UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

BROOKHAVEN MEMORIAL HOSPITAL
MEDICAL CENTER
Employer[1]

and Case No. 29-RC- 073738

LOCAL 342, UNITED FOOD AND
COMMERCIAL WORKERS UNION
Petitioner[2]

DECISION AND ORDER

Brookhaven Memorial Hospital Medical Center ("Brookhaven Memorial" or "the Employer") is an acute-care hospital located in Patchogue, New York. On February 2, 2012, Local 342, United Food and Commercial Workers Union ("Local 342" or "the Petitioner") filed a petition under Section 9(c) of the National Labor Relations Act ("the Act"), seeking to represent a unit of employees in the Employer's "dietary" or "nutritional services" department. However, the Employer contends that the petitioned-for unit is not appropriate for bargaining under the National Labor Relations Board's rule for bargaining units in the health care industry. By contrast, the Petitioner contends that it has petitioned for an appropriate "residual" unit.

As discussed in more detail below, the Board's rules and regulations delineate eight appropriate units for purposes of collective bargaining in acute-care hospitals. (Section 103.30, also known as the Health Care Rule, or hereinafter "the Rule.") The

---

1 The Employer's name appears as amended at the hearing.

2 The Petitioner's name appears as amended at the hearing.

Rule allows parties to adjudicate the appropriateness of other proposed units only where "extraordinary circumstances" exist. Section 103.30(b). A hearing on the unit issue in this case was held before Annie Hsu, a Hearing Officer of the Board. Because the petitioned-for unit herein did not appear to conform to the Board's Health Care Rule, the Hearing Officer limited the Petitioner to submitting an offer of proof to show why it should be allowed to litigate the appropriateness of its proposed non-conforming unit. The Hearing Officer then rejected the Petitioner's offer of proof and closed the hearing.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned Acting Regional Director.

For the reasons discussed below, I conclude that the Hearing Officer was correct in precluding the Petitioner from litigating the appropriateness of its proposed unit. I conclude that, even if all facts asserted by the Petitioner are true, they would not constitute "extraordinary circumstances" so as justify a non-conforming unit. Accordingly, since the Petitioner seeks to represent a unit which is inappropriate for collective bargaining, I will dismiss the petition.

FACTS

The parties stipulated that Brookhaven Memorial is an acute-care hospital as defined in the Board's Health Care Rule.[3] Thus, there is no dispute that the Rule applies to this Employer.

The Petitioner herein does not currently represent any employees at Brookhaven Memorial. However, two other labor organizations represent certain employees, as

---

3 *See* Section 103.30(f)(2).

follows.

The parties stipulated that the Brookhaven Memorial Federation of Nurses and Health Professionals ("FNHP"), NYSUT, AFT, AFL-CIO, represents a unit of professional employees, including registered nurses, case managers, physicians' assistants, psychologists, pharmacists, social workers and other professional classifications.[4] Excerpts of the 2008 – 2011 contract between the Employer and FNHP showing the composition of that unit were introduced as part of the parties' factual stipulation. (Board Exhibit 2)

Local Union No. 111,[5] International Brotherhood of Teamsters ("Local 111") represents a unit of clerical employees. Excerpts of the 2010 – 2012 contract between the Employer and Local 111 (also attached to Board Exhibit 2) describes the unit as follows:

> all full-time and regular part-time clerical employees employed by the Hospital in the following Departments effective January 1, 2004: Accounts Payable, Business Office, Communications, Home Care Billing, Information Services, Mail and Duplicating, and Patient Access, excluding all other employees, professional employees, technical employees, service and maintenance employees, guards and supervisors as defined in the National Labor Relations Act of 1947, as amended.

The Employer characterizes the unit represented by Local 111 as a unit of "all business office clerical employees," which is the sixth unit delineated in the Health Care Rule. Thus, according to the Employer, this unit conforms to the Rule. However, the Petitioner herein contends that certain classifications (e.g., mail room employees and

---

4 The three professional units delineated in Section 103.30(a) of the Board's Rules include: (1) all registered nurses, (2) all physicians, and (3) all professionals except for registered nurses and physicians. The FNHP unit does not include physicians. Thus, the FNHP unit appears to be a combination of units (1) and (3), that is, all registered nurses and all other (non-physician) professionals. A bargaining unit may conform to the Board's rules if it consists of "a combination" of the eight specified units. Section 103.30(f)(5).

certain patient access clerks) included in this unit are not "business office clerical employees", and therefore that the Local 111 unit is a "non-conforming unit" under the Rule.

There is no dispute that the Employer employs other non-professional employees who are not represented by any union including, for example, certain "environmental service" employees.

THE PARTIES' CONTENTIONS

At the hearing, the Petitioner offered to prove, *inter alia*, that the unit represented by Local 111 is a non-conforming unit under the Board's Rule, inasmuch as it contains certain nonprofessional employees who are not business office clericals. The Petitioner appears to argue that those employees would belong in a so-called service and maintenance bargaining unit, rather than the business office clerical unit. The Petitioner further argues that, because of the existing non-conforming unit, it may seek to represent the petitioned-for nutritional services employees as a "residual" unit. Finally, the Petitioner offered to prove that the petitioned-for nutritional services employees have a different community of interest from the other unrepresented, nonprofessional employees (i.e., the other service and maintenance employees).

By contrast, the Employer contends that the petition must be dismissed because the Petitioner seeks an inappropriate, non-conforming unit under the Board's Rule. The Employer denies that any classifications in the existing Local 111 unit are service and maintenance employees. However, the Employer contends that, even if that were true,

---

5 Both FNHP and Local 111 appeared at the hearing in the instant case, but they did not seek to intervene.

the only possible "residual" unit would be a unit of *all* the unrepresented service and maintenance employees. To allow a fractured unit of only *some* service and maintenance employees (the petitioned-for nutritional services employees) would allow a proliferation of units which the Board's Health Care Rule sought to avoid.

DISCUSSION

The Board's Health Care Rule provides that the following units are the only appropriate units in an acute-care hospital:

(1) All registered nurses
(2) All physicians
(3) All professionals except for registered nurses and physicians
(4) All technical employees
(5) All skilled maintenance employees
(6) All business office clerical employees
(7) All guards
(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Section 103.30(a). The eighth unit, essentially a "catch-all" consisting of all the nonprofessional employees not already included in units 4 through 7, is commonly known as a "service and maintenance" unit.

In enacting this Rule, the Board sought *inter alia* to avoid an undue proliferation of units in the health-care industry. The Rule provides that any unit which is not one of the eight specified units (or a combination among those eight units) is "non-conforming." Section 103.30(f)(5). If a hospital already has non-conforming units, and a petition is filed to represent additional units, then the Board "shall find appropriate only units which comport, insofar as practicable" with the eight specified units. Section 103.30(c). Finally, the Rule provides that the Board shall determine appropriate units "by

adjudication" (instead of by rule-making) only in "extraordinary circumstances." Section 103.30(b).

In general, "residual" employees are those who, for whatever reason, have been excluded from existing bargaining units. Such excluded employees may constitute a separate, appropriate bargaining unit, but only if they include *all* the unrepresented employees of the type covered by the petition. G.L. Milliken Plastering, 340 NLRB 1169 (2003); Fleming Foods, Inc., 313 NLRB 948 (1994).

When the Board enacted the Health Care Rule in 1989, it expressly deferred resolving whether it would process a petition for a residual unit filed by a non-incumbent union in cases involving non-conforming units. Later, in St. Mary's Duluth Clinic Health System, 332 NLRB 1419 (2000), the Board allowed such a petition. Specifically in that case, one union represented a unit of licensed practical nurses, who constituted *some* of the hospital's technical employees. The existing unit did not conform to the fourth enumerated unit in the Health Care Rule because it did not include "all" of the technical employees. A second union sought to represent a separate "residual" unit of the unrepresented technical employees employed by the hospital. The Board found the petitioned-for unit appropriate because it included *all* of the unrepresented technical employees. Id. at 1420. The Board reasoned that such a unit would meet the language of Section 103.30(c) of the Rule, requiring additional units (in the context of existing non-conforming units) to comport "insofar as practicable" with the enumerated units. Id. at 1421.

In the instant case, the parties dispute whether the existing unit represented by Local 111 (1) conforms to the Rule as a unit consisting only of all business office clerical

employees, or (2) is a non-conforming unit because it also includes some service and maintenance employees. However, we need not resolve that dispute. For even assuming *arguendo* that Local 111 represents some service and maintenance employees, the Petitioner herein has not petitioned-for an appropriate residual unit of *all* the Employer's unrepresented service and maintenance employees. Instead, the Petitioner seeks to represent nutritional services employees, who are only a portion of the unrepresented service and maintenance employees. Such a unit would improperly leave a remaining "residue" of unrepresented service and maintenance employees; would create the risk of undue unit proliferation; and would not comport "insofar as practicable" with the all service and maintenance employees unit required under Section 103.30(a)(8) of the Rule. St. Mary's, *supra*. *See also* Kaiser Foundation Health Plan of Colorado, 333 NLRB 557, 558 n.8 (2001)("any residual unit must necessarily include all unrepresented employees of the type covered by the petition").

In sum, based on all the foregoing, I conclude that the petitioned-for unit of employees in the Employer's nutritional services department is not appropriate for bargaining under the Board's Health Care Rule. The Petitioner has not indicated any willingness to proceed in an alternate, appropriate unit. I will therefore dismiss the petition in the instant case.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. The Hearing Officer's rulings are free from prejudicial error and are hereby affirmed.

2. The record indicates that Brookhaven Memorial Hospital Medical Center is a domestic corporation, with its principal office and place of business located at 101 Hospital Road, Patchogue, New York. The parties stipulated that the Employer is engaged in operating an acute-care hospital. During the past year, which period represents its annual operations generally, the Employer derived gross revenues in excess of $250,000, and purchased and received at its Patchogue, New York facility, goods and supplies valued in excess of $5,000 directly from points located outside the State of New York.

Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. It will therefore effectuate purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I hereby find, that Local 342 is labor organization as defined in Section 2(5) of the Act. It claims to represent certain employees of the Employer.

4. As discussed above, the Petitioner seeks an election in a unit that is inappropriate for the purposes of collective bargining. No question concerning commerce exists concerning the representation of those employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

ORDER

Accordingly, it is hereby ordered that the petition in Case No. 29-RC-073738 be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 16, 2012.** The request may be filed electronically through the Agency's website, www.nlrb.gov,[6] but may **not** be filed by facsimile.

Dated: March 2, 2012.

David Pollack
Acting Regional Director, Region 29
National Labor Relations Board
Two MetroTech Center, 5th Floor
Brooklyn, New York 11201

6 To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents**, click on the NLRB Case Number, and follow the detailed instructions.