

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

SINAI HOSPITAL OF BALTIMORE, INC.  
d/b/a VSP

Employer

and

Case 05-RC-244319

1199 SEIU UNITED HEALTHCARE  
WORKERS EAST

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Sinai Hospital of Baltimore, Inc. d/b/a VSP<sup>1</sup> (the Employer), a corporation with an office and place of business in Baltimore, Maryland, is engaged in the operation of an acute care hospital providing inpatient and outpatient medical care.<sup>2</sup> The Employer also operates a program called Vocational Services Program (VSP) which provides vocational services and employment opportunities to individuals with “severe” disabilities.<sup>3</sup> The Petitioner, 1199 SEIU United

---

<sup>1</sup> In the petition, the Employer's name appears as “VSP A/W Sinai Hospital a Life Bridge Health Center.” The Employer’s Statement of Position, its Questionnaire on Commerce, and Board Exhibit 2 represent its correct legal name to be Sinai Hospital of Baltimore, Inc. d/b/a VSP. During the hearing, there was testimony that VSP is a department within Sinai Hospital of Baltimore, Inc. Neither party sought to clarify this testimony or otherwise made a motion to amend the name of the Employer. Because the Employer’s attorney represented that its correct legal name is Sinai Hospital of Baltimore, Inc. d/b/a VSP in legal documents, I will treat that as the Employer’s name herein.

<sup>2</sup> Neither party was able to establish with certainty whether the facility in question is in Baltimore, Maryland or Woodlawn, Maryland. However, it is clear from the record that both parties are contemplating the same facility, the Social Security Administration’s (SSA’s) Perimeter East Building (the PEB), which is located in either Woodlawn or Baltimore, two areas within the State of Maryland which are geographically adjacent. For purposes of this decision, I will refer to the location of the PEB as Baltimore.

<sup>3</sup> The Employer stipulated, and I find, that during the 12-month period ending June 30, 2019, the Employer derived gross revenues in excess of \$250,000 and purchased and received at its Baltimore, Maryland facility goods valued in excess of \$5,000 directly from points outside the State of Maryland. Additionally, the parties stipulated, and I find, the Employer is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the National Labor

Healthcare Workers East (the Petitioner or the Union),<sup>4</sup> filed a petition with the National Labor Relations Board (the Board). That petition, as clarified at hearing, seeks a unit of all full-time and regular part-time janitors<sup>5</sup> employed by the Employer at the PEB currently located in Baltimore, Maryland, excluding all office clericals, professionals, managerial and confidential employees, guards, and supervisors as defined in the Act.<sup>6</sup>

The primary issue raised in this case is whether janitors employed by the Employer at the PEB have a primarily rehabilitative, rather than a typically industrial, relationship with the Employer, and therefore are not “employees” within the meaning of Section 2(3) of the Act. This case also raises the issue asserted by the Employer, explained below, that all of its janitors share a community of interest such that if its disabled janitors are not employees within the meaning of the Act, then a unit comprised solely of the nondisabled janitors would be an inappropriate “microunit.”

The Board, in *Brevard Achievement Center*, 342 NLRB 982 (2004), reaffirmed the “typically industrial/primarily rehabilitative” standard for determining the statutory employee status of disabled individuals working in rehabilitative vocational programs. Under this standard, the Board examines the nature of the relationship between the disabled workers and their employer:

If the relationship is guided primarily by business considerations, such that it can be characterized as “typically industrial,” the individuals will be found to be statutory employees; alternatively, if the relationship is “primarily rehabilitative” in nature, the Board examines numerous factors including, inter alia, the existence of employer-provided counseling, training, or rehabilitation services; the existence of any production standards; the existence and nature of disciplinary procedures; the applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility); and the average tenure of employment, including the existence/absence of a job-placement program.

id. at 984.

---

Relations Act (the Act), and is a healthcare institution within the meaning of Section 2(14) of the Act and is subject to the jurisdiction of the National Labor Relations Board.

<sup>4</sup> The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

<sup>5</sup> The Petitioner orally amended its petition at the hearing to reflect that it is not seeking inclusion of housekeepers in the petitioned-for unit because there are no housekeepers employed by the Employer at the Social Security Administration’s Perimeter East Building.

<sup>6</sup> The parties stipulated, and I find, there is no contract bar, or other bar, to an election.

As the party asserting that the workers at issue are not statutory employees, the Employer has the burden to demonstrate the primarily rehabilitative nature of its relationship with its disabled janitors. See *Goodwill Industries of North Georgia, Inc.*, 350 NLRB 32, 35 (2007).

The Employer asserts that the janitors employed by the Employer at the PEB have a primarily rehabilitative, rather than a typically industrial, relationship with the Employer, and therefore are not “employees” within the meaning of Section 2(3) of the Act. The Petitioner contends the Employer has not demonstrated that the employment of the individuals in question is primarily rehabilitative in nature. Accordingly, the Petitioner maintains all of the Employer’s janitors at the PEB should be included in the unit as Section 2(3) employees.

Additionally, the Petitioner asserts that, if the disabled janitors are found not to be employees, an election should be directed for a unit comprised of the Employer’s nondisabled janitors. The Employer argues that such a unit, comprised solely of the nondisabled janitors, would be an inappropriate microunit.

I have considered the evidence and arguments presented by the parties on this issue. As discussed below, I conclude that the Employer has not met its burden of showing that its relationship with its approximately 35<sup>7</sup> disabled janitors at the PEB is primarily rehabilitative.<sup>8</sup> Accordingly, I conclude that all of the disputed janitorial workers are employees within the meaning of Section 2(3) of the Act. That finding renders moot the Employer’s argument that a unit comprised solely of its nondisabled janitors would be an inappropriate microunit.<sup>9</sup>

To provide a context for my discussion of these issues, I will first provide an overview of the procedural history of this petition and the Employer’s operations. I will then present the facts and reasoning that support my conclusions on this issue, tracking the factors identified by the Board in *Brevard* and *Goodwill Industries of North Georgia*.

## **I. PROCEDURAL HISTORY**

The Employer timely filed a Statement of Position asserting that none of the janitors in the petitioned-for unit are employees within the meaning of Section 2(3) of the Act. A hearing officer of the Board held an initial hearing on July 12, 2019, and at the beginning of that hearing

---

<sup>7</sup> There was testimony at the second hearing that three additional janitors had been hired during the interim between the two hearings and the record is unclear about how many of those three janitors are disabled. The testimony at the first hearing was that 35 of the Employer’s janitors are disabled.

<sup>8</sup> As discussed below, the Employer’s claim that the nondisabled workers are not employees within the meaning of the Act because their terms and conditions of employment are so similar to the disabled workers significantly undercuts the Employer’s arguments about the Section 2(3) status of the disabled workers.

<sup>9</sup> As explained below, the Employer’s argument would not be persuasive if my legal conclusions regarding the Section 2(3) status of the janitors were such that it must be considered.

the Employer stipulated that if it was determined that its disabled janitors at the PEB are not employees within the meaning of the Act, its remaining nondisabled janitors would be an appropriate unit for the purposes of collective bargaining.

Following the initial hearing date, the parties were given the opportunity to file briefs with me. In its brief, the Employer argued, contrary to the stipulation received at hearing, that the terms and conditions of employment for its disabled and nondisabled janitors at the PEB are so similar that none of the janitors in the petitioned-for unit are employees within the meaning of the Act. “[T]he Board will not honor a stipulation that is contrary to the Act[.]” *Westlake Plastics Co.*, 119 NLRB 1434, 1441 (1958), citing *F.M. Reeves & Sons, Inc.*, 114 NLRB 1243 n. 2 (1955) (Board rejected an agreement of the parties to include individuals who were supervisors within the unit). Accordingly, I reopened the record to give the parties an opportunity to introduce evidence on the issue the Employer took in its first post-hearing brief regarding the employee status of its nondisabled janitors at the PEB.

A second hearing date occurred before a hearing officer of the Board on September 12, 2019, and both parties were again given a full opportunity to call and examine witnesses. At the outset of the second hearing date, the Employer raised for the first time its argument that if its disabled janitors are not employees under Section 2(3) of the Act, but the nondisabled janitors are employees, then the nondisabled janitors would not be an appropriate unit for the purposes of collective bargaining because they share an overwhelming community of interest with the disabled janitors.<sup>10</sup> After the second hearing, the Employer and the Union filed post-hearing briefs with me.

## **II. OVERVIEW OF THE EMPLOYER’S OPERATIONS**

The Employer operates an acute care hospital providing inpatient and outpatient medical care. The Employer is a member of LifeBridge Health. LifeBridge Health is a business entity which includes the Employer, Northwest Hospital, Levindale, Carroll Hospital, and other entities. The record established that VSP is not a company, but instead is a department within the Employer’s operation. VSP is comprised of at least two distinct programs: (1) vocational services and (2) contracts and employment.<sup>11</sup>

Individuals are referred to VSP because of the vocational services it provides, which include a career assessment and training. After completing the vocational services program offered by VSP, referred individuals are given the opportunity to find employment through

---

<sup>10</sup> While the Employer did not seek to amend its Statement of Position to assert its microunit contention, it was not prevented in any way from adducing evidence in support of that argument, or in support of its assertion that its nondisabled janitors are not employees within the meaning of the Act.

<sup>11</sup> The division between the Employer’s vocational services program, where it provides assessment and training for referred individuals, and its contract and employment program, where it places or employs individuals, is similar to the different departments operated by the employer in *Goodwill Industries of North Georgia*. 350 NLRB 33 (2007).

VSP's contracts and employment program, either with the Employer or with an outside employer. The Employer offers training programs to individuals referred to VSP in order to train those individuals in what the Employer terms "essential skills" and "hard skills." "Essential skills" include getting to work on time, dressing appropriately, using proper hygiene, and interacting appropriately with a supervisor. VSP Director Lisa Mules (Mules) testified at the hearing that hard skills include the Employer's clerical skills and work adjustment training programs. An example of the work adjustment training program was given as someone training in the kitchen at Sinai Hospital learning to slice and dice tomatoes or stock cutlery. Those skills trainings occur at a different facility from the PEB and are part of the Employer's vocational services program. One such training program is an internship-based training program where an individual may be placed at Sinai Hospital or another entity within LifeBridge Health in a training capacity meant to simulate a work environment. The training period offered to individuals referred to VSP occurs prior to VSP assisting those individuals with finding employment, as they are separate programs. The training program is not offered to individuals who are not referred to VSP. After completing the Employer's internship-based training program, the individuals move on to placement, which could be either working for the Employer in some capacity, such as performing janitorial work at the PEB, or placement with an outside employer such as Walmart, McDonald's, or University Medical Center. The petitioned-for disabled janitors matriculated out of VSP's training program, which is only available to disabled individuals, and received placement at PEB through the employments and contracts program of VSP. The petitioned-for nondisabled janitors did not go through the training programs described above which the Employer offers through the vocational services program under its VSP department.

Separate from the vocational services program provided by VSP, the Employer administers a contracts and employment program under its VSP department. Under its contracts and employment program, the Employer maintains a contract with SSA to perform janitorial services at the PEB and has provided staffing to SSA since at least 1987. This contract to provide the janitorial services for SSA at the PEB is not competitively bid, but instead goes through SourceAmerica and the President's Committee. Mules testified that SourceAmerica is a nonprofit agency which coordinates the program and that everything flows through SourceAmerica to the President's Committee. It is unclear from the record whether SourceAmerica is an agency of the Federal Government. The record is also unclear about the precise nature of the President's Committee, though it establishes that the President's Committee is appointed by the President of the United States and "everything flows through SourceAmerica to the Committee (Tr. 272)." The Employer provides these janitorial services to SSA at the PEB under the Javits-Wagner-O'Day Act (the JWOD Act). The JWOD Act created the AbilityOne program. In order to operate under the JWOD Act, at least 75 percent of the janitors the Employer employs at the PEB must have "severe disabilities." The disabilities of the individuals employed by the Employer must be certified, which is typically accomplished through medical, psychological, or psychiatric documentation. SourceAmerica audits the Employer on an annual basis to ensure continued compliance with its requirements. Pursuant to these audits, the Employer annually completes competitive employment evaluations for each worker. The competitive employment evaluations document the worker's disability, provide general historical information about the individual, and describe achievements and weaknesses during the course of the year that must be improved upon. Finally, the competitive employment evaluations

document the limitations of each individual and the support services the Employer provides those individuals related to their limitations.<sup>12</sup>

Individuals are able to gain employment with the Employer by being referred to VSP, or by approaching VSP themselves. Disabled workers are referred to VSP, and nondisabled workers approach VSP themselves, either applying through a friend already in the program or as a walk-in. The individuals who are referred to VSP get referred through a variety of sources, including: Division of Rehabilitation Services under the Maryland State Department of Education (DORS), Veterans Administration, Chimes, and Arc of Baltimore. After an individual is referred, that individual fills out an application and is screened to determine eligibility for employment. The screening process involves interviewing with the Project Manager and Case Manager, after which, if a candidate is deemed eligible for employment, the candidate submits to a criminal background check required by the government, a drug screen, and a physical within LifeBridge Health. Referred individuals receive the vocational services portion of the Employer's VSP program, such as the various skills trainings. Once an individual completes the vocational services program, that individual can be placed in outside employment or at a contract the Employer maintains, like that at the PEB. Disabled and nondisabled workers go through the same application process, except for the requirement for disabled workers that VSP must have background documentation related to each disabled worker's limitations and accommodations.

### **III. RELEVANT FACTORS OF CONSIDERATION**

#### *a. The Nature of the Disabilities of the Individuals at Issue*

Thirty-five of the 44 individuals who make up the Employer's janitorial staff at the PEB are considered by the Employer to be severely disabled, according to the definition contained in the JWOD Act. The disability status of these individuals is audited on an annual basis in order for the Employer to remain compliant with the requirements of the JWOD Act. Additionally, Mules testified that beyond the 35 individuals who are documented as disabled, another three individuals who are considered nondisabled by the Employer "present evidence of having a disability (Tr. 26)." The individuals employed by VSP at PEB have physical disabilities as well as mental disabilities like schizophrenia, paranoid bipolar disorder, autism, and Down syndrome. I do not find that the Employer providing jobs through the JWOD Act is determinative of whether the Employer's relationship with its janitors at the PEB is primarily rehabilitative in nature. Rather, I find that the Employer has sufficiently established the legitimate disabilities of its disabled janitors working at the PEB. Regarding its nondisabled janitors, other than vague and general testimony about three of those janitors "presenting" as disabled, I find the Employer has not established its nondisabled janitors are disabled.

---

<sup>12</sup> The Employer did not introduce any of these competitive employment evaluations into the record, despite its practice of documenting the support services the Employer provides its disabled janitors related to their limitations.

*b. Terms and Conditions of Employment and Production Standards*

In *Brevard*, the Board stated that one of the factors in the “primarily rehabilitative” analysis is “[t]he applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility).” 342 NLRB at 984. The Board noted in *Goodwill Industries of North Georgia* that “[t]wo former supervisors... testified that, as supervisors, they were never made aware of the workers’ disabilities, nor were they provided any guidance as to the types of assignments disabled workers should receive.” 350 NLRB at 33. There was some evidence in *Goodwill Industries of North Georgia* that the employer there would, “modify job duties or work schedules or otherwise accommodate the disabled workers to enable them to successfully perform their jobs.” *id.* at 38. But the Board noted there was also “evidence that cast doubt on” the evidence of modification to job duties and work schedules for disabled workers. *ibid.*

With respect to production standards, the Board in *Goodwill Industries of North Georgia* found that the expectation of the employer in that case that, “disabled and nondisabled workers alike... complete their assigned cleaning tasks by the end of their 8-hour shifts” constituted the “maintenance of productivity standards” which “weigh[ed] against a finding of a primarily rehabilitative relationship.” *id.* In *Brevard*, the disabled workers were “permitted to work at their own pace” and “if [a disabled worker forgot] his or her responsibilities, [Brevard] sen[t] out a trainer to correct the problem.” 342 NLRB at 983.

The evidence in the record is consistent regarding the wages and other benefits received by the Employer’s janitors at the PEB. Regardless of disability status, all of the Employer’s 44 workers in the petitioned-for unit receive the same wages and other benefits, pursuant to the applicable Wage Determination governing the Employer’s contract with SSA.<sup>13</sup> Additionally,

---

<sup>13</sup>The Employer repeatedly asserts, through witness testimony and in both briefs it filed, that it has no control over the wages it pays its workers at the PEB because those are set by the Wage Determination governing its contract with SSA. Despite that claim, the Board has made it abundantly clear that:

“[The] Service Contract Act does not remove employers’ control over essential terms and conditions of employment by setting minimum standards with which employers must comply. The economic constraints within which employers subject to the Service Contract Act must operate are no different from the economic restrictions placed on any private contractor by the marketplace and by the Fair Labor Standards Act, 29 U.S.C. § 206... [the Employer’s] contract here may set minimum wage and benefit requirements, but the Employer is able to bargain with the employees over the terms and conditions of employment and is free to compensate its employee at more than the minimum levels set by the DOL.”

See, e.g., *Dynaelectron Corp.*, 286 NLRB 302, 304 (1987).

The Employer is compensating its janitors at the PEB at the minimum levels required by law, but it is free to compensate its janitors at levels beyond the statutory minimum, and thus can control aspects of worker wages.

the janitors all work eight-hour shifts, irrespective of disability status. The Employer's workers at the PEB each get three breaks per shift, regardless of disability status. Finally, disabled and nondisabled janitors receive the same employee benefit plans.

With respect to basic expectations of its janitors, the Employer applies its probationary period to both disabled and nondisabled workers who are newly hired. While the Employer elicited testimony suggesting the Employer does not maintain traditional production standards for any of its workers at the PEB,<sup>14</sup> the record demonstrates that the Employer expects its janitors to complete assigned tasks during their shifts. This is evidenced by the testimony and exhibits establishing the Employer disciplines and discharges janitors, regardless of disability status, for sleeping on the job, taking unauthorized breaks, failing to put supplies away, and having unacceptable work performance. Accordingly, there are production standards in effect for the Employer's janitors working at the PEB. The existence of production standards weighs against a finding of a primarily rehabilitative relationship.

The only Employer witnesses who could testify about the day-to-day work at the PEB were the four witnesses called by the Employer. None of those four witnesses work full-time at the PEB. The witness called by the Employer who spends the most time at the PEB was Senior Project Manager Robinita Michelle Edmonds-Hill (Edmonds-Hill). Edmonds-Hill testified that she is at the PEB between 80 and 85 percent of her time. Edmonds-Hill does not directly supervise any of the Employer's janitors at the PEB; the Employer's organizational chart shows the Project Managers and the Contract Site Supervisors as two levels of supervision between Edmonds-Hill and the janitors. The Contract Site Supervisors directly supervise the Employer's janitors at the PEB. The Employer elected not to call any of its PEB Contract Site Supervisors or Project Managers during the hearing. However, Case Manager Veronica White (White) testified that while all 44 janitors have the same job description, if a disabled worker may not completely grasp a certain task, that disabled worker may be moved to a different task. At the same time, if a disabled janitor performs a task with less speed, he may, for example, be given a smaller area to work on or assigned to a different area, or he may be given lighter objects to lift if he has trouble lifting heavier objects.

Regarding the assignment of tasks to janitors, there was different testimony from different sources. No testimony was elicited at the hearing regarding how duties are assigned, beyond that they are assigned by the Contract Site Supervisors at beginning of shift meetings, with Mules specifically testifying that she is not involved with the assignment of duties. Case Manager White testified that most of the workers get their daily tasks together, but there are some workers who receive their tasks separately so they are not embarrassed by the manager who makes the assignments. However, White also testified that tasks are assigned by the Contract Site Supervisors, and she did not indicate that she is present when tasks are assigned. Moreover, because White only works at the PEB one or two days a week, if she is ever present when tasks are assigned, her presence is infrequent. White's testimony about the assignment of

---

<sup>14</sup> The example given was Mules testifying "we don't have production standards like you have to clean 4,000 square feet an hour (Tr. 57)."

tasks was contradicted by the only two PEB janitors to testify at the hearing, Gregory Parker (Parker) and Wilzona Tyler (Tyler), who have firsthand knowledge of the process. Parker and Tyler both testified the workers always receive task assignments together, and neither had ever seen anyone pulled aside to be assigned tasks separately. Because White works elsewhere the majority of her time, I accord greater weight to the testimony of Parker and Tyler regarding the assignment of tasks, as they work full-time at the PEB and are present every shift for the assignment of tasks.

The same six Contract Site Supervisors supervise the work of the disabled and nondisabled janitors. Much like the supervisors in *Goodwill Industries of North Georgia*, the Employer's supervisors do not know who is disabled and who is nondisabled, although there was some testimony that the supervisors are aware of accommodations. However, the testimony on this point was vague and general, and was not elicited from the supervisors themselves. White testified about one of the workers at the PEB who has a prosthetic leg who is given the opportunity for extra breaks as a result of White's intervention. White also testified about another worker who had difficulty reading so she made a photo schedule showing him what he should be doing at different times of the day.<sup>15</sup> Tyler, a current nondisabled janitor, testified during the hearing. She has worked as a supervisor, lead janitor supervisor, and janitor during the course of her 30 years working for the Employer. Tyler was unable to recall there ever being a time when she was a supervisor where any employee, whether disabled or nondisabled, asked for additional breaks because of a medical condition, nor was she aware of any employees being given extra breaks because of a medical condition. Parker has never been given additional breaks because of his medical conditions. However, he did confirm that when he has worked with other disabled workers, they might not have to lift something if it is too heavy for them. The Employer's supervisors receive training on disability etiquette, however the disability etiquette training specifically does not include a relaxation of policies applied to disabled individuals. Instead the disability etiquette training focuses on treating disabled individuals with dignity.<sup>16</sup> The example given by White was that if someone is in a wheelchair, the supervisor

---

<sup>15</sup> While White testified about this situation, neither the disabled worker with the prosthetic leg nor her supervisor testified. Considering the lack of foundation laid for White's knowledge on this issue, I will give less weight to White's testimony here. There is no direct evidence about how this individual takes her breaks and whether her supervisors consider her medical condition. More importantly, there is no evidence about the frequency with which the extra breaks are requested and the frequency those requests are granted or denied by the Employer's supervisors. Similarly, the worker who had difficulty reading did not testify nor did any of the supervisors. Because the record does not include witnesses with personal knowledge of these situations, but rather general assertions, I am affording White's testimony limited weight.

<sup>16</sup> In response to questions from the Employer's counsel, White testified:

Q. BY MR. BERG: Is it part of that disability etiquette to recognize that sometimes it may be necessary to relax polices that are in place that might otherwise apply differently to a nondisabled individual?

A. I'm going to say no; I hate to disagree with you, but no.

would be trained to sit in a chair to speak directly with the individual rather than standing over top of them while speaking. SSA has certain site rules in effect at the PEB, which apply to all 44 janitors in the petitioned-for unit. Annual performance evaluations are given to both disabled and nondisabled janitors. However the disabled janitors receive competitive employment evaluations as well to ensure continued compliance with the JWOD Act's requirements.

The facts here are similar to *Goodwill of North Georgia* with respect to some evidence of modification to job duties and schedules for disabled workers with other evidence casting doubt on the same. Just as in that case, there was some evidence modification of job duties occurs for the Employer's janitors at the PEB. This came through White's testimony about securing extra breaks for one worker and creating a photo schedule for another worker to help that worker figure out job assignments. Also, like in *Goodwill Industries of North Georgia*, there is some uncertainty about the evidence concerning modification of job duties. None of the employees who received modifications testified, and there was no testimony from any Contract Site Supervisors about making modifications to work assignments. The only testimony from individuals who work at the site full-time came from Tyler and Parker. Tyler testified she was not aware of any employees ever being given extra breaks because of their medical conditions and Parker testified he has not received any extra breaks related to his medical conditions. While the Employer's Contract Site Supervisors may have been able to provide specific evidence about this, the Employer did not call any of its supervisors, despite bearing the burden of establishing its janitors are not statutory employees through specific evidence.

Unlike in *Brevard*, there is no evidence that the disabled workers here are permitted to work at their own pace, and the Employer does not employ any trainers to correct a problem when a disabled worker forgets their responsibilities.

The Employer did not adduce any evidence at the hearing to establish that the terms and conditions of employment for its disabled and nondisabled workers at the PEB differ from each other in any meaningful or significant way. Instead, the evidence establishes that the terms and conditions of employment for the Employer's disabled and nondisabled workers are virtually indistinguishable. The Employer conceded as much, noting in its first post-hearing brief that "[o]nce a factual record was actually made, however, things took a surprising turn. SEIU extracted from Ms. White, and from VSP witnesses, that non-disabled workers also receive assistance well beyond what one would expect from an industrial employer. Mr. Parker even testified that he was not aware that he himself is severely disabled." In its second post-hearing brief, the Employer argued that its disabled and nondisabled janitors share such a community of interest, in essence because their terms and conditions of employment are so similar, that it would be inappropriate to separate them for the purposes of collective bargaining. While there is some evidence of different terms and conditions of employment, those are relatively minor in

---

Tr. 109.

This colloquy provides an example of counsel for the Employer's leading questions of its own witnesses during direct examination. Where there are any conflicts between the hearing record between testimony elicited through leading questions and testimony from open-ended questions, I have given more weight to the latter.

nature and do not transform the relationship between the Employer and its workers at the PEB from traditionally industrial to primarily rehabilitative in nature. Based on the record in this case, I am not persuaded that the disabled individuals have significantly distinct terms and conditions of employment at the PEB when compared to the nondisabled individuals.<sup>17</sup> Accordingly, I find this factor weighs in favor of finding that the relationship between the Employer and its janitors at the PEB is traditionally industrial in nature.

*c. Employer-Provided Counseling Services, Training, and Rehabilitative Services*

“[C]ounseling and rehabilitative services need not be mandatory for the Board to find a primarily rehabilitative relationship.” *Goodwill Industries of North Georgia*, 350 NLRB at 37. *Brevard Achievement Center* had a “trainer” working at the site “3 days per week teaching new clients the duties they are expected to perform, and training those existing clients whose performance has regressed[...],” as well as a “mental health counselor [...] present every day at the facility providing counseling, problem-resolution, and crisis-intervention services.” 342 NLRB at 983. Additionally, in *Brevard*, “the disabled workers...received assistance with daily-living activities, such as shopping, paying bills, and preparing meal...[and] when necessary, it also provided financial assistance for outpatient mental health services.” *Goodwill Industries of North Georgia*, 350 NLRB at 37. In identifying those facts in *Brevard* as significant in finding a primarily rehabilitative relationship in that case, the Board in *Goodwill Industries of North Georgia* distinguished that case from *Brevard* by noting “the counseling and rehabilitative services provided by the [e]mployer are considerably less extensive than those in *Brevard*. The [e]mployer does not employ either an onsite trainer or an onsite counselor.” *ibid*. It went on to note that the employer in *Goodwill Industries of North Georgia* “does not furnish financial assistance to disabled workers who may require the services of outside providers, such as outpatient mental health services.” *ibid*. The Board considered it significant in *Brevard* that the employer there made its “rehabilitative services available to its disabled clients only.” 342 NLRB at 986.

White is essentially the Employer’s sole source of counseling, training, and rehabilitation services for its janitors at the PEB. During the hearing, White testified that she maintains an office at the PEB and is usually there “one or two times a week (Tr. 138).” Despite being there only one or two times a week, White is on-call at all times. White spends the rest of her working time performing the same services at other sites where the Employer operates including: the Federal Courthouse, Frederick, the Motor Vehicle Administration, and the Employer’s main office. White maintains an office at one of those locations<sup>18</sup> and the Employer’s organizational

---

<sup>17</sup> The Employer appears to concede this with its arguments that: (1) none of its janitors, even those nondisabled, at the PEB are statutory employees; and (2) the disabled and nondisabled janitors share such a community of interest that a unit comprised only of the nondisabled janitors would be an inappropriate microunit under *The Boeing Co.*, 368 NLRB No. 67 (2019).

<sup>18</sup> It is not clear from the record at which location White’s other office is located, and whether she spends more time there than at the PEB. Also unclear is how White is on-call at all times to provide her services at the PEB when she provides the same services at multiple other locations for similarly-situated workers, and even maintains a second office at one of those locations.

chart shows White is the only case manager employed by the Employer for all of its operations. It is unclear from the record how White can be on-call to perform her services at the PEB at the same time she is performing similar services for the Employer elsewhere. Employer Exhibit 8 is a booklet provided to all incoming Employer supervisors. It discusses the role of "Case Manager" and states "[t]he role of VSP's Case Manager is to ensure the success of our employees." There is no evidence that the Employer employs a job trainer or mental health counselor on site at the PEB. White does not meet with any of the workers at the PEB as part of any sort of fixed schedule. Meetings might be scheduled on a weekly basis with an individual depending on what particular issue an individual is facing at that particular time. White testified that she might meet with anywhere from two to 15 of the 44 workers during a given week, depending on circumstances at that time. In describing her meetings with disabled workers, White testified "it depends on what the situation is. If they were in a crucial situation, I would meet with them more frequently. If they were in a space where they were settled and they were doing well, I wouldn't meet with them as frequently. (Tr. 164)." There was no testimony that any of the 44 workers meet with White in any sort of regular or periodic way throughout a given year, and Parker testified that he has never received notifications about being required to meet with White.

White performs what the Employer refers to as "wraparound services" which could be helping someone with budgeting, making medical appointments, or whatever their specific needs are. In her testimony, White verified that she does perform these services, and they are available to both disabled and nondisabled workers at the PEB. During the hearing, White testified that as part of its annual evaluations of its workers, the Employer determines whether White is available to provide assistance to nondisabled workers in addition to disabled workers. In the case of one nondisabled worker who was pregnant, White helped that worker make medical appointments at a hospital that specialized in difficult pregnancies. The pregnant worker also received help modifying her schedule to attend those medical appointments, with the end result of a successful pregnancy. That pregnant worker was Tyler, who testified during the hearing and is considered nondisabled by VSP. Tyler testified and described three instances where White provided her counseling and assistance. The first was the pregnancy about which White also testified. The second instance was when Tyler was paying to take her son to and from the hospital and White informed Tyler of a medical assistance program called "MCHP." The record is unclear about the entity for which "MCHP" is an initialism, but the record makes clear that it is health insurance for low-income families, and that it is a community resource and not a part of VSP. The third instance of assistance involved issues Tyler has had with her eye. Tyler had surgery performed twice on her eye and when she came back from surgery, Tyler went to White's office to tell White about Tyler's issues with her eye. White asked Tyler about medication and helped Tyler to see if Tyler met the guidelines for being visually impaired. Tyler did not meet those guidelines.

When asked during her testimony, White could not identify any of the janitors currently working for the Employer at the PEB as individuals who were referred to VSP, placed in outside employment through the Employer's employment program, were unsuccessful in that outside employment, and then placed at the PEB to perform janitorial work. One disabled worker was identified by the Employer as someone who worked for the Employer at the PEB, resigned, and then was rehired after completing a drug rehabilitation program. That individual was rehired on

April 12, 2016, and subsequently discharged on May 13, 2016, for attendance reasons. That individual is listed as ineligible for rehire, as is every other disabled janitor listed as discharged in Employer Exhibit 7. The unwillingness to rehire individuals who were previously unsuccessful, whether at the PEB or elsewhere, weighs against finding the relationship between the Employer and the petitioned-for janitors is primarily rehabilitative in nature.

The Employer established that White provides some counseling, training, and rehabilitation services to its janitors at the PEB. Specific examples included attending medical appointments with one janitor to ensure the janitor understood what was said. The Employer also provides “Consumer Credit Counseling Services” on money management, budgeting, and credit counseling. That training last occurred approximately three years prior to the hearing, and it was voluntary and open to everyone. White also testified that she once did a training “quite some time ago” for parents of children with cognitive disabilities. (Tr. 397-398). It is not clear when that occurred, and from the testimony, the training was instead made available to the parents of people who work for the Employer rather than the Employer’s janitors at the PEB. That White provides counseling, training, and rehabilitation services indicates there are some rehabilitative elements to the Employer’s relationship with its janitors. However, as noted in *Brevard*, this fact would be more significant if White’s services were only available to disabled janitors. Because they are available to all of the Employer’s janitors, the provision of these rehabilitative services by White is of limited weight in the Employer meeting its burden of establishing a primarily rehabilitative relationship with its disabled janitors.

The Employer sought to establish that it was more lenient towards disabled janitors, in terms of providing training and retraining. The Employer elicited testimony in support of that effort through Edmonds-Hill, who merely provided a conclusory statement rather than specific, detailed evidence.<sup>19</sup> Parker, who is considered “disabled” by the Employer,<sup>20</sup> testified that he learned the day of the hearing that the Employer considers him disabled. When Parker first came to the Employer, he was not asked about whether he has a disability and never had any

---

<sup>19</sup> As an example:

Q. BY MR. BERG: When you’re talking about training and retraining that you may do more of that with disabled individuals, is it fair to say that VSP is generally more lenient or more patient with disabled individuals relative to non-disabled individuals?

A. It’s more understanding of their limitations.

Tr. 499.

In an example of the Employer failing to meet its burden with specific evidence, there was no follow-up with Edmonds-Hill to see what she meant by “more understanding of their limitations.” It is unclear how Edmonds-Hill can testify that she is more understanding of disabled janitors’ limitations when she also testified that she does not always know who is disabled and who is not, and sometimes does not learn someone is disabled for a very long time.

<sup>20</sup> Parker testified he had been with the Employer for four years, and that for the first two years he worked as a supervisor for the Employer.

conversations with anyone from the Employer about having a disability. Parker first learned at the hearing that he could go to White and ask for help with skills and scheduling doctor's appointments. That this testimony contradicts White's testimony about the services she provides, and considering the Employer did not call other witnesses with firsthand knowledge of White's services, supports my finding that the Employer failed to meet its burden of establishing that its janitors at the PEB are not employees under the Act.

Some of the Employer's janitors at the PEB have job coaches. On leading questioning from the Employer's counsel, White testified the coaches work in conjunction with the Employer. The record is unclear, but either most or all of these coaches are employed through other agencies.<sup>21</sup> Therefore, I view the job coaches as not qualifying as an "Employer-provided" service. The Board considered a somewhat similar factual scenario in *Goodwill Industries of North Georgia*, where counseling and rehabilitative services were assigned by outside funding sources, and "any counseling or rehabilitative services provided by such individuals – and there is no specific evidence concerning such services – do not evidence a rehabilitative relationship between disabled workers and the Employer." 350 NLRB at 37 [emphasis in original]. In the instant case, there was vague testimony about job coaches provided by and paid for by outside sources. Just as in *Goodwill Industries of North Georgia*, there was "no specific evidence concerning" such services. While it is rehabilitative that the Employer grants these coaches access, because coaches are provided by outside sources and paid for by outside sources, the job coaches do not evidence a rehabilitative relationship between disabled workers and the Employer.

The Employer here does not employ a mental health counselor in any capacity, let alone a full-time capacity, nor does it employ someone to specifically provide job training at the site, like in *Brevard*. Nor does the Employer provide financial assistance to its janitors for treatment. Failing to provide these services to its disabled janitors weighs against finding the Employer's relationship with those workers is primarily rehabilitative in nature.

There was general testimony about nine counselors who are available to help the Employer's disabled workers at the PEB. However, there is no specific evidence of any of those counselors providing any assistance to any of the Employer's workers at the PEB. The lone exception is one of the counselors who works with one individual at the PEB, White's son. White cannot work with her son because of a conflict of interest. Two current workers at the PEB who are in the petitioned-for unit, Tyler and Parker, testified they had never heard of these nine counselors prior to the hearing. This is similar to a supervisor in *Goodwill Industries of North Georgia* being unaware about that employer's career services until a year before the

---

<sup>21</sup> White testified "[t]hey work in conjunction with us. They are generally employed through other agencies. The ARC of Baltimore is one of them, Center for Social Change, Humanim, Chimes, just to name a few." (Tr. 366.) There was no testimony about whether any of the coaches are employed by the Employer, no testimony from any of the coaches, no testimony from anybody who works with the coaches, and no specific testimony about any of the work the coaches perform. Accordingly, I give limited weight to White's general testimony and assertions about the coaches.

hearing in that case, despite having worked there for six years, which the Board found to be “significant.” 350 NLRB at 37 n. 25. The unawareness about these alleged services is more pronounced in the instant case because the only workers in the petitioned-for unit to testify had no knowledge of the alleged availability of these counselors until testimony at the hearing. No specific evidence was introduced about what assistance, if any, these nine counselors provide to the workers employed by the Employer at the PEB, other than White’s son because of the conflict of interest.<sup>22</sup> The counselors do not provide significant support for the conclusion that Employer has a primarily rehabilitative relationship with its janitors at the PEB.

The Employer’s maintenance of a probationary period for all newly hired janitors at the PEB, with a demonstrated willingness to discharge employees under that probationary period policy, weighs heavily against the Employer’s arguments about the status of its janitors. Not only is a probationary period for new employees typically industrial in nature, but it is inherently contradictory to a rehabilitative relationship, where employers such as *Brevard* have the primary objective of preparing workers for private competitive employment. Instead, the Employer’s probationary period is in effect competitive employment, and if newly hired disabled janitors do not meet the Employer’s standards during that 90-day period they are discharged. Applying a probationary status to new hires would not happen if the primary purpose of the relationship with those new hires was to spend time training and rehabilitating them so they can enter the competitive work force.

While some of elements of this factor weigh in favor of a primarily rehabilitative relationship, such as the job coaches and extra services provided by White, multiple other facts outweigh those facts. Particularly, that the Employer imposes a probationary period for new janitors, that all discharged disabled janitors are ineligible for rehire, and the Employer’s failure to employ an on-site mental health counselor or job trainer. The various facts described *supra* make this factor on the whole weigh against the finding of a primarily rehabilitative relationship between the Employer and its janitors at the PEB.

*d. Disciplinary Procedures*

Disciplinary procedures for disabled workers are another factor in the Board’s analysis of whether the relationship between and employer and its disabled workers is traditionally industrial or primarily rehabilitative in nature. In *Brevard*, where there was a primarily rehabilitative relationship, the employer would never issue discipline to its workers for misconduct related to their disability. 342 NLRB at 986. Additionally, in *Brevard*, the “nondisabled workers [were] subject to a progressive discipline procedure, while the [disabled workers were] not.” *id.* at 983. The Board faced the situation in *Goodwill Industries’ of North Georgia* where an employer

---

<sup>22</sup> Mules testified that the nine counselors are involved in a post-employment capacity providing job retention services. These include working with supervisors and employees to help them understand rules and regulations, helping them with time and attendance, and the soft skills she testified to earlier. The parties were advised at the start of the hearing that they would need to present specific, detailed evidence in support of their position and that general conclusionary statement by witnesses would not be sufficient.

witness testified “if a disabled worker were unable to complete his assigned duties, the [e]mployer would accommodate that individual by modifying his job duties. By contrast, if a nondisabled worker were unable to perform his assigned duties, the [e]mployer would not modify his job duties but, rather, would apply its progressive disciplinary procedures.” 350 NLRB at 33. In finding this factor weighed in favor of a primarily rehabilitative relationship in that case, because of the evidence of more lenient treatment, the Board noted that “[e]mployer presented general testimony that it treats its disabled workers more leniently than its nondisabled workers.” *id.* at 38-39. Despite that, the Board there found a traditionally industrial relationship between the employer and its disabled employees, noting “[a]lthough the factor of disciplinary standards cuts the other way, it is insufficient by itself to dictate a different outcome.” *id.* at 39. The Board considered a situation in *Goodwill Industries of Denver*, where that employer provided various services, including janitorial, to an Air Force base, and it was that employer’s practice to impose discipline on its disabled workers “only in extreme cases.” 304 NLRB at 765. In finding those workers to not be statutory employees, the Board found it noteworthy that it was that employer’s practice to “counsel the client trainees if difficulties arise with their employment at [the Air Force base], and to transfer them to a position at another Goodwill location if [the Air Force base] is deemed unsuitable.” *ibid.* A review of Board cases analyzing whether a relationship between an employer and its disabled workers is primarily rehabilitative or traditionally industrial in nature does not reveal references to probationary status under which newly hired workers could be disciplined or discharged. Employment relationships that are primarily rehabilitative in nature generally do not involve a rigorous implementation of discipline on disabled workers, progressive discipline, or probationary periods for new hires.

The Employer here maintains a progressive discipline system which it applies to all of its janitors, regardless of disability status. Employer Exhibit 8 lays out the Employer’s corrective discipline process. Employer Exhibit 8 does not direct supervisors to treat disabled workers or workers with special needs in a different way from the Employer’s nondisabled workers. Indeed, there have been circumstances where disabled workers exhaust their corrective discipline and are discharged, including during their probationary period. However, the Employer presented some testimony through White regarding various circumstances where she provided counseling in lieu of discipline for numerous disabled workers at the PEB.<sup>23</sup> White also testified that she does not

---

<sup>23</sup> In response to questioning from the Employer’s counsel, White testified:

Q. BY MR. BERG: Okay. And with respect to Ms. Conyers, did you – were you involved with her punctuality issues and trying to keep them from happening in the future?

A. No, I was not.

Q. Do you know if she was given a corrective action?

A. I know that she was.

Q. Whereas Ms. Cooper and Ms. O’Neill were not given the same level of corrective action for that behavior for their punctuality?

A. Eventually, I believe Ms. – you know what, Ms. Cooper did not receive disciplinary action.

Q. Uh-huh.

make the decision about whether to issue discipline to a disabled worker, but if a worker is having an issue with their disability which is affecting that worker's performance or attendance, she would "talk to the manager, and instead of disciplining them [...] the decision may be made to not discipline them but to let me work with them and counsel them and see if they can improve in that area (Tr. 187)." The Employer will issue discipline to janitors at the PEB for misconduct related to their disabilities. This willingness to discipline employees, under a progressive disciplinary scheme, stands in direct opposition to *Brevard*, where it was critical in the Board's determination that those workers at issue were never disciplined for conduct related to their disability and were not subject to progressive discipline. Additionally, the willingness to discipline a disabled janitor, without involving any sort of diversion, for failing to put away supplies, is not an "extreme case" like those under which *Goodwill Industries of Denver* would issue discipline to its disabled workers. 304 NLRB at 765.

At the hearing, there was testimony that individuals removed from the SSA contract at the PEB for violating SSA's rules could be re-referred to VSP, if eligible, and could be moved elsewhere. There was testimony about three disabled janitors at the PEB who were removed from the PEB at SSA's request. Of those three, two were ineligible for rehire because of the nature of their conduct, while one was placed at a different Employer contract site, where he was subsequently terminated again.<sup>24</sup> These facts stand in contrast to *Goodwill Industries of Denver*, where that employer would place its workers at other sites if working at the Air Force base site was problematic.

Edmonds-Hill is involved in the decisional process about whether to issue discipline. She testified that she applies the same criteria to both disabled and nondisabled janitors when making a decision about whether to issue discipline. That is consistent with Employer Exhibit 8, which does not direct a different process for disabled and nondisabled workers when making disciplinary decisions. Edmonds-Hill also testified that she will involve White when a disabled janitor is disciplined, however Edmonds-Hill is not always aware of who is disabled and who is

---

A. And off the top of my head I can't remember if Ms. O'Neill did not. I can't remember if she did or did not.

Tr. 116-117.

This colloquy provides another example of where I have given less weight to a witness' answers in response to leading questions. While White testified in this exchange that she was involved with the disciplinary action for one disabled worker and not involved with a nondisabled worker, White could not recall what happened with the other disabled worker. Parker, a disabled janitor, testified in response to relatively open questions from the Petitioner's counsel that he elected not to involve White when he most recently received discipline for not performing his assigned tasks and instead received a standard discipline consistent with the Employer's progressive disciplinary policy.

<sup>24</sup> This demonstrates again the Employer's willingness to discharge its disabled workers, which substantially undermines its argument that its relationship with these workers is primarily rehabilitative in nature, as opposed to typically industrial.

nondisabled, but “sometimes” she “can assume” who is disabled (Tr. 492).<sup>25</sup> At the same time, she testified that if it is not physically obvious that a janitor is disabled, such as if they have a mental disability, she “might not find that out until they have been on the site for a while, a long time (Tr. 527).” Given that self-contradictory testimony, it is unclear how Edmonds-Hill can testify that she will involve White when there is discipline for a disabled janitor. Rather, I interpret that testimony to mean that Edmonds-Hill involves White when she observes what she believes to be a physical disability or otherwise assumes someone is disabled.

White testified that both disabled and nondisabled workers are given the opportunity to meet with her when disciplinary action is under consideration. A form is given to the workers when they are being disciplined asking whether they are willing to meet with White. White testified that even if the individual selects no, if that individual is disabled, it is mandatory for them to meet with White. Edmonds-Hill testified about a specific discipline she issued to a disabled janitor in February 2019. That janitor was issued the discipline because she was observed taking an unauthorized break. The discipline the Employer entered into the record in Employer Exhibit 12 indicates that it is a “level of discipline consistent with how others have been treated for similar offenses,” meaning the Employer consistently issues discipline to its disabled janitors for unauthorized breaks.<sup>26</sup> When Parker testified about the disciplinary process he experiences at the PEB, he described a different process than White’s testimony. With his most recent discipline, Parker was written up by a supervisor named Dana for leaving supplies out. When he was written up, Parker was asked if he wanted to see White about the discipline but he elected not to see her because Parker considered it “a simple write-up (Tr. 220).” Parker never met with White about the write-up. Tyler described a similar experience with being disciplined where she was asked if she wanted to speak with White and declined.

The Employer did not call any of its Contract Site Supervisors who work at the PEB, or the Project Managers to whom they report, to testify at the hearing. The only testimony about the actual disciplinary process followed by the Employer at the PEB, from individuals who work full-time at the PEB, was presented by Tyler and Parker. I give greater weight to the direct testimony of Parker and Tyler, who work full-time at the PEB, regarding the disciplinary process followed at the site.

I find that this factor of disciplinary procedures weighs against finding a primarily rehabilitative relationship. While there was some evidence that the disabled workers are treated more leniently by the Employer, like in *Goodwill Industries of North Georgia*, the facts here are distinguishable from that case in several noteworthy ways. In *Goodwill Industries of North Georgia* if a disabled worker was unable to complete assigned duties, those duties would be modified, while a nondisabled worker would be subject to progressive discipline. Here, Parker, a disabled janitor, provided un rebutted testimony that he was disciplined for failing to put his

---

<sup>25</sup> This general testimony is should be contrasted with Parker’s testimony that he received discipline without any involvement from White, despite his status as disabled.

<sup>26</sup> This reinforces my conclusion above that the Employer maintains productivity standards for its janitors at the PEB.

supplies away, without any intervention from White. Parker is disabled and was subjected to progressive discipline for not completing his assigned duties. Additionally, the existence of probationary periods, which involves the imposition of discipline and discharge for disabled workers, also distinguishes this case from *Goodwill Industries of North Georgia* with respect to application of the disciplinary procedures factor. On the whole, this factor weighs against the finding of a primarily rehabilitative relationship between the Employer and its disabled janitors at the PEB.

*e. Tenure of Employment and Job Placement*

*Goodwill of North Georgia*, *Goodwill of Tidewater*, and *Brevard* provide a good contrast of how this factor is considered by the Board in determining whether disputed workers are employees within the meaning of Section 2(3) of the Act. In *Brevard*, where the workers were not employees, the Board noted the employer “evaluate[d] clients at least annually to determine if they have progressed sufficiently to work in a competitive employment environment.” 342 NLRB at 983. The employer in *Brevard* also “presented un rebutted testimony that its clients ‘routinely make [the] transition’ to competitive employment. 342 NLRB at 987. While in *Goodwill Industries of Tidewater*, the Board noted “[t]he record also shows that long-term employment is not contemplated for the clients; rather, the objective is to prepare each client for private competitive jobs.” 304 NLRB 767, 768 (1991). To achieve that objective, the employer in *Goodwill Industries of Tidewater* “employ[ed] a full-time job placement counselor to obtain information on, and make arrangements for, the placement of clients in private employment.” *ibid.* at 768-769. The Board in *Goodwill of North Georgia* contrasted the “routine” transition to private employment present in *Brevard* with the facts present in *Goodwill of North Georgia*, and it noted “that only one disabled worker was referred for outside employment in the 2 years preceding the hearing, and that only approximately four to five employees were referred for outside employment in the prior 5 years.” 350 NLRB at 39. The petitioned-for unit in *Goodwill Industries of North Georgia* included 26 workers. *id.* at 32. Given those facts in comparison to the routine transition to outside employment in *Brevard*, the Board noted this factor in *Goodwill Industries of North Georgia* “weigh[ed] against finding the [e]mployer’s relationship with its disabled workers to be primarily rehabilitative.” *id.* at 39.

As for the factor of the disabled and nondisabled individuals’ tenure of employment and job placement – or rehabilitation – into other employment, I find the record weighs in favor of finding that the relationship between the Employer and the janitors at the PEB more closely resembles a “typically industrial” relationship. The Employer does not employ anyone in the position of job-placement coordinator nor was there evidence that the Employer maintains a formal job-placement program. White performs some job-placement services as part of her general duties as case manager. White testified that she would draft resumes for disabled workers but would not draft resumes for nondisabled workers, although she would “red pen”<sup>27</sup> their résumés (Tr. 119). White performs mock interviews with disabled workers and would not

---

<sup>27</sup> White did not testify what she meant by “red pen” a résumé, but presumably she means editing services.

for nondisabled workers, but she does help nondisabled workers with completing job applications. She posts job leads publicly for all of the Employer's workers at the PEB to review.

In the five years prior to the hearing, 41 disabled individuals<sup>28</sup> departed from employment with the Employer at the PEB. One disabled janitor left the PEB for another job in the approximately four years prior to the hearing and six more workers left the PEB in the year prior to that, meaning a total of seven disabled janitors left the PEB for other jobs in the five years prior to the hearing. Of those seven disabled janitors who left, one did not receive any assistance from White and two others found their own job leads with White providing assistance related to the job application process.

Nineteen of the 41 disabled janitors who left in the five years prior to the hearing were discharged by the Employer.<sup>29</sup> The Employer's reasons for discharging disabled workers include unsatisfactory performance of job duties, attendance, and punctuality. Four of those discharged workers were in their probationary period and six of the 19 were discharged after working for the Employer for as little as approximately one to four months.

I find that the facts presented in this case are more like *Goodwill Industries of North Georgia* than *Brevard* or *Goodwill Industries of Tidewater*. In *Goodwill Industries of North Georgia*, the Board found it noteworthy that only one disabled worker was referred for outside employment in the two years prior to the hearing, but in this case, the Employer referred only one disabled worker to outside employment in the four years prior to the hearing, a lower rate than in *Goodwill Industries of North Georgia*. The lower rate of transition into outside employment present in this case, compared to *Goodwill Industries of North Georgia*, is more striking when it is considered that the unit size here is nearly twice that of the unit sought in *Goodwill Industries of North Georgia*. The Employer discharged 19 disabled workers in the five years prior to the hearing, while only seven workers transitioned to private employment during the same period. Accordingly, it is significantly more likely that the Employer will discharge one of its disabled workers at the PEB than help transition that worker to private competitive employment. Much like in *Goodwill Industries of North Georgia* and "unlike in *Brevard*, there is no evidence indicating that disabled workers regularly transition to private competitive employment." 350 NLRB at 39. Finally, the Employer does not maintain a job-placement program or employ anyone as a job-placement coordinator, let alone a full-time job placement counselor like in *Goodwill Industries of Tidewater*, whose objective was to make arrangements to place the janitors at the PEB in private competitive employment. This factor weighs against finding the Employer's relationship with its disabled janitors to be primarily rehabilitative in nature.

---

<sup>28</sup> One of these workers left employment twice.

<sup>29</sup> The Employer points to these 41 individuals in its post-hearing brief as evidence that its relationship with its workers at the PEB is primarily rehabilitative in nature. In doing so, the Employer fails to distinguish between the seven workers who left for outside employment and the 19 workers it discharged.

#### IV. DETERMINATION

##### *a. Disabled Janitors*

I find that the Employer has not met its burden of showing that its relationship with its disabled janitors at the PEB is primarily rehabilitative. As explained *supra*, the Employer applies essentially the same terms and conditions of employment to its disabled janitors as it applies to its nondisabled janitors. Those terms and conditions of employment include a probationary period during which the Employer has demonstrated a ready willingness to discharge its disabled janitors who do not perform at what the Employer considers to be an acceptable level. Furthermore, the Employer's disabled janitors are subject to production standards, as they are expected to perform their assigned tasks and will be disciplined for taking unauthorized breaks during their shifts or not putting away supplies. The Employer's janitors are subject to progressive discipline and, significantly, the Employer will impose discipline on its janitors for conduct they engage in which is related to their disability. There are no full-time counselors or trainers employed by the Employer at the PEB to provide counseling or other rehabilitative services to its janitors at that site. Instead, the Employer provides the services of Case Manager White. White is only at the PEB one or two days a week and splits her time providing the same services to multiple other locations where the Employer operates. Significantly, the Employer does not maintain a job-placement program or employ anyone tasked with helping its janitors at the PEB in transitioning to private competitive employment.

Though the increased leniency and additional services White provides janitors at the PEB supports a rehabilitative relationship between the Employer and its disabled janitors, I conclude these facts are insufficient to overcome the other facts supporting a traditionally industrial relationship. Accordingly, I find that the Employer's disabled janitors at the PEB are statutory employees.

##### *b. Nondisabled Janitors*

Because I find that the disabled janitors are employees within the meaning of Section 2(3) of the Act, it is axiomatic that the Employer's nondisabled janitors are employees as well. Despite the mootness of the Employer's argument, I will still address its substance. The Employer argues that its nondisabled janitors are not employees because they share such similar terms and conditions with their disabled counterparts, who are also not employees. This argument stems from a misapprehension of Board precedent in *Brevard* and related cases. All of those cases involve, as a threshold matter, an analysis of the relationship between employers and *disabled* workers they employ. The Board stated as such when explaining the standard in *Brevard* where it noted it "summarized these developments in *Goodwill Industries of Tidewater* and *Goodwill Industries of Denver*, which explicated the case-by-case factual analysis applied to assess whether *disabled* individuals working in a primarily rehabilitative setting are statutory employees." 342 NLRB at 983 [emphasis added]. Because the Employer's nondisabled janitors

at the PEB are not disabled, the “primarily rehabilitative” analysis of *Brevard, Goodwill Industries of North Georgia*, and other related cases, is inapplicable to the interrelationship between the Employer and its nondisabled janitors at the PEB.

**V. WHETHER THE NONDISABLED JANITORS ARE AN APPROPRIATE UNIT FOR THE PURPOSES OF COLLECTIVE BARGAINING**

I now turn briefly to the Employer’s secondary argument that a unit of only its nondisabled janitors would be an inappropriate microunit because the nondisabled janitors share a community of interest with the disabled janitors. This argument is rendered moot by my determination that all of its janitors are statutory employees within the meaning of the Act, regardless of disability status. Nevertheless, I will address the Employer’s argument here. The Employer undermines its primary position with its microunit argument by arguing that the community of interest shared by its disabled and nondisabled janitors is so strong those two categories of workers should not be separated for the purposes of collective bargaining. In its second brief, the Employer argues that if its disabled janitors are excluded from the bargaining unit the Petitioner seeks to represent, the remaining nondisabled janitors would not be an appropriate unit because its interests are not sufficiently distinct from the interests of the disabled janitors. In its recent *Boeing* decision, the Board reaffirmed that it “will consider ‘both the shared and distinct interests of petitioned-for and excluded employees’” and “the community-of interest analysis must consider whether excluded employees ‘have meaningfully distinct interests in the context of collective bargaining that outweigh similarities with the included employees[.]’” *The Boeing Co.*, 368 NLRB No. 67 slip op. at 3 (2019), quoting *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 794 (2d Cir. 2016). Explicit in that analysis is there are two sets of *employees*, one of which is petitioned-for and one of which is excluded. If the Employer had successfully established that its disabled janitors are not *employees* within the meaning of the Act, then they are not “excluded employees” as contemplated in a community of interest analysis. Accordingly, the remaining nondisabled janitors would not be a microunit, rather they would be a wall-to-wall unit of all of the Employer’s employees performing janitorial work at the PEB.

Finally, the Employer here ignores that the Petitioner’s petition is not seeking to exclude any of the janitors at issue, rather it is the Employer who is seeking to exclude janitors. The Petitioner is petitioning for a wall-to-wall unit including all of the Employer’s janitors at the PEB. The reason a unit comprised of only nondisabled janitors is an issue is because on the record at the beginning of the first hearing the Employer indicated that if the disabled janitors were not employees within the meaning of the Act, the remaining nondisabled janitors would be a unit appropriate for the purposes of collective bargaining. Thereafter, the Petitioner indicated a willingness to represent a unit smaller than one it had initially petitioned-for. As indicated by its petition, the Petitioner seeks to represent all of the Employer’s janitors at the PEB, regardless of disability status.

**VI. CONCLUSIONS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearings are free from prejudicial error and are hereby affirmed.

2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act. The Petitioner claims to represent certain employees of the Employer, and the Employer declines to recognize the Petitioner.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Sections 9(b) of the Act:

All full-time and regular part-time janitors employed by the Employer at the Social Security Administration's Perimeter East Building located in Baltimore, Maryland or Woodlawn, Maryland; excluding all office clerical employees, confidential employees, professional employees, managers, guards, and supervisors as defined in the Act.

## **VII. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by 1199 SEIU United Healthcare Workers East. The date, time, and manner of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### *a. Election Details*

The date, time, and place of the election will be specified in a Notice of Election that will issue shortly after this Decision.

### *b. Voting Eligibility*

Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the issuance date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. The specific date for voter eligibility will be set forth in the Notice of Election that will issue shortly after this Decision.

Employees engaged in an 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. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

*c. Voter List*

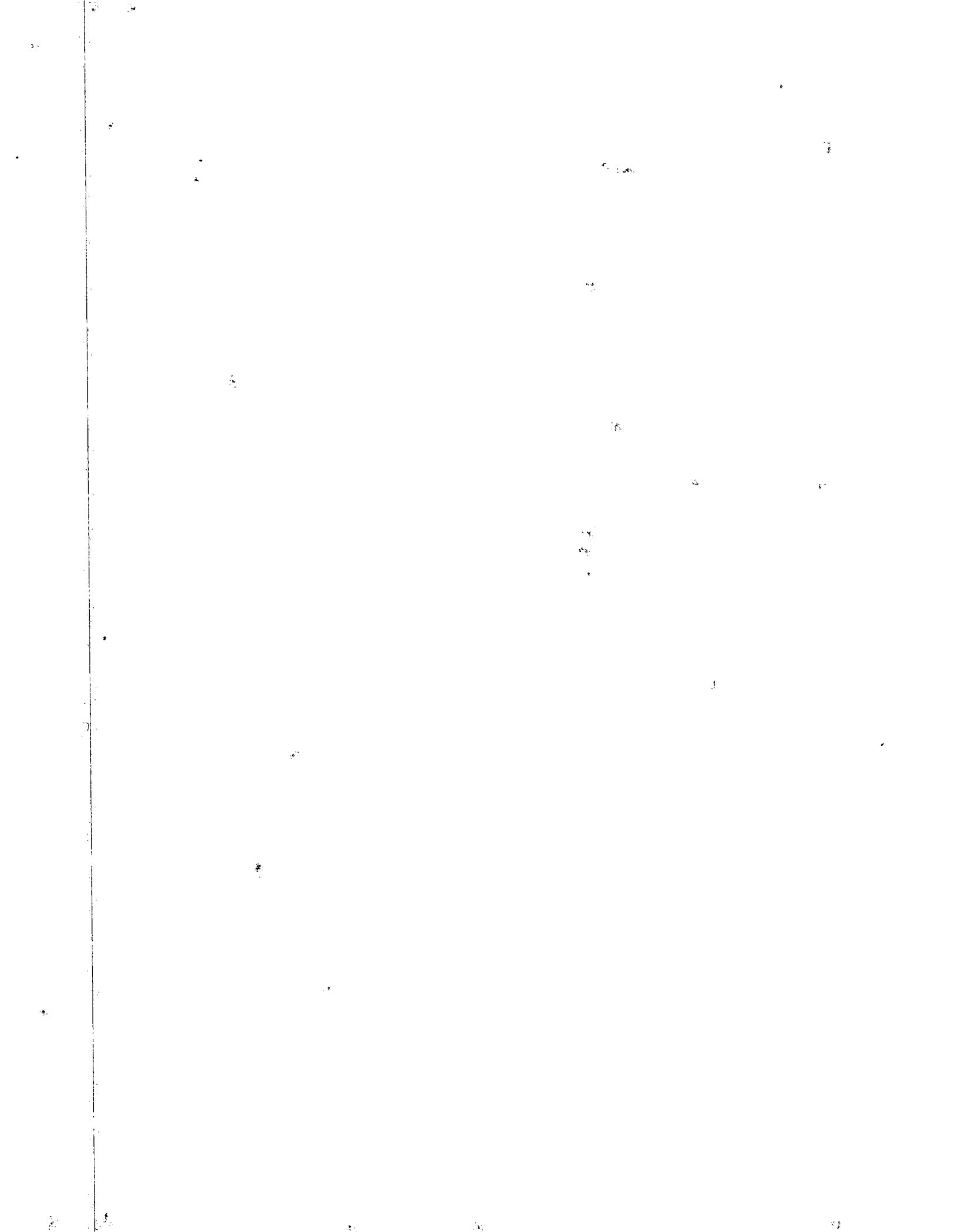
As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

To be timely filed and served, the list must be *received* by the regional director and the parties by **Tuesday, December 3, 2019**. The list must be accompanied by a certificate of service showing service on all parties. **The region will no longer serve the voter list.** Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.



*d. Posting of Notices of Election*

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election, which will be furnished subsequent to the issuance of this Decision, in conspicuous places, including all places where notices to employee in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturday, Sunday, and holiday. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

**VIII. RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Sinai Hospital of Baltimore, Inc. d/b/a VSP  
05-RC-244319

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: November 29, 2019



---

Nancy Wilson  
Acting Regional Director  
National Labor Relations Board,  
Region 5  
100 S. Charles Street, Suite 600  
Baltimore, Maryland 21201