

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

**FOR DISTRIBUTION**

DATE: April 27, 2011

TO : Joseph A. Barker, Regional Director  
Region 13

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Wincrest Nursing  
Case 13-CA-46470

339-7575-7575  
347-4001-5000  
401-2575-2800  
401-2575-2825  
440-1760-5320  
530-0167  
530-8020-0100  
530-8020-7500

This case was submitted for advice as to whether the Employer's resident security employees are guards and, if so, whether the Employer violated Section 8(a)(5) when it ceased recognizing the Union as their bargaining representative in a mixed guard/nonguard unit. We conclude that the resident security employees are guards and that the Employer did not violate the Act, because a Section 8(a)(5) complaint would require the Board to find a mixed guard/nonguard unit to be an appropriate unit in contravention of Section 9(b)(3). Accordingly, the Region should dismiss the charge, absent withdrawal.

### **FACTS**

Wincrest Nursing (the "Employer") provides long-term residence, living assistance, activities, and programs to mentally disabled adults. The Employer is party to a collective-bargaining agreement (the "Agreement") between SEIU Healthcare Illinois and Indiana (the "Union") and the Illinois Association of Health Care Facilities, effective January 1, 2008 through December 31, 2011.

Article 2, Section 1 of the Agreement defines the unit as including the job titles for which the Union "historically has been recognized," and lists certain specific job classifications, but excluding guards and supervisors, for new employers becoming bound to the Agreement. Article 2, Section 3(a) describes how to accrete unrepresented employees, whose job classifications are not excluded from the unit description, into a Union-represented facility's existing bargaining unit. That provision requires the Employer to recognize the Union as the representative of the additional employees by majority

card check if the parties agree to forego a Board election, and requires the Employer to apply the terms of the Agreement to the additional employees within 30 days of voluntary recognition.

As of September 2010,<sup>1</sup> the Union represented a unit of about 60 nonprofessional employees at the Employer's facility. At that time, the Union obtained signed authorization cards from three groups of unrepresented employees: social service workers, resident security employees, and activity directors.<sup>2</sup> On September 16, the Union sent the Employer a form letter requesting "recognition pursuant to Article 2, Section 3(a)" for those employees, with copies of the signed authorization cards. On September 24, after receiving no response, the Union repeated the identical request to the Employer.

On October 11, the Employer's administrator returned the recognition agreement to the Union with his signature, but with the "activity director" classification crossed out.<sup>3</sup> The social service worker and resident security employee classifications remained. On October 19, however, the Employer informed the Union that it would not recognize the Union as the bargaining representative for the resident security employees. Specifically, the administrator faxed a letter to the Union stating that he had consulted with the Employer's representative for union affairs, and that security guards and supervisors were to be excluded from the unit per Article 2, Section 1 of the Agreement. Accordingly, the Employer administrator stated that "only social service will be allowed to join," and that the Employer "will recognize only the binding [A]greement with the Union. No guards. No supervisors."<sup>4</sup>

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<sup>1</sup> All dates are in 2010 unless otherwise indicated.

<sup>2</sup> The Union believes that the Employer employed about five resident security employees, two social service workers, and one activity director.

<sup>3</sup> The Employer administrator told the Union that the activity directors were "management."

<sup>4</sup> Meanwhile, on October 20, the Union filed a petition in Case 13-RC-21985 to represent the activity directors. On October 26, the Employer signed a recognition agreement pursuant to Article 2, Section 3(a), regarding the activity directors. Accordingly, on October 27, the Union withdrew the RC petition.

The resident security employees wear shirts with "security" on them, sit at a designated desk with monitors attached to security cameras, check everyone in and out of the facility, carry keys to the entire facility, make rounds to ensure that employees and residents are not violating rules, and report all suspicious behavior and rules violations to the Employer administrator. In addition to the above duties, resident security employees assist nurses with giving residents baths and direct residents to their activities and to buses for outside activities. Resident security employees carry no badges or weapons, receive no special training, and are not bonded or fingerprinted when hired. There is at least one resident security employee working on each shift to ensure coverage 24 hours per day, seven days per week.

### ACTION

We conclude that the resident security employees are guards and that the Employer's conduct was not unlawful, even though it had briefly recognized the Union as the representative of the guards in an existing unit covered by a collective-bargaining agreement, because a Section 8(a)(5) complaint in the circumstances of this case would require the Board to find a mixed guard/nonguard unit to be appropriate in contravention of Section 9(b)(3). Accordingly, the Region should dismiss the charge, absent withdrawal.

Although Section 9(b)(3) does not prohibit voluntary recognition of a mixed guard/nonguard unit,<sup>5</sup> it precludes the Board from deciding that a mixed unit of guards and nonguards is appropriate.<sup>6</sup> Congress enacted Section 9(b)(3)

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<sup>5</sup> See Radio Corporation of America, 173 NLRB 440, 444 (1968); Brink's Inc., 272 NLRB 868, 870 (1985); Velez v. Puerto Rico Marine Management, 957 F.2d 933 (1st Cir. 1992).

<sup>6</sup> See Wm. J. Burns Int'l Detective Agency, 134 NLRB 451, 452 (1961) (unit containing guards and nonguards is "inappropriate for any purpose").

Section 9(b)(3) also precludes the Board from certifying a union to represent a unit of guards if the union admits nonguards as members or is affiliated with a union that admits nonguards as members. The instant case does not involve certification of a guard/nonguard union or the continued viability of Wells Fargo Corp., 270 NLRB 787, 790 (1984), review denied 755 F.2d 5 (2d Cir.), cert. denied 474 U.S. 901 (1985) (finding that employer may

to protect employers' property interests by shielding them from the potential conflict of loyalties likely arising in such bargaining units.<sup>7</sup> In the representation case context, a collective-bargaining agreement covering a mixed guard/nonguard unit does not bar an election petition for a guard-only unit.<sup>8</sup> The Board also will entertain a unit clarification petition involving a mixed guard/nonguard unit midway through the term of a contract, unless the contract included guards in the unit description and a unit clarification would disrupt a long-term bargaining relationship voluntarily continued when the contract was executed.<sup>9</sup>

In the ULP context, the Board has found that, when no contract is in effect, Section 9(b)(3) precludes a Section 8(a)(5) violation with respect to a mixed guard/nonguard unit.<sup>10</sup> This differs from the Board's jurisprudence in cases involving voluntarily-established bargaining units

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withdraw recognition from guard/nonguard union at will following contract expiration).

<sup>7</sup> See Stay Security, 311 NLRB 252, 252-53 (1993) (Section 9(b)(3) is "grounded in a concern about the protection of certain property rights of an employer").

<sup>8</sup> Corrections Corp. of America, 327 NLRB 577, 577 (1986).

<sup>9</sup> See Peninsula Hospital Center, 219 NLRB 139, 140 (1975) (granting unit clarification petition to exclude guards from unit containing nonguards, where petition was filed shortly before contract expiration); Parker Jewish Geriatric Institute, 304 NLRB 153, 154 (1991) (granting unit clarification petition to exclude guards from unit containing nonguards, during contract term, where most recent contract did not include guards in unit description). Compare Wallace-Murray Corp., 192 NLRB 1090, 1090 (1971) (dismissing unit clarification petition, filed midway through contract term, where contract specifically included guards in unit and clarification would disrupt 28-year bargaining relationship).

<sup>10</sup> See Field Bridge Associates, 306 NLRB 322, 323 n.3 (1992), enfd. 982 F.2d 845 (2d Cir.), cert. denied 509 U.S. 904 (1993) (alleged successor employer not obligated to recognize and bargain with union in mixed guard/nonguard unit because a successor employer is "only obligated to bargain in an appropriate unit"); Burns Electronic Security Services, 256 NLRB 860, 862 (1981) (refusal to bargain following improper certification of mixed guard/nonguard unit not unlawful).

containing supervisors<sup>11</sup> or professional and nonprofessional employees.<sup>12</sup> Thus, Section 9(b)(3) prohibits the Board from finding that a unit including guards and other employees is appropriate, while no such provision exists as to supervisors.<sup>13</sup> And the Board has recognized that Section 9(b)(3) is a more restrictive limitation on the Board's authority than Section 9(b)(1), which merely precludes the Board from certifying a unit of professional and nonprofessional employees without holding a self-determination election among the professionals.<sup>14</sup>

Section 8(a)(5)'s applicability to employer conduct regarding mixed guard/nonguard units during a contract's term has depended upon the relationship between the alleged bargaining violation and the guards' inclusion in the unit. Thus, in Supreme Sugar Co.,<sup>15</sup> an employer lawfully refused to apply contract terms to newly-hired watchmen during the term of a contract with language excluding guards from the unit, even though the parties had treated watchmen as unit employees for decades. In order to reach the Section 8(a)(5) issue, the Board would have had to make a unit finding contrary to Section 9(b)(3) since it had found that the watchmen were guards.<sup>16</sup> On the other hand, where an

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<sup>11</sup> See, e.g., Arizona Electric Power, 250 NLRB 1132, 1133-34 (1980) (employer unlawfully withdrew recognition during term of contract for all load dispatchers on the ground that they were supervisors).

<sup>12</sup> See, e.g., Int'l Telephone & Telegraph, 159 NLRB 1757, 1763-64 (1966), *enfd.* in pertinent part 382 F.2d 366 (3d Cir. 1967), *cert. denied* 389 U.S. 1039 (1968) (employer unlawfully withdrew recognition from union as representative of professional employees in mixed professional/nonprofessional unit).

<sup>13</sup> Supreme Sugar Co., 258 NLRB 243, 246 n.3 (1981) (Section 9(b)(3) is a "more restrictive limitation on the Board's authority" than the Act's provisions regarding supervisors).

<sup>14</sup> Retail Clerks Local 324 (Vincent Drugs), 144 NLRB 1247, 1254 n.11 (1963) (stating that the Board is "precluded from finding [mixed guard/nonguard] units are appropriate for any purpose," whereas that is "not true in the case of a unit combining professional and nonprofessional employees").

<sup>15</sup> 258 NLRB at 245-46.

<sup>16</sup> Id. Also significant was the finding that, unlike in Wallace-Murray, above, the contracts excluded guards from

employer's alleged bargaining violation has not centered on the inclusion of guards and nonguards in the same unit, e.g. where an employer withdrew recognition from the entire unit, the Board has issued Section 8(a)(5) bargaining orders.<sup>17</sup>

Here, we initially conclude that the resident security employees are guards, because they patrol the Employer's premises, observe and report suspicious behavior and rules infractions, and sign employees and visitors in and out, even though they also perform some other tasks and do not wear badges or carry guns.<sup>18</sup>

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the unit description, bringing into question whether the employer knew that the employees at issue were guards within the meaning of Section 9(b)(3). 258 NLRB at 245.

<sup>17</sup> Atlanta Hilton & Towers, 278 NLRB 474, 474 n.1, 478 (1986) (declining to determine whether certain employees are guards because existence of mixed guard/nonguard unit would not justify withdrawal of recognition from entire unit; if employer believed certain individuals should be excluded because of their guard status, the "proper procedure for determining the issue is unit clarification"); New York Times Co., 270 NLRB 1267, 1272-73 (1984) (employer unlawfully refused to provide information to union that had represented mixed guard/nonguard unit for over 35 years, where UC petition regarding exclusion of guards from unit was pending in separate proceeding and information request related solely to portion of unit that would, under any UC determination, be found appropriate by the Board). Cf. E.G. & H, Inc. v. NLRB, 949 F.2d 276, 279 (9th Cir. 1991) (Board need not determine appropriate unit in Section 8(a)(5) cases where no conduct at issue turns on the appropriateness of the unit).

<sup>18</sup> Jakel Motors, 288 NLRB 730, 742-43 (1988), enfd. 875 F.2d 644 (7th Cir. 1989) (finding night custodians to be guards where, in addition to custodial duties, they maintained log book and notified police and management of emergencies, even though they did not wear uniforms, carry guns, or have any security training); A. W. Schlesinger Geriatric Center, 267 NLRB 1363, 1363-64 (1963) (finding night and weekend maintenance employees to be guards where, in addition to maintenance duties, they were authorized to enforce employer rules to protect safety of individuals on premises, keep unauthorized persons off the property, and protect the premises, even though they did not wear guard uniforms, carry firearms, or have any security training).

We further conclude that, on October 11, the Employer recognized the Union as the bargaining representative of the resident security employees and social service workers as part of the existing unit covered by the Agreement, not in a separate stand-alone unit. The recognition agreement specifically referenced Article 2, Section 3(a) of the Agreement, which sets forth the procedure for accreting unrepresented employees into an existing bargaining unit at a particular facility. Moreover, the Union organizer stated that she intended all three classifications to be accreted into the existing unit. Finally, the Employer's October 19 letter stating that it would not recognize the Union as the representative of the "guards" specifically referenced the unit description contained in the Agreement. The fact that the Union filed and withdrew an RC petition for a separate unit of activity directors does not alter this conclusion.

However, we conclude that the Employer did not violate Section 8(a)(5) by withdrawing recognition of the Union as the resident security employees' bargaining representative in the mixed guard/nonguard unit covered by the Agreement about a week after granting such recognition. As in Supreme Sugar Co.,<sup>19</sup> the Employer's conduct directly implicated the propriety of including the resident security employees in the same unit as nonguard employees. In order to find a violation, the Board would have to make an appropriate unit determination inconsistent with Section 9(b)(3).<sup>20</sup> Moreover, it is unclear whether the Employer's administrator understood that the resident security employees were guards who could be excluded from the unit when he recognized the Union as their bargaining representative on October 11. The administrator retracted the voluntary recognition with respect to the resident security employees after only eight days, after consulting the Employer's union-affairs representative. Finally, the Board's interest in preserving stability in bargaining units does not apply in the instant case, because (1) the agreement excludes guards from the unit; and (2) the

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<sup>19</sup> 258 NLRB at 245-46.

<sup>20</sup> See GHG Corp., Case 12-CA-20787, Advice Memorandum dated November 20, 2000 (employer did not violate Section 8(a)(5) by no longer recognizing union with respect to guards in mixed guard/nonguard unit during contract term, because such units are inappropriate, and "a Section 8(a)(5) violation can only be established for failure to bargain in an appropriate unit").

Employer treated the resident security employees as members of the unit for only eight days.<sup>21</sup>

For the above reasons, the Region should dismiss the charge, absent withdrawal.

B.J.K.

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<sup>21</sup> Compare New York Times Co., 270 NLRB at 1272-73 (parties included watchmen in contract unit during most of their 43-year bargaining history); Wallace-Murray Corp., 192 NLRB at 1090 (parties included watchmen in contract unit for 28 years, and two most recent contracts referred to watchmen as "guards").