S. S. Joachim and Anne Residence *and* 1199 National Health and Human Service Employees Union, Petitioner. Case 29–RC–8187

September 19, 1994

DECISION AND DIRECTION OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

Upon a petition for election filed under Section 9(c) of the National Labor Relations Act, a hearing was held on various dates in August 1993 before a duly designated hearing officer of the National Labor Relations Board. On September 21, 1993, pursuant to Section 102.67(h) of the Board's Rules and Regulations, the case was transferred to the Board for decision.

Having carefully reviewed the entire record in this proceeding, including the Petitioner's posthearing brief, the Board makes the following findings:

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

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate purposes of the Act to assert jurisdiction.

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. S. S. Joachim and Anne Residence, the Employer, is a skilled nursing facility providing health care and related services in Brooklyn, New York. On June 11, 1993, pursuant to a Stipulated Election Agreement in Case 29–RC–8124 between the Employer, Local 1199, Drug, Hospital, and Health Care Employees Union a/k/a Local 1199 National Health and Human Service Employees Union (the Petitioner), and Local 144, Hotel, Hospital, Nursing Home and Allied Services Union, SEIU, AFL–CIO, a representation election was held in the following units:

Technical Unit

Included: all full-time and regular part-time technical employees, including licensed practical nurses, physical therapy assistants, and occupational therapy assistants.

Excluded: all other employees, service and maintenance employees, rehabilitation nurses, clinic coordinator, activities leader, medical records coordinator, chef, dietitian, purchasing clerk, bookkeepers, secretaries, patient care coordinators, registered nurses, occupational therapists, social workers, office clerical employees, guards and supervisors, as defined by the Act.

Service and Maintenance Unit

Included: all full-time and regular part-time service and maintenance employees including dietary workers, nursing assistants, orderlies, ward clerks, porters, maids, maintenance employees, recreation aides, rehabilitation aides, and receptionists.

Excluded: all other employees, technical employees, rehabilitation nurses, clinic coordinator, activities leader, medical records coordinator, chef, dietitian, purchasing clerk, bookkeepers, secretaries, patient care coordinators, registered nurses, occupational therapists, social workers, office clerical employees, guards and supervisors, as defined by the Act.

As a result of the election, on June 25, 1993, the Petitioner was certified as the collective-bargaining representative of the employees in the technical unit and the service and maintenance unit.

On July 9, 1993, the Petitioner filed the instant petition seeking to represent all full-time and regular part-time employees employed by the Employer at its Brooklyn facility, excluding all technical and service and maintenance employees included in the certification of representative in Case 29–RC–8124.[1] Subsequently, the Petitioner filed an amended petition which was further amended during the hearing to read:

> *Included*: All full-time and regular part-time employees in the following positions and voting units:
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> A. *Professional*: Dietitian, Dietary Technician, Physical Therapist, Occupational Therapist, Registered Nurse and Social Worker.
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> B. *Business Office Clerical (BOC)*: Secretary to Administrator, Secretary to Personal Director/-CFO, Secretary to Director of Nursing, Account Payable Coordinator, Account Receivable Coordinator, Medical Residence Coordinator and Payroll Records Coordinator.
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> C. *Residual Service and Maintenance*: Medical Records Coordinator, Activities Leader a/k/a Activities Supervisor and the Chef.
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> D. *Residual Technical*: Clinic Coordinator, Rehabilitation Nurse, Dietary Technician and the Residence Care Coordinator.
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> Excluding all technical, service and maintenance employees included in prior certification in Case No. 29–RC–8124, and all guards and supervisors as defined by the Act.

At the hearing, the parties stipulated that certain of the classifications listed above should be excluded

[1] At the hearing, it was noted that Local 144, SEIU disclaimed interest in representing any of the petitioned-for employees.

from the petitioned-for units: the dietitian, dietary technician, clinic coordinator, and rehabilitation nurse as supervisors within the meaning of the Act; the physical therapist and occupational therapist as independent contractors; and the secretary to the administrator, secretary to the personnel director, and secretary to the director of nursing as confidential or managerial employees.

The parties, however, disagree as to whether certain of the remaining classifications are appropriately included in the above units. The Employer contends that several of the positions listed above should be excluded as they are supervisory, confidential, and/or managerial within the meaning of the Act. The Employer would also exclude on-call registered nurses as casual employees and objects to the inclusion of the social workers on the additional ground that they do not share a community of interest with the registered nurses. In addition, the Employer moved to dismiss the petition in the residual technical unit, alleging that since the Petitioner had agreed to exclude those classifications from the units in the Stipulated Election Agreement in Case 29–RC–8124, the Petitioner is precluded from seeking to represent such employees now.

The Employer's Motion to Dismiss

At the hearing, the Employer made a motion to dismiss the petition with respect to the residual technical unit because the employees sought in that unit were also sought in the original petition filed in Case 29–RC–8124, but ultimately excluded by the parties' Stipulated Election Agreement. The hearing officer denied the Employer's motion, and the parties subsequently filed motions with the Board. The Employer argues that Section 9(c)(3) of the Act bars an election in any bargaining unit in which a valid election has been held in the preceding 12 months, that it is a waste of the Board's resources to consider the eligibility of these employees when the parties waived a hearing on their eligibility in the prior proceeding, and that a proliferation of units will result from the existence of two technical units. The Petitioner argues that the stipulation was reached between the three parties to the election in Case 29–RC–8124 and that the Petitioner never considered or agreed not to seek those excluded positions in a subsequent petition.

We find no merit in the Employer's position. A new election is barred only in a ''unit or any subdivision'' in which a previous election was held. The employees sought by the Petitioner in the residual technical unit are not in the bargaining unit or subdivision thereof which voted in the prior election; they were specifically excluded. Thus, there is no 9(c)(3) problem. Indeed, this argument was specifically rejected in *Philadelphia Co.*, 84 NLRB 115 (1949), where the union sought to represent four distinct employee classifications which the union had specifically agreed to exclude in the previous election held only 6 months earlier. In directing an election, the Board noted that an election among the petitioned-for employees ''would not involve the same bargaining unit or subdivision thereof within the meaning of Section 9(c)(3) of the Act, as amended.'' 84 NLRB at 116. Further, there is no evidence the Petitioner ever expressly promised or agreed to refrain from representing the employees. *Briggs Indiana Corp.*, 63 NLRB 1270 (1945). The stipulated agreement in Case 29–RC–8124 only assured the Employer that the resident care coordinators would not participate in that election; such a stipulated agreement has no effect on subsequent petitions. Finally, with regard to proliferation of units, as the Petitioner already represents a unit of technicals, if the majority of ballots in this voting group are cast for the Petitioner, the employees will be included in the existing technical unit. The Petitioner has not sought a separate unit of technicals nor do we find that the petitioned-for technicals in this case constitute a separate appropriate unit. Accordingly, we dismiss the Employer's motion.[2]

Residual Technical Unit

Resident Care Coordinator: The Employer objects to the inclusion of the resident care coordinators (RCCs), arguing that the RCCs are supervisors within the meaning of the Act. The Petitioner contends that the RCCs serve no supervisory function. Since the record indicates that the RCCs, inter alia, assign and direct aides and orderlies in day-to-day matters of resident care as well as ensure that these employees are following their respective job duties, the resolution of their status involves consideration of the Supreme Court's recent decision in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994). Accordingly, the Board by its Order of August 5, 1994, severed the technical voting group, consisting solely of the RCCs, from the instant petition and remanded that portion of the case to the Regional Director for the purpose of reopening the record with respect to the supervisory issue and thereafter transferring the record to the Board for decision of that issue.

Professional Unit

On-Call Registered Nurses (RNs):[3] The Employer contends that the approximately 11 on-call RNs are

[2] The Employer's motion does not appear to raise this issue with respect to the residual service and maintenance unit. To the extent, however, that the Employer's arguments also apply to those petitioned-for employees, we find, for the reasons discussed above, that there is no 9(c)(3) problem with respect to the residual service and maintenance employees.

[3] At the hearing, although the Employer argued that the two full-time RNs should be excluded as supervisors of the nurses aides, it offered no testimony or other evidence in support of its contention.

casual employees and thus should be excluded from the professional unit. The Petitioner contends that the on-call RNs work on a regular basis and share a community of interest with the permanent RNs.

The Employer employs between 9 and 11 on-call or per diem RNs. All of the Employer's RNs, permanent or on-call, have the same job description and common supervision. Like the permanent RNs, the on-calls report to the nursing office each day to receive assignments as medication nurse or charge nurse. The on-call RNs do not receive the same benefits as the full-time employees. Several of the on-call RNs have a fixed schedule with the Employer, working the same day or days each week. The remaining on-call nurses hold full-time positions at other institutions and report their availability to Shirley Armstrong, the assistant director of nursing (ADON), at the beginning of each month. The ADON fills any vacancies in the facility's daily staffing schedule from the list of available on-call RNs. There is no expected number of hours to be worked by an on-call RN, and the on-call RN is free to reject employment. The Employer has offered several of the on-call RNs full-time employment, and one of the on-calls, Sandra Karimpinalkummel, worked as a full-time RN at the facility before changing to on-call status. The Employer's payroll records for the 6-month period preceding the hearing, from February 13 to August 14, 1993, indicate that one on-call RN worked as few as 84 hours, that another worked 794 hours, and that the cumulative hours worked by the remaining on-call RNs ranged between 200 and 400 hours.[4]

In determining whether on-call employees should be included in a unit, the Board considers the similarity of the work performed and the regularity and continuity of employment.[5] *Trump Taj Mahal Casino*, 306 NLRB 294, 295 (1992), enfd. 2 F.3d 35 (3d Cir. 1993). With regard to the similarity of work, in the instant case it is undisputed that the on-call nurses perform the same duties under the same conditions and supervision as the full-time RNs. With regard to regularity, the Board finds this requirement is met when an employee has worked a substantial number of hours within the period of employment prior to the eligibility date. *Trump,* supra (citing *Mid-Jefferson County Hospital*, supra). Under its most widely used test, the Board has held that, absent special circumstances, an on-call employee has sufficient regularity of employment if the employee averages 4 or more hours/week for the last quarter prior to the eligibility date. *Davison-Paxon Co.*, 185 NLRB 21 (1970). In *Marquette General Hospital*, 218 NLRB 713 (1975), the Board utilized 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. The Board employed this formula because of the significant disparity in the number of hours worked by the employer's on-call nurses; some worked as many as 540.5 hours per quarter, and some as few as 23. The more restrictive formula allowed the Board to distinguish those on-call nurses whose work patterns more closely resemble full-time nurses from those who worked relatively infrequently. Here, although two RNs worked 84 hours and 794 hours, respectively, the vast majority of the Employer's on-call RNs worked a substantial number of hours within a relatively narrow range. In these circumstances, we find the *Davison-Paxon* eligibility formula is more appropriate. *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990). Accordingly, the Employer's on-call RNs are eligible to vote if they regularly average 4 hours or more of work per week during the quarter prior to the eligibility date.

Social Workers: At the hearing, the Employer took the position that social workers should be excluded from the unit because they are in a supervisory/managerial position. The Petitioner contends that the Employer failed to establish that the social workers are supervisors or managerial.

The Employer's social services department consists of one admissions clerk, two social workers, Nadine Nekrewich and Sandra Defredes, and the director of social services, Eileen Wagner. According to the job description, the social worker assists the director of social services, assesses the social needs of residents, formulates treatment plans, and follows through on established goals. The treatment plans and goals are established by the social worker and the director. The social worker conducts preliminary interviews with new residents and performs quarterly reviews of residents to monitor problems and progress.

The social workers are also involved in investigations of patient abuse. When a resident complains to the social worker about abuse or neglect, the social worker reports the incident to Pat Brienza, the director

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In fact, the parties stipulated that Lance Mars, the director of human resources, could find no documentary evidence that the RNs are involved in hiring, firing, or discipline. In addition, staff RN Gloria Matteson testified without contradiction that she possessed no authority to hire, discipline, discharge, promote, or authorize the transfer of employees. Accordingly, we find that the staff RNs are not supervisors within the meaning of the Act and include them in the professional unit.

[4] Although on-call RN Sima Unger only worked 101.5 hours during this period, she did not begin working for the Employer until July 3, 1993. At this rate, however, she would have accumulated approximately 400 hours had she been employed the full 6 months. Consequently, she should be included in the group that has worked 200–400 hours. Compare *Modern Food Market*, 246 NLRB 884 (1979).

[5] It is well settled that an employee's ability to reject work when offered and the lack of identical benefits are not determinative of an individual's employment status so as to exclude the individual from the unit as a casual employee. *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981), and the cases cited there.

of nursing (DON) and then the DON and the social worker interview the resident. The social worker records the facts given in the interview, and gives the report to the DON. When other staff members report an incident of resident abuse or neglect to the DON, the social worker is asked to participate in the interview of the resident by the DON and prepare a written report of the facts. Nekrewich testified that she sometimes makes a verbal recommendation to the DON with respect to those cases being investigated by the DON, such as noting that an aide's behavior was unacceptable and that the aide should ''be spoken to, at the very least.'' After the written reports are filed, the DON often conducts a further investigation. Nekrewich, however, testified that she did not know whether the DON's investigation included interviewing the nursing staff or supervisors. Nekrewich also testified that she has never fired or suspended any employee. The parties further stipulated that the Employer's records indicate that the two social workers never issued any written warnings or imposed any discipline.

The social workers are not involved in hiring, and do not have scheduling authority for the nursing staff. The director approves vacation for the social workers, although Nekrewich testified that, if the director was absent, she has the authority to approve a vacation request by the other social worker or the admissions clerk.

The social workers attend interdisciplinary meetings along with the director, the DON, the ADON, the resident care coordinators, and the dietitian. At the meetings, they discuss each resident's plan of care. The social workers also attend the ''morning report,'' at which the residents' condition during the previous day are discussed. They are also involved in bereavement counseling, family counseling, community referrals, and decisions regarding resident transfer and discharge.

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

> any individual 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 to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The burden of proving supervisory status is on the party alleging that such status exists. *Northcrest Nursing Home*, 313 NLRB 491, 496 fn. 26 (1993). As set forth below, we find that the Employer has failed to meet its burden of establishing that the social workers are supervisors within the meaning of the Act.[6]

It is undisputed that the social workers lack authority to hire or fire employees. There is no evidence that the social workers assign or direct the work of the nursing staff. Nekrewich testified that if her supervisor is absent, she has the authority to approve vacation or leave requests. Even assuming that this authority would render the social workers statutory supervisors, there is no evidence that this substitution is regular or substantial. The sporadic assumption of supervisory duties is not sufficient to establish supervisory authority. *Rhode Island Hospital*, 313 NLRB 343 (1993). While the social workers are required to report instances of resident neglect or abuse and to participate in any investigations that may result from both their reports or staff reports, their role appears limited to preparing a written report of the facts. In most instances, an even further investigation of the incident is conducted by the DON. Although Nekrewich testified that she may, at times, recommend disciplinary action, there is no evidence that the DON or ADON relies on this recommendation in disciplining an employee. Thus, the recommendations given by the social workers are not effective; instead, the record evidence shows that the DON conducts an independent investigation. *Northcrest*, supra. Accordingly, we find that the social workers are not statutory supervisors and are properly included in the unit.

Residual Service and Maintenance Unit

Activities Supervisor:[7] The Employer contends that the activities supervisor should be excluded from the unit as a supervisory position. The Petitioner contends that the activities supervisor exercises no supervisory authority.

The Employer's activities department consists of the director, David Alvarez, the activities supervisor, and

[6] We further find that the Employer failed to establish that the social workers are managerial employees. The Board has long held that managerial employees are those who formulate and effectuate management policies by expressing and making operative the decisions of their employer and who have discretion in the performance of their jobs independent of their employer's established policies. See *Palace Laundry Dry Cleaning Corp.*, 75 NLRB 320, 323 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). As discussed above, the record shows that the social workers participate in decisions regarding resident care and long-term treatment. However, there is no record evidence that their decisionmaking involves the formulation of management policy or that they have the discretion to deviate from the Employer's established policies.

The Employer also argued that the social workers should be excluded from the professional unit as they do not share a community of interest with the RNs. However, the parties stipulated that the social workers are professional employees within the meaning of the Act, and, based on that stipulation, they are a fortiori properly included in the petitioned-for all professional unit. *Health Care Rule*, 53 Fed.Reg. 33932, 284 NLRB 1573 (1988) (an all professional unit ''would obviously be appropriate''). See also *Bay St. Joseph Care Center*, 275 NLRB 1411 (1985).

[7] During the hearing, or shortly before, the Employer changed the title of this position from activities leader to activities supervisor. Although the job title was changed, the nature and duties of the job remained the same.

four activities aides, two full-time and two part-time. The activities supervisor position is currently held by Maryanne Nazario, who was promoted to that position from activities aide. According to the job description, the activities supervisor, under the supervision of the director of activities, performs a variety of duties with respect to resident's activities programs and plans, organizes, and directs specialized recreation programs to meet the needs of the residents.

Any requests for hiring within the activities department are made to Mars, the director of human resources. Mars arranges for an interview between the candidate and the director of activities and, the activities supervisor, both of whom make a verbal recommendation with regard to that candidate. Mars also interviews the candidate and makes the job offer. The most recent hiring was approximately 3 months prior to the hearing and before Nazario was promoted to the position. The director of activities has the authority to terminate and suspend employees. The Employer has no record of any performance evaluations by the activities supervisor and the activities supervisor has never fired an employee. Mars testified that the activities supervisor has the authority to give verbal and written warnings; however, there have been no incidents since Nazario's appointment. The only incident prior to her appointment involved the voluntary termination of the former activities leader.

According to Mars, the programs administered by the department are ''pre-planned'' so there is no need to tell aides what to do unless there has been a change. While the activities supervisor plans the programs, the director tells her the number of programs that should be arranged in each area. The director also meets with the DON with respect to the types of programs, whether art or music, that are needed and the director communicates these needs to the activities supervisor.

On the basis of the record evidence, we find that the activities supervisor has no supervisory authority. The direction of activities aides by the activities supervisor appears routine and requires no independent judgment or discretion. She also exercises no independent judgment or discretion in planning programs since the number and type of each are prescribed by the director. The activities supervisor has no authority to hire or fire. She may participate in the interview of a job candidate and make a verbal recommendation; however, there is no evidence that the recommendation is relied on and Mars conducts his own independent interview of the job candidate. Finally, although the activities supervisor has the authority to issue a verbal or written warning, she has never done so, nor is there any evidence that such warnings, even if given, would have an adverse effect on an employee's job status or tenure. *Northcrest*, supra. Accordingly, the activities supervisor is included in the residual service and maintenance unit.

Business Office Clerical Unit

Payroll Coordinator: The Employer contends that Jim Weeks, the payroll coordinator, should be excluded from the unit as a confidential employee.[8] The Petitioner contends that Weeks does not have a confidential relationship with management.

Weeks has been employed at the facility since February 1991. His immediate supervisor is the controller, Maria Aymil, who also supervises the account payable coordinator, the account receivable coordinator, and the medical residence coordinator. His primary responsibility is issuing employee paychecks based on timecards. Accordingly, Weeks does not make any changes in the Employer's payroll procedure without written instructions. He does not attend supervisory or management meetings. He has no access to either budget and cost estimates or to financial projections. Weeks has access to wage and benefit information for all employees including management. A memo dated July 8, 1993, from Mars to the facility's chief financial officer, Joseph Giacomo, requests the assistance of Weeks in preparing payroll information requested by the Petitioner for contract negotiations regarding the certified technical and service and maintenance units. The requested information is described as relating to ''pay rates and classifications.''

Weeks submits memos to Mars, outlining specific payroll problems such as an employee's sick leave, absence, or overtime and the Employer's past practice concerning such a problem if Weeks is aware of any. On occasion, Mars will discuss the problem with Weeks before advising him of what action should be taken. A memo dated June 11, 1993, from Mars to Giacomo regarding a proposed maternity leave policy notes that the policy is based on the recommendation of Weeks and is ''in keeping with our past practice.''

The Board applies a narrow test in making determinations as to whether an employee is ''confidential'' and will exclude an employee from a bargaining unit as confidential only if that employee assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the

[8] At the hearing, the Employer alternatively contended that Weeks should be excluded as managerial. We find no evidence that the payroll coordinator formulates and effectuates management policies by expressing and making operative the decisions of the Employer. See fn. 6, supra, and cases cited there. The record discloses that Weeks' primary responsibility is to prepare employee paychecks according to the Employer's existing practices. He does not deviate from established policy without written instructions. When confronted with a problem, he prepares a memo for Mars outlining the facts of the situation and the existing policy, if any, and Mars, by his own admission, makes the final decision as to what is the appropriate action. Accordingly, we find that Weeks is not a managerial employee.

field of labor relations. *B. F. Goodrich Co*., 115 NLRB 722 (1956); *PTI Communications*, 308 NLRB 918 (1992). The Board will also exclude employees who have access to confidential information regarding anticipated changes that may result from collective-bargaining negotiations; however, the Board will not exclude employees who merely have access to personnel or statistical information on which an employer's labor relations policy is based, nor will it exclude employees with access to labor relations information after it has become known to the union or employees concerned. *Pullman, Inc*., 214 NLRB 762 (1974).

It is well settled that the party asserting confidential status has the burden of providing evidence to support its assertion. *Intermountain Electric Assn*., 277 NLRB 1 (1985). We find that the Employer has not met its burden. While Weeks may assist Mars on occasion with administrative determinations regarding payroll, there is no evidence that he assists in a confidential capacity with respect to labor relations. Weeks merely informs Mars of current problems and then implements the action determined by Mars. Further, with regard to contract negotiations, unlike *Pullman*, supra, where the excluded employees had access to the precise terms to which the employer would agree in a collective-bargaining agreement, Weeks appears to be responsible only for retrieving and compiling information about current wage rates. Accordingly, we find that the payroll coordinator should be included in the unit.

Appropriate Units and Voting Groups

Based on the foregoing and the parties' stipulations, we find that the following units are appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *Professional Unit*: All full time and regular part-time professional employees including registered nurses and social workers, but excluding dietitian, occupational therapists, all other employees, guards and supervisors as defined by the Act.
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> *Business Office Clerical Unit*: All full time and regular part-time business office clericals including account payable coordinator, account receivable coordinator, medical residence coordinator and payroll records coordinator, but excluding the secretary to the administrator, secretary to the personnel director and secretary to the director of nursing, all other employees, guards and supervisors as defined by the Act.

The Petitioner also seeks to represent a residual group of service and maintenance employees—the medical records coordinator, the activities supervisor, and the chef. As the Petitioner is the current collective-bargaining representative of a unit of service and maintenance employees, it does not seek to represent these employees in separate units but to add the unrepresented employees to its existing unit; and no other labor organization seeks to represent them separately. In these circumstances, the representation of the petitioned-for employees can only be resolved by a self-determination election in which the employees are given an opportunity to express their desire with respect to being included in the bargaining units already represented by the Petitioner. *Comax Telcom Corp*., 219 NLRB 688 (1975). Accordingly, we shall direct an election in the following voting group:

Voting Group

> All medical records coordinators, activities supervisors and chefs excluding all other employees, guards and supervisors as defined in the Act.
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> If a majority of the employees in this voting group vote ''YES,'' they will be taken to have indicated their desire to be included in the existing service and maintenance employee bargaining unit represented by the Petitioner. If not, they will be taken to have indicated their desire to remain unrepresented.

[Direction of Election omitted from publication.]