

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

THE STATE OF RHODE ISLAND,
DEPARTMENTS OF
DCYF and DHS

CASE NO: EE- 3671
Home Daycare Providers

-AND-

NEW ENGLAND HEALTH CARE :
EMPLOYEES UNION, LOCAL 1199, SEIU,
AFL-CIO :

DECISION AND ORDER & DIRECTION OF ELECTION

TRAVEL OF CASE

The above entitled matter came on to be heard before the Rhode Island State Labor Relations Board (hereinafter "Board") on a Petition by Employees for Investigation and Certification of Representatives" (hereinafter "Petition") seeking to represent approximately 1300 certified home daycare providers. The Petition was filed with the Board by Service Employees International Union, District 1199 on October 3, 2003. The Petition was accompanied by signature cards which, if verified, were sufficient in number to warrant the conducting of an election.

An informal hearing on the Petition was conducted by the Board's Investigative Agent on October 27, 2003 which was attended by representatives of both the Petitioner and the Respondent. The Respondent took the position that it was not the Employer of employees sought by the petitioning Union and therefore objected to the formation of the bargaining unit. Formal hearings were conducted on January 8, 2004, January 13, 2004 and January 27, 2004. The parties presented numerous documents and the testimony of three witnesses: (1) Ms. Reeva Sullivan Murphy, the Child Care Administrator for the Department of Human Services. (2) Ms. Joanne Flodin, the Licensing and Monitoring Supervisor for the Department of Children, Youth and Families, and (3) Mr. Anthony A. Bucci, Personnel Administrator for the State of Rhode Island. In addition to the documentary evidence and testimony of the witnesses, the parties also submitted

voluminous briefs with appendices in support of their respective positions. In reaching the decision herein, the Board has carefully reviewed and considered all of the testimony, evidence and arguments presented.

SUMMARY OF TESTIMONY

Ms. Murphy, testified that she is responsible for the administration of the child care assistance program, a benefit program for families who are in the family independence program (Cash Assistance, Welfare-to-Work) (TR. p. 15 Families in Rhode Island who make up to 225 percent of the federal poverty level are entitled to some cash assistance from the State of Rhode Island to pay for child daycare services. (TR. p. 15) In order to receive assistance, a family must file an application with DHS. If approved, the family is issued a voucher which they may use with any “approved” day care provider. (TR. p. 16) ¹ Approximately 2900 children receive care from about 1100 active DHS-approved providers. (TR. p. 17) The rate paid by DHS for these child care services is established by R.I.G.L. 40-6.2-1.1. (See Petitioner’s Exhibit #1-16) The Department has enacted extensive regulations for administering the child care assistance program. (Petitioner’s Exhibit #1-18) To work for DHS, providers must submit an application and sign an agreement. (TR. p. 29) (Petitioner’s Exhibit #1-18) If a provider is denied approval, he/she will be notified and is entitled to a hearing. (Petitioner’s Exhibit #1-21)

Ms. Murphy also testified DHS requires providers to submit a family’s DHS voucher number and a daily attendance form to DHS. (Petitioner’s Exhibit #1-20) Once the form is approved, the provider receives payment from the State. (TR. p. 42) (TR. p. 38) Providers are also eligible for health insurance from the State of Rhode Island if they earn more than \$1800 from DHS in a six-month period. (TR. p. 55-56) Approximately 700 providers are eligible for health insurance under the Rite Care Program (even if not otherwise economically qualified) and approximately 349 have chosen to participate. (TR. p. 57-58, 165) In order to be certified, day care providers, among other things, must: (1) Agree that the workplace remain smoke-free. (2) Insure unrestricted access by parents, (3) Maintain daily attendance records, (4) Retain records

¹ In order to be an approved provider, the provider must hold a current DCYF certification.

for three years and make them available to the State for inspection, (5) Use State generated billing sheets for submitting request for payment, (6) Use Parent Provider Enrollment Forms issued by the State, (7) Obtain a clearance through the Child Abuse and Neglect Tracking System (CANTS).

Ms. Murphy also testified that some family daycare providers have incorporated with the Secretary of State and that DHS issues 1099's to the providers. (TR. p. 152) She also testified that there are no deductions from the daycare providers' payments for FICA, federal tax, state tax or retirement. (TR. p. 153) Ms. Murphy also testified that DHS pays one rate to the providers which do not contemplate overtime. (TR. p. 162) She indicated that DHS does not monitor or control the hours of business of providers. p. 162) She stated that although a certified provider must provide daycare services at its approved (licensed) location, DHS does not control the location of providers; controlled by the market place. (TR. p. 163) She testified that if a parent has a complaint relating to DCYF regulations, DHS advises the parent to contact DCYF. If the parent's complaint is related to business practices or curriculum, DHS advises the parent to find another provider. (TR. p. 164)

The second witness to testify was Joanne Flodin, licensing and monitoring supervisor for DCYF. Pursuant to R.I.G.L. 42-72.1-3, DCYF has promulgated twenty-five pages of regulations governing character, health, suitability, and qualifications; provider/child ratios; workload assignments; procedures and practices regarding basic child care and services; and compliance with fire and safety codes. (TR. p. 67-68) (Petitioner's Exhibit # 1-3) DCYF also maintains a web site which provides information on how to become a provider, including job qualifications and a summary of the regulations. Interested parties are directed to contact DCYF to obtain more information. (Petitioner's Exhibit # 1-4)

To become a provider, applicants must first attend a three-hour DCYF orientation. (TR. p. 76-77) DCYF distributes application packets which require physician's references, an employment history, a criminal records affidavit, a fingerprinting card, evidence of a successful screening through the attorney general's office and DCYF's Child Abuse and Neglect System, and a landlord's permission slip. (TR. p. 86) DCYF

shows a video and leads a discussion about how to start a family day care home and reviews DCYF regulations and guidelines. (TR. p. 80)

Next, DCYF social workers investigate the suitability of an applicant's home, complete an eleven-page evaluation checklist, (Petitioner's Exhibit #1-11) and investigate everyone living in the applicant's household. (TR. p. 84-85, 91 A fire inspector also visits the home. (TR. p. 87) Ms. Flodin also testified that DCYF prohibits providers from engaging in other employment while children are in their care and from having children in their care on the morning following all-night employment. (TR. p. 95-96)

DCYF also regulates the type and nature of discipline that a provider may use. (TR. p. 98) If there is any difference between what the provider thinks is appropriate and what DCYF thinks is appropriate, DCYF's judgment governs. (TR. p. 111-112) There are also regulations requiring providers to spend a "substantial portion of each day directly involved in activities that center around the developmental needs, interests, and strengths of the children in their care." (TR. p. 74) Providers must demonstrate and document ten hours of approved training every two years and must re-certify every two years. (TR. p. 108, 217) In order for the training to qualify as "approved", it must be related to child care. (TR. p. 204) No amount of demonstrated ability or prior child care experience excuses a provider from the required training. (TR. p. 109)

DCYF social workers are authorized to make unannounced visits to providers' homes to investigate compliance with DCYF regulations. (TR. p. 10) When a qualitative judgment must be made about whether a regulation has been violated, it is the social worker who makes the judgment. (TR. p. 111-112)

If DCYF decides that a violation of its regulations has occurred, it determines the remedy. (TR. p. 12) DCYF may choose to monitor the provider on a more regular basis, require additional training, issue a verbal or a written warning, suspend, or terminate the provider. (TR. p. 114) Ms. Flodin may require that the provider meet with her so she can decide, based on her own qualitative judgment, "whether there is an alternate solution or whether [termination] is going to be requested." (TR. p. 113) If DCYF decides to revoke a provider's certification, it sends the provider a notice stating the reason for the

revocation. The provider may then appeal the decision to Ms. Flodin's supervisor, Ms. Lee Sperduti. (TR. p. 113)

Ms. Flodin testified that the afore-referenced DCYF regulations are applicable only to home daycare providers who provide care to four or more children (none of whom may be the provider's child). (TR. p. 174) Home daycare providers who care for three or less children do not require certification, but may still charge parents for their services. DCYF certified home daycare providers may care for up to six unrelated children without an assistant and up to eight children, with an assistant. (TR. p.175) The providers hire (subject to DCYF regulations) and fire their own assistants. Fired assistants have no right to appeal their dismissals through the DCYF. (TR. p. 227-228)

Ms. Flodin testified that DCYF does not advertise for providers, but that individuals who express an interest in becoming certified must attend a three-hour orientation. (TR. p. 175-176) She also testified that although the DCYF orientation packet contains information about a variety of child care related organizations and agencies, providers do not have to become members of those organizations or agencies in order to become certified. (TR. p. 184-185)

Ms. Flodin also testified that DCYF does not share in the profits earned or losses sustained by the daycare providers. (TR. p. 198) DCYF provides business and tax reporting information to providers, but has no say in what deductions, if any, providers take on their personal income tax returns. (TR. p. 201-202) Ms. Flodin also testified that certified home daycare providers set their own schedules, including vacations and that no advance notification to DCYF is required. (TR. p. 206) She also stated that a provider could stop working altogether, with no notification to DCYF. (TR. p. 207, 209) However, if a provider is going on vacation and child care is still going to be provided, via an assistant, notification is required. (TR. p. 234, 236) In addition, the provider is required to have an emergency care plan on file for handling emergency absences for up to three days. (TR. p. 234)

The final witness to testify before the Board was Anthony A. Bucci, the State's Personnel Administrator. He testified that he has full authority for all appointments in state government, all personnel transactions in state government, all benefit programs and

the civil service examination process. (TR. p. 238) He testified that there is no such classification in state service as a home day care provider, nor does the state maintain any personnel records for any home daycare providers. (TR. p 239).

DISCUSSION

As noted by the Respondent in its brief, for an employer to be required to negotiate with a union, or for the union to petition to represent the employees of an employer, there must first be an employer-employee relationship. In cases where the employee-employer relationship is disputed, the Board first looks to the Rhode Island State Labor Relations Act for statutory guidance. The following provisions of the Act are deemed relevant by the Board in its deliberations.

R.I.G.L. 28-7-2 (e)

“In the interpretation and application of this chapter and otherwise, it is the public policy of the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self organization, and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint, or coercion of their employers.” R.I.G.L. 28-7-2 (d) ***“All the provisions of this chapter shall be liberally construed for the accomplishment of this purpose”***. (Emphasis added herein)

R.I.G.L. 28-7-3 (3)

"Employee" includes, ***but is not restricted to***, any individual employed by a labor organization; any individual whose employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment; and is not limited to the employees of a particular employer, unless the chapter explicitly states otherwise, but does not include any individual employed by his or her parent or spouse or in the domestic service of any person in his or her home, or any individuals employed only for the duration of a labor dispute, or any individuals employed as farm laborers. (Emphasis added herein)

R.I.G.L. 28-7-3 (4)

"Employer" includes any person acting on behalf of or ***in the interest of an employer***, directly or indirectly, with or without his or her knowledge, but a labor organization or any officer or agent of it shall only be considered an employer with respect to individuals employed by the organization. (Emphasis added herein)

R.I.G.L. 28-7-2 Policy of Chapter

(a) The economic necessity for employees to possess full freedom of association, actual liberty of contract, and bargaining power equal to that

of their employers, who are frequently organized in corporate or other forms of association, has long been sanctioned by public opinion, and recognized and affirmed by legislatures and the highest courts. As the modern industrial system has progressed, there has developed between and among employees and employers an ever greater economic interdependence and community of interest which have become matters of vital public concern. Employers and employees have recognized that the peaceable practice and wholesome development of that relationship and interest are materially aided by the general adoption and advancement of the procedure and practice of bargaining collectively as between equals. It is in the public interest that equality of bargaining power be established and maintained....

R.I.G.L. 28-7-2 (e)

This chapter shall be deemed an exercise of the police power of the state for the protection of the public welfare, prosperity, health, and peace of the people of the state.

In addition to the foregoing statutes, for the present dispute, the Board also looks to Title 36 of the Rhode Island General Laws which contains various chapters pertaining to "Public Officers and Employees." Chapter 11 of Title 36 extends the right to engage in collective bargaining to certain state employees:

R.I.G.L. 36-11-1 Right to Organize - Bargaining Representatives.

(a) *State employees*, except for casual employees or seasonal employees, shall have the right to organize and designate representatives of their own choosing for the purpose of collective bargaining with respect to wages, hours, and other conditions of employment. State employees, as used in this chapter, shall include employees and members of the department of state police below the rank of lieutenant.

(b) The representatives of state employees are hereby granted the right to negotiate with the chief executive or his or her designee (appointed, elected, or possessing classified status) on matters pertaining to wages, hours, and working conditions.

(c) The chief executive or his or her designee (appointed, elected, or possessing classified status) is hereby authorized and required to recognize an organization designated by state employees for the purpose of collective bargaining as the collective bargaining agency for its members.

Thus, the Board's challenge is to determine whether the Home Daycare providers are state employees within the meaning of these statutes.

DEFINING AN EMPLOYEE

Neither of the aforementioned statutes specifically lists “home daycare providers” or any other specific employment title as “employees” so as to lend guidance as to whether or not home daycare providers are “state employees” for the purposes of collective bargaining under the State Labor Relations Act or are “independent contractors”

The Board has not the occasion in recent years to deal with many cases that dispute the identity of an employer. When the Board has considered the question, the determining issue has been whether the purported employer has the “right to control” the employees in question. See RISLRB, EE-3612, Town of North Smithfield and RISLRB EE 3607, Town of Exeter. This approach is also used by the Rhode Island Supreme Court. See Sormanti v. Marsor Jewelry Co., 83 R.I. 438, 441 (1955) (“in the absence of a more specific definition, resort must necessarily be had to the common-law rules of master and servant according to which, broadly speaking, the status of a person as an employee depends upon whether the employer has or has not retained power of control or superintendence over him. The final test is the *right* of the employer to exercise power of control rather than the actual exercise of such power”)

When considering the question of determination of employee status at federal law, the United States Supreme Court has indicated that generally when a federal statute is silent or does not meaningfully define the term “employee” resort should be had to the common law principles of agency. Community for Creative Non-Violence v Reid, 490 U.S. 730, 751-52, (1989); Nationwide Mutual Insurance Company v Darden, 503 U.S. 318, 112 S.Ct. 1344 (1992). In Reid, the Court identified thirteen factors to consider when analyzing an employment relationship under the common law agency test. (hereinafter the “Reid” factors) They are:

- 1) The alleged employer’s right to control the manner and means of the employment.
- 2) The skill required.
- 3) The source of the instrumentalities and tools.
- 4) The location of the work.
- 5) The duration of the relationship between the parties.
- 6) The hired party’s discretion over hours.
- 7) The method of payment
- 8) The hired party
- 9) The role in hiring and paying assistants.
- 10) Whether the work is part of the regular business of the hiring part

- 11) Whether the hiring party is in business
- 12) The provision of employee benefits.
- 13) The hired party's tax returns.

Each factor must be assessed and weighed with no one factor being *decisive*. Darden at 1349. *The agency test however, does place greater emphasis on the first factor, the hiring party's right to control the manner and means by which the work is accomplished.* (Emphasis added) Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 519 citing Frankel v Bally Inc., 987 F.2d 86, 90 (2d. Cir. 1993).

The Board hereby adopts the common law agency test, as defined and analyzed by the Reid factors, as its preferred method for ascertaining employment status in disputed cases. Section I of the discussion below will deal with the Reid factors, as applied to the facts of this case. Section II of the discussion contains a comparison of the instant case to two NLRB "daycare" cases. These cases are: (1) Rosemount Center, 248 N.L.R.B. 1322 (1980) in which the NLRB extended recognition to home daycare workers; (2) Cardinal McCloskey's Children's and Family Services, 298 NLRB 424 (1990) where the NLRB reversed the Regional Director's finding that these workers were employees rather than independent

I) The Standard For Analysis Of Employment Indicia- The "Reid" Factors

Right to control manner and means

(a) The Employer controls eligibility for employment

Pursuant to R.I.G.L. 42-72.1-3(e), DCYF has issued specific regulations and application-requirements for becoming a provider (Petitioner's Exhibit #1-3), hereinafter referred to as "Regs." First, providers must attend a three-hour orientation to obtain an application for employment with DCYF. (Petitioner's Exhibit #1-7) Then, they must complete an extensive employment application which requires the following: landlord permission slip, employment history verification, medical examinations, criminal records check, screening of providers, and everyone living in their homes, through the Attorney General's office and through CANTS, and fire and health inspections of the home. (Petitioner's Exhibit #1-7)

Providers must also open their homes to both routine and unannounced inspections by DCYF. Providers, as well as all family members, must be in “good physical, mental and emotional health.” (Regs. 14) Providers are disqualified from employment with DCYF if they hold foster care licenses. (Regs. 5)

Likewise, DHS has issued regulations governing employment qualifications. (Petitioner’s Exhibit #1-18) As a condition of employment, providers must sign “Individual Child Care Provider Agreements” (“CCPA”) and submit the following: “Central Provider Directory Application,” Confidentiality Statements, evidence of clearance by the Attorney General, and evidence of clearance by the CANTS Unit. Further, providers cannot have been, within the last three years, debarred, suspended, proposed for debarment, declared ineligible, defaulted, been terminated from any transaction covered by any federal department or agency. (Petitioner’s Exhibit #1-18)

(b) The Employer controls employee workload

Providers may not independently dictate their own workload. The Employer tells providers how many children for whom they are allowed to provide care. (Regs. 12) Providers cannot care for more than six (6) children at any given time, including their own children, unless they have an assistant, in which case they cannot care for more than eight (8) children. Of these eight (8) children, no more than four (4) may be under eighteen (18) months. Likewise, if a provider cares for children under the age of eighteen (18) months, she cannot care for more than four (4) children under the age of six (6) years old, and of these four (4) children, no more than two (2) shall be under the age of eighteen (18) months. The number of children providers may care for also depends on the size of their home; they must have thirty-five (35) square feet of indoor space available per child in their care. (Regs. 15)

Providers’ choices as to which children they may care for are also limited. DCYF forbids providers from caring for a child exhibiting certain symptoms, regardless of whether the provider has other children in her care at that time. (Regs. 20) Further, providers’ own children are included in determining the maximum number of children they may care for, even if someone else is available to care for those children. (Regs. 12)

(c) The Employer controls providers' relationships with their assistants

The Employer also controls providers' relationships with their assistants. Providers *must* engage an assistant, approved by DCYF, whether or not they feel they need one, in order to care for more than six (6) children. (Regs. 12) Further, the Employer controls how often providers may be absent from their homes even when children are left under the direct supervision of a DCYF-approved assistant. (Regs. 12)

(d) The Employer controls providers' work environments

DCYF has issued extensive regulations governing providers' workplaces and the equipment which may be utilized for childcare. (Regs. 15-18) For example, the areas outside providers' homes must, in the opinion of the Employer, be "safe, protected and free from hazards;" providers' domestic hot water system must be set at 65 degrees; a specifically prescribed solution of bleach must be used to clean the diaper-changing area (after each use); the first aid kit must contain a precise variety and number of amenities; practice emergency evacuations must take place once a month; and providers' homes must be maintained, in the opinion of the Employer, in "good repair and in a clean, sanitary, hazard-free condition." Providers must have "a variety of equipment and materials which are appropriate to the age and developmental level of the children, but are prohibited from utilizing certain toys. (Regs. 22)

(e) The Employer controls nutrition

The Employer also controls what types of food providers may serve, as well as what time providers should feed children. Providers must serve "nutritional mid-morning and mid-afternoon snacks to the children in care." Further, "nutritional meals" must be served to children, in addition to snacks. (Regs. 21) The definition of "nutritional" is determined by DCYF, but DCYF gives providers 80-pages of materials ("Guidelines") that enable them to comply with this, and other, regulations. (Petitioner's Exhibit #1-14) If providers abide by the Guidelines, they will be abiding by the regulations. (TR. p. 232) However, providers who serve meals not listed in the Guidelines run the risk of violating the regulations if their nutritional beliefs are in conflict with DCYF's.

(f) The Employer controls providers' daily routine

DCYF controls what activities providers must engage in with the children. Providers must “spend a substantial portion of each day directly involved in activities that center around the developmental needs, interests and strengths of the children in care. (Regs. 22) The focus of these activities must be “toward child-centered, child-directed and provider supported play activities.” (Regs. 22) Further, the “learning environment in the home shall be designed to provide the children with opportunities to learn through active exploring, interacting with other children and adults and with the materials provided.” (Regs. 22)

As discussed above, DCYF gives providers Guidelines, which, if complied with, would constitute compliance with the regulations. Conversely, failure to abide by Guidelines may constitute a violation of the regulations.

Additionally, pursuant to the CCPA, providers must comply with all state and federal laws and rules and regulations governing childcare. (Petitioner's Exhibit #1-18) The care provided must be “safe and age appropriate care that meets the diverse needs of all children.” DHS makes the subjective decision of what care is considered “age-appropriate” and “safe.” (TR. p. 31)

(g) The Employer controls child discipline

DCYF dictates how and when providers may discipline children. (Regs. 23) The Guidelines detail the Employer's accepted methods of discipline. (Petitioner's Exhibit #1-14) Providers must “encourage appropriate behavior and set clear limits and rules that children can understand;” match their “expectations with the children's developmental abilities and capabilities;” “praise the children's accomplishments as well as their attempts;” use “positive, firm limit settings in situations where a child's safety is at stake;” and “redirect children from inappropriate actions to activities that are more favorable.” Providers are forbidden to use corporal punishment on children, deprive children of meals or snacks as a form of discipline and punish children for soiling, wetting or not using the toilet. (Regs. 23)

(h) The Employer controls the relationship between providers and parents

Providers may not independently negotiate their fees with parents of DHS children. (Petitioner's Exhibit #1-18) Providers must give parents at least 7-days advance notice before terminating child care services, (Petitioner's Exhibit #1-18) providers and parents may not contract around this. Moreover, providers must give care in accordance with DCYF regulations, DHS rules and regulations, and the CCPA, regardless of the needs of the parent, and must give parents unrestricted access to their children. (Petitioner's Exhibit #1-18) Furthermore, DCYF gives providers a variety of authorization forms which must be signed by parents. (Petitioner's Exhibit #1-13)

Based upon all of the foregoing, the Board finds that this critical factor, control of the manner and means by which the work is performed, supports a finding of an employer-employee relationship.

The skill required.

Individuals who are unskilled labor are usually regarded as employees rather than independent contractors. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 520 citing Restatement (Second) of Agency 220 (2) (d) (1957). In this case, the Respondent acknowledges that no particular skill is required for a person to become a home daycare provider. (Respondent's Brief p. 17) The provider does have to successfully pass a criminal background check, a physical examination and the provider's home needs to meet regulatory criteria. However, no particular education, experience or skill is required to become certified. Therefore, this factor supports a finding that daycare providers are employees, not independent contractors.

The source of instrumentalities and tools required to perform the function.

An individual who provides their own necessary instrumentalities and tools for their profession is usually considered an independent contractor. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 520 citing Restatement (Second) of Agency 220 (2) (d) (1957).

In this case, the Respondent argues that the home daycare providers provide all their own instrumentalities and tools and that the State provides none. (Respondent's Brief p. 17) The Petitioner argues however that the State indeed provides books, puzzles,

puppets, games, toys, videos and reimbursement for food through “Childspan”, a DHS funded training system. Although Ms. Flodin (DCYF) described “Childspan” as a training system for child care providers and testified that DCYF does have any affiliation with Childspan, (Respondent’s Exhibit #23 p. 2) indicates that Childspan is in fact partially funded by DHS. Through Childspan, providers have access to a broad array of tools, instrumentalities and training. Thus, it seems to this Board that the State does in fact provide at least some of the tools and instrumentalities of daycare providers.

Nevertheless, the Board does not find this factor to be significant with this type of employment because many of the tools and instrumentalities used in a family daycare are typical household items which would likely be present in many households - even those without children (videos, books, games, food). Providers with their own children would tend to have all of the necessary tools and instrumentalities. Thus, since this factor could point to both an employee status and an independent contractor status, the Board will not place great weight on it.

The location of the work

There is usually a strong indication of employer-employee status of the work is performed on the premises of the employer. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 520 citing Restatement (Second) of Agency 220 (2) (d) (1957).

In this case, the daycare providers all work from their own apartments or personally owned homes. This fact, on its face would suggest that this is a weak indicator of employer-employee relationship. The Board believes, however, that the reason that the work is even permitted to be performed in private homes is because of the intense scrutiny and pre-screening which takes place before a home can be certified. For instance, the record established that homes are subject to an inspection by DCYF social workers and fire inspectors; homes must have 35 square feet of play/work space available for each child within the home; there must be an area for outdoor play which is safe from hazards; there are limitations on the use of porches above the first floor; there must be a separation of functions from room to room; hot water may not be set higher than 120 degrees; electrical outlets must be covered when

not in use; the heating system must be capable of maintaining a minimum temperature of 65 degrees; there must be a working telephone at all times; emergency phone numbers must be posted and clearly visible; there must be a first aid kit on the premises with a specific inventory of items; there must be an emergency evacuation plan and it must be practiced monthly; the refrigerator must be maintained at 45 degrees or less; drugs, medicines and cleaning materials must be stored in specific stairways must be gated; doors and windows must be securely screened; no peeling paint or plaster is permitted and domestic animals must be vaccinated and away from the children. (See Respondent's Exhibit #3, Regulations for Certification of Family Daycare Home.)

Thus, while the home "work premises" is either owned or rented by the provider, the condition of the home is strictly controlled by the State. The provider cannot be "independent" and decide not to follow the regulations, lest she lose her provider's certification. Moreover, the provider must allow DCYF social workers access to the home upon demand, and without prior notice, when a complaint has been received. (Petitioner's Exhibit #1-18) Further, DCYF social workers must enter providers' homes and examine their work habits in order to complete a check-list, certifying that a provider has complied with DCYF regulations. (Petitioner's Exhibit #1-11) These checklists must be completed 1) to employ providers 2) to renew employment bi-annually 3) whenever a complaint is received regarding a provider and 4) whenever a provider changes her residence. (Petitioner's Exhibit #1-11) The social workers may also inspect and access "all applicable records." (Petitioner's Exhibit #1-3)

This is not comparable to true independent contractors (i.e., real estate agents or insurance agents) who also maintain home offices. In these latter cases, there is little chance that the companies with whom they do business will be monitoring the health and safety of their homes. This Board believes that true "independent contractors" have the right to choose the location and condition of their workspaces and to deny access to the workspaces to other persons. Given the extensive, detailed requirements for the condition of the workplace, this Board

believes that despite the location of the work site, the presumption in favor of an independent contractor status is rebutted by the facts presented herein.

The duration of the relationship between the parties.

Employment over a considerable period of time indicates that an individual is an employee rather than an independent contractor. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 520 citing Restatement (Second) of Agency 220 (2) (d) (1957).

In the instant case, the Respondent argues that the provider has sole control over the length of the relationship, with the State's sole condition merely being that the provider must file for re-certification every two years. The Petitioner argues that providers have a continuing relationship with the State and are employed exclusively by the State. The Board notes that there was no evidence presented by either party as to how long any one or more daycare provider has been certified and accepting children for care. Only one thing is certain, on the record before the board: as long as a provider is certified, she is eligible to accept children for care. Since there is insufficient information before the Board on this factor, it will not be given any weight in our deliberation.

Whether the hiring party has the right to assign additional projects to the hired party.

An employer-employee relationship is more likely to exist if the hiring party has the right to assign additional projects to the hired party. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 522.

In the instant case, the State argues that it has no right to assign any children to the provider, never mind additional ones. The Board believes that the State's argument on this factor misses the mark. It is not the children who are "projects"; it is the right to require the providers to comply with additional layers of bureaucracy and regulations.

The record established that at the present time, DHS mandates that providers maintain daily attendance records of children subsidized by DHS for up to three (3) years. (Petitioner's Exhibit #1-18) The records must be kept on forms provided by DHS and must be produced to DHS for inspection upon request. (Petitioner's Exhibit #1-18) Further, providers must submit a published rate schedule to DHS annually. (Petitioner's Exhibit #1-18) DCYF requires that providers maintain files containing specifically

enunciated information on each child. The files must be kept in a “readily accessible” place, so that DCYF can inspect them at any time, (Regs. 25) and must contain information on each child’s mental state, sleeping habits, bowel movements, feeding times, food consumed, allergies, special medical and emotional problems, the skill the provider focused with him or her, and exactly what the child did during the day. (Petitioner’s Exhibit #1-13G)

Pursuant to R.I.G.L. 42-72.1-3, the DCYF has the authority to unilaterally amend the regulations pertaining to:

- 1) Financial, administrative and organizational ability, and stability of the applicant;
- 2) Compliance with specific fire and safety codes and health regulations;
- 3) Character, health suitability, qualifications of child care providers;
- 4) Staff/child ratios and workload assignments of staff providing care or supervision to children
- 5) Type and content of records or documents that must be maintained to collect and retain information for the planning and caring for children;
- 6) Procedures and practices regarding basic child care and placing services to ensure protection to the child regarding the manner and appropriateness of placement;
- 7) Service to families of children in care;
- 8) Program activities, including components related to physical growth, social, emotional, educational, and recreational activities, social services and habilitative or rehabilitative treatment;
- 9) Investigation of previous employment, criminal record check and department records check; and
- 10) Immunization and testing requirements for communicable diseases, including, but not limited to tuberculosis, of child care providers and children at any child day-care center or family day-care home as is specified in regulations promulgated by the director of the department of health. Notwithstanding the foregoing, all licensing and monitoring authority shall remain with the department of children, youth, and families.

In addition, the administrator may:

- 1) Prescribe any forms for reports, statements, notices, and other documents deemed necessary;

.... (g) The department may promulgate rules and regulations for the establishment of child day care centers located on the second floor.

Clearly then, the State retains all authority to regulate the workplace and to assign more “projects” in terms of paperwork, qualifications for the work premises and employees, reporting requirements, curriculum issues, etc. Therefore the Board finds that this factor supports the finding of an employee-employer relationship.

The extent of the hired party's discretion over when and how long to work.

An employer-employee relationship is more likely to exist when the hiring party exerts a greater discretion over when and how long to work. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 522. 2001

In the instant case, the State argues that the provider unilaterally controls the hours and days of operation, and may unilaterally change them at any time. The Union argues that the providers cannot set their own hours. Both parties have over-reached with their arguments. The record establishes that the providers have the authority to set the days and hours of work, only with the limitation that they may not care for children directly following all night employment elsewhere. (See Regulations) Therefore, the Board finds that this particular factor would not tend to support a finding of an employer-employee relationship.

The method of payment.

To determine whether an individual is an employee or an independent contractor, one factor to consider is whether the worker is paid hourly or by salary. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 523. citing Restatement Second of Agency 220(2) (g) 1957 Another factor to consider is who provided the worker with payment for services rendered. Id.

In the instant case, the Respondent argues that a provider is not guaranteed any funding whatsoever by the State and that as to children who are not subsidized by the State, payment is strictly between the provider and the parent. Further, the state argues that DHS payment is set by statute, and is beyond the control of either DHS or DCYF.

The Petitioner argues that the State has the sole authority to determine the rate paid for the DHS supported children and that DHS sends monthly paychecks for payment after time sheets have been submitted. The Petitioner also notes that state-sponsored Rite Care health insurance is offered and available to those providers who make a minimum of \$1,800.00 over a six-month period.

The record before the Board on this factor is mixed. There can be no question that the State sets the rate for providers on DHS vouchered families. The provider has no authority to change the rate and must accept the same. Moreover, the payment rate is by

time interval- daily and weekly rates, as opposed to salary. This would tend to support a finding of an employee-employer relationship. However, the Respondent has no control over “private pay” children. Indeed, other than the market rate survey reference in the DHS payment regulations, the record is silent on this issue. Moreover, the payment for private pay children is just that- private- and is paid by the families directly to the providers, with no State involvement. Therefore, this factor would tend to suggest that the providers who provide services to *DHS* clients, even on a part time basis, would more likely be in an employer-employee relationship.

The trickier question however is whether providers who are paid directly by parents can be considered employees. In its brief, the Petitioner argues that the NLRB has found statutory employment relationships to exist despite the lack of direct compensation by the Employer:

“In New York University, 322 N.L.R.B. at 1206, the Board held that, even though graduate students were not directly paid by their Employer, but rather received the same financial aid that non-workers received, ‘[i]t is indisputable...that the graduate assistants, unlike the other students receiving financial aid, perform work, or provide services, for the Employer under terms and conditions controlled by the Employer.’ *Id.* Likewise, in American Federation of Musicians (Royal Palm Theater), 275 N.L.R.B. 677, even though the theater did not directly hire or pay musicians, the Board held that the degree of control exercised by the theater’s music director over the details of recording indicated an employer-employee relationship. *See also Jonbruni, Inc.*, 337 N.L.R.B. 376 (dancers paid by customers, not by employer); St. Joseph News-Press, 2001 N.L.R.B. LEXIS at *5 (newspaper carriers paid by customers, not by employer).

Furthermore, the fact that providers may not receive all of their wages from the Employer makes them no less employees. Many attorneys in state and municipal law departments are state employees with private practices. In Yellow Cab of Quincy, Inc., 312 N.L.R.B. at 144 n.7, the Board noted that the fact that drivers do not receive all of their fares from their employer, but rather receive some of their fares directly from their customers, does not undermine their employee-status. Thus, providers who receive some of their income from private-pay children may still be State employees. This is particularly true where, as there, the State controls *all the conditions* of employment- except wages- for private-pay parents.”

The Board is persuaded by the Petitioner’s immediately preceding arguments that there is sufficient case law and facts in this case to support a finding under this factor that all the daycare providers, including those who do not accept DHS children, are employees and not independent contractors.

The hired party's role in hiring and paying assistants.

An individual who hires his own assistants *may* be considered an independent contractor. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 523 citing *Reid*, 490 U.S. at 753.

In the instant case, the Respondent argues that its sole role relative to assistants is that it requires providers who have seven or eight children, to have at least one assistant present. The Respondent argues that it has no control over who the provider hires or fires, how much the assistant is paid, what benefits - if any - the assistant receives, the number of hours the assistant may work, how many assistants are hired, etc.

The evidence establishes however, that the Respondent is clearly involved in hiring of assistants, to the extent that the assistants must pass the State's screening requirements. The assistant has to pass a criminal background check, a CANTS screening, and provide certification of his or her health and fitness from a physician. Therefore, the provider who hires an assistant is not free to choose whoever he or she believes to be appropriate for the job, as other independent contractors would do. Although it is true that the Respondent does not actually select assistants from an applicant pool, the daycare provider is limited to the pool of applicants who meet the State's pre-screening.

The Board finds therefore, that the provider's inability to select whomever she deems appropriate as an assistant, mitigates against finding an "independent contractor" relationship and shifts the balance, ever so slightly, toward a finding of an employer-employee relationship.

Whether the work is part of the regular business of the hiring party.

The Respondent argues: 'neither DHS nor DCYF provide or maintain Family Day Care Homes. These departments regulate the providers (DCYF) and in some cases provide funding to parents. (DHS) However, these two departments regulate a private function; the departments do not perform that function.'

The Petitioner argues that the "Rhode Island Supreme Court has held that an important indicator of employee status is that 'the services rendered [by the worker] are necessary to the conduct and furtherance of the [employer's] business.' See Laliberte,

503 A.2d 510 (worker cleaned up and assisted carpenters in their tasks furthered the remodeling business of the employer and was thus as employee). Likewise, the NLRB has found that workers who perform ‘a vital function that is an integral part of an employer’s regular business’ are employees. St. Joseph News-Press, 2001 N.L.R.B. LEXIS at *16.²

The Board is persuaded that the daycare providers’ work is “integral to and virtually coextensive with,” DCYF and DHS functions.³ Pursuant to R.I. Gen. Laws § 42-12-23, DHS is “the principal agency of the employer for the planning and coordination of employer involvement in the area of child care.” Further, DHS is charged with the responsibility of assuring that a statewide child care resource and referral system exists in this employer to provide services and consumer information to assist parents in locating and choosing licensed, approved and/or certified providers, and to maintain data necessary for such referrals. (R.I.G.L. 42-12-23) Likewise, one of DCYF’s core functions is “to protect the health, safety and well being of children temporarily separated from or being cared for away from their natural families.

Clearly, daycare providers perform services for the Respondent that are essential to, rather than merely incidental to, its operations. DHS is responsible for planning and coordinating child care. It fulfills this responsibility by certifying and compensating child care providers. Likewise, DCYF uses providers to fulfill its responsibility of ensuring that children are well taken care of while their parents are working.

Providers perform other functions that allow the Respondent to fulfill its obligations. Providers educate, nurture and protect the State’s youth. In doing so, they also allow parents to work and contribute to a more productive society. When parents are working, they are less likely to need aid from the State to support their families.

² See also Roadway Package System, Inc., 326 NLRB at 851, where the Board found an employment relationship to exist, and Dial-A-Mattress Operating Corp., 326 NLRB 884 (1998), where the court held that the workers were independent contractors. The results differed because of the different work performed. In Roadway, the employees transported chemicals for a company whose core function was the transportation of such products for its customers. In contrast, in Dial-A-Mattress, the core of the company’s business was the marketing and selling of product; the owner-operators there contracted only to deliver the company’s product.

³ See Adderley Industries, Inc., 322 NLRB 1016. There, the employer was in the business of providing cable television installation services. It hired employees to perform installation work. The NLRB found that the installers were employees of the corporation since their work was “integral to and virtually coextensive with the Company’s operations.” Id. at 1022.

Thus, the Board finds that although the Respondent is not actually offering daycare services as a “provider”, the services performed are an integral part of DCYF and DHS functions which cannot be separated or segregated from its statutory mandates. Therefore, the Board finds that this factor tends to support a finding of an employer-employee relationship.

The provision of employee benefits.

Independent contractors generally do not receive employee benefits. Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 523. citing *Reid*, 490 U.S. at 753. The Respondent argues that “providers receive none of the benefits associated with State employment”. However, the record established that although the providers do not receive vacation, sick time or retirement, health insurance benefits are offered to and made available to daycare providers who earn at least \$1,800.00 from DHS within a six month period. This provision of health care benefits muddies the water considerably from the Board’s perspective. The Board has not ever been presented with a case where an Employer would offer health insurance at its expense to “independent contractors”. The concept just doesn’t make sense. Therefore, the Board finds that this factor would tend to suggest that there is indeed an employer-employee relationship, at least as to those providers who accept DHS children.

Whether the hiring party is in business.

The Respondent argues that although it regulates child care, is not in the business of actually providing such. “Providers, on the other hand, are in that business. In the instant case, some providers chose to incorporate. Some are sole proprietorships. Some may be partnerships. Some providers choose to advertise, a decision over which DHS has no control. Providers are advised to purchase business insurance. Providers are informed in writing that they are a business.” (Employer’s Brief p. 18)

The Petitioner argues essentially that since providers are required to display their licenses, and because they are listed in the State’s DHS Central Provider Registry that providers are doing business in the name of the State. The Board finds the Union’s argument on this factor to be a reach. The simple fact of the matter is that there is no evidence in the record to support a contention that the State is in business.

However the Board also finds that this factor is one which should not be given much weight in any event, for the simple reason that it is irrelevant to whether the Respondent is an employer. Even though the State is not “in business”, thousands of Rhode Islanders are employed. Since a public employer does not have to be “in business” to be an employer, we find this factor to be unilluminating to the issues presented and we decline to give it any weight.

The tax treatment of the hired party.

The State argues that it has no involvement with tax issues other than to report to the IRS any funding forwarded to a provider through DHS. Those providers who choose to qualify as DHS approved day care homes receive IRS form 1099. Those providers - approximately one half of the 1,308 - who qualify, receive no W-2 forms. No income taxes or F.I.C.A. contributions are withheld.

The Petitioner argued:

“The NLRB has held that the belief of an employer as to the status of his workers is irrelevant because it is self-serving. See e.g., Jonbruni, Inc., 337 N.L.R.B. 376. The Board found tax status irrelevant in the following cases: Jerry Durham Drywall, 303 N.L.R.B. 24 (nothing withheld from pay of “subcontractors,”); Roofing, Metal & Heating Association, Inc., 304 N.L.R.B. 155 (no deductions taken, no benefits or insurance); Elite Limousine Plus, Inc., 324 NLRB 992 (franchisees are issued an RIS 1099 form and file with the IRS a Schedule C Profit or Loss statement and a Schedule SE Self-Employment statement, employer does not withhold city or state income tax, federal income tax or FICA; unemployment insurance is not deducted; employer does not provide disability or workers’ compensation); Metro Cars, Inc., 309 N.L.R.B. 513 (drivers fill out 1099 forms and employer does not withhold taxes or workers’ compensation premiums). “A worker's non receipt of benefits, and the employer's failure to withhold taxes, might simply suggest the employer's cost cutting, rather than a good faith or honest belief regarding the worker's status.” Selected Topics, supra, at 678. This is most obviously true where the employer is the State. Further, providers do not choose their tax status; rather they must fill out W-9 forms as a condition to obtaining employment with the State. UX-1-18. The Employer offered no evidence that providers have formed corporations. The NLRB has held, however, that this fact does not preclude a finding of employee status. See Elite Limousine Plus, Inc., 324 N.L.R.B. at 993 (even though franchisees form companies, they are still employees). See also Frankel v. Bally, Inc., 987 F.2d 86, 91 (2d Cir. 1993) (stating the fact that worker had incorporated his “business” did not preclude finding that he might be an employee).

Although there is apparently some support for the union’s position on the treatment of tax status, the Board finds that this factor tends to weigh more heavily in favor of an independent contractor status for the daycare providers. However, it must be

noted that no one of the Reid factors are controlling and all the factors must be balanced and weighed.

II) Precedent pertaining specifically to home daycare providers

In their briefs, both parties have cited and discussed two NLRB cases dealing with home daycare providers: (1) Rosemount Center, 248 N.L.R.B. 1322 (1980) in which the NLRB extended recognition to home daycare workers; (2) Cardinal McCloskey's Children's and Family Services, 298 NLRB 424 (1990) where the NLRB reversed the Regional Director's finding that these workers were employees rather than independent. We will now turn to a discussion of these cases as they compare to the facts presented in this case.

In Rosemount Center, the NLRB held that a non-profit corporation was the employer of five "family home mothers" who provided daycare services in their homes as an alternative to center based care provided by the corporation. In that case, the "family home mothers" had to be licensed by the government, undergo training and had to sign a "contract" with the non-profit corporation. The contract required the family home mothers to provide care on weekdays from 7:30 am to 6 p.m.; to provide suitable outdoor and indoor play areas; to provide children with meals; to record attendance, to regularly attend training, to be present in the home when the children were being care for unless an authorized substitute was present; to notify the Center 30 days in advance of any planned absence such as vacations; to comply with all health, dietary and safety standards and all other rules and regulations; to not provide daycare services for children other than those referred by the Center (except their own children or relatives); to receive fees for services from the Center on a bi-weekly basis. In turn, the Center was obligated under the contract to provide equipment, educational materials and other supplies to the extent feasible. The Center assumed no responsibility for negligence or willful conduct on the part of the family home mothers or for any acts on the part of the children or parents of the children assigned to her care.

In analyzing the facts, the NLRB held that while some factors in a case will point unmistakably to either an independent contractor relationship or employer–employee relationship, other factors may be indicative of neither. (Emphasis added herein) The

Board also held that the existence of an employment relationship, as opposed to that of an independent contractor, depends upon whether the principal has retained the right to control the manner and means by which a result is sought to be accomplished by the individual performing the service. “Where the control is limited to the result sought, the relationship between the individual performing the service and the principal is that of an independent contractor.” Id. “In determining whether an individual is an employer or an independent contractor ‘all the incidents of the relationship must be assessed and weighed with no one factor being decisive’ citing NLRB v United Insurance Co. of America, 390 U.S. 254, 258 (1968). Id.

In Rosemount. The Board found that

“the Employer has retained the right to control the manner and means by which the family home mothers perform their work. Thus, while the Employer argues that the family home mothers are free to set their own hours, the agreement requires them to provide daycare on a weekday basis from 7:30 am to 6:00pm. Although they are not required to be on the Employer's premises, they are required to care for the children in their home, and the Employer furnishes equipment and supplies. Although they are allowed to perform their work without contemporaneous supervision, they are frequently visited in their homes by the Employer's family home coordinators. Although they are licensed by the District of Columbia, the Employer determines which applicants to hire after requiring them to attend an initial 2-week training session. Subsequent to their hiring, the Employer requires them to attend weekly training sessions. Although the family home mothers are paid fees rather than wages, these fees are determined by the Employer and are not subject to negotiation....

We find that the Employer's control over the work conditions and environment leads inexorably to the conclusion that the family home mothers are employees, rather than independent contractors. Id.

In this case, the State, through its pervasive regulatory presence in the daycare home, has retained the right to control the manner and means by which the home daycare providers perform their work. Although the providers in Rosemount were contractually bound to provide care between the hours of 7:30 am and 6:00 pm and the providers in this case are not required to *provide* service in any given time frame, the Rhode Island providers are *prohibited from providing* care after all night employment or while holding employment elsewhere. Like the Rosemount providers, the daycare providers in this case are required to: undergo training; receive fees for services rather than wages; perform their work without any contemporaneous supervision; do not perform their work on the Employer's premises and do not provide all of their own equipment.

In *Cardinal McCloskey Children's and Family Services*, 298 NLRB 434 (1990), the NLRB considered another daycare case. There, a petition for certification was filed on behalf of day care providers associated with individual day care centers. These centers, privately run, contracted with the City of New York, Department of Social Services, to provide day care services for families that were eligible for publicly funded services. These services were then contracted out to individual homes much like the ones in Rosemount. Just like in the instant case, these providers had to meet certain regulatory criteria.

The Regional Director found that “the manner in which the providers furnish child care service is pervasively and meticulously supervised and controlled by... [the City pursuant to its] regulations and guidelines.” Id. at 436. The factors the Regional Director relied on in finding that the City controls childcare service are present in this case: providers may not subcontract their duties; corporal punishment is prohibited; although providers may decline to accept certain children, they may not do so for discriminatory reasons; providers must periodically attend training workshops; personnel from the centers monitor the providers’ operations closely and frequently to ensure that providers are in compliance with all pertinent policies, regulations, and guidelines; provider are required to make and post schedules of daily activities; center personnel make extensive suggestions concerning ways in which the providers can operate more effectively; and providers are required to keep records of the attendance of [children subsidized by the City] in order to get reimbursed. Id. at 435-436.

However, in *reversing the* decision of the Regional Director, the NLRB stated:

“Applying these principles to the facts in the record before us, we find, as did the Regional Director, that numerous factors indicate that the providers are (not employees). A provider may decline to accept the maximum number of children she is licensed by (the governmental agency), or even the full number referred to her by the centers. Providers can take vacations or other time off without first receiving permission from the centers. The providers give child care in their own homes, thereby furnishing their own workplace. Any hazardous conditions in a provider’s home must be eliminated at the provider’s expense, and any expense arising from breakage of or damage to a provider’s property caused by FDC children must also be borne by the provider. Providers pay the costs of all their own utilities. Providers are paid stipends based on the number of FDC Children cared for ... no deductions, for taxes or otherwise, are made from the stipend checks. Providers are not afforded paid vacations or sick leave, and except for ...medical insurance (for some providers also paid for by the city) providers receive no fringe benefits.” Id. at 1324.

Of particular importance however in our analysis of the instant matter, is that the NLRB raised an *inference* that the Cardinal McCloskey providers, while not “employees” of the daycare centers, might⁴ actually be employees of the City, because of the extensiveness of the governmental regulations. Thus, the critical “right of control” test, applied to the facts of the McCloskey case, did not support a finding of employee status, *at least vis-à-vis the centers*. Id. at 437-38.

The factors the Regional Director [in Cardinal McCloskey] relied upon in finding that the manner in which the provider furnish child care service is pervasively and meticulously supervised and controlled are also present in this case: providers may not subcontract their duties; corporal punishment is prohibited; although providers may decline to accept certain children, they may not do so for discriminatory reasons; providers must periodically attend training workshops; personnel from the state periodically monitor the providers’ operations to ensure that providers are in compliance with all pertinent policies, regulations, and guidelines; providers are required to keep records of the attendance of children subsidized by the DHS in order to get reimbursed.

There is, however, a critical distinction between the facts in this case and both Rosemount and Cardinal McCloskey. In both of those cases, the regulated daycare providers were dealing with an “intermediary”; that is, the daycare centers. In this case, the Board is not dealing with daycare homes that provide childcare services, auxiliary or otherwise, to daycare centers or their clients. In this case, the services are being provided directly to clients of DHS and the general public. Thus, the inference raised in Cardinal McCloskey, that the daycare providers might be City employees, because of the extensiveness of the governmental regulations bears a close examination by this Board. The NLRB did not reach the question of whether or not the City was indeed the Employer because that was not the questions before it and the NLRB would have had no jurisdiction over a city, as political subdivision of a state.

In this case however, this Board does have jurisdiction over public sector employees. Thus, the results of the “right of control” test are critical in determining the outcome. As stated previously, although each “Reid” factor must be assessed and

⁴ The Board did not actually find that the providers were City employers as stated by the Union in its brief. The NLRB clearly stated that it did not need to reach that question in order to resolve the case before it.

weighed with no one factor being decisive, the agency test however, does place greater emphasis on the first factor, the hiring party's right to control the manner and means by which the work is accomplished. (Emphasis added) Metropolitan Pilots Association v. Schlosberg 151 F. Supp 2d 511, 519 citing Frankel v Bally Inc., 987 F.2d 86, 90 (2d. Cir. 1993). Here, the State controls virtually every aspect of providers' jobs. It controls who becomes a provider; providers' home and work environments; the number of children they may care for; what they may feed the children; daily routines with the children; methods of discipline; relationships with assistants, if any; and providers' relationships with parents. Further, the Employer places limits on the providers work schedules, supervises and reviews providers' activities by requiring them to submit attendance records, requires providers to notify the Employer of any changes in their location, status or other information and requires providers to maintain specific files on each child. Financial records must also be kept for a specified period of time. extraordinary, the Employer has unfettered access to providers' homes when a complaint has been raised.

All of these factors indicate that the State, through its ability to control the manner and means by which daycare is provided in this State, leads inexorably to the conclusion that the family home mothers are employees, rather than independent contractors. Board therefore so holds.

THE BOARD'S JURISDICTION

In its brief, the Respondent argues that the Board lacks jurisdiction to hear this matter because the creation of state employee positions is controlled by statute and that by granting the Petition would violate the statutory limitations on the full-time equivalent employee ("FTE") cap. The State's argument is misplaced. The Board, by virtue of its decision is not "creating" state employee positions; the Board's decision merely concludes, on the basis of the facts and evidence presented, that home daycare providers are in fact actually already state employees. The fact that there is no written or recognized classification of "Family Day Care Provider" set forth in the State's personnel system is not disputed, nor dispositive. The point and the result of this decision is that despite the lack of such a written or adopted classification, this class of employees (approximately

1300 of them) exists. Indeed, the very purpose of this contested petition is for the Board to make the ultimate decision as to whether these workers are at present, actually employees of the State of Rhode Island. Thus, the Board's jurisdiction has been properly invoked by the petition and the fact that the Board's ultimate decision is adverse to the Respondent's position, does not serve to divest the Board of subject matter jurisdiction. If the FTE cap and personnel regulations have been violated, it is the actions of the State of Rhode Island that have created the violations, not the within decision which has merely interpreted the State's actions.

The State also argues that the Board does not have the jurisdiction or authority to include home daycare providers in the proposed bargaining unit because they are "supervisors" for their assistants. While it is true that the daycare providers can hire assistants, they may only choose from a pool of applicants that have been pre-screened by the State though it's required qualifications. Furthermore, there was no evidence introduced by either party that any home daycare providers actually hire assistants. The regulations that require assistants speak also to commercial daycare centers. Thus, it is entirely possible that home daycare providers simply do not employ assistants. Since there is no evidence in the record to support a conclusion that the home daycare employ assistants, the Board will not speculate further and will not exclude home daycare providers on the basis that they may be "supervisory".

FINDINGS OF FACT

- 1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
- 2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection and as such is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.
- 3) Families in Rhode Island who make up to 225 percent of the federal poverty level are entitled to some cash assistance from the State of Rhode Island to pay for child daycare services. In order to receive assistance, a family must file an application with DHS. If approved, the family is issued a voucher which they may use with any "approved" day

care provider. Approximately 2900 children receive care from about 1100 active DHS-approved providers.

- 4) The rate paid by DHS for these child care services is established by R.I.G.L. 40-6.2-1.1
The Department has enacted extensive regulations for administering the child care assistance program. To work for DHS, providers must submit an application and sign an agreement. DHS requires providers to submit a family's DHS voucher number and a daily attendance form to DHS.
- 5) Providers are also eligible for health insurance from the State of Rhode Island if they earn more than \$1800 from DHS in a six-month period. Approximately 700 providers are eligible for health insurance under the Rite Care Program (even if not otherwise economically qualified) and approximately 349 have chosen to participate.
- 6) Some family daycare providers have incorporated with the Secretary of State and that DHS issues 1099's to the providers. DHS makes no deductions from the daycare providers' payments for FICA, federal tax, and state tax
- 7) Pursuant to R.I.G.L. 42-72.1-3, DCYF has promulgated twenty-five pages of regulations governing character, health suitability and qualifications; provider/child ratios; workload assignments; procedures and practices regarding basic child care and services; and compliance with fire and safety codes.
- 8) DCYF also maintains a web site which provides information on how to become a provider, including job qualifications and a summary of the regulations. Interested parties are directed to contact DCYF to obtain more information.
- 9) To become a provider, applicants must first attend a three-hour DCYF orientation. DCYF distributes application packets which require physician's references, an employment history, a criminal records affidavit, a fingerprinting card, evidence of a successful screening through the attorney general's office and DCYF's Child Abuse and Neglect System, and a landlord's permission slip. DCYF shows a video and leads a discussion about how to start a family day care home and reviews DCYF regulations and guidelines. DCYF social workers investigate the suitability of an applicant's home, complete an eleven-page evaluation checklist, and investigate everyone living in the applicant's household. A fire inspector also visits the home.

- 10) In order to be certified as a daycare home, the provider's premises must be inspected by DCYF social workers and fire inspectors; homes must have 35 square feet of play/work space available for each child within the home; there must be an area for outdoor play which is safe from hazards; there are limitations on the use of porches above the first floor; there must be a separation of functions from room to room; hot water may not be set higher than 120 degrees; electrical outlets must be covered when not in use; the heating system must be capable of maintaining a minimum temperature of 65 degrees; there must be a working telephone at all times; emergency phone numbers must be posted and clearly visible; there must be a first aid kit on the premises with a specific inventory of items; there must be an emergency evacuation plan and it must be practiced monthly; the refrigerator must be maintained at 45 degrees or less; drugs, medicines and cleaning materials must be stored in specific ways; stairways must be gated; doors and windows must be securely screened; no peeling paint or plaster is permitted and domestic animals must be vaccinated and kept away from the children.
- 11) DCYF prohibits providers from engaging in other employment while children are in their care and from having children in their care on the morning following all-night employment.
- 12) DCYF also regulates the type and nature of discipline that a provider may use. There are also regulations requiring providers to spend a "substantial portion of each day directly involved in activities that center around the developmental needs, interests, and strengths of the children in their care.
- 13) Providers must demonstrate and document ten hours of approved training every two years and must re-certify every two years. In order for the training to qualify as "approved", it must be related to child care.
- 14) DCYF social workers are authorized to make unannounced visits to providers' homes to investigate compliance with DCYF regulations. If DCYF decides that a violation of its regulations has occurred, it determines the remedy.
- 15) DCYF requires that providers maintain files containing specifically enunciated information on each child. The files must be kept in a "readily accessible" place, so that DCYF can inspect them at any time, and must contain information on each child's mental

state, sleeping habits, bowel movements, feeding times, food consumed, allergies, special medical and emotional problems, the skill the provider focused with him or her, and exactly what the child did during the day.

- 16) DCYF certified home daycare providers may care for up to six unrelated children without an assistant and up to eight children, with an assistant. DCYF does not share in the profits earned or losses sustained by the daycare providers. DCYF provides business and tax reporting information to providers, but has no say in what deductions, if any, providers take on their personal income tax returns.
- 17) Certified home daycare providers set their own schedules, including vacations and that no advance notification to DCYF is required.
- 18) The provider is required to have an emergency care plan on file for handling emergency absences for up to three days.
- 19) Daycare providers' work is "integral to and virtually coextensive with," DCYF and DHS functions.
- 20) DHS is responsible for planning and coordinating child care and fulfills this responsibility by certifying and compensating child care providers. Likewise, DCYF uses providers to fulfill its responsibility of ensuring that children are well taken care of while their parents are working. Providers perform other functions that allow the Respondent to fulfill its obligations. Providers educate, nurture and protect the State's youth. In doing so, they also allow parents to work and contribute to a more productive society.

CONCLUSIONS OF LAW

- 1) When the word "employee" is not defined within a state statute pertaining to eligibility for collective bargaining, the proper analysis is a 'common law agency test', as defined in Community for Creative Non-Violence v Reid, 490 U.S. 730, 751-52, (1989) and as subsequently developed by case law.
- 2) Certified home daycare providers are "employees" within the meaning of R.I.G.L. 28-7-3 (3).
- 3) Certified home daycare providers are "state employees" within the meaning of R.I.G.L. 36-11-1

- 4) The Respondent is the “Employer” of certified home daycare providers within the State of Rhode Island.

ORDER & DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the Rhode Island State Labor Relations Board by the Rhode Island Labor Relations Act, it is hereby:

DIRECTED that an election by secret ballot shall be conducted within sixty (60) days hereafter, under the supervision of the Board or its agents, or designees of the American Arbitration Association, at a time, place and during hours to be fixed by the Board.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni
Walter J. Lanni, Chairman

Frank J. Montanaro
Frank J. Montanaro, Member

Joseph V. Mulvey
Joseph V. Mulvey, Member

Gerald S. Goldstein
Gerald S. Goldstein, Member (Dissent)***

Ellen L. Jordan
Ellen L. Jordan, Member (Dissent) ***

John R. Capobianco
John R. Capobianco, Member

Elizabeth S. Dolan
Elizabeth S. Dolan, Member (Dissent)***

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: APRIL 6, 2004

By: Robyn H. Golden
Robyn Golden, Acting Administrator

***DISSENT: OPINION ATTACHED

DISSENT BY GERALD GOLDSTEIN

There is little disagreement that the duties and the responsibilities of Family Daycare Providers are most difficult. The services they provide are repugnant to most people who would not want, or could not perform the duties required for the children who occupy family care homes. These children are often the products of broken homes, abusive parents, violence and drug related environments. (To mention just a few of the social problems they might have encountered.

However, our society is governed by laws, rules and regulations which we must abide by regardless of personal feelings, and at times, heart rendering conditions. Accordingly, I am compelled to vote against the inclusion of the Petitioners who seek status as "State Employees". I have not made this conclusion lightly. My decision was made after reading the Board's investigators report; and after carefully listening to the testimony and studying and evaluating the opposing briefs by both parties.

In view of the above, I have also concluded that Home Providers are classic examples of Independent Contractors. It should be noted that the following list of arguments are my personal viewpoints and do not necessarily reflect or include the opinions of others who may have additional reasons, and different views and/or other points of law, that I have not covered.

DISSENTING POINTS OF ARGUMENT:

- EXPLICIT DISCIPLINARY RULES DO NOT EXIST (EXCEPT FOR
COPORAL PUNISHMENT – HITTING THE CHILD, ETC.) ALTHOUGH
LIMITED GUIDELINES ARE PUBLISHED. ACTUAL AND UNOBSERVED
PUNISHMENT IS LEFT TO THE DESCRETION OF THE PROVIDER.
2. NO ESTABLISHED HOURS OF WORK EXISTS AND IS LEFT TO THE
PROVIDERS DESCRETION – IE// "THEY COULD WORK ONLY HOUR"
 3. HOME DAYCARE PROVIDERS DO NOT SHARE OR CONTROL
FINANCIAL MATTERS (NO ASSISTANCE PROVIDED BY STATE)
 4. STATE DOES NOT PROVIDE TAX RETURNS TO THE HOME DAYCARE

PROVIDERS

5. HOME DAYCARE PROVIDERS DO THEIR OWN ADVERTISING
6. NO CLASSIFICATION EXISTS FOR HOME DAY CARE PROVIDERS
(TESTIMONY FROM ANTHONY BUCCI)
7. ALTHOUGH THE STATE ISSUES LICENSES TO HOME DAYCARE PROVIDERS, THIS IS NOT UNIQUE, AS SIMILAR DEGREES OF CONTROL PERTAIN TO THE PRIVATE SECTOR (SUCH AS LIQUOR LICENSES ISSUED TO LIQUOR STORES, BARS, RESTAURANTS AND TO ALL LICENSED BUSINESSES AND FACILITIES TOO NUMEROUS TO MENTION). HOWEVER, THE COMMON DENOMINATOR IS THAT EVERY PRIVATE LISCENSED HOLDER MUST CONFORM TO LOCAL, STATE, AND FEDERAL REQUIREMENTS WHICH INCLUDE ZONING REQUIREMENTS, HEALTH CONFORMS, LEGAL USAGES, SAFETY FACTORS, ETC. HOME DAYCARE PROVIDERS FALL INTO THE "PRIVATE SECTOR" CATEGORY BY COMMUNITY AND SIMILARITY OF THEIR LICENSING REQUIREMENTS.
8. THE STATE DOES NOT PAY THE HOME DAYCARE PROVIDERS (DHS DISTRIBUTES VOUCHERS)
9. THE STATE DOES NOT WITHHOLD PAYROLL TAXES FROM HOME DAYCARE PROVIDERS
10. SERVICES ARE NOT PROVIDED IN STATE OWNED (OR STATE RENTED) HOMES. THE STATE CANNOT OBSERVE THE SAME CONDITIONS THAT EXIST IN COMMONLY USED STATE PROPERTIES; THE STATE DEPENDS ON OCCASIONAL INSPECTIONS AND/OR RESPONDS AFTER THE COMPLAINT IS FILED.
HOME DAYCARE PROVIDERS CAN CHARGE THEIR OWN FEES. (SEE "PRIVATE PAY CHILDREN")
12. NO CONTRACT EXISTS BETWEEN DCYF AND THE HOME DAYCARE PROVIDER.
13. DCYF DOES NOT HIRE AND FIRE HOME DAYCARE EMPLOYEES, THE HOME DAYCARE PROVIDER DOES.

14. THE HOME DAYCARE PROVIDER PURCHASES THE FOOD FOR THEIR RESIDENTS.
5. THE HOME DAYCARE PROVIDER CONDUCTS ITS OWN BUSINESS MATTERS.
16. THE HOME DAYCARE PROVIDER DOES NOT SHARE ITS PROFITS WITH DCYF.
17. SOME PROVIDERS ARE RHODE ISLAND CORPORATIONS.

In summation, the Petitioner cites reasons and examples of State powers related to them that allegedly qualifies them as State Employees. On examination of the data, testimony and evidence submitted in this case, it is obvious that these are factors common to all licensed business enterprises. Therefore, Home Daycare Providers have the same community of requirements as do private businesses and, therefore, cannot be classified as State Employees. No one denies the right of State employees to petition to elect and to organize. However, in this instance, the Petitioners have not met the necessary criteria or standards to qualify the Home Daycare Providers as State Employees. Therefore, the Petition for formulation of a bargaining unit should be denied.

DISSENT BY ELLEN JORDAN

Dissent from the Majority Opinion of the State Labor Relations Board and Partial Concurrence with the Dissent authored by Board Member Gerald Goldstein.

I dissent from the Majority Opinion in its entirety and partially concur with the Dissent by Board Member Gerald Goldstein. I concur with the dissent authored by Mr. Goldstein only to the extent that the evidence presented to this Board reflects that the group before this Board is a group of independent contractors and not state employees. As independent contractors, this group is not entitled to the rights of collective bargaining under the R.I. State Labor Relations Act.

I emphatically disagree with Mr. Goldstein's categorization of the duties of certified home daycare providers as "repugnant." In addition, it is untrue and the record is devoid of evidence to support the statement that the children cared for by these daycare providers are "the products of broken homes, abusive parents, violence and drug related environments." In fact, these daycare providers are located throughout the state and provide care to children of working parents of all income levels.

DISSENT BY ELIZABETH DOLAN

PARTIAL CONCURRENCE WITH THE WRITTEN DISSENT BY MEMBER GOLDSTEIN

I concur with the seventeen points raised by Mr. Goldstein which demonstrate that the day care providers are independent contractors and not state employees. I strongly disagree with the statement, made by Mr. Goldstein, that the services provided are “repugnant to most people” and also disagree with the categorization of the children serviced by home day care providers. These statements are subjective views and are irrelevant to the critical issue of whether home day care workers by virtue of state control are, in fact, state employees.