

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

WATERS OF SEVEN OAKS

Employer

and

**Case No. 26-RC-8218
(formerly 30-RC-6239)^{1/}**

SEIU, LOCAL 150, AFL-CIO, CLC^{2/}

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds: ^{3/}

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are thereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. ^{4/}

3. The Petitioner involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining unit within the meaning of Section 9(b) of the Act: ^{5/}

Included: All full-time and part-time (including individuals classified by the Employer as casual) certified nursing assistants (CNAs), dietary aides, cooks, housekeeping and laundry employees, licensed physical therapy assistants (LPTAS), restorative aides, medical records clerk and activities leadperson employed by the Employer at the its Glendale, Wisconsin facility.

Excluded: All other employees, including office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election

date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the **SEIU, LOCAL 150, AFL-CIO, CLC**.^{6/}

LIST OF VOTERS

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days of the date of this Decision. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Milwaukee Regional Office (Region 30), 310 West Wisconsin Avenue, Suite 700, Milwaukee, WI 534203-2211, on or before **November 1, 2000**.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a Request for Review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC

20570-0001. This request must be received by the Board in Washington by **November 8, 2000.**

DATED at Memphis, Tennessee, this 25th day of October, 2000.

/s/

Ronald K. Hooks, Director, Region 26
National Labor Relations Board
1407 Union Avenue, Suite 800
Memphis, TN 38104-3627

1/ On October 5, 2000, the General Counsel issued an Order Transferring Case from Region 30 to Region 26. Pursuant to said Order, to the extent that further proceedings are appropriate to effectuate this Decision, this case will automatically transfer back to Region 30 and will continue as Case 30-RC-6239, except that Region 26 will retain jurisdiction only with respect to pre-election issues relating to the substance of this Decision.

2/ The Petitioner's name appears as amended at the hearing.

3/ The Employer and the Petitioner filed timely briefs which have been duly considered.

4/ The parties stipulated that Waters of Seven Oaks, hereinafter referred to as the Employer, is a Wisconsin corporation with an office and place of business located in Glendale, Wisconsin, where it is engaged in the operation of a nursing home and rehabilitation facility. During the past 12 months, a representative period, the Employer

received gross revenues in excess of \$100,000 and purchased and received goods valued in excess of \$50,000 directly from firms located outside the State of Wisconsin.

5/ The Petitioner seeks to represent all full-time, part-time and casual certified nursing assistants (CNAs), housekeeping and laundry employees, dietary aides, restorative aides and activities leadperson employed at the Employer's facility.

The Employer asserts an appropriate unit is all full-time and regular part-time employees including CNAs, housekeeping and laundry employees, dietary aides, restorative aides, activities leadperson, medical records clerk, medication technician, licensed practical nurses (LPNs), cooks, receptionists, occupational therapists, physical therapists, speech and language pathologists, certified occupational therapist aides (COTAs) and licensed physical therapist aides (LPTAs), excluding all registered nurses (RNs), professional employees, temporary employees, confidential employees, casual employees, guards and supervisors as defined in the Act.

The Petitioner asserts the additional employees sought by the Employer should not be included in an appropriate bargaining unit. Specifically, the Petitioner asserts the LPNs, medical records clerk and cooks are supervisors within the meaning of the Act; the LPNs are technical employees and, thus, should be excluded; the receptionists, medication technician and medical records clerk lack a community interest with an appropriate bargaining unit; the occupational therapists, physical therapists, speech and language pathologists, LPTAs and COTAs are professional or technical employees and/or lack a community of interest.

The Employer is a nursing home, which is staffed at all times by one of three shifts. The shifts are approximately 6:30 a.m. to 3:00 p.m., 2:30 p.m. to 11:00 p.m. and

10:30 p.m. to 7:00 a.m. At present, there are 45 residents at the nursing home, who are located in one of three wings. A fourth wing is closed.

The parties stipulated the following individuals are supervisors within the meaning of Section 2(11) of the Act:

Suzanne Navin	Executive Director
Sheila Zimmer, RN	Director of Nursing
Shawn Dauer	Acting Rehabilitation Director
Robin Rateau	Dining Services Director
Judy Breigenzer	Activities Director
Dennis Gabel	Environmental Services Director

The parties also stipulated that the following individuals were managerial employees and, thus, should be excluded from the unit:

Minnie Harris	Director of Human Resources
Sheila Ward	Business Office Director
Tricia Calvey	Admissions Director
Michelle Acevedo	Social Services Director

The record evidence established that all employees sought by the Petitioner as well as those employees sought by the Employer receive the same fringe benefits, including health and life insurance, 401(k) plan, short-term disability plan, attendance bonus, vacation and holidays, and are hourly paid employees, who are eligible for overtime.

As previously stated, the Petitioner is seeking “casual” employees in the bargaining unit while the Employer seeks to exclude such employees. In determining whether an employee is a regular part-time employee, who is eligible to vote, or a casual employee, who is ineligible, the Board reviews whether the employees perform

unit work with sufficient regularity to demonstrate a community of interest with the remaining employees in the unit. **Hampton Inn**, 309 NLRB 942, 947 (1992). The only dispute concerning the Employer's so-called "casual" employees is whether they work with sufficient regularity.

The Employer submitted a document entitled "casual employees", which listed 28 employees. The parties stipulated that 24 of the 28 employees should be excluded as casual employees. According to the Employer, these employees averaged between 0 hours per week and 10.5 hours per week (LPTA Bonnidene Maglio). The parties did not stipulate as to 4 employees, CNA Nichole Dudovoire, dietary aides Marques Reaves and Stacy Pampuch, and LPN Beverly Neal. Despite this stipulation, Minnie Harris, the Employer's Human Resources Director, testified the Employer defines casual employees as those employees who work between 22 ½ and 29 ½ hours per two week pay period, occasional employees as those who work less than 22 ½ per 2 week period and part-time employees as those who work between 30 and 74 ½ hours per two-week pay period. Thus, most of the employees on the "casual employee" list are actually considered "occasional" employees by the Employer.

As previously stated, the parties are in dispute on 4 of the employees on the "casual" list, Dudovoire, Reaves, Pampuch and Neal, with the Employer seeking their exclusion. The evidence reflects Dudovoire, Reaves and Pampuch averaged approximately 11 hours a week in the past 3 months. I find these 3 employees work with sufficient regularity to be eligible to vote in the above-described unit. As determined below, I find LPNs to be Section 2(11) supervisors; thus, this moots the issue of whether LPN Neal works with sufficient regularity. Notwithstanding, the

parties stipulation that LPTA Maglio is ineligible to vote, the evidence reflects that she has averaged 10.5 hours per week in calendar year 2000. Therefore, I find the parties' stipulation as to her exclusion to be inconsistent with Board precedent and will allow her to vote by challenged ballot. **Pat's Blue Ribbons**, 286 NLRB 918, 919 (1987), where the Board found an employee who averaged 10 hours per week to have a sufficient community of interest to be included in the unit.

The Employer employs approximately 21 CNAs. The CNAs report to Sheila Zimmer, Director of Nursing. The CNAs are paid between \$7.20 and \$9.40 an hour. In order to become a CNA, one must pass a two-week training course. The duties of the CNAs are to provide the following care to patients: dressing, bathing, feeding and toileting; to record the intake of fluids and the amount of food eaten; and to make up the beds. Some of the CNAs' work is physically demanding because it involves the moving of patients while in bed as well as into and out of bed.

The Employer also employs two housekeeping employees and one laundry employee. These employees report to Dennis Gabel, the Director of Environmental Services. The housekeeping and laundry employees are paid between \$6.20 and \$8.60 an hour. These employees are responsible for the housekeeping duties of the nursing home as well as the laundry of linen and towels.

The record is devoid of evidence of the duties of the activities leadperson but the parties have agreed on the inclusion of this job classification, which is held by Michelle Meunier.

The Petitioner asserts the LPNs are statutory supervisors or should be included in a technical unit, rather than this bargaining unit. The Employer employs

approximately 11 LPNs. The Director of Nursing as well as the RNs supervises the LPNs. The LPNs are paid between \$14 and \$17 an hour. In order to be licensed as an LPN, one must pass an 18 month to two-year program at a technical college. The duties of the LPNs are to pass out medications to patients, document in patients' charts any change of the patients' conditions and inform the CNAs about the patients' condition. Also, if an LPN is certified to do so, then she may start IVs. This duty is also performed by RNs. According to Zimmer, she is always on call when not on duty.

LPNs have the authority to move CNAs to different wings to ensure proper coverage of the patients. Furthermore, LPNs can request employees to work overtime into the next shift but do not have the authority to require such. If the requested CNAs are unwilling or unable to work overtime into the next shift, then the LPN must call Zimmer, who authorizes calling a temporary agency for additional help. LPNs have the authority to order employees to go home if there is an allegation of patient abuse or the employee appears to be under the influence of alcohol or drugs. Concerning the LPNs' authority to discipline, Zimmer testified LPNs could discipline an employee for poor quality of care or not following the care plan but not for any other reasons. Zimmer stated before any such discipline would be issued, she would fully investigate the matter by speaking to all applicable parties. Zimmer, who has only been employed at the facility for several months, stated that no employee had been disciplined for these two offenses during her tenure. The Petitioner presented an employee who testified she was recently disciplined by LPN Kerry Mogensen for failure to wear a company shirt. Neither the LPN nor any other official of the Employer signed the warning. Furthermore, this employee testified LPNs discipline employees for a number reasons, including

failure to wear a nametag, taking too long of a break and conflicts between employees. There was also testimony that LPN Kerry Mogensen recently took away a 15 minute break period from an employee. Although the LPNs' authority to discipline employees is in dispute in the record evidence, there appears to be little dispute about the LPNs' authority to evaluate employees. Specifically, Zimmer testified that LPNs perform the evaluations of employees and based upon these evaluations, she determines the amount of raise for the employees. Additionally, the LPNs are the ones who go over the evaluations with the employees. CNAs testified they are evaluated by LPNs and these evaluations are used to determine their wage increases.

Assuming *arguendo* that LPNs do not have the authority to independently discipline employees, I find that LPNs are supervisors within the meaning of Section 2(11) of the Act based upon their authority to conduct evaluations of employees that affect the amount of their wage increases. See **Bayou Manor Health Center**, 311 NLRB 955 (1993), and **Harbor City Volunteer Ambulance**, 318 NLRB 764 (1995), where the Board found the authority to conduct employees' evaluations, which were thereafter used as the bases for wage increases, established statutory supervisory status. The case *sub judice* is distinguishable from the Board's recent holding in **Coventry Health Center**, 332 NLRB No. 13 (2000), wherein it was held the charge nurses' participation in annual evaluations did not establish supervisory status. In that case, the evidence showed the RN supervisors filled out the evaluations before showing them to the charge nurses, whose only authority was to "suggest" changes. Thus, I shall exclude the LPNs from the unit on the basis of their statutory supervisory status.

The Employer seeks the inclusion of the medication technician while the Petitioner seeks her exclusion on the basis of a lack of community of interest. The duties of the medication technician, Joyce Vang, are to pass out medications, check the patients' vital signs, check fluid intake, and report on any changes in the patients. According to the Employer, she works as a CNA once or twice a week. The Petitioner's witnesses testified the medication technician is an LPN, who performs the same duties as LPNs. Due to the lack of clarity in the record concerning the duties and authority of the medication technician, I shall order the medication technician to vote by challenged ballot.

Although the Petitioner asserted the cooks were supervisors within the meaning of the Act, there is no record evidence to support this assertion. Rather, the record evidence established that the seven cooks work in the kitchen with the two dietary aides, a group of employees, that the Petitioner is seeking, and are supervised by Robin Rateau, Dining Services Director. The dietary aides are in charge of setting up and cleaning up the dining room, serving the food and washing dishes. The dietary aides are paid between \$6.20 and \$9.83 an hour. The cooks' duties are to prepare and cook the food, serve and cleanup and are paid between \$8.25 and \$10.50 an hour. I find the cooks are not supervisors within the meaning of Section 2(11) of the Act and shall be included in an appropriate unit. The seven cooks are Esther Alvarado, Diahann Crumble, Beatrice Hale, Vanessa King, Deanna Rabideaux, Eleanor Roundtree and Rose Webster.

The Employer seeks the inclusion of the six receptionists. The record evidence established the receptionists' duties are to answer the telephone and distribute

paychecks. The record is devoid of any interaction between receptionists and bargaining unit employees, except for the distribution of paychecks. The receptionists' workstation is near the front entrance and away from the working areas of bargaining unit employees. The receptionists report to the Director of Human Resources Minnie Harris. No other employees directly report to Harris. The receptionists are essentially business office clerical employees. See **Baptist Memorial Hospital**, 225 NLRB 1165, 1168-69 (1976). Based upon the record evidence and caselaw, I find the receptionists do not share a community of interest with the bargaining unit employees; thus, I shall exclude them from an appropriate unit.

The Employer seeks the inclusion of the medical records clerk, Valerie Ondrejka. The Petitioner opposes the inclusion of the medical records clerk on the basis that she is a supervisor within the meaning of the Act and/or lacks a community of interest. The only evidence presented by the Petitioner on alleged supervisory status is the fact that she attends a daily meeting with RNs and LPNs where the nursing report is discussed. Such attendance at this meeting is not an indicia of supervisory status; thus, I find the medical records clerk is not a supervisor within the meaning of the Act. As for a community of interest, the Director of Nursing Sheila Zimmer supervises the medical records clerk. The medical records clerk is paid between \$8.25 and \$10.50 an hour. The record evidence established she is in charge of maintaining patient charts and making transportation arrangements for patients to go to their doctor appointments. Through these duties, the medical records clerk interacts with the CNAs on a regular basis. Thus, I find the medical records clerk shares a community of interest with the bargaining unit employees and shall be included in the bargaining unit. See **Valley**

Hospital, Ltd., 220 NLRB 1339, 1343 (1975), **Baptist Memorial Hospital**, *supra*, at 1168.

The final group of employees in dispute is the therapy department employees. Specifically, the Employer seeks the inclusion of the physical therapists, occupational therapists, speech and language pathologists, LPTAs and COTAs while the Petitioner asserts these employees are either professionals, technicals or lack a community of interest with the bargaining unit employees. The parties are in agreement that the restorative aide, Pamela Williams, should be included in an appropriate bargaining unit.

Professional employees are defined in Section 2(12) of the Act as “(a) an employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education, from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.” The record evidence establishes physical therapists, occupational therapists and the speech and language pathologist perform evaluations on the patients in order to determine their physical, occupational and/or language needs. After these evaluations, they determine the necessary therapy based upon their intellectual judgment and use of knowledge, which they acquired in their education to become therapists. They perform the

necessary therapy for the patients. Each has obtained a four-year degree in their appropriate area of study. They are paid between \$14.00 and \$17.62 an hour. In **Sutter Community Hospitals of Sacramento**, 227 NLRB 181, 187 (1976), the Board specifically found physical therapists and occupational therapists were professional employees. Based upon the record evidence, including the fact that their work is predominantly intellectual, involves the use of independent judgment and requires knowledge of an advanced field of science, and Board precedent, I find the physical therapists, occupational therapists and speech and language pathologists are professional employees within the meaning of the Act; thus, I shall exclude them from the bargaining unit.

The remaining therapy department employees in dispute are the LPTAs and COTAs. The Petitioner asserts the LPTAs and COTAs should be excluded from an appropriate bargaining unit as technical employees and/or because of a lack of community of interest. At the time of the hearing, the Employer employed one LPTA, Catherine Torres, and no COTAs. According to the record evidence, the LPTA treats patients through therapy following the guidelines of the physical therapists. The LPTA interacts with the restorative aide, the medical records clerk and laundry employees on a daily basis. Furthermore, the LPTA interacts with the activities leadperson on an occasional basis. The LPTA is paid between \$14.00 and \$17.62 an hour. I need not make a finding on whether the LPTA is a technical employee because assuming *arguendo* that she is found to be a technical employee, this does not preclude her inclusion in an appropriate bargaining unit in a non-acute care facility, such as a nursing home. **Brattleboro Retreat**, 310 NLRB 615, 617 (1993). Thus, I shall review the

relevant facts to determine whether the LPTA has a community of interest with the other bargaining unit employees. Important factors in favor of a community of interest are that the restorative aide is included in the bargaining unit and the LPTA's daily interaction with many unit employees, including the restorative aide, the medical records clerk and laundry employees. I find the LPTA has a community of interest with the bargaining unit employees and shall be included in the unit.

Since the Employer does not currently employ a COTA and the record is devoid of evidence relating to this position, I shall not make a finding on whether any employees employed as COTAs should be included in the bargaining unit. If the Employer has hired a COTA after the hearing and before the eligibility cutoff date, this employee shall vote by challenged ballot.

There are approximately 37 employees eligible to vote.

6/ In accordance with Section 102.97 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Region will conduct the election when scheduled even if a Request for Review is filed, unless the Board expressly directs otherwise.

CLASSIFICATION INDEX

177-8560-1000

177-8560-1500

470-1700

470-6700