

In This Issue:

September 2011

In a decision that makes it easier for unions to organize in all industries, the NLRB has set a new standard for determining appropriate bargaining units in non-acute healthcare settings.

NLRB Defines New Standard for Determining Appropriate Bargaining Units

By Anita Polli and Carie Torrence

Marking the end of Chairman Wilma Liebman's term, the National Labor Relations Board issued three significant decisions at the end of August that overturn long-standing Board precedent. In what may be the most significant of the three, a decision involving the healthcare industry, the Board paved the way for the proliferation of bargaining units by overruling its 1991 decision in *Park Manor Care Center*, 305 NLRB 872 (1991), and determining that certified nursing assistants ("CNAs") comprise an appropriate stand-alone bargaining unit. Although it involved a nursing home, the Board's decision is not limited to the healthcare industry and fundamentally changes the standard for determining appropriate bargaining units applicable to all employers.

In 1989, the Board used its rulemaking authority to define eight bargaining units for acute care hospitals. Pursuant to the rule, which was adopted to prevent fragmentation and proliferation of bargaining units in healthcare settings, any other unit is inappropriate absent extraordinary circumstances. CNAs fall within the unit that includes all nonprofessional service and maintenance employees.

In *Park Manor*, the Board declined to strictly apply the 1989 rule in a non-acute healthcare setting, such as a long-term care facility. Instead, the Board adopted a pragmatic or empirical approach to examining the appropriateness of bargaining units. Besides the traditional "community of interest" factors, the Board also considered the unique structure and organization of the work performed at such facilities, noting that "there is less diversity in nursing homes among professional, technical and service employees, and the staff is more functionally integrated." In adopting this approach, the Board sought to strike a balance between bargaining units that are too large, making union organizing difficult, and units that are too small, creating the risk of repetitious bargaining and frequent strikes. Since *Park Manor*, the Board generally has found that the eight units applicable to hospitals are appropriate in non-acute facilities and has almost universally combined CNAs and other service and maintenance employees in a single bargaining unit.

The Board made clear its intention to revisit *Park Manor* last December. In an unprecedented move, it issued a Notice and Invitation to File Briefs in *Specialty Healthcare*, 356 NLRB No. 56 (2010), a case before it on an employer's request for

review from a NLRB regional director's decision certifying a petitioned-for unit of CNAs at a nursing home. In its request for review, the employer contended that, under *Park Manor*, the only appropriate unit was one that included CNAs and nonprofessional service and maintenance employees. The Board invited interested parties to file briefs addressing their experiences under *Park Manor* and whether the Board should reconsider the *Park Manor* test. In a lengthy dissent, Board Member Brian Hayes criticized the Board's approach to what he considered a simple case and warned that the Board's invitation constituted a preliminary step in revising a well-established test for determining bargaining unit composition in *all* industries.

As expected, in *Specialty Healthcare*, 357 NLRB No. 83 (2011), the Board in a 3-1 decision overruled *Park Manor* and adopted a new standard for determining appropriate bargaining units. Under the new standard, so long as a union's petitioned-for unit consists of a clearly identifiable group of employees, the Board will presume the unit is appropriate. If an employer argues that the unit should include additional employees, the employer must demonstrate that employees in a larger unit share an "overwhelming" community of interest with those in the petitioned-for unit. Applying this standard, the Board found that the union's petitioned-for unit consisting solely of CNAs was an appropriate unit.

Before the decision issued, it was well known where Member Craig Becker stood on the issue the case raised, and assumed that his Democratic colleagues would follow the approach he advocated. Member Becker, in his dissenting opinion in *Wheeling Island Gaming, Inc.*, 355 NLRB No. 127 (2010), expressed a belief that unions should be able to organize smaller units, such as a single department. He advocated a "same job, same place" unit determination standard, noting that if employees in the petitioned-for unit are performing the same job, "[a]bsent compelling evidence that such a unit is inappropriate, the Board should hold that it is an appropriate unit. "

In his dissenting opinion in *Specialty Healthcare*, Member Hayes noted that the Board's new test encourages unions to organize the smallest units possible, resulting in a fragmentation of the workforce in non-acute healthcare facilities. Member Hayes also recognized that the heightened burden on employers makes it "virtually impossible" for an employer to prove that excluded employees should be included in a petitioned-for unit.

In light of the new standard for determining whether a petitioned-for unit is appropriate, non-acute healthcare facilities face even greater risk of unionization, particularly with respect to CNAs. In the case of a long-term care facility, the likely result of *Specialty Healthcare* will be that employers may need to deal with three or more separate nonprofessional bargaining units where they traditionally have had only one. For example, CNAs, laundry workers, dietary workers and recreation aides could be in four distinct units.

Significantly, the Board did not, as it could have done, limit the new standard to non-acute healthcare facilities. The practical effect of this decision is that, in the not uncommon situation where a union is unable to garner widespread support, unions in all industries will be encouraged to organize the smallest units of employees possible. Employers, meanwhile, will be forced either to accede to the appropriateness of a mini-unit or take on the difficult and costly task of proving that other employees belong in the unit. Suffice it to say that it is easier for a union to organize a small unit of employees and, once it gains a toehold, a domino effect may ensue, as one narrow unit after another is organized. As a result, employers may be forced into negotiations with multiple bargaining units.

Employers should consult with experienced labor counsel to discuss the more complex ramifications of unionization among fragmented bargaining units and to devise strategies to minimize this risk.

.....
Anita Polli is a Shareholder, and Carie Torrence is an Associate, in Littler Mendelson's Boston office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Polli at apolli@littler.com, or Ms. Torrence at ctorrence@littler.com.