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BEFORE THE NATIONAL LABOR RELATION BOARD

ST. JAMES MEDICAL GROUP,

Employer,

-and-

MONTANA NURSES ASSOCIATION,

Petitioner.

Case No. 19-RC-233533

**PETITIONER'S OPPOSITION TO
EMPLOYER'S REQUEST FOR REVIEW**

Pursuant to Rule 102.67(f) of the Rules and Regulations of the National Labor Relations Board, Petitioner Montana Nurses Association files this statement in opposition to the request for review filed by Employer St. James Medical Group.

BACKGROUND:

On January 3, 2019, Petitioner Montana Nurses Association filed a petition to represent a unit of registered nurses ("RNs") employed at outpatient health clinics operated by the Employer in and around Butte, Montana. The Employer contended the petitioned-for unit was not appropriate and the appropriate unit had to include all non-physician professionals including nine advanced-practice practitioners (four licensed physician assistants and five licensed advanced-practice registered nurses), a licensed counselor/behavior health specialist and two unlicensed social workers and must exclude an RN who works part-time at a clinic located on the campus of

Montana Tech. *Employer's Statement of Position* at Attachments C & D.

After hearing, the Regional Director issued the January 22, 2019 Decision and Direction of Election (“Decision”) finding the petitioned-for unit was appropriate. A Supplemental Decision was issued on February 6, 2019 after it was revealed in testimony in another matter involving this Employer that the Employer “may or may not” operate one of the clinics involved here. *See, Footnote 2, infra*. On February 11, 2019, the Employer filed a “Motion to Stay the February 14, 2019 Election/Impoundment of Ballots” which was denied by the Board on February 15, 2019. The election occurred on February 14, 2019. All 12 eligible voters voted and all voted to be represented by Petitioner.

Accordingly, the primary issue at the Region and here is the appropriateness of a unit comprised solely of staff RNs, i.e., one that excludes other non-physician professionals. In this request for review, the Employer contends the Regional Director “misapplied the standard of *PCC Structuralists*”¹ in approving a “gerrymandered unit of all RNs.” *Employer's Request for Review* at 2 & 6.

The Employer operates at three locations in Butte, Montana, and has approximately 75 total employees.² *Decision* at 2. Two of the clinics are organized by practice group. *Id.* at 1.

¹ 365 NLRB 160 (217)

² At hearing, the Employer's witness testified that the Employer operates four clinics: the Rocky Mountain Clinic on Crystal Street in Butte, *Tr.* at 14:7; a nearby clinic on Porphyry Street, *Tr.* 16:6-8; the clinic on the campus of Montana Tech (located a “couple of miles” from the Rocky Mountain and Porphyry clinics), *Tr.* 15:19; and, a clinic in Boulder, Montana (located about 35 miles from Butte). *Tr.* 33:13-15; *Board Exhibit 2* at ¶8. The Employer asserted that employees of the Boulder clinic were its employees. *Id.*; *See, e.g., Tr.* 33:4-6. Accordingly, while there are no RN's permanently assigned to the Boulder clinic, *Tr.* 70:5-7, the January 22, 2019 Decision and Direction of Election defined the unit to include the Boulder clinic. A few days after the Decision in the present case, there was a hearing in another case involving this

The smaller Montana Tech clinic is not divided by practice group, but instead provides a wide range of services to the college student community it serves. *Id.*

The Employer employs 12 registered nurses – four in family practice, one in pediatrics, one in neurology, two floats, one employed in the CPC program, one in urology, one in OB-GYN, and one at the Montana Tech clinic. *Id.* at 2. The RNs work with primary care providers -- physicians, physician assistants or advanced-practice registered nurses – who diagnose patients and determine appropriate treatments, which treatments and diagnoses then directs the work of the RNs within their scope of practice. *Tr.* 96:14 - 97:19. The Employer employs two unlicensed social workers who do no direct patient care, but instead refer patients to service providers for services not provided by the Employer. *Tr.* 86:15 -87-15. The Employer also employs a counselor/behavior health specialist, a licensed clinical social worker, who “has patients that she schedules on her own that she provides counseling services to.” *Tr.* 27:17-19

The Regional Director Followed the Rule of PCC Structuralists:

In the health care industry, as any other, unions are not required to organize in the most comprehensive unit available or even the most appropriate unit. They need only select an appropriate unit. *Fairbault Clinic*, 308 NLRB 131, 133 (1992); *Newington Children's Hospital*, 217 NLRB 793 (1975). Thus, scrutiny of the appropriateness of an alternative unit is not the issue unless the unit sought by the petitioner is inappropriate. *Marian Manor for the Aged*, 333

Employer in 19-RC-234472 (*St. James Medical Group, Employer and Teamsters Local Union No.2, Petitioner*). In that proceeding, the Employer asserted the Boulder clinic is operated by a separate employer and employees of the Boulder clinic are not employees of the Employer. Thereafter, at the suggestion of the Regional Director, Petitioner agreed that because no RNs are employed in Boulder and because “the Boulder facility may or may not be operated by the Employer,” the unit here would not include the Boulder clinic. *Supplemental Decision and Direction of Election* (February 6, 2019).

NLRB 1084, 1094(2001); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989).

Here, a unit limited to RNs is an appropriate unit. This conclusion is fully in line with the Board's decision in *PCC Structural*s.

While *PCC Structural*s involved a non-healthcare employer, the Board explicitly reinstated the standard for non-acute healthcare facilities established in *Park Manor Care Center*, 305 NLRB 872 (1991). *PCC Structural*s, 365 NLRB No.160, slip op. at 1 n.3. Under *Park Manor*, unit appropriateness is determined under the "pragmatic or empirical community of interest test" examining traditional community of interest factors plus background information gathered during the healthcare rulemaking and prior cases involving either the type of unit sought or the particular type of healthcare facility at issue. *Park Manor*, 305 NLRB at 875. Traditional community of interest factors include such factors as the similarity in wages and other working conditions, common supervision, the nature of the skills required and functions performed, the frequency of contact and interchange among employees and functional integration. *Id.*

The background information gathered during the healthcare rulemaking process led the Board to conclude that RNs in acute-care hospitals constitute a unique group. *Section 103.30, Rules and Regulations of the National Labor Relations Board*. In that regard, RNs appropriately constitute a separate bargaining unit in that their profession demands continuous interaction with patients and constant patient care responsibilities and they possess distinct functions and collective bargaining interests. *53 Fed. Reg. 33911, 33917*. The rulemaking proceedings also revealed the historical desire of RNs for separate representation as well as the objections of other

professional groups to their inclusion with RNs. 53 Fed. Reg. 33913-4.³ The Board also found that RN-only bargaining units would not lead to wage whipsawing, strikes, jurisdictional disputes and bargaining unit proliferation. Additionally, the Board concluded that the use of multi-disciplinary teams does not detract from the separateness of their identity or the separate appropriateness of RN units. *Id.* Thus, the Board found that the interaction of RNs and other professionals is a process to further the delivery of patient care which does not alter either the responsibility of licensed professionals in their scope of practice or their wages, hours, benefits or functions. 53 Fed. Reg. 33913.

A review of Board precedent since *Park Manor* reveals that the Board has regularly applied the pragmatic community of interest standard to approve units limited to RNs in non-acute health care facilities. *South Hills Health System*, 330 NLRB 653 (2000); *Marian Manor for the Aged*, *supra*; *Charter Hospital of St. Louis*, 313 NLRB 951, 954 (1994); *Holliswood Hospital*, 312 NLRB 1185 (1993); *McLean Hospital Corporation*, 311 NLRB 1100 (1993); *McLaren Medical Management*, 332 NLRB 1297 (2000). In those cases the Board found that RNs constituted a sizeable homogenous grouping of professionals whose specialized training and license requirements clearly prevent other professions from performing their work. Likewise, their participation in interdisciplinary teams did not alter the fact that they still had responsibility for their individual scope of practice.

As mentioned, it is well established that there may be more than one appropriate bargaining unit within the confines of a single employing entity. *See, e.g., American Hospital*

³ It should be noted that although the Employer contends that the Decision and Direction of Election was “based solely on the extent of union organizing,” *Request for Review* at 8, nothing in the Decision supports that contention.

Association v. NLRB, 499 U.S. 606, 610 (1991). In accordance with that principle, the Board accepts a petitioned-for unit as long as it is one of the many possible appropriate units. There is nothing in the Act requiring that the unit sought be the only unit, the ultimate unit, or the most appropriate unit. The Act requires only that the unit be appropriate. *Overnite Transportation Co.*, 322 NLRB 723 (1996).⁴

In determining whether a group of employees possess a separate community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, employee skills and job functions, contact and interchange among employees, fringe benefits, bargaining history, and similarities in wages, hours, benefits, and other terms and conditions of employment. *Home Depot USA, Inc.*, 331 NLRB 1289 (2000); *Esco Corp.*, 298 NLRB 837 (1990).

Here, the record reveals that the advanced-practice practitioners perform a separate function from the RNs. The advanced-practice practitioners, who are separately licensed, are the patients' primary care providers who direct and supervise the care of the patient – the tasks of that care is then carried out by RNs acting within the scope of their practice. *Tr.* 96:14-24. The advanced-practice practitioners are hired in a process different from the hiring process for RNs.

⁴ The Employer cites cases involving units that included RNs and other professionals. Those cases involved petitioned-for units that included RNs and the other professionals. *See, e.g. Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260 (2nd Cir. 2000)(union petitioned for all-professional unit); *Rockwood Medical Care Center*, 221 NLRB 253 (1998)(union petitioned for unit of RNs and nurse practitioners); *St. Vincent Healthcare*, 27-RC-8577 (2009)(petitioned-for unit included RNs and nurse practitioners). Because those cases involved petitioned-for units, they are not applicable here but they are consistent with the rule that the Board certifies any unit that is appropriate, *Bartlett Collins*, 334 NLRB 484 (2001), even though "more than one appropriate bargaining unit logically can be defined in any particular factual setting." *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000).

Tr. 72:18-73:3. The advanced-practice practitioners are supervised by the chief executive physician, whereas the RNs are separately supervised by the manager of operations, who supervises none of the advanced-practice practitioners. Tr. 66:18-23; 68:1-4; 69:13-14; 71:10-13; 74:19-22; 75:18-20; 77:16-19; 78:16-18; 80:3-4; 82-12-13.⁵ The manager of operations has essentially unilateral authority to discipline RNs but has no authority whatsoever to discipline any of the advanced-practice practitioners. Tr. 80:11-15. The advanced-practice practitioners are scheduled by the chief executive physician in cooperation with the advanced-practice practitioners, whereas the RNs' schedules are determined solely by the manager of operations. Tr. 65:16-66:66:17; 68:5-13; 69:15-21; 71:14-72:17; 74:23-75:1; 76:10-22; 77:20-78:15; 79:24-80:4. The advanced-practice practitioners are salaried, whereas the RNs are paid hourly. Tr. 65:5-6; 67:23-25; 73:5-8; 74:17-18; 77:14-15; 78:19-20. There is absolutely no interchange between RNs and the advanced-practice practitioners.⁶ Tr. 69:22-70-4; 73:12 -22; 75:2-7; 76:1-9; 78:21-79:1; 80:5-10. The advanced-practice practitioners are not included in regular nursing staff meetings and likewise RNs are not included in regular meetings

⁵ The Employer cites to *Huckleberry Youth Programs*, 326 NLRB 1272 (1998) as holding that common supervision exists when there is common "secondary" supervision. That case involved a small group of employees who did not share common immediate supervision, but had similar secondary and overall supervision as the other employees in the proposed bargaining unit. *Id.* at 1274. There, unlike here, the employees met at least weekly with their secondary (common) supervisor. *Id.* Here, the supervisor of the RNs is separated by three levels of supervision from the Chief Clinical Officer (the common supervisor) and the supervisor of the advanced-practice practitioners is separated by two entirely different levels of supervision from the Chief Clinical Officer. *Employer Exhibit 1*. Here, there is no evidence that the Chief Clinical Officer has any involvement in any direct supervision of either the RNs or any of the others the Employer seeks to add to the petitioned-for unit.

⁶ Interchange is the performance of petitioned-for unit work by the excluded employees such that the excluded employees "regularly and frequently perform[] duties of the employees in the petitioned-for unit." *United Rentals, Inc.*, 341 NLRB 540, 541 (2004).

of "providers." *Tr.* 35:22-36:12; 94:2-10;103:15-21.

These same differences apply as to the RNs and the counselor/behavior health specialist. The counselor has different education and licensure requirements than those of the RNs. *Tr.* 81:7-15. The counselor cannot do nursing and the RNs do no counseling. *Id.* Compared to that of the RNs, the hiring process is different, *Tr.* 82:16-22, the supervision is different, *Tr.* 82:12-13, the work is different, the pay scale is different, *Tr.* 114:3-9, the pay classification (salaried versus hourly) is different, *Tr.* 82:10-11, and there is absolutely no interchange between the RNs and the counselor. *Tr.* 82:23-83:4. Additionally, the hours of work are different in that the RNs' workweek consists of four ten-hour days whereas the counselor works five eight-hour days. *Tr.* 100:22-25; 85:5-6. The counselor is not included in nursing team meetings. *Tr.* 81-83.

The social workers do not perform any direct patient care and are not primary care-givers. *Tr.* 87:7-15. Thus, their work is functionally very different from that of the RNs. Their hours of work are different in that they, like the counselor, work a five-day per week schedule. *Tr.* 84:24-85:6; 85:5-6. There is no interchange between the RNs and the social workers, limited interaction and there is no career ladder whereby social workers can be promoted to RN or RNs promoted to social workers. *Tr.* 85:7-12. Social workers have a different salary scale than do RNs. *Tr.* 128:19-21. Social workers are not licensed. *Tr.* 83:16-19. The social workers were hired using a different process than that used to hire RNs. *Tr.* 83:23; 84:20.

The Employer objected to the inclusion of the Montana Tech RN. The skills, job functions, and working conditions for that position are almost exactly the same for the clinic nurses and the Montana Tech RN. The Tech RN has the same wage structure, the same job description, the same job duties, and the same license requirements as the clinic RNs.

Employer's Exhibit 5. The Tech RN and the clinic RNs share common supervision. *Employer Exhibit 1.* There is interchange in that the Tech RN is called to work at the clinics on occasion and when the Tech RN is absent, an RN from one of the clinics takes her place. *Tr. 15:11-13; 112:19-24.*

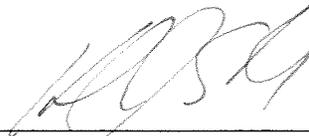
The close proximity weighs in favor of including the Tech RN in the unit. The Board has a varied definition of "close" and "far," depending on other circumstances. For example, the Board in *Staten Island University Hospital*, 308 NLRB 58 (1992) found a distance of eight miles or 30 minutes travel time to be "too far" to weigh in favor of a multi-facility unit. However in *Trane*, 339 NLRB 866 (2003), the Board found that the unit had to include employees working at a facility 108 miles away. In *Dayton Transport Corp.*, 270 NLRB 114 (1984) the Board found that locations located 110 and 65 miles apart were "not in close geographic proximity, neither are they that distant." Here, the Tech RN works "a couple of miles" from the other RNs. *Tr. 15:17-19.*

Finally, it is significant that the Tech RN is the only RN the employer seeks to exclude from the bargaining unit. Although she shares other terms and conditions of employment, she would be the only RN employed by the Employer not included in the unit. She would, therefore, be unable to avail herself of the protection of the Act, as it is well established that the Board will not certify a unit of one employee.

Accordingly, because an all RN unit is appropriate and because of the significant differences in wages, hours, supervision, working conditions, and benefits and the total lack of interchange between RNs and the advanced-practice practitioners, social workers and counselor, the unit as stated in the Decision and Direction of election is appropriate and appropriately

includes the RNs including the RN who regularly works at Montana Tech.

Dated this 14th day of March 2019:



Karl J. Englund

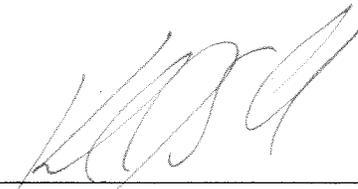
CERTIFICATE OF SERVICE

This is to certify that on the 14th day of March 2019, the foregoing was duly served upon the following by e-mail and by depositing a true copy thereof in the United States mail, postpaid, addressed as follows:

Terry L. Potter
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This is to further certify that on the 14th day of March 2019, the foregoing was duly served upon the following by depositing a true copy thereof in the United States mail, postpaid, addressed as follows:

Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
915 2nd Avenue, Suite 2948
Seattle, Washington 98174-1006



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