

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

In the Matter of:

*

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

*

*

Employer,

*

Case No. 05-RC-244319

and

*

1199 SEIU UNITED HEALTHCARE
WORKERS EAST,

*

Petitioner.

*

* * * * *

**REQUEST FOR REVIEW FROM THE
DECISION AND DIRECTION OF
ELECTION AND FOR A STAY
PENDING RESOLUTION**

Peter S. Saucier
Eric Paltell
Kollman & Saucier, P.A.
1823 York Road
Business Law Building
Timonium, Maryland 21093
(410) 727-4300
sauce23@kollmanlaw.com
epaltell@kollmanlaw.com
Attorneys for VSP

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PRELIMINARY STATEMENT

This brief is submitted by Sinai Hospital of Baltimore d/b/a VSP (“VSP”) ¹ to the National Labor Relations Board (“NLRB” or “Board”) in support of VSP’s Request for Review. The November 29, 2019 Decision and Direction of Election (“DDE”) of Acting Regional Director Nancy Wilson should be overturned because her decision on a “substantial factual issue is clearly erroneous,” and such error prejudicially affects the rights of VSP. Specifically, the Acting Regional Director erred by disregarding overwhelming and compelling evidence that the disabled individuals engaged by VSP as janitors at the Social Security Administration (“SSA”) Perimeter East Building (“PEB”) in Baltimore County are in a primarily rehabilitative as opposed to industrial relationship and, therefore, are not employees under Section 2(3) of the National Labor Relations Act (“NLRA”).

As explained more fully below, VSP employs a Case Manager and counselors who train individuals for work readiness before they begin at VSP. VSP’s full-time Case Manager (Veronica White) is regularly at the SSA complex and is on call 24/7 to assist individuals who need assistance. Job duties and schedules are modified for disabled workers, and disabled workers are held to different disciplinary standards than are non-disabled workers. Many individuals leave VSP after less than two years, and at least seven contract site janitors were recently placed in the competitive job market. Therefore, under the standards set forth in *Goodwill Industries of North Georgia*, 350 NLRB 32, 36 (2007) and *Brevard Achievement Center, Inc.*, 342 NLRB 982, 984, (2004), the Acting Regional Director erred in concluding that

¹ VSP, which stands for Vocational Services Program (but is known as VSP to workers), is a primarily rehabilitative entity within Sinai Hospital.

the individuals engaged by VSP at the PEB are in a primarily industrial, as opposed to rehabilitative, relationship.

PROCEDURAL HISTORY AND BACKGROUND

VSP is a department of Sinai Hospital in Baltimore, Maryland, which employs and provides vocational services to individuals, including those with disabilities. VSP has no independent legal existence -- it is a department of Sinai Hospital, a LifeBridge Health Center. VSP's mission is "to provide employment opportunities to individuals with disabilities[,]” with the ultimate goal of helping those disabled individuals lift themselves up to find job placement and employment elsewhere if they so desire.

VSP operates as an AbilityOne program and community rehabilitation provider, following the Javits-Wagner-O'Day Act (JWOD Act). Under the AbilityOne Program, VSP provides base level janitor services to Social Security Administration (SSA) buildings, as it has since at least 1987.

All of the money allowed through AbilityOne (the Service Contract Act Wage Determination) is paid directly (passed through) to the VSP workers, and VSP has no leeway to increase the contractual wage rate. Like any other AbilityOne contractor, VSP is subject to annual audits by SourceAmerica to ensure that VSP is "compliant with the Service Contract Act and the [governing] [W]age [D]etermination,” down to the penny. Moreover, each employee receives full health benefits and all other benefits at absolutely no cost to the worker.

To maintain its status as a vocational services program, seventy-five (75) percent of the individuals in the program must have disabilities. Accordingly, at the Social Security Administration PEB in Baltimore County where the petitioned-for individuals are engaged, at least thirty-five (35) of the individuals are disabled, while no more than nine (9) ever are non-disabled.

On July 3, 2019 1199 SEIU United Healthcare Workers East filed a petition seeking to represent the forty-four (44) “full-time and part-time janitors and housekeepers employed by VSP at the Social Security Administration Complex in Woodlawn.”² VSP contested the petition on the grounds that none of the janitors in the unit are employees under the NLRA. After hearings on July 12, 2019 and September 12, 2019, the Acting Regional Director issued her Decision and Direction of Election on November 29, 2019 and found the janitors engaged by VSP at the Social Security Administration’s Perimeter East Building in Baltimore are employees under the NLRA. An election was held on December 18, 2019, and a Certification of Representative issued on December 30, 2019.

VSP now seeks review of the Decision and Direction of Election.

THE STANDARD FOR GRANTING A REQUEST FOR REVIEW

There are four bases for the Board to grant a Request for Review. Pursuant to Section 102.67 of the Board’s Rules and Regulations, the Board will grant a Request for Review upon one or more of the following grounds:

1. That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent;
2. *That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party;*
3. That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or

² There are no housekeepers.

4. That there are compelling reasons for reconsideration of an important Board rule or policy. (emphasis supplied).

The Decision and Direction of Election should be overturned because the Regional Director's Decision on a "substantial factual issue is clearly erroneous," and such error prejudicially affects the rights of VSP. *See In re Video Tape Enters., Inc.*, 214 NLRB 1037 (1974) (Board granted employer's request for review brought pursuant to "clearly erroneous" standard); *In re Kamehameha Sch. Bernice P. Bishop Estate*, 213 NLRB 52 (1974) (Board granted employer's request for review brought pursuant to "clearly erroneous" standard); *In re Walker-Roemer Dairies, Inc.*, 196 NLRB 20 (1972) (Board granted employer's request for review brought pursuant to "clearly erroneous" standard). Additionally, the Acting Regional Director's decision that the non-disabled employees could form a stand-alone bargaining unit should be overturned because it departs from Board law and compelling reasons warrant reconsideration.

The Board reviews *de novo* the Acting Regional Director's decision. *See Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) ("[W]e base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings."); *Sands Bethworks Gaming, LLC*, 361 NLRB 916 (2014) ("The Board then stated that it had considered *de novo* the representation issues and the hearing officer's report recommending disposition of them."). Where the fact-finder's conclusions are not based on a resolution of all the relevant facts, the Board should make its own factual findings. *See Williamson Mem'l Hosp.*, 284 NLRB 37, 37 (1987) ("Inasmuch as the judge has failed to perceive and resolve on two occasions the factual and legal issues before him, the Board is

certainly free to view the record *de novo* and make appropriate findings of fact and conclusions of law.”).

**THE ACTING REGIONAL DIRECTOR’S DECISION ON SUBSTANTIAL
FACTUAL ISSUES IS CLEARLY ERRONEOUS**

A. THE ACTING REGIONAL DIRECTOR’S FINDINGS

A review of the Acting Regional Director’s Decision and Direction of Election, dated November 29, 2019, confirms that the findings of the Acting Regional Director are clearly erroneous in any number of respects, with prejudicial effect to the Employer, thereby warranting Review.

B. LEGAL ANALYSIS

I. The Record Overwhelmingly Establishes A Primarily Rehabilitative Relationship Between VSP Management And The Contract Site Janitors.

A. Individuals In A Primarily Rehabilitative Working Relationship Are Not Statutory Employees Under The Act.

“For [over] half a century, the Board has declined to assert jurisdiction over employment relationships, such as . . . rehabilitative vocational programs, which are primarily rehabilitative in nature.” *Brevard Achievement Center, Inc.*, 342 NLRB 982, 983 (2004); *see Sheltered Workshops of San Diego*, 126 NLRB 961 (1960) (no jurisdiction over business whose “essential purpose is to provide therapeutic assistance rather than employment”). This is because “individual[s] whose working conditions are ‘primarily rehabilitative’ do[] not qualify as [] ‘employee[s]’ under the Act.” *Baltimore Goodwill Indus. v. NLRB*, 134 F.3d 227, 228 n.3 (4th Cir. 1998) (citing *Davis Mem’l Goodwill Indus. v. NLRB*, 108 F.3d 406, 410 (D.C. Cir. 1997)); *see also Goodwill Indus. of Denver*, 304 NLRB 764, 765 (1991).

The parties agree that, “[w]hen the relationship is primarily rehabilitative and working conditions are not typical of private sector working conditions, [] the Board has indicated it will

not find statutory employee status.” *Goodwill Indus. of Denver*, 304 NLRB at 765 (emphasis added); see Tr. 199:6-8. Only “[w]hen the [employment] relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship” has statutory employee status been found. *Goodwill Indus. of Denver*, 304 NLRB at 765.

Treating primarily rehabilitative working relationships as outside the jurisdiction of the Board is consistent with the text and intent of the Act:

In *Goodwill Industries of Southern California*, 231 NLRB 536, 537-38 (1977), the Board acknowledged that collective bargaining in the context of a rehabilitative work training program may not always effectuate the purposes of the Act. Collectively bargained terms of employment that would represent obvious gains for employees in another setting can work to the detriment of participants in a rehabilitative work training program. For example, collective bargaining might secure higher wages. Higher wages, however, can force the employer to employ more productive workers who often have less to gain from rehabilitative training. See *id.* at 537.

Davis Mem’l Goodwill Indus., 108 F.3d at 410. In other words, “in the rehabilitation setting[,] the employer may . . . safeguard employee interests more effectively than a union[.]” *Baltimore Goodwill Indus.*, 134 F.3d at 228 (quoting *Davis*, 108 F.3d at 410) (citation omitted).

As the Board explained in *Brevard*:

The imposition of collective bargaining on relationships that are not primarily economic does not further the policies of the Act. The Act is premised on the view that in arms-length economic relationships, there can be areas of conflict between employers and employees that, if the parties cannot reach agreement, can be resolved through a contest of economic strength in the collective-bargaining process if the employees choose to bargain collectively. This premise is not well suited to a setting that is not primarily economic but primarily rehabilitative.

Brevard, 342 NLRB at 985. Consequently, “the principles developed for the industrial setting cannot be ‘imposed blindly’ in other contexts.” *Id.* (citing *NLRB v. Yeshiva University*, 444 U.S. 672, 680-81 (1980)).

In evaluating whether a working relationship is “primarily rehabilitative,” as opposed to “typically industrial,” “the Board examines numerous factors[,]” 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 non-disabled 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, 350 NLRB 32, 36 (2007) (quoting *Brevard*, at 984).

Applying the *Brevard* standard, there is a primarily rehabilitative relationship between VSP management and the contract site janitors, not a typically industrial one. At least 79.5% of these individuals (35 out of 44) -- and as many as 86.3% (38 out of 44) -- have one or more known “severe disabilities” within the meaning of the JWOD Act. In other words, these individuals have “a severe physical or mental impairment (a residual, limiting condition resulting from an injury, disease, or congenital defect) which so limits the person’s functional capacities (mobility, communication, self-care, self-direction, work tolerance or work skills) that the individual is *unable to engage in normal competitive employment over an extended period of time.*” 41 C.F.R. § 51-1.3 (emphasis added); *Brevard*, 342 NLRB at 982.

The individuals in the proposed unit are predominantly referred to VSP by the Maryland Division of Rehabilitation Services (DORS), the Veterans Administration, or other community rehabilitation providers. See *Goodwill Indus. of Tidewater*, 304 NLRB 767, 768 (1991) (disabled individuals found not to be Section 2(3) employees in part because they “primarily come from referrals by the Virginia Department of Rehabilitation Services (DRS)”). VSP maintains required documentation (including medical diagnoses by a certified physician,

psychiatrist, and/or psychologist) of individuals' respective disabilities, and it has always maintained active certifications of compliance from DORS and other agencies that the individuals VSP assists do, in fact, have severe disabilities.

B. The Acting Regional Director Erroneously Disregarded Evidence That VSP Provides Counseling, Training, And Rehabilitation Services To Disabled Individuals.

“Not surprisingly, an important ingredient of primarily rehabilitative employment relationships is the availability of counseling.” *Davis*, 108 F.3d at 412 (citing *Goodwill Indus. of Denver*, 304 NLRB at 765, and *Goodwill Indus. of Tidewater*, 304 NLRB at 768). VSP provides *extensive* counseling to individuals: it employs a full-time Case Manager (Ms. Veronica White) on site who is available 24/7 and “act[s] as an advocate and support for the disabled individuals [she] serve[s].” Tr. 101:1-6; 15-17; 140:1-10. Not only does Ms. White “work with the supervisory staff, [and] the management staff, to ensure that the individuals are receiving accommodations that they may need[.]” Tr. 101:15-19, but she also provides:

- job placement assistance, such as drafting résumés, conducting mock interviews, finding job leads (both external and elsewhere internally), and helping individuals complete job applications (Tr. 104:25-105:21, 459:2-20);
- crisis intervention, such as getting involved when individuals are bullied in the workplace or assaulted by a stranger on the way home from work, so that further incidents do not arise (Tr. 348:2-24, 418:9-15);
- medical assistance, such as helping individuals schedule medical appointments -- and even attending medical appointments with individuals as needed to help them understand the medical information and medication they receive (Tr. 102:5-103:17, 223:7-18, 338:10-22, 412:11-414:16, 416:11-417:15);
- community resource assistance, such as helping individuals find community meals and food pantries, locate resources to reinstate the utilities in, or remove mold from, their living environment, coordinate their childcare, and find interpreting services at no cost to the individuals (Tr. 103:18-22, 123:4-22, 346:3-347:5, 418:1-8); and

- financial assistance, such as conducting weekly meetings to help individuals learn how to budget their money, pay their bills, and write checks, counseling an individual on how to stop being taken advantage of financially, and helping individuals find access to educational loans in order to pursue their careers (Tr. 44:16-45:13, 104:5-24, 392:10-396:18, 415:17-416:10, 469:13-22).

In addition to the Case Manager, VSP also employs nine (9) other counselors who provide extensive pre-employment training, and who help rehabilitate the employability of these individuals and provide coaching and retraining when applicable. Tr. 296:22-301:11. These individuals include:

- A career assessment counselor who works with individuals in groups of one to four at a time and then submits a report to the referring counselor regarding their skills and career recommendations (Tr. 297:9-17);
- Work readiness counselors who work with individuals in small groups and provide counseling services to those individuals (Tr. 297:18-21);
- Placement counselors who work with individuals who are in placement services to assist them in finding jobs, including helping with applications and teaching interviewing skills (Tr. 297:22-25); and
- Counselors who follow up with individuals after they are placed in jobs to assist in their transition to a new environment (Tr. 297:25-298:6).

Individuals are also given vocational services such as work readiness training by VSP that lasts between 12 and 20 weeks, depending on individual needs, before they come to work at the contract site (or elsewhere). Tr. 41:21-42:12, 267:6-10. VSP Director Lisa Mules explained these vocational services:

[VSP] provide[s] a continuum of services that starts with a career assessment where we work with individuals to help them establish career goals based on their academic – their academics, their education history, career interest, a whole, a whole litany of tests are used to come up with a recommendation. So we have career assessment. We have a couple of training programs. One is referred to as work readiness training. Individuals work with us for about 12 weeks developing work appropriate behaviors like showing up to training on time, dressing

appropriately, speaking to individuals in a supervisory capacity
appropriately.

We have a clerical skills training program. And then we have placement and retention services where we help individuals identify employment and then support them in that employment for 2 to 3 months[.]

Tr. 267:11-268:2.

Significantly, the Acting Regional Director's Decision and Direction of Election is replete with findings concerning the availability of counseling and training that are indicative of a primarily rehabilitative as opposed to industrial relationship. Specifically:

- The Acting Regional Director found that White may meet with between two to 15 of the 44 workers in a given week, and these meetings may be scheduled on a weekly basis. (DDE p.12);
- The Acting Regional Director found that White attended medical appointments with a janitor to make sure he understood what was said (DDE p.13); and
- The Acting Regional Director found that White provided consumer credit counseling services on money management, budgeting, and credit counseling to janitors (DDE p. 13).

Despite these findings, the Acting Regional Director nevertheless found that VSP's "failure to employ an on-site mental health counselor or job trainer" outweighed the other evidence of counseling and training indicative of a primarily rehabilitative relationship. (DDE p.15). This finding is clearly erroneous and disregards Board precedent. *See Brevard*, 342 NLRB at 986 (primarily rehabilitative relationship existed where record evidence showed that employer "provides clients assistance with daily living skills such as check writing, meal preparation, and the coordination of transportation"); *Goodwill Industries of Denver*, 304 NLRB 764, 765 (1991) (finding rehabilitative relationship where employer provided training on topics

such as staff interaction and how to follow instructions); *Goodwill Indus. of Tidewater*, 304 NLRB 767 (1991) (finding rehabilitative relationship where individuals received on the job skill training as well as training on workplace behavior and socialization skills) .

Moreover, in *Baltimore Goodwill Indus. v. NLRB*, 134 F.3d 227, 230 (4th Cir. 1998), the Fourth Circuit explicitly rejected the Board's reliance on the fact that there was not a trainer at the employer's facility, stating "while Goodwill does not provide trainers at the facility to teach custodial skills, Goodwill offers training emphasizing other areas, such as time management and interpersonal relations." *Id.*

C. The Acting Regional Director Erroneously Disregarded Evidence That VSP Relaxes Disciplinary Procedures For Disabled Individuals.

A critical component of the determination of a rehabilitative relationship is the comparative application of disciplinary standards to disabled and non-disabled individuals. *Brevard*, 342 NLRB at 986. In the instant case, the record shows that as between disabled and non-disabled individuals, written policies are enforced differently. Tr. 67:25-68:18. Time and time again, the Case Manager -- in conjunction with a supervisor or project manager -- has offered verbal coaching to disabled individuals in lieu of disciplinary action. Tr. 168:22-185:2. Those case manager meetings may reveal that the performance issue is attributable to an individual's disability. When that happens, retraining or workplace accommodation(s) -- such as creating a picture book for an individual who struggled to understand the sequence of his tasks; teaching a visually impaired individual which cleaning chemicals to use based on their colors rather than through written labels; or allowing an individual's job coach to physically go around the PEB complex with the individual during his or her shift -- is normally given. Tr. 68:19-

69:11, 363:19-365:6, 383:22-388:14, 462:24-463:11. Discipline is not given under those circumstances. Tr. 108:12-109:8, 169:5-12.

Moreover, a non-disabled individual with punctuality issues at VSP was subject to progressive discipline for violating the applicable Time and Attendance Policy. Tr. 117:11-19, 405:15-406:9. In contrast, a disabled individual who exhibited the same conduct was counseled by reviewing the applicable bus schedule, and, after it became clear that the individual had difficulty ambulating to the bus stop, the Case Manager worked to coordinate mobility services so that the individual could better arrive on time. Tr. 116:23-117:10, 406:10-407:18. Likewise, whereas a non-disabled individual was discharged for two or three punctuality violations during their initial probationary period, a disabled individual was afforded much greater leniency by being late “8, 9, [or] 10 times” during his probationary period before being discharged. Tr. 424:6-425:13.

When disabled individuals have difficulties meeting their objectives, they are given more leeway relative to their non-disabled colleagues. As the SEIU’s two witnesses -- each of whom was a former supervisor -- testified, supervisors were trained specifically on how to work with and coach individuals with disabilities. That training emphasizes, among other things, the need for mentoring disabled individuals rather than “[b]ringing the suggestion of corrective action” into play, and the importance of involving the Case Manager to offer further training to disabled individuals having performance issues. VSP Ex. 8 at 4. In addition, one individual who was going to be given disciplinary action after taking unauthorized breaks was permitted to take such breaks and was **not** disciplined after explaining to the Case Manager that the breaks resulted from difficulty the individual was having with her prosthetic limb. Tr. 108:12-109:8. In

contrast, a non-disabled individual was given corrective action for taking unauthorized breaks.
Tr. 109:9-17.

The record is replete with other evidence of VSP giving disabled individuals extensive coaching or counseling in lieu of discipline:

- In lieu of being disciplined for punctuality issues, one individual was counseled and coached about parking in the parking lot closest to the SSA building to arrive on time (Tr. 169:14-170:2);
- A second individual was counseled for “doing things that w[ere] making other people uncomfortable” but did not have discipline imposed (Tr. 171:10-25);
- After taking unauthorized breaks, a third individual was “close counseled” in lieu of discipline (Tr. 172:10-20);
- In lieu of disciplining a fourth individual for punctuality issues, VSP worked with the individual’s brother to make alternative transportation arrangements (Tr. 172:25-173:17);
- A fifth individual was counseled on at least five occasions in lieu of discipline after having disagreements with coworkers (Tr. 175:1-176:13);
- A sixth individual was counseled in lieu of disciplinary action for unauthorized breaks (Tr. 175:18-24);
- A seventh individual was counseled in lieu of discipline for punctuality issues, and that counseling has resulted in improvement (Tr. 176:14-19);
- An eighth individual was counseled instead of being disciplined after coworkers complained about inappropriate workplace interactions (Tr. 176:19-25);
- On two or three occasions, a ninth individual was counseled about hygiene issues rather than being disciplined (Tr. 177:1-15);
- A tenth individual was counseled “[m]aybe three” times for hygiene concerns, instead of being disciplined (Tr. 179:22-180:4);
- After coworker complaints about her interactions with people, an eleventh individual received counseling, but not discipline, two or three times (Tr. 180:4-12);
- A twelfth individual met with the Case Manager in lieu of discipline (Tr. 180:19-21);

- After breaking site rules about staying on the premises after the end of his shift, a thirteenth individual was counseled “two or three times” in lieu of disciplinary action (Tr. 180:25-181:9);
- A fourteenth individual was coached one or two times for comments that could be considered inappropriate flirting, rather than being disciplined (Tr. 181:10-18);
- After having punctuality issues, a fifteenth individual was counseled “[m]aybe one or two times” in lieu of disciplinary action (Tr. 116:18-20, 182:1-6); and
- In lieu of discipline, a sixteenth individual both met with the Case Manager four or five times after having “verbal explosions,” and met with the Case Manager and his family another two or three times for hygiene concerns (Tr. 182:18-183:6); and
- In still another instance, Ms. White intervened on a disabled individual’s behalf to advocate for her to be given certain days off so that the individual would not be disciplined for attendance concerns. (Tr. 184:12-22).

The Acting Regional Director ignored this overwhelming evidence of relaxed disciplinary standards for disabled employees. Instead, the Acting Regional Director erroneously focused on evidence such as SEIU witness Parker’s testimony that he was once disciplined for failing to put his supplies away without intervention from Case Manager White (DDE 18). A review of the record shows this occurred at some unspecified time, and was described by Parker as a “simple write up.” (Tr. 220-221). Critically, Parker admits he was asked to speak to White about this counseling but declined to meet with her. (Tr. 221). Despite Parker’s testimony (and the Acting Regional Director’s acknowledgement (DDE p. 18)) that this was just a “simple write up” that he could have taken up with Ms. White if he had so elected, this single incident was taken as proof that disabled employees are “subjected to progressive discipline” (DDE p.19).

The Acting Regional Director also relied upon the fact that both disabled and non-disabled individuals are subject to a probationary period to conclude that the record evidence on

discipline weighed in favor of an industrial relationship. (DDE 18-19). In so doing, the Acting Regional Director erred by ignoring and/or minimalizing the multitude of evidence showing that disabled and non-disabled individuals are held to different disciplinary standards.³ The facts of the instant case are similar to those in *Goodwill Indus. of Tidewater*, 304 NLRB 767, 768 (1991), where the Board found the workers to be in a primarily rehabilitative relationship. There, the Board concluded that disabled individuals were not statutory employees even though they were subject to the same work rules as nondisabled workers, where they were subject to a different standard of discipline. *Goodwill Indus. of Tidewater*, 304 NLRB 767, 768 (1991). *See also Davis Mem'l Goodwill Industries v. NLRB*, 108 F.3d 406, 411 (D.C. Cir. 1997) (“[A]s the Board itself has emphasized, the relevant question . . . is not what rules [disabled] workers must follow but the penalties they face for breaking those rules.”)

D. The Acting Regional Director Erroneously Disregarded Evidence That VSP Modifies Schedules And Production Standards For Disabled Individuals.

In the Decision and Direction of Election, the Acting Regional Director repeatedly acknowledges that there is substantial evidence in the record establishing that VSP modifies job duties and schedules for disabled workers. For example:

- The Acting Regional Director acknowledged the record evidence showing that disabled workers will be moved to a different task if they have difficulty grasping a certain task in their job description (DDE p.8);

³ Notably, Union witness Tyler testified that she was “not sure” if disabled individuals are held to a different disciplinary standard (Tr. 203:21-24), while Union witness Parker testified that supervisors may refrain from correcting the way a disabled worker completes a task. Tr. 220:3-10.

- The Acting Regional Director acknowledged the record evidence showing that disabled workers will be given a smaller area to clean if they are slower than others (DDE p.8);
- The Acting Regional Director acknowledged the record evidence showing that disabled workers will be given lighter objects to lift if he or she has trouble lifting heavy objects (DDE p.8);
- The Acting Regional Director acknowledged the record evidence showing that VSP provided a worker with an artificial leg extra breaks (DDE p.9);
- The Acting Regional Director acknowledged the record evidence showing that Case Manager White made a photo schedule for a worker had difficulty reading (DDE p.9); and
- The Acting Regional Director found that disabled janitors are given competitive employment evaluations that are not given to non-disabled janitors (DDE p.10).

Nevertheless, the Acting Regional Director disregarded this evidence and found this factor to weigh in favor of a typically industrial relationship. (DDE p.11). In so doing, the Acting Regional Director wrongly minimized the weight to be afforded VSP's management witnesses, and instead erroneously relied almost exclusively on the testimony of the two Union witnesses, Gregory Parker and Wilzona Tyler. For example, the Acting Regional Director disregarded White's testimony that she sometimes gave disabled workers their assignments separately from other staff to avoid embarrassing the individual. Inexplicably, the Acting Regional Director discredited this testimony because White's use of discretion had succeeded in not being observed first hand by either of the two Union witnesses (DDE pp.8-9).

Moreover, the Union witnesses offered testimony supporting VSP's position that work assignments may be handled differently for disabled employees. During his direct examination, Parker testified:

- Q. And do you see any differential treatment between you and the non-disabled person that you were working with at that time?
A. There might be certain things, but --.
Q. Such as what?
A. --it's the work assignment...

Tr. 218:18-23.

Parker went on to explain that VSP supervisors -- including Parker, a former supervisor himself -- would refrain from correcting the way a disabled individual completes a task because of the difficulty such persons have adapting to change. Tr. 220:3-10.

In light of the record evidence, the Acting Regional Director should have found VSP's modifications of schedules and production standards to be indicative of a primarily rehabilitative relationship.

E. The Acting Regional Director Erroneously Disregarded Evidence Regarding The Tenure Of Employment For Disabled Individuals.

The average tenure of the individuals presently on the site is about 13 years, but no less than 41 disabled individuals -- a group essentially as large as the petitioned-for unit itself -- have left the SSA contract site within the last five years. Tr. 54:14-21, 63:17-64:10; *see* VSP Ex. 7. Twenty-two (22) of those individuals were in VSP for less than two years at the time they left, and 10 had a tenure of less than six months. Tr. 64:11-22, 500:21-501:12; *see* VSP Ex. 7.

“[T]he mere fact that a number of severely disabled employees participate in the program for several years does not negate the program's rehabilitative character.” *Baltimore Goodwill*

Indus., 134 F.3d at 230 (citing *Davis*, 108 F.3d at 410-11). To the contrary, the Board’s reasoning in *Brevard* applies with full force to VSP:

That some [individuals] remain with [VSP] for a period of several years (while others move on within months), supports the rehabilitative quality of [VSP]’s program. Some disabled individuals (*e.g.*, those with more severe disabilities) may require more training or, simply, more repetitive experience, and/or more counseling in working with others and attending to their daily living needs before they can leave the sheltered atmosphere [VSP] provides.

342 NLRB at 987. Indeed, consistent with JWOD Act regulations, some severely disabled individuals remain at VSP precisely because they remain “unable to engage in normal competitive employment[,]” pending annual re-assessment. 41 C.F.R. § 51-1.3. As Ms. White explained, at least two of the contract site janitors “have long-term job coaching that’s for the rest of their life” -- precisely because they are not expected *ever* to be able to engage in competitive employment. Tr. 476:22-23. And there has not been any “showing that [severely disabled individuals] are retained to the exclusion of creating new openings for other[s].” *Goodwill Indus. of Tidewater*, 304 NLRB at 769. This is further proof that VSP is not a competitive, typically industrial setting.

F. The Acting Regional Director Erroneously Disregarded Evidence That VSP Successfully Places Disabled Persons In Jobs.

Since 2014, Case Manager White and VSP have helped at least seven (7) disabled individuals at this contract site secure job placement elsewhere. Tr. 65:5-13, 65:23-66:9; *see* VSP Ex. 7. White helped one of these individuals obtain his dream of a career in the culinary arts by helping him gain admission into culinary school, obtain loans, navigate the testing process (including helping him do more studying to pass the test on his second try), and help him “obtain a position outside of VSP doing culinary arts work.” Tr. 65:8-66:9, 105:7-21, 186:1-6. SEIU witness Tyler discussed another individual (though Ms. Tyler was not sure whether the

individual was disabled) who went to work competitively at Amazon. Tr. 563:17-22, 568:18-19, 568:25-569:8.

The Acting Regional Director acknowledged that “White performs job placement services as part of her general duties as case manager” (DDE p.19). The Acting Regional Director also found that White drafts resumés for disabled workers and conducts mock interviews for disabled workers, services she does not provide to non-disabled workers (DDE pp. 19-20). Nevertheless, despite the foregoing, the Acting Regional Director found “no evidence that disabled workers regularly transition to private competitive employment.” (DDE p. 20). This finding disregards the undisputed evidence that, in the past five years, a substantial number of disabled individuals have secured employment elsewhere because of VSP’s efforts. Accordingly, the Acting Regional Director erred in concluding that this factor weighs in favor of finding a typically industrial relationship.

2. The Non-Disabled Individuals Would Not Be An Appropriate Bargaining Unit.

In its post-hearing Brief, VSP argued that it would be improper to certify a unit comprised only of the non-disabled employees working at the SSA site. The Acting Regional Director found this argument to be moot in light of her determination that all of the individuals VSP engages at SSA are employees under Section 2(3). (DDE 22). Nevertheless, the Acting Regional Director went on to address this argument and rejected it on the grounds that a unit of non-disabled workers would not be an improper “microunit” under the *The Boeing Co.*, 368 NLRB No. 67 (2019). As explained below, this conclusion is contrary to Board law and there are compelling reasons for reconsideration of this conclusion.

“It is well established that the Board does not approve fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis.” *Seaboard Marine, Inc.*, 327 NLRB 556, 556 (1999) (citing *Colorado Nat’l Bank of Denver*, 204 NLRB 243 (1973)). Following the Board’s recent decision in *Boeing*, there is now “a three-step process for determining an appropriate bargaining unit under [the] traditional community-of-interest test.” *Boeing*, 368 NLRB No. 67, slip op. at 3.

First, the proposed unit must share an internal community of interest. Second, the interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit must be comparatively analyzed and weighed. Third, consideration must be given to the Board’s decisions on appropriate units in the particular industry involved.

Id.

At the first two steps of this process, the Board applies the traditional community-of-interest test and considers whether those in the proposed unit

- [1] are organized into a separate department;
- [2] have distinct skills and training;
- [3] have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;
- [4] are functionally integrated with the Employer’s other employees;
- [5] have frequent contact with other employees;
- [6] interchange with other employees;
- [7] have distinct terms and conditions of employment; and
- [8] are separately supervised.

Id. at 2 (quoting *PCC Structurals*, 365 NLRB No. 160 (2017), slip op. at 5 (in turn quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002))). Ultimately, this assessment is intended to “ensure[] that bargaining units will not be arbitrary, irrational, or ‘fractured’—that is, composed of a gerrymandered grouping of employees whose interests are insufficiently distinct from those of other employees to constitute that grouping a separate appropriate unit[.]” *Boeing*, 368 NLRB No. 67, slip op. at 3 (quoting *PCC Structurals*, slip op. at 5).

A. The Non-Disabled And Disabled Individuals Have Shared Interests With One Another.

Although an argument can be spun that the non-disabled janitors at the SSA site have an internal community of interest -- they work at the same job site, with common supervision, using the same tools such as mops, gloves, brooms, and buffers -- certifying such a unit would not be consistent with the law. A microunit of only these individuals is not appropriate because it lacks any rational basis at the second step of the *Boeing* analysis.

B. A Microunit Of Only Non-Disabled Individuals Does Not Satisfy Step Two of The *Boeing* Analysis Because The Interests Of Non-Disabled Individuals Are Not Sufficiently Distinct From Those Of The Disabled Individuals Who Must Be Excluded.

The second step of the *Boeing* analysis requires a “comparative analysis” between “those within the proposed unit” (the “included group”) and “those excluded from that unit” (the “excluded group”). 368 NLRB No. 67, slip op. at 3, 4. Furthermore, “[a]s the Board has observed before, it is ‘particularly inappropriate to carve out a disproportionately small portion of a large, functionally integrated facility as a separate unit.’” *Id.* at 5 (quoting *Publix Super Markets*, 343 NLRB 1023, 1027 (2004)).

To be sure, “[t]his inquiry does not require that distinct interests must outweigh similarities by any particular margin, nor does it contemplate that a unit would be found inappropriate merely because a different unit might be more appropriate.” *Id.* at 4. But, “what is required” is that the Regional Director “analyze the distinct and similar interests and explain why, taken as a whole, they do or do not support the appropriateness of the unit.” *Id.* (emphasis added). Before concluding that a unit is appropriate, in other words, the Regional Director must explain why those excluded from the unit “‘have distinct interests *in the context of collective bargaining*[,]’” and not “‘[m]erely record[] similarities or differences’” between those within the

proposed unit and those excluded from it. *Id.* at 3, 4 (emphasis added) (quoting *Constellation Brands v. NLRB*, 842 F.3d 784, 794-95 (2d Cir. 2016)).

The traditional community-of-interest factors weigh heavily against a microunit of non-disabled individuals in this case. Contract site janitors at the PEB complex are not organized into separate “disabled” versus “non-disabled” departments, nor are janitors assigned to specific floors of the five-story PEB based on whether they are non-disabled. Tr. 490:23-491:8, 508:2-512:5; *compare* VSP Ex. 2 (list of contract site janitors) *with* VSP Ex. 14 (examples of daily shift reports showing janitors’ assignments). Though disabled individuals may be given more extensive work readiness training and job coaching than their non-disabled colleagues, no special licensure is required among either group. Tr. 487:18-23. Non-disabled individuals and disabled individuals often work extensively alongside one another throughout the same shift, and may even share supplies with one another. Tr. 491:5-24. Non-disabled individuals also have the same common supervisors as their disabled colleagues, work the same scheduled shifts and perform the same tasks as their disabled colleagues, and receive the same wages and benefits as their disabled colleagues. Tr. 457:12-458:20, 486:14-487:12.

The practical realities of the situation further confirm why non-disabled individuals are not an appropriate unit in the context of collective bargaining. Wages and staffing levels are dictated by the AbilityOne contract procured under the JWOD Act and monitored by SourceAmerica for the entire PEB; there is no separate “carve out” based on non-disabled status. *See* p. 3, *supra*. In addition, if non-disabled individuals elected to form a unit, supervisors would have no way of knowing who is non-disabled (and, therefore, entitled to have a union representative present during disciplinary meetings, for example) and who is severely disabled under the JWOD Act regulations. *See* pp. 6-7, *supra*. Thus, the non-disabled individuals are **not**

an appropriate “subdivision [of]” VSP’s workforce at the contract site. 29 U.S.C. § 159(b). Indeed, they are not even “readily identifiable as a group[.]” *PCC Structurals*, 365 NLRB No. 160, slip op. at 5 (citation omitted).

Furthermore, “the Board has also long given substantial weight to prior bargaining history[.]” *Boeing*, 368 NLRB No. 67, slip op. at 2. There is no prior bargaining history between VSP and the SEIU over the more than three decades that VSP has staffed the SSA contract. Tr. 8:15-20, 18:24-19:3. Individuals who have not yet been placed elsewhere have benefitted from the stable work setting that VSP offers, and many continue to benefit from the assistance of VSP staff in helping to develop new professional and life skills. Indeed, as SEIU witness Mr. Parker explained, disabled individuals “do good work; but they’ve been doing it their way[.]” Tr. 219:17-24. Disturbing this primarily rehabilitative relationship -- no less than changing the supervision process from a flexible one to a rigid, one-size-fits-all arrangement -- would certainly interrupt this routine. And, as Mr. Parker said, “[y]ou know, you don’t want to do that, kind of throw them off.” Tr. 219:24-220:5. Consequently, “[g]iven a long history of not injecting collective bargaining into the rehabilitation process,” the Board should remain “unwilling to suddenly change course and possibly place that process at risk.” *Brevard*, 342 NLRB at 988.

Simply put, the interests of non-disabled individuals are **not** sufficiently distinct from the interests of “those excluded from that [proposed] unit” -- *i.e.*, disabled individuals -- “to warrant the establishment of a separate unit.” *Boeing*, 368 NLRB No. 67, slip op. at 2, 3 (quoting *Wheeling Island Gaming*, 355 NLRB 637, 637 n.2 (2010)). Those disabled individuals are not statutory employees, however, as discussed above, so there is no appropriate bargaining unit.

C. The Board’s Precedent In Other Cases Involving Janitors Governed By The JWOD Act Contracts Further Supports The Conclusion That Non-Disabled Individuals Are Not An Appropriate Unit.

Step Three of the *Boeing* analysis requires, a consideration of “the Board’s decisions on appropriate units in the particular industry involved” establishes that it would be inappropriate to certify a unit of only non-disabled individuals. For many decades, the Board has repeatedly held that the Act was not intended to disturb the efforts of primarily rehabilitative companies who coach and train their workforce toward becoming employees in a competitive setting. *See, e.g., Sheltered Workshops of San Diego*, 126 NLRB 961 (1960); *Epi-Hab of Evansville*, 205 NLRB 637 (1973); *Goodwill Indus. of S. Cal.*, 231 NLRB 536 (1977); *Goodwill Indus. of Tidewater*, 304 NLRB 767 (1991); *Goodwill Indus. of Denver*, 304 NLRB 764 (1991); *Brevard Achievement Ctr., Inc.*, 342 NLRB 982 (2004).

Notably, even in those rare instances when the Board has certified units of disabled and non-disabled janitors on a contract governed by the JWOD Act, courts have refused to enforce those decisions. *See Davis Mem’l Goodwill Indus. v. NLRB*, 108 F.3d 406 (D.C. Cir. 1997); *Baltimore Goodwill Indus. v. NLRB*, 134 F.3d 227 (4th Cir. 1998) (denying enforcement of Board’s certification of “all full-time and regular part-time janitorial and custodian employees . . . employed by the Employer at the Woodlawn Social Security Complex, operations and annex buildings, located in Baltimore, Maryland”); *see also Brevard*, 342 NLRB at 988 (discussing both *Davis* and *Baltimore Goodwill Indus.*). The reasoning of these decisions and cases applies here to make inappropriate a stand-alone unit of non-disabled individuals.

THE BOARD SHOULD STAY THE ACTING REGIONAL DIRECTOR'S DECISION & DIRECTION OF ELECTION

Section 102.67(j)(1) of the Board Rules and Regulations states:

A party requesting review may also move in writing to the Board for one or more of the following forms of relief: [] (ii) A stay of some or all of the proceedings ...

As explained below, the Board should stay VSP's duty to bargain pending the Board's decision on this Request for Review.

Absent the granting of a stay of the duty to bargain, an employer must bargain with a union following the certification of election results, notwithstanding the employer's filing of a Request for Review. As recently stated by the United States District Court for the Northern District of California in *Coffman v. Queen of the Valley Medical Center*, 2017 U.S. Dist. LEXIS 197502 (N.D. Cal. 2017):

Under well-established law, an employer is not relieved of its obligation to bargain with a certified representative of its employees pending Board consideration of a request for review. *Audio Visual Servs. Grp., Inc. d/b/a Psav Presentation Servs. & Int'l All. of Theatrical Stage Employees, Local 15*, 365 NLRB No. 84 (May 19, 2017) (citing *Benchmark Industries*, 262 NLRB 247, 248 (1982), *enf'd* 724 F.2d 974 (5th Cir. 1984)). "In order to challenge certification of a collective bargaining unit, an employer must refuse to recognize a union after its certification." *Technicolor Gov't Servs., Inc. v. NLRB*, 739 F.2d 323, 326 (8th Cir. 1984). "If the union files unfair labor practice charges for refusal to bargain, under § 8(a)(5) of the Act, the employer may then raise the issue of the propriety of the unit as an affirmative defense to the charges" in order to obtain judicial review of the certification determination by the Board." *Id.* Failure to follow this procedure waives the right to contest certification, and thus the defense to the refusal to bargain charge. *Id.*

This requirement places both employers and unions in a procedurally awkward posture. If the employer bargains with the union, it waives its right to further challenge the certification of the election, leaving the employer who wishes to obtain further review of the Regional Director's

decision with no choice but to refuse to bargain and force the union to file an unfair labor practice charge. As the D.C. Circuit stated in *Terrace Gardens Plaza, Inc. v. N.L.R.B.*, 91 F.3d 222, 225-26, 319 U.S. App. D.C. 418 (D.C. Cir. 1996) (emphasis supplied):

If [the employer] prevails on its affirmative defense, then the certification will be held invalid and the Board's finding that it committed an unfair labor practice [by refusing to bargain] will be vacated. Alternatively, the [employer] may avoid the unfair labor practice charge altogether by agreeing unconditionally to bargain. *It may negotiate with, or challenge [*6] the certification of, the Union; it may not do both at once.*

As a result of this conundrum, the Board has embraced a willingness to stay the duty to bargain pending the resolution of issues raised in a Request for Review. As Chairman Ring recently noted in *Northwestern University and SEIU Local 73, CLC/CTW*, 2018 NLRB LEXIS 414, [** 7-8], n.8 (2018), “[i]n light of the problems that may be created by the issuance of a certification while contested election issues remain unresolved, the Chairman believes that the Board should look with favor on requests to stay certifications in these circumstances.”

For the foregoing reasons, VSP respectfully requests that the Board stay these proceedings, including the imposition of its duty to bargain, pending the issuance of a decision on this Request for Review.

SUMMARY & CONCLUSION

For the reasons stated above, the Board should issue an order staying VSP's obligation to bargain and VSP's Request for Review should be granted.

Respectfully submitted,

/s/ Eric Paltell

Peter S. Saucier
Eric Paltell
Kollman & Saucier, P.A.
1823 York Road
Business Law Building
Timonium, Maryland 21093
(410) 727-4300
sauce23@kollmanlaw.com
epaltell@kollmanlaw.com

Attorneys for VSP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of January, 2020, a copy of the foregoing Request for Review and Stay Pending Resolution was electronically filed through the Board's website (www.nlr.gov), with a copy served by e-mail on Gillian Santos, Counsel for Petitioner, gsantos@abato.com and by regular mail to Nancy Wilson, Acting Regional Director, National Labor Relations Board, Region 5.

/s/ Eric Paltell

Eric Paltell