

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

SKILS'KIN

Employer

and

Case 19-RC-079903

**UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 1439**

Petitioner

DECISION AND DIRECTION OF ELECTION

The above-captioned matter is before the National Labor Relations Board (the Board) upon a petition duly filed under §9(c) of the National Labor Relations Act (the Act), as amended. Pursuant to the provisions of §3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, the undersigned makes the following findings and conclusions.¹

I. SUMMARY

The Employer provides general cleaning work in food service areas at Fairchild Air Force Base (Base), outside Spokane, Washington, for the U.S. Military. Petitioner filed the instant petition seeking to represent a bargaining unit (Unit) consisting of approximately 28 employees working for the Employer at the Base. While the parties stipulate to the inclusion of about 10 employees in the Unit and to the exclusion of certain positions, they are in disagreement as to 18 other employees. Specifically, the parties are in dispute regarding whether crew supervisor Marilyn Beck should be excluded from the petitioned-for unit because she allegedly possesses indicia of supervisory authority as that term is defined in § 2(11) of the Act. As for the remaining 17 employees in dispute, the Employer contends that those employees should be excluded because they are disabled, rehabilitation clients and, thus, are not “employees” within the meaning of § 2(3) of the Act. Petitioner, on the other hand, contends the 17 employees are not rehabilitation clients and are properly

¹ The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of §9(c)(1) and §2(6) and (7) of the Act.

included in the petitioned-for unit. Petitioner is willing to proceed to an election in any unit found appropriate herein and the Employer does not argue against an election being directed with respect to the 10 employees whom the parties agree should be included in the Unit.

I have carefully reviewed and considered the record evidence and the arguments of the parties both at hearing and in their post-hearing briefs, if filed.² As for crew supervisor Beck's status, I shall permit her to vote subject to challenge for reasons described in more detail below. Regarding the remaining 17 employees in dispute, I find that the Employer has met its burden of showing that its relationship with its disabled workers is primarily rehabilitative in nature and, thus, those disabled employees should be excluded from the Unit. Accordingly, I will direct an election in the Unit of about 10 employees.

Below, I have set forth the record evidence regarding background on the Employer's operations and regarding the employees at issue. Following that is an analysis of the record evidence in relation to the appropriate legal standard applicable in cases of this nature. Additionally, I have set forth the details of the directed election and the procedures for requesting review of this decision.

II. RECORD EVIDENCE ³

A. Background on the Employer's Operations

The Employer is a non-profit provider of work opportunities to individuals with disabilities. To accomplish this purpose, the Employer holds approximately a dozen service contracts with the Federal Government in Washington, Idaho, and Montana. The employees in the Unit sought are employed under a contract to perform general cleaning work in the food service areas of Fairchild Air Force Base. The Employer has held this contract since March of 2011.

The Employer's contracts with the Federal Government are awarded under the Javits, Wagner, O'Day Act, 41 USC §46 (JWOD Act). The JWOD Act is designed to allow organizations that employ disabled individuals to compete for and obtain Federal service contracts. The primary requirement to qualify as a JWOD Act certified employer is that 75 percent of the "work hours of direct labor" must be performed by blind or severely disabled individuals. The JWOD Act defines a person with a severe disability as "a person other than a blind person who has a severe physical or mental impairment ... which so limits the person's functional capabilities ... that the individual is unable to engage in normal competitive employment over an extended period of time." 41 CFR §51-1.3. Employers operating under the JWOD Act are required to maintain written documentation of an employee's qualifying disability, signed by a licensed physician, psychiatrist, or qualified psychologist. 41 C.F.R. § 51-4.3(c)(1).

The record reveals that the Employer's organization consists of two divisions. The AbilityOne division is responsible for the Employer's JWOD contracts. A second division,

² The Employer filed a timely post-hearing brief. Petitioner did not file a brief.

³ The Employer called Operations Manager Janet Harper, Director of Human Resources Julie Orchard, Job Coach Ruth Cozzens, and Program Coordinator for Group-Supported Employment and Community Access Amanda Vazquez as witnesses. Petitioner called employee Glenn Clapper as a witness.

Disability Services, provides staffed living accommodations for individuals with disabilities. A disabled individual may utilize both services provided by the Employer, but an individual is not required to participate in one in order to be eligible for the other. The record does not indicate how many, if any, of the employees employed at Fairchild Air Force Base live in the living facilities operated by the Employer's Disability Services division.

Operations Manager Janet Harper is the Employer's senior manager at the Base. The parties stipulated to the exclusion of the Operations Manager position, as it possesses indicia of supervisory authority within the meaning of § 2(11) of the Act, including the authority to hire and discipline employees. Based on the parties' stipulation and the record evidence, I shall exclude the Operations Manager from the Unit.

The Employer also employs a job coach, Ruth Cozzens, at the Base. This job coach works exclusively with two disabled employees for whom the Washington State Division of Developmental Disabilities compensates the Employer for employing the two through the Employer's Group-Supported Employment program. These two employees are referred to as "funded" employees. The parties stipulate the job coach position does not perform the work of the employees in the Unit sought and, therefore, is properly excluded from the Unit. Based on the stipulation and record evidence, I shall exclude the job coach position from the Unit. The parties also stipulate the "funded" employees are properly excluded from any bargaining unit found appropriate as they qualify as "rehabilitation clients" under the Board's standard in this regard, and are not employees within the meaning of § 2(3) of the Act. Based on the parties' stipulation and the record evidence, I shall also exclude funded employees from the Unit found appropriate herein.

Of the approximately 28 remaining individuals employed by the Employer at the Base, 10 are not disabled. The 10 non-disabled employees include 3 food service workers and 7 crew supervisors. Unlike Marilyn Beck's crew supervisor position, these seven other crew supervisors' employee status is not in dispute, as neither party contends these seven crew supervisors possess indicia of §2(11) supervisory authority. Accordingly, I have included the 3 food service workers and 7 crew supervisors in the Unit.

As for Beck's status, it was not addressed at hearing due to that proceeding being conducted under the Board's new rule modifying certain portions of the Board's procedures applicable to the processing of representation cases. However, following the hearing, the Board temporarily suspended implementation of the new rule in response to a recent District Court decision (*Chamber of Commerce v. NLRB*, D.D.C., No. 11-cv-2282, 5/14/12) dealing with the validity of the Board's new rule. After the Board's suspension, the parties were contacted and given the opportunity by the Region to continue processing the case from its current posture, rather than re-initiating the case under the Board's representation procedures in effect prior to the new rule. Both parties elected to proceed with the case in its current posture. In light of the foregoing and the lack of a record dealing with Beck's supervisory status, I shall permit Beck to vote subject to challenge in the election that I will direct below.

B. Employees at Issue

Operation of the food service areas at Fairchild Air Force Base involves the U.S. Military and the Employer. The Military is responsible for all food preparation, and the

Employer is responsible for tasks such as cleaning the food preparation equipment, the kitchens, and the dining areas. As a result, the Employer's employees are responsible for tasks such as bussing tables, washing pots, pans and the kitchen's large scale cooking devices, running dishwashers, vacuuming, and cleaning restrooms.

The record reveals that on a daily basis, Operations Manager Harper assigns employees work based on their comfort and ability but employees also rotate assignments to avoid excessive repetition. The seven crew supervisors perform the same work as the other employees, but are responsible for observing the work of several disabled employees to verify the work is performed completely as required. The parties do not dispute that the employees at issue, as well as the funded employees, are disabled under the JWOD Act.

The Employer and Military both have work rules that apply to all employees employed by the Employer, both disabled and non-disabled. Further, the Employer's contract with the Military specifies a specific time target for each task performed by the Employer's employees. In practice, however, the Employer is providing work opportunities for disabled individuals, who frequently are dealing with barriers to competitive employment outside the JWOD Act context. Thus, the Employer balances its Military contract responsibilities with its disabled workforce resulting in some characteristics unique to the Employer's workplace.

1. Counseling, Training, or Rehabilitation Services

The Employer provides extensive job training to its disabled employees. The crew supervisors provide Harper information daily on disabled employees' skills and abilities, stability, dependability, and endurance, all typical barriers to entering the competitive employment workplace. Harper takes this written and verbal information and once every 2 weeks compiles a written evaluation for each disabled employee. Based on this frequent assessment, the Employer determines whether the disabled employees are performing appropriate tasks. If problems are apparent, the disabled employee may be given different tasks or additional training. These bi-weekly evaluations also form the basis for a yearly evaluation that assesses whether the employee could enter the competitive workforce or continues to have barriers to this transition. The Employer introduced blank bi-weekly and yearly evaluation forms, but completed evaluations are not contained in the record.

The Employer also provides some services to assist disabled employees with their specific challenges. Recognizing that transportation is frequently a barrier to employment for disabled individuals, the Employer organizes a rideshare program whereby non-disabled employees are compensated for providing transportation to their disabled coworkers. Harper also testified she frequently works with the disabled employees to make sure they understand the necessary bus schedules, and occasionally Harper will have to personally transport employees to and from their homes or to transit stations.

To the extent the Employer provides counseling, training, or rehabilitation services outside direct job training, this is not identified in the record. The Employer's Director of Human Resources testified the Employer "refers out" employees for counseling and mental health services, as the Employer lacks that capability in-house, but the record does not contain any details regarding these referrals, or whether the Employer provides any financial assistance in this regard. There is passing reference in the record to a "home

services” or “community living services” program that assists disabled individuals with cleaning, cooking, and outings, but it is not clear from the record whether this is part of the Employer’s AbilityOne division, whether these services are available to disabled employees, or whether this is a separate program similar to the Employer’s Disability Services division.

In sum, the record does not reveal whether or to what degree the Employer actually provides support for employees’ daily living activities, such as shopping, paying bills, and preparing meals.

2. Production Standards

Disabled employees are expected to complete their assigned tasks completely and properly, but Operations Manager Harper testified disabled employees are also allowed to work “at their own pace.” In situations where an assigned task is not completed properly, or where the employee’s own pace of work significantly deviates from the time designated in the service contract, the crew supervisor will intervene. The Employer’s disciplinary alternatives in these situations are discussed in the following section.

Crew supervisors’ intervention usually involves finishing a job and then reminding the disabled employee how to perform the job properly. If necessary, the crew supervisor could also retrain the disabled employee on how to perform the task correctly within the time allotted. Harper provided the specific illustrative example of non-funded employee Scott, who occasionally deviates from the proper pot washing method. When a crew supervisor observes this deviation, the crew supervisor brings this to Scott’s attention, reminds him of the proper procedure, and then verifies that Scott started over from the beginning and correctly performed the work. When asked to estimate how often this occurred, Harper estimated she or a crew supervisor observes the problem, reviews the proper method, and redirects Scott to perform the task again about three times a week.

3. Disciplinary Procedures

The Employer’s standard disciplinary procedure is to issue a verbal warning for an initial incident where an employee violates workplace rules, a written verbal for a second incident, a written warning on a third incident, followed thereafter by termination. Some rule infractions are so serious as to result in immediate termination, as detailed in the Employer’s handbook. However, as described by the Employer’s Director of Human Resources Julie Orchard, while all workplace rules apply to all employees, they are applied in a different manner for disabled employees.

In practice disabled employees receive multiple verbal corrections prior to each step of the disciplinary process. Additionally, guardians, case workers, and others involved in the disabled employee’s care may be involved in the disciplinary process in an attempt to develop workable solutions. According to Orchard and Harper, if a disabled employee continues to have difficulties performing their work satisfactorily and does progress through the disciplinary system, or commits an infraction that requires the individual to be removed from the Air Force Base, the Employer does not terminate the disabled employee, but will transfer the employee to its in-house custodial crew, referred to as the Pathways department, for additional training. If the Employer finds it necessary to transfer an employee from Fairchild Air Force Base to the Pathways department or some other work

setting, the Employer will meet with the employee's guardian, case worker, or other appropriate individual and execute a "work agreement," which memorializes the change taking place.

When asked to provide examples of the Employer applying its disciplinary procedures in this way, both Orchard and Harper described several examples in detail. However, most of these examples involved funded employees. The only example of a non-funded disabled employee receiving modified discipline involved the attendance issues of an employee named Aaron. Aaron repeatedly failed to arrive at work on time, multiple times a week, over a period of many months. Aaron also failed to appear at all for work on two occasions. Instead of discipline, however, the Employer engaged in a number of meetings with Aaron. Harper testified she met repeatedly with Aaron in an attempt to resolve the issue, up to and including providing him transportation to and from work and offering to buy him an alarm clock. The problem persisted, however, and after his second missed shift, Aaron was terminated. Aaron was not transferred and a work agreement was not arranged. Neither Orchard nor Harper could provide a comparator to Aaron's situation, as the Employer has not disciplined a non-disabled employee for attendance issues at the Base since commencing work there in March 2011.

4. Terms and Conditions of Employment

Disabled employees receive the same pay and benefits as non-disabled employees. Disabled employees generally work the same hours and shifts as non-disabled employees, but the Employer does accommodate special needs related to employees' disabilities in scheduling. Several examples of schedule accommodation were provided in the record. A number of disabled employees receive Social Security disability benefits, and are limited in the number of hours they may work. Consequently, the Employer tracks these employee's hours and ensures they do not jeopardize their benefits. Other scheduling accommodations include specific shift assignments. For example, two employees are scheduled to work afternoon shifts because their medications make it difficult to work in the morning. Another employee is only scheduled to work the slower evening shift because he becomes stressed if scheduled to work during the busier morning shift. The Employer also allows extra breaks, although it may only be a few moments, for certain needs such as diabetic employees checking their blood sugar, taking insulin, or eating as needed.

5. Tenure of Employment

The Employer has not placed any of the disabled employees at Fairchild Air Force Base in outside competitive employment, although this is the stated goal of the Employer's program. The Employer does not utilize job placement counselors or other employees whose job is specifically designated as helping disabled employees gain employment outside the contract.

III. ANALYSIS

A. The Board's Primarily Rehabilitative Standard

When faced with a rehabilitative program in the workplace, the Board has recognized a distinction between employees, those who under § 2(3) fall within the coverage of the Act, and "rehabilitation clients," who are not statutory employees. *Brevard Achievement Center*, 342 NLRB 982 (2004); *Goodwill Industries of Denver*, 304 NLRB 764 (1991); *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991). The standard applied in making this distinction is the "the primarily rehabilitative standard." *Brevard* at 984. Specifically, if the relationship between the employer and the individual is a typical industrial relationship, then the employee is considered a statutory employee within the meaning of § 2(3). *Id.* If, however, the relationship is a rehabilitative relationship, with working conditions that are not typical of the private sector, then the individuals will be found to be rehabilitation clients outside the coverage of the Act. *Id.* Consistent with the Board's approach in other areas of the law, where a party seeks to exclude an otherwise eligible employee from the coverage of the Act as a rehabilitation client, that party has been held to bear the burden of proof in that regard. *Goodwill Industries of North Georgia*, 350 NLRB 32, 35 (2007).

In these types of cases, the Board examines numerous factors in determining the nature of the employer-employee relationship, including: (1) the existence of employer-provided counseling, training, or rehabilitation services; (2) the existence of any production standards; (3) the existence and nature of disciplinary procedures; (4) the applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility); and (5) the average tenure of employment, including the existence/absence of a job-placement program. *Goodwill Industries of North Georgia* at 36.

In 2004, the Board reaffirmed the primarily rehabilitative standard in *Brevard Achievement Center*, and there concluded the employees at issue were rehabilitation clients, not statutory employees. In 2007, the Board addressed the issue again in *Goodwill Industries of North Georgia* and came to the opposite conclusion, that the employees at issue were statutory employees. In *Goodwill Industries of North Georgia* the Board specifically addressed how the facts differed from *Brevard*, and the distinctions between the two cases highlight how the Board applies the factors described above to assess whether a primarily rehabilitative relationship exists. In addressing each of the factors in detail in the following sections, I have compared the instant record to those in *Brevard* and *Goodwill Industries of North Georgia*. Before turning to the specific factors, it is necessary to address two arguments made by the Employer.

First, the Employer maintains that the disabled employees' employment under a JWOD Act contract is itself evidence that the relationship is primarily rehabilitative. I do not find this is the case, as the Board has repeatedly addressed similar workplaces involving JWOD Act contracts, yet has found both employee status and rehabilitation client status in the JWOD Act context. However, to the extent the Employer raises this point to establish its disabled employees do have severe disabilities consistent with the definition in the JWOD Act, I recognize this point is relevant. As the Board stated in *Goodwill Industries of North Georgia* "Although it is not the Board's province to police an employer's compliance with the requirements of the JWOD Act, the nature of the disabilities of workers the Employer

classifies as disabled, and the standard the Employer applies in making those classifications, are relevant..." *Goodwill Industries of North Georgia* at 37. For instance, in *Goodwill Industries of North Georgia*, the Employer admitted to using the disability standard contained in the Americans with Disabilities Act (ADA), as opposed to the JWOD Act definition, and that it classified employees with diabetes, high blood pressure, and high cholesterol as disabled. *Id.* Here, there is no contention that the Employer utilizes a disability standard other than the JWOD standard, or that the employees classified as disabled lack a severe disability.

Second, the Employer appears to assert on brief that Petitioner's stipulation regarding the rehabilitation client status of the funded employees supports the Employer's position regarding the non-funded disabled employees. I do not draw that conclusion regarding the stipulation. If aspects of the funded employees and non-funded disabled employees employment are the same, this may constitute evidence in support of the Employer's position. I do not, however, find that Petitioner's acknowledgement alone that one group in the workplace is composed of rehabilitation clients is conclusive in determining the status of the group of employees at issue. Again, it is not in dispute that the Employer's workplace has a rehabilitative function. Rather, the question is whether for the non-funded disabled employees that function is so prevalent as to make the employment relationship primarily rehabilitative

B. Primarily Rehabilitative Factors

1. Extent of Employer-Provided Counseling, Training, or Rehabilitation Services

It is not mandatory that the Employer provide counseling and rehabilitative services in order for the Board to find a primarily rehabilitative relationship. *Goodwill Industries of North Georgia* at 37. However, the existence of these services and their extent is a factor to be considered in determining whether a primarily rehabilitative relationship exists.

In *Brevard* the employer provided job training, mental health counseling, and assistance with daily living activities such as shopping, paying bills, and preparing meals, to its employees. *Brevard* at 983. The employer also referred its disabled workers to an outside mental-health agency for medication checks and counseling and, when necessary, provided financial assistance for these services. *Id.* In contrast, in *Goodwill Industries of North Georgia*, the employer provided no onsite counseling, training, and/or rehabilitative services. *Goodwill Industries of North Georgia* at 37. To the extent the employer in *Goodwill Industries of North Georgia* employed an offsite staff of job coaches and case managers, the Board found there was no evidence regarding the nature or extent of these individuals' actual contact with employees. *Id.*

Here, evidence of Employer-provided counseling, training or rehabilitative services is minimal. The Employer provides some assistance directly related to disabled employees employment, such as helping employees obtain their food handler card and the rideshare program. The record does not contain evidence showing the Employer providing assistance with activities outside the workplace, such as shopping, paying bills, and preparing meals, as the employer did in *Brevard*.

To the extent the Employer provides these services or others as part of its “referring out” employees for counseling and mental health services, the nature and extent of these contacts and the services provided are not developed in the record. Similarly, if employees are able to obtain daily living assistance through the Employer’s home or community living services programs mentioned in the record, this also is not developed in the record. See *Goodwill Industries of North Georgia* at fn.22 (“Moreover, Brevard did not hold that the extent to which disabled workers actually use available counseling services could never be probative of the nature of the relationship.”)

In sum, while the instant record contains evidence of job training, there is no evidence that the Employer here provides mental health counseling and assistance with daily living activities of the type provided in *Brevard*. In light of the foregoing and the record as a whole, I find this factor weighs in favor of Petitioner’s position.

2. Production Standards

In *Brevard* the Board found that while the employer assigned non-disabled and disabled employees the same amount of work and expected the work to be done “at a certain level of quality,” employees were allowed to work at their own pace. *Brevard* at 983. If the work was not completed on time or was done incorrectly, a trainer was assigned to work with the employee until the work was done correctly, and an assessment was made regarding whether the assignment was the correct fit for the disabled employee. *Id.* In *Brevard* some employees received one-on-one assistance from a trainer for the duration of their employment. *Id.*

In *Goodwill Industries of North Georgia* the Board acknowledged some evidence of accommodation existed, modifying disabled employees’ schedules and assigning disabled employees to areas that were easier to clean. *Goodwill Industries of North Georgia* at 38. However, the record also contained evidence to the contrary; noting the example of a diabetic employee denied a regular lunch break and disabled employees assigned to “difficult” floor care tasks. *Id.* The Board also noted that the record revealed the supervisors making assignments frequently were not aware of an employee’s disability, were provided no guidance on how to make assignments to the disabled employees, and one supervisor had been explicitly told *not* to make accommodations for employees’ disabilities. *Id.*

Here, as in the cases described above, disabled employees are expected to complete their assigned tasks completely and properly. As in *Brevard*, the Employer’s disabled employees work “at their own pace,” and the evidence supports the conclusion that when an assigned task is not completed properly on time, the crew supervisor completes the task. The Employer’s non-funded disabled employees do not receive the one-on-one assistance that was present in *Brevard*, as the instant record only developed evidence of this level of assistance being provided to funded employees.

However, the instant record does not contain the type of contravening evidence at play in *Goodwill Industries of North Georgia*. While examples of completed bi-weekly reports are not contained in the record, Harper’s testimony supports the conclusion she is constantly assessing the appropriateness of disabled employees’ assignments based on her own observations and the reports of the crew supervisors. Thus, unlike in *Goodwill*

Industries of North Georgia, the crew supervisors here appear to closely scrutinize and note employees' disabilities and the impact of such on work performance. Indeed, the record reveals a concrete example regarding employee Scott and involving Harper or a crew supervisor as frequently as three times a week reviewing Scott's work, noticing a deficiency, and engaging in retraining that requires the work to be redone. Such evidence supports finding a primarily rehabilitative relationship. This extensive, time-consuming correction and re-training is not a hallmark of the "typical industrial relationship."

I recognize that the assistance present in *Brevard* is, here, concretely revealed largely in connection with funded employees. Yet, the record as a whole supports finding that funded and non-funded disabled employees work at a pace suited to their individual situation. As noted above, the instant record reveals, unlike in *Goodwill Industries of North Georgia*, that the Employer is acutely aware of disabled employees' limitations and is constantly assessing whether they are being given assignments and support sufficient to complete their work.

In light of the above and the record as a whole, I find that this factor supports the Employer's position.

3. Disciplinary Procedures

In *Brevard* the application of the employer's disciplinary procedure to disabled employees was straightforward, in that the progressive discipline policy only applied to non-disabled workers, as disabled workers were not subject to discipline for any conduct related to their disabilities. *Brevard* at 983. If a disabled employee was unable to perform their work, they were transferred to another team. *Id.* In *Goodwill Industries of North Georgia*, the disciplinary procedure applied to disabled employees, but was applied in a more lenient fashion. *Goodwill Industries of North Georgia* at 38. Specifically, there the employer tried to provide additional training and counseling in lieu of discipline, and when discipline was necessary, disabled employees were given additional chances. *Id.* A specific example was provided of a disabled employee who was provided notice of inadequate performance six times prior to termination, while a non-disabled employee only received notice on three occasions prior to termination. *Id.* In both *Brevard* and *Goodwill Industries of North Georgia* the Board found this factor weighed in favor of finding a primarily rehabilitative relationship.

Here, the Employer's stated approach to discipline and its disabled employees is similar to the leniency described in *Goodwill Industries of North Georgia*. The example described in the previous section, involving employee Scott, exemplifies such leniency. Specifically, while Harper or a crew supervisor must repeatedly review Scott's work, and deficiencies requiring Scott's work to be redone happen frequently, there is no evidence of any discipline of Scott. In sum, it is undisputed that Scott's work performance problems are corrected with close observation and frequent retraining.

Although a non-disabled employee comparable was not provided, the example of disabled employee Aaron's attendance problems demonstrates significant leniency compared to what is typically found in a competitive workplace. This is true both in regard to the number of chances Aaron was provided, but also the extent to which Harper worked with him to try to correct the problem (including personally picking him up at home and

transporting him to the workplace, and offering to buy an alarm clock). I note that while it appears from the record Aaron was eventually terminated and not transferred pursuant to a work agreement, this was also the case with the specific example discussed in *Goodwill Industries of North Georgia*; yet there, the Board ultimately concluded this factor weighed in favor of finding a primarily rehabilitative relationship. See *Goodwill Industries of North Georgia* at fn. 33. Further, unlike in *Goodwill Industries of North Georgia* at 39, the Employer's witness testimony here was not at "odds" or contradictory with regard to the factor of disciplinary procedures.

Problematic in analyzing this factor, is that almost all of what is discussed in the instant record in regard to lenient discipline involves *funded* employees. Specifically, the Employer introduced detailed testimony regarding retraining, reassignment, and eventual transfer pursuant to a work agreement of employees Zach and Ryan, and to a lesser extent the manner in which employees Meaghan and Nick had behavior that was addressed under the disciplinary system. All of these employees, however, are funded employees. The Employer asserts these examples demonstrate leniency toward disabled employees, but in actuality these examples fail to clearly demonstrate that funded and non-funded disabled employees are similarly treated in terms of the Employer's disciplinary process.

Notwithstanding the foregoing, I find evidence of leniency is strong enough in the record to tip this factor in favor the Employer's position that the relationship is primarily rehabilitative.

4. Terms and Conditions of Employment

In *Brevard* and *Goodwill Industries of North Georgia*, both disabled and non-disabled employees shared the same wages and benefits and generally worked the same hours. In *Brevard*, the Board noted these similarities, but highlighted that the critical difference in the terms and conditions of employment was that disabled employees were allowed to work at their own pace and were not subject to discipline. However, in *Goodwill Industries of North Georgia*, the Board found many supervisors were unaware of employees' disabilities or disregarded them, demonstrating that the Employer had failed to show any significant distinction between the terms and conditions of employment of disabled and non-disabled employees.

Here, both disabled and non-disabled employees share the same wages and benefits and generally work the same hours, as was the case in both *Brevard* and *Goodwill Industries of North Georgia*. In the instant case, the Employer is conscious of employees' disabilities, assigns tasks accordingly, and reassess on a frequent basis whether each disabled employee is performing appropriate work. Further the record contains evidence of the Employer accommodating disabilities in scheduling, from recognizing Social Security disability benefit limitations to scheduling employees for afternoon shifts because their medications make it difficult to work in the morning. On balance, this accommodation of employees' needs is more similar to what was present in *Brevard* than the lack of recognition present in *Goodwill Industries of North Georgia*.

On the basis of the foregoing and the record as a whole, I find this factor weighs in favor of the Employer's position that the relationship is primarily rehabilitative.

5. Tenure of Employment

In *Brevard*, the employer evaluated employees “at least annually” and “routinely” to determine whether they were prepared to transition to competitive employment. *Brevard* at 983. In *Goodwill Industries of North Georgia*, only one employee made such a transition in the 2 years prior to the hearing, and only four or five employees were referred to outside employment in the previous 5 years. *Goodwill Industries of North Georgia* at 39. In finding this factor weighed against establishing a primarily rehabilitative relationship, the Board also noted the Employer did not employ any sort of job placement coordinator or utilize a job placement program. *Id.* *Goodwill Industries of North Georgia* involved an employee complement of approximately 20 disabled employees, about the same in size as is present in this case. *Goodwill Industries of North Georgia* at 32.

Here, the evidence clearly demonstrates that the Employer has an annual review process in place to make a transition assessment, similar to *Brevard*. However, in the year since the Employer commenced work at the Air Force Base, it has not placed any of its disabled employees from the Base in outside competitive employment. Also, the Employer does not utilize job placement counselors or other employees whose job is specifically designated as helping disabled employees gain employment outside the contract. While the lack of any transition to competitive employment would appear to favor Petitioner’s argument, I do not draw this conclusion because the combination of a short period of time and a relatively small complement of employees makes for a small sample size. Yet I will not speculate, given time, that such transition is likely to occur as insufficient evidence in the record warrants such conclusion. In sum, the absence of actual transition or evidence establishing the likelihood of such, offsets favorable evidence regarding the Employer’s annual review process.

In view of the above and the record as a whole, I find tenure of employment essentially a neutral factor favoring neither party.

C. Conclusion Regarding Primarily Rehabilitative Factors

Having considered the parties’ arguments regarding the disabled employees in question, I conclude the relationship is primarily rehabilitative in nature. The production standard, disciplinary procedure, and terms and conditions of employment factors here all favor the Employer’s position and this combination of factors is sufficient to carry the Employer’s burden. While I recognize the counseling, training and rehabilitative services factor here favors the Petitioner, I note this is only a factor, as the Board specifically stated in *Goodwill Industries of North Georgia* that the existence of these programs is not mandatory in order for the Board to find a primarily rehabilitative relationship.

IV. CONCLUSION

I find the 17 employees classified by the Employer as disabled under the JWOD Act are rehabilitation clients and not employees within the meaning of § 2(3) of the Act, for the reasons stated above. Petitioner has indicated it is willing to proceed to an election under these circumstances, and I direct an election accordingly. Marilyn Beck shall vote subject to challenge in the election, with her disputed § 2(11) status to be resolved in post-election proceedings, if necessary.

For these reasons and in view of the record evidence, I shall direct an election in the following appropriate Unit:

All full and regular part-time food service workers and crew supervisors employed by the Employer at Fairchild Air Force Base; excluding job coaches, disabled employees, funded disabled employees, the Operations Manager, guards and supervisors as defined by the Act.

There are approximately 10 employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding 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 that 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. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by United Food and Commercial Workers Local 1439.

A. List of Voters

In order to assure 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 that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in Region 19 of the National Labor Relations Board, 915 Second Avenue, Suite 2948, Seattle, Washington 98174 on or before **June 8, 2012**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the

filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

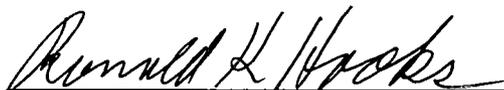
B. Notice Posting Obligations

According to Board Rules and Regulations, § 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. § 103.20(c) of the Board's Rules and Regulations 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.

C. Right to Request Review

Under the provisions of § 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 NW, Washington, DC 20570. This request must be received by the Board in Washington by **5:00 p.m. (ET) on June 15, 2012**. The request may be filed through E-Gov on the Board's web site, <http://www.nlr.gov>, but may not be filed by facsimile.⁴

DATED at Seattle, Washington on the 1st day of June, 2012.



Ronald K. Hooks, Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

⁴ To file a request for review electronically, go to www.nlr.gov and select the "File Case Documents" option. Then click on the E-file tab and follow the instructions presented. Guidance for E-filing is contained in the attachment supplied with the Regional office's original correspondence in this matter, and is also available on www.nlr.gov under the E-file tab.