

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:)	
)	
ECUMEN d/b/a ECUMEN SCENIC SHORES,)	Case No. 18-RD-2724
)	
Employer)	
and)	
)	
KRISTY GROSSKURTH)	
)	
Petitioner)	
and)	
)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 5)	
)	
Union)	

**UNION’S REQUEST FOR REVIEW OF
SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION**

AFSCME Council 5 (“the Union”), pursuant to 29 C.F.R. § 102.67, hereby moves the National Labor Relations Board (“the Board”) to reverse the Supplemental Decision and Direction of Election ordering separate elections for groups of non-professional and professional employees. The Supplemental Decision modified a previous Decision ordering an election for decertification in a bargaining unit coextensive with the existing collective bargaining unit. The determination that the bargaining units should be coextensive is consistent with prior Board law, and with the parties’ agreement regarding employees voting in the election. The Board should reverse the Supplemental Decision, and order that the election be in a unit coextensive with the existing collective bargaining unit.

FACTS

The Union began representing employees at Sunrise Nursing Home in Two Harbors, Minnesota at least twenty-five years ago. Sunrise Nursing Home was owned by Lake County, and in 2010, the County announced its intention to transfer ownership to Ecumen, which at that time, was managing the nursing home for the County. The transfer became effective on January 1, 2011, and the nursing home was renamed Ecumen Scenic Shores (“Ecumen,” or “the Employer”).

On January 19, 2011, Petitioner Kristy Grosskurth, filed a decertification petition with Board Region 18 seeking to decertify the Union as the employees’ bargaining representative. The Petition indicated that the unit included nursing staff along with other staff. Region 18 received position statements from the Union and the Employer regarding whether the successor bar doctrine should bar the decertification petition, along with relevant documents such as the collective bargaining agreement between the Union and the County, and communications among the Union, the County, and Ecumen. Regional Director Decision, 3. After the Region reviewed these documents, a hearing was deemed necessary.

On February 15, 2011, Region 18 conducted an evidentiary hearing before Hearing Officer Roger O. Czaia in Two Harbors, Minnesota. The parties agreed at the hearing that no testimony was necessary because the sole issue, whether the successor bar applied, was a legal one, and the parties agreed that the prerequisites for the successor bar had been met. Tr. 24:20-24, Feb. 15, 2011.

The Union argued that the petition should be dismissed to give Ecumen and the Union a reasonable period of time to negotiate. On August 27, 2010, the Board granted a request for review in UGL-UNICCO Service Co., stating that a regional director’s decision and direction of

election “raises substantial issues regarding whether the Board should modify or overrule MV Transportation, 337 NLRB 770 (2002), and return to the successor bar doctrine as set forth in St. Elizabeth Manor, Inc., 329 NLRB 341 (1999).” UGL-UNICCO Service Co., 355 NLRB 155 (2010). Ecumen argued that the petition should be determined under current Board law, which overruled the successor bar doctrine. The Petitioner also stated her belief that the Petition should be determined under current Board law.

The parties did not stipulate to having an election, but did stipulate as to certain other issues. Ecumen agreed that it had hired a substantial majority of the predecessor’s employees and agreed that it would not challenge the Union’s assertion that it had requested recognition and to bargain. Tr. 20:5-7, 23:14-17. The parties further agreed that if there was an election, all employees in the bargaining unit as of December 31, 2010 under the predecessor employer should be able to vote. The Union and Employer agreed to exclude managers, supervisors, confidential employees, guards and professional employees from the bargaining unit. The Petitioner stated no position regarding which employees should be permitted to vote in an election.

The Union and Employer made clear during the hearing that they disagreed regarding what employees, if any, should be considered “professional employees.” First, the Union stated its position that the unit for the election should include all the employees that were in the bargaining unit before, including registered nurses (RNs):

HEARING OFFICER CZAIA: . . . Now, want to make note, of course, that in the former bargaining unit, LPNs – the licensed practical nurses and registered nurses were included. And that my understanding is that none of the parties – or certainly the Union is not waiving any representation rights with regard to the LPNs and registered nurses.
Anybody have any feedback at this point?

MR. CORWIN:¹ Well, we object to the unit description. Our proposal is all full-time and regular part-time employees employed by the Employer at its skilled nursing home facility in Two Harbors, Minnesota, excluding managerial employees, guards and supervisors as defined by the National Labor Relations Act.

Secondly, our position is that with respect to any election that the Board may order – and we’re not agreeing that the Board should order an election – but if the Board were to order an election pursuant to the decert petition that has been filed, which we object to, that all employees who were in the unit on December 31st would be entitled to vote in that election, including employees who might not be included in a unit description that would be issued pursuant to the National Labor Relations Act; specifically, it is our position that included would be licensed practical nurses and registered nurses. . . .

Tr. 11:2-23. The Employer then stated its position that all employees in the bargaining unit as of December 31st should be allowed to vote:

For our purposes with respect to who should vote, we concur that the positions that should be allowed to vote in an election should be those positions that were included within the bargaining unit as of December 31, 2010. Going forward under Board law, we would agree that the employees who could be include – that should be excluded from the bargaining unit would be termed as professional employees, confidential employees, managerial employees, guards and supervisors as defined by the Act, understanding that there is some dispute as to what a professional employee is, which is more of a legal fact argument than it is an argument over positions, what positions would be professional. We would contend that the licensed practical nurses may be professional, as well as the nurses, as well as the licensed social services employees could be professional employees.

Tr. 13:3-17. The Union and the Employer agreed that the issue of what positions should be included or excluded as professionals would be decided at a later time. Tr. 13:22-14:2. The Union and Employer also then explicitly stated their agreement on what employees should be entitled to vote:

MR. CORWIN: Our position is that all employees who were certified to the unit under the prior public sector unit on December 31st of 2010 should be entitled, if the Board orders an election, should be entitled to vote.

MR. BOWEN: In the decert.

¹ At the hearing, Gregg M. Corwin represented the Union, and John F. Bowen represented the Employer. The Petitioner, Kristy Grosskurth represented herself.

MR. CORWIN: There should be no exclusion.

MR. BOWEN: We concur with that.

HEARING OFFICER CZAIA: Okay. Okay. Well, good. We don't need to spend any more time on this.

Tr. 15:20-16:3. The Petitioner stated no position regarding whether any employee was a professional.

The Regional Director issued a decision in this matter on February 23, 2011 finding that the successor bar doctrine did not bar an election in this matter. The Decision noted that “[t]he record itself is clear that included in the unit of the predecessor employer were nonprofessional employees, licensed practical nurses and registered nurses.” Regional Director Decision, 3. The Decision further stated:

I order an election in a unit coextensive with the bargaining unit that existed prior to the Employer assuming operation of the facility. That unit consists of nonprofessional employees, licensed practical nurses and registered nurses.

Id. at 3-4. The election was scheduled for March 25, 2011.

The Union filed a Request for Review of the Regional Director's Decision on the successor bar issue, and requested a stay of the election. On March 23, 2011, the Board granted the Union's Request for Review and denied the request for a stay of the election. The following day, the Union learned that the Regional Director intended to postpone the election for approximately three weeks and issue a Supplemental Decision and Direction of Election to have a Sonotone election. That same day, the Union filed a Special Appeal asking that the Board order that the election continue as previously scheduled, on March 25, 2011, and that all employees in the bargaining unit as of December 31, 2010 be permitted to vote.

The following day, the day the election was to have taken place, the Regional Director issued a Supplemental Decision. The Supplemental Decision postponed the election, based

apparently on American Medical Response, Inc., 344 NLRB 1406 (2005). The Regional Director directed a Sonotone election even though no party had ever presented any evidence regarding which employees should be considered “professional,” and the parties had agreed that this issue would be determined after the election on the decertification petition. The Supplemental Decision identified the professional unit as consisting of “all registered nurses and professional employees,” and the other of “licensed practical nurses and all other non-professional unit employees.”² The Supplemental Decision acknowledges a dispute regarding the professional status of other employees and stated that “[t]o the extent the parties disagree on the professional status of certain employees, the Board’s challenged ballot procedure may be used.” The election was scheduled for April 15, 2011.

ARGUMENT

The Regional Director erred in ordering a separate election for professional employees. The parties had agreed that the election should be in the bargaining unit as of December 31. That agreement is consistent with Board law, and did not contravene Board law or policy. The Regional Director’s decision to order a separate election for professional employees does, however, conflict with Board practice of determining professional status based on actual evidence. Moreover, the Regional Director’s decision was based on a perceived conflict between the Board’s past decisions in Utah Power & Light Company, 258 NLRB 1059 (1981) and American Medical Response, Inc., 344 NLRB 1406 (2005), but a close reading of these cases reveals that no such conflict exists.

² The Supplemental Decision found that LPNs were not professional employees but did not indicate what other employees should be considered professional employees for purposes of the election.

I. The Parties' Stipulation Regarding the Unit for Election Is Consistent With the Provisions and Purposes of the Act, and With Board Policy.

The Board has long held that parties' stipulations regarding unit compositions should be afforded deference:

Upon consideration we conclude that in the health care industry we will give effect to all stipulations designating unit compositions that do not contravene the provisions or purposes of the Act or well-settled Board policies.

This conclusion is based on several considerations. First and foremost, to give the parties to our representation proceedings the broadest permissible latitude to mutually define the context in which collective bargaining should take place is consonant with the design of the Act and its stated policy to encourage the practice and procedure of collective bargaining. Such a policy demands that questions preliminary to the establishment of the bargaining relationship be expeditiously resolved. The expeditious resolution of preliminary questions will be impeded if we ourselves, absent statutory command or compelling policy considerations, initiate additional delay simply because the parties' shared perspective does not comport with our own.

Otis Hospital Inc., 219 NLRB 164, 164 (1975). Thus, unless the parties' stipulation contravenes the provisions or purposes of the Act or well-settled Board policies, the Regional Director should have given effect to the parties' stipulation.

The parties' stipulation was consistent with the provisions and purposes of the Act, and with well-settled Board policies. Board policy is to use the same bargaining unit for decertification as the existing collective-bargaining unit. Fast Food Merchandisers, Inc., 242 NLRB 8 (1979); Utah Power & Light, 258 NLRB 1059. The parties agreed that it was appropriate to use the same unit for decertification as the unit that existed as of December 31, and the Regional Director originally found that this was the appropriate unit.

Further, even assuming that the unit is mixed, it would not contravene the provisions or purposes of the Act to maintain that unit. In acute care settings, there is a presumption that RNs should be in a separate unit, but that presumption does not apply to nursing homes. 29 C.F.R. §

103.30. Even if it did apply to nursing homes, a non-conforming unit may be appropriate based on the bargaining history. Id.

Under Board law, the bargaining history should have weighed heavily in favor of maintaining the bargaining unit.

Regarding the appropriateness of historical units, the Board's longstanding policy is that a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective bargaining unless the units no longer conform reasonably well to other standards of appropriateness. The party challenging a historical unit bears the burden of showing that the unit is no longer appropriate. The evidentiary burden is a heavy one.

Trident Seafoods, Inc., 318 NLRB 738, 738 (1995). See also Ready Mix USA, Inc., 340 NLRB 946 (2003) ("Indeed, compelling circumstances are required to overcome the significance of bargaining history.") This evidentiary burden is based on the Supreme Court's decision in Fall River Dyeing Corp. v. NLRB, 482 U.S. 27 (1987). "By requiring that the party challenging a historical unit to show the unit is no longer appropriate, the Board recognizes the importance Fall River places on the employees' perspective in a successorship analysis." Trident, 318 NLRB at 738-39.

In Crittenton Hospital, 328 NLRB 879 (1999), the Board found that a non-conforming unit of RNs was appropriate in light of the fact that the union had represented the RNs for the past twenty-five years. The Board held that the rule setting the appropriate bargaining units in health care settings did not require that nonconforming units be restructured to conform to the units prescribed by the Rule. This holding was based on "the Board's longstanding policy of promoting industrial stability by according great deference to collective-bargaining history." Crittenton, 328 NLRB at 880. See also Pathology Institute, Inc., 320 NLRB 1050, 1051 (1996) (maintaining historical unit in health care setting despite changes in employer structure because change did not destroy appropriateness of the unit). Based on that same policy of according great

deference to collective bargaining history, the election should be in the same unit that has existed for at least twenty-five years.

Thus, in light of the bargaining history, and the heavy burden the Employer would have had to overcome, it cannot reasonably be said that maintaining a unit that could *potentially* be mixed goes against Board law. The Union and Employer agreed that the unit that votes should be consistent with the bargaining unit on December 31, 2010. That stipulation was consistent with Board law, and with the bargaining history. Even if the unit could be later found to be mixed, the unit could still be appropriate, and particularly in light of the bargaining history, it should be the unit that is used for the election:

[A]s the D.C. Circuit has noted, “in most cases, a historical unit will be found appropriate if the predecessor employer recognized it, even if the unit would not be appropriate under Board standards if it were being organized for the first time.”

Ready Mix USA, Inc., 340 NLRB at 947 quoting Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 118 (D.C. Cir. 1996).

II. Under Both Utah Power & Light and American Medical Response, the Appropriate Unit for Election is the Unit That the Parties Stipulated.

The Regional Director’s original Decision correctly relied on Utah Power & Light to determine that the unit for election should be the unit that existed as of December 31. The Supplemental Decision asserted that Utah Power & Light is inconsistent with American Medical Response, and that because American Medical Response was a more recent decision, it controlled and required a Sonotone election. There is, however, no inconsistency between the two cases, and both compel the original decision – that the unit for the election should be the one that existed on December 31, and that the parties agreed to.

In American Medical Response, the Board considered an objection to an election where employees that were undisputedly professional employees were not asked if they wanted to be

included in a unit with nonprofessionals. The Board ordered that the election be set aside because “the election was held in a unit that, contrary to Section 9(b)(1) of the Act, combined professional employees with nonprofessional employees without affording the professionals an opportunity to vote whether they wished to be included in such a unit.” 344 NLRB at 1408. This case is clearly distinguishable from the instant case, where there is a dispute over whether there are any professional employees in the bargaining unit. Unlike in American Medical Response, where the Board found that all parties agreed that the RNs were professionals, there has been no agreement on whether any employees are professionals. In fact, the Union and the Employer explicitly agreed at the hearing that they *did not agree* on whether any employee was a professional.

In Utah Power & Light Company, the Board directed a decertification election in a voting group made up only of professional employees. The petitioners, engineers, sought a decertification election and contended that they were professional employees, and therefore entitled to vote on whether they desired to be included in the unit. The Board reviewed the facts in the record regarding the work the engineers were assigned to perform, the knowledge required to perform these functions, and the expectations that the engineers exercise autonomy and discretion. Based on that record, the Board found that the engineers were professionals who had a separate community of interest from other employees. 257 NLRB at 1060. On that basis, the Board made an exception to the policy that the unit for decertification be coextensive with the existing unit, but explicitly affirmed that this policy would continue in effect.

Unlike in Utah Power & Light, there are no facts in evidence from which the Regional Director or the Board can determine that any employees are professionals. No employee has argued that he or she is a professional. No party has presented any evidence regarding any

employees' functions, responsibilities or expectations for work performance. There is therefore no basis to depart from the policy that the unit for decertification is coextensive with the existing unit.

Together, these cases stand for the proposition that the election should be in the existing unit, with very limited exceptions that do not apply here. In both Utah Power & Light and American Medical Response, it was either undisputed or clear based on the evidence in the record that the employees at issue were professional. In Utah Power & Light, it was the professional employees themselves that asked to be in a separate unit. No employee in this case has identified as professional, or asked to be in a separate unit. In American Medical Response, it was also clear that the employees at issue were professional, and the election would lead to certification of a unit represented by a different union. In this case, there is no evidence that the any employee is a professional, and the election is for decertification only.

III. A Separate Election for Professional Employees Without Evidence to Determine Professional Status Contravenes Board Policy.

Using the pre-existing unit for the election did not conflict with Board policy, but the Regional Director's decision that the RNs are professional employees without any evidence on the record does contravene Board policy of conducting an inquiry to determine employees' professional status. Without such evidence on the record, it is impossible to determine whether the RNs meet the test for a "professional employee."

A professional employee is defined in terms of the work the employee performs. Avco Corp., 313 NLRB 1357 (1994).

Thus, if an employee performs work of a predominantly intellectual and varied character, involving the consistent exercise of discretion and judgment, and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction

and study in an institution of higher learning or a hospital, then that employee qualifies as a professional.

Id. at 1357 (emphasis added). This definition requires evidence regarding the work that the employee performs. The determination simply cannot be made based solely on educational background, which is the only possible basis for the Regional Director's decision that the RNs are professionals, particularly since the decision stated that if the parties disagreed on the professional status of other employees, a challenged ballot procedure would be used.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that if the Board orders an election pursuant to the decertification petition, that the election be in the unit that existed on December 31, 2010, which is the unit that all parties agreed was appropriate.

Dated: April 8, 2011

GREGG M. CORWIN & ASSOCIATE
LAW OFFICE, P.C.

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AMERICAN FEDERATION OF STATE,)	
COUNTY AND MUNICIPAL EMPLOYEES)	
COUNCIL 5,)	
)	
Union)	

I, Cristina Parra Herrera, certify that on April 8, 2011, I caused the Union's Request for Review of Supplemental Decision and Direction of Election to be served on the following named individuals via electronic mail and also putting same in the United States mail with proper postage affixed there to:

Marlin O. Osthus
Regional Director
National Labor Relations Board, Region 18
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John F. Bowen
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I also notified Petitioner, Kristy Grosskurth, by telephone of the substance of this Request and sent a copy of the same by overnight delivery service to:

Ms. Kristy Grosskruth
1606 Highway 61
Two Harbors, MN 55616

Dated: April 8, 2011

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