

**Pontiac Osteopathic Hospital and Service Employees International Union, Local, 79, Intervenor and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Petitioner.** Cases 7-RC-21181 and 7-RC-21183

March 31, 1999

DECISION AND ORDER REMANDING

BY MEMBERS FOX, HURTGEN, AND BRAME

On July 8, 1998, Hearing Officer Michael D. Pearson issued his Report and Recommendations on Objections to Conduct Affecting the Results of the Elections conducted March 19, 1998, pursuant to a Decision and Direction of Election. The hearing officer recommended that the Employer's request to withdraw certain objections be approved and that the remaining objections in Cases 7-RC-21181 and 7-RC-21183 be overruled and that a Certification of Representative issue in both cases.<sup>1</sup> The Employer filed timely exceptions and a brief in support of exceptions to the hearing officer's report.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The hearing officer refused to take evidence regarding the Employer's Objection 8 in Case 7-RC-21181, which alleged that "med techs" were professional employees erroneously included in a technical unit. We find, for the reasons discussed below, that evidence should be taken to determine whether "medical technologists," referred to in the unit description as "med techs, are professional employees under the Act."<sup>2</sup>

The unit description in Case 7-RC-21181 is as follows:

All full-time, regular part-time, and contingent technical employees employed by the Employer at its facility located at 50 N. Street, Pontiac, Michigan, including LPNs, telemetry techs, surgical techs, med techs, cytotechs, cardiology techs, bio-med techs, nuclear med techs, x-ray techs, respiratory therapist, ct techs, computer coordinator med tech, cardio specialist procedures tech, x-ray special procedures techs, cardio stenographer, cardio cath techs, and ultrasound techs; but excluding physicians, RNs, professional employees, skilled maintenance employees, business office clerical employees, guards and supervisors as defined in the Act.

<sup>1</sup> The petitions in Cases 7-RC-21181 and 7-RC-21183 were consolidated for preelection hearing and decision with the petition in Case 7-RC-21182 involving a residual unit of service and maintenance employees. The Employer filed objections to the election in Case 7-RC-21182 that were considered separately in a supplemental decision.

<sup>2</sup> The other objections in Case 7-RC-21181 and the objections in Case 7-RC-21183 will be held in abeyance pending the issuance of the hearing officer's supplemental report on the Employer's Objection 8.

In its Objection 8, the Employer asserts that the "Section 7 rights of the employees have been abridged by the erroneous inclusion of Medical Technologists in the unit description. Said employees possess education and expertise setting them apart and are properly 'other professionals' under the Rules." The Employer made an offer of proof during the hearing that it was prepared to present evidence to establish that the medical technologists were professional employees.

The hearing officer rejected that offer of proof and would not allow testimony to establish whether the "med techs" are professional employees. The hearing officer concluded that the presumption that medical technologists are professional employees<sup>3</sup> was rebutted here by the Employer's conduct.<sup>4</sup> The hearing officer, thus, concluded that Objection 8 in Case 7-RC-21181 was in the nature of a postelection challenge, and therefore rejected the offer of proof. For the reasons stated below, we find that even though the Employer failed to raise the issue of the medical technologists' alleged professional status prior to the election, the Regional Director had received sufficient information to put him on notice that there was a substantial issue as to whether these employees are professionals. Under these circumstances, we find that it was an error for the Regional Director not to conduct a further inquiry to determine the medical technologists' status.

We first note that Section 9(b)(1) of the Act provides that the Board shall not "decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Thus, the Act effectively grants professional employees the right to decide by a majority vote whether they wish to be included in a unit with non-professional employees.<sup>5</sup>

Next, we note that, under Board precedent, there is a rebuttable presumption that medical technologists are professional employees. In *Group Health Assn.*, supra, 317 NLRB at 244, the Board stated that:

[W]e will apply a rebuttable presumption in all future cases that medical technologists are professional employees as defined in Section 2(12) of the Act. Any party seeking to rebut this presumption will carry the burden of establishing that the medical technologists in question do not engage in the duties customarily assigned to this classification of employees.

<sup>3</sup> See, *Group Health Assn.*, 317 NLRB 238 (1995).

<sup>4</sup> In this regard, the hearing officer noted that in response to the election petition, the Employer presented a list of its technical employees including the "med techs." Further, the Employer stipulated that the "med techs" were in the technical unit. The Employer did not attempt to litigate the eligibility of the "med techs" during the preelection hearing and no evidence was taken as to their status. Further, the Employer did not attempt to challenge the "med techs" ballots.

<sup>5</sup> See *Sonotone Corp.*, 90 NLRB 1236 (1950).

Here, although the stipulation referred to the employees at issue as “med techs,” and, thus, on its face did not give rise to the rebuttable presumption of professional employee status as set forth in *Group Health*, two exhibits submitted by the Employer in the preelection hearing listed these employees as medical technologists.<sup>6</sup> Further, and most importantly, after the issuance of the Decision and Direction of Elections on February 18, 1998, and prior to the election on March 19, 1998, the medical technologists asserted their professional status to the Regional Office by letter, dated March 13, 1998.<sup>7</sup> Thus, in our view the Regional Director, prior to the election, had sufficient notice that the term “med techs” in the unit stipulation referred to medical technologists. Given the rebuttable presumption that medical technologists are professional employees, further inquiry was required regarding the status of these employees.

That the Employer stipulated to the inclusion of the medical technologists in the unit cannot override the requirements of Section 9(b)(1) in this case.<sup>8</sup> Thus, in *Valley View Hospital*, 252 NLRB 1146 (1980), the Board concluded that, a “stipulation, alone, cannot override the mandate of the statute regarding the inclusion of professional employees in a nonprofessional unit.” In that case the General Counsel had filed a Motion for Summary Judgment on complaint allegations that the Respondent had violated Section 8(a)(5) of the Act by refusing to bargain with the certified bargaining representative in the unit found appropriate, a stipulated unit of nonprofessional employees which included registered nurses. In denying the General Counsel’s motion, the Board noted that at the time the certification election occurred, the Regional Director had been aware that the unit included registered nurses, who as professional employees normally would be entitled under Section 9(b)(1) to vote regarding whether they desired inclusion in a unit with

<sup>6</sup> One of these exhibits was represented, by the Employer at the preelection hearing, as containing the names and classifications of the employees in all three petitioned-for units. This list does not show a classification of “med techs” but does list approximately 29 medical technologists. The second exhibit also was represented, by the Employer at the preelection hearing, to be a listing of the employees and classifications for all three petitioned-for units, but these were separated into groups representing each of the units. For the technical unit, again there was no classification for “med techs”, however, approximately 30 employees were listed as medical technologists. The Petitioner’s attorney, during the postelection hearing, represented that “med techs” and medical technologists were the same persons and were so understood among the parties.

For these reasons, we disagree with the hearing officer’s attempt to distinguish *Sunrise*, infra, and *Valley View Hospital*, infra, on the ground that “it was perfectly clear” that the employees, registered nurses, at issue in those two cases were professional employees, while here, “it is not totally clear that the med techs are professional employees.”

<sup>7</sup> The letter was received by the Regional Office on March 16.

<sup>8</sup> In Member Hurtgen’s view, a unit stipulation varying the statutory status of an employee is insufficient if it does not include supporting facts.

nonprofessional employees. In view of the stipulation of the parties, however, the Regional Director had found the unit to be appropriate and had failed to conduct a *Sonotone* election. In finding that to be an error, the Board stated that:

There was no testimony presented at the representation hearing which would indicate [that the registered nurses] were technical employees, or performed duties different from those implied in their job classification. The stipulation, alone, cannot override the mandate of the statute regarding the inclusion of professional employees in a nonprofessional unit, or that of established Board policy. [252 NLRB at 1147.]<sup>9</sup>

We also do not agree with the hearing officer’s conclusion that the Employer’s conduct rebutted the presumption that medical technologists are professional employees. In so finding, the hearing officer relied on the Employer’s inclusion of “med techs” in a preelection list of technical employees, its stipulation that “med techs” were in the technical unit, and its failure to litigate the status of the “med techs” at the preelection hearing or to challenge their ballots. Yet none of this conduct is relevant to the requirement, set forth in *Group Health Assn.*, supra, that the party seeking to rebut the presumption that medical technologists are professionals must meet the burden of showing that they do not engage in the duties customarily assigned to medical technologists.

We, therefore, conclude that a hearing is warranted in Case 7–RC–21181 to determine the professional or nonprofessional status of the employees referred to in the unit stipulation as “med techs.” If the employees in question here are determined to be professionals, the election in Case 7–RC–21181 must be set aside and a *Sonotone* election directed. See *Sunrise*, supra.

Accordingly, we shall remand this objection to the Regional Director who shall prepare and cause to be served on the parties a notice of hearing before a hearing officer at a time and place to be determined by the Regional Director.

#### ORDER

It is ordered that this proceeding is remanded to the Regional Director for a supplemental report based on evidence adduced at a hearing. The supplemental report shall contain recommendations concerning the professional status of the medical technologists, referred to as “med techs” in the stipulated appropriate unit in Case 7–

<sup>9</sup> See also *Sunrise, A Community for the Retarded, Inc.*, 282 NLRB 252 (1986). There the employer challenged the ballots of registered nurses, included in the unit stipulation. The Board concluded that the stipulated unit on its face violated Sec. 9(b)(1), as it included registered nurses with nonprofessional employees without giving the registered nurses an opportunity to vote regarding whether they wished to be included in the unit.

RC-21181 and also recommendations regarding the disposition of the unit stipulation.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of credibility of witnesses, findings of fact, and recommendations to the Board on the disposition of the objection. Within 14 days from the

issuance of the report, any party may file with the Board in Washington, D.C., eight copies of exceptions to the report. Immediately on the filing of exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the hearing officer.