

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

**FAIRMOUNT BEHAVIORAL HEALTH**

**Employer**

**and**

**Case 04-RC-265965**

**NATIONAL UNION OF HOSPITAL AND  
HEALTHCARE EMPLOYEES, DISTRICT 1199C<sup>1</sup>**

**Petitioner**

**REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION**

This case requires me to resolve several challenges to the petitioned-for unit of psychiatric technicians employed by Fairmount Behavioral Health (the Employer) at its hospital in Philadelphia, Pennsylvania (Employer's facility) where it provides psychiatric and chemical dependency services. The National Union of Hospital and Healthcare Employees, District 1199C (Petitioner) seeks to represent approximately 133 full-time, regular part-time, and per diem psychiatric technicians employed at the Employer's facility.<sup>2</sup> The parties dispute several crucial issues in this case, including (1) whether the petitioned-for employees are technical employees as defined by the Board; (2) whether the petitioned-for unit lacks a sufficiently distinct community of interest apart from eight additional employee classifications such that the smallest appropriate unit must include those additional employees; (3) whether employees in the cook classification are statutory supervisors that must be excluded from any appropriate unit; (4) whether per diem psychiatric technicians share a sufficient community of interest with petitioned-for employees such that they are appropriately included in a unit with all full-time and regular part-time psychiatric technicians; and (5) if the per diem psychiatric technicians are appropriately included in the unit, which eligibility formula should be used to determine the eligibility of the per diem employees.

Briefly, the Employer contests the appropriateness of the petitioned-for unit by arguing that the psychiatric technicians are non-technical employees who do not share a sufficiently distinct community of interest apart from eight<sup>3</sup> additional classifications of employees to warrant

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<sup>1</sup> The correct legal names of the Employer and Petitioner appear in this decision as stipulated by the parties.

<sup>2</sup> Although Petitioner did not include per diem psychiatric technicians in the original petitioned-for unit, at the hearing it sought to amend the petition to include those employees. Despite the Employer's objection that the amendment was sought too late, the Hearing Officer permitted the amendment because the appropriateness of per diem psychiatric technician's inclusion in the petitioned-for unit was an issue already raised by the parties. I hereby affirm the Hearing Officer's ruling, and approve the amendment, substantially for the reasons articulated by the Hearing Officer.

<sup>3</sup> The eight additional employee classifications are cooks, dietary aides, drivers, housekeepers, floor techs, maintenance, unit clerks, and trainers.

their own separate unit, and thus the smallest appropriate unit includes all non-professional employees. With respect to employees in the “cook” classification, the Employer asserts that they do not meet the Board’s definition of statutory supervisors, and thus should be included in any unit found appropriate. Lastly, the Employer argues that per diem psychiatric technicians do not share a community of interest with the petitioned-for employees and should not be included in any unit found appropriate. If I were to find that per diem psychiatric technicians are appropriately included in a unit with the other psychiatric technicians, however, the Employer argues that per diem employees in all the other classifications must also be included, and further argues that the Board’s eligibility formula applied in *Marquette General Hospital*, 218 NLRB 713 (1975) must be used here to determine the eligibility of per diem employees.

The Petitioner, on the other hand, argues that the petitioned-for unit employees are technical employees that share a sufficiently distinct community of interest apart from the other non-professional employee classifications sought to be included by the Employer to warrant a separate unit. Moreover, if a community-of-interest analysis is conducted, Petitioner argues that employees in the “cook” classification are statutory supervisors within the meaning of Section 2(11) of the Act. Lastly, the Petitioner maintains that per diem employees share a sufficient community of interest with the other psychiatric technicians sought in the petitioned-for unit such that they should be included in any unit found appropriate, and asserts that the eligibility formula applied by the Board in *Davison-Paxon*, 185 NLRB 21, 24 (1970) should be applied here.

An additional issue in this case is whether, in light of the ongoing COVID-19 pandemic<sup>4</sup>, the election in this matter should be conducted manually or by mail. The Employer argues that a manual election should be directed because one can be conducted safely at the Employer’s facility. In contrast, the Petitioner contends that only a mail ballot election is appropriate given the ongoing pandemic.

A hearing in this matter was held by videoconference before a Hearing Officer of the Board on October 14 and 15, 2020<sup>5</sup>, during which the parties entered into several stipulations, presented evidence, and stated their respective positions on all issues. Although election details, including the type of election to be held, are nonlitigable matters left to the discretion of the Regional Director, the parties were permitted to present their positions as to the mechanics of this election at the hearing. Additionally, the parties were permitted to file post-hearing briefs on all issues.

Having reviewed the stipulations, evidence, and arguments presented by the parties as well as the applicable legal precedent, I find that the petitioned-for psychiatric technicians are employees working in a non-acute care hospital.<sup>6</sup> I further find that employees in the cook classification are not supervisors as defined in Section 2(11) of the Act, and that the smallest

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<sup>4</sup> Throughout this decision, the terms “COVID-19,” “COVID,” and “Coronavirus” are used interchangeably.

<sup>5</sup> Herein, all dates occurred in 2020 unless otherwise noted.

<sup>6</sup> For the reasons that follow, I do not reach the issue of whether psychiatric technicians meet the Board’s definition of technical employees.

appropriate unit must also include employees in two additional classifications: trainers and unit clerks. In that regard, I find that psychiatric technicians, unit clerks, and trainers share a sufficiently distinct community of interest apart from employees in the remaining six classifications to warrant a separate unit. I additionally find that per diem psychiatric technicians are appropriately included in the petitioned-for unit. Moreover, I conclude that the Board's longstanding eligibility formula applied in *Davison-Paxon*, 185 NLRB 21, 24 (1970) will be used to determine the eligibility of employees in this matter. Finally, after careful review and consideration of the parties' positions regarding the mechanics of the election, I find that a prompt mail-ballot election is appropriate given the extraordinary circumstances presented by the continuing COVID-19 pandemic.

## **I. RESOLUTION OF THE SUBSTANTIVE DISPUTES REGARDING THE PETITIONED-FOR UNIT**

### **a. Factual Overview**

#### *i. The Employer's operation*

As noted above, the Employer's facility provides psychiatric and chemical dependency treatment services. Most of the psychiatric patients being treated at the Employer's facility are inpatient, and all of them come to the Employer's facility solely as referrals from other medical facilities because the facility does accept walk-in patients.

The Employer's facility comprises a campus of six buildings: (1) the main hospital; (2) ABC Pods; (3) A3/Detox; (4) Partial/Maintenance; (5) A4; and (6) G-Cottage. The main hospital consists of seven inpatient units, N1 through N7. N1 is a 24-bed unit for general psychiatric patients. N2 is a 14-bed unit that usually houses more aggressive male psychotic patients, and N3 is a 14-day bed unit for female trauma patients. N4 is a 26-bed unit for dual diagnosis patients, and N5 is a 22-bed unit for younger/young adult general psychiatric patients. Lastly, unit N6 is a 16-bed coed adolescent unit, and N7 is a 16-bed all-female adolescent unit. In addition to units N1 through N7, the main hospital includes offices, a kitchen and two cafeterias, a gym, classrooms, and the admissions department.

ABC Pods, a separate building, is another inpatient unit separated from the main hospital by a walkway. It has 32 beds and is essentially one large unit broken down into three separate sleeping quarters. ABC Pods houses mostly voluntarily committed patients. A3/Detox is the Employer's detox and chemical dependency building. Building 4 is where the Employer's partial program and its maintenance shop are located. A4 is a rehabilitation facility, and G-Cottage, also referred to in the record as G-Pod, is the Employer's business office.

According to an organizational chart in the record, Mark Howard, Chief Executive Officer (CEO), is the highest-ranking individual at the facility. The Chief Financial Officer (CFO) and the Chief Nursing Officer (CNO) are direct reports to the CEO. Reporting to the CFO directly is the Director of Plant Operations & Dietary. Department heads for Maintenance, Housekeeping, Dietary, and Transportation report to the Director of Plant Operations & Dietary. Unit managers

at the main hospital and ABC Pods, and the RN managers at the main hospital, report directly to the CNO.

*ii. Petitioned-for psychiatric technicians*

Psychiatric technicians report to nurse managers, and mostly work in the main hospital and the ABC Pods. Full-time psychiatric technicians typically work Monday through Friday and every other weekend on one of three eight-hour shifts: 7:00 a.m. to 3:30 p.m., 3:00 p.m. to 11:30 p.m., or 11 p.m. to 7:30 a.m. When they work a weekend, they have one day off the prior week and one off the following week. The Employer employs a mix of full-time, part-time, and per diem psychiatric technicians, with per diem employees working on an as-needed basis. Psychiatric technicians all wear navy blue scrubs.

To provide care for its patients, the Employer designs a master treatment plan for each one created through collaboration among nurses, doctors, and therapists. The master treatment plan identifies any issues affecting the patient, psychiatric and medical diagnoses, and the reasons for admission to the Employer's facility. It sets forth the issues that will be worked on with the patient and the treatment plan. In addition, each patient has a recovery plan, a coordinated plan created by the patient and the therapists with occasional nurse involvement. Psychiatric technicians have no involvement in either of these processes.

Psychiatric technicians are primarily responsible for working and engaging with the patients at the Employer's facility, meeting with them, observing them, performing safety checks, conducting community (group) meetings with patients, assisting with patient mealtimes, and escorting patients around the facility as needed. They are responsible for checking the welfare of patients every 15 minutes and recording on forms the patients' location and behavior. In community meetings, the psychiatric technicians use scripted notes to ask questions of patients, such as their individual goals for the day, and they record each patient's answers to the questions. The notes are then placed in each patient's medical file and are typically reviewed by nurses, therapists, and doctors.

If any medical or psychiatric issues arise, psychiatric technicians report those issues to nurses. Psychiatric technicians perform vital checks of each patient's temperature, blood pressure, respiration and heart rate, which they document in notes if they are normal and report to nurses if they are not.

Additionally, psychiatric technicians escort patients around the campus. Prior to the pandemic, they escorted the patients to the serving lines at the cafeteria, oversaw them as they received their meals, and discussed any dietary restrictions with the cooks and dietary aides. Since the pandemic began, however, psychiatric technicians often retrieve meals for their assigned patients from the cafeteria and bring those meals back to patient rooms. Psychiatric technicians also escort patients to the gym, classrooms, the outside courtyard, the lab or conference area, and other areas around the campus as needed.

The psychiatric technician job description lists a requirement of either a bachelor's degree, or a high school degree or GED with some relevant experience. While psychiatric technicians are not required to have any specialized education or training to work for the Employer, many of them do have college-level bachelor's degrees.

Unlike psychiatric technicians, per diem psychiatric technicians do not have a set schedule but instead pick up part-time or full-time shifts as needed and when available. They perform all the same work on the same units as the full-time and regular part-time technicians, and they are supervised by the same nurse managers. While they are not eligible for benefits like full-time and regular part-time technicians, they receive similar wages.

*iii. Additional classifications sought by the Employer*

1) Cooks and dietary aides

Currently, approximately eleven dietary aides are employed at the Employer's facility. A majority of them are full-time employees, but some are part-time or per diem. The full-time dietary aides work Monday through Friday and every other weekend on one of two shifts: 5:00 a.m. to 1:30 p.m., or 10 a.m. to 6:30 p.m. Part-time dietary aides work truncated schedules within those shifts, and per diem employees do not have a set schedule. Dietary aides are supervised by Kitchen Manager Craig Quinn, and they all wear black scrubs.

Prior to the pandemic, dietary aides arrived to work and began their days in the cafeterias and the kitchen, performing prep work and assembling patient snacks for the day. When patients from each unit arrived at the cafeteria for their meals, dietary aides served them their prepared meals and snacks in serving lines. Since the pandemic, dietary aides prepackage the meals for the patients on each unit, place them on a cart, and then call a psychiatric technician on the unit to let them know the meals are ready for pickup. The psychiatric technicians retrieve the meals and take them back to the unit.

Pre-pandemic, dietary aides interacted with psychiatric technicians when the technicians accompanied patients to the cafeteria for mealtimes. Often, psychiatric technicians stood near the beginning or the end of the serving line, observing the patients as they were served their food. Post-pandemic, psychiatric technicians and dietary aides may interact when technicians pick up the meals for their units. Dietary aides also interact with psychiatric technicians when discussing dietary restrictions for certain patients. The kitchen has three phones that dietary aides often answer, and psychiatric technicians may call the phones to discuss specific dietary needs for certain patients.

Like the dietary aides, the three cooks report to Quinn and wear black scrubs. All the cooks are full-time: one works 5:30 a.m. to 1:30 p.m., the second cook works 10 a.m. to 6:30 p.m., and the third cook works a different schedule, often when the other two cooks are not working. The days of their work week vary on a weekly basis.

The main function of the cooks is to prepare food for patients in the kitchen. They interact with psychiatric technicians in ways similar to the dietary aides, but less frequently, often when a cook is in the front of the cafeteria near the patients. Additionally, cooks may interact with psychiatric technicians on the telephone regarding patients' dietary needs.

Cooks do not have the authority to discipline dietary aides, nor do they have any involvement in the performance evaluations for dietary aides. If Quinn is not present at the facility and a cook notices a dietary aide engaging in misconduct, the cook, like any employee who witnesses misconduct, can report it to Quinn who then takes over and addresses the situation. Cooks are not involved in the hiring or firing of dietary aides, nor do cooks train dietary aides. Additionally, cooks do not assign dietary aides to particular work assignments. While the cook job description indicates that cooks provide immediate supervision in lieu of food service managers and coordination of dietary staff, Quinn testified that in practice cooks do not perform those tasks. Cooks do not approve time off requests, they cannot authorize overtime or track dietary aides' hours, and they are not held accountable for the work of dietary aides. Cooks do not transfer, lay off, or recall employees, nor do they adjust grievances.

According to the record, while one dietary aide will sometimes fill in as a psychiatric technician when there are open shifts, no cooks fill in for psychiatric technicians, and psychiatric technicians never work as cooks or dietary aides.

## 2) Housekeepers

There are approximately six housekeepers who work on the individual units performing housekeeping duties in individual patient rooms and other areas of the facilities. Housekeepers work Monday through Friday, 7 a.m. to 3:30 p.m., and every other weekend. They report to Environmental Services Supervisor Dave Watson, and wear maroon scrubs. A majority of the housekeeping staff are employed full-time, but some are part-time or per diem. Most housekeepers work in the main hospital; one works in the ABC Pods. Housekeepers perform their duties mainly in patient areas and common areas, nurses' stations, galleys, and medical rooms. They are tasked with cleaning and sanitizing bathrooms, bedrooms, beds, common areas, and the like.

Throughout the course of their workday, housekeepers have occasion to interact with psychiatric technicians. For example, if a housekeeper needs to clean an occupied patient's room, the housekeeper will interact with the patient's assigned psychiatric technician to assist with removing the patient from the room. Or, a housekeeper may discuss with the psychiatric technician the best time of day to clean a particular room or common area so as to not disrupt patients. If any contraband is found in a patient's room, the housekeeper will inform the psychiatric technician assigned to that patient.

There is one housekeeper who occasionally fills in as a psychiatric technician when not scheduled to work as a housekeeper. There is no evidence, however, that psychiatric technicians ever work as housekeepers.

### 3) Floor techs

There are two employees classified as floor techs, one full-time and the other per diem. Floor techs work weekdays and every other weekend. Like housekeepers, they report to Watson and wear maroon scrubs.

Floor techs handle all heavy lifting work, including removing trash and used linens out of each building, transporting and distributing clean linens to different buildings, and maintaining the floors by stripping, waxing, polishing, and scrubbing them. In maintaining the floors, floor techs first use a dust mop to clean them, then run a Zamboni throughout the hallways, patient areas, common areas, laundry room, gym, cafeterias, and other areas. Often, housekeepers will perform floor tech duties as needed.

Similar to housekeepers, floor techs often interact with psychiatric technicians to have patients removed from rooms where the floor tech must work. This is necessary because floor techs are not permitted to leave wet floors unattended for safety reasons. In addition, floor techs are often required to respond to spills, floods, and any areas that need cleaning due to a mess.

There is no evidence in the record that floor techs fill in as psychiatric technicians, nor is there any evidence that psychiatric technicians ever work as floor techs.

### 4) Maintenance employees

There are six full-time maintenance employees who work for the Employer, including lead maintenance employee Martin O'Connor. They work Monday through Friday and every other weekend, most from 7:30 a.m. to 4:30 p.m., but one from 10:30 a.m. to 7:00 p.m. Maintenance employees do not wear scrubs; they have a separate uniform of their own.

When maintenance employees arrive at work, they report to the maintenance shop where they clock in. The maintenance department uses a work order system, and O'Connor assigns the work orders to maintenance staff based on each maintenance employee's skill set. Maintenance employees work throughout all of the buildings, performing any needed maintenance tasks, from fixing broken furniture and changing light bulbs to working on electrical, plumbing, and other issues. They routinely check water temperatures throughout the facilities to ensure sufficient hot water supplies.

On a daily basis, maintenance employees work in patient rooms and common areas and interact with psychiatric technicians. They will work with psychiatric technicians to coordinate the best times to perform needed maintenance work and the removal of patients from rooms they need to access. Psychiatric technicians and maintenance employees also interact during fire drills conducted by the maintenance department.

The parties stipulated that there is no commonality between the job functions of the maintenance employees and psychiatric technicians. There is no evidence in the record that

maintenance employees fill in as psychiatric technicians, nor is there any evidence that psychiatric technicians ever work as maintenance employees.

#### 5) Drivers

The Employer employs five full-time drivers who work various shifts throughout the week. Drivers are responsible for transporting patients in Employer vehicles to various places, including interviews for placement at other facilities, doctor's appointments, and discharge to their homes. Drivers report to Robert Jones, Transportation Department Manager, and do not wear scrubs but do have their own separate uniform. Each time a patient is transported somewhere, the psychiatric technician assigned to the patient gives the driver a transportation handoff form with details regarding the patient's transportation.

At times, psychiatric technicians accompany patients, especially adolescents, in the transport vehicles. But other times, there may be no need for an escort, as when an adult patient has been discharged. Prior to the pandemic, technicians accompanied patients in transport vehicles more than once a week, and sometimes daily, especially with adolescent patients. Psychiatric technicians would necessarily interact with drivers when such escorts occurred. Since the pandemic began, patients are not being escorted off premise as often, so the technicians and drivers may interact just once per week.

There is one driver who fills in as a psychiatric technician. That individual started with the Employer as a psychiatric technician, then transferred into a driver position. There are no psychiatric technicians who fill in for drivers.

#### 6) Trainers

Trainers have the same duties and job functions as psychiatric technicians, and function in a training capacity only when new psychiatric technicians finish their orientation. At that point, trainers provide on-the-job training to the new technicians. All seven trainers currently employed by the Employer previously worked in the psychiatric technician classification. Like the psychiatric technicians, trainers are supervised by the nurse managers and wear navy blue scrubs.

The on-the-job training they provide usually consists of three eight-hour shifts for the new technicians; thereafter, additional training may be given as needed on an ad hoc basis. During the regular training, the trainers orient the new employees to all of the position's responsibilities and duties, using a training manual and training checklist. New training takes place whenever new employees are hired, so orientation and on-the-job training may take place once per month or once every three or four months, depending on the Employer's hiring schedule.

Trainers exclusively perform psychiatric technician duties when they are not training employees, and continue to perform them while conducting on-the-job training. If there are not enough trainers to train a new class of psychiatric technicians, the Employer will pair a new technician with an experienced psychiatric technician to conduct the training. Some trainers also

conduct verbal de-escalation and handle-with-care trainings that all psychiatric technicians are required to take. There are two psychiatric technicians who work in the admissions department, and one trainer who performs psychiatric technician work in the admissions department when he is not performing his trainer duties.

#### 7) Unit Clerks

There are five unit clerks, all of whom work normal business hours Monday through Friday and wear navy blue scrubs. Unit clerks are responsible for such tasks as ordering supplies for the unit, making sure patient charts are properly stickered and thinned, refilling charts with blank progress notes for an upcoming shift, and, after a patient is discharged, breaking down the patient's chart to take out medical records. All five unit clerks are former psychiatric technicians, and like the psychiatric technicians and trainers, they report to the nurse managers. Psychiatric technicians and unit clerks fall under the same departmental code.

Unit clerks occasionally work as psychiatric technicians. At times, unit clerks may pick up psychiatric technician shifts on their days off, and on other occasions while performing their unit clerk positions, they may receive patient requests for certain items or have to jump in to assist a patient in a crisis situation. In those circumstances, unit clerks effectively act as psychiatric technicians.

Conversely, psychiatric technicians sometimes perform unit clerk tasks, especially during overnight hours or on weekends when unit clerks do not work. At those times, psychiatric technicians who have down time assist in maintaining charts, thinning the charts and replenishing them with blank forms, labeling, and ordering supplies. If a unit clerk is on vacation or is otherwise absent, psychiatric technicians can, and have, covered unit clerk shifts.

#### *iv. Similar terms and conditions of employment*

Employees in all of the classifications listed above are required to wear badges and record their work time via use of a time clock, and all have access to the same break rooms. The record largely reflects that all full-time and regular part-time employees in the above classifications have access to the same benefits, and they are subject to the same employee manual and policies and rules contained therein.

Wage rates differ among, and within, each of the classifications listed above. Cooks' wage rates range from \$15.23 to \$22 per hour<sup>7</sup>, while dietary aides' rates of pay range from \$14 to \$14.59. The drivers earn wages between \$14.87 and \$17.05. Housekeeper rates of pay range from \$14.25 to \$19.02, while one floor tech earns \$14 and the other earns \$14.85. Maintenance employee rates of pay also vary between \$18.15 and \$25.36. Psychiatric technicians' wages vary substantially, with wages from \$14 to \$27.66. Trainers earn between \$20.90 and \$29.49, and unit clerks' wage rates range from \$19.84 to \$25.61.

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<sup>7</sup> All wage rates discussed in this paragraph are hourly rates of pay.

v. *Training*

All of the classifications listed above receive the same orientation manual when they begin working for the Employer. That manual documents Employer policies, practices, rules, benefits eligibility, and other terms and conditions of employment. Each classification receives training in their classification-specific duties and job functions. Additionally, as discussed above, certain of the listed classifications are required to receive verbal de-escalation training as well as handle-with-care training. The verbal de-escalation training is an eight-hour classroom course that trains employees how to observe certain patient behaviors and deal with those behaviors when they arise. The handle-with-care training is a full-day training that teaches employees how to conduct a physical hold on a patient if the verbal de-escalation training does not have the desired outcome. Psychiatric technicians, unit clerks, and trainers receive both trainings, and housekeepers and floor techs have access to an online version of the de-escalation training but not the handle-with-care training. The record reflects that the maintenance employees, drivers, dietary aides, and cooks do not receive either of those trainings.

**b. Positions of the Parties**

The Petitioner argues that psychiatric technicians are technical employees. As such, according to Petitioner, the petitioned-for unit enjoys a community of interest sufficiently distinct from the other classifications involved herein to constitute an appropriate unit. The Petitioner also contends that cooks are statutory supervisors within the meaning of Section 2(11) because they responsibly direct the dietary aides, and must be excluded from any unit found appropriate. Lastly, Petitioner asserts that in assessing the eligibility of per diem psychiatric employees, who it argues share a community of interest with full-time and regular part-time psychiatric employees, I should use the formula applied by the Board in *Davison-Paxon*, 185 NLRB 21, 24 (1970).

The Employer argues that the smallest appropriate unit in this case must include employees in the cook, dietary aide, driver, housekeeper, floor tech, maintenance, unit clerk, and trainer classifications. According to the Employer, psychiatric technicians are non-technical employees who do not have a sufficiently distinct community of interest from employees in the other classifications to warrant a separate unit, and instead all eight classifications must be included in the unit found appropriate. The Employer denies that cooks are statutory supervisors, as they do not possess any of the indicia enumerated in Section 2(11) of the Act. Lastly, the Employer contends that full-time and regular part-time psychiatric technicians share a sufficiently distinct community of interest from per diem psychiatric technicians to require the per diem employees' exclusion. However, were I to find that per diem psychiatric technicians should be included in an appropriate unit, the Employer argues that I should apply the eligibility formula used by the Board in *Marquette General Hospital*, 218 NLRB 713 (1975) due to the disparity in hours worked by the per diem psychiatric technicians.

**c. Applicable Board law and application of that law to the facts**

*i. Psychiatric technicians work in a non-acute care hospital.*

1) Board law

When promulgating its Health Care Rule, the Board excluded psychiatric hospitals from the definition of “acute care hospital”: “The term ‘acute care hospital’ shall . . . exclude facilities that are . . . primarily psychiatric hospitals....” 29 C.F.R. § 103.30 (f)(2). Continuing, the Rule states that “[p]sychiatric hospital is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).” 29 C.F.R. § 103.30 (f)(3). As defined in the Medicare Act:

[t]he term ‘psychiatric hospital’ means an institute which—

- (1) is primarily engaged in providing, by or under the supervision of a physician, psychiatric services for the diagnosis and treatment of mentally ill persons;
- (2) satisfies the requirements of paragraphs (3) through (9) of [42 U.S.C. § 1395x(e) which defines the term hospital];
- (3) maintains clinical records on all patients and maintains such records as the Secretary finds to be necessary to determine the degree and intensity of the treatment provided to individuals entitled to hospital insurance benefits under part A; and
- (4) meets such staffing requirements as the Secretary finds necessary for the institute to carry out an active program of treatment for individuals who are furnished services in the institution.

In the case of an institution which satisfies paragraphs (1) and (2) of the preceding sentence and which contains a distinct part which also satisfies paragraphs (3) and (4) of such sentence, such distinct part shall be considered to be a ‘psychiatric hospital.’

42 U.S.C. § 1395x(f).

2) Application of the law to the facts

The Employer argues that the Employer, as a primarily psychiatric hospital, is excluded from the Board’s definition of an acute care hospital. The Petitioner does not deny that the Employer is an acute care hospital, and it cites case law in its post-hearing brief noting that the Board declined to apply acute care hospital rules to psychiatric hospitals, which suggests it does not disagree with the Employer’s position on this issue. In any event, I find that the Employer is not an acute care hospital. It is clear from the record that the Employer’s facility is primarily a psychiatric facility where patients receive psychiatric treatment from a team of psychiatrists and therapists. The Employer’s main hospital, which houses the vast majority of its beds, is dedicated

to psychiatric inpatient care. Based on the parties' positions and the record evidence, I conclude that the Employer's facility involved herein is not an acute care hospital.

Furthermore, the parties dispute whether psychiatric technicians are technical employees as defined by the Board. According to the Employer, the psychiatric technicians are not technical employees, while the Petitioner argues that they are. While the parties have raised and litigated the technical nature of the psychiatric technicians' work, I do not reach that issue because it is not dispositive of the ultimate unit scope issue. The Board has found technical employees in a non-acute care hospital to be an appropriate unit by themselves, but also has found a unit of only technical employees in that setting to be inappropriate, with the only appropriate unit including additional non-professional employees. See, e.g., *Battleboro Retreat*, 310 NLRB 615 (1993). In other words, whether the petitioned-for unit shares a sufficiently distinct community of interest apart from all, or some, of the classifications sought to be included by the Employer is not dependent on their status as technical or non-technical employees. Accordingly, because the appropriateness of the petitioned-for unit in this non-acute care hospital does not turn on the status of the psychiatric technicians as technical employees, I do not reach that issue.

ii. *Psychiatric technicians share a community of interest with trainers and unit clerks.*

1) Board Law

Petitioner is not required to seek a bargaining unit that is the only appropriate unit or even the most appropriate unit. The Act merely requires that the unit sought by Petitioner be *an* appropriate unit. *Wheeling Island Gaming*, 355 NLRB 637, fn. 2 (2010), citing *Overnite Transp. Co.*, 322 NLRB 723 (1996); *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988). "The Board's inquiry necessarily begins with the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends." *The Boeing Company*, 368 NLRB No. 67, slip op. at 3 (2019).

In *PCC Structural, Inc.*, 365 NLRB No. 160 (2017), the Board returned to the traditional community-of-interest standards for determining whether a unit is appropriate. In conducting a community-of-interest analysis, the Board will look at 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.

Id. at 13, citing *United Operations, Inc.*, 338 NLRB 123 (2002). Additionally, the Board must analyze "whether employees in the proposed unit share a community of interest *sufficiently distinct* from the interests of employees excluded from the unit to warrant a separate bargaining unit." *PCC Structural*, supra, slip op. at 11. (emphasis in original)

Further, while *PCC Structural*s involved a non-healthcare employer, in that case the Board explicitly reinstated the standard for non-acute healthcare facilities established in *Park Manor Care Center*, 305 NLRB 872 (1991). *PCC Structural*s, supra, slip op. at 1 fn.3. See also *Manor Care of Yeadon PA, LLC*, 368 NLRB No. 28, slip op. at 1, fn. 3 (2019) (applying *Park Manor* based on *PCC Structural*s).

Under *Park Manor*, unit appropriateness is determined under the “empirical community of interest test” by examining 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 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. *Ibid.*

During its rulemaking, the Board received ample evidence regarding appropriate units at psychiatric hospitals. The Board later noted in a decision concerning a psychiatric hospital unit:

Although the Board originally planned to apply the rules regarding unit determination to psychiatric hospitals, it eventually determined to exclude psychiatric hospitals from coverage of the rule and proceed on a case-by-case basis. The Board noted that psychiatric hospitals differ from other acute care hospitals in that therapeutic programs are highly integrated, there are more paraprofessionals (mental health workers), and all employees are specially trained in relating to patients as all employees' actions have an impact on patient care. 53 Fed. Reg. 33930, 284 NLRB 1515, 1570 (1984).

*Brattleboro Retreat*, supra at 616. Furthermore, “[t]here is not a wealth of case law prior to rulemaking regarding units limited to technical employees at psychiatric hospitals. The limited precedent that exists does not disclose a general rule applicable to such situations.” *Ibid.* In *Mount Airy Psychiatric Center*, 217 NLRB 802 (1975), the Board found that the only appropriate unit was a hospital-wide unit of all non-professional employees of the employer, including technical employees. By contrast, in *Milwaukee Psychiatric Hospital*, 219 NLRB 1043 (1975), the Board found that technical employees could be excluded from a petitioned-for unit of service and maintenance employees.

2) Application of the law to the facts

**A. The petitioned-for unit does not share a sufficiently distinct community of interest separate from the unit clerks and trainers to permit the exclusion of those employees.**

The application of background information gathered during rulemaking, prior precedent, and community-of-interest factors in the instant case leads me to the conclusion that the petitioned-

for unit, limited to psychiatric technicians, is not appropriate. I find that the smallest appropriate unit in this case must also include employees in the trainer and unit clerk classifications, as the psychiatric technicians do not share a community of interest sufficiently distinct from those employees.

Psychiatric technicians, unit clerks, and trainers are all organized into the same department. According to the record, these three classifications share a different hierarchical reporting structure from the other classifications at issue, with these classifications all reporting to the same nurse managers who ultimately report to the CNO. There is, therefore, evidence of common departmental organization and common supervision among the psychiatric technicians, unit clerks, and trainers.

The record also reflects that there is significant interchange among the three classifications. Trainers are essentially psychiatric technicians who have additional responsibilities to train new psychiatric technicians. When they are not performing their training duties, which may occur only once per month or every couple of months, the trainers work as psychiatric technicians. Moreover, every unit clerk and trainer employed by the Employer used to work in the psychiatric technician classification prior to becoming a unit clerk or trainer, respectively.

The evidence also reflects that these classifications have distinct skills and training, have distinct job functions, and perform distinct work, and there is significant overlap among the classifications. Psychiatric technicians, unit clerks, and trainers are the only classifications discussed herein that are required to receive both the Employer's in-person classroom verbal de-escalation training and its handle-with-care training. In that regard, all three classifications are trained in how to care for and "handle" patients at the Employer's facility. Moreover, psychiatric technicians are required to perform unit clerk duties during overnight shifts and on weekends, when unit clerks do not work. Likewise, unit clerks fill in for psychiatric technicians who are absent or on leave, or when the Employer has a technician shift that needs to be filled.

There also is a high level of functional integration and frequent contact among the three classifications. Unit clerks are required to perform tasks that directly impact the psychiatric technicians as well as the trainers who predominantly perform psychiatric technician duties. Unit clerks order supplies for the unit and maintain patient charts by thinning them and replenishing them with blank forms, both of which psychiatric technicians use on a daily basis in performing their patient-care duties. If a situation occurs that requires crisis management, all three are trained in the proper patient-handling practices and techniques to support each other during the crisis. Furthermore, the record reflects that psychiatric technicians, unit clerks, and trainers have frequent contact with one another. Beyond the fact that trainers are practicing psychiatric technicians, they are required to train newly hired psychiatric technicians through both on-the-job and classroom instruction. Unit clerks and psychiatric technicians work on the same units and at times can both be involved in assisting patients when needed.

Lastly, the three classifications share distinct terms and conditions of employment. The record discloses that psychiatric technicians, unit clerks, and trainers have access to the same

benefits, use the same time reporting system, wear the same color uniforms, are subject to the same orientation manual that outlines all policies and procedures, and, as noted above, are required to receive the same trainings. While wage rates differ among the three classifications, and even within the classifications, that alone is not indicative of a lack of community of interest among the employees. See *TDK Ferrites Corp.*, 342 NLRB 1006, 1009 (2004) (finding that any distinct community of interest based on different wage rates was outweighed by the highly integrated nature of the workforce, the high degree of interaction and integration, and common supervision and other common terms and conditions of employment). Accordingly, for the foregoing reasons, I find that employees in the petitioned-for unit do not share a sufficiently distinct community of interest from the unit clerks and trainers, hence the latter classifications must be included in any appropriate unit.<sup>8</sup>

**B. Psychiatric technicians, unit clerks, and trainers share a sufficiently distinct community of interest separate from the remaining classifications.**

In contrast to the above, I find that psychiatric technicians, unit clerks, and trainers do share a sufficiently distinct community of interest from employees in the cook, dietary aide, driver, housekeeper, floor tech, and maintenance classifications to warrant the latter employees' exclusion from the unit.<sup>9</sup> To begin, the Employer maintains separate departments for maintenance, housekeeping (including housekeepers and floor techs), dietary (including cooks and dietary aides), and transportation (including drivers). Each department has separate immediate supervision, all of whom report to the Director of Plant Operations & Dietary. That individual reports to the CFO. Psychiatric technicians, unit clerks, and trainers have a completely different reporting structure—they report to nurse managers, who report to the CNO. Thus, I find that there is no similar departmental organization, nor is there common supervision, between psychiatric technicians, unit clerks, and trainers on the one hand, and cooks, dietary aides, drivers, housekeepers, floor techs, and maintenance employees on the other.

Moreover, there is very little evidence of interchange among the two groupings of classifications. First, there is no evidence that psychiatric technicians, unit clerks, or trainers ever perform the job functions of the other six classifications. Furthermore, there is no evidence that any other employees ever fill in for the maintenance, cook and driver classifications. There is some evidence that one driver, one housekeeper, and one dietary aide sometimes fill in for psychiatric technicians, but that is the only evidence of employee interchange. With a unit of approximately 133 employees, as exists here, evidence that three employees in non-psychiatric technician classifications sometimes fill in for open psychiatric technician shifts, where there is no evidence that psychiatric technicians, unit clerks, or trainers ever fill in for the other six

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<sup>8</sup> Petitioner has indicated that it is willing to proceed in any alternate unit that I find appropriate.

<sup>9</sup> Hereinafter, references will be made to two groups of employee classifications. Such references refer to the included classifications—psychiatric technicians, unit clerks, and trainers, and excluded classifications—cooks, dietary aides, drivers, housekeepers, floor techs, and maintenance employees.

classifications, is insufficient to show meaningful employee interchange. Thus, I find there is a lack of employee interchange between the two groupings of classifications.

The evidence also reflects that psychiatric technicians, unit clerks, and trainers share distinct skills, training, and job functions and perform distinct work compared to the remaining classifications, with whom there is no overlap in these areas. Psychiatric technicians, unit clerks, and trainers are required to attend eight-hour classroom trainings for verbal de-escalation and handle-with-care; the remaining classifications do not receive that same training. While housekeepers and floor techs can access an eight-hour online verbal de-escalation training, they do not receive the same instruction in person, nor do they receive the handle-with-care training at all. Drivers, maintenance employees, cooks, and dietary aides receive neither of the trainings. Moreover, the work performed by psychiatric technicians, unit clerks and trainers—providing patient care, escorting patients around the facility, conducting group community meetings, assessing and observing patients, ordering unit supplies, maintaining records, and training other psychiatric technicians—is not done by any of the other classifications. The excluded classifications also report to different parts of the campus.<sup>10</sup> While there is contact among the classifications, as discussed below, there is no overlap in functions between the two groups. Accordingly, I find that consideration of these factors supports the conclusion that the psychiatric technicians, unit clerks, and trainers share a sufficiently distinct community of interest apart from the remaining classifications.

There is also no evidence of functional integration among the two groups of employee classifications. Functional integration exists when employees in a unit sought by a union work on different phases of the same product or a single service as a group. *Arvey Corp.*, 170 NLRB 35 (1968); *Transerv Sys.*, 311 NLRB 766 (1993). Evidence that employees work together on the same matters, have frequent contact with one another, and perform similar functions is relevant when examining whether functional integration exists. *Ibid.* Here, employees in the two classification groupings do not perform similar functions, do not work together on the same issues, and do not provide the same “service” to patients. While they all work towards achieving a high level of patient care, they have very different roles to play in that process, and they perform very different functions. For those reasons, I find there to be a lack of functional integration between the two groups.

I acknowledge that there is regular contact among the classifications. Psychiatric technicians communicate with cooks and dietary aides regarding patient dietary needs, with drivers when patients are being transported to various locations, with maintenance employees when maintenance issues arise, and with floor techs and housekeepers when cleaning must be done. Those communications usually take the form of discussing how a patient’s needs can be met while tending to certain classification-specific matters that arise, such as scheduling cleaning and maintenance tasks around patients’ schedules, or discussing patients’ dietary restrictions and

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<sup>10</sup> Cooks and dietary aides report to the kitchen, drivers and maintenance employees report to the maintenance shop, and housekeepers and aides have janitorial closets where they retrieve their supplies for the day.

needs. I find that the contact among the workforce only occurs when specific issues arise, is relatively brief in nature, and is limited to the issue that precipitated the contact. Even if contact between the classifications supports a finding of a lack of sufficiently distinct community of interest between the groups, I find it to be nominal.

Finally, terms and conditions of employment among the classifications are similar in some respects and different in others. All of the employees in the classifications at issue have access to the same break rooms, are subject to the same employee manual, are required to wear badges, use the same time reporting system, and have access to the same benefits. As noted above, however, their pay rates vary significantly. Their uniforms also vary: whereas psychiatric technicians, unit clerks, and trainers wear navy blue scrubs, maintenance employees and drivers do not wear scrubs, cooks and dietary aides wear black scrubs, and housekeeping and floor techs wear maroon scrubs. Moreover, whereas psychiatric technicians, unit clerks, and trainers are required to attend eight hour classroom trainings for verbal de-escalation and handle-with-care, none of the other classifications receive handle-with-care training or eight-hour classroom de-escalation training, and only the housekeepers and floor techs have access to online de-escalation training. Accordingly, I find that the distinct terms and conditions of employment factor of the community-of-interest analysis does not favor either inclusion or exclusion of the remaining classifications with the psychiatric technicians, unit clerks, and trainers in an appropriate unit.

Based on the my consideration of the traditional community of interest factors described above, and a review of the complete record, I find that psychiatric technicians, unit clerks, and trainers have a sufficiently distinct community of interest apart from the cooks, dietary aides, drivers, housekeepers, floor techs, and maintenance employees to warrant a separate unit.

**C. Background information received by the Board during the rulemaking, as well as precedent prior to the rulemaking, does not impact my findings.**

Neither pre-rulemaking case law nor rulemaking background impact my findings. In its rulemaking, the Board made clear that bargaining units in psychiatric hospitals must be evaluated on a case-by-case basis. 53 Fed. Reg. 33930, 284 NLRB 1515, *supra*. Moreover, while the Board observed that all employees in psychiatric hospitals “are specially trained in relating to the patients as all employees’ action have an impact on patient treatment”, that is not true here. As discussed below, there is no evidence that apart from their classification-specific training, the remaining contested classifications receive specialized training on how to interact with psychiatric patients. It cannot be said, then, that in order for the unit to be appropriate, the Board’s rulemaking background requires it to include all classifications sought by the Employer.

Further, I do not find the limited pre-rulemaking precedent to be dispositive. In *Mount Airy Psychiatric Center*, 217 NLRB 802 (1975), the Board found a hospital-wide unit of nonprofessional employees to be the only appropriate unit. In doing so, it relied on frequent interchange of employees in the housekeeping, dietary, and maintenance groups; essentially comparable rates of pay; and, among other things, equal opportunities for advancement through

job postings similar to those of employees in the petitioned-for unit. *Mount Airy Psychiatric Center*, 217 NLRB at 803. Here, there is no equivalent interchange among the other employee classifications, no evidence of employee paths to promotion outside of the psychiatric technician, unit clerk, and trainer classifications, no common departmental organization or supervision, and disparate rates of pay. In *Milwaukee Psychiatric Hospital*, 219 NLRB 1043 (1975), the Board found that technical employees could be excluded from a petitioned-for unit of service and maintenance employees, but did so in reliance on a number of acute-care cases not applicable here. Accordingly, I do not find that precedent prior to the Board's rulemaking dictates a different conclusion than the one I have made.

For the foregoing reasons, I find that the smallest appropriate unit in this case must include unit clerks and trainers with the petitioned-for psychiatric technicians, but not cooks, dietary aides, drivers, housekeepers, floor techs, and maintenance employees.

iii. *Per diem psychiatric technicians share a community of interest with full-time and part-time psychiatric technicians.*

1) Board Law

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). Moreover, the Board has long held that part-time employees who are ineligible for fringe benefits will not be excluded from the bargaining unit on that basis if they otherwise 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 their exclusion from the bargaining unit).

There are no per diem unit clerks or trainers. Thus, the only per diem employees at issue are per diem psychiatric technicians. Those employees perform the exact same job functions as full-time and regular part-time psychiatric technicians, are supervised by the same nurse managers, and are included in the same departmental organization. Their only distinctions from full-time and regular part-time psychiatric technicians are that they lack a set schedule, work fewer hours, and are ineligible for fringe benefits. Given these limited distinctions, I find that the full-time and regular part-time psychiatric technicians do not share a sufficiently distinct community of interest apart from the per diem psychiatric technicians, and therefore the per diem psychiatric technicians must be included in the unit I find appropriate, subject to the eligibility considerations discussed below.

iv. *Cooks are not supervisors as defined in Section 2(11) of the Act.*

1) Board law

The Act expressly excludes supervisors from its protection. Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

Possession of any of those attributes will confer supervisory status, provided that the authority is exercised with independent judgment. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Michigan Masonic Home*, 332 NLRB 1409, 1409 (2000). Supervisory status derives from the authority not only to perform a supervisory function but also to effectively recommend it. If the authority is used only sporadically, however, the putative supervisor will not be deemed a statutory supervisor. *Coral Harbor Rehabilitation and Nursing Center*, 366 NLRB No. 75, slip op. at 17 (2018). Further, the supervisor must act or effectively recommend such action “without control of others and form an opinion or evaluation by discerning and comparing data.” *Oakwood Healthcare*, 348 NLRB 686, 692-693 (2006).

The assignment of work “in a routine fashion does not make one a supervisor, nor does the assumption of some supervisory authority for a temporary period create supervisory status.” *Coral Harbor*, supra, slip op. at 17-19. To show responsible direction of work, the employee must have authority to direct the work and exercise corrective action over other employees, and face possible adverse consequences for failure to do so. *Oakwood Healthcare*, supra at 690-691.

Judgment is not independent when the putative supervisor follows detailed instructions contained in employer policies, rules, or collective-bargaining agreement requirements. *Id.* at 693. If a choice is obvious, the judgment is not independent. *Ibid.* Nor does independent judgment encompass actions that are routine or clerical in nature, sporadic, or perfunctory. *Id.* at 693, citing *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). The party asserting supervisory status has the burden of proving supervisory authority and must establish it by a preponderance of the evidence. Purely conclusory evidence is insufficient to establish supervisory status. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991). Similarly, supervisory status is not demonstrated when evidence is in conflict or inconclusive. *Entergy Mississippi, Inc.* 367 NLRB No. 109, slip op. at 2-3 (2019).

2) Application of the law to the facts

While I have determined that employees in the cook classification must be excluded from unit on community of interest grounds, the parties also litigated the supervisory status of the cooks, so I will resolve that issue, too. In its post-hearing brief, Petitioner contends that cooks are statutory supervisors because they responsibly direct the work of the dietary aides. It does not assert that cooks have any other indicia of supervisory authority, nor is there record evidence they do. Accordingly, I find that cooks do not have the authority to hire, fire, discipline, suspend, transfer, lay-off, recall, adjust grievances, reward, promote, or assign work, nor do they have the authority to effectively recommend those employment actions.

Petitioner argues that cooks have the authority to responsibly direct dietary aides because they are responsible for ensuring the smooth operation of the kitchen, and because the cook job description states that cooks are held accountable for the effective use of dietary aides and to ensure that staff complete all responsibilities. It also argues that cooks have an inspection and oversight role in ensuring the kitchen is properly cleaned and prepared.

Contrary to Petitioner's contention, I find that cooks do not have authority to responsibly direct dietary aides or any other employees. In testimony, Kitchen Manager Craig Quinn admitted that cooks are not held accountable for the performance of dietary aides and do not assign or direct their work. Addressing the "smooth operation" of the kitchen, Quinn testified that cooks are held responsible for their own job performance and work duties, but not those of dietary aides. While the cook job description states that cooks "provide immediate supervisor, in lieu of Food Service Manager, and coordination of dietary staff", Quinn testified that in practice, cooks are not given the authority to supervise dietary staff, and are not held accountable for their performance.

Petitioner failed to adduce specific evidence that cooks have, in practice, supervised or responsibly directed dietary aides, and so did not meet its evidentiary burden. Accordingly, I find that cooks are not statutory supervisors as defined by Section 2(11) of the Act.

- v. *The appropriate eligibility formula for determining eligible voters is the formula applied by the Board in Davison-Paxon, 185 NLRB 21 (1970).*

Having found that per diem psychiatric technicians must be included in the smallest appropriate unit, I next turn to the parties' disagreement regarding the appropriate eligibility formula to determine which per diem employees are eligible to vote. The Employer urges me to apply the eligibility formula used by the Board in *Marquette General Hospital*, 218 NLRB 713 (1975). In that case, due to a disparity in the hours worked by on-call employees,<sup>11</sup> the Board applied an eligibility formula providing that the only employees eligible to vote were those who worked a minimum of 120 hours in either of the two 3-month periods immediately preceding the date of issuance of the decision. *Marquette General Hospital*, 218 NLRB at 714. In the Employer's view, the *Marquette* formula is warranted due to a significant disparity of hours worked by per diem psychiatric technicians.

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<sup>11</sup> In *Marquette*, it was found that on-call employee hours ranged from 23 to 540.5 in a given three-month period.

In contrast, Petitioner argues that the longstanding eligibility formula applied in *Davison-Paxon*, 185 NLRB 21 (1970) is appropriate here. There, the Board fashioned a formula whereby any contingent worker who “regularly averages 4 hours or more per week for the last quarter prior to the eligibility date has a sufficient community of interest or inclusion in the unit and may vote in the election.” *Id.* at 24. According to Petitioner, the Employer’s data is misleading and does not accurately reflect the true nature of the hours worked by per diem employees, so there is no reason to depart from the standard *Davison-Paxon* formula.

I have carefully considered the parties’ positions on this issue, and I find that the *Davison-Paxon* eligibility formula is appropriate in this case. “Selection of eligible voters in cases where there is a significant difference in the number of hours worked by part-time or on-call employees depends on a careful balancing of the factors of length, regularity, and currency of employment.” *Marquette General Hospital*, 218 NLRB at 715. Initially, I note that the Employer provided per diem data only for the quarter immediately preceding this hearing, whereas the formula it urges me to apply requires the evaluation of hourly data for the *two* three-month periods preceding the eligibility date. Nevertheless, after evaluating the data submitted by the Employer, I find that the disparity in hours worked by per diem psychiatric technicians is less than in cases where the Board applied the *Marquette* formula, and does not warrant deviation from the *Davison-Paxon* formula.

The Employer provided the hours worked by per diem psychiatric technicians for the seven pay periods in the three months preceding the hearing. The data provided by the Employer did not include employee start or end dates, so the summary discussed below includes notations in parentheses where the data suggests the employee had not worked throughout the entirety of the quarter. That data is summarized as follows:

- 2 per diem psychiatric technicians worked less than 10 hours (both had reported hours only for the July 10 pay period, suggesting they may not work for the Employer any longer);
- 2 per diem psychiatric technicians worked between 15 and 20 hours (both had reported hours only for the October 2 pay period, suggesting they may have just begun working for the Employer);
- 4 per diem psychiatric technicians worked between 36 and 48 hours (1 per diem psychiatric technician had reported hours only in the last 2 pay periods; 2 had reported hours in at least 3 pay periods; and 1 had reported hours in 4 pay periods);
- 9 per diem psychiatric technicians worked between 59 and 117 hours;
- 7 per diem psychiatric technicians worked between 130 and 191.75 hours;
- 13 per diem psychiatric technicians worked between 211.25 and 298.5 hours;
- 7 per diem psychiatric technicians worked between 306.5 and 394.43 hours;
- 7 per diem psychiatric technicians worked between 403.9 and 484.25 hours;
- 1 per diem psychiatric technician worked 510.5 hours;
- 1 per diem psychiatric technician worked 536.62 hours.

While the evidence does show a disparity in the number of hours worked by per diem psychiatric technicians, the Board approved the use of the *Davison-Paxon* formula in *Trump Taj Mahal Associates*, 306 NLRB 294 (1992)—a post *Marquette* case—where the disparity in hours of casual employees was much more extensive. In that case, casual technicians worked anywhere from 30 to 952 hours in 1990. *Id.* at 294. In January and most of February 1991, those same employees worked from 0 to 271 hours. *Ibid.* In 1990, convention lounge technician casual employees worked from 4 to 1524 hours, and in the first two months of 1991, they worked 0 to 287. *Ibid.* The Regional Director in that case applied the *Davison-Paxon* eligibility formula. *Id.* at 295.

Although the eligibility formula was not challenged by a party to the case, the dissent in the Board decision proposed using a different formula, so the majority addressed the issue. It noted that “[a]lthough no single eligibility formula must be used in all cases, the *Davison-Paxon* formula applied by the Regional Director is the one most frequently used, absent a showing of special circumstances”, and “our experience shows it to be a reliable test for on-call employees.” *Ibid.* Notwithstanding the wide disparity in hours, the Board found that the “facts show[ed] that as a group the on-call employees here have worked on a regular basis and have [] a continuing interest [in the working conditions of the employer].” *Ibid.*

Here, the disparity in hours worked by per diem psychiatric technicians is far less than that in *Trump Taj Mahal*. Moreover, the data in this case shows that of the 53 psychiatric technicians with hours worked in the three-month period preceding the hearing, 38—or approximately 71 percent—worked in five of the seven pay periods for which the Employer submitted data. I find that the data submitted by the Employer conclusively shows that the vast majority of per diem psychiatric technicians work on a regular basis. Accordingly, I will apply the eligibility formula articulated in *Davison-Paxon*, 185 NLRB 21 (1970), and any psychiatric technician who regularly averages four hours or more per week for the 13 weeks prior to the eligibility date will be eligible to vote in this election.

## II. TYPE OF ELECTION: MANUAL OR MAIL

### a. Factual overview

#### i. *The COVID-19 Pandemic Generally*

At the outset, I take administrative notice of the current public health crisis in the United States created by the COVID-19 pandemic. To date, there have been nearly 18 million confirmed cases of COVID-19 in the United States, and over 318,000 deaths.<sup>12</sup> In recent weeks, infection rates have exploded. Between October 6 and December 15, the 7-day moving average for

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<sup>12</sup> *CDC COVID Data Tracker: Maps, charts, and data provided by the CDC, CENTERS FOR DISEASE CONTROL AND PREVENTION*, December 15, 2020. [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100klast7days](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days)

confirmed COVID-19 cases shot up from 43,883 cases per day to 211,356 cases per day.<sup>13</sup> On December 17, the United States saw an astonishing 247,544 confirmed cases.<sup>14</sup>

*ii. The COVID-19 Pandemic in the Commonwealth of Pennsylvania*

In response to the pandemic, many state and local governments have issued COVID-19 restrictions tailored to the particular conditions in their communities. After COVID cases spiked recently in Pennsylvania, Governor Tom Wolf issued an order effective December 12 through January 4, 2021 mandating telework except where impossible, prohibiting indoor dining, suspending school sports and extracurriculars, closing casinos, gyms, and entertainment venues, and sharply reducing the number of people allowed to gather in one place to ten for indoor gatherings and 50 for outdoor ones.<sup>15</sup>

Pennsylvania currently ranks seventh in the nation in confirmed COVID-19 cases with 563,589 confirmed cases and 13,980 confirmed deaths.<sup>16</sup> In the month of December alone, Pennsylvania has seen over 10,000 cases daily on nine separate dates.<sup>17</sup> Philadelphia County, where the Employer's facility is located, has consistently had the highest confirmed total of COVID-19 cases within the Commonwealth.<sup>18</sup> The most recent confirmed test positivity rate in the city is 12.57% , more than double the 5% threshold that experts say is a sign that viral spread is out of control."<sup>19</sup>

Facilities such as the Employer's, where individuals congregate and/or share living spaces, are particularly vulnerable to transmission of this virus. Governor Wolf's plan for reopening specifically underscores the need for protection in "high-risk settings, including correctional institutions, personal care homes, skilled nursing facilities, and other congregate care settings, and assurance that facilities have adequate safeguards in place such as staff training, employee screening, [and] visitor procedures and screening...."<sup>20</sup>

**b. Positions of the Parties**

Despite the pandemic, the Employer argues that a manual election is still appropriate in this case, citing the Board's longstanding policy favoring manual elections. The Employer further contends that manual elections lead to higher voter turnout, and it questions the efficacy of the United States mail given the recent presidential election and the volume of mail currently being

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<sup>13</sup> [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases)

<sup>14</sup> Ibid.

<sup>15</sup> <https://www.pa.gov/guides/responding-to-covid-19/#COVIDMitigationinPennsylvania>

<sup>16</sup> <https://www.cdc.gov/covid-data-tracker/#cases>.

<sup>17</sup> [https://covid.cdc.gov/covid-data-tracker/#trends\\_dailytrendscases](https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases)

<sup>18</sup> <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Cases.aspx> (Covid 19 Dashboard)

<sup>19</sup> <https://policylab.chop.edu/covid-lab-mapping-covid-19-your-community>

<sup>20</sup> <https://www.governor.pa.gov/process-to-reopen-pennsylvania/>

processed. Moreover, the Employer cites to General Counsel Memorandum 20-10 (“GC 20-10”) wherein the General Counsel provided suggested guidelines for conducting manual ballot elections during the pandemic. The Employer states that it is willing and able to comply with all suggested guidelines in GC 20-10.

The Employer proposes to hold a manual election at its facility in either its 54 feet by 47 feet gymnasium or through the use of large tents it is willing to secure to conduct the election in its parking lot. In either circumstance, the Employer asserts that temperature checks and health screens are conducted of every person that enters its facility, the facility is cleaned and disinfected constantly, and the Employer has ample personal protective equipment to provide to all election participants. Further, the Employer proposes a two-day election with nine cumulative hours of voting in four different voting blocks. Lastly, the Employer suggests the use of an alternative voting method for any eligible employees who are exposed to virus prior to the election. The Employer proposes that any employee who is directed to quarantine within 14 days of the election be permitted to vote by mail.

The Petitioner, on the other hand, argues that only a mail ballot election is appropriate here. Petitioner contends that the pandemic is such an extraordinary circumstance that it warrants deviation from the Board’s longstanding policy favoring manual elections. Due to the extensive time during which election participants would be in close proximity to one another, the Petitioner asserts that the Employer simply cannot guarantee a safely run manual election at its premise.

**c. Agency Directive and Legal Authority**

Section 11301.2 of the Board’s Casehandling Manual (Representation) provides, in part:

The Board’s longstanding policy is that representation elections should, as a general rule, be conducted manually. The Board has also recognized, however, that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done. In these instances, the regional director may reasonably conclude that conducting the election by mail ballot or a combination of mail and manual ballots would enhance the opportunity for all to vote.

The Manual Section sets forth several types of conditions favoring mail-ballot elections, including situations where eligible voters are “scattered,” either geographically or as to their work schedules, or where there is a strike, lockout, or picketing in progress. Finally, this Section states that “[u]nder extraordinary circumstances, other relevant factors may also be considered by the regional director,” citing *San Diego Gas & Electric*, 325 NLRB 1143, 1145 (1998). Thus, while there is a clear preference for conducting manual elections in ordinary circumstances, the Manual indicates that the regional director may use discretion to order a mail ballot election where conducting an election manually is not feasible, and that under extraordinary circumstances, the

regional director should tailor the method of conducting an election to enhance the opportunity of unit employees to vote. See *ibid.*

On April 17, 2020, the Board issued an announcement regarding the COVID-19 pandemic titled, “COVID-19 Operational Status,” which states in pertinent part:

Representation petitions and elections are being processed and conducted by the regional offices. Consistent with their traditional authority, Regional Directors have discretion as to when, where, and if an election can be conducted, in accordance with existing NLRB precedent. In doing so, Regional Directors will consider the extraordinary circumstances of the current pandemic, to include safety, staffing, and federal, state and local laws and guidance. Regional Directors, in their discretion, may schedule hearings through teleconference or videoconference, although the latter may involve delays due to limited availability.

On July 6, the General Counsel for the Board issued GC 20-10 to provide guidance for conducting manual elections during this pandemic. The memorandum details numerous suggested manual election protocols to minimize the risk of COVID transmission. It also reaffirmed that Regional Directors have authority delegated by the Board to make initial decisions about when, how, and in what manner all elections are conducted. According to the General Counsel, Regional Directors:

have made, and will continue to make, these decisions on a case-by-case basis, considering numerous variables, including, but not limited to, the safety of Board Agents and participants when conducting the election, the size of the proposed bargaining unit, the location of the election, the staff required to operate the election, and the status of pandemic outbreak in the election locally.

More recently, the Board instituted guidelines for evaluating the propriety of a mail ballot election during this pandemic. On November 9, the Board issued its Decision on Review in *Aspirus Keweenaw*, 370 NLRB No. 45 (2020), where it “set forth more specific and defined parameters under which Regional Directors should exercise their discretion in determining election type against the back-drop of Covid-19.” *Id.*, slip op. at 4. The Board identified the following six situations, any of which would make it appropriate to conduct a mail ballot election:

(1) [t]he Agency office tasked with conducting the election is operating under ‘mandatory telework’ status...(2) [e]ither the 14-day trend in the numbers of new confirmed cases of Covid-19 in the county where the facility is located is increasing, or the 14-day testing positivity rate in the county where the facility is located is 5 percent or higher...(3) [t]he proposed manual election site cannot be established in a way that avoids violating mandatory state or local health orders relating to maximum gathering size...(4) [t]he employer fails or refuses to commit to abide by the GC Memo 20-10 protocols...(5) [t]here is a current Covid-19

outbreak at the facility or the employer refuses to disclose and certify its current status...(6) [o]ther similarly compelling considerations.

Id., slip op. at 4-8.

**d. Analysis**

*i. The COVID-19 pandemic necessitates holding a mail ballot election.*

In view of the criteria set forth by the Board in *Aspirus Keweenaw*, I find it appropriate to exercise my discretion to direct a mail-ballot election, the details of which are provided below. The circumstances surrounding the COVID-19 virus are nothing but extraordinary, and, like the rest of the United States, the Commonwealth of Pennsylvania is currently experiencing an unprecedented level of COVID infection and deaths.

Evaluating the circumstances presented in this case, I find that the situation set forth in the second *Aspirus Keweenaw* criterion is met. In Philadelphia, the positivity rate is currently 12.57%. For this reason alone, I conclude that the second situation identified by the Board as being appropriate for a mail ballot election is present here.

I also find that compelling circumstances exist in this case that warrant holding a mail ballot election. A manual election in this case will be conducted in an inpatient facility among approximately 150 healthcare workers. Inpatient facilities where individuals are in close contact and share communal living spaces are particularly ripe for virus transmission. While there is not the same detailed COVID-19 data available for psychiatric hospitals as exists for long-term care facilities, the same conditions are present—daily interactions among staff and patients, and the shared use of common living spaces. Not only is there a risk of virus transmission among the patients, but that risk clearly extends to the employees who care for them. Of particular concern in this case is the inclusion of per diem employees in the appropriate unit. Per diem employees work scattered and reduced hours for the Employer, and many likely work at other facilities in the a similar capacity. Thus, not only are the employees eligible to vote in this election employed at a healthcare facility, but there are a number of employees who may work at other healthcare institutions in the area, thus furthering the risk for virus transmission.<sup>21</sup>

In addition to the analysis required by *Aspirus Keweenaw*, I have also considered the accommodations and arrangements offered by the Employer but find that they are inadequate under the circumstances. Manual election procedures inherently require substantial interaction among voters, observers, party representatives and the Board agent, all of whom must be present

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<sup>21</sup> The record does not disclose whether the Employer has had positive COVID-19 cases among its staff, or whether it is currently facing an outbreak. However, because I have found that the second and third situations identified by the Board in *Aspirus Keweenaw* are met, I do not find that this record must be supplemented to include that data.

at the Employer's facility, irrespective of whether an election is held in the gymnasium or outdoors under a tent.<sup>22</sup>

All but the voters would need to gather for approximately 30 minutes for the pre-election conferences, including the check of the voter list and the parties' inspection of the voting areas. The Board agent and observers would share a voting area for the duration of the proposed manual election, an exposure sufficient to risk exposure to the virus. The observers would need to check in voters on the voter list, and the Board agent would provide a ballot to each voter. Additionally, there are elements of a manual election that simply cannot be undertaken in compliance with proper social distancing requirements, for instance in the case of a challenged ballot where the Board Agent, observers, and voter must be in close proximity to deal with the voter challenge, exchange and passing of the required envelopes, and initialing of the appropriate section of the challenge envelope. See Casehandling Manual Section 11338.3. At the conclusion, the agent would count the ballots, typically in the same voting area, with the observers, party representatives, and other employees who wish to attend.

There is also a significant risk of voter disenfranchisement for any voter who (1) is diagnosed with COVID-19 immediately preceding the election, (2) is required to self-quarantine based on contact tracing, or (3) shows up to the election with a temperature and cannot pass the Employer's temperature screening. While the Employer does not explicitly state what happens if an individual fails the Employer's temperature and/or health screen, presumably that individual would be unable to access the facility or voting area on the day of the election. Even more, should the Board agent(s) tasked with conducting the election fail the temperature screen, the election would necessarily be cancelled. On the other hand, these screening procedures are not infallible and may result in a COVID-infected employee, particularly those that are asymptomatic, entering the facility. These scenarios may not only result in voter disenfranchisement, but also the potential transmission of the virus by asymptomatic employees or ill employees without a fever. Were any of those participants to be COVID-19 positive but asymptomatic at the time of the election, the risk to others would be significant. All of the substantial risks outlined above are eliminated by use of the Board's mail-ballot procedures.

From the earliest days of the Act, the Board has permitted eligible voters in appropriate circumstances to cast their ballots by mail. See, *London Farm Dairy*, 323 NLRB 1057 (1997) (internal citations omitted). Furthermore, the Board has previously rejected arguments that mail ballot elections result in lower voter participation. See *San Diego Gas & Electric*, 325 NLRB at 1146; *London Farm Dairy*, supra at 1058. While long-standing Board policy favors manual elections, mail ballot elections continue to be an often-utilized voting method and continue to have

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<sup>22</sup> Conducting an election outdoors, irrespective of whether it is done under large tents, presents its own set of challenges beyond the pandemic. Although the voting would be conducted under the tent, inclement weather could not only cause employees to congregate underneath the tent, employees may choose to avoid voting altogether in order to stay out of the poor weather. I do not find voting outdoors under a tent to be a viable solution, especially given the time of year this election will be conducted.

their place in circumstances where manual elections are prohibitively challenging, including the extraordinary circumstances caused by this global pandemic.

Lastly, I find unworkable the Employer's proffered plan to allow mail ballot voting for any eligible employee who is directed to quarantine within 14 days of the election. There is currently no anticipated testing regimen that will allow for rapid test results such that testing would allow the parties, and the Region, to assess whether any employees are COVID-19-positive at any given time. Tests results take time, and there is ample evidence that the same individual can test both negative and positive within days of each test. Both types of elections require substantial planning and time such that it is impracticable to simply switch from a manual election to a mail election for specific voters at a moment's notice. Notices of Election will issue with this decision to inform eligible voters of the mechanics of the election, and switching the voting method prior to an election could lead to confusion amongst voters and the potential for further disenfranchisement. The uncertainties inherently present in this proposed plan are entirely mitigated by directing a mail ballot election at the outset.

To alleviate the significant health risks associated with conducting manual elections during this pandemic, I find that the most responsible measure to ensure a safe election is by conducting mail-ballot elections. Mail ballots will eliminate the risk of unnecessarily exposing employees, Board agents, party representatives, their families, and the public to COVID-19, and it will ensure that the employees in the unit herein will have the opportunity to vote promptly.

*ii. The scattered nature of the schedules among the employees in the voting unit also necessitates holding a mail ballot election.*

The scattered nature of the employee schedules in this case fits squarely within those circumstances identified by the Board as being appropriate for mail ball elections, even in the absence of a pandemic. Per diem psychiatric technicians work scattered hours that are neither set nor usual. While some work a sizeable number of weekly hours, the data provided by the Employer shows that some do not. Those employees who work only a few hours, and who may have other jobs, may be unable to rearrange their schedules to accommodate a manual election in this case. By the Board's definition, the per diem psychiatric technicians' schedules are "scattered," thus making a mail ballot election appropriate.

For the foregoing reasons, I direct a mail-ballot election to be conducted in this case in accordance with the election details discussed below.

## 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, as stipulated by the parties, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The parties stipulated, and I find, that the National Union of Hospital and Healthcare Employees, District 1199C is a labor organization within the meaning of Section 2(5) of the Act.
4. The parties stipulated, and I find, that that there is no collective-bargaining agreement covering any of the employees included in the appropriate unit, there is no contract bar or other bar to an election in this case, and there is no collective bargaining history for the employees herein.
5. 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.
6. The following employees of the Employer constitutes a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

***Included:*** All full-time, regular part-time, and per diem psychiatric technicians, trainers, and unit clerks employed by the Employer at its 561 Fairthorne Ave., Philadelphia, Pennsylvania facility.

***Excluding:*** All other employees, office clerical employees, confidential employees, professional employees, managerial employees, guards and supervisors as defined by the Act.

### **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 National Union of Hospital and Healthcare Employees, District 1199C.

#### **A. Election Details**

The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit on January 11, 2021. Voters must return their mail ballots so that they will be received by close of business on February 8, 2021. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

The mail ballots will be commingled and counted on February 15, 2021 at 10:00 a.m. at a location to be determined, either in person or otherwise, after consultation with the parties, provided the count can be safely conducted on that date. In order to be valid and counted, the returned ballots must be received by the Region Four office prior to the counting of the ballots.

The parties will be permitted to participate in the ballot count, which may be held by videoconference. If the ballot count is held by videoconference, a meeting invitation for the videoconference will be sent to the parties' representatives prior to the count. No party may make a video or audio recording or save any image of the ballot count.

If any eligible voter does not receive a mail ballot or otherwise requires a duplicate mail ballot kit, he or she should contact Election Clerk Ed Canavan at (215) 597-7618 no later than 5:00 p.m. on January 25, 2020 in order to arrange for another mail ballot kit to be sent to that employee.

### **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending December 19, 2020 including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who have worked an average of four (4) hours or more per week during the 13 weeks immediately preceding the eligibility date for the election.<sup>23</sup>

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(1) of the Board's Rules and Regulations, the Employer must provide the Acting 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.

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<sup>23</sup> *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990); *Davison-Paxon Co.*, 185 NLRB 21 (1970).

To be timely filed and served, the list must be *received* by the Regional Director and the parties by Tuesday, December 29, 2020. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**<sup>24</sup>

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](http://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](http://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 that will issue and that accompany 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, 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

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<sup>24</sup> The Petitioner has stated that it will not waive any of the ten days it is permitted to receive the voting list prior to the opening of the polling period.

nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review in this case 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 Acting 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](http://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 Acting 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. If a request for review of a pre-election decision and direction of election is filed within 10 business days after issuance of the decision and if the Board has not already ruled on the request and therefore the issue under review remains unresolved, all ballots will be impounded. Nonetheless, parties retain the right to file a request for review at any subsequent time until 10 business days following final disposition of the proceeding, but without automatic impoundment of ballots.

Dated: December 23, 2020



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THOMAS A. GOONAN  
Regional Director, Region Four  
National Labor Relations Board