UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
SOUTH METRO HUMAN SERVICES,	)	
	)	
Employer,	)	
	)	
and	)	Case No. 18-RC-17754
	)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 5,	)	
	)	
Petitioner.	)	

South Metro Human Services' Brief In Support of Its Exceptions to the Hearing Officer's Report and Recommendation On Challenges and Objections

Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Employer South Metro Human Services ("South Metro") respectfully submits this brief in support of its Exceptions to the Hearing Officer's Report and Recommendation on Challenged Ballots and Objections in Case 18-RC-17754, which issued on June 17, 2011. Except as set forth below, South Metro generally endorses the Hearing Officer's findings and conclusions and urges the Board to adopt the Hearing Officer's recommendations for resolving election challenges and objections. However, based upon the record[1] and the applicable law, as discussed more fully below, the Board should reject the Hearing Officer's recommendation to sustain Petitioner's challenges to ballots of Samantha Hofmaster and Cindy Van Heise. The Board should also be advised of the complete record related to "schedules" referenced in the Report,

[1] For convenience, citations to the record will be abbreviated in the following ways: page numbers from the Hearing Transcript as "Tr. [#]" (where helpful the witnesses last name may be indicated in parenthesis); and Exhibits will be abbreviated for Employer's Exhibits as "E-#", for the Union's (Petitioner's) Exhibits as "P-#," and for Board exhibits as "B-#." The Hearing Officer's Report and Recommendation to the Board on Challenges and Objections will be referred to as the "Report."

and, if necessary, should reject the Hearing Officer's recommendation to overrule South Metro's contingent objection related to disenfranchised on-call employees. As to that objection, South Metro urges the Board to accept the Hearing Officer's conclusion that on-call employees are excluded from the stipulated unit. If, however, the Board should find that on-call employees are eligible, South Metro's objection should be sustained and the Election set aside because of voter disenfranchisement. Finally, South Metro excepts to certain findings related to Petitioner's Objections.

I. Facts and Procedural History

South Metro is a Minnesota nonprofit providing residential mental health and case management services to adults with mentally illness and/or chemical dependency. South Metro delivers services via approximately twenty different programs, ranging from Adult Foster Care to county-based case management programs to homeless outreach services. (*See, e.g.*, Tr. 257 (Kluge); Tr. 583 (Paul).) South Metro also provides Intensive Residential Treatment Services ("IRTS") at its Community Foundations facility. (*See* Tr. 257 (Kluge).)

The Petitioner, AFSCME Council 5 ("Petitioner" or "the Union"), petitioned to represent four different units of South Metro employees.[2] One petitioned-for unit is comprised of professional employees[3] and is the subject of these proceedings. An Election was conducted by secret ballot on April 28, 2011, pursuant to a Stipulated Election Agreement approved by the Regional Director. Out of 151 votes cast, 70 were cast in favor of representation by Petitioner and 71 votes were cast against. There were 9 challenged ballots, enough to determine the

[2] The Union petitioned to represent three non-professional units of South Metro employees (*see* case files for cases 18-RC-17751, 18-RC-17752, 18-RC-17753) in addition to the professional unit.

[3] The parties stipulated to the following bargaining unit description:

> All full-time and regular part-time Professional Employees employed by South Metro Human Services; excluding all Service and Maintenance employees, M.D.'s, psychiatrists, licensed psychologists, technical employees, business office clericals, skilled maintenance employees and guards as defined by the Act.

outcome of the Election. The Union challenged the ballots of Darcy Anderson, Samantha Hofmaster, and Cindy Van Heise, alleging that they lacked the qualifications necessary to be considered professionals. The Board challenged the ballots of Mark Fellows, Robin Nadeau, Jennifer Olson, Lindsay Paeztnick, and Sara Stamschror because they did not appear on the voter eligibility list. South Metro challenged the ballot of Aboidun "Shay" Adeboye because she is an on-call employee. Both parties' filed objections.

The Regional Director ordered a formal hearing to resolve substantial and material issues of fact raised by the challenges and parties' objections. A hearing was conducted before Hearing Officer Joseph Bornong on May 16, 19, 23, and 24, 2011. Both parties filed post-hearing briefs. South Metro respectfully refers the Board to its post-hearing brief for further explanation of relevant facts.

Hearing Officer Bornong issued his Report and Recommendation to the Board on Challenged Ballots and Objections on June 17, 2011. South Metro excepts herein to certain findings and conclusions of the Hearing Officer.

II. Argument

Exception 1: While the Hearing Officer Properly Concluded That the Job Classification of Mental Health Counselor II (MHC II) Is Included in the Stipulated Professional Unit, The Hearing Officer Erred in Findings and Conclusions Resulting in the Recommendation that Petitioner's Challenges to the Ballots of MHC II's Samantha Hofmaster and Cindy Van Heise Should Be Sustained. The Hearing Officer's Recommendation is Not Supported by Applicable Law or Facts in the Record.

The Union challenged ballots cast by Darcy Anderson, a Substance Abuse Case Manager for one of South Metro's Assertive Community Treatment programs, and Samantha Hofmaster and Cindy Van Heise, whose job classification is Mental Health Counselor II ("MHC II") in South Metro's Adult Foster Care program, alleging that they are not professional employees and were ineligible to vote in the April 28 election. With respect to Ms. Anderson, the Hearing

Officer correctly found "no factual basis" for questioning the parties' agreement that case managers in general, and therefore Ms. Anderson in particular, are professionals. Conversely, while affirming that the parties agreed that Ms. Hofmaster's and Ms. Van Heise's job classification was properly within the stipulated professional unit, Hearing Officer Bornong recommended sustaining the Union's challenges to their ballots.

It is well established that the statutory definition of "professional" relates to a particular job, rather than the individual employee's qualifications. *See Avco Corp./Textron Lycoming Div.*, 146 L.R.R.M. 1161, 313 N.L.R.B. 1357 (1994). Ms. Hofmaster and Ms. Van Heise are part of a much larger group of employees, the MHC II classification, in which they perform a job that is included within the professionals unit. The Union has never objected, either before or after the Election, to the professional status of the MHC II job classification in which Ms. Hofmaster and Ms. Van Heise serve.[4] As the Hearing Officer himself observed, when the parties agree to professional status of a particular job classification, the Board is not generally required to inquire beyond that stipulation on its own initiative. (Report, p. 16) (citing *Minneapolis Society of Fine Arts*, 194 N.L.R.B. 371, 373 (1971).) The Board has a well established policy of honoring concessions made in the interest of expeditious handling of representation cases. *Westlake Plastics Co.*, 119 N.L.R.B. 1434, 1441 (1958). In accordance with this policy the Board will not permit, subsequent to an election, the litigation of eligibility matters that were settled before the election by stipulation or agreement of the parties. *Id.*

The issue of whether the job classification of MHC II belongs in the professional unit was settled at the time the parties stipulated to the Election Agreement. Accordingly, the Hearing Officer should have applied the same analysis to resolve the challenges to Ms.

[4] Whether MHC II's generally are professionals was not and is not at issue. As the Hearing Officer explained, "no other challenges were made, and no objections were filed on this issue by either party." (Report, p. 20 n. 9.)

Hofmaster's and Ms. Van Heise's ballots as he applied to Ms. Anderson's, and thereby come to the same conclusion. As was the case with Ms. Anderson, Ms. Hofmaster's and Ms. Van Heise's job classification was and is decidedly within the stipulated bargaining unit. Therefore, like Ms. Anderson, Ms. Hofmaster and Ms. Van Heise were eligible to vote in the election and the challenges to their ballots should be overruled. To the extent that the Hearing Officer relied on factual findings to yield a discordant result, the Hearing Officer failed to consider the record evidence, discussed below, which supports and establishes the professional nature of the work Ms. Hofmaster and Ms. Van Heise perform.

a) The Hearing Officer's erred in finding that South Metro "prefers" MHC II's to have a Bachelor's degree in a related field. The record evidence establishes that a Bachelor's degree is required and exceptions to this requirement are limited to specific circumstances, and that Ms. Hofmaster and Ms. Van Heise fall within this limited exception.

According to Section 2(12) of the Act, a "professional" employee is, inter alia, engaged in work requiring "knowledge of an advanced type."[5] "If a group of employees is predominantly composed of individuals possessing a degree in the field to which the profession is devoted, it may logically be presumed that the work requires 'knowledge of an advanced type.' Conversely, if few in the group possess the appropriate degree, it logically follows that the education characteristics of the work are not those requiring the utilization of advanced knowledge." *Western Electric Co., Inc.*, 126 NLRB 1346 (1960). MHC II's are required to have a Bachelor's degree in a behavioral sciences or related field *and* either 2,000 hours of experience working

[5] In relevant part, under Section 2(12) of the Act, the term "professional employee" means—
any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

with individuals with mental illness or 2,000 hours of experience working in Corporate Adult Foster Care. (E-18.) The vast majority of MHC II's have a relevant Bachelor's or higher degree. (E-19.) Accordingly, work in the MHC II classification must logically be presumed to require knowledge of an advanced type. Significantly, qualifications for the MHC II position are the same as those for the professional position of Mental Health Practitioner at Community Foundations, which is included in this unit. (E-53, *cf.* E-18.) Job duties for the two positions are also substantially similar. (E-53, *cf.* E-18.) The Union did not object to any ballot cast by a Mental Health Practitioner, nor has it ever suggested that these employees are not professionals within the meaning of the Act, despite the great similarity of this position to that of MHC II.

Moreover, per the regulatory framework under which South Metro operates, 6,000 hours of relevant experience without a degree is treated as an equivalent qualification to a Bachelor's degree in a related field plus 2,000 hours of experience. (Tr. 564 (Schneider).)[6] This regulatory equivalency between a degree and substantial experience applies to the MHC II position and equally to Mental Health Practitioners in Community Foundations, as well as to Substance Abuse Case Managers like Ms. Anderson. (Tr. 132, 629 (Wendle).) This equivalency is not inconsistent with Section 2(12) of the Act because, as the Hearing Officer acknowledged, knowledge of an advanced type required by Section 2(12)(iv) is "customarily," not exclusively, acquired in pursuit of specific academic degrees. (Report, p. 17.)

While neither Ms. Hofmaster nor Ms. Van Heise has a Bachelor's degree in a related field, each has over 6,000 hours of experience working with severely and persistently mentally ill individuals. (Tr. 120–21 (Wendle).) As Ms. Van Heise's resume evidences, she has worked with severely and persistently mentally ill adults for more than eight years. (E-21.) At the time

[6] *See* Minn. Stat. § 245.462. The Hearing Officer took judicial notice of this statutory and regulatory framework under which South Metro operates.

she was hired at South Metro, she had worked with this population for over five years. (*Id.*) Ms. Hofmaster had experience supervising an Adult Foster Care home for severely and persistently mentally ill adults before she was hired at South Metro, and has several years of experience working with this population. (E-20.) An exception to the degree qualification has been made for roughly 20 of the some 200 MHC II's hired by recruiter Deb Wendle over the years, all of whom possessed the requisite amount of experience under the regulatory framework. (Tr. 119.) South Metro has similarly hired employees for the Mental Health Practitioner position who did not have a degree but did have more than 6,000 hours of experience. (Tr. 629 (Wendle).) However, inexplicably the only MHC II ballots challenged by the Union were those of Ms. Hofmaster and Ms. Van Heise, and no Mental Health Practitioners were challenged. (B-1(a), p. 2).

MHC II's generally, and Ms. Hofmaster and Ms. Van Heise specifically, are entitled to the presumption that their work requires knowledge of an advanced type and they should be considered professionals under the Act with regard to this criterion. *Western Electric Co., Inc.*, 126 NLRB 1346 (1960).

b) The Hearing Officer erred in finding that "most or all" of Ms. Hofmaster's and Ms. Van Heise's duties are not intellectual and varied in character, and improperly concluded that Ms. Hofmaster's and Ms. Van Heise's work is not predominantly intellectual and varied in character.

The Hearing Officer is improperly dismissive of the varied clinical nature of Ms. Hofmaster's and Ms. Van Heise's work. It is impossible to regard their work as recurrent and routine as they provide direct clinical services to persistently mentally ill people. Ms. Hofmaster and Ms. Van Heise are responsible for supervising clients, helping them manage their mental health symptoms, and working through any crisis situations that happen at the house. (Tr. 354 (Schimp).) The clients in their care exhibit "different behaviors . . . , different symptoms,

different chemical abuse things that require different expertise" than would be required of non-professionals. (Tr. 403 (Schimp).)

Juli Schimp, a licensed social worker and the director of the program in which Ms. Hofmaster and Ms. Van Heise work, testified regarding the unpredictable nature of what MHC II's like Ms. Hofmaster and Ms. Van Heise encounter on a daily basis:

> "[T]he job [of an MHC II]. . . change[s] – it's different every day, so you just come in and you're responding to whatever is happening that day. So one day the clients might all be doing well and you're engaging in activities, one day the clients might be escalated and you're working with them on . . . helping them use their DBT [dialectical behavior therapy] skills to help them calm down."

(Tr. 355 (Schimp).)

The clients Ms. Hofmaster and Ms. Van Heise serve have, among other things, chemical dependency issues and suicidal thoughts and tendencies, which manifest in myriad behavior problems including self-injurious behavior. (Tr. 356 (Schimp).) Homes are staffed 24 hours per day, 7 days per week because these clients benefit from constant clinical supervision and care. MHC II's like Ms. Hofmaster and Ms. Van Heise are required to "spend the majority of each shift interacting with clients . . . and conducting tasks that are directly related to client care." (E-18). The fact that MHC II's also model independent living skills and assist clients with non-clinical needs does not undermine the varied nature and clinical demands of their core job responsibilities.

c) The Hearing Officer failed to consider the record evidence establishing that Ms. Hofmaster's and Ms. Van Heise's job duties require consistent exercise of professional discretion and judgment, and erred in concluding that Ms. Hofmaster's and Ms. Van Heise's work does not involve consistent exercise of professional discretion and judgment.

"Professional employee status turns on the degree of judgment required of the employees in applying knowledge" of an advanced type. *See Virtua Health, Inc.*, 344 N.L.R.B. 604, 609–10 (2005). MHC II's, including Ms. Hofmaster and Ms. Van Heise, are required to have advanced knowledge of behavioral sciences acquired in pursuit of a Bachelors degree or by means of extensive experience working with severely and persistently mentally ill persons. (E-18). They are required to have knowledge of the symptoms and course of serious and persistent mental illness, as well as medications, therapies, treatment modalities, and evidence-based clinical practices. (*Id.*) Unlike circumstances where an employee mechanistically applies ratios or other guidelines to achieve a predictable result, MHC II's must apply their knowledge in circumstances that demand discretion and independent judgment.

> I mean, if you interact with a client in the wrong way, you're going to set them off even worse and make them more escalated, and they might run out, slam the door, and go do something [to engage in self-harm]. It takes a skill to be able to figure out how to talk to the client and how to do it in a way that's going to calm them down versus get them more agitated.

(Tr. 359 (Schimp).)

The work of an MHC II "dealing as it does with various mental problems of the clients, involves the consistent exercise of discretion and judgment in the treatment of those clients, and is clearly an intellectual endeavor." *See Malcolm X Center for Mental Health, Inc.*, 222 N.L.R.B. 944, 946, 91 L.R.R.M. 1352 (1976).

d) The Hearing Officer erred insofar as he determined that a general incident reporting protocol and individual client treatment plans "too closely circumscribe" the independent judgment and discretion required for Ms. Hofmaster and Ms. Van Heise to be considered professionals.

South Metro is required by law to prepare an individual treatment plan for each of their adult clients.[7] The contents of each plan are also prescribed by law.[8] In addition, the regulations demand that South Metro maintain a written policy setting forth accident reporting procedures.[9] The fact that South Metro adheres to these relatively perfunctory legal obligations does not alter the professional nature of the work Ms. Hofmaster and Ms. Van Heise perform.

Ms. Hofmaster and Ms. Van Heise must use independent discretion and judgment, for example, to *implement* each individual client's treatment plan as well as to glean necessary information from the client to continuously *assess* the plan's effectiveness and the client's service needs. (Tr. 360–61; Tr. 565–66 (Schneider).) As explained by high level licensed professionals at SMHS, a treatment plan is not a script, nor is it "the only thing you can do with the client; it's kind of just suggestions for what works with the client." (Tr. 361 (Schimp).)

> [Treatment plans] define the therapy intervention to be used. But in the course of all this stuff there is a tremendous discretion that still needs to be implemented by that line staff [MHC II's] on how they're going to implement the cognitive behavioral therapy technique. It's not like everything is scripted out so that there's no discretion at all. It's impossible to do that in healthcare.

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[7] Minn. R. 9520.0640, Subp. 1.

[8] Minn. R. 9520.0640, Subp. 2. An individual program plan shall contain at least the following components:

A. an assessment, including a strength and need list, of the resident in at least the following areas of life: social, medical, legal, family, leisure and recreation, spiritual or religious, psychological, financial, vocational, and educational;
B. the specific problems to be resolved;
C. a list of goals in order of priority;
D. specific, measurable, and time-limited objectives which relate directly to the goals;
E. specific methods, strategies, and resources, including medications, to be used by the staff in assisting the resident to accomplish the goals and objectives;
F. the names of community resource personnel, program staff, or other persons designated to assist the resident in implementing the various components of the plan; and
G. notes indicating progress in achieving the goals and objectives.

[9] Minn. R. 9520.0570.

(Tr. 565 (Schneider).) To interact appropriately with clients, MHC II's like Ms. Hofmaster and Ms. Van Heise must consistently exercise clinical discretion and judgment in order, for example, "to be able to figure out how to talk to the client and how to do it in a way that's going to calm them down versus get them more agitated." (Tr. 359 (Schimp).)

At the hearing, the Union sought to establish that because MHC II's may utilize an on-call mental health professional as a "backup" for clinical matters, *all* MHC II's are incapable of exercising independent judgment and discretion. (*See e.g.* Tr. 166–68) MHC II's, by law, have an on-call Mental Health Professional as a backup for clinical matters. (Tr. 568 (Schneider).) One on-duty on-call Mental Health Professional supports all fifteen Adult Foster Care houses. (Tr. 362–63 (Schimp).) Furthermore, the testimony of the Union's witnesses on this topic is not credible and should be given no weight.

The Union's main witness on the subject, Jennifer Jendro, readily acknowledged that she has no way of knowing how often any MHC II elected *not* to consult her in a crisis situation, relying instead upon the MHC II's own skills to address the situation. (Tr. 539–40.) Conversely, witnesses who are highly licensed and qualified professionals and who actually oversee the Adult Foster Care program testified at length about the independent discretion and judgment an MHC II must exercise. (*See* Tr. 352–70, 402 (Schimp); Tr. 562–70 (Schneider).) As stated by Terry Schneider, South Metro's co-founder and Director of Clinical Services who ultimately supervises Ms. Jendro, Ms. Jendro's contention that MHC II's have "no discretion" in clinical matters is absolutely incorrect. (Tr. 565.)

e) The Hearing Officer unduly emphasized development of client treatment plans as "crucial" to finding that Ms. Hofmaster and Ms. Van Heise are professionals, and erred in finding that MHC II's have "no responsibility in the development of client plans"; the record evidence establishes that MHC II's are responsible for continually assessing a plan's effectiveness and for recommending changes or improvements to clients' plans.

The Hearing Officer gave undue weight to the function of developing treatment plans. In addition, he erred in finding that Van Heise and Hofmaster play no role in such development. The cases relied upon by the Hearing Officer to establish a critical degree of difference between developing and implementing treatment plans are inapposite. The social workers in *Catholic Bishop of Chicago* who were found to meet the statutory criteria for professional employees provided counseling services, prepared case reports, and worked with the employer's psychologists to provide therapeutic treatment to children. 235 N.L.R.B. 776, 780 (1978). No mention is made of creating or developing plans; rather, like MHC II's, the social workers worked with other professionals to provide treatment to those in their care. MHC II's, including Ms. Hofmaster and Ms. Van Heise, not only implement clients' treatment plans, they also are responsible for continually assessing the plans' effectiveness and for recommending changes or improvements to clients' plans. (*See* Tr. 360–61 (Schimp); Tr. 565–66 (Schneider).)

Likewise, *Samaritan Health Services, Inc.* does not support the Hearing Officer's finding that developing versus implementing plans is a "crucial" dividing line between professionals and non-professionals. The social worker assistants who were found in that case not to be professionals performed *primarily* administrative tasks—

> assisting families in carrying out recommendations for post-hospital care, finding resources for home care or transferring the patient to a nursing home, securing background information from various sources for a patient's 'social evaluation,' and acting as a liaison for the social service department in gathering information about community resources.

Samaritan Health Services, Inc., 238 N.L.R.B. 629, 640, 99 L.R.R.M. 1551 (1978). Unlike MHC II's, these non-professional workers' job duties involved collecting information about resources; they provided no direct, therapeutic care to clients. The *Samaritan* workers were correctly found to be non-professionals. In contrast, MHC II's have considerably more in common with the professional social workers in *Catholic Bishop of Chicago* than with the *Samaritan* workers.

f) The Hearing Officer failed to distinguish administrative burdens from limitations on the exercise of professional judgment and discretion, improperly conflating the former with the latter.

As set forth above, a general written accident notification policy and procedure is prescribed by law. The Hearing Officer gives short shrift to the significant distinction between circumstances in which MHC II's have a duty to *inform* an on-call Mental Health Professional, after an incident has occurred, and those where an MHC II is required to *consult* the Mental Health Professional before discharging his or her duties. (*See e.g.* Tr. 166, 534; *cf.* Tr. 568–69 (Schneider); Tr. 527 (Pratt).) The Union's witness described approval that is needed from an on-call mental health professional for administrative expenditures – as distinguished from client care issues – to illustrate MHC II's purported lack of discretion. (Tr. 535–36, 546–47). The situation she described as illustrating lack of discretion, the requirement that MHC II's obtain administrative approval from the on-call Mental Health Practitioner before paying cab fare for a client, does not involve the exercise of clinical judgment. (*See* Tr. 358–62, 401–02 (Schimp).) This testimony therefore does not speak to the professional duties of an MHC II or the amount of discretion those duties require. That MHC II's have to bear administrative burdens does not affect the nature of the job they perform.

g) The Hearing Officer erred in finding that South Metro only "generally" distinguishes between Mental Health Counselor I's (MHC I's) and MHC II's. The record evidence establishes that MHC II is a separate job class from MHC I, and that MHC II's serve a different, higher-need population and thus require different, higher-level skills and qualifications.

The record makes clear that MHC I is a separate and distinct job classification from MHC II. Important differences between the positions of MHC I and MHC II are reflected in the qualifications for each position. (*See* E-17; E-18.)[10] To be qualified as a MHC I, an employee or applicant needs a high school diploma or equivalency, "good knowledge" of mental illness, and some experience in a group home environment. (E-17.) However, for a position as an MHC II, qualifications include a Bachelors degree in a behavioral sciences or related field *and* either 2,000 hours of experience working with individuals with mental illness or 2,000 hours of experience working in Corporate Adult Foster Care. (E-18.) MHC II's are also paid at a higher rate than are MHC I's. (E-17; E-18; *see also* Tr. 49 (Stromback) and Tr. 60 (Phelps).)

MHC II's like Ms. Hofmaster and Ms. Van Heise work in what have been designated "Level 2" Adult Foster Care facilities. (*See* Tr. 42 (Stromback).) MHC II's require a higher level of clinical judgment to perform their job tasks than do MHC I's. (Tr. 356 (Schimp); *see also* Tr. 402 (Schimp) (The difference between discretion exercised by an MHC II versus an MHC I "comes down to the clinical issues, the behaviors of the clients. That's where the difference is.") Clients in a Level II home have a higher incidence of behavior problems, chemical dependency, and routinely engage in self-injurious behavior and/or suicidal actions. (Tr. 357 (Schimp).) By contrast, clients in a Level I home do not generally use chemicals or engage in self-injury; they mainly require assistance with independent living skills rather than with managing mental health symptoms. (Tr. 357 (Schimp); *see also* Tr. 403 (Schimp) (In a Level II home, there are

[10] *See also* Tr. 46 (Stromback.)

"different behaviors that [clients] exhibit, different symptoms, different chemical abuse things that require different expertise."

The distinction in the job duties and qualifications between MHC I's and MHC II's is reflected in the units they were stipulated to be part of. MHC I's were, by agreement, placed in a non-professional unit. (*See* case file for NLRB Case No. 18-RC-17751.) In contrast, MHC II's were stipulated to be part of the professional unit because of their professional qualifications.

h) The Hearing Officer erred in finding that "crisis duty responsibilities" for MHC I's and MHC II's are distinguished only by "frequency." The record evidence establishes crises differ not only due to frequency but also because of their nature and severity. MHC II's respond frequently to crises of a clinical nature with severe consequences.

The difference between Level I houses "in a nutshell" comes down to the clients' level of clinical need. (Tr. 356 (Schimp).) It is not only the frequency of crises encountered which differs, but also their nature. MHC II's encounter crises of a clinical nature whereas MHC I's generally do not. (*See* Tr. 362, 369–70 (Schimp).)

For the foregoing reasons, the Employer excepts to, and the Board should reject, the Hearing Officer's recommendation as to the Hofmaster and Van Heise challenges and find that these MHC II's are professionals properly included in the unit and that, accordingly, their ballots should be opened and counted.

Exception 2: The Hearing Officer erroneously refers to phone lists for South Metro's Adult Foster Care and Community Foundations Programs as "schedules."

South Metro urges the Board to accept the Hearing Officer's conclusions related to "schedules" presented as exhibits by the Union. As the Hearing Officer concluded, these so-called schedules "do not establish permanence or regularity inconsistent with [challenged employees'] on-call status." (Report, p. 8.) However, South Metro excepts to the term

"schedules" as the record evidence clearly establishes that the documents referred to are phone lists, which are separate and distinct from work schedules and do not establish the actual schedule employees work. (Tr. 390 (Olson); Tr. 210 (Lowe); Tr. 479 (Schultz).)

Exception 3: While the Hearing Officer Properly Concluded that On-Call Employees Should Be Excluded From the Bargaining Unit, The Hearing Officer Improperly Relied Upon Perceived Employer Fault to Conclude That Employer's Contingent Objection Concerning Disenfranchisement of On-Call Employees Should Be Overruled If On-Call Employees Are Included in the Bargaining Unit.

South Metro urges the Board to accept the Hearing Officer's recommendation to exclude on-call employees from the bargaining unit. If the Board determines, however, that on-call employees should be included in the professionals unit, South Metro's objection to the conduct of the election should be granted and a new election ordered because in that event the vast majority of all on-call employees, who did not vote, will have been disenfranchised.

The Hearing Officer would overrule South Metro's disenfranchisement objection on the basis that "the problem would be purely a result of the Employer's erroneous decision to declare them ineligible and publicize its decision." The Hearing Officer's emphasis on perceived employer fault is misplaced. In determining whether to set aside an election because of voter disenfranchisement, the Board makes "no attempt to assess the [e]mployer's [or the union's] responsibility for the disenfranchisement." *Yerges Van Liners*, 162 1259 (167); *see also Alterman-Big Apple, Inc.*, 116 N.L.R.B. No. 130, 38 L.R.R.M. 1406 (Sept. 12, 1956). Rather, so long as the employee is denied the opportunity to vote through no fault of his or her own and the number of voters disenfranchised is sufficient to affect the results of the election, the election must be set aside.

In this case, on-call employees who did not vote are not at fault for failing to cast a ballot. The language the Union used to describe the unit of eligible voters did not include on-call employees. South Metro did not intend that the stipulated unit include on-call employees, and

South Metro informed employees in writing that on-call employees were not eligible to vote. Prior to the election, the Union never suggested or expressed an intent that on-call employees were part of the unit, and in fact, at the pre-election conference, the Union agreed to remove an on-call employee (Sara Stamschror) who had been on the voter eligibility list but who had since terminated her regular employment. In addition, if on-call employees are determined to be part of the unit, the number of disenfranchised voters would be significant – while there was 88% turn-out for the election,[11] only 5 of 41 or 12% of on-call employees voted. The number of voters who would be disenfranchised – 36 – would plainly affect the results of the election.

"It would be unjust to permit the election to stand if its outcome would be affected by the disenfranchisement of an eligible voter." *McCormick Lumber Co.*, 206 N.L.R.B. No. 78, 84 L.R.R.M. 1267 (Oct. 10, 1973). "It is the Board's responsibility to establish the proper procedure for the conduct of elections, which procedure requires that all eligible employees be given an opportunity to vote." *Yerges Van Liners*, 162 NLRB 1259 (1967). "While the Board is not required to guarantee that every voter is able to get to the polls, when it is alleged that numerous employees were prevented from voting, the Board must assess whether the particular circumstances so affected a sufficient number of ballots as to destroy the requisite laboratory conditions under which elections must be conducted. If there is a reasonable possibility that this occurred and a determinative number of votes are called into question, to maintain the Board's high standards, the election must be set aside." *Bakery Victory Servs.*, 331 N.L.R.B. No. 146, 165 L.R.R.M. 1057 (Aug. 23, 2000).

South Metro agrees with the recommendation of the Hearing Officer to sustain the on-call challenges and maintains that on-call employees were not part of this unit. The ballots of the

[11] Out of approximately 171 eligible voters, valid votes plus challenged ballots totaled 150. (Corrected Tally, issued 4/28/11, for Case 18-RC-17754.)

on-call employees who voted subject to challenge should be excluded. If, however, such challenged ballots are allowed, South Metro's objection to the conduct of the election should be sustained and the election results should be set aside and a new election should be held in which all on-call employees, not just a select few, are given an opportunity to vote.

Exception 4: While the Hearing Officer Properly Concluded that Petitioner's Objections Should Be Overruled, the Hearing Officer Erred in Summarizing the Record Evidence Concerning Wage Increases.

a) The Hearing Officer incorrectly stated that testifying employee witnesses did not remember the rationale for wage increases; the record evidence establishes that employees who testified remembered the rationale given for the increases.

Two employees who testified about meetings they attended where increases were discussed stated that they understood or concluded from the conversation with Mr. Paul the rationale for the increases. The Union's witness, employee Robert Radspinner, testified that it "[s]ounded like they had money in the program to allow for raises." (Tr. 10 (Radspinner).) Another employee, Brian Nolan, testified that while he did not recall Mr. Pauls' exact words, he remembered "taking away from [the conversation with Mr. Paul] that they had evaluated and made a decision to increase the salary." (Tr. 461 (Nolan).) He understood that "they," South Metro's management, made this decision based on year-end financials or similar reports. (*Id.*)

b) The Hearing Officer erred in finding that "past practice is not supportive of Employer's position"; the record evidence of past practice supports South Metro's rationale for granting wage increases to employees in specific programs.

Contrary to the Report finding, the record evidence demonstrates that program-based wage increases have been given to South Metro employees in the past under circumstances similar to those in which the raises in question were given. (Tr. 236 (Schneider); Tr. 337–39 (Paul); E-29).

III. CONCLUSION

In light of the foregoing arguments in support of its exceptions, South Metro urges the Board to reject the Hearing Officer's recommendation on Petitioner's challenges to the ballots of Samantha Hofmaster and Cindy Van Heise and to instead overrule those objections and order their votes be counted. South Metro also urges the Board to fully consider its exceptions and the arguments herein to the extent they become material to the Board's decision in this case.

DATED: July 1, 2011

GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.

By: *___/s/ Mark S. Mathison_____*

Mark S. Mathison (Atty. No. 028709X)
Meghann F. Kantke (Atty. No. 0391270)
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: 612/632-3247

ATTORNEYS FOR EMPLOYER

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