

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION EIGHTEEN**

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CHAMPLIN SHORES :
ASSISTED LIVING :
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 Employer, : **CASE NO. 18-RC-087228**
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 - and - :
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SEIU HEALTHCARE MINNESOTA :
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 Union. :
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**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

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I. INTRODUCTION

Pursuant to Section 102.67(c) of the National Labor Relations Board's ("Board" or "NLRB") Rules and Regulations, Champlin Shores Assisted Living ("Employer" or "Champlin Shores") hereby requests the Board's review of the Regional Director's Decision and Direction of Election ("Decision") in the above captioned matter on the grounds that:

- 1) A substantial question of law and policy is raised because of the absence of, or a departure from, officially reported Board precedent; and
- 2) There are compelling reasons for reconsideration of an important Board rule or policy.

The Regional Director's decision that a unit of resident assistants ("RAs") and medication technicians ("med techs") is an appropriate unit without the inclusion of the life enrichment ("LE") assistant and waitstaff/kitchen helpers ("dietary aides") is a departure from officially reported Board precedent and, therefore, raises a substantial question of law and policy. For the reasons argued in the Employer's post-hearing brief and those below, the LE assistant and the dietary aides share overwhelming community of interest with the RAs and the med techs. While med techs and RAs are organized within the "Health Services" department, the employer has long structured its operations so that med techs and RAs perform work outside of that department and side-by-side with the employees in the excluded classifications, with whom they all share many other traditional community of interest criteria.

However, even if the Employer cannot meet its burden under the "overwhelming community of interest" standard, there are compelling reasons for reconsideration of an important Board policy. *Park Manor Care Center, Inc.*, 305 NLRB 872, 875 (1991) established a modified analysis in senior living unit determinations that combined traditional community of interest factors with factors deemed relevant for health care facilities during the Board's

rulemaking proceedings for units in acute care hospitals. The Board's misguided decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011) overturned *Park Manor* and its twenty years of progeny. Until *Specialty Healthcare*, 357 NLRB No. 83 (2011), the Board had never even found a unit of CNAs alone within a nursing home to be an appropriate unit for collective bargaining under the *Park Manor* standard.¹ See *Specialty Healthcare*, slip op. at 17, fn. 13 (Member Hayes, dissenting) (“I am aware of no case, and the majority did not cite to one, in which the Board itself has determined in a representation case that a disputed petitioned-for unit of CNAs was appropriate under *Park Manor*.”) There are compelling reasons to reconsider *Specialty Healthcare* and return to the *Park Manor* standard. For these reasons, the Employer requests review to reconsider the appropriateness of the *Specialty Healthcare* standard and urges a return to the *Park Manor* standard for determining the appropriateness of a petitioned-for unit at a senior care community.

II. STATEMENT OF THE CASE

A. The Petition

On August 14, 2012, SEIU Healthcare Minnesota (“SEIU,” “Petitioner,” or the “Union”) petitioned to represent a unit of “All Resident Assistants and Medication Technicians (full-time and regular part-time)” employed at Champlin Shores Assisted Living. (B. Exh. 1(a).)² Excluded from the petitioned-for unit were “all managers, guards, and supervisors as defined by

¹Here, the petitioned-for employees, while performing many tasks similar to those of CNAs in a nursing home, are not separately licensed or certified and perform many other common functions with the employees within their assisted living community than CNAs do within a traditional nursing home.

² References to the Transcript are noted as “(Tr.--)”, to Employer Exhibits as “(E. Exh.--)”, to Board Exhibits as “(B. Exh.--)”, to pages of the Decision and Direction of Election as “(DDE --)”, to Board Exhibits as “(B. Exh.--)”, to pages of the Decision and Direction of Election as “(DDE --).”

the Act, as amended, dietary employees, maintenance employees, clerical employees, and all other employees.” (B. Exh. 1(a).)

B. The Hearing and Stipulations

A hearing regarding the appropriateness of the unit and issues concerning supervisory status was held before Hearing Officer Abby Schneider on August 29, 2012. The parties have stipulated that any appropriate unit will also include “casual/on call employees; however, they further agree that the employees eligible to vote, whether regular part-time or casual/on-call, must meet the *Davison-Paxon* formula.” (B. Exh. 2).

Following the Hearing, on September 6, the Employer submitted a post-hearing brief arguing that the LE assistant and dietary aides shared community of interest with the petitioned for unit and must be included in any appropriate unit.

C. The Regional Director’s Decision

On September 7, Marlin O. Osthus, Acting Regional Director for Region 18, issued a Decision. In his decision, the Regional Director found that the unit sought by the Union constituted a unit appropriate for the purpose of collective bargaining. Relying on *Specialty Healthcare’s* overwhelming community of interest standard, the Regional Director found that the Employer “failed to demonstrate that the kitchen staff or the Life Enrichment Assistant share such an overwhelming community of interest with these employees that there is no legitimate basis for their exclusion.” (DDE 13).

III. THE EMPLOYER’S REQUEST FOR REVIEW SHOULD BE GRANTED

A. The Regional Director’s Decision Departed from Board Precedent

The unit petitioned for by the Union is an inappropriate fractured unit, as the traditional community of interest factors applicable to all RAs and med techs, who are included in the petition, “overlap almost completely” with certain classifications that are excluded from

the petitioned-for unit. *Specialty Healthcare*, 357 NLRB at *11. “A petitioner cannot fracture a unit, seeking representation in ‘an arbitrary segment’ of what would be an appropriate unit.” *Specialty Healthcare*, 357 NLRB No. 83, *13 (2011), quoting *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999). In making the determination of whether the proposed unit is an appropriate unit, the Board focuses on whether employees share a “community of interest.” *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). The Board weighs the following factors when determining whether employees in the proposed unit share a community of interest:

- whether the employees are organized into a separate department;
- have distinct skills and training;
- have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;
- are functionally integrated with the Employer’s other employees;
- have frequent contact with other employees;
- interchange with other employees;
- have distinct terms and conditions of employment; and are separately supervised.

Specialty Healthcare, 357 NLRB at *9, citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002).

Here, the record evidence shows that all employees receive the same handbook, are eligible for the same benefits, have a common orientation. (Tr. 43, 46-49; E. Exhs. 11-13). They are each eligible for pay increases on their anniversary date and have similar rates of pay.³ (Tr. 71; E. Exh. 25). They receive identical recurring training in wellness programs, on serving

³ RAs make between \$10-\$12.80 per hour; med techs make between \$11-\$15.72 per hour; the wellness coordinator makes \$14.00 per hour; the life enrichment assistant makes \$11.50 per hour; and the waitstaff/kitchen helpers make between \$9-10.25 per hour. (EREXH 25).

meals, and on performing activities and participate in monthly staff meetings. (Tr. 59-60, 76-77, 144-45).⁴

RAs, med techs, dietary aides, and the LE assistant perform many common job functions. For instance, Ras and med techs are required to work in the dining rooms serving food to residents, sometimes alongside dietary staff. (Tr. 30, 108-09, 133, 143, 152, 194-95). Med techs spend about 1.5 to 2.5 hours of their shift in the dining room serving and cleaning up after meals. (Tr. 109., 139, 194-195). RAs, med techs, and dietary aides receive all training and supervision while in the dining rooms from the Dining Services Director (“DSD”). (Tr. 144-45, 152). RAs and med techs are required to monitor food temperatures in one kitchen as the cooks are required to in the other. (Tr. 147; E. Exh. 35-36).

Similarly, RAs and med techs are required to perform and lead activities, sometimes alongside the LE assistant. (Tr. 155-59, 165-167, 176; E. Exh. 38-39). In addition to assigned, template activities, they are also required to engage residents in memory care and are instructed- in the same manner as the LE assistant- on the method of engaging residents. (Tr. 162; E. Exh. 40, 42). They receive the same training as the LE assistant and all three classifications are required to record that activities are being performed. (Tr. 168-69, 171, 173; E. Exh. 41)

It is undisputed that med techs spend 75-90% of their day performing job duties and functions, namely medication administration, that RAs cannot perform. (Tr. 108, 195). When med techs are not performing medication administration during this 75-90% of their shift, they are scheduled to assist with meal service and clean the dining rooms under the direction of

⁴ The Regional Director states that the “record suggests that at time the RAs and med techs assist residents participating in activities.” (DDE 11). The record does not “suggest” that; it is an undisputed fact based on testimony of the LE Director.

the DSD and alongside dietary staff (both in AL and Memory Care) and to participate and lead required activities under the direction of the LED alongside the LE assistant and RAs (primarily in Memory Care). (Tr. 108-09, 138-39, 165-67, 176). Med techs are not scheduled to assist RAs with toileting and showering; however, they can and do assist with such activities when RAs cannot. It is only that aspect of the RA's job duties that RAs and med techs share independent from the dietary staff and the LE assistant. By the union witness's own account, this amounts to far less than 10% of a med tech's job duties on AL.⁵ In Memory Care, the med tech must perform and assist with activities in addition to dining functions and, therefore, the percentage of time where med techs and RAs perform the same duties that waitstaff and the LE assistant do not perform would be even lower.

RAs and med techs, while organized within the same department and wear the same uniform, perform very few common job functions that other excluded employees do not perform. Therefore, the majority and the most time-consuming of the few job functions that med techs and RAs share- meal service and activities, they share with the dietary staff and the LE assistant. In his decision, the Regional Director does not address that med techs and RAs perform very few of the same functions that dietary aides and the LE assistant also do not perform and, to that point, RAs cannot work as med techs. (Tr. 107).

As an assisted living community, Champlin Shores does not require its RA or med tech positions be filled by certified nursing assistants, as was the case in the nursing home in *Specialty Healthcare*. (Tr. 21, 25). Neither med techs nor RAs are required to be certified or have special training or education prior to beginning at the Community. In *Specialty Healthcare*,

⁵ A current med tech testified that 75% of the med tech's job duties in AL consisted of passing medication. This is 6 hours of an 8 hour shift. He also testified that a med tech spent about 1.5 hours assisting with meals in the dining room. This leaves a ½ hour of his shift- or 6.25%-dedicated to other activities

there was no evidence of significant functional interchange of overlapping job duties. *Id.* at * 12. Here, there is significant evidence of both.

In *Odwalla, Inc.*, 357 NLRB No. 132, *22 (2011), the Board found that a unit including multiple job classifications, but excluding merchandisers was “fractured” because none of the traditional community-of-interest factors suggested that the petitioned-for employees shared a community of interest that the merchandisers did not equally share. Here, the vast majority of community of interest factors between med techs and RAs are shared with dietary employees, the LE assistant, and the wellness coordinator, namely common skills and duties, mutuality of interest in wages, hours, and other working conditions, degree of common functions, frequency of contact and interchange with other employees, and functional integration. *See Specialty Healthcare*, 357 NLRB at *9, citing *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001).

In *Odwalla, Inc.*, the petitioned-for grouping of employees did not all work in the same department. However, whether employees are organized into a single department is not the only overwhelming community of interest factor. For example, the Board in *Specialty Healthcare* suggested that the traditional community of interest test “focuses almost exclusively on how *the employer* has chosen to structure its workplace.” *Id.* at fn. 19. The structuring of the workplace goes beyond departmental lines. Here, in addition to all the other community of interest standards, Champlin Shores has chosen to fully integrate its med techs and RAs into meals and activities services. The Regional Director departed from Board precedent in that the traditional community of interest factors overlap almost completely and, even under *Specialty Healthcare*, the unit is fractured and inappropriate.

B. There are Compelling Reasons for Reconsideration of *Specialty Healthcare*

Two decades ago, the Board sought harmonized evolving precedent in the long-term health care industry with its experience in rulemaking in acute care hospitals,⁶ approved in *American Hospital Association v. NLRB*, 499 U.S. 606 (1991), to yield a flexible, but rational approach to industry bargaining unit decisions. *Park Manor Care Center*, supra. A unanimous full Board adopted a dynamic approach:

We prefer to take a broader approach utilizing not only “community of interests” factors but also background information gathered during rulemaking and prior precedent. Thus,...our consideration will include those factors considered relevant by the Board in its rulemaking proceedings, the evidence presented during rulemaking with request 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.

305 NLRB at 875 (footnote omitted). This was called a “pragmatic” or “empirical community of interest” approach. *Id.* at 875 n. 16.⁷ The traditional “community of interest” approach to Board unit determinations had been used by the NLRB for many years. The Board examines the nature of employee skills and functions, the degree of functional integration, interchangeability and contact among employees, common work situs, common supervision, geographic separation (if any), bargaining history and commodities in general working conditions. To a certain extent, *Park Manor* adopted this community of interest test, informed by concerns associated with long-term health care facilities, and flexible enough to account for future adaptation.

⁶ Codified at 29 CFR §103.30 of the Board’s Rules and Regulations.

⁷ The Board further expressed the hope that from its experience with litigated cases over time ““certain recurring factual patterns will emerge and illustrate which units are typically appropriate.”” *Id.* at 875 (footnote and citations omitted), an approach cited with apparent approval in the Supreme Court’s opinion, regarding the Board’s rulemaking. *American Hospital Assn. v. NLRB*, supra ; *Id.* at 875 n. 17.

Specialty Healthcare needlessly abandoned a fair, workable and accepted method of collective bargaining in long-term healthcare establishments and rejected the Board's two-decade old approach for determining appropriate bargaining units in sub-acute, long-term health care institutions. In its place, it imposed a rigid model, deferring almost entirely to the union's choice of bargaining unit. This is particularly inappropriate in an industry, such as assisted living, which has largely moved to operational models employing fewer workers with a broader range of responsibilities. This operational shift is fully consistent with *Park Manor* but cuts against the narrow-unit objective of *Specialty Healthcare*.

The new *Specialty Healthcare* standard "encourage[s] union organizing in units as small as possible, in tension with, if not actually conflicting with the statutory prohibition in Section 9(c)(5) against extent of organization as the controlling factor in determining appropriate units." *Id.*, slip op. at 19 (Member Hayes dissenting). It ignores Congressional admonition against the undue proliferation of bargaining units in the health care industry. Finally, we agree with Member Hayes in his dissent in *DTG Operations, Inc.* 357 NLRB No. 175 (2011):

I adhere to the previously expressed view that giving the Board's imprimatur to this balkanization represents an abdication of our responsibility under Section 9 and may well disrupt labor relations stability by requiring a constant process of bargaining for each micro-unit as well as pitting the narrow interests of employees in one such unit against those in other units.

Id. at slip op. 9.

The Regional Director cited *Specialty Healthcare* five times in his decision and used the "overwhelming community of interest" standard in determining the appropriateness of the unit. (DDE 11-13). For all of these reasons, there are compelling reasons for reconsideration of the Board's *Specialty Healthcare* decision and a return to the standard of *Park Manor*. Under such a standard, the petitioned-for unit is clearly inappropriate.

IV. CONCLUSION

Wherefore, for all of the foregoing reasons, the Employer respectfully requests that the Board:

- (1) Grant this Request For Review; and
- (2) Stay the Regional Director's Decision and Direction of Election, dated October 5, 2012.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was delivered by email on this 21st day of September 2012 to the following:

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