

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Clovis, CA)

BEVERLY HEALTHCARE CALIFORNIA
INC., d/b/a GOLDEN LIVING
CENTER-CLOVIS

Employer

and

Case 32-RD-120481

PATRICK KRONYAK,

Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL
UNION – UNITED HEALTHCARE
WORKERS - WEST

Intervenor/Union

**REGIONAL DIRECTOR'S DECISION
AND DIRECTION OF ELECTION**

Beverly Healthcare California Inc., d/b/a Golden Living Center-Clovis, hereafter the Employer, is a California corporation engaged in the operation of a skilled nursing facility. The Employer was a party to a collective-bargaining agreement with Service Employees International Union – United Healthcare Workers - West, hereafter the Union, which expired on December 31, 2013. The expired collective-bargaining agreement covered four skilled nursing facilities – assertedly separate employers – as a single bargaining unit. The Petitioner, Patrick Kronyak, filed a petition under Section 9(c) of the Act to decertify the Union as the bargaining representative of a unit of certain employees at the Employer's facility, and later clarified at the hearing that he intended the petitioned-for unit to conform

to the classifications listed in the most recent collective-bargaining agreement between the Union and the Employer.¹

The Union contends that the petition must be dismissed for two reasons: 1) the Employer is a single employer along with the other three Beverly Healthcare California, Inc. facilities and cannot unilaterally withdraw from the historically recognized multi-facility unit in the expired collective-bargaining agreement; and 2) even assuming the facilities covered by the expired collective-bargaining agreement are separate employers, the Employer did not effectively withdraw from the multiemployer bargaining unit.

On January 29, 2014, a hearing officer of the Board conducted a hearing on this petition. The Petitioner orally set forth his position at the hearing, and the Employer and the Union filed post-hearing briefs. After considering the evidence and arguments presented by the parties, I have concluded, as discussed below, that the Union failed to establish that the facilities covered by the expired collective-bargaining agreement constitute a single employer. I have further concluded that the Employer was a part of a multiemployer bargaining unit, and that the Employer effectively withdrew from that multiemployer unit.

BACKGROUND

The Employer operates a skilled nursing facility in Clovis, California. The Employer is a subsidiary of Beverly Healthcare California, Inc., which operates about 20 assisted living facilities in the state of California. The highest level manager at the

¹ The unit described in the expired collective-bargaining agreement includes all full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, medical records assistants, and a receptionist (at the Fresno facility), excluding all registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office and clerical employees, professional employees, supervisory employees, and guards, as defined in the National Labor Relations Act. In addition, the single bargaining unit includes the following classifications that are employed by separate employer Healthcare Services Group: housekeeper, janitor, and laundry aide. During the hearing, all parties agreed that Healthcare Services Group employees are a part of the bargaining unit in the expired collective-bargaining agreement.

Employer's facility is Executive Director Joshua Davis. Reporting to Executive Director Davis is a management team consisting of a director of nursing services, a dietary services manager, a business office manager, a director of maintenance, a medical records director, a social services director, and an activities director. Reporting to the management team are various bargaining unit employees including charge nurses, certified nursing assistants, dietary aides, and cooks. Housekeeping and laundry services are performed at the Employer's facility by Healthcare Services Group, a vendor with whom the Employer has contracted since about 2003.

Since at least 2006, the Employer and the Union have been parties to successive collective-bargaining agreements. The Employer's most recent collective-bargaining agreement with the Union expired by its terms on December 31, 2013. The expired collective-bargaining agreement contains the following language in its recognition clause:

The Union and separate employers Beverly Healthcare-California, Inc. or GGNSC² Stockton LP d/b/a Golden Living Center-Fresno, Golden Living Center-Clovis, Golden Living Center-Galt and Golden Living Center-Hy-Pana, which all parties agree are separate employers, each agree to associate with the other for the purpose of recognizing the Union as the exclusive bargaining representative of a single bargaining unit, as provided for under federal labor law regarding multi-employer bargaining....

The Employer's previous two collective-bargaining agreements with the Union, effective by their terms from October 10, 2006 through June 15, 2008, and September 17, 2009 through December 31, 2011, contained similar language in their recognition clauses regarding multiemployer bargaining.

By letter dated September 27, 2013, the Union notified the Employer that it was seeking to open negotiations for the contract expiring on December 31, 2013. Thereafter,

² "GGNSC" stands for Golden Gate National Senior Care. Although Beverly Healthcare California, Inc. appears to be a subsidiary of GGNSC, the Employer's only witness, Area Vice President of Operations Kristine Williams, was unable to conclusively testify on the matter.

by letter dated October 31, 2013, Labor Relations Vice President Scott Norton³ notified Union President David Regan that the Employer was withdrawing from multiemployer bargaining, and was proposing to “negotiate its own single employer unit contract as a successor agreement to the collective bargaining agreement expiring December 31, 2013.” By email dated November 11, 2013, union agent Al Green advised Vice President Norton that the Union was in receipt of his letter “requesting negotiations for each facility,” and did not object.⁴ The Union presented no evidence that it provided any other response to the Employer’s October 31, 2013 letter notifying it that the Employer intended to withdraw from multiemployer bargaining. On January 14 and 15, 2014, the Employer and the Union met and exchanged proposals for a successor bargaining agreement.⁵

ANALYSIS

The Board’s longstanding rule is that an employer may withdraw at will from a multiemployer bargaining unit so long as it meets certain conditions. See *Retail Associates*, 120 NLRB 388 (1958). The Union asserts that the Employer may not avail itself of that right because the present situation does not involve a multiemployer bargaining unit, but rather, multiple facilities of a single employer. In addressing the Union’s contention, I give

³ Vice President Norton did not testify at the hearing. Area Vice President Williams testified that she believes Norton reports to GGNSC, and that he is involved with contract negotiations.

⁴ During the hearing, union agent Green testified that she understood the Employer’s October 31, 2013 letter to mean only that the Union and the Employer were going to “bargain each table separately.” There is no contention, however, that Union President Regan did not understand the Employer’s letter.

⁵ Neither of the two witnesses presented at the hearing attended the January 14 and 15, 2014 bargaining sessions. The parties stipulated that the Employer and the Union exchanged proposals to make changes to the recognition clause of the expired collective-bargaining agreement, but did not reach agreement on the matter. The Employer also introduced copies of proposals and bargaining notes from the two bargaining sessions, but there were no witnesses available to authenticate or provide testimony regarding those documents. Accordingly, I give those documents little weight as evidence of what happened at the bargaining table.

heavy weight to the recognition clauses agreed upon between the Union and the Employer in three successive collective-bargaining agreements, which state that the facilities covered therein are separate employers who agree to associate for the purposes of multiemployer bargaining. The Union has offered no explanation why it agreed to such language in successive collective-bargaining agreements, but now claims that the various facilities are in fact a single employer. I find that the Union's agreement to those successive recognition clauses creates a presumption that the facilities covered therein are separate employers, and, as discussed below, I find that the Union has not overcome that presumption.

The Board examines four factors in determining whether nominally separate entities constitute a single employer: (1) common ownership; (2) common management; (3) interrelation of operations; and (4) centralized control of labor relations. *Cimato Brothers, Inc.*, 352 NLRB 797 (2008). The Union presented none of its own witnesses on this issue, but attempted to make its case through cross-examination of the Employer's single witness, Area Vice President of Operations Kristine Williams.⁶ Williams indicated at various points during her testimony that she was unfamiliar with the organization and structure of the various California facilities and their relationship to any parent entity. Williams was unable to conclusively testify whether the four facilities covered by the expired collective-bargaining agreement are commonly owned, and the Union did not question Williams about interrelation of operations between the facilities (e.g., employee interchange or commingling of books, records, or financial information). The testimony elicited from

⁶ Williams testified that she is employed by "Golden Living Centers," which is apparently another name used by Beverly Healthcare California, Inc. Williams oversees the operation of 10 assisted living centers in the state of California, not including any of the four facilities covered by the expired collective-bargaining agreement. From June 2006 until September 2013, Williams was a Human Resources consultant who provided consulting services for Golden Living Center's California facilities, including the four facilities involved herein.

Williams demonstrates, at most, some degree of common control over labor relations, as Williams testified that she provides human resources support to the four facilities covered by the expired collective-bargaining agreement, and that Vice President Norton handles all contract negotiations for Beverly Healthcare California, Inc.⁷ In these circumstances, the record evidence is insufficient to establish that the four facilities constitute a single employer, and I decline to find that the petition must be dismissed on that basis.

I turn next to the question of whether the Employer's withdrawal from the multiemployer bargaining unit was effective, and I conclude that it was, for the following reasons. In *Retail Associates*, 120 NLRB 388 (1958), the Board established guidelines governing withdrawal from multiemployer bargaining. Under those rules, an employer or union is free to withdraw from a multiemployer unit for any reason prior to the date set for renegotiation of an existing contract or the date on which negotiations actually commence, provided adequate written notice is given. See also *Meat Packers Assn.*, 223 NLRB 922, 924 (1976). Here, there is no question that the Employer provided timely written notice of its withdrawal from multiemployer bargaining since its October 31, 2013 letter to the Union was sent well in advance of the commencement of negotiations on January 14, 2014.

⁷ The Union asserts that Vice President Norton was sent to the bargaining table on January 14 and 15, 2014, to bargain on behalf of all four facilities. Inasmuch as neither of the two witnesses presented at the hearing attended those bargaining sessions and were able to testify about what happened during those sessions, the record does not establish that Norton was bargaining for all four employers when he met with the Union on January 14 and 15, 2013. Even assuming that Norton is authorized to set the wages, benefits, and other terms and conditions of employment on behalf of the Employer as well as the other three facilities, that establishes, at most, a limited degree of centralized control over labor relations, and is a far cry from establishing that Norton attended the January 14 and 15, 2013 bargaining sessions as the negotiator for all four employers. Moreover, in the absence of evidence establishing that there is centralized control over day-to-day labor relations matters, such as hiring, firing, and discipline of employees, I am unwilling to infer the degree of centralized control over labor relations that is necessary to support a finding of single-employer status.

In addition to the timeliness requirement, the Board requires that withdrawal from a multiemployer unit, to be effective, must be unequivocal. That is, the decision to withdraw “must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis.” *Retail Associates*, above, 120 NLRB at 394. The Union contends that the Employer’s conduct at the January 14 and 15, 2014 bargaining sessions establishes that the Employer had no intent to bargain as a separate employer. It is true that an employer is not free to attempt to “secure the best of two worlds” by filing a purported withdrawal and then remaining in a multiemployer unit in hopes of securing advantageous terms through group negotiations. *See Associated Shower Door Co.*, 205 NLRB 677, 682 (1973), *enfd.* 512 F.2d 230, 233 (9th Cir. 1975), *cert. denied*, 423 U.S. 893 (1975); accord *Michael J. Bollinger Co.*, 252 NLRB 406, 407-08 (1980), *enfd. mem.* 705 F.2d 444 (4th Cir. 1983). Here, however, as discussed above, there is no evidence that is what happened during the January 14 and 15, 2014 bargaining sessions, as the Union presented no evidence that any employers other than the Employer were present at the January 14 and 15, 2014 bargaining sessions.

Even assuming that Vice President Norton was authorized to handle contract negotiations on behalf of the Employer, as well as the remaining three facilities, during the same bargaining sessions, that fact alone does not preclude unequivocal withdrawal by the Employer. In *Walt's Broiler*, 270 NLRB 556, 557 (1984), the Board found there had been unequivocal withdrawal from a multiemployer bargaining unit notwithstanding that the employers hired the same consultant who had represented the unit to do their bargaining, but the consultant made it clear during negotiations that he was representing the employers individually and was seeking a base contract from which their individual contracts could be

fashioned, and, on a number of occasions, addressed specific concerns of individual employers. Accordingly, I decline to find that the Employer nullified its withdrawal from multiemployer bargaining simply because it continues to utilize Norton to negotiate on its behalf, and I conclude that the Employer met its burden to establish that it has effectively withdrawn from the multiemployer bargaining unit.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated, and I find, that the Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and there is no bar to an election in this matter.

5. I find that the following employees of the Employer, together with certain employees of separate employer Healthcare Services Group, as described below, constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and medical records assistants, excluding all registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office and clerical employees,

professional employees, supervisory employees, and guards, as defined in the National Labor Relations Act.

All full-time and regular part-time housekeepers, janitors, and laundry aides employed by Healthcare Services Group to provide services at the Employer's facility.

There are approximately 52 employees in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees in the Unit will vote on whether they wish to be represented for purposes of collective-bargaining by Service Employees International Union – United Healthcare Workers - West, or no union. The dates, times, and place of the election will be specified in the Notice of Election that the Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for

cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by the Region to assist in determining an adequate showing of interest. The Region shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5224, on or before **February 21, 2014**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional office by electronic filing through the Agency's website,

www.nlr.gov,⁸ by mail, by hand or courier delivery, or by facsimile transmission at (510) 637-3315. The burden of establishing the timely filing and receipt of this list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

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., EDT on

⁸ To file the eligibility list electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

February 28, 2014. This request may be filed electronically through E-Gov on the Agency's web site, www.nlr.gov,⁹ but may not be filed by facsimile.

Dated at Oakland, California, this 14th day of February, 2014.

_____/s/ George Velastegui_____
George Velastegui
Regional Director
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

⁹ To file the request for review electronically, go to www.nlr.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. Guidance for electronic filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located on the Agency's website, www.nlr.gov.