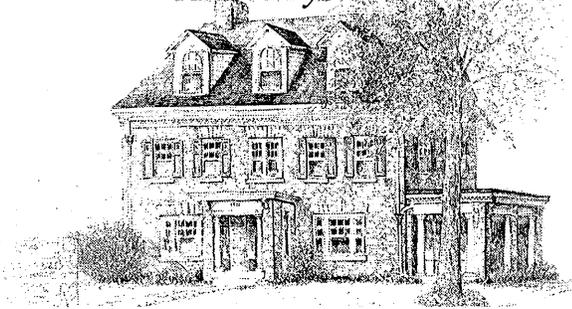


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July 8, 2019

Executive Secretary
National Labor Relations Board
Washington, DC

E-FILED

RE: REQUEST FOR BOARD REVIEW
CASE 04-RC-241150
Decision of Region Director of June 24, 2019
29 CFR § 102.67(c)
Our Matter No. 314-19

Dear Members of the National Labor Relations Board:

Pursuant to 29 CFR § 102.67(c), the Employer, Mountain View Health Care and Rehabilitation Center, LLC, by its attorneys (“Mountain View”), requests the Board’s review of the Regional Director’s June 24, 2019 Decision and Direction of Election in this matter (copy attached hereto). Mountain View submits that there are compelling reasons supporting Board review as required under 29 CFR § 102.67(d)(1) (the absence of or a departure from officially reported Board precedent):

The Regional Director rejected the application of Board precedent cited by the Employer that the size of the unit to be added through the *Armour Globe* election requested by the Union is a critical factor in determining the appropriateness of the requested new unit. The Employer’s Post-Hearing Brief (copy attached) noted that there are 47 individuals in the presently

unorganized unit (PRN/Flex CNAs); and, that the Board, in *Hillhaven Convalescent Center of Delray Beach*, 318 NLRB 1017, 1018-1019 (1995), a case involving units in a nursing home such as the one here, stated that a “12-or 13-member...unit, although not large, is a sufficient size to warrant separation.”

The Regional Director rejected the application of this precedent stating: “I reject the Employer’s argument that the size of the petitioned-for unit requires a separate bargaining unit as this is not a critical factor which would outweigh all the other substantial factors in favor of finding a community of interest between the two groups of employees.” The Regional Director’s analysis gives greater weight to other factors and the Board has not provided guidance on how these separate factors are to be weighed in determining whether a petitioned for unit is appropriate when the Board adopted a case-by-case approach to establish appropriate patterns for application. Since the prior Board decision relied upon by the Employer is one of those cases that the Board’s adopted approach indicates is to be considered in establishing such patterns, the Regional Director erred by failing to apply it here.

The Board in *PCC Structural, Inc.*, 365 NLRB No. 160 at FN3 (2017) reinstated the standard established in *Park Manor Care Center*, 305 NLRB 872 (1991), for determining appropriate bargaining units in nonacute healthcare facilities such as Mountain View. The standard established in *Park Manor Care Center*, 305 NLRB at 875, is a case-by-case approach, noting that nursing homes are undergoing a period of rapid transition. The Board may take notice that they still are.

Under such a case-by-case approach, the Regional Director erred by failing to give appropriate weight to factors the Board has recognized since 1991 as constituting grounds for separation of units, since in *Park Manor Care Center*, the Board, at 875, noted:

“We hope, however, that after various units have been litigated in a number of individual facilities, and “after records have been developed and a number of cases decided from these records, certain recurring factual patterns will emerge and illustrate which units are typically appropriate.”

Since the Board recognized in *Park Manor Care Center* at FN17 that this approach was cited with apparent approval by the U.S. Supreme Court in *American*

Hospital Association v. NLRB, 499 U.S. 606, 617, 111 S.Ct. 1539, 1546 (1991), the Board should provide guidance and review here to establish how the approach is to be implemented in the case-by-case adjudications required.

In *PCC Structural, Inc.*, at page 11, the Board stated:

“Accordingly, having overruled *Specialty Healthcare*, we reaffirm that the community-of-interest test requires *the Board* in each case to determine 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.”

Here, the PRN CNAs, have distinct terms and conditions of employment as stipulated and recognized by the Regional Director (“The parties stipulated that the petitioned-for-unit and the existing bargaining unit share a community of interest in all but two factors: rules of assignment and benefits.”).

In *Park Manor Care Center*, the Board, at 876, noted:

“[I]n exercising its discretion to determine appropriate units, the Board must steer a careful course between two undesirable extremes: If the unit is too large, it may be difficult to organize, and, when organized, will contain too diversified a constituency which may generate conflicts of interest and dissatisfaction among constituent groups, making it difficult for the union to represent; on the other hand, if the unit is too small, it may be costly for the employer to deal with because of repetitious bargaining and/or frequent strikes, jurisdictional disputes and wage whipsawing, and may even be deleterious for the union by too severely limiting its constituency and hence its bargaining strength. [Footnote omitted.] The Board's goal is to find a middle-ground position, to allocate power between labor and management by “striking the balance” in the appropriate place, with units that are neither too large nor too small. [Footnote omitted; 53 Fed.Reg. 33904, 284 NLRB 1534.]”

See also: *Park Manor Care Center* at 877 (“ Finally, there are only four LPNs, a number too few to lead automatically to a separate technical unit even if this were an acute care hospital subject to the Rule”).

The PRN Unit here has 47 members, as noted in the Employer’s Post-Hearing Brief, more than the number found sufficient to warrant separation in *Hillhaven Convalescent Center of Delray Beach*. The Regional Director’s citation to cases where the Board has included “per-diem RNs in a single bargaining unit with the regularly scheduled RNs,” *S.S. Joachim & Ann Residence*, 314 NLRB 1191 (1994) (involving 9-11 PRN RNs); *Sisters of Mercy Health Corp.*, 298 NLRN 483 (1990) (involving 6 PRN RNs), do not involve proposed additions of the size found sufficient to warrant a separate unit in *Hillhaven Convalescent Center of Delray Beach* or the significantly larger group involved here.

The Board has previously recognized that its traditional community of interest test permits a greater number of units in the healthcare industry that would result from the application of the “disparities of interest test,” *St. Francis Hospital*, 286 NLRB No. 123 at 1306 (1987).

The cases relied on by the Regional Director to discount the weight of the differences between the PRN employees and the existing unit of full-time and part-time employees do not involve PRN employees. *Quigley Indus., Inc.*, 180 NLRB No. 37 (1969), involved a part-time employee who voluntarily restricted his benefits in order not to lose Social Security benefits; and, therefore, the benefits available to him were no different from those of the petitioned-for unit members, unlike the stipulated facts here. *SFOG Acquisition Co., LLC d/b/a Six Flags*, 333 NLRB No. 78 at 665 (2001), involved employees determined to be regular part-time employees. Since the unit into which the PRN employees are sought to be added includes “full and part-time CNA’s,” that fact demonstrates that the PRN employees involved here are not the same types of employees as involved in *Six Flags*.

Similarly, *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 at 642 (2010), relied on by the Regional Director, involved gaming employees who had no differences in terms of work or pay with the other employees involved; and, the Board affirmed there noting at 637 FN2, cited by the Regional Director: “Our inquiry—though perhaps not articulated in every case—necessarily proceeds to a further determination whether the interests of the group sought

are *sufficiently distinct* from those of other employees to warrant the establishment of a separate unit.”

Here, the interests of the PRN group are sufficiently distinct because of the differences noted in their terms and conditions of employment. Those differences in their conditions of employment presents the potential for conflicts of interests addressed by the Board in *Park Manor Care Center* and should preclude their combination as ordered by the Regional Director given that the size of unit involved is sufficient for separation under Board precedent.

WHEREFORE, the Employer requests the Board to review the Regional Director’s Decision and Direction of Election in this case and to reverse it.

Respectfully submitted,


Brandon S. Williams, Esquire
Attorney for the Employer

Attachments:

Regional Director’s Decision

Employer’s Post-Hearing Brief

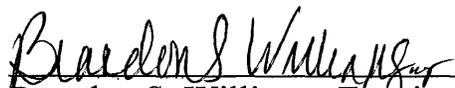
CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.67 of the Board's Rules and Regulations, a true and correct copy of the Request for Board Review was served by email, addressed as follows:

Christopher S. Baluzy, Esq.
Cary Kane LLP
1350 Broadway, 5th Floor
Suite 1400
New York, NY 10018
cbaluzy@carykane.com
(Union's Legal Counsel)

Paul Bazemore, Organizer
Retail Wholesale and Department Store Union (RWDSU)
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Suite 501
New York, NY 10001
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A copy was served on Dennis P. Walsh, Regional Director, Region 04, by filing through the NLRB Electronic System concurrently with the electronic filing of the Request for Board Review.



Brandon S. Williams, Esquire

DATE: July 8, 2019

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

MOUNTAIN VIEW HEALTH CARE AND
REHABILITATION CENTER, LLC

Employer

and

Case 04-RC-241150

RETAIL WHOLESALE AND DEPARTMENT
STORE UNION (RWDSU)

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The parties dispute the unit placement of a group referred to as "PRN" Certified Nursing Assistants (CNAs). The Petitioner seeks an election to determine whether those employees wish to be represented in an already-certified unit of full and part-time CNAs. The Employer contends that they do not share a sufficient community of interest with that unit and therefore should not be allowed to decide whether they want to join it. The parties have stipulated, however, that the PRN employees only differ from the full and part-time CNAs in a couple of respects, i.e., they do not receive certain benefits and they are scheduled differently. Because there is no dispute that they share a community of interest with the existing unit in all other respects, I am directing an election to allow them to decide whether they want to be included in that unit.

Petitioner (Retail Wholesale and Department Store Union) seeks a self-determination election, commonly referred to as an *Armour Globe*¹ election, to ascertain whether approximately 47 PRN Certified Nursing Assistants (CNAs), Flex-time CNAs, Super Flex-Time CNAs, and Per Diem CNAs (collectively referred to as PRN CNAs)² wish to be included in an existing unit of all full time and part-time CNAs and Restorative Aides.³ The Employer (Mountain View Health Care and Rehabilitation Center, LLC) contends, however, that the unit is inappropriate because the petitioned-for-unit does not share a sufficient community of interest with the existing bargaining unit as they have different benefits and rules for assignment. Because the classifications perform the same duties, share common supervision, and have the same skills and training, I have concluded that the petitioned-for-unit share a community of interest with the existing unit, and shall order the petitioned-for *Armour-Globe* election.

¹ The procedure is so named because it originated in *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), and was refined in *Armour & Co.*, 40 NLRB 1333 (1942).

² The term PRN or flex refer to the same group of employees.

³ There is no evidence in the record concerning the number of employees in the existing bargaining unit.

BOARD LAW

A. *Armour-Globe Elections*

An *Armour-Globe* self-determination election permits employees who share a community of interest with a unit of already represented employees to vote on whether to join the existing unit. *NLRB v. Raytheon Co.*, 918 F.2d 249, 251 (1st Cir. 1990); *Armour & Co.*, *supra*; *Globe Machine & Stamping Co.*, *supra*. The Board has long recognized that a self-determination election is the proper mechanism by which an incumbent union adds unrepresented employees to its existing unit if the employees sought to be included share a community of interest with unit employees and “constitute an identifiable, distinct segment so as to constitute an appropriate voting group.” *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990).

B. *Community of Interest*

The Act requires that a petitioner seek representation of employees in *an* appropriate unit, not the most appropriate unit possible. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988); *Morand Bros. Beverage*, 91 NLRB 409, 418 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). Procedurally, the Board examines the petitioned-for unit first. If that unit is appropriate, the inquiry ends. *Wheeling Island Gaming, Inc.*, 355 NLRB 637, *fn.* 2 (2010); *Bartlett Collins Co.*, 334 NLRB 484 (2001). It is only where the petitioned-for unit is not appropriate that the Board will consider alternative units which may or may not be units suggested by the parties. *Bartlett Collins Co.*, *supra*; *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000).

In *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017), the Board reinstated the traditional community-of-interest standard for assessing the appropriateness of a petitioned-for unit. When deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; 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. *Id.* slip op. at 11 (quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)); *Park Manor Care Center, Inc.*, 305 NLRB 872 (1992) (examining these factors in a non-acute healthcare facility). All relevant factors must be weighed in determining community of interest.

In determining whether per diem or on-call employees should be included in a unit with regular full-time employees, the Board considers the similarity of the work performed and the regularity and continuity of employment. *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994); *Trump Taj Mahal Casino Resort*, 306 NLRB 294, 295 (1992). The Board’s objective in deciding the eligibility of per diem nurses, for example, is “to distinguish ‘regular’ part-time employees from those whose job history with the employer is sufficiently sporadic that it is most accurately characterized as ‘casual.’” *Sisters of Mercy Health Corp.*, 298 NLRB 483, 483 (1990).

The Board has included per-diem RNs in a single bargaining unit with regularly scheduled RNs when they performed the same work and were regularly employed. *Id.* To determine whether they are regularly employed, the Board has utilized the eligibility formula set forth in *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970). To be eligible to vote under this formula, per-diem employees must work an average of four or more hours per week in the 13 weeks preceding the election eligibility date. *S.S. Joachim & Anne Residence, supra*; *Sisters of Mercy Health Corp., supra*. The Board has generally not found that per-diem RNs have a separate community-of-interest warranting a unit separate from other RNs at a single medical facility. See *S.S. Joachim & Anne Residence, supra*; *Sisters of Mercy Health Corp., supra*.

APPROPRIATENESS OF THE PETITIONED-FOR UNIT

The Employer, a Pennsylvania corporation, provides rehabilitation services and nursing home care to patients at its Scranton, Pennsylvania facility. The Petitioner has represented all full-time and regular part-time CNAs and Restorative Aides at the Employer's Scranton facility since the Union was certified on June 14, 2018 in Case 04-RC-220072.

The parties stipulated that the petitioned-for-unit and the existing bargaining unit share a community of interest in all but two factors: rules of assignment and benefits. Accordingly, the petitioned-for-unit of PRN CNAs and the regular full and part-time CNAs and Restorative Aides share all the other community of interest factors, including common supervision and having the same duties, skills and training.

The parties stipulated that two documents detailing the different rules of assignment and different benefits demonstrated the only differences between the PRN CNAs and the existing bargaining unit. PRN employees can only be scheduled by Nursing Administration, Staffing Coordinator or Department Head, and full-time and part-time CNAs cannot request PRNs to replace them in schedules without prior authorization. There are different requirements for the PRN CNAs who were hired before February 2018 and those hired after February 2018. PRNs hired after February 2018 are required to work one weekday and weekend shift per month while PRNs hired prior to February 2018, only had to work one shift in a 90-day period. For PRN/Flex employees hired after February 2018, they are required to work one weekday shift and one weekend shift. PRN Super Flex employees are required to work eight weekday shifts and one weekend shift. The Employer mandates that PRN/Flex employees work one holiday in the summer and one holiday in the winter and are paid time and half for working the holiday. Full and part-time CNAs are required to work every other weekend and every other holiday. Full and part-time CNAs also receive time and half for working a holiday, but full-time employees have the option of receiving an additional day's pay or an additional day off within 30 days.

Unlike the full-time and part-time employees, none of the PRN CNAs receive any benefits including PTO, health, dental, vision, 401(k), life insurance or bereavement leave. PRN/Flex employees receive an additional \$3.00/hour and all PRN/Flex and Super Flex employees receive a shift differential for working from 3 p.m. until 11 p.m. and from 11 p.m. until 7:00 a.m. However,

there is no record evidence regarding the hourly rate or any applicable shift differentials for the regular full and part-time CNAs.

The parties stipulated during the hearing that PRN CNAs can consistently be scheduled to work in a certain wing for continuity of care reasons with patients or clients. As PRN CNAs can cover shifts performed by regular CNAs as long as there is supervisory approval, the record establishes a certain interchangeability and functional integration. The stipulated evidence regarding the rules of assignment for PRN CNAs simply establishes that a supervisor needs to approve a PRN CNA's schedule, including when a PRN CNA replaces a regular CNA on the schedule. Supervisory approval for scheduling purposes does not outweigh the interchangeability of the employees where PRN CNAs perform the same work as the full and part-time CNAs.

The Board has long held that part-time employees who do not receive the Employer's fringe benefits will not be excluded from the bargaining unit solely on that basis, especially when the employees share a community of interest with the rest of the bargaining unit. *Quigley Industries, Inc.*, 180 NLRB 486 (1969); *see also Six Flags/White Water & American Adventures*, 333 NLRB 662 (2001) (seasonal maintenance employees' exclusion from participating in various fringe benefits does not, by itself, support excluding them from the bargaining unit). The PRN CNA's work is essentially identical to the full and part-time CNAs. As the PRN CNAs and the existing bargaining unit CNAs perform exactly the same duties alongside each other, the differences in their scheduling and benefits, including any difference in compensation, are not significant enough to require separate units. *See Wheeling Island Gaming, Inc.*, 355 NLRB 637 fn. 2 (2010). I reject the Employer's argument that the size of the petitioned-for unit requires a separate bargaining unit as this is not a critical factor which would outweigh all the other substantial factors in favor of finding a community of interest between the two groups of employees.

In its Notices of Proposed Rulemaking generally setting forth the appropriate units in acute care hospitals, the Board commented that in non-acute hospitals:

[T]here is less diversity in nursing homes among professional, technical and service employees, and the staff is more functionally integrated [cites to testimony omitted]. Generally, nurses provide a less intensive, lower level of care to patients in skilled and extended care facilities, and thus receive lower salaries than that paid in acute care hospitals [cites to testimony omitted]...[T]here is for the most part little difference in the duties of LPNs and nurses' aides [cites testimony omitted]. Both are primarily responsible for providing nursing care to patients.

Park Manor, supra, 365 NLRB at 876 (citing 53 Fed.Reg. 33928, 284 NLRB 1516, 1567 (1987)). Similar to RNs and LPNs, in the instant case, both the PRN CNAs and the employees in the existing bargaining unit are primarily responsible for providing care to patients.

I find that the petitioned-for-unit for PRN CNAs constitutes a readily identifiable group, and they share a community of interest with the existing bargaining unit based on all the community of interest factors that they share, including performing the same duties, common

supervision, interchange, and having the same skills and training as the bargaining unit CNAs. I find that any differences in scheduling and benefits are not significant enough to warrant a finding that these classifications do not share a community of interest. Since the petitioned-for employees share a community of interest with the employees in the existing bargaining unit, I find that an *Armour Globe* election is appropriate and I shall order an *Armour Globe* election to determine whether the petitioned-for employees wish to be included in the existing bargaining unit.

CONCLUSION

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

1. The 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. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
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, if added to the existing unit, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All PRN Certified Nursing Assistants (CNAs), Flex-time CNAs, Super Flex-Time CNAs, and Per Diem CNAs⁴ employed by the Employer at its facility located at 2309 Stafford Avenue, Scranton, Pennsylvania.

Excluded: All other employees, guards and supervisors as defined in the Act.

⁴ Employees in the unit are eligible to vote if they worked an average of four or more hours of work per week in the 13 weeks preceding the election eligibility date. *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990); *Davison-Paxon Co.*, 185 NLRB 21 (1970).

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Retail Wholesale and Department Store Union (RWDSU)** as part of the existing unit of full-time and regular part-time Certified Nursing Assistants (CNAs) and Restorative Aids employed by the Employer at its 2309 Stafford Avenue, Scranton, Pennsylvania facility.

A. Election Details

The election will be held on **Monday, July 15, 2019** from 6:00 a.m. – 8:00 a.m. and 2:00 p.m. – 4:00 p.m. in the Chapel at the Employer's facility located at 2309 Stafford Avenue, Scranton, Pennsylvania.

B. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending June 22, 2019 including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

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. Unit 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 June 26, 2019. 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.nlr.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.nlr.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 and the ballots will be published in the following languages: English and Spanish. 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 unit 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.

Mountain View Care and Rehabilitation
Center
Case 04-RC-241150

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.nlr.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: June 24, 2019



DENNIS P. WALSH, REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 04
100 E Penn Square
Suite 403
Philadelphia, PA 19107

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4**

**MOUNTAIN VIEW HEALTH CARE AND
REHABILITATION CENTER**

Respondent,

Case No.04-RC-241150

AND

**RETAIL, WHOLESALE, AND DEPARTMENT
STORE UNION, UFCW**

Petitioner.

**POST-HEARING BRIEF OF EMPLOYER/RESPONDENT MOUNTAIN
VIEW CARE AND REHABILITATION CENTER**

Respondent Mountain View Care and Rehabilitation Center (hereinafter “Mountain View”), by its attorneys, pursuant to the directive of Hearing Officer Joanne Sachettie that briefs are due from the parties on May 29, 2019, and Case Handling Manual 11244.1 (relating to filing of briefs), hereby submits this Post-Hearing Brief in support of its position that the Proposed Bargaining unit of PRN/Flex and Super Flex Certified Nursing Assistants does not share a community of interests with the current Bargaining Unit and, therefore an *Armor/Globe* election is not appropriate.

PROCEDURAL HISTORY AND STATUS

The Union filed a Petition for Election on or about May 9, 2019, and subsequently amended that Petition on or about May 20, 2019. As amended, the Union's Election Petition seeks to include

All PRN Certified Nursing Assistants (CNAs), Flex-Time CNAs, Super Flex-Time CNAs and Per Diem CNAs¹ employed by the Employer at its 2903 Stafford Avenue, Scranton, PA facility

in to an already existing unit of:

All full-time and regular part-time Certified Nursing Assistant (CNAs) and Restorative Aids employed by the Employer at its 2309 Stafford Avenue, Scranton, PA facility

via an *Armour-Globe* election.

Mountain View timely filed its Position Statement on May 21, 2019, and objected to the possible inclusion of the PRN/Super-Flex Employees into the same Bargaining Unit with Full Time and Regular Part-Time employees because the employees do not share a community of interests—namely the PRN employees terms and conditions of employment differ drastically from the employees who make up the current bargaining unit. PRN/Super-Flex employees receive no paid benefits from Mountain View.

¹ Note that per Counsel for Employer's explanation found at Hearing Transcript p. 21, lines 14-17, "there is one class of employees that are called PRNs or flex . . . those are the same employees. Sometimes they're called PRNs and sometimes they are called flex."

A hearing was held before Hearing Officer Joanne Sacchetti on Wednesday, May 22, 2019. No testimony was heard, but the parties stipulated to facts, including the issue at hand, and to the differences in benefits among the current bargaining unit and the employees proposed to vote on whether they want to join that bargaining unit. At the close of the hearing, the Hearing Officer directed that the parties file Briefs on or before Wednesday, May 29, 2019 at 5:00 p.m.

PRN/FLEX AND SUPER FLEX NURSING ASSISTANTS DO NOT SHARE A COMMUNITY OF INTERESTS WITH FULL-TIME AND REGULAR PART-TIME NURSING AIDES AT MOUNTAINVIEW BECAUSE OF THE DIFFERENCE IN TERMS AND CONDITIONS OF EMPLOYMENT

PRN/Flex and Super Flex Nursing Assistants do not share a community of interests with Full-Time and Regular Part-Time nursing aides at Mountain View because of the difference in terms and conditions of employment.

As described in Employer's Exhibit E-2, PRN/Flex and Super Flex Aides do not receive any benefits, in lieu of higher wages received by full-time and regular part-time aides. The PRN/Flex and Super Flex aides receive no paid time off. They receive no health, dental, or vision insurance. They receive no 401(k) benefit. They receive no life insurance coverage. And they receive no bereavement leave or holiday pay. See Exhibit "E-2". Full-time and regular Part-time employees at Mountain View receive all of these benefits in some form.

In *Pcc Structural, Incl*, the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), and reinstated the traditional community-of-interest standard for determining an appropriate bargaining unit in union representation cases. Under that test, the Board will assess whether employees in the proposed bargaining unit share interests that are sufficiently separate and distinct from those of the remainder of the workforce to constitute an appropriate unit for bargaining, considering whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work; 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 Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017).

Here, the dramatic differences in terms and conditions of employment are sufficient to require that the PRN/Flex and Super Flex Aides not be included with the Full Time and Regular Part Time Aides. Although the Union contends that the difference can be worked out in the collective bargaining process, these economic terms of employment constitute the vast majority of subjects between bargaining parties.

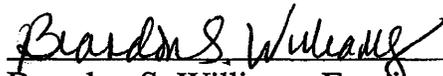
Additionally, in *Cargill, Inc. Employer & United Food & Commercial Workers Union Local No. 324 Petitioner*, current Chairman of the National Labor Relations Board Miscimarra (then Member) noted that the interchangeability of employees warranted examination as a factor to be considered in the community of interests analysis as well. Here, Employer's Exhibit E-1, which reflects the PRN Scheduling and Attendance Policy, shows that Employer's policies strictly forbid PRN employees from covering schedule changes with Full-Time and Regular Part-Time employees. without approval. See Exhibit E-1.

Finally, the Employees subject to this proposed election are sufficient in number to support a separate Bargaining Unit. Attachment "D" to Employer's Position Statement included a list of employees in the Petitioned for Unit. That list includes 47 employees at Mountain View who are either PRN/Flex or Super Flex employees. As the Board indicated in *Hillhaven Convalescent Ctr. of Delray Beach*, a "12-or 13-member . . . unit, although not large, is a sufficient size to warrant separation. *Id.*, 318 NLRB 1017, 1018-19 (1995).

WHEREFORE, Employer Mountain View requests the Board to dismiss the Union's Election Petition for an *Armour/Globe* election of PRN/Flex CNAs and Super Flex CNAs to join the already existing bargaining unit of Full Time and Regular Part time employees.

Respectfully submitted,

CAPOZZI ADLER, P.C.



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[Attorneys for Employer]

DATE: May 29, 2019



MOUNTAIN VIEW

CARE AND REHABILITATION CENTER

PRN SCHEDULING AND ATTENDANCE

I. POLICY

It is the policy of Mountain View Care & Rehab Center that PRN employees can only be scheduled to work by Nursing Administration, Staffing Coordinator or Department Head.

II. PROCEDURE

1. PRN employees cannot be utilized for covering schedule changes without appropriate approval from DON, Staffing Coordinator or Department Head.
2. Failure to comply with this policy will result in disciplinary action for all parties involved.
3. Staff who are designated as PRN must work within a 90-day period of their last day worked. If 90 days or more expire between shifts worked, the PRN employee will be considered to have voluntarily terminated their employment with Mountain View Care & Rehab Center. This pertains to shifts unavailable for work if contacted by Mountain View Care & Rehab Center or if the PRN employee does not initiate contact with Mountain View Care & Rehab Center for work availability.



PRN'S/Flex hired prior to February 2018:

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They must work 1 shift in a 90-day period.

They do not receive any benefits, i.e., PTO, Health, Dental, Vision, 401K, Colonial Life, Bereavement.

PRN's/Flex hired after February 2018:

They must work 1 weekday shift and 1 weekend, Friday/Saturday for 11pm-7am, Saturday/Sunday for 7am-3pm & 3pm-11pm, per schedule. A schedule is for 2 pay periods (1 month).

They do not receive any benefits, i.e., PTO, Health, Dental, Vision, 401K, Colonial Life, Bereavement.

Super Flex's:

They must work 8 weekday shifts and 1 weekend, Friday/Saturday for 11pm-7am, Saturday/Sunday for 7am-3pm & 3pm-11pm, per schedule. A schedule is for 2 pay periods (1 month).

They do not receive any benefits, i.e., PTO, Health, Dental, Vision, 401K, Colonial Life, Bereavement.

PRN's/Flex receive an additional \$3.00/hour for being a PRN/Flex employee.

Super Flex employees are hired with a higher rate and do not receive the \$3.00/hour differential. All PRN/Flex and Super Flex employees receive a shift differential when they work 3pm-11pm & 11pm-7am.

FT/PT employees must work every other weekend, and receive all benefits, i.e., PTO, Health, Dental, Vision, 401K, Colonial Life, Bereavement.

PRN/Flex employees must work 1 holiday in the summer, and 1 holiday in the winter. They receive time and a half for working the holiday.

FT/PT employees are required to work every other holiday. They will receive time and a half for the hours worked. FT employees will have the option of an additional days pay or an additional day off within 30 days.

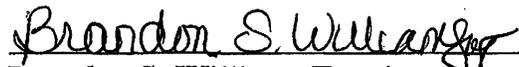
E-2

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.21 of the Board's Rules and Regulations, a true and correct copy of the Brief of the Respondent was served by email, addressed as follows:

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Brandon S. Williams Esquire
[Legal Representative for Respondents]

DATE: May 29, 2019