

**Huckleberry Youth Programs and Service Employees International Union, Local 790, AFL-CIO, Petitioner.** Case 20-RC-17345

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On December 24, 1997, the Regional Director for Region 20 issued a Decision and Direction of Election (pertinent portions of which are attached as an appendix) finding that a certain group of workers—Peer Health Educators—are not statutory employees and thus should not be included in a unit of program employees of the Employer.<sup>1</sup> Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review. The matter was considered by a panel of the Board and on January 27, 1998, a majority of the panel granted review.<sup>2</sup>

Having reviewed the record, the Board has determined, contrary to the Regional Director, that the Peer Health Educators (PHEs) are employees within the meaning of Section 2(3) of the Act and share a sufficient community of interest with the program employees to be included in that unit. Accordingly, we reverse his decision and remand this matter to him for appropriate action.

I. FACTS

The Employer is a nonprofit social service agency providing services to young people in San Francisco and Marin County, California. The Petitioner seeks a unit of all full- and part-time program employees. There are approximately 40 employees in the unit sought, 5 of whom are PHEs.<sup>3</sup> The employee status and unit placement of these five PHEs was the only issue presented to the Regional Director.

The five PHEs are assigned to two of the Employer's four locations in the Bay Area. As found by the Regional Director, PHEs work part time in connection with the Employer's program to provide crisis, health, and other support service to at-risk youth. The Peer Health Education Program is based on four basic principles:

- (1) Young people are more receptive to their peers' views than to adults'.
- (2) The experience of young people makes them more qualified than adults to discuss youth topics.
- (3) While abstinence may be taught, the most important first step is the reduction and limiting of harmful behaviors among the target population.
- (4) The personal sharing of experience with peers (PHEs) provides a basis for education and an oppor-

tunity for growth and learning for the targeted at-risk youth.

The roles for the PHEs in this program are varied. They conduct orientations by greeting youth in the clinic waiting room, providing them with refreshments, and facilitating group discussions around video presentations. They also conduct outreach programs in the community. This outreach effort is aimed at high-risk youth and seeks to draw them into the clinic. As the program manager of the Montecito clinic testified, the PHEs "really are for us, the bridge between the community and our program."

The Employer acknowledges that the primary qualification for a PHE is the ability to relate to the target population. In making a PHE hiring decision, the Employer will seek people who have the same kind of problems as the target population and if two people applied for a job and one had "excellent support systems" and the other did not, the Employer would "probably" select the person who could use its services. When they have utilized the Employer's services, PHEs have obtained assistance on matters such as health care, tuition, moving expenses, clothing, furniture, and parental mediation.

PHEs are paid \$6 per hour while other program employees receive more—prevention case managers and residential counselors at a range of \$8.50–\$10 per hour and case managers a range of \$10.50 to \$12.50 per hour. PHEs do not receive benefits available to the full-time program employees such as insurance, disability coverage, and vacations. However, this is only because, as the Employer's employee handbook states, insurance benefits are available only to employees who work at least 30 hours per week and vacation benefits are available only to regular full-time employees.

The PHE program is budgeted to permit a total of 90 hours per week. A particular PHE must work a minimum of 10 hours and no more than 30. PHE working hours are flexible depending on whether a PHE is in school or not. They work according to a published schedule, are given particularized assignments (when and where to be), and sign timesheets. PHEs attend all employee staff meetings but do not attend treatment and client review meetings because of the confidential material discussed.

The Regional Director found that the average age of PHEs when hired is 16 and that their average term of employment is 1 year. That finding appears to be based on testimony that some stay a week and others 3 to 4 years and that employees in other job classifications "usually stay longer." PHEs generally leave their jobs because of age (they no longer represent the client base), because they become skilled in other work or because they become bored and want to do something else. However, PHEs could begin work at age 16 and stay until their early 20s.

<sup>1</sup> As certain of the employees sought by the petition are professional, the Regional Director directed an election pursuant to *Sonotone Corp.*, 90 NLRB 1236 (1950).

<sup>2</sup> Members Liebman and Hurtgen, Member Brame dissenting.

<sup>3</sup> Five other PHEs working at the Employer's facilities are employed by Americorp. The Parties agree that they are not included in the unit.

Since the program started in 1989, 32 individuals have worked as PHEs, 4 of whom later moved into other positions with the Employer. There is a senior PHE position that is paid 50 cents an hour more than a PHE. While the record does not describe the duties of a senior PHE, there is no contention that the position has supervisory responsibilities.

PHEs meet weekly with their supervisors. These meetings include discussions of business matters, but could also involve “lifestyle” issues that might have arisen in the life of the PHE. The Employer’s witness acknowledged, however, that if and when such discussions do occur, the supervisor “is doing what a supervisor generally would do, that is, seeking to determine if there are problems that can be dealt with to make the worker a better worker.” The Regional Director did find that supervisors spend more time with PHEs in a week (3–5 hours) than with other unit employees (1 hour).

The Employer contends that PHEs receive more training than do other unit employees. An employer witness stated that PHEs are in “training at all times” which she defined as “learning how to be in the world.” However, the training was more fully described as training “in different areas they’ll be doing workshops on, HIV, pregnancy prevention, drugs and alcohol, presentation skills, group facilitation skills, and how to represent the agency in the community. They’re not expected to know those things when they come into the position.” Other program employees, the Employer stated, are expected to be “job ready.”

The Employer points out that it is more flexible with PHEs than with unit employees when dealing with matters of employee performance. PHEs are, however, evaluated and can be disciplined and fired. PHEs are subject to the Employer’s employee handbook but also have their own separate manual.

## II. CONTENTIONS OF THE PARTIES

The Employer argues that its PHE program seeks to improve the general life skills and independent living skills of the PHE as well as provide them with job training. Thus, it contends that the peer education program is designed to improve the quality of the lives of the PHEs and that PHEs are treated differently from other employees. They receive lower salaries, do not receive benefits, have more flexible work schedules and are subject to different discipline and performance expectations. Accordingly, the Employer contends that PHEs are not employees under Section 2(3) of the Act in that their relationship with the Employer is “primarily rehabilitative and working conditions are not typical of private sector working conditions.” Further, the Employer contends that even if the PHEs are employees, they should be excluded from the programwide unit because they do not share a community of interest with those employees.

The Petitioner, on the other hand, argues that the PHEs do not come within those cases in which the Board has found that individuals working for a social service agency are “clients” rather than employees of those agencies. See, e.g., *Goodwill Industries of Denver*, 304 NLRB 764 (1991). Rather, the Petitioner contends that the PHEs and the Employer have a business relationship and that there is no requirement that a PHE be involved in any self-rehabilitation effort in order to obtain or maintain his or her employment relationship. The Petitioner argues that the PHEs are therefore statutory employees and that they have a community of interest with those in the proposed unit.

## III. ANALYSIS

As noted, this case presents two issues, the employee status of PHEs and, if that status is found, their community of interest with the unit of full-time and regular part-time nonprofessional program employees. The Regional Director found that the relationship between PHEs and the employees is more rehabilitative than business-like in nature. We disagree.

Initially, and most significantly, we note that there is no requirement that a PHE become or even be a client. While they come from the “peer” group, that means only that they are teenagers. That some of them may also use the Employer’s services is not a requirement of their jobs. Further, the PHEs were not referred to the Employer by a state agency for rehabilitation purposes.<sup>4</sup>

Nor are these individuals who need a sheltered work atmosphere. Indeed, a PHE is charged with going out to recruit clients for the Employer’s services. The fact that these individuals are selected because potential “customers” may relate to them in no way suggests that they need the Employer’s services or that their relationship with the Employer is “primarily rehabilitative and working conditions are not typical of private sector working conditions.”<sup>5</sup> They are recruiters who work with an age-specific client population when and where they find them. The fact that some of the PHEs may also use the Employer’s services because they are in that same age-specific population does not make their relationship with the Employer less business-like and thus warrant a non-employee finding. They clearly were not hired because they are in need of the Employer’s services and, in fact, some PHEs never use those services. Rather, they are hired because they can relate to potential clients.

There is some difference between PHE working conditions and those of other unit employees, but the fact is that the PHEs are teenagers, often in their first jobs. Thus, the additional training, closer supervision, and greater tolerance provided PHEs by the Employer does

<sup>4</sup> Cf. *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991), and *Goodwill Industries of Denver*, 304 NLRB 764 (1991).

<sup>5</sup> *Goodwill Industries of Denver*, supra at 765.

not appear to be substantially different than that provided in other teenage employment situations.

We find on the record here that the relationship between the PHEs and the Employer is a business relationship bearing little, if any, of the attributes that have prompted us to find nonemployee status because of a rehabilitative relationship. Quite simply, these are part-time employees who are young and in their first employment situation, and thus likely in need of employment training. While they may in some cases use the Employer's services, they are not in need of rehabilitation. Indeed, as the record indicates, a youth does not have to be in need of or to utilize the Employer's services in order to be a PHE. Accordingly, we find the PHEs to be employees within the meaning of Section 2(3) of the Act.

With respect to the community-of-interest issue, the fact that the wages of PHEs are different from employees in other classifications and that PHEs do not receive certain benefits is not a basis for excluding PHEs from the overall unit of the program employees. They are part of the Employer's overall program in that they are functionally integrated with the rest of the workforce. They do not have the same benefits because of an Employer decision to limit certain benefits to full-time employees. While they do not share common immediate supervision, secondary and overall supervision is the same. Most importantly, it appears that their inclusion would result in an overall unit of all of the Employer's program employees, and the Petitioner is requesting this presumptively appropriate unit. Their exclusion, as we have found them to be employees, would create a residual unit, which the Board seeks to avoid. In these circumstances, their inclusion in the unit is clearly warranted. See *Airco, Inc.*, 273 NLRB 348 (1984), and *Livingstone College*, 290 NLRB 304 (1988).

#### ORDER

The decision of the Regional Director is reversed and this matter is remanded to the Regional Director for further appropriate action.

MEMBER BRAME, dissenting.

Essentially for the reasons set forth in the attached decision of the Regional Director, I would not find the Peer Health Educators (PHEs) to be statutory employees. I wish to emphasize several points, however.

In *Goodwill Industries of Denver*, 304 NLRB 763, 765 (1991), we set forth a test for determining employee status in a rehabilitative setting:

When the [employment] relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status has been found. When the relationship is primarily rehabilitative and working conditions are not typical of private sector working

conditions, however, the Board has indicated it will not find statutory employee status.

Like the courts, however, I believe the Board has often misapplied its own test. See *Baltimore Goodwill Industries v. NLRB*, 134 F.3d 227 (4th Cir. 1998); *Davis Memorial Goodwill Industries v. NLRB*, 108 F.3d 406 (D.C. Cir. 1997).

As found by the Regional Director, the key indicia favor a finding that these individuals are not employees within the contemplation of the Act; it is this aspect of his decision that I stress.

*Discipline.* PHEs are not subject to the same disciplinary standards as employees. The Regional Director found that the Employer has different performance expectations for PHEs, and anticipates they will engage in "inappropriate work behaviors," including showing up drunk for work, failing to show up for work at all for days, and forming "inappropriate relationships with clients." Such misconduct is usually treated with counseling and "a contract for improved performance." In comparable situations, employees are placed on administrative leave while the misconduct is investigated for possible further discipline.

*Duration of Employment.* Because the "peer group" target population is between the ages of 16 to 22, PHEs *must* be in this age range, while there is no age qualification for employees. Employers typically prefer employee retention to reduce training costs, but the average length of PHE employment is only one year.

*Support Services and Training.* PHEs are encouraged to use the Employer's support services. The Regional Director found that these have included "paying their tuition; providing health care services; case management services, clinical therapy services; advocating for PHEs with their teachers; performing mediation with their parents; providing furniture for their homes; and co-signing on their loans." There is no evidence these services are available to employees.

Unlike employees, PHEs are not expected to be "job ready" when hired. They receive 30 hours of intensive personal training before beginning regular work, while other employees receive only 5 hours of "orientation type training." PHEs receive continuing job-related training on a weekly basis, and, as necessary, other training, such as for literacy and independent living, all in contrast with employees.

*Wages, Hours, and Employer's Benefits.* PHEs receive wages at the rate of \$6 an hour, while other employees (to the extent shown by the record) make between \$8.50 and \$12.50 an hour. In contrast to most employees, PHEs work part time; current PHEs work between 10 and 28 hours per week and are accorded significant flexibility in scheduling. Except for holidays, PHEs do not receive benefits enjoyed by regular employ-

ees, which include health, dental, life and disability insurance, and vacation time.

*Supervision and Substitution.* PHEs are supervised separately from employees and do not substitute for employees.

In sum, in my judgment, the record fully supports the Regional Director's refusal to classify PHEs as statutory employees.

#### APPENDIX

##### DECISION AND DIRECTION OF ELECTION

*Issue Presented.* The only issue presented herein is whether five employees employed by the Employer as peer health educators (PHEs) should be included in the petitioned-for unit.<sup>1</sup> The Petitioner contends that the PHEs are statutory employees who should be included in the unit based on their community of interest with other unit employees. Contrary to the Petitioner, the Employer asserts that the PHEs are not employees under the Act and should be excluded from the unit. In the alternative, the Employer asserts that the PHEs should be excluded from the unit because they do not share a community of interest with the other unit employees.

*Background.* The Employer provides crisis, health and support services to at-risk young people and their families in the San Francisco Bay Area. The record reflects that the Employer's peer health education program began in Marin County and in San Francisco, California, in 1988 and 1989, respectively, with a grant from the Center for Disease Control to provide HIV prevention and education to at-risk youth in the community. Since its inception, the focus of the program has been broadened to include the provision of services dealing with teen pregnancy, substance abuse, decision-making, self-esteem, and other youth related issues.

*The Employer's Locations.* The Employer operates at five locations in the San Francisco Bay Area, including two residential facilities, two health clinics, and an administrative office. In San Francisco, it operates the Cole Street Youth Clinic where it provides primary medical care, psychosocial services, and a peer health education program. The Cole Street Youth Clinic serves about 1600 young people a year. Also in San Francisco, the Employer operates Huckleberry House, a 12-bed shelter for runaway youth that serves about 650 children and teens a year. The Employer maintains a separate administrative office at its central headquarters on Geary Boulevard in San Francisco.

In Marin County, the Employer operates Huckleberry Teen Health Program at Montecito Plaza in San Rafael, California (Montecito Clinic), which provides adolescent health care services, peer health education, and psychosocial services. At Nine Grove Lane Shelter in San Anselmo, California (Nine Grove Lane), the Employer operates a 6-bed shelter for young persons who are experiencing family problems, abuse, or neglect.

*The Employer's Managerial and Administrative Staff.* The Employer is headed by Executive Director Bruce Fisher and

Deputy Executive Director Michelle Magee. Both Fisher's and Magee's offices are located at the Employer's administrative office on Geary Boulevard in San Francisco. The Employer's human resources and personnel functions are handled by Vicki Schwartz, the director of administration and development, who also works at the administrative office. Susan Castillo and Joannell Serra are the associate directors of the San Francisco and Marin County programs, respectively. The Employer employs at each of its facilities, a program manager: Rebecca George at Huckleberry House; Cynthia Bott at the Cole Street Youth Clinic (Bott also has the title of psychosocial services director); Lisa Sterner at Montecito Clinic; and Carol Harvey at Nine Grove Lane.

The Employer employs several administrative and clerical employees at its administrative headquarters, whose exclusion from the unit is not disputed by the parties, including a fiscal director; a community relations coordinator; a project coordinator; an office manager; a bookkeeper; a development assistant; an assistant to the executive director; and an assistant to the fiscal director.

The Employer's associate director for San Francisco, Susan Castillo, testified that at the Cole Street Youth Clinic, the Employer operates in a partnership with the State of California Department of Public Health. The Department of Public Health operates special youth programs at the site and employs its own medical staff there, including family nurse practitioners, registered nurses, health workers, two licensed clinical social workers, a licensed vocational nurse/psych tech, and an administrative staff person.

At the Cole Street Youth Clinic, the Employer employs approximately five paraprofessionals, including two case managers; one on duty case manager; and two prevention case managers. In addition, the Employer employs at this facility three of the five PHEs at issue herein; Program Manager/Psychosocial Services Director Cynthia Bott; Peer Education Coordinator Dale Frett; and Office Manager Melissa Egan.

The case managers carry case loads and provide counseling services and teach independent living skills to the Employer's clients. They assist clients in getting into school; finding housing; and they provide supportive counseling. They earn between \$10.50 and \$12.50 per hour.

The on duty case manager, who is also categorized by the Employer as a case manager, is responsible for dealing with crises that arise in the clinic; for handling the intake of clients; and for substituting when other staff people (i.e., case managers and prevention case managers) are on vacation. The on duty case manager does not carry a [sic] own caseload unless another staff member goes on vacation and she is overseeing their cases. She provides minimal support services (e.g., counseling, housing, food, and transportation vouchers) to clients of other staff members. If she is absent from work, the case managers, prevention case managers or therapists fill in for her. The on duty case manager is paid at a rate similar to that of the case managers.

The two prevention case managers at the Cole Street Youth Clinic are case manager trainees. The Employer's associate director for San Francisco Programs, Susan Castillo, referred to them as "junior case management positions." According to Castillo, their duties overlap with those of the on duty case manager. They carry their own small case loads, sometimes handle client intakes, and perform other administrative tasks.

<sup>1</sup> The PHEs at issue were identified as Pearl Brown, Monique Mayer, and Myrna Valderrama who are employed at the Employer's Cole Street Youth Clinic in San Francisco; and Myra Bueno and Victor Gonzales who are employed at the Employer's Huckleberry Health Teen Program at Montecito Plaza in San Rafael.

The pay rate for the prevention case managers ranges from \$8.50 to \$10 an hour.

The Employer also employs a family mediation counselor at the Cole Street Clinic. The record does not disclose the duties or pay rate of this employee. The three PHEs who work at the Cole Street Youth Clinic are discussed below along with the two PHEs who work at the Montecito clinic.

At Huckleberry House in San Francisco, the Employer employs regular and on-call residential counselors I and II. Residential counselors I are responsible for the day-to-day living of the clients who live at the residential shelter (e.g., getting them up in the morning; helping them to do chores; and getting them to school, therapy sessions, and other appointments). Residential counselors II perform a function similar to case managers in that they set preliminary case plans prior to those plans being transferred to the Cole Street Youth Clinic. They also help clients locate stable housing; help them to get enrolled in school; and help them with school related issues.

At the Montecito Clinic in San Rafael, the Employer employs case managers; on duty case managers; prevention case managers; two PHEs; Psychosocial Services Coordinator Robin Bertoli; Latino Youth Services Coordinator Jose Hernandez; and Office Manager Nancy Jorth. The Employer's associate director for Marin Programs, Joanel Serra, and Peer Education Coordinator Myel Jenkins also work at this location.<sup>2</sup> At the Montecito Clinic, there are also five peer educators who are employed by AmeriCorp<sup>3</sup> and not by the Employer.

At the Nine Grove Lane Shelter in San Anselmo, the Employer employs residential counselors as at Huckleberry House in San Francisco and also family counselors and a family advocate.

*The Peer Health Education Program.* The Employer's peer health education program is directed towards improving the health and welfare of at-risk teenagers. The record contains a policies and procedures manual for the Peer Health Education program that describes the program as based on four basic principles: that young persons are more likely to listen to their peers than to adults; that young people are more qualified to address youth topics because of their own experiences; that while abstinence may be taught, the first and most important step is to reduce and limit harmful behaviors among the target population; and that the personal sharing of experiences by peers (i.e., PHEs) provides a basis for education and an opportunity for growth and learning by other young persons.

In fulfilling the mission of the program, PHEs provide various services for at-risk young persons at the Cole Street Youth Clinic and at the Montecito Clinic. At the Cole Street Youth Clinic, the three PHEs conduct clinic orientations by greeting youth who come into the waiting room; by providing them with food and drink; and by facilitating group discussions through video presentations. The PHEs also provide peer outreach programs in the community.

The program manager at the Montecito Clinic, Lisa Sterner, testified that at the Montecito Clinic, the two part-time PHEs employed by the Employer focus on workshops and community

outreach programs and do not work in the clinic as do the PHEs at the Cole Street Youth Clinic. Sterner testified that there are five peer educators at the Montecito Clinic who are employed by AmeriCorp and not by the Employer. According to Sterner, the AmeriCorp peer educators are not in school and tend to be older and more skilled than the PHEs. The AmeriCorp peer educators do presentations; put on workshops in the community; run school or community based peer health education programs; and recruit and train volunteer peer educators in the community. The AmeriCorp peer educators also work in the clinic and handle the intake of clients for the Employer.

As indicated above, the PHEs focus on workshops and presentations in the community and do not work in the clinic. They do not perform counseling of clients as do the case managers, prevention case managers, and on duty case managers; they do not carry a case load; and they do not substitute for the other petitioned-for employees.

According to the Employer's associate director of San Francisco Programs, Susan Castillo, and the Montecito Clinic Program Manager Lisa Sterner, the Peer Health Education program is intended to be a social service intervention for the PHEs. According to Castillo, the purpose of the program is to provide the PHEs with training in independent living skills as well as job training. While the Employer does not require the PHEs to make use of the Employer's services or to be clients of the Employer, it encourages them to do so. Castillo testified that five of the PHEs have been residents of the Employer's facility in San Francisco.

According to Castillo and Sterner, the Employer also encourages the PHEs to utilize the Employer's other services and in the past, the Employer has provided PHEs with many types of support and services, including: paying their tuition; providing health care services; case management services; clinical therapy services; advocating for PHEs with their teachers; performing mediation with their parents; providing them with help finding housing and moving into new housing; providing furniture for their homes; and co-signing on their loans.

In hiring PHEs, Castillo and Sterner testified that the Employer requires applicants be persons whose age is within the peer group of the target population which is from 16 to 22. The average age of the PHEs when they are hired is 16 years old and their average term of employment is 1 year. The requirement that they be within the age of the peer group they are serving is not a qualification required of any other employee hired by the Employer. According to Sterner, the Employer also seeks persons who have had similar experiences as the target population and can relate to them and whom the Employer believes could benefit from the Employer's intervention program.

Individuals hired as PHEs are not required to have any training while other employees hired by the Employer are required to be "job ready," and to possess the job skills necessary for their positions when they are hired.

Sterner testified that once hired, the PHEs receive approximately 30 hours of intensive one-on-one training before they are allowed to work in the community. Such training involves information about the subjects they will be presenting workshops on such as HIV, pregnancy prevention, and drugs and alcohol. The PHEs are also trained in presentation skills; group facilitation skills; and how to represent the Employer to the community. According to Sterner, after this initial intensive training the PHEs have ongoing training every week. In addi-

<sup>2</sup> As set forth above, the parties stipulated that Serra should be excluded from the unit as a managerial employee and/or a statutory supervisor and Jenkins has been stipulated by the parties to be a statutory supervisor who is excluded from the unit.

<sup>3</sup> AmeriCorp is a Federal program administered through a fiscal/management agent called BAYAC which hires the peer educators and places them with the Employer.

tion to the training described by Sterner, Castillo testified that the PHEs have also had training from the Employer in other areas, such as learning to read and on independent living skills. According to Castillo, the Employer's peer health education program is a "social service intervention and because we can't adopt these kids, we use job training as an intervention to improve their quality of life."

Sterner testified that employees other than the PHEs receive a minimal amount of orientation type training of about 5 hours. The Employer also offers other employees ongoing opportunities to take training offered in the community in order to enhance their professional development or skills.

The PHEs are paid a flat rate of \$6 an hour. As set forth above, the record reflects that the case managers and on duty case managers earn between \$10.50 and \$12.50 per hour and the prevention case managers earn between \$8.50 and \$10 an hour. The record does not disclose the wage rates of the other petitioned-for employees. The other petitioned-for employees receive the same benefits from the Employer, including health, dental, life insurance, disability, and vacation benefits. None of these benefits are provided to the PHEs, with the exception that the PHEs are given holidays if the rest of the staff is off for that day. Castillo also testified that certain more senior PHEs have also been unofficially granted time off. According to the Employer's Peer Health Education handbook, the PHEs are also given a paid lunch hour to be taken each day, preferably at noon.

The PHEs work part time, according to scheduled times as do other employees. However, the Employer gives the PHEs much more flexibility in their schedule because of school or other life situations that affect their work. The Employer is budgeted at 90 hours a week for the PHEs. According to the Employer's Peer Health Education handbook, the part-time PHEs must commit to work a minimum of 10 hours a week. At the Cole Street Clinic, the three PHEs work 10, 15, and 28 hours per week, respectively. At the Montecito Clinic, the two PHEs work from 12 to 16 hours a week. The PHEs must use sign-in sheets to record their time worked.

All employees in the petitioned-for unit, including the PHEs, are subject to the same personnel policies and procedures handbook which includes standards of conduct and disciplinary policies (except that the PHEs do not receive the benefits outlined therein). In addition, as noted above, the Employer has a policies and procedures manual that applies only to the PHEs. This manual describes the program and its goals; working hours; ethics; the need for punctuality; and other matters pertaining to the PHEs' work.

The PHEs have separate supervision from the other employees in the petitioned-for unit. At the Cole Street Youth Clinic, the PHEs are supervised by Peer Education Coordinator Dale Frett. Other employees at the Cole Street Youth Clinic are supervised by Psychosocial Services Director and Program Manager Cynthia Bott. Frett's duties are to recruit, train, oversee and implement the peer health education program. He also provides supportive services to the PHEs similar to those provided by the case managers to the general client population. The PHEs at the Montecito Clinic are supervised by Assistant Peer Health Education Coordinator Myel Jenkins and the other petitioned-for employees are supervised by Program Manager Lisa Sterner. According to Castillo, the PHEs at the Cole Street Clinic have about 5 hours of supervision per week while the other employees in the petitioned-for unit are supervised ap-

proximately 1 hour a week. Sterner testified that at the Montecito Clinic, the PHEs spend between 3 and 4 hours a week in supervision.

According to Castillo, while the PHEs may be suspended or terminated if they persist in inappropriate behavior, they are not, in fact, subject to the same disciplinary standards as are other employees. Castillo testified that because the average age of the PHEs is about 16 years old when they come to work for the Employer and, because they are hired in the belief that they have the type of life situations that could benefit from the Employer's program, the Employer has different performance expectations for them and assumes that they will engage in some inappropriate work behaviors. According to Castillo, the Employer has had PHEs come to work intoxicated; form inappropriate relationships with clients; and for days fail to show up for work or even call in. She testified that the Employer attempts to use the inappropriate behaviors of the PHEs as learning tools for them. When misconduct by PHEs occurs, counseling and a contract for improved performance is generally implemented.

Castillo testified that the Employer would deal with misconduct by other non-PHE employees much differently. Specifically, she testified that when similar situations had occurred with other employees, the Employer has placed the employee on administrative leave with pay and investigated the misconduct in order to determine whether further discipline is warranted. Castillo testified that PHEs have probably been terminated but the record contains no evidence regarding such terminations or other actual instances of discipline of PHEs or any other employees. According to Castillo, most of the PHEs decide to leave their employment not because they are terminated but because they find other jobs or get tired of the work they are doing. The Employer does not employ PHEs who are beyond their early twenties.

Castillo and Sterner testified that the PHEs at the Cole Street Youth Clinic attend staff meetings held twice a month for the purpose of discussing business and logistics; attend a weekly meeting with their supervisor; and attend a weekly meeting with other PHEs, held primarily for training purposes. They do not attend the weekly team treatment and client review meetings because confidential material is disclosed about clients at such meetings. In addition to the foregoing meetings, Sterner testified that the PHEs at the Montecito Clinic attend a weekly meeting with the other PHEs and AmeriCorp peer educators the purpose of which is primarily skill development.

The PHEs do not substitute for any other employees. The record reflects that 3 or 4 former PHEs have moved to other positions with the Employer that they now occupy, including those of case manager, prevention case manager, and Latino Coordinator at the Montecito Clinic.

*Analysis.* The Employer contends that the PHEs should be excluded from the unit because they are not statutory employees under Section 2(3) of the Act and because they do not share a community of interest with other petitioned-for employees. The Petitioner takes the opposite position.

In making the determination of whether persons such as the PHEs are employees under Section 2(3) of the Act, the Board examines the relationship between the employer and the employees at issue. When that relationship is guided to a great extent by business considerations and may be characterized as a typically industrial relationship, statutory employee status is found. See *Davis Memorial Goodwill Industries*, 318 NLRB

1044 (1995); *Arkansas Lighthouse for the Blind*, 284 NLRB 1214 (1987); *Cincinnati Assn. for the Blind, Inc.*, 235 NLRB 1448 (1978). When the relationship is primarily rehabilitative and working conditions are not typical of private sector working conditions, the Board does not find statutory employee status. See *Goodwill Industries of Tidewater*, 304 NLRB 767 (1991).

In making its determination, the Board reviews the following factors: whether the employees at issue are subject to production standards and discipline as are other employees; whether the employer provides counseling or social services to them that are not provided to other employees; whether the employer's operation has contemplated or resulted in long-term employment for the employees; whether the employees at issue receive similar wages as other employees; and whether those wages are based on productivity or performance.

In the instant case, the record establishes that the Employer does not hold the PHEs to the same disciplinary standards as its other employees. Rather, it expects that the PHEs will engage in misconduct because of their age and other factors and it views their misconduct as providing opportunities for learning and growth through counseling and treatment. Thus, while the PHEs may be subject to the same types of discipline as are other employees, the testimony in the record shows the Employer treats them in a rehabilitative manner when approaching disciplinary issues.

Further, the record shows that the Employer offers the PHEs intensive training aimed not only at teaching them the job skills needed to perform the Employer's job but also at teaching them independent living and other skills necessary to work in the private sector. In addition, the Employer provides the PHEs with a variety of other social/rehabilitative type services, including providing them with a home; tuition; health care; case management services; help finding housing; furniture for their homes; and cosigning their loans.

In addition, the PHEs can work for the Employer only between the ages of 16 and 22. While a few have taken other positions with the Employer, the average length of time that PHEs are employed with the Employer is only 1 year.

The PHEs are also paid a flat rate of \$6 an hour, a rate substantially lower than that of the other petitioned-for employees. They do not receive the same fringe benefits as the other employees. They are separately supervised and do not substitute for other unit employees.

Based on the record as a whole and particularly on the following factors, I find that the Employer's relationship to the PHEs is more rehabilitative than business like in nature and that the PHEs are not employees under the Act: the fact that the PHEs are hired based at least in part on the likelihood that they will benefit from the Employer's intervention program; the fact that the Employer encourages the PHEs to make use of its services and has provided a number of them with many such ser-

vices, as described above; the fact that the PHEs receive much more intensive training and supervision than do other employees and that such training covers areas beyond just those job skills needed for their jobs with the Employer; the fact that the Employer treats the PHEs differently from its regular employees in disciplinary matters; the fact that the Employer accords the PHEs much more flexibility in their scheduling than it does other employees because of their schooling and other life situations affecting their work; the fact that the PHEs are paid at a rate of pay that is different from that of other employees and they do not receive the same benefits as other employees; the fact that the PHEs are separately supervised from other employees; they do not substitute for any other employees; and finally, the fact that the Employer limits the term of the PHEs' employment to their early twenties and that PHEs tend to be short term employees. Accordingly, I find that the PHEs are not employees under Section 2(3) of the Act and they are excluded from the unit.

Because I find that the PHEs are not statutory employees, it is unnecessary to reach the issue of whether they share a community of interest with other unit employees. However, assuming arguendo that the PHEs were employees under the Act, I would nonetheless exclude them from the petitioned-for unit based on their lack of a community of interest with the other unit employees. In this regard, I note that the PHEs have supervision separate from that of the unit employees; do not substitute for unit employees; earn a rate of pay that is substantially lower than that of unit employees; do not receive the same benefits as unit employees; and are subject to different standards of performance than unit employees.

The Petitioner contends that the facts in this case make it akin to *Davis Memorial Goodwill Industries*, supra; and *Arkansas Lighthouse for the Blind*, 284 NLRB 1214 (1987), where the Board found the employees at issue to be employees under Section 2(3) of the Act and did not find that their relationship with their respective employers was rehabilitative in nature. However, a review of the facts in those cases shows significant differences from the facts in the instant case. Thus, in both *Davis* and *Arkansas Lighthouse*, unlike the PHEs in the instant case, the employees at issue received the same wages and benefits as employees whose unit status was not at issue; had the same working hours as the unit employees; and received little or no social services, counseling or training for anything other than the skills needed to perform their jobs. Further, unlike the PHEs in the instant case, in *Davis*, the employees at issue worked under the same supervision as unit employees and in *Arkansas Lighthouse*, the record showed that the employees at issue had a pattern of long-term employment in their jobs. Given these factual differences, I find that the Petitioner's reliance on *Davis* and *Arkansas Lighthouse* to be misplaced and the PHEs will be excluded from the unit.