UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

DHP INCORPORATED, D/B/A QUESTCARE EMS,	)	
Employer,	)	
and	)	**Case No. 9-RC-18353**
NATIONAL EMERGENCY MEDICAL SERVICES ASSOCIATION (NEMSA),	)	
Petitioner.	)	

QUESTCARE EMS' EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS TO THE ELECTION AND RECOMMENDATIONS TO THE REGIONAL DIRECTOR

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COMES NOW, Questcare EMS (hereinafter sometimes referred to simply as the "Employer"), by its attorneys, pursuant to §§ 102.67 and 102.69 of the National Labor Relations Board's Rules and Regulations, and files it Exceptions to the Hearing Officer's Report on Objections to the Election and Recommendations to the Regional Director (attached hereto as Exhibit A)[1].

I. STATEMENT OF THE CASE

On April 7, 2011, the National Emergency Medical Services Association (NEMSA) (hereinafter referred to either as the "Petitioner" or the "Union") filed a Petition in Case No. 9-RC-18353 seeking to represent certain employees of the Employer. Following a hearing on April 21, 2011, and the submission of post-hearing briefs, the Regional Director issued a Decision and Direction of Election on May 12, 2011. An election was held on June 10, 2011, among "[a]ll full-time and regular part-time paramedics, EMT basics, EMT first responders,

[1] The Employer's Post-Hearing brief is also attached as Exhibit B for the Regional Director's consideration.

lifters, dispatchers, mechanics, and office clerical employees but excluding all professional employees, guards and supervisors as defined in the Act" (EX 1, p. 19).[2] Upon conclusion of the election, the votes were counted and a Tally of Ballots was completed. As evidenced by the Tally of Ballots, forty-five (45) votes were cast in favor of the Union and forty (40) votes were cast against Union representation. There were two (2) void ballots and one (1) challenged ballot. The challenged ballot was not sufficient to affect the results of the election.

On June 17, 2011, the Employer timely filed objections to conduct affecting the results of the election (Bd. Ex. 1-A). Generally, the Employer alleged that Gina Tarver, a supervisor, engaged in pro-Union conduct in contravention of the Board's standards as delineated in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), which interfered with the laboratory conditions that are a prerequisite for a fair election requiring that the election be set aside. Pursuant to § 102.69 of the Board's Rules and Regulations, the Regional Director caused a preliminary investigation to be made of the objections. Based on that investigation, the Regional Director determined that the Employer's Objections Nos. 1 through 11 raised substantial and material issues with respect to conduct affecting the results of the election which warranted the development of record testimony at a hearing.

A hearing was conducted on July 19, 2011, before Hearing Officer Jamie Ireland, Region 9 of the National Labor Relations Board. On August 25, 2011, Hearing Officer Ireland issued her Report on Objections to the Election and Recommendations to the Regional Director. In her Report, Hearing Officer Ireland found that, at all relevant times, Tarver was a supervisor within the meaning of Section 2(11) of the Act. Hearing Officer Ireland ultimately recommended,

[2] The designation "Bd. Ex __" shall refer to NLRB/Region 9 Exhibits offered and received by Hearing Officer Ireland at the outset of the hearing; the designation "EX __" shall refer to Exhibits offered by the Employer and received by Hearing Officer Ireland at hearing; the designation "UX __" shall refer to Exhibits offered by the Union and received by Hearing Officer Ireland at hearing; and the designation "TR __" shall refer to transcript page citations.

however, that all of the Employer's Objections be overruled and that the Regional Director certify the Union as the employees' exclusive bargaining representative because the Union received a majority of the valid votes cast in the election.

II. BASIS FOR EXCEPTIONS

The Employer submits, pursuant to the National Labor Relations Board Rules and Regulations, Section 102.67 (b) and (c), that compelling reasons exist for review and consideration of the Employer's exceptions because substantial questions of law or policy exist inasmuch as Hearing Officer Ireland erred by departing from established Board precedent by failing to properly apply the Board's test in *Harborside Healthcare*. By failing to apply extant Board law, Hearing Officer Ireland erred, concluding that Tarver's conduct did not constitute objectionable conduct warranting that the election be set aside.

Similarly, Hearing Officer Ireland erred by departing from established Board law for determining whether an entity falls within the exemption for political subdivisions. By failing to properly apply the Board's test as delineated in *Hawkins County*, Hearing Officer Ireland improperly concluded that the Employer was not a political subdivision and, thus, was subject to the Board's jurisdiction.

Finally, the Employer submits that Hearing Officer Ireland ignored or minimized significant, material facts, and that her actions resulted not only in Hearing Officer Ireland misapplying extant Board law but also prejudicially affecting the Employer's rights.

III. FACTUAL BACKGROUND

A. Brief Description of the Employer.

The Employer operates a ground ambulance transport service providing emergency and non-emergency transportation for Pike, Johnson, Magoffin, and Floyd counties in the Commonwealth of Kentucky. Importantly, the Employer is the *sole* provider of ambulance services in Magoffin County (TR 116).[3] As a private ambulance service, the Employer is highly regulated by the Commonwealth (TR 103). Specifically, the Kentucky Board of EMS regulates ambulance services throughout the Commonwealth (TR 103). Dossett is a member of the Kentucky Board of EMS and represents private ambulance services (TR 103-04).[4]

Ambulance services, such as the Employer, must comply with various statutes and regulations (TR 105-07; EX 2-3). For example, the regulations set forth the job duties of first responders, emergency medical technicians (EMTs), and paramedics (TR 107-09). Ambulance services cannot deviate from the regulations in the assignment of tasks to employees (TR 109). Likewise, the Employer must conduct background checks on applicants and is prohibited by law from hiring individuals with felony convictions (TR 110-11; EX 3). Finally, the Kentucky Board of EMS has the authority to discipline individual employees of the Employer, including imposing fines, revoking or suspending certification or licensure, or placing a limitation on an employee's ability to practice (TR 109; EX 2, *see* Ky. Rev. Stat. § 311A.060).

[3] The Employer became the sole provider of ambulance services in Magoffin County through a contract with the County.

[4] Dossett was appointed to the Kentucky Board of EMS by the governor to a four (4) year term.

B. Brief Synopsis of Facts Relating to the Supervisory Status of Gina Tarver and Tarver's Active Role in and Support of the Union's Organizing Campaign.

The Employer presented several witnesses, all of whom testified regarding Tarver's supervisory status and her active role in the Union's organizing campaign. All of the Employer's witnesses testified pursuant to a subpoena.

Brandy Standifer, who is employed by Questcare as an EMT-B, first learned of the Union organizing effort when she was contacted by Dana Baldwin, then the Employer's head dispatcher (TR 15-16). Baldwin met with Standifer and explained that Tarver had told her (Baldwin) that employees needed to protect themselves and their families because upcoming changes were not "going to be beneficial to [employees] or [their] families" (TR 17). Baldwin also admonished Standifer not to mention Tarver's name when speaking with employees about the Union (TR 17-18). Baldwin subsequently approached Standifer, Nerissa Campbell, and Hannah Rider, and asked them to sign Union authorization cards, again mentioning that employees need to keep the organizing effort "hush-hush" and to keep Tarver's name out of it (TR 19).

In addition to her conversations with Baldwin, who told her that Tarver had instructed her to call employees and get them to sign Union authorization cards (TR 18-19), Standifer also spoke directly with Tarver on several occasions, who told her that she needed to protect herself and her family because the Employer was going to change from twenty-four (24) hour shifts to twelve (12) hour shifts (TR 21-22). According to Standifer, Tarver was the highest ranking Company official that she dealt with on a day-to-day basis (TR 75). As Standifer indicated, Tarver basically ran the Company (TR 74). Tarver consistently told Standifer that to protect herself, she needed to vote for and support the Union (TR 23, 47-48, 51-53, 64). During a telephone conversation shortly before the election, Tarver reversed course and told Standifer that

she should vote "no" instead of supporting the Union (TR 38-39). When Standifer questioned her, stating that Tarver had started the organizing effort, she (Tarver) admitted it (TR 38-39). Although Standifer was not shocked at Tarver's change in position because she believed that Tarver was merely trying to save her job, Tarver's final conversation had no impact on her decision because Tarver "***never*** took back the things that she said"—specifically Tarver never indicated that things would improve or that the employees' stations or twenty-four (24) hour shifts were guaranteed (TR 70-71).

Similarly, Greg Suiter spoke with Tarver on several occasions about the Union (TR 149). During one conversation, Tarver asked Greg Suiter whether anyone had talked to him about signing a Union authorization card and told him that he really needed to think about protecting himself and his family because Tarver didn't "know what those fuckin' idiots in St. Louis [were] going to do" (TR 150-51, 163).[5] Based on his conversations with Tarver, Greg Suiter understood that Tarver wanted him to sign an authorization card and support the Union (TR 154-55, 157). Tarver's conversations impacted Greg Suiter, causing him great concern about his job (TR 156). One of the greatest concerns among employees was the prospect of losing their twenty-four (24) hour shifts and fixed stations (TR 164).

Sam Music also testified that Tarver told a group of employees at her home, including Chris Dameron, Star Driskill, John Cruz, Dana Baldwin, and Marc Tarver, her husband, that "it would be in the best interest of the employees to vote the Union in, because if [they] didn't, the Company could cut [them] to twelve 12 hour shifts" (TR 181). This meeting occurred shortly

[5] Importantly, Tarver traveled to St. Louis to meet with the Employer's president, Kevin Fairlie, and to observe Abbott Ambulance's operations in St. Louis in late February 2011 (TR 544-46). Abbott was previously owned by the same individuals who currently own and operate the Employer and Fairlie was a former high-ranking executive at Abbott who was intimately familiar with Abbott's operations (TR 546). During that trip, Tarver and Fairlie discussed, *inter alia*, the concept of staging and the fact that Abbott employed shifts other than twenty-four (24) hour shifts (TR 546). The purpose of Tarver's trip was to allow her to learn about the Employer's blueprint for operating a highly successful EMS provider. The Employer acquired the Company in December 2010.

after Tarver returned from St. Louis where she had the opportunity to observe and study Abbott's operations (TR 179). Tarver's comments caused great concern and anxiety among the employees because no one wanted to work twelve (12) hour shifts (TR 182). Music was approached by both Dana Baldwin and Kevin Reid about signing an authorization card (TR 190, 192-93) after he had been specifically told by Tarver that Baldwin and Reid were soliciting employees to sign authorization cards (TR 196).

Another employee, Roger Duty, who is currently the Employer's supervisor for Magoffin County, attended a meeting with other employees including Sam Suiter, Julie Suiter, Tim Marsillett, Matt Lawson, and William Callahan, where Tarver discussed new changes, the new ownership, and the future outlook of the Company (TR 207-08). Tarver told everyone at the meeting that they needed to protect themselves *at whatever cost* and specifically mentioned that employees needed to form a Union (TR 208). Timothy Marsillett corroborated Duty's testimony in this respect (TR 227-28). Tarver had recently returned from her trip to St. Louis where she had the opportunity to observe and discuss Abbott's operations, particularly Abbott's use of shifts other than twenty-four (24) hour shifts and its use of staging, when this occurred (TR 216). Duty was also present for another conversation and meeting with Tarver which also included Julie Suiter, Sandy Price, Stephenie Burchett, James Hitchcock, Bobby Page, and Lena Schindler (TR 210-11, 240). Tarver again told employees that they needed to protect themselves and consider forming a Union (TR 212, 216-17). Again, as corroborated by Julie Suiter, Tarver discussed new changes, particularly the possibility that twenty-four (24) hour shifts would be eliminated in favor of twelve (12) hour shifts (TR 241). Tarver also went to Marsillett's house in late April or early May to force him to sign a Union authorization card (TR 213, 219).[6]

[6] Although Marsillett testified that Tarver did not come to his home (TR-233), the record evidence conclusively demonstrates that Tarver intended to go to Marsillett's house to persuade him to sign a card.

C. Brief Synopsis of the Union's Witnesses' Testimony.

For all practical purposes, the Union's witnesses deny, in large part, that Tarver had any role in the Union organizing effort or in even speaking with employees about the Union (TR 288, 304, 306, 348, 349, 386, 387-88, 457-58, 460). The Union's witnesses also testified about the Company's response to the Union's organizing efforts and the insertion of information in payroll slips.

Calvin Daniels, self-identified as the lead Union organizer, claims that he contacted the Union (TR 263). Daniels denied that other employees discussed or knew anything at all about the Union until after he had received blank authorization cards and had a meeting with a "core group" of employees, whom he identified as Sandy Price, Stephenie Burchett, Jeff Burchett, and Kevin Reid (TR 273). According to Daniels, this meeting occurred on March 31, 2011, when he "knew" that Fairlie and Dossett would be in St. Louis (TR 274).[7] Daniels denied that Baldwin attended the first meeting of the "core group" (TR 273, 313) or that Baldwin had twenty (20) to thirty (30) Union authorization cards in her possession (TR 313). Daniels also claims that, despite record evidence to the contrary, that Sam Suiter told him the Union was a great idea and that he supported it (TR 315-16). Daniels admitted, though, that employees were concerned about possible changes and particularly that the Company was going to eliminate twenty-four

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Moreover, the fact that numerous other employees believed that Tarver did so illustrates that, in the eyes of employees, Tarver took an active role in the organizing campaign, and urged employees to sign authorization cards and support the Union.

[7] Interestingly, when pressed on cross-examination, Daniels was unable to explain why he knew that Fairlie and Dossett would be out of town on March 31, 2011 (TR 326). Initially, he indicated that "someone" had told him both Fairlie and Dossett would be in St. Louis, but he was unable to identify the person in question (TR 326). Likewise, Jeff Burchett was unable to explain how Daniels knew that Fairlie and Dossett would be gone on March 31 (TR 462-63). When pressed further, Burchett stated that "Calvin [Daniels] knows lots of things. . . . That's all I'm going to say. Calvin knows a lot of people in a lot of high up positions" (TR 463). Clearly, the only individual that would have known with certainty that both Fairlie and Dossett would have been out of town on March 31, 2011, was Gina Tarver. Burchett's reluctance to provide any additional information and his reference to "people in . . . high up positions" compels the conclusion that Daniels "knew" Fairlie and Dossett would be out of town because he had been informed of this fact by Tarver.

(24) hour shifts and implement twelve (12) hour shifts (TR 324-25). He also indicated that the elimination of stations in favor of having employees stage at various locations was also a concern among employees (TR 325).

Kevin Reid, despite Daniels's contrary testimony (TR 318), claims that he was responsible for obtaining signed authorization cards from employees assigned to Pike County (TR 330). Reid also testified that Dana Baldwin was present for the initial "core group" meeting and Skype call with the Union (TR 332). And, despite Daniels's claims that most employees were unaware of the Union organizing, he testified that not only were some employees not surprised (TR 343-45), that he and Daniels had a conversation about a week before the initial "core group" meeting about the Union and he and Baldwin had also discussed the Union before March 31, 2011 (TR 350).

Sandy Price also confirmed that Dana Baldwin was present at the initial "core group" meeting (TR 446). Price also indicated that employees were concerned about the elimination of twenty-four (24) hour shifts and stations (TR 389, 391). Although she denied that Tarver specifically mentioned the Union in the course of a meeting in March where employees voiced their concerns, she admitted that Tarver told employees they needed to protect themselves and their families (TR 392-93). *See also* TR 434-36, 439. She also expressed that Tarver's response did nothing to alleviate employees' concerns (TR 397). Like Reid, Price had discussed the need for a Union in mid-March 2011 with Stephenie Burchett and Bobby Page (TR 442-43).

Jeff Burchett also confirmed that Dana Baldwin was a member of the "core group" and actively involved in the organizing effort (TR 451). Burchett, too, indicated that the chief concern among employees was the elimination of twenty-four (24) hour shifts and stations (TR 462-63).

Importantly, as illustrated more fully above, ***all*** of the Union's witnesses admitted that the potential loss of twenty-four (24) hour shifts and stations in favor of twelve (12) hour shifts and staging concerned employees and was the primary reason employees were interested in forming a Union and signed authorization cards (TR 325, 389, 391, 462-63). These concerns, however, did not arise and were not a topic of discussion among employees until ***after*** Tarver returned from her February 2011 trip to St. Louis where Tarver had the opportunity to observe and study Abbott's operations, particularly Abbott's use of shifts other than twenty-four (24) hour shifts and its use of staging as opposed to fixed stations.

Tarver also testified that she was not involved in the Union's organizing effort (TR 503, 504-05, 508, 510) and claimed that she first received notice of the Union's efforts when the Company received notification from the NLRB that a petition had been filed (TR 500). Similarly, despite corroborated evidence to the contrary, Tarver denied that she had any conversation about the Union with Standifer, Greg Suiter, Sam Music, and others (TR 517-18, 520, 526). As discussed below, however, the Hearing Officer properly discredited Tarver's testimony given the general nature of her denials and her lack of specific details.

D. <u>Credibility Determinations by the Hearing Officer.</u>

Importantly, Hearing Officer Ireland generally credited the testimony of the Employer's witnesses, especially over the testimony of Tarver. For example, Hearing Officer Ireland found that Dana Baldwin, contrary to Calvin Daniels' contention, was part of the "core group" and actively participated in obtaining signed Union authorization cards from employees. Likewise, Hearing Officer Ireland credited the testimony of the Employer's witnesses regarding several conversations with Tarver about signing authorization cards or supporting the Union. In doing

so, Hearing Officer Ireland noted that Tarver's testimony consisted of general denials where the Employer's witnesses provided specific and detailed accounts.

IV. ANALYSIS

A. The Hearing Officer Erred by Misapplying Extant Board Law and Failing to Properly Conclude That Tarver's Conduct Was Objectionable and Affected the Results of the June 10, 2011 Election, Warranting That the Election Be Set Aside.

For ease of reference, the Employer will address each of its eleven (11) objections in turn. As will be illustrated more fully herein, the Employer contends that Hearing Officer Ireland ignored or minimized significant, material facts, and misapplied existing Board law in concluding that Tarver's conduct was not objectionable or, alternatively, that even if Tarver's conduct was objectionable, it did not sufficiently affect the results of the June 10, 2011 election.

As Hearing Officer Ireland properly recognized, Tarver's conduct must be analyzed under the two-prong test set forth in *Harborside Healthcare*, 343 NLRB 906 (2004). When determining whether supervisory pro-Union conduct runs afoul of the Act, the Board looks to two factors:

> (1) Whether the supervisor's pro-Union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-Union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, 343 NLRB at 909. As the Board recognized, while objectionable pro-Union supervisory conduct may be less frequent, it still has the potential to interfere with and impact employee free choice. According to the *Harborside* board,

> Whether [a] supervisor improperly importunes subordinates to vote for the union or against, the vice is the same, viz employees may be induced to support/oppose the union because they fear future retaliation, or hope for preferential treatment, by the supervisor. [Citations omitted.] A supervisor is typically an employee's principal contact with management. Whenever a supervisor engaged in pro-Union or antiunion activities directed at employee he or she supervises, the potential exists for these activities to put pressure on employees, who are unlikely to forget the power the supervisor has over their work life. This is true whether or not the statements or actions of the supervisor are consistent with the view of the employer.

Id. Moreover, the Board has stated that evidence of express threats or promises is not a perquisite to establishing supervisory pro-Union misconduct. *Id*. at 909. Although some cases may involve explicit coercion, other cases will involve "the more subtle question of whether the conduct and speech of the supervisor" constitutes an implicit threat or is coercive. *Id*. As the Sixth Circuit has explained, "the *Harborside* inquiry seeks to foreclose conduct—*however implicit or subtly framed*—that, *in the aggregate*, pressures employees to support or oppose Unions out of fear of retaliation or hope for preferential treatment by the supervisor." *NLRB v. Family Fare, Inc.*, 205 F. App'x 403, 408 (6th Cir. 2006), *cert. denied*, 551 U.S. 1133 (2007) (emphasis supplied).

1. Objection No. 1 – A Supervisor and Manager of the Employer Personally Solicited Employees to Sign Authorization Cards Individually and in the Presence of Other Employees.

As the testimony of Greg Suiter, Julie Suiter, and Roger Duty makes abundantly clear, Tarver personally solicited employees to sign Union authorization cards. Greg Suiter testified that after the Union had filed its Petition seeking to represent certain employees of the Employer, Tarver, holding a Union authorization card, asked him if anyone had talked with him about

signing a Union authorization card (TR 150).[8] When he responded that he was not interested in the Union, Tarver retorted that he "need[ed] to think about it to protect" himself and his family (TR 150). Later, another employee, Drew,[9] told Greg Suiter that he could not believe that Tarver wanted him (Drew) to sign a Union authorization card (TR 151-53).

Similarly, Julie Suiter testified convincingly that at least five (5) other employees told her that Tarver went to Tim Marsilett's home in an effort to force him to sign a Union authorization card (TR 244).[10] In fact, Marsilett was one of the employees who told Julie Suiter that Tarver told him that he "needed to sign a Union card" (TR 244). Tarver's conduct occurred after the Petition was filed but before the election was conducted on June 10, 2011. Julie Suiter's testimony was corroborated by Roger Duty, who had also been told by other employees that Tarver had gone to Marsilett's home to pressure him into signing a Union authorization card (TR 213).

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. The Board has held that the solicitation of Union authorization cards by a supervisor has "an inherent tendency to interfere with the employee's freedom to choose to sign a card or not." *Harborside Healthcare, Inc.*, 343 NLRB 906, 911 (2004). As the Board explained, "[b]y definition, a supervisor has the power to affect—for good or for ill—the working life of the employee. The

[8] Hearing Officer Ireland erroneously concluded that the record evidence did not establish that Tarver was holding a Union authorization card. The Employer submits that, given the nature of the discussion and the subject matter, and reading Greg Suiter's entire line of testimony on this matter, it is clear that Tarver was, in fact, holding an authorization card when interrogating Greg Suiter whether he had been requested to sign an authorization card.

[9] Drew is one of the Employer's mechanics. Greg Suiter was unadvised as to Drew's last name (TR 151).

[10] Although Marsillett testified that Tarver did not come to his home (TR-233), the record evidence demonstrates that, at a minimum, Tarver intended to go to Marsillett's house to persuade him to sign a card. Moreover, the fact that numerous other employees believed that Tarver did so illustrates that, in the eyes of employees, Tarver took an active role in the organizing campaign, and urged employees to sign authorization cards and support the Union.

solicitation of cards gives the supervisor the opportunity to obtain a graphic illustration of who is pro-Union and, by the process of eliminating non-signers, who likely is not. When a supervisor asks that a card be signed, the employee will reasonably be concerned that the 'right' response will be viewed with favor, and a 'wrong' response with disfavor." *Id.* Tarver's actions in soliciting employees to sign Union authorization cards is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

Moreover, the Board has held that if a supervisor directly solicits authorization cards, those cards are tainted and may not be counted as supportive of a showing of interest, thus warranting dismissal of the petition. *Southeastern Newspapers, Inc.*, 129 NLRB 311 (1960) (petition dismissed where supervisor participated in obtaining signatures of employees on authorization cards); *The Toledo Stamping & Manufacturing Co.*, 55 NLRB 856, 867 (1944) (petition dismissed when authorization cards were secured with assistance of a supervisor). *See also National Gypsum Co.*, 215 NLRB 74 (1974) (supervisory taint found where supervisors personally solicited and obtained employees' signatures). The Board reaffirmed this bright-line rule in *Dejana Industries, Inc.*, 336 NLRB 1202 (2001). Although the Board realized that application of its bright-line rule may seem unduly harsh in situations where the petitioning Union may not be fully aware of such activity, "this possible disadvantage is outweighed by the benefits of providing the Board's Regional Directors and all parties in representation cases with clear procedural guidelines." *Id.*

Hearing Officer Ireland improperly diminishes Tarver's actions to reach her conclusion that Tarver's conduct is not objectionable within the meaning of *Harborside Healthcare* and its progeny. In this respect, Hearing Officer Ireland, although acknowledging that Baldwin was part of the "core group," minimizes the role that Baldwin played in obtaining signed authorization

cards from employees, even when crediting the Employer's witnesses that conversations involving Baldwin did, in fact, occur. Likewise, Hearing Officer Ireland attempts to draw a distinction, albeit one without a difference, with respect to Tarver's conversation with Greg Suiter regarding the Union and signing a Union authorization card. Although crediting the testimony of Greg Suiter over Tarver and finding that the conversation took place during the critical period, Hearing Officer Ireland nevertheless concludes that Tarver did not engage in objectionable conduct because she merely "asked him if anyone *talked* to him about Union cards" rather than asking him if anyone had talked to him about *signing* an authorization card. The record evidence, however, clearly demonstrates that the substance of Tarver's conversation with Greg Suiter was whether he had been approached to sign an authorization card and to urge him to do so. While somewhat subtle, Tarver's conduct is nevertheless still objectionable under *Harborside* and its progeny. As *Harborside* and its progeny make clear, pro-Union supervisory misconduct need not be explicit or express to be objectionable; subtle and implicit conduct can be, and is, violative of the Act.

Hearing Officer Ireland further improperly concludes that Tarver's conversation with Greg Suiter was merely demonstrative of her personal opinion about unionizing, and, thus, was not objectionable.[11] To reach this rather illogical conclusion, Hearing Officer Ireland contends that Tarver merely *talked* to Greg Suiter about authorization cards and did not expressly request him to sign one. It is, however, clear that under existing precedent, pro-Union supervisory misconduct does not have to be express—implicit or subtly framed comments or actions can, and

[11] For this proposition, Hearing Officer Ireland relies on the Board's decision in *Werthan Packaging, Inc.*, 345 NLRB 343, 344 (2005), where the Board found that a supervisor telling an employee that it was in that person's best interest to vote against the Union, unaccompanied by threats, was too vague to warrant a finding that the employer was threatening the employee because, at most, the supervisor was merely expressing his or her opinion. As Member Liebman noted in her dissent, conduct must be viewed in conjunction with the totality of what was said as isolated permissible statements can be elevated to objectionable if they "impart a coercive overtone." *Id.*, citing *Reno Hilton*, 319 NLRB 1154, 1155 (1995)

do, run afoul of the Act. When viewed in totality with other credited testimony it is clear that Tarver engaged in objectionable conduct, however subtle that conduct may have been. Tarver's actions in soliciting employees to sign Union authorization cards is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

2. Objection No. 2 – A Supervisor and Manager of the Employer Directed Others to Solicit Signatures from Employees on Authorization Cards.

Matt Fraley, through his Affidavit,[12] and Brandy Standifer provided compelling testimony that Tarver directed employees to solicit other employees to sign authorization cards (TR 17-19; EX 4). According to Fraley, Tarver directed her husband, Mark Tarver, and Dana Baldwin to discuss the Union with other employees and get other employees to sign Union authorization cards (EX 4). Specifically, Tarver directed Mark to research the Union and directed Dana to have other employees sign Union authorization cards (EX 4). As Fraley indicated, it was common knowledge to the employees in Floyd, Johnson, and Magoffin counties that Tarver was the individual who started the Union's organizing effort and was directing both Dana Baldwin and Mark Tarver (EX 4).

Standifer testified that Dana Baldwin informed her that Tarver said employees needed to protect themselves and their families and needed to bring in the Union (TR 21, 27, 29, 47-48, 52-53). According to Standifer, Baldwin told her that Tarver instructed her to get other employees interested in the Union and to have them sign Union authorization cards (TR 18-19). Baldwin also told Standifer that Tarver expressly told her (Baldwin) that she (Tarver) could not be involved in the organizing effort and directed her not to use her name because she (Tarver) is a

[12] Although Hearing Officer Ireland dismisses Fraley's statement because he did not appear and testify at hearing, in large part, the information contained in Fraley's Affidavit is corroborated by the Employer's witnesses and, thus, should be considered to that extent inasmuch as it further demonstrates that Tarver engaged in objectionable conduct affecting employees' exercise of free choice in the election.

manager (TR 18-19). Approximately one week later, Baldwin approached Standifer and handed her a Union authorization card, admonishing her not to use Tarver's name (TR 19). Standifer also testified that Mark Tarver, Gina Tarver's husband, told her that Tarver was responsible for the Union organizing effort and its genesis (TR 55). A few weeks prior to the June 10, 2011 election, Standifer confronted Tarver, telling her that the Union's organizing effort had started with Tarver (TR 38-39). Tarver admitted it, responding, "I know" (TR 38-39).

Hearing Officer Ireland, however, again diminishes Tarver's conduct and its impact on employees notwithstanding competent record evidence to the contrary. Importantly, Hearing Officer Ireland credits Standifer's testimony, and Tarver's admission, that the Union organizing effort started with Tarver. Notwithstanding this vital fact (and contrary to the competent record evidence), Hearing Officer Ireland diminishes the impact of Tarver's admission to Standifer by characterizing Tarver's comments to employees as expression of her personal opinion. Likewise, Hearing Officer Ireland minimizes the impact of Tarver's admission to Standifer, which she credits, by characterizing Tarver's express and explicit admission that the organizing campaign started with her as "vague."

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions in directing employees to have other employees sign Union authorization cards is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

3. Objection No. 3 – A Supervisor and Manager of the Employer Threatened Employees with Loss of Benefits, Job Loss, and Other Reductions in Their Terms and Conditions of Employment if They Did Not Support the Union.

At hearing, Standifer, Fraley (through his Affidavit), Greg Suiter, Sam Music, and Roger Duty testified that Tarver threatened employees with loss of benefits, job loss, and other reductions in their terms and conditions of employment if they failed to support the Union. On multiple occasions, Tarver told Standifer that she needed to protect herself and her family (TR 21, 27, 29, 47-48, 52-53). Specifically, she told Standifer that if she did not support and vote in favor of the Union, the Employer would alter her shifts from twenty-four (24) hour shifts to twelve (12) hour shifts (TR 21-22, 47). As amply demonstrated above, this was one of the employees' main areas of concern.

Likewise, Fraley testified that Tarver threatened that, without the Union, the Employer would transition employees from twenty-four (24) hour shifts to twelve (12) hour shifts and that employees would lose their stations forcing them to stage at various locations and sit in their ambulances for their twelve (12) hour shift (EX 4). According to Fraley, Tarver implored employees to support the Union and told them that they needed the Union to protect themselves (EX 4). Additionally, Greg Suiter testified that contemporaneous with his conversation with Tarver as delineated above, Tarver told him that the Employer was going to reduce employees' hours and eliminate overtime (TR 164-66).

Tarver also held several meetings in March 2011, approximately a month before the Union filed its Petition and shortly after she returned from St. Louis, where she told Sam Suiter, Matt Lawson, Tim Marsillett, William Callahan, and Roger Duty that they needed to protect themselves and their families and that meant having a Union (TR 207-08, 227-28).

Hearing Officer Ireland, however, attempts to minimize the obvious impact of Tarver's statements to employees threatening loss of benefits, particularly the loss of twenty-four (24) shifts and stations—a prime concern for employees—by characterizing Tarver's comments as

merely advising employees to protect themselves and that Union representation might be the answer. When viewed in the proper context, *i.e.*, that for all intents and purposes, Tarver was not only *a* supervisor but *the* supervisor, Tarver's comments are far greater than a mere expression of her personal opinion. Tarver's comments, especially her remarks concerning twenty-four (24) hour shifts and stations, were not merely her personal opinion. Instead, given Tarver's high-level position within the company and unique knowledge, especially considering that she had recently returned from St. Louis where she observed another ambulance service's use of staging and other shift options, Tarver was predicting the real prospect that employees might lose their twenty-four (24) hour shifts and stations. When viewed in this light, the competent record evidence compels the conclusion that Tarver engaged in objectionable conduct warranting that the election be set aside. This is especially true where the Hearing Officer credited generally the testimony of the Employer's witnesses over Tarver and credited specifically Standifer's testimony (and Tarver's admission) that the Union organizing effort started with Tarver.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions in threatening employees with loss of benefits and other reductions in their terms and conditions of employment if they did not support the Union is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

4. Objection No. 4 – A Supervisor and Manager of the Employer Directed Employees That They Had to Support the Union to Protect Themselves and Their Families.

The record testimony of Standifer, Sam Music, Julie Suiter, Greg Suiter, Fraley, and Duty makes clear that Tarver directed and advised employees that they had to support the Union to protect themselves and their families (TR 21, 27, 29, 47-48, 52-53, 163, 208, 216, 242; EX 4).

The record evidence demonstrates that employees clearly understood that Tarver's admonishment to "protect themselves" meant that, without the Union, they would be subjected to loss of benefits and other reductions in their terms and conditions of employment. Most notably, and of great importance and concern to employees, Tarver instructed employees that they needed to protect themselves by supporting the Union to avoid having their twenty-four (24) hour shifts reduced to twelve (12) hour shifts, having their stations being taken away, and loss of overtime (TR 47-48, 74, 164, 181, 227-28, 241-42).

As discussed more fully above, Hearing Officer Ireland, however, attempts to minimize the obvious impact of Tarver's statements to employees threatening loss of benefits, particularly the loss of twenty-four (24) hour shifts and stations—a prime concern for employees—by characterizing Tarver's comments as merely advising employees to protect themselves and that Union representation might be the answer. Again, Tarver's statements constitute substantially more than mere personal opinion as explained more fully above. Rather, the competent record evidence compels the conclusion that Tarver engaged in objectionable conduct warranting that the election be set aside. While it seems obvious, it must be stressed that someone only needs to "protect" themselves from a threat. If there is no threat, there is nothing to protect from. Tarver's repeated statements to individuals and groups alike about the need to protect themselves can only be viewed as a threat. As stated by Administrative Law Judge Locke in *Mid Mountain Foods*, 332 NLRB 299, 245 (2000):

> the word 'protect' unavoidably implied a threat or risk against which protection would be needed. The inference of danger is chained just as firmly to the word 'protect' as the attaché case is handcuffed to a diplomatic courier. It is necessary baggage. (emphasis added)

To find that the phrase "protect yourself" implies anything other than a threat strains the bounds of credulity. Here, Tarver even repeatedly tied the phrase not just to a general need for

protection but from the specific threats of loss of hours and other benefits and those specific threats were the common concern of employees who signed authorization cards forming the entire basis for their desire to form a Union.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions in instructing and directing them to support the Union in order to "protect themselves and their families" to avoid loss of benefits and other reductions in their terms and conditions of employment is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

5. Objection No. 5 – A Supervisor and Manager of the Employer Instructed Employees to Begin Organizing Activities on Behalf of the Union.

As Standifer, Julie Suiter, Greg Suiter, Fraley, and Duty made clear, Tarver instructed employees to initiate organizing activities on behalf of the Union. For example, according to Standifer, Tarver urged Baldwin to encourage other employees to support the Union and to start looking into the Union but told her that she (Baldwin) could not mention her (Tarver's) name because Tarver was a manager (TR 17-18, 19). In response, Baldwin brought up the subject of the Union with, *inter alia*, Standifer, and asked her what she thought about the Union and how Standifer's partner would feel about the Union (TR 17).

Similarly, Tarver held meetings where she told employees that they needed to protect themselves and their families and that that meant supporting the Union. Julie Suiter was present at a station meeting conducted by Tarver in mid-March 2011, where Tarver told employees including Duty, Sandy Price, Stephenie Burchett, Bobby Page, James Hitchcock, and Lana Schindler that they needed to protect themselves and their families because she (Tarver) did not

know what negative changes the new owners would be making, including possible changes to shift structures and partner assignments (TR 240-41). Within a week, Julie Suiter was approached by Price about supporting an effort to bring in the Union (TR 243).

Likewise, Fraley testified that he had several meetings with Tarver about the Union both before and after the Union filed its Petition (EX 4). Tarver told Fraley and other employees on several occasions that they were going to lose their twenty-four (24) hour shifts and their stations, meaning they would have to stage and sit in their ambulances for the duration of their shifts, and that they needed to look into the Union to protect themselves (EX 4). Duty corroborated Fraley's affidavit testimony, stating that he attended two meetings in mid-March where Tarver admonished employees to protect themselves and their families, telling employees that that meant having the Union (TR 207-08, 210-11).

Although Hearing Officer Ireland attempts to diminish Tarver's actions, the record evidence compels the conclusion that Tarver engaged in objectionable conduct. This is especially true where Hearing Officer Ireland credited the testimony of Standifer (and, by extension, Tarver's admission) that the organizing effort had its genesis in Tarver.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions in instructing and directing them to commence an organizing effort on behalf of the Union in order to "protect themselves and their families" to avoid loss of benefits and other reductions in their terms and conditions of employment is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

6. Objection No. 6 – A Supervisor and Manager of the Employer Was Present and Oversaw the Solicitation of Support for the Union by Employees She Had Directed to Solicit Support for the Union.

The testimony of Standifer, Julie Suiter, Greg Suiter, Fraley, and Duty clearly demonstrates that Tarver was present for and oversaw the solicitation of support for the Union by those employees she had directed and instructed to solicit support for the Union. Tarver, holding a Union authorization card, confronted Greg Suiter and asked him if anyone had talked with him about signing a Union authorization card (TR 150). When he responded that he was not interested in the Union, Tarver retorted that he "need[ed] to think about it to protect" himself and his family (TR 150). Moreover, Tarver's decision and expressed intentions to other employees to go to Marsillett's house in an effort to force him to sign a Union authorization card is a particularly egregious example of Tarver's supervision of the organizing effort (TR 219, 244).

Again, Hearing Officer Ireland improperly diminishes Tarver's actions to reach her conclusion that Tarver's conduct is not objectionable within the meaning of *Harborside Healthcare* and its progeny. The competent record evidence compels that conclusion that Tarver was present for and actively encouraged and directed other employees to solicit support for the Union. This is especially true where, as here, Hearing Officer Ireland credited the testimony of Standifer that the Union organizing effort was started by Tarver.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions, both in being present for and overseeing the solicitation of support for the Union by employees is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

7. Objection No. 7 – A Supervisor and Manager of the Employer Promised Increased Pay, Benefits, and Other Improvements to Employee Terms and Conditions of Employment if Employees Would Support the Union.

As the testimony of Standifer and Fraley makes clear, Tarver promised increased pay, benefits, and other improvements to employees' terms and conditions of employment in exchange for supporting the Union. Specifically, Tarver told Fraley that with the Union, his shift and station assignments could not be taken away (EX 4). Similarly, Tarver told Standifer and her partner on several occasions that, with the Union, their twenty-four (24) hour shifts would be protected (TR 48; EX 4).

As discussed above, Hearing Officer Ireland, however, attempts to minimize the obvious impact of Tarver's statements to employees regarding the potential loss of twenty-four (24) hour shifts and stations—a prime concern for employees—by characterizing Tarver's comments as merely advising employees to protect themselves and that Union representation might be the answer. As amply demonstrated, Tarver communicated that, by supporting the Union, employees would be able to protect their twenty-four (24) hour shifts and station assignments. Contrariwise, by not supporting the Union, employees might lose their twenty-four (24) hour shifts and station assignments. As discussed above, Tarver's statements in this respect were not mere expressions of her personal opinion. Rather, as *the* Employer's supervisor, especially considering the knowledge Tarver recently garnered from her trip to St. Louis, Tarver was predicting the real prospect that the Employer would take away employees' twenty-four (24) hour shifts and permanent stations in favor of shorter shifts and staging. Notwithstanding Hearing Officer Ireland's contrary determination, the competent record evidence compels the conclusion that Tarver engaged in objectionable conduct warranting that the election be set aside.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions, in promising increased pay, benefits, and other improvements to employees' terms and conditions of employment in exchange for supporting the Union is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

8. Objection No. 8 – A Supervisor and Manager of the Employer Was Present When Union Authorization Cards Were Distributed and/or Signed by Employees.

As the testimony of Greg Suiter and Julie Suiter makes clear, Tarver was present when Union authorization cards were distributed or signed by employees. One of the most egregious examples of Tarver's conduct in this respect is illustrated by her expressed intention to go to Marsillett's home to force him to sign a Union authorization card (TR 219, 244). Likewise, as the record demonstrates, Tarver confronted Greg Suiter, holding a Union authorization card, and interrogating him about whether he had been asked to sign a Union authorization card and urging him to do so to protect himself and his family (TR 150-51, 163).

Hearing Officer Ireland, however, attempts to diminish or minimize Tarver's actions and objectionable conduct notwithstanding the fact that she credits the testimony of the Employer's witnesses that Tarver intended to go to Marsillett's home to pressure him to sign an authorization card and interrogated Greg Suiter about signing an authorization card. The competent record evidence compels the conclusion that Tarver engaged in objectionable conduct in doing so, warranting that the election be set aside.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions, both in being present when Union authorization cards were distributed or signed by

employees and her active participation in the distribution of Union authorization cards and obtaining employee signatures is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

9. Objection No. 9 – A Supervisor and Manager of the Employer Assisted Employees in Obtaining Signed Authorization Cards.

The testimony of Standifer, Fraley, Greg Suiter, and Duty illustrates that Tarver actively assisted employees in obtaining signed authorization cards. Standifer's testimony demonstrates that Tarver instructed and assisted Dana Baldwin in obtaining signed Union authorization cards from other employees (TR 17, 18-19). Fraley's affidavit also demonstrates that Tarver directed Baldwin to solicit other employees to sign Union authorization cards (EX 4). Moreover, Tarver actively approached and attempted to get Greg Suiter to sign a Union authorization card (TR 150). Likewise, the record evidence indicates that Tarver went to the home of Marsillett to force him to sign a Union authorization card (TR 219, 244).

As illustrated above, Hearing Officer Ireland improperly diminishes Tarver's actions to reach her conclusion that Tarver's conduct is not objectionable within the meaning of *Harborside Healthcare* and its progeny. The competent record evidence amply demonstrates that Tarver took an active role in assisting employees in their efforts to obtain signed Union authorization cards. Tarver's conversation with Greg Suiter and her expressed intentions to other employees to go to Marsillett's home to force him to sign an authorization card are indicative of Tarver's actions. Importantly, Tarver's conduct in this respect constitutes objectionable conduct within the meaning of *Harborside Healthcare* and its progeny, and impacted employees' exercise of free choice in the election.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's

actions, in assisting employees in obtaining signed Union authorization cards, is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

10. Objection No. 10 – A Supervisor's and/or Manager's Support for the Union Was Communicated to Eligible Voters by Said Supervisor and Manager and by Eligible Voters/Employees.

The testimony of the Employer's witnesses compels the conclusion that Tarver actively and expressly communicated her support for the Union and urged employees to support the Union to protect themselves and their families. Tarver's support for the Union was also manifested by her actions, particularly her expressed intention to go to Marsillett's home to force him to sign a Union authorization card (TR 219, 244), and her interrogation of Greg Suiter as to whether he had been approached about signing a Union authorization card and urging him to support the Union to protect himself and his family (TR 150, 154-55, 163).

Hearing Officer Ireland's attempts to minimize Tarver's conduct and its impact must be rejected. Although crediting the Employer's witnesses that Tarver did indeed in certain conduct, Hearing Office Ireland tries to diminish Tarver's actions by improperly characterizing them as expressions of her personal opinion. The record evidence, however, amply demonstrates that not only was Tarver responsible for the start of the organizing effort but that she actively participated in having employees sign authorization cards and expressing her support for the Union. Tarver did not merely express her personal opinion, she actively encouraged employees to support the Union, indicating that employees would be subjected to losses in benefits, particularly the loss of twenty-four (24) hour shifts and stations, if they did not support the Union. In doing so, Tarver tied potential losses to employees' failure to support the Union, and, thus, impacted employees' exercise of free choice in the election. Tarver's conduct was clearly objectionable, warranting that the election be set aside.

As found by Hearing Officer Ireland based upon competent record evidence, Tarver, at all relevant times, was a supervisor within the meaning of Section 2(11) of the Act. Tarver's actions, in communicating her support for the Union to employees is clearly violative of the Act and constitutes objectionable conduct warranting that the election be set aside.

11. Objection No. 11 – A Supervisor and Manager of the Employer Engaged in Pro-Union Conduct Expressly Prohibited Under the Board's Standards as Enumerated in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004).

The Board was clear in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), that pro-Union conduct by a supervisor is grounds for overturning an election. As explained above, when determining whether pro-Union supervisory conduct interfered with the laboratory conditions required for a fair election, the Board employs a two-pronged test:

> (1) Whether the supervisor's pro-Union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
>
> This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-Union conduct; and (b) an examination of the nature, extent, and context of the conduct in question.
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Harborside, 343 NLRB at 909.

The solicitation of Union authorization cards by a supervisor has "an inherent tendency to interfere with the employee's freedom to choose to sign a card or not" and will be objectionable "absent mitigating circumstances." *Harborside* at 901. *See also, Madison Square Garden*, 350 NLRB 117 (2007). Not only did Tarver directly solicit signatures on cards, such solicitations

were accompanied by threats of lost hours, pay, and other benefits, and there are not any mitigating circumstances warranting a finding that the conduct was not coercive. *Harborside* also makes clear that such card solicitations are grounds to overturn an election even if the solicitation occurs prior to the filing of the petition because of the inherent coercive nature of the conduct, the effects of it would poison employee sentiment throughout the critical period. *Harborside* at 912. It is clear from the evidence presented that Tarver, the highest ranking supervisor present on a day-to-day basis, told employees they needed the Union to protect themselves and if they did not bring in the Union, they would lose hours, pay, and other benefits. Particularly, Tarver tied the employees' failure to support the Union to the loss of twenty-four (24) hour shifts and stations—predicting a very real prospect given her position and unique knowledge, especially considering the timing of events following her return from St. Louis. Such statements are clearly threatening and coercive in nature and were repeated to multiple employees in individual as well as group settings both before and after the filing of the petition. Not only did the highest ranking official directly solicit cards, but it was common knowledge she was directing others to solicit signatures on the cards and was directing the entire Union organizing effort. Her conduct could not be anymore coercive, pervasive, and objectionable.

All of the factors set forth in *Harborside* weigh in favor of setting aside the election. Regarding the first factor, it is clear that the highest ranking official present on a day-to-day basis and with direct supervisory authority over the bargaining unit employees engaged in inherently coercive conduct. The second prong of the analysis is also met as the margin of victory was five (5) votes out of a unit of one hundred, the conduct was widespread, the conduct occurred both before and after the filing of the petition, the conduct in question was "common knowledge" among the employees, and, as a matter of law, the conduct had a lingering effect.

Hearing Officer Ireland attempts to diminish the impact of Tarver's actions by contending that Tarver's conduct during the critical period affected only three (3) employees. Hearing Officer Ireland, however, recognizes that Tarver's pre-petition conduct, which may be considered because it adds meaning and dimension to Tarver's related post-petition conduct, *Dresser Industries, Inc.*, 242 NLRB 74, 74 (1979) (*citing Stevenson Equipment Co.*, 174 NLRB 865, 866 n.1 (1969)), would clearly have affected a critical number of—at the very least ten (10)— employees. Moreover, it is important to recognize that Hearing Officer Ireland's premise rests on the faulty presumption that employees did not communicate with one another about Tarver's conduct or her support for the Union—a presumption which is clearly belied by the record evidence as Tarver's conduct and support for the Union was "common knowledge" among the employees. Further, the testimony of Petitioner's witnesses who solicited authorization cards was that it was definitely discussed among employees who signed authorization cards. (TR. 350-352). Specifically, Petitioner witness Reid who solicited 21 signatures on authorization cards testified that the subject of hours being cut from twenty-four (24) hour shifts to twelve (12) hour shifts was brought up to him by those he solicited several times. (TR 352)

Similarly, Hearing Officer Ireland attempts to minimize the timing of Tarver's objectionable conduct by concluding that only four (4) credited conversations took place during the critical period and roughly two-and-one-half (2 ½) months elapsed between Tarver's purported final conversation about the Union and the election. Hearing Officer Ireland's treatment of this factor is specious. The simple fact is that Hearing Officer Ireland recognized that Tarver's pre-petition conduct is relevant and must be examined because it gives meaning and context to her post-petition conduct. Moreover, Hearing Officer Ireland's conclusion

considers only certain conversations and wholly fails to consider Standifer's late May conversation with Tarver that occurred shortly before the election.

Likewise, Hearing Officer Ireland discounts the lingering effect of Tarver's objectionable conduct. Tarver's conduct was not only common knowledge among the employees, Tarver's last minute, impassioned pleas to Standifer to vote against the Union had no impact because, as Standifer testified, Tarver "never took back the things that she said"—specifically, that employees' twenty-four (24) hour shifts and stations were in jeopardy and that the employees' needed to support and vote for the Union to protect these things and prevent the Employer from altering them. Additionally, Hearing Officer Ireland minimizes the impact of Tarver's objectionable conduct by erroneously concluding that her actions impacted only three (3) employees despite record evidence to the contrary.

Finally, Hearing Officer Ireland erroneously concludes that the Employer's communications to employees during the critical period, *i.e.*, six (6) memoranda distributed between April 29 and June 7 which Hearing Officer Ireland characterizes as anti-Union, were sufficient to overcome or remedy Tarver's objectionable conduct. In doing so, Hearing Officer Ireland, emphasizes the fact that the Employer's memoranda did not discuss, mention, or disavow Tarver's alleged conduct prior to the election. This fact, however, assumes, erroneously, that the Employer knew about Tarver's activities on behalf of the Union's organizing effort *before* the election. Although the Board has recognized that an employer's anti-Union campaign *may* mitigate the coercive effect of objectionable pro-Union supervisory conduct, such mitigation hinges on whether higher management learns of such conduct and takes timely and effective steps to disavow it. *Terry Machine Co., Division of S.P.S. Technologies, Inc.*, 2011 NLRB LEXIS 136, 356 NLRB No. 120 (2011). Unlike here, the employer in *Terry*

Machine engaged in an aggressive anti-Union campaign and explicitly disavowed the pro-Union supervisory conduct at issue. *Id*. In this case, the Employer neither waged an *aggressive* or *vigorous* anti-Union campaign nor explicitly disavowed any of Tarver's objectionable conduct because it was not aware of the conduct until *after* the election. Moreover, it bears repeating that, as the record evidence clearly demonstrates, employees viewed Tarver not only as *a* supervisor, but *the* Employer's supervisor. This simply is not a case of a low-level supervisor engaging in objectionable behavior that was sufficiently mitigated by other actions undertaken in response to the Union's petition by an employer.

Tarver's actions as the highest ranking official on a day-to-day basis with direct supervisory authority over the employees were coercive, pervasive, and objectionable. Moreover, the competent record evidence compels the conclusion that the employees' exercise of free choice was impacted by Tarver's actions. When considered in the aggregate, it is clear that Tarver's objectionable pro-Union conduct warrants setting aside the election.

B. The Hearing Officer Erred by Misapplying Extant Board Law and Failed to Properly Conclude That the Board Lacks Jurisdiction Inasmuch as the Employer Is a "Political Subdivision" Within the Meaning of the Act.

As Hearing Officer Ireland recognized, notwithstanding the Union's contention to the contrary (TR 111), a question concerning *statutory* jurisdiction may be raised at any time. *See Ryder Student Transportation, Inc.*, 297 NLRB 371 (1989), and the cases cited therein. *See also Training School at Vineland*, 301 NLRB 217 (1991). Thus, a question regarding whether the exemption contained in Section 2(2) for political subdivisions applies may be raised at any time and the failure of a party to raise the issue during an initial representation case hearing does not constitute waiver.

To determine whether an entity falls with the exemption for state or political subdivisions contained in Section 2(2) of the Act, the Board looks to whether the entity is: (1) created directly by the state so as to constitute a department or administrative arm of the government, or (2) administered by individuals who are responsible to public officials or to the general public. *Natural Gas Utility District of Hawkins County*, 167 NLRB 691 (1967), *enfd.* 427 F.2d 312 (6th Cir. 1970), *aff'd as to applicable standard only* 402 U.S. 600 (1971). Importantly, the issue whether an entity is a "political subdivision" is a question of *federal* law. *Id.* Although state law interpretations of an entity's status are among the factors to be considered, the entity's "actual operations and characteristics" are determinative. *Id*.

In determining whether an entity falls within the first prong of *Hawkins County*, the Board and courts generally look to whether the entity was created by or pursuant to statute. *Hinds County Human Resource Agency*, 331 NRLB 1404 (2000) (Board dismissed petition on jurisdictional grounds after finding that the employer was created by the county Board of Supervisors pursuant to a state statute granting the authority for these agencies to Boards of Supervisors); *Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266 (6th Cir. 1990) (regional transit authority authorized by and created pursuant to state statute is a political subdivision); *New Britain Inst.*, 298 NLRB 862 (1990) (public library created by special act of state legislature is a political subdivision); *State Bar of New Mexico*, 346 NLRB 674 (2006) (jurisdiction lacking where state bar is a creature of the New Mexico Supreme Court and serves as an administrative arm of the court). An entity, however, does not become a creature of the state by the mere receipt of public funds, *see Service Employees Local 402 (San Diego Facility Corp.)*, 175 NLRB 161 (1969); *Trans-East Air, Inc.*, 189 NLRB 185 (1971), or even because employees are paid by the governmental entity where this is merely a convenient method for

transferring funds to the entity. *Minneapolis Society of Fine Arts*, 194 NLRB 371 (1972). Exemption from federal income taxes is only relevant *if* the exemption exists because of the entity's status as a political subdivision under federal law. *Concordia Elec. Coop.*, 315 NLRB 752 (1994).

With respect to the second prong of *Hawkins County*, an entity is administered by individuals who are responsible to the general electorate "only if the composition of the group of electors eligible to vote for the entity's governing body is sufficiently comparable to the electorate for general political elections in the State that the entity in question may be said to be subject to a similar type of degree of popular control." *Concordia Elec. Coop.*, 315 NLRB 752 (1994); *see also Enrichment Services Program, Inc.*, 325 NLRB 818 (1998). In *Enrichment Services*, the Board found that the employer was not an exempt political subdivision because less than a majority of its board was comprised of public officials or individuals responsible to the general electorate.

Similarly, in *FiveCAP, Inc.*, 331 NLRB 1164 (2000), the Board found that the governing body of a Head Start program was not an exempt political subdivision where one-third of the board was required to be "representatives of the poor." FiveCAP, a non-profit community action agency, served four counties in Michigan. Because it received federal funds pursuant to the Community Services Block Grant Act, it was required to have a board of directors with a tripartite structure, with one-third of its members elected public officials or their representatives, one-third chosen from the private sector, and one-third "persons chosen in accordance with democratic selection procedures adequate to assure that they are representatives of the poor in the area served." The determinative issue was whether this latter group of individuals was

"responsible to the general electorate." The Board answered that question in the negative because "such an electorate was not the same as the electorate for general political elections."

Recently, in *Charter School Administration Services, Inc.*, 353 NLRB 394 (2008), the Board reaffirmed its two-prong test for determining whether an employer is a political subdivision. The Board held that the private for-profit corporation was not a political subdivision, even assuming that the school itself was a political subdivision. The Board noted that in determining whether an entity is "administered" by individuals responsible to public officials or to the general public, "the relevant inquiry is whether the individuals who administer the entity are appointed by and subject to removal by public officials." *Id. citing Research Foundation of the City University of New York,* 337 NRLB 965, 969 (2002). Specifically, the Board considers "whether the composition, selection and removal of the employer's board of directors are determined by law or by the employer's own governing documents." *Id.* Importantly, the Board continues to consider the relationship between the employer's governing body and the governmental agency to which it is linked. As explained more fully above, the Board has continued to find it significant where a majority of the employer's board of directors is composed of individuals responsible to public officials or to the general public. *Id. citing Regional Medical Center at Memphis*, 343 NLRB 346, 359 (2004).

In *Charter School Administration Services,* the Board, in concluding that the employer was not a political subdivision, found it significant that: (1) the employer's board of directors were elected by the corporation's shareholders (not public officials), who had the power to remove a director with or without cause; (2) the employer, as a private corporation, was not subject to Michigan's Open Meetings Act or Freedom of Information Act; thus, the employer's meetings were not open to the public and its corporate documents, *e.g.*, financial records, audit

records, etc., were not public records; (3) there was no state requirement that the employer be audited and its corporate budget was not subject to review or approval by any other entity; (4) the employer's corporate business operations were conducted by its president/CFO, several vice presidents, etc.; and (5) the employer's employees did not take a public oath or enjoy governmental immunity.

In the instant case, it is clear that the Employer operates at the pleasure and direction of the Commonwealth of Kentucky. In this respect, the Employer, operating as a private ambulance service, is highly regulated by the Commonwealth (TR 103). Specifically, the Kentucky Board of EMS regulates ambulance services through the Commonwealth (TR 103). Dossett is a member of the Kentucky Board of EMS and represents private ambulance services (TR 103-04).[13]

The Employer must comply with various statutes and regulations (TR 105-07; EX 2-3). For example, the regulations set forth the job duties of first responders, emergency medical technicians (EMTs), and paramedics (TR 107-09). Ambulance services cannot deviate from the regulations in the assignment of tasks to employees (TR 109). Likewise, the Employer must conduct background checks on applicants and is prohibited by law from hiring individuals with felony convictions (TR 110-11; EX 3). Finally, the Kentucky Board of EMS has the authority to discipline individual employees of the Employer, including imposing fines, revoking or suspending certification or licensure, or placing a limitation on an employee's ability to practice (TR 109; EX 2, *see* Ky. Rev. Stat. § 311A.060).

Given the broad authority of the Kentucky Board of EMS and particularly the Employer's position as the *sole* provider of ambulance services in Magoffin County, the

[13] Dossett was appointed to the Kentucky Board of EMS by the governor to a four (4) year term.

Employer is a "political subdivision" within the meaning of the Act. The Kentucky Board of EMS' ability to discipline directly individual employees in conjunction with the regulatory scheme imposed by the Commonwealth compels the conclusion that the Employer is a "political subdivision" and, thus, the Board is without jurisdiction. Therefore, the Board should set aside the election for the reasons more fully discussed above and dismiss the Petition for lack of statutory jurisdiction.

V. CONCLUSION

WHEREFORE, for all of the reasons set forth herein, the Employer respectfully requests that the Regional Director set aside the results of the June 10, 2011 election and dismiss the Petition.

Respectfully submitted,

THE LOWENBAUM PARTNERSHIP, L.L.C.

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Dated: September 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of September, 2011, served a true and correct copy of the foregoing upon the following via E-Filing:

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570-0001

Gary W. Muffley, Regional Director
National Labor Relations Board
Region 9
3033 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Additionally, I hereby certify that I have this 8th day of September, 2011, served a true and correct copy of the foregoing upon the following via e-mail:

Mr. Dan Thompson, Esq.
National EMS Association
11344 Coloma Road, Suite 145
Gold River, California 95670
Daniel@goyette-assoc.com

Additionally, I hereby certify that I have this 8th day of September, 2011, served a true and correct copy of the foregoing via Federal Express to the following:

Mr. Torren Colcord, President
National Emergency Medical Service Association (NEMSA)
4701 Sisk Road, Suite 102
Modesto, CA 95356-9320

John P. Hasman