STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Service Employees International Union, Local 73,	)	
Petitioner	)	
and	)	Case No S-UC-12-059
County of McHenry (Valley-Hi Nursing and Rehabilitation)	)	
Employer	)	

ORDER

On January 4, 2013 Administrative Law Judge Kimberly Faith Stevens, on behalf of the Illinois Labor Relations Board, issued a Recommended Decision and Order in the above-captioned matter. No party filed exceptions to the Administrative Law Judge's Recommendation during the time allotted, and at its March 12, 2013 public meeting, the Board, having reviewed the matter, declined to take it up on its own motion.

THEREFORE, pursuant to Section 1200.135(b)(5) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(b)(5), the parties have waived their exceptions to the Administrative Law Judge's Recommended Decision and Order, and this non-precedential Recommended Decision and Order is final and binding on the parties to this proceeding.

Issued in Chicago, Illinois, this 12th day of March, 2013.

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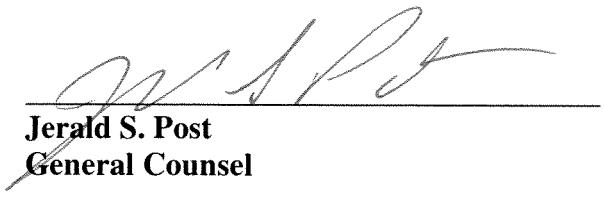

Jerald S. Post
General Counsel

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STATE OF ILLINOIS
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Service Employees International Union, Local 73,	)	
Petitioner	)	
and	)	Case No. S-UC-12-059
County of McHenry, Valley Hi Nursing and Rehabilitation,	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On June 15, 2012, Service Employees International Union (Petitioner or Union), filed a unit clarification petition in Case No. S-UC-12-059 with the State Panel of the Illinois Labor Relations Board (Board) pursuant to the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). This petition seeks to include the title "Pool Certified Nursing Assistant" to an existing bargaining unit, certified in Case No. S-RC-12-095. The Employer objects to the inclusion of this title in the existing bargaining unit.

A hearing was held on October 16, 2012, before Administrative Law Judge Michelle Owen at the Board's offices in Chicago, Illinois. At that time, all parties appeared and were given a full opportunity to participate, introduce relevant evidence, examine witnesses, and argue orally. Briefs were timely filed by both parties. After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following.

I. PRELIMINARY FINDINGS

1. I find that the Board has jurisdiction to hear this matter pursuant to Sections 5(a-5) and 20(b) of the Act.

2. I find that the Petitioner is a labor organization within the meaning of Section 3(i) of the Act.

3. I find that the Employer is a public employer within the meaning of Section 3(o) of the Act.

4. The parties stipulate, and I find, that the Employer is a unit of local government subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a-5) of the Act.

5. I find that the Employer is a unit of local government subject to the Act pursuant to Section 20(b) of the Act.

6. I find that the Union was certified to represent an existing bargaining unit in S-RC-12-095, which is described as follows: Included: All full-time and part-time employees of the County of McHenry, Valley Hi Nursing and Rehabilitation, in the following classifications: Activity Assistant; Administrative Specialist I; Admissions Coordinator; Certified Nursing Assistant I; Certified Nursing Assistant II; Cook; Custodian; Food Service Assistant; Food Service Worker; Front Desk Associate; Housekeeper; Laundry Worker; Medical Records Coordinator; Non-Certified Nursing Assistant; Office Assistant I; Psych-Social Aide. Excluded: Pool-Certified Nursing Assistant (title is disputed and therefore excluded under Section 1210.100(b)(7)(B) of the Board's Rules and Regulations, 80 Ill. Admin. Code §§ 1200-1240); all supervisors, managers and confidential employees as defined by the Illinois Public Labor Relations Act.

7. I find that the Union filed a Unit Clarification Petition in the instant case on June 15, 2012, seeking to include the position of Pool Certified Nursing Assistant.

II. ISSUES AND CONTENTIONS

The Employer argues that the on-call CNAs have no community of interest with the employees in the certified bargaining unit. The Employer also objects to the inclusion of the on-call CNAs because it alleges that they are "temporary" employees. To the extent that the Employer intends to indicate that it believes the on-call CNAs are "short term" employees under the Act, I will address this contention below. The Union contends that the record does not support the Employer's contention that the on-call CNAs lack the requisite community of interest with the current bargaining unit members and should, as such, be included in the petitioned-for unit.

II. FINDINGS OF FACT

Valley Hi Nursing and Rehabilitation Center is a state-licensed, county-owned facility located in Woodstock, Illinois, in McHenry County. It provides skilled nursing services and short-term rehabilitation services to seniors in the area surrounding the center. At the time of hearing, the center serviced 126 residents, with an average regular population between 124 and 128 residents. The center accepts private insurance, private payment, Medicare, Medicaid, and Medicare Advantage plans. At the time of hearing, Thomas Annarella was employed by the County of McHenry as the administrator of Valley Hi. The center has approximately 160 staff. The center has CNAs and licensed nurses along with housekeeping, laundry, activity, social service, business office, administrative, and County maintenance staff. Each department of staff has a representative department head who reports to the administrator.

The County of McHenry owns the center, which is funded through the aforementioned pay groups and also by County taxes. The budget for the facility is finalized and approved by the County Board. As administrator, Annarella is responsible for overall operational day-to-day management of the facility, assessing the facility's operations, and managing the department heads. The facility has three shifts for nursing staff (approximately 7 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., and 11:00 p.m. to 7:00 a.m.) and flexible shifts for the administrative staff. The day shift consists of approximately 35 employees, with the later shifts having fewer employees. On the day shift, the staff consists of as many as six or seven or as few as three RNs and LPNs. A CNA, or Certified Nursing Assistant, assists residents with activities of daily living, including feeding, dressing, toileting, and transportation within the facility. There are approximately 45 CNAs on the center's roster of staff. On average, there are 13 CNAs working on the day shift, 12 on the afternoon shift, and 8 on the night shift.

The center also maintains an "on-call registry" or "float pool" of CNAs, which is a group of CNAs that are used on an as-needed basis to supplement time off requests, vacation requests, leaves of absence, and employees leaving employment at the center, so that the center can maintain its staffing levels. Minimum staffing levels are determined by the State of Illinois, but the center has established its own staffing levels that exceed the state-mandated levels. If resident census is reduced, the facility may not need to utilize the on-call registry to supplement staffing levels even if some employees are absent. At times, the center knows in advance when an on-call CNA will be needed to fill a shift, such as when an employee requests time off in advance. Other times, if an employee calls off of work on a particular day, an on-call CNA might be utilized to fill that void with only a few hours notice. The CNAs in the on-call registry are not required to be available for a certain number of shifts per week. The center utilizes the

on-call registry system as opposed to a contracted company to provide supplemental staffing on a shift-by-shift basis. The County has utilized the contract method in the past, but it had not done so in the last couple of years prior to the hearing.

At the time of hearing, there were approximately nine CNAs on the on-call registry. Annarella testified that these CNAs are employees of McHenry County. The on-call CNAs do not receive benefits, whereas the full-time and part-time employees of the center do receive benefits, including health insurance. If a position on the on-call registry needs to be filled, the center will advertise on the County's website or within the facility. Many of the on-call CNAs are employees that have transferred from a full-time or part-time position into a registry position, while some are individuals from the community who are looking to supplement their income or work on an as-needed basis. The on-call CNAs are prohibited from also being full-time or part-time employees of the center or the County, and they are at-will employees.

There is no expectation that an on-call CNA will receive a specific number of shifts. However, there is a minimum work and availability requirement for the on-call CNAs of three shifts per month provided that shifts are available for them to work. If not enough shifts are available, the on-call CNAs are not held to this requirement. The on-call CNAs are paid on an hourly basis based on the shifts that they work. The wage rate, $13.50 per hour, is the same for on-call CNAs as for full-time and part-time CNAs at the center. Typically, the on-call CNAs do not work more than 40 hours per week; however, if they did, they would be eligible for overtime pay. On-call CNAs usually work full shifts, but if they are only available for part of a shift, the center may choose to allow them to do so. The on-call CNAs and regular CNAs all work at the same facility, hold the same certification, and have the same supervision. The on-call and regular CNAs work side by side on their shifts and perform the same duties, although some

specialized duties, such as therapy and rehabilitation activities, may not be performed by on-call CNAs. The on-call CNAs are evaluated under the same process as regular CNAs, and all CNAs are subject to the same policies and procedures. On-call CNAs are subject to discipline, although due to their at-will status, discipline need not be progressive and an on-call CNA may be removed from the registry if the center finds that they engaged in egregious misconduct. Annarella testified that, typically, the on-call registry position is a supplemental position to another full-time job held by CNAs either at a nursing home or hospital.

If no registry CNAs are available to work an available shift, the opportunity is offered to the full-time and part-time employees at either an overtime rate or in the form of additional hours for part-time employees. The center administrator oversees the ability of the on-call CNAs to remain on the registry, but the scheduling of these individuals is done by the nursing supervisors and assistant director of nursing. If the on-call registry was not in place, the facility would have to utilize a private agency to fill the shifts, which would impact the budget due to the significant cost associated with using the private agency. Annarella also noted that having staff that are invested in the operation of the center is an advantage over using a private agency, because these CNAs are already trained and familiar with the residents. The facility also maintains an on-call registry for RNs and LPNs that is administered the same way as the CNA registry.

IV. DISCUSSION AND ANALYSIS

A. Appropriateness of Bargaining Unit

With regard to the appropriate bargaining unit for a petitioned-for employee, Section 9(b) of the Act provides, in pertinent part:

> The Board shall decide in each case, in order to assure public employees the fullest freedom in exercising the rights guaranteed by this Act, a unit appropriate for the purpose of collective bargaining, based upon but not limited to such factors as: historical pattern of recognition; community of interest including employee skills and

> functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desires of the employees. For purposes of this subsection, fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining unit.

The Board has held that "[t]he standard for judging whether a unit is appropriate is not whether the petitioned-for unit is the most appropriate but whether it is an appropriate unit." City of Chicago, 23 PERI ¶172 (IL LRB-SP 2007), citing Rend Lake Conservancy District, 14 PERI ¶2051 (IL SLRB 1998).

In considering the factors outlined by the Act for purposes of determining whether a proposed bargaining unit is appropriate, I find that the proposed bargaining unit is appropriate. Specifically, the employees at issue have a community of interest concerning their skills and functions and have contact with other CNAs on each shift they work; indeed, they work side-by-side with full-time and part-time CNAs to provide services to residents of Valley Hi when on duty. They are functionally integrated and interchangeable with full-time and part-time CNAs, as evidenced by the testimony that the very purpose of maintaining the on-call registry is to ensure that CNAs are available to fill in when full-time or part-time CNAs are absent or a vacancy exists. Although the on-call CNAs do not receive benefits from the County, the on-call CNAs have the same certification requirements as the full-time and part-time CNAs and receive the same hourly wage. They have comparable working conditions in that they work in the same facility and under the same supervision as the full-time and part-time CNAs. Moreover, the on-call CNAs are evaluated using the same process as the full-time and part-time CNAs.

The on-call CNAs are subject to discipline in the form of being removed from the on-call registry. As stated by the Employer, they are not necessarily subject to progressive discipline as they are at-will employees. However, the Board has held that the fact of at-will employment in

and of itself does not preclude an employee from participating in collective bargaining. State of Ill., Dep't of Cent. Mgmt Serv. (Revenue), 29 PERI ¶ 62 (2012) (holding that, where the Board's order did not require the employer to agree to a just cause provision for discipline or to other terms or conditions of employment, the employer's concern in maintaining at-will status of petitioned-for employee was not a basis for excluding the employee, particularly in light of the duty of the employer to bargain with respect to newly unionized employees). See also State of Ill., Dep't of Cent. Mgmt Serv., 28 PERI ¶ 50 (IL LRB-SP 2011); State of Ill., Dept of Cent. Mgmt Serv. (EPA, DPR DHS, DCEO), 26 PERI ¶ 155 (IL LRB-SP 2011) (holding that exemption from the Personnel Code by section 4d(3) is not contained as an exclusion in the Act and that the General Assembly created, within the Act itself, all the exceptions it intended to create); State of Ill., Dep't of Cent. Mgmt Serv., 25 PERI ¶ 184 (IL LRB-SP 2009) ("Shakman exempt", "Rutan exempt", or " at-will" civil service classification may not serve as a basis to exclude employees from collective bargaining); County of Cook, 24 PERI ¶ 36 (IL LRB-LP 2008); City of Chicago (Mayor's Office of Information and Inquiry), 10 PERI ¶ 3003 (IL LLRB 1993).

In this case, the similarities between the on-call and full-time and part-time CNAs are substantial. As noted by the Union, a majority of the on-call CNAs have indicated their desire to become Union members. Therefore, I find that the factors outlined by the Act weigh in favor of a finding that the proposed bargaining unit is appropriate as petitioned. Ultimately, the Employer has not shown that including all of the petitioned-for employees in the same bargaining unit would violate the Act or its intent. Therefore, I find that the proposed bargaining unit is appropriate under the Act.

B. Short-Term Employees

The Employer argues in its position statement that the on-call CNAs are considered "temporary employees" by the County. The Union construes this argument as a contention that the on-call CNAs are "short-term" employees and therefore excluded by the Act.[1]

Indeed, Section 3(n) of the Act does exclude "short-term" employees from collective bargaining. Section 3(q) of the Act defines a "short-term" employee as "an employee who is employed for less than 2 consecutive calendar quarters during a calendar year and who does not have a reasonable assurance that he or she will be rehired by the same employer for the same service in a subsequent calendar year." The Illinois Appellate Court has held that, because this definition is "stated in the conjunctive, in order to exclude a part-time employee from the definition of public employee on the ground that they constitute a short-term employee, both elements must be present." Laborer's International Union of North America, Local 1280 v. ISLRB, 154 Ill. App. 3d 1045, 1062 (5th Dist. 1987). The element regarding working two consecutive quarters implies that an employee needs to work for at least six consecutive months during a calendar year to be considered a public employee.

The first element, by its plain language, contemplates a situation in which an employee would actually be "rehired" as opposed to retained as an employee. The Fourth District Appellate Court has found that this requires an affirmative act by the employer that demonstrates its intent to rehire the employee. City of Tuscola v. ISLRB, 314 Ill. App. 3d 731, 732 (4th Dist. 2000), citing William Rainey Harper Community College 512 v. Harper College Adjunct Faculty Ass'n, 273 Ill. App. 3d 648 (4th Dist. 1995). The Fourth District has used a five-part test

[1] The Act also excludes "independent contractors" from collective bargaining; however, neither party raised an argument that these on-call CNAs are independent contractors. The Employer has admitted that the on-call CNAs are employees of the County. Therefore, I do not consider whether they would be considered independent contractors for purposes of the Act.

to determine whether an employee has a reasonable assurance of rehire, which considered: (1) whether any preference is given to those who have worked for the governing body in previous years; (2) whether the position requires a special license or certificate; (3) whether the individuals must reapply each year; (4) whether the employer has made any assurance or indicated that it will rehire the individual; and (5) the number of individuals rehired from year to year. Northwest Mosquito Abatement District v. ISLRB, 303 Ill. App. 3d 735, 743 (1st Dist. 1999). The Fourth District was critical of the Northwest Mosquito test, as it took into account the expectations of the employees rather than specific assurances made by the employer. City of Tuscola, 314 Ill. App. 3d at 737.

It is questionable whether the definition of short-term employee would even apply to the on-call CNAs, given their employment status. Specifically, on-call CNAs are not required to reapply for the position on a quarterly, biannual, or even annual basis. In fact, the On-Call Registry Guidelines, provided as a joint exhibit, state: "Registry employees will be classified as 'temporary' employees of McHenry County until such a time that they are voluntarily or involuntarily removed from the Registry." Once hired, it appears that these individuals remain on the on-call registry until the employment relationship is terminated either by the individual or by the County. They are not required to be "rehired" after a certain period of time.

To the extent that "rehire" could be construed as implying that these employees would be "retained", it appears that the on-call CNAs do have a reasonable assurance that they will be retained as on-call CNAs. First, according to information provided by the Employer in its exhibit at hearing, there are several on-call CNAs who have been employed as such for several years. Second, as provided by the Employer in testimony, on-call CNAs are subject to the same

evaluation process as full-time and part-time CNAs. Therefore, by all accounts, the first element of the definition is not met with respect to the on-call CNAs.

In addition, the Employer's exhibit shows that many of the on-call CNAs have worked for more than six consecutive months in a calendar year. Therefore, the second element of the definition is not met with respect to the on-call CNAs. Because the on-call CNAs do not meet the definition of a short-term employee under the Act, they are not thereby excluded from collective bargaining.

V. CONCLUSIONS OF LAW

The on-call CNAs are not short-term employees under the Act; therefore, the Employer has not shown that a unit including these individuals is inappropriate. Moreover, the on-call, part-time, and full-time CNAs share collective interests suitable for collective bargaining in a single unit. Therefore, the petitioned-for unit is an appropriate unit.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that the unit clarification petition to represent the on-call, or pool, CNAs at Valley Hi is GRANTED.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 14 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 10 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 5 days from the filing of cross-exceptions, parties may file cross-responses to the cross-

exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 14-day period, the parties will be deemed to have waived their exceptions.

Issued at Springfield, Illinois, this 4th day of January, 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Kimberly Faith Stevens
Administrative Law Judge