

Genesis Health Ventures of West Virginia, L.P., d/b/a Ansted Center and District 1199, the Health Care and Social Service Union, SEIU, AFL-CIO-CLC, Petitioner. Case 9-RC-17005

September 30, 1998

DECISION AND DIRECTION

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections in an election held December 19, 1997, and the hearing officer's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 22 for and 17 against the Petitioner, with 7 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the hearing officer's findings and recommendations as modified below.²

The hearing officer found, and we agree, for the reasons stated in his report, that the challenge to the ballot of Larry Smith and the challenge to the ballot of Gay Neal should be sustained.³ We also agree with the hearing officer, for the reasons he stated, that the Employer's objections should be overruled.

We disagree, however, with the hearing officer's recommendation to sustain the challenge to the ballot of Deborah McGraw.

The parties stipulated that the appropriate bargaining unit should include "receptionists" but exclude the "bookkeeper/business office manager" and "all other employees" not specifically included in the stipulated unit.⁴ The hearing officer found that McGraw was a business office clerical rather than a receptionist and should be excluded from the unit. We disagree.

¹ Pertinent portions of the hearing officer's report are attached as an appendix.

² In the absence of exceptions, we adopt pro forma the hearing officer's recommendation that the challenges to the ballots of Marvin Settle, Mary Brown, Amy Linkenhoker, and Betty Kincaid be overruled and that these ballots be opened and counted.

³ We find it unnecessary to rely on the hearing officer's statement concerning Smith's transfer after the election (last sentence of par. 10 in the section entitled "The Challenge to the Ballot of Larry Smith"). Incidents which took place after the election have no bearing on Smith's eligibility to vote.

⁴ The parties executed a Stipulated Election Agreement which described the appropriate bargaining unit as follows: "All full-time and regular part-time service and maintenance employees employed by the Employer at Ansted Center, including restorative nursing assistants (RNAs), geriatric nursing assistant specialists, certified nursing assistants, dietary aides, cooks, the assistant dietary manager, laundry aides, housekeeping aides, the ward clerk, receptionists, the activities director and the maintenance director, but excluding the administrator, director of nursing, dietary manager, bookkeeper/business office manager, housekeeping/laundry supervisor, registered nurses (RNs), licensed practical nurses (LPNs), physical therapy and team rehab employees, the social services/admissions coordinator, all other employees, and all professional employees, guards and supervisors as defined in the Act."

It is well settled that in stipulated unit election cases the Board's function is to ascertain the parties' intent in regard to the disputed employees and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. *Viacom Cablevision*, 268 NLRB 633 (1984). Where the parties' intent is clear and does not contravene any statutory provision or Board policy, the Board holds the parties to their agreement. *Id.* Only where the objective intent is unclear or the stipulation ambiguous does the Board consider community of interest principles to determine whether the disputed employee belongs in the unit. *Lear Siegler, Inc.*, 287 NLRB 372 (1987).

Here, the stipulated unit to which the Petitioner voluntarily agreed plainly includes "receptionists." We agree with the hearing officer that this is clear and unambiguous. We do not agree with the hearing officer, however, that because McGraw performs tasks that "cross the traditional lines of classification" she should be excluded from the unit.

We find, instead, that McGraw is a dual-function employee who performs both unit work and nonunit work. "The test for determining whether a dual-function employee should be included in a unit is 'whether the employee [performs unit work] for sufficient periods of time to demonstrate that he . . . has a substantial interest in the unit's wages, hours, and conditions of employment.'" *Air Liquide America Corp.*, 324 NLRB 661, 662 (1997), quoting *Berea Publishing Co.*, 140 NLRB 516, 518-519 (1963).

Applying that test, we find that McGraw should be included in the unit. The Employer's job description for the receptionist position begins as follows:

POSITION SUMMARY: The Receptionist is responsible for operation of the switchboard and paging system. He/she answers all incoming calls, redirecting them as needed. The Receptionist greets visitors and gives directions to customers, visitors and guests, and supports clerical activities.

Other responsibilities listed for the receptionist include preparing and distributing timecards, arranging appointments and travel reservations, ordering supplies, compiling reports and typing general or technical material, maintaining current lists of customers and personnel, and coordinating outgoing and incoming mail. McGraw testified that she performs each of the tasks listed above, and her uncontroverted testimony establishes that she performs receptionist duties for at least 22 to 24 hours of her 32-hour workweek. Monday through Thursday, McGraw is the primary person responsible for greeting visitors, answering phones, and delivering the mail. Amy Linkenhoker, who is a part-time receptionist substitute for McGraw on Friday and Saturday, has been found to be in the unit. Although McGraw also prepares the payroll, processes invoices, works on the accounts payable, and processes the paperwork and forms associated with pay,

benefits and personnel matters, her testimony indicates that she spends only 4-5 hours a week on bookkeeping, about the same on typing, and spends the rest of her time answering the phones, distributing faxes, and transmitting messages from doctors and hospitals.

We conclude that Deborah McGraw is a dual-function employee who spends a substantial portion of each working day performing stipulated unit work. Because McGraw regularly performs unit work for sufficient periods of time to demonstrate that she has a substantial interest in the unit's wages, hours, and conditions of employment, she is properly included in the unit. *Air Liquide America Corp.*, supra; *Oxford Chemical, Inc.*, 286 NLRB 187 (1987). Accordingly, we shall overrule the challenge to Deborah McGraw's ballot and shall direct that her ballot be opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Marvin Settle, Mary Brown, Amy Linkenhoker, Betty Kincaid, and Deborah McGraw, serve on the parties a revised tally of ballots, and issue the appropriate certification.

APPENDIX

HEARING OFFICER'S REPORT AND RECOMMENDATIONS TO THE BOARD

The Challenge to the Ballot of Larry Smith

The Petitioner challenged the ballot of Larry Smith on the basis that he did not work sufficient hours to be considered a regular part-time employee and is a casual, on-call employee not included in the bargaining unit. The Employer takes the position that Smith is a regular part-time employee and is therefore eligible to vote in the election.

Administrator Kevin Crickard testified that, prior to March 1997, Larry Smith was a maintenance employee at a facility operated by the Employer in Williamsburg, Virginia. This facility was referred to on the record as "Piedmont." Crickard testified that Smith had been used "off and on" in maintenance for years. Crickard hired Smith as a maintenance helper to assist Maintenance Director Marvin Settle on special projects and to perform electrical maintenance and installation work that Settle was unable to perform. Smith began working on March 3. Smith, a certified electrician, was primarily responsible for the electrical installation of fans throughout the facility, a walk-in freezer, electrical heaters and a compressor. Crickard testified that Smith could perform electrical work at an hourly rate that was cheaper than hiring an outside contractor. Crickard scheduled Smith to work and Smith reported directly to him. On various occasions from March through December, Crickard loaned Smith to a facility operated by the Employer in Hilltop, West Virginia. This facility was referred to on the record as Hilltop. Smith took his timecard to Hilltop and the hours he worked there would be marked accordingly. Those hours were entered on computer payroll summaries called cost center reports. The cost center reports in the record show that Smith's Hilltop hours were billed back to the Ansted, West Virginia facility involved herein, which will be referred to where appro-

appropriate as Ansted. Smith is designated as a "maintenance helper/maintenance assistant" on his timecards and the cost center reports.

Maintenance Director Settle testified repeatedly that he was the only employee in the maintenance department and that he had no direct responsibility for work performed by Smith. In addition to the duties described by Crickard, Settle testified that Smith also hung wallpaper, a task that Settle was unable to perform. Settle testified that he believed Smith contracted for the wallpaper job. However, Crickard credibly testified that Smith was paid at an hourly rate for all work performed at Ansted. Settle further testified that Smith performed other work, such as painting and minor plumbing repairs, that Settle could perform. Smith was available to cover for Settle during a week in March when Settle was off for surgery and during a week vacation period in July. Settle testified that Smith performed his duties in his absence.

Evidence was presented which suggests that Smith was engaged in contract-type work outside the scope of the bargaining unit. Smith was hired to perform special projects that required skills that Maintenance Director Settle did not possess. These skills included advanced electrical knowledge and wallpapering expertise. Despite the fact that Settle, an eligible employee, was unable to perform these functions, they are clearly within the realm of maintenance work. Moreover, Smith is described on payroll records as a "maintenance helper/maintenance assistant." The appropriate bargaining unit agreed to by the parties specifically includes "maintenance employees."⁷ Accordingly, I find that Smith, if found to be a regular part-time employee, is a maintenance employee properly included in the unit.

Payroll records establish that Smith worked 268.75 hours at Ansted, 182.5 hours at Hilltop and 48.5 hours at Piedmont between his hire on March 3 and the eligibility date of November 23, a period of 38 weeks. The total hours for all locations average slightly more than 13 hours per week. There were numerous weeks, or parts of weeks, during which Smith was not employed at Ansted, Hilltop, or Piedmont. Smith continued to be listed on the Ansted payroll cost center reports. Administrator Crickard testified that he granted Smith a leave of absence that began on September 26. Smith did not offer, and Crickard did not request, a reason for the absence or a date when Smith would return to employment. Other than this occurrence, there is no other evidence regarding Smith's absences. In late October, Smith contacted Crickard and offered to return to work. In the 6 weeks prior to his leave of absence, Smith worked 182.5 hours at Hilltop and only 14.5 hours at Ansted. Upon his return to employment on October 27, Smith worked 67.5 hours exclusively at Ansted until December 19, the date of the election. Crickard testified that, a couple of days after the election, he

⁷ In resolving challenges to the ballots of disputed employees in elections in which the appropriate bargaining unit is stipulated by the parties, the Board will look to whether the parties clearly intended to include or exclude the category of employee in issue. *S & I Transportation, Inc.*, 306 NLRB 865 (1992); *Southwest Gas Corp.*, 305 NLRB 542 (1991); *Viacom Cablevision of San Francisco*, 268 NLRB 633 (1984). This is because a "Stipulated Election Agreement is a binding contract to which the parties will be held, and that if the unit description of that agreement is expressed in clear and unambiguous terms, the Board will not examine extrinsic evidence to determine the parties' intent regarding bargaining unit composition." *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997); *Gala Food Processing*, 310 NLRB 1193 (1993).

granted Piedmont's request that Smith return to employment at that facility. Following the election, Smith worked 8 hours each on January 1 and 17, 1998. It is not clear whether Smith had officially transferred to Piedmont by that time or whether he was on loan. Smith has not returned to work at Ansted and did not testify at the hearing.

As previously stated, the rule to determine the eligibility of a casual, on-call employee is whether the employee worked an average of 4 hours per week in the 13 weeks preceding the eligibility date. *Davison-Paxon Co.*, [185 NLRB 21 (1970)]. Between August 24 and November 23, the 13 weeks preceding the eligibility date, payroll records show that Smith worked 34.5 hours at Ansted for an average of 2.7 hours per week. Accordingly, Smith did not work sufficient hours to be classified as a regular, part-time employee.

In its brief, the Employer argues that the eligibility formula should include the hours Smith worked at all facilities operated by the Employer and not just the hours worked at the site where the bargaining unit is located. *Golden Fan Inn*, 281 NLRB 226 (1986), cited in support thereof. In *Golden Fan Inn*, the maintenance employees in question were new hires challenged as temporary employees. The facts in the case did not clearly indicate whether the employees worked in the bargaining unit or were employed at other sites owned by the employer. The Board found evidence that the disputed employees worked in the bargaining unit and concluded that it was irrelevant whether they had also worked at other facilities. The eligibility rule in *Davison-Paxon Co.* was not utilized by the Board in *Golden Fan Inn*.⁸ In the instant case, Smith is not a new hire and has a clear history of employment preceding the eligibility date. The issue is not whether he is employed in the bargaining unit but whether he worked sufficient hours in the bargaining unit to warrant inclusion. Under these circumstances, I find, contrary to the Employer, that the Board did not intend the eligibility rule in *Davison-Paxon Co.* to be modified by *Golden Fan Inn* to include hours worked by an employee in different bargaining units at other facilities operated by the same employer.⁹ Accordingly, I find that only those hours worked at Ansted are relevant to the application of the eligibility rule in *Davison-Paxon Co.*

The Employer also argues that Smith's 4-weeks' leave of absence in September and October should be excluded from the time period used to compute his eligibility. *Pat's Blue Ribbons & Trophies*, 286 NLRB 918 (1987), cited in support thereof. In that case, an employee went on maternity leave and returned 9 months later just prior to the eligibility date. Because of her leave status, the Board examined the employee's "preleave [sic] and reemployment hours and her compensation" to determine her eligibility. *Pat's Blue Ribbons & Trophies*, supra at 919. The employee worked 248 hours in the 2 months prior to her leave and 43 after her return to work for a 9-week average of at least 32.3 hours per week. Under these circumstances, the Board concluded that she was a regular part-time employee under *Davison-Paxon Co.* In contrast, the Board applied the

same reasoning to another employee on maternity leave who worked 4.5 hours in the 2 months prior to her leave and 14.5 hours upon her return and concluded that she was ineligible to vote.

The Board's holding in *Pat's Blue Ribbons & Trophies* suggests that some accommodation may be made for a leave of absence. However, it does not appear to establish a hard, fast rule for the mathematical application of the eligibility formula in *Davison-Paxon Co.* If, like in *Pat's Blue Ribbons & Trophies*, the hours Smith worked in the 2 months prior to his leave on September 26 are included with his hours between his return to work on October 27 and the eligibility date, Smith worked a total of 42.25 hours in 11 weeks for an average of 3.8 hours per week. If the 4 weeks' leave of absence is excluded from the time period used to calculate eligibility and the time period is extended back an additional 4 weeks to July 27, Smith worked a total of 42.25 hours in 13 weeks, for an average of 3.25 hours per week. If the leave of absence is merely excluded and Smith's 34.5 hours are divided by only 9 weeks, the average per week is 3.8 hours. Under any of these more liberal applications, Smith failed to work the 4 hours per week minimum established by the eligibility rule in *Davison-Paxon Co.*¹⁰

Smith's status as a casual, on-call employee is supported elsewhere in the record. Maintenance Director Settle did not consider Smith to be a regular employee in the maintenance department. Although Smith's duties included maintenance work, he was primarily hired to complete special projects that required his particular expertise. These projects, wallpapering and electrical installations, by their nature were of limited duration. Throughout his employment, Smith floated freely between Ansted and Hilltop. His leave of absence, which was without specific duration and granted without question, came after he had not had significant employment at Ansted in at least six weeks. Instructive, if not controlling, is the fact that Smith was loaned to Piedmont almost immediately following the election and worked only 16 hours at Ansted in the next 4 weeks while permanently transferring to Piedmont.

Accordingly, I conclude that Smith is a casual, on-call employee and not eligible to vote in the election. I therefore recommend that the Board sustain the challenge to the ballot of Larry Smith and that it be neither opened nor counted.

The Challenge to the Ballot of Deborah McGraw

The Petitioner challenged the ballot of Deborah McGraw on the basis that she is a bookkeeper, a classification excluded from the bargaining unit. The Employer takes the position that McGraw is a receptionist included in the bargaining unit and is therefore eligible to vote in the election.

McGraw testified that she works 32 hours per week, Monday through Thursday at a desk with a glass partition near the entrance to the facility. Her desk is adjacent to the office of Bookkeeper/Business Office Manager Beverly McCutcheon, which is likewise adjacent to the office of Administrator Kevin

⁸ The Board does not strictly apply the eligibility rule in *Davison-Paxon Co.* to new employees hired in the quarter preceding the eligibility date. *Modern Food Market*, 246 NLRB 884 (1979).

⁹ Smith was challenged as a casual, on-call employee. Based upon the application of the eligibility rule in *Davison-Paxon Co.* and my findings herein, I have not considered Smith's eligibility as a dual function employee. *Fleming Industries*, 282 NLRB 1030 (1987), and cases cited therein.

¹⁰ In *Trump Taj Mahal Associates*, supra, Board Member Raudabaugh posited that application of the eligibility rule in *Davison-Paxon Co.* did not establish a per se showing of regularity of employment and community of interest. The Board disagreed. Although the rule may be viewed as substituting rote mathematics for reasoned judgment, it offers the parties a clear, bright line that permits "optimum employee enfranchisement and free choice, without enfranchising individuals with no real continuing interest in the terms and conditions of employment." *Trump Taj Mahal Associates*, supra at 296.

Crickard. Her nametag, which she sometimes wears, designates her as “receptionist/personnel.” She is listed as “Bookkeeper/Personnel” on the Employer’s monthly newsletter. McGraw typed an internal memorandum concerning a disciplinary investigation of an employee and designated her position as “Payroll/Benefits/Personnel.” She is classified on the Employer’s payroll cost center reports as “Manager-Personnel Ctrs” and receives a wage of \$10.61 per hour, slightly higher than the \$10.59 per hour received by McCutcheon.

McGraw testified that she performed most, if not all, of the tasks outlined in the job description for a receptionist. She operates the switchboard and paging systems, takes incoming calls, greets visitors, coordinates and distributes mail and time-cards, orders supplies, sets up appointments for Administrator Crickard, and performs other clerical support work. In addition to these duties, McGraw also testified that she is responsible for preparing the payroll sheets, works on the accounts payable, prepares invoices and types memoranda and letters for department heads and supervisors. She is primarily responsible for the Employer’s benefits program and is called upon to explain those benefits to employees in staff meetings. McGraw answers inquiries from employees regarding their pay and benefits, puts through changes in payroll direct deposit, and keeps track of vacation and attendance records. McGraw, along with department heads and the bookkeeper/business office manager, has complete access to the personnel files of all employees for purposes of filing and record keeping. Additionally, she occasionally attends department head meetings when benefits or personnel policies are discussed. There is no evidence that she formulates those policies.

The bargaining unit agreed to by the parties specifically includes “receptionists” and excludes the “bookkeeper/business office manager” and “all other employees” not included in the bargaining unit. The unit specifically names various classifications included and excluded from the unit, but makes no mention of office clerical employees in general. At first blush, it might appear that the stipulated bargaining unit is ambiguous or unclear.¹¹ However, I do not find that to be the case. As a general rule, business office clerical employees are excluded from customary service and maintenance units. *Rhode Island Hospital*, 313 NLRB 343, 359 (1993); *Mercy Hospitals of Sacramento*, 217 NLRB 765, 770 (1975). However, receptionists have been included in health care service and maintenance units where they do not perform distinct business office duties such as handling finances, billing and extensive personnel functions. *Lincoln Park Nursing & Convalescent Home*, [318 NLRB 1160, 1164 (1994)]; *Charter Hospital of Orlando South*, 313 NLRB 951 (1994). Moreover, the phrase “all employees” has been found to be of sufficient clarity to warrant unit placement. *Laidlaw Transit, Inc.*, supra. The stipulated unit herein does not expressly include or exclude classifications that would clearly violate Board policy or the Act. The parties have presented no evidence that the unit does not reflect their agreement. It is, therefore, clear and unambiguous.

¹¹ Extrinsic evidence that the intent of the parties is unclear might be gleaned from the fact that the Petitioner, for various reasons, challenged the ballot of every voter who could arguably be a receptionist and the Employer now argues that every clerical but the bookkeeper/business office manager is merely a receptionist. Regardless of these divergent positions, the Board will not examine extrinsic evidence if the unit is expressed in clear and unambiguous terms. *Gala Food Processing, Inc.*, supra, and fn. 6, above.

The question is whether McGraw is a receptionist included in the unit or a business office clerical excluded with “all other employees.” McGraw performs many receptionist duties including answering the phone, delivering the mail, greeting visitors and typing correspondence. The fact that McGraw performs these duties in addition to others, is not persuasive. The 60-bed facility involved herein is among the smallest of the approximately 250 facilities operated by the Employer. It is not unusual in these circumstances that an employee performs tasks that cross traditional lines of classification. However, McGraw also prepares the payroll, processes invoices and works on the accounts payable. She processes most, if not all, of the paperwork and forms associated with pay, benefits and personnel matters. Except for her nametag, McGraw is not designated as a “receptionist” on any other document on the record. Most significantly, McGraw is classified on payroll records as the “Manager-Personnel Ctrs” and is paid on par with other managers far above the rate paid to Receptionist Linkenhoker. In view of the evidence when taken as a whole, I conclude that McGraw is not a receptionist but is a business office clerical properly excluded from the bargaining unit. *Lincoln Park Nursing & Convalescent Home*, supra at 1164.

Accordingly, I conclude that McGraw is a business office clerical properly excluded from the bargaining unit and not eligible to vote in the election. I therefore recommend that the Board sustain the challenge to the ballot of Deborah McGraw and that it be neither opened nor counted.

The Challenge to the Ballot of Gay Neal

The Petitioner challenged the ballot of Gay Neal on the basis that she is a supervisor at the Employer’s Hilltop facility and/or that she is a bookkeeper, a classification excluded from the bargaining unit. The Employer takes the position that McGraw is a regular part-time receptionist included in the bargaining unit and is therefore eligible to vote in the election.

Called by the Petitioner, Gay Neal testified that she is employed full time at the Employer’s Hilltop facility as a data processor. In August 1997 she began working at the Employer’s Ansted facility to earn extra income. Neal is able to set her own schedule on the weekends but primarily works on Saturday. Neal testified that she works in the office of the bookkeeper/business office manager where she has access to McCutcheon’s computer. Neal requires access to the terminal in order to “back up the computer.” This involves retrieving patient care information from three network computers at the facility, organizing the information, inputting the information on the facility’s network file server and creating a backup tape of the inputted information to protect against data loss. Neal testified that she cannot leave the computer while doing the backup because someone could log-in and the files would be lost. Neal testified that her responsibilities include patient billing and that she has access to patient billing files. According to Neal, her primary responsibility is to complete tasks assigned to her by McCutcheon, including computer backup and billing. Neal stated that McCutcheon would finish any work that Neal was unable to complete. Neal also testified that she answered telephones, did filing and assisted visitors.

Neal’s testimony was somewhat confused. On direct examination, Neal testified that she spent the majority of her time backing up the computer. On cross-examination, she testified that 80 percent of her time was spent on receptionist duties and 20 percent on patient billing. When I attempted to clarify the

record, Neal explained that she spent a majority of her time backing up the computer, but only on the days when McCutcheon instructed her to back up the records. On cross-examination, Neal stated that she was not sure why the Employer's records listed her as a medical records clerk, and then went on to describe how she inputted patient medical records into the computer network. Neal testified that she and receptionist Linkenhoker worked together on Saturdays on overlapping shifts. Neal works in McCutcheon's office. Linkenhoker works at the desk normally occupied by Deborah McGraw which is adjacent to McCutcheon's office. By the time of the hearing, Neal and Linkenhoker had worked together for almost 3 months. However, upon repeated questioning, Neal was unable to describe what Linkenhoker did during the day.

Administrator Crickard testified that he determined there was a need for a receptionist on Saturdays to answer the phones, take messages, greet visitors and be available in the business office. Around early August, he arranged for Neal to work a weekend schedule at Ansted. In November, Crickard again assessed the situation and hired Linkenhoker to serve, according to Crickard, as the primary receptionist on Fridays and a co-receptionist on Saturday. The record reflects that there continues to be no receptionist on Sundays. Instead, managers and supervisors on the weekend rotation are responsible for answering the phone, taking messages and greeting visitors.

According to the Employer's payroll cost center reports, Neal is a medical records clerk earning \$7.56 per hour. The hours Neal works at Ansted are billed to Hilltop. Her paycheck and W-2 forms designate Hilltop as her employer. The Employer's payroll records for the period August 24 to November 23 show that Neal worked 47.75 hours at Ansted.

The record contains no evidence whatsoever that Neal performs supervisory duties at Ansted or Hilltop. I do not conclude that Neal is ineligible to vote in the election on the basis that she is a supervisor.

As with the challenge to the ballot of Deborah McGraw, the threshold issue is whether Neal is a receptionist and included in the unit or a business office clerical and ineligible to vote. I credit Neal's testimony that she spends most of her time in McCutcheon's office backing up the computer or completing other assignments normally performed by the bookkeeper/business office manager. These assignments include patient billing and organizing patient medical records. As with McGraw, I am sure that Neal has found it necessary on occasion to answer phones, take messages and greet visitors. However, I conclude that Neal spends very little time performing these functions. Most of her day is spent in the business office and she is unable to leave the computer terminal when backing up records. Other evidence further supports the fact that Neal is not a receptionist. Crickard's testimony that both Neal and Linkenhoker are Saturday receptionists is not substantiated by the facts. When taken as a whole, Neal's testimony supports that she was hired to assist McCutcheon in the completion of her bookkeeper/business office manager duties and, secondarily, to perform receptionist duties as needed. When it became apparent to Crickard that McCutcheon and Neal were to busy to adequately perform receptionist duties on Fridays and Saturdays, he hired Linkenhoker to fill the gap. The fact that Linkenhoker performs receptionist duties and Neal does not is substantiated by the fact that Neal does not know what duties Linkenhoker performs during the day. This is not because Neal is inattentive. It is because she is working in McCutcheon's

office and focused on her business office clerical duties. Finally, I note that Neal is classified as a medical records clerk by the Employer and that her wages at Ansted are 32-percent higher than Linkenhoker's.

For the reasons set forth above, I conclude that Neal is not a receptionist but a medical records clerk and therefore a business office clerical properly excluded with "all other employees" from the bargaining unit. In the event Neal is found to be a receptionist and included in the unit, the record established that Neal worked 47.75 hours at Ansted during the 13 weeks preceding the eligibility date for an average of 3.7 hours per week. Accordingly, Neal is a casual, on-call employee and should likewise be excluded on that basis. *Davison-Paxon Co.* supra.¹²

I therefore recommend that the challenge to the ballot of Gay Neal be sustained and that it be neither opened nor counted.

III. THE OBJECTIONS

The Employer's Objection 1

This objection alleges that the Petitioner encouraged a plan by prounion employees to intentionally call off sick in order to disrupt the Employer's operations and to require employees who did not support the Petitioner to work mandatory overtime.

In support of this objection, the Employer presented the testimony of Administrator Kevin Crickard. Crickard testified that the Employer has a mandatory overtime system called the "star system." Employees on a particular shift receive a star by their name on the work schedule that designates them as the employee who will be required to work an additional shift if an employee "calls off" and is absent. The star rotates daily from one employee to the next. For example, if there are 10 employees on a shift, then an employee would only be starred every tenth day. The star system is for mandatory overtime only. Employees can volunteer for the shift, thereby relieving the starred employee of their obligation for that day.

The Employer presented Evelyn Briles, certified nursing assistant, as a witness in support of this objection. On November 26 following the employee meeting described fully in Employer Objection 9, Briles rode with an employee to Gino's Restaurant in Ansted, West Virginia. When they arrived at Gino's, Petitioner Organizer McFarland was in the banquet room with employees eating pizza and drinking sodas.¹³ Other employees later joined the group. The meeting was very informal. Employees sat at different tables and McFarland moved among them, sitting and chatting. The employees discussed various subjects, both personal and work related. Briles testified that a few employees expressed their satisfaction that Crickard had been upset when McFarland came to the employee meeting held earlier that day. Briles did not recall the identity of these employees. Briles stated that an employee made a comment that a way "to further agitate certain employees that were not supportive of the Union would be to call off on their star day." Briles could not recall the identity of the employee who made this statement. Briles testified that McFarland heard the comment and stated, "[Y]es, that would be great, but what kind of problem would that create at work all

¹² The record shows that Neal is "loaned" to Ansted from Hilltop and she might be considered a dual-function employee. *Fleming Industries*, supra. Because Neal is ineligible on other grounds, I have not examined her potential status as a dual-function employee.

¹³ I find that McFarland is a responsible agent of the Petitioner under Sec. 2(13) of the Act.

the way around?” Briles did not recount the employees’ response to McFarland’s question. According to Briles, various unidentified employees at the gathering stated at some point that they would target Rhonda Wilson, Rachel Willis, and April Haynes for calling off work.

On cross examination, Briles testified that she attended three “formal” union meetings conducted by McFarland. At those meetings, McFarland told employees to work their schedules as much as they could because it would cause problems at work if employees called off work.¹⁴ She further testified that, at the meeting at Gino’s, McFarland did not directly instruct employees to call off work.

The Employer introduced into evidence a chart which lists all of the incidents where employees called off work between November 30 and December 17. The chart designates employees as supporters or nonsupporters of the Petitioner based upon whether the Employer saw them wear union buttons during the campaign. Sixteen incidents were cited where employees called off work. Of those, 11 involved voluntary overtime and only 5 incidents involved the use of the star system. Of those five, one incident involved a “pro-union” employee calling off which resulted in a “non-union” employee being required to work and another incident involved a “non-union” employee calling off which resulted in a “pro-union” employee being required to work. The remaining three incidents of mandatory overtime involved both “non-union” employees or “pro-union” employees.

The Employer also requested that I take administrative notice of an unfair labor practice charge in Case 9–CB–9564–3, in which it was alleged that the Petitioner engaged in similar conduct with another employer. I have taken administrative notice of the charge and find that the charge was withdrawn prior to issuance of complaint.

Based upon the foregoing evidence presented by the Employer, I conclude that the Employer has not established that the Petitioner engaged in objectionable conduct. Briles’ testimony was spotty at best. This is not surprising since the scene at Gino’s was one of numerous employees moving about, eating, drinking and discussing a myriad of subjects all at the same time. It was far more an informal lunch party than a meeting. The Employer’s best evidence is that, in response to a suggestion by an unidentified employee that employees could agitate non-union employees by calling off on their star day, McFarland acknowledged the statement but then asked what problems it would cause. Briles did not recount any more of the conversation that would shed further light as to McFarland’s concerns. However, Briles’ further testimony clearly shows that, on other occasions, McFarland told employees to work their schedules as best they could. Moreover, the chart introduced by the Employer shows that there was only 1 incident out of 16 that could even arguably support its objection. Accordingly, there appears to be no probative evidence whatsoever to support the Employer’s Objection 1.

I therefore recommend that the Board overrule the Employer’s Objection 1 in its entirety.

The Employer’s Objection 6

In support of this objection, the Employer presented Rhonda Wilson as a witness. Wilson testified that she is a geriatric

nursing assistant specialist and has been employed by the Employer for nine years. Wilson testified that, on or about November 16, she was having a conversation with Rachel Willis. Willis is also a geriatric nursing assistant specialist employed by the Employer and a close friend of Wilson. Wilson states that Willis told her that “when the Union went through I would be one of the first ones they got rid of” and that “there was a lot of Union people saying that.”

The Petitioner called Rachel Willis as a witness. Willis testified that she was not involved in the Petitioner’s campaign and engaged in no activities in support of the Petitioner other than to attend one meeting. Willis testified that, on or about November 16 in a conversation with Wilson, she told Wilson that “if the Union came in she might be one of the first ones to lose her job.” Wilson asked Willis what she meant. Willis replied that “we might all be hunting jobs before this thing is over.” Wilson testified that she made the statements concerning job loss based upon unsubstantiated rumors she had heard. Willis testified that no official of the Union, including Petitioner Organizer McFarland, ever told her that any employee would lose their job if the Union came in.

The evidence presented is nothing more than a conversation and conjecture between two employees. There is no evidence that the Petitioner encouraged, authorized or condoned the statements made by Willis. There is no evidence whatsoever that the Petitioner threatened an employee with loss of employment for any reason.

I therefore recommend that the Board overrule the Employer’s Objection 6 in its entirety.

The Employer’s Objection 9

In support of this objection, Administrator Kevin Crickard testified that on November 11 he entered the facility and found Petitioner Organizer McFarland standing in the lobby area with a group of employees and their children. McFarland introduced herself to Crickard and offered to shake hands. Crickard refused and asked McFarland to leave the facility because she was trespassing. The conversation took about 30 seconds. Crickard then called the police to have McFarland removed. McFarland remained in the lobby for about an hour until the police arrived. Crickard testified that the group was not loud or rowdy and did not chant or clap hands. When the police arrived, they asked McFarland to leave and she did so immediately.¹⁵

Administrator Crickard further testified that on November 26 he conducted a mandatory staff meeting for all employees in the dining room at the facility. Employees not scheduled to work were required to attend the meeting. Approximately 45 employees were present. Crickard stated that at about 5 minutes into the meeting he heard some “commotion” in the back of the room and saw Petitioner Organizer McFarland “forcing her way into the meeting.” Crickard testified that he saw McFarland enter the rear of the dining room with around 10 employees. Chez Cepolla, a labor relations consultant for the Employer, was standing at the entrance. Crickard testified that he watched McFarland “push her way into him and by him and through him into the room.” According to Crickard, McFarland was “loud and disruptive” and “immediately took over and

¹⁴ The Petitioner presented witnesses that corroborated that McFarland, at various times, instructed employees not to call off work without a legitimate reason.

¹⁵ This incident occurred prior to the filing of the petition and thus falls outside the critical period for objectionable conduct. I recount the incident here only because the Employer presented it in support of its allegations of objectionable conduct that occurred on November 26.

started saying that she's here to represent the employees" and that she wanted "to discuss issues." Crickard asked McFarland to leave and, according to Crickard, McFarland replied, "[N]o, I'm not going to leave." Crickard replied, "[T]his meeting is over" and canceled the meeting. McFarland then left with some of the employees and did not return to the facility until the date of the election. The conversation between Crickard and McFarland lasted about 30 seconds. Employees began arguing with each other, some loudly, over whether McFarland had a right to be there. The entire incident took around 2 or 3 minutes. Crickard testified that he had previously instructed the charge nurses to call the police if McFarland entered the facility. The police were apparently called but McFarland had already left the facility. Crickard testified that he reconvened the meeting about 10 to 15 minutes after the incident. Fewer employees attended the second meeting because some employees had left the facility when the first meeting was cancelled.

Crickard testified that, following the incident of November 26, the Employer continued with its election campaign and distributed literature, showed videos and conducted small group meetings with employees.

The Employer presented Evelyn Briles, certified nursing assistant, as a witness concerning the November 26 meeting. Briles testified that McFarland, accompanied by some employees, arrived around 5 minutes after the meeting started. Some of the employees with McFarland passed out doughnuts. McFarland told Crickard that she wanted to talk about "certain issues concerning the Union and hopefully to have a chance to clear up some of the differences between the non-Union employees and the Union employees." Some of the employees became upset and Crickard immediately asked McFarland to leave. After a brief exchange between Crickard and McFarland, Crickard asked someone to call the police and McFarland left the room.

The Petitioner presented various witnesses in rebuttal, including Mae Ross, Ida Bragg, and Daniel Gill. The only significant new fact introduced is that Gill and Bragg testified that McFarland was told by Chez Cepolla before entering the dining room that she was not supposed to be there, that she was trespassing and would have to leave. Other than that, their testimony concerning the facts of the November 26 meeting essentially corroborate the facts as presented by Crickard and Briles, but without the hyperbole supplied by Crickard. No other witness testified that McFarland was loud, pushy, forceful or disruptive although I am sure that was the conclusion reached by Crickard, who, during testimony, remained visibly angered concerning the incident. I credit the facts related by Crickard, but not his characterizations of the incident.

The facts as I credit them show that McFarland entered the dining room after being told not to by Cepolla. Her entrance caused employees, both prounion and nonunion, to talk and even argue about her presence at the meeting. McFarland announced that she was there as the representative of certain employees and wanted essentially to offer the Union's side of the story. Crickard immediately told McFarland to leave, announced that the meeting was canceled and instructed that the police be notified and called to the scene. McFarland left the

facility and did not return. The entire incident took well under five minutes. After 10 minutes or so, Crickard reconvened the meeting.

It is clear that fewer employees attended the second meeting than the first. Some employees followed McFarland to Gino's. Others just left. The employees did not leave the room upon McFarland's entrance: she did not drive them out. They left because Crickard, regardless of the reason or justification, told them the meeting was cancelled. Those that did not leave the facility attended the second meeting. Others who left returned for the meeting.

In this objection, McFarland's conduct on November 26 constitutes the single incident of alleged misconduct to be considered. McFarland's conduct did not involve physical assault and her brief statements were not threatening or coercive. Her conduct and statements cannot reasonably be found to have caused fear among employees. Although, most of the employees in the bargaining unit witnessed the conduct, there is no evidence that the incident continued to be a source of debate or argument among employees long after it occurred. The incident occurred more than 3 weeks prior to the election and the Employer continued to conduct its election campaign without further interruption or hindrance. Under these circumstances, I conclude that McFarland's conduct did not interfere with the right of employees to freely and fairly exercise their choice in the election. *Avis Rent-A-Car System*, 280 NLRB 580, 581 (1986).

McFarland was clearly informed that her presence at the meeting was uninvited. However, after making her brief statement, McFarland was ordered to leave and she did so almost immediately. McFarland's actions did not expose the Employer as powerless to defend its own property rights and were not, therefore, inherently objectionable. *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). I find that McFarland's conduct on November 26 was not objectionable and does not warrant setting aside the election. Compare to *Mediplex of Connecticut, Inc.*, 319 NLRB 281, 289 (1995); *Edward J. DeBartolo Corp.*, 313 NLRB 382 (1993); *Station Operators, Inc.*, 307 NLRB 263 (1992).

I therefore recommend that the Board overrule the Employer's Objection 9 in its entirety.

IV. CONCLUSIONS AND RECOMMENDATIONS

For the reasons set forth above, I recommend that the challenges to the ballots of Marvin Settle, Mary Brown, Amy Linkenhoker, and Betty Kincaid be overruled and their ballots be both opened and counted. I recommend that the challenges to the ballots of Larry Smith, Deborah McGraw, and Gay Neal be sustained and their ballots be neither opened nor counted. I further recommend that the Employer's Objections 1, 6, and 9 be overruled in their entirety.¹⁶

¹⁶ The filing of exceptions hereto is governed by Sec. 102.69(f) of the Board's Rules which provides that they must be filed with the Board within 14 days of the issuance of this report.