CLIENT ALERT

National Labor Relations Board Alters Landscape for Determining the Scope of Petitioned-For Bargaining Units

Sep.09.2011

In a decision that will have far-reaching implications on determinations of the National Labor Relations Board ("Board" or "NLRB") regarding the appropriateness of petitioned-for bargaining units, the Board, in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (Aug. 26, 2011) held that its previous test to determine appropriate bargaining units in nonacute health care facilities was "both confusing and misguided." Accordingly, the Board decided that for such facilities, it would now use its traditional "community of interest test" when deciding whether a proposed bargaining unit is appropriate. Specifically, the Board held that once it is determined "that employees in the proposed unit share a community of interest, it cannot be that the mere fact that they also share a community of interest with additional employees renders the smaller unit inappropriate." The Board further explained that when an employer objects to the composition of a petitioned-for unit on the grounds that the employees in the proposed unit could be placed in a larger unit that "would also be appropriate or even more appropriate," the employer must demonstrate that employees in the larger unit share an "overwhelming community of interest" with employees in the petitioned-for unit.

The employer in *Specialty Healthcare*, a nursing home and rehabilitation center in Mobile, Alabama, employs Registered Nurses, Licensed Practical Nurses, Certified Nursing Assistants ("CNAs"), and numerous non-medical support staff. The NLRB Regional Director found that a petitioned-for bargaining unit consisting of all 53 CNAs who work for the nursing home was an appropriate unit. The employer sought review of this decision and, in an August 26, 2011 decision, the Board upheld the certification of the petitioned-for unit.

The Board expressed, in *Specialty Healthcare*, its respect for Congress' recommendation, as set forth in legislative history, to avoid undue proliferation of bargaining units in the healthcare industry. Nevertheless, the Board sought to find a balance between bargaining units that are too large and difficult to organize, and those that are too small. Small bargaining units are more costly for employers due to repeated bargaining for multiple smaller units and the potential for frequent strikes and/or jurisdictional disputes. At the same time, the Board emphasized employees' rights to self-organization and its duty to ensure that employees have the "fullest freedom" to exercise those rights. With these considerations in mind, the Board concluded that the traditional community of interest test to determine appropriate bargaining units was the best approach for nonacute healthcare facilities.

Prior to its decision in *Specialty Healthcare*, appropriate bargaining units in the context of nonacute health care facilities were determined using the "empirical or pragmatic" community of interest approach, enunciated in *Park Manor Care Center*, 305 NLRB 872 (1991). This approach utilized not only an analysis of "community of interest" factors, but also "background information gathered during rulemaking and prior precedent." More specifically, the Board would consider "evidence presented during rulemaking with respect to units in acute care hospitals, as well as prior cases involving either the type of unit sought or the particular type of health care facility in dispute." Twenty years later, the Board determined that this test did not sufficiently

provide meaningful guidance, and that the test enunciated in *Park Manor* "proposes a backward-looking standard using facts and analysis already over two decades out of date."

In overruling *Park Manor,* the Board applied a traditional community of interest approach to the case. This approach considers factors such as the employees' department and organizational structure, distinct skills and training, job functions, terms and conditions of employment, type of supervision, overlap between job classifications, and interchange with other employees, to determine whether employees in a proposed unit share a community of interest. The employer in *Specialty Healthcare* did not argue that the CNAs lacked a community of interest. Instead, it asserted that a unit comprised solely of CNAs would be inappropriate because it would exclude other "nonprofessional service and maintenance employees" with whom the CNAs also shared a community of interest, including resident activity assistants, social services assistants, the staffing coordinator, the maintenance assistant, the supply clerk, cooks, dietary aides, the medical records clerk and the data entry clerk.

The Board held that a party contending that a bargaining unit made up of employees who share a community of interest is nevertheless inappropriate because it excludes additional employees must make a "heightened showing" that the unit is inappropriate. In essence, this requires demonstrating that the included and excluded employees share an "overwhelming community of interest." While the Board in *Specialty Healthcare* does not provide clear guidance as to the evidence an employer must show in order to satisfy this burden, the Board, quoting the District of Columbia Circuit Court of Appeals' opinion in *Blue Man Vegas, LLC v. NLRB*, 529 F.3d 417, 422 (D.C. Cir. 2008), explained that "two groups have an 'overwhelming community of interest' when the factors 'overlap almost completely.'" Further, the Board emphasized that simply showing that a unit is small, or that another unit would be *more* appropriate, is not enough. Instead, the party challenging the petitioned-for unit must show that there is no legitimate reason to exclude certain employees from the unit, and that the smaller proposed unit would create a combination of employees that is too narrow in scope or that has no rational basis. A majority of the Board concluded that the employer in *Specialty Healthcare* failed to make such a showing in this case and, therefore, ruled that the proposed bargaining unit was appropriate.

While the unit determination in *Specialty Healthcare* involved CNAs in a non-acute healthcare setting, the Board's holding will have far-reaching implications. The Board explained that "the traditional community of interest test . . . will apply as the starting point for unit determinations in all cases not governed by the Board's Health Care Rule."

In a strongly worded dissent, Board Member Brian E. Hayes urged that the majority's decision "fundamentally changes the standard for determining whether a petitioned-for unit is appropriate in any industry subject to the Board's jurisdiction." Hayes further criticized the majority's holding, asserting that the "'overwhelming community of interest test' . . . will make the relationship between petitioned-for unit employees and excluded coworkers irrelevant in all but the most exceptional circumstances." Hayes argued, moreover, that the Board's overruling of *Park Manor* and its reformulation of the test to determine appropriate bargaining units was done "for the purely ideological purpose of reversing the decades-old decline in union density in the private American workforce." According to Member Hayes, as a result of the Board's opinion in *Specialty Healthcare*, employers can expect unions to "engage in incremental organizing in the smallest units possible," which could result in "extraordinary fragmentation of the workforce for collective-bargaining purposes."

In light of the Board's decision in *Specialty Healthcare*, it is prudent for employers to carefully review and analyze the composition and function of all employee units. Based on well-established Board precedent, establishing the requisite "overwhelming community of interest" among the employees in a petitioned-for unit and those who an employer seeks to add

to the unit would require extensive cross-training of many of the employees in the relevant job classifications, and ensuring interchange among a substantial number of employees in such job classifications.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com

Glenn D. Grant
Senior Counsel – Washington, D.C.
Phone: +1 202.624.2852
Email: ggrant@crowell.com