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 Opposition to Petitioner's Exceptions to the Hearing Officer's Report and Recommendation On Challenges and Objections

I. INTRODUCTION

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 opposition to the Petitioner's Exceptions to the Hearing Officer's Report and Recommendation on Challenged Ballots and Objections in Case 18-RC-17754 that issued on June 17, 2011 ("Report"). South Metro opposes and urges rejection of all of the Petitioner's exceptions, for the reasons stated in this brief. As discussed in the South Metro Human Services' Brief in Support of Its Exceptions to the Hearing Officer's Report and Recommendation on Challenges and Objections[1] that was filed with the Executive Secretary on July 1, 2011, and except as set forth therein, South Metro generally endorses the Hearing Officer's findings and conclusions and

[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." South Metro Human Services' Post-Hearing Brief Regarding Election Challenges and Objections will be referred to as "Post-hearing Brief." AFSCME Council 5's Exceptions to the Hearing Officer's Report on Challenged Ballots and Brief will be referred to as "Petitioner's Exceptions."

urges the Board to adopt the Hearing Officer's recommendations for resolving election challenges and objections.

As South Metro has made clear in its other submissions of record, if the Board should find that the challenged on-call employees are eligible, then South Metro's objection to the conduct of the election (Employer Objection #1) should be sustained and the Election set aside because of voter disenfranchisement.

II. FACTS AND PROCEDURAL HISTORY

South Metro respectfully refers the Board to its Post-hearing Brief for a statement of relevant facts. However, South Metro takes issue with Petitioner's presentation of facts in Petitioner's Exceptions. First, Petitioner misrepresents the classification of challenged voters Nadeau, Paetznick and Stamschror. Petitioner states that they are "classified as mental health practitioners." (Petr.'s Exceptions, p. 3.) The record shows that these employees are classified as on-call employees, and their job titles reflect this classification. (E-9 (Paetznick), E-10 (Olson); E-12 (Nadeau).) Second, Petitioner omits mention of the fact that Sara Stamchror was a full-time employee until April 4, 2011 in stating her average hours worked from November 1, 2010 until April 30, 2011. (*See* Petitioner's Report, p. 3; *see also* (Tr. 90–93 (Shea); E-6; E-40.) Third, Petitioner's repeated assertions that the challenged on-call employees work "regular" shifts are not supported by the record. (Tr. 645–46 (Shea).) Furthermore, Petitioner's statement that "[i]f on-call employees in CF fail to work a minimum of one shift per month, they receive a letter threatening termination of the on-call employment," is misleading. (*See* Petitioner's Exceptions, p. 4.) The record evidence shows that this policy is not consistently enforced. (Tr. 645–46 (Shea).) Finally, although Petitioner states that South Metro's human resources employees "did not discuss the eligibility of on-call employees with any Union representative,"

South Metro's position with regard to on-call employees was published in advance of the election and was well-understood by South Metro employees. ((E-2.); Tr. 80 (Shea); Tr. 292 (Ringstad).) Furthermore, at least one of the challenged on-call employees publicly identified herself as a Union organizer. (P-20, signed by Lindsey Paetznick.) Knowledge of on-call status as a classification and job title should therefore be imputed to the Union.

III. ARGUMENT

A. The Board Should Reject Petitioner's Exception 1

South Metro Opposes Petitioner's Exception 1 and Urges the Board to Reject It Because the Hearing Officer Correctly Found that the Parties Agreed During the Pre-Election Conference to Strike Ms. Stamschror From the List of Eligible Voters, and That Finding is Well-Supported in the Record.

South Metro urges the Board to reject the Petitioner's Exception 1 and to adopt the Hearing Officer's findings and conclusion related to the challenged ballot of Sara Stamschror. The Hearing Officer correctly found that the parties agreed at the pre-election conference to remove Ms. Stamschror from the voting list. The Union is incorrect when it states that "there is no evidence of an agreement between the Union and the Employer regarding Sara Stamschror." (Petr.'s Exceptions, pp. 12-13.) There is, in fact, record testimony from an attendee of the preelection conference that strongly supports this finding. (*See* Tr. at 493 (testimony of Melissa Kluge that at the preelection conference the parties agreed to remove Ms. Stamschror from the voter eligibility list because her full time employment had terminated).)

Furthermore, as pointed out by the Hearing Officer, this finding is supported by other record evidence that it is proper for the Board to consider. The Board's case file in the record contains the eligibility list used in conducting the election, with the parties' initials next to the strike-out of Ms. Stamschror's name. The initials of the parties on the voting list—a Board document in the record that was used at the polls—stand on their own as evidence for the

unmistakable proposition that the parties agreed Ms. Stamschror would not be eligible to vote. There is no reason—and Petitioner has not shown any—why that agreement should not be honored in this stipulated election. Contrary to Petitioner's argument, the ruling of the Hearing Officer that handwriting on party exhibits would require foundational testimony in order for the handwriting to become part of the case record is inapposite to the record treatment of official Board documents. *See* NLRB Casehandling Manual § 11312.11 (Ultimate Disposition of List) (providing that the original eligibility list used in the election "should be preserved as a part of the case file"); *see also* NLRB Casehandling Manual § 11312.4). In fact, the Board's procedures for conduct of the election provide for the initialing of changes to the voting list that is presented to the parties at the pre-election conference. *See id*. § 11312.4 (Preelection Check of List). The purpose of this procedure is to reduce the number of challenges." *Id.* Therefore, these initialed changes must be given effect and the Board should adopt the recommendation to sustain the Board agent's challenge to the ballot of Sara Stamschror.

B. The Board Should Reject Union Exception 2

South Metro Opposes Petitioner's Exception 2 and Urges the Board to Reject it Because the Hearing Officer Correctly Applied Board Law Concerning the Eligibility of On-Call Employees to Vote in an Election Held Pursuant to a Stipulated Election Agreement.

South Metro urges the Board to reject the Union's Exception 2 and to adopt the Hearing Officer's findings and conclusions related to the challenged on-call employees. Contrary to the Petitioner's exception, the Hearing Officer correctly applied the three-prong test articulated in *Caesars Tahoe* to determine that the parties stipulated to exclude on-call employees from the bargaining unit. *See* 337 NLRB 1096, 1097 (2002). Petitioner's allegation that the Hearing Officer failed to apply *Caesars Tahoe* test either misunderstands the Hearing Officer's report or attempts to mislead the Board as to which test should be applied. Also, Petitioner would have the Board skip past the first two prongs and go directly to the third prong, which relies on

community-of-interest factors to determine voter eligibility. This would be error. *See Halsted Communications*, 347 NLRB 225, 226 (2006) (holding that a community-of-interest test is not applied where the parties' intent to exclude the classification is clear.). Instead, the Hearing Officer correctly applied the *Caesars Tahoe* three-step framework to find that the parties' intent to exclude on-call employees is evident from the explicit wording of the stipulated unit description.

In order to arrive at the conclusion that the Hearing Officer failed to apply the *Caesars Tahoe* test, Petitioner misquotes the Hearing Officer's Report. Referring to the *Caesars Tahoe* test, Petitioner states:

> The Hearing Officer's Report stated that applying *this general rule* would result in a finding that the stipulation is not clear inasmuch as on-call employees are not explicitly included in the unit description, nor are they explicitly excluded. The Hearing Officer based his decision not to apply this test in this matter on two legal errors.

(Petr.'s Exceptions, p.6 (emphasis added).)

In fact, the "general rule" referred to by the Hearing Officer is not *Caesars Tahoe* but one having a different purpose, which is articulated in *Butler Asphalt L.L.C.*, 352 NLRB 189, 190 (2008), pertaining to how the Board may determine the parties' intent with respect to a disputed classification in a stipulated unit description. Determining whether or not the parties' intent is clear is the first step in the three-part test set forth in *Caesars Tahoe*.

> The three-part test set forth in Caesars Tahoe, 337 NLRB 1096 (2002), applies to the resolution of challenged ballots in cases involving stipulated units. Under this test, if the objective intent of the parties is expressed in clear and unambiguous language in the unit stipulation, then the Board will enforce the agreement. If the language of the stipulation is ambiguous with respect to an employee's eligibility, then it is appropriate for the Board to examine the extrinsic evidence to interpret the stipulation. If the intent of the stipulation still cannot be determined, then the Board will decide the eligibility of the challenged voter using traditional community-of-interest criteria.

Regional Emergency Medical Servs., Inc., 354 NLRB No. 20, slip op. at 1 (May 21, 2009). Analyzing this case under the *Caesars Tahoe* framework—and not some other rule as Petitioner contends—the Hearing Officer explained:

> Generally, where a stipulation neither includes nor excluded a disputed classification, the Board will find that the parties' intent with respect to that classification is not clear. . . . The Board bases this approach on the expectations that the parties know the eligible employees' job titles, and intend their descriptions in the stipulation to apply to those job titles. Butler Asphalt L.L.C., 352 NLRB 189, 190 (2008).

(Report, p. 7 (internal quotations omitted)). The Hearing Officer distinguishes the *Butler Asphalt* rule on intent from the rule applied to on-call employees, set forth in *Inter Continental Hotels Corp.*, 237 NLRB 906 (1978) and *National Public Radio, Inc.*, 328 NLRB 75 (1999). This rule provides that, "[w]hen an employer's use of the on-call term as a job classification is well established, and on-calls are not explicitly excluded in the stipulation, then on-call employees are excluded." (Report, pp. 7–8.) Accordingly, the Hearing Officer applied this rule within the *Caesars Tahoe* framework to conclude that on-call employees are excluded and to recommend that challenges to the ballots of Abiodun "Shay" Adeboye, Robin Nadeau, Jennifer Olson, and Lindsay Paetznick be sustained.

Petitioner argues that these cases address "a very different situation than the one at hand." (Petr.'s Exceptions, p. 7.) According to the Petitioner, the instant case is different from *Inter Continental Hotels* because "the Hearing Officer [in this case] did not conclude that the parties intended to exclude on-call employees." (*Id.*) This is a misstatement of the Hearing Officer's conclusion. Instead, as stated in the Hearing Officer's Report, "the express intent of the parties . . . may be determined by reference to the employer's regular use of the classifications in a manner known to its employees, industry practice, and the Board's established definitions of the classification." (Report, p. 8 (citing *National Public Radio*, 328 NLRB at 75 n.2.)) The

Hearing Officer found that the classification of "on-call" is known to and used by employees, and it is used consistently with the Board's established definition of on-call employees." (*Id*.) The Union has not excepted to these findings other than to state its position that the Board has no definition of on-call employee. (*See* Petitioner's Exceptions, p. 9–10.) On this basis, the Hearing Officer concluded that on-call employees should be excluded. Furthermore, the *Inter Continental* case does not examine what the petitioning union(s) knew or did not know about the employer's classifications of employees; rather, the Board found that the employer hired two categories of part-time employees, regular part-time and on-call, and that "[h]aving expressly limited the stipulation to employer-designated categories of all 'full-time' and 'regular part-time' employees, it is quite clear that the parties did not intend for the additional classification of 'on-call' employees to be included in the unit." *Inter Continental*, 237 NLRB at 907. The record clearly establishes and the Hearing Officer's Report reflects that this is exactly the situation here. South Metro has three categories for active employment: 1) "full-time"; 2) "part-time"; and 3) "on-call." (Tr. 79 (Shea).) It is understood at South Metro that the term "regular part-time employee" does not include employees in on-call status. (Tr. 80 (Shea).)

The Petitioner's further attempt to distinguish the instant case from *Inter Continental* is likewise without merit. Petitioner contends that "there is no evidence that the SMHS employees designated 'part-time' are actually any different from the challenged 'on-call' employees with respect to the number of hours they worked." (Petr.'s Exceptions, p. 8.) The record is replete with testimony and documentation that define the difference between regular part-time employment at South Metro and on-call status. (*See, e.g.,* Post-hearing Brief, pp. 3-6 (summarizing relevant facts of record).) Petitioner's suggestion that the number of hours worked is the only worthwhile consideration is not supported by law, nor does a consideration of the

number of hours worked distinguish the instant case from *Inter Continental*. No reference is made to the number of hours worked by on-calls in that case; rather, on-call employees were employees who were called to substitute for absent and vacationing employees. *Inter Continental*, 237 NLRB at 907. Contrary to petitioner's assertions, employment in on-call status at South Metro is consistent with this definition. *See* [Petr.'s Rpt. 8.] On-call employees pick up open shifts. (Tr. 257 (Kluge).) They are not guaranteed minimum hours or a regular shift. (Tr. 635–36.) An on-call employee may pick up a series of shifts, for example to cover a full-time employee's leave under the Family and Medical Leave Act (FMLA), but that will not change the employee's on-call status. (Tr. 636 (Shea).) Although an on-call employee may elect to pick up an open shift on a "regular" basis, they are not regularly scheduled and are not regarded as regular part-time employees. In addition, on-call employees are not expected to work any shift that they have not already elected to pick up. (Tr. 635–36.) On-call status can only change through a formal documentation process. (Tr. 650 (Shea).)

Petitioner argues that the record evidence must show that the Union was aware of the on-call designation in order for the Board to find that the Union agreed to exclude on-call employees from the stipulated bargaining unit. This argument fails. "The Board examines the [parties'] intent on an objective basis, and denies recognition to any subjective intent at odds with the stipulation." *Viacom Cablevision*, 268 NLRB 633, 633 (1984). The Hearing Officer did not deviate from *Caesars Tahoe* as Petitioner asserts, but rather applied an objective test to the Union's intent rather than a subjective one, which is consistent with Board law. That the on-call classification is in general use by South Metro in documents known to and used by employees and is used consistently with the Board's established definition of on-call employees objectively establishes the Union's intent to exclude on-call employees when it stipulated to a unit of full-

time and regular part-time employees at South Metro. "When the objective intent is clear, the Board will hold the parties to their agreement." *Viacom*, 268 NLRB at 633. Petitioner's claim of ignorance is unavailing because the applicable standard for examining intent is objective, not subjective. The Board presumes that the parties know the eligible employees' job titles, and intend their descriptions in the stipulation to apply to those job titles. *Butler Asphalt*, 352 NLRB at 190.

Petitioner goes to great lengths to distinguish job "title" from job "status" in order to give effect to the Union's claim of ignorance and to distinguish the instant case from *National Public Radio*. This, too, is unavailing. As the record reflects, the job titles of the challenged employees include the designation "on-call."[2] (E-9 (Paetznick)[3]; E-10 (Olson); E-12 (Nadeau).) Furthermore, Petitioner misstates the Board's conclusions in *National Public Radio*. Petitioner emphasizes "certain classifications," as if in reference solely to job titles, as determinative. (Petr.'s Exceptions, p.9.) In fact, the Board's analysis focuses on job status as Petitioner would define it and the Board makes no distinction between job status and job title in terms of "classification" for the purposes of its analysis. *National Public Radio*, 328 NLRB at 75. ("Under the circumstances, we perceive no ambiguity in the parties' stipulation. The Employer has distinct and separate categories of regular and temporary employees. By specifically agreeing to include only full-time and regular part-time employees in certain classifications and to exclude all other employees, the parties must have intended the exclusion of temporary broadcast/recording technicians.")

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[2] The exception is Ms. Adeboye, whose title was listed as "PT Mental Health Counselor II" in her Terms of Employment document (Tr. 495–96; E-48). This is attributed to clerical error. (Tr. 492 (Kluge).) In all other regards, Ms. Adeboye's employment reflects on-call status. (Tr. 492, 496; E-33 *et seq.*). Also, as noted by the Hearing Officer, Ms. Stamschror's Terms of Employment is not in the record, but her resignation from full-time employment and request to become an on-call employee are well-documented. (Tr. 90–93 (Shea); E-6.)

[3] As previously mentioned, Ms. Paetznick publicly identified herself as a union organizer, which undermines any notion that the Union was unaware of on-call status.

While an exclusion of "all other employees" may sometimes be found by the Board to assist in analyzing the parties' intent to exclude a classification that is not specifically included, *see Halsted Communications*, 347 NLRB 225, 225 (2006) it is not the case that without such express exclusion a non-listed classification will be included, nor is such a conclusion consistent with Board law. The rule articulated in *National Public Radio* does not rely on the parties' subjective intent, nor does it require the exclusion of "all other employees." 328 NLRB at 75 n.2 ("[T]he express intent of the parties concerning the definition of job classifications sought to be included in the stipulated unit may be determined by reference to the employer's regular use of the classifications in a manner known to it's employees[.]") Excluding "all other employees" in the stipulation is not necessary to find the parties' objective intent.

Petitioner's assertion that the Hearing Officer's finding that that the procedural posture of this case determines whether the community-of-interest analysis applies is without legal support is both a misstatement of the Hearing Officer's finding and a misstatement of law. (*See* Petr.'s Exceptions, p. 10.) "It is well established that in stipulated cases such as the one before us, the Board's function is first to ascertain the parties' expressed intent with regard to the disputed employees and then to determine whether this intent is contrary to any statutory provision or established Board policy." *Inter Continental*, 237 NLRB at 907. To bypass this primary function and go directly to a community-of-interest analysis would be error. *Id.* ("In determining the eligibility of on-call employees on the basis of community-of-interest principles, the Regional Director failed to apply the proper test."); *Halsted Communications*, 347 NLRB at 226 (holding that only when the parties' intent remains unclear will the Board "reach step three and employ its standard community-of-interest test to determine the bargaining unit.")

The Hearing Officer pursued the proper course and, having found the objective intent of the parties' to exclude on-call employees from the bargaining unit, did not reach step three. It bears mention that had the Hearing Officer come to the opposite conclusion to find that the parties intended to include on-call employees in the bargaining unit, the election results could not be certified because the unit would be contrary to Board law. On-call employees do not qualify as professionals, as explained further below.

Although it is not necessary to do so, if the Board chooses to apply the community-of-interest test pursuant to *Caesars Tahoe*, that test does not yield a different result for the on-call challenges. Any application of community-of-interest factors in these circumstances must begin with an examination of whether the challenged ballots have been cast by voters who are professionals, since this is strictly a professionals unit. The answer provided by the record is that on-call employees are not qualified as professionals. (Tr. 412, 439–44, 450 (Jachymowski); Tr. 634 (Shea); *see* E-30, E-33 through E-38; *see also* Tr. 470–72 (Schultz) (identifying houses by Level).) There is no requirement that on-call employees be qualified with any kind of degree or its equivalent. Furthermore, on-call employees sometimes work in residential South Metro settings that require a bachelor's degree to qualify for work as a regular employee and sometimes in settings where there is no such requirement. (*Id*.) Thus, on-call employees are not professionals within the meaning of the Act and may not be included in this professionals unit without proper Board procedures being conducted pursuant to Section 9(b). Those procedures have not been followed here. Therefore, regardless of whether the first, first and second, or all three stages of the *Caesars Tahoe* test are applied here, the result must be to sustain the challenges to the on-call ballots.

C. **The Board Should Reject Petitioner's Exception 3**

South Metro Opposes Petitioner's Exception 3 and Urges the Board to Reject It Because the Hearing Officer Did Not Make the Finding the Union Claims and Because Application of the Standard in the Manner Advocated for by the Union Would be Contrary to Board Law.

As discussed above, the Hearing Officer did not misapply, but, rather, correctly applied, Board law in reaching his findings and conclusions concerning the challenged on-call employees. Accordingly, Petitioner's Exception #3 must be rejected, not only because the Hearing Officer did not make the finding on which the Union bases this exception, but also because giving effect to the claimed finding would be error resulting in a misapplication of Board law.

In its Exception 3, the Petitioner purports to except to a "finding" that appears as a conditional statement in a footnote in the Report. In footnote 4 the Hearing Officer states in clearly conditional terms that if the issue of on-call employees' inclusion in the unit been litigated before the election was ordered that on-call employees "would almost certainly have been included because in that posture, community of interest would have been the only determinative factor." (Report p. 6 n.4.) Such a conditional statement is simply not a finding. Moreover, neither this conditional statement nor the text of this footnote in its entirety constitute findings or conclusions of the Hearing Officer such that they may be excepted to under the Board's rules.

Furthermore, the conjecture in this footnote is not based on a fully litigated analysis of the issue in a pre-election posture. Rather, to the extent the parties litigated the on-call inclusion issue, it was after the election in the context only of the challenged ballots and objections that were the subject of the post-election hearing. That posture does make a difference, and for good reason. For example, had the issue been litigated before the election, the parties and South

Metro employees would have been alerted to the issue. The Employer in that instance would certainly have communicated accurately to its employees, if necessary, the Board's decision on the inclusion or exclusion of on-call employees. The parties would have had the opportunity and occasion to fully develop their evidence and positions on the community-of-interest factors. If the issue had been litigated and decided before the election both parties would have had ample opportunity to target messages directly to on-call employees. Although the record shows that some on-call employees received campaign messages from the parties (Tr. 298, 301 (Ringstad), there is no clear picture in the record suggesting that the parties were actually focusing or directing messages specifically to on-call employees (who, if included may have constituted twenty percent or more of the entire unit and would thus likely have been the targets of significant campaign activity specifically directed at them and their interests.)

Perhaps most importantly, in any application of the community-of-interest test that was subject to Board litigation, full consideration would necessarily have been given to the issue of whether on-call employees qualify as professionals and whether a *Sonotone* procedure would have been necessary. Although aspects of these questions may have been litigated in the post-election hearing, they did not receive the full treatment they would have had the issue been presented before the election. The Petitioner argues, for example, that "there is no evidence in the record that the on-call employees are not professional employees." (Petr.'s Exception, p. 12.) That is not correct. The record shows that, in fact, the qualifications for on-call employees do not include the requirement of a degree or advanced learning such as would satisfy the statutory definition of a professional employee. And even if Petitioner's statement that there is no such evidence were accurate, that would not be a sufficient basis for ruling that the challenged on-call

employees should be included in this professionals unit and allowed to vote on the representation question.

As it has previously made clear in its submissions, 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 Board should adopt the Hearing Officer's recommendation to sustain the challenges to the ballots of the five on-call employees who voted. If, however, these challenges are denied, then South Metro's objection to the conduct of the election should be granted, the election 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.

III. CONCLUSION

In light of the foregoing, South Metro urges the Board to reject the Petitioner's Exceptions in their entirety and to adopt the Hearing Officer's recommendation to sustain the challenges to the ballots of the five on-call employees at issue.

DATED: July 8, 2011

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

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