employee's hours were sufficient to classify her as a regular-part-time employee, then she would be included in the unit). The issue of inclusion of employees is resolved by the extent such employees are part of a cohesive group of individuals who possess a mutual interest in their working conditions.

With regard to separate supervision, Chow receives his assignment to a particular store directly from the district manager. Chow does not advise his home store manager when the district manager tells him to report to a particular location. When Chow reports to a store, he reports to the store manager or shift supervisor on duty. More specifically, when he arrives at the store, is "supervised" by the store manager.<sup>18</sup> Chow tells the store manager that he was sent by the district manager; the store manager tells Chow what needs to be done and then they work together on a plan to resolve the inventory issue. Chow sends the district manager pictures of the store when his job is complete and the district manager sends him to another store. Chow speaks directly to the store manager when he needs to take a day off. If he needs to take more than a day off, he speaks to both the store manager and the district manager. Chow also indicated that the Flatbush Avenue store manager and the district manager called him into work on the day of the election. While Chow is evaluated by his home store manager, he indicates that his home store manager seeks input from other managers when deciding his yearly wage increase. Thus, there is an indication that when working at the Flatbush Avenue store, Chow's wages and working conditions are subject to being affected by the same store manager as other bargaining unit employees. The record indicates that Chow received one verbal warning, dated November 26, 2011, issued by a supervisor for being late, but it is unclear where the initiating supervisor was based. The surrounding circumstances, such as information identifying the store where the lateness incidents were reported to have taken place and who reported the lateness incidents, are

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<sup>17</sup> In comparing challenged employee Chow to the unit description herein, I note that the unit description includes "All regular full-time and part-time retail employees, including Clerk/Cashiers. ." While the both Henry-Aughton and Ellsmore were determined to be regular part-time retail employees, the hearing officer found Chau ceased to work with sufficient regularity at the Flatbush Avenue store on a date before the parties entered into the Stipulated Election Agreement herein. Thus, when applying the language of the stipulation to Chow, yet another ambiguity is revealed. The unit description is subject to more than one interpretation, i.e., by specifying clerk/cashiers as being included, the parties may have intended that all such employees (i.e., clerk/cashiers) be part of the unit without qualification. On the other hand, the parties may have intended that the reference to clerk/cashiers is qualified by the term "all regular full-time and part-time retail employees." Thus, viewing the inclusions alone, it is unclear whether the parties intended to include all Clerk/Cashiers, regardless of the regularity of their work or to include only those Clerk/Cashiers who are regular full-time or part-time retail employees. See e.g., *Gala Food Processing*, 310 NLRB 1193, 1194 (1993) (finding stipulation ambiguous where subject to at least two interpretations). Further analysis is not necessary in this regard however inasmuch as the ambiguity raised with regard to the word floaters remains and no exception is raised as to the ambiguity of the stipulation as related to Chow.

<sup>18</sup> Senior Advisor to Human Resources Valentin testified that when an employee works at a store other than their home store, they are supervised by the manager on duty at the store they are working at. Chow initially testified that he is "supervised" by the store manager on duty but during later questioning, when asked how he was supervised by those on duty, he said testified, "They – don't supervise me. We just come up with a detailed plan on what to do. .The supervisor doesn't really supervise me on what to do. Only if there's a certain change of plan, then they'll tell me."

not set forth in the record. In light of the foregoing, the evidence tends to indicate that Chow is subject to supervision by the district manager, his home store manager and also the store manager of Flatbush Avenue when he is working at the Flatbush Avenue store. Thus, when he is working at the Flatbush Avenue store, it appears he is to some extent subject to the same supervision as the unit employees.

With regard to Chow's duties in the Flatbush Avenue store, the evidence shows that Chow organized inventory, stocked the selling floor and set up merchandise on the sales floor in accordance with "plan-o-grams," i.e., specific instructions and pictures of how the area should look created by corporate administration. The evidence shows that other unit employees also do plan-o-grams and perform stock duties. Thus, the evidence indicates Chow's skills and functions are similar to those of the other unit employees.<sup>19</sup>

In addition, as noted by the hearing officer, Chow's working conditions are similar to those of the other unit members and he interacted, albeit not extensively, with other employees during his time at the Flatbush Avenue store.

With regard to regularity and continuity of work, Chow started working at the Flatbush Avenue store in February of 2015. Chow was sent to the Flatbush Avenue store to organize its stock room and update inventory at the store, i.e., "to deal with a backlog in getting new merchandise to the selling floor, and getting old merchandise removed from the selling floor," as noted in the Employer's brief in support of its exceptions. Chow testified that "it took a while, two to three months to clean up."<sup>20</sup> In doing so, Chow worked a sufficient number of hours during the relevant period prior to the eligibility date to satisfy the *Davison-Paxon* formula. In this regard, as noted by the hearing officer, Chow worked an average of 11 hours per week at the Flatbush Avenue store during the thirteen weeks before the eligibility date (July 18, 2015). However, the evidence shows that after May 30, 2015, Chow ceased working with the same regularity at the Flatbush Avenue store. Indeed, the record indicates that once Chow completes his work at an assigned location, he sends District Manager Blake pictures of his work and he receives approval to move on. And, the evidence indicates that Chow has only worked at the Flatbush Avenue store two days since May 30, 2015,<sup>21</sup> that he did not expect to return to the store until October or November, and thereafter not for another three months.<sup>22</sup> Thus, the evidence does not indicate that his work since May 30, 2015 is anything but sporadic and his relationship to the job at the Flatbush Avenue store is not the same as other regular bargaining unit employees. Accordingly, I find that this factor outweighs the other factors and I agree with

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<sup>19</sup> Chow testified at one point that he is basically an inventory specialist; however, the evidence is clear that he is classified as a clerk/cashier. There is no contention that he is a pharmacy inventory specialist, a title specifically excluded from the unit.

<sup>20</sup> "Cleaning up" refers to organizing and processing stock at the store.

<sup>21</sup> I note that the evidence shows that one of the two days was August 7, 2015, the day of the election. Chow testified that he was called in to help move "everything" upstairs. In this regard, I note that in the Stipulated Election Agreement, the parties agreed to hold the election in the basement of the Flatbush Avenue store, where Chow had worked with stock at the store.

<sup>22</sup> Chow also testified that he expects to return to the Flatbush Avenue store in about a month or two and stay for one or two weeks; thereafter he generally returns to a store every three months for a week or two. Chow also testified that he goes to every store to check in without being told by the district manager.

the hearing officer's finding that Chow does not share a community of interest with the other bargaining unit employees.

#### The allegation that the Hearing Officer's Findings Disenfranchise Chow

The Employer contends that the hearing officer's rulings effectively disenfranchise Chow as there is no unit in which Chow would be an eligible voter. The Petitioner argues that the record evidence is insufficient to support such a claim. While the hearing officer's finding does find that Chow is ineligible to vote at the Flatbush location, the evidence is insufficient to support a finding that he would be ineligible to vote no matter when or for which store a representation petition is filed, as asserted by the Employer.

Accordingly, I find in agreement with the hearing officer that the challenge to the ballot of Kane Chow should be sustained.

#### **CONCLUSION**

Based on the above and having carefully reviewed the entire record, the hearing officer's report and recommendations, and the exceptions and arguments and answering documents made by the Petitioner and the Employer, I overrule the parties' exceptions. I adopt the hearing officer's recommendations to overrule the Petitioner's challenges to the ballots of Debra Ellsmore and Debbie Henry-Aughton and that their ballots be opened and counted. I also adopt the hearing officer's recommendation to sustain the Petitioner's challenge to the ballot of Kane Chow, and that a Revised Tally of Ballots issue.

#### **REQUEST FOR REVIEW**

Pursuant to Section 102.69 (c) (2) of the Board's Rules and Regulations, any party may file with the Board in Washington, D.C., a request for review of this decision. This request for review must conform with the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by Washington by December 2, 2015. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must

serve a copy on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Date November 18, 2015

A handwritten signature in cursive script that reads "James G. Paulsen". The signature is written in black ink and is positioned above a horizontal line.

James G. Paulsen  
Regional Director, Region 29  
National Labor Relations Board  
Two MetroTech Center, Suite 5100  
Brooklyn, New York 11201

# EXHIBIT B



**Excluded:** All floaters, seasonal employees and pharmacy employees, including pharmacists, pharmacy interns, inventory specialists, and pharmacy technicians, and guards, managers and supervisors as defined in the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the payroll period ending July 18, 2015, including employees who did not work during that period because they were ill, on vacation, or were 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, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (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 began more than 12 months before the election date who have been permanently replaced.

**6. VOTER LIST.** Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.7.

**7. THE BALLOT.** The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated.

The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by Local 338 Retail, Wholesale and Department Store Union (RWDSU), United Food and Commercial Workers International Union (UFCW)?" The choices on the ballot will be "Yes" or "No"

**8. NOTICE OF ELECTION.** The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or

Initials: \_\_\_\_\_

**8. NOTICE OF ELECTION.** The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

**9. ACCOMMODATIONS REQUIRED.** All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

**10. OBSERVERS.** Each party may station an equal number of authorized, nonsupervisory-employee observers at the polling places to assist in the election, to challenge the eligibility of voters, and to verify the tally.

**11. TALLY OF BALLOTS.** Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

**12. POSTELECTION AND RUNOFF PROCEDURES.** All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

CVS Albany, LLC  
(Employer)

Local 338, Retail, Wholesale and  
Department Store Union (RWDSU), United  
Food and Commercial Workers  
International Union (UFCW)  
(Petitioner)

By /s/ Daniel Schudroff 7/22/2015  
(Name) (Date)

By /s/ Jae Chun 7/22/2015  
(Name) (Date)

\_\_\_\_\_  
(Union)

Recommended: *Naoki P. Fujita* 7/22/2015  
NAOKI P. FUJITA, Field Attorney (Date)

By \_\_\_\_\_  
(Name) (Date)

Date approved: \_\_\_\_\_

*12 1 24 Paulsen / TOR* 7/23/2015  
Regional Director, Region 29  
National Labor Relations Board

# EXHIBIT C

**Jae Chun**

**From:** Cooper, Michael R. (NYC) <CooperM@JacksonLewis.com>  
**Sent:** Wednesday, September 02, 2015 1:35 PM  
**To:** Jae Chun  
**Subject:** FW: Front Store Schedules  
**Attachments:** olena schedule request.zip; FS10041.zip

Mr. Chung,

The three challenged employees worked at the following stores at some point since January 1, 2015:

- 00549 - Metropolitan Ave - Ridgewood
- 01107 - Myrtle Ave - Glendale
- 02127 - Astoria (closed)
- 02141 - Kings Highway - Brooklyn
- 02280 - Wyckoff Ave - Ridgewood
- 02431 - Avenue U - Brooklyn
- 02436 - Pennsylvania Ave - Brooklyn
- 02442 - Far Rockaway
- 02812 - Flatbush Ave - Brooklyn
- 02906 - Flatlands Ave - Brooklyn
- 03146 - Steinway St - Astoria
- 05773 - Grand Ave - Maspeth
- 07881 - Metropolitan Ave - Forest Hills
- 10041 - 23rd & 10th NYC
- 10407 - Mulberry St NYC

The schedules for those stores from 1/1/15 forward are in excel spreadsheets, one per store, in the attached zip files. Note that store 10041 has its own zip file.

Please also note that in these spreadsheets the job title column lists CURRENT title. This means that if someone had a different title earlier in the year than they do today, that would not show up. And it means that those names with no title are employees who are no longer employed.

Michael R. Cooper  
Attorney at Law  
Jackson Lewis P.C.  
666 Third Avenue  
New York, NY 10017

212-545-4009 | Direct  
212-972-3213 | Fax

[cooperm@jacksonlewis.com](mailto:cooperm@jacksonlewis.com)

[www.jacksonlewis.com](http://www.jacksonlewis.com)

**Representing management exclusively in workplace law and related litigation.**

**Confidentiality Note:** This e-mail, and any attachment to it, contains privileged and confidential information intended only for the use of the individual(s) or entity named on the e-mail. If the reader of this e-mail is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that reading it is

Exh. No: 3 Received 1 Rejected       
Case No.: 29-RC-155927  
Case Name: CVS Albany  
No. Pgs:      Date: 9-3-15 Rep.: AM

JOINT 1

# EXHIBIT D

**In The Matter Of:**  
*CVS ALBANY, LLC. d/b/a CVS and  
LOCAL 338, RWDSU/UFCW*

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*Vol. 1  
September 3, 2015*

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*Burke Court Reporting, LLC  
1044 Route 23, Suite 316  
Wayne, NJ 0747  
(973) 692-0660*

Original File CVS Albany vol 1.prn

**Min-U-Script®**

BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

CVS ALBANY, LLC. d/b/a CVS,           Case No. 29-RC-155927

Employer,

and

LOCAL 338, RWDSU/UFCW,

Petitioner.

The above-entitled matter came on for hearing pursuant to Notice, before SHAO CHEN, Hearing Officer, at the National Labor Relations Board, Region 29, 2 Metro Tech Center, in Suite 500, Brooklyn, New York 11201, on Thursday, September 3, 2015, at 9:30 a.m.

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470

## A P P E A R A N C E S

On behalf of the Employer:

MICHAEL R. COOPER, ESQUIRE  
Jackson, Lewis, P.C.  
666 Third Avenue  
New York, New York 10017  
(212) 545-4000

On Behalf of the Petitioner:

JAE CHUN, ESQUIRE  
PARIS NICHOLLS, ESQUIRE  
Friedman & Anspach  
1500 Broadway  
Suite 2300  
New York, New York 10036  
(212) 354-4500

BURKE COURT REPORTING, LLC  
1044 Route 23 North, Suite 316  
Wayne, New Jersey 07470

## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Adrian Caddle	21	49			29
Mavis L. Wilson	60	76			
Adrian Caddle	80	81	83	84	
Mavis L. Wilson	85				
Temanie Barthelemy	86	93			
Jason Ryan	96	101			
Ana Valentin	107	121	146	148 151	

BURKE COURT REPORTING, LLC  
 1044 Route 23 North, Suite 316  
 Wayne, New Jersey 07470

1 MR. CHUN: Thank you.

2 HEARING OFFICER CHEN: Ms. Mavis, you may step down.

3 (Witness excused.)

4 HEARING OFFICER CHEN: Off the record.

5 (Whereupon, a recess was taken from 1:26 pm. to 1:31 p.m.)

6 HEARING OFFICER CHEN: On the record.

7 MR. CHUN: I believe that now I'd like to recall Adrian  
8 Caddle to the stand.

9 HEARING OFFICER CHEN: Adrian Caddle, you are reminded  
10 that you are still under oath.

11 Whereupon,

12 ADRIAN CADDLE,  
13 was recalled as a witness by and on behalf of the Petitioner  
14 and, having been previously duly sworn, was examined and  
15 testified further on his oath, as follows:

16 DIRECT EXAMINATION

17 BY MR. CHUN:

18 Q. Do you know what a floater is?

19 A. You know, to be a floater is someone that basically goes  
20 from one location to the next.

21 Q. Have you ever heard your manager or managers from CVS  
22 speak on what a floater is?

23 A. No.

24 Q. Has CVS as a company ever defined what a floater is to  
25 you?

1 Q. 2015?

2 A. 2015, correct.

3 Q. Do you know an employee named Jean Camara?

4 A. Yes, I know him. I worked a couple of times with him.

5 Q. Do you know if he works only in Store 2812?

6 A. He worked there, but he used to do other -- help in  
7 other stores.

8 Q. On a regular basis?

9 A. Not what I know. I don't know if he -- if it's on a  
10 regular basis.

11 Q. Are you aware that the pay period ending January 10th,  
12 2015 Jean Camara worked 40 hours in Store 1906?

13 A. No, I didn't know that.

14 MR. COOPER: I have no further questions.

15 HEARING OFFICER CHEN: Do you know what a floater is?

16 THE WITNESS: I assume it is somebody that goes from  
17 store-to-store to help or to cover a shift. That's the way  
18 that I asked somebody.

19 HEARING OFFICER CHEN: And where did you get that  
20 definition from?

21 THE WITNESS: For what I know.

22 HEARING OFFICER CHEN: From what you know?

23 THE WITNESS: I believe it's a floater is something on  
24 that that you use it in the category of the store. like if  
25 you're talking about the store, it's somebody that goes from

1 places to some place-to-place.

2 HEARING OFFICER CHEN: Have you ever heard CVS managers  
3 or shift supervisors use the term floaters?

4 THE WITNESS: No.

5 HEARING OFFICER CHEN: Have you ever heard them define  
6 what a floater is?

7 THE WITNESS: No.

8 HEARING OFFICER CHEN: Have you ever worked in other  
9 stores while your home store was Flatbush?

10 THE WITNESS: No, I don't.

11 HEARING OFFICER CHEN: Okay. Do you know anyone at CVS  
12 who is called a floater?

13 THE WITNESS: Maybe someone in the Pharmacy. Sometimes  
14 the pharmacies would call and say they need a floater.

15 HEARING OFFICER CHEN: Okay, I have no further  
16 questions.

17 MR. COOPER: Nothing here.

18 MR. CHUN: No questions.

19 HEARING OFFICER CHEN: Okay. You can step down. Thank  
20 you.

21 (Witness excused.)

22 MR. CHUN: Okay. Union calls Jason Ryan.

23 HEARING OFFICER CHEN: Please raise your right hand.  
24 Whereupon,

25 JASON RYAN,

1 HEARING OFFICER CHEN: I have a question on Joint  
2 Exhibit 8. Do you recall ever seeing the weekly schedules --  
3 well, first take a look and see -- what do you see here? Is  
4 this the weekly schedule that is posted in the back?

5 THE WITNESS: Yeah.

6 HEARING OFFICER CHEN: Okay. Had you ever seen what  
7 the schedule status is and do you recall it ever said --

8 THE WITNESS: No, I never paid attention to that.

9 HEARING OFFICER CHEN: Okay. And have you ever heard  
10 the term floaters used in the store?

11 THE WITNESS: I heard it once.

12 HEARING OFFICER CHEN: From who?

13 THE WITNESS: One of the managers that was there,  
14 Walter.

15 HEARING OFFICER CHEN: Uh-huh.

16 THE WITNESS: He used it and it was like what's that?  
17 And then he was like, you know.

18 HEARING OFFICER CHEN: What did he say?

19 THE WITNESS: He said it's a person that goes from  
20 store-to-store.

21 HEARING OFFICER CHEN: And what was the context of him  
22 referencing floaters?

23 THE WITNESS: Because I was arguing about hours and he  
24 was saying that we don't have any hours. And I'm like why  
25 don't -- why we don't have hours and we have other people in

1 the store getting hours? And that's when the whole topic  
2 came about floaters.

3 HEARING OFFICER CHEN: Can you tell me the full  
4 conversation to the best of your recollection?

5 THE WITNESS: I came in and I saw my schedule and I saw  
6 a lot of new people, new faces in the store. And I went to  
7 him and I asked him what's going on? And he was like what do  
8 you mean? And I was like why is there all these people at  
9 the store and we who belong to the store don't have any  
10 hours?

11 And he was like they're just floaters, which means that  
12 they -- their store don't have any hours so they come to our  
13 store. I said but that doesn't make any sense to me because  
14 we don't have any hours either supposedly, you know. And  
15 then he was like Jay's like not looking out to cover you,  
16 you're not a manager. I go okay and that was the end of the  
17 conversation.

18 HEARING OFFICER CHEN: Who was around for this  
19 conversation?

20 THE WITNESS: Mischa, who is no longer with CVS and  
21 myself and Walter along with Gennaro and -- I'm trying to  
22 remember his name, the other supervisor.

23 HEARING OFFICER CHEN: And when did this occur?

24 THE WITNESS: This occurred like about January. Yeah.

25 HEARING OFFICER CHEN: Do you recall if it's after New

1 Year's?

2 THE WITNESS: Yes.

3 HEARING OFFICER CHEN: Do you know Walter's full name?

4 THE WITNESS: Walter Rodriguez.

5 HEARING OFFICER CHEN: Do you know if he's still  
6 employed?

7 THE WITNESS: I don't know.

8 HEARING OFFICER CHEN: I have no further questions.

9 MR. COOPER: Nothing further.

10 MR. CHUN: No questions.

11 HEARING OFFICER CHEN: Thank you. You are excused and  
12 step down.

13 (Witness excused.)

14 MR. CHUN: All right. The Union's going to rest at  
15 this point subject to a right to call them as rebuttal  
16 witnesses and our right to I guess question the subpoenaed  
17 witnesses should we not be satisfied with what the Employer's  
18 going to be presenting here at all.

19 HEARING OFFICER CHEN: Okay. All right, Employer may  
20 call its first witness.

21 MR. COOPER: We're not going to call any of the three  
22 subpoenaed witnesses outstanding.

23 HEARING OFFICER CHEN: Okay.

24 MR. COOPER: That makes no sense.

25 MR. CHUN: Well, you know what? In that case I think

1 some work with --

2 MR. COOPER: What's the relevance --

3 A. -- kids, with -- I mean, you know.

4 Q. I guess during all of that time that you were working in  
5 Operations or HR did you ever hear of the word floater?

6 MR. COOPER: Objection. What on earth does that have  
7 to do with CVS?

8 THE WITNESS: I think if we had floaters anywhere --

9 BY MR. CHUN:

10 Q. No, no, your understanding of the word floater.

11 A. Oh, like general English knowledge, yeah, I know what a  
12 floater is.

13 Q. Well, what do you think it is? What was it?

14 A. Somebody who floats, right? Somebody who, you know,  
15 goes multiple places. They kind of float around, they're  
16 kind of here, there and everywhere I mean.

17 Q. Is an employee who's not regularly assigned to a certain  
18 location would you say that's a floater?

19 A. That could be the definition of one, yeah.

20 Q. Someone who doesn't have a fixed schedule at any  
21 particular location would that be a floater?

22 A. Well, no because we don't really do fixed schedules so  
23 you could --

24 Q. No, not we as in, you know, CVS.

25 MR. COOPER: Well, let the witness answer the question.

**In The Matter Of:**  
*CVS ALBANY, LLC. d/b/a CVS and  
LOCAL 338, RWDSU/UFCW*

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*Vol. 2  
September 10, 2015*

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*Burke Court Reporting, LLC  
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Original File CVS Albany vol 2.prn

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BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

CVS ALBANY, LLC. d/b/a CVS,           Case No. 29-RC-155927

Employer,

and

LOCAL 338, RWDSU/UFCW,

Petitioner.

The above-entitled matter came on for hearing pursuant to Adjournment, before SHAO CHEN, Hearing Officer, at the National Labor Relations Board, Region 29, 2 Metro Tech Center, in Suite 500, Brooklyn, New York 11201, on Thursday, September 10, 2015, at 10:30 a.m.

## A P P E A R A N C E S

On behalf of the Employer:

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## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS	VOIR DIRE
Debbie Henry- Aughton	170	193	200	203	
Kane Chow	205	219	229	230	
Debra Ellsmore	232	250	252 257	252 258	

1 interested in jumping around from store-to-store and doing  
2 these builds so --

3 Q. What does that mean doing the builds?

4 A. With the new store build, basically.

5 Q. What is that? I don't --

6 A. Like basically when CVS opens a new store --

7 Q. Right.

8 A. -- and all the -- all the shelving is in and all the  
9 -- you know, everything is being built, construction company  
10 builds everything and all of us just go in and do the  
11 merchandising.

12 Q. So since the first time he asked you to help out with  
13 the building how many different stores have you -- how many  
14 different CVS stores have you gone to to do this building?

15 A. To do the builds?

16 Q. Right.

17 A. So far?

18 Q. Yes.

19 A. So far. Well, I did maybe 12 or 14 so far.

20 Q. And is it always the District manager who tells you  
21 which store to go to?

22 A. Yes, it's always him. He always tells my manager to  
23 send me to that store and that's when I go.

24 Q. So who is your District manager now?

25 A. Roy.

1 Q. Roy Blake?

2 A. Yes.

3 Q. And you say Roy Blake tells your manager? Who is your  
4 manager?

5 A. Well, we haven't had any new store builds lately so he  
6 didn't send me anywhere so far.

7 Q. He hasn't sent you anywhere? So what are you doing now?

8 A. So what I'm doing right now, I'm basically inventory  
9 specialist. Basically I jump around, like I said plan-o-  
10 gram, clean up back rooms, organize it.

11 Q. Okay.

12 A. Try to make it still workable again, you know, like it's  
13 organized and people could get what they need easily.

14 Q. Right.

15 A. And that's what I do.

16 Q. And where do you get the instruction to go to a  
17 particular location?

18 A. Once my District manager sends me to the location I work  
19 a plan with the store manager in that location and we work  
20 out a plan how to do this, how to do that, and that's -- then  
21 after that it's just procedure. And I know the procedure of  
22 what to do, how to get it working again.

23 Q. Okay, but you're getting your location assignments, I  
24 guess, directly from Mr. Blake?

25 A. I'm sorry?

1 Q. You're getting your location assignments directly from  
2 Mr. Blake?

3 A. Yeah.

4 Q. And how is that communicated? Do you talk by phone?

5 A. By text.

6 Q. By text?

7 A. By text and phone, yes.

8 Q. And when he does that do you have to speak to someone at  
9 Store 549?

10 A. No, no, no.

11 Q. So you get the direct instruction from Mr. Blake to go  
12 to a particular location?

13 A. Um-hum.

14 Q. And what's the first thing you do when you go to that  
15 location?

16 A. I speak with the store manager.

17 Q. Okay.

18 A. And I tell them I was sent by Roy and I tell them what's  
19 going on, what do you need, what do you need help with and  
20 they tell me what's going on, tell me the situation and then  
21 I work with them on a plan with that.

22 Q. Do you recall going to the Flatbush location this year?

23 A. Flatbush, yes.

24 Q. And can you explain what happened when you first arrived  
25 at the location?

1 A. Flatbush, Flatbush location. Okay, that store. Well,  
2 that first time we went or I went the store was in a mess,  
3 everything -- every plan-o-gram out of date and I was sent  
4 there to update everything, clean up the back room and that's  
5 pretty much what I did.

6 Q. Do you know names of any of the employees at the  
7 Flatbush location?

8 A. When I first started?

9 Q. No, now.

10 A. Oh, now? There's Jessica, there's Oscar.

11 Q. Okay, that might be the Flatlands location.

12 A. Oh, Flat -- I'm confused which store you're talking  
13 about.

14 Q. The store number, I believe, is 2812.

15 A. Oh, 2812. Oh, that store, the first time I went, yeah,  
16 pretty much everything was disarray and yeah, that's pretty  
17 much it. It was disarray and everything wasn't updated so  
18 that's what I did.

19 Q. Do you recall speaking to anyone at that store when you  
20 arrived?

21 A. I mean I don't know everyone's name.

22 Q. Do you know anyone's name there?

23 A. Hmm?

24 Q. Do you know anyone's name at the 2812 store?

25 A. I know Paul. He works as the store manager over there.

1 And then what is it, Adrian, Adrian --

2 Q. Adrian Caddle, the shift supervisor?

3 A. Yeah, yeah.

4 Q. Do you recall having a conversation with him when you  
5 arrived at the 2812 store this year?

6 A. Yeah, we just talked normally, conversation.

7 Q. All right.

8 A. I mean that's the only name I can recall right now.  
9 It's just -- I'm not very sociable so I just do what I got to  
10 do and just finish it.

11 Q. Okay. So what did you do at the 2812 store? What did  
12 you do at the 2812 store this year?

13 A. What did I do?

14 Q. Yeah.

15 A. I just -- like I said, I just did a plan-o-gram, updated  
16 everything. The previous store manager made a mess of the  
17 store and there was a lot of stuff down there. It took a  
18 while, maybe two, three months to clean up.

19 Q. And you're talking about the basement when you say down  
20 there?

21 A. The basement, the plan-o-grams and everything.

22 Q. And Roy Blake told you to go to that store?

23 A. Yes.

24 Q. And once you were done with that store did Roy Blake  
25 send you any -- somewhere else?

1 A. Yes, he did.

2 Q. Where?

3 A. I forget the store. I don't remember which store he  
4 sent me to.

5 Q. Okay.

6 A. I know another store in Queens, but I'm not sure which  
7 one was it.

8 Q. But you moved to another CVS store and do you recall  
9 what you did at that new CVS store?

10 A. Same thing.

11 Q. And then were you moved around again?

12 A. I moved around again.

13 Q. Okay. So you moved around several times after you  
14 finished with the Flatbush --

15 A. Yeah.

16 Q. -- 2812 store?

17 A. Ummm.

18 Q. Yes?

19 A. Yes.

20 Q. And doing the same thing?

21 A. Doing the same thing and then until there was an event  
22 called inventory pre-count. And the inventory we basically  
23 count everything in the store and get like a -- I don't know,  
24 it's like a detailed count of the store merchandise and  
25 everything.

1           That's what I also do. I count the store, get it ready  
2 to count the back room, organize everything, count the back  
3 room and then help the store ready so the employees would  
4 work on the sales floor just basing -- you know, make sure  
5 everything's organized and I just work in the back room.

6 Q.    Are there any days when you're going from store-to-store  
7 or are you spending the whole day at a particular store?

8 A.    I'm spending at least 35, 40 hours per week in each  
9 store. I usually stay like a month or a month and a half  
10 long in each store and move on to the next.

11 Q.    And when you're working at these stores, are you working  
12 with someone else who's regularly working at those stores or  
13 are you usually by yourself?

14 A.    I'm usually by myself.

15 Q.    Okay.

16 A.    Usually whatever instruction, whatever the plan. I work  
17 with the manager so the manager at that point, I just  
18 continue work with it.

19 Q.    And once you're done at the store what's the procedure?  
20 Once you're satisfied with the work you did, what do you do?

21 A.    Once I'm done with it and then I just let my boss know,  
22 let Roy know.

23 Q.    Roy Blake?

24 A.    Yeah. I let him know, I let him know --

25 Q.    Do you text him or you call him?

1 A. Yeah, I fax him, I send him pictures and he says okay.  
2 This is how the store it is and I'm done with this store.  
3 And then he sends me to the next.

4 Q. So you send him a picture of the work you did and he  
5 says okay?

6 A. Yeah.

7 Q. And then he assigns you to the next store?

8 A. Yeah, pretty much.

9 Q. Do you recall casting a ballot in the Union election at  
10 the Flatbush store?

11 A. Yeah.

12 Q. Were you scheduled to work at that store that day?

13 A. Yeah.

14 Q. You were?

15 A. I worked on Tuesday.

16 Q. On what?

17 A. I worked on Tuesday.

18 Q. I believe again, the Union election took place on August  
19 7th?

20 A. Yeah, yeah, yeah. I wasn't scheduled to work that day.

21 Q. Did you work elsewhere, anywhere on that day?

22 A. No, I just go -- I just went in, Paul needed help for a  
23 few hours so I just jumped in early and helped him out a  
24 little bit during the election day and then I voted.

25 Q. How did you know that Paul needed help?

1 A. Because he called me.

2 Q. Paul called you?

3 A. Yeah.

4 Q. He told you to come and help at the store?

5 A. Yeah. And then Roy also told me to. He needed help a  
6 little bit on that day so I just jumped in.

7 Q. So Roy called you and told you he needs your help at the  
8 Flatbush location on August 7th?

9 A. Yeah.

10 Q. So what did you do? What work did you do that day?

11 A. Well, basically all -- we had all the employees coming  
12 in. They were clocking in for four hours so basically what I  
13 did was just try to get everything upstairs, bring everything  
14 upstairs and that was what I did that day.

15 Q. During that week did you work at that store on other  
16 days?

17 A. That week? I worked -- for that week I worked -- I  
18 worked a different store at the same time too.

19 Q. Okay. Did someone tell you to cast a vote on the Union  
20 election?

21 A. No. I heard there was a Union vote and Roy told me that  
22 my name was on the ballot and I said okay. So I went by and  
23 vote.

24 Q. What did you think that vote -- what did you think the  
25 outcome of that vote would be?

1 HEARING OFFICER: on the record.

2 BY MR. CHUN:

3 Q. Mr. Chow, how do you clock in when you go to these  
4 various stores?

5 A. I clock in, I usually ask for a manager override and a  
6 manual override. I don't follow -- I don't have a set  
7 schedule. I usually just tell them I'm going to be helping  
8 you guys out and I don't want to go over your hours and that  
9 sort of thing. They just manually override for me most of  
10 the time.

11 Q. Okay. So when you were working at the Flatbush store  
12 did you approach one of the managers or supervisors to  
13 override?

14 A. Yes, yes, most of the time.

15 Q. Do you recall who?

16 A. Hmmmm?

17 Q. Do you recall who you --

18 A. The first time? I mean most of the overrides come from  
19 Paul. I don't know. Farley, he's a shift there. Adrian,  
20 you know.

21 Q. Was there any CVS store where you don't need an  
22 override?

23 A. Just my home store.

24 Q. 549?

25 A. Yeah.

1 MR. CHUN: Okay. No more questions. Thank you.

2 MR. COOPER: I'd like to show the witness Joint Exhibit  
3 3.

4 CROSS EXAMINATION

5 BY MR. COOPER:

6 Q. So on the first page it shows that that's the end date  
7 for the week for pay so this is where you worked the 13 week  
8 period. So just starting for the first entry for the week  
9 ending April 18th you were at 2812?

10 A. Yeah.

11 Q. And what were you doing at 2812?

12 A. I was -- it was the -- it was clean out the whole entire  
13 back room, the whole basement basically.

14 Q. And that's what you did at 2812 --

15 A. Yes.

16 Q. -- whenever you worked there that --

17 A. Yeah, from that point on.

18 Q. Did you ever go on the selling floor?

19 A. More -- when I had to bring products out, yes, I have to  
20 go on the selling floor.

21 Q. And you would stock the selling floor?

22 A. I stock the selling floor. That's pretty much it.

23 Q. It also shows that you worked at 2280 at least one day.

24 A. Yeah.

25 Q. Do you remember what you did at 2280?

1 A. 2280, 2280 -- it was -- I don't recall. It's been a  
2 while back. I don't recall.

3 Q. Do you ever remember being at Store 2280?

4 A. I remember being in the Store 2280. I think it was just  
5 the building racks for the pharmacy records. That's what it  
6 was, yes.

7 Q. Then it shows that you spent a lot of time in Store  
8 2431.

9 A. Um-hum.

10 Q. What were you doing in 2431?

11 A. 2431, they needed an update on their plan-o-gram so  
12 that's what I did most of the time over there.

13 Q. and what is updating a plan-o-gram?

14 A. Basically corporate comes -- sends down a new plan-o-  
15 gram, a new set of instructions how to set it up, so they  
16 call me and I go set it up for them.

17 Q. Instructions on how to set up merchandise on the floor?

18 A. Yes, yes, yes.

19 Q. Did you ever do that at 2812?

20 A. 2812, yes, I did.

21 Q. And that's the same plan-o-gram process?

22 A. It's the same process, but you know, different  
23 instructions how to set it up.

24 Q. Okay. It shows you got holiday pay at 549. That's your  
25 home store, right?

1 A. Yes.

2 Q. And it shows you worked one day at 7881. Do you  
3 remember what you did there?

4 A. 7881, 7881 is -- it was -- it was a plan-o-gram update I  
5 believe it was there. I got called in for that, plan-o-gram  
6 updates.

7 Q. When you work in a different store do you basically do  
8 the same sorts of things in each store that you work in?

9 A. I'm sorry?

10 Q. Do you basically do the same kind of thing in each store  
11 that you're assigned to?

12 A. Yeah, pretty much.

13 Q. And in each of those stores you're on the selling floor  
14 to restock things?

15 A. Restock things, plan-o-gram, I have to be on the sales  
16 floor too.

17 Q. And when you're in the basement what do you do?

18 A. Organizing, cleaning out stuff like outdates, damages,  
19 stuff that's not on the shelf anymore.

20 Q. And do you work alongside other employees in the store  
21 at any time?

22 A. Yes, I do.

23 Q. What would you be doing when you're working alongside  
24 them?

25 A. Well, if -- well, they would sometimes help me. Like

1 let's say I need them to bring out this whole set of trays to  
2 work on, so that's why I would ask them for help. And then  
3 when they bring it up, you know, I would sometimes help them  
4 packing shelves. And I'd go down and get more to clean out  
5 the basement pretty much.

6 MR. COOPER: May I have a few minutes?

7 HEARING OFFICER: Yes. Off the record.

8 (Whereupon, there was a pause off the record.)

9 HEARING OFFICER: On the record.

10 BY MR. COOPER:

11 Q. So in the period covered by this exhibit you worked  
12 mostly in two stores, 2812 and 2431.

13 A. Yeah.

14 Q. When you report to a store who supervises you?

15 A. Whoever's on duty at that point.

16 Q. So it could be the store manager?

17 A. Store manager, shift manager, whoever is taking the  
18 shift at that point.

19 MR. COOPER: I have no further questions.

20 MR. CHUN: No more questions.

21 HEARING OFFICER: I have a few questions.

22 Can you go into more detail on how the people who are on  
23 duty supervise you?

24 THE WITNESS: They -- they don't supervise me. We just  
25 come up with a plan, a detailed plan on what to do and I

1 would tell them what to do and then I'm pretty much set on  
2 what I have to do in that store, what's my role and that's  
3 pretty much it. The supervisor doesn't really supervise me  
4 on what to do and what to do. Only there's a certain change  
5 of plan, then they'll tell me.

6 HEARING OFFICER: Have you ever encountered a situation  
7 where you need to call in sick or take a day off?

8 THE WITNESS: Yeah.

9 HEARING OFFICER: Who do you speak to when you need to  
10 take a day off?

11 THE WITNESS: I speak directly to the store manager and  
12 tell him I need a day off.

13 HEARING OFFICER: You call the store manager you're  
14 scheduled to work with.

15 THE WITNESS: Yeah, that I'm scheduled to work with in  
16 that store.

17 HEARING OFFICER: Do you tell this to anyone else?

18 THE WITNESS: I'm sorry?

19 HEARING OFFICER: So you ask the store manager for  
20 permission to take the day off?

21 THE WITNESS: Yeah.

22 HEARING OFFICER: Okay. Is there anyone else you  
23 report to regarding that?

24 THE WITNESS: If I need to take any longer days off I  
25 would speak to the store manager and Roy, tell him, you know,

1 I need like a week off, four days off, five days off and  
2 that's who I speak to.

3 HEARING OFFICER: So you're saying if it's more than a  
4 day you need the permission of Roy Blake as well?

5 THE WITNESS: Yeah, pretty much.

6 HEARING OFFICER: Who writes your yearly performance  
7 evaluations?

8 THE WITNESS: My store manager at 549.

9 HEARING OFFICER: Does Roy -- does the District manager  
10 have any input into your performance?

11 THE WITNESS: I'm not so sure, no.

12 HEARING OFFICER: Okay. Do you know who gives you wage  
13 increases?

14 THE WITNESS: Hmmm?

15 HEARING OFFICER: Who gives you wage increases?

16 THE WITNESS: Who gives me my raise?

17 HEARING OFFICER: Your raises, right.

18 THE WITNESS: It's my -- usually it's the corporates,  
19 you know. My yearly raise is my store manager, 549.

20 HEARING OFFICER: Do you know what the store manager  
21 bases this off of, the yearly raise?

22 THE WITNESS: I think she usually goes and asks Roy and  
23 some of the other managers, but I'm not really sure.

24 HEARING OFFICER: Does your wage rate ever change when  
25 you work at different stores?

1 THE WITNESS: I'm sorry, my what?

2 HEARING OFFICER: Does your pay get changed when you  
3 work at different stores?

4 THE WITNESS: No, it stays the same.

5 HEARING OFFICER: It stays the same? What about your  
6 benefits?

7 THE WITNESS: Benefits, no, stay the same. \*\*\*

8 HEARING OFFICER: So according to Joint 3, you worked  
9 from April 18th -- so if you could take a look here?

10 THE WITNESS: Yes.

11 HEARING OFFICER: It shows you working at 2812 April  
12 18th. And the last time you worked there was May 30th.

13 THE WITNESS: Um-hum.

14 HEARING OFFICER: Can you tell me how many times since  
15 then that you have returned to 2812?

16 THE WITNESS: I returned there twice, I think it was  
17 twice because I go on to different stores in the District, so  
18 it just -- it's just hard to return to the store when you  
19 have so many things going on in the District.

20 HEARING OFFICER: And do you remember the dates of the  
21 times you returned or the month?

22 THE WITNESS: I -- I'm not sure. I don't remember the  
23 dates.

24 HEARING OFFICER: According to what you previously  
25 testified, you said you returned on the day of the election?

1 THE WITNESS: Yeah, I returned on the day of the  
2 election.

3 HEARING OFFICER: Is that one of the instances?

4 THE WITNESS: It's one instance that I returned, yes.

5 HEARING OFFICER: Do you know if the other instance was  
6 after the election or before the election?

7 THE WITNESS: It was before the election.

8 HEARING OFFICER: And do you recall how many hours you  
9 worked in that instance?

10 THE WITNESS: Eight. I think eight or ten hours.

11 HEARING OFFICER: Do you know if you're going to be  
12 scheduled to return to 2812 any time in the future?

13 THE WITNESS: Not any time soon. I'm in a different  
14 store right now.

15 HEARING OFFICER: When you say not any time soon, how  
16 long do you expect it will be before you can?

17 THE WITNESS: I expect to return in a month or two  
18 after things settle down.

19 HEARING OFFICER: And when you return to the store you  
20 haven't worked at for a month, how long do you usually stay  
21 in that store for?

22 THE WITNESS: I usually stay a week, a week or two  
23 weeks.

24 HEARING OFFICER: And how often would you return to the  
25 store afterwards?

1 THE WITNESS: Not with things going on -- if there's  
2 not much stuff going on in the District, I would return maybe  
3 every three months for a week or two.

4 HEARING OFFICER: What is your current job title?

5 THE WITNESS: Store clerk.

6 HEARING OFFICER: Have you ever heard the term floater  
7 used?

8 THE WITNESS: Floaters, yes, I heard of that term.

9 HEARING OFFICER: Okay. And where have you heard it  
10 from?

11 THE WITNESS: I heard it from my fourth store manager I  
12 work with in 549.

13 HEARING OFFICER: And who is that manager?

14 THE WITNESS: Nate.

15 HEARING OFFICER: And what was the context of the  
16 conversation?

17 THE WITNESS: Basically, jump around from store-to-  
18 store, no home store.

19 HEARING OFFICER: Can you tell me the whole  
20 conversation --

21 THE WITNESS: Okay. He told me that -- he told me of  
22 another employee that was coming in and I asked him who he  
23 was, did he work for us, is he permanent. And he said no,  
24 he's a floater, he jumps around from store-to-store. And he  
25 just jumps around from store-to-store, gets called on by

1 different people, different store managers that needs his  
2 expertise.

3 And I said does every employee does that? No, some  
4 employees does that, some employees don't. He said that  
5 sometimes store manager -- shift managers also do it  
6 sometimes, but not often.

7 HEARING OFFICER: Do you know if this floater was in  
8 the pharmaceutical unit?

9 THE WITNESS: I'm sorry?

10 HEARING OFFICER: Do you know if this floater was in  
11 the pharmacy?

12 THE WITNESS: First time I -- that person, no, I did  
13 not know.

14 HEARING OFFICER: You don't know where he is?

15 THE WITNESS: No, I think he was a regular employee.  
16 But after that I keep hearing there's pharmacy floaters too.  
17 That's where I heard the term from mostly.

18 HEARING OFFICER: How long ago was this conversation?

19 THE WITNESS: Three years, three to four years. I  
20 don't know.

21 HEARING OFFICER: Is this the only conversation?

22 THE WITNESS: About floaters?

23 HEARING OFFICER: About floaters that you heard?

24 THE WITNESS: Yes, that's where I heard the context  
25 from.

1 The photo tech is David. Dimitris is a cashier. Ronneal is  
2 in health and beauty and Sierra is in cosmetics. And Kim is  
3 one of the techs in pharmacy. And Susan is the pharmacist.

4 Q. So you know all these guys. How do you know all these  
5 guys?

6 A. Because I've worked with them for many years.

7 Q. Is there anyone else?

8 A. There's like floaters and people coming in and going.

9 Q. What did you mean by floater?

10 A. People that come and go.

11 Q. People whose home stores are not 2436, you mean?

12 A. Yes. And there are other people that just get hired and  
13 don't last.

14 Q. Okay.

15 A. But those are the main people in the store.

16 Q. Why would you say someone who's not -- whose home store  
17 is not 2436 is a floater?

18 A. Because some people come and go. They just come and  
19 help out.

20 Q. Now, when their work -- their home store is somewhere  
21 else, but they come here, come to 2436 to help out?

22 A. Yeah, and do inventory and stuff like that, yes.

23 Q. And that's a floater?

24 A. Yes.

25 Q. In 2812, Store 2812, do you know your colleagues there?

# EXHIBIT E

Employee First Name	Employee Last Name	Department Charged	Earnings Description	Earnings End Date	Other Hours	Monetary Amount
Debra	Ellsmore	01107	Overtime Pay	2015-04-18	0.12	2.37
Debra	Ellsmore	01107	Regular Pay	2015-04-18	11.55	152
Debra	Ellsmore	02436	Regular Pay	2015-04-18	16.78	220.82
Debra	Ellsmore	02812	Regular Pay	2015-04-18	7.68	101.07
Debra	Ellsmore	02906	Regular Pay	2015-04-18	3.98	52.38
Debra	Ellsmore	01107	Regular Pay	2015-04-25	12.08	158.97
Debra	Ellsmore	02436	Regular Pay	2015-04-25	16.12	212.14
Debra	Ellsmore	02812	Regular Pay	2015-04-25	6.52	85.80
Debra	Ellsmore	02906	Regular Pay	2015-04-25	4.27	56.19
Debra	Ellsmore	01107	Regular Pay	2015-05-02	8.37	110.15
Debra	Ellsmore	02436	Regular Pay	2015-05-02	14.48	190.56
Debra	Ellsmore	02442	Regular Pay	2015-05-02	6.27	82.51
Debra	Ellsmore	02812	Regular Pay	2015-05-02	5.02	66.06
Debra	Ellsmore	02906	Regular Pay	2015-05-02	3.10	40.80
Debra	Ellsmore	01107	Regular Pay	2015-05-09	4.50	59.22
Debra	Ellsmore	02436	Regular Pay	2015-05-09	15.45	203.32
Debra	Ellsmore	02442	Overtime Pay	2015-05-09	0.05	0.99
Debra	Ellsmore	02442	Regular Pay	2015-05-09	7.18	94.49
Debra	Ellsmore	02812	Regular Pay	2015-05-09	7.27	95.67
Debra	Ellsmore	02906	Regular Pay	2015-05-09	5.60	73.70
Debra	Ellsmore	01107	Regular Pay	2015-05-16	8.05	105.94
Debra	Ellsmore	02436	Regular Pay	2015-05-16	16.98	223.46
Debra	Ellsmore	02442	Regular Pay	2015-05-16	5.65	74.35
Debra	Ellsmore	02812	Regular Pay	2015-05-16	3.88	51.06
Debra	Ellsmore	02906	Regular Pay	2015-05-16	4.25	55.93
Debra	Ellsmore	01107	Regular Pay	2015-05-23	9.22	121.34
Debra	Ellsmore	02436	Regular Pay	2015-05-23	8.02	105.54
Debra	Ellsmore	02436	State Specific Sick Pay	2015-05-23	8	105.28
Debra	Ellsmore	02442	Regular Pay	2015-05-23	7.10	93.44
Debra	Ellsmore	02812	Regular Pay	2015-05-23	2.82	37.11
Debra	Ellsmore	02906	Regular Pay	2015-05-23	4.23	55.67
Debra	Ellsmore	01107	Regular Pay	2015-05-30	4.83	63.56
Debra	Ellsmore	02436	Holiday Pay	2015-05-30	8	105.28
Debra	Ellsmore	02436	Holiday Overtime	2015-05-30	7.78	153.58
Debra	Ellsmore	02436	Regular Pay	2015-05-30	7.92	104.23
Debra	Ellsmore	02442	Regular Pay	2015-05-30	5.37	70.87
Debra	Ellsmore	02812	Regular Pay	2015-05-30	5.87	77.25
Debra	Ellsmore	02906	Regular Pay	2015-05-30	6	78.96
Debra	Ellsmore	01107	Regular Pay	2015-06-06	8.42	110.81
Debra	Ellsmore	02436	Regular Pay	2015-06-06	16.10	211.86
Debra	Ellsmore	02442	Regular Pay	2015-06-06	6.68	87.91
Debra	Ellsmore	02812	Regular Pay	2015-06-06	5.18	68.17
Debra	Ellsmore	02906	Regular Pay	2015-06-06	3.23	42.51
Debra	Ellsmore	01107	Regular Pay	2015-06-13	8.25	108.57
Debra	Ellsmore	02436	Regular Pay	2015-06-13	16.53	217.53
Debra	Ellsmore	02442	Regular Pay	2015-06-13	6.95	91.46
Debra	Ellsmore	02812	Regular Pay	2015-06-13	2.30	30.27
Debra	Ellsmore	02906	Regular Pay	2015-06-13	4	52.64
Debra	Ellsmore	01107	Regular Pay	2015-06-20	6.28	82.64
Debra	Ellsmore	02436	Regular Pay	2015-06-20	16.02	210.82
Debra	Ellsmore	02442	Regular Pay	2015-06-20	7.07	93.04
Debra	Ellsmore	02812	Regular Pay	2015-06-20	4.35	57.25
Debra	Ellsmore	02906	Regular Pay	2015-06-20	3.22	42.38
Debra	Ellsmore	01107	Regular Pay	2015-06-27	10.62	139.76
Debra	Ellsmore	02436	Regular Pay	2015-06-27	8.27	108.83

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Debra	Ellsmore	02436	Vacation Pay	2015-06-27	16	210.56
Debra	Ellsmore	02442	Regular Pay	2015-06-27	1.83	24.08
Debra	Ellsmore	02812	Regular Pay	2015-08-27	3.78	49.74
Debra	Ellsmore	01107	Regular Pay	2015-07-04	8.50	111.86
Debra	Ellsmore	02436	Holiday Pay	2015-07-04	8	105.28
Debra	Ellsmore	02436	Lump Sum Merit	2015-07-04	0	390
Debra	Ellsmore	02436	Regular Pay	2015-07-04	16.50	217.14
Debra	Ellsmore	02442	Regular Pay	2015-07-04	9.92	130.55
Debra	Ellsmore	02812	Regular Pay	2015-07-04	2.95	38.82
Debra	Ellsmore	01107	Regular Pay	2015-07-11	8.12	106.86
Debra	Ellsmore	02436	Regular Pay	2015-07-11	15.92	209.51
Debra	Ellsmore	02442	Regular Pay	2015-07-11	4.33	56.98
Debra	Ellsmore	02812	Regular Pay	2015-07-11	5.23	68.83
Debra	Ellsmore	02906	Regular Pay	2015-07-11	2.83	37.24
Debra	Ellsmore	01107	Regular Pay	2015-07-18	8.25	108.57
Debra	Ellsmore	02436	Incentive Overtime Calculation	2015-07-18	8.90	1.26
Debra	Ellsmore	02436	Regular Pay	2015-07-18	16.40	215.82
Debra	Ellsmore	02436	Vacation Pay	2015-07-18	8	105.28
Debra	Ellsmore	02442	Regular Pay	2015-07-18	3.20	42.11
Debra	Ellsmore	02812	Regular Pay	2015-07-18	2.17	28.56
Debra	Ellsmore	02906	Regular Pay	2015-07-18	1.97	25.93
Kane	Chow	02812	Regular Pay	2015-04-18	32.27	305.60
Kane	Chow	02812	Regular Pay	2015-04-25	34.10	322.93
Kane	Chow	02812	Regular Pay	2015-05-02	29.58	280.12
Kane	Chow	02812	Regular Pay	2015-05-09	24.55	232.49
Kane	Chow	02280	Regular Pay	2015-05-16	8.65	81.92
Kane	Chow	02812	Regular Pay	2015-05-16	22.50	213.08
Kane	Chow	02280	Regular Pay	2015-05-23	21.52	203.79
Kane	Chow	02812	Regular Pay	2015-05-23	7.17	67.90
Kane	Chow	00549	Holiday Pay	2015-05-30	8	75.76
Kane	Chow	02431	Regular Pay	2015-05-30	8.17	77.37
Kane	Chow	02436	Regular Pay	2015-05-30	14.23	134.76
Kane	Chow	02812	Holiday Overtime	2015-05-30	3.53	50.14
Kane	Chow	02436	Regular Pay	2015-08-06	28.60	270.84
Kane	Chow	02431	Regular Pay	2015-08-13	37.22	352.47
Kane	Chow	02431	Regular Pay	2015-08-20	17.42	164.97
Kane	Chow	02436	Regular Pay	2015-08-20	7.75	73.39
Kane	Chow	02141	Regular Pay	2015-08-27	16.50	156.26
Kane	Chow	02431	Regular Pay	2015-08-27	17.92	189.70
Kane	Chow	00549	Holiday Pay	2015-07-04	8	75.76
Kane	Chow	02141	Overtime Pay	2015-07-04	3.92	55.68
Kane	Chow	02141	Regular Pay	2015-07-04	19.75	187.03
Kane	Chow	07881	Regular Pay	2015-07-04	20.25	191.77
Kane	Chow	02431	Regular Pay	2015-07-11	37.90	371.80
Kane	Chow	02431	Regular Pay	2015-07-18	37.38	366.70
Debbie	Henry-Aughton	02906	Regular Pay	2015-04-18	23.62	208.68
Debbie	Henry-Aughton	02906	Regular Pay	2015-05-02	19.33	169.14
Debbie	Henry-Aughton	02906	Regular Pay	2015-05-09	27.27	238.61
Debbie	Henry-Aughton	02906	Regular Pay	2015-05-16	8.08	70.70
Debbie	Henry-Aughton	02906	Regular Pay	2015-05-23	13.97	122.24
Debbie	Henry-Aughton	02812	Regular Pay	2015-05-30	16.47	144.11
Debbie	Henry-Aughton	02906	Regular Pay	2015-05-30	7.58	66.33
Debbie	Henry-Aughton	02812	Regular Pay	2015-06-06	12.27	107.36
Debbie	Henry-Aughton	02906	Regular Pay	2015-06-06	12.78	111.83
Debbie	Henry-Aughton	02812	Regular Pay	2015-06-13	11.75	102.81
Debbie	Henry-Aughton	02906	Regular Pay	2015-06-13	25.85	226.19
Debbie	Henry-Aughton	02812	Regular Pay	2015-06-20	16.85	147.44
Debbie	Henry-Aughton	02812	NY Premium	2015-06-27	1	8.75

Debbie	Henry-Aughton	02812	Regular Pay	2015-08-27	22.65	198.19
Debbie	Henry-Aughton	02906	Overtime Pay	2015-08-27	8.72	114.45
Debbie	Henry-Aughton	02906	Regular Pay	2015-06-27	17.35	151.81
Debbie	Henry-Aughton	02812	Regular Pay	2015-07-04	19.80	173.25
Debbie	Henry-Aughton	02906	Holiday Overtime	2015-07-04	7.08	92.93
Debbie	Henry-Aughton	02906	Regular Pay	2015-07-04	13.07	114.36
Debbie	Henry-Aughton	02906	Regular Pay	2015-07-11	29.42	264.78
Debbie	Henry-Aughton	02812	Overtime Pay	2015-07-18	0.12	1.62
Debbie	Henry-Aughton	02812	Regular Pay	2015-07-18	19.88	178.92
Debbie	Henry-Aughton	02906	Regular Pay	2015-07-18	20.12	181.08