

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Gilroy, California)

REBEKAH CHILDREN'S SERVICES,

Employer

and

Case 32-UC-399

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 715, AFL-CIO

Petitioner.

DECISION AND ORDER

Rebekah Children's Services, herein called the Employer, is engaged in the care and treatment of children with special needs. Service Employees International Union, Local 715, AFL-CIO, herein called the Petitioner or the Union, has represented a collective bargaining unit of the Employer's nonprofessional employees for several years. The Union filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to have the established collective bargaining unit clarified to include the classification of Family Partner. A hearing officer of the Board held a hearing in this matter.¹

As evidenced at the hearing and in closing arguments, the parties disagree on whether the Family Partner classification should be included in the unit.² As discussed below, I have concluded that the unit should be clarified to include the Family Partner classification. To provide a context for my

¹ The parties gave oral arguments at the end of the hearing, and neither party filed a post-hearing brief.

² The Union had initially sought the inclusion of several job classifications into the unit, and the Employer opposed the inclusion of these classifications. The parties in negotiations over a new collective bargaining agreement, resolved their dispute over the placement of each of the contested classifications except that of the Family Partner classification. The Union amended the instant petition to merely seek clarification on the classification of Family Partner.

discussion of the issue, I will first briefly describe the origins and evolution of the existing bargaining unit and then will give an overview of the Employer's operations. Finally, I will present the facts and reasoning that supports my conclusions in this matter.

THE FACTS

The Bargaining Unit

The Union filed a petition in 1997 seeking to represent a unit of “all full-time and regular part-time employees working for the employer in Gilroy (California).” After a hearing was held concerning certain disputed classifications, the former Regional Director for Region 32 ordered an election in a unit described as “All full-time and regular part-time employees employed by the Employer at its Gilroy, California facility, including employees in the following classifications: clerical, dietary, housekeeping, maintenance (including utility person), residential counselor I and II (including specialists), night resident counselor, day treatment coordinator, on duty and family care workers; excluding all other employees, guards, and supervisors as defined in the Act.” The certification, which issued July 1, 1997, contained the same unit description. The parties entered into their initial collective bargaining agreement in October 2000. This agreement, which was in effect from July 1, 2000 through June 30, 2003, contains the following recognition language:

The Employer recognizes the Union as exclusive representative of all full-time and part-time employees employed by the Employer at it's [sic] Gilroy California facility, in the following classifications: clerical, dietary, utility, housekeeping, maintenance, residential counselor, recreation therapist, on duty, medical aide, central supply worker, compadres specialists, family linkage specialists, and family care specialists. All other employees of the Employer shall be excluded from the bargaining unit, including confidentials, professionals, on-calls, temporaries, intermittants, per diems, interns, volunteers, guards, and supervisors as defined in the Act.

Contemporaneously with these proceedings, the parties have entered into a successor agreement, and have agreed to include in the unit the classifications of LVN, Resource Coordinator, and Teaching Assistant. The parties also agreed to exclude the classifications of Training and Education Assistant, Quality Assurance Coordinator, Accounting Assistant, Systems Administrator, and Technical

Support I. There are currently approximately 75 employees in the bargaining unit.

The Employer's Operations

The Employer refers to its services for non-resident children as its "Compadres Program." The goal of the Compadres Program is to enable children to remain in their homes. This program was developed in 1998, and, initially, there were 5 or 6 employees working in the Compadres Program. Currently, there are approximately 40 employees in the Compadres Program serving approximately 62 children. All Compadres Program employees work in the same office area of the Employer's Gilroy facility, using the same computer and telephone systems. Over the years, the Employer has expanded and refined the structure of the Compadres Program to better implement its philosophy of how best to serve the children. Currently, the Compadres Program is run by a Director, Mike McGrath. Reporting to the director are four Compadres Program Managers. Each Compadres Program Manager oversees a "pod" consisting of employees in the in the following job classifications: Program Facilitator, Family Specialist, Behavioral Intervention Specialist and Family Partner. All employees share a common goal: assisting the children and their families so that the children can remain in the home.

Currently, when a child is referred by Santa Clara County to the Employer for assistance, the child is assigned to a four-member team, consisting of a Facilitator, a Family Specialist, a Behavioral Intervention Specialist and a Family Partner from the same "pod." There are currently approximately 12-15 Facilitators, 10-12 Family Specialists, 8 Behavioral Intervention Specialists, and 10 Family Partners. Each employee is assigned to work on from 2-9 teams. The team members work together in the treatment of the children assigned to their respective teams. This team system is based on the Employer's general approach to treating troubled children, which is known as the "wraparound" approach. Other individuals who are not employed by the Employer, such as social workers, probations officers, teachers, coaches and family members, may, at least to some extent, also participate along with the Employer's team members in the "wraparound" program.

Although they work closely together and share the same goal, each of the Employer's four "team members" has a separate role and a separate area of specialization. The Facilitators are professional employees who have at least Master's Degrees, and they are not included in the unit. The Facilitators are the leaders of the teams. They are responsible for drafting a service plan for each child, and that plan is submitted to the appropriate officials of Santa Clara County. The Facilitators also have the lead responsibility for drafting the Family Support Plan, although all of the team members, including Family Partners, participate in creating this plan and all team members consult this plan in treating the child. Facilitators spend some of their time "in the field" but work primarily in their offices at the Employer's facility, and they coordinate team meetings and direct the work of their team members.

The Family Specialists work directly with each child, coaching the child and reporting back to the other members of the team. As such, the Family Specialists have "direct-care" responsibility for the child. The Behavior Intervention Specialists, as their title indicates, have specialized training in child behavior. The Behavior Intervention Specialists assess the child's behavior and create plans to improve problematic behavior. These plans are incorporated into the Family Service Plan used by other team members. The Family Specialists and the Behavior Intervention Specialists are in the bargaining unit.

The Family Partner job classification differs from the other team classifications in two key respects: Family Partners are required to have been the parent or other relative of a "special needs" child, and Family Partners function as an advocate for the child's family unit, as opposed to being primarily an advocate for the child. The Employer created this classification as a way to better integrate families into the treatment of each child. The personal experience qualification required for this classification was imposed by the Employer because it believes that the child and its family benefit from the presence of an individual who has personally "been through the system."

Each of the teams frequently meet with its designated Compadres Program Manager to refine its plan of treatment for the child and to update each other on the status of the goals each has been

assigned to implement. The Family Specialists, Behavior Intervention Specialists and Family Partners all spend about 50-60 % of their work time “in the field,” working directly with the children and their families. Often, all three will meet together at the home of the child. They all regularly write up progress reports on each child, which contain the same billing codes and which are inserted into the same master file for each child. On some occasions, such as in situations where the child’s family has a good rapport with the Family Partner, but does not have a good rapport with the Facilitator, the Family Partner will temporarily assume some of the duties of the Facilitator. The Behavior Intervention Specialists also assume that role from time to time.

History of the Family Partner Job Classification

At the time of the election in 1997, it is clear that the classification of Family Partner did not exist. There is some dispute whether the classification emerged before or after the parties entered into their initial collective bargaining agreement in October 2000. As such, witness Christophe Rebboah, a manager with the Compadres Program and an 8-year employee of the Employer, testified that the first two Family Partners were hired within six months of the date he started working in the Compadres Program. Although Rebboah stated that he had started working in the Compadres Program in 2000, he could not recall whether he began working in the Compadres Program prior or subsequent to October 2000. Thus Rebboah’s testimony does not resolve the issue of when the first Family Partner was hired in respect to contract negotiations.

Likewise, witness Mike McGrath, presently the Director of the Compadres Program, testified that when he first came to work for the Employer on January 2, 2001 there was one Family Partner. Because it preceded his employment, McGrath did not know when the classification was first created, nor could he testify whether the Union was notified when the classification was first created. McGrath also testified that an outside consultant, in the course of evaluating the Compadres Program for the Employer, recommended expanding the classification. McGrath believes that during the summer months

of 2001, the Employer decided to include Family Partners on each Compadres team, and began hiring several additional Family Partners.

Witness Jodi Conti, a Family Partner, testified that when she was hired in mid-February, 2001, Susan Fennimore had already been employed as a Family Partner. When asked when Fennimore had been hired as a Family Partner, Conti testified that she thought it was the year before her, but that she was not certain. When asked if she did not know when, Conti stated that Fennimore had been there at least a year before she was there, but that she was not certain. There is no evidence regarding how Conti had first hand knowledge of Fennimore's job status during the year prior to Conti's date of hire, and there is no documentary evidence showing or indicating when Fennimore was hired as a Family Partner.³

Thus the testimony was inconclusive regarding the date when the first Family Partner was hired.

There is also no evidence that the Union was given notice of the creation of the Family Partner classification prior to the agreement on the October 2000 collective bargaining agreement. Neither Rebboah nor McGrath knew if the Union had been notified about the creation of the Family Partner classification in the period leading up to the agreement on the 2000 collective bargaining agreement.

The evidence also shows that the work performed by the Family Partners had, in some form or other, been performed by unit employees prior to the creation of the Family Partner classification. Thus, prior to the creation of the Family Partner classification, there were two bargaining unit classifications whose employees did some work similar to that of the Family Partners: Family Care Specialists and Family Linkage Specialists. The Family Care Specialists worked in the Family Care Department, which

³ Maria Tamez, a former employee who had been a family partner, was asked if the Family Partner position had existed in 2000 and into 2001, and she answered that she believed so. She provided no details and did not testify that the position had been in existence prior to the agreement on the collective bargaining agreement in October 2000. There is also evidence that in a letter dated July 17, 2002, the Employer's Human Resources Director, Patrick C. Wiley, informed the Union that the Family Partner classification was created prior to the commencement of the current contract on July 1, 2000. There is evidence that Wiley was still the Human Resources Director at the time of the hearing, and there are references during the hearing to an individual named Wiley who made comments on the record; however, Wiley did not testify at the hearing.

was organizationally separate from the Compadres Program. Some of the duties performed by the Family Care Specialists were quite similar to the duties performed by the Family Partners. Maria Tamaz, a former Family Care Specialist, had her job classification changed to Family Partner when the Family Care Department was eliminated. Tamaz testified that her duties did not change substantially when her classification changed from Family Care Specialist, a former bargaining unit classification, to Family Partner. For example, as both a Family Care Specialist and as a Family Partner, she consulted with the child's family and communicated the family's concerns to other employees engaged in treating the child. Similarly, there was testimony that the Family Partners had duties that were formerly performed by the Family Linkage Specialists, another former bargaining unit classification.

In a letter dated July of 2001, the Union notified the Employer that several newly created positions should be in the unit and identified the contested positions as the Compadres Resource Coordinator and the Compadres Staff Training Coordinator. The letter does not refer to Family Partners; however, as noted above, it is not clear from the record when the Union had actual or formal notice of the creation of the Family Partner classification or of the fact that these positions were not included in the unit. According to Reggie Grimes, who was employed by the Union in July of 2001, the Employer failed to respond to phone calls regarding this matter and failed to appear at meetings scheduled to discuss this matter. In August 2001, the Union filed a grievance on behalf of employee Maria Tamaz, whose job as a Family Care Specialist had been eliminated. That grievance alleges that the Employer failed to give the Union notice of a newly created position; however, the post grievance documents show that that grievance concerned the position of Education and Prevention Services Coordinator. In July 2002, the Union filed a grievance concerning several disputed classifications, including the Family Partner classification. The Employer denied the grievance. On November 4, 2002, the Employer filed a unit clarification petition, Case 32-UC-395, seeking a finding that the classifications covered by the Union's July 2002 grievance should not be included in the unit. That

petition was withdrawn on February 25, 2003. The petition in this case was filed on March 3, 2003.

POSITION OF THE PARTIES

The Union raises several arguments. First, the Union argues that the classification of Family Partner should be accreted into the unit because many of the duties were previously performed by employee in the now-eliminated classifications of Family Care Specialist and Family Linkage Specialist, which were classifications in the bargaining unit. Second, the Union argues that the classification of Family Partner shares a strong community of interest with others in the bargaining unit and was not a historically excluded classification. Finally, the Union argues that it has not waived the right to seek a unit clarification with regard to the Family Partner classification.⁴

The Employer also raises several arguments in support of its position. As a threshold matter, the Employer urges the Region to defer.⁵ As to the merits of this petition, the Employer argues that the classification of Family Partner had been historically excluded from the unit and must remain excluded. Alternatively, the Employer argues that the Family Partner classifications lack a community of interest with the other members of the bargaining unit. Lastly, the Employer argues that the Union was on notice of the Family Partner classification and has waived its right to accrete those classifications into the unit because of its inaction for several years.

ANALYSIS

It is well established that a unit clarification petition is appropriate for resolving ambiguities concerning the unit placement of individuals who come within a newly created classification. *Bethlehem*

⁴ The Union also argues that it represents a “wall-to-wall” unit, and therefore that the newly created positions are a part of the unit. The certification and the collective bargaining agreement make it clear that the unit is not a wall-to-wall unit, and I therefore reject this argument.

⁵ The Employer also argues in its brief that the Region should defer this matter this determination to the parties’ grievance and arbitration procedures. The Employer had raised this argument in the form of a motion to the to the hearing officer and then the Regional Director during the hearing. The motion was denied based on Board policy as expressed in *Ziegler, Inc.*, 333 NLRB 949 (2001). The Employer raises no new arguments in this regard, and I adhere by my decision that it is appropriate for the Board to entertain and rule on this petition. I also direct the parties to the Board decisions in *Shop Rite Foods*, 247 NLRB 883 (1980) and *St. Francis Hospital*, 282 NLRB 950 (1987) for further explanation as to why it is appropriate for the Board to make the determination on the petitioned-for clarification of the unit.

Steel Corp., 329 NLRB 241 (1999). In cases such as this one, where the bargaining unit consists of job classifications rather than employee functions, the Board will clarify the unit by adding the newly created position into the unit if the employees in the newly created position share an overwhelming community of interest with the employees in the already established bargaining unit and if the employees in the newly created position do not have a separate identity. *Safeway Stores, Inc.* 256 NLRB 918 (1981). In evaluating the community of interest, the Board considers these factors: “integration of operations, centralization of management and administrative control, geographical proximity, similarity of working conditions, skills and functions, common control of labor relations, collective bargaining history and interchange of employees. Employee interchange and common day-to-day supervision are the two most important factors” *Archer Daniels Midland Co.*, 333 NLRB 673, 675, (2001).

The evidence in this case shows that each Compadres Program team, which include unit employees, a Family Specialist and a Behavior Intervention Specialist, and which includes a Family Partner, is supervised by a Compadres Program Manager, and therefore the team members share common day to day supervision. Although it appears that unit employees rarely transfer into the Family Partner position, or vice versa, the Family Partners regularly work closely with the unit members who are on the Compadres Program teams to which the Family Partners are assigned. Because each team member is assigned to work on a number of teams, the Family Partners regularly work with a variety of unit members. The employees on the Compadres Program teams attend the same meetings, have input into plans to assist the children and fill out the same type of progress reports for inclusion in a shared file for each child. Moreover, despite the differing roles of the team members, the Compadres Program is functionally integrated and all of the team members are working to achieve a common goal of trying to create a situation in which the child may be re-integrated into the family unit. The evidence also shows that the Family Partners share a common work space and similar terms and conditions of employment with the Family Specialists and Behavior Intervention Specialists, including almost identical wages and

benefits.⁶

The Employer argues that the Family Partners have a separate identity because only they are required to be parents or relatives of a “special needs” child and because the Family Partners work primarily with the families rather than with the child and are the advocate for the families. I conclude that the “special needs” child requirement does not create a separate identity for the Family Partners, and I note that at least some of the unit employees also appear to be parents or relatives of “special needs” children. With regard to the Family Partners focus on the family, I note that the evidence establishes that the employees in the Family Partner classification are performing some of the functions previously performed by other bargaining unit employees; namely, the Family Care Specialist and Family Linkage Specialist. Although the employees in these two classifications had a variety of duties, they did spend time trying to help the families in dealing with the child who is being cared for by the Employer. They also sought and communicated to their co-workers the families’ view regarding the child and helped the families in dealing with the various bureaucracies regarding the care of the child. Thus even though their role is somewhat different and is now specialized, the job duties performed by the Family Partners were previously performed by unit members. Based on the above evidence, I have concluded that the Family Partners share an overwhelming community of interest with the bargaining unit members and that the Family Partners do not share a separate identity from the unit.

The Employer argues even if the Family Partners share an overwhelming community of interest with the unit employees, they should not be accreted into the unit. The Employer bases this argument on its claim that the Family Partner classification existed prior to the date on which the parties reached agreement on the collective bargaining agreement that was signed in October of 2000, that the Family

⁶ The employees are governed by the same employee handbook and have the same terms and conditions in every respect except wages. The Family Partner classification has been deemed to be exempt by the Employer and therefore the Family Partners are salaried employees, whereas the Family Specialist and Behavior Intervention Specialist classifications have been deemed to be non-exempt and are paid hourly. Nonetheless, the gross pay of the employees in these three classification is quite similar. Furthermore, the former classifications of Family Care Specialist and Family Linkage Specialist were also classified as exempt and had been included in the bargaining unit.

Partner classification was therefore historically excluded from the unit and that the Union has therefore waived its right to seek a unit clarification for that classification. I agree that the Board has held that a unit clarification is not appropriate in situations where a classification has been historically excluded from the unit, and that, in such cases, a union may be found to have waived its right to seek a clarification of the unit. *Sunar Hauserman*, 273 NLRB 1176 (1984).

Here, however, the evidence presented at the hearing was insufficient to establish that the classification of Family Partner existed at the time the parties negotiated their initial contract.⁷ Moreover, whenever the Family Partner classification was first created, the evidence does not establish when the Union received notice of that fact from the Employer or when the Union first received actual notice of the existence of the Family Partner position. The evidence also does not establish when the Union was first put on notice that the Employer was treating the Family Partner classification as being outside the unit.

The evidence also establishes that the Union filed a grievance in 2002 challenging the Employer's decision to exclude the Family Partner classification from the unit, and that in the recent negotiations for a new collective bargaining agreement, the parties agreed to disagree regarding the placement of the Family Partner classification in the unit. In these circumstances, I must reject the Employer's argument that the classification was "historically excluded" from the unit. *Sunar Hauserman*, 273 NLRB 1176 (1984). I also do not find that the Union waived any right to claim the

⁷ I also note that all of the evidence indicating that the classification of Family Partner may have been created prior to the parties reaching agreement on the 2000 collective bargaining agreement was hearsay testimony and/or lacked any foundation or indication of the competence or certainty of the witness regarding the date on which the Family Partner position was created. None of the Employer's witnesses worked at the Compadres Program at the time the classification was initially created. The employee who first held that classification is apparently still employed by the Employer but was not called to testify. Furthermore, I note that the Employer failed to provide any documentary evidence that could have established that the classification existed prior to the parties' initial collective bargaining agreement, such as payroll records. The Employer relied heavily on a letter it sent to the Union on July 17, 2002, in response to the Union's grievance, in which the Employer stated that the classification of Family Partner existed prior to July 1, 2000. I did not find this letter sufficient to establish the truth of the statements asserted within it. I also note, that even assuming that a Family Partner classification did exist in calendar year 2000, there is no evidence regarding the duties of the Family Partner at that time and therefore, it would be unclear whether the position is substantially the same as the position that exists now.

classification. Id.⁸

Accordingly, I find that the classification of Family Partner should properly be included in the existing bargaining unit.⁹

CONCLUSIONS AND FINDINGS

1. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is a California non-profit corporation engaged in the business of providing social welfare services for children, with a principal place of business in Gilroy, California. The parties stipulated and I find that the Employer is engaged in commerce within the meaning of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The Petitioner seeks to clarify the existing bargaining unit to include the position of Family Partner, and the Employer seeks to exclude the position of Family Partner from the bargaining unit.

5. I find that the Family Partner classification should be included in the unit.

ORDER

The unit is clarified to include the classification of Family Partner.

⁸ I have reviewed the cases the Employer cited on oral argument in support of its waiver argument and find that they are not applicable to the instant dispute See *Robert Wood Johnson University Hospital*, 328 NLRB 912 (1999); and *Plough, Inc.* 203 NLRB 818 (1993).

⁹ I also note that the Employer argued at the hearing that the Family Partner employees do not desire to be part of the bargaining unit and that this would support the Employer's position that the Family Partners do not have a community of interest with the employees in the bargaining unit. In support of this argument, the Employer presented the testimony of one Family Partner who stated her preference not to be in the Union, and asserted that each of the other Family Partners did not want to be represented by the Union. Her assertions regarding the preference of the remaining Family Partners is hearsay. Regardless, employee support or lack of support is not a controlling factor for determining this accretion issue in a UC petition case. See, e.g. *Consolidated Papers*, 253 NLRB 283 (1980).

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, DC 20570. This request must be received by the Board in Washington by February 23, 2004.

DATED AT Oakland California this 9th day of February, 2004.

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