

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**PERSONAL TOUCH HOME CARE, INC.,**

**EMPLOYER**

**and**

**CASE NO. 2-RC-22447**

**NEW YORK'S HEALTH & HUMAN SERVICE  
UNION 1199/SEIU, AFL-CIO,**

**PETITIONER**

**DECISION AND DIRECTION OF ELECTION**

Upon a petition filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Helena Fiorianti, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Upon the entire record in this proceeding, it is found that:

1. The Hearing Officer's rulings are free from prejudicial error and hereby are affirmed.
2. The parties stipulated and I find that Personal Touch Home Care, Inc. (the Employer), a New York corporation, with a place of business located at 170 East Post Road, White Plains, New York, herein called the White Plains facility, provides home health care services. During the past year, which period

represents its annual operations generally, the Employer derived gross annual revenues in excess of \$100,00 and purchased and received at its White Plains facility goods, supplies and materials valued in excess of \$5,000 from points located outside the State of New York.

Accordingly, based upon the record and the stipulation of the parties, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated that New York's Health & Human Service Employees Union 1199/SEIU, AFL-CIO (Petitioner), is a labor organization within the meaning of Section 2(5) of the Act.

Accordingly, based upon the record and the stipulation of the parties, I find that Petitioner is a labor organization within the meaning of the Act.

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

5. Petitioner seeks to represent all full-time and regular part-time home health care aides (HHAs) and personal care aides (PCAs) employed by the Employer at its White Plains facility excluding office clerical employees, guards and supervisors.<sup>1</sup> The Employer contends that the petition does not raise a question concerning representation since the petitioned-for employees do not fall within the statutory definition of employee, as set forth in Section 2(3) of the

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<sup>1</sup> The Petitioner amended its petition on the record indicating that it only seeks to represent HHAs and PCAs. The initial petitioned for unit also included homemakers. However, upon the Employer's counsel representation that no such classification exists, the Petitioner amended its petition to reflect the unit defined above.

Act. The Employer contends that all of its HHAs and PCAs fall within the domestic service, independent contractor and casual employee exemptions of Section 2(3) of the Act.

The question of whether the petitioned-for unit is an appropriate unit for the purposes of collective bargaining has been considered by the Board in Case No. 29-RC-9697. In this previous matter, the Union sought to represent the Employer's employees employed in the same job classifications at the Employer's facility located in Jamaica, New York. Based on the record, the Acting Regional Director, Region 29, rejected the Employer's argument that the HHAs and PCAs were not employees within the meaning of the Act and found that a unit of HHAs and PCAs was appropriate. The Decision and Direction of Election issued in that case was reviewed by the Board which upheld the Acting Regional Director's decision an October 10, 2001 Order denying the Employer's Request for Review.

In the instant case, the parties stipulated to the facts contained in the record from the prior matter and they further stipulated to the receipt of that transcript as part of the instant record. Also the parties stipulated that, since the August 17, 2001 hearing in that prior case, there have been no operational or managerial changes to the Employer's business. The Employer's employees are employed under the same job titles and the Employer has the same managerial structure. The Employer, however, concedes that the only difference between the record evidence in the prior case and the instant case is the actual statistics concerning the number of weeks and hours worked by the White Plains

employees during the 1999, 2000 and 2001 calendar years. Furthermore, Vincent Guida, the Regional Manager at the Employer's White Plains facility claims that unlike the Employer's Jamaica facility, 75% of the White Plains PCA's job involves domestic duties and only 25% of the work involves personal care.

Based on the Employer's concession that there have been no changes in the Employer's basic operations since the hearing in Case No. 29-RC-9697 and the statistical evidence concerning the regularity of work of the White Plains employees, there appears to be no basis to reject the findings and conclusions of the Acting Regional Director made in the prior case. This is particularly so where the Board refused to grant review of the Acting Regional Director's Decision and Direction of Election. Likewise, there is no basis to abandon the *Davison-Paxon* eligibility formula that was applied in the prior case. The Employer provides no evidence nor proposes any basis for me to conclude that any other eligibility formula would be more appropriate. Therefore, based on the record herein, including the stipulated record, all HHAs and PCAs working four (4) hours per week in the quarter preceding the eligibility date herein shall be eligible to vote.

For all the foregoing reasons, I find that the following constitutes a unit that is appropriate for the purposes of collective bargaining:

All full-time and regular part-time home health care aides (HHA) and personal care aides (PCA)<sup>2</sup> employed by the Employer at its 170 East Post Road, White Plains, New York facility excluding office clerical employees, coordinators, registration department employees, guards and supervisors as defined by the Act.

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<sup>2</sup> In accordance with *Davison-Paxon, Co.*, 185 NLRB 21 (1970), all HHAs and PCAs working four (4) hours per week in the quarter preceding the eligibility date herein shall be eligible to vote in the election.

## DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time<sup>3</sup> and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.<sup>4</sup> Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who

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<sup>3</sup> Pursuant to Section 101.21 (d) of the Board's Statements of Procedure, absent a waiver, an election will normally be scheduled for a date or dates between the 25<sup>th</sup> and 30<sup>th</sup> day after the date of this decision.

<sup>4</sup> Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer "at least 3 full working days prior to 12:01 a.m. of the day of the election." Section 103.20(a) of the Board's Rules. In addition, please be advised that the Board has held that Section 103.20 (c) of the Board's Rules requires that the Employer notify the Regional Office at least five full working days prior to 12:01 a.m. of the day of the election, if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB No. 52 (1995).

have been permanently replaced.<sup>5</sup> Those eligible shall vote whether they desire based upon the record and the stipulation of the parties, to be represented for collective-bargaining purposes by New York's Health & Human Service Union, 1199/SEIU, AFL-CIO or not.

Dated at New York, New York

November 5, 2001

(s) \_\_\_\_\_  
Celeste J. Mattina  
Regional Director, Region 2  
National Labor Relations Board  
26 Federal Plaza, Room 3614  
New York, New York 10278

Code:  
440-1720-0133  
177-2414-3300

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<sup>5</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **November 13, 2001**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

<sup>5</sup> Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **November 19, 2001**.