

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

ST. JOHN RIVER DISTRICT HOSPITAL

Respondent

and

Case 7-CA-183327

**LOCAL 324, INTERNATIONAL UNION OF
OF OPERATING ENGINEERS (IUOE), AFL-CIO**

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S MOTION TO TRANSFER CASE
TO THE BOARD AND FOR SUMMARY JUDGMENT ON THE PLEADINGS**

Eric S. Cockrell, Counsel for the General Counsel in this matter and pursuant to Sections 102.24 and 102.50 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, files this Motion to Transfer Case to the Board and for Summary Judgment on the Pleadings, and in support of this Motion, states as follows:

1. The charge in this proceeding was filed by the Charging Party on August 30, 2016, and a copy was served by regular mail on Respondent on September 1, 2016. Copies of the charge and the affidavit of service of the charge are attached as Exhibits A and B, respectively.
2. On September 23, 2016, the Regional Director for the Seventh Region issued and served on Respondent by regular mail a Complaint. Copies of the Complaint and the affidavit of service are attached as Exhibits C and D, respectively.

3. On October 6, 2016, Respondent filed its Answer to the Complaint and Affirmative Defenses (hereafter Answer), a copy of which is attached as Exhibit E.

4. In its Answer, Respondent admits to paragraph 9 that the Board issued a certification in Case 07-RC-170700 to the Charging Party as the exclusive collective bargaining representative for the Unit described in paragraph 7 of the Complaint. Respondent admits to Complaint paragraph 6 that Joanne Tuscanly held the position of Respondent's Senior Director, Human Resources and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. Respondent admits to Complaint paragraph 11 that about June 16, 2016, and on about August 12, August 22, and August 29, 2016, the Charging Party requested dates to bargain with Respondent. Respondent admits to Complaint paragraph 12 that since about June 16, 2016, Respondent has failed and refused to recognize and bargain with the Charging Party as the exclusive collective-bargaining representative of the Unit and on August 29, Respondent reiterated its failure and refusal to recognize and bargain collectively with the Charging Party as the exclusive collective-bargaining representative of the Unit. Respondent denies Complaint paragraph 10, wherein the Regional Director for Region Seven alleges that the Charging Party is, pursuant to Section 9(a), the exclusive collective-bargaining representative of the Unit.

5. On the basis of Respondent's limited admission to Complaint paragraph 1 and admission to paragraphs 2 through 4, the filing and service of the charge is established, and the Board has jurisdiction over this matter.

6. Respondent neither admits nor denies the labor organization status of the Charging Party in paragraph 5 of the Complaint.

7. On the basis of Respondent's limited admission to Complaint paragraph 1 and full admission to Complaint paragraphs 2 through 4, 6, 8, 9, 11, and 12, it is established that the Charging Party was certified as the exclusive collective-bargaining representative of the Unit; that the Charging Party requested that Respondent bargain collectively with the Charging Party; and that Respondent failed and refused to bargain with the Charging Party.

8. Respondent, by its admissions and denials in its Answer, is seeking to test the validity of the Board's certification of the Charging Party as the exclusive collective-bargaining representative of the Unit through the instant unfair labor practice proceeding. Respondent denies Complaint paragraph 7 concerning the appropriateness of the Unit. Respondent's denial is based on its assertion that because the Unit consists of guards and the Charging Party is a union that represents non-guards the Board has inappropriately and wrongly certified the Charging Party as the exclusive collective bargaining representative of the Unit, and contrary to Section 9(b)(3) of the Act.¹

¹ For the first time Respondent makes procedural challenges, one with regard to the due date for the filing of the Answer to the Complaint, and the other regarding the timelines under which the representation case 07-RC-170700 was processed. With regard to each challenge, Respondent misstates the Board's Rules and Regulations. Under Section 102.20 a respondent is allowed 14 days from the date of the service of the complaint in which to file. Respondent correctly states that. However, under Subpart I, Service and Filing of Papers, Section 102.112, Date of service; Date of Filing, - "The date of service shall be the day when the matter served is deposited in the United States mail. " The representation case petition was filed on February 2, 2016, and was processed under the Board's "new" Rules and Regulations concerning Representation Case proceedings, which provide at Section 102.67(c), " .such a "request for review" shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director." No

9. Respondent fully litigated this assertion in Case 07-RC-170700 in which the Regional Director found the petitioned-for unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act. A copy of the representation petition, Decision and Direction of Election, and Erratum in Case 7-RC-170700 are attached as Exhibits F, G, and H, respectively.

10. The Board conducted a representation election on April 19, 2016, which resulted in the issuance of a Certification of Representative. A copy of the Certification is attached as Exhibit I.

11. Respondent filed a Request for Review of Decision and Direction of Election (Request for Review) with the Board on April 22, 2016. A copy of the Request for Review is attached as Exhibit J (without the attachments identified at page 30 of the Request for Review because they constitute the underlying record in the hearing in case 07-RC-170700).

12. On August 12, 2016, the Board issued its Order denying Respondent's Request for Review. A copy of the Request for Review is attached as Exhibit K.

13. Respondent raises no material issue in its Answer, but merely disputes the Board's affirmance that the Unit in question is appropriate. Respondent does not aver newly discovered or previously unavailable evidence of circumstances not previously considered. It is well established that there can be no re-litigation before the Board of representation issues which were or could have been litigated in the prior representation

error was made in either instance.

proceeding. *Ovid Convalescent Manor, Inc.*, 264 NLRB 774, 775 (1982); *Lighthouse for the Blind of Houston*, 248 NLRB 1366, 1367 (1980), enfd. 696 F.2d 399 (5th Cir. 1983); *Boatel, Inc.*, 204 NLRB 896, 897 (1973); *Keco Industries, Inc.*, 191 NLRB 257, 258 (1971); *General Dynamics Corporation*, 187 NLRB 679, 680 (1971); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Wherefore, Counsel for the General Counsel respectfully moves:

1. That in order to expedite judgment in the instant unfair labor practice proceeding, this matter be transferred to and continued before the Board for decision. *General Dynamics Corp.*, 187 NLRB 679 (1971), enfd. 447 F.2d 1370 (5th Cir. 1971); *NLRB v. Tallahassee Coca-Cola Bottling Co., Inc.*, 409 F.2d 201 (5th Cir. 1969); *NLRB v. Union Brothers, Inc.*, 403 F.2d 201 (5th Cir. 1969); *Walli's Supper Club, Inc.*, 174 NLRB 1224 (1969); *Edward G. Partin, et. al.*, 171 NLRB 727 (1968); *E-Z Davies Chevrolet*, 395 F.2d 191 (9th Cir. 1968).

2. That the Board find the pleadings to reveal no controversy as to any relevant or material facts pled in the Complaint which would necessitate a hearing or administrative law judge's decision.

3. That the Motion to Transfer Case to the Board and for Summary Judgment on the Pleadings be ruled upon immediately so that in the event that such is granted, the necessity for a hearing will be obviated.

4. That the operative facts admitted and affirmative defenses stated in Respondent's Answer are sufficient to establish that Respondent has violated Section

8(a)(1) and (5) of the Act, and the Board issue a Decision and Order containing findings of fact, conclusions of law, and a remedial order consistent with the conclusions that Respondent violated Section 8(a)(1) and (5) of the Act; that Respondent be required to recognize the Charging Party as the exclusive collective bargaining representative of the employees in the appropriate Unit; and upon request, bargain collectively and in good faith with the Charging Party as the exclusive collective bargaining representative of the Unit for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

Respectfully submitted this 13th day of October 2016.

/s/ Eric S. Cockrell

Eric S. Cockrell
Counsel for the General Counsel
National Labor Relations Board, Seventh Region
Room 300, Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226-2543

I certify that on the 13th day of October, 2016, I emailed copies of the Counsel for the General Counsel's Motion to Transfer Case to and Continue Proceedings Before the Board and for Summary Judgment to the following parties:

E-File:

Executive Secretary
National Labor Relations Board

By E-mail:

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abachelder@sachswaldman.com

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE

Case 07-CA-183327 Date Filed 8-30-2016

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer St. John River District Hospital		b. Tel. No. 313 343-7263
d. Address (Street, city, state, and ZIP code) 4100 River Rd. East China Twp., MI 48054		c. Cell No.
e. Employer Representative Joanne Tuscany		f. Fax No.
i. Type of Establishment (factory, mine, wholesaler, etc.) Hospital		g. e-Mail
j. Identify principal product or service Health Care		h. Number of workers employed

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since about August 29, 2016 the above Employer has refused to bargain with Local 324, International Union of Operating Engineers as the exclusive collective bargaining representative of its employees.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
Local 324, International Union of Operating Engineers

4a. Address (Street and number, city, state, and ZIP code) 500 Hulet Drive Bloomfield Twp. MI 48302		4b. Tel. No. 248 451-0324
		4c. Cell No.
		4d. Fax No.
		4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)
International Union of Operating Engineers, AFL-CIO

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By <u>Amy Bachelder</u> (signature of representative or person making charge)	Amy Bachelder, Attorney (Print type name and title or office, if any)	Tel. No. 313 496-9408
		Office, if any, Cell No.
		Fax No. 313 965-4602
		e-Mail abachelder@sachswaldman.com

Address Sachs Waldman, 2211 E. Jefferson, Ste 200, Detroit, MI 48207 8/30/16
(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.





UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. JOHN RIVER DISTRICT HOSPITAL

Charged Party

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE)

Charging Party

Case 07-CA-183327

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on , I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

St. John River District Hospital
Attn: Joanne Tuscany
4100 River Rd
East China, MI 48054-2914

September 1, 2016

Date

M. Walsh, Designated Agent of NLRB

Name.

M. Walsh

Signature

EXHIBIT

B

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

ST. JOHN RIVER DISTRICT HOSPITAL

Respondent

and

Case 07-CA-183327

**LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO**

Charging Party

COMPLAINT

This Complaint is based on a charge filed by the Charging Party. It is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Respondent has violated the Act as described below:

1. The charge in this proceeding was filed by the Charging Party on August 30, 2016, and a copy was served on Respondent by U.S. mail on September 1, 2016.

2. At all material times, Respondent has been a non-profit corporation with an office and facility in East China Township, Michigan (East China facility), and has been engaged in the operation of an acute care hospital.

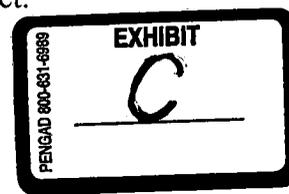
3. (a) In conducting its operations during the calendar year ending December 31, 2015, Respondent derived gross revenues valued in excess of \$250,000.

(b) During the period of time described in paragraph 3(a), Respondent purchased and received at its East China facility goods and supplies in valued in excess of \$5,000 directly from points outside the State of Michigan.

4. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

5. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

6. At all material times, Joanne Tuscany held the position of Respondent's Senior Director, Human Resources and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.



7. The following employees of Respondent (the Unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time maintenance employees, including electricians, employed by the Respondent at its facility located at 4100 River Road, East China Township, Michigan; but excluding office clerical employees, and guards and supervisors as defined in the Act.

8. On April 19, 2016, a representation election in Case 07-RC-170700 was conducted among the employees in the Unit.

9. On April 27, 2016, the Board certified the Charging Party as the exclusive collective-bargaining representative of the Unit.

10. At all times since April 19, 2016, based on Section 9(a) of the Act, the Charging Party has been the exclusive collective-bargaining representative of the Unit.

11. About June 16, 2016, by letter, and on about August 12, August 22, and August 29, 2016, by e-mail, the Charging Party requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Charging Party as the exclusive collective-bargaining representative of the Unit.

12. Since about June 16, 2016, Respondent has failed and refused to recognize and bargain with the Charging Party as the exclusive collective-bargaining representative of the Unit and on August 29, 2016, Respondent reiterated its failure and refusal to recognize and bargain collectively with the Charging Party as the exclusive collective-bargaining representative of the Unit.

13. By the conduct described above in paragraph 12, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

14. The unfair labor practice of Respondent described above affects commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, it is prayed that the Respondent be ordered to:

1. Cease and desist from:

(a) engaging in the conduct described in paragraph 12, or in any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed in Section 7 of the Act.

(b) engaging in the conduct described in paragraph 12, or in any like or related manner, refusing to bargain collectively and in good faith with the Charging Party as the exclusive collective-bargaining representative of the Unit.

2. Take the following affirmative action:

(a) Recognize and upon request, bargain collectively and in good faith with the Charging Party as the exclusive collective-bargaining representative of the Unit.

(b) Bargain in good faith with the Charging Party, on request, for the period required by *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), as the recognized bargaining representative in the appropriate unit.

(c) Post appropriate notices.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practice herein alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before October 7, 2016, or postmarked on or before October 6, 2016**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

A hearing, if necessary, will be conducted at a time and date determined in the future.

Dated: September 23, 2016

/s/ Terry Morgan

Terry Morgan, Regional Director
National Labor Relations Board, Region Seven
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, MI 48226-2543

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

ST. JOHN RIVER DISTRICT HOSPITAL

and

Case 07-CA-183327

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO

AFFIDAVIT OF SERVICE OF: COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on September 23, 2016, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Joanne Tuscani
Senior Director, Human Resources
St. John River District Hospital
4100 River Road
East China, MI 48054-2914

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED 7004-1160-0004-9191-6692**

Amy Bachelder, Esq.
Sachs Waldman, P.C.
2211 East Jefferson Avenue, Suite 200
Detroit, MI 48207

FIRST CLASS MAIL

Local 324, International Union of Operating
Engineers (IUOE), AFL-CIO
500 Hulet Drive
Bloomfield Township, MI 48302

CERTIFIED 7004-1160-0004-9191-6708

September 23, 2016

Date

Mary Lou Iho, Designated Agent of NLRB

Name

/s/ Mary Lou M. Iho

Signature



7004 1160 0004 9191 6692

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PS Form 3800

PS Form 3800, June 2002

See Reverse for Instructions

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

ST. JOHN RIVER DISTRICT HOSPITAL,

Respondent

and

Case No. 07-CA-183327

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO,

Charging Party

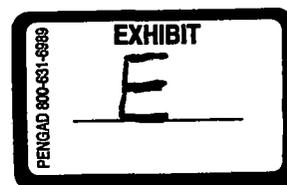
ANSWER TO COMPLAINT

Pursuant to sections 102.20 and 102.21 of the National Labor Relations Board's Rules and Regulations, ST. JOHN RIVER DISTRICT HOSPITAL ("Respondent") answers the Complaint in the above captioned matter as follows:

GENERAL OBJECTIONS AND DENIAL

The Respondent objects to the Regional Director's assertion in the Complaint that the Respondent's Answer must be received on or before October 7, 2016. Pursuant to 29 CFR § 102.20, the Respondent has 14 days from the service of the Complaint to file an answer thereto. The Complaint was served on the Respondent on October 3, 2016. Therefore, contrary to the Regional Director's assertion, the Respondent's Answer is not due until October 17, 2016.

Except as otherwise expressly stated herein, Respondent denies each and every allegation contained in the Complaint, including but not limited to, any allegations contained in the preamble, headings, or subheadings of the Complaint, and Respondent specifically denies that it



violated the National Labor Relations Act in any of the manners alleged in the Complaint or in any other manner.

Respondent expressly reserves the right to seek to amend and/or supplement its Answer as may be necessary.

RESPONSE TO SPECIFIC ALLEGATIONS OF THE COMPLAINT

1. Answering paragraph 1, Respondent admits that the charge was filed on or about August 30, 2016, but denies that it was served on Respondent on or about September 1, 2016.
2. Answering paragraph 2, Respondent admits the allegations contained therein.
- 3(a). Answering paragraph 3(a), Respondent admits the allegations contained therein.
- 3(b). Answering paragraph 3(b), Respondent admits the allegations contained therein.
4. Answering paragraph 4, Respondent admits the allegations contained therein.
5. Answering paragraph 5, Respondent neither admits nor denies the allegations contained therein.
6. Answering paragraph 6, Respondent admits the allegations contained therein.
7. Answering paragraph 7, Respondent denies the allegations contained therein.
8. Answering paragraph 8, Respondent admits that the election was conducted on April 19, 2016.
9. Answering paragraph 9, Respondent admits the allegations contained therein.
10. Answering paragraph 10, Respondent denies the allegations contained therein.
11. Answering paragraph 11, Respondent admits only that on or about the referenced dates the Charging Party made requests for dates to bargain and denies all other allegations contained therein.
12. Answering paragraph 12, Respondent admits the allegations contained therein.

13. Answering paragraph 13, Respondent denies the allegations contained therein.
14. Answering paragraph 14, Respondent denies the allegations contained therein.

WHEREFORE, Respondent prays that the Complaint be dismissed in its entirety.

AFFIRMATIVE DEFENSES

1. The certified unit of employees does not constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.
2. The Board has violated Section 9(b)(3) of the Act by certifying a Union which represents or seeks to represent non-guards.
3. The proposed unit, as petitioned for, which includes “all full-time and regular part-time maintenance employees” and excludes “office clerical employees, guards, and supervisors” does not contain any employees.
4. The Complaint and each purported claim for relief stated therein fail to allege facts sufficient to state a claim upon which relief may be granted.
5. The remedies requested in the Complaint are improper because Respondent has not violated the National Labor Relations Act.
6. The Decision and Direction of Election was improper and invalid. The Decision and Direction of Election was issued on April 8, 2016, and directed that the election be held on April 19, 2016, only eleven days later. Pursuant to Board Rules and Regulations, the employer has 14 days after the issuance of the Decision and Direction of Election to exercise certain rights, including but not limited to the right to move for a “stay of some or all of the proceedings, including the election.” Therefore, the Regional Director’s action directing an election to occur in less than 14 days was improper, invalid, and in violation of the Board’s own Rules and Regulations.

7. Respondent expressly reserves, and incorporates herein, all defenses it raised during the previous proceedings between the Parties in Case No. 07-RC-170700.

Respondent expressly reserves the right to raise any additional defenses not asserted herein of which it may become aware through investigation, as may be appropriate at a later time.

HALL RENDER KILLIAN HEATH & LYMAN, LLC

BY: s/ Bruce M. Bagdady
BRUCE M. BAGDADY (P40476)
JONATHON A. RABIN (P57145)
BRADLEY M. TAORMINA (P76629)
Attorneys for Respondent
201 W. Big Beaver Road, Suite 1200
Troy, MI 48084
(248) 740-7505

PROOF OF SERVICE

I, Karen A. Saur, an employee of Hall Render Killian Heath & Lyman, hereby certify that a copy of the *Respondent's Answer to Complaint* was served via email to Amy Bachelder, counsel for Charging Party at abachelder@sachswaldman.com this 6th day of October, 2016.

I declare that the statement above is true to the best of my knowledge, information and belief.



Karen A. Saur

Signed before me on this 6th day of
October, 2016



Sharon R. Thrasher, Notary Public
County of Macomb, State of Michigan
My Commission Expires: 12/19/2017
Acting in Oakland County

FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS AREA
Case No. 07-RG-170700
Date Filed 2-29-2016

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition or: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB-4372). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION, RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer: St. John River District Hospital
2b. Address(es) of Establishment(s) involved (Street and number, city, state, ZIP code): 4100 River Rd. East China Twp., MI 48054

3a. Employer Representative - Name and Title: Joanne Tuscani, Worklife Services Director
3b. Address (if same as 2b - state same): 22101 Moross Rd. Detroit, MI 48236-2148

3c. Tel. No.: 313 343-7283
3d. Cell No.:
3e. Fax No.: 313 343-7405
3f. E-Mail Address: joanne.tuscani@stjohn.org

4a. Type of Establishment (Factory, mine, wholesaler, etc.): Hospital
4b. Principal product or service: Health Care
5a. City and State where unit is located: East China, MI

5b. Description of Unit Involved
Included: All full-time and regular part-time maintenance employees
Excluded: office clerical employees, guards and supervisors as defined in the Act.
6a. No. of Employees in Unit: 5
6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes No

Check One: 7a. Request for recognition as Bargaining Representative was made on (Date) _____, and Employer declined recognition on or about (Date) _____ (if no reply received, so state).
 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (if none, so state): None known
8b. Address:

9c. Tel. No.:
9d. Cell No.:
9e. Fax No.:
9f. E-Mail Address:

9g. Affiliation, if any:
9h. Date of Recognition or Certification:
9i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year):

9. Is there now a strike or picketing at the Employer's establishment(s) involved? _____ If so, approximately how many employees are participating? _____
(Name of labor organization) No has picketed the Employer since (Month, Day, Year) _____

10. Organizations or individuals other than Petitioner and those named in Items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state):
None known

10a. Name:
10b. Address:
10c. Tel. No.:
10d. Cell No.:
10e. Fax No.:
10f. E-Mail Address:

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.
11a. Election Type: Manual Mail Mixed Manual/Mail

11b. Election Date(s): Tuesday March 22, 2016
11c. Election Time(s): 8-7 am; 2-3 pm
11d. Election Location(s): East China, MI

12a. Full Name of Petitioner (including local name and number): Local 324; International Union of Operating Engineers, AFL-CIO
12b. Address (street and number, city, state, and ZIP code): 500 Hulet Drive, Bloomfield Twp., MI 48302

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state):
International Union of Operating Engineers - AFL-CIO

12d. Tel. No.: 248 541-0324
12e. Cell No.:
12f. Fax No.: 248 454-1756
12g. E-Mail Address:

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title: Amy Bachelder Attorney Sachs Waldman
13b. Address (street and number, city, state, and ZIP code): 2211 E. Jefferson, Suite 209, Detroit, MI 48207

13c. Tel. No.: 313 456-9408
13d. Cell No.:
13e. Fax No.: 313 965-4802
13f. E-Mail Address: abachelder@sachswaldman.com

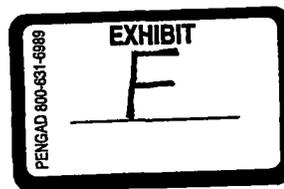
I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print): Amy Bachelder
Signature: 
Title: Attorney
Date: February 29, 2016

WITFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.



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

ST. JOHN RIVER DISTRICT HOSPITAL

Employer
and

Case 07-RC-170700

**LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO¹**

Petitioner

APPEARANCES:

Bradley M. Taormina and Jonathan A. Rabin, Troy, Michigan, for the Employer.
Amy Bachelder, Detroit, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

The Employer operates a 68-bed acute care hospital located in East China, Michigan, the only facility involved herein. The Petitioner seeks to represent a unit of six full-time and regular part-time maintenance employees at the Employer's facility.

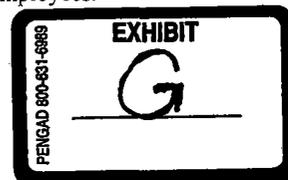
Pursuant to Section 102.63(b) of the Board's Rules and Regulations, prior to the hearing in this matter, the Employer submitted a Statement of Position, wherein it asserts that the entire proposed unit is comprised of statutory guards under the Act.² In its Statement of Position, the Employer further asserts that upon the exclusion of those petitioned for employees who are statutory guards under the Act, there are no employees remaining in the bargaining unit sought by Petitioner and therefore the unit is inappropriate. With respect to the six employees described as maintenance employees in the petition at issue, five are classified by the Employer as maintenance/security guards and one is classified as an electrician, all of whom for the purposes of brevity will hereon be referred to as "maintenance employees" unless otherwise noted.² The Employer appears to contend that all six maintain identical Section 9(b)(3) guard duties. In the interest of brevity, the six petitioned for employees.

As discussed below, based on the record and relevant Board law, I conclude that the petitioned-for employees are not guards under the Act, and the proposed unit is appropriate.

¹ The Petitioner's name appears as amended at the hearing.

² The Employer, in its Statement of Position also asserted that one maintenance employee in the proposed bargaining unit, Maintenance and Facilities Supervisor Darien Mills, is a statutory supervisor under the Act. At the beginning of the hearing, the parties' stipulated to Mills' supervisory status under Section 2(11) of the Act and both parties agreed that he should be excluded from any proposed bargaining unit.

² The Employer made no claim that the electrician does not share a community of interest with the five maintenance employees.



I. Overview

A. The Facility at Issue.

The Employer's East China, Michigan facility is a one-floor, 68-bed hospital that is part of the Employer's East Regional operations, which includes hospitals located in Wayne, Macomb and Oakland counties. In addition to the 68 beds, the facility includes a maternity/baby unit, an emergency room (ER), a physical therapy department, a diagnostic imaging department, a laboratory and an intensive care unit (ICU). The facility maintains a parking lot for employees and visitors as well as a helipad in the front of the facility for emergency events that require a patient to be transported by helicopter. Unlike other facilities in the East Region, the East China facility does not maintain dedicated security guards who work exclusively as guards.³

B. Duties of Maintenance Employees.

The six maintenance employees in the proposed unit report directly to Maintenance and Facility supervisor Darien Mills, who has held this position for approximately two years. Mills has been employed by the Employer in other capacities since 2006. Mills oversees the training of maintenance employees and is responsible for their performance appraisals.

Maintenance employees are not required to be bonded or fingerprinted upon hire. They do undergo background checks⁴ but are not licensed as guards. They receive no weapons training at any time. They do not carry firearms, batons, or pepper spray. They do not wear specific guard uniforms and are able to wear whatever they want, although most of them wear blue short-sleeve shirts emblazoned with "St. John Providence Maintenance and Engineering." They also wear identification badges with their names and "Maint Mechanic/Security Guard" on them.⁵

Like all clinical employees employed by the Employer, which includes anyone who has patient care responsibilities, such as registered nurses, health unit clerks and lab assistants, maintenance employees must undergo Crisis Prevention Intervention (CPI) training, which teaches employees to use words to de-escalate conflict situations with abusive, angry or out of control patients or visitors to the hospital. The Employer also maintains emergency preparedness drill training for maintenance employees, nurses and doctors, last performed in September 2015, where the Employer erected a decontamination tent outside the facility to test, among other things, maintenance employees' ability to control traffic and access to the facility in the event of a contamination situation. Maintenance employees and all clinical employees also undergo "Code Pink" and "Code Purple" training which relate to infant and child abduction from the hospital.

The Employer schedules maintenance employees in three shifts, with one or two scheduled per shift. Their primary maintenance responsibilities include, among other things,

³ The testimony was not clear as to whether the Employer's Oakland County facility maintains a dedicated contingent of guards.

⁴ The record is silent as to whether the background checks for maintenance employees were any different from other employees hired by the Employer, or whether they are different or the same as the dedicated guards at the Employer's other facilities.

⁵ The badge for the electrician does not have any reference to security on it.

servicing rooftop electrical units, exhaust fans, painting, drywalling, plumbing, carpentry, mowing the lawn, filter changing, locksmithing, light electrical and generator testing and general maintenance. Such work takes the vast majority of their work day. The electrician duties include electrical installations, small remodeling jobs, emergency generator testing and general maintenance duties.

Their non-maintenance duties can include enforcing parking rules, no-smoking rules, locking all the doors to all exterior exits to the facility at night with the exception of the emergency room entrance—which remains open 24-hours a day, occasionally making rounds, and responding to various non-maintenance events within the hospital, including crisis intervention situations. Additionally, a maintenance employee may also be asked to remain in the ER during high patient volume periods. When a patient is brought to the facility by helicopter, which has happened approximately three times in the previous two years, maintenance employees regulate the helipad by turning on beacon lights and landing pad lights. They also bring a gurney out from the hospital for the incoming patient and after the patient is brought in to the hospital from the helicopter, one maintenance employee remains outside to keep onlookers away from the helipad area.

The Employer presented evidence which is part of its Exhibit 5, consisting of approximately 250 pages of what it generally describes as “incident reports.”⁶ These documents were extracted by the Employer from its logbook dating from approximately March 2014 through February 2016. A number of the log pages include multiple incidents, some of which address the proposed bargaining unit employees’ maintenance responsibilities and do not involve non-maintenance functions. However, the vast majority of the selectively chosen incident reports provided by the Employer concern “deescalating” combative/threatening/ disorderly patients and/or relatives of patients within the facility, helping restrain patients in their beds or providing a “security presence.” With respect to these situations, they were typically precipitated by a “Code Gray” emergency announcement over the Employer’s public address system. Such Code Gray announcements are not only responded to by maintenance employees, but various other Employer personnel as well, including Assistant Clinical Leads (ACL), administrators, paramedics and nurses. The de-escalation activity by maintenance employees and other personnel in these situations can involve confronting a loud and irate, intoxicated or verbally abusive patient or visitor, and requires the responders to utilize their CPI training to speak to the patient or visitor in a manner that will calm the person and defuse the situation. In such de-escalation situations, maintenance employees will typically take direction from an ACL, nurse or doctor. Maintenance employees will similarly take direction when they are asked to hold down a limb of a recalcitrant patient while medical personnel strap the patient down.

With respect to providing a security presence, maintenance employees are stationed in areas where there is a physical threat or potential physical threat from a patient or visitor. In one instance, a maintenance employee injured his hand when a combative patient took a swing at him. While the vast majority of Code Grays are handled by in-house staff, occasionally security at the Employer’s main facility or a local police agency will be contacted to address the situation.

⁶ The documents included in Employer Exhibit 5 that the Employer described as incident reports had various headings, including, “Daily Work Order Log,” “Code Gray Audit Tool,” and “Security Incident Tracking & Debriefing Tool.”

Some of the incident reports also related other non-maintenance activities, such as maintenance employees contacting the police over a patient's or visitor's behavior; keeping watch over an inebriated patient; staying with the body of a deceased patient until the medical examiner arrived; looking for a nurse's missing purse; escorting employees of the Employer to their cars at night; opening a locked door for a staff member; asking a transient person to leave when he was found to be loitering on the Employer's property; and telling someone to move a car that was parked near the helipad. Although not reflected in an incident report, once, in 2014, a maintenance employee was assigned to wait outside the HR department while a staff member was being discharged.

In addition to announcing Code Grays through its public address system in crisis situations, the Employer maintains thirteen panic buttons in the facility for other emergency-type situations, located in, among other places, the gift shop, administration offices, pharmacy, ICU, mother/baby unit and ER. The majority of the panic buttons are connected to an outside security company located in Port Huron, Michigan. The security company, upon receiving notice of the panic alarm, contacts the police to respond.⁷ There is also a separate alarm system utilized on entry ways in the administration offices, the patient registration area and in the Health Information Management office (medical records), where an alarm is tripped by the unauthorized opening of a door. In those instances, the Employer's switchboard operator is notified directly, and the switchboard operator in turn contacts the maintenance employees to investigate the alarm, via two-way radio.⁸ Only the switchboard operator on duty and the maintenance employees maintain two-way radios. While maintenance employees utilize their two-way radios for such non-maintenance purposes, they also utilize them for their regular maintenance duties as well.

With respect to all non-maintenance duties outlined in the incident reports and other documentary and testimonial evidence, the five maintenance employees who testified at hearing estimated that, on average, from 2% to 8% of their work day is taken up by such functions. Maintenance and Facility supervisor Mills testified that maintenance employees must always remain vigilant in keeping an eye out for the safety and well-being of all patients, visitors and employees and thus, their security responsibilities can range up to 100% of their working time.

II. Legal Authority and Analysis

A. Board Law

Section 9(b)(3) of the Act defines a guard as "any individual employed to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." See *J. C. Penney Co.*, 312 NLRB 32 (1993). Section 9(b)(3) also prohibits the Board from certifying a union as the collective bargaining

⁷ Although Maintenance and Facilities Supervisor Mills testified that maintenance/guard employees also respond to panic alarms, the record was silent as to when, specifically, they responded or what their role is when responding and how frequently this happened.

⁸ The record was silent as to how often maintenance/guard employees respond to this type of alarm, although the Employer provided two incident reports of a maintenance/guard employee responding to such an alarm. (ER Exh. 5, pp. 192, 224) It was not clear as to what their role was in responding to these alarms.

representative of employees in a bargaining unit of guards if the union admits non-guards to its membership. The parties stipulated that the Petitioner represents and admits non-guards into its membership.

The Board has interpreted the legislative history of Section 9(b)(3) as indicating the intention of Congress to avoid conflicting loyalties on the part of plant protection employees, and to ensure an employer that it would have a core of such employees to enforce plant rules during a period of unrest and strikes by other employees. *McDonnell I*, 109 NLRB 967, 969 (1954); *Lion Country Safari*, 225 NLRB 969, 970 (1976); *Blue Grass Industries*, 287 NLRB 274, 300 (1987). Hence, when employees enforced employers' safety rules during normal operations, and not during strikes and other incidents of industrial unrest, the Board has found that such rule enforcement duties were not related to circumstances in which Congress felt conflicting loyalties might exist, and that the employees in question therefore were not guards. *McDonnell I*, supra; *Lion Country Safari*, supra.

In a number of representation cases based on an analysis under Section 9(b)(3) of the Act, an employer, as in the instant case, will charge certain employees with duties that are arguably security-related for only a portion of their working hours. Of central concern in such cases is not a numerical accounting of the percentage of time employees spend on such duties but rather the specific nature of the duties themselves. See, e.g., *Rhode Island Hospital*, 313 NLRB 343, 346 (1993) (Shuttle van drivers whose primary duties were to transport employees from building to building, found to be guards because they patrolled the grounds, made periodic rounds of the cafeteria, restrooms and parking lots and they regularly responded to calls for emergency help from employees or patients); *Wolverine Dispatch, Inc.*, 321 NLRB 796, 797 (1996) (Receptionists who continually monitored and controlled access to the employer's facility found not to be guards because such work was incidental to their overall clerical duties); *55 Liberty Owners Corp.*, 318 NLRB 308, 310 (1995) (Doorpersons and elevator operators in condominium buildings who continually monitored and regulated access into the building, denied entry to unauthorized persons, received deliveries and observed and reported irregularities found not to be guards because such duties were incidental to their primary function of providing courtesy-oriented and receptionist type-services to building tenants); *Burns Security Services*, 300 NLRB 298, 300 (1990), enf. denied 942 f.2d 519 (8th Cir. 1991) (Firefighters who spent much of their time checking for fire and safety rules violations found not to be guards because the specific rules they enforced against other employees were limited); *Boeing Co.*, 328 NLRB 128, 131 (1999) (Firefighters' regular rounds of facility were deemed to be fire and safety related and therefore firefighters were found not to be guards).

Accordingly, the Board has determined that employees are guards within the meaning of the Act if they are charged with guard responsibilities that are not a minor or incidental part of their overall responsibilities. *Rhode Island Hospital*, supra, at 347. Guard responsibilities include those typically associated with traditional police and plant security functions, such as the enforcement of rules directed at other employees and the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer's

premises; and wearing guard-type uniforms or displaying other indicia of guard status. *Wolverine Dispatch*, supra, at 797; *55 Liberty Owners Corp.*, supra, at 310; *Burns Security Services*, supra, at 300.

Thus, whether the maintenance employees spend 2% or 8% of their workday performing asserted guard duties (as the employee witnesses testified) is immaterial as to their statutory guard status. Instead the specific nature of their duties as they relate to traditional police and plant security functions must be examined to determine whether those responsibilities imbue them with Section 9(b)(3) status under the Act.

B. Application of Board Law to this Case

1. Enforcement of rules directed at other employees and the possession of authority to compel compliance with those rules.

There was virtually no evidence presented at hearing that maintenance employees enforced rules directed at other employees and the possession of the authority to compel compliance of such rules. Although there was some testimony with respect to maintenance employees enforcing parking rules, either in the hospital parking lot or near the helipad, no evidence was presented that these rules are actually enforced against employees and not just patients or visitors to the Employer's facility. In this regard, the "Parking Operations" rules themselves as provided by the Employer do not reference enforcement against employees. See *55 Liberty Owners Corp.*, 318 NLRB 308, 310 (1995) (Lack of other guard responsibilities including enforcing rules against other employees warrant the finding that doormen are not guards.) While there was some evidence at hearing that maintenance employees are required to report untoward occurrences, such duty to report appears to be shared by all of the Employer's employees and thus is not dispositive of the maintenance employees' guard status. See *Pepsi-Cola Bottling Co. of Cincinnati*, 189 NLRB 105, fn. 1 (1971).

While some evidence was presented by the Employer concerning maintenance employees enforcing its no-smoking rules, no evidence was presented as to whether these employees are enforcing the rules toward other employees. Perhaps the closest example to enforcement of any type of rule against employees of the Employer was the one-time example of maintenance employees, in 2014, standing outside the door of Human Resources upon the discharge of another employee. However, the record was silent as to whether the employee in question was being discharged based upon the enforcement of any rule by a maintenance employee or that he was being discharged based on unrelated circumstances. Given this lack of evidence of any enforcement of rules directed at employees, I find that maintenance employees do not enforce rules directed at other employees and that they do not possess the authority to compel compliance.

2. Training in security procedures.

As noted above in discussing the duties of maintenance employees, they must undergo crisis prevention training and emergency preparedness training. The CPI training as utilized in the numerous Code Gray events cited by the Employer are focused on the non-violent de-

escalation management of patients and visitors and not security related procedures. Moreover, such training is not “specialized” in that the exact same training is provided to registered nurses, health unit clerks and lab assistants.⁹ See *Guards Union Local 79 (ICI Americas)*, 297 NLRB 1021 (1990) (receptionist/switchboard operators not determined to be a guard under the Act because, among other reasons, they did not receive specialized training in security procedures). The Employer’s assertion that because it does not provide other non-clinical employees such as food service workers and housekeepers CPI training is a distinction without a difference, given that the training provided to maintenance employees is the same training provided to nurses, clerks and lab assistants and therefore not specialized. Similarly, the emergency preparedness drill training, and Code Pink and Code Purple abduction training is provided to all clinical employees, as well as maintenance employees. Even assuming, arguendo, that these types of training constitute guard training, it appears to be incidental to the maintenance employees’ regular duties, given that there is testimony of only one emergency preparedness training exercise in 2015, and the record is completely silent as to if and when Code Pink or Code Purple training was held. Thus, I conclude that the foregoing training is minor and incidental to their job duties.

3. Weapons training and possession of weapons.

Maintenance employees are not provided weapons training. Furthermore, they do not carry weapons of any kind.

4. Participation in security rounds or patrols.

With respect to making rounds or patrols, the evidence adduced at hearing disclosed that maintenance employees do not make regular rounds or patrols of the Employer’s premises. Instead, it appears that the Employer conflates locking doors at night and unlocking them in the morning, which takes approximately 5-10 minutes, to be “making rounds.” These duties are clearly inapposite to traffic control guards in *Rhode Island Hospital*, supra, at 345-6, cited by the Employer, who made regular periodic rounds of the employer’s facility exclusively for security purposes.

It is true that maintenance employees are provided a set of keys to restricted areas of the Employer’s facility, used, in part, to lock all the doors to the facility at 8 p.m. every night, with the exception of the ER entrance, and to open those same doors in the morning. However, a number of those keys are used for their maintenance duties, providing them access to areas such as the boiler room and the roof. Given the irregular and sporadic nature of maintenance employees making rounds, such duties are an incidental part of their overall responsibilities.

5. Monitor and control of access to the employer’s premises.

Based on the testimony of the witnesses, the only control maintenance employees exhibit over access to the Employer’s premises occurs when, as discussed in the section directly above,

⁹ The Employer has made no assertion registered nurses, health unit clerks and lab assistants are statutory guards under Section 9(b)(3) of the Act.

they lock the doors at 8 p.m. every night, and then open the same doors in the morning. As found above, such duties are incidental to their maintenance duties and do not imbue these employees with Section 9(b)(3) guard status.

With respect to controlling access to its premises, the Employer maintains no metal detectors at its facility and no buzzer that visitors need to push to gain access. Visitors do not need to obtain passes upon entering the facility, with the exception of those entering the mother/baby unit within the hospital, who obtain the passes from a clerk in that unit and not a maintenance employee. While the Employer maintains cameras in patient rooms, the ER and the mother/baby unit, those are monitored by nurses or recorded for possible future use and no evidence was presented at hearing that maintenance employees play any role with respect to these cameras.

Even when doors are locked after 8 p.m. every night, prospective patients or visitors to the hospital are able to walk directly into the facility through the ER without any type of access control by any employee. The Employer, without explication as to the specific incidents, cites to certain work orders that appear to show that maintenance employees let other employees into the dietary office and another office. To the extent that maintenance employees have on limited occasions controlled access to certain offices or areas within the facility, such control is extremely minor and certainly well below the level of control of employees found not to be guards in *55 Liberty Owners Corp.*, supra, at 310. (Employees who monitored and regulated access into the building, denied entrance to unauthorized persons, and observed and reported irregularities, were not guards because the foregoing functions were incidental to the employees' primary function of providing courtesy oriented and receptionist type services to various tenants.)

6. Wearing guard-type uniforms or displaying other indicia of guard status.

Although the Board uses the phrase "traditional police and plant security functions," it has not required employees to look like guards by wearing a uniform and possessing a weapon to find them to be guards within the meaning of the Act. See, for example, *A.W. Schlesinger Geriatric Center, Inc.*, 267 NLRB 1363, 1364 (1983).¹⁰ Nor does the use of a guard/security related job title alone confer guard status. *Ford Motor Co.*, 116 NLRB 1995 (1956). Thus the fact that five of the employees at issue wear a name tag listing their job title as "maint mechanic/security guard" (excluding the electrician whose name tag does not include "security guard"), without any actual traditional guard duties, is not dispositive and insufficient on its own

¹⁰ The Employer's reliance on *Schlesinger Geriatric Center* in support of its position is misplaced. Although in *Schlesinger* as in this case the maintenance employees had no special training as guards and did not wear guard uniforms or carry firearms, and had some maintenance duties, they were hired to replace uniformed security guards. They made hourly rounds of the premises, just as the predecessor security guards had done; during shift changes, they observed employees who were entering or leaving the center, to see if they were carrying packages and they were vested with the authority to open the packages; they were responsible for the safety of employees who worked the night shift by standing watch as they entered the facility; and they devoted 50 to 70 percent of their working time to such "security functions."

to establish that the employees in question are guards under Section 9(b)(3) of the Act. In *Purolator Courier Corp.*, 300 NLRB 812, 815 fns. 9, 11 (1990), the Board rejected reliance on any single factor as a “bright-line test” of guard status in favor of “analyzing the entire range of actual employee duties.” Based on the record, in analyzing and reviewing the entire range of maintenance employees’ actual duties, I find the maintenance employees, including the one electrician, not to be statutory guards under Section 9(b)(3) of the Act.

III. Conclusions

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer’s rulings are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce¹¹ within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time maintenance employees, including electricians, employed by the Employer at its facility located at 4100 River Road, East China Township, Michigan; but excluding office clerical employees, and guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Local 324, International Union of Operating Engineers (IUOE), AFL-CIO**.

¹¹ The Employer, St. John River District Hospital, is a Michigan non-profit corporation engaged in the operation of an acute care hospital at its facility located at 4100 River Road, East China Township, Michigan. During the calendar year 2015, a representative period, the Employer had gross revenues in excess of \$250,000. During the same period, the Employer purchased goods and materials valued in excess of \$5,000 and caused said purchases to be delivered to its East China Township, Michigan facility directly from points located outside the State of Michigan.

A. Election Details

The election will be held on **Tuesday, April 19**, from **6:30 a.m. to 7:15 a.m.** and **2:30 p.m. to 3:15 p.m. in an appropriate enclosed area at the Employer's East China Township, Michigan facility to be designated by the Regional Director.**

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the biweekly payroll period ending **March 26, 2016**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees 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 since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

As required by Section 102.67(l) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the Regional Director and the parties by **April 12, 2016**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, 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. Because the list will be used during the election, 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. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

D. Posting of Notices of Election

Notices of Election will be electronically transmitted to the parties, if feasible, or by overnight mail if not feasible. Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. If the Employer does not receive copies of the notice by April 12, 2016, it should notify the Regional Office immediately. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

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, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request

for review 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 of the request 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.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: April 8, 2016



Dennis Boren, Acting Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, MI 48226

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

ST. JOHN RIVER DISTRICT HOSPITAL

Employer

and

Case 07-RC-170700

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO

Petitioner

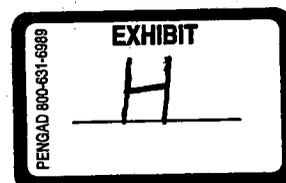
ERRATUM

The Decision and Direction of Election issued on April 8, 2016, was issued and signed by the Acting Regional Director for Region 7 of the National Labor Relations Board *Dennis R. Boren*, as indicated below, not signed by Terry Morgan as inadvertently set forth on page 12 of the Decision and Direction of Election.



Dennis R. Boren, Acting Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

Dated: April 11, 2016





**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

St. John River District Hospital

Employer

and

Case 07-RC-170700

**Local 324, International Union of Operating
Engineers (IUOE), AFL-CIO**

Petitioner

TYPE OF ELECTION: RD DECISION

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots has been cast for

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS (IUOE), AFL-CIO

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

Unit: All full-time and regular part-time maintenance employees, including electricians, employed by the Employer at its facility located at 4100 River Road, East China Township, Michigan; but excluding office clerical employees, and guards and supervisors as defined in the Act.



April 27, 2016

/s/ Terry Morgan

Terry Morgan
Regional Director, Region 7
National Labor Relations Board



NOTICE OF BARGAINING OBLIGATION

In the recent representation election, a labor organization received a majority of the valid votes cast. Except in unusual circumstances, unless the results of the election are subsequently set aside in a post-election proceeding, the employer's legal obligation to refrain from unilaterally changing bargaining unit employees' terms and conditions of employment begins on the date of the election.

The employer is not precluded from changing bargaining unit employees' terms and conditions during the pendency of post-election proceedings, **as long as** the employer (a) gives sufficient notice to the labor organization concerning the proposed change(s); (b) negotiates in good faith with the labor organization, upon request; and (c) good faith bargaining between the employer and the labor organization leads to agreement or overall lawful impasse.

This is so even if the employer, or some other party, files objections to the election pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board (the Board). If the objections are later overruled and the labor organization is certified as the employees' collective-bargaining representative, the employer's obligation to refrain from making unilateral changes to bargaining unit employees' terms and conditions of employment begins on the date of the election, not on the date of the subsequent decision by the Board or court. Specifically, the Board has held that, absent exceptional circumstances,¹ an employer acts at its peril in making changes in wages, hours, or other terms and conditions of employment during the period while objections are pending and the final determination about certification of the labor organization has not yet been made.

It is important that all parties be aware of the potential liabilities if the employer unilaterally alters bargaining unit employees' terms and conditions of employment during the pendency of post-election proceedings. Thus, typically, if an employer makes post-election changes in employees' wages, hours, or other terms and conditions of employment without notice to or consultation with the labor organization that is ultimately certified as the employees' collective-bargaining representative, it violates Section 8(a)(1) and (5) of the National Labor Relations Act since such changes have the effect of undermining the labor organization's status as the statutory representative of the employees. This is so even if the changes were motivated by sound business considerations and not for the purpose of undermining the labor organization. As a remedy, the employer could be required to: 1) restore the status quo ante; 2) bargain, upon request, with the labor organization with respect to these changes; and 3) compensate employees, with interest, for monetary losses resulting from the unilateral implementation of these changes, until the employer bargains in good faith with the labor organization, upon request, or bargains to overall lawful impasse.

¹ Exceptions may include the presence of a longstanding past practice, discrete event, or exigent economic circumstance requiring an immediate response.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 7

St. John River District Hospital,

Employer,

and

Case No. 07-RC-170700

Local 324, International Union of Operating
Engineers (IUOE), AFL-CIO,

Petitioner.

**EMPLOYER'S REQUEST FOR REVIEW OF
DECISION AND DIRECTION OF ELECTION**

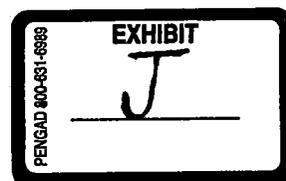


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INTRODUCTION

This request for review is made pursuant to §102.67(c) of the NLRB's Rules and Regulations. It seeks review and reversal of the Decision and Direction of Election ("DDE") by Region 7's Acting Regional Director ("ARD") (Ex. A, Decision and Direction of Election and Erratum).¹ Specifically, the ARD directed an election for six employees who provide maintenance and the only security guard services at St. John River District Hospital.

As explained below, this request raises a substantial question of law and policy because the ARD departed from official reported Board precedent regarding whether the employees in the petitioned-for unit were guards within the meaning of Section 9(b)(3) of the National Labor Relations Act. In addition, the ARD's finding on substantial factual issues were erroneous and clearly affected the Employer's rights.

STATEMENT OF FACTS

The International Union of Operating Engineers, Local 324, AFL-CIO ("IUOE") filed a petition for election dated February 29, 2016 in which the IUOE sought to represent "all full-time and regular part-time maintenance employees," excluding "clerical employees, guards, and supervisors" (Ex. B, Board Exhibit 1(a)). The IUOE stipulated at the hearing that it admits to membership or is affiliated indirectly with a labor organization that admits to membership non-guards (Ex. C, Stipulation, ¶2).

¹ The original Decision and Direction of Election, dated April 8, 2016, was signed by Terry Morgan. An Erratum was issued on April 11, 2016 stating that the April 8 DDE was "not signed by Terry Morgan as inadvertently set forth," but that it was instead signed by Dennis R. Boren, Acting Regional Director.

A hearing was held in Detroit on March 10, 2016 (Ex. D, Transcript). The parties litigated the issue of whether the employees in the petitioned-for unit were guards within the meaning of the National Labor Relations Act, Section 9(b)(3).

The Hospital presented testimony from the guards' supervisor, Darien Mills, and Kenneth Cressman, one of the employees in the petitioned-for unit (Ex. D, Tr., 13-161). The Hospital also submitted a series of exhibits that were admitted by the Hearing Officer as E-1 through E-5, including: (1) the guards' identification badges, which say "Maint. Mechanic/Security Guard"; (2) the guards' Security Management Plan; (3) the nonviolent crisis prevention and intervention ("CPI") training manual signed by the guards; (4) the guards' annual CPI training cards; and (5) the guards' security incident report binder. The Hearing Officer informed the parties that the Regional Director would not be amenable to post-hearing briefs (Ex. D, Tr., 9).

St. John River District Hospital (the "Hospital") is a small, 68-bed facility located in East China Township, Michigan (Tr., pp. 13, 57, 91-92). Among its departments are a mother-baby unit, emergency room, physical therapy, diagnostic imaging, pharmacy, administration, a laboratory, and intensive care (See e.g., Ex. D, Tr., 61, 92).

Mr. Darien Mills supervises the six employees,² five of whom are called "Maintenance Mechanic/Security Guard" and the sixth who holds the title "Electrician" (Ex. D, Tr. 14).³ All six employees are required to wear badges bearing those titles at work (Ex. D, Tr., 14; Ex. E, badges). The Hospital runs three partially overlapping shifts for the guards with one or two

² The parties stipulated that Mr. Mills was a supervisor within the meaning of the National Labor Relations Act (Ex. D, Tr., 11).

³ The employees acknowledged that they held these job titles (See e.g., Ex. D, Tr., 124, 183, 208).

individuals assigned for each shift (Ex. D, Tr., 25). Upon hire, the employees are trained in the duties of maintenance mechanic/security guard, including everything from learning the heating and cooling system to how they must respond to code gray alerts (Ex. D, Tr., 17).⁴ Testimony established that the guards were also trained on responding to codes called for infant or child abductions (Ex. D, Tr., 21).

In addition to this training, all six employees were required to read the Security Manual (Ex. D, Tr., 17). Each of them signed that Security Manual acknowledging that they did so (Ex. F, Security Manual, pp. 000005-6; Ex. D, Tr., 17-18). All six employees are required to comply with and follow all of the security policies and procedures contained in that Security Manual (Ex. D, Tr., 18). Among the goals of the Security Manual to "[c]onduct risk/threat and vulnerability assessments" and to "improve safety and security" (Ex. F, p. 000002). Page 10 of the Security Manual says:

It is recognized that security responsibilities for River District Hospital are performed by staff in the maintenance and engineering department (Ex. F, p. 000010).

To be clear, that "department" consists only of Mr. Mills and the six guards (Ex. D, Tr., 20).

No other employees or anyone else provides security services on site at the Hospital (Ex. D, Tr., 25, 109, 214).

A description of some of the guards' responsibilities under the Security Manual reflects that their duties include both: (a) protecting the safety of persons on the employer's premises; and (b) enforcing against employees and other persons rules to protect the property of the employer. Among the duties outlined in their Security Manual are:

⁴ A Code Gray is generally called when a combative person is present (Ex. D, Tr., 28-29).

1. Policy No. 1, which provides that "security responsibilities for River District Hospital are performed by staff from the Maintenance & Engineering Department." Under that policy, when security is requested, the guards are to determine whether anyone's safety is at risk, whether any weapons are involved, where the incident is located, and to acknowledge that someone is responding (Ex. F, Policy No. 1, p. 000010).
2. The guards must complete Security Incident Reports for certain categories of incidents (Ex. F, Policy No. 2, p. 000011).
3. The guards must "respond quickly" to the affected area of a Code Gray and "provide necessary assistance and/or leadership in de-escalating the situation, which may include directing other staff to summon law enforcement." They also must coordinate a security response with other members of the hospital staff, complete Code Gray reports, and ask any assault victim if he or she wishes to file a police report (Ex. F, Policy No. 3, p. 000011).
4. When a police prisoner is brought to the hospital, the guards must complete a security incident report (Ex. F, Policy No. 4, p. 000013).
5. Whenever a weapon is brought into the hospital by a person other than a law enforcement officer, the guards are responsible to call 9-1-1 and police, and complete a security incident report. In addition, under certain circumstances, they must confiscate legally possessed weapons (Ex. F, Policy No. 5, p. 000014-15).
6. In reports of power failure, natural disaster or mass casualties, the guards are to coordinate a response with Hospital administration and provide security by, among other things, activating the Hospital's Incident Command System and opening the Emergency Operations Center (Ex. F, Policy No. 6, p. 000016).
7. Policy No. 7 addresses incidents involving a hostage or active shooter. In those cases, although the guards are not to negotiate or take matters into their own hands, they must coordinate with Command Officers from public law enforcement (Ex. F, p. 000017). In addition, the guards must assist with the patient and visitor evacuation if practical, and activate the Hospital's Incident Command System (Ex. F, Policy No. 7, p. 000017).
8. When an infant or child abduction is reported, the guards must be "first responders" (Ex. F, Policy No. 8, p. 000019). In such situations, they must: (a) respond to the affected area; (b) coordinate search efforts with the leader of the affected hospital unit; and (c) announce over their two-way radios information about the need to search restrooms, parking areas and other areas where the perpetrator may hide (Ex. F, Policy No. 8, p. 000019).

9. Under Policy No. 9, when staffing is low and safety is at greater risk, the guards must maintain a physical presence at the Emergency Department to "promote[] a sense of awareness, security and being in control of the environs during interactions with persons displaying disorderly behaviors" (Ex. F, p. 000020). Further, they must assist patients and visitors in way-finding and "[m]onitor after hours visitors" (Ex. F, p. 000020). Where a disorderly person is present, the guards must "attempt to de-escalate and redirect the person's behavior" and call law enforcement if unsuccessful in doing so (Ex. F, p. 000020). The policy also makes clear that "[i]t is imperative" that they "make every effort to create a safe environment by remaining alert for escalating behaviors" (Ex. F, p. 000020).
10. Policy No. 10 provides that the guards must take control of any suspected illegal controlled substances/paraphernalia to be delivered to nursing staff and turn it over to law enforcement as soon as possible (Ex. F, p. 000022). In doing so, they must make a telephone Security Incident Report, seal the items in a properly tagged evidence envelope, store the envelope in the department vault, and contact the police for pickup (Ex. F, p. 000022).
11. The guards must respond to and provide support for VIP visitors, including by establishing two-way radio communication with the nursing staff on the unit where the VIP will be treated and by being "alert for any calls for assistance to that unit" (Ex. F, Policy No. 11, p. 000023).
12. In the case of a bomb threat, the guards must obtain all pertinent information, provide information to police and fire personnel, make sure that a Code Yellow is announced and that law enforcement are notified, and "assume a lead role in organizing a thorough search of the premises" (Ex. F, Policy No. 12, p. 000024).
13. The guards must respond to panic alarms⁵ and "assume a lead role in gaining control of the situation, up to and including giving directives for local law enforcement to be summoned if needed" (Ex. F, Policy No. 13, p. 000025; Ex. D, Tr., 137).
14. The guards have "an active role and specific responsibilities as it relates to access control at the hospital," including recording that a request to open a door has been made (Ex. F, Policy No. 15, p. 000027).

⁵ There are three panic alarms which sound only internally at the Hospital. These include alarms from Health Information Management (medical records), patient registration, and Hospital administration (Ex. D, Tr., 35, 61-64). In those cases, the alarms go to the Hospital switchboard who, in turn, contact the guards. *Id.* Dyke Security, an external monitoring service, monitors the other panic alarms (Ex. D, Tr., 35). Dyke contacts law enforcement for those alarms it monitors, but never sends its own personnel in response to a panic alarm (Ex. D, Tr., 64, 102).

As noted, each of the guards signed the Security Manual acknowledging their responsibility to read and become familiar with those policies and unrebutted testimony established that the guards were required to comply with and follow all of those policies and procedures (Ex. F, pp. 000005-6; Ex. D, Tr., 18). In addition, the Supervisor testified, by way of example, that the guards would be disciplined if they refused to respond to a Code Gray, a security call, or a panic alarm (Ex. D, Tr., 29, 36). Guard Ken Cressman acknowledged that he would likely face discipline if he saw a patient in pharmacy at 2:00 a.m. and did nothing about it (Ex. D, Tr., 133-134).

As noted, the guards are also trained on non-violent crisis prevention and intervention techniques ("CPI") (Ex. D, Tr., 22).⁶ They receive a complete manual reflecting that CPI training and annual updates on that training (Ex. D., Tr., 22-23, 187; Ex. G, CPI Manual; Ex. H, CPI training cards). Included in the CPI training are the use of kick blocks, one-hand grab releases, one-hand hair pull releases, and the use of physical restraints (Ex. G, CPI Manual).

Testimony established that the guards' duties also include:

- Verbally de-escalating the behavior of disorderly patients and visitors (Ex. D, Tr., 29-31, 133).
- The use of physical restraint on aggressive or combative persons (Ex. D, Tr., 32-33, 132, 179, 187-188).
- Monitoring or providing a security presence when there is a combative or potentially combative person or a person with challenging behaviors (Ex. D, Tr., 34, 41, 127).

⁶ Although the guards are not the only employees trained on CPI, there are no other non-clinical personnel trained in CPI (Ex. D, Tr., 99). Likewise, no other non-clinical employees are required to respond to Code Gray alerts (Ex. D, Tr., 100, 178-179). For instance, employees who work in environmental service, food and nutrition, administrative or billing positions do not respond to Code Gray calls (Ex. D, Tr., 100-101).

- Locking down the building (except for two specific doors) and making their presence known at 8:00 p.m. (Ex. D, Tr., 36-37, 122).
- Using their building access to investigate suspicious behavior (Ex. D, Tr., 113). For instance, if a light is on in the president's office, they can use their building-wide access to investigate it (Ex. D, Tr., 114).
- Conducting rounds of the premises, especially in the evening hours (Ex. D, Tr., 111).
- Periodically monitoring the entrances and exits (Ex. D, Tr., 112).
- Keeping lookout during that lockdown process for suspicious activity and for individuals present in areas without authorization (Ex. D, Tr., 37-38).
- Cutting keys, changing locks and using their discretion to regulate access within the building (Ex. D, Tr., 39, 138-139).
- Providing a security presence in locations where a situation may escalate or become confrontational (Ex. D, Tr., 39).
- Waiting outside Human Resources during the termination of someone's employment (Ex. D, Tr., 39-40, 204-205).
- Securing contraband, such as illegal drugs (Ex. D, Tr., 112-113).
- Maintaining a physical presence in the emergency department during off shifts or when patient volume is high (Ex. D, Tr., 40).
- Investigating missing or stolen items (Ex. D, Tr., 41).
- Accessing the Hospital's security surveillance system (Ex. D, Tr., 42).
- Preventing crime by intervening before something happens (Ex. D, Tr., 42).
- Investigating suspicious vehicles in the parking lot (Ex. D, Tr., 44).
- Escorting employees to their vehicles at night when requested (Ex. D, Tr., 45).
- Regulating access to the hospital's helipad, including posting sentry to keep away pedestrians and onlookers and otherwise keeping people away so they are not injured, and staying with the helicopter until the patient is put in or taken away (Ex. D, Tr., 46-48, 140).⁷

⁷ Mr. Mills estimated about 20 helipad visits per year (Ex. D, Tr., 91).

- Contacting police or directing others to call the police when necessary (Ex. D, Tr., 48-49).
- Intervening when a person is loitering on the property (Ex. D, Tr., 50).
- Participation in emergency management drills by, for instance, controlling parking lot traffic and access into and out of the Hospital during the simulated event (Ex. D, Tr., 66 & 100).
- Providing security in the event of a strike (Ex. D, Tr., 115-116).

The guards are assigned a two-way radio during their shifts which they must carry and keep on at all times, for security purposes, and respond when called (Ex. D, Tr., 25-26, 126).⁸ No employees other than the switchboard operator carry two-way radios (Ex. D, Tr., 178). In addition, they are required to complete written security incident reports and phone in certain types of incidents and complete Code Gray reports when a Code Gray is called (Ex. D, Tr., 26, 167, 175). Depending on the level of security incident involved, they will either report it in their work log as a security incident or complete a Code Gray report (Ex. D, Tr., 127, 175). All of these written reports are maintained in a binder in their department (Ex. D, Tr., 27-28). This binder was introduced as Employer Ex. 5 and is attached hereto as Ex. I.

The incident report binder reflects countless incidents in which the guards enforced rules to protect Hospital property and/or the safety of persons on the Hospital's premises. Illustrative examples include:

- February 24, 2016: Ken Cressman responded to a Code Gray when a suicidal psychiatric patient was brought in by police to the Emergency Room. Mr. Cressman monitored the patient (Ex. I, p. 000077).

⁸ Although the union presented testimony that guards cannot hear two-way radios while working on the roof, when they are working alone, they should not be anywhere that they cannot hear a Code Gray call (Ex. D, Tr., 101).

- February 9, 2016: Mr. Cressman was requested to keep a presence when a mentally unstable patient threatened to leave against medical advice and pulled the IV out of his arm (Ex. I, p. 000086; Ex. D, Tr., 128).
- February 15, 2016, Supervisor Darien Mills and guard Brad Hubbard responded to a Code Gray when an intoxicated patient had to be restrained with a three-point restraint (Ex. I, p. 000087).
- January 30, 2016: Guards Cressman and Thomas were summoned by two-way radio to the ER when a patient became upset with her nurse (Ex. I, p. 000089).
- January 29, 2016: Guard Ken Cressman was summoned by the Assistant Clinical Leader to the Intensive Care Unit when a patient became aggressive and verbally abusive (Ex. I, p. 000092, 000097-98; Ex. D, Tr., 128-129).
- January 23, 2016: Mr. Cressman and Mr. Thomas responded to assist law enforcement who brought in a female arrestee to the hospital after the arrestee struck a nurse and tried to kick and bite even though the arrestee was chained to bed rails (Ex. I, p. 000093; Ex. D, Tr., 129-130).
- January 19, 2016: Mr. Cressman was sent to the Emergency Room about an unstable patient to "make sure E.R. staff was O.K." (Ex. I, p. 000094).
- January 15, 2016: Mr. Cressman reported to the Emergency Room to ask two people to leave (Ex. I, p. 000095; Ex. D, Tr., 130-131).
- January 14, 2016: Mr. Hubbard and Mr. Frank were called to ensure the safety of staff when a patient was not listening and trying to get out of bed (Ex. D, Tr., 188; Ex. I, p. 000096).
- January 9, 2016: While doing late morning rounds, a possibly intoxicated person came to the Emergency Room, so Mr. Cressman provided a "security presence" for the nurses (Ex. I, p. 000098).
- January 7, 2016: Mr. Frank and Mr. Hubbard responded to a Code Gray to verbally de-escalate a patient who was yelling (Ex. I, p. 000099; Ex. D, Tr., 188-189).
- November 25, 2015: Supervisor Mills and guard Brian Meldrum responded to a Code Gray in their security capacity when a patient spat at a nurse and threatened to blow her own head off. Law enforcement was called (Ex. I, pp. 000107-108; Ex. D, Tr., 173).
- November 24, 2015: Mr. Cressman attempted to verbally de-escalate an Emergency Room patient who, when being discharged, became agitated and banged on furniture (Ex. I, p. 000109).
- November 20, 2015: Mr. Cressman had to address a discharged patient who was loitering in the hospital (Ex. I, p. 000111).

- Supervisor Mills and guard Jon Frank responded to a Code Gray when a patient kicked a nurse in the chest. The patient was restrained using a four-point technique (Ex. I, p. 000113; Ex. D, Tr., 221-222).⁹
- November 3, 2015: Mr. Cressman's presence was requested when an intoxicated patient, whose demeanor was uncertain, was waiting to be transported away by law enforcement (Ex. I, p. 000114).
- October 23, 2015: While escorting an employee to her car at night, Mr. Cressman reported on a suspicious visitor he noticed wandering around with no Hospital business (Ex. I, p. 000115).
- October 9, 2015: Mr. Frank responded to a Code Gray when a patient swore at a nurse and was not doing as instructed (Ex. I, p. 000121).
- September 30, 2015: Mr. Cressman responded to a Code Gray and tried to stop a patient who was a danger to himself and others, from leaving the Hospital. The patient grabbed his right arm and scratched him (Ex. I, p. 000125).
- September 18, 2015: Mr. Hubbard was called to help control the situation when a patient was swearing at and threatening nurses (Ex. D, Tr., 189; Ex. I, p. 000130).
- July 8, 2015: Mr. Hubbard and Jon Frank locked down the Hospital when a patient's son, who had left, threatened to come back and kill nurses (Ex. D, Tr., 191-192). They also escorted staff and family members in and out of the Hospital (Ex. D, Tr., 191-192; Ex. I, p. 000143).
- July 4, 2015: Mr. Cressman noted that his "security presence" was requested for multiple combative and argumentative patients (Ex. I, p. 000144).
- June 27, 2015: Mr. Cressman investigated when a person was loitering and trying to sleep at the north end of the building. He asked the person to leave (Ex. I, p. 000145; Ex. D, Tr., 131).
- June 9, 2015: Mr. Cressman responded when a "security presence" was requested when a patient's family member in the Admitting area was upset (Ex. I, p. 000153). That same evening, Mr. Cressman's presence was requested when an overdosed patient's behavior was "initially unpredictable" (Ex. I, p. 000154; Ex. D, Tr., 158-159).
- April 8, 2015: A physician asked Mr. Cressman to "post" at the Emergency Room where a verbally abusive and combative patient had recently left in anger (Ex. I, p. 000166-167).
- March 24, February 26, February 29 and February 17, 2015: Mr. Cressman escorted employees to their vehicles (Ex. I, p. 000179, 000183-184 & 000186).

⁹ Applying a four-point restraint means tying all four limbs down (Ex. D, Tr., 33).

- February 18, 2015: Mr. Hubbard and Mr. Frank responded to a Code Gray and attempted to verbally de-escalate a patient who was inappropriately touching nurses (Ex. I, p. 000185; Ex. D, Tr., 195).
- February 7, 2015: Mr. Hubbard and Mr. Cressman assisted with an intoxicated and disorderly patient in the Emergency Room waiting area (Ex. I, p. 000189; Ex. D, Tr., 195-196).
- February 4, 2015: Mr. Hubbard responded when a panic button was activated (Ex. I, p. 000192).
- January 31, 2015: Mr. Cressman was asked to provide a "security presence" when an intoxicated person was present (Ex. I, p. 000195).
- January 18, 2015: Mr. Hubbard was called to the Emergency Room waiting room so that he could ask a person to leave (Ex. I, p. 000200; Ex. D, Tr., 197). During that same shift, Mr. Hubbard was brought in to help calm a patient who went "ballistic" when moved from the EMS stretcher (Ex. D, Tr., 197; Ex. I, p. 000202).
- January 15, 2015: Mr. Hubbard responded to a Code Gray and had to evict a person who was swearing at secretaries and nurses (Ex. I, p. 000203).
- January 3, 2015: During his process of locking down the building, Mr. Hubbard found lights on and the door unlocked in Occupational Medicine and investigated who had been there (Ex. I, p. 000204).
- December 20, 2014: Mr. Delor responded when a visitor was with a patient removing supplies from a room (Ex. I, p. 000209-210).
- December 16, 2014: Mr. Hubbard was called for two security incidents: once when a patient was being combative toward EMS personnel and another when another patient was combative (Ex. I, p. 000212 & 000213). That same evening, Mr. Cressman responded to two separate security requests when combative or suicidal patients were present (Ex. I, p. 000214).
- December 14, 2014: Mr. Cressman was called when a vehicle was parked on the helipad (Ex. I, p. 000214; Ex. D, Tr., 140).
- November 6, 2014: Mr. Frank responded when an alarm sounded in Family Practice (Ex. I, p. 000224).
- October 31, 2014: Mr. Hubbard was called when an Emergency Room staff member believed a patient may be combative (Ex. I, p. 000237).
- October 14, 2014: Mr. Frank and Mr. Hubbard responded to a panic alarm when a staff member became concerned that a discharged patient was threatening his father over the phone (Ex. I, p. 000247).

In short, the guards regularly enforce rules to protect Hospital property and/or the safety of persons on the Hospital's premises.¹⁰

ARGUMENT

I. THE ACTING REGIONAL DIRECTOR DEPARTED FROM OFFICIAL REPORTED BOARD PRECEDENT IN DETERMINING THAT THE EMPLOYEES IN THE PETITIONED-FOR UNIT WERE NOT GUARDS WITHIN THE MEANING OF SECTION 9(b)(3).

Under Section §9(b)(3) of the National Labor Relations Act, the Board "shall not. "

decide that any unit is appropriate for such purposes [collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards. 29 U.S.C. §159(b)(3).

Thus, the Board may not allow guards in a bargaining unit when the organization itself allows non-guards in its membership. *See e.g., Wells Fargo Guard Services of Baker Protection Services, Inc.*, 236 NLRB 1196-1197 (1978).

Contrary to the express terms of the NLRA, the Decision and Direction of Election by Region 7's ARD would do just that: include security guards within the same organization as one that represents non-guards. Consistently, the ARD's Decision and Direction of Election is also

¹⁰ Additional illustrative examples appear in Ex. I, p. 000105, Ex. I, p. 000110, Ex. I, p. 000122, Ex. I, p. 000146, Ex. I, p. 000183, Ex. I, p. 000186, Ex. I, p. 000188, Ex. I, p. 000226, and Ex. I, p. 000187.

contrary to established Board precedent. Based on the record described above, the employees in the petitioned-for unit are unequivocally "guards" under that precedent.

In *Allen Services Co.*, 314 NLRB 1060, 1062 (1994), the Board held that security guards who enforced against unauthorized persons rules to protect company equipment, kept unauthorized persons from the property, and protected the premises were guards. It was not significant that they lacked weapons, security badges and special uniforms. *Id.* It also was immaterial that they notified police where appropriate rather than taking matters into their own hands. "The fact that they notify the police does not detract from their guard status. Rather it is sufficient that they possess and exercise responsibility to observe and report trespass infractions because this is an essential part of the Employer's procedures for protecting the premises and equipment." *Id.*

In *Rhode Island Hospital*, 313 NLRB 343, 346 (1993), the Board determined that shuttle van drivers were guards. Even though they primarily transported employees from one building of the hospital to another, they also watched for security problems and rule violations and reported "threatening situations when needed." *Id.*

The Board has previously recognized that maintenance personnel who provide security services in addition to their maintenance duties were nevertheless guards under Section 9(b)(3). In *Jakel Motors, Inc.*, 288 NLRB 730 (1988), the Board held that Night Custodians were guards where they were to: maintain the plant and grounds; notify management and police or fire in cases of fire, theft, vandalism, or illegal entry; record unusual events in a log; and require entrants to sign in. *Id.* at 742-743. The Board observed:

The Board has held that in circumstances where employees perform security work in addition to their maintenance work, they are excluded from the unit as statutory guards under Section 9(b)(3) of the Act which provides the Board shall not "(3) decide that any unit is appropriate for such purposes if it includes, together with any other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises."

Id. at 743 (emphasis added), citing *A. W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983).

The Night Custodians in *Jakel* were guards even though they did not wear uniforms, carry guns, or have special security training. *Id.* at 743.

In other cases, too, maintenance or janitorial service employees have been deemed guards when they held security-related duties. In *A.W. Schlesinger Geriatric Center*, *supra*, the Board determined that maintenance employees hired to meet the company's security needs were guards. Among other duties, they locked and unlocked doors and gates, opened packages, were responsible for employee safety, made rounds, quelled disturbances and asked trespassers to leave. They had no special guard training, did not carry weapons and did not wear uniforms. *See also Erlanger Dry Goods Co.*, 107 NLRB 23 (1953) (finding that the employer's "watchman-janitor" was a guard where his primary duties were sweeping and cleaning, but he also held "monitorial duties" such as checking the packages of employees leaving the store); *The New Jersey Zinc Co.*, 108 NLRB 1663 (1954) (holding that janitor-watchmen, shovelers, and compressor operators who had part-time guard duties were excluded as guards); *Monroe Calculating Machine Co.*, 109 NLRB 314 (1954) (excluding as guards employees who predominantly cleaned and swept but also patrolled the plant).

In *MGM Grand Hotel*, 274 NLRB 139 (1985), the employees at issue operated and monitored a fire alarm system which had fire detection as the primary function. The employees'

primary duty was monitoring the system for fire prevention but they also monitored door exit alarms and certain motion detectors. They also had duties associated with monitoring the heating, venting and air conditioning systems. All they did in case of an alarm was acknowledge it by pushing a button to notify security or the other appropriate department, and then an actual security guard would then come and take control of the operations. Nevertheless, the Board held that these employees were guards. The fact "[t]hat the operators spend only a portion of their time monitoring [security] functions is immaterial in determining their status as guards under the Act." *Id.* at 140. It should be noted by contrast that, in the instant case, the guards are the only security presence at the building (Ex. D, Tr., 25, 109, 214).

The Board has found employees to be guards even where the employees' property protection duties were comparatively minimal to the duties assigned in this case. In *Thunderbird Hotel*, 144 NLRB 84 (1963), for instance, the Board concluded that timekeepers who prevented entrance by unauthorized persons and watched for the improper entrance and exit of property were guards. In *Republic Aviation*, 106 NLRB 91 (1953), it found that receptionists who simply screened visitors, issued passes, and checked deliveries were guards. The guards at issue in the instant case regularly protect the Hospital's property and premises by watching for suspicious activity, protecting employees, confronting loiterers and combative persons, and ejecting unwanted visitors.

The Decision and Direction of Election pointed out that the guards are not licensed, do not carry weapons or receive weapons training and do not wear guard uniforms. However, the Board has repeatedly explained such facts are immaterial if the employees otherwise function as

guards, just as they do here. See e.g., *Jakel, supra*; *Allen Services, supra*; *A.W. Schlesinger Geriatric Center, supra*.

Although the guards indicated through conclusory testimony in this case that the security functions of their jobs represented small fractions of their daily duties, that suggestion was belied by the record described above.¹¹ Further, Mr. Mills made clear that the guards must remain on alert for security incidents by keeping their eyes and ears open at all times while on duty (Ex. D, Tr., 83). In addition, as the ARD correctly recognized, the percentage of time spent on security duties is immaterial. The Board reiterated in *J.C. Penney*, 312 NLRB 32, 33 (1993), that "[i]t is the nature of the duties of guards and not the percentage of time which they spend in such duties which is controlling" (emphasis added) (citing *Walterboro Mfg. Corp.*, 106 NLRB 1383, 1384-1385 (1953)). Accord: *Rhode Island Hospital, supra* at 346; *Blue Grass Industries, Inc.*, 287 NLRB 274, 300 (1987) (quoting *Supreme Sugar Co.*, 258 NLRB 243, 245 (1981) and noting that

¹¹ When Mr. Hubbard claimed that only two percent of his time is spent on security incidents, he was asked how he arrived at that estimate. In giving his answer, he estimated that he would be called to the emergency room one time in a month (Ex. D, Tr., 185-186). However, on cross examination, it was clear this was not an accurate estimate, as the evidence showed by way of example that he responded to three Code Grays alone between mid-February and mid-January 2016 (Ex. D, Tr., 187-189). He later admitted that he'd used only one thirty-day period to provide this estimate (Ex. D, Tr., 190). He further admitted that two percent of his eight-hour shift is approximately nine minutes but that the lockdown portion of his shift alone took about nine minutes (Ex. D, Tr., 191). Other reports showed that he responded to several significant events within just a few days of one another (Ex. D, Tr., 190, 192; Ex. I, pp. 000130, 000132, 000143, 000147). An additional example showed three Code Grays for Mr. Hubbard in one shift (Ex. I, pp. 000148-150). Another single report shows that Mr. Hubbard was called several times in one shift about the same intoxicated visitor (Ex. I, p. 000150; Ex. D, Tr., 194). On another single shift, Mr. Hubbard handled at least four security incidents (Ex. I, pp. 000212-214; Ex. D, Tr., 199-200). Mr. Cressman, for his part, claimed that 90% of his work log items were not security events and that he could go for two weeks without a security incidents. However, he admitted that in some shifts he will have several security incident events (Ex. D, Tr., 158-159). Further, the record established that Mr. Cressman's name is all over the security logs and Code Gray reports and that, on countless occasions, he has responded to security events (Ex. I).

less than nine percent of employees' hours were devoted to security services); *United Technologies Corporation*, 245 NLRB 932 (1979).

That other employees also participate in the Code Gray calls and other clinical events is immaterial. *Brink's Inc.*, 272 NLRB 868, 869 (1985) ("The fact that the non-guard employees of the Employer may also take measures to restrict access to the premises does not nullify the guard-type duties of the coin room employees. "). Indeed, it would make little sense that clinical personnel were not involved in Code Gray calls because, as shown, it is the clinical employees who primarily encounter combative people. Moreover, as noted above, the guards are the only non-clinical employees who must respond to the codes (Ex. D, Tr., 100-101, 178-179). They are the only security presence at the Hospital (Ex. D, Tr., 25, 109, 214).

The ARD believed that the guards did not enforce rules against other employees (See Ex. A, DDE, p. 6). Although the ARDs' factual finding that the guards in that regard was erroneous (as explained Section II.B, *infra*), his suggestion that this is a factual prerequisite for guard status is also at variance with Board decisions. Even employees who protect the property of the employer's customers have been considered guards. *Brink's Inc.*, 226 NLRB 1182, 1183 (1976) ("The Board has long held, with court approval, that the foregoing definition [of guards] applies equally to persons engaged in protecting property of an employer's customers"). In many cases, the Board has found that employees who have seemingly no rule-enforcement authority against employees are nevertheless guards. Notably, in *Brinks*, the Board was silent on the issue of "divided loyalties" associated with having guards and non-guards in the same labor organization. *See also Purolator Courier Corp.*, 266 NLRB 384 (1983) (holding that couriers were guards where they transported valuable commodities, made deliveries in vans, and held keys to access

locked premises and vaults of the employer's customers). In other cases, too, the Board has recognized that employees can be guards when they carry no enforcement authority against other employees. See e.g., *Crossroads Community Correctional Center*, 308 NLRB 558 (1992) (holding that correctional residence counselors in a half-way house were guards when they watched inmates, safeguarded the premises and reported violations to third parties); *Wackenhut Corp.*, 196 NLRB 278 (1972) (finding that toll booth operators were guards because they were responsible for protecting the highway premises and not employer property).

In fact, the ARD's conclusion in this regard also failed to recognize that the regularity with which the guards actually enforce rules against other employees is not significant because the question is whether the potential for doing so exists. As the Sixth Circuit explained, "Congress enacted section 9(b)(3) to alleviate not merely divided loyalties at a company plant, but the potential for divided loyalty that arises whenever a guard is called to enforce the rules of his employer against any fellow union member." *N.L.R.B. v. Children's Hosp. of Michigan*, 6 F.3d 1147, 1150 (6th Cir. 1993) (emphasis added) (citing *NLRB v. Brinks, Inc. of Florida*, 843 F.2d 448, 453 (11th Cir.1988)) (quoting *Truck Drivers Local Union No. 807*, 755 F.2d 5, 9 (2nd Cir.), cert. denied, 474 U.S. 901, 106 S.Ct. 225, 88 L.Ed.2d 225 (1985)). Accord: *Wells Fargo Armored Service Corp.*, 270 N.L.R.B. 787, 789 n.10 (1984)) (stressing that the "potential for a conflict of loyalties" within "mixed" guard unions" was the reason Congress precluded certification of mixed unions) (emphasis in original); *Teamsters Local 71 v. NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977). Thus, the frequency with which the guards enforced rules against employees was not significant.

As shown above, the ARD departed from Board precedent by directing an election of guards to be included in a unit represented by an organization which represents non-guards. Consequently, the Board should grant review and reverse the ARD's decision.

II. THE ACTING REGIONAL DIRECTOR'S FINDINGS ON SUBSTANTIAL FACTUAL ISSUES WERE ERRONEOUS AND CLEARLY AFFECTED THE HOSPITAL'S RIGHTS UNDER THE ACT.

A. The Acting Regional Director's Finding that the Guards' Security Duties are "Incidental" to their Maintenance Duties was Erroneous.

To the extent that the Board has deviated from earlier precedent by focusing on whether an employees' security duties are "incidental" to their other duties, that distinction does not apply in this case. The security guard duties of the employees in the petitioned-for unit are not "incidental" to their maintenance duties. The ARD's conclusion to the contrary was erroneous.

The ARD operated under a mistaken interpretation of the word "incidental" in his finding. In *Burns Security Services*, 300 NLRB 298, 301 at n.19 (1990), enf. denied 942 F.2d 519 (8th Cir. 1991), the Board confirmed that the word "incidental" in this context means "being likely to ensue as a chance or minor consequence." This is made clear in the very cases relied on by the ARD which described employees whose duties were incidental to their primary duties. In *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996), the security duties were obviously "incidental" to receptionist duties because the receptionists sat in a reception area from which they could see visitors. From that seat, they used an intercom and either allowed or disallowed the visitor. *Id.* at 797. As a result, their duties in controlling access were merely incidental to – a consequence of -

serving as the receptionists. Similarly, in *55 Liberty Owners Corp.*, 318 NLRB 308 (1995), the responsibility of doormen to ask unauthorized persons to leave or to enforce no-smoking and no-loitering rules were incident to being stationed at the door. *Id.* at 310. In *Burns, supra*, the firefighters' enforcement of no-smoking rules was "only incidental to their duties to fight fires and ensure fire safety." *Id.* at 301. Similarly, in *Boeing Co.*, 328 NLRB 128, 131 (1999), the Board determined that firefighters' security-related duty during a strike was to remain alert for suspicious activity was "incidental" because they were instructed to do so only while on their regular fire safety tours. *Id.* at 131.

The guards' security duties in the instant case do not merely result from chance or a minor consequence of their maintenance duties. They do not merely respond to Code Gray alerts and panic alarms because they happen to be unclogging a toilet in the department where the alert originated. They do not evict unwanted or dangerous persons because they happened to be checking an electrical outlet near the lobby. They do not restrain patients in the Emergency Room because they happened to be cleaning the cabinet where restraints are kept. They do not stand outside Human Resources during employee terminations merely while working in the area. They are called upon to perform these duties specifically for protecting the Employer's premises, its employees, and its visitors and separately from their maintenance duties. Moreover, they are specifically and separately trained to provide security services, non-violent crisis prevention and intervention, and to report rule violations. Thus, the ARD's finding that the guards' security duties were "incidental" to their maintenance duties was erroneous. Because that finding determined the outcome of this case, it clearly affected the Hospital's rights and should be reversed.

B. The Acting Regional Director's Finding on a Substantial Factual Issue – Whether the Employees are Employed to Enforce Against Employees and other Persons Rules to Protect Property of the Employer or to Protect the Safety of Persons on the Employer's Premises – Was Erroneous.

The ARD somehow found that the guards did not enforce employer rules against other employees. Yet, testimony clearly established that the guards in the instant case carry responsibility for enforcement of rules against employees such as the prohibition against smoking on campus, parking in handicapped spots, parking overnight at the hospital, and parking on or near the helipad (Ex. D, Tr., 110-111). In addition, Mr. Hubbard admitted that if he saw an employee in an area where he or she was not authorized, it would be his responsibility to address the matter even without being instructed to do so (Ex. D, Tr., 205). Mr. Meldrum testified that he was called to Occupational Health to observe a urinalysis test (Ex. D, Tr., 176). In controlling access to the building, it would be a guard's responsibility to investigate why, for instance, a light was on in the president's office at night (Ex. D, Tr., 114). Further, as Mr. Mills explained, the CPI training does not distinguish between restraining a patient to prevent harming an employee from restraining one employee from harming another employee: "a fight is a fight" (Ex. D, Tr., 228-229). There also was testimony that the guards have been called upon to wait outside Human Resources during employee terminations (Ex. D, Tr., 39-40, 204-205). In fact, if a strike occurred, testimony established that the guards would be expected to provide security services

(Ex. D, Tr., 115-116).¹² In fact, not a single guard testified that he does not enforce rules against fellow employees. As noted, there is no other security at the Hospital (Ex. D, Tr., 25, 109, 214).

In addition, many of the duties described in Security Manual and through the testimony make no distinction between enforcement of rules against employees as opposed to patients and visitors. These include, for instance: monitoring or providing a security presence in cases of combative persons (Ex. D, Tr., 34, 41, 127); restraining such persons (Ex. D, Tr., 32-33, 132, 179, 187-188); investigating suspicious behavior (Ex. D, Tr., 113); watching for suspicious activity and for individuals present in areas without authorization (Ex. D, Tr., 37-38); investigating missing or stolen items (Ex. D, Tr., 41); and controlling access by persons to areas in which they are not unauthorized (Ex. D, Tr., 39, 138-139; Ex. I, p. 000027). One does not have to be a patient or other outside visitor in order to engage in wrongful conduct like assaulting a patient or peer, stealing medicine or money, parking on the helipad, or bringing a weapon to the premises. The guards are the Hospital's round-the-clock security, and the Hospital's only security force.

The ARD's finding that the guards do not enforce employer rules against other employees also takes too narrow a view of the statutory guard clause. Enforcement of employer rules against other employees is not the sole factor in determining guard status under the NLRA. Rather, the Act prohibits forcing the inclusion in a non-guard organization persons who are "employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises") (emphasis added).

¹² Mr. Mills was unsure whether a strike had ever occurred at the Hospital (Ex. D, Tr., 122).

Interestingly, one of the decisions the ARD cited in suggesting that the enforcement of rules against employees is a pivotal fact is quite helpful to the Hospital in this case. In *Blue Grass Industries*, 287 NLRB 274 (1987), a group of "watch and sweep employees" cleaned the plant and machinery, made hourly rounds to check doors and had "authority to prevent unauthorized persons from entering the plant." *Id.* at 300. Even though they had instruction in job interviews that their duties included security duties and enforcing plant rules, it was acknowledged that "generally there are no employees present" when the watch and sweep employees were on duty. *Id.* at 300 (emphasis added). No facts were evident from the opinion that the watch and sweep employees ever enforced a rule against any employee. In the instant case, by contrast, the security guards are trained on enforcing countless rules against all persons and while those other employees are on duty.

The other two cases cited by the ARD in this regard are easily distinguished. In *McDonnell Aircraft Corp.*, 109 NLRB 967, 969 (1954), the Board declined to exclude from the unit a group of 16 firefighters who protected the plant and its equipment from fire. The employer employed a staff of 100 separate guards at the plant and the sole authority of the firefighters for rule-enforcement was watching and enforcing fire rule violations. In *Lion Country Safari*, 225 NLRB 969 (1976), the Board concluded that watchtower employees at a safari park who merely observed and reported rule violations, were not guards. *Id.* at 969-970. Unlike the present case, they enforced no rules against employees. *Id.* In addition, unlike this case where the guards are the only Hospital security, a separate security force was retained to patrol the premises when the park was closed. *Id.* Also in contrast with the guards here who regularly interact with patients, the watchtower employees had limited customer contact. *Id.*

In discussing the guards' alleged lack of rule-enforcement authority against other employees, the ARD also cited to *55 Liberty Owners, supra*, for the proposition that the lack of rule-enforcement authority against other employees in that case warranted a finding that the doorpersons at issue were not guards. However, on closer examination, the Board in *55 Liberty Owners* noted that the doorpersons at issue did not make rounds, were not trained in security, and were not instructed in physical intervention. Instead, as previously noted, their guard duties were limited to asking unauthorized persons to leave or enforcing no-smoking and no-loitering rules as an incident to being stationed at the door of the building. *Id.* at 310. As shown above, the guards in the instant case are trained in security, they do make rounds, and they are instructed in the use of force (although using non-violent prevention methods). Moreover, they do not perform their guard duties incident to maintenance duties. Instead, they are separate duties which are not a consequence of their maintenance responsibilities. Again, they are the Hospital's only guards.¹³

As explained in Argument I, *supra*, the Board, the Sixth Circuit and other appellate courts have held that the actual enforcement of rules against other employees is immaterial because it is the potential for doing so that is significant. As explained repeatedly above, the guards do enforce rules against other employees and the potential that they will do so exists because they are the Hospital's only security. As noted, for instance, they could be called on in the event of a strike, they may have to enforce employer rules, report them for violation of those

¹³ In this regard, the ARD also wrote that reporting "untoward occurrences. . .appears to be shared by all of the Employer's employees and thus is not dispositive of the maintenance employees' guard status" (Ex. A, DDE, p. 6). It is unclear to what testimony or evidence the ARD was referring. As shown above, there was ample testimony about enforcement of rules against employees, patients, and visitors.

rules, intervene in fights, investigate their suspicious behavior, or instruct them to leave areas in which they are not authorized, and report their behavioral issues.

The Acting Regional Director's Focus on Certain Facts Dramatically Diminished the Guards' Security Responsibility to Enforce Rules Against Everyone.

The ARD all but ignored the many guard duties described above which reflect their duties associated with enforcing rules against employees, visitors, and patients. Instead, it appears that he selectively highlighted several responsibilities where he apparently felt the Hospital was vulnerable. Even in doing that, however, the ARD disregarded facts in the record.

In reaching the conclusion in this case that the guards do not enforce parking rules against other employees and did not have power to compel compliance, the ARD said that "the 'Parking Operations' rules themselves as provided by the Employer do not reference enforcement against employees" (Ex. A, DDE, p. 6). This statement is misleading because the Parking Operations Memo (Ex. I, pp. 000067-68) does not specifically address enforcement in connection with suspicious vehicles (and determining ownership). Testimony separately established that they do enforce those rules against employees (Ex. D, Tr., 110-111). And no contrary evidence was presented.

The ARD also concluded that "[w]hile there was some evidence at hearing that maintenance employees are required to report untoward occurrences, such duty to report appears to be shared by all of the Employer's employees and thus is not dispositive of the maintenance employees' guard status" (Ex. A, DDE, p. 6). It is unclear how the ARD reached that generic conclusion; he offered no citation to the record and there was no evidence that other employees had a security role in connection with reporting "untoward" occurrences.

Finally, the ARD noted that [w]hile some evidence was presented by the Employer concerning maintenance employees enforcing its no-smoking rules, no evidence was presented as to whether these employees are enforcing the rules toward other employees" (Ex. A, DDE, p. 6). This too is contrary to the record testimony (Ex. D, Tr., 110-111). The ARD therefore should have concluded that the Union presented no evidence that the guards did not enforce such rules against employees.

In short, the ARD's conclusion that the guards do not enforce rules against other employees was erroneous. This is especially true when the law is considered in light of the evidence presented in this case.

In Other Areas, too, the Acting Regional Director Ignored Relevant Facts.

The ARD concluded that the training received by the Hospital's guards in CPI and responding to infant and child abductions was not "specialized" because clinical employees also receive it and that it was "minor and incidental" (Ex. A, DDE, p. 7). He ignored additional important facts about their training and work (Ex. A, DDE, pp. 6-7). He ignored the fact that the guards are trained on and must enforce the policies contained in the Security Manual which explains that it is only they who are responsible for enforcement of those rules (Ex. F, p. 000010). Moreover, while clinical employees were also trained in CPI and infant and child abductions, the guards certainly had plenty of on-the-job training and responsibility unique to their roles. The clinical and other employees at the Hospital are not trained under a Security Manual and on the job to: serve as the "first responders" in child abduction cases; handle disorderly and combative persons; to stand outside Human Resources during employee terminations; to look for weapons; to complete security incident reports; to coordinate the

security response in Code Grays; to attend to police prisoner matters; to handle weapons and take control of contraband; to assume a security role in emergencies; to maintain a physical presence in the Emergency Room during off-shift periods; to lead the search in cases of bomb threats; and are to respond to panic alarms (See Ex. I, pp. 000001-000027; Ex. D *passim*). The ARD's conclusion that the guards' specialized training is "minor" and "incidental" therefore ignores the facts (Ex. A, p. 7).

The ARD also said that the guards do not perform true "rounds" because they merely lock doors at night and unlock them in the morning. Again, this finding discounts the guards' duties. Evidence established that they are to remain on lookout during the lockdown process for suspicious activity and for individuals present in areas without authorization and they are to make their presence known (Ex. D, Tr., 36-38, 122). They also conduct rounds of the premises, especially in the evening hours (Ex. D, Tr., 111; Ex. I, p. 000098). The conclusion that the rounds were "incidental" to their maintenance duties under these circumstances was also erroneous because they do not do their rounds incident to maintenance duties; doing rounds and locking down the building are separately-assigned responsibilities and not a "consequence" of their maintenance duties.

In discussing the guards' control over and monitoring of the premises, the ARD said they "only" lock doors in the evening and unlock doors in the morning. He also pointed out that no "buzzer," metal detectors or passes are used to screen visitors or regulate visitor access (Ex. A, DDE, pp. 7-8). Again, however, the ARD ignored the guards' other duties associated with regulating access and monitoring events. As explained above, they not only lock down and re-open building doors, but they otherwise regulate access to the building through their authority to

evict loiterers and combative persons, they use their discretion to grant employee access to certain areas, and investigate situations where people may have no business (Ex. D, Tr., 39, 50, 114, 131, 133-134, 138-139; Ex. I, pp. 000027, 000111, 000145). Further, they are to remain on guard for suspicious behavior and do so and maintain a physical presence in the emergency department (*See e.g.*, Ex. D, Tr., 40, 83, 113). The ARD's finding in this regard, too, was erroneous.

It is abundantly clear from the records established at the hearing that the employees at issue are employed for all of the reasons described in Section 9(b)(3): to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises. The ARD's conclusion to the contrary was erroneous. And because that conclusion affected the Hospital's rights in this case by directing an election, the Board should grant review and reverse the ARD's Decision and Direction of Election.

RELIEF REQUESTED

For the foregoing reasons, the Board should grant review and reverse the Acting Regional Director's Decision and Direction of Election.

Respectfully submitted,

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By: /s/ Jonathon A. Rabin

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April 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed the foregoing Employer's Request For Review of Decision and Direction of Election with the National Labor Relations Board and the Regional Director using the electronic filing system and served the same electronically upon: Amy Bachelder, counsel for the Union, via email at abachelder@sachswaldman.com.

/s/ Kathleen E. Bening
Kathleen E. Bening
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INDEX OF EXHIBITS

Ex. A: Decision and Direction of Election Erratum

Ex. B: Petition for Election

Ex. C: Stipulation

Ex. D: Hearing Transcript

Ex. E: Badges

Ex. F: Security Manual

Ex. G: CPI Manual

Ex. H: CPI Training Cards

Ex. I: Incident Report Binder

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. JOHN RIVER DISTRICT HOSPITAL

Employer
and

Case 07-RC-170700

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS (IUOE), AFL-CIO

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Direction of Election is denied as it raises no substantial issues warranting review.

MARK GASTON PEARCE,	CHAIRMAN
PHILIP A. MISCIMARRA,	MEMBER
LAUREN McFERRAN,	MEMBER

Dated, Washington, D.C., August 12, 2016.

