UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

AMEDISYS, OREGON, LLC d/b/a
AMEDISYS HOME HEALTH CARE
Employer

and **Case 19-RC-217127**

OREGON NURSES ASSOCIATION
Petitioner

DECISION AND DIRECTION OF ELECTION

Oregon Nurses Association ("Petitioner") filed a petition in the instant case under § 9(c) of the National Labor Relations Act ("Act") seeking to add the classification of Per Diem Registered Nurse ("Per Diem RN") to its existing bargaining unit of registered nurses[1] working at Amedisys, Oregon., LLC d/b/a Amedisys Home Health Care ("Employer") via an *Armour-Globe* self–determination election. The Per Diem RNs have historically been excluded from the existing unit which raises a question concerning representation. The Employer contends that the Per Diem RN does not share a community of interest with the existing bargaining unit and furthermore is not eligible to vote based on irregular hours worked.

A hearing officer of the Board held a hearing in this matter and the parties orally argued their respective positions prior to the close of the hearing. As explained below, based on the record and relevant Board law, I find that the Per Diem RN shares a community of interest with the existing bargaining unit and works a sufficient number of hours for inclusion in the unit. Accordingly, I find that the petition for a self-determination election is appropriate to include the Per Diem RN to the existing unit.

I. THE EMPLOYER'S OPERATION

The Employer provides home health services in nursing, physical therapy, occupational therapy, speech therapy and social work. The Employer markets its services to facilities and hospitals and also receives referrals from facilities.

Once the referral comes in, insurance coverage is checked before the referral goes to the scheduler. The scheduler then assigns the referral to the case manager who is the full time RN responsible for that particular patient's care.

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[1] The parties stipulated that the existing bargaining unit consists of all registered, professional nurses employed by the Employer at its facility located at 12021 NE Glenn Widing Drive, Building G, Portland Oregon; excluding all licensed practical nurses, per diem (PRN) nurses, nurses serving as supervisors as defined in the Act, confidential employees and all other employees.

Although the record does not disclose the Employer's hierarchy, the Director of Operations is in charge of running the office which includes ensuring there is sufficient staff. The Employer divides its territory into two areas; the east side and the west side and has a Clinical Manager responsible for each area. The record is silent as to whom the Clinical Managers report. The Registered Nurses ("RNs") and the Per Diem RN report to the Clinical Managers. Although the record is not clear, it appears the Clinical Managers supervise other clinicians such as therapists and social workers who would also be involved in patient care.

A. THE REGISTERED NURSES

Petitioner currently represents 10 full-time RNs working out of the Employer's Portland office. The RNs typically work Monday through Friday from 8:00 a.m. to 5:00 p.m., but can be scheduled to be on call from 5:00 p.m. to 8:00 a.m. The record is not clear if the RNs are also on call or actually work every fourth or fifth weekend. The RN rate of pay is covered by the collective bargaining agreement.

The RNs manage caseloads consisting of approximately 20 to 30 patients. For the start of care, the RN calls the patient the night before and sets up a time to meet in order to begin services. When with the patient, the RN goes over the plan of care which includes reviewing medications, how often and how long the RN will visit, what other disciplines might be involved in the patient's care, and if necessary, providing wound care. Once this is done, the RN informs the doctor about how the start of care went and what the plan of care for the patient will be. The start of care visits last approximately an hour and half to two hours and an RN will typically have between one to four start of care visits per week.

From this point on, the RN makes follow up visits and recertifications before the patient is discharged. Record testimony is that recertification involves education on topics such as wound care and "disease process," although the record is silent on specifics.

The RNs can see their schedule seven days in advance except for a start of care which is provided the night before the visit.

The RNs spend over 90 percent of their time outside the office. Once a week, the RNs attend a case management conference at the office which lasts approximately an hour to an hour and fifteen minutes. The case management conference is attended by other clinicians such as physical therapists, occupational therapists, social workers and speech therapists and the purpose of the conference is to go over the status of patients. The RNs also attend an all staff meeting once a month and record testimony is that the Employer is attempting to hold a nurses' meeting once a month, as well.

B. THE PER DIEM REGISTERED NURSE

There is one Per Diem RN working for the Employer. The Per Diem RN has been working approximately three years in this position and typically works every Monday and Friday

for five to eight hours per day. The Per Diem RN worked as a full time RN in the bargaining unit before assuming her current position. When she left the bargaining unit, the Per Diem RN made $47.01 an hour, which is the hourly wage she currently receives. Other than earning sick leave per Oregon law, the Per Diem RN does not receive any Employer benefits. There is no separate Per Diem RN job description as the job duties are the same as for a RN. Similar to the RNs, the Per Diem RN has to have the same certifications such as CPR and State of Oregon required continuing education credits to maintain her license. The Per Diem RN reports to the west side Clinical Manager.

After the RNs receive their schedule, if there are any extra visits the Employer puts them on the Per Diem RN's schedule, which she typically receives on her tablet the day before her scheduled shift. There are certain patients who request the Per Diem RN and they are automatically placed on her schedule. If a patient requires a recertification, the Employer will ask the Per Diem RN if she is able to do this. According to the Employer witness, the Per Diem RN has requested not to do start of cares even though she is able to perform this step of patient care. The testimony of the Per Diem RN, however, did not support this statement as she was unsure as to why she is currently doing less start of cares. The majority of the Per Diem RN's time is spent on follow up visits and charting. Prior to visiting the patients, the Per Diem RN uses her tablet to go over patient notes input by either a RN or a LPN and once the visit is complete, she charts remotely on her tablet. Like the RNs, the Per Diem RN communicates patient status to the clinicians involved in the patient's care via email or telephone. The Per Diem RN does not spend much time in the office.

If a RN calls off sick on a day the Per Diem RN is working and a patient is going through recertification, being discharged or resuming care after a hospital visit, the Employer will ask the Per Diem RN if she can perform these services. Otherwise, the Per Diem RN performs the regular visits scheduled by the RN who is off that day.

Similar to the RNs, the Per Diem RN is subject to the Employer's policies. Any discipline received by the RNs or the Per Diem RN would come from the Director of Operations. Although the Per Diem RN can attend the weekly case management conference, she testified she chooses not to do so as it does not fall on a convenient day.

From January 1, 2018 to March 23, 2018, the Per Diem RN worked 194 hours.

II. APPLICATION OF BOARD LAW

A. PCC STRUCTURALS, INC. COMMUNITY OF INTEREST FACTORS

In determining whether a unit is appropriate, the Board looks at whether the petitioned-for employees have shared interests. See *Wheeling Island Gaming*, 355 NLRB 637. Additionally, the Board analyzes "whether employees in the proposed unit share a community of interest *sufficiently distinct* from the employees excluded from that unit to warrant a separate bargaining unit." *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 11 (emphasis in original). See also

Wheeling Island Gaming, 355 NLRB at 637 n. 1 (the Board's inquiry "necessarily proceeds to a further determination of whether the interests of the group sought are *sufficiently distinct* from those of other employees to warrant establishment of a separate unit"). In weighing the "shared and distinct interests of petitioned-for and excluded employees […] the Board must determine whether 'excluded employees have meaningful distinct interests in the context of collective bargaining that *outweigh* similarities with unit members." *PCC Structurals Inc.*, 365 NLRB No., 160, slip op at 11 (emphasis in original) (quoting *Constellation Brands U.S. Operations, Inc. v. NLRB* 842 F.3d 784, 794 (2d Cir. 2016)). Once this determination is made, "appropriate-unit analysis is at an end." *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. at 11.

In making these determinations, the Board relies on its community of interest standard, which examines:

> whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

PCC Structurals, Inc., 365 NLRB No. 160, slip op. at 11 (citing *United Operations*, 338 NLRB 123 (2002))

On the record, the Employer argues that the Per Diem RN does not share a community of interest with the bargaining unit RNs because she has a sporadic work schedule, receives no benefits outside those required by State statute, sets her own work schedule, can turn down assignments if necessary, and most significantly does not perform the same scope of job duties as the RNs. The RNs provide patient management from the start of care through discharge while the Per Diem RN mostly performs follow up visits as needed. The Per Diem RN does not attend the weekly case management conference because it is not necessary for her to do so.

Although the Employer concedes that the Per Diem RN is a regular part-time employee, it argues that the Board looks to whether a group of part-time employees has so substantial an interest with respect to working conditions and remuneration therein to justify their inclusion. The Employer cited *Newberry Manufacturing Co.,* in support of this argument but did not provide a case citation. An exhaustive search has been unable to find or locate this citation. However, in any event, I find that the facts of the instant case make this argument inapplicable because the record is clear that the Per Diem RN does the same work as the RNs because she essentially fills in for them to perform extra visits or to cover an RN who is absent. Additionally, the Per Diem RN does not set her own schedule; rather she is available to work on Monday and Friday and the Employer schedules the patient visits for her on those days.

The record clearly shows that except not receiving Employer benefits, most likely because she is not working a full time schedule and voluntarily not attending the case management conferences and monthly meetings, the Per Diem RN does the same work, has the same skills and training, is under the same supervision, and is functionally integrated with the RNs. Although the RNs may deal with more start of cares and work with patients more consistently than the Per Diem RN, this does not detract from the overall similar nature of the work performed by both groups of employees. Moreover, the record is ambiguous as to why in fact the Per Diem RN does not perform more start of care duties. Accordingly, I find that the Per Diem RN does not share a community of interest sufficiently distinct from the RNs to exclude her from the existing bargaining unit.

B. THE *DAVISON- PAXON* STANDARD

The Employer also argues that the Per Diem RN's irregular schedule should exclude her from the existing bargaining unit.

Part-time employees are included in a unit with full-time employees whenever the part-time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing interest in the wages, hours and working conditions of the full-time employees in the unit. *New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004).

"On-call" employees may or not be considered regular part-time employees, depending on the specific nature of their employment. If the employees are employed sporadically with no established pattern of regular continuing employment, they are excluded from the unit. *Piggly Wiggly El Dorado Co.*, 154 NLRB 445, 451 (1965).

However, if the "on-call" employees have a substantial working history, with a substantial probability of employment and regular hiring, and meet any other criteria established by the Board, they are considered regular part-time employees. Various standards, such as hours worked per day or week, or days worked per calendar period have been applied in different industries to determine whether a part-time employee is regular or casual, *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970); *C. T. L. Testing Laboratories,* 150 NLRB 982 (1965), *Motor Transport Labor Relations,* 139 NLRB 70 (1962). "With the exception of certain employees whose exclusion is required by established Board policy such as temporary or seasonal employees, any contingent or extra employee who regularly averages four hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest for inclusion in the unit and may vote in the election," *Davison-Paxon*, supra.

In its oral argument, the Employer, citing *El Dorado*, 124 NLRB 445[2], contends that under the Act such part-time employees as the Per Diem RN are not to be included in a bargaining unit with regular full-time employees. The Employer argues that the question is not limited solely to just the hours worked but also to the work schedule itself and its position is that the Per Diem RN's schedule has some level of irregularity.

In *Piggly Wiggly El Dorado Co.,* supra, none of the 14 on-call employees worked in as many as 5 of the 10 weeks preceding the demand for recognition. Additionally, during one month only seven on call employees worked; five of them worked one day and two of them worked two days. As such, the Board excluded these employees from the unit because the record established that the employment of the on-call employees was sporadic and casual and established no pattern of regular, continuing employment.

In the instant case, the Per Diem RN has worked on Mondays and Fridays for five to eight hours a day for the past approximately three years. From January 1, 2018 to March 23, 2018, a period of 12 weeks, the Per Diem RN worked 194 hours, an average of approximately 16 hours a week. Using a 13-week period, which is equivalent to a calendar quarter, and keeping the hours at 194, the weekly average is approximately 15 hours per week. The number of hours worked by the Per Diem RN and the consistent Monday and Friday schedule does not suggest a pattern of sporadic and intermittent employment. As such, I find that the Per Diem RN meets the eligibility requirement for inclusion in the existing bargaining unit.

C. ARMOUR-GLOBE ELECTION

A self-determination election, also referred to as an *Armour-Globe* election, is the proper method by which a union may add unrepresented employees to an existing unit. See, *Globe Machine & Stamping*, 3 NLRB 294 (1937); *Armour and Co*., 40 NLRB 1333 (1942); *Warner Lambert Co*., 298 NLRB 993 (1990). The petitioned-for employees need not constitute a separate appropriate unit by themselves in order to be added to an existing unit, *Warner-Lambert Co*., supra; *St. Vincent Charity Medical Center,* 357 NLRB 854 (2011). The appropriateness of a self-determination election depends on the extent to which the employees to be included share a community of interest with the existing unit of employees and whether they constitute an identifiable, distinct segment so as to constitute an appropriate voting group. *St. Vincent Charity Medical Center*, supra.

In view of the above and the record as a whole, I find that the Per Diem RN is an identifiable, distinct segment of the Employer's workforce and shares a community of interest with the existing bargaining unit RNs. Therefore, Petitioner seeks an appropriate voting group.

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[2] On the record, the Employer cites this case as *El Dorado*, 124 NLRB 445. However, this is not the correct case citation. A search for *El Dorado* led to *El Dorado Club,* 151 NLRB 579 (1965) which discusses the gaming industry and does not deal with the issue of whether part-time employees should be included in a unit of full time employees. It appears the Employer meant to cite the *Piggly Wiggly El Dorado Co*. case, *supra,* in support of its argument.

CONCLUSION

In determining that the voting group sought by Petitioner is appropriate, I have carefully weighed the community-of-interest factors cited in *United Operations*, supra. Additionally, I have concluded that the number of hours worked by the Per Diem RN also demonstrates a sufficient community of interest to be included in the existing bargaining unit. Accordingly, I find that a self-determination election is appropriate.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute an appropriate voting group:

> All Per Diem Registered Nurses employed by the Employer at its facility in Portland, Oregon; excluding licensed practical nurses, confidential employees, therapists, social workers and guards and supervisors as defined in the Act.
>
> There is approximately one employee in the voting group found appropriate.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by Oregon Nurses Association. If a majority of the valid votes in the election are cast for Petitioner, they will be taken to have indicated the employees' desire to be included in the existing Registered Nurses unit represented

[3] The Employer, a State of Oregon limited liability company, with a place of business in Portland, Oregon, is engaged in the business of providing non-acute medical care and services. During the last 12 months, a representative period, the Employer derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $50,000 directly from points located outside the State of Oregon.

by Petitioner. If a majority of valid ballots are not cast for representation, they will be taken to have indicated the employees' desire to remain unrepresented.

A. Election Details

I have determined that a mail ballot election will be held. In making this determination, I note that the Per Diem RN does not report to the office often and normally only works two days a week. In addition, both parties on the record stated they would not object to a mail ballot.

The ballots will be mailed to employees employed in the appropriate voting group. At 4:30 p.m. on Thursday, April 26, 2018, ballots will be mailed to voters from the National Labor Relations Board office. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by Monday, May 7, 2018, should communicate immediately with the National Labor Relations Board by either calling the Subregion 36 office at (503) 326-3085 or our national toll-free line at 1-844-762-NLRB (1-844-762-6572).

All ballots will be commingled and counted at the Subregion 36 office located at 1220 SW 3rd Ave., Ste. 605, Portland, Oregon at 3:00 p.m. on Thursday, May 17, 2018. In order to be valid and counted, the returned ballots must be received in the Subregion 36 office, prior to the counting of the ballots.

B. Voting Eligibility

Eligible to vote are those in the voting group who were employed during the payroll period ending **April 6, 2018**, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the voting group who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Voting group employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

C. Voter List

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

To be timely filed and served, the list must be *received* by the regional director and the parties by Monday, April 23, 2018. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlrb.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015.

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

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

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

D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the voting group found appropriate, the Employer must also distribute the Notice of Election electronically to

those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

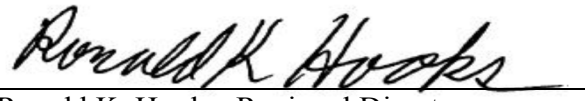
RIGHT TO REQUEST REVIEW

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

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

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

Dated: April 19, 2018.



Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Ave., Ste. 2948
Seattle, WA 98174-1006