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

INTERNATIONAL LONGSHORE AND  
WAREHOUSE UNION, LOCAL 5

Case No. 19-RC-221706

Petitioner,

and

PET'S RX, INC. d/b/a VCA NORTHWEST  
VETERINARY SPECIALISTS,

Employer.

**PETITIONER ILWU LOCAL 5'S BRIEF IN OPPOSITION TO THE EMPLOYER'S  
REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND  
ORDER RESOLVING CHALLENGED BALLOTS**

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## I. INTRODUCTION

Petitioner International Longshore and Warehouse Union, Local 5 (“ILWU,” or “Union”) respectfully requests that the Board deny the Employer’s Request for Review of the Regional Director’s Decision and Order (“DO”) on October 5, 2018 finding that Monica Neptune is an eligible voter whose ballot should be opened and counted. There is no reason for the Board to grant review because the Regional Director correctly concluded the Hearing Officer’s Report (“HOR”) was free from prejudicial error and correctly held that Ms. Neptune was an eligible part-time employee of VCA Northwest Veterinary Specialists (“VCA”) who shares a community of interest with the bargaining unit. The Regional Director affirmed the Hearing Officer’s holding that Ms. Neptune was a newly hired employee as of May 9, 2018, or in the alternative, that Ms. Neptune was on employment hiatus from May 5, 2017 to May 9, 2018. Either of these theories support the Hearing Officer’s ultimate conclusion that Ms. Neptune shares a community of interest with her fellow veterinary technicians:

Ultimately, the key to an analysis of an employee’s status as a regular part-time employee is whether or not the employee shares a community of interest with the employees who are indisputably eligible to vote. In this case, it is clear that Ms. Neptune shares a community of interest.

HOR at 15.

The party seeking to establish a voter’s ineligibility bears the burden of proof and the Regional Director correctly found that VCA failed to demonstrate Ms. Neptune was ineligible to vote. *Sweetener Supply Co.*, 349 NLRB 1222 (2007). Nonetheless, VCA repeatedly makes the self-serving argument that that Ms. Neptune was not a newly hired employee simply because of *its own opinion* that Ms. Neptune was employed as a relief worker. VCA urges the Board to turn a blind eye to the overwhelming evidence demonstrating that Ms. Neptune was either not an employee of VCA from May 2017 to May 2018 or was on a hiatus from employment during this time. The Regional Director astutely noted the absurdity of VCA’s self-serving definition of employment status:

At the same time, the Employer also argues that Neptune's lack of hours does *not* affect her status as an employee throughout the gap period, **apparently because the Employer considers employment status to be an existential state, disconnected from earning any compensation from it.**

DO at 4 (emphasis added). In making these arguments, the Employer seeks to shift the burden to ILWU and ignores decades of established precedent as well as the undisputed facts elicited at the hearing. As such, VCA's arguments must be disregarded.

The Regional Director's first conclusion that Ms. Neptune was a newly hired employee is supported by decades of well-settled law holding that a recently hired employee, like Ms. Neptune, is eligible to vote based upon the average number of hours she worked from the date of hire to the election day. *See Stockham Valve and Fittings, Inc.*, 222 NLRB 217 (1976); *Arlington Masonry Supply*, 339 NLRB 817 (2003); *New York Display & Die Cutting Corp.*, 341 NLRB 930 (2004). Ms. Neptune was clearly not an employee during between May 2017 to May 2018 because (1) she informed VCA she was resigning and did not go to work, receive wages, or accrue benefits during this time; (2) she was never contacted by VCA or offered any employment during this period; (3) she herself and other disinterested employees did not believe her to be an employee of VCA; and (4) upon her employment with VCA in May 2018, VCA required her to sign a new employment offer letter, fill out new hire paperwork, and activate a new email account and password.

The Regional Director's alternate conclusion that Ms. Neptune was on a "hiatus" from employment during May 2017 to May 2018 is supported by the holding of the oft-cited case *Pat's Blue Ribbons*, 286 NLRB 918 (1987), which establishes that the relevant inquiry as to regularity is whether the employee worked a sufficient number of hours *prior to* and *following* a "hiatus," or break in employment. During the entire year-long period, Ms. Neptune was clearly on hiatus: she did not work a *single* shift for an entire year. VCA fails to cite to a *single* case holding that an individual who did not work for even one day over a yearlong period was considered to be a casual employee, and insists that a rigid application of the *Davison-Paxon* test be applied.

Under either analysis, Ms. Neptune worked a weekly average of approximately twenty to twenty-five hours prior to leaving VCA, and a weekly average of eight hours after she returned to VCA employment. Therefore, her hours well exceed the minimum four-hour per week requirement under the test articulated in *Davison-Paxon Co.*, 185 NLRB 21 (1970) (“*Davison-Paxon*”). Ms. Neptune undeniably shares a community of interest with other members of the bargaining unit.

## II. FACTUAL BACKGROUND

Ms. Neptune’s terms of employment with VCA can be neatly broken down into three distinct phases. First, from January 2015 to May 2017, Ms. Neptune worked for VCA as a full-time veterinary technician assistant. HOR at 10; Tr. 184:12-14; Exh. E-4. Second, from May 2017 to May 2018, she did not work for VCA: after submitting a resignation letter, she left employment so that she could finish her education, graduate, obtain her EMT license, and work closer to home. HOR at 10; Exh. E-5; Tr. 259:1-12. Third, from May 2018 to present, she returned to VCA as a relief worker, working 65.35 hours in the eight-week period prior to the election, all while expressing a desire to work more frequent shifts and to ultimately obtain a set schedule with VCA. HOR at 12; Exh. U-9; Tr. 266:12-15; 267:2-12. Far from an intermittent employee or one with a sporadic work history, Ms. Neptune’s employment history overwhelmingly demonstrates that she shares a community of interest with her fellow veterinary technicians. *See* HOR at 15.

On January 26, 2015, Ms. Neptune began working for VCA as a full-time veterinary technician assistant. HOR at 10; Tr. 184:12-14; Exh. E-4. After working for over two years in this role, she submitted a resignation notice on April 28, 2017 and ceased employment with VCA on May 8, 2017. HOR at 10; Exhs. E-5, E-6. She informed VCA that she would be working in another position, closer to her home. *Id.* She expressed an interest in working relief shifts for VCA and became eligible to work relief. Tr. 257:20-25; Exhs. E-6, E-7.

However, during the subsequent year, Ms. Neptune “**did not work a single hour** for the Employer, either from being assigned and called in as an ‘on-call’ employee, or from picking up

open shifts.” HOR at 10 (emphasis added); *see also* Tr. 248:24-249:2. During this period, Ms. Neptune instead attended and completed EMT schooling, worked as a bartender, and pursued alternate employment. Tr. 259:1-12. On at least one occasion, she reached out to VCA’s hiring manager at the time, Kyle Gordon, to inquire about employment, but “received no response of any kind.” HOR at 10; Tr. 249:19-250:2. Ms. Neptune did not receive any wages, accrue any benefits, and did not consider herself an employee of VCA. Tr. 248:24-249:2. VCA placed her on “inactive” status but nonetheless purports to consider her an employee; as the Hearing Officer noted, VCA claims that *any* inactive worker who is eligible to work relief remains an employee “even if they have not worked **a single hour for the employer in 5, 10, or even 50 years.**” HOR at 11 (emphasis added); Tr. 190:16-23; 217:12-13.

As soon as Ms. Neptune finished school and had obtained her EMT license in late 2017, she reached out to supervisor Megan Brashear about potential employment opportunities with VCA, and was not offered a single shift. Tr. 259:15-260:9. On April 30, 2018, Ms. Neptune reached out again to Ms. Brashear, stating that she was “looking for part time work” as she had graduated and had no more educational obligations. HOR at 11; Exh. E-10. Ms. Brashear agreed, and offered her a shift on May 9, 2018, advising Ms. Neptune to “bring all the identifications because we may need to re-do paperwork to get you up and running again.” Exh. E-10. Ms. Brashear’s advice was warranted because Ms. Neptune had to submit a new application and was required to update her address, education, employment history, work availability, and provide updated references. HOR at 11; Tr. 201:2-202:11.

VCA further provided Ms. Neptune with an offer letter dated May 9, 2018, that stated:

On behalf of VCA Northwest Veterinary Specialists (NWVS), I am pleased to **extend an offer of employment to you** for an on-call/relief Technician Assistant, with a start date of 5/9/2018.

Exh. E-8 (emphasis added). Ms. Neptune accepted this offer, and began work on May 9, 2018. HOR at 11; Tr. 262:23-263:1.

During her first shift, Ms. Neptune discovered that she was unable to access her prior email account and that VCA had deactivated her time clock ID. HOR at 11; Tr. 200:7-14; 214:9-15; 250:20-251:14. Once she did obtain computer and email access – approximately one month later – she discovered all her prior emails had been deleted. HOR at 12; Tr. 251:15-22.

The Hearing Officer’s ultimate – and undisputed – characterization of Ms. Neptune’s work pattern is that her work can be broken down into three clear periods:

[A]s of May 9, 2018, Neptune’s employment status changed. For a one-year period preceding May 8, 2018, Neptune worked zero hours for the employer. From May 9, 2018 until the date of the election, Neptune averaged approximately 8 hours per week, and her work assignments were spaced relatively regularly. In fact, she worked approximately 8 hours per week for the 4 weeks before the eligibility date (June 2) and approximately 8 hours per week for the 4-plus weeks between the eligibility date and the election dates (July 3 and July 5.) This is closely equivalent to an employee who works one full time shift per week.

HOR at 15-16.

Given Ms. Neptune’s regularity of employment following her change in employment status, the inevitable conclusion, as discussed below, is that Ms. Neptune shares a community of interest with her fellow veterinary technicians, and that her vote must be counted.

### **III. ANALYSIS**

The Employer asserts that the Regional Director incorrectly found Ms. Neptune was either newly hired employee as of May 9, 2018 or, in the alternative, that she was on “hiatus” from May 5, 2017 through May 9, 2018. In doing so, VCA urges the Board to ignore the voluminous evidence supporting the Regional Director’s Decision and Order. VCA’s exceptions should be overruled because the Decision and Order was based on a thorough examination of the Hearing Officer’s Report and a correct application of clearly established law.

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**A. The Regional Director’s Decision and Order that Ms. Neptune Was a New Hire as of May 8, 2018, is Consistent with Officially Reported Precedent and is Amply Supported by the Record.**

**1. As a Threshold Matter, VCA’s Contention that Its Purported Internal Classification of Ms. Neptune as an Employee Between May 2017 and May 2018 Should Trump the Unrebutted Evidence to the Contrary Must Be Disregarded.**

The crux of VCA’s argument – and one that it returns to many times in its lengthy brief – is that the Regional Director erred by refusing to find that VCA’s purported internal classification that Ms. Neptune was an employee between May 8, 2017 to May 9, 2018 is dispositive and should therefore trump all other evidence showing she was, in fact, not employed by VCA during this period. In making this argument, VCA completely ignores the farfetched testimony of its own office manager, who testified that an individual who was on “inactive” status with VCA would still **be considered an employee if she worked *no* shifts but remained on inactive status for *fifty* years.** HOR at 11, 13; Tr. 217:12-13.

VCA’s arguments are contrary to law. The NLRA provides that the term “employee” includes “any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise...” 29 U.S.C.A. § 152. The term is to be taken in its **ordinary meaning**, i.e., as someone who works for another for hire. *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 167 (1971). Employees who quit or abandon their jobs lose employee status because they no longer have an expectation of future employment. *Roy Lotspeich Publishing Co.*, 204 N.L.R.B. 517 (1973); *Atlantic Coast Fisheries*, 183 N.L.R.B. 921 (1970). Some of the factors the Board has used in making the determination as to whether the employment relationship has been severed include:

- (1) Whether benefits, such as holiday pay, vacation time, and insurance continues to accrue while the employee is absent. *Red Arrow Freight Lines*, 278 NLRB 965 (1986);
- (2) Whether the employee’s position remains open for his or her return. *Ibid.*;

(3) The testimony of disinterested employees as to the employee’s work status. *Whiting Corp. v. NLRB*, 200 F.2d 43 (7th Cir. 1952); and

(4) The employee’s own understanding of his or her work status. *Ibid.*

In *In Re Cenergy Grp., Inc.*, 32-RC-4973, 2002 WL 31650172 (Nov. 13, 2002), an administrative law judge evaluated these factors and determined that an individual for whom an employer did not call in for a 7½ month period after the completion of a work project was *not* an employee or, in other words, did not retain his employee status during this period. Throughout this individual’s “hiatus” of employment, the employer did not contact the employee to perform any work, despite him living within commute range. *Id.* The judge reasoned that this employee was not an employee of the Employer because there was nothing “regular, or even intermittent” about his work with the employer, and it was “likely” that the employment connection had been severed. *Id.*

VCA ignores this well-established precedent. As discussed below, there was overwhelming evidence supporting the Regional Director’s finding that Ms. Neptune was not a VCA employee between May 2017 and May 2018. As such, VCA’s circular arguments to ignore the undisputed evidence in favor of its own unsupported opinion regarding Ms. Neptune’s employee status can easily be dismissed. To credit the Employer’s arguments here would allow it to “easily manipulate the employee count for its own benefit.” *Montgomery Ward & Co. v. N.L.R.B.*, 668 F.2d 291, 300–01 (7th Cir. 1981).

**2. The Regional Director Correctly Found the Hearing Officer’s Careful Factual Analysis of the Period Between May 2017 and May 2018 was “Free From Prejudicial Error” and Supports the Finding that Ms. Neptune was not a VCA Employee During this Timeframe.**

VCA argues that the Board should ignore the undisputed fact that Ms. Neptune did not work a *single shift* between May 8, 2017 and May 9, 2018, and received no wages or benefits of any kind during this period. However, these facts strongly support both the Regional Director’s and Hearing Officer’s conclusion that Ms. Neptune’s May 2017 offer letter “was never put into practice . . .” HOR at 13. As such, Ms. Neptune never even *began* as a “relief worker” – rather, she was simply *eligible* to work relief shifts.

VCA supervisor Ms. Megan Brashear’s testimony supports the notion that Ms. Neptune was not employed as a relief worker, but rather was simply eligible to work relief shifts. Ms. Brashear testified that she required Ms. Neptune to submit a resignation letter at the end of her employment in order have her be *eligible* to work relief in the future if she so desired:

Q: Okay. And was there a reason why you asked her to write [the resignation letter]?

A: Yes. Just so that we have a paper trail of when she gave her notice so that -- that tells us that she left in good terms and is eligible to continue on as relief. So if I am no longer the manager, somebody else can find that paper trail and say, she gave her two weeks[’] notice, so she can come back.

Tr. 224:10-16.

Further, the reasonableness of VCA’s own determination that Ms. Neptune was an “employee” was belied by the testimony of VCA’s own Office Manager, who claimed that an individual who was on “relief status” for five decades without working a single shift would still be considered a VCA employee. The Hearing Officer correctly found, affirmed by the Regional Director, this specific fact “cuts sharply against the idea that Ms. Neptune remained as an employee simply because the Employer internally classified her as an employee.” HOR at 13. VCA does not address this statement in its brief, and simply argues the Board agree with VCA’s determination that Ms. Neptune was an employee during this period.

To agree with VCA’s argument here would lead to the absurd result of considering all individuals who remain on an outdated “on-call” or “relief” lists and who have not worked for decades, be considered employees of a company. Simple common sense belies such a result. Clearly, while Ms. Neptune may have technically been *eligible* to work relief shifts, Ms. Neptune was not actually *employed* as a relief worker between May 2017 to May 2018.

**a. VCA’s Own Actions – Including Placing Ms. Neptune on “Inactive” Payroll Status – Support the Regional Director’s Conclusion that Ms. Neptune was Not an Employee.**

VCA did not treat Ms. Neptune as if she were a VCA employee from May 2017 to May 2018. The Regional Director agreed with the Hearing Officer’s finding that VCA removed Ms.

Neptune from active payroll status and placed her on “inactive” status. HOR at 11, 13. However, the fact that she was simply listed on payroll – as active or inactive – was not dispositive.

VCA argues removal from active payroll status is not determinative that an individual is no longer an employee. VCA’s Request for Review of DO at 14. However, the cases it cites in support of this position are distinguishable and cover situations where an employee was unquestionably going to return to employment. For instance, VCA’s reliance on *Anything Distributors, Inc.*, 04-RC-020682 (Sept. 3, 2003) is misplaced: in that case, the employer informed a laid-off employee that he would be returning to work in a few weeks. The employee’s removal from payroll was not determinative of status because it was clear he would be returning to work shortly. Similarly, in *Stretch-Tex*, 118 NLRB 1359 (1957), the employees at issue agreed to voluntary, *temporary* layoffs. It was obvious from the nature of the voluntary layoff policy was that they were temporary, and that they would be returning to work. As such, their temporary removal from payroll status was not dispositive in their voting eligibility.

VCA, however, is correct in that removal from payroll status – in and of itself – may not be *determinative* of voting eligibility where an employee has a future expectation of employment, but removal from payroll status is indisputably *relevant* in an analysis as to whether or not an individual is still an employee of the company. Ms. Neptune’s removal from active payroll status is one of many factors *relevant* to whether she was an employee of VCA. VCA fails to cite any cases in support of this proposition that the removal from payroll is *irrelevant* to the determination of employment status and has further failed to identify any case in support of the proposition that, simply because an employer purports that an individual is internally classified as an employee, that individual remains an employee under the Act’s definition.

Here, VCA’s removal of Ms. Neptune from active payroll status was one of many facts supporting the Regional Director’s conclusion that she was not an employee during the yearlong period.

**b. The Regional Director Correctly Found Numerous Additional Indicia that Ms. Neptune was Not an Employee between May 2017 and May 2018.**

Other indicia further support the Regional Director's conclusion that Ms. Neptune was a new employee as of May 9, 2018. Once Ms. Neptune resigned in May 2017, she was not eligible for and did not receive any benefits, such as health insurance, paid time off, or vacation. Tr. 226:10-19; 198:2-4; 198:20-199:1; 248:24-249:2. Ms. Neptune communicated to VCA that she had accepted another position closer to home and with a better schedule for her "hectic life." Exh. E-5. Further, the Regional Director left undisturbed the Hearing Officer's finding that during her year-long absence VCA disabled Ms. Neptune's email account; and Ms. Neptune's her re-employment with VCA in 2018, she was unable to use her username or password to log on to the computer. Tr. 250:12-251:3. In fact, it took management approximately one month to approve a new email address for Ms. Neptune and allow her access to VCA's computer system. Tr. 251:9-19. Once she obtained email access, all of the emails that were previously in her account had been deleted. Tr. 251:20-22. Ms. Neptune was also removed from VCA's time clock system and had to be added back into the system. Tr. 200:5-14, 214:9-12. All these facts strongly support the Regional Director's finding that Ms. Neptune was no longer a VCA employee between May 2017 and May 2018.

In addition, upon her return to VCA employment, Ms. Neptune was required to fill out a new application, a W-4, direct deposit information, and provide new references. Tr. 202:3-5; 214:11-13. While the employer may not have called Ms. Neptune's references, the Hearing Officer correctly found that this was unsurprising given her prior work with VCA: "an Employer's familiarity with an applicant would obviate the need to discover certain details about the applicant's background." HOR at 13. Similarly, Ms. Neptune's prior VCA experience obviated the need for employee training, regardless of whether she was a new hire. *Ibid.* Further, Ms. Neptune was never formally trained when she first started working for VCA in January 2015. *Ibid.*

It was also Ms. Neptune's *own* understanding that she was not an employee of VCA during the year-long period while she attended school and worked in another job. Tr. 249:3-6. This was bolstered by the testimony that she formally applied for a dermatology position at VCA. Tr. 256:8-13. Other disinterested employees similarly understood that Ms. Neptune was not an employee of VCA because she did not work at all during this period of time. Tr. 56:21-56:25; 97:15-17. If anything, the fact that Ms. Neptune returned to VCA employment as soon as she finished graduating should support a finding of regular part-time employment status starting May 9, 2018.

VCA urges that the Board ignore this plethora of evidence, but provides no evidence rebutting any of these conclusions. Instead, VCA simply repeats the argument that its *own* purported internal classification that Ms. Neptune was an employee should trump all other evidence that clearly supports the finding that Ms. Neptune was not, in fact, a VCA employee.

**3. VCA's Failure to Respond to Ms. Neptune's Employment Inquiries Between May 2017 and May 2018 Further Support the Conclusion She was Not a VCA Employee.**

Ms. Neptune's non-employee status was confirmed when she reached out to the hiring manager, Kyle Gordon, at certain points during her year-long absence to request to work, and received no response. Tr. 249:19-250:2. Ms. Neptune also unsuccessfully reached out to another supervisor, Ms. Brashear, seeking work. Tr. 261:5-10. Both of these facts support the finding that Ms. Neptune was not an employee between May 2017 and May 2018.

In addition, the language used in Ms. Neptune's April 30, 2018 email inquiring about employment opportunities with VCA further demonstrates that she understood she had resigned and wanted to return to work: "I miss you guys I'm looking for part time work if you want me or need me." Exh. E-10. In this email, Ms. Neptune does not reference her being an employee, or that she wants to take advantage of her position as relief worker. *Id.* Rather, the plain language of her email demonstrates that she is requesting to re-join VCA as a regular, part-time employee because she has now graduated from school. *Id.*

It is mind-boggling how such an individual – who submitted a *resignation* letter, who received no wages, who accrued no benefits, who had informed the employer that she received a *new job*, whose time clock and email accounts had been deactivated, who was marked as “inactive” in the payroll system, who periodically inquired about employment but received no response whatsoever, and who was required to re-apply to return to work – could possibly be considered an employee.

**4. The Regional Director Correctly Found that VCA’s May 9, 2018 Offer Letter Further Supported a Finding that Ms. Neptune was a New Hire.**

VCA again urges that the Board ignore the undisputed evidence that VCA issued Ms. Neptune a letter dated May 9, 2018 that offered her a position working part-time relief with VCA. VCA makes the curious argument that the offer letter – which unambiguously states “I am pleased to **extend an offer of employment**” and lays out the terms and conditions of employment – “simply reiterated and confirmed Ms. Neptune’s relief status and employment terms.” Exh. E8; VCA’s Request for Review of DO at 12, n.10. VCA suggests that the Board completely ignore the content of the letter, making the claim that the letter was simply “pro forma” and that “[n]o independent thought was put into crafting the text.” VCA also ignores the fact that **the “offer” letter was for part-time relief work – the exact same position VCA purports Ms. Neptune was *already employed in at the time she received the letter.***

The simple fact is that VCA would not have needed to issue any “offer” letter if Ms. Neptune in fact was continuing in the *exact same* employment status with VCA. The need to “reiterate” the terms of employment through a letter extending an offer of employment is unnecessary – VCA would have emailed Ms. Neptune or written her a different letter reiterating the terms of her employment and mentioning her continued employment, if in fact she was an employee. VCA’s Request for Review of DO at 12, n.10. Further, the Regional Director left undisturbed the Hearing Officer’s persuasive comparison of Ms. Neptune’s letter to that of a letter received by another VCA employee, Sonya Huskey: “Huskey, whose employment with the

Employer was undisputedly continuous, received a letter saying the Employer was ‘looking forward to your continued work with the VCA NWVS team.’” HOR at 13. Ms. Neptune’s letter, in contrast, did not reference continuing employment: it simply extended a job offer, and as such, on its face, was clearly an offer of employment.

VCA offered no evidence to support its far-fetched claim that the letter was issued to “reiterated and confirmed” the terms of employment. VCA’s Request for Review of DO at 12, n.10. For instance, no evidence was introduced demonstrating other individuals who continued in the same positions with VCA received “offer” letters reiterating the terms and conditions of employment. Additionally, in an apparent acknowledgement of the weakness of its argument, VCA states it was “**plausible**” the Company may have wanted to clarify her employment status based on her prior applications for full-time employment. VCA’s Brief ISO Exceptions at 24.

That it is “plausible” VCA would want to clarify Ms. Neptune’s relief status with a letter formally extending employment cannot possibly meet VCA’s burden of demonstrating she was not an eligible employee. Simple common sense dictates that there is *no need* to “extend an offer of employment” when an employee is already working in the offered position. The Employer’s specious argument to ignore the offer letter that VCA *itself* provided to Ms. Neptune must be overruled.

**5. VCA’s Attempt to Distract from the Relevant Facts by Arguing the Regional Director Conflated On-Call with Relief Work Must be Disregarded.**

VCA misleadingly argues that the Regional Director “conflated” on-call work with relief status, and that because the Hospital’s policy is to not reach out to relief workers in order to fill shifts, the fact that VCA did not communicate with Ms. Neptune during her yearlong absence is irrelevant. VCA’s Request for Review of DO at 11-12. However, this contention ignores the fact that Ms. Neptune *herself* reached out to VCA to request work, and VCA never responded to her inquiries. This point is crystallized by VCA’s own argument, which states that, given Ms. Neptune’s relief status, “[i]t would not make sense for VCA to call her until Ms. Neptune called

to ask for work.” VCA Brief ISO Exceptions at 22. What VCA again ignores is the un rebutted fact that Ms. Neptune *did* contact VCA to inquire about working relief shifts – and that it never responded to her request.

Nonetheless, to the extent that VCA continues to argue the Hearing Officer conflated on-call and relief status, this proposition is quickly discounted by the Report’s specific discussion regarding the distinction between on-call and relief work:

On-Call and Relief are two separate terms that refer to different employee duties. Not all relief employees are automatically on-call. An on-call employee is one who is signed up to be available to the Hospital if they receive a phone call. That employee then has a certain time frame to come into the hospital During that on-call period, the employee has an obligation to work if called; they have to be able to come in and work.

HOR at p. 10.

The Regional Director affirmed the Hearing Officer’s Report which noted the fact that, in VCA’s own paperwork dated May 18, 2017, VCA technically classified Ms. Neptune’s “employment type” as “on-call/relief”: in fact, VCA *hand wrote* that Ms. Neptune was classified as “on call/relief.” Exh. E7. In addition, offer letter dated May 4, 2017 and offer letter dated May 9, 2018, both extend Ms. Neptune an offer of on-call/relief ER/ICU technician. Exhs. E6 and E8.

Thus, VCA’s efforts to misconstrue the Regional Director’s Decision and Order and muddy the facts must be disregarded. VCA cannot simply dismiss its own documents that clearly reflect it classified Ms. Neptune as an “on-call/relief” technician and ignore the Regional Director’s obvious understanding of the distinction between on-call and relief status.

**6. Given that Ms. Neptune was a Newly Hired Employee, the Regional Director Properly Calculated her Average Hours Worked from the Hire Date of May 9, 2018.**

The Regional Director properly applied the new hire eligibility formula as articulated in *Stockham Valve and Fittings, Inc., supra*, 222 NLRB 217, *Arlington Masonry Supply, supra*, 339 NLRB 817, and *New York Display & Die Cutting Corp., supra*, 341 NLRB 930, 931, in determining whether Ms. Neptune was eligible to vote. When part-time employees perform work

on a regular basis and for a sufficient period of time, such that they have a substantial and continuing interest in the wages, hours, and working conditions of full-time employees, they will be considered regular part-time employees and eligible to vote in an election. *Farmers Insurance Group*, 143 NLRB 240, 244–245 (1979). In general, an employee can demonstrate a community of interest with other employees in the bargaining unit where the employee has worked an average of four or more hours in a week in the quarter preceding the eligibility date. *Davison-Paxon Co.*, *supra*, 185 NLRB 21, 23–24. However, the *Davison-Paxon* test is applied flexibly, in an effort to “permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer.” *Trump Taj Mahal Assocs.*, 306 NLRB 294, 296 (1992).

The Regional Director correctly noted that the Board has “long held” that new hires who work an average of four hours per week prior to the election date, rather than the eligibility date, are regular part-time employees, as long as they were working on both the election date and eligibility date. HOR at 14; *See, e.g., Stockham Valve and Fittings, Inc.*, *supra*, 222 NLRB 217 (employees hired just five weeks prior to election and who were frequently absent in the weeks preceding the election were regular part-time employees where their work hours averaged at least for hours per week from the date of the election); *Arlington Masonry Supply*, *supra*, 339 NLRB 817, 819 (part-time employee who began working ten days prior to the eligibility date and averaged slightly over nine hours per week during a month and one half period was an eligible employee).

The standard has held even where an employee began employment just five days before the eligibility date and just nine days before the election date. In *New York Display & Die Cutting Corp.*, *supra*, 341 NLRB 930, 931, the Board reversed a hearing officer’s determination that an employee hired just nine days before the election date was not a regular part-time employee, unequivocally holding that while the tenure of employment should be considered in a regular part-time employee analysis, “brevity of employment is not, by itself, a reason for

denying eligibility.” *Id.* The new hire, who worked 4-6 hours per day for three days over a period of two weeks preceding the election, was a regular part-time employee. *Ibid.*

VCA makes the strained argument that, because Ms. Neptune was hired three weeks before the payroll eligibility date, whereas the employees in *Stockholm Valve*, *Arlington Masonry Supply*, and *New York Display* were hired ten days or fewer before the eligibility date, these cases should not apply. The argument is meritless first because, as the Hearing Officer noted, ten days is “substantially closer to three weeks than it is to thirteen weeks,” and therefore Ms. Neptune’s work situation is more analogous to these cases rather than cases traditionally applying the *Davison-Paxon* test. HOR at 14. In addition, this argument makes no practical sense. The Employer is essentially arguing that because Ms. Neptune worked *more hours* than the employees at issue in *Stockholm Valve*, *Arlington Masonry Supply*, and *New York Display*, her hours should not count. Surely the Board, in articulating the rule in these cases could not have contemplated that an employee who was hired just nine days before the election date, and who worked approximately 24 to 36 hours over a two-week period, would be considered a regular part-time an employee, whereas an employee who worked a similar number of hours per week, but for a greater number of weeks, would not be considered a regular part-time employee. Such an analysis would cut against the Board’s well-settled flexible application of the *Davison-Paxon* test in special circumstances.

Here, Ms. Neptune started working for VCA on May 9, 2018, just under 1-month before the eligibility period of June 2, 2018. Tr. 262:23-263:1. From her employment on May 9, 2018, through the election date of July 4, 2018<sup>1</sup>—a period of 8 weeks—Ms. Neptune worked a total of 65.35 total hours, and 64.35 paid hours.<sup>2</sup> Exh. U-9. As such, she worked an average of over 8 hours per week, well over the four hour per week minimum pursuant to *Davison-Paxon*. Ms.

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<sup>1</sup> The election took place on July 3, 2018 and July 5, 2018. May 9th and July 4th are the same day of the week, making the average weekly calculation simpler and more precise than using July 3rd or July 5th. Using either of these dates, however, does not affect the ultimate finding, however, that Ms. Neptune worked significantly in excess of an average of 4 hours per week.

<sup>2</sup> Phyllis Collins testified that total hours are the total number of hours an employee works during a day. Paid hours have non-paid time deducted; i.e., a lunch hour would be deducted. Tr. 219:22-220:3.

Neptune also worked both during the eligibility period and throughout the election dates. Using the standard articulated in *New York Display & Die Cutting Corp.*, *supra*, 341 NLRB 930, there can be no reasonable dispute that Ms. Neptune worked sufficient hours from the date of her hiring to render her a regular part-time employee.

**B. The Regional Director Correctly Concluded That, In the Alternative, Ms. Neptune was on an Employment “Hiatus” And Eligible to Vote.**

The Regional Director’s alternate conclusion that Ms. Neptune was on employment hiatus from May 2017 to May 2018 is supported by the undisputed facts as well as decades of precedent. The Regional Director relied on *Pat’s Blue Ribbons*, *supra*, 286 NLRB 918, which evaluated the status of three part-time employees. In that case, the Board found the first employee to be a regular part-time employee because she worked a “substantial number” of hours over a one-month period between her date of hire and eligibility period; she performed the same work under the same supervision as other employees; and, despite her pay structure being different than full-time employees, she received an equivalent rate of pay to the rate received by full-time employees. *Id.* at 917-8. Because this employee shared the same wages, hours, and other terms and conditions of employment, the employee was a regular part-time employee and eligible to vote. *Id.* at 918.

As to the second, the Board found her to be a regular part-time employee where she worked continuously until she went on leave for a 9-month period. *Id.* at 919. In the two months prior to her leave, she worked 140 hours and 108 hours, respectively. In the one-month period prior to the eligibility date, she worked 43 hours. *Ibid.* Because the hours preceding her leave were substantial, and because she received the same worker’s compensation, unemployment compensation, tax deductions, and hourly pay as the other employees, she shared a community of interest with the other employees. *Ibid.*

The Board found the third employee to be a casual employee where she was employed from October 1984 through April 1985, worked a mere 4.5 hours in March 1985 and 4.5 hours in April 1985 (averaging approximately 1.1 weekly hours between the two months), and then did

not return to work for the employer again for sixteen months. *Ibid.* When she started work again, she worked only 14 hours in the one-month period prior to the eligibility cutoff date (an average of approximately 3.5 weekly hours). *Ibid.* Because her hours *before and after* her leave were insubstantial, averaging less than four hours per week, she was found to be a casual employee. *Ibid.*

In a similar case, also upon which the Regional Director and Hearing Officer relied, an employer laid off an employee due to lack of work, and rehired him again when work became available. *A L Inv'rs Orlando, LLC, d/b/a the Pavilion at Crossing Pointe*, 344 NLRB 582, 583 (2005); DO at 3; HOR at 14. Citing *Pat's Blue Ribbons*, the Board looked to the hours the employee worked *before and after* the period he was laid off in finding that he was a regular part-time employee, rather than the fact the employee was absent for a period of time:

[W]here employees have experienced lengthy breaks in employment, the Board has looked to the periods both before and after the hiatus to assess whether the employee had sufficient employment to be counted as a regular part-time employee. [citation.]

During the 4-month period between March and July 5, Mogollon worked 2 days a week (Thursdays and Fridays), 7 hours per day, or 14 hours per week . . . After returning to work in October, Mogollon resumed his regular Thursday and Friday schedule, working about 14 hours a week, or 28.5 hours in the 2-week period ending the day after the election. Given the length and regularity of his employment both before and after his layoff, we find that Mogollon was a regular part-time employee.<sup>3</sup>

Notably, the Board found that this employee was a regular part-time employee despite the fact that he **was not working on the eligibility date**. *Id.*; See also *Genesis Health Ventures of W. Virginia, L.P.*, 326 NLRB 1208 (1998) (casual employment found because, even if a four-week leave period was excluded from the eligibility calculation, employee's average hours per week totaled less than 4 hours).

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<sup>3</sup> While the Board found that this employee had a reasonable expectation of future employment while he was laid off due to representations made by the employer, this fact did not factor into the Board's analysis as to whether or not he was a regular part-time employee. Rather, the Board simply looked to his hours worked before and after his break in employment. The Board further found that because he was technically unemployed on the **eligibility date**, but had a reasonable expectation of future employment on this date, he could vote. In the present case, Ms. Neptune was indisputably an employee on both the eligibility date and the election date.

Ms. Neptune's status is most analogous to the two regular part-time employees in *Pat's Blue Ribbons* based on her pre-resignation and post-resignation hours alone. In April 2017, the month preceding her resignation, Ms. Neptune worked a total of 79.21 hours; in March 2017, she worked a total of 110.06 hours in April 2017. Exh. U-9 (adding together "total hours" for the month of April and March). Upon her return, she worked 32.9 hours in her first month (May 2018), and 21.65 in her second month (June 2018). Exh. U-9. These pre- and post-resignation hours *far exceed* the scant number of hours worked by the casual employee in *Pat's Blue Ribbons* – and, exceed the four hour per week minimum as articulated in *Stockham Valve, supra*, 222 NLRB 217. Thus, Ms. Neptune's average weekly pre- and post-hiatus hours clearly exceed the minimum of four hours per week.

**1. VCA's Attempt to Artificially Distinguish *Pat's Blue Ribbons* and Other "Hiatus" Cases Must Fail.**

Despite the clear application of *Pat's Blue Ribbons* to this case, VCA contends that none of the cases cited by the Regional Director addressed an employee's change from pre-hiatus full-time employment to post-hiatus part-time employment, and as such, they are all inapplicable on that basis. VCA appears to insinuate that a separate test should be used in evaluating the pre- and post-hiatus hours for an employee who works full-time prior to a hiatus, and then returns to part-time work after a hiatus.

VCA's hollow argument attempts to create an artificial and irrelevant distinction that should have no bearing on the end result. Employees who work part-time prior to a hiatus and part-time after a hiatus are no different from employees who work full-time prior to a hiatus and return to work part-time. In fact, an employee who works full-time prior to a hiatus, and then returns as a part-time employee, would arguably be *more likely* to share a community of interest with other members of the bargaining unit, given that prior to the hiatus the employee would have worked a substantial number of hours *over* an employee who worked only part-time before and after the hiatus. VCA offers no explanation for why the change from full-time to part-time work following a hiatus would be determinative of the Board's hiatus test.

**2. The Employer Fails to Identify a Single Case Where the Board Has Found an Individual to be a Casual Part-Time Employee Where the Individual Has Not Worked a Single Hour Over a Year-Long Period.**

Importantly, as the Regional Director noted, the Employer fails to identify any case where the Board has found that an individual is a casual part-time employee where, during a year-long period as a purported relief employee “lack of any work . . . renders the case law on new hires and hiatuses inapplicable . . .” . DO at 4. In fact, the Regional Director aptly described VCA’s perplexing argument:

[T]he Employer also argues that Neptune’s lack of hours does *not* affect her status as an employee throughout the gap period, **apparently because the Employer considers employment status to be an existential state, disconnected from earning any compensation from it.**

DO at 4 (emphasis added).

There is thus no support for its argument that Ms. Neptune should be considered to be a casual employee due to her hiatus. The most closely analogous case as identified by all parties is *Pat’s Blue Ribbons*, 286 NLRB 918. As discussed *supra*, however, this case supports the Union’s position and holds that lengthy periods during which an employee is on hiatus from work should not be counted in the eligibility calculation. Rather, the periods before and after the hiatus should be calculated.

**3. VCA’s Repeated Argument that Ms. Neptune “Chose” Not to Work Must Be Disregarded.**

VCA makes the stale argument that Ms. Neptune “chose” not to work, and thus could not be considered on hiatus. HOR at p. 34. This argument, yet again, ignores the undisputed fact that Ms. Neptune reached out to VCA to work on numerous occasions, but received no response whatsoever from the Employer. VCA cannot on the one hand ignore communications from an individual, and then on the other hand argue that this individual is an actual employee.

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**4. Ms. Neptune’s Work History is Distinguishable from that of an Employee Whose Work Tracks the Academic Year.**

VCA argues Ms. Neptune’s work history tracks that of the academic calendar and as such, she must be found to be an irregular employee. VCA relies on *Orland Park Motor Cars, Inc.*, 333 NLRB 1017 (2001), which held that an employee with a pattern of irregular employment, consistent with that of a student, was a casual and irregular employee. The employees at issue in that case, however, closely tracked the academic year: one started working in May, then ended work in August. *Id.* at 42. The other displayed a similar irregularity. *Id.* at 43. He then resumed work over a one-week period covering the Thanksgiving Holiday, and then again over a one-week period covering the Christmas holiday. *Id.* at 42. Because it was clear that either these individuals were students working only during the summer and other school breaks, or had stopped working for the company at the time of the Union’s petition, the workers did not share a community of interest with the other members of the unit. Other cases are in accord. *See, e.g., Columbus Symphony Orchestra, Inc.*, 350 NLRB 523, 525 (2007) (Stagehands who worked only over summers on an irregular and intermittent basis and who did not work an average of four hours per week were casual employees.).

Clearly, Ms. Neptune’s work patterns do not follow the academic year and the Hearing Officer properly found as such: “She is not a seasonal or student employee, and her newly sustained employment in May 2018 began after she completed her educational studies and related examinations, which further supports the idea that Neptune’s employment will be ongoing.” HOR at 16. It is further undisputed that prior to her graduation, Ms. Neptune did not work over any school breaks. Ms. Neptune simply took a one-year hiatus from VCA employment between May 2017 and May 2018 and then resumed work with VCA after she *graduated* from school. As such, her employment patterns differ significantly from that of student employees.

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**5. The Regional Director Properly Analyzed Ms. Neptune’s Work History with VCA Holistically, Correctly Finding that She Shares a Community of Interest with Other Eligible Employees.**

VCA encourages the Board to stringently apply the *Davison-Paxon* test and to disregard established policy of the Board to “permit optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment offered by the employer.” *Trump Taj Mahal Assocs.*, 306 NLRB 294, 296 (1992). However, as discussed *supra*, the Board regularly relaxes the test in the case of new hires; it also flexibly applies the test in a variety of other circumstances, depending on the structure of the employer and the nature of the industry. *See, e.g., C. T. L. Testing Laboratories*, 150 NLRB 982, 985 (1962) (Employees who worked a at least 15 days in either of the two 3-month periods immediately prior to the issuance of the Board’s decision); *Scoa Inc.*, 140 NLRB 1379, 1381–1382 (1963) (Part-time employees who worked at least 15 days in the calendar quarter before the eligibility date); *Marquette General Hospital*, 218 NLRB 713 (1975) (Employees who worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the date of issuance of decision); *Juilliard School*, 208 NLRB 153, 155 (1974) (Employees who have been employed during two theatrical productions for a total of 5 working days over a 1-year period, or who have been employed by the employer for at least 15 days over a 2-year period).

The Regional Director found that Ms. Neptune shares a community of interest with other bargaining unit members in that she performs similar work duties and receives wages and benefits that are on par with full-time employees. *Muncie Newspapers, Inc.*, 246 NLRB 1088, 1089 (1979); *see also Arlington Masonry Supply*, 339 NLRB 817, 820 (2003) (worker who averaged approximately four hours per week and received the same pay, had the same supervision, and worked under the same conditions as other drivers was a regular part-time employee). The record evidence shows that Ms. Neptune performs the exact same work and receives the same pay as other workers in the unit; in fact, upon her return to work she received the exact same hourly rate she did when she was working as a full-time employee – 13 dollars per hour. Tr. 247:19-23; Exh. E-4. Her current wages are 18 dollars per hour, just a dollar more

than her fellow Technician Assistant, Julie Greenough and a dollar less than her other fellow Technician Assistant, Alison Lubo. Tr. 89:23-24, 110:2-8; 247:16-18. She currently works side-by-side with other members of her “team,” performing the same duties she had previously performed as a full-time employee. Tr. 263:5-17. In addition, she is covered by VCA’s worker’s compensation policy, as other full-time employees are. Exh. E-8. She refers to her coworkers at VCA as her “family” and testified during the hearing in support of her shared community of interest with her coworkers. Tr. 257:18-19. As such, the evidence is compelling that Ms. Neptune shares a community of interest with full-time employees at VCA, and thus, the challenge to Ms. Neptune’s ballot must be overruled and her ballot must be counted.

In sum, the Regional Director’s adoption of the Hearing Officer’s “holistic analysis” of Ms. Neptune’s work history strongly supports a finding that she shares a community of interest with other workers, regardless of how Ms. Neptune’s change in employment is categorized. From January 2015 to May 5, 2018, Ms. Neptune worked for VCA as a full-time employee. As of May 9, 2017, Ms. Neptune’s work status changed. Between May 9, 2017 and May 9, 2018, she worked a total of zero hours for VCA. From May 9, 2018, until the date of the election on June 5, 2018, she averaged approximately eight hours per week. Prior to and following her break in employment, Ms. Neptune worked well over the four hour per week minimum. Far from a casual or intermittent employee, Ms. Neptune clearly shares a community of interest with her fellow veterinary technicians.

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#### IV. CONCLUSION

For the foregoing reasons, Petitioner ILWU Local 5 respectfully requests that the Board deny VCA's Request for Review of the Regional Director's Decision and Order and order Ms. Neptune's ballot to be opened and counted.

Dated: October 23, 2018

Respectfully submitted,

LEONARD CARDER, LLP

By:   
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Emily M. Maglio  
Julia Lum

*Attorneys for Petitioner  
ILWU LOCAL 5*

**PROOF OF SERVICE**

I am employed in the County of San Francisco, State of California. I am over the age of 18 years old and not a party to the within action; my business address is 1188 Franklin Street, Suite 201, San Francisco, CA 94109.

On **October 23, 2018**, I served a true and accurate copy of the foregoing document(s):

**PETITIONER ILWU LOCAL 5'S BRIEF IN OPPOSITION TO THE  
EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S  
DECISION AND ORDER RESOLVING CHALLENGED BALLOTS**

to be filed electronically with the National Labor Relations Board, and a true and correct copy of the same was served on all interested parties in this action as follows:

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- BY U.S. MAIL:** I caused such envelope to be deposited in the mail at my business address, addressed to the addressee(s) designated.
- BY ELECTRONIC MAIL:** I caused the documents to be sent to the person at the electronic notification address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under the penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **October 23, 2018** at San Francisco, California.

  
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Kiara Patino