

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**MOUNT SINAI MEDICAL CENTER,
Employer**

and

Case No. 02-RC-067094

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 30,
Petitioner**

DECISION AND DIRECTION OF ELECTION

The International Union of Operating Engineers, Local 30, AFL/CIO (“the Petitioner”), filed a petition, pursuant to Section 9(b) of the National Labor Relations Act (“the Act”), amended at the start of the hearing, to seek to represent a residual skilled maintenance unit of all full-time and regular part-time fire marshals (“fire marshals”) employed by Mount Sinai Medical Center (“the Employer”) located at 1 Gustave Levy Place, New York, New York, 10029¹.

In accordance with the provisions of Section 3(b) of the Act, the National Labor Relations Board (“the Board”) has delegated its authority in this proceeding to the Regional Director, Region 2. A hearing was held before a Hearing Officer of the Board.

The Employer contends that the fire marshals should be included in a residual unit of “other non-professional employees”, and they are not skilled maintenance employees within the meaning of the Board’s Health Care Rules, 29 CFR § 103.30 (“Board’s Health Care Rules”). In the alternative, the Employer argues that in the event that the fire marshals are found to be skilled maintenance employees, they must be included in a unit that includes all other

¹ United Federation of Special Police and Security Officers, as the Section 9(a) representatives of the security guards employed by the Employer, intervened in this matter should the fire safety marshals at issue here be found to be guards. As these employees are not security guards, this motion to intervene is denied.

residual skilled maintenance employees that it employs. Finally, the Employer argues that a unit of its fire marshals would not be appropriate unless it was coextensive in scope with the multiemployer unit embodied in the collective-bargaining agreement between 1199 United Healthcare Workers East ("1199") and the Voluntary League of Hospitals and Homes of New York ("VLHH"), of which the Employer is a member.

Upon a petition duly filed under Section 9(c) of the Act, as amended, a hearing was held before a hearing officer of the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter² and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is a New York State acute care hospital and health care institution within the meaning of the Act and is located at 1 Gustave Levy Place, New York, NY. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$250,000, and purchases and receives at its New York, New York facility, goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

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

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and 2(6) and (7) of the Act.

5. As noted above, Petitioner seeks to represent a unit of all fire marshals employed at the Employer's facility³, as a residual skilled maintenance unit.

The Employer argues that fire marshals are not skilled maintenance employees within the meaning of the Board's Health Care Rules, and, therefore, are only properly included in a residual unit of presently unrepresented "other non-professional employees" under the Rules. According to the Employer, there are 55 other unrepresented non-professional employees employed in 14 job classifications who must be included in a residual unit of other non professional employees.⁴ In the alternative, the Employer argues that in the event that the fire marshals are found to be skilled maintenance employees, the only appropriate unit must also include all of the other unrepresented skilled maintenance employees of the Employer. In this regard, the Employer points to five classifications, namely the audio visual equipment coordinator, data entry specialist, material management analyst, radiation safety monitor, and radiation safety specialist, as five other classifications of employees that must be classified as being within the skilled maintenance category. Finally, the Employer argues that any unit which includes the fire marshals must be part of the multiemployer unit between 1199 and the VLHH, of which the Employer is a member.

As noted above in footnote 1, United Federation of Special Police and

² The briefs filed by the parties have been duly considered.

³ Petitioner noted on the record that it would proceed to an election in any unit found appropriate.

⁴ Those fourteen classifications are child life specialist II and III, child life assistant, radiation safety monitor, materials data specialist I, data entry specialist II, audio visual coordinator, life skill specialist, radiation safety specialist, special events coordinator, material management analyst, patient representative assistant, utilization review

Security Officers, the bargaining representative of the security guards, intervened in this matter in the event that the fire marshals are found to be guards. Neither the Employer nor Petitioner contends that the fire marshals are guards. As discussed below, I have found that fire marshals are not guards, and thus I am denying their motion to intervene.

I have considered the evidence and the arguments presented by the parties on these issues. I have concluded that the petitioned-for unit is an appropriate unit of residual skilled maintenance employees and that the record establishes that there are no other job classifications that would be properly classified as skilled maintenance.

Collective Bargaining

The Employer is an acute care hospital located in Manhattan. The Employer's facility consists of about thirteen interconnected buildings covering approximately six million square feet.

The Employer employs approximately 15,000 employees in different job classifications, including, but not limited to, doctors, nurses, engineering employees, maintenance employees, security employees and fire marshals.

Most of the Employer's employees are members of a bargaining unit and are represented by one of several unions. They are represented by 1199 SEIU ("1199"), Local 32BJ, SEIU ("32BJ"), Local 3, IBEW or United Federation of Special Police and Security Officers ("UFSPSO"). The Employer negotiates on a multi-employer basis with 1199 as a member of the League of Voluntary Hospitals ("LVH"), regarding various employee classifications, including all other professional employees (other than physicians and nurses), skilled maintenance employees, business office clericals, technical employees, and licensed practical nurses.⁵ It appears that the 1199 unit is a non-conforming unit under the Board's

admission specialist, and entitlement coordinator.

⁵ I note that the neither the collective-bargaining agreement nor the 2009 memorandum of understanding between 1199 and the LVH, contains any unit description. There was no testimony regarding the scope of the unit or units. The unit description in the

Health Care Rules. In addition, the Employer negotiates directly with 32BJ in a unit of maintenance employees in Employer's residential apartment buildings on its campus, and with Local 3, IBEW, which represents the Employer's stationary, junior, lead stationary and refrigerator engineers. The Employer also negotiates with the UFSPSO in a unit of the Employer's security guards. In addition to UFSPSO discussed herein, 1199 and Local 3 were notified of these proceedings, but neither of these labor organizations intervened or expressed any interest in representing the petitioned-for employees.

General Employment Practices

The record establishes that most of the Employer's employees, except security guards, nurses, and fire marshals, work five days per week from 9 a.m. to 5 p.m. Their work schedules may or may not include weekend days.

In order to obtain a job with the Employer, an applicant must contact the Employer's recruitment office. Job vacancies, regardless of the department or the position, are posted in the same location. All applicants for employment with the Employer, excluding nursing applicants, fill out a uniform application. The Recruitment Office coordinates the hiring process with the individual department. The hiring department interviews the candidates and makes a recommendation to the Recruitment Department which processes the offer letter and responses. Salaries for available positions fall into an established range, depending on the applicant's education and experience.

There is a single human resources department for all employees, and all personnel files are maintained in the same location, with the exception of physicians. All employees participate in the same orientation process, including a full-day orientation program. All employees receive an employee manual that applies to all employees. All unrepresented employees are subject to the same disciplinary forms and procedures and all unrepresented, non-medical personnel

Employer's employee handbook indicates that 1199 represents skilled maintenance employees. In its brief, the Employer states that the 1199 represents carpenters,

evaluations are done annually whereas all represented employees receive their evaluations at the end of their probation period. All represented and unrepresented employees have access to a grievance procedure. All unrepresented employees must complete a probationary period of approximately three months. All unrepresented employees have the same flex spending account, health benefits, retirement plans, time off schedules (including meals and break times), holidays, and service award programs.

Fire Marshals

The Employer employs eight fire marshals. Their direct supervisor is the Fire Life Safety Manager Michael Coppola ("Coppola") who is employed by Sodexho, a management service provider contracted for by the Employer. Coppola reports directly to Emma Hooks at Sodexho, and does not report to any of the Employer's management personnel. It appears that at one time, the fire marshals were part of the security department, but as of the time of the hearing were no longer part of that department.

Fire marshals work one of three shifts, 12 a.m. to 8 a.m., 8 a.m. to 4 p.m., or 4 p.m. to 12 a.m. Each fire marshal is required to attend fire safety training sessions with engineering department employees and possibly other new hires in other departments. The fire marshals' offices are located in the environmental safety department's offices, along with the chemical safety manager and the general environmental safety staff. Fire marshals are required to obtain and maintain four certifications issued by the Fire Department of New York City ("FDNY"), including a fire safety director certification called an "F-25 license", a sprinkler systems certification called an "F-96 license", a supervision of fire alarms certification, and an institutional fire drill certification called an "F-35 license". All of the certifications, except the fire safety director certification, require the fire marshal to take a test at 9 Metro Tech Center, administered by the FDNY. The fire marshal must pass the exam, pay a fee and submit a letter of recommendation from his or her employer to obtain the certification. To obtain

electricians, and firemen who are skilled maintenance employees.

the necessary certification for the fire safety director, a fire marshal must take a six-week course, prior to taking and passing an FDNY examination. In addition to receiving this certification, they must pass an onsite exam at a local battalion house, pay a fee and submit a letter of recommendation from his or her current employer. All of the aforementioned certifications must be renewed every three years. Fire marshals do not have a New York State Security Guard certification.

Upon commencing his or her shift, a fire marshal reviews the e-mails from the prior shift's marshal or from Coppola in order to become familiarized with current construction projects and any incidents that have occurred on the preceding shift or shifts, including those that could affect fire safety and maintenance, the fire pump system, fire panels, the sprinkler system, and new and ongoing construction work being conducted by vendors, contractors, and employees. His or her other duties will include conducting fire safety training and the inspection of fire extinguishers. The fire inspector also patrols the facility to ensure that facility construction projects are in compliance with both New York City and the Employer's fire safety rules and regulations and to ensure that the Employer's fire safety equipment and fire detection systems are operating satisfactorily. He or she also responds to fire alarms and reports of smoke, prepares and submits reports regarding the events occurring on their shift, and instructs patients on the dangers of smoking. During any given shift, a fire marshal spends about an hour and fifteen minutes to three hours reviewing e-mails and/or writing occurrence reports, and spends the remainder and majority of the shift patrolling as discussed above, conducting training and engaging in emergency response activities.

The fire marshals conduct approximately five types of training for Employer's employees. At the new employee orientation sessions, the fire marshals conduct an introduction to fire safety training, called new beginnings, for new employees wherein new employees are given instructions regarding the location of fire extinguishers, the meaning of sounding bells and protocols in the event of an emergency. In addition, fire marshals conduct fire safety training, fire

alarm training, fire drill training and fire warden training on an ongoing basis. To this end, a fire marshal conducts a fire drill in an assigned area of the hospital and makes recommendations to the employees regarding ways to improve their performance in the event of a fire. In addition to critiquing the employees' response to the fire alarm, a fire marshal also inspects the smoke lights, audible signals and bell sequence of the alarm itself to ensure that they are operating properly, and observes the magnetic fire safety doors to ensure that they properly close. A protocol for conduct during fire drills is issued by the FDNY and is posted on the FDNY website. The fire marshals do not determine the fire drill schedule on their own, but are given the fire drill schedule by the fire safety manager.⁶ Fire marshals conduct one fire drill approximately every other week, or on an irregular basis whenever new fire wardens are assigned by the floor manager.

The fire marshals ensure the continued operation of the fire safety system, and that all FDNY and Employer fire safety rules and regulations are being observed in the Employer's facility. In addition, on a less frequent basis, they are responsible to inspect the fire safety systems, the fire pumps, fire extinguishers, fire panels, sprinklers and respond to alarms and complaints of smoke. Thus, the fire marshals have access to fire command stations, mechanical rooms, electrical closets, but do not have access to any offices that are otherwise locked.

Fire marshals inspect all fire extinguishers on a monthly basis to ensure that the hoses are not frayed, that the gauges are in the proper area, that the extinguisher is in the correct location, is sealed, and possesses the correct weight. In the event that a fire marshal determines that a fire extinguisher is not operating properly, he or she may exchange the fire extinguisher for a working one from the supply closet without the authorization of Coppola. At times, fire marshals may investigate reports that a fire extinguisher is missing.

With respect to the inspection of fire panels, the fire marshals inspect the eight fire panels at the facility on a daily basis to ensure that they do not need to

⁶ In addition, a fire safety manager may schedule a fire drill if new exits are created due to a temporary reconstruction project. This training is called interim life fire safety training.

be reset and are in proper working order. While the fire marshal would report a serious malfunction to a vendor to do a more detailed inspection, on occasion the fire marshal resets the panel either through a normal reset or what is called a "hot and cold" reset. A hot reset entails pushing a reset button while a cold reset requires the fire marshal to open the panel take apart the equipment inside and reattach it. This process requires training and experience but does not require the use of tools.

On a weekly basis fire marshals also inspect approximately eight fire pumps, located in the Annenberg building, the Five East building, the Atrium building, Icalm building and the CAM building. He or she conducts "churn tests" that require the fire marshal to turn off the operation of water to the building on the fire panel and on the fire pump.

Fire marshals test the fire alarm system by sending a signal to the company that monitors the alarm system to ensure that the communication is working properly. While it is the responsibility of the company which maintains the fire alarm systems to make sure that the system and the smoke detectors are working properly, the fire marshals are responsible to make sure that items are kept away from the smoke detectors in accordance with rules of the FDNY.

Although the fire marshals are trained to maintain and repair fire safety equipment, such as sprinklers, there is no evidence that a fire marshal has ever him or herself repaired faulty equipment. When a fire marshal has encountered a fire safety issue, he or she contacts Coppola to report the problem. If the fire marshal could not obtain the assistance necessary to obviate the fire risk, the fire marshal would call security to come assist them in removing the risk from the facility. Fire marshals may change the fire extinguishers without manager approval.

Fire marshals allow a fire alarm repair technician access to the mechanical rooms although there is no evidence of how frequently alarm repair contractors are called to the facility to repair the fire alarm system. When the fire alarm repair is needed in a room for which the fire marshals do not have access, they contact the security officers to allow the service tech entry. There is no

other evidence in the record regarding the types of contractors who repair the other fire safety equipment at the facility and with what frequency.

To the extent that the fire marshals respond to fire alarms, they are responsible to report to the fire command station on the ground floor in that building and determine what type of alarm is sounding. To do so, the fire marshal must read a fire panel that indicates the type and the location of the alarm. There are approximately five types of fire panels and the fire marshal must be able to interpret the data contained therein to determine the type and location of the sounding alarm. Once the type and location of the sounding alarm has been determined, the fire marshal calls the security officers who will go to the location identified by the fire marshal and investigate the alarm. The security officer then determines whether to evacuate the floor or the building. If an evacuation is necessary, the security officer will call the FDNY and assist them in the evacuation. After a security officer investigates the alarm and finds that there is evidence of a fire, the security officer calls the fire marshal to coordinate the response with the FDNY. In these circumstances, fire marshals may be required to turn on fans that purge smoke from a given area by activating the fan system and selecting the floor to be purged. However, fire marshals would only perform this duty at the instruction of the chief of the FDNY in emergency situations.

In response to reports of smoke, the fire marshal will investigate the usual causes of the smell of smoke. For example, a fire marshal who upon finding that the smoke condition was caused by equipment that has overheated would advise the department to have the equipment replaced and would not endeavor to repair the equipment personally. If the smoke was caused by a patient smoking in his or her hospital room or if the fire marshal receives a report of a patient smoking in his or her room, the fire marshal contacts a security officer and the two will report to the offending patient's room. The fire marshal will explain the dangers of smoking in a hospital room to the patient and the security officer will make sure the patient is not hiding lighters, cigarettes or matches.

Fire marshals are responsible to create reports. On a daily basis, at the end of each shift, the fire marshal creates a shift report that records the tasks

completed that day and any other issues that occurred during the shift. These reports are forwarded by e-mail to all fire marshals and to Coppola so that they are all aware of any issues relating to fire safety that had arisen. Fire marshals also write an occurrence report to document any event that occurred during the shift, such as a fire alarm. Fire marshals also fill out a mechanical room checklist after inspecting the mechanical rooms. It is unclear how frequently the mechanical checklists are completed. Fire marshals also create weekly and monthly reports which are submitted to Coppola and kept in a binder in the fire and safety office. It is unclear from the record what types of information are contained in either the weekly or the monthly reports.

While Coppola stated that the fire marshals establish safety measures and safety policy, both fire marshals Hudnall and Dobrowsolski contradicted this assertion. Senior labor relations specialist Karen Johnson stated that she was not aware of any time when a fire marshal created or proposed either safety measures or safety policies, or whether they were asked to, or instructed to do so by the department. Karen Johnson further testified that all Employer fire protocols are currently established by Coppola and Hooks, and are in writing. Ms. Johnson also stated on the record that fire marshals do develop and implement policies, by discussing proposed changes to policies with managers but no examples were provided of this actually happening. According to the testimony of the fire marshals, they do not formulate any fire safety policies or procedures and, in fact, they receive instructions regarding their role in enforcement of fire safety protocols required by OSHA, National Fire Protection Association, FDNY, and Employer's emergency response policies from their certification trainings, on the job training, and through Coppola and Hooks at irregular fire safety department meetings. The record does not set forth any examples of a fire marshal ever creating or formulating any Employer policy.

The fire marshals wear badges issued by the hospital that identify them as fire marshals. The fire marshals wear a fire safety uniform consisting of a gray shirt and blue pants. The fire marshals carry two way radios and emergency pagers. Through their two-way radios, the fire marshals can communicate with

other fire marshals, engineering department employees, and security officers, who also carry two-way radios. The fire marshals do not carry weapons or other security devices. The fire marshals do not issue passes or badges to people entering or exiting the facility or any particular building; although they do admit the repair vendors into locked mechanical rooms to access fire safety equipment. The fire marshals cannot serve as security officers, and, in the event of a strike the fire marshals do not have any additional security functions with respect to the Employer's facility or property therein.

Security Guards

The Employer employs approximately 100 security guards, all of whom are represented by UFSPSO. The Employer's security guards apparently perform typical security officer functions at the hospital by protecting the property and individuals employed by, or utilizing the services of, the Employer. The security guards report to four or five security supervisors, all of whom report to the Director of Security, Tim Berginder. In order to work in this capacity, the security guard must obtain a license from New York State pursuant to a State statute. Fire marshals do not perform the same security functions as a security guard and security guards cannot perform the fire marshals' duties, although an unspecified number of security guards have transferred to the fire marshal position. Security guards wear uniforms, including a dress shirt, jacket, and a tie. Security guards carry two-way radios and communicate with one another via radios.

Other Unrepresented Classifications

The Employer employs employees in several classifications which are not represented by a labor organization. There are two child life skills specialist III's, four child life skills specialist II's, one child life assistant, three radiation safety monitors, four materials data specialist I's, four data entry specialist II's, one audio visual equipment coordinator, five life skill specialists, two radiation safety

specialists, one special events coordinator, four materials management analysts, four patient representative assistants, thirteen utilization review admission specialists, and five entitlement coordinators.

The child life specialist III position (also called the life skills specialist III) provides direct patient care by designing, developing and implementing recreational, therapeutic and rehabilitative activities of patients and families to facilitate their therapy. The child life specialist II's (also called the life skills specialist II's) perform the same job duties as the child life specialist III's with the same minimum degree requirement. However, the child life specialist II position requires 3 years of relevant experience, while the child life specialist III position requires a minimum of 5 years of relevant experience. The child life skills specialists perform work duties similar to those of the other life style positions, and require a bachelor's degree in child development or a related field and one year of experience in infant and childhood development. The child life assistant also provides direct patient care by assisting the "child life specialists" in organizing and implementing recreational activities for pediatric patients to meet their developmental needs. It is unclear whether the child life assistant assists one child life specialist, all child life specialists, or all of the life skill specialists.

The radiation safety monitors (1) evaluate radiation contamination in laboratories, decontamination rooms for therapy patients; (2) receive and dispose of radioactive material; and (3) respond to emergency situations involving radiation. The radiation safety specialist is responsible to perform routine audits and inspections of laboratories and work sites for the use of radioactive materials and to process orders, receive, distribute survey and inspect radioisotope deliveries. A radiation safety monitor is required to have a BS in science and a minimum of one year of radiation experience while a radiation safety specialist is required to have a BS in science and a minimum of two years of radiation experience.

The employees who work as material data specialist I perform administrative duties, including recording receipts of supplies and equipment, following up on misplaced undeliverable parcels and items not received, and

updating inventory. Those in the material data specialist II positions perform similar administrative tasks, including receiving, collecting, reviewing and entering data into a computer system or tracking database, ensuring the accuracy of the data recorded, and verifying that the information is complete. Both a material data specialist I and II are required to have a minimum education of GED or HS diploma but the material data specialist II is required to have a minimum of 2 years experience and a material data specialist I does not have a minimum experience requirement.

The special events coordinator coordinates special events for the Employer and its school of medicine, particularly their fundraising and award ceremonies. These employees create event correspondence and materials, solicit donors, maintain and report financial records and schedule and maintain external vendors.

The audio visual equipment coordinator is responsible to maintain the audio visual equipment by diagnosing and evaluating any audio visual equipment problems, recommending a repair solution, as well as assisting the various departments with their audio visual equipment needs including consulting on the correct equipment to use and assisting in its use.

The material management analysts are responsible to monitor, analyze, maintain and update two computer programs, the Pathways Materials Management System and the Horizon Surgical Manager. There is a minimum educational requirement of a bachelor's degree for this position.

The patient representative assistants perform all office and clerical duties in the patient representative department.

The entitlement coordinators provide screening, counseling and assistance to clients seeking entitlement under the law as part of the Employer's Resource Entitlement and Advocacy Program.

The utilization review specialists field telephone calls regarding surgeries and utilize computer programs, Cerna and McKesson, to add surgical cases to the computer system for operating room scheduling. The utilization review specialists do not need a certification, but must type a minimum of 40 words per

minute.

ANALYSIS

There are several interrelated issues that I must decide in this matter. Initially, I must determine whether the fire marshals are guards within the meaning of Section 9(b) (3) of the Act. If they are found to be guards, the petition must be dismissed because Petitioner, which admittedly represents employees other than guards, is thus a disqualified labor organization under Section 9(b)(3) of the statute. If the fire marshals are not guards, I must decide whether they are skilled maintenance employees or “other non-professional employees” under the Health Care Rules. As certain skilled maintenance employees employed at the Employer’s facility are part of a multi-employer bargaining unit and are represented by 1199, if the fire marshals are found to be skilled maintenance employees, I can only find the petitioned-for unit to be appropriate if there are no other unrepresented skilled maintenance employees. Similarly, if the fire marshals are determined to be other non-professional employees”, then a separate residual unit of fire marshals will be appropriate only if all other unrepresented non-professional employees are included.

Fire Marshals are not Guards

A guard is defined as “any individual employed...to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises.” In analyzing whether an employee engages in security-related duties, the Board looks to the nature of the duties themselves. *The Boeing Company*, 328 NLRB 128, 130 (1999). Security-related duties are those:

[t]ypically associated with traditional police and plant security functions, such as the enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer’s

premises; and wearing guard-type uniforms or displaying other indicia of guard status.

The purpose of excluding employees who perform security related duties is to prevent the conflicts between employees that might arise where a union that represents both guards and non-guards calls a strike and the guards must enforce the employer's security rules against their striking employees. *Id.* Therefore, the duties of an alleged guard during a strike are of utmost concern to this analysis. As with all representation cases, the Board cannot certify a union as the representative of employees in a bargaining unit of guards under the Health Care Rules if the union also represents employees other than guards. 29 USC § 159(b)(3); *see also, MGM Grand Hotel, Las Vegas*, 274 NLRB 139, 140 (1985).

Here, fire marshals enforce the fire and safety rules and procedures of the Employer and FDNY by patrolling the Employer's premises, identifying hazards, and taking steps to remove them by instructing other employees to take steps, by taking steps themselves, or by calling Coppola or a security guard for assistance. While engaged in the protection of the Employer's property in a broad sense, none of the aforementioned duties are traditional guard or security-type duties. *BPS Guard Services, Inc.*, 330 NLRB 298, 299 (1990); *see also Briggs Manufacturing Company*, 101 NLRB 74, 76 (fire inspectors focused on fire detection and prevention are not guards); *West Virginia Pulp and Paper Co., Inc.*, 140 NLRB 1160, 1163 (1963) (watchmen-janitors who made rounds to check for fire hazards, horseplay and destruction of property were guards where there was evidence that they were authorized to apprehend or prevent entry to the employer's property of persons who are not authorized to be there and/or who are found removing company property without permission). The only evidence that fire marshals arguably perform any type of security function is that around January 1, 2010, the fire marshals had the authority to issue citations to vendors and to employees who violated fire and safety rules. However, it appears from the record that fire marshals no longer issue such citations. Even if the fire marshals did currently have the authority to issue fire safety citations, the Board

has consistently held that where employees are responsible for enforcement of an employer's fire and safety rules, "even against fellow employees, and....only incidentally to their other duties, those employees will not be found to be guards..." *BPS Guard Services, supra*; see also, *Petroleum Chemicals*, 121 NLRB 630, 632 (1958)(safety inspectors who enforced safety regulations were not guards). Even if the fire marshals have the authority to issue citations to enforce fire and safety rules, such enforcement is incidental to their duties, and, therefore, does not render them guards within the meaning of the Act.

The fact that fire marshals patrol the Employer's premises itself is also insufficient to establish guard status, where, as here, there is no evidence that the fire marshals perform any traditional security related duties. See, *Briggs Manufacturing, supra* at p. 75 (fire inspectors who check fire extinguishers, hoses and automatic sprinklers and report hazards to their supervisor are not guards and are contrasted with guards who patrol the plant to enforce the plant rules to protect the Employer and the Employer's property).

Finally, there is no evidence that the fire marshals are authorized to perform any job duties that create the possibility of divided loyalty on their part in the event of a strike or other labor unrest. The testimony establishes that in fact the fire marshals cannot perform security officer functions and that security officers cannot perform fire marshal functions, and, further, that the fire marshals would not be responsible to protect the Employer's property and enforce Employer's security rules in the event of a strike.

For the foregoing reasons, the fire marshals are not guards within the meaning of Section 9(b)(3) of the Act.

Fire Marshals are Skilled Maintenance Employees

As noted above, Petitioner asserts that the fire marshals here are skilled maintenance employees, while the Employer, on the contrary, contends that they are properly considered other non-professional employees, or in the alternative

managerial employees⁷. The Board has never been presented with a situation requiring that it analyze and decide whether the fire marshal position falls within a skilled maintenance or a other non-professional unit in an acute care hospital. Both Petitioner and the Employer set out the Board's standard without citing to any case support directly on point and they argue their positions based solely on an application of the Board's standard for determining if a classification falls within the skilled maintenance unit in an acute care hospital. I conclude that the fire marshals are appropriately placed in the skilled maintenance unit based upon their involvement in monitoring and testing the fire safety system, and particularly their training and skill in resetting fire panels, all of which clearly relate to, and are part of, the Employer's physical plant.

According to the Board, skilled maintenance employees are those "who are generally engaged in the operation, maintenance, and repair of a hospital's physical plant systems, such as heating, ventilation, AC, refrigeration, electrical, plumbing, and mechanical, or the trainees, helpers and assistant of such employees." *Silver Cross Hospital*, 350 NLRB 114, 115 (2007), *citing* 53 Fed.Reg. 33900, 33920-33924, 284 NLRB 1527, 1557, 1561 (1988). The Board has held that employees who make rounds to survey, maintain, and repair plant equipment, such as mechanical equipment, electrical equipment, boilers, heaters, air-conditioning, refrigeration equipment, hospital and clinic equipment, kitchen equipment, office machines and equipment, steam, gas, water, air and sanitary plumbing pipes and fixtures, motors and other machinery, cleaning sink and grease traps and valves, as well as some general cleaning type work were skilled maintenance employees. *Hebrew Home & Hospital, Inc.*, 311 NLRB 1400, 1401, 1403 (1993).

The rationale provided by the Board for finding that skilled maintenance employees constitute a distinct unit is because they:

work with highly complex and sophisticated systems and equipment, and that skilled maintenance jobs consequently require a higher level of skill and knowledge than is required of unskilled service,

⁷ The records fail to establish that the fire marshals are managerial employees.

maintenance, and clerical employees, as evidenced by higher education, licensing, and training requirements. Skilled maintenance employees are frequently contained within a separate department and are not supervised by any supervisors from outside their own department. While they usually share common fringe benefits and personnel policies with other hospital personnel, skilled maintenance employees uniformly have higher wages than service and maintenance employees. Because the operation and maintenance of physical plant systems are the same no matter in which industry they are performed, skilled maintenance employees have separate labor markets and highly mobile cross-industrial career paths, and their wage scales are tied to those of skilled maintenance employees in other industries rather than to wages in the health care industry. Skilled maintenance workers usually have a separate internal labor market within a hospital in terms of career path, with training programs permitting less skilled employees to move into more highly skilled positions and virtually no transfer of clerical or service employees into maintenance positions.

McLean Hospital Corp., 309 NLRB 564, 573 (1992).

Job classifications where employees do not operate, maintain or repair the Employer's physical plant or where the employees engage in direct patient care are not considered skilled maintenance employees. *The Jewish Hospital of St. Louis*, 305 NLRB 955, 955 (1991) (occupational therapy craftsman is not a skilled maintenance position). Further, even where a job classification does operate, maintain, or repair an employer physical system, the classification is not a skilled maintenance position unless the position performs traditional skilled maintenance duties that are more than routine in nature. *Silver Cross Hospital, supra* at 116. To this end, a computer operator who performs maintenance on the employer's computer software and hardware was not found to be a skilled maintenance employee because the repairs they made were routine in nature, such as correcting minor printer problems or swapping a computer or printer. *Supra*. Similarly, employees who worked in grounds maintenance positions, responsible for upkeep of the employer's property were not skilled maintenance

employees even where they performed some repair work to the employer's irrigation system and the employer's vehicles for use in their duties because the repairs were routine in nature. *Barnes Hospital*, 306 NLRB 201, 201 (1992); see also *Ingalls Memorial Hospital*, 309 NLRB 393, 395-96 (1992).

Here, the fire marshals maintain fire and safety equipment to protect the Employer's property and the safety of persons on the Employer's premises. They maintain and monitor the fire pump system, the sprinkler system, and the fire panels, all part of the Employer's physical plant. They also inspect the smoke lights and bell sequence of the fire alarms to insure they operate properly. They also monitor the magnetic fire safety doors to ensure they close appropriately. They reset the eight fire panels in the Employer's facility if they are not operating properly. They are required to turn off the water in the building when conducting various tests. They review new and ongoing construction, as well to ensure that the entire facility complies with the Employer's rules for fire safety as well as the rules promulgated by the FDNY, and to respond to fire alarms, and reports of smoke.

The evidence further establishes that the fire marshals are certified to inspect, test and determine whether or not the Employer's fire safety equipment is operating properly or not. While it appears the fire marshals do not personally perform repairs on any faulty fire and safety equipment, it is the fire marshals' certification and training that enables them to test the Employer's fire and safety equipment, to recognize that the equipment is not operating properly and needs to be repaired, and to relay this information to Coppola to facilitate the repair. As part of their job requirement, the fire marshals obtain four certifications from the FDNY to test the fire safety equipment that they must renew every three years. Their certification is unique to fire marshals. In addition, only the fire marshals report to Coppola and Hooks, and only Coppola and Hooks create the Employer fire and safety policies that the fire marshals follow. The fire marshals' duties and skills that enable them to inspect fire safety equipment and to patrol the Employer's facility to ensure compliance with fire safety rules and regulations, does not involve patient care and are not skills that are exclusive to a hospital

employer.

Because the fire marshals patrol the Employer's facility, inspect, test and maintain the plant's fire safety equipment, use their training to determine whether the equipment is operating properly, and alert the necessary parties if repairs are needed, the fact that they do not repair any equipment is not determinative. While typically skilled maintenance positions do involve repair work, there is no requirement that a job classification must include repair work to be a skilled maintenance position.

In light of the foregoing, I find that fire marshals are skilled maintenance positions, and would not be placed in the other non-professional employee unit.

There are No Other Unrepresented Skilled Maintenance Employees

The Employer urges that five other classifications of employees are skilled maintenance employees, and, therefore, must be included in a petitioned-for unit of skilled maintenance employees. Under the Health Care Rules, a petitioned-for residual unit will be deemed appropriate only if it includes all employees residual to the unit, not just a segment thereof. *St. Mary's Duluth Clinic Health System*, 332 NLRB 1419, 1421 (2000). Those classifications cited by the Employer as being skilled maintenance employees are the following: audio visual equipment coordinator, data entry specialist, material management analyst, radiation safety monitor, and radiation safety specialist.

The audio visual equipment coordinator maintains the audio visual equipment and assists various departments in selecting the most useful audio visual equipment, setting it up and operating it. The audio visual equipment coordinator is not skilled maintenance as the duties require no traditional skilled maintenance duties, it has no responsibility with respect to any portion or equipment on the Employer's physical plant and it does not require any special training or education.

Data entry specialists are not skilled maintenance employees as their main duties include the performance of clerical duties, specifically inputting data

into a computer system and ensuring the accuracy of the data recorded. Their duties are not traditional skilled maintenance duties, nor do they require skill, education, or tools.

The material management analyst monitors, analyzes, maintains and updates two software programs: the Pathways Materials Management System and the Horizon Surgical Manager. It is well settled Board law that, despite the requisite educational requirement of a bachelor's degree, employees who maintain an employer's computer software are not engaged in skilled maintenance work, conduct only routine repairs, and are properly excluded from any such unit. See, e.g., *Silver Cross Hospital, supra* at 116.

Similarly, the radiation safety monitor and the radiation safety specialist inspect laboratories and other facilities for radiation, and receive, handle, dispense and dispose of radioactive materials, but do not engage in any traditional skilled maintenance work on the Employer's physical plant. In addition, while these classifications inspect the Employer's facility to ensure a safe level of radio active material and are required to have a bachelors of science degree, there is no evidence that these classifications use tools, have any special training, or engage in anything more than routine diagnoses of radiation levels as opposed to the investigation and diagnoses of the Employer's physical plant or equipment therein.

In light of the foregoing, the evidence presented at the hearing establishes that none of these job classifications are appropriately included in a skilled maintenance unit.

*Certification of a Unit of Fire Marshals Will Not Cause Undue Proliferation
of Bargaining Units*

Having determined that fire marshals are skilled maintenance employees, and that no other employee classifications are properly included in a skilled maintenance unit, I find that certification of a unit of eight fire marshals will not cause undue proliferation of units in this acute healthcare facility.

If a unit does not have a sufficiently separate identity because their work is

virtually identical to the work performed by other represented employees, their work requires no particular training, education or certifications, and they are entitled to the same wages and benefits as the represented employees, then certification in the unit would cause undue proliferation of bargaining units. *Levine Hospital of Hayward*, 219 NLRB 327, 328 (1975).

Here, the fire marshals are a homogenous, separately identifiable group from the represented employees, who have specialized skills and certifications, perform unique job duties, report to different supervisors than any other employees, and have only incidental contact with other employees during the discharge of their duties. Therefore, although they are relatively few in number, they are a cohesive group with a separate identity and their certification will not cause undue proliferation of units.

Multiemployer Bargaining History Does Not Preclude the Certification of a Single Employer Unit

The Employer argues that because the Employer bargains with 1199 on a multi-employer basis as a member of the VLHH, any petitioned for unit must be coextensive in scope with the multiemployer unit. The Employer cites *Los Angeles Statler Hilton Hotel*, 129 NLRB 1349 (1961), in support of its argument.

The relevant case law does not compel the conclusion that the petitioned-for unit must be coextensive with the multiemployer bargaining unit represented by 1199. In *Los Angeles Statler* and its progeny, the Board holds that:

An established bargaining history on a multiemployer basis will determine the scope required for a unit of previously unrepresented employees if those employees are in excluded fringe classifications which otherwise lack homogeneity, cohesiveness, or separate identity, and are merely residual to the main body of employees in the established unit.

Pacific Drive-In Theatres Corp., 167 NLRB 661 (1967); see also *St. Luke's Hospital*, 234 NLRB 130 (1978).

The unrepresented fire marshals constitute a homogeneous, separately identifiable group from the maintenance, clerical, technical and licensed practical nurse unit covered by 1199's multiemployer collective-bargaining agreement. The fire marshals perform unique job duties, are the only of Employer's

employees required to obtain four particular certifications from the FDNY and to renew those licenses, are subject to supervision by Coppola and Hooks who exclusively supervise the fire marshals. Fire marshals have minimal interaction with other employees in the performance of their work duties. No other employee classification can perform the duties of the fire marshals. As a result, the evidence shows that the fire marshals have more of a community of interest with one another than with any other group of 1199 represented employees, including maintenance employees, and are not merely an excluded fringe classification to the multiemployer unit. See, *Los Angeles Statler Hilton, supra* (where the Board refused to certify a petitioned-for unit at a single employer of all remaining unrepresented employees where the employer bargained in all other units on a multiemployer basis because the petitioned for unit of employees had as much of a community of interest with the represented employees as with each other); see also, *St. Luke's Hospital, supra* (where Board held that then the only appropriate unit is one coextensive with the multiemployer unit where the petitioned for technical employees had no greater community of interest with one another than with the technical employees already represented on a multiemployer basis).

Because the fire marshals are a homogenous, cohesive group with a separate identity from the Employer's employees whom are represented on a multiemployer basis, a unit of fire marshals does not have to be in a unit coextensive in scope with the multiemployer bargaining unit.

The Board in *St. Mary's Duluth Clinic, supra* at 1419, held that a non-incumbent union may represent a separate residual unit of employees in the healthcare industry. Under the circumstances here, where the incumbent unions, both 1199 and Local 3, who both separately represent employees classified as skilled maintenance employees, have declined to represent the fire marshals, it is appropriate to direct an election among the residual skilled maintenance unit of fire marshals. To do otherwise, would deprive these employees of any representation. Thus, in view of the foregoing, I find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

INCLUDED: All full-time and regular part-time fire marshals employed by the Employer.

EXLUDED: All other employees, office clerical employees, guards, and supervisors as defined by the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations.⁸ Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁹

⁸ Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(1) of the Board's Rules. In addition, please be advised that the Board has held Section 103.20(c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995).

⁹ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible

Those eligible shall vote in each of the two units shall vote on whether or not they desire to be represented for collective-bargaining purposes by International Union of Operating Engineers, Local 30.¹⁰

Signed January 16, 2013

at New York, New York



Karen P. Fernbach
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **January 23, 2013**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

¹⁰ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **January 30, 2013**. The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with this Supplemental Decision for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlr.gov. On the home page of the web site, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.