

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

MERCY CATHOLIC MEDICAL CENTER :	:	
MERCY PHILADELPHIA HOSPITAL :	:	
DIVISION :	:	
	:	Case 4-RC-191143
	:	
Employer,	:	
and	:	
	:	
DISTRICT 1199C, NUHHCE, AFSCME,	:	
AFL-CIO :	:	
	:	
	:	
Petitioner.	:	

**PETITIONER DISTRICT 1199C’S OPPOSITION TO EMPLOYER’S
REQUEST FOR REVIEW**

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I. BACKGROUND

District 1199C (“Union”) filed a representation petition on January 11, 2017, seeking to represent “all full-time and regular part-time employees, including PCAs, CNAs, Environmental Services and Housekeeping employees, Unit Facilitators and unit Clerks, Transport and Orderly employees, Dietary and Food Service Associates, ER Techs, Mental Health Techs, Monitor Techs, Storage Room employees, Laundry employees and Central Service Tech/SPD employees (Hearing Ex. B. 1).¹ In a stipulated election agreement (“stip”), the parties agreed that non-professional employees at the Employer’s facility were eligible to vote, but that certain employees, such as business office clerical and technical employees, were not eligible.² (Stipulated Election Agreement appended as Exhibit A). The parties agreed that the eligibility of certain voters had not been resolved, and would be resolved following the election if the challenged ballots were determinative. Those permitted to vote subject to challenge included:³

CLERK GENERAL
CLERK RADIOLOGY
DISCHARGE PLANNING ASST
EEG TECHNICIAN
ENDOSCOPY TECHNICIAN
HEALTH INFORMATION LIAISON
HEALTH INFORMATION MANAGEMENT CLERK
NUTRITION AIDE
OCCUP HEALTH ASST
*** OR TECHNICIAN⁴**
*** PAT ACCESS REG REP**
PHARMACIST TECHNICIAN
PHYSICAL THERAPY AIDE
*** QR DATA SPECIALIST**
STAFFING SPECIALIST

¹ (Hearing Ex. B. “_____”) refers to Board Exhibits; (Hearing Ex. E. “_____”) refers to Employer Exhibits, (Hearing Ex. P. “_____”) refers to Petitioner Exhibits.

² The stip specifies an inclusion of “non-professional employees employed by the Employer” and an exclusion including “technical employees, professional employees, business office clerical employees...” There is not a specific list of eligible titles and voters in the election agreement. See Hearing Ex. B. 1.

³ At the hearing the Union agreed to the eligibility of the nutrition aides.

⁴ The Employer only requests review of the highlighted titles: OR technician, PAT access reg. rep., QR data specialist, and utilization mgt assist.

*** UTILIZATION MGT ASST**

Thereafter, an election was held on February 7, 2017. Fifty-nine employees cast ballots subject to the list of employees permitted to vote subject to challenge. The Board additionally challenged the ballot of Elaine Creamer, who was not listed on the voter list or the challenge list.

The Union challenged the following additional voters/titles:⁵

<i>CANTERBURY, BLASE</i>	PROFESSIONAL EMPLOYEE – RADIOGRAPHER
<i>KING, LAVATRICE</i>	PROFESSIONAL EMPLOYEE - EKG TECH
<i>COLEMAN, JASMINE</i>	PROFESSIONAL EMPLOYEE – EKG TECH
<i>JOHNSTON, MARY</i>	PROFESSIONAL EMPLOYEE - RADIOLOGY TECH
MYERS, JENNIFER	PROFESSIONAL EMPLOYEE- RADIOLOGY TECH
<i>MOON, AMANDA</i>	<i>PROFESSIONAL EMPLOYEE - CNA-PCA</i>
<i>CLAHAR, MAXINE</i>	PROFESSIONAL EMPLOYEE - EKG TECH
<i>HARRITY, CATHERINE</i>	PROFESSIONAL EMPLOYEE - RADIOLOGY AIDE
<i>MCCORMICK, MARY J</i>	PROFESSIONAL EMPLOYEE - EKG TECH
<i>BOYER, CHARMAINE</i>	<i>PROFESSIONAL EMPLOYEE - STERILE PROCESS TECH</i>
<i>NYAME, DOROTHY</i>	PROFESSIONAL EMPLOYEE - RADIOLOGY TECH

In the election 132 ballots were cast FOR the Union District 1199C, and 97 were cast against union representation. The 72 challenged ballots were therefore sufficient in number to affect the results of the election. A hearing on challenges was held at the NLRB Region Four offices over the course of two days, March 22 and 23, 2017. The Employer maintained that all challenged employees should be included in the unit, with the exception of Elaine Creamer, whom it argued should be excluded. The hearing examiner issued his decision, including some classifications and employees in the bargaining unit, and excluding others. The Regional Director (hereinafter “RD”) affirmed this decision in most respects, but removed a radiology tech student, Jennifer Myers, from the unit and included two staffing specialists in the unit.⁶ The Employer has

⁵ The Union dropped its challenge to Amanda Moon and Charmaine Boyer.

⁶ The hearing officer found that two per diem employees lack sufficient hours – Tee Dubose (pharmacy tech) and Blasé Canterbury (radiology tech). The RD affirmed this finding and the Employer has not requested review of it.

excepted to the RD's finding with respect to four classifications of employees and one specific employee:

1. Pat Access Registration Reps (found by the RD to be Business Office Clericals)
2. Utilization Management Assistants (found by the RD to be Business Office Clericals)
3. QR Data Specialist (one employee) (found by the RD to be Business Office Clericals)
4. Operating Room Technicians (found by the RD to be Business Office Clericals)
5. Jennifer Myers (Radiology Tech Student – RD found she should not be included in the non-professional unit.

II. STANDARD FOR REVIEW

The Employer bears a heavy burden in its Request for Review. Pursuant to NLRB Rules and Regulations § 102.67(c) and (d), requests for review are discretionary, do not cause a stay of a Regional Director's decision, and are only granted in limited circumstances. Review will only be granted on the following basis:

- (1) That a substantial question of law or policy is raised because of:
 - (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

[R&R § 102.67(d).]

III. ARGUMENT⁷

This is a garden-variety acute care hospital case. The RD's findings do not deviate from long-established precedent and practice. For the following reasons the Employer fails to show that the Board should exercise its discretion to overrule the RD's factual findings as clearly erroneous, or find that the RD has misapplied Board precedent and policy, and the Employer fails to demonstrate that there is a compelling reason for reconsideration of a Board rule.

A. EMPLOYER'S POINT 1 (THAT THE RD ERRED IN FINDING THAT PATIENT ACCESS REGISTRATION REPS BELONG IN A BUSINESS OFFICE CLERICAL UNIT) SHOULD BE REJECTED

The Patient Access Registration Reps ("PARRs") are admitting clerks. Admitting clerks are generally in a business office clerical unit, which has been precedent for over 40 years. These workers gather insurance information from patients before they receive care at the Hospital. The Employer contends in its Request for Review that the RD erred because PARRs 1) have contact with patients, 2) are directly involved in patient care not simply billing, 3) are isolated from other BOCs, 4) work with patients, and 5) are not supervised by the BOC supervisors.

The PARRs do not perform patient care and have minimal contact with patients. They sit at desks with computers in designated registration areas, taking insurance information from

⁷ It does not change the outcome in this case, but neither party should bear a burden of proof with respect to the inclusion of voters who voted subject to challenge. Such a hearing is investigatory and not adversarial. The post-election hearing was conducted under Section 9(c) of the Act. The purpose of a 9(c) hearing is to determine if a question of representation exists. "A question of representation exists if a proper petition has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted." Board's R&R Section 102.64. Typically, such a hearing occurs before an election. However, it can also occur after an election. When it is after an election, this hearing is still investigatory, not an adversarial-type of hearing in which a burden should be assigned, "The hearing in a representation proceeding is a formal proceeding designed to elicit information on the basis of which the Board or its agents can make a determination under Section 9 of the Act. The hearing is investigatory, not adversarial." Representation Case Outline of Law 3-810, page 36.

patients. In at least one location they are seated behind a glass partition. (Tr. at 134-135.) The job requires the registration reps to verify insurance benefits and check for precertification authorization and referrals. (Tr. at 140-41).

The Position Description of the Patient Access Representative enumerates the following “major accountabilities” of the position, which include: Registration/Data Collection, and notes that the registration rep “[c]ollects and verifies all comprehensive personal, financial and medical information in an effective and courteous manner for the registration process...communicates to the patient the patient’s financial responsibilities...verifies and obtains insurance benefits and required referral and pre-certifications...verifies insurance coverage...communicates and explains insurance benefits...contacts the patient’s insurance carrier to obtain benefits.” (Hearing Ex. E. 12).

Because of the duties of this position the dress code is a striped oxford shirt and ascot, not scrubs. (Tr. at 132). The PARRs are not responsible for patients’ physical and environment health, there is no interchange with the employees in the non-professional unit and only occasional contact with nurses or physicians. (Tr. at 139, 135-136). As further evidence of the isolation of this department from the rest of the Hospital, the director of registration supervises no other employees. (Tr. at 138.). She does not supervise non-professional employees.

Business office clericals are typically and primarily responsible for financial and billing practices. They are not responsible for the physical and environmental health of patients. The Mercy System Director of Patient Access, Mary Kelso, described the job as one that requires an insurance background.

Q: What skills are most critical for an employee to be an effective patient care representative -- excuse me, patient access representative?

A: A patient access representative needs to have exception customer service skills. They need to have technical knowledge of healthcare. They need to have an insurance background and knowledge. They need to be personable. And then they need to be diligent to complete their work and accurate [sic].

[Tr. at 131.]

There is no reported interaction in the record between the patient registration reps and the employees who are stipulated non-professionals, such as would require that they be included in the non-professional unit. See, e.g., Jewish Hospital of Cincinnati, 223 NLRB 614, 621 (1976)(finding admitting clerks had extensive contact with *nonprofessional employees*). Clerical employees may be included in a non-professional unit when their contact with unit employees gives them a community of interest with unit employees. Here there is no community of interest.

Thus, the Employer's statement that PARRs have consistent contact with patients and are directly involved in patient care that is not limited to billing and insurance is false and is not supported by the Record.⁸ Moreover, to the extent that the PARRs are not working side-by-side with the non-professionals, but are instead isolated from the non-professionals, with a separate supervisor who does not supervise the non-professionals, the evidence does not support the Employer's position that the PARRs must be in the non-professional unit.

B. EMPLOYER'S POINT 2 (THAT THE RD ERRED IN FINDING THAT UTILIZATION MANAGEMENT ASSISTANT BELONG IN A BUSINESS OFFICE CLERICAL UNIT) SHOULD BE REJECTED

Emily Tilghman works with insurance companies to ensure that the Hospital is paid for the patient care it provides. (Tr. at 471). She spends her day at her desk dealing with billing and

⁸ The Employer makes a big deal about nothing, with respect to Lifeline Mobile Medics, Inc., 308 NLRB 1068 (1992), and the Board's Rulemaking. There is no discernable difference between saying that BOCs *generally* work in finance, billing and insurance, versus saying that they deal with "financial and billing practices...insurance types, and new reimbursement..."

insurance companies. She does this on day shift, usually 7 am-3:30 pm. She sits at a desk near other office employees, in an area of the Hospital where patients are not housed. She has no contact with patients and no contact with non-professional unit employees. She has no community of interest with non-professional employees.

Asked to describe her duties more fully, she explained:

A ...I'm the middle man between the two PA advisors, you have a physician advisor for the insurance company, you have a physician advisor from the hospital. I'm the liaison, I communicate between the two doctors.

Q What kind of things do you communicate?

A Just like what's going on with the patient, if they had any tests, surgery, why we feel like we should be paid for whatever services we --

Q And how do you get the information that you get communicate?

A I get that information from office systems, MediTech [computerized record].

Q And who tells you to reach out to the insurance company?

A Well, it's a normal process. We review -- any patient that comes in they have insurance, we've got to send a review over to the insurance company...

Q And are you in the utilization -- what is your office?

A UH management office.

Q And who else works in that office?

A There's three other nurses and the physician advisor.

Q Do you have patients in your office?

A No, ma'am.

Q ... and what floor are you on?

A The seventh floor.

Q What else is on your floor?

A A bank, the case management report, social work office, chapel and I guess IT is on the other side of the floor.

[Tr. at 472.]

Tilghman testified that her contact with other Hospital employees is mainly with the Hospital's six attending physicians, or hospitalists (not non-professional employees) and is required only because "insurance companies are getting really really hard with paying us it's more often, like it's every day or something like that." (Tr. at 478). Clerical employees may be included in a non-professional unit when their contact with unit employees gives them a community of interest with unit

employees. Here there is not community of interest. Tilghman is the quintessential BOC, because of her duties with the Hospital's financial and billing practices.

C. EMPLOYER'S POINT 3 (THAT THE RD ERRED IN FINDING THAT THE QR DATA SPECIALIST BELONGS IN A BUSINESS OFFICE CLERICAL UNIT) SHOULD BE REJECTED

The Hospital contends that Decis Gordon belongs in the non-professional unit because she works near, or does work similar to, a medical records employee and is therefore a medical records employee.⁹ Gordon is not a medical records employee and she does not perform medical records work. She audits records for the collection of data for CMS, the Center for Medicare Services. This is a desk job, which must be done in order for the Hospital to receive money from CMS for patient care performed; it is related to finance and billing.

To say that this position does not have anything to do with the Hospital's financial practices is laughable. Gordon explained, "[t]his data collection is mandated by the state, CMS, Centers for Medicare and Medicaid Services, and it is done by a stipulated formula, using the guideline of the state." (Tr. at 502).¹⁰

Clerical employees may be included in a non-professional unit when their contact with unit employees gives them a community of interest with unit employees. Here there is no contact between Gordon and unit employees.

Although employees in these categories [clerical-type] spend the substantial portion of their time in functions admittedly "clerical" in nature, many work alongside employees in the unit sought by Petitioner. Thus, as an example, while the Employer employs approximately nine file clerks, several work in such departments as pathology, heart station, and health clinic and,

⁹ To the extent that it matters, Gordon's position requires either an Associate's degree or three years of equivalent experience, and knowledge of healthcare computing systems, according to the Employer's documentation. Hearing Ex. E. 17 at 4.

¹⁰ CMS provides this payment data to the general public. <https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/HospitalQualityInits/MedicarePaymentAndVolume.html> (last accessed 5/18/17).

consequently, spend almost their entire working day with employees in those departments. In addition, it is apparent that their placement in such departments stems from the close functional relationship their work shares with the work of other employees in those departments, whom Petitioner seeks to represent. At the same time, certain clerical employees work in an essentially “business office” capacity and, on that basis, have little in common with the role played by those clerical employees who work alongside and with a similar objective as employees involved more immediately with the care of patients.

[Trumbull Memorial Hospital, 218 NLRB 796 (1975).]

Gordon’s testimony was that every so often, not even once a week, she may call a nurse manager (a 2(11) employee) to inquire about a chart. (Tr. at 505). Otherwise Gordon sits at her desk at her computer in a suite of offices, where no patients pass through. There is no record evidence that she has any contact with employees in the non-professional unit. And she has no contact with patients.

D. EMPLOYER’S POINT 4 (THAT THE RD ERRED IN FINDING THAT THE OR TECHS BELONG IN A TECHNICAL UNIT) SHOULD BE REJECTED

The OR techs are technical employees by virtue of their lengthy educational requirements, training, and skills. The crux of the Employer’s exception with respect to the OR techs is that the OR techs do not use independent judgment and therefore they are not technical employees. The Employer makes this claim despite the evidence of the education required (six months to two years), because it contends that the OR techs are supervised and also use protocols (i.e. “preference cards” indicating instrument preferences of surgeons). It is well established that protocols do not obviate the need for expertise and judgment. See Grp. Health Ass'n, Inc., 317 NLRB 238, 243 (1995). Additionally, the supervision of OR techs by surgeons does not detract from their expertise in the OR.

Notably, the OR techs complete a perioperative surgical program. (Tr. at 320). Graduation from a perioperative training program is a required condition of employment. (Tr. at 320). The

manager testified that the job is “extremely complex” and that there is expertise needed for the job, which an individual must possess. Knowledge of establishing a sterile field, even knowing how to scrub properly for a particular procedure is judgment.

Nursing Director Linda Fleming testified:

Q What kind of things are they taught in school just generally?

A About the surgical procedures, what the typical instrument that you would use for that procedure.

Q Could somebody walk in off the street and with a four-hour training course go sit in as a surgical tech in an operation?

A Never.

Q Why is that?

A Because it's extremely complex, there's thousands of instruments, there's you know, different types of equipment. There's the same equipment of different sizes that you would need to know...

Q And the OR tech would have to know exactly what kind of instrument he is she is getting in order for the operation to proceed?

A Yes...

Q Are there standards in the profession in terms of, I don't know, cleanliness and maintaining like --

A A sterile field...

Q -- in a course of an operation? Can you tell us what that means?

A In order to have -- well clearly *what's number one you have to know how to scrub to be a surgical technician and what the procedure is for that, because there's a procedure for that. There's a procedure for how you set up a sterile field, which makes sure that the entire area that they're working in is sterile and not contaminated.*

Q So when an OR tech finds out the kind of procedure that's happening that they're assisting with how do they know what instruments to get for that procedure?

A So --

Q Is that just part of their training?

A So there's a course of knowledge that you get because you know that you're going to do an abdominal surgery and this is the basic things that you need. But again we use the preference cards as the specific things that that *surgeon prefers* to use for that case.

[Tr. at 321-323.]

More often than not, OR techs are included in the technical unit. See GC 91-4 * (finding OR techs belong in tech bargaining unit except when education is minimal and employer relies

primarily on on-the-job training). Mercy techs must be “graduate[s] of an approved school of Surgical Technology” and the “Association of Surgical Technologists Certification [is] preferred”.

See E. Ex. 23 at 6.

E. EMPLOYER’S POINT 5 (THAT THE RD ERRED IN FINDING THAT THE RADIOLOGY TECH STUDENT JENNIFER MYERS BELONGS IN A TECHNICAL UNIT) SHOULD BE REJECTED

The radiology tech students belong in the technical unit. The Board has included students in a bargaining unit when they perform the same tasks as the unit employees, even if it is under supervision. Lydia E. Hall Hosp., 227 NLRB 573 (1976)(Including graduate nurses in a unit of RNs, noting the graduate nurses “are hired to perform all the duties of registered nurses, albeit under supervision”).

The parties have agreed that radiology techs are in the technical unit. There is no dispute that Jennifer Myers, the radiology tech student, is performing the work of a radiology tech, albeit under indirect supervision. The manager admits, “Radiology technology students can perform exams, emitting radiation to patients under *indirect* supervision by a licensed technologist.” (Tr. at 272.) Myers was required to complete 12 months of a 24-month educational program before hire. (Tr. at 285.) Myers’ supervisor admits that the tech students and the techs do the same work. Her supervisor further admits that Myers is functioning as any radiology tech would:

Q: So these two rad students who are doing -- performing the rad tech duties are able to do that because they have completed one year of school?

A: That is correct.

[Tr. at 286.]

And Myers was only hired *because* she could work as a radiology tech.

Q [W]hen you hired her had she already completed a year of school?

A Yes.

Q And you hired her knowing that she had completed a year of school?

A Yes.

Q And knowing that she could essentially fill the duties of a rad tech but with supervision?

A Yes.

[Tr. at 286-87.]

The only difference the employer can point to between what Jennifer Myers does and what a non-student radiology tech does is that there is *indirect* supervision of the student radiology tech. But every hospital, including this one, is subject to the State's regulation of radiology services, and they require the supervision of all radiology personnel:

The hospital shall ensure that all radiographic equipment is operated at all times by competent personnel under physician supervision and trained in the use of radiographic equipment and in safety precautions. Nonportable equipment shall be operated only in properly shielded spaces. Caution shall be exercised in using portable equipment to protect employes, patients, and other persons from exposure to radiation.

[28 Pa. Code § 127.21]

This is specialized work. For instance, the radiology aides cannot do the work of the techs or tech students. (Tr. at 273 – radiology aides cannot conduct imaging). The students were hired because they had one year of technical education and could perform radiologic procedures. Non-professional employees cannot perform these tasks.

Counsel for the employer elicited generalized statements about how various employees do not “exercise independent judgment,” but with respect to the radiology tech students there is no testimony in the record that the radiology tech students perform their duties without the use of independent judgment. By law no radiology tech has the authority to order radiologic films to be taken; they are taken pursuant to a written doctor's order. 28 Pa. Code § 127.32. In fact, the testimony is that the radiology tech students do exactly what the radiology techs do, but with indirect supervision. (Tr. at 286-87.)

There was testimony from the manager of radiology about the tasks performed by radiology techs, which are the same tasks performed by the students. This testimony establishes that independent judgment is exercised by both the radiology techs and the tech students. They have technical expertise to perform images and emit radiation. They oversee patient safety and make judgments about patient history with respect to the exam. They use their technical judgment in positioning a patient to take films.

A: A licensed radiology technologist performs imaging and emits radiation to patients with a physician order. They oversee the safety of the patient from interview, receiving patient's history that would be pertinent to the exam. Changing the patient's clothing. Transferring them on and off of the exam table. Positioning the patient properly for the imaging that is being requested. Shielding the patient from unnecessary exposure to radiation...Making sure that the rooms are stocked with the proper equipment that is needed for the exams. You know, cleaning up after the exam. Transferring the patient off of the table ensuring that they're safe...Rechanging their clothes.

Q: Now, you had said that the radiology technology students can perform radiology exams but they can't do imaging.

A: They can doing imaging.

[Tr. at 288-289.]

The only difference between the job performance of a tech and a tech student is that a student works under indirect supervision. (Tr. at 272).

The students clearly share more of a community of interest with other technical employees, despite the fact that they are not yet certified, than they do with non-professional employees such as the clerks and housekeepers. Given that there is no difference between the work performance of the students versus the non-student radiology techs, and considering all of the other factors, the radiology techs should be excluded from the non-professional unit. See Barnert Mem'l Hosp. Ctr., 217 NLRB 775, 778 (1975)(finding radiology techs technical - "The parties stipulated that the x-

ray technicians' job requires knowledge of all the various types of x-rays; positioning for such x-rays; and the ability to handle isotopes, give injections, and do blood testing”).

IV. CONCLUSION

Based on the foregoing reasons, the Board should DENY the Employer’s Request for Review.

Respectfully submitted,



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Dated: July 7, 2017

CERTIFICATE OF SERVICE

I, LISA LESHINSKI, caused a copy of the foregoing OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW to be delivered via email on the date and to the addresses below:

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LISA LESHINSKI

Dated: July 7, 2017