

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

RICE HEALTH CARE FACILITIES OF WISCONSIN, INC.,
D/B/A LANCASTER CARE CENTER

Employer

and

Case 9-RC-17394
(Formerly 30-RC-6193)

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,
LOCAL UNION #565, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called 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:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization 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 Employer, a corporation, is engaged in the operation of nursing homes in the State of Wisconsin, including its nursing home in Lancaster, Wisconsin, the only facility involved herein. There is no history of collective-bargaining affecting any of the approximately 57 employees in the unit found appropriate.

The Petitioner seeks to represent a unit comprised of all full-time and regular part-time certified nursing assistants, and service and maintenance employees, including dietary employees, laundry employees, cooks, maintenance workers and activity aides excluding all registered nurses, licensed practical nurses, professional employees, the medical records clerk, office employees, guards and supervisors as defined in the Act. Contrary to the Petitioner, the Employer asserts that 22 employees whom it characterizes as casual should be excluded from the unit because of their "casual" status and because they lack a community of interest with other employees in the unit sought. The Employer also asserts that approximately five cooks and one maintenance employee should be excluded from the unit as supervisors within the meaning of Section 2(11) of the Act. The Petitioner contends that none of the cooks possess or exercise any of the statutory indicia of supervisory status set forth in the Act and that they are properly included in the unit. The Petitioner declined in brief to take a position with regard to the supervisory status of Jered Mezera, the maintenance employee whom the Employer seeks to exclude from the unit. In addition to the above, the Petitioner seeks to exclude from the unit "casual" employees Kimberly Duncan and Dennis Duncan based on their familial relationship to the Employer's administrator. The Employer would include Dennis Duncan and Kimberly Duncan in the unit if it were determined that the "casual" employees are otherwise properly included in an appropriate unit. The Petitioner has stated a willingness to proceed to election in any alternate unit found appropriate.

The Employer's facility contains beds for approximately 70 residents who require skilled and intermediate care, including those who are suffering from dementia related conditions. The Employer's resident census or population is typically in the middle 60s. The layout of the facility consists of a single main floor with three wings. The dementia related residents are grouped together at the end of one of the wings. The remaining residents requiring skilled and intermediate care are interspersed throughout other resident rooms in the facility. The facility also includes a basement with a therapy room, maintenance shop, conference room and storage. There are no resident rooms on the basement level.

The Employer's highest ranking on-site manager is Administrator Phyllis Duncan, who is in charge of the day-to-day operation of the facility. Duncan reports to Administrative Director Karen Clapp, who visits the facility on a quarterly basis. Reporting to Duncan are: Director of Nursing (DON) Connie Carbone; Activities Supervisor Sharon Brookens; Dietary Supervisor Kris Blankenburg; Housekeeping Supervisor Arlene Wieland; Laundry Supervisor Barbara Zenz and Social Services Supervisor Lisa Tranel. The supervisors under Duncan typically work a day shift schedule from 7:30 a.m. or 8 a.m. to 4:30 p.m. or 5 p.m. 5 days a week, with Wieland and Zenz both being scheduled to work weekends. Duncan's normal hours of work are between 7:30 a.m. or 8 a.m. to 5 p.m. or 5:30 p.m. Monday through Friday.

The Employer operates 24 hours a day, 7 days a week. Its supervisory personnel are responsible for supervising a total of approximately 80 employees, which includes registered nurses (RNs) and licensed practical nurses (LPNs) as well as the employees sought to be represented by the Petitioner. The Employer's day shift is from approximately 6:30 a.m. to 3 p.m. The second shift or afternoon shift is from approximately 2:30 p.m. to 11 p.m. and the night shift is from approximately 11 p.m. to 7:30 a.m. There are some variations in the scheduled hours for each shift to provide overlap and ensure continuous coverage for the residents.

The Employer's nursing department on the day shift is typically staffed with an employee designated as RN or LPN supervisor and two additional LPNs. Although dependent on patient census, there are typically seven certified nursing assistants (CNAs) scheduled on the day shift. On the afternoon shift the Employer again schedules an employee designated as RN or LPN supervisor and typically six CNAs according to patient census. The night shift nursing staff consists of a RN or LPN supervisor and typically three CNAs. The activity aides are typically scheduled to work a day shift from about 8 a.m. to about 5 p.m. or 6 p.m. Employees in the dietary department may begin work as early as 5 a.m. and some may be scheduled to work as late as 7 p.m. Employees in the housekeeping department are scheduled from 4 a.m. to 1:30 p.m. to 2 p.m. and laundry department employees are scheduled from about 5 a.m. to 1 p.m. or 1:30 p.m. The two maintenance department employees, putative supervisor Mezera and Dennis Duncan, work from about 7 a.m. to 4 p.m. Mezera is also typically on call, although he may delegate on-call status to Dennis Duncan.

The Employer categorizes employees in its handbook as regular full-time, regular part-time, casual and student. Full-time employees are defined as those who are scheduled to work 60 hours or more per bi-weekly pay period. Part-time employees are defined as those who are scheduled to work on the average more than 40 hours but less than 60 hours per bi-weekly pay period. Casual employees are defined as those who are scheduled to work less than 40 hours per bi-weekly pay period or have been hired on a temporary basis to perform a specific job. There is no contention that any of the "casual" employees involved herein were hired on a temporary basis. Finally, the Employer defines student employees as those employees who are enrolled full-time. Student employees are considered casual employees regardless of the number of hours worked per bi-weekly pay period.

Of the approximately 22 "casual" employees in dispute, approximately 15 are CNAs. Two "casual" employees are employed as activities aides, 2 are employed in housekeeping and 2 more are employed in the dietary department. Maintenance Department Employee Dennis Duncan is the remaining "casual" employee in dispute. Employees who are categorized as casual are not eligible for benefits. Regular full-time and regular part-time nursing employees have the option of opting for "no benefit" status. If they opt for no benefit status they receive a higher rate of pay in lieu of benefits. Benefits that regular full-time and regular part-time nursing employees may receive include health insurance coverage, paid sick leave and paid vacation, certain paid

holidays and their anniversary date off work, life insurance coverage and the option to take a leave of absence. Regular full-time and regular part-time non-nursing employees are not afforded the no benefit option.

A casual employee with comparable experience receives the same hourly rate of pay as regular full-time and regular part-time employees who opt for no benefit status. The current wage range for CNAs is \$8.35 an hour to \$9.55 an hour for regular full-time and regular part-time CNAs who do not elect the “no benefit” option. The current wage range for “casual” CNAs and regular full-time and regular part-time CNAs who choose the “no benefit” option is \$10 an hour to \$11 an hour. Housekeeping, laundry and dietary employees are paid between \$7.05 an hour to \$8.30 an hour. Dietary cooks are paid between \$7.60 an hour to \$9 an hour. Maintenance employee Duncan is paid \$10.50 an hour and Mezera is paid \$11.50 an hour.

With regard to staffing, the State of Wisconsin requires a minimum of 2½ hours of nursing care per patient per day (PPD). This staffing requirement is met by scheduling the requisite number of RNs, LPNs and CNAs to meet the nursing needs of the residents. Of this minimum requirement, at least 20 percent of those hours must be staffed by RNs and LPNs, who are considered professional employees. The Employer staffs above the state minimum, at 3 hours of nursing care PPD. To ensure adequate staffing levels, the Employer schedules nursing employees 1-month out.

CASUAL EMPLOYEES:

The parties stipulated that the “casual” employees who are employed in the various classifications included in the proposed unit, with one exception, perform the same duties as regular full-time and regular part-time employees in those classifications. The noted exception to the above statement is activities aide, Jessica Johnson, who passes the mail, assists with bingo and engages residents in one-on-one conversations. Other activities aides also perform these functions and additionally they arrange for various types of large group activities in which they direct and assist residents. The record discloses that “casual” employees also share the same supervision as regular full-time and regular part-time employees in their respective departments. In fact, “casual” employees differ from regular full-time and regular part-time employees in only two respects; the manner and number of hours that they are scheduled for work and their ineligibility for benefits based presumably on those hours.

The Employer has insufficient regular full-time and part-time employees to fully staff the facility each day of the week. Accordingly, when DON Carbone makes out the monthly schedule for CNAs there are “holes” in the schedule that she fills with “casual” employees. Additionally, when nursing employees call off work for illness, vacation or other reasons, the Employer attempts to fill those openings, to the extent they must be filled to meet PPD requirements, by requesting casual employees to work those shifts. The Employer prefers to use “casual” employees to fill these vacancies because it is more cost efficient than using employees from outside agencies or regular full-time and regular part-time employees who might be eligible for overtime. Accordingly, the Employer's

policy specifies that “casual” employees are the first resource to be utilized in filling such vacancies. Furthermore, it appears that at least some “casual” employees are scheduled to work particular shifts on a regular basis, although for a lesser number of hours than regular full-time and regular part-time employees are scheduled.

The Employer fills its staffing needs in departments other than the nursing department in a similar manner. Thus, employees in the Employer's other departments at the facility are scheduled 2 weeks to 1 month in advance. Casual employees are again the first resource used to fill holes in the departmental schedules resulting from scheduled vacations or other planned absences. They are also utilized as substitutes for regular full-time and part-time employees who take a day off on short notice, or who are ill or absent from work for some other reason.

The record reflects that during the two quarters prior to this proceeding that the Employer's “casual” employees averaged anywhere between 4 hours a week up to 28 hours a week. These numbers do not reflect an average over the entire period for several employees who were apparently hired or unavailable for some reason during the 6-month time frame. “Casual” employees are required by the Employer's policy to work a minimum of 8 hours per calendar month to maintain employment and seniority if the minimum is offered to them.

It is well settled that an employee's eligibility as a regular part-time employee is not determined by the fact that he or she may reject offered employment or does not receive benefits identical to others in the proposed unit. *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981); *Tri-State Transportation Co., Inc.*, 289 NLRB 356, 367 (1988). Rather, the appropriate considerations to resolve whether an employee is a casual or regular part-time employee are the extent to which the employee performs unit work and the regularity of his or her hours. *Mid-Jefferson County Hospital*, supra; *S.S. Joachim & Anne Residence*, 314 NLRB 1191, 1193 (1994), citing *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992). Here, it is undisputed that the “casual” employees in the various classifications in the proposed unit perform the same duties as the regular full-time and part-time employees in the unit.^{1/} This circumstance coupled with common supervision and a similar pay structure reflects a strong community of interest among many if not all of the Employer's “casual” employees and its regular full-time and part-time employees. Thus, the only possible basis to exclude “casual” employees in this matter is the regularity of their hours of work.

In some industries, the Board has resolved the issue of regularity of employment by applying various formulas to determine whether part-time employees have a sufficient interest in the working conditions of the unit to vote in the election. *Davison-Paxon Company, a Division of R. H. Macy & Co., Inc.*, 185 NLRB 21, 24 (1970). Under the widely accepted *Davison-Paxon* formula, the Board has repeatedly held that

^{1/} The one noted exception to this statement is activities aide, Jessica Johnson, who performs some, but not all of the duties performed by the other activities aides. I conclude, however, that this is an insufficient basis on which to exclude her from the unit found appropriate as she is commonly supervised with other activities aides and is paid under the same wage scale.

regularity of employment is satisfied, absent special circumstances, when an employee averages at least 4 hours a week for the quarter immediately preceding the eligibility date. *Davison-Paxon*, supra; *S.S. Joachim & Anne Residence*, supra; *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). As discussed more fully below, the record does not reflect the existence of special circumstances in the instant matter. Accordingly, I find that application of the Board's traditional eligibility formula for on-call employees is appropriate. *Davison-Paxon*, supra. I shall, therefore, include in the unit any "casual" employee in the unit found appropriate who has worked an average of 4 hours a week during the quarter immediately prior to the eligibility date. Use of the *Davison-Paxon* formula will serve to enfranchise the maximum number of employees in the unit based on their strong community of interests.

In reaching the above conclusion regarding the appropriate formula for eligibility I have given careful consideration to the arguments of the parties at hearing and in their briefs. Initially, I note that the Employer does not offer any case support for its primary argument that all of the "casual" employees should be excluded from the unit. The apparent basis for this argument is the Employer's assertion that, "the overwhelming evidence proves that casual employees are a supplemental workforce without any expectation of hours." To the contrary, I find that the record evidence establishes that many, if not all, of the Employer's "casual" employees are regularly employed by the Employer. In this connection, I note they generally worked throughout the two quarters analyzed on the record and that their continuity of employment is further demonstrated by the fact that the number of hours worked by each of the "casuals" are remarkably similar from one quarter to the next. Thus, while there may be no "guarantee" of hours of work, there certainly is both an expectation of those hours and a practice of working such hours over a sustained period.

The Employer argues in the alternative that 13 of the approximately 22 "casual" employees should be excluded from the petitioned for unit by application of the formula utilized by the Board in *Marquette General Hospital*, 218 NLRB 713, 714 (1975). In *Marquette*, the Board used an eligibility formula which required employees to have worked a minimum of 120 hours in either of the two quarters immediately preceding the eligibility date. Supra at 714. The Board indicated in *Marquette* that some of the on-call nurses in issue worked as many as 540.5 hours per quarter while others worked as few as 23. Id. Subsequent Board decisions have interpreted the application of the formula used in *Marquette* as one designed to enfranchise those, "on-call nurses whose work patterns most closely resembled those of other full-time unit nurses" as "distinguished from those who worked relatively infrequently." *Sisters of Mercy*, supra at 483. Thus, the *Marquette* formula may be applied when there is a significant disparity in the number of hours worked by on-call or casual employees. Supra. However, I am unaware of the Board applying the *Marquette* formula in any subsequent decision. E.g., *Crittenton Hospital*, 328 NLRB No. 120, slip op. at 6 (June 30, 1999)(*Marquette* formula applied by Regional Director, but issue of eligibility formula not reached by the Board.)

Contrary to the Employer, I find that the application of the *Marquette* formula on the instant facts is unwarranted as it would be too restrictive and, using the Employer's

calculations, would tend to arbitrarily disenfranchise employees who share a strong community of interest with other employees in the proposed unit. Thus, for example, the Employer's application of the *Marquette* formula would exclude "casual" employees who had worked: 119.5 hours, 118.5 hours, 117.5 hours and two employees who had worked 99.25 hours in an unspecified 12 week period, rather than a 13 week quarter. Admittedly, there is some disparity among the hours worked by the Employer's "casuals," with one employee in the most recent quarter working 25 hours and two employees working 368 hours. However, most of the "casual" employees worked hours in a much more narrow range of each other. Thus, excluding those "casuals" who apparently began their employment during the most recent quarter, the record reflects that four "casuals" worked between 368 and 300 hours in the quarter, three worked between 300 and 200 hours in the same quarter, eight worked between 200 and 100 hours and three worked between 100 and 57 hours, with one employee working 25 hours as noted. The median number of hours worked was 123. Accordingly, I find that the wide disparity in hours noted in *Marquette* is not present herein. In fact, I find the hours worked as a group by the "casual" employees here to be more analogous to those worked by the on-call nurses in *S.S. Joachim & Anne Residence* where most of the employees in issue worked between 200 hours and 400 hours a quarter. *Supra* at 1193. The Board applied the *Davison-Paxon* formula in those circumstances. *Supra*; see also, *Sisters of Mercy*, *supra*.

Accordingly, based on the above and the record as a whole, I find that those "casual" employees in the proposed unit who meet the *Davison-Paxon* formula for eligibility are eligible to vote in the representation election.

THE SUPERVISORY STATUS OF COOKS:

The employees in the Employer's dietary department are under the immediate supervision of Dietary Department Supervisor Kris Blankenburg. There are a total of approximately 11 employees in the dietary department, including 5 employees who perform a significant amount of cooking. The primary duty of the cooks consists of preparation of the main meal. The cooks are Lynn Stoney, Kathy Pennekamp, Julie Letcher, Pat Bloom and Tina Dryer. The remaining dietary employees work as tray setters and cook's helpers. Tray setters are responsible for setting up juices, milk, desserts and salads before each meal and also have the duties of cleaning up and washing dishes. Cook's helpers' primary duties involve preparation and serving of coffee, bread, and salt and pepper. They may also perform cleaning tasks or preliminary cooking tasks such as cleaning potatoes.

The cooks work either a morning or an afternoon shift. Such shifts are from 6 a.m. to 12:30 p.m. and either 10:30 a.m. or noon to 6 p.m. Cooks who are scheduled to work on the morning shift will work a longer shift when the patient census is high. The cook's helpers are scheduled to work a morning shift from 5:30 a.m. to 1:15 p.m. and an afternoon shift from 4:30 p.m. to 6:30 p.m. Tray setters are scheduled to work a morning shift from 5:45 a.m. to 1:15 p.m. and an afternoon shift from 3 p.m. or 4 p.m. to 6 p.m., depending on the patient census. All five of the Employer's cooks work a set schedule to ensure coverage for all meals.

All of the scheduling in the dietary department is done by Blankenburg, who prepares and posts a bi-weekly schedule in the department. The schedule informs employees of their hours and whether they are scheduled to work a particular shift as a cook, cook's helper or tray setter. Typically, a tray setter and a cook's helper are scheduled on each shift with a cook. Blankenburg also posts a production schedule on the bulletin board in the dietary department. The production schedule contains specific instructions for the cooks and the cook's helpers as to what duties they are to perform on a particular shift. In this connection, the meals that the cooks serve each day are based on a set menu that is established by contract with the Employer's corporate supplier. Blankenburg does not normally specify work assignments on the production schedule for the tray setters because they perform the same duties on a daily basis. The only addition to the above routine is that a cook will occasionally be instructed by Blankenburg or Activities Supervisor Brookens to prepare a snack item such as cookies for a planned activity.

Blankenburg performs the hiring, including interviewing applicants, in the dietary department. She may issue verbal or written warnings to dietary department employees for rules infractions. She may also recommend more severe discipline such as termination to Administrator Duncan. The record does not disclose the extent to which Blankenburg has been involved in disciplining employees. She attends regular supervisory meetings that Duncan holds with the department heads. The cooks do not attend any supervisory meetings. When Blankenburg holds dietary department meetings all of the employees in the department attend, including the cooks. There are no licensing or educational requirements that apply to cooks and other dietary employees.

Blankenburg cannot schedule employees in excess of PPD requirements without authorization from Administrator Duncan. Additionally, she cannot schedule employees to work overtime without Duncan's authorization. Employees in the dietary department who are ill can find a replacement for themselves. The only restriction on locating a substitute is that they cannot use an employee who would end up working more than 40 hours a week if he or she agreed to substitute. If an employee who is going to be absent from a shift cannot or does not locate a substitute, a cook or another dietary employee can seek a substitute.

Cooks order bread, milk and cheese from suppliers based on the requirements needed to fulfill the preset menu. Cook's helpers and tray setters may also perform these ordering functions. Blankenburg orders all other raw supplies. There was non-specific testimony that cooks may change an employee's work assignment as scheduled by Blankenburg and that this has occurred. However, it appears that an assignment might only be changed if Blankenburg omitted a task from the schedule. Even then, it is not clear who would change the assignment as a cook specifically testified that she had never made such a change. Moreover, it appears that any task assigned would be quite routine and of the type normally performed by cook's helpers or tray setters.

Cooks have reported to Blankenburg problems with the job performance of other dietary employees. In such instances, Blankenburg investigates and speaks with the employee in an attempt to correct any deficiencies. Cooks do not play any role in disciplining employees with performance problems should Blankenburg determine that discipline is warranted. Blankenburg is not on-call, but occasionally receives telephone calls at home from dietary department employees, primarily cooks. In one example, a cook called Blankenburg at home on the weekend to report a milk shortage and to request permission to obtain more milk. In the event of shortage of a food item when Blankenburg is not at work a cook may substitute a similar item for the item that is in short supply.

Section 2(11) of the Act defines a supervisor as a person:

. . . 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 to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment. . . .

It must be noted, however, that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Although the possession of any one of the indicia specified in Section 2(11) of the Act is sufficient to confer supervisory status, such authority must be exercised with independent judgment and not in a routine manner. *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Moreover, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985); *Chicago Metallic Corp.*, supra; *Advanced Mining Group*, 260 NLRB 486, 507 (1982). It is also well established that the burden of proving that an individual is a supervisor rests on the party asserting supervisory status. See, *Beverly Enterprises-Ohio d/b/a Northcrest Nursing Home*, 313 NLRB 491 (1993); *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). “Accordingly, whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Based on a careful review of the record, and applying the principles enunciated above, I conclude that the Employer here has not met its burden in establishing that its cooks are supervisors within the meaning of Section 2(11) of the Act. To the contrary, the record evidence affirmatively discloses that the Employer's cooks do not possess any indicia of supervisory authority within the meaning of Section 2(11) of the Act. Cooks do not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge,

reward, discipline, or responsibly direct the work of employees or adjust their grievances, in a manner requiring the exercise of independent judgment.

The Employer contends that its cooks are statutory supervisors based primarily on their purported involvement in disciplining employees, obtaining replacements for absent employees, their purported responsibility to request overtime approval, their higher wage rate than that of other dietary employees and their substitution of menu items and ordering of supplies. In fact, as noted above, cooks are not involved in disciplining employees. At most, they might report a performance issue to Blankenburg, who independently investigates the issue. In this connection, it is well established that the mere exercise of a reporting function which does not automatically lead to further discipline or adverse action against an employee and which is reviewed by a conceded supervisor does not establish supervisory authority. See, *Lincoln Park Nursing and Convalescent Center*, 318 NLRB 1160, 1162 (1995); *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992).

The record discloses that cooks may find replacements for absent employees. However, other dietary employees may also perform this function. Moreover, neither the cooks or other dietary employees can compel employees to report to work. Absent the authority to compel employees to report this function is insufficient to confer supervisory status. *Northcrest Nursing Home*, 313 NLRB 491, 505 (1993); *Providence Hospital*, 320 NLRB 717 (1996); *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). In this connection, I also note that cooks cannot compel employees to perform overtime duties, but can only convey the need for overtime to Blankenburg. Blankenburg then, if she deems overtime necessary, must request authorization for overtime from Administrator Duncan. Thus, the cook's role in recommending overtime hours is again a mere reportorial function on which no action is taken until there has been supervisory review through two levels of supervision.

The remaining purported indicia cited by the Employer simply do not support a conclusion that the cooks even remotely resemble statutory supervisors. Thus, there is no evidence that their slightly higher wage rate than other dietary employees is, as the Employer claims, "clearly . . . for the purpose of compensating the cooks for their supervisory duties." Although there is no evidence regarding this slight difference in wages, I find it more likely that the cooks are compensated at a slightly higher rate because cooking food is more skilled work than assisting in that function or in performing tray setter tasks such as setting up drink items or washing dishes. Additionally, I find that ordering limited supplies as required by a pre-established menu is a routine function that does not require the use of independent judgment. Similarly, it requires only slight experience and common sense for a cook to substitute one menu item for another in the event of a shortage. Again, independent judgment is not required. Moreover, such meal item substitution does not involve independent judgment in connection with the supervision of other employees.

Finally, although not controlling, I note that if I were to find the cooks to be statutory supervisors, the result would be a somewhat absurd ratio of one dietary

department supervisor to each dietary department employee. The existence of this unrealistic supervisory/employee ratio further militates against finding the cooks to be statutory supervisors. *Manor West, Inc.*, 313 NLRB 956 (1994); *First Western Building Services, Inc.*, 309 NLRB 591, 603 (1992); *Bay Area Los Angeles Express*, 275 NLRB 1063 (1985).

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in their briefs, I find that the cooks are not supervisors within the meaning of Section 2(11) the Act and I shall include them in the unit.

THE SUPERVISORY STATUS OF JERED MEZERA:

Jered Mezera has been employed as the Employer's maintenance supervisor since about June 1999. "Casual" employee Dennis Duncan is the only other employee in the maintenance department. Both maintenance employees repair equipment, paint, perform light carpentry work and perform plumbing and electrical tasks. Mezera is responsible for maintaining and overseeing inspections to various systems such as the fire alarm system and the sprinkler system. He also maintains and ensures that regular inspections are performed on the Employer's boiler system and on its elevators.

Duncan works approximately 16 to 24 hours a week and he does not have a set work schedule. However, Mezera may request that he work a particular day or days of the week to accommodate certain maintenance projects. Mezera assigns Duncan's work to him. Additionally, Mezera is responsible for overseeing any maintenance related work performed by community service volunteers, who are sent to the Employer by Grant County to fulfill community service requirements. These individuals are not paid employees. Administrator Duncan testified that Mezera spends approximately 70 percent of his work time performing hands on maintenance tasks and the remaining 30 percent of his time is spent in a supervisory capacity overseeing the operation of the department. However, the extent to which Administrator Duncan observes the workings of the maintenance department is unclear. Neither Mezera or Dennis Duncan testified in this proceeding and, therefore, a clearer picture of Mezera's duties is not available.

Mezera has not hired, fired or engaged in the discipline of employees since he assumed his position. The Employer asserts, however, that he has the authority to issue verbal and written warnings without prior authorization and that he would make discharge recommendations to Administrator Duncan if the need arose. The Employer also contends that Mezera would attempt to resolve employee grievances and complaints when they arise. However, Mezera has not performed such functions to date. Further, Mezera has the authority to evaluate Dennis Duncan's work performance and is required to do an annual performance evaluation on him. Again, this has not yet occurred. Mezera is not responsible for keeping Duncan's time records.

Mezera is included among those department heads who regularly meet with Administrator Duncan and he reports directly to her. Administrator Duncan discusses

corporate policy in these meetings, including issues such as changes in disciplinary procedure and the expectation that her supervisors carry out these changes. Personnel issues and employee discipline, however, are not discussed in these meetings. Mezera has been involved in the discussion in these meetings of procedural changes such as the formation of the Employers' new employee orientation policy.

Mezera is authorized to pledge the Employer's credit at selected local merchants without obtaining prior authorization. The record does not disclose what dollar limits are imposed on his ability to pledge the Employer's credit. Dennis Duncan may also pledge the Employer's credit with Mezera's approval.

I find that there is an insufficient basis on which to render a determination of Mezera's status. In reaching this conclusion, I note that Mezera has held the position of maintenance supervisor for only a short time and that neither Mezera nor Dennis Duncan, the employee he purportedly supervises, testified in the instant proceeding. Accordingly, as I am unable to resolve the issue of Mezera's supervisory status on the record before me, I shall instruct my agent to permit Mezera to cast his ballot subject to challenge.

FAMILIAL RELATIONSHIP OF EMPLOYEES TO THE ADMINISTRATOR:

As I have found that the "casual" employees who meet the hours of work requirements of the *Davison-Paxon* formula are properly included in the unit, I must resolve the issue of the eligibility of "casual" employees Kimberly Duncan and Dennis Duncan. Dennis Duncan is Administrator Duncan's father-in-law. He does not reside with Administrator Duncan and there is no evidence that he is dependent on her in any respect. Furthermore, the record describes his duties, hours and working conditions and there is no evidence that he receives any special privileges or benefits as a result of his familial relationship to Administrator Duncan.

Kimberly Duncan is employed in the dietary department and is Administrator Duncan's teenage daughter. She is a high school student who resides with Administrator Duncan and is dependent on her for her financial support. There is also no evidence that she receives any special privileges or benefits as a result of her mother's managerial position in the Employer's hierarchy. However, the record in this area is not fully developed. Thus, there is insufficient evidence to determine what, if any, special privileges or benefits she may enjoy by virtue of her familial relationship to the Employer's administrator.

The Board excludes relatives of nonowner managers from bargaining units where it is shown that the employee sought to be excluded enjoys a "special status" in connection with his or her job duties. *Cumberland Farms*, 272 NLRB 336 (1984); *Allen Services Co.*, 314 NLRB 1060 (1994). I find that the record is sufficiently developed to permit a determination that Dennis Duncan does not enjoy a special status based on his familial relationship to Administrator Duncan. I shall, therefore, include him in the unit found appropriate. However, as I indicated above, I find that there is insufficient record evidence to reach a conclusion regarding any special status that Kimberly Duncan may

enjoy as a result of being the administrator's daughter. Accordingly, I shall instruct my agent to permit Kimberly Duncan to cast her ballot subject to challenge.

STIPULATED SUPERVISION:

In accord with the stipulation of the parties and the record evidence, I shall exclude the following individuals from the unit as supervisors within the meaning of Section 2(11) of the Act: Karen Clapp, Administrative Director; Phyllis Duncan, Administrator; Connie Carbone, Director of Nursing (DON); Sharon Brookens, Activities Supervisor; Kris Blankenburg, Dietary Supervisor; Arlene Wieland, Housekeeping Supervisor; Barbara Zenz, Laundry Supervisor and Lisa Tranel, Social Services Supervisor.

THE UNIT:

Based on the foregoing, the record as a whole and careful consideration of the arguments of the parties at the hearing and in their briefs I shall direct an election among the employees in the following bargaining unit:

All full-time and regular part-time certified nursing assistants, and service and maintenance employees, including dietary employees, laundry employees, cooks, maintenance workers and activity aides excluding all registered nurses, licensed practical nurses, professional employees, the medical records clerk, office employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director for Region 30 among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision and, with respect to the part-time employees, meet the requirements of the eligibility formula set forth in the 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 their status as such during the eligibility period and their replacements. Those in the military services of the United States 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 Sheet Metal Workers International Association, Local Union #565, AFL-CIO.

LIST OF ELIGIBLE VOTERS

In order to insure that all eligible voters may 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 using full names, not initials, and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB No. 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director for Region 30 who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in Region 30, National Labor Relations Board, Room 700, 310 West Wisconsin Avenue, Milwaukee, Wisconsin 53203-2211, on or before **June 14, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions 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, D.C. 20570. This request must be received by the Board in Washington by **June 21, 2000**.

Dated at Cincinnati, Ohio this 7th day of June 2000.

Richard L. Ahearn, Regional Director
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