UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

TOUCHETTE REGIONAL HOSPITAL

Employer

and **Cases 14-RC-096744 and 14-RC-096816**

SEIU HEALTHCARE ILLINOIS & INDIANA

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTIONS

The Employer, Touchette Regional Hospital, is an Illinois corporation engaged in the operation of an acute care hospital located in Centreville, Illinois. The Petitioner, SEIU Healthcare Illinois & Indiana,[1] filed petitions with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent two separate units of employees employed at the Employer's Centreville hospital.[2] In Case 14-RC-096744, the Petitioner seeks to represent a unit of all full-time, regular part-time, and per diem service and maintenance employees. In Case 14-RC-096816, the Petitioner seeks to represent a unit of all full-time, regular part-time, and per diem technical employees. A hearing officer of the Board held a hearing and the parties filed briefs with me.

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[1] Though the Petitioner has experienced changes in form/name, no party contends that Petitioner is not the representative of the represented employees at issue here and properly recognized as such by the Employer. Accordingly, these changes are irrelevant to this proceeding and therefore the term "Petitioner" will also refer to any previous form/name of Petitioner.

[2] On January 28, 2013, the Region issued an Order Consolidating Cases and Rescheduling Hearing in the above-captioned matter.

The Employer and Petitioner agree that the employees in the petitioned-for units share a community of interests with the other employees in their respective units and that the petitioned-for units are appropriate. Contrary to the Petitioner, the Employer contends that employees currently represented by Petitioner should be excluded from their respective units and should not be eligible to vote because these employees have previously voted to be represented by Petitioner and the Board has traditionally respected historical units. Petitioner seeks to include the currently represented employees in the petitioned-for units. Based on my review of the record, and for the reasons set forth below, I conclude that the petitioned-for units are appropriate and must include both the currently represented and unrepresented employees because these employees share an overwhelming community of interests; the current unit configuration derives from historical accident that has resulted in fringe defects; and the incumbent Petitioner is the only union seeking to represent the employees in these two units. There are 190 employees in the service and maintenance unit sought by the Petitioner, 122 in the service and maintenance unit sought by the Employer, and 190 employees in the service and maintenance unit found appropriate here. There are 48 employees in the technical unit sought by the Petitioner, 34 employees in the technical unit sought by the Employer, and 48 employees in the technical unit found appropriate here.

I. HISTORY AND OVERVIEW OF OPERATIONS

The Employer previously operated two separate facilities. One facility is Touchette Regional Hospital (Touchette) located in Centreville, Illinois. The other

facility was Kenneth Hall Regional Hospital (Kenneth Hall), located 5 miles away in East St. Louis, Illinois. Kenneth Hall was originally called St. Mary's Hospital of East St. Louis. In 2004, St. Mary's was purchased by Southern Illinois Healthcare Foundation (the Foundation) which changed the name of the hospital to Kenneth Hall. The Petitioner has been the exclusive collective-bargaining representative of the former Kenneth Hall professional[3] and non-professional employees since October 19, 2000, when it was separately certified as the representative of each unit of employees. The Kenneth Hall non-professional unit included technical employees, service and maintenance employees, skilled maintenance employees, and business office clerical employees. The employees of Touchette were historically unrepresented. In around 2008, Touchette integrated with Kenneth Hall, and their parent organization, the Foundation, began the process of winding down operations at Kenneth Hall and transferring operations and employees to Touchette. In around 2011, the Foundation completed the integration, and Kenneth Hall closed.

During the integration process, the Petitioner continued to represent the Kenneth Hall professional and non-professional employees. These employees were covered by a collective-bargaining agreement which was effective by its terms from April 1, 2006 to March 31, 2009. In 2008, the Petitioner filed unit clarification petitions in Cases 14-UC-204 and 14-UC-205, seeking to accrete the professional and non-professional employees at Touchette into the professional and non-professional bargaining units at Kenneth Hall. A Regional Director's Decision and Order issued on December 10, 2008, dismissing these petitions as

[3] The professional employees are not at issue in this proceeding.

premature because the merging of the two hospitals had not yet been completed at the time of the hearing. On April 23, 2009, an election was conducted in the Kenneth Hall non-professional unit pursuant to a decertification petition filed in Case 14-RD-1918. The decertification was unsuccessful and a Certification of Representative issued on May 1, 2009, limiting the unit to employees employed at the East St. Louis, Illinois facilities.

Subsequently, the Employer, as the successor to Kenneth Hall, recognized the Petitioner as the exclusive collective bargaining representative of employees in the two units of former Kenneth Hall professional and non-professional employees. After the Employer recognized the Petitioner, the parties engaged in bargaining, but have not reached or signed a successor collective bargaining agreement. The Employer implemented terms and conditions of employment for the employees represented by Petitioner, effective September 1, 2012 through March 31, 2013. Since recognizing the Petitioner as the bargaining representative of the unit of former Kenneth Hall non-professional employees, the Employer has continued to employ Touchette employees in the same job titles encompassed in this unit, but who are not represented by any union. Some non-professional employees employed by Kenneth Hall, who were represented by the Petitioner at Kenneth Hall, were hired by Touchette in the same job titles they held at Kenneth Hall and continued to be represented by the Petitioner after their hire. Some non-professional employees employed by Kenneth Hall, who were represented by the Petitioner at Kenneth Hall, were hired by Touchette in the same job titles they held at Kenneth Hall, but removed

by Touchette from the non-professional unit and are no longer represented by the Petitioner.[4] Thus, non-professional employees in the job titles included in the unit and already represented by the Petitioner, currently work at Touchette alongside employees in the same classifications, who are not included in the unit and not represented by the Petitioner, with the same supervision and under the same general working conditions. The petitioned-for job classifications in each unit sought here by Petitioner, as set forth below, share a community of interests in that they have similar or interrelated duties, come into contact with each other, transfer and exchange, have similar hours, wages and benefits, and common supervision.

II. ANALYSIS

The Board's procedure for determining an appropriate unit under Section 9(b) is to first examine the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. *Wheeling Island Gaming*, 355 NLRB 637 fn. 2 (2010); *Boeing Co.*, 337 NLRB 152, 153 (2001). The Employer acknowledges that the petitioned-for units are appropriate and I so find.

The Employer contends that the currently represented technical and service and maintenance employees should be excluded from the petitioned-for units and ineligible to vote in any election because these employees have already voted and historical units must be respected. The Employer's contention is without merit. In the somewhat unique circumstances of this case, the

[4] The record is unclear how many of these non-professional employees were removed from the unit by Touchette or why, but they are amongst the currently unrepresented technical and service and maintenance employees the Petitioner seeks to separately represent.

historical units are defective and the currently represented employees are appropriately included in the petitioned-for units.

In *D.V. Displays Corp*., 134 NLRB 568 (1961), several unions which had collective bargaining agreements covering employees who produced custom displays with firms that manufactured such displays petitioned the Board for an election among the already-covered employees and various other employees at the firms. The petitioned-for unit would include, among others, production employees at one of the firms who did not work on custom displays, maintenance workers, and photographers. *Id*. at 568-70. In *D.V. Displays*, the Board found that a unit consisting of all production employees, photographers, and maintenance employees was appropriate, and that a question concerning representation existed regarding this unit. The Board held that the employees whom the union contracts had not previously covered constituted a fringe group. Previously, the Board had held that such fringe groups were not to be included in a historical unit, "without first ascertaining whether or not they desire to be included." *Id*. at 571 (citing *The Zia Company*, 108 NLRB 1134 (1954)). The Board in *D.V. Displays*, however, decided to modify the rule calling for a separate election where "there is a question of representation in the historical unit and the incumbent union seeks to add a previously unrepresented fringe group whom no other union is seeking to represent on a different basis . . . ." *Id*. In such a case, the Board concluded that only one election among all the employees in the unit would be appropriate. *Id*. The Board reasoned that a single election was appropriate since the exclusion of the fringe group derived "from historical

accident rather than from any real difference in functions or status, and which creates a fringe defect in the historical unit." *Id*. The Board found it more consistent with its statutory responsibility for determining the appropriate unit to direct an election among the entire unit. Also, the Board found that directing a single election was the more democratic approach because the single election would give all the employees in the unit an equal voice in choosing their bargaining representative. *Id*. at 571-72.

As in *D.V. Displays*, the petitions here raise a question concerning representation in the historical unit of non-professional former Kenneth Hall employees. The Petitioner, the incumbent union, seeks to divide the non-professional employee unit into two units and to add two previously unrepresented fringe groups whom no other union is seeking to represent on a different basis. *Id*. at 571. The fringe groups here are those technical and service and maintenance employees in the petitioned-for classifications described below employed by the Employer who are unrepresented because they had not worked at Kenneth Hall or had been removed from the non-professional unit upon being hired by Touchette after Kenneth Hall's closure. The parties have stipulated that the former Kenneth Hall and previously unrepresented Touchette technical and service and maintenance employees share the same supervision and same general working conditions, and that the specified job classifications in the petitioned-for units share a community of interests. Further, as in *D.V. Displays*, and as further explained below, the exclusion of this fringe group derives from historical accident rather than from

any difference in functions or status, thereby creating a fringe defect in the historical unit.

The record is unclear as to how many former Kenneth Hall technical and service and maintenance employees the Employer removed from the non-professional employee unit after their hire at Touchette, or why it did so. In any event, these employees' exclusion from the historical non-professional employee unit essentially derives from the same underlying factual circumstance that resulted in the exclusion of the previously unrepresented Touchette technical and service and maintenance employees from this unit. In 2000, when the Petitioner was certified as the bargaining representative of the non-professional employees at St. Mary's Hospital of East St. Louis, Kenneth Hall did not yet exist. In 2004, St. Mary's was purchased by the Foundation which changed the name of the hospital to Kenneth Hall. In around 2008, Touchette integrated with Kenneth Hall, and the Foundation began the process of winding down Kenneth Hall's operations and transferring operations and employees to Touchette. Had the Petitioner sought initial representation after the integration was complete, clearly the petitioned-for units would be appropriate. No basis would exist to exclude employees who work in the same classifications and alongside unit employees. The only basis to support the exclusion is the accident of this history of the consolidation of two separate facilities, one union, the other not. Therefore, to include only the currently unrepresented technical and service and maintenance Touchette employees in the petitioned-for units "would, in practical effect, be to permit them to perpetuate that fringe defect by voting to maintain their

unrepresented status." *Id.* at 571. See, e.g., *Lydia E. Hall Hospital*, 227 NLRB 573, 574 (1976); *Duke Power Co.*, 173 NLRB 240, 241 (1968); *Century Electric Co.*, 146 NLRB 232, 244 fn. 18 (1964).

The cases relied on by the Employer are distinguishable. In *Banknote Corp. of America v. NLRB*, 84 F.3d 637 (2nd Cir. 1996), cert. denied 519 U.S. 1109 (1997), a successor employer argued in an unfair labor practice case that the historical bargaining units that the charging party unions sought to represent were not appropriate under its operations, and that it therefore had no duty to recognize or bargain with the unions. *Id*. at 642. In enforcing the Employer's bargaining obligation, the Court of Appeals concluded the Board properly applied a presumption in favor of historical bargaining units in finding that the employees in the three bargaining units at issue continued to perform substantially the same work as they had prior to the change in ownership of the facility. *Id*. at 648-650. The presumption in favor of historical bargaining units discussed in *Banknote Corp. of America* involved application of the Board's successorship doctrine rather than, as in the instant case, a determination of appropriate units under Section 9(b), which only requires that the units sought by the petitioner be appropriate units for collective bargaining. Most importantly, though, in *Banknote*, there was no question concerning representation and the incumbent union was seeking to continue its representation of the historical unit.

The Employer also relies on *Pathology Institute*, 320 NLRB 1050 (1996), enfd. 116 F.3d 482 (1997), cert. denied, 522 U.S. 1028 (1997). In that case, the Board found that a historical employer wide bargaining unit continued to be

appropriate after a single employer closed the facility where the unit employees were located and transferred them to different facilities. The Board concluded that the change in the unit's size resulting from the single employer's reduction of its operations did not destroy the continued appropriateness of the historical unit. *Id*. at 1051. Like *Banknote Corp. of America* noted above, *Pathology Institute's* discussion of the continued appropriateness of an historical unit occurred in the context of an unfair labor practice case, raised no question concerning representation, and the incumbent union was seeking to continue its representation of the historical unit.

Thus, under the circumstances, it is appropriate to conduct elections in both petitioned-for units and to include the former Kenneth Hall technical and service and maintenance employees currently represented by Petitioner, as well as the Employer's employees in the agreed-upon classifications in these groups, as set forth below, who are currently unrepresented.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

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

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

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

4. The Petitioner claims to represent certain employees of the Employer.

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

6. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:[5]

> All full-time, regular part-time and per diem (those regularly averaging four (4) or more hours per week in a quarter) service and maintenance employees including activity technicians, admitting representatives, behavioral health technicians, cashiers, central supply techs - certified, CNAs, cooks, customer relations reps, department secretaries, environmental technicians, ER technicians, floor technicians, food service workers, groundskeepers, instrument technicians, lab assistants, laundry/linen technicians, materials management technicians, medical assistants, OR assistants, patient care assistants, patient care technicians, patient navigators, pharmacy technicians, phlebotomists, psych aides, purchasing agents, receptionists, stock/safety inspectors, surgical assistants, surgical EVS technicians, surgical technicians - certified, transportation drivers, unit secretaries EXCLUDING technical employees, skilled maintenance employees, business office clericals, professional employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

[5] The parties stipulated to the classifications appropriately included in each of the petitioned-for units. However, the stipulation failed to address the following classifications: accounts receivable coordinator, clinical service representative, IOP coordinator, maintenance worker, medical billing specialist, medical billing specialist lead, medical records coder, office assistant, pharmacy lead tech, and program assistant. The parties are attempting to reach an agreement as to the unit placement of these classifications which, if achieved, will result in the issuance of an erratum to clarify the appropriate collective bargaining units herein. Absent an agreement, I will permit employees in those classifications to vote subject to challenge or take other action as deemed appropriate.

> All full-time, regular part-time and per diem (those regularly averaging four (4) or more hours per week in a quarter) technical employees including CT techs, LPNs, mammography technicians, medical lab techs - certified, nuclear med techs, physical therapy assistants, radiology technicians, registered diagnostic card sonographers, respiratory care practitioners, respiratory techs/therapists, and ultrasound technicians EXCLUDING service and maintenance employees, skilled maintenance employees, business office clericals, professional employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

IV. DIRECTION OF ELECTIONS

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. The employees in these units will vote on whether or not they wish to be represented for the purposes of collective bargaining by SEIU Healthcare Illinois & Indiana. The date, time, and place of the elections will be specified in the Notices of Election that the Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the elections are those in the units who were employed during the payroll period immediately prior to the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who

have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit Lists of Eligible Voters

To ensure 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 elections should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list for each unit, containing the full names and addresses of all the eligible voters in the units. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). Upon receipt of the lists, I will make them available to all parties to the elections.

To be timely filed, the lists must be received in the Regional Office, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103, on or before **February 22, 2013**. No extension of time to file the lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file the lists. Failure to comply with this requirement will be grounds for setting aside the elections whenever proper objections are filed. The lists may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlrb.gov,[6] by mail, or by facsimile transmission at (314) 539-7794. The burden of establishing the timely filing and receipt of the lists will continue to be placed on the sending party.

Since the lists will be made available to all parties to the elections, please furnish a total of **two** copies of each list, unless the lists are submitted by facsimile or electronic mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 days prior to the date of the elections. Failure to follow the posting requirement may result in additional litigation if proper objections to the elections are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the elections if it has not received copies of the election notices. *Club*

[6] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notices.

V. RIGHT TO REQUEST REVIEW

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, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **March 1, 2013**. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov[7], but may not be filed by facsimile.

Dated February 15, 2013, at St. Louis, Missouri.

_____/S/_____
Daniel L. Hubbel, Regional Director
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63013-2829

[7] To file the request for review electronically, go to www.nlrb.gov and select the E-Gov tab. Then click on the E-Filing link on the menu, and follow the detailed instructions. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.