UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	*	
	*	
Sinai Hospital of Baltimore, Inc.	*	
d/b/a VSP,	*	
	*	
Employer	*	
	*	
and	*	**CASE NO. 05-RC-244319**
	*	
1199 SEIU United Healthcare Workers East,	*	
	*	
	*	
Petitioner	*	

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PETITIONER'S STATEMENT IN OPPOSITION TO
EMPLOYER'S REQUEST FOR REVIEW

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INTRODUCTION

This Brief is submitted by 1199 United Healthcare Workers East ("SEIU") in response to Sinai Hospital of Baltimore d/b/a VSP's ("VSP" or "Employer") Request for Review ("RR") of the Acting Regional Director's Decision and Direction of Election ("DDE"). The Employer seeks to overturn the Acting Regional Director's Decision and Direction of Election on the grounds that the decision is clearly erroneous on a substantial factual issue. As explained in more detail below, the Acting Regional Director's Decision and Direction of Election contains sound and thoughtful analysis, fully supported by the record and applicable board law.

The Employer also suggests that the Acting Regional Director's Decision and Direction of Election on its secondary argument[1] should be overturned because it is contrary to Board law. As demonstrated below, the Regional Director's conclusions are consistent with the Board's recent decision in Boeing Co. NLRB 67 (2019) as well as applicable Board decisions. Accordingly, the Board should decline to grant review.

STANDARD OF REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, the Board will grant a Request for Review of the action of the Regional Director only where *compelling reasons exist* 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;

[1] In its Request for Review, the Employer raises a secondary argument that a unit comprised on nondisabled janitors would be improper pursuant to the Board's decision Boeing. It is the Union's position that disabled and nondisabled janitors are an appropriate unit. Assuming arguendo, that disabled janitors are not statutory employees due to their rehabilitative relationship with the Employer, a unit comprised of nondisabled janitors would be an appropriate unit.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

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

24 C.F.R. § 102.67(d) (emphasis added). Furthermore, a "request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record . . . ." 24 C.F.R. § 102.67(e). The Employer proffers that the Regional Director's Decision and Direction of Election is subject to review in accordance with subsections (1)(ii) and (2) above. See RR, p. 3-4. Therefore, it is the Employer's burden to demonstrate the Regional Director's DDE was *clearly erroneous* and raises a *substantial* question of law that is a *clear departure from Board Precedent.*

In a feeble attempt to escape meeting its burden, the Employer dishonestly invites the Board to review *de novo* the Regional Director's DDE. See RR, p. 4-5. To support this proposition, the Employer cites to Board decisions that have absolutely no bearing on the matter at hand. See RR, p. 4-5 (citing In re Standard Dry Wall Products, Inc., 91 NLRB 544 (1950) (granting *de novo* review of *trial examiner's* determination in an unfair labor practice charge); Sands Casino Resort Bethlehem, 361 NLRB 961 (2014) (reviewing *de novo* an unfair labor practice charge and a representation proceeding solely due to the peculiar composition of the Board that was alleged to be constitutionally infirm); Williamson Mem'l Hosp., 284 NLRB 37 (1987) (reviewing *de novo* a supplemental decision issued by an administrative law judge in an unfair labor practice proceeding)). The Employer's tactics are improper as those decisions do not involve review of the action of a Regional Director in a representation case. As demonstrated below, the Employer failed to meet its burden as required by the Board's Rules and Regulations codified within 24 C.F.R. § 102.67(d).

ARGUMENT

I. The Regional Director's Decision on Substantial Factual Issues Is Not Clearly Erroneous.

The Employer had the burden of proving janitors working at its contract site have a primarily rehabilitative relationship with VSP management. The Acting Regional Director concluded that the Employer failed to meet its burden. For the Employer to secure Board review of the Regional Director's Decision and Direction of Election, it must prove that the Regional Director's decision on a substantial factual issue was clearly erroneous on the record and such error prejudicially affects its rights. 29 C.F.R. § 102.67(d)(2). The legal definition of "clearly erroneous" is "being or containing a finding of fact that is not supported by substantial or competent evidence or by reasonable inferences." MERRIAM WEBSTER, https://www.merriam-webster.com/legal/clearlyerroneous (last visited Feb. 5, 2020); cf. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948) (finding is clearly erroneous when, although evidence exists to support the finding, the reviewing body, on entire evidence, is left with definite and firm conviction that a mistake has been committed).

Notably, the Employer misconstrues the clearly erroneous standard and repeatedly states throughout its Request for Review that the Acting Regional Director "erroneously disregarded evidence" in making her findings. That is not the standard applied in determining whether the Board should review the Decision and Direction of Election. Here, the Employer failed to prove the Regional Director's factual findings were clearly erroneous.

A. The Acting Regional Director's Determination that All Janitors Working at the Social Security Administration Site Have an Industrial Relationship with VSP, and Thus, Are an Appropriate Unit Was Not Clearly Erroneous.

To assess whether a group of workers constitute statutory employees under Section 2(3) of the National Labor Relations Act ("the Act"), the Board examines the relationship between the

workers and the employer. See Goodwill Indus. of Denver, 304 NLRB 764, 765 (1991). The Board has indicated that it will not find statutory employee status "when the relationship is primarily rehabilitative and working conditions are not typical of private sector working conditions." Goodwill Indus. of Tidewater, 304 NLRB 767, 768 (1991). In Brevard Achievement Center, Inc., the Board articulated several factors used to assess whether a relationship is industrial or primarily rehabilitative:

> [T]he 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.

342 NLRB 982, 984 (2004). The Acting Regional Director properly considered the foregoing factors in her Decision and Director of Election. Moreover, her application of the Brevard standard was not clearly erroneous on the record.

In Goodwill Industries of North Georgia, Inc., the Board clarified Brevard and found that the mere existence of counseling or rehabilitative services provided by the employer is not enough to establish a primarily rehabilitative relationship between an employer and disabled workers if those services are limited in nature and scope. 350 NLRB 32, 37 (2007). Moreover, the absence of an established job-placement program tends to weigh in favor of finding an industrial relationship between workers and an employer. North Georgia, 350 NLRB at 39. Regarding discipline, any testimony by the employer asserting the lenient application of workplace rules and disciplinary action toward a disabled worker does not establish a rehabilitative relationship if there exists testimony directly contradicting the employer's evidence. North Georgia, 350 NLRB at 39 (citing Brevard, 342 NLRB at 986). Furthermore, the Board will find a primarily rehabilitative relationship where the employer only issues discipline to disabled workers under "extreme cases."

See Denver, 304 NLRB at 765; see also Tidewater, 304 NLRB at 768. The corollary of such is that the Board will find an industrial relationship where the record demonstrates an employer regularly issues discipline to such workers. Id.

1. *The Acting Regional Director's Conclusion that VSP Does Not Relax Disciplinary Procedures for Disabled Individuals Was Not Clearly Erroneous.*

   a. The Request for Review

The Employer argues the Acting Regional Director erroneously disregarded evidence that VSP relaxes disciplinary procedures for disabled individuals. In its Request for Review, the Employer cites various examples in support of its position that written policies are enforced differently between disabled and non-disabled individuals.

- Case Manager, Ms. White, offered verbal coaching to disabled individuals in lieu of disciplinary action. Tr. 168: 22-185: 2;

- When retraining or workplace accommodation(s) are necessary due to performance issues, the Employer creates picture books, permits job coaches to physically go around the [SSA] complex with the individual during his or her shift, and discipline is not given under such circumstances. Tr. 68: 19-69: 11, 363: 19-356: 6, 383: 22-388: 14, 462: 24-463: 11, 108: 12-109: 8, 169: 5-12;

- Non-disabled individuals with punctuality issues are subject to progressive discipline for violating the applicable Time and Attendance Policy, including discharge, for individuals who incur two or three punctuality violations during their initial probationary period. Tr. 117: 11-19, 405: 15-406: 9, 424: 6-425: 13;

- Disabled individuals with punctuality issues are counseled, and individuals during the probationary period are discharged only after eight, nine or ten violations. Tr. 116: 23-117: 10, 406: 10-407: 18, 424: 6-425: 13;

- A disabled individual with a prosthetic limb was not disciplined after taking unauthorized breaks. Tr. 108: 12-109: 8;

- A non-disabled individual was given corrective action for taking unauthorized breaks. Tr. 109: 9-17;

- 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: 15-173: 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 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 eight 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 complains 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 evidence 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. 116: 18-20, 182: 1-6;

- 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 of advocate for her to be given certain days off so that the individual would not be disciplined for attendance concerns. Tr. 184: 12-22.

b. The Acting Regional Director's Decision and Direction of Election

The Acting Regional Director noted that "[d]isciplinary procedures for disabled workers are another factor in the Board's analysis of whether the relationship between the employer and its disabled workers is traditionally industrial or primarily rehabilitative in nature." DDE, p. 15 (citing Brevard Achievement Ctr., Inc., 342 NLRB 982 (2004). "In Brevard, where there was a primarily rehabilitative relationship, 'the employer never issue[d] discipline to its workers for misconduct related to their disability.'" Id. (quoting Brevard, at 986). Similarly, there, "'nondisabled workers [were] subject to a progressive disciplinary procedure, while the [disabled workers were not].'" Id. (quoting Brevard, at 983). However, "although a factor of disciplinary standards cuts the other way, it is insufficient by itself to dictate a different outcome." DDE, p. 16 (quoting Goodwill Indus. of North Georgia, 350 NLRB 32, 39 (2007).

In this case, the Acting Regional Director found that the Employer failed to meet its burden in showing disciplinary procedures are similarly applied to disabled and non-disabled workers during and after employees' probationary period. The record demonstrates that the Employer maintains a disciplinary system, which it applies to all its janitors, regardless of disability, during and after probation. DDE, p. 17. In fact, disabled individuals who engage in misconduct related to their disabilities are disciplined. Id. Moreover, in at least two instances, disabled workers were terminated and removed from the SSA site due to the nature of their conduct while a third individual was removed from the SSA site and placed at another contract site, where he was

subsequently terminated again. Id. On another instance, a disabled worker was disciplined for failing to put away supplies. DDE, p. 18-19. "While there was some evidence that the disabled workers are treated more leniently by the Employer," these instances demonstrate that the Employer applies discipline in circumstances which the Board would not consider extreme under Goodwill Industries of Denver. 304 NLRB 764, 765 (1991); DDE, p. 17-19. On the whole, these factors "weigh against the finding of a primarily rehabilitative relationship between the Employer and its disabled janitors at the [SSA]." DDE, p. 19.

c. Petitioner's Position

The Acting Regional Director's determination was not clearly erroneous as it is fully supported by the record as well as applicable caselaw. In Brevard, the Board found the employer had a primarily rehabilitative relationship with its disabled workers because the employer never imposed discipline on disabled workers but did so with respect to non-disabled workers. 342 NLRB at 986. Similarly, in a line of Goodwill cases, the Board found that where disabled employees are only disciplined in extreme circumstances, a finding of a rehabilitative relationship may be warranted. Goodwill Indus. of Tidewater, Inc., 304 NLRB 767, 768 (1991); Goodwill Indus. of Denver, 304 NLRB 764, 765 (1991).

The Acting Regional Director's Reasoning is sound. The record clearly establishes the Employer similarly applies its disciplinary procedures to disabled and non-disabled janitors. The Employer's disciplinary policy provides no indication that the policy shall be applied more leniently to disabled workers or that special considerations shall be made when disabled workers violate the policy. See Employer's Exhibit 8. This is confirmed by the Employer's witness, Ms. Edmonds-Hill, who testified that as the project manager on site who disciplines all workers, she applies the Employer's disciplinary policy to both disabled and non-disabled similarly. Union

witnesses, Mr. Parker and Ms. Tyler, who are respectively disabled and non-disabled VSP employees at the contract site, testified they were both issued discipline for violating workplace rules. Both individuals were treated similarly thereafter and given the opportunity to meet with the Employer's Case Manager, Ms. White, to discuss ways to improve and any mitigating circumstances (though the meeting did not actually take place because such meetings are not deemed mandatory by workers).

Furthermore, Ms. White explained disabled individuals are subject to disciplinary action if they fail to meet their responsibilities after receiving coaching. Tr. 458.[2] In fact, Ms. White and Ms. Edmonds-Hills' provided detailed testimony revealing that the following disabled individuals were the subjects of disciplinary actions—even when the violations incurred were at times the direct result of an individual's disability and during an individual's probationary period.

- Gabrielle Cooper, suspended for insubordination. Tr. 175: 1-13.
- Emanuel Dunstan, disciplined for issues with personal hygiene. Tr. 177: 1-18.
- Jonas McMillan, disciplined for failure to come to work. Tr. 181: 1-2.
- Vera Bowen, disciplined for taking unauthorized breaks, sitting at a cubicle, and failing to follow instructions. Tr. 172: 1-8, 332: 22-25, 333-334: 1-15.[3]
- Gregory Parker, disciplined for failure to put away supplies. Tr. 220: 20-25, 221: 1-20, 571: 13-17.

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[2] Ms. White provided further testimony with respect to the coaching of disabled individuals prior to the issuance of discipline. In response to Hearing Officer Palewicz's question of "[d]o employees always get coaching before discipline?" Ms. White testified:

> "[I]t depends on what the circumstance is. If there is—some things are immediate corrective action or immediate termination such as if there are three no calls – three consecutive no/no shows, that's immediate. If there is theft, that's immediate. If there is fighting, that's immediate. Physical fighting." Tr. 448: 22-25, 449: 1-4.

[3] Ms. White also testified that at the time Vera Bowen was issued a disciplinary action for taking unauthorized breaks, the breaks taken were the result of Bowen's "medical impairment." Tr. 334: 5-15. Additionally, Ms. Edmonds-Hill also testified on direct that Vera Bowen was issued disciplinary actions for not following instructions. Tr. 506-507:1-11.

- Donald Street, discharged during probationary period for falling asleep while on duty. Tr. 150: 16-25.

- Deandre Williams, discharged during probationary period for inappropriate behavior. Tr. 152: 20-25, 153; 1-11.

- Octavius Lloyd, discharged during probationary period for failure to come to work. Tr. 155: 17-25, 156-157: 1-22.

- Isaiah Jackson, discharged during probationary period for poor attendance and punctuality. Tr. 157: 24-25, 158: 1-2.

- Daquan Harrell, discharged during probationary period. Tr. 158: 10-12.[4]

- Noah Young, discharged during probationary period for poor attendance and punctuality. Tr. 424: 6-25, 425: 1-4.

- Robert Featherstone, employed at VSP's SSA contract site twice. Initially discharged during probationary period for possessing illegal substances and discharged a second time for poor attendance. Tr. 426: 20-25, 427-428.

These instances are not random facts unworthy of consideration. They demonstrate that the Acting Regional Director's decision is sound as they show the Employer's willingness to discipline disabled individuals, no matter the circumstances. As such, an acceptance of the Employer's position on this issue by the Board would stand in opposition to the standards it articulated in Brevard, Tidewater and Denver. The Employer's disciplinary procedures are not only applied to disabled individuals in extreme circumstances; they are also applied to disabled workers whenever an individual violates workplace rules—in the same manner that disciplinary procedures are applied to non-disabled individuals at the contract site.

The Employer's position is further weakened by its failure to produce any supervisors directly involved in its offered examples in its Request for Review. As the record establishes, supervisors notify Ms. White when disabled individuals violate workplace rules. Tr. 883:11. Yet,

[4] Ms. White testified that she could not recall the reason behind Daquan Harrell's discharge. Tr. 158: 11-12.

in every example offered, the Employer failed to provide the necessary testimony that would give context to the alleged violations committed by the disabled, and testimony that would demonstrate that disciplinary actions are indeed applied more leniently to the disabled than non-disabled. Yet again, these factors demonstrate the Employer's failed attempt at meeting its burden.

In its Request for Review, the Employer does not directly challenge any element of the Acting Regional Director's sound and thoughtful analysis. It does not challenge the Acting Regional Director's point with respect to instances in which disabled employees are terminated for a host of different reasons related to their disabilities and work performance. It does not challenge the Acting Regional Director's conclusion regarding its application of its disciplinary procedures to disabled and non-disabled individuals during probationary period. Nor does the Employer provide any reason for failing to produce supervisors as witnesses who could support its assertion that disciplinary procedures are applied more leniently to disabled workers than non-disabled workers. Instead, the Employer offers twenty instances it cherry-picked from its records, which it claimed that disciplinary procedures are applied more leniently to disabled than to non-disabled individuals. That is, the Employer urges the Board to focus on the few instances it specifically told disabled individuals to: (1) take a shower because of issues with hygiene, (2) stop engaging in flirtatious conduct to avoid making others feel uncomfortable, (3) park at the closest parking lot to avoid being late, (4) show up to work on time, and (5) stop sitting at cubicles while performing their janitorial duties. In other words, despite the overwhelming evidence in support of the industrial nature of their employment, the Employer urges the Board to strip these disabled workers of their Section 7 rights under the NLRA because it "coached and mentored in addition to applying corrective action" just as its disciplinary policy mandated for both its disabled and

nondisabled workers. Employer's Exhibit 8. That it did so certainly cannot be the reason why the Acting Regional Director's Decision must be overturned.

Moreover, insofar as the Board considers the instances in which the Employer asserted that it provided additional accommodations to the three individuals described on p.11-12 of its Request for Review in lieu of discipline, the Union would argue that in every one of those instances, the Employer merely complied with American Disabilities Act ("ADA") requirements for disabled workers. As the ADA makes clear, an employer "'must make reasonable accommodations to the known physical or mental limitations' of an employee. Bugg-Barber v. Randstad US, 271 F. Supp. 2d 120 (D.D.C. 2003) (quoting Vande Zande v. Wisconsin, 44 F.3d 538, 542 (7th Cir. 1995). Thus, employers must "be willing to consider making changes to its ordinary rules, facilities, terms, and conditions in order to enable a disabled individual to work." Vande, 44 F. 3d at 542.

The Employer's Request for Review also offered examples which demonstrate that once the Employer determined that the alleged misconduct actually was not misconduct at all, but rather the direct result of an individual's disability, the Employer made the necessary accommodations to the individuals so that the individuals could adequately and properly do their jobs just as their non-disabled coworkers. For example, in the case of Rebecca Abrams, a disabled individual who allegedly took unauthorized breaks for pain associated with her prosthetic limb, the Employer accommodated Abrams' disability by allowing her to take additional breaks throughout the day to prevent her from suffering further pain as she performed her duties. Tr. 108: 12-24. Similarly, in the case of Gabriel Cooper, whom the Employer alleged had violated the Employer's Time and Attendance Policy, the Employer accommodated Cooper by reviewing the bus schedule with her and allowing her to receive mobility services.[5] Tr. 116: 22-25, 117: 1-10. Likewise, the Employer

[5] The Employer cited two other examples where it provided alternative transportation arrangements to other disabled individuals as a result of their disability. RR, p. 13; see also Tr. 169:14-170:2, 172:25-173:17.

provided accommodation to Philon Harris by permitting the usage of pictures on labels to address Harris' functionality and visual impairments, and to allow him to distinguish between cleaning agents. Tr. 387: 16-25, 388: 1-14. These examples do not demonstrate that disabled individuals are given more leeway than their non-disabled colleagues. They simply demonstrate that the Employer "made changes to its ordinary rules, facilities, terms, and conditions in order to enable a disabled individual to work" as it was legally required to by the ADA. Vande, 44 F. 3d at 542. The fact that such accommodations were made in lieu of discipline, as the Employer suggests, does not tend to weigh in favor of a primary rehabilitative relationship between the disabled and the Employer. Instead, it reflects the Employer's recognition of its legal obligation to make such accommodations to the disabled that will enable them to do the same work that their non-disabled colleagues are doing. To assert that these accommodations are grounds for stripping these disabled workers of their Section 7 rights would mean that every disabled worker who receives an accommodation from their employer would be stripped of his or her rights to join a union under federal law. That simply cannot be the case.

2. *The Acting Regional Director Director's Conclusion that VSP Does Not Provide Disabled Individuals with Adequate Counseling, Training, and Rehabilitative Services Was Not Clearly Erroneous.*

a. The Request for Review

The Employer argues that the Acting Regional Director erroneously disregarded evidence that VSP provides counseling, training, and rehabilitative services to disabled individuals. In its Request for Review, the Employer relied on the following examples to support its position that it meets the standard articulated in Brevard in providing counseling, training and rehabilitative services to individuals with disabilities. 342 NLRB 982 (2004).

- VSP provides job placement assistance, such as drafting resumes, conducting interviews, and finding job leads. Tr. 104: 25-105: 21, 459: 2-20;

- VSP provides crisis intervention, such as getting involved when individuals are bullied in the workplace or assaulted by a stranger on the way home from work. Tr. 348: 2-24, 418: 9-15;

- VSP provides medical assistance, such as helping individuals schedule medical appointments. Tr. 102: 5-103: 17, 223: 7-18, 338: 10-22, 412: 11-414: 16, 416: 11-417:15;

- VSP provides community resource assistance, such as helping individuals find community meals and food pantries, locate resources to reinstate the utilities in, or remove mod from, their living environment, etc. Tr. 103: 18-22, 123: 4-22, 346: 3-347:5, 418: 1-8;

- VSP provides financial assistance, such as conducting weekly meetings to help individuals learn how to budget their money, pay their bills, etc., Tr. 44: 16-45: 13, 104: 5-24, 392: 10-396: 18, 415: 17-416: 10, 469: 13-22;

- VSP provides career assessment, work readiness, and placement counselors. Tr. 297: 9-17, 297: 18-21, 297: 22-25, 297: 25-298:6; and,

- VSP provides vocational services. Tr. 41: 21-42:12, 267:6-10.

b. The Acting Regional Director's Decision and Direction of Election.

The Acting Regional Director noted that "'[c]ounseling and rehabilitative services need not be mandatory for the Board to find a primarily rehabilitative relationship.'" DDE, p. 11 (quoting Goodwill Industries of North Georgia, 350 NLRB 32, 37 (2007). In Brevard Achievement Center, the Employer had a trainer 'working at the site '3 days per week teaching new clients the duties they [were] 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.'" Id. (quoting Brevard Achievement Ctr., 342 NLRB 982, 983 (2004). However, "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.'" DDE, p. 11 (quoting Goodwill Industries of North Georgia, 350 NLRB 32, 37 (2007). Unlike Brevard,

"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.'" Id.

In this case, the Acting Regional Director found that the evidence weighed in favor of a typically industrial, rather than a rehabilitative relationship relationship on several grounds. First, the Employer does not employ on-site job trainers or counselors nor provide financial assistance to the disabled who may need additional outpatient mental services as did the Employer in Brevard. Second, the record demonstrated the Employer's unwillingness to rehire disabled individuals who were previously unsuccessful, whether at the SSA complex or elsewhere. Third, current employees were not aware of the existence of the counselors the Employer alleged it employs. Finally, the Employer "maintain[s] a probationary period for all newly hired employees. . . with a demonstrated willingness to discharge employees under that probationary policy." DDE, p. 15.

c. The Petitioner's Position

In Goodwill Industries of North Georgia, for a number of reasons, the Board held that a typically industrial relationship existed between the Employer and its disabled and non-disabled workers. 350 NLRB at 32. Thus, the Board found that while job coaches and case managers were available to the disabled, all but one was funded by outside referral sources, not the Employer. Id. at 37. (*emphasis added*). Therefore, their existence and the services they provided, if any, did not evidence a primarily rehabilitative relationship between the Employer and its workers. Id. The Board also noted that unlike in Brevard, the Employer in North Georgia did not provide financial assistance to disabled individuals who may require the services of outside providers. Id. Additionally, while the Employer alleged that its "own rehabilitation services, through its career services division, are available to *all* of its disabled workers," the Employer's own supervisor had

been unaware of the existence of the career services division until the previous year, casting doubt as to whether such services were in fact genuinely available to the disabled. Id.

In its Request for Review, the Employer failed to meet its burden of demonstrating either that the Acting Regional Director erroneously disregarded evidence regarding the existence of counseling, training and rehabilitative services to disabled workers or that the Acting Regional Director disregarded Board precedent. The Decision and Direction of Election is heavily supported by the record.

Instead of challenging the considerations upon which the Acting Regional Director relied, the Employer's Request for Review offered examples of what it claimed to demonstrate the extent of counseling and rehabilitative efforts. However, what the Employer failed to do was address the testimony it elicited from its own witnesses, which called into question whether counseling, training, or rehabilitative services are in fact given to the disabled.

First, the Employer failed to address the testimony of its Case Manager, Ms. White, who testified about her availability at the contract site and the absence of on-site job trainers and counselors. Ms. White is the only case manager available to provide wraparound services to the disabled. However, despite her testimony that she is available on call twenty-four hours a day, seven days a week to assist the disabled, Ms. White also testified that she is only available to meet with them when she is at the site approximately "one or two times every week." Tr. 139: 2-4. On the days that she is not at the contract site, no other case manager is available to speak to or meet with disabled workers. Id. Ms. White's damaging testimony did not stop there. When asked to provide details of the existence of job coaches who could provide training or retraining to disabled workers whose skills had regressed, Ms. White testified that job coaches are not provided by the Employer, but rather, are funded and provided to the disabled by their referral source. Tr. 366: 1-12, 384 1-7,

460: 19-25, 461-462. Thus, when a disabled needs job coaching assistance, the referral source is contacted, which determines the length and type of coaching to be provided to the individual. Tr. 432: 17-24. The Employer has no role in providing or assigning job coaches to the disabled, funding the employment of any job coaches, or providing financial assistance to individuals who may need outpatient services. Id.; 476: 13-25, 477: 1-8. Consistent with these factors, times spent with job coaches outside of the contract site are not considered paid time. Tr. 462: 14-23. In other words, the rehabilitative relationship the Employer insists it has with the disabled exists only between the disabled and their referral sources—not between the Employer and the disabled. The Acting Regional Director's analysis is consistent with the Board's findings in North Georgia, where it found that the absence of on-site job trainers or the existence of such on-site job trainers or counselors, but are funded and provided by referral sources (not the Employer), tended to weigh in favor of an industrial relationship. 350 NLRB at 37.

Despite the numerous similarities of this matter to North Georgia, the Employer's Request for Review simply glossed over its failure to provide evidence demonstrating the existence of on-site job trainers it employs, as if that factor was not heavily weighted in either Brevard or North Georgia. Instead, it urges the Board to consider the few times Ms. White aided the disabled as the only case manager available to them "*one or two days*" per week as basis for finding a primarily rehabilitative relationship. Tr. 139: 2-4 (*emphasis added*). Such a finding, however, would deviate from Brevard and North Georgia. The fact that the Employer aids the disabled one or two days per week is not enough to meet the standard applied in either cases. The Employer's Request for Review failed to meet its burden that the Acting Regional Director erroneously disregarded evidence in this regard.

Second, the Employer's Request for Review failed to challenge the Acting Regional Director's finding regarding the lack of on-site counselors who could provide adequate counseling to disabled individuals. In doing so, it ignored additional testimony from VSP Director, Ms. Mules, who explained that while the Employer employs ten counselors for disabled individuals in the Employer's Vocational Services Program, a program separate from the Employer's employment service contract with the Social Security Administration, those counselors are not available or located at the SSA site.[6] Tr. 300-301. Instead, the ten counselors are dispersed throughout the state of Maryland at various VSP offices, with the nearest one at Seton Park, five miles away from the SSA complex. Tr. 39: 8-15. These counselors are so far removed from the contract site that even the Employer's site project manager, Ms. Edmonds-Hill, testified that she does not "really work with counselors" at the site. Tr. 512: 16-24. And, when cross-examined on the issue of what efforts, if any, are made by the Employer to notify disabled and non-disabled workers of the availability and existence of these counselors, Ms. Mules answered, "[w]e would not take any steps to let our employees know that because they're . . . they would not know that because they are employees." Tr. 289: 11-17. In other words, the disabled and non-disabled workers employed at the site would not know that counselors are available to them for assistance because counseling services are, in fact, not available to them at all, but are available only to the disabled in the Employer's vocational

[6] The Employer entity is comprised of two programs: (1) its vocational services program and (2) contracts and employment program. DDE, p. 4-5. The Employer's vocational services program provides hard and essential skills, work readiness, and career assessment trainings. Tr. 292: 2-12, 294: 19-25, 295: 1-25. When a disabled individual is referred to the Employer, the individual is initially placed in the Employer's vocational services program, where the disabled undergo a 12-20-week-training. Tr. 41-42, 266: 1-11. At the completion of training, the individual is moved to the contracts and employment program, where they are considered for placement at private companies (e.g. McDonalds, Walmart, etc.) or at government agencies with which the Employer maintains a contract, like the Social Security Administration. Tr. 43: 3-25, 44: 1-4, 266: 1-11, 295: 21-25. Once placed at a contract site, the individual is no longer a client of the Employer, but a paid employee. Tr. 289. The counselors discussed throughout the record refers to counselors working for the Employer's vocational services program, who work with the disabled while individuals are in training and not yet employed by the Employer at a private company or contract site through the contract and employment program. Tr. 265 22-25, 266: 1-11.

services program. This is corroborated by disabled worker, Mr. Parker and non-disabled worker, Ms. Tyler, who testified that the first time they learned about the existence of counselors that are available to them at the contract site, as the Employer alleges, was during the July 12, 2019 hearing for the instant matter.[7] Tr. 215: 17-22, 223: 3-6, 573: 4-10. Throughout the July 12, 2019 and September 19, 2019 hearings, the Employer failed to produce a single counselor who could corroborate its claims that counselors are, in fact, working with and are available to disabled workers at the contract site.

The Employer's Request for Review made no efforts to resolve or explain this inconsistency between its arguments and the damaging testimony elicited at hearing. Instead, the Employer urges the Board to find that the career, work readiness, and placement counselors it provides to disabled trainees in its vocational services program, prior to the placement of the petitioned-for individuals for employment at the contract site, are sufficient to meet the on-site counselors requirement emphasized in Brevard and North Georgia, but the Acting Regional Director's analysis is sound.[8] Testimony demonstrating the employment of counselors who work with disabled individuals in other departments of its organization outside of the contract site do not meet the Brevard and North Georgia standards. Instead, they demonstrate that the services the Employer provides to the disabled in this case are considerably less than those provided in Brevard, and more like those in North Georgia.

Third, the Acting Regional Director's conclusion that the Employer showed unwillingness to hire previously unsuccessful employees and maintain a probationary period in which disabled workers could be discharged is consistent with the record, and unchallenged by the Employer in

[7] Mr. Parker has been employed by the Employer at the contract site as a disabled worker for four years; while Ms. Tyler has been employed as a non-disabled employee by the Employer at the contract site for thirty years.
[8] See footnote 6.

its Request for Review. In at least three instances, disabled workers who were discharged for the nature of their conduct were ineligible for rehire. Tr. 371-373, 468: 17-20. The first individual, Kenneth Peterson, was terminated at the request of the Social Security Administration for his deteriorating mental health. The second individual, Antoine Cooper-Jackson, was also terminated at the request of the Social Security Administration for accidentally breaking a sprinkler. Tr. 468: 17-20, 371: 23-25, 372: 1-20. Finally, the third individual, Noah Young, was discharged and ineligible for rehire due to poor attendance. Employer Exhibit 7. Tr. 92: 19-25, 93: 1-5. In all of these examples, the Employer made no efforts to place the disabled at other contract sites.[9] Moreover, in at least seven instances, as specified on pages 9-20 of this brief, the Employer showed willingness to discharge disabled individuals while on probation for various workplace violations, none of which constitute "extreme circumstances" as the Board described in Goodwill Industries of Tidewater, Inc., 304 NLRB 767, 768 (1991) and Goodwill Industries of Denver, 304 NLRB 764, 765 (1991).

For an organization that paints itself to be the supreme organization willing to spend endless time and resources rehabilitating disabled workers, at the hearings, and in its Request for Review, the Employer provided no explanation for its failure to place any of the above individuals at other contract sites for further rehabilitation. More importantly, the Employer's Request for Review failed to address why the Acting Regional Director's findings of its willingness to impose discipline to individuals on probation was erroneous, and how its very maintenance of a probationary period is not "inherently contradictory to its rehabilitative relationship." DDE, p. 15. The Employer cannot assert a primary objective of preparing disabled workers for competitive employment, while at the same time, show a willingness to impose discharge during the first three

[9] Employer Exhibit 7 lists at least 19 workers who were discharged and ineligible for rehire.

months of a disabled's employment. Such actions stand in direct contradiction with its claims that its very existence is for the sole purpose of rehabilitating the disabled for competitive employment. The Employer's claim that the Acting Regional Director's findings were erroneous is simply vacuous.

3. *The Acting Regional Director's Conclusion that VSP Failed to Demonstrate Modifications of Terms and Conditions of Employment and Production Standards Was Not Clearly Erroneous.*

a. Request for Review

The Employer's Request for Review offers the following examples in support of its position that the Acting Regional Director erroneously disregarded evidence that the Employer modifies schedules and production standards for disabled individuals. According to the Employer:

- 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.
- 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 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 [who] had difficulty reading. DDE, p. 9.
- The Acting Regional Director found that disabled janitors are given competitive employment evaluations that are not given to non-disabled janitors. DDE, p. 10.

b. The Acting Regional Director's Decision and Direction of Election.

The Acting Regional Director noted that another factor in the Board's analysis of a primarily rehabilitative relationship is "'[t]he applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the facility).'" DDE, p. 7 (quoting

Brevard Achievement Center, 342 NLRB 982, 984 (2004). In Goodwill Industries of North Georgia, "'[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." DDE, p. 7; 350 NLRB 32, 33 (2007). Moreover, while "'[t]here 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[,]" the Board also noted evidence to the contrary. Id. at 983.

Once again, the Acting Regional Director concluded that the record evidenced a typically industrial relationship. First, the Acting Regional Director found that the Employer maintains production standards by instituting a probationary period for both disabled and non-disabled, and as established by testimony and exhibits, imposing discipline on disabled and non-disabled workers for sleeping on the job, taking unauthorized breaks, failing to put away supplies, and having unacceptable work performance. DDE, p. 8. Second the Acting Regional Director pointed out the absence of any persuasive testimony from management witnesses that the Employer in fact, modified tasks, assignments, and other employment conditions. DDE, p. 8-9.

c. Petitioner's Position

The Acting Regional Director's determination that the Employer failed to demonstrate modifications made to schedules and production standards for disabled individuals was clearly not erroneous on the record. In Goodwill Industries of North Georgia, among the factors evidencing a typically industrial relationship was the Employer's expectation that both disabled and nondisabled workers complete their assigned cleaning tasks by the end of their 8-hour shifts. Similarly, in Brevard, the Board held that the evidence tended to weigh in favor of a rehabilitative

relationship where disabled individuals 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.'" DDE, p. 7; 342 NLRB 982, 983 (2004). Consistent with Brevard, in Goodwill Industries of Tidewater, the Board found a primarily rehabilitative relationship where there was absence of any typical industrial means of ensuring productivity. 304 NLRB 767, 769. (1991).

The Employer's Request for Review relies on six instances the Acting Regional Director mentioned in the Decision and Direction of Election, which showed the extent of aid given to disabled individuals in the performance of their duties. The Employer would have it that those instances sufficiently demonstrate the existence of a primarily rehabilitative relationship between the Employer and its disabled workers.

The Employer may not have it so. The Acting Regional Director found that production standards were enforced by the imposition of discipline on disabled and non-disabled individuals for taking unauthorized breaks, failing to put away supplies, and having unacceptable work performance. Nor did the Employer challenged the Acting Regional Director's finding that these productions standards were enforced by discipline imposed on disabled and nondisabled. As Project Manager, Ms. Edmonds-Hill described, workers are evaluated after every shift through inspection of their assigned areas. Tr. 510; 1-7. When a supervisor "detects an area that is unsatisfactory in their view . . . [the] supervisor would go to the employee and ask them to correct the problem," regardless of whether the individual is disabled or nondisabled. Tr. 510; 8-15. When a worker is notified of their unsatisfactory performance, discipline is imposed. For example, disabled worker, Gregory Parker, testified that he was disciplined after failing to put away the barrel of supplies he used on his assigned floor at the end of his shift. Tr. 571: 13-17. Similarly, when nondisabled worker Wilzona Tyler finished cleaning her floor earlier than scheduled, the

Employer issued discipline for "leaving [her] assigned area early." Tr. 548; 20-25, 549 1-15. Throughout the hearings, the Employer insisted that production standards do not exist. Consistent with that position, its Request for Review fails to address this issue, citing no evidence to the contrary. Instead, it urges the Board to consider the minimal instances it offered additional breaks to Rebecca Abrams because of her prosthetic limb, the instances it permitted disabled individuals to avoid lifting objects due to their disability to find that no such production standards exist, and the one instance in which it advised Gregory Parker not to tell other disabled workers how to do their jobs. Tr. 219: 20-25, 220: 1-10.

Second, the Employer's Request for Review did not challenge the Acting Regional Director's finding that the Employer failed to call even a single contract site supervisor who could testify as to how tasks are assigned to janitors. Instead, the Employer's Request for Review complains that the Acting Regional Director gave more weight to the testimony of Union witnesses who work full time at the contract site, than it did to the testimony of its witnesses who are not involved in the assignment of duties and the scheduling of shifts, on the issue of task assignments. See RR. p 16. Tr. 56: 6-10.

To be clear, the assignment of tasks and scheduling of shifts are the responsibilities of these contract site supervisors. Tr. 56: 1-17, 509; 6-15. They directly supervise the workers and are the first point of contact if modifications are requested or needed. Tr. 483; 2-3. They determine when a disabled individual works, what tasks he or she is assigned, and when he or she can take breaks. Yet, at every afforded opportunity, the Employer failed to introduce a single one of these supervisors who alone could have testified about whether or how modifications of tasks and schedules are implemented. The Employer presented no evidence. The Acting Regional Director's

conclusion is consistent with applicable board law, and there is no basis to find that she erroneously disregarded evidence.

4. *The Acting Regional Director's Conclusion VSP Failed to Demonstrate the Existence of a Successful Job-Placement Program and Tenure of Employment of Disabled Individuals Was Not Clearly Erroneous.*

a. The Request for Review

The Employer argues the Acting Regional Director erroneously disregarded evidence that it successfully places disabled persons in jobs and erroneously disregarded evidence regarding the tenure of employment for disabled individuals. In its Request for Review, the Employer suggests that it has a successful job-placement program because "[s]ince 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. Moreover:

- White helped one of these individuals obtain his dream 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. VSP Ex. 7.

- 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 Employer also suggests disabled individuals have a limited tenure with VSP. It provided:

- 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. 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. VSP. Ex. 7.

b. The Acting Regional Director's Decision and Direction of Election

The Acting Regional Director cited Goodwill of North Georgia, Goodwill of Tidewater, and Brevard in support of her determination. In evaluating successful job-placement and tenure, the Regional Director noted the employer will have an objective "to prepare each client for private competitive jobs." Goodwill of Tidewater, 304 NLRB 767, 768 (1991). To achieve that objective the employer will "employ a full-time counselor . . . for, the placement of clients in private employment." Id. at 768-69.

Applying the above-mentioned standards, the Acting Regional Director found the record weighs in favor of finding a "typically industrial relationship." DDE, p. 19. In this connection, the Acting Regional Director noted that "the Employer does not employ anyone in the position of job-placement coordinator nor was there evidence the Employer maintains a formal job-placement program." DDE, p.19. The Acting Regional Director noted that, the Employer referred only one disabled worker to outside employment in the four years prior to the hearing. Id.

Regarding tenure of disabled janitors, the Acting Regional Director indicated that in the five years prior to the hearing of the forty-one (41) disabled individuals who departed from the Employer's employment, nineteen (19) of the forty-one (41) were discharged by the Employer, and only seven (7) workers voluntarily transitioned to private employment during the same period. Id. The Acting Regional Director concluded it is considerably more likely that the Employer will discharge one of its disabled workers than help transition that worker to private employment. Id.

c. The Petitioner's Position

The Acting Regional Director's determination the Employer failed to demonstrate it had a significant track record geared toward outside placement of disabled individuals was not clearly erroneous on the record. First, the Acting Regional Director properly concluded that the Employer did not adequately demonstrate it took steps "to prepare [each disabled janitor] for private

competitive jobs." Goodwill of Tidewater, 304 NLRB 767, 768 (1991). For example, the Acting Regional Director, citing Tidewater, stated that, to establish a primarily rehabilitative relationship with disabled janitors, the Employer is required to show it has dedicated a full-time counselor on site. 304 NLRB at 768-69. There was no record evidence demonstrating that the Employer maintained a full-time job placement counselor at the SSA site like in Tidewater or Brevard, nor does the Employer present evidence in its Request for Review to contest the Acting Regional Director's conclusion that it did not maintain a full-time job placement counselor. See RR, p. 17-19.

Moreover, the Acting Regional Director properly concluded the Employer failed to show it *routinely* helped place disabled janitors into other full-time employment as required by Brevard. 342 NLRB at 987. In its Request for Review, the Employer merely reiterates testimony that Ms. White helped a minimal number of individuals find employment elsewhere. See RR, p. 18-19. However, the Acting Regional Director acknowledged this fact in her Decision and Direction of Election. DDE, p. 20. The Acting Regional Director simply found that Ms. White's assistance was not enough to surmount the Brevard standard because Ms. White's assistance was far from routine particularly because Ms. White testified that she is only at the contract site "one or two days per week." Tr. 139: 2-4. Therefore, the Acting Regional Director's determinations and conclusions were not clearly erroneous on the record.

II. No Compelling Reasons Exist for Reconsideration of the Acting Regional Director's Determination that Nondisabled Janitors Would Be an Appropriate Bargaining Unit.

It is the Union's position that disabled and nondisabled janitors are an appropriate unit because they have a typically industrial relationship with Employer. Assuming arguendo, that disabled janitors are not statutory employees due to their rehabilitative relationship with the Employer, a unit comprised of nondisabled janitors would be an appropriate unit.

A request for review is properly granted where "a substantial question of law or policy is raised because of . . . [a] departure from, officially reported Board precedent." 29 C.F.R. § 102.67(d)(1)(ii). The Employer submits there are compelling reasons for reconsideration of the Regional Director's conclusion that a unit comprised of nondisabled workers would be an appropriate unit. See RR, p. 19; see also DDE, p.22. The Employer's argument for grant of request for review on this ground is also without merit as the Regional Director's Decision and Direction of Election comports with Board law.

A. The Acting Regional Director's Determination and Direction of Election.

In her Decision and Direction of Election, the Regional Director addressed the Employer's secondary argument that nondisabled janitors would not be an appropriate unit. She properly concluded non-disabled janitors would be an appropriate unit for the purposes of collective bargaining. DDE, p. 22.[10] The Regional Director noted the Employer undermined its primary position by arguing the community-of-interest shared by its disabled and non-disabled janitors is so strong those two categories of workers should not be separated for purposes of collective bargaining. DDE, p. 22. Notwithstanding, the Regional Director addressed the Employer's community-of-interest argument in a manner wholly consistent with this Board's recent decision in Boeing, 368 NLRB 67 (2019).

Specifically, the Regional Director recognized that in determining whether a unit is appropriate, Boeing requires an examination of "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

[10] Although the Acting Regional Director addressed the Employer's secondary argument in her Decision and Direction of Election, she noted that the Employer's argument was rendered moot by her determination that all of the Employer's janitors are statutory employees within the meaning of the Act, regardless of disability status. See DDE, p. 22.

bargaining that outweigh similarities with the included employees[.]'" See DDE, p. 22 (citing Boeing, 368 NLRB 67, at 3 (2019) (additional citations omitted)). She further recognized that Boeing explicitly requires two sets of *employees*, one of which is petitioned for and one of which is excluded. DDE, p. 22. She noted that if the Employer successfully established its disabled janitors are not statutory *employees*, then they are not "excluded employees" as contemplated under a Boeing community-of-interest analysis. DDE, p. 22. On this basis, the Regional Director concluded nondisabled janitors would be an appropriate unit. DDE, p. 22.

B. The Acting Regional Director's Determination Is Consistent with Boeing and Is Not a Departure from Board Precedent.

The Employer urges this Board to review the Acting Regional Director's Decision and Direction of Election based upon its fundamental misunderstanding and misapplication of Boeing. See RR, p. 19-24. A closer review of Boeing and related caselaw further supports the Acting Regional Director's conclusions.

In Boeing, the Board determined whether a petitioned-for unit limited to two classifications within the employer's production line was an appropriate unit under the Act. 367 NLRB 67, at 1 (2019). In doing so, it clarified that its prior decision in PCC Structurals, Inc., 365 NLRB 160 (2017), contemplates a three-step process for determining an appropriate bargaining unit under the traditional community-of-interest test. Id. at 3. That three-step-process requires:

> 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.

367 NLRB 67, at 3 (2019).[11]

[11] In its Request for Review, the Employer concedes that the first step of the Boeing test would be satisfied because nondisabled janitors have an internal community-of-interest. RR, at 21. While the Union agrees that a unit comprised

In explaining step two of Boeing, the Board provided that one must analyze the shared and distinct interests of excluded and included *employees*. 368 NLRB 67, at 4 (2019) (emphasis added). Such inquiry must also consider whether "excluded *employees* have meaningfully distinct interests in the *context of collective bargaining*." Id. (citations omitted). While the Boeing analysis is arguably new, the legal principles establishing the analysis are longstanding. Board precedent demonstrates a community-of-interest analysis applies when comparing the interests of *employees* entitled to rights pursuant to the Act. See PCC Structurals, Inc., 365 NLRB 160 (2017); Harrah's Club, 187 NLRB 810 (1974) (applying the community-of-interest test to two classifications of employees).

Though Boeing would only apply in comparing the interests of two classifications of statutory *employees*, the Employer overlooks such fact. See RR, p. 19-24. Instead, the Employer applies Boeing in a manner that is illogical and flawed. First, the Employer posits that disabled janitors are not statutory employees, and thus, cannot engage in the collective bargaining process. See RR, p. 5-19. If such were the case, nondisabled janitors would be the only group of *employees* afforded rights under the Act at the SSA site, and there would be no need to apply step two of the Boeing analysis.

Next, the Employer argues that a unit comprised of nondisabled janitors is also improper, primarily based upon its misapplication of step two of the Boeing analysis. It argues that disabled and nondisabled janitors share a strong community-of-interest for purposes of collective bargaining and provides a thorough list of similarities between both categories of workers. See RR, p.22. The Employer cannot have it both ways. If disabled janitors are not statutory employees, as the Employer also argues, an inquiry into their interests in the context of collective bargaining

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of nondisabled janitors would share an internal community of interest and satisfy the first prong of the test, a community-of-interest analysis would be inappropriate if disabled janitors were not statutory employees.

would not be appropriate because they would have no rights under the Act. Because Boeing is not necessarily applicable, the Acting Regional Director was correct in concluding non-disabled workers would be an appropriate unit.

Importantly, adopting the Employer's understanding and application of Boeing is problematic because it would permit any employer to effectively dismantle a petitioned-for unit that includes at least one primarily rehabilitative worker. For example, if a work site included one-thousand individuals where nine-hundred and ninety-nine (999) of those individuals were considered employees under the Act, and one individual occupied a primarily rehabilitative role, an employer could prohibit the petitioned-for unit from engaging in an election. If such were the case, then nine-hundred and ninety-nine workers (999) would have no access to unionize under the law. That simply cannot be the way the law was intended to be applied.

As demonstrated above, there is no compelling reason for the Board to review the Acting Regional Director's Decision and Direction of Election. Accordingly, the Board should deny review.

III. The Board Should Not Stay the Acting Regional Directors Decision and Direction of Election.

The Employer requests that the Board stay the Acting Regional Director's Decision and Direction of Election pending the Board's decision on its Request for Review. RR, p. 25-26. Section 102.67(j) of the Board Rules and Regulations provides in relevant part:

> (j) ***Requests for extraordinary relief.***
>
> > (1) 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, including the election; or

> (2) *Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case.* The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the regional director will be altered in any fashion.

24 C.F.R. § 102.67(j) (emphasis added). Here, the Employer failed to demonstrate how such *extraordinary* relief is necessary under the *particular* circumstances of this case. See RR, p. 25-26. Instead, the Employer suggests that its legal requirement to bargain places the Employer in a "procedurally awkward posture" because if it bargains with the Union, it waives its right to further challenge the certification of the election, and if it refuses to bargain the Union may file an unfair labor practice charge. See RR, p. 25.

The Employer attempts to fashion support for its position by introducing a block quote in its brief that inappropriately excludes a crucial sentence from the D.C. Circuit's decision in Terrace Gardens Plaza, Inc. v. NLRB. 91 F .3d 222 (D.C. Cir. 1996). In responding to a comparable "conundrum", the D.C. Circuit recognized that employers are not placed in a "procedurally awkward position" as they continue to have a legal remedy under the law. Id. at 225. The court's entire analysis provides:

> **Therefore, [the employer] is not foreclosed from obtaining judicial review either of the Board's finding that it committed an unfair labor practice or of its certification of [the union] as the representative of the Company's employees.** 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 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 the certification of, the Union; it may not do both at once.

See id. at 225 (emphasis added); see also RR, p. 26. Despite the D.C. Circuit's clear position on this matter, the Employer excludes the first sentence of the court's analysis to its benefit. RR, p. 26. Once again, the Employer's tactics are improper, and its position is not supported by the law

it cites in its brief. Therefore, the Employer's motion for a stay of the Regional Director's Decision and Direction of Election should be denied.

CONCLUSION

The Board should not grant the Employer's request for review as the Employer has not met the standard necessary for this Board to grant review. The Employer failed to demonstrate that the Regional Director's Decision and Direction of Election on substantial factual issues was clearly erroneous and that such error prejudicially affected its rights. The Employer has also failed to show that the Regional Director's determination was a departure from Board precedent. Therefore, the Board should not grant review as the Employer has not met the standard for such review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2020, a copy of the foregoing Opposition to Request for Review of the Regional Director's Decision and Direction of Election was electronically filed through the Board's website, with a copy served by e-mail on Pete Saucier (Sauce23@kollmanlaw.com) and Eric Paltell (epaltell@kollmanlaw.com), Counsels for the Employer, and by regular mail to Acting Regional Director, National Labor Relations Board, Region 5 at 100 S Charles St #600, Baltimore, MD 21201.

/s/ Gillian Santos
Gillian Santos