

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 18-05

December 22, 2017

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Beth Tursell, Associate to the General Counsel

SUBJECT: *Representation Case Procedures in Light of PCC Structural, Inc.*,
365 NLRB No. 160 (2017)

In *PCC Structural, Inc.*, 365 NLRB No. 160 (December 15, 2017), the Board overruled *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), thereby specifically discarding the previous overwhelming community-of-interest standard. Rather, under the analysis set forth therein, “applying the Board’s traditional community-of-interests factors, the Board will determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.” *PCC Structural*, 365 NLRB, slip op. at 7. The Board remanded the case to the Regional Director for further appropriate action, including, if necessary the reopening of the record and analysis of the appropriate unit under the new standard. *PCC Structural*, 365 NLRB, slip op. at 13.

Both the Board’s Rules and Regulations and the Representation Casehandling Manual provide the framework through which Regional Offices will be able to address the appropriateness of petitioned-for bargaining units under *PCC*. Regions are to consistently apply the Board’s new analysis at all stages of case processing in currently active cases.¹ In order to effectuate this desired consistency, Regions are to utilize the following practices in all active cases.

I. Addressing Appropriateness of Bargaining Unit Through Issuance of Notice to Show Cause in Currently Active Cases

Regional Directors have discretion to entertain requests to revisit a unit determination. For instance, under CHM section 11097, a Regional Director has the discretion to approve a request to withdraw from an election agreement upon an “affirmative showing of unusual circumstances.” Under Section 102.65(e)(1) of the Board’s Rules and Regulations, a Regional Director has the authority to reopen the record after close of a pre-election hearing or after issuance of a decision and direction of election upon a showing of “extraordinary circumstances.” That section of the Board’s Rules and Regulations further authorizes a Regional Director to treat a request for review filed with the Board as a motion for reconsideration of his or her pre-election decision. The modification of extant law by the Board in *PCC* constitutes such an “unusual” or “extraordinary” change in circumstances as to warrant reconsideration

¹ For purposes of this memo “currently active cases” are defined as those open RC, RM and UC cases where the case is not presently before the Board on a request for review and where the employees do not comprise a conforming unit in the context of an acute care hospital.

of the propriety of a bargaining unit defined under a stipulated or consent election agreement or decision and direction of election in a currently active case.

Regions should routinely afford the parties to an R case an opportunity to argue that the *PCC* decision has now rendered a recently consented, stipulated or directed bargaining unit inappropriate in a currently active case. Parties should be given an opportunity to revisit a unit determination at this juncture, rather than wait for the Board to determine whether to remand the case pursuant to a later request for review. This is true whether the case is in a pre-election or post-election posture as we should address these unit issues in pending representation cases as soon as possible. Thus, Regional Directors should routinely entertain a party's request to introduce evidence relevant to a *PCC* analysis in a currently active case, whether in the form of a motion after opening of a hearing or issuance of a decision and direction of election, or pursuant to a request by letter after entering into a stipulated or consent election agreement, even if an election has already been held.

Furthermore, where no party has sought reconsideration of an election agreement or unit determination in a currently active case, Regions should issue a Notice to Show Cause directing any party to the case to show cause, with specifics, as to why the stipulated or directed bargaining unit is inappropriate pursuant to the analysis set forth in *PCC*. The show cause notice will require a party to affirmatively identify with significant specificity those community of interest factors a party is relying upon to show that the directed unit is not sufficiently distinct from another employee group such that it should be rendered inappropriate. A party's general request that the Regional Director review a unit determination under the *PCC* analysis is insufficient, standing alone, to satisfy the party's burden of presenting specific community-of-interest factors upon which such a determination could be made.² However, the Region should not allow parties to re-litigate a standard community-of-interest analysis where they have had the opportunity to do so already. Thus, issuance of a Notice to Show Cause is unnecessary where both parties either were invited by the Regional Director or Hearing Officer to address traditional community-of-interest factors without regard to *Specialty Healthcare*.

Regions should issue show cause notices for any currently active case at any point after entry into a stipulated or consent election agreement, or after issuance of a pre-election decision or post-election determination of challenges or objections unless a request for review has been filed with the Board. Model Notices to Show Cause for cases where the unit was determined by stipulated or consent agreement and by decision and direction of election are appended to this Memorandum.

II. Looking Forward - Regional Director Discretion Regarding Hearings and Elections in Light of *PCC*

In light of the issuance of *PCC*, it is anticipated that parties will raise concerns regarding the impact of this significant case. Regional Directors have always been afforded a wide range of discretion in the handling of representation case matters and they will continue to use their substantial discretion to address the issues that will inevitably arise under *PCC*. As set forth in the Board's Rules and Regulations, Regional Directors have:

- **Discretion to set the hearing beyond the eighth day** after service of the notice of hearing in matters involving unusually complex issues, including substantial community-of-interest issues. Under

² The parties should be advised that the same specificity requirement will be applied to a motion after the opening of a hearing or a letter sent after entering into a stipulated or consent election agreement.

the community-of-interest standard set forth in *PCC*, a fact intensive analysis is required, and therefore, it is anticipated that parties may request additional time to ascertain the appropriate unit and to prepare their evidence for hearing.

- **Discretion to postpone hearings and the due date for the Statement of Position (SOP)** for up to 2 days upon request of a party showing special circumstances and for more than 2 business days upon request of a party showing extraordinary circumstances. As set forth in GC 15-06:

A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should be filed with the regional director and should include the positions of the other parties regarding the postponement. E-filing the request is preferred, but not required. A copy of the request must be served simultaneously on all the other parties

A request to postpone the hearing is not automatically to be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that the postponements of both are sought.

- **Discretion to set an election date for the “earliest date practicable”** consistent with the Board’s Rules and Regulations, where the date is based on the circumstances of each case. A substantial change in law such as that in *PCC* is one such circumstance where, particularly in the short term, additional time may be required to set an election date. Similarly, where a unit is expanded in a Decision and Direction of Election, Regions are reminded of the Regional Director’s discretion to grant a reasonable amount of time, which may necessarily extend beyond the normal 2 days, to secure an additional showing of interest.

III. Hearings in Light of *PCC*

Where cases proceed to hearing, the record will necessarily be fact intensive as community-of-interest factors are litigated. The hearing need not be protracted however, and efforts must be made to streamline the proceedings. Stipulations of fact should be explored throughout the process so as to streamline evidence gathering and to avoid a lengthy hearing. Such stipulations, including those regarding community-of-interest factors, should be as detailed as possible so as to obviate the need for lengthy testimony. The Hearing Officer should make sure the record does not contain irrelevant, duplicative, or otherwise unnecessary evidence. In this regard, pursuant to Section 102.66(d) of the Board’s Rules and Regulations, a party is precluded from raising or litigating *any* issue that it failed to raise in its timely Statement of Position (SOP) or response, except that no party will be precluded from contesting or presenting evidence relevant to statutory jurisdiction.

Also as set forth in GC 15-06³, if a party contends as part of its SOP that the proposed unit is not appropriate, the party will be required to state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit. Mere claims or rote citations to *PCC* will not be sufficient. Rather, parties should be strongly encouraged to provide in the SOP specific details in

³ Any directives in GC 15-06 applying *Specialty Healthcare* are rescinded.

order to warrant consideration for hearing. For example, where community-of-interest factors are at issue, such as in a *PCC* scenario, the Regional Director should advise the parties to include in their SOP a specific description of those factors, along with the evidence which will be provided in support. As part of their SOP, the parties must also identify any other individuals whose eligibility they intend to challenge at the pre-election hearing and the basis for such contention. It is equally imperative that the petitioner be prepared to respond at hearing with specificity to each issue that is raised in the SOP. Hearing Officers must elicit the petitioner's response to the issues raised in the SOP at the beginning of the hearing so as to determine areas for agreement and seek stipulations, where appropriate, at the outset of the hearing in order to streamline the proceedings.

If you have any questions about this memorandum, please contact AGC Aaron Karsh or DAGC Dolores Boda.

/s/
B.T.