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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD, REGION 32

NATIONAL UNION OF HEALTCARE WORKERS,)	Case 32-RC-090886
)	
Petitioner/Union,)	NUHW'S BRIEF IN SUPPORT
)	OF EXCEPTIONS TO HEARING
and)	OFFICER'S REPORT AND
)	RECOMMENDATIONS ON
)	CHALLENGED BALLOT
SOUTHERN MONTEREY COUNTY)	
MEMORIAL HOSPITAL, INC. D/B/A)	
GEORGE L. MEA MEMORIAL HOSPITAL,)	
)	
Respondent/Employer,)	
)	
)	

I. INTRODUCTION

Petitioner the National Union of Healthcare Workers (NUHW) brought a single challenge to the eligibility of a voter named Henrietta Perez, who Petitioner contended was a statutory supervisor. After a one-day hearing, the Hearing Officer issued findings and recommended that

the challenge to the ballot of Ms. Perez be overruled. Petitioner here respectfully raises two related exceptions to the Hearing Officer's Report and Recommendations. First, Petitioner contends this Hearing Officer erred in finding a lack of evidence that Perez engaged in supervisory duties, and in particular, Petitioner notes that this case is very similar to a prior case holding that an activities director with very similar duties and status was found to be a supervisor. Second, Petitioner contends that the Hearing Officer also erred in essentially disregarding important evidence in which the employer held Ms. Perez out as being an activities "director" who, according to the employer, was responsible for engaging in duties of a supervisory nature. Having so asserted to outside agencies, the employer should be held to those assertions.

II. BACKGROUND

Although this hearing involved only one challenged ballot, eight employees testified regarding whether or not Ms. Perez is a statutory supervisor under the Act. Petitioner attaches the hearing transcript as Exhibit 1, and here summarizes this testimony in relevant part.

In support of its position, Petitioner offered specific testimony from five bargaining unit employees. All of those employees testified about their personal, direct interactions with Henrietta Perez, and two of the employees additionally testified that Ms. Perez interviewed them when they had applied for the position of Activities Coordinator. Petitioner contends that the cumulative evidence directly from employees regarding how Ms. Perez regularly assigned them work, and told them how to do their jobs, shows that Ms. Perez' overall functions were consistent with supervisor status. As detailed below, many employees testified that Ms. Perez assigns them work and gives them directions. This, at least, indicates that Ms. Perez is perceived as the "director" or the person running the activity program, with Ms. Pina serving as the activity program "coordinator" or assistant. See also, Tr. at 75, 88-90.

Gabriela Montoya has worked at Mee Memorial for over four years, and worked as a Certified Nurse Assistant, or CNA, in the same units where Henrietta Perez works. Tr. 9-12. She is sometimes assigned to work on Activities, which she described as working “under” Ms. Perez. Tr. 11-13. She testified that Ms. Perez tells the CNAs when and where to bring the patients for activities, even telling them where each patient should be seated. Tr. 15-17. She tells CNAs to take patients back and shave them, or to change their clothing. Tr. 27, 70-71, 110-112. Barbara Marquez Pacheco has worked at Mee Memorial as a LVN since October of 2011, in the same units where Ms. Perez works. Tr. 50-51. Ms. Perez introduced herself to Ms. Pacheco as the activities director, and said she “ran the program.” Tr. 51-52, 55.

Miguel Villarreal worked at Mee Memorial for over six years, and worked as a CNA until March of 2012, and sometimes worked in the same units where Ms. Perez works. Tr. 73-74. He testified that Ms. Perez frequently gave him directions, and even talked to him in a manner he understood to be a “reprimand” when a patient to which he was attending voided himself after being taken to activities. Tr. 75-80, 85-87, 100-102. When he questioned Ms. Perez, she responded “that’s unacceptable” and repeated her directions. Tr. 80, 83-86. Emy Sanchez has worked at Mee Memorial since March 2008 as a CNA, and worked in the same units as Ms. Perez. Tr. 103-108. She testified that Ms. Perez is the activity director, who “managed the activity department” and tells her and other employees what to do. Tr. 107-110.

It is noteworthy that several bargaining unit employees testified that they do not direct Ms. Perez to perform any tasks. When asked why she doesn’t ever tell Ms. Perez to perform any tasks, Ms. Montoya replied, “Because I’m working under her.” Tr. 26-27. See also, Tr. at 32 (“Because she’s the one who tells me what to do”; “Not nobody else”) There was also evidence that the other activity coordinator, Ms. Pina, does not similarly direct other employees. See, e.g., Ms. Montoya’s testimony, only Ms. Perez tells her what to do. Tr. 32-33.

III. ARGUMENT

A. **Petitioner Excerpts to the Hearing Officer's Conclusion That the Evidence Fails to Establish That the Challenged Voter Possessed Supervisory Authority**

In a similar case, the Board found that a Nursing Home's "Activities Director" whose duties and status were similar to those of Ms. Perez, was properly found to be a supervisor under the Act. In *Clark Manor Nursing Home Corp.*, 256 NLRB 456 (1981), the Board upheld an Administrative Law Judge's exclusion of an "activity director" from a bargaining unit after sustaining a challenge to that employees' vote based upon a finding that the activities director was a statutory supervisor who should be excluded from the bargaining unit. The First Circuit further affirmed this determination, stating, in relevant part:

The critical finding was that one Sansoucy, the Home's Activities Director, was a supervisor as defined in s 2(11) of the Act and thus not entitled to vote in an election which was won by the union, 6 to 5. The issue is a close one, there being no strong evidence of key supervisory powers being unambiguously exercised. The Home's staff in any given functional area was small. The activities branch consisted of two people, Sansoucy and a full time assistant. Sansoucy's testimony made it evident that her modus operandi was to sheathe the hand of authority in the glove of accommodation. The evidence showed, however, that she complained at least twice prior to the discharge of an earlier assistant; that she suggested the hiring of a successor, a person with whom she had worked at another nursing home, and that this person was chosen for the job; that she planned the activities and gave daily marching orders to her assistant; and that her level of training and salary and attendance at staff planning meetings were consistent with supervisor status.

NLRB v. Clark Manor Nursing Home, 671 F.2d 657, 659 (1982). The factors noted as being applicable to employee Sansoucy in *Clark Manor Nursing Home* are not unlike the findings of employee Ms. Perez here, and should result in a similar finding that Ms. Perez' status is that of a supervisor as defined in section 2(11) of the Act. While the issue here may similarly "be a close one," the *Clark Manor* cases portray a work situation very similar to that at issue

here. Like at Clark Manor, at Mee Memorial the activities branch consisted of only two people, Ms. Perez and Ms. Michelle Pina. At Clark Manor, the First Circuit described Ms. Sansoucy as the activities director, and described the other employee as a full-time assistant. Here, there was abundant testimony that, regardless of her actual job title, Ms. Perez was, at least until after the election, regarded as being the Activities Director at the Hospital, and that even her supervisors referred to her in written correspondence as being the Activities Director. Furthermore, the employees who actually worked with Ms. Perez and Ms. Pina perceived Ms. Perez as the “boss” or the “director” and perceived Ms. Pina as Ms. Perez’s assistant.

Ms. Perez too “planned the activities” and “gave marching orders to her assistant.” In particular, here, there was evidence that Ms. Perez directs the activity program and that Ms. Pina functions more as Ms. Perez’s assistant. First, there was evidence that Ms. Perez plans the activities. Ms. Montoya testified that Ms. Perez plans the activity calendar (“She does the calendar for every single day the activities that we’re going to do”). Tr. 15-17. Second, there was evidence that Ms. Pina does not plan activities herself, but instead looks to Ms. Perez for approval and direction, even when Ms. Perez is on vacation. Ms. Montoya testified about an incident in 2011, when Ms. Perez was on vacation, and Ms. Montoya was assisting with activities. Tr. 17-21. A religious group came to the Hospital, asking if they could pray with the patients. Tr. 21-22. Ms. Montoya asked Michelle Pina, who was the Activities coordinator, about it, and Ms. Pina responded that she was going to call Ms. Perez, who was then on vacation, to ask her about it. Tr. 21-23. In December of 2011 or January of 2012, employee Barbara Pacheco had a similar interaction with Michelle Pina. Tr. 58. Musicians were requesting to perform in the activities program while Ms. Perez was on vacation. Tr. 58-59. Ms. Pina said she had to call Ms. Perez for approval. When Ms. Pacheco asked, “Isn’t she [Ms. Perez] on vacation?” Ms. Pina responded, “Everything has to go thorough Ms. Perez. Tr. 62-63. Third,

there was evidence that Ms. Perez tells employees what times to work when they are working on activities, and directs when employees assisting with activities will take their breaks and their lunch. Tr. 22-25, 33-34. (Montoya testimony). At the time of hearing, Ms. Perez had recently assigned a new task, patient menus, to at least one CNA, Ms. Mante. Tr. 120-123. Fourth, there was evidence that Ms. Perez tells Ms. Pina what to do when the two are supposedly working together on a task, such as nail care. Tr. 119-121.

Like Ms. Sansoucy, Ms. Perez also at least “suggested the hiring of a successor” and “this person was chose for a job.” In considering whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, it is well-settled that the “possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class.” *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). To this extent, Petitioner contends that Ms. Perez is a statutory supervisor because she has effectively recommended hiring Ms. Pina as an Activities Coordinator. Indeed, in the *Clark Manor* case discussed *supra*, a factor noted by the Board was that the activities director had suggested the hiring of a successor, and that the person she recommended was chose for the job. Here, Ms. Perez’s involvement in the hiring of the Activities coordinator position was at least as great, if not greater, than was present at Clark Manor.

Unit Clerk and bargaining unit employee Laurie Burden testified that when she interviewed for the job of Activities Coordinator, she was interviewed by both Janeel, a supervisor, and by Ms. Perez. Tr. 41-42. During the interview, Ms. Perez identified herself as the Activities Director and also wore a badge stating the same. Tr. 42-43. During the interview, Ms. Perez stated that she was in charge of the activities program, and that the newly hired activities coordinator would be Ms. Perez’s “assistant,” and would be “working under her” and

that Mr. Perez “would be my boss.” Tr. 43-45. At the end of the interview, while Ms. Burden was preparing to leave but still in the room, Ms. Perez said to Janeel, “I have another excellent candidate for the position, Michelle Pina.” Tr. 45. Ms. Pina was hired soon after, within two weeks. Tr. 46.

This evidence was corroborated. Ms. Montoya also testified that when she applied for the position of Activities Coordinator, Ms. Perez “was doing the interview” together with an admitted supervisor, and during the interview, both asked questions of Ms. Montoya. Tr. 34, 37-39.

B. Petitioner Excerpts to the Hearing Officer’s Error in Dismissing the Importance of The Employer’s Prior Stated Admissions That The Challenged Voter Was Exercising Independent Judgment or Otherwise Acting In The Capacity of A Supervisor or Director: The Hospital Has Held Ms. Perez Out As Being A Supervisor, or Even A Director, And Is Bound By Its Prior Representations to That Effect

The Employer claims that it has not had an official position entitled Activities Director for a number of years. This assertion is directly contradicted by annual recertification records that the Employer filed with the California Department of Public Health in September of 2010. These records, which were signed and dated by the Employer’s CEO Lex Smith, indicate that the Employer’s female Activities Director was interviewed by state inspectors on August 9, 2010. Furthermore, it indicates that the Employer’s Activity Director interviewed three patients on September 8, 2010, updated patients’ care plans, and reviewed the Employer’s activities guidelines.

These records are contained in a Form CMS-2567, also known as a “Statement of Deficiencies and Plan of Correction,” prepared by the California Department of Public Health, and introduced at hearing, and attached hereto. From August 8 until August 11, 2010, two inspectors from the California Department of Public Health conducted a recertification survey of

the Employer's "Distinct/Part Skilled Nursing Facility" (D/P SNF), where Ms. Perez is employed. The state's inspectors discovered that the facility was out of compliance with a variety of federal and state regulations, including regulations governing the Employer's activities program. A description of these violations and the Employer's "Plan of Correction" are contained in the Form CMS-2567. See Exhibit 2, attached hereto.

The Employer's "Plan of Correction," which is contained on the right-hand side of the same Form CMS-2567, includes the following statements that were written by the Employer and approved by the Employer's CEO (emphasis added):

On September 8, 2010 the three residents were interviewed by the activities director and their care plans were updated. By September 25, 2010 the admission screening and ongoing needs assessment and documentation tools will be reviewed and revised as needed...
On September 8, 2010 the activity director was in-serviced regarding activities guidelines. (p. 1 of 24, emphasis added)

Meanwhile, the inspectors' "Summary Statement of Deficiencies," which is contained on the left-hand side of the Form CMS-2567, includes statements like the following that were authored by state inspectors and refer to the Employer's "Activities Director" or "AD:"

During an interview with the AD on 8/9/10 at 4:50p.m., she stated she did not have to do room-bound activities with Resident 3 because he came out of his room a lot. (p. 3 of 24)
During an interview with the AD on 8/11/10, she stated Resident 1 had been getting more sleepy the past couple of days, but would respond if you shook her shoulder, and the resident could answer appropriately at times. Her conversations with the resident were geared to yes and no responses. (p. 14-15 of 24)

These passages make clear, and the hospital's witnesses admitted, that, at least for certification purposes, the employer held out Ms. Perez as being the "Activities Director."

This designation is significant because federal regulations list the responsibilities of the activities director as having to be a "qualified professional" who possesses supervisory duties. The Code of Federal Regulations §483.15(f)(2) requires the Employer's "Distinct Part Skilled

Nursing Facility” (D/P SNF) to maintain a program of activities for its residents/patients that is directed by a “qualified professional.” Guidelines published by the Center for Medicare and Medicaid Services (CMS) and contained in the "State Operations Manual" (CMS Manual System, Pub. 100-07 State Operations Manual, Appendix PP, F248, Activities and F249, Activity Director), reference section 483.15(f)(2) (see attached Exhibit 3) state, in part, the following (emphasis added):

ACTIVITIES DIRECTOR RESPONSIBILITIES

An activity director is responsible for directing the development, implementation, supervision and ongoing evaluation of the activities program. This includes the completion and/or directing/delegating the completion of the activities component of the comprehensive assessment; and contributing to and/or directing/delegating the contribution to the comprehensive care plan goals and approaches that are individualized to match the skills, abilities, and interests/preferences of each resident.

Directing the activity program includes scheduling of activities, both individual and groups, implementing and/or delegating the implementation of the programs, monitoring the response and/or reviewing/evaluating the response to the programs to determine if the activities meet the assessed needs of the resident, and making revisions as necessary.

By holding out Ms. Perez as the activity director or activity leader, the employer has admitted that Ms. Perez is responsible for direction, supervision, and evaluation. If Ms. Perez is engaged in these duties, she is acting as a supervisor and exercising independent judgment.

In sum, these inspection records and “Plan of Correction” provide direct evidence that the Employer employed an Activities Director in September of 2010, which contradicts the Employer’s claims to the Region that “it has not had an official position entitled Activities Director for a number of years.” The employer’s witnesses, including Ms. Welburn, admitted that the person referenced in these documents is Ms. Perez. Tr. 213-214. The employer cannot for one purpose designate Ms. Perez as a supervisor, and then for another purpose claim she is

not a supervisor. By relying on Ms. Perez as being the “qualified professional” in charge of the activities program, by designating Ms. Perez as the employer’s “activities director,” the employer, a party to this proceeding, has admitted that Ms. Perez is responsible for direction, supervision, and evaluation. After having chosen to represent that Ms. Perez is the “activity director” or “activity leader” or in substance as the person who shall “supervise the activity program,” Mee Memorial should be held to have so admitted.

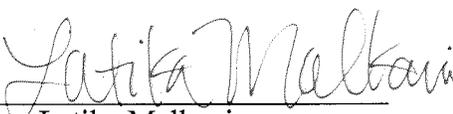
IV. CONCLUSION

For all the foregoing reasons, or any one of them, Petitioner’s challenge to the ballot of Henrietta Perez should be sustained.

Respectfully submitted,

DATED: February 14, 2013

SIEGEL, LEWITTER & MALKANI

By: 

Latika Malkani

Attorneys for Petitioner,
National Union of Healthcare Workers

PROOF OF SERVICE

I declare that I am employed in the county of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 1939 Harrison Street, Suite 307, Oakland, California 94612.

On February 14, 2013, I served the within document:

**NUHW'S BRIEF IN SUPPORT OF EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOT
(Re: Mee Memorial Hospital – Case 32-RC-090886)**

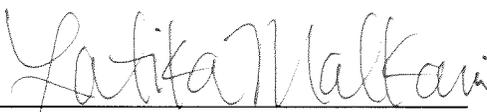
on the interested party(ies) herein by sending a true copy as follows:

William A. Baudler*
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- X [1] (BY ELECTRONIC MAIL) All of the pages of the above-described document(s) were sent to the recipients listed above via electronic mail, at the respective email address(es) indicated thereon.
- X [2] (BY FACSIMILE) All of the pages of the above-described document(s) were sent to the recipients listed above via electronic transfer, at the respective facsimile numbers indicated thereon.
- X [3] (BY U.S. MAIL) Each such envelope, with postage thereon fully prepaid, was placed in the United States mail at Oakland, California. I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service pursuant to which practice the correspondence will be deposited with the U.S. Postal Service this same day in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 14, 2013 at Oakland, California.



Latika Malkani

