

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



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In the Matter of *
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HOWARD RELIEF SOCIETY, *
d/b/a HOWARD MENTAL HEALTH SOCIETY *
*
Employer 1/ *
*
and *
*
AMERICAN FEDERATION OF STATE, *
COUNTY AND MUNICIPAL EMPLOYEES, *
AFL-CIO *
*
Petitioner *
*
* * * * *

CASE NO. 1-RC-18,051

DECISION AND DIRECTION OF ELECTION

Upon a Petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. Pursuant to provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

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

1/ The name of the Employer appears as amended at the hearing.

2. The Howard Relief Society, d/b/a Howard Mental Health Services, herein called the Employer, is a private, non-profit Vermont corporation with its principal place of business at 300 Flynn Avenue, Burlington, Vermont and is engaged in providing comprehensive mental health and mental retardation services to Chittenden County, Vermont.

At the hearing, the Employer moved for transfer of this case to the Board upon the ground that the facts herein relating to the Employer's operations, generally, pose such a unique and novel situation that only the Board itself can properly pass upon the issue of whether jurisdiction is properly asserted.

I have considered this Motion fully. In light of the available record evidence, and as more fully discussed below, I do not find that the facts relating to the Employer's operations here to be so unique or novel that there is a compelling reason for transfer of this case to the Board. Consequently, the motion to transfer this case to the Board is denied.

On the issue of jurisdiction itself, the Employer specifically contends that its operations are exempt because it is a non-profit, eleemosynary corporation with little impact upon interstate commerce. Moreover, the Employer argues that its day-to-day functions are a de facto extension of pure governmental interest, so extensively controlled and regulated that there is no real separation between it and the government. This it argues, of itself, must exclude the Employer's operations from the provisions of the Act.

The record of evidence reflects that the Employer has existed since 1878, when it was incorporated as a non-profit entity called, "The Howard Relief

Society." Its main focus then, as now, was the providing of care to the mentally retarded. In 1973, the State of Vermont discarded the state institution concept of treatment of the mentally retarded in favor of a community or localized care concept. In practice, this came to mean the parcelling-out by contract of responsibility for direct care of the mentally retarded, to independent providers of care. This was done by counties, and within Vermont's Chittenden County, the Employer became the provider of care in 1974, and began to do business as Howard Mental Health Services. This role has continued to date, the record shows, and has expanded considerably.

As it is now constituted, the Employer has two distinct types of services which it provides. The first of these is its mental retardation services (herein, MRS). MRS operates three group homes, two intermediate care facilities, a/k/a intensive residential programs, three staff apartments and eleven supervised apartments. The aim of the MRS is to create an alternative to institutional life for the mentally retarded that integrates them in society, according to the level of their disability. MRS, therefore, is subdivided according to a logical scheme related to patient disability and program management supervision. This scheme has four subdivisions titled, Residential, Respite, Day Services and Services Coordination. The Residential subdivision includes the Child and Adolescent Development Program (CADH), Supervised Apartments, Group Homes, Intermediate Care Facilities and Staff Apartments, all self-explanatory. The Respite Program is designed for relieving families temporarily of patient-care burdens and is a further subdivision, as is Day Services, which includes an adult education program and a job skills training

program called Project Hire. Finally, there is Services Coordination, which appears to be designed to control and allocate the Employer's resources within the broad overview of MRS.

The second type of service offered by the Employer to the community is its Mental Health Services (herein, MHS). Within these services, there are three subdivisions, Out-Patient, Psychiatric Disability and Acute Care Services and Emergency Services. The Out-Patient subdivision offers counseling in eight distinct areas of mental health definitions ranging, for example, from children's problems to alcoholic rehabilitation to Vietnam veterans adjustment. The Psychiatric Disability Acute Care Services subdivision involves, like the MRS, residential programs, rehabilitative programs and clinical and support systems. Emergency Services, also a subdivision, is essentially a crisis response service. A pyramidal administration is overlaid upon this scheme, which has at its apex, a Board of Trustees with various directorships beneath. The evidence indicates that this organization is dictated of necessity, by the specialized areas of care provided, the varying expertise, professional and non-professional demanded by this care, all in a final reflection of the requirements levied by the source funding of the Employer.

In its day-to-day operation, patients or clients come to the Employer's programs through some organ of the State of Vermont, such as a State institution or from a patient's family or, otherwise, from the community at large. There are also internal transfers from one of the Employer's programs to another.

The record indicates that the Employer's most recent budget was in excess of 3.8 million dollars. It, as well, purchased goods valued in excess of

\$50,000 from points directly outside the State of Vermont. There are several sources for the monies which the Employer receives for its MRS and MHS programs. The major source of monies for both is Medicaid funds pursuant to Title 19 of the Social Security Act. Title 19 provides for a two-third Federal to a one-third State mix of funds. The Employer also derives considerable monies from its contracts with the State of Vermont and its agencies such as the State Department of Health. It is also substantially subsidized by Grants-in-Aid in both its MRS and MHS. These Grants-in-Aid emanate mainly from various Federal programs and are usually block grants aimed towards some specific societal problem such as alcoholism. In at least its MRS function, the Employer receives monies from patient's room and board, which principally is their Supplemental Security Income (SSI) monies. Then, there is a small percentage of monies received directly from billing patients or their guardians and an even smaller percentage that it derives from such sources as United Way or local government.

Of this most recent 3.8 million dollar budget, approximately 1.6 million dollars was solely devoted to MRS. The record is silent as to the exact percentage expenditure within each of MRS and MHS subdivisions, and exactly how much money is derived directly from Federal Government programs or indirectly from some State conduit in or for each program, but what is abundantly clear from the record is that over 95% of the Employer's gross revenue are derived from Federal sources.

The high degree of Government subsidy for financing carries with it certain consequences to the Employer, such as close review of expenditures made on all

programs and budgets, generally, to protect the public purse, but also that to insure the patient population in MRS and MHS is accorded the best possible care for the money expended. To this end, the Federal Government, through its various health agencies, directly or indirectly through the State of Vermont, continually imposes many requirements in the administration of MRS and MHS. Specifically, these range from individual treatment plans for mentally retarded persons with periodic reviews, to the actual licensing of these facilities. There are also occasions where specific staffing level is set in a program and where special employee skills are required for an employee to work in that program. However, beyond the limits broadly set by budget, and the basic requirements a particular staff position must have, there is no evidence that the Employer is restricted by any Governmental agency in the slightest way in the setting of specific salary levels or, otherwise, in the hiring management and supervision of its employees. In all areas relating to personnel policies and practices, the record shows that the employer has retained complete prerogatives to itself.

I find, therefore, from the evidence in the record as a whole, that the Employer does have a substantial impact upon interstate commerce based on significant gross revenues in excess of the standard applicable to its type of operation. Moreover, I do not find the Employer's day-to-day operations so hampered by Governmental regulation and control that its operations are an

extension of the State. As the Employer has complete control over personnel policies and practices within which its discretion to establish wages, hours and working conditions is intact, I find no reason to decline jurisdiction and, accordingly, find that it is properly asserted herein. J. Arthur Trudeau Center, 227 NLRB 1439 (1977); J. Arthur Trudeau Center, 233 NLRB 151 (1977); United Services for the Handicapped, 239 NLRB 976, 977 (1978); Resident Home for the Mentally Retarded of Hamilton County, Inc., 239 NLRB 3 (1978); D.T. Watson Home for Crippled Children, 242 NLRB 1368 (1979).

3. The labor organization involved claims to represent certain employees of the Employer.

4. 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.

5. The Petitioner seeks to represent an all inclusive unit of professional and non-professional employees. The Employer took no position with regard to the appropriate unit. The parties, however, did stipulate that professional employees should be permitted to vote separately on the question of their inclusion in a unit of non-professional employees. It appears that there are approximately 170 employees in the overall unit. There is no history of collective bargaining.

The Petitioner seeks to include Residential Managers, whereas the Employer would exclude them on the basis that they are supervisors as defined in the Act. Residential Managers fall in two assignment areas, within MRS Staffed Apartments and Group Homes. Each of the Staffed Apartments has a Residential Manager, two

permanent Residential Instructors, and two to three part-time or on-call employees. Each of the Group Homes, which has a broader kind of care as its aim, employs a staff which include a Residential Manager and approximately three full-time Residential Instructors and as many part-timers as necessary, geared to the needs of the group involved. The Residential Managers for staffed apartments are Joel Slayton, Richard Holmes and Kathleen O'Kelley. The Resident Managers for group homes are David Wright, Tim Mullen, Judy Joslin and Joanne Markoff, the latter two being co-managers of one group home.

While the form of care is different for each assignment area, the day-to-day operation is virtually identical. All Residential Managers receive higher salaries than other employees. All regularly attend weekly meetings to discuss various patient care problems and administrative problems. All Residential Managers similarly complete annual written employee evaluations upon which salary adjustments are made.

There is no record evidence that any Residential Manager has ever been directly responsible for any employee discharge, but their evaluations have been a factor in such cases. Residential Managers have, as well, performed job applicant interviews and have effectively recommended hire in some cases.

In all significant respects, the day-to-day responsibility for patient care in these special separate environments falls upon these Residential Managers and the staffs they train and direct. Based on the evidence and the record as a whole, I find that the Residential Managers in both the Staffed Apartments and Group Houses to be supervisors within the meaning of the Act and are excluded. Fred Finch Childrens' Home, Inc., 243 NLRB 77, (1979). Mon Valley United Health Services, Inc., 238 NLRB 916, 925 (1978).

In accordance with the above findings and the record as a whole the following may constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

All full-time and regular part-time employees, 2/ including the switchboard operator, receptionists, van drivers, billing specialists, accounting specialists, data entry employees, medical records employees, transcriptionists, janitors, maintenance employees, and the secretary to the administrative assistant, on-call substitute employees, Community Mental Health Clinicians, Community Support Workers, Psychiatric Disability Counselors, Cooperative Apartment Workers, Residential Treatment Workers, Residential Assistants, Acute Care Counselors, ACU Night Managers, Registered Nurses, Adult Outpatient Clinicians, Contracted Outpatient Clinicians, Elderly Services Coordinator, Children's Clinicians, CRASH Contracted Clinicians, CRASH Group Leaders, Residential Instructors - Staffed Apartments, Residential Instructors - Group Homes, Residential Instructors - Intermediate Care Facilities, Residential Instructors - Floaters, Intermediate Care Facility Team Leaders, Reception/Intake Employees, The Supervised Apartment Instructor, Managing Trainers, Day Services Instructors, Service Coordinators, Coordinator of CADH/Foster Homes, Psychiatrists,

2/ Based on the stipulation of the parties and the record as a whole, certain part-time employees are found to be eligible for inclusion according to the following formulas agreed to by the parties:

(i) On-call substitute employees who work no less than fifty hours in a 30 day period prior to the eligibility date as determined by the Board.

(ii) CRASH-contract employees who work at least three (3) hours per week for four weeks prior to the eligibility date as determined by the Board.

Day Services Team Leaders, Emergency Services Clinicians, Law Enforcement Court Liaison, but excluding all confidential but excluding all confidential employees, 3/ managerial employees, 4/ guards and supervisors 5/ as defined in the Act.

3/ Based on the stipulation of the Parties and the record as a whole, Pat Capponi is found to be a confidential employee and is excluded from the Unit.

4/ Based on the stipulation of the Parties and the record as a whole, Susannah Nickerson, co-ordinator of the Employer Assistance Program, is found to be a managerial employee and is excluded from the Unit.

5/ Based on the stipulation of the Parties and the record as a whole, the following are found to be supervisors within the meaning of Section 2(11) of the Act and are therefore excluded from the Unit:

~~James Leddy, Executive Director; Gail Barton, Medical Director; Lois Nexon Payne, Chief of Crisis Services of Chittenden County; Todd Centybear, Director of Psychiatric Disabilities and Acute Care Services; Jonathan Coffin, Chief of Outpatient Services; Matt McCue, Director of Mental Retardation Services; Marcia Hawkins, Personnel Administrator and Assistant to the Director; Jack Barnes, Director of Finance and Administrative Services; Linda Taft, Coordinator of Clinical and Support Services; Sheryl Bellman, Coordinator of Rehabilitation and Social Programs; Charles Biss, Chief of Mental Health Residential and Acute Care Services; Anita Royer-Bell, Cooperative Apartment Program Coordinator; Lis Mickenberg, Arroway Program Coordinator; Craig Coldberg, Intermediate Care Facility Residential Manager; Sarah Chambers, Intermediate Care Facility Residential Manager; Don Alexander, Coordinator of Acute Care Services; Bobbie Bryant, GRASH Coordinator; Mark Andrews, Coordinator of Mental Retardation Residential Services; Jim Cameron, Coordinator of Mental Retardation Residential Services; Margaret Skinner, Community Apartment Coordinator; Sam Booska, Intermediate Care Facility Residential Manager; Marilyn Myers, Intermediate Care Facility Residential Manager; Donna Gallagher, Coordinator of Mental Retardation Day Services; Lenny Julius, Assistant Director of Finance and Administrative Services; David Beckett, Transportation Coordinator; Bob Emmons, Maintenance Superintendent; David Hedelund, Controller; Paul Landerl, Clinical Supervisor; Marjorie Wood, Coordinator of Children's Services; Ruth Ritchie, Administrative Assistant; Rose Hillegas, Medical Records Supervisor; Carol Bean, Data Entry Supervisor; Debra Gould-Kelly, Training Coordinator - Project HIRE.~~

However, as this unit includes professional 6/ and non-professional employees whom the Board cannot join in a single unit without the desires of the professional employees being determined in a separate vote, 7/ I shall direct separate elections in voting groups A and B. The Employees in Group A will be asked questions on their ballots.

(1) Do you desire to be included in the same unit as other non-professional employees employed by the Employer at its various locations within Chittenden County for the purposes of collective bargaining?

(2) Do you desire to be represented for the purpose of collective bargaining by the American Federation of State, County and Municipal Employees?

6/ Based on the stipulation of the parties and the record as a whole, the following job classifications are found to be professional.

Community Mental Health Clinicians, Community Support Workers, Psychiatric Disability Counselors, Cooperative Apartment Workers, Residential Treatment Workers, Residential Assistants, Acute Care Counselors, ACU Night Managers, Registered Nurses, Adult Outpatient Clinicians, including Contracted Outpatient Clinician Elderly Services Coordinator, Children's Clinicians, CRASH Contracted Clinicians, CRASH Group Leaders, Residential Instructors - Staffed Apartments, Residential Instructors - Group Homes, Residential Instructors - Intermediate Care Facilities, Residential Instructors - Floaters, Intermediate Care Facility Team Leaders, Reception/Intake Employees, Supervised Apartment Instructor, Managing Trainers, Day Services Instructors, Services Coordinators, Coordinator of CADH/ Foster Homes, Psychiatrists, Day Services Team Leaders, Emergency Services Clinicians, Law Enforcement Court Liaison, Group Home Residential Managers and Staffed Apartment Residential Managers.

7/ Sonotone Corporation 90 NLRB 1236 (1950).

If a majority of the professional employees in voting group A vote yes to the first question, indicating their desire to be included in a unit with the non-professional employees, they will be so included. Their vote on the second question will then be counted with the votes of the non-professional employees voting in group B to decide the representative for the combined bargaining unit (professionals and non-professionals). If, on the other hand, a majority of the professional employees in voting group A do not vote for inclusion, they will not be included with the non-professional employees and their votes on the second questions will then be separately counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

The ultimate determination is based in part on the elections. However, the followings findings are made in regard to the appropriate unit:

(1) If a majority of the professional employees vote for inclusion in a unit with the non-professional employees, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time employees, including the switch-board operator, receptionists, van drivers, billing specialists, accounting specialists, data entry employees, medical records employees, transcriptionists, janitors, maintenance employees, and the secretary to the administrative assistant, on-call substitute employees, Community Mental Health Clinicians, Community Support Workers, Psychiatric Disability Counselors, Cooperative Apartment Workers, Residential Treatment Workers, Residential Assistants, Acute Care Counselors, ACU Night Managers, Registered Nurses, Adult Outpatient Clinicians, Contracted Outpatient Clinicians, Elderly Services Coordinator, Children's Clinicians, CRASH Contracted Clinicians, CRASH Group Leaders, Residential Instructors - Group Homes, Residential Instructors - Intermediate Care Facilities, Residential Instructors Floaters, Intermediate Care Facility Team Leaders, Reception/Intake Employees, The Supervised Apartment Instructor, Managing Trainers, Day Services

Instructors, Services Coordinators, Coordinator of CADH/Foster Homes, Psychiatrists, Day Services Team Leaders, Emergency Services Clinicians, Law Enforcement Court Liaison, but excluding all confidential employees, managerial employees, guards and supervisors as defined in the Act.

(2) If a majority of the professional employees do not vote for inclusion in the unit with non-professional employees, I find the following two units to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Unit 1: All full time and regular part time professional employees including; Community Mental Health Clinicians, Community Support Workers, Psychiatric Disability Counselors, Cooperative Apartment Workers, Residential Treatment Workers, Residential Assistants, Acute Care Counselors, ACU Night Managers, Registered Nurses, Adult Outpatient Clinicians, Contracted Outpatient Clinicians, Elderly Services Coordinator, Children's Clinicians, CRASH Contracted Clinicians, CRASH Group Leaders, Residential Instructors - Staffed Apartments, Residential Instructors - Group Homes, Residential Instructors - Intermediate Care Facilities, Residential Instructors Floaters, Intermediate Care Facility Team Leaders, Reception/Intake Employees, The Supervised Apartment Instructor, Managing Trainers, Day Services Instructors, Services Coordinators, Coordinator of CADH/ Foster Homes, Psychiatrists, Day Services Team Leaders, Emergency Services Clinicians, Law Enforcement Court Liaison, but excluding all other employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

Unit 2: All full time and regular part time non-professional employees, including the switchboard operator, receptionists, van drivers, billing specialists, accounting specialists, data entry employees, medical records employees, transcriptionists, janitors, maintenance employees, and the secretary to the administrative assistant, on-call substitute employees but excluding all other employees, confidential employees, managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

Separate elections by secret ballot shall be conducted by the undersigned 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. Eligible to vote are those in the groups who were employed during the payroll period ending immediately preceding the date below, including employees who did not work during that 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 services of the United States 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 payroll 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. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by American Federation of State, County and Municipal Employees, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election 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); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned 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 Walker Building, Third Floor, 120 Boylston Street, Boston, Massachusetts 02116 on or before February 9, 1984. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

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, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 15, 1984.

/s/ Robert S. Fuchs |

Robert S. Fuchs, Regional Director
National Labor Relations Board
First Region
Boston, Massachusetts

Dated at Boston, Massachusetts
this 2nd day of February, 1984.