

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

CHAMPLIN SHORES ASSISTED LIVING

and

SEIU HEALTHCARE MINNESOTA

CASE NO. 18-CA-093766

**EMPLOYER'S RESPONSE TO GENERAL COUNSEL'S MOTION FOR SUMMARY
JUDGMENT AND NOTICE TO SHOW CAUSE AND MEMORANDUM
IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

On December 26, 2012, Counsel for the General Counsel filed a Motion to Transfer Proceeding to the Board and Motion For Summary Judgment in the instant matter. On December 28, 2012, the National Labor Relations Board ("the Board") issued its Order Transferring Proceeding To the Board and Notice To Show Cause as to why the General Counsel's Motion should not be granted. General Counsel seeks a summary determination that Champlin Shores Assisted Living ("Champlin" or "the Employer") violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act by refusing to recognize and bargain with the Charging Party, SEIU Healthcare Minnesota. The Employer hereby responds in opposition to that Motion:

1. On August 14, 2012, SEIU Healthcare Minnesota ("the Union") filed a representation petition seeking to represent certain employees of the Employer at its assisted living community in Champlin, Minnesota.

2. On September 7, 2012, the Regional Director for Region 18 issued a Decision and Direction of Election in case 18-RC-087228 finding the petitioned-for unit appropriate

for collective bargaining and directing an election among all full-time, regular part-time and casual/on call resident assistant and medication technicians at the Champlin facility.

3. In finding a unit of resident assistants and medication technicians appropriate, the Regional Director relied almost exclusively on *Specialty Healthcare & Rehabilitation of Mobile*, 357 NLRB No. 83 (2011).¹

4. In *Specialty Healthcare*, the Board concluded that a unit of certified nursing assistants (“CNAs”) in a nursing home was an appropriate unit despite never before concluding that a CNA-only unit was appropriate for collective bargaining. *Id.* at slip. op. 17, fn. 13 (Member Hayes dissent).

5. On September 21, 2012, the Employer timely filed a Request for Review of this Decision, arguing, *inter alia*, that the *Specialty Healthcare* standard used by the Regional Director in determining the appropriate unit at the Employer’s assisted living community was inappropriate and there were compelling reasons to reconsider it and return to the standard of *Park Manor Care Center*, 305 NLRB 872 (1991).

6. On October 3, 2012, with one dissent, the Board denied the Employer’s Request for Review.

7. Pursuant to the Decision and Direction of Election and with the Request for Review denied, an election was held on October 5, 2012. A majority of employees who voted in the election voted for the Union.

8. On October 12, 2012, the Regional Director issued a Certification of

¹ The Employer in *Specialty Healthcare* has refused to recognize or bargain with the Union and is testing the NLRB’s certification of that unit because the decision was inconsistent with the Act and an abuse of the Board’s discretion. *See Kindred Nursing Centers East, LLC v. NLRB*, 12-1027/1174 (6th Cir. April 16, 2012). The Sixth Circuit has not yet ruled on the underlying refusal to bargain complaint.

Representative.

9. The certification is invalid because the standard used to determine the appropriateness of the bargaining unit was improper.

10. *Specialty Healthcare* abandoned a workable and accepted method of collective bargaining in long-term healthcare establishments and rejected the Board's approach for determining appropriate bargaining units in sub-acute, long-term health care institutions both before and after its decision in *Park Manor*.

11. Regional Directors had always explicitly rejected as inappropriate petitioned-for units of CNAs or other bargaining units of non-professional employees which were smaller than the traditional service and maintenance unit. *See, e.g. Delaware Health Corporation*, Case 5-RC-16610 (December 3, 2010); *Care One, LLC*, Case No. 22-RC-12116 (August 9, 2001).

12. Likewise, *Specialty Healthcare* ignored the Congressional admonition to avoid undue proliferation in health care facilities and its own past precedents in which it consistently viewed health care facilities differently. *See Mercy Hospitals of Sacramento*, 217 NLRB 765, 766 (1975)(Board noting that its consideration of unit issues "must necessarily take place against this background of avoidance of undue proliferation").

13. *Specialty Healthcare* is a substantial departure² from the Act and does not effectuate the Act's policy of efficient collective bargaining. The Board's decision in *Specialty Healthcare*, therefore, "oversteps the law." *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

² It is not, as the Board suggested in that decision, a "clarifying" of existing law. *Specialty Healthcare* at slip. op. 1.

14. With the Taft-Hartley amendment to the National Labor Relations Act in 1947, Congress added Section 9(c)(5) to emphasize that the extent of union organizing alone cannot serve as the basis for determining the appropriateness of a petitioned-for unit. *See Specialty Healthcare*, at slip. op. 19 (Member Hayes correctly noting in dissent that the decision “encourage[s] union organizing in units as small as possible, in tension with, if not actually conflicting with the statutory prohibition against extent of organization as the controlling factor in determining appropriate units).

15. *Specialty Healthcare* ignores this prohibition by permitting unions to petition for practically any group of employees, as long as it “does not make the mistake of petitioning for a unit that consists of only part of a group of employees in a particular classification, department, or function.” *DTG Operations, Inc.*, 357 NLRB No. 175, slip. op. 11 (December 30, 2011)(Member Hayes dissent). Employers are “entitled to a reasonably adequate protection from the results of piecemeal unionization.” *NLRB v. Pinkerton’s, Inc.*, 428 F.2d 479, 485 (6th Cir. 1970). *Specialty Healthcare* provides no protection and disregards the prohibition intended by Congress enacting Section 9(c)(5).

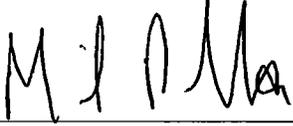
16. This is particularly inappropriate in an industry, such as assisted living, and in a community which has largely moved to operational models employing fewer workers with a broader range of responsibilities.

17. For all the above reasons and the grounds set forth in the Employer's Request for Review, the Board’s certification of the Union is improper and the Employer is under no obligation to bargain.

WHEREFORE, the Employer prays that the General Counsel's Motion for Summary Judgment be denied, that the Complaint that is the basis thereof be dismissed, and the previously issued Certification of Representative be revoked.

Respectfully submitted,

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By: 

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Dated: January 11, 2013
White Plains, NY

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AFFIDAVIT OF SERVICE

I hereby certify that the foregoing Employer's Amended Response To General Counsel's Motion For Summary Judgment And Notice To Show Cause and Accompanying Memorandum In Support of Motion for Summary Judgment was served on the 11th Day of January, 2013 upon the individuals named below, addressed as follows:

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Dated: White Plains, New York
January 11, 2013