

People Care, Inc. and Local 1199, Drug, Hospital and Health Care Employees Union, Petitioner.
Case 13-RC-18592 (formerly 2-RC-21209)

June 9, 1993

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached). The request for review is granted solely with respect to the Regional Director's finding that the petitioned-for home health care workers (providers) are employees of the Employer. On review, having carefully considered the entire record, including the Employer's request for review and the Petitioner's opposition brief, we affirm the Regional Director's decision. In all other respects, the request for review is denied.¹

APPENDIX

The Petitioner, Intervenor, and Incumbent Unions seek to represent a unit consisting of all full-time and regular part-time home health care workers employed by the Employer, including home health aides, junior home health aides, nurses aides, homemakers, personal care workers and housekeepers; but excluding all other employees, including registered nurses, office clerical and professional employees, guards and supervisors as defined in the National Labor Relations Act.

The parties have raised three issues. First, the Employer contends that certified home health care aides, personal care aides, junior aides and housekeepers are independent contractors and thus may not be included in any bargaining unit. (Hereafter, certified home health aides and personal care aides are referred to sometimes as "aides.") All three Unions maintain that these workers are employees. Second, the Employer contends that should I find the junior aides to be statutory employees, they nonetheless should be excluded from the unit as temporary or casual employees. All three Unions maintain that junior aides are regular employees who properly belong in the unit. Third, the Employer and Unions are at odds over the formula by which to determine the eligibility of employees to vote in any election directed here.

The Employer is a home care agency, certified under the laws of the State of New York. It places individuals in the homes of the elderly or infirm in order to assist with their

¹ Review was requested of the Regional Director's findings that: (1) home health care workers provided by the Employer to certified home health care agencies are employees of the Employer, rather than independent contractors; (2) quality assurance technicians should be included in the unit found appropriate; and (3) the appropriate eligibility formula to be applied is that set forth in *Davison-Paxon Co.*, 185 NLRB 21 (1970), rather than the more restrictive formula set forth in *Marquette General Hospital*, 218 NLRB 713 (1975). Only the portions of the Regional Director's decision addressing the first issue are attached.

various needs. Thus, certified home health aides and junior aides perform light housekeeping tasks, meal preparation, shopping, and laundering, as well as routine health care procedures such as dressing wounds, assistance with medications and personal hygiene, and catheter, ostomy, and enema care. Certified home health aides must be licensed by the State of New York's Department of Health. Junior aides undergo training in order to be certified as home health aides. Personal care aides are certified by New York's Department of Social Services. They perform the same personal hygiene, feeding, dressing, and housekeeping tasks as certified home health aides. However, they do not carry out some of the health care tasks, such as enemas and colostomy irrigation, which certified home health aides and junior aides perform. The Employer also retains the services of fewer than five housekeepers. They do not have to be certified or licensed and primarily perform light house cleaning work.

The vast majority of the Employer's business comes from contracts with state-certified home health agencies known as vendors. Vendors, such as those associated with hospitals, contact the Employer to request that it place an aide in a patient's home or a specific number of hours over a certain period of time. The Employer has no control over the hours, duration, or location of a particular assignment. The vendor agency determines the specific plan of care under which the aide will work. The Employer has no authority to modify this plan of care without the vendor's prior approval. The vendor pays the Employer either an hourly rate or, in the event of sleep-in care, a flat daily rate. In addition to vendor contracts, the Employer also provides aides to private clients with which it has individual contracts. At the time of the hearing, the Employer had only two or three such private patients.

The Employer maintains a list of individuals who either have worked with the Employer in the past or have indicated a willingness to do so. In order to fill a vendor's request, employees referred to as coordinators phone individuals off this list to offer them the position. Should the individual decline the work, the coordinator calls another person on the list until the position is filled. Approximately 1200 individuals have worked for the Employer during the period January 1 through September 30, 1992. On average, approximately 600-700 individuals work for the Employer on any given week.

An individual must apply for a position with the Employer in order to be placed in the Employer's labor pool. The Employer requires an applicant to complete a written application. Individuals in the Employer's human resources department then interview the applicant, looking for such things as reliability, preferred work locations, and language facility. If the applicant for an aide position is certified by the appropriate governing bodies, a requirement under state law, the Employer confirms the validity of the certificate. It also subjects the applicant to a physical examination and checks his or her references, as required by state law. If the individual meets the Employer's needs, he or she will fill out a Federal W-4 income tax withholding form. In addition, the Employer provides the individual with copies of its personnel manual as well as other work rules. Vendors play no role during this hiring process.

The Employer offers a free, state-certified training program for successful applicants for a home health aide posi-

tion who do not yet hold a certificate. The trainee first undergoes 2 weeks of classroom instruction run by the Employer's employees. The training program tracks state guidelines; the Employer does not supplement required course work to any significant degree. At the end of the 2-week period, the trainees are tested on their classroom work. Slightly more than 50% percent of the trainees pass on to the second level of instruction. At this stage, trainees (now referred to as junior aides) undergo a series of 10 field evaluations within 60 days, similarly mandated by state law. Thus, junior aides accompany the Employer's registered nurses on home visits. The aides perform the duties expected of a certified home health aide, and are evaluated by the registered nurses. Approximately 75 percent of the junior aides satisfy this final hurdle, receive state home health care certificates, and are placed on the Employer's on-call list. The Employer pays junior aides for time spent on the evaluative visits; trainees undergoing class work are not paid.

The Federal and state governments also require that certified aides receive continuing education, referred to as "in-service" training programs. The Employer runs some of these sessions; some are also presented by a vendor agency. The Employer has no educational requirements for housekeepers.

The Employer has a limited onsite supervisory role once an aide receives an assignment. As set forth above, vendors compose a patient's plan of care to be implemented by an aide. Visiting nurses employed by the vendors come into the patient's home once a week or so to provide further care and to investigate the aide's compliance with the plan. Vendors prohibit the Employer from entering a patient's home to supervise an aide. Rather, visiting nurses will direct an aide's performance to whatever event necessary in order to fulfill the plan of care. Pursuant to state law, however, the Employer must include in each contract with a vendor a clause guaranteeing that it is the Employer's responsibility to, "insur[e] adherence by agency staff to the agency plan of care established for patients." 10 NYCRR Sec. 766.2(d). The Employer indemnifies vendors from any liability resulting from injury or damage as a result of an aide's negligent or willful acts while on duty.

The Employer, however, checks the aide's attendance in the home each day. The Employer also investigates if an aide calls in sick. Should a vendor complain to the Employer about an aide's performance, the Employer will issue the aide a correction letter describing the deficiencies and notifying the aide of the appropriate behavior. The Employer will remove a particular aide from a case should the vendor so request. Once assigned, the Employer cannot replace an aide without the vendor's approval. Following removal, the Employer may conduct an investigation into the performance problem. Based on the results, the Employer may utilize that aide on other cases and/or for other vendors.

The Employer also issues warnings to employees for rules infractions, such as absenteeism and repeated tardiness. As per the Employer's personnel manual, warnings will affect, "raises, vacations, and [aides'] ability to obtain letters of references." Depending on the nature and duration of the infraction, the Employer may remove that aide from its on-call list altogether. For instance, the Employer's orientation and personnel manuals provide that such things as patient abandonment and verbal abuse are cause for "termination." A

"terminated" aide has the right to meet with an Employer representative to defend his or her conduct. That representative, called a coordinator, may rescind the earlier decision and reinstate the aide on the list.

Aides can call both visiting nurses as well as the Employer's own personnel with on-the-job questions or problems. The Employer will refer questions about the plan of care to the visiting nurse. In some circumstances, the Employer responds to aides' work-related inquiries, particularly where they involve emergency situations.

Under state law, the Employer must produce an annual evaluation of each aide. In practice, the Employer or the aide provides an evaluation form to a visiting nurse who works with an aide on a case. The visiting nurse fills out the form and returns it to the Employer. The Employer conducts its own evaluations of aides who are assigned to private patients.

State law also requires the Employer to develop and maintain specific policies and procedures. For instance, regulations require the Employer to implement, "written personnel policies and procedures." 10 NYCRR Sec. 766.3(a). Other state-mandated policies include documentation of the health of aides and housekeepers; time and payroll records; orientation programs; written job descriptions; and instruction concerning HIV transmission and confidentiality.

The Employer pays aides an hourly wage, which the Employer sets. The Employer pays a premium to aides working either on a holiday or on a case involving a patient with AIDS. At the start of 1992, the Employer initiated a program of bonuses to those aides who establish satisfactory attendance records. The Employer has since abolished this program. Aides are not guaranteed a minimum number of hours. The Employer does not provide aides with any benefits, with the exception of vacation leave for those aides who work at least 42 weeks per year. Aides wear a white uniform with a badge identifying the Employer, both of which are required by the State. Aides pay for their own uniform. The Employer also maintains rules regarding aides' grooming and cleanliness. Aides are not required to assume any costs of patient care; travel costs to and from the patient's home constitutes their only out-of-pocket expense. The Employer deducts state and Federal withholding taxes from aides' wages. The Employer also contributes to unemployment and workman's compensation funds on behalf of the aides.

In determining whether individuals are employees or individual contractors, the Board applies common law tests of agency status. *NLRB v. United Insurance Co.*, 390 U.S. 259 (1968). Among the principles the Board utilizes is the "right of control" test, as follows:

Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative.

Cardinal McCloskey Services, 298 NLRB 434 (1990), citing *News Syndicate Co.*, 164 LRB 422, 423-424 (1967). The Board also takes note of the extent to which the individuals

have proprietary interest as well as a financial risk in their work. *Standard Oil Co.*, 230 NLRB 967 (1977). The Board has recently concluded that

[e]nforcement of laws or government regulations, however, is not considered control over the “manner and means” by which results are accomplished, because such enforcement is, in reality, supervision by the government, not by the “employer.”

Cardinal McCloskey, supra at 435, citing *Air Transit, Inc.*, 271 NLRB 1108, 1110–1111 (1984).

The record establishes that the Employer retains significant control over the aides’ terms and conditions of employment. The Employer unilaterally sets the aides’ wages and adopts and rescinds benefits, such as the bonus program, as it sees fit. The Employer deducts Federal and state withholding taxes from the aides’ paychecks. The Employer also contributes on behalf of aides to workmen’s and unemployment compensation funds.

Aides are also expected to adhere to a variety of work rules set forth in the Employer’s personnel manuals such as call-in requirements and a grooming code. The Employer issues warning letters to aides for such work rule violations as absenteeism and tardiness. The warnings may affect the aides’ wages as well as their continued employment. The Employer will terminate an aide for a variety of more serious infractions spelled out in the personnel manual. The Employer may conduct a posttermination investigation which can lead to reinstatement. Terminated aides similarly have the right to meet with the Employer to argue for their reinstatement.

Although the State requires the Employer to maintain written personnel policies, I do not find that by doing so the State has divested the Employer of its supervisory authority. State law does not require the Employer to adopt regulations, such as a disciplinary procedure, which constitute hallmarks of an employer/employee relationship. Rather, the State leaves the Employer with the flexibility to structure its personnel policies according to its own needs and requirements. Those policies which the State does specifically require are either ministerial (e.g., the production of time and payroll records) or within the States’ traditional role as monitor of public health and safety (e.g., maintenance of employee health records and implementation of HIV policies).

Aides exhibit few traits of an entrepreneur. Aides assume no costs of patient care, never work in their own homes, are indemnified from liability while at work, and are not required to purchase equipment other than a uniform. Their out-of-pocket expenses—limited to travel expenses to and from the patient’s home—is no different from other employees who similarly pay to travel to the workplace. Like other classifications which the Board has found to be employees, aides “bear slight resemblance to the independent businessmen whose earnings are controlled by self-determined policies, personal investment and expenditures, securing business, and market conditions.” *News-Journal Co.*, 227 NLRB 568, 570 (1976).

The record establishes that vendors, through the auspices of the visiting nurse, directs aides in the performance of those duties set forth in the plan of care. Vendors also compose the aides’ annual state-mandated evaluations. The Employer nonetheless retains significant control over the aides’

conduct through its disciplinary procedure, personnel rules, its ability to respond to aides on-the-job problems. The record further establishes that the vendors control the type, scope, and duration of the work the aides perform. It is not unusual, however, for a customer to specify the product or service which it purchases. Nonetheless, to the extent that the Employer does share with vendors some measure of supervisory authority over the aides, it should be stressed that when addressing the issue of employee status no single factor is determinative. *News Syndicate Co.*, supra. See generally *South Carolina Education Assn.*, 240 NLRB 542 (1979) (individual found to be an employee despite “practically no supervision”).¹

The Employer contends that state regulation has effectively usurped its authority to control the “manner and means” by which aides perform their work. Thus, it maintains that it does not impose any significant requirements on aides other than those required by law. In its brief the Employer cites cases in which the Board found the individuals at issue to be independent contractors due in part to pervasive governmental regulation. While acknowledging that the government regulations of the home health care industry in New York are significant, I find the cases upon which the Employer relies to be distinguishable.

The government in *Cardinal McCloskey Services*, 298 NLRB 434 (1990), set the day care providers’ hours of operation, determined their wages, reimbursed them for costs of meals and equipment, provided them with insurance coverage, and mandated that the employer provide them with a number of paid holidays. In *Air Transit, Inc.*, 271 NLRB 1108 (1984), the government set the fare schedules which effectively controlled driver earnings, and required that drivers take out insurance and purchase two-way radios and meters for their cabs. Here, the Employer, not the government, sets the employees’ wages and determines their raises and bonuses, if any. The government does not provide aides with insurance or mandate that they take any out. Aides are not obligated to purchase any equipment other than a uniform and have no state-sponsored holidays.

Unlike home health aides, the individuals at issue in the above-cited cases also assumed some of the risks of an entrepreneur. For instance the day care providers in *Cardinal McCloskey* worked out of their own homes, and assumed such business-related costs as utilities fees as well as any expenses arising from damage to their own property or the elimination of hazardous conditions in their home. The cab-drivers in *Air Transit* received no wages or benefits from the company and were responsible for the purchase, financing, insurance, and maintenance of their own vehicles. The Employer’s aides, junior aides, and housekeepers assume none of these risks and incur no costs other than the purchase of

¹ Since no party contends here that the Employer is a joint employer with vendors, I will not pass on this issue. However, even assuming *arguendo* that such a relationship exists, the lack of participation by the “joint employer/vendors” does not prejudice the Employer’s positions or interests in any way. The record herein establishes appropriateness of a bargaining unit. The inclusion of a joint employer in these proceedings would not otherwise alter the Employer’s duties and obligations, if any; it would simply have allowed a union to bargain with a vendor as well. See, e.g., *NLRB v. Western Temporary Services*, 821 F.2d 1258 (7th Cir. 1987).

a uniform and the cost of traveling to and from the workplace.

Unlike the Employer here, day care centers in *Cardinal McCloskey* had no authority to discipline providers, did not deduct withholding taxes from their pay, and did not contribute to providers' unemployment and workmen's compensation funds. In *Air Transit, Inc.*, the company's earnings

were determined solely by the number of cabdrivers it could contract with by law, and not by driver earnings. Thus, as the Board concluded, "the Company's interest in the manner and means of the drivers' performance is virtually nil." *Id.* at 1111. These indicia, in toto, distinguish the above cases from the instant matter.