

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

**ST. JOHN RIVER DISTRICT HOSPITAL'S
RESPONSE TO BOARD'S NOTICE TO SHOW CAUSE AND
OPPOSITION TO GENERAL COUNSEL'S MOTION FOR SUMMARY JUDGMENT**

St. John River District Hospital ("Employer" or "Hospital"), by and through its undersigned counsel, pursuant to §102.24(b) of the National Labor Relations Board's Rules and Regulations, submits the following response to the Board's Notice to Show Cause and opposition to the General Counsel's Motion for Summary Judgment.

The basis for both the Complaint and the Motion for Summary Judgment is the General Counsel's averment that the Hospital has violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (the "Act") by failing or refusing to bargain with Local 324, International Union of Operating Engineers (the "Union"). This argument relies on the conclusion that the Regional Director's April 8, 2016 Decision and Direction of Election was valid.

However, the Hospital asserts that the Decision and Direction of Election, the Regional Director's certification of the Union, and the Board's failure to grant review were in error. All members of the certified bargaining unit are guards within the meaning of Section 9(b)(3) of the

Act. 29 U.S.C. §159(b)(3); *See e.g., Allen Services Co.*, 314 NLRB 1060, 1062 (1994). The Union stipulated at the hearing that it admits to membership or is affiliated indirectly with a labor organization that admits to membership non-guards (*See* attached Exhibit 1, Stipulation, ¶3). The Act prohibits the certification of a labor organization as the representative of guards if the labor organization admits non-guards in its membership. 29 U.S.C. §159(b)(3); *See also, Wells Fargo Guard Services of Baker Protection Services, Inc.*, 236 NLRB 1196-1197 (1978). Certification of a labor organization which admits non-guards to membership, as the representative of a unit of guards, was invalid and inappropriate under the Act.

The Decision and Direction of Election was also invalid under the Board's Rules and Regulations. 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 the Board's 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." *See e.g.* 29 CFR 102.67. The Employer could not conceivably move for a stay of the election 14 days after the issuance of the Decision and Direction of Election if the election was directed to occur prior to that deadline. The Employer made its objection clear to the Regional Office at the time of the Decision and Direction of 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. The failure by an administrative agency to follow its own procedural rules violates due process. *Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954); *Wilson v. Commissioner of Social Security*, 378 F.3d 541, 545-547 (6th Cir. 2004); *Hollingsworth v. Balcom*, 441 F.2d 419, 421 (6th Cir. 1971).

The Hospital preserves and reasserts all of the arguments previously set forth in its Request for Review of Decision and Direction of Election filed on April 22, 2016 (Exhibit 2, with the attachments omitted), and its Answer to Complaint and Affirmative Defenses filed on October 6, 2016 (Exhibit 3). By failing to dismiss the Union's Representation Petition and certifying the unit deemed inappropriate by statute, the Board exceeded the statutory limitations imposed on its authority by the Act. The Hospital has no duty to bargain with the Union and has not violated the Act by failing or refusing to do so. For these reasons, and those expressly reserved and reasserted herein, the General Counsel's Motion for Summary Judgment should be denied and the Complaint should be dismissed in its entirety.

Respectfully submitted,

HALL, RENDER, KILLIAN, HEATH & LYMAN, PLLC

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October 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2016, I electronically filed the foregoing document with the Office of the Executive Secretary/Board via the National Labor Relations Board electronic filing system. Additionally, I certify that on October 28, 2016, copies of the foregoing document have been served *via Certified Mail – Return Receipt Requested* upon:

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October 28, 2016

EXHIBIT 1

BOARD EXHIBIT 2 ✓

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

Correct Name of Employer:	
St. John River District Hospital	Case No. 07-RC-170700
Correct Name of Petitioner:	
Local 324, International Union of Operating Engineers (IUOE), AFL-CIO	

STIPULATION

We stipulate and agree that:

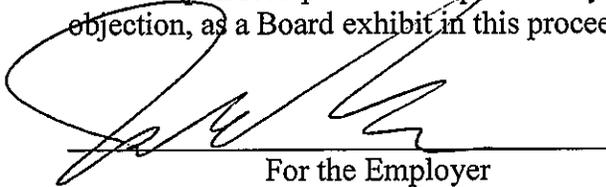
1. We have been informed of the procedures at formal hearings before the National Labor Relations Board by service of the Statement of Standard Procedures with the Notice of Hearing. The Hearing Officer has offered to us additional copies of the Statement of Standard Procedures.
2. To the extent the formal documents in this proceeding do not correctly reflect the names of the parties, the parties hereby make a joint motion to the Regional Director to amend the petition and other formal documents to correctly reflect the names as set forth above.
3. **The Petitioner is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act that admits to membership or is affiliated indirectly with an organization that admits to membership non-guards.**
4. The Petitioner claims to represent the employees in the unit described in the petition herein and the Employer declines to recognize the Petitioner.
5. There is no collective-bargaining agreement covering any of the employees in the unit sought in the petition herein and there is no contract bar or other bar to this proceeding.
6. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and is subject to the jurisdiction of the Board.

Commerce facts are as follows:

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 \$50,000 and caused said purchases to be delivered to its East China Township, Michigan facility directly from points located outside the State of Michigan.

7. There is no collective bargaining history between the parties for the petitioned-for unit at the Employer's East China Township, Michigan facility.

Upon receipt of this Stipulation by the Hearing Officer it may be admitted, without objection, as a Board exhibit in this proceeding.

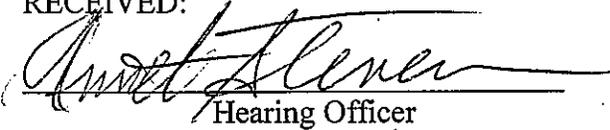


For the Employer

 3/10/16

For the Petitioner

RECEIVED:



Hearing Officer

Date: 3-10-16

Board Exhibit 2

EXHIBIT 2

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,

HALL, RENDER, KILLIAN, HEATH & LYMAN, PLLC

By: /s/ Jonathon A. Rabin

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(248) 740-7505

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

HALL, RENDER, KILLIAN, HEATH & LYMAN, PLLC

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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

EXHIBIT 3

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
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PROOF OF SERVICE

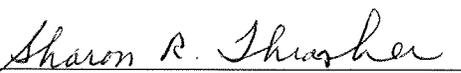
I, Karen A. Saur, an employee of Hall Render Killian Heath & Lyman, hereby certify that a copy of the *Respondent's Answer to Complaint* was served via email to Amy Bachelder, counsel for Charging Party at abachelder@sachswaldman.com this 6th day of October, 2016.

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