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

In the Matter of

DHP INCORPORATED D/B/A QUESTCARE EMS

Employer

and Case 9-RC-18353

NATIONAL EMERGENCY MEDICAL SERVICES ASSOCIATION (NEMSA)

Petitioner

SUPPLEMENTAL DECISION,
ORDER
AND
DIRECTION OF SECOND ELECTION

Pursuant to the provisions of a Decision and Direction of Election (Decision) issued on May 12, 2011, an election by secret ballot was conducted on June 10, 2011 [1]/ among certain employees of the Employer. [2]/ According to the tally of ballots made available to the parties, there were 102 eligible voters of whom 45 cast votes for the Petitioner, 40 cast votes cast against the Petitioner and 1 cast a challenged ballot, which was not determinative of the election results. The Employer timely filed 11 objections to conduct affecting the results of the election, all of which were predicated on the alleged pro-union conduct of statutory supervisor Gina Tarver. On July 7, a Supplemental Report, Order Directing Hearing and Notice of Hearing issued directing that a hearing be held before a hearing officer to resolve the issues raised by the Employer's objections. On July 19 and 20, a Hearing Officer held a hearing on the issues raised by the objections and thereafter, on August 25, issued her report recommending that they be overruled in their entirety and that an appropriate certification of representation be issued.

The Employer timely filed exceptions to the Hearing Officer's findings and recommendations. [3]/ In general terms, the Employer maintains that the Hearing Officer erred in her application of extant Board law to the appropriate facts in finding that Tarver's conduct was not objectionable and did not warrant an order setting aside the election. Additionally, the

[1] / All dates hereinafter are in 2011 unless otherwise stated.

[2] / The Decision sets forth the appropriate unit as: "All full-time and regular part-time paramedics, EMT basics, EMT first responders, lifters, dispatchers, mechanics and office clerical employees; but excluding all professional employees, guards and supervisors as defined in the Act."

[3]/ The Petitioner filed a brief reply to the exceptions.

Employer maintains that the Hearing Officer erred in failing to find that it is exempt from the Board's jurisdiction as a political subdivision within the meaning of Section 2(2) of the Act, an issue that the Employer first raised at the post-election hearing on objections. [4]/

The objections generally break down into three categories related to (a) Tarver's alleged direct and indirect involvement in the solicitation of union authorization cards (Objections 1, 2, 6, 8 and 9); (b) her alleged initiation and direction of organizing activities among employees (Objection 5); and, (c) her alleged statements threatening the loss of jobs, and other benefits if employees failed to support the union and promising increased pay, benefits and other improvements if employees supported the union (Objections 3, 4 and 7). Additionally, the Employer advances a general claim that Tarver's support for the union was communicated to eligible voters (Objection 10) and that she engaged in pro-union conduct expressly prohibited by the Board in *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004) (Objection 11).

I have carefully reviewed the Hearing Officer's rulings made at the hearing and find that they are free from prejudicial error. Accordingly, her rulings are affirmed. After a review of the record in light of the exceptions and the parties' briefs, and for the reasons set forth in detail below, I agree with the Hearing Officer's conclusions and recommendations finding that the Employer is subject to the Board's jurisdiction and overruling Objections 1, 2, 5, 6, 7, 8, 9 and 10, relating to Tarver's alleged initiation of organizing activity, involvement in the solicitation of union authorization cards, and promise of benefits. However, I find merit to the Employer's exceptions to the Hearing Officer's conclusions and recommendations overruling Objections 3 and 4, relating to Tarver's statements concerning the loss of jobs and other benefits if employees failed to support the union, and overruling Objection 11 insofar as it encompasses such statements and I will sustain those Objections. I will first address the threshold jurisdictional issue. I will then address the objections, and the Employer's exceptions, by reference to the three categories of Tarver's alleged conduct as outlined above.

I. Jurisdiction:

I agree with the Hearing Officer's findings, conclusions and recommendations that the Employer falls within the jurisdiction of the Act. As reflected in the Regional Director's Decision and the record herein, the Employer is a private ambulance provider engaged in providing emergency and non-emergency transportation in Floyd, Johnson, Pike and Magoffin counties in southeastern Kentucky. The Employer argues that it is a political subdivision within the meaning of Section 2(2) because it operates at the pleasure and direction of the Commonwealth of Kentucky, must comply with its various statutes and regulations and is the sole provider of ambulance services to Magoffin County. It adds that Terry Dossett, its Vice-President of Operations, is a member of the Kentucky Board of Emergency Medical Services (EMS), to which he was appointed a four-year term by the Governor of Kentucky. None of these factors render the Employer a political subdivision within the meaning of the Act.

An entity is exempt from the Board's jurisdiction as a political subdivision if it is either (1) directly created by the state so as to constitute a department or administrative arm of the

[4]/ At the pre-election hearing in this matter the Employer stipulated that it was an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971); *Charter School Administration Services, Inc.*, 353 NLRB 394, 397 (2008). There is no record evidence showing how the Employer was created and the Employer does not assert that it was created by the Commonwealth of Kentucky. Thus, it clearly does not come within the first prong of *Hawkins County*, supra. For an entity to be deemed "administered by" individuals responsible to public officials or the general electorate under the second prong of *Hawkins County*, supra, such individuals must constitute a majority of the entity's board. *Enrichment Services Program, Inc.*, 325 NLRB 818, 819 (1998), citing *Jefferson County Community College v. NLRB*, 732 F.2d 122, 126 (10th Cir. 1984). Moreover, they must be appointed and subject to removal by public officials. Cf. *Research Foundation of the City University of New York*, 337 NLRB 965, 969 (2002) As correctly pointed out by the Hearing Officer, there is no record evidence regarding the composition of the Employer's board of directors or by whom its members are appointed. Dossett's governor-appointed membership on the Kentucky Board of EMS is the sole piece of evidence that the Employer proffered in support of the proposition that it is administered by individuals responsible to public officials or the electorate and his appointment is simply not probative of the issue. In this regard, the record discloses that the Kentucky Board of EMS is comprised of various governor-appointed individuals from the emergency medical services field, including first responders, EMTs and paramedics, and is responsible for regulating both public and private sector ambulance services. There is no evidence in the record indicating that Dossett is responsible to the Kentucky Board of EMS *on behalf of the Employer*, which is the relevant inquiry.

The Employer's role as the sole provider of ambulance services to Magoffin County does not, standing alone, make it a political subdivision. The Board has routinely asserted jurisdiction over private corporations who contract with government entities to provide certain services. See, e.g., *Charter School Administration Services*, supra; *Research Foundation of the City University of New York*, supra; and *Enrichment Services Program, Inc.*, supra. Finally, the extent to which the Commonwealth of Kentucky dictates certain of the Employer's hiring criteria, e.g., criminal background checks, applies equally to all emergency medical service providers that operate in Kentucky and is merely a byproduct of its oversight of the industry.

II. The Objections:

The Hearing Officer correctly found that Tarver was a supervisor during all times material to this proceeding and up until her termination on June 22. In this regard, both the record herein, and the stipulation of the parties at the pre-election hearing, reflect that Tarver held the position of the Employer's Director of Operations until at least April 21, in which capacity she undisputedly possessed at least three indicia of supervisory authority – the authority to hire, fire and discipline employees. [5]/ The record further establishes that Tarver continued to possess supervisory authority after April 21 when she assumed new administrative duties. I further note that although the Petitioner contended at the post-election hearing that Tarver was no

[5]/ The April 21 date is based upon the parties' April 21 stipulation at the pre-election hearing that Tarver was the Employer's Director of Operations and a supervisor within the meaning of Section 2(11) of the Act possessing or exercising one or more indicia of supervisory authority.

longer a supervisor following the hire of Dossett on April 1, neither party filed exceptions to the Hearing Officer's findings regarding Tarver's supervisory status.

In considering the Employer's exceptions, and the proof available to sustain or overrule its objections, I rely on the Hearing Officer's factual findings, and her related credibility resolutions, which I adopt as fully supported in the record. [6]/ Like the Hearing Officer, I consider Tarver's alleged conduct within the framework of *Harborside Healthcare, Inc.*, supra, wherein the Board articulated a two-part test to determine whether pro-union supervisory conduct upsets the requisite laboratory conditions for a fair election. Thus, I must consider whether Tarver's alleged conduct:

> (1) reasonably tended to coerce or interfere with the employees' exercise of free choice in the election (a) considering the nature and degree of her supervisory authority and (b) examining the nature, extent and context of her conduct; and
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> (2) 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 her conduct was widespread or isolated; (c) the timing of the conduct; (d) the extent to which her conduct became known, and (e) the lingering effect of the conduct. *Harborside Healthcare*, supra at 909.

I must also consider whether the alleged pro-union supervisory conduct was mitigated by any anti-union statements by higher-level management officials and whether the Employer disavowed Tarver's conduct. *Id*. at 910, fn. 12.

A. Tarver's alleged direct and indirect involvement in the solicitation of union authorization cards (Objections 1, 2, 6, 8 and 9):

In agreement with the Hearing Office, the probative evidence does not establish that Tarver either directly or indirectly solicited union authorization cards from employees. The Hearing Officer properly ignored the purported affidavit of Matthew Fraley, which was ostensibly taken by the Employer's attorney before the hearing and proffered at the hearing to support the Employer's objections related to Tarver's alleged solicitation activities and initiation of the organizing campaign, after Fraley failed to appear. The affidavit does not fall within any exceptions to the hearsay rules; Fraley was not available for cross-examination and the affidavit otherwise carries no indicia of reliability or trustworthiness warranting its consideration. See, *Ohmite Manufacturing Co.*, 290 NLRB 1036, 1037 (1988). Like the Hearing Officer, I have given no weight to Fraley's affidavit in considering the evidence supporting the objections.

Tarver's alleged acts of indirect solicitation are supported solely by uncorroborated hearsay testimony. For example, EMTs Sam Music, Brandi Standifer, Timothy Marsillett and Greg Suiter (G. Suiter) all testified that Dana Baldwin made statements to them *attributing*

[6]/ The Employer does not except to the Hearing Officer's credibility determinations and the Board's long-established policy is to not overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the reviewer that they are incorrect. *BFI Waste Services*, 343 NLRB 254, fn. 1 (2004); *Deaconess Medical Center*, 341 NLRB 589, fn. 1 (2004).

solicitation activity to Tarver. However, none of them witnessed such activity, Baldwin was not called to corroborate their claims and Tarver denied such activity. G. Suiter testified that mechanic Drew (last name unknown) told him that Tarver had asked him (Drew) about union cards but, again, Drew was not called as a witness to corroborate such claim and Tarver denied such conduct. Even assuming that these conversations occurred, they may not be properly relied upon to prove the assertion that Tarver engaged in solicitation activities and the Hearing Officer appropriately accorded them no weight. [7]/ See, e.g., *Delphi/Delco East Local 651(General Motors Corporation)*, 331 NLRB 479, 481 (2000) (uncorroborated testimony of employee who testified that a fellow employee told her that he heard a union official call her a "voodoo sister" unreliable hearsay which does not support a finding that union was hostile towards her); *Ohmite Manufacturing Co.*, supra (Board upheld Administrative Law Judge's dismissal of alleged threat of plant closure supported solely by uncorroborated hearsay testimony).

There are two alleged instances of direct solicitation in the record, an exchange that occurred between Tarver and G. Suiter and Tarver's alleged solicitation of Marsillett at his home. The Hearing Officer correctly found that the latter did not occur based upon the credited testimony of Marsillett, corroborated by Tarver, denying the incident. In the former instance, the Hearing Officer concluded that Tarver's conduct toward G. Suiter did not constitute solicitation. Based on the credited testimony of G. Suiter, the Hearing Officer found that, at some point after the petition was filed, Tarver, while sitting at her desk about 10 feet away from G. Suiter, asked G. Suiter if anyone had talked to him about union cards while holding up either a "book" or a "little square" card. G. Suiter admitted that he did not know whether Tarver was actually holding an authorization card. After G. Suiter stated that he was anti-union and didn't want anything to do with it, Tarver replied that "you need to really think about . . . need to do whatever you can to protect your family" and that "she didn't know what those f----n' idiots from St. Louis are going to do." This was the entirety of their exchange. The Hearing Officer reasonably inferred from these credited facts that Tarver did not solicit an authorization card from G. Suiter, and I find no basis for rejecting her inferences and reaching a different conclusion. [8]/ "Solicitation . . . usually means asking someone to join the union by signing his name to an authorization card" and "is not the same thing as talking about a union, or a union meeting or whether a union is good or bad." *W.W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978); *Wal-Mart Stores, Inc.*, 340 NLRB 637, 638 (2003). An "integral part" of the process is the "actual presentation of an authorization card" to the solicited employee. *Wal-Mart Stores*, supra. Here the credited evidence does not establish that Tarver presented a card to G. Suiter. Moreover, as the Hearing Officer pointed out, Tarver never asked G. Suiter to sign anything. Under these circumstances, the Hearing Officer appropriately concluded that Tarver's conduct amounted to mere questioning rather than solicitation.

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[7]/ The Hearing Officer stated that she believed that the conversations between Marsillett and Baldwin and between G. Suiter and Drew occurred, but she properly rejected them as hearsay.

[8]/ In agreeing with the Hearing Officer's conclusion, I do not necessarily adopt her statement that the outcome would be the same if the evidence established that Tarver had been holding an authorization card. Moreover, I do not rely on the Hearing Officer's analysis insofar as it may be interpreted to suggest that supervisory solicitation of authorization cards must be accompanied by other coercive conduct in order to be found objectionable. See, *Harborside Healthcare Inc.*, supra at 911 (supervisory solicitation of an authorization card has an inherent tendency to interfere with an employee's freedom to choose to sign a card or not).

This, of course, does not conclude my inquiry into whether Tarver's statements to G. Suiter were objectionable for other reasons. Tarver obviously interrogated G. Suiter concerning his union activities. Moreover, her statement implying that G. Suiter needed to support the Union to protect his family from possible changes by the Employer imparts a coercive tone when coupled with the interrogation and is similar to later objectionable statements, discussed below. For these reasons, I find her statements to G. Suiter are objectionable and rely on them as part of Objections 3 and 4 below in finding that Tarver's overall conduct materially affected the outcome of the election.

Accordingly, based on the above reasons, I agree with the Hearing Officer's conclusions overruling Objections 1, 2, 6, 8 and 9.

B. Tarver's alleged initiation and direction of organizing activities among employees (Objection 5):

The Hearing Officer correctly found no merit to the allegation that Tarver initiated and directed organizing activities among employees. Tarver's pro-union statements, upon which the Employer generally relies in support of this objection, do not prove that she initiated the campaign or directed others to do so. The Hearing Officer properly rejected other testimony purporting to establish Tarver's role in the campaign as either unreliable, i.e., hearsay, and/or vague. This includes witnesses' testimony concerning Baldwin's alleged statements implicating Tarver's involvement, Standifer's testimony concerning Greg Tarver's alleged comment to Tarver, his wife, that he was going to tell Fairlie "everything about the Union and how it took place," and the exchange between Tarver and Standifer wherein Tarver responded "I know" to Standifer's statement that "this [the Union] all started with you." Finally, the direct evidence in the record establishes, and the Hearing Officer found, that employee Calvin Daniels, with the assistance of other employees, initiated and carried out the organizing campaign. For these reasons I agree with the Hearing Officer's conclusions overruling Objection 5.

C. Tarver's alleged threats and promise of benefits (Objections 3, 4, 7, 10 and 11):

A brief overview of certain facts found by the Hearing Officer is necessary to place Tarver's alleged threats and promises of benefits in proper context. The Employer acquired the ambulance service about December 15, 2010. Tarver's statements came on the heels of her late-February visit, with President Fairlie, to an ambulance facility in St. Louis, Missouri where the employees were "staged," or stationed, at gas stations and restaurants and worked various hourly shifts. During the period in which Tarver made her statements, the Employer's paramedics and EMTs herein worked 24 hour shifts, 72 hours a week, and earned overtime for any time in excess of 40 hours. They were stationed out of various home-like stations located in Floyd, Pike, Johnson and Magoffin counties in Kentucky. Against this backdrop, the Hearing Officer found that Tarver made the following pre-petition and post-petition statements, which I find to be objectionable in addition to Tarver's interrogation of G. Suiter as described above:

1. During the first two weeks of March, at a cookout held at Tarver's home, Tarver told EMTs Music and Star Driskill "that it would be in the best interest of employees to vote the

union in, because if they didn't the company could cut them to 12 hour shifts, and if they didn't vote the union in then the company could pretty much do everything it wanted." [9]/

2. About mid to late March, outside of the Central Office, Tarver, in the presence of Roger Duty, EMT Marsillett, Julie Suiter (J. Suiter), Matt Lawson and EMT William Callahan, said that employees "needed to protect themselves at whatever the cost, even if it meant bringing in a union, and that they were going to be in bad trouble and would need someone to protect them because the Employer was talking about cutting shifts and staging employees." [10]/

3. About mid-March, at a meeting at the Paintsville station attended by Duty, J. Suiter, paramedics Sandy Price and Lana Schlinder, and EMTs Stephanie Burchett, James Hitchcock, Bobby Page and Adrienne Ashburn, Tarver told employees "that she was uncomfortable with new changes that were taking place, that people needed to protect themselves and their jobs, to consider a union (even if that meant a union), that employees may have to work 12-hour shifts and 40-hour workweeks, and to educate and be prepared to take care of themselves and their families."

4. About March 31, at the Central Office, Tarver told EMTs Standifer and Fraley that "changes were coming about, there would be 12-hour shifts, no one would work for 24 hours, 72 hours straight, or be guaranteed the station where they had been working, that it was time for them to stand up against people coming in and trying to change things, and to protect themselves and their families."

5. About the end of the first week of April, at the Water Gap Station, Tarver told EMTs Standifer and Fraley that "she was scared for her job, scared for their jobs, and 'we just need to protect ourselves and our family.'" Tarver further stated that "she felt like the union was the way to go, to take care of ourselves and protect our family."

6. In early or late April, at the Water Gap Station, Tarver stated, in the presence of EMTs Standifer and Fraley, dispatcher Mellissa Hannah, and Marc Tarver, Tarver's husband, that employees "need to protect themselves and their families, things are changing . . . we don't know these people. They came in and have taken over and [I] can't say who will be working here next week." [11]/ Tarver also stated that "the company was going downhill really quickly."

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[9]/ Music testified that he and Driskill later discussed Tarver's comments in the presence of employees John Cruz and Duane Madore, neither of whom testified. The Hearing Officer did not find that Tarver's comments were disseminated to Madore and Cruz and I agree that the probative evidence does not sufficiently establish such fact. I, therefore, find that they were not affected by Tarver's statements.

[10]/ At the time of this statement, Duty and J. Suiter were paramedics and presumably would have been included in the bargaining unit; however, they were promoted to county supervisors about May 19, prior to the election. Additionally, according to the Decision and Direction of Election, the parties agreed and the pre-election record disclosed that Lawson is the Employer's Dispatch Manager/Supply Officer and a supervisor within the meaning of the Act. Based thereon, and notwithstanding witness Duty's claim that he is an EMT, I do not take into account the impact of Tarver's statement on Lawson.

[11]/ Standifer, upon whose testimony the Hearing Officer solely relied in making this finding, stated on direct that employee Duane Madore was at the site of this conversation when she first arrived, but it is unclear from her testimony whether he actually witnessed Tarver's statements. In this regard, on cross-examination, she said that the conversation took place between her, the "two of them," i.e., Gina and Marc Tarver, Hannah and her partner, Fraley. I, therefore, find that Tarver's statements did not affect Madore.

While I agree that the above statements do not contain an implied or direct promise of benefits, I find, contrary to the Hearing Officer, that the statements express more than Tarver's favorable opinion regarding the benefits of unionization but rather imply to employees that their failure to choose the Union carried the real consequence that they would lose valued working conditions, benefits, overtime wages and possibly jobs. The fact that Tarver was essentially the "messenger" bringing news of the impending losses, rather than actor who would ultimately effectuate them, does not mitigate the coercive nature of her statements. However benign Tarver's intentions, her status as a high ranking manager lent particular credence to her expressed fears of employee job loss and her claims regarding the implementation of 12-hour shifts and the loss of guaranteed stations. Moreover, the atmosphere in which she made the statements, at a time when the Employer was undergoing a transitional period under a new owner, only magnified their coercive impact. Indeed, she made one of the statements at a meeting where employees had voiced concerns with Tarver about 12-hour shifts, "staging" and other potential changes. I infer from the testimony of employee witnesses, notably paramedic Price and EMT Standifer, that employees generally favored the ability to work 72-hour shifts, to earn overtime, and to be stationed at the Employer's facilities as opposed to "staging" areas outside the facilities; and would have considered the loss of such terms a significant detriment. Under all of these circumstances, I find that Tarver's statements reasonably tended to interfere with employees' exercise of free choice regarding union representation, and were, therefore, objectionable.

Relying specifically on the factors of the margin of victory in the election, the extent to which the conduct became known and the lingering effects of the conduct, as set forth in *Harborside*, supra, I also find that Tarver's overall conduct materially affected the outcome of the election and warrants that it be set aside. Thus, I note that the margin of victory was by four votes [12]/ and the record discloses that a total of four employees were affected by Tarver's post-petition conduct, G. Suiter, Standifer, Fraley and Hannah, which, alone, is sufficient to assume an effect on the results of the election. [13]/ There were 10 additional employees who witnessed her pre-petition conduct [14]/, which was substantively similar to her conduct inside the critical period, and thus, "adds meaning and dimension to [her] related post petition conduct." *Dresser Industries, Inc.*, 242 NLRB 74 (1979). For this reason, I consider Tarver's pre-petition statements alongside her statements inside the critical period and find that such statements would have affected the outcome of the election. As to the extent to which Tarver's conduct was known, I find that knowledge of her conduct was limited to those employees which the record establishes directly witnessed her statements given the lack of evidence showing that they were disseminated to other employees. Nevertheless, her conduct affected a total of 14 employees, a significant number given the small margin of victory.

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[12]/ Forty-five votes were cast for the Petitioner, 40 votes were against representation and there was 1 challenged ballot which, in agreement with the Hearing Officer's view of the facts in a light most favorable to the objecting party, I will assume was cast against the Petitioner.

[13]/ It appears that the Hearing Officer inadvertently failed to include Hannah in her count of employees who were affected by Tarver's post-petition conduct.

[14]/ Music, Driskill, Marsillett, Callahan, Price, Schlindler, S. Burchett, Hitchcock, Page and Ashburn.

While I realize that Tarver's conduct occurred primarily in March and April, up to some 2-1/2 months before the election, I find that her statements regarding employees' loss of jobs, wages and valued working conditions would objectively tend to linger in the minds of the listeners given their direct correlation to the employees' livelihood, particularly here where the record evidence shows that employees were concerned about the loss of such terms. Moreover, the Hearing Officer found that Tarver's most recent coercive conversation, during which she told employees she couldn't say who would be working and that the Employer was going "downhill quickly," occurred in early or *late* April, potentially placing the remarks closer in time to the election.

Turning to the question of whether the Employer's anti-union campaign, as found and described by the Hearing Officer, mitigated Tarver's conduct, I find that it did not under the facts of this case. Tarver was essentially speaking to the employees from the perspective of a high-ranking manager who was giving the employees "insider" knowledge regarding the Employer's planned course of action. Nothing short of a disavowal of her statements, which did not occur here, would have sufficiently mitigated their impact.

Under all of these circumstances I find merit to Objections 3 and 4. I also find merit to Objection 11 insofar as it alleges that Tarver engaged in pro-union conduct expressly prohibited by the Board in *Harborside Healthcare*, supra, which would encompass her coercive statements concerning the loss of jobs, benefits, wages and other favorable working terms. I do not, however, find merit to Objection 7, as such statements do not contain an implied or direct promise of benefits. Nor do I find merit to Objection 10, which generally alleges that Tarver's support for the union was communicated to eligible voters. Beyond the employees who directly witnessed Tarver's coercive statements, the record does not establish that her support for unionization was generally communicated to employees. In any event, a supervisor's pro-union speech, without more, is not objectionable. See, *Harborside Healthcare*, supra at 911. Consequently, the mere dissemination of her pro-union position, assuming that it occurred, would not have interfered with employee's free choice.

Accordingly, based on my findings discussed above, I will overrule Objections 7, 10 and the portion of 11 not encompassed by the conduct alleged in Objections 3 and 4. I will, however, sustain Objections 3 and 4 and the portion of Objection 11 alleging conduct co-extensive with Objections 3 and 4.

III. Conclusion:

Based on the foregoing and having carefully reviewed the entire record, the Hearing Officer's report and recommendations, and the exceptions and arguments made by the Employer, I will overrule Objections 1, 2, 5, 6, 7, 8, 9, 10 and the portion of Objection11 not co-extensive with Objections 3 and 4. I will sustain Objections 3 and 4 and the portion of Objection 11 encompassed by those objections and I will set aside the election and order a new election.

ORDER

IT IS HEREBY ORDERED that the election conducted on June 10, among the employees of the Employer in the unit found appropriate be, and hereby is, set aside and that a new election be conducted.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the appropriate unit under my direction and supervision, subject to the Board's Rules and Regulations, at the time and place set forth in the Notice of Second Election to be issued subsequently to this Supplemental Decision. [15]/ Eligible to vote in the second election are those employees in the unit who were employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all unit employees who have averaged 4 hours per week for the last 13 weeks preceding the election eligibility date. *Davison Paxon Co.*, 185 NLRB 21 (1970). Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the date of the first election, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. *Jen-Weld of Everett, Inc*., 285 NLRB 118 (1987). Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by National Emergency Medical Services Association (NEMSA).

LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list

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[15]/ The Notice of Second Election in this matter shall contain the following language:

NOTICE TO ALL VOTERS

> The election conducted on June 10, 2011 was set aside because the National Labor Relations Board found that certain conduct a supervisor of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Second Election. All eligible voters should understand that the National Labor Relations Act, as amended, gives them the right to cast their ballots as they see fit and protects them in the exercise of this right, free from interference by any of the parties. *Lufkin Rule Company*, 147 NLRB 341, 342 (1964).

of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election. No extension of time to file this list will be granted except in extraordinary circumstances. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, **www.nlrb.gov**, [16]/ by mail, or by facsimile transmission at (513) 684-3946. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Second Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO FILE REQUEST FOR REVIEW

Pursuant to the provisions of Sections 102.69 and 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this Supplemental Decision by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Supplemental Decision, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party

[16]/ To file the list electronically, go to the Agency's website www.nlrb.gov and select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.

files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

PROCEDURES FOR FILING A REQUEST FOR REVIEW

Pursuant to the Board's Rules and Regulations, Sections 102.111-102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **November 22, 2011**, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically**. If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. [17]/ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, click on **File Case Documents** enter the NLRB Case Number and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated at Cincinnati, Ohio this 8th day of November 2011.

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

[17]/ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.