

Mercy General Health Partners Amicare Homecare and Mercy Healthcare at Home and Local 586, Service Employees International Union, AFL-CIO, Petitioner. Case 7-RC-21647

July 17, 2000

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 4, 1999, the Regional Director issued a Decision and Direction of Election finding, among other things, that Mercy General Health Partners Amicare Homecare (Amicare) and Mercy Healthcare at Home (MHH) are a single employer. The Regional Director ordered a self-determination election to determine whether the 60 home health care aides in the extended care group (the petitioned-for employees) wished to be represented by the Petitioner, which already represents 12 licensed practical nurses and home health care aides employed by Amicare. On October 28, 1999, the Board ruled on Amicare's request for review. The Board found that the issue of single-employer status was neither raised nor litigated at the hearing, and remanded the case to the Regional Director to reopen the record to secure additional evidence regarding the single-employer issue and to issue a supplemental decision.¹

On January 11, 2000, the Acting Regional Director issued a supplemental decision finding that Amicare and MHH constitute a single employer. The Acting Regional Director also found that, even if these two entities did not constitute a single employer, the Petitioner indicated a desire to represent the petitioned-for employees in a separate unit and that a separate unit of home health care aides employed by MHH was appropriate. Accordingly, the Acting Regional Director found that the impounded ballots should, in any event, be opened and counted.

Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, Amicare filed a timely request for review of the Acting Regional Director's supplemental decision.²

In its request for review, Amicare contends that the Acting Regional Director erred in his finding that MHH and Amicare are a single employer, and that the record does not support the Acting Regional Director's finding that the two entities have common ownership or management, common control over labor relations, or interrelation of operations. The request for review also takes issue with the Acting Regional Director's finding that the impounded ballots should be opened and counted. In this regard, Amicare contends that the Notices of Election and the ballots distributed at the election incorrectly informed employees of their employing entity, and that

employees were unable to express their desire to be represented in a separate unit as employees of MHH.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Amicare's request for review is granted. Having carefully considered the entire record in this case, we find that MHH and Amicare are not a single employer, but are separate unintegrated entities. We also reverse the Acting Regional Director's finding that the ballots should be counted.

1. With respect to the single-employer issue, it is undisputed that Mercy Health Systems is the parent company of two subsidiary corporations, Mercy Continuing Care and Mercy General Health Partners (Mercy General). Until October 1, 1999, Amicare, owned and operated by Mercy General, provided two kinds of care: short-term acute care based on a physician's prescribed order, and long-term home healthcare services to chronically ill patients. The duration of short-term acute care is limited to the time designated by the physician and is authorized pursuant to Medicare and Medicaid standards. When the physician's prescribed order expired, Amicare continued to provide long-term noncertified home healthcare to chronically ill patients, such as respite care, personal care, senior housing and homemaking duties, which are arranged directly with the patient.

On October 1, 1999, Amicare ceased providing long-term home healthcare to patients. At all material times since that date, this service has been provided by MHH, an entity owned and operated by Mercy Continuing Care. MHH was created for the sole purpose of providing noncertified long-term home healthcare aid. Thus, Mercy Continuing Care owns and operates MHH, while Mercy General owns and operates Amicare. Each entity has its own tax identification number. Amicare continues to employ a unit of about 12 licensed practical nurses and home health care aides represented by the Petitioner. It is undisputed, however, that on creation of MHH on or about October 1, 1999, the petitioned-for employees who previously worked for Amicare were hired by MHH. They completed new W-4 forms, employment applications, and I-9 forms, but were not interviewed by MHH. All those who desired work were hired by MHH. Sixty Amicare employees were hired by MHH. Upon hire by MHH, employees received wages and benefits that essentially remained unchanged, except for a minor difference in their pension plan. It also appears that the job duties and responsibilities of the petitioned-for employees remained the same after their hire by MHH.

With respect to the structure of each entity, the director for Mercy Continuing Care (MHH's owner and operator) is Bruce Alkema. He reports directly to the chief operating officer of Mercy Continuing Care, Jeffrey Lemon. Together with Mercy Continuing Care's human resource manager, Lisa Minni, Alkema is responsible for all labor relations for MHH. Alkema hired a clinical manager,

¹ Prior to the issuance of the Board's October 28, 1999 Order, the Region conducted the self-determination election and impounded the ballots.

² MHH did not file a request for review.

Barb Koski, who maintains clinical care for MHH. Koski has never worked for any other Mercy Health Systems institution. Alkema also hired a customer service coordinator, Tracy Bultema. Bultema previously worked for Amicare in its human resource department, but was hired by Alkema to be MHH's customer service coordinator. She maintains the communication between patients and healthcare providers and ensures that all shifts for MHH patients are covered. Mercy Continuing Care's human resource manager, Minni, hired two former Amicare managers, Langlois and Martin. Langlois is MHH's office coordinator and she schedules the work for the petitioned-for employees at MHH. It appears from the record that Martin, also previously employed by Amicare, was hired by Minni to schedule work for MHH employees. Since their hire by MHH, Langlois, Martin, and Bultema have not scheduled or assigned work to any of Amicare's employees.

Amicare's director is Alan Adyniec, who reports to Mercy General's vice president for patient care services, Gay Landstrom. Amicare has its own clinical director, Mary Ann Rankin, who reports to Adyniec. Amicare also has its own financing director, Pat Jakovitz, and a human resource manager, Joanne Peterson. It is Adyniec, along with Peterson, who has responsibility for Amicare's labor relations.

As noted above, it is undisputed that after MHH's hire of the former Amicare employees, their job duties and responsibilities reflected little or no change, and their wages and hours remained unchanged. However, the petitioned-for employees of MHH are now subject to a recently created personnel policy of Mercy Continuing Care, whereas Amicare's employees, including those already represented by the Petitioner, are subject to the personnel policies of Mercy General. Mercy Continuing Care's personnel policy manual was completed sometime in early October 1999 and was made available to unit employees during six meetings held by Area Services Director Alkema. Approximately 15 to 20 unit employees attended those meetings. Although some employees may not have received or were never informed of the new personnel policies, this can be primarily attributed to the fact that employees were working during the scheduled meetings at which the policies were made available.

Although the Acting Regional Director found that Amicare is the primary source of referrals for MHH, the record does not support that finding. Amicare is, indeed, a referral source for MHH, but it is by no means the primary referral source. The record undisputedly shows that 60 to 70 percent of MHH's work is referred by a local institution known as the Area Agency on Aging. There are also referrals from the United States Department of Health and Human Services.

Although MHH and Amicare share office space and the same telephone number, MHH leases office space and equipment from Amicare. In this regard, Alkema's

unrefuted testimony established that MHH entered into a lease agreement with Amicare and compensates Amicare for MHH's use of space and equipment. Although the lease is of indefinite duration, Alkema has solicited bids for space elsewhere. Inasmuch as MHH's and Amicare's employees work in patients' homes, these two groups have little work-related contact with each other.

All Amicare and MHH employees receive a 1-month advance work schedule. One MHH employee testified that while she was employed by Amicare, her work assignments were distributed primarily by Langlois and Martin, and that the same individuals continue to distribute her work assignments since her employment by MHH. However, Langlois and Martin are currently employed by MHH and have not been employed by Amicare since at least October 1, 1999.³

MHH and Amicare share the services of an afterhours coordinator, who receives emergency afterhours calls for both Amicare and MHH. When a call comes from an Amicare patient, it is referred to an Amicare representative. When a call comes from an MHH patient, it is referred to an MHH representative. The afterhours coordinator was formerly employed by Amicare but is currently employed by MHH. The record reflects that the afterhours coordinator maintains records of the time he/she spends responding to Amicare's clients, and MHH bills Amicare for that work on an hourly basis.

In determining whether two nominally separate employing entities constitute a single employer, the Board looks to four factors—common ownership, common management, interrelations of operations, and common control of labor relations. *Radio Technicians Local 1264 v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965); *Denart Coal Co.*, 315 NLRB 850, 851 (1994). No single factor is controlling, and not all need be present. Rather, single-employer status depends on all the circumstances and is characterized by the absence of the arm's-length relationship found between unintegrated companies. *Dow Chemical Co.*, 326 NLRB 288 (1998); *Alexander Bistrizky*, 323 NLRB 524 (1997). The Board has generally held that the most critical factor is centralized control over labor relations. Common ownership, while necessary, is not determinative in the absence of centralized control over labor relations. *Western Union*, 224 NLRB 274, 276 (1976). The Board has addressed the common ownership issue in the context of parent-subsidiary relationships. In *Dow Chemical*, the Board held that such common ownership, by virtue of a parent-subsidiary relationship, by itself, indicates only potential control over the subsidiary by the parent entity. The Board concluded that a "single employer relationship will be found only if one of the companies exercises ac-

³ It is undisputed that, for reasons that are unexplained in the record, MHH's employees continue to wear Amicare badges while on the job.

tual or active control over the day-to-day operations or labor relations of the other.” *Id.*, supra at 288.

Applying this standard to the facts before us, we find, contrary to the Acting Regional Director, that Amicare and MHH do not constitute a single employer. Because MHH and Amicare are corporate subsidiaries of the larger corporate parent, Mercy Health Systems, common ownership is present. However, more evidence is required to establish that one entity exercises actual or active control over the other. The record is clear that the corporate parent, Mercy Health Systems, exercises virtually no control over either MHH or Amicare. Moreover, there is a second level of separate ownership. MHH is owned and operated by Mercy Continuing Care, while Amicare is owned and operated by Mercy General. There is no evidence that either Mercy General or Mercy Continuing Care exercises any control over the other. Similarly, it has not been shown that Amicare exerts any actual or active control over MHH, or vice versa. The record clearly establishes that MHH has its own managers and supervisors, while Amicare in turn has its own managers and supervisors. There also is no evidence that MHH’s employees are supervised by managers or supervisors of Amicare, or vice versa. Rather, the evidence shows that some of MHH’s managers (Bultema, Langlois, and Martin) were formerly employed as managers by Amicare, but, since October 1, 1999, they have been employed solely by MHH. None of these MHH managers supervise Amicare’s employees who are currently represented by the Petitioner, and Amicare’s managers do not supervise MHH’s employees. At best, there is evidence that Amicare and MHH share an afterhours coordinator, who receives afterhours calls for both entities. Although the Acting Regional Director relied on this factor as evidence of common management and supervision, the record reflects an arm’s-length relationship between MHH and Amicare regarding the work of this afterhours coordinator, with MHH billing Amicare for the work performed by the afterhours coordinator.

With respect to interrelation of operations, the Acting Regional Director relied on the following factors: Amicare and MHH share offices and the function of the afterhours coordinator; MHH receives referrals from Amicare; assignments are distributed by the same managers; employees wear badges bearing Amicare’s logo; and terms and conditions of employment remained the same after employees were hired by MHH. With respect to sharing office space and equipment, the record establishes, contrary to the finding of the Acting Regional Director, that MHH leases office space and equipment from Amicare. With respect to the use of the afterhours coordinator, as noted above, MHH bills Amicare for any time that the coordinator spends on Amicare’s work. These factors are evidence of an arm’s-length relationship between the two entities. As for the Acting Regional Director’s finding that Amicare refers work to

MHH, the evidence shows that the primary referral source is another local institution, which refers 60 or 70 percent of MHH’s work. Regarding the assignment of work, while there was some evidence that the same individuals assign work for MHH’s and Amicare’s employees, this evidence fails to account for the fact that some of MHH’s managers were hired from Amicare, which may explain employees’ perception that their assignments are distributed in the same fashion as when they were employed by Amicare. While it is true that the petitioned-for employees suffered no changes in their wages or other terms and conditions of employment upon their transfer from Amicare to MHH, and that they continue to wear Amicare badges while on the job, these two factors alone are insufficient to support the conclusion that Amicare and MHH’s operations are interrelated.⁴

With respect to the most critical element, centralized control over labor relations, the record shows that MHH’s employees are subject to Mercy Continuing Care’s personnel policies, while Amicare’s employees are subject to Mercy General’s personnel policies. In addition, the labor relations functions are handled by different individuals for each of the two entities. Alkema and Minni are responsible for labor relations at MHH, and Adyniac and Peterson are responsible for that function at Amicare. As stated by the Board in *Dow Chemical*, no single-employer relationship exists where the actual day-to-day management and labor relations functions are carried out by each entity’s own managers and officers. In the instant case, each entity has its own managers who supervise their distinct group of employees; there is no “cross supervision”; employees are subjected to different personnel policies; and labor relations functions are handled by separate individuals.

Based on all of the above, we conclude that Amicare and MHH do not constitute a single employer. Accordingly, we reverse the Acting Regional Director in this regard.

2. The Acting Regional Director also found that even if Amicare and MHH did not constitute a single employer, the petitioned-for employees could constitute a separate appropriate unit, with MHH as the employing entity, and that the impounded ballots should be opened and counted. Amicare contends that if there is no single-employer relationship, then the Notices of Election and ballots incorrectly informed employees of their employing entity, and employees expressed their choice in a self-determination election rather than as a separate unit of employees. Thus, Amicare argues that the election should be nullified and the petition dismissed. For the reasons set forth below, we agree that the impounded ballots should not be counted, but find it unnecessary to

⁴ The Acting Regional Director also relied on a memo issued by Amicare informing MHH’s employees that the two entities will “routinely interact.” However, that statement is not probative evidence that employees actually have work-related contact.

dismiss the petition. Instead, we shall instruct the Regional Director to direct a second election.

In the initial Decision and Direction of Election, the Regional Director found that MHH's employees share a sufficient community of interest with the employees employed by Amicare who are already represented by the Petitioner. As a result, the Regional Director held a self-determination election. The Notices of Election and the ballot identified the employing entity as MHH and Amicare, a single employer. The Notices of Election informed voters of the following: "If a majority of valid ballots is cast for the Petitioner, the employees will be deemed to have indicated the desire to be included in the existing unit of LPNs and certified home health aides currently represented by the Petitioner, and it may bargain for those employees as part of that unit."

Based on our finding that MHH is the sole employing entity of the petitioned-for employees, we find that a new election is required. First, the ballot indicated that employees were employed by MHH *and* Amicare, as a single employer, which is inaccurate and misidentifies the employing entity. In addition, employees were also erroneously informed that if they voted for the Petitioner, they indicated their desire to be represented by the Petitioner

in the unit of employees of Amicare which the Petitioner currently represents. Given our finding that the petitioned-for employees are solely employed by MHH, and that a self-determination election is not warranted, the election cannot stand. If the unit employees vote to be represented by the Petitioner, the unit description would be limited to the employees of MHH; they would not be included in Amicare's unit. As a result, the unit as certified would differ substantially in character and scope from the unit in which the election was conducted, and the question on that ballot would have been different from the one that should have been presented to the employees. Based on the foregoing, we find that the impounded ballots should not be counted and, if the Petitioner desires to represent employees solely as employees of MHH, a second election should be directed.

ORDER

The Acting Regional Director's supplemental decision is reversed with respect to the issues on review. This proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision on Review.