SEYFARTH SHAW

Management Alert

Micro Collective Bargaining Units In Educational Institutions

As we discussed in our last *One Minute Memo*, the National Labor Relations Board ("Board") has several high-stakes cases before it which will determine if and when the Board will assert jurisdiction over religious schools, and whether graduate students are in fact "students" or employees under the National Labor Relation Act ("Act"). As the federal government gets up and running again following the government shutdown, so shall the Board, with its decisions on these pressing cases soon to follow.

Whichever way the Board rules in the pending cases, all private educational institutions, including colleges and universities, need to have an understanding of the approach that the Board takes to making bargaining unit determinations. The concept of bargaining unit appropriateness is an extremely important one. This is because the bargaining unit defines the group of employees who will be permitted to vote on whether they desire to be represented by a union. If the employees select unit representation, then it is this group with which the employers must deal.

Board elections are much like other elections—you enhance your chances of victory if you can determine who gets to vote. In the political arena, the effort to affect the outcome of elections by determining the voting group is known as gerrymandering. In the Board context, it is a bargaining unit determination. These determinations are a critical precursor to the outcome of union elections because it is widely recognized that what is at stake in contested bargaining-unit determinations is the likelihood of election victory.

Not surprisingly, the determination of unit appropriateness is a subject of contention between unions and employers. While unions are inclined to argue for an election in a unit in which they think they will win, employers historically have argued that the unit should be expanded to include other employees who work under similar terms and conditions of employment and thus share a community of interest with the narrower grouping sought by the union. Often, the employer's argument also is accompanied by a claim that finding the narrow unit sought by the union to be appropriate violates the admonition in Section 9(c)(5) of the Act that, "[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling."

The Board's Micro-Unit Decisions

The push by labor unions to obtain elections in easier-to-organize small bargaining units recently received a boost when the Sixth Circuit Court of Appeals affirmed the Board's controversial 2011 ruling in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011). See *Kindred Nursing Centers East, LLC v. NLRB*, No. 12-1027/1174 (6th Cir. Aug. 15, 2013).

For decades, the Board held that where employees share a "community of interest" (similar wages, working conditions, skills, common management, frequent interchange, etc.) that the appropriate bargaining unit was a unit of all the employer's similarly-situated employees. In order to establish the appropriateness of a smaller "micro" sub-unit of employees, a party needed to show that the interests of the employees in the smaller unit were "sufficiently distinct" from those of other employees. *Specialty Healthcare* dramatically changed this.

Under *Specialty Healthcare*, a presumptively appropriate bargaining unit is any "readily identifiable" group of employees who also share a community of interest. The burden is then on the employer to show that excluded employees share an "overwhelming community of interest" with the proposed unit and should be included. As the post-*Specialty Healthcare* decisions have demonstrated, meeting this burden has proven nearly impossible for employers, causing the proliferation of smaller and smaller bargaining units in a variety of industries.

Although none of the cases issued thus far have involved bargaining unit determinations in schools, a brief discussion of some of the post-*Specialty Healthcare* decisions should provide schools with an idea of what they may be facing. For example, in one case pending for review by the Board, a Regional Director determined that the petitioned-for unit of sales employees in the women's shoes department of a major retailer was appropriate, as opposed to a store-wide unit or all sales employees. *See The Neiman Marcus Group, Inc.*, *d/b/a Bergdorf Goodman v. Local 1102 Retail, Wholesale Dep't Store Union*, 02-RC-076954 (May 30, 2012). In another case, the Board declined to review a Regional Director's determination that a unit of bread bakers who worked in six of the employer's cafes in the state was appropriate, as opposed to the bakers in all of the seventeen cafes that the employer owned in the state. *See Bread of Life, LW*, 7-RC-072022 (March 21, 2012).

These are just a few of the many cases in which small, gerrymandered bargaining units that likely would not have been found appropriate under the Board's historical standard were deemed appropriate under *Specialty Healthcare*.

What does this mean for educational institutions?

In the context of schools, one can only imagine how the *Specialty Healthcare* standard could drastically increase the number and variety of distinct labor-management relationships existing within a single institution, and the administrative nightmare that could necessarily follow.

For example, a bargaining unit consisting solely of history professors might be deemed appropriate as opposed to a broader unit of all professors at a university. Or a unit of professors who teach in one particular campus building could be seen as having a sufficient community of interest to comprise their own bargaining unit separate from professors in other buildings. Cashiers in the student store might be able to obtain a unit separate from other employees who work in the student store. Or, the Board could find a unit of cooks appropriate to the exclusion of the others who work in the student cafeteria. The permutations, and horror stories, are endless.

With each separate bargaining unit comes a separate collective bargaining agreement, bargained over in a separate set of negotiations, and likely containing different provisions than in separate agreements covering other micro units. Also, the more bargaining units, the greater the likelihood of multiple strikes, and the more time that has to been spent by managers in contract negotiations.

So, what should schools be doing? Labor lawyers experienced in representing schools and practicing before the Board can often assist a school in "bargaining unit planning." This process may involve operational changes such as increased cross-training and the restructuring of supervisory and reporting relations. Each of these and other similar changes would have a goal of assisting the school in trying to meet the Board's *Specialty Healthcare* "overwhelming community of interest" standard.

Of course, all private schools should try to avoid this rather untenable situation by implementing sound human resources, compensation and benefits programs. Supervisory training also is advisable.

In the meantime, *Specialty Healthcare* remains the order of the day. Regardless of how the Board answers the questions before it regarding the unionization of religious schools and graduate students, private schools of all types should expect increased union efforts to organize smaller and more fractured bargaining units.

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