

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ALLIANCE FOR HEALTH, INC.
Employer

and

Case No. 29-RC-9751

NEW YORK'S HEALTH AND HUMAN SERVICE
UNION, 1199/SEIU, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Lilliam Perez, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Alliance For Health, Inc., herein called the Employer, a New York corporation, with its principle office and place of business located at 76 Court Street, Brooklyn, New York, herein called the Brooklyn facility, provides home health care services.¹ During the past year, which period represents its annual operations generally, the Employer derived gross annual revenues in excess of \$100,000

¹ Although not included in the commerce stipulation, it appears from the record that the Employer has another facility at 2488 Grand Concourse Avenue, Bronx, New York.

and purchased and received at its Brooklyn facility, goods, supplies and materials valued in excess of \$5,000 directly from points located outside the State of New York.

Based on the foregoing, and the record as a whole, 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 labor organization involved herein claims to represent certain employees of the Employer.

4. The petition, on its face, seeks all full-time and regular part-time home health aides, personal care aides and home attendants employed by the Employer out of 76 Court Street, Brooklyn, and 2488 Grand Concourse Avenue, Bronx, New York, excluding guards and supervisors.² However, during the hearing, the Petitioner amended its petition seeking to represent home health aides only, based on the Employer's representation that it does not employ any individuals as personal care aides or home attendants. The Employer contends that the petition does not raise a question concerning representation because the petitioned-for employees do not fall within the statutory definition of employee, as set forth in Section 2(3) of the Act. First, the Employer contends that the home health aides fall within the "domestic service" exemption of Section 2(3) of the Act. Second, the Employer argues that the petitioned-for unit employees are independent contractors, also excluded from Section 2(3) of the Act. In support of its position, the Employer called as its sole witness the manager of the Bronx office, Patricia Martin, to testify. The Petitioner called no witnesses.

² There are approximately 1400 employees working out of the Bronx facility and the remaining 800 employees work out of the Brooklyn facility. It appears from the record that the Employer also employs approximately 10 coordinators, whose job duties and responsibilities are described more fully below, and 10 registered nurses. The parties entered into a conclusionary stipulation that these latter groups of

The Employer is a home care agency and it places individuals in the homes of the elderly or infirm to assist with their various needs. According to the Employer's job description, home health aides provide personal care, home management and other related supportive service to individuals in their homes. The job description indicates that the aides' "major responsibilities" include moving patients from a bed to a chair, assistance in walking, bathing, bathroom needs, oral hygiene, care of nails, hair, dressing, shaving, assistance with oral medication, patient treatments as required by the physician, and taking the patient's temperature, pulse, respiration and blood pressure. The Employer refers to these activities as personal care responsibilities. Home health aides also assist in "incidental household functions," which the Employer contends are domestic in nature. These duties include accompanying a patient to a medical appointment or other essential errands, dish washing, dusting, vacuuming, listing needed supplies, changing linens, laundry, preparation and service of meals, food shopping, and cleaning the bathroom, bedroom and kitchen.³ Home health care aides are licensed by the State of New York's Department of Health. Approximately 80% of an aide's work day involves domestic duties and 20% of their work day involves personal care functions. However, these percentages can vary depending on the patient involved.

The Employer's business is derived from contracts with different types of home health agencies referred to in the record as vendors. These vendors contact the

employees are supervisors within the meaning of Section 2(11) of the Act. It appears from the record that this stipulation is based on the fact that both classifications have the authority to evaluate employees.

³ See Employer Exhibit 1. The job description also indicates that certain functions may not be performed at all, under any circumstances. They include: foley catheter irrigation; catheter insertion; sterile dressing removal; set up of sterile field; draw medication; remove traction; repair medical equipment; irrigate colostomy; tracheal suction; take blood pressure in any site other than the arm; or hook up or administer IV fluids. There are other functions that, according to the job description, are permissible "under special circumstances," but the record does not reflect the circumstances required before an aide may perform those functions.

Employer to request that it place an aide in a patient's home for a specific number of hours over a period of time. The cases are transmitted to the Employer via computer and describe the duties required for that assignment, the hours needed, and the address of the patient. The Employer has no control over the hours, duration or location of a particular assignment. The vendor agency employs registered nurses who determine the specific plan of care under which the aide will work. The Employer has no authority to modify the plan of care.⁴

An individual must apply for a position with the Employer in order to be placed in the Employer's labor pool. The Employer does no advertising and receives their applicants only by word of mouth. Upon arrival at the Employer's facility, the Employer administers an exam that measures reading comprehension. The test is prepared by the Employer. If the applicant passes the exam, they are interviewed. If the applicant passes the interview process, they commence a classroom training course. This course trains them with a curriculum prepared by the Employer but approved by the New York City Department of Health and Social Services. After they complete the course, aides are considered trainees. As trainees, they work "in the field" and are observed by the Employer's registered nurses. This "in field" training process is approximately 6 weeks in duration. After successful completion as trainees, they

⁴ No party to this proceeding contends that the Employer is a joint employer with the vendors. I am mindful of the Board's recent decision in *M.B. Sturgis*, 331 NLRB No. 173 (2000), where the Board set forth the test for establishing whether jointly-employed employees, supplied by a "supplier employer" and working at the "user employer" facility, can be included in a unit of employees employed solely by the user employer. In the instant case, it would appear that the Employer herein is the supplier employer, inasmuch as they supply the labor the vendor seeks. Thus, the vendor would be considered the "user" employer. Nevertheless, the Petitioner herein did not seek to amend its petition, and, in *Professional Facilities Management, Inc.*, 332 NLRB No. 40 (2000), the Board held that "a petitioner may seek to bargain only with a single supplier employer on behalf of its employees in an appropriate unit, even though the employees may be jointly employed by one or more user employers." Thus, the fact that employees may be jointly employed does not require that a petitioner name the joint employers or litigate the existence of a joint employer relationship. *Id.*

become home health care aides and are certified by New York State. In this regard, it appears from the Employer's handbook that, once the training is completed, the Employer performs a competency test in the field by its own registered nurses. According to the handbook, this competency test is based on "Federally mandated criteria." The handbook also requires that the competency test be administered annually, although it is not clear from the record testimony whether the Employer does so.⁵ After completion of the training course, the aides receive a certificate of completion from the Employer. According to the Employer's handbook, it has a 90 day probationary period during which time aides are evaluated "on all aspects of performance." During the probationary period, the Employer "reserves the right to terminate any employee who fails the probationary period."⁶ Applicants also must provide references and have a physical examination.⁷ It is undisputed that the applicant completes a W-4 income tax withholding form. In addition, the Employer provides the applicant with copies of its handbook, discussed more fully below. It appears from the record that vendors play no role in the hiring process.

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, coordinators phone individuals off this list to offer them positions.⁸ Should the individual decline the work, the coordinator calls another aide on the list until the

⁵ See page 19 of Petitioner Exhibit 1.

⁶ See page 29 of Petitioner Exhibit 1.

⁷ It is known from other cases in this industry that the physical is required by New York State's Department of Health

⁸ Cases from vendors must be filled by a time specified by the vendor.

position is filled. According to the Employer's witness, a coordinator can call anywhere between 1 to 4 applicants before an employee accepts the assignment. Aides may reject assignments because they are not located close to that aide's home, the hours of work are not convenient, or because the assignment does not represent a sufficient number of hours. It is undisputed that the aides may work for other employers while simultaneously working for the Employer. The record shows that from September 2000, through September 2001, the Employer employed approximately 2208 aides.⁹ Of this number, there were approximately 685 aides who worked between 320 and 520 hours, somewhere between 6 to 8 weeks, during the third quarter of 2001, the quarter immediately preceding the filing of the petition. During the same period, approximately 546 aides worked more than 520 hours, an excess of 13 weeks. As for the second quarter of 2001, approximately 726 aides worked between 320 and 520 hours, somewhere between 6 and 8 weeks, and, during the same period, approximately 436 aides worked in excess of 520 hours during the quarter, more than 13 weeks.

It is undisputed that the homeowner/patient does not pay the aides directly. The aides' wage rates are not reflected in the record. According to the Employer's handbook, employees are paid by the Employer on a weekly basis, every Thursday. In order to receive their weekly paychecks, the aides must submit duty sheets. These duty sheets include the patient's name, address, identification number, and medical record

⁹ Employer Exhibit 2 is a list of 2208 aides whom the Employer contends worked at least one shift during the twelve months prior to the filing of the petition. Although the first column of Employer Exhibit 2 allegedly reflects the number of weeks worked during the year prior to the filing of the petition, the Employer made clear on the record that the numbers do not reflect full work weeks. According to the Employer, even if an aide worked one shift during one calendar week, and even if the shift consists of a few hours, it will appear on Employer Exhibit 2 as if that aide worked one whole week. Thus, the Region requested data that reflected the number of hours worked by each aide in each of the two quarters preceding the filing of the petition. That information is reflected in a summary chart on page 22.

number, and must explain the duties performed. These duty sheets must be delivered to the Employer's office every week by the Monday preceding Thursday's payday.¹⁰

It is undisputed that the Employer has a limited on-site supervisory role once an employee receives an assignment. As indicated above, the vendors set forth the care plan for each patient and thereafter, registered nurses, employed by the vendors, visit the patient's home to "see what's happening" and ensure the quality of care. The Employer employs about 10 supervisory registered nurses of its own, although the full extent of their duties are not detailed in the record. According to the Employer, "oftentimes" the vendor's nurse advises the Employer to remove an aide from a case. The Employer does so immediately. It appears from the record that whenever a complaint is submitted about an aide's performance, the Employer's coordinators perform evaluations of the aide's performance.¹¹ If "violations" are found, the matter is investigated to determine if termination is warranted.

With the exception of the training process, the Employer does not send any of its own managers, supervisors or registered nurses to check on the quality of the care provided. However, the Employer's coordinators ensure timely attendance. In this regard, the aides are responsible for telephoning when they arrive at a patient's home and telephone when they depart. If the aide has not called, the coordinators call the patient's home to check on the arrival of the aide. According to the handbook, aides are

¹⁰ Each vendor contracting with the Employer has different requirements for completion of these duty sheets. According to the handbook, aides are instructed to call the coordinator if they are uncertain about the reporting requirements of a particular vendor. See Petitioner Exhibit 1, p 22.

¹¹ It is unclear whether these complaints about an aide's performance originate from the vendor's nurse or from the patient directly.

required to report absences 12 hours prior thereto. They may not telephone the patient directly regarding a late arrival and they may not have a friend or relative report the absence to the Employer. If less than 12 hour advance notice is provided, the aide may be asked to document the basis for the absence. If an aide is out of work for more than 3 days due to illness, a doctor's note is required prior to returning to work. The Employer also may require that an aide provide documentation which supports the reasons for an aide's late arrival at a patient's home. Two incidents of tardiness requires a meeting with human resources.¹² However, during the hearing the Employer's witness testified that consistent tardiness could be grounds for termination.

As indicated above, the Employer has a handbook which it distributes to the aides. The handbook commences with a lengthy discussion regarding its "Code of Conduct." The code of conduct is essentially a description of ethical standards with which an aide is required to comply. The code of conduct includes discussions regarding standards of care, ethical behavior in providing care, maintenance and confidentiality of records (both the Employer's proprietary records and the patient's records), compliance with third-party billing (i.e., Medicare and Medicaid), bribery or kickbacks, responses to formal inquiries from government officials, and the prohibition of direct or indirect contact with politicians in the Employer's name. The code indicates that the receipt of gifts from patients poses a conflict of interest and only token or nominal gifts are permitted and only if they are infrequent. In another section of the handbook, the Employer advises the aide to avoid accepting any type of gift from a patient without formal approval by the Employer.¹³ The code of conduct also contains a

¹² See p. 31 of Petitioner's Exhibit 1.

¹³ Petitioner's Exhibit 1 at page 16.

conflict of interest statement specifically indicating that “employees have a duty and loyalty to [the Employer] and should put [the Employer’s] interests ahead of any personal business or commercial intent.” Thus, the Employer “expects” its employees to “avoid situations that present an actual or potential conflict between their interests and those of the Employer.”¹⁴ In fact, aides are required to promptly disclose any fact or circumstance that may involve or have the appearance of creating a conflict of interest. The handbook also has an extensive “cannot do” list, which, in pertinent part, prohibits the acceptance of gifts without approval of the Employer, sending a replacement aide, working directly or indirectly for any patient supplied by the Employer, visiting the patient during off-duty hours, or providing one’s telephone number to the patient.

There is no record testimony that establishes the kind of infraction warranting discharge. However, the Employer’s handbook addresses this issue. Disciplinary action may be taken for actions that violate the “code of conduct” described above, failure to report a violation of the code of conduct or participate in an investigation involving such a violation, or retaliation against an individual for reporting a code of conduct violation. The handbook specifically states that the “code of conduct does not set forth all of the reasons or situations in which employees may be disciplined or discharged.”¹⁵ In this regard, the Employer has an “employment at will policy” covered in its handbook indicating that either the employee or the Employer may terminate their employment relationship at any time and that the Employer may terminate employees with or without cause.¹⁶ Additionally, the probationary section of the handbook indicates that during the

¹⁴ Id. at page 6.

¹⁵ Id. at pages 8-9.

¹⁶ Id. at page 41.

probationary period, “as with the remainder of employment, Alliance reserves the right to terminate any...employee.”¹⁷ The Employer’s handbook indicates that every attempt will be made to provide 2 weeks notice prior to discharge, but the Employer reserves the right to request “immediate resignation.”¹⁸ The handbook also indicates that working privately for a patient is grounds for termination,¹⁹ that reporting to work under the influence of drugs or alcohol are grounds for immediate termination,²⁰ and that inappropriate attire results in automatic and immediate suspension from a particular case. Inappropriate attire includes colored hi-top sneakers, jewelry, open toe shoes, dungarees, mini skirts or shorts.²¹ Although aides are not required to wear an Employer-issued uniform, they are required to wear light colored clothing, i.e., white or other pastel colored smocks, pants and shoes.

According to the handbook, any work-related disagreement, except for those related to wages, may be appealed by filing a written complaint with the administrator, a copy of which is given to the aide’s supervisor. Thereafter, the administrator sends a written acknowledgement of the complaint and arranges a conference to discuss the problem. If the matter cannot be resolved between the aide and the supervisor, the aide can request that an “appeals committee” be formed to resolve the problem. The administrator has the discretion to determine the members of the appeals committee.²²

According to the Employer’s witness, evaluations are performed once a year, as required by the State’s Department of Health and are performed by the Employer’s

¹⁷ Id. at page 29.

¹⁸ Id. at page 33.

¹⁹ Id. at page 16.

²⁰ Id. at page 41.

²¹ Id at page 18.

²² Id. at page 33.

registered nurses.²³ However, the Employer's handbook indicates that aides receive "at least four" written evaluations per year and it is not clear if this portion of the handbook is in effect. The record is silent as to whether the Employer takes any adverse disciplinary action when a poor evaluation is issued, although it appears from the handbook that the Employer maintains the evaluations in its personnel files.

The petitioned-for employees may perform work on behalf of a number of agencies. An aide may be assigned to a job referred by the Employer for a certain number of days per week, and, during the same week, may perform similar work on behalf of another employer in another patient's home.

It is undisputed that the Employer issues checks to the petitioned-for employees and makes the appropriate governmental tax deductions, i.e., FICA and other Federal and New York State tax deductions. As indicated above, all the petitioned-for employees complete W-4 forms. It is also undisputed that the Employer provides certain benefits to the aides. For instance, the Employer provides for up to 5 consecutive days for unpaid bereavement leave, paid vacation based on the number of hours worked each year, workman's compensation, disability insurance, FMLA leave, pay for jury duty, overtime pay, time and a half pay for work on certain holidays, birthday pay, rights to a 30 day unpaid leave of absence, and referral awards for those aides who refer other aides and such referred aides are employed by the Employer for 3 months. According to the Employer's witness, the Employer also offers a 401K plan and health insurance. Many of these benefits are available to aides who have been employed by the Employer for one year. The New York State Department of Health

²³ According to the Employer's witness, if there are problems with an aide that is detected by a coordinator, the Employer's registered nurse goes to the home to evaluate the situation. Thus, evaluations

requires that all aides wear identification badges, but these badges bear the Employer's name. According to the handbook, the Employer provides the first identification card for free but charges \$10.00 to replace a lost one, and aides are required to attend 12 hours of in-service training on an annual basis in order to maintain a valid State certificate.²⁴ However, the Employer requires that aides "receive a minimum of 15 hours" of in-service training each year, 3 hours above the State required limit.²⁵

Based on all of the evidence described above, the Employer contends that the petitioned-for employees are either domestic servants or independent contractors, and, therefore, excluded from Section 2(3) of the Act. Taking each argument in turn, I reject the Employer's argument that the petitioned-for employees are domestic servants. The main relevant record evidence in support of this argument is that the aides spend most of their day performing domestic duties such as housekeeping. However, the Board has long held that the domestic servant exemption is not evaluated by the "undisputedly domestic nature" of some of the services rendered. In this regard, in *Ankh Services, Inc.*, 243 NLRB 478, at 480 (1979), the Board examined the legislative history of the Act regarding the domestic service exclusion and held that Congress meant it to exclude domestic servants only. Thus, the Board held:

The Congress did not, however, elaborate on the term domestic servant, nor did it define the scope of any particular employment relationship it may have intended to exempt from the operation of the Act in this regard. Nor, apparently, have the Supreme Court or lower Federal courts been called upon to construe the parameters of the domestic service exclusion of the Act. Thus, neither the Congress

can be performed more than one time annually if aides perform below expectations.

²⁴ The in-service training curriculum is set by the Employer.

²⁵ Petitioner's Exhibit 1 at pages 23-24. In this regard, the Employer's handbook and the witness' testimony conflict. According to the witness, aides are required to perform 15 hours of training by State standards. The handbook indicates that 12 hours meet the State mandated requirement.

nor the courts have given us any reason to believe that the former intended to exclude from the coverage of the Act any other than those individuals whose employment falls within the commonly accepted meaning of the term domestic servant.

In *30 Sutton Place Corp.*, 240 NLRB 752, fn. 6, the Board viewed the “commonly accepted meaning” of domestic service as an employment relationship developed on an individual and personal basis created between the homeowner and the employee. Thereafter, in *Ankh*, the Board laid out the test for domestic service, focusing on the principals to whom the employer-employee relationship ‘in fact’ runs, and not merely on the undisputedly domestic nature of some of the services rendered. The *Ankh* employees were in-home service workers, paid by the employer, and were not employed by the homeowner or residents in whose homes the employees provided their services. Although the employees rendered their services to the clients, they essentially performed these services on behalf of the employer and the client had no control over the wages, hours or other terms and conditions of the employees’ employment.²⁶ Based on the above, the Board concluded that the in-home service workers did not fall within the domestic servant exclusion envisioned by the Act.

I conclude that the factual circumstances herein are similar to *Ankh*, and find that the petitioned-for home health care aides are not domestic servants within the meaning of the statute. The petitioned-for employees undisputedly receive checks from the Employer, not the patient, and take all of their work-related direction from the care plan prepared by the vendor. Also noteworthy is that the Employer specifically strongly advises against the receipt of gifts without its prior approval and the aide is prohibited from divulging his/her telephone number to the patient for ease of contact. These

factors support the conclusion that the employer-employee relationship is with the Employer and not with the patient or homeowner. Although there is evidence that the petitioned-for employees spend significant portions of their day performing housekeeping and domestic-related services, as noted above, the nature of the service provided is not the major factor in evaluating whether an employee is a domestic servant exempted from Section 2(3) of the Act. Based on the above, I reject the Employer's argument in this regard.

The Employer also contends that the petitioned-for unit employees are independent contractors, and, therefore, not employees within the meaning of Section 2(3) of the Act. The Board has long held that any party seeking to exclude employees on statutory grounds has the burden of proof. Indeed, the Supreme Court recently upheld this view. See *Kentucky River v. NLRB*, 121 S.Ct. 1861, 167 LRRM 2164 (2001) (where the Court held that the "general rule of statutory construction is that the burden of proving justification or exemption under a special exemption to the prohibitions of a statute generally rests on the one who claims its benefits.") In my view, the Employer has not met its burden of establishing that the employees herein are independent contractors and excluded from the Act's protection.

In *Roadway Package System*, 326 NLRB 842 (1998) and *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1998), the Board re-examined the test for determining whether an individual is an employee or an independent contractor and adopted the common law test of agency. This test, as described in Restatement (Second) of Agency, Section 220, lists factors that should be considered in determining employment status, including: whether the work performed is an essential part of the company's regular

²⁶ See *Ankh*, at footnote 16.

business; whether the person is engaged in an occupation or business that is distinct from the company's regular business; the length of time for which the person is employed or contracted; the skill required in the particular occupation; whether the company provides the tools and instrumentalities necessary to perform the work; the method of payment; and the extent to which the company controls the details of the work. No one factor is determinative. The Board in *Roadway* explained that all factors regarding the parties' relationship must be considered, not just those involving the right to control. One pre-*Roadway* case involving home health care attendants, *People Care, Inc.*, 311 NLRB 1075 (1993) examined the company's control over the manner and means of the work performed by the unit employees, but evaluated many other factors encompassed by the common-law test of agency. In that case, the Board held, on very similar facts as here, that personal care attendants and home health care aides were not independent contractors because the employer set the wages and terms and conditions of employment for the unit employees; federal and state taxes were withheld from employees' pay; contributions were made to workmen's and unemployment compensation funds; the employer's personnel policies were applied to the unit employees; and the employer disciplined employees. Thus, it appears that the Board's analysis in *People Care* is not inconsistent with the Board's declaration in *Roadway* that all aspects of the parties' arrangements, including the parties' financial interdependence and entrepreneurial activity, must be considered.

As both the Board and the Supreme Court have acknowledged, it is often difficult to determine whether a person is an employee or independent contractor and "there is no shorthand formula or magic phrase that can be applied to find the answer."

NLRB v. United Insurance Co. of America, 390 U.S. 254 (1968). Typically, factors exist on both sides of the issue and all factors must be carefully analyzed.

In the instant case, there are some factors that support an independent contractor finding. For instance, New York State regulates certification, requires training and annual evaluations; the Employer has no control over the hours, duration or location of an assignment; the vendor sets the plan of care; aides may reject assignments; and there is a limited on-site supervisory role by the Employer.²⁷ Thus, there is evidence that, to some extent, either the State²⁸ or the Employer's contracting vendors effectively control

²⁷ In its brief, the Employer argues that the aides' ability to work for other agencies is a significant factor in determining independent contractor status. In support of this position, the Employer cites 2 cases, *Boston After Dark*, 210 NLRB 38 (1974) and *Century Broadcasting, d/b/a WFMF* 198 NLRB 923 (1972). However, those cases are factually distinguishable. In *Boston After Dark*, the Board found freelance contributors to be independent contractors, in part, because they were free to write for other newspapers while other employees were prohibited from doing so. In the instant case, although the aides are permitted to work for other agencies, the Employer's handbook requires loyalty to the Employer above the aide's personal business interests. The handbook also requires that aides report conflicts of interest and the Employer can terminate aides at will. As for *WFMF*, the Board found radio announcers to be independent contractors because of their freedom to accept or reject assignments, their ability to provide a substitute for their work, their broad latitude in scheduling taping sessions and the absence of any restriction as to their outside work. In the instant case, although aides are free to accept or reject assignments, they may never send in a substitute for their work, they have no latitude regarding their hours of work, and, as noted above, the Employer requires that conflicts of interest be reported to it.

²⁸ In its brief, the Employer, for the first time, submitted rules and regulations issued by the State of New York regarding home health aides. First, I note that the appropriate time to have submitted this evidence was during the hearing and the submission of these documents as an appendix to the brief is not appropriate. However, I shall nevertheless consider the documents and the arguments proffered by the Employer regarding these documents.

The Employer contends that New York State requires that all home health care agencies maintain personnel policies, employment records, and job descriptions; require physical examinations; have training programs; and provide identification badges. Thus, the Employer contends that New York State, and not the Employer, governs these issues. There is no dispute that the State has established controls over this industry in general. While the Board and the Courts of Appeal have "rejected the argument that government imposed regulations constitute company control over" employees, *Precision Bulk Transport, Inc.*, 279 NLRB 437 (1986) and *Seafarers Local 777 (Yellow Cab) v. NLRB*, 603 F.2d 862 (D.C. Cir. 1978), here, for the reasons noted above, the Employer's conditions of employment exceed the government regulations. For instance, the Employer provides benefits that are not required by the State, it has the right to terminate at will, and aides are severely restricted in selecting a replacement to perform their work.

Regarding supervision of the aides, the Employer, at page 6 of the brief, states that New York State regulations require that only the vendors, and not the Employer, directly supervise the work of the aides. According to the Employer, the State does not permit vendors to delegate supervision to the Employer and, in support of this claim, the Employer cites 10 NYCRR Section 766.10(d), which provides, in pertinent part, that vendors are responsible for ensuring that the service provided complies with all pertinent provisions of Federal, State, and local statutes and that the plan of care is followed. Although the Employer claims that this section of New York State law requires that the Employer delegate supervisory authority to

the manner and the means by which the aides perform their work. On the other hand, neither do the aides exercise control over these factors.

There are other factors that support a Section 2(3) finding. In this regard, it is undisputed that the employees receive checks from the Employer and that the Employer withholds FICA and other State taxes. The petitioned-for employees receive vacation pay, holiday pay, jury duty pay and are eligible to participate in the Employer's 401K plan and health insurance plan. The employees are also covered by workers compensation, unemployment insurance and disability benefits. It also appears that the Employer determines their wage rates. While the Employer does not have much control in assessing the on-site performance of the aide, it calls the patient's homes on a daily basis to ensure attendance, and, when problems are detected by a coordinator, the Employer dispatches one of its own registered nurses to assess the situation. The Employer's registered nurses perform annual evaluations. Additionally, the Employer has a provision in its handbook indicating that workplace disagreements may be taken up by an appeals committee, and the Employer's witness indicated that an investigations department evaluates any complaints about an aide's performance. It also appears that the Employer may discipline employees for tardiness, for violating the code of conduct, and for inappropriate attire. The Employer also may terminate aides "at will," not only during the probationary period but also throughout their tenure. The handbook indicates that aides may be terminated if they work privately for a patient and prohibits aides from subcontracting their work to another aide. In addition, the petitioned-for employees exhibit few traits of a true entrepreneur. There is no capital investment on

the vendors, I do not read the cited provision in the same way. In my view, the provision only requires that the vendors ensure that the plan of care is followed and that quality care is provided.

their part. They assume no costs of patient care, they do not bring their own equipment, and, as noted above, they are prohibited from securing a replacement if they are unavailable to work. Moreover, the Employer's handbook contains provisions that severely restrict any entrepreneurial activity. In this regard, aides owe "a duty of loyalty" to the Employer, the Employer's interests must supercede any personal business or commercial intent, and any conflict of interest must be immediately reported.

When considering these factors against the principles outlined in Restatement (Second) of Agency, Section 220, it is clear that the work performed by the petitioned-for employees is an essential part of the company's regular business; they are engaged in an occupation or business that is *not* distinct from the company's regular business; aides can neither subcontract nor assign others to perform their assigned duties at a patient's residence; and they are paid by the Employer directly, payroll taxes are withheld and a full panoply of employment-type benefits are provided. There are other factors to be considered as well, namely, the length of time for which the person is employed or contracted and the extent to which the company controls the details of the work. The evidence established that a significant portion of the Employer's aides work on a regular basis. Although the aides may work for other home health agencies, Employer Exhibit 2 shows that in the quarter immediately preceding the filing of the petition, from July through September 2001, approximately 685 aides worked between 320 and 520 hours, around 6 to 8 weeks during the quarter. During the same period, approximately 546 aides worked more than 520 hours, an excess of 13 weeks. As for the second quarter of 2001, approximately 726 aides worked between 320 and 520 hours, between 6 and 8 weeks, and, during the same period, approximately 436 aides worked in excess of 520

hours during the quarter, more than 13 weeks. Thus, the Employer seems to have a workforce that remains on its active payroll for a substantial period of time. With respect to the extent to which the Employer controls the details of the work, there is some evidence, as noted above, that on-site supervision primarily lies in the hands of the vendors' nurses. However, the Employer's own nurses perform on-site evaluations, are responsible for in-field training, and are dispatched to a patient's home when problems arise. Additionally, as noted above, the Employer has the authority to discipline employees and even terminate them without cause. Based on all of the above, in my view, the evidence does not establish that the Employer has met its burden of proving that home health care aides are independent contractors. To the contrary, the record demonstrates the existence of an employment relationship and that the petitioned-for individuals are employees within the meaning of Section 2(3) of the Act.²⁹

Having found that Section 2(3) of the Act covers the petitioned-for employees for the reasons noted above, I find that a question concerning representation exists.

5. As indicated above, the Petitioner seeks to represent home health care aides employed by the Employer out of its Brooklyn and Bronx facilities. The

²⁹ In its brief, the Employer cites cases that I find distinguishable. First, the Employer cites *Big East Conference*, 282 NLRB 335 (1986), where the Board upheld the ALJ's determination that officials of the Eastern Conference Basketball Association were independent contractors. In that case, the officials had full time jobs with other employers, were paid on a per game basis, and there were no deductions for withholding, workmen's compensation, unemployment insurance, social security taxes or fringe benefits. They paid for their own health insurance, purchased their own uniforms and were never disciplined by the employer. By contrast, in the instant case, employees receive an hourly wage rate, all deductions are made on their behalf, they may receive health insurance and other benefits from the Employer and employees have been disciplined by the Employer.

AmeriHealth Inc., 329 NLRB No. 55 (1999), cited by the Employer, is also distinguishable. In that case, the employer recruited a network of participating doctors who provided health care services. Those doctors contracted with other health insurance companies including the employer involved therein. A significant distinguishing fact in that case is that the doctors employ staffs of their own, such as nurse practitioners, registered nurses, medical assistants and secretaries, whose compensation is determined by the doctor and not by *AmeriHealth*. The Board affirmed the Regional Director in finding these doctors to be independent contractors. The Director, with Board approval, found that the doctors retained economic

Employer contends that petitioned-for employees work on such a sporadic basis that they are casual employees and as a result, they cannot be included in any bargaining unit.

It is well established that regular part-time employees are included in a unit with full-time employees whenever the part time employees perform work within the unit on a regular basis for a sufficient period of time during each week or other appropriate calendar period to demonstrate that they have a substantial and continuing community of interest with the remainder of the unit. See *Fleming Foods*, 313 NLRB 948 (1994), where the Board included part time warehouse clerical employees who worked in that classification between 20 to 24 hours per week. Where the number of employees fluctuate from week to week, but a substantial number of them report and work fairly regularly over a period of several months, the Board has concluded that such evidence is “scarcely a pattern of a temporary, part-time or casual work force.” *Fresno Auto Auction* 167 NLRB 878, 879 (1976). In that case, the Board held that “in determining the relative regularity or permanence of the employment in the proposed unit, this fact outweighs those considerations having to do with the individual’s freedom to determine his own work schedule or report for work intermittently.” Also see *Henry Lee Co.*, 194 NLRB 1107 (1972), where the Board held that employees engaged in unit work for a “substantial period each week, even on an unscheduled basis” are considered regular part-time employees. On the other hand, the Board has concluded that irregular part-time status warrants a finding that the employee is a casual employee and is excluded from the unit. In *Royal Heath Restaurant*, 153 NLRB 1331 (1965), the Board found that

separateness and had wide entrepreneurial control. The aides in this case clearly do not possess the entrepreneurial control as the doctors in *AmeriHealth*.

an employee who worked 1 day per week in the quarter preceding the election was considered a casual employee. Considerations such as the ability of an employee to accept or reject employment is not determinative of a casual status finding. Rather, the test for whether an employee is a regular or casual part-time employee takes into consideration such factors as regularity and continuity of employment, length of employment and similarity of work duties. See *Pat's Blue Ribbons*, 286 NLRB 918 (1987) and *Tri-State Transportation*, 289 NLRB 356 (1988). Regularity does not necessarily mean a fixed schedule; rather, this requirement can be satisfied by evidence that an employee has worked a substantial number of hours within the period of employment prior to the eligibility date and there is no showing that work is on a sporadic basis. See *Pat's Blue Ribbon*, supra at footnote 6. Infrequent employment can lead to a casual status finding. *Callahan-Cleveland, Inc.*, 210 NLRB 1355, 1357 (1958) and *Columbia Music and Electronics*, 196 NLRB 388 (1972). However, in *Mercury Distribution Carriers*, 312 NLRB 840 (1993), the Board held that an employee's option to turn down work and the fact that an employee did not call in every day did not preclude a finding of regular part-time status.

In the instant case, the Employer essentially asserts that the entire unit is composed of casual employees, or employees who are employed on an irregular part-time basis. The record evidence does not support that conclusion. In this regard, I note that Employer's Exhibit 2 indicates the number of hours each employee worked in each of the two quarters preceding the filing of the petition. That document is summarized as follows:

	2 nd Quarter 2001 (April-June)	3 rd Quarter 2001 (July-September)
No. of employees working 0-40 hours (1 week)	161	188
No. of employees working 40-100 hours (1 – 2.5 weeks)	100	139
No. of employees working 100-240 hours (2.5 – 6 weeks)	438	435
No. of employees working 240-320 hours (6 –8 weeks)	316	285
No. of employees working 320-520 hours (8 – 13 weeks)	726	685
No. of employees working 520 hours or more (more than 13 weeks)	436	546

The above chart weighs heavily against the Employer’s contention that the unit consists entirely of casual employees. Significant numbers of employees worked more than 520 hours during each of the two quarters prior to the filing of the petition, and a larger number worked 320 to 520 hours during each of the two quarters. To be sure, there is evidence that there are employees who have averaged only one week of work or less during the last year.³⁰ As noted above, an irregular part-time or casual employee is

³⁰ As indicated above, Employer Exhibit 2 shows that there are approximately 37 employees who worked “zero” weeks during the year preceding the filing of the petition. However, of these employees, there are approximately 19 who are listed as having worked “zero” weeks during the year, but somehow worked a significant number of hours during the second quarter of this year. For instance, employee # 153 is shown as having worked “zero” weeks between September 2000 and September 2001, but is shown as having worked 420 hours in the second quarter of 2001. Similarly, employee #198 is shown as working “zero” weeks between September 2000 and September 2001, but 330 hours during the second quarter of 2001.

generally an employee who averages less than 4 hours per week in the quarter preceding the eligibility date. However, the evidence overwhelmingly reflects that many of the Employer's employees worked a substantial number of hours during the two quarters preceding the filing of the petition so that unit cannot be characterized as one that consists of entirely casual or irregular part-time employees. Thus, I reject the Employer's argument that the unit consists predominately of casual employees.³¹

However, it is undisputed that the employees here have varying hours of work. Where an employer's employees have varying hours of work, the Board has devised specific formulas to determine employees' eligibility to vote based on the hours worked during a particular period. In this regard, the Board has long held that various standards, such as hours worked per day or week, or days worked per calendar period, have been applied in different industries to determine whether a part-time employee is regular or casual. In *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970), the Board

There are 19 employees that fall into this category and no explanation was provided as to why the records reflect such contradictory information.

³¹ In its brief, the Employer cited cases in support of its position that the entire petitioned-for unit consists of casual employees. However, I find these cases to be distinguishable. First, the Employer cites *Pekowski Enterprises, d/b/a Expo Group*, 327 NLRB 413 (1999), as standing for the following propositions: casual employees are those who lack a community of interest with regular employees to be included in the unit; employees who work for various companies on an as-need basis are considered to be casual; and employees who work for other competitors in the industry can be found to be casual employees. However, the ALJ in *Expo* went further and explained that the Board applies certain eligibility formulae, such as the *Davison-Paxon* formula discussed more fully in this Decision, to determine whether a particular employee has worked a sufficient number of hours in a particular time period to warrant inclusion in the unit. I have applied a similar analysis here, which is set forth more fully above.

The Employer also cites *Pilot Freight Carriers*, 223 NLRB 286 (1986). That case involved a *Gissel* bargaining order and the judge found that certain employees were casual (and excluded from the unit) because they worked irregular hours and only when the employer needed their services. *Id.* at p. 303. Here, I do not find that the petitioned-for employees, as a group, work such irregular hours to warrant a casual status finding. Similarly, the Employer's reliance on *El Rancho Market*, 235 NLRB 468, 474 (1978) is also misplaced. There, the Board held that one particular employee was a casual employee and excluded from the unit because he did not work any hours during the payroll period immediately preceding the election. Here, I find that a substantial number of employees work a sufficient amount of hours to warrant a finding that they can be included in a bargaining. However, as discussed more fully above, an eligibility formula shall be utilized to weed out those employees whose hours of work are so irregular that they will not be eligible to vote.

concluded that employees who averaged 4 hours per week for the quarter preceding the election eligibility date had a sufficient community of interest to warrant their inclusion in the bargaining unit. Where there is a wide disparity in the numbers of hours worked by part-time employees, the Board may fashion an appropriate standard to assure an equitable formula. In the health care industry, particularly with nurses, the Board has laid out two standards. The first standard was set forth by the Board in *Marquette General Hospital*, 218 NLRB 713 (1975).³² In that case, the Board found that on-call nurses who worked a minimum of 120 hours in either of the 2 quarters preceding the eligibility date were eligible to vote. In three later cases, *Sisters of Mercy Health Corp.*, 298 NLRB 483 (1990), *Northern California Nurses Association*; 299 NLRB 980 (1990) and *Beverly Manor Nursing Home*, 310 NLRB 538 (1993), the Board declined to apply the *Marquette* standard. The Board explained when, and under what circumstances, application of the restrictive *Marquette* formula is appropriate. In *Sisters of Mercy*, *Northern California*, and *Beverly Manor*, the Board indicated that in determining the status of on-call employees in the health care industry, it has utilized various eligibility formulae as guidelines to distinguish regular part-time from those whose job history with the employer is sufficiently sporadic that it is characterized as casual. In *Sisters of Mercy*, the Board indicated that it devised the *Marquette* formula where there was a significant disparity in the number of hours worked by that employer's on-call nurses. However, the Board indicated that, where on-call nurses, as a group, work on a regular basis, the more liberal *Davison-Paxon* eligibility formula applies. More relevant to the instant case is the Board's extension of the *Davison-Paxon* eligibility formula to health

³² During the hearing, the Employer's counsel indicated that he would take a position on the eligibility formula in his brief. In his brief, counsel argues that the *Marquette* formula is appropriate.

care employees working out of individual patients' homes. Thus, in *People Care*, 311 NLRB 1075 (1993), the employer employed personal care attendants and home health care attendants in individual patients' homes, similar to the unit employees herein. The Board applied the *Davison-Paxon* formula in that case, rather than the more restrictive *Marquette* formula. See *People Care*, supra, at footnote 1, where the Board specifically denied the employer's request for review concerning the eligibility formula issue. More recently, in *Five Hospital Homebound Elderly Program*, 323 NLRB 441 (1997), the Board applied the *Davison-Paxon* formula to a part-time home health care manager who provided skilled nursing care for patients at their homes.³³

Based on the Board's findings in *People Care* and *Five Hospital Homebound Elderly Program*, it appears that the Board intends to apply the *Davison-Paxon* eligibility formula to employees providing in-home patient care. Therefore, all home health care attendants working 4 hours per week in the quarter preceding the eligibility date herein shall be eligible to vote. Based on all of the above, the following unit is appropriate for the purposes of collective within the meaning of 9(b) of the Act:

All full-time and regular part-time home health care aides³⁴ employed by the Employer out of its 76 Court Street, Brooklyn, New York, facility, and 2488 Grand Concourse Avenue, Bronx, New York, facilities excluding guards, coordinators, registered nurses, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of

³³ In *Personal Touch Home Care, Inc.*, 29-RC-9697, the Board denied the employer's Request for Review on this issue and on all issues raised by the Employer.

³⁴ In accordance with *Davison-Paxon, Co.*, 185 NLRB 21 (1970), all home health care aides working 4 hours per week in the quarter preceding the eligibility date shall be eligible to vote in the election.

election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this 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 that 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 employed in the unit may vote if they appear in person or 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 have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by New York's Health and Human Service Union, 1199/SEIU, AFL-CIO, or by no labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of

Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before November 9, 2001. No extension of time to file the 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.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

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 14th Street, N.W., Washington, D.C. 20570.

This request must be received by November 16, 2001.

Dated at Brooklyn, New York, November 2, 2001.

/s/ Alvin Blyer
Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

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