

DC 37, 3 OCB2d 21 (BOC 2010)

(Rep) (Docket No. AC 47-09).

Summary of Decision: DC 37 sought to accrete the Behavioral Health Associate title to its bargaining unit of hospital technicians. CWA intervened to seek accretion of the title to its bargaining unit of administrative titles. HHC took the position that DC 37's bargaining unit was the most appropriate. The Board found that Behavioral Health Associates have a greater community of interest with the titles in DC 37's bargaining unit than CWA's bargaining unit and amended Certification No. 16-2007 to add the Behavioral Health Associate title. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF CERTIFICATION**

In the Matter of the Certification Proceeding

- between -

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

- and -

COMMUNICATIONS WORKERS OF AMERICA,

Intervenor,

- and -

THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondent.

DECISION AND ORDER

On February 23, 2009, District Council 37, AFSCME, AFL-CIO ("DC 37") filed a petition, docketed as AC-47-09, seeking to add the title Behavioral Health Associate (Title Code No. 039810) ("BHA") to Certification No. 16-2007, its bargaining unit of hospital technician titles. DC 37 asserts that BHAs share a community of interest with employees in the titles Psychiatric Social Health

Technician (“PSHT”), Patient Care Technician (“PCT”), and Patient Care Associate (“PCA”). On March 19, 2009, the Communications Workers of America (“CWA”) filed a motion to intervene. CWA is seeking to add the BHA title to Certification No. 41-73, its bargaining unit of administrative titles including Assistant Coordinating Manager (“ACM”). CWA asserts that BHAs share a community of interest with ACMs who perform BHA duties. The employer, the New York City Health and Hospitals Corporation (“HHC”), takes the position that BHAs are most appropriately placed in DC 37’s bargaining unit. This Board finds that BHAs have a greater community of interest with the employees in DC 37’s bargaining unit than with the employees in CWA’s bargaining unit. Accordingly, we amend Certification No. 16-2007 to add the BHA title.

BACKGROUND

A hearing was conducted over six days at which testimony was heard from BHAs and employees in titles represented by DC 37 and CWA.

Behavioral Health Associate

HHC announced the creation of the BHA title on November 12, 2008. HHC created the title, whose duties include de-escalating crisis situations, in order to minimize the need for intervention by the hospital security personnel in psychiatric units. As of July 9, 2009, there were at least 17 employees in the BHA title working at four HHC facilities: Bellevue Hospital (“Bellevue”), Elmhurst Hospital Center (“Elmhurst”), Jacobi Hospital (“Jacobi”), and Kings County Hospital Center (“Kings County”). (CWA Ex. 2).

HHC’s job specification for the BHA title provides:

Under the direction of a Registered Nurse (RN) and/or physician, and in

collaboration with the interdisciplinary team, performs crisis and/or de-escalation interventions, therapeutic observations, engagements, client supervision, and other behavioral health related duties, including assisting in the implementation of seclusion for clients presented to behavioral health services for psychological assessment and treatment. Acts in compliance with corporate, hospital and all relevant regulatory policies.

(Trial Examiner Ex. 1). The BHA job specification identifies the following as typical tasks:

1. Utilizes crisis and/or de-escalation intervention practices, when necessary and appropriate, with clients whose behavior cannot be otherwise supported without such intervention.
2. Assists in the application and removal of restraints and the implementation of seclusion, when deemed necessary by appropriate personnel; ensures the physical and emotional health and safety of the client when using such methods.
3. Identifies client characteristics and environmental variables that may trigger agitated behavior(s) and communicates such information to the treatment team.
4. Performs observation and monitoring of assigned clients on a one-to-one basis.
5. Performs client checks/rounds and video surveillance, as required, and reports observations, interactions and client activity to assigned nursing staff.
6. Communicates clinical matters to the assigned RN or other professional staff as required.
7. Escorting clients to required locations(s), on and off facility premises.
8. Monitors and controls client, family, and staff traffic flow through behavioral health services.
9. Assures the safety of clients and staff through electronic scanning and safety checks prior to entry to behavioral health services.
10. Inspects and categorizes client's belongings at time of admission and assures that property is safely maintained and returned at the time of transfer or discharge; notifies appropriate personnel of illegal items for proper handling.
11. Participates in staff, departmental, and team/committee meetings.
12. Participates in departmental quality assurance/performance improvement (QA/PI) activities.
13. Participates in departmental and/or facility-wide training as required.
14. May lead or co-lead discussion groups in areas such as anger management techniques and practices; appropriately documents group activity.
15. Performs related work.

(*Id.*). HHC's qualification requirements for the BHA title are as follows:

1. An Associate's degree in criminal justice, social services, or health-related area; or
2. A High School diploma or G.E.D. and two years of full-time experience in law enforcement, nursing, or psychiatric/behavioral health in a high volume, intensive care environment; or
3. A satisfactory equivalent combination of education, training, and experience. However, all candidates must possess a minimum of a High School diploma or G.E.D.
4. Successful completion of an appropriate training program in the application and use of restraints and seclusion must be completed prior to an individual performing such work.

(*Id.*). In reference to requirement 4, the use of restraints, the BHA job specification notes:

As required by the Centers for Medicare and Medicaid Services (CMS), Hospital Conditions of Participation—Patients' Rights (42 CFR Part 482), before applying restraints, implementing seclusion, performing associated monitoring of the restrained or secluded individual, or providing care for such individuals, staff must be trained and able to demonstrate competency in the performance of these actions.

(*Id.*). The salary range for the BHA title is \$37,440 to \$46,421.

BHAs work in divisions such as the Comprehensive Psychiatric Emergency Program, also known as the psychiatric emergency room, Prison Wards, Adolescent Units, and in-patient areas. BHAs work 37.5 hours per week, one of three tours, and alternate weekends. BHAs report to medical professionals. Prior to June 2009, all BHAs reported to a Registered Nurse, typically the Head Nurse or the Assistant Director of Nursing. Beginning in June 2009, BHAs at Kings County reported to a Doctor, the Director of the Patient Safety Initiative Department.

Two BHAs testified. One became a BHA at Bellevue in March 2009, having been a PHST since 2003. The other became a BHA at Kings County in January 2009, having been a Nurse's Aide since 1989.¹ The BHA from Bellevue testified that, as a BHA, he will, on occasion, perform every

¹ The Nurse's Aide title is represented by DC 37 in a different bargaining unit than the one to which it seeks to add the BHA title.

duty he performed as a PSHT, such as taking vital signs, leading skills and information groups, and monitoring patients. Similarly, the BHA from Kings County testified that, as a BHA, he still performs many of the duties he performed as a Nurse's Aide, including responding to crises and monitoring patients. Both BHAs were required to attend specialized training prior to promotion into the BHA title. Among other topics, the BHA training courses dealt with the proper use of patient restraints.

The BHA witnesses testified that the primary job function of a BHA is the prevention and de-escalation of crisis situations. A secondary job function of a BHA is client interaction, trying to develop a rapport with the patients in order to better monitor and assist them should they become out of control.

A BHA's tour begins with a report from the Nurses concerning the previous tour. This report would note patients who are volatile or appearing to becoming more unstable. The report would also note any special need of patients, such as diabetes, admissions, and discharges. BHAs regularly attend meetings with Doctors and Nurses at which treatment plans for patients are discussed. BHAs interact with the patients, determine their moods, and try to maintain a calm atmosphere in the unit.

Since 2008, BHAs have participated in crisis intervention teams. HHC facilities implemented these teams to respond to patients who are, or may become, out of control. These interdisciplinary teams can include Doctors, Nurses, BHAs, ACMs, PSHTs, PCTs, and PCAs. The team's goal is to de-escalate the situation, and, initially, the team tries to calm the patient verbally. If unsuccessful, the team may physically restrain the patient in order to provide medication and avoid a physical altercation. BHAs, due to their training, are expected to take the lead in crisis situations. However, BHAs will defer to another employee who has a better rapport with the patient.

DC 37's Hospital Technician Bargaining Unit

DC 37's bargaining unit of hospital technicians includes approximately 4,624 employees working at HHC facilities, including, as of March 2009, 440 PSHTs, 1,350 PCTs, and 1,675 PCAs. At Bellevue, 22 employees in DC 37 represented titles had completed a training program to become BHAs. As of July 15, 2009, two of these employees had been promoted to the BHA title; the remaining 20 consist of 16 PSHTs and four PCAs.

Psychiatric Social Health Technician

The PSHT job specification provides:

Under direct supervision of a professional nurse or other professional staff member, performs therapeutic and related mental health service activity; maintains direct contact with people who have social and emotional problems and handicaps, and interests [*sic*] with clients in daily living activities, and insures a properly maintained physical, social and clinical environmental including home visits and evaluation of patient needs, makes patient referrals and works with families on related social, economic and health problems.

(DC 37 Ex. B). Examples of typical tasks of PSHTs include:

1. Observing a patient's physical condition, mental state and social behavior, and reporting to team leader or Nurse-in-charge . . .
2. Participates in planning and implementing an orientation program for new patients. Gathers information for intake, social histories, referrals and related purposes which would augment the understanding of cases.
3. Participates in planning and implementing daily living activities on the ward for patients and contributes to the development of a therapeutic environment.
4. Assists in planning and implementing therapeutic activities with groups of hospitalized psychiatric patients and encouraging client involvement in various individual and group activities as part of planned treatment program;
5. Reports observations pertaining to patient's behavior, physical condition and activities at schedule interdisciplinary conferences and submits appropriate reports. . . .
11. Interviews and teaches patients and families to develop awareness of sound health practices and disease conditions, i.e., pap smear, diabetes, tranquilizer medication, lead poisoning, etc.
13. Acts as liaison between medical and nursing staffs, patients, relatives, and appropriate outside agencies.

(*Id.*). The qualification requirements for a PSHT are:

1. One year of satisfactory experience as described in “Examples of Typical Tasks” in a hospital, health care or medical facility; or
2. One year of satisfactory experience in providing non-professional nursing or medical support services in a hospital, health care or medical facility, and satisfactory completion of prescribed courses in an approved mental health or social health care. Also the following:
3. Ability to establish successful interpersonal relationships with patients and co-workers.
4. Good knowledge of methods and procedures used in applying appropriate treatment.
5. Ability to effectively carry out oral and written instructions.

(*Id.*). The salary range for the PSHT title is \$30,991 to \$41,706.

PSHTs work in HHC facilities such as Bellevue, Queens Hospital Center (“Queens”), and Kings County in units such as the psychiatric emergency room, Prison Wards, Adolescent Units, and in-patient areas. PSHTs work 37.5 hours per week, one of three tours, and alternate weekends. They report to Registered Nurses in the title of Head Nurse and Assistant Director of Nurses.

One current and two former PSHTs testified about their PSHT duties.² The primary function of a PSHT is to monitor patients who may be suicidal or otherwise a threat to themselves or others. At the start of his or her shift, a PSHT receives a report describing the patients’ behavior during the preceding tour. If a patient is considered a threat to himself or others, PHSTs will do one-on-one monitoring and record their observations, taking notes every 15 minutes. PSHTs also communicate observations to Nurses and others, perform searches, handle patients’ personal property, process transfers, take vital signs, lead skills and information groups, and assist in patient activities.

PSHTs in Adolescent Units supervise the patients’ daily living activities, including showers and oral care, and escort the patients to school. PSHTs and Nurses meet as a team to discuss the

² The PHST who testified had been a PHST at Kings County since 1988.

patients. While school is in session, PSHTs perform a range of duties, from dealing with the patients who are not in school to making beds and cleaning out the refrigerator. After school, the PSHTs run skills and information groups on a range of topics, from proper grooming to what to expect upon release.

PSHTs work regularly with BHAs, including on crisis intervention teams. In the event that a patient becomes agitated, PSHTs would first “try and talk them down.” If unsuccessful, the PSHTs would inform the Nurses. If the situation continued to escalate, a Nurse would summon a Doctor and possibly the crisis intervention team. PSHTs are trained in the use of restraints and apply them when necessary.

Patient Care Technician

The job specification for the PCT title provides:

Under direct supervision of a licensed nurse or other licensed professional staff, performs activities and procedures of a non-professional nature in direct/indirect care of patients and residents, or participates as a member of a treatment, nursing, medical, health care team in implementing appropriate regimens.

(DC 37 Ex. D). Examples of typical tasks listed on the PCT job specification include:

7. Assists in care and storage of patients’ clothing and property and sterilizes clothing and other personal items when required.
8. Reports observations of patients’ and families’ condition, mental state and social behavior to medical and professional staff caring for patients, and participates in the assessment and/or care of patients and families.
9. Maintains, controls, completes, processes and files patients’ charts, records, transportation and time records, appropriate forms and documents.
10. Assists in clinic, admission procedures and in regulation of visitors. . . .
15. Maintains clinical competence by attending continuing education programs.

(*Id.*). The qualification requirements for a PCT are graduation from elementary school, successful completion of a basic skill training program for Nurse’s Aides or its equivalent and, for those

assigned to a long term care facility, a New York State Nurse's Aide Certificate. The salary range for the PCT title is \$34,409 to \$39,705.

PCTs work at facilities such as Kings County's Adolescent Unit. They report to titles such as Head Nurse and work 37.5 hours per week, in one of three tours. PCTs work with BHAs, respond to crises, and apply restraints.

One PCT who works in a Male Adolescent Unit testified. He makes sure the young men practice good daily living skills. He is supposed to teach by example, being consistent and punctual. He also monitors and interacts with the patients to avoid the patients becoming aggressive. He escorts them to school and monitors lunch. On occasion, he will perform one-on-one monitoring. He testified that all titles respond when there is a crisis and that he has put restraints on patients.

Patient Care Associate

The PCA job specification states: "Under direct supervision of a licensed nurse or other professional medical staff in a health care setting, performs a variety of clerical and health-related duties associated with patient care; performs related work." (DC 37 Ex. C). Examples of typical tasks of PCAs include:

1. Checks vital signs, . . .
6. Performs simple first aid, such as dressing changes, bandaging and cleaning of wounds, irrigation and cleansing of ears. . . .
11. Maintains, controls, completes, processes and files patients' charts, appropriate forms and documents.
12. Reports observations of patients to medical staff caring for patients to ensure professional. . . .
16. Works effectively as a team member in the delivery of care . . .
17. Directs and escorts patients to other hospital departments and/or facilities, as needed.

(*Id.*). The qualification requirements for a PCA are:

1. A four year high school diploma or its educational equivalent; and
2. Successful completion of a NYS Department of Health prescribed training

- program for phlebotomy, satisfactory to the laboratory director and appropriate to the workload of the facility; and
3. Completion of a facility-based training program in the performance of electrocardiographs and basic life support procedures including certification in Cardio-Pulmonary Resuscitation.

(*Id.*). The salary range for the PCA title is \$37,255 to \$43,523.

No PCAs testified. Several witnesses testified that they witnessed PCAs monitoring patients, responding to crises, and using patient restraints. The PHST who testified stated that PCAs receive the same report from the Nurses that the PSHTs receive and attend the same continuing education classes, such as CPR. When the PCA title was added to the hospital technician unit, this Board noted that the title's duties "involve direct patient care." *SEIU, Local 144*, 60 OCB 1, at 36 (BOC 1997).

CWA's Bargaining Unit

CWA's bargaining unit includes "administrative employees" in titles such as Principal Administrative Associate, Coordinating Manager, and ACM. (Tr. 469). CWA asserts that the ACM title is the only title in this unit that shares a community of interest with the BHA title. CWA's bargaining unit includes approximately 630 ACMs.³ A CWA Supervising Staff Representative testified that ACMs are "basically administrative employees" who "coordinate the flow of work." (Tr. 469).

Assistant Coordinating Manager

We take administrative notice of the ACM job specification, which provides:

Under general supervision with latitude for independent judgment and initiative, assists in the planning, organizing, controlling and coordinating of administrative and office operations in a variety of organizational settings and

³ In the proceeding to accrete the ACM title to its bargaining unit, CWA described that unit as consisting of "various administrative titles." *CWA*, 40 BOC 5, at 14 (BOC 1987).

modalities in the delivery of business management support systems, health care and patient support systems. Integrates these programs, functions and services with other hospitals and Central Office sectors to maximize optimal levels of performance in the coordination of such activities.

Examples of typical tasks include:

1. Conducts studies related to the service/program and analyzes modifications and development of systems and procedures to improve departmental operations. Makes recommendations and implements.
2. Assists in planning for the service/program through consultation with management and professional staff and other associated health care fields in order to coordinate joint patient and management objectives.
3. Serves as liaison between department administrative, technical, professional divisions and Central Office management.
4. Assists in budgetary planning, reviews operating costs, performs cost studies and prepares department budgets.
5. Assists in planning, development and may conduct training programs to maintain proficiency of personnel and for use of new equipment and implementation of methods and procedures.
6. Evaluates office production, revises procedures, or devises new forms or methods to improve efficiency of work flow.
7. Reviews official directives and correspondence to ascertain such data as changes prescribed in corporate, facility or department programs, policies, procedures and new assignments or responsibilities delegated to office.
9. Establishes uniform correspondence procedures and style practices.
10. May provide for administrative supervision for a program of comprehensive health service of professional and non-professional staff and related health care personnel.
11. Is responsible for employee supervision, performance and employee development of assigned personnel in areas of responsibility and accountability.
12. Supervises the office administration and office record keeping activities of the department.
13. Assigns and schedules staff on basis of workload, space and equipment.
14. Reviews, prepares and rewrites operational manuals and procedures.
15. May represent the departmental administrator in external contracts with community organizations and agencies as required.

The qualification requirements are:

1. A baccalaureate degree from an accredited college or university in business administration, community health, psychology or related discipline with one (1) year of full-time experience in supervisory or administrative capacity in business management systems, general administration, health care and

- medical patient systems administration; or
2. A satisfactory combination of education, training and experience.

As of July 2009, 38 ACMs work in behavioral health departments at HHC. At least 20 of these ACMs are performing BHA duties.⁴ At Kings County, 15 ACMs are serving as BHAs. HHC plans to reclassify these ACMs as BHAs once the BHA title is assigned to a bargaining unit.⁵ In the interim, these 15 employees are performing BHA duties under the functional, or in-house, title of Assistant Coordinating Manager/Behavioral Health Associate (“ACM/BHA”).⁶ At least one ACM at Elmhurst has the functional title ACM Behavioral Health Officer, which Elmhurst views as identical to the BHA title. There are four ACMs at Queens performing BHA duties.⁷

A CWA Supervising Staff Representative testified that she was not aware of ACMs having patient care duties before 2008. However, an ACM from Kings County testified that he began performing patient care duties in December 2006. The ACM Behavioral Health Officer from Elmhurst testified that he has had patient care duties since July 2007 and was aware of ACMs at Elmhurst working in the psychiatric emergency room in late 2006.

Five ACMs performing BHA duties testified. These ACMs were promoted into the ACM

⁴ The record is devoid of any information regarding the remaining 18 ACMs.

⁵ In February 2009, HHC changed the titles of these Kings County employees from ACM to BHA, removing them from the CWA bargaining unit. When CWA complained to HHC, HHC promptly restored these employees to the ACM title pending resolution of this proceeding.

⁶ The Kings County ACM/BHA functional position description is similar to the BHA job specification. Its purpose section states that ACM/BHAs perform therapeutic observations and work with a multi-disciplinary clinical team to provide quality patient care in a therapeutic milieu. Typical tasks listed on it are similar to those listed on the BHA job specification and include crisis intervention. The education requirements listed for the Kings County ACM/BHA are the same as those listed on the BHA job specification, including training in the use of restraints.

⁷ One such ACM testified, and documents introduced established that Queens views this ACM as a BHA.

title from titles such as PSHT, Nurse's Aide, Emergency Medical Technician, and a hospital security title. Four work in the psychiatric emergency room. The fifth worked in the psychiatric emergency room but now works in an in-patient unit. All were required to take a specialized training program.⁸ These ACMs work 35 hours per week, one of three tours, and alternate weekends. They all report to medical professionals, such as Head Nurse. The ACMs at Kings County performing BHA duties report to the Doctor in charge of the Office of Psychiatric Safety Initiatives.

Three ACMs testified that the ACM and BHA positions were identical; one of which testified that ACMs and BHAs can cover shifts for each other. One ACM testified that the position is primarily clinical—patient care. Another ACM described the position as a liaison between the patient and the rest of the staff. ACMs are part of the interdisciplinary crisis intervention teams that respond when a patient becomes violent. While all disciplines assist in a crisis, because ACMs, like BHAs, have specialized training, they ordinarily take the lead trying to de-escalate crisis situations. ACMs are expected to talk to the patient, attempt to calm them down, and get them to orally take medication. However, if a Nurse or another employee has a better rapport with the patient, the other employee would lead, and the ACM would take on a support role. One ACM testified that he has presented a class for other staff members on crisis intervention.

ACMs monitor patients, take notes, search new patients, remove contraband, handle patients' personal property, escort patients, conduct skills and information groups, and use patient restraints. One ACM testified that he performed most of the duties he now performs when he was a PSHT. Another testified that, as an ACM, he performs all the duties he performed as a Nurse's Aide except for conducting one-on-one observations and taking vital signs. ACMs have a little more

⁸ The programs were of varying lengths. Two attended a three-week training course, two attended two-month courses, and one attended a three- to four-month training program.

responsibility than PSHTs and are more focused on agitated patients and communicating with the patients.

The ACMs testified that their day begins with a report that details what occurred in the prior tour. The report also includes an assessment of the patients, including those who might be a danger to themselves or others. In the psychiatric emergency room, an ACM will bring the patient in, perform the initial searches, and take the patient to the nursing station, where triage is done. At this point, ACMs secure the patient's personal property. If the patient is considered a threat, the ACM accompanies the patient, waits while the Doctor conducts an interview, and then escorts the patient back to the psychiatric emergency room, where the nursing staff takes over.

The ACM assigned to an in-patient unit testified that he monitors patients and make rounds. Occasionally, he will participate in group meetings with patients. Specifically, if the ACM believes that there is a safety issue, such as food smuggled into rooms that can lead to a bug infestation, the ACM will conduct a meeting. An ACM recently called a meeting to educate the patients on Tourette's syndrome since he felt that some patients were picking on a patient with the syndrome. ACMs will accompany violent patients to meetings with their doctors or to administrative hearings.

The ACMs testified that they do not perform many of the tasks listed on the ACM job specification. They testified that they do not do administrative work such as conducting studies, assisting in budgetary planning, evaluating and revising procedures, developing training programs, supervising record keeping, completing performance appraisals, planning for new equipment, or acting as a liaison between departments.

POSITIONS OF THE PARTIES

DC 37's Position

DC 37 argues that the BHA title has a strong community of interest with the titles in its bargaining unit of hospital technicians. PSHTs, PCTs, and PCAs have similar job duties and responsibilities, qualifications, skills, and salary ranges as BHAs. These four titles also work comparable hours—37.5 hours per week, eight-hour tours, and alternating weekends. Witness testimony established that the four titles have similar patient care duties and responsibilities. All four titles monitor the mental and physical conditions of psychiatric patients to ensure that they remain calm and do not pose a danger to themselves or others. All four titles attempt to identify the triggers that may incite a patient and, thereby, prevent crisis situations. Should a crisis arise, all four titles work in interdisciplinary teams to de-escalate the situation, calm the patients, and, when necessary, apply restraints. The four titles also have similar lines of supervision, reporting to medical professionals such as Head Nurse or the Assistant Director of Nursing.

Further, the four titles share similar qualification requirements in that none require a four-year college degree and all allow for experience to substitute for some formal education. DC 37 requests that the Board take administrative notice of the ACM job specification, which requires a four-year degree and some experience. Testimony established that BHAs, PSHTs and PCTs receive similar training in de-escalating a crisis, restraining patients, and the mental illnesses afflicting the psychiatric patients. These titles undergo training in understanding patient behaviors and identifying patient triggers.

According to DC 37, the BHA title does not share a community of interest with the ACM title. Of over 630 ACMs employed by HHC, only 38 are employed in psychiatry departments. To the extent that ACMs have been assigned to perform patient care duties, “such duties are out of title

and, therefore, should not be considered in determining a community of interest.” (DC 37 Brief at 22). The ACM functional position descriptions introduced should be disregarded as a reflection of out-of-title work. The record is clear that the 15 ACMs at Kings County performing BHA duties are temporarily in the ACM title and will become BHAs upon resolution of the instant matter. Therefore, there is no community of interest between the ACM and BHA titles.

DC 37 notes that the ACM job specification, which CWA chose not to introduce into evidence, contains only administrative duties. A CWA Supervising Staff Representative testified that CWA represents “administrative employees” and that, prior to 2008, ACMs did not perform patient care duties. (Tr. 469). Other witnesses similarly testified. DC 37 requests that the Board take administrative notice of the ACM title certification proceedings in which CWA described ACMs as “employees in various administrative titles.” (DC 37 Brief at 2) (quoting *CWA*, 40 BOC 5, at 14).

CWA’s Position

CWA contends that, when determining whether accretion is appropriate, the Board considers whether the title would have been included in the unit at the time of original certification and the comparative size of the groups. Since CWA represents over 630 ACMs at HHC and seeks to accrete 17 BHAs, CWA notes that its unit is clearly significantly larger than the group of employees to be accreted.

Considering the unit placement factors, CWA argues that had the BHA title been in existence when CWA was certified to represent ACMs, the BHA title would certainly have been included in CWA’s bargaining unit. As for community of interest, CWA argues that BHAs and ACMs perform “exactly the same job.” (CWA Brief at 10). Upon creation of the BHA title, Kings County chose to move 15 ACMs into it. At Elmhurst, the ACM and the BHA functional job descriptions are

identical. Three witnesses also testified that the ACM and BHA positions were identical.

According to CWA, the only evidence DC 37 put forth regarding the PCA title was its job specification. A job specification, standing alone, is not controlling proof as to the duties performed by an individual. Therefore, CWA argues, it cannot be determined whether the duties of BHAs and PCAs are similar or if the titles share a community of interest.

Testimony established significant differences between the responsibilities that BHAs and ACMs share and those that PSHTs and PCTs share. ACMs and BHAs are given greater latitude to determine what tasks to perform than PSHTs and PCTs. PSHTs are assigned meetings to run, while ACMs and BHAs are “only responsible for meetings as they see fit regarding issues such as safety.” (CWA Brief at 11).

According to CWA, the salary range of the ACM title encompasses the salary range of the BHA title, while PSHTs and PCTs are paid less.

CWA argues that the PSHTs and PCTs titles, like many DC 37 represented titles, are lower level positions than those titles represented by CWA, like ACMs. ACMs and BHAs participate in team meetings at which the patients’ treatment plan are discussed, but DC 37’s titles do not. The ACM/BHAs at Kings County now report to the Doctor in charge of the Office of Psychiatric Safety Initiatives, while PSHTs and PCTs report to the Nursing Department. Also, BHAs and ACMs need a higher level of education and experience than DC 37 represented titles. ACMs and BHAs share similar educational requirements, as both are required to have an Associate’s degree or a high school diploma and related experience. PSHTs have no educational requirement, and PCTs are only required to have graduated from elementary school and have completed a training course for Nurse’s Aides.

CWA further argues that the BHA title should not be considered a new title. Instead, HHC is moving work that has been performed by ACMs out of CWA's bargaining unit. CWA maintains that a title is properly added to the bargaining unit that has employees who already perform the work. ACMs were performing crisis intervention work before the creation of the BHA title. One witness testified that he performed such work after he became an ACM in December 2006. Another witness testified he observed ACMs performing the same work they perform today in 2006. Therefore, CWA argues, the BHA title should be accreted to its bargaining unit, or in the alternative, an election be ordered.

HHC's Position

HHC argues that DC 37's bargaining unit is the most appropriate unit to which to accrete the BHA title. BHAs have a strong community of interests with PSHTs, PCTs, and PCAs. Among the overlapping duties, both BHAs and the titles represented by DC 37 monitor patients, respond to crises, assist in de-escalating crises, and utilize restraints. BHAs regularly interact with PSHTs, PCTs, and PCAs and work directly with these titles on a daily basis. HHC notes that all the employees chosen by Bellevue to undergo training to become BHAs were in DC 37 represented titles. BHAs' salary range is also comparable to those of PSHTs, PCTs, and PCAs. HHC does not address the ACM title, except to note that a CWA Supervising Staff Representative testified that CWA represents administrative employees who do not have a patient care duties.

DISCUSSION

The New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") grants this Board the statutory power and duty:

to make final determinations of the units appropriate for purposes of

collective bargaining between public employers and public employee organizations, which units shall be such as shall assure to public employees the fullest freedom of exercising the rights granted hereunder and under executive orders, consistent with the efficient operation of the public service, and sound labor relations, . . .

NYCCBL § 12-309(b)(1). Section 1-02(k) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) sets forth the criteria that we apply in determining appropriate bargaining units:

- (1) Which unit will assure public employees the fullest freedom in the exercise of the rights granted under the statute and the applicable executive order;
- (2) The community of interest of the employees;
- (3) The history of collective bargaining in the unit, among other employees of the public employer, and in similar public employment;
- (4) The effect of the unit on the efficient operation of the public service and sound labor relations;
- (5) Whether the officials of government at the level of the unit have the power to agree or make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment which are the subject of collective bargaining;
- (6) Whether the unit is consistent with the decisions and policies of the Board.

Among the factors considered when deciding whether there is a community of interest are:

“(a) the job duties and responsibilities of the employees; (b) their qualifications, skills, and training; (c) interchange and contact; (d) wage rates; (e) lines of promotion; and (f) organization or supervision of the department, office, or other subdivision.” *OSA*, 78 OCB 5, at 44-45 (BOC 2006), *affd*, *Matter of HHC v. Bd. of Certification of the City of New York*, 237 N.Y.L.J. 99 (Sup. Ct. N.Y. Co. April 23, 2007). “This list is not exclusive, and none of the factors necessarily is controlling.” *Id.* at 45. We consider each case individually. When, as here, the parties assert that a title is appropriately added to more than one bargaining unit, this Board will “balance the various factors to determine where the greater community of interest lies.” *Id.*; see *CEU, Local 237*, 30 OCB 41, at 18 (BOC 1982).

The theory behind adding or accreting a title to a pre-existing unit is that “the new title—because of its similarity or close relationship to unit titles—would have been included in the unit had it existed at the time of the original certification.” *CWA*, 42 OCB 9, at 23 (BOC 1988); *see Local 371, SSEU*, 76 OCB 1, at 20-21 (BOC 2005). The Board will add the title to the bargaining unit that it finds to be more appropriate. *See, e.g., NYSNA*, 66 OCB 5, at 17 (BOC 2000); *NYSNA*, 20 OCB 2, at 3 (BOC 1977). In the event that the Board finds that no one bargaining unit is more appropriate than the others, the Board will order an election to determine the employees’ preference for representation. *See, e.g. Local 371, SSEU*, 76 OCB 1, at 25; *CSTG, Local 375*, 26 OCB 27, at 18-19 (BOC 1980).

Here, we find that the totality of the evidence demonstrates that BHAs have a greater community of interest with titles in DC 37’s bargaining unit. The record indicates that DC 37 titles have been performing work similar to that performed by BHAs for at least two decades prior to the creation of the BHA title and continue to perform similar work after the creation of the BHA title. The BHAs testified that, following additional training, they still performed many of the duties of their former titles, including responding to crises, monitoring patients, and using restraints. The overlap in duties is especially prevalent between the BHA and PHST titles.⁹ Indeed, at Bellevue, BHAs are expected to be able perform every duty and responsibility of a PSHT. The only difference is that BHAs focus on crisis prevention and intervention and have more input in patient care.

The four titles—BHA, PHST, PCT, and PCA—share a large amount of interchange and contact. All four titles respond to crises, have an active role in crisis intervention and de-escalation, and are

⁹ One of the two BHAs who testified was promoted into the BHA title from the PHST title. The 22 employees sent for BHA training by Bellevue were PHSTs or PCTs. Also, two of the five ACMs performing BHA duties who testified were promoted into the ACM title from the PHST title.

members of crisis intervention teams. While BHAs will often take the lead because of their specialized training, employees in other DC 37 titles will also take the lead if they have a better rapport with a patient.

The BHA, PHST, PCT, and PCA titles also share similar qualifications, skills, and training. Although the education requirements for PHST, PCT, and PCA are less than that for a BHA, none of these titles require a four-year degree, and all allow experience to substitute for formal education. Like the BHAs, PHSTs, and PCTs are trained in the use of restraints.

The salary range for the BHA title overlaps with that of the PHST, PCT, and PCA titles. The salary range for the BHA title is \$37,440 to \$46,421. Titles in DC 37's bargaining unit earn between \$30,991 to \$43,523; the PSHT salary range is \$30,991 to \$41,706, the PCT salary range is \$34,409 to \$39,705, and the PCA salary range is \$37,255 to \$43,523.

The line of supervision for the BHA, PHST, PCT, and PCA titles are similar since all four titles report to medical professionals, either Registered Nurses or Doctors. At Bellevue, BHAs and PHSTs have the same line of command, reporting to the Head Nurse and the Assistant Director of Nursing. The BHA at Kings County reported to the Assistant Director of Nursing until June 2009 but now reports to a Doctor.

Given the similarities in their duties, the regular interaction among these titles, and the long history of titles in the hospital technicians unit performing similar work, we find that BHAs have a strong community of interest with titles in DC 37's bargaining unit.

On the other hand, the evidence does not establish as strong a community of interest between BHAs and the titles in CWA's bargaining unit. It is undisputed that currently at least 20 ACMs have been assigned to perform identical duties to those performed by BHAs, and, since 2008, some HHC facilities have utilized ACMs and BHAs interchangeably. The only distinction between ACMs who

perform BHA duties and BHAs is that BHAs work 37.5 hours per week while ACMs work 35 hours per week.

However, the duties of the 20 ACMs performing as BHAs are unique and distinguishable from the vast majority of ACMs.¹⁰ The record does not demonstrate that any ACM had patient care duties prior to 2006, and there is no evidence that the remaining 600 plus ACMs perform any patient care duties.¹¹ In the absence of testimony on these ACMs, we conclude that the majority of ACMs perform administrative duties consistent with the ACM job specification, duties such as conducting studies, evaluating procedures, representing the department, and budgetary functions. Thus, contrary to CWA's assertion, the record does not support a finding that BHAs would have been included CWA's bargaining unit when CWA was certified to represent ACMs in 1991. *See CWA*, 48 OCB 5, at 3 (adding the ACM title to a unit "covering various administrative and related titles"); *see also CWA*, 42 OCB 9, at 29 (noting that a title is properly placed in the same bargaining unit as "titles in the same or related craft"). CWA does not argue that BHAs have a community of interest with any other title in CWA's bargaining unit other than ACM.

That some ACMs serve as BHAs is insufficient to overcome the lack of community of interest between the BHA title and the ACM title. *See CWA*, 42 OCB 9. In *CWA*, the Board held that the Telecommunications Associate and Telecommunications Specialist titles were more appropriately added to a computer-oriented unit rather than CWA's administrative unit even though

¹⁰ Indeed, 15 of those 20 ACMs are scheduled to be reclassified as BHAs as soon as this Board makes its unit placement determination.

¹¹ Additionally, we note that, with the exception of the ACMs currently performing BHA duties, ACMs have little to no interaction with BHAs, have different reporting lines, and have a broader salary range with a higher maximum. Further, several witnesses testified that the ACMs who are performing as BHAs do not perform the duties listed on the ACM job specification.

some Principal Administrative Associates served as “*de facto* Telecommunications Associates.”¹² *Id.* at 27. Initially, the employer utilized employees in existing titles, such as Principal Administrative Associate, to perform duties and responsibilities similar to those of the subsequently created Telecommunications Associate and Telecommunications Specialist titles.¹³ At the time of the hearing, there were employees serving in the new titles as well as employees in other titles “acting unofficially” as Telecommunications Associates and Telecommunications Specialists. *Id.* at 5. The Board found that, “[n]otwithstanding some overlap in duties and responsibilities,” the Telecommunications Associate and Telecommunications Specialist titles do not “perform work consistently, and significantly, similar” to that of the Principal Administrative Associate title. *Id.* at 27-28.

Under the circumstances presented here, we find that BHAs have a greater community of interest with DC 37’s hospital technician bargaining unit than with CWA’s administrative bargaining unit. Inclusion of BHAs with PSHTs, PCTs, and PCAs is consistent with prior Board decisions and NYCCBL policies and will further efficient operation of the public service and sound labor relations. Accordingly, we find that BHAs are more appropriately added to Certification No. 16-2007 and amend that certification to reflect the addition of the BHA title.

¹² One Principal Administrative Associate was identified on his work identification card as a Telecommunications Associate, and another incorrectly believed himself to be a Telecommunications Associate. *CWA*, 42 OCB 9, at 5 n.5.

¹³ The Principal Administrative Associate title is “a cross-occupational, high level administrative title found throughout the City in all fields of specialization.” *CWA*, 42 OCB 9, at 27. The Telecommunications Associate title performs “telecommunication functions necessary to the delivery of telecommunication services.” *Id.* at 3. The Telecommunications Specialist title “serves as a consultant on major, highly specialized telecommunication matters.” *Id.* at 4.

ORDER

Pursuant to the powers vested in the Board of Certification by the New York City Collective Bargaining Law, it is hereby

ORDERED, that Certification No. 16-2007 (as previously amended) be, and the same hereby is, further amended to include the title Behavioral Health Associate (Title Code 039810), subject to existing contracts, if any.

Dated: May 10, 2010
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

NOTICE OF AMENDED CERTIFICATION

This notice is to acknowledge that the Board of Certification has issued an Order Amending Certification as follows:

DATE: May 10, 2009 **DOCKET #:** AC-47-09

DECISION NUMBER: 3 OCB2d 21 (BOC 2010)

EMPLOYER: The New York City Health and Hospitals Corporation
125 Worth Street
New York, NY 10013

CERTIFIED/RECOGNIZED BARGAINING REPRESENTATIVE:

District Council 37, AFSCME, AFL-CIO
125 Barclay Street
New York, NY 10007

AMENDMENT: Certification No. 16-2007 has been amended to add the following title/code:

Added: Behavioral Health Associate (Title Code No. 039810)