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**Connecticut Humane Society and International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26.** Cases 34-CA-012557 and 34-RC-002351

April 12, 2012

DECISION, ORDER, AND  
CERTIFICATION OF REPRESENTATIVE

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On June 8, 2011, Administrative Law Judge Steven Fish issued the attached decision in this consolidated unfair labor practice and representation proceeding. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel and the Union filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.<sup>2</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employees Bridget Karchere and Maureen Lord, and that the Respondent also committed independent 8(a)(1) violations against them. On exceptions, the Respondent contests all of those findings only on the ground that Karchere and Lord were managers or, in Lord's case, a supervisor, rather than employees protected by the Act. We agree with the judge's findings, for the reasons he gave, that Karchere and Lord were statutory employees. Accordingly, we adopt all of his unfair labor practice findings.

Similarly, the Respondent's election objections rest on its contentions that Karchere and Lord were managers and/or supervisors. Having rejected those contentions, we find it unnecessary to pass on the judge's application of *Harborside Healthcare, Inc.*, 343 NLRB 906 (2004), and we shall certify the Union.

Finally, the Acting General Counsel has not excepted to the judge's dismissal of allegations that the Respondent unlawfully threatened that employees would lose benefits if they supported the Union, and that strikes would be inevitable if the Union became their representative.

<sup>2</sup> The Respondent argues that Karchere and Lord are not entitled to reinstatement because, after their discharges, they made disparaging public comments about the Respondent's management. We reject this argument. Nothing in the record here, or in the Board's precedent, demonstrates that Karchere or Lord were "unfit for further service" under the high bar set by the controlling standard. See *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 2 (2011). We thus find it unnecessary to address the judge's discussion of this issue. In finding that

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Connecticut Humane Society of Newington, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

IT IS FURTHER ORDERED that, in Case 34-RC-002351, the Respondent's objections to the election are overruled.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time receptionist/customer care employees, animal care workers, veterinary assistants and veterinary technicians employed by the Employer at its Newington, Connecticut facility, including the Connecticut Humane Society Memorial Clinic at that location, and at its Waterford and Westport, Connecticut facilities, but excluding all office clerical employees, managerial employees, guards, professional employees and supervisors as defined in the Act.

Dated, Washington, D.C. April 12, 2012

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Brian E. Hayes, Member

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Richard F. Griffin Jr., Member

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Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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Lord's conduct did not render her unfit for further service, Member Hayes would not impute James Luberda's statements to her absent affirmative evidence that she authorized these statements.

*Thomas E. Quigley, Esq.*, for the Acting General Counsel.  
*Brian Clemow, Esq.* and *Henry J. Zaccardi, Esq. (Shipman & Goodwin, LLP)*, of Hartford, Connecticut for the Respondent/Employer.  
*Gregg D. Adler, Esq. (Livingston, Alder, Pulda Meiklejohn & Kelly PC)*, of Hartford, Connecticut for the Charging Party/Petitioner.

## DECISION

### STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges and amended charges filed by International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 26 (the Charging Party, the Petitioner, or the Union), the Regional Director for Region 34 issued a complaint and notice of hearing on August 26, 2010, alleging that Connecticut Humane Society (Respondent, CHS, or the Employer) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by terminating the employment of Bridget Karchere (Karchere) and Maureen Lord (Lord) because of their support for the Union, as well as by several instances of unlawful interrogations, threats, and creation of the impression of surveillance.

The Regional Director also issued a Report on Objections in Case 34–RC–2351 on September 1, 2010, finding that the objections filed by the Employer therein warranted a hearing.

On the same date, the Regional Director issued an order consolidating the above cases for hearing.

The trial, with respect to allegations raised in the above complaint and objections report, was held before me in Hartford, Connecticut, on November 17, 18, and 19, 2010. Briefs have been filed<sup>1</sup> and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

### FINDING OF FACT

#### I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a nonprofit corporation with an office and facility in Newington, Connecticut (Newington facility), and facilities in Waterford and Westford, Connecticut, where it is and has been engaged in the business of animal care, sheltering, and adoption. During the 12-month period ending July 21, 2010, Respondent purchased and received at its Connecticut facilities goods valued in excess of \$50,000 directly from points located outside the State of Connecticut.

It is admitted, and I so find, that Respondent is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I so find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> Subsequent to the close of the hearing and the receipt of briefs, the General Counsel, pursuant to the rule enunciated in *Reliant Energy*, 339 NLRB 66 (2003), alerted the parties to a recently issued Board decision relevant to one of the issues in the instant case. Respondent, consisted with *Reliant Energy*, filed a response commenting on the recent case cited by the General Counsel, which has been considered.

#### II. THE REPRESENTATION CASE

The Union filed its petition in Case 34–RC–2351 on October 21, 2009.<sup>2</sup> On November 2, the parties entered into a Stipulated Election Agreement providing for an election in a unit comprised of all full-time and regular part-time receptionist/customer care employees, animal care workers, veterinary assistants and veterinary technicians employed by the Employer at its Newington, Connecticut facility, including the Connecticut Humane Society Memorial Clinic at that location, and at its Waterford and Westport, Connecticut facilities, but excluding all office clerical employees, managerial employees, guards, professional employees and supervisors as defined in the Act.

The election was conducted on December 9. The results were 18 “yes,” 15 “no,” and no challenges or void ballots. On December 11, the Employer filed timely objections to the election, which asserts as follows:

#### *Objection to Election:*

CHS supervisors were directly and actively involved in soliciting support for the union during the organizing campaign, and disseminated implied threats of CHS action against employees if they did not secure union representation, thereby tainting the laboratory conditions required for a free and fair election.

The following are examples of this behavior by CHS supervisory personnel:

In or about September 2009, Maureen Lord, CHS Development Manager, and Bridget Karchere, CHS Finance Assistant Manager, contacted Nancy Patterson, District Manager of CHS’s Waterford branch office on more than one occasion. Both Ms. Karchere and Ms. Lord stated that they were contacting Ms. Patterson to encourage the Waterford staff, and Ms. Patterson, to sign a “petition” for unionization, and indicated that Ms. Patterson needed to act on this matter quickly. Ms. Lord also stated that CHS’s Waterford employees needed to sign a petition for unionization as soon as possible, so that Ms. Patterson and the Waterford employees would be “protected” from management and could not be discharged by CHS. This was either an implied threat of discharge in the absence of union representation, or an implied promise of protection from discharge if union representation was elected, or both.

In or about September 2009, Maureen Lord, CHS Development Manager, and Bridget Karchere, CHS Finance Assistant Manger, contacted Brandon Guy, Assistant District Manager of CHS’s Waterford branch office on at least one occasion. Both Ms. Karchere and Ms. Lord stated that they were contacting Mr. Guy to encourage him, and through him the CHS’s Waterford staff, to join the union.

In or about September 2009, Ms. Heather Keith, Medical Team Leader Manager, contacted Sandra Ocasio,

<sup>2</sup> All dates subsequently referred to herein are in 2009, unless otherwise indicated.

CHS Animal Wellness Technician at CHS's Newington offices, and asked Ms. Ocasio to consider being part of a union. Ms. Keith solicited Ms. Ocasio's involvement in the union organizing effort, and offered to drive Ms. Ocasio to union organizing meetings to listen to organizers' promotional efforts where she could be solicited to sign a petition or authorization card. Ms. Keith's actions thus assisted the union in arranging and conducting organizing meetings for CHS employees, and encouraged such employees to participate in such meetings.

In addition, the following facts demonstrate that the foregoing supervisory involvement in the election was sufficient to taint the outcome of the election:

Each of the supervisors involved in improper activity was included in the union's original definition of the scope of the bargaining unit, and upon information and belief, they were union partisans. Although CHS was able to demonstrate that these individuals were in fact *bona fide* managers who should not be included in the bargaining unit, they were obviously union supporters who, at the outset of the union's organizing effort, anticipated being included in the union, and upon information and belief, they likely signed any petition and/or authorization cards that became part of the showing of interest upon which the union relied. Clearly, they intended to and did in fact campaign for the success of the organizing effort on that basis, and because of their position as supervisors they would have an influence on the employees they spoke to.

In addition, upon information and belief CHS asserts that the above-mentioned supervisors and others must have expressed similar views to other CHS employees in their efforts as union partisans to persuade CHS employees to sign a petition and/or authorization cards, and ultimately to vote in favor of union representation.

The outcome of the election was extremely close, with 18 voters supporting the union and 15 voting against unionization. Because the election took place in a small proposed bargaining unit, and the outcome was determined by as few as two votes, any activity by supervisors urging employee support for and votes in favor of unionization, or making implied threats that union representation was needed in order to protect employees against discharge from employment, would be sufficient to taint the required laboratory conditions and to affect the outcome of the election.

The supervisor activities set forth above, including solicitation of signatures for union organizing and implied threat of discharge in the absence of union representation or promise of protection from discharge if union representation was elected were improper for at least the following reasons:

(a) they were a direct solicitation for support of unionization and execution of a petition for unionization

by supervisory employees in a coordinated course of union partisan conduct;

(b) they implied a threat that employees would be terminated by CHS management during the union organizing campaign;

(c) they tainted the necessary laboratory conditions in which a National Labor Relations Board election must be conducted.

### III. RESPONDENT'S OPERATIONS

As noted above, Respondent provides animal care, sheltering, and adoption services at three locations, Newington, Westport, and Waterford, Connecticut. Respondent employed approximately 50 employees in its three locations of which 35 were eligible to vote in the election.

Richard Johnston (Johnston) at the time of the events in question was Respondent's president and CEO and undisputedly its top official.

The Newington facility is attached to a separate legal entity, called the Fox Memorial Clinic (Fox Clinic). The employees at the Fox Clinic were part of a bargaining unit set forth in the election. They were considered part of the Newington facility, which comprised 22 employees listed on the *Excelsior* list for the Newington location. The *Excelsior* list also listed eight employees at Waterford and five at Westport.

Janice Marzano is Respondent's executive assistant to the president, an admitted supervisor and is responsible for human resources functions for all of Respondent's facilities. Raymond Gasecki, another admitted supervisor, is Respondent's chief financial officer.

Respondent also employed managers at each facility, which were also admitted supervisors. They were Joanne Draper, acting district manager at Newington; Joanne Freeman, practice manager of the Fox Clinic;<sup>3</sup> Nancy Patterson, district manager at Waterford; and Allyson Smith, district manager at Westport.

Respondent also employs four team leaders at the Newington facility. Their supervisory status is uncertain, but is inconsequential to the issues herein.<sup>4</sup>

### IV. THE UNION'S ORGANIZING CAMPAIGN

Bridget Karchere was employed by Respondent as a "finance assistant," and Maureen Lord was "manager of development technology." Respondent contends that both Karchere and Lord are managerial employees under the Act and that Lord is also a supervisor under Section 2(11) of the Act.<sup>5</sup> Therefore, Respondent, while conceding that it terminated both Karchere and Lord because they engaged in union activities, asserts that such

<sup>3</sup> There were approximately five or six unit employees at the Fox Clinic.

<sup>4</sup> While the Employer did allege in its objections that one of the team leaders engaged in objectionable conduct, it presented no evidence of any such conduct nor any evidence of supervisory status of that or any other team leader. Thus, I find it unnecessary to decide the supervisory status of Respondent's team leaders.

<sup>5</sup> While in its objections and answer, Respondent contended that Karchere was also a supervisor, that position appears to have been abandoned at trial since its own witnesses conceded that Karchere did not supervise anyone.

conduct is not unlawful in view of the managerial and/or supervisory status (Lord) of the employees. It further asserts that the activities engaged in by Karchere and Lord in support of the Union represents objectionable conduct sufficient to warrant the election being set aside.

I shall detail the facts concerning the status of these employees below, but shall first set forth their union activities. The Union's organizing efforts at Respondent were initiated by Cathy DeMarco, who had been employed by Respondent as a "human educator," but who resigned in August 2009.

In late August, DeMarco began contacting Respondent's employees, including Karchere and Lord, and suggested to them that unionization might be useful to deal with problems and complaints that employees had about their working conditions and how they were treated by management. DeMarco informed the employees that she would be setting up a meeting of employees to discuss the possibility of unionizing Respondent's employees. Karchere informed DeMarco that she was interested in attending the meeting because the employees were treated inhumanely and were miserable. Lord responded to DeMarco that the possibility of a union "sounded interesting."

A meeting was subsequently scheduled for September 11 and was held on that date at an old school in Berlin, Connecticut, called the "Grange." Present were approximately 12 employees, including Karchere, Lord, and DeMarco. Lord and Karchere drove to the meeting separately, and neither of them instructed any other employees to attend the meeting. However, Karchere admitted that all the employees were talking amongst themselves about the meeting and that "we were all friends and we all kind of agreed that we should go to this meeting."<sup>6</sup>

At the meeting, DeMarco informed those in attendance that the employees had been collectively griping about their working conditions and told them that she would be inviting a union representative to speak with them about the unionization process. She added that if anyone was uncomfortable with speaking with a union representative they could leave. No one left, so DeMarco called Everett Corey, the Union's business representative, on her cell phone.

Shortly thereafter, Corey arrived at the Grange. He introduced himself as a representative from the Machinists Union and spoke about some of the benefits of a union, such as a grievance procedure, fair treatment, and protections from the Company.

Corey then asked employees if they had comments or questions. Some employees expressed some concerns about their working conditions, such as complaints about chemicals that they work with, possibly affecting their health and that they were not able to spend as much time as they felt was appropriate to take care of the animals.

Lord asked Corey, "If the Union was voted in, whether employees would have to join or if they could choose not to join the Union?" Corey replied that it depended on the contract that was negotiated. Near the end of the meeting, Corey passed around a petition inviting employees, who were interested in representation by the Union, to sign. Lord did not sign the peti-

<sup>6</sup> The record does not reveal specifically what Karchere said to her fellow employees about attending the meeting.

tion at that meeting because she was not sure if the union "applied" to her since most of the employees there were directly involved in animal care and worked downstairs. In that regard, both Karchere and Lord worked upstairs on the second floor, where clerical and administrative employees were situated. Downstairs on the first floor, employees were involved with animal care and dealing with the public with respect to various issues. They were called customer care representatives or receptionists.

Karchere asked one question at the meeting. That is, "How could the union help us?" After Corey responded, Karchere asked if she was eligible to sign the petition since she does not handle animals and is a clerical employee. Karchere briefly described to Corey her job duties. Corey stated that Karchere was not a manager or a supervisor and was eligible to sign since the Union was seeking to represent all nonmanagerial, nonsupervisory positions.<sup>7</sup> Karchere signed the petition after about five or six others had signed and before four or five other employees signed. Neither Lord nor Karchere encouraged or suggested to any employees present that they should sign the petition.

About a week later, DeMarco called Karchere and Lord and informed them that a second union meeting was scheduled for September 22, also at 6 p.m. at the Grange. In between the two meetings, Lord furnished DeMarco with a copy of her job description and asked her to find out if she (Lord) would be eligible for union representation. DeMarco reported to Lord that she had checked with Corey, who informed DeMarco that Lord "would be a candidate for the group."

At this meeting about six or seven employees were present, including Karchere and Lord. Luke Collins was present for the Union. He discussed what the Union could do for the employees. Some employees mentioned that they wanted protection, and Collins passed out another petition to sign. Karchere had already signed the petition on September 11, so she did not sign again on September 22. All the other employees present signed the petition, including Lord, who did so because she had now been informed by the Union through DeMarco that she would be eligible for representation.

Also present at this meeting was Gay Marie Kuznir, who was Lord's assistant.<sup>8</sup> Lord did not encourage or indeed say anything to Kuznir about either attending the meeting or signing the petition. Kuznir signed the petition before Lord did, but clearly observed that Lord signed the petition as well. Indeed, it is undisputed that at both meetings, employees observed Karchere and Lord signing the petition for union representation.

On or about September 18, Lord telephone Nancy Patterson, who was, as related above, the district manager at Respondent's Waterford facility. Lord informed Patterson that employees at Newington were very unhappy, that employees were not al-

<sup>7</sup> The petition filed by the Union on October 21 sought a unit, including all full-time and regular part-time employees, excluding the president, CFO, public relations representatives, district managers, assistant district managers, executive assistant to the president and administrative assistant to the president.

<sup>8</sup> The precise relationship between Lord and Kuznir will be detailed below.

lowed to talk to each other and had various other issues with management. Lord added that the employees at Newington had met with a union representative to discuss their concerns and asked Patterson to let her know if any of the employees at Waterford were interested in attending such a meeting. Lord also informed Patterson that other Newington employees, such as Karchere,<sup>9</sup> would be willing to attend such a meeting with a union representative in the Waterford area and at such a meeting employees would be asked to sign a petition in order to eventually have a “union vote.” Finally, Lord assured Patterson that the meeting would be off property, so if the employees signed the petition their jobs would be safe. Patterson responded that she would let Lord know if any of the employees at Waterford were interested.

Immediately after that call, Patterson spoke individually to each member of her staff, including the assistant district manager, Brandon Guy.<sup>10</sup> Patterson told each employee that she had just received a call from Lord, who informed her that there were a lot of disgruntled and agitated people at Newington and that they had met with a union representative. Patterson added that Lord had asked her to find out if any of the Waterford employees were interested in attending such a meeting. Patterson asked each employee how they felt about it. Each of the Waterford employees responded to Patterson’s inquiries that they were not interested in attending such a meeting, that they were very happy working for Respondent and added, “Why don’t they leave us alone?”

A few days later, Lord called Waterford and asked to speak to Patterson. She was not there, so Lord spoke to Assistant Manager Guy. Lord asked Guy if any of the Waterford employees were interested in meeting with the Newington employees and the Union. Guy replied, “No.” Lord perceived that Guy was uncomfortable talking to her about the subject and the conversation ended.

A few days prior to September 25, Lord called Patterson at home in the evening. Lord asked Patterson if she had spoken to employees about meeting with the Union and the Newington employees. Patterson replied that she had done so and that the employees at Waterford “wanted no part of the Union.” At that time, Patterson’s husband was home and overheard the conversation between Lord and Patterson. After the conversation ended, Patterson’s husband, who had been a union member for 30 days, told her that it was illegal for management employees to become involved with the Union. He suggested that Patterson inform Johnston immediately about Lord’s call. However, she did not do so at that time.

On or about September 25, Karchere telephoned Patterson. Karchere reiterated what Lord had told Patterson about having a meeting with union representatives and the Newington employees. Karchere gave Patterson her cell phone number and asked Patterson to give the cell phone number to the Waterford employees and to tell them that if they were interested in such a meeting to call Karchere. Patterson agreed to pass out

<sup>9</sup> Lord also told Patterson that former employee DeMarco was also involved in the union campaign.

<sup>10</sup> As noted above, the *Excelsior* list included eight names for the Waterford facility.

Karchere’s number. She offered it to her employees and told them about Karchere’s call. Most of her staff did not even take the number or took it and threw it away. According to Patterson, a day or so later, Guy informed her that Karchere had called Guy at the facility and asked Guy if the employees had been given her cell phone number since nobody had called her.<sup>11</sup>

#### V. RESPONDENT’S REACTION TO THE UNION’S CAMPAIGN

As noted above, the Union filed its petition on October 21. Shortly after the petition was filed, Respondent’s attorney, Brian Clemow, spoke with Johnston. Johnston informed Clemow that the petition was “all news to him” and that he (Johnston) had “no clue about any of this.” Clemow answered that this is not a good sign. Clemow informed Johnston that he couldn’t ask rank-and-file employees about their union activities, but he could ask supervisors what they heard and to keep their ears open. Clemow suggested that Johnston check with Respondent’s managers and supervisors and ask if they heard anything (about the Union).

On October 23, Johnston conducted a meeting of various individuals, including Wright, Gasecki, Marzano, Draper, Melissa Zaluski,<sup>12</sup> and Team Leaders Kitty Baker and Elizabeth Clavette and Lord. Karchere was not present.

Johnston informed the participants at the meeting that Respondent had received a petition for a union election and that he was surprised. He added that he had not had any indication and had not seen it coming. Johnston said that Respondent did not believe that a union would be beneficial to the employees or the pets, that this would be management’s stance and that those present would be expected to back that up and support that position. Johnston asked if anyone at the meeting had heard anything about the Union. No one answered that they had heard anything. Johnston added that if anyone there heard anyone talking about the Union, they should give their names to Marzano. Johnston then informed those present that there would be a meeting with a lawyer the following week to discuss the matter further. Lord informed Johnston that she would be on vacation the following week and would not be able to attend the meeting with the lawyer. Johnston responded that that was okay.

On October 27, a meeting was conducted by Clemow and Johnston at the Newington facility. In addition to the individuals present at the October 23 meeting, the participants included Karchere and Patterson.<sup>13</sup> Clemow began the meeting by stating that this was a meeting for members of management and that if

<sup>11</sup> My findings with respect to the conversations between Lord, Karchere, and Patterson are based on a compilation of the credible portions of the testimony of Patterson, Karchere, and Lord. While I found Patterson’s testimony to be generally reliable and believable, she was uncertain concerning dates. To the extent that she testified that she informed Johnston about her calls from Lord and Karchere shortly after her husband told her to do so, I do not credit that testimony. Rather as more fully explained below, I find that she did not so inform Johnston until sometime in November.

<sup>12</sup> Zaluski was Respondent’s volunteer director.

<sup>13</sup> As noted above, Lord was not present because she was on vacation.

anyone was not comfortable in that role or did not want to be in the room, they could leave. Karchere did not leave. According to her testimony, it was because she was scared or afraid of retaliation from Johnston.

Clemow went over with the participants what they can and cannot legally do with regard to the union campaign and handed out a document entitled, "Quick Reference for Supervisors." It reads as follows:

#### QUICK REFERENCE FOR SUPERVISORS

Brian Clemow  
Shipman & Goodwin

##### You Cannot

1. Promise increases in wages or benefits or improvements in working conditions if the union is voted out.
2. Tell employees that Connecticut Humane Society won't agree to any of the union demands.
3. Ask employees as to their grievances or complaints, or suggest they come to you with their problems rather than the union.
4. Question employees as to their feelings about the union, or eavesdrop on discussions about the union.
5. Discriminate against union sympathizers by harassment or undesirable work assignments.
6. Force employees into one-on-one discussions about the union.
7. Misrepresent facts about the union (such as the amount of their dues, rumors about their officers, etc.)
8. Threaten employees with loss of their jobs if the union wins the election.
9. Tell employees that if the union wins the election, a strike is inevitable.
10. Force an employee to vote, or restrain him from voting.

##### You Can

1. Remind employees of existing benefits and compare them with benefits in other organizations, both union and non-union.
2. Tell them the union can't get them anything unless Connecticut Humane Society agrees to it.
3. Remind them that the Connecticut Humane Society has always had an "open door" policy and tell them you think most problems have been worked out satisfactorily without a union.
4. Listen to unsolicited comments or complaints, and report them to senior management without making any problems.
5. Enforce firm and fair discipline for violating the Connecticut Humane Society rules (such as discussing union business on working time).
6. Express your views to individuals or groups of employees.

7. Pass on any factual information you have about this union or unions in general.

8. Remind employees that the union cannot guarantee them employment; only the Connecticut Humane Society can do that.

9. Remind employees that strikes do happen, and can cause employees to lose their jobs if the Connecticut Humane Society is forced to hire replacements for striking employees.

10. Encourage all employees to vote, and express your hope that they will vote "no".

Summary: In general, you cannot promise employees improvements in benefits or working conditions to encourage them to vote against the union, or threaten employees with loss of benefits if they vote for the union. You can always relate facts that are pertinent to the union campaign, and you can always express your personal opinion, or the position of the Connecticut Humane Society, on workplace issues. You cannot change your policies or discriminate against union sympathizers, but you can always limit union campaigning to non-working time and non-working areas.

On November 2, the representation hearing was scheduled at the Regional Office. The Board agent assigned to the case conducted a sort of "shuttle diplomacy" between the Union and Respondent in order to facilitate the parties' agreement on the election and unit issues. In fact, Johnston and Clemow never even saw or spoke to Corey, who was present at the Region on behalf of the Union on that day.

There were three primary issues that needed to be resolved before the parties could agree to an election. Respondent wanted to include the employees employed by the Fox Clinic, while the Union wanted these employees excluded from the unit. Conversely, the Union wanted to include the team leaders in the unit while Respondent contended that these individuals were supervisory and should be excluded. Finally, the Union sought to include both Karchere and Lord in the unit. Respondent contended that Lord and Karchere were both managers and supervisors and should be excluded.

After several hours of "shuttle diplomacy," an agreement was obtained for an election to be held on December 4 in a unit which specifically included employees employed at the Fox Clinic.<sup>14</sup> The unit excluded various classifications and excluded others, including office clerical employees, managerial employees and supervisors.

According to Clemow, the Board agent reported to him that the Union agreed that the team leaders were supervisors and would not be included in the unit. I do note that the unit agreed upon makes no reference to team leaders.

The Board agent also informed Clemow that both Karchere and Lord would not be eligible to vote in the election, but she did not tell Clemow that the Union had agreed with Respondent's position that Karchere and Lord were supervisors or managers. In this regard, I note that the job titles of Karchere

<sup>14</sup> While the "Fox Clinic" is not mentioned in the unit description, the "Memorial Clinic" is referred to, which is the Fox Clinic.

and Lord were not specifically included or excluded in the unit description.

After the Stipulated Election Agreement was executed, both Karchere and Lord had conversations with Corey during which he informed them that due to Respondent's insistence the Union had agreed that they would not be eligible to vote in the election, but that the Union hoped that they could be part of a separate clerical or administrative unit in the future.<sup>15</sup>

Two days later, on November 4, Gasecki asked Karchere to come into a small conference room. Gasecki asked Karchere if she had heard anything about the union activity or knew what was going on with that or "what situations might have provoked it." Karchere testified that the questions made her uncomfortable, but she responded that "[c]ompany policy always changed. It was never consistent and the staff was very upset about it. Whatever Richard wanted, happened." She added that these were the reasons why the employees decided to unionize. Gasecki replied that this was "good to know" and instructed Karchere that if she heard anything to let him know.

On November 6, both Karchere and Lord were separately called into a meeting in a small conference room. Present were Johnston, Gasecki, and Wright for Karchere's meeting. Johnston spoke, and Wright was writing notes while Johnston addressed Karchere. Johnston informed Karchere that he considered her to be a manager and wanted to know what Karchere had heard about the Union. She responded that employees were upset with company policies such as benefit time being taken in proper increments. Johnston repeated that Karchere was a manager, and he expected her to take that position and support management and to "report anything" to him that she heard or saw. Karchere did not challenge Johnston's assertion that she was a manager because she was afraid she would lose her job if she did so. She added that "[y]ou don't disagree with him," referring to Johnston.

Marzano was present at Lord's meeting along with Johnston and Gasecki. Johnston informed Lord that the Union had argued that she should be included in the group eligible to vote in the election. He asked Lord if she knew why they would do that. Lord responded that she had no idea why they would do that. Johnston told Lord that he was thinking of having some employees speak at a general staff meeting about management's position and asked Lord if she would be comfortable speaking in that regard. She replied that she would be.

On November 12, Johnston conducted a staff meeting at Newington. He began by stating that he had considered asking employees to speak about management's position concerning the Union, but decided against it and would give management's position himself. He then spoke for an hour about how he did not believe it was in the best interest of the employees or the animals at the Connecticut Humane Society for a variety of reasons.

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<sup>15</sup> In that connection, none of the employees, who worked on the second floor with Karchere or Lord, were included in the unit, which did specifically exclude office clericals. The *Excelsior* list submitted by Respondent did not include any of the employees working on the second floor, including Karchere, Lord, and Lord's assistant, Kuznir, or the team leaders.

At some point in early November, Patterson participated in a conference call with Johnston, Marzano, and other supervisors. Johnston asked the participants on the call whether any of them had heard anything about a union. Patterson, at that point, informed Johnston that she had been contacted by Lord and Karchere and was asked by them to discuss with her staff about a meeting with a union representative.

Shortly after this call, Johnston informed Clemow that he had just learned that Karchere and Lord had called Patterson about setting up a meeting with her staff and the Union. Clemow replied that this explains why the Union was so anxious to have Lord and Karchere included in the bargaining unit when the parties had met on November 2. Johnston asked Clemow what his options were. Clemow replied that based on their previous discussion, he believed that Lord and Karchere were supervisors or managers, and that Respondent therefore had the right to terminate them. However, Clemow added the downside of the action was that Respondent would lose two key management members and there was also a risk that Karchere and Lord were key players in the organizing campaign that they would become martyrs in the eyes of the rank-and-file workers and engender sympathy for the prounion efforts. Clemow also added that if they were not terminated and the Union won the election, Respondent would have to conduct collective bargaining while having two key management players closely affiliated with the Union.

Accordingly, Clemow recommended that Respondent not terminate Lord or Karchere at that time, but should speak to the employees about the matter. He urged Johnston to inform Lord and Karchere that Respondent knew that they were involved in union organizing, that it was inappropriate for them to do that and to urge them to stop any prounion activities. Clemow also recommended that Johnston suggest that Lord and Karchere do anything they can to neutralize the damage they might have done and that Respondent would take some time to decide what action to take.

Johnston agreed to accept Clemow's advice. Thus, on November 13, Johnston met separately with Lord and Karchere in a large conference room. Present, in addition to Johnston, were Marzano and Gasecki. Johnston asked Karchere if she had listened to what he had said in their earlier conversation about supporting management's position with regard to the Union. Karchere replied that she did and that she was to support management's position that the Union did not belong at CHS and that she should report anything back to Respondent that she heard. Johnston replied, "Good, glad to know," but added that he had been told by a "reliable source" that she had been involved in union organizing activities. Karchere asked who and what was said about her. Johnston refused to tell Karchere his "source" or what had been reported to him about her activities. Since she was fearful of Johnston, Karchere denied engaging in any union organizing. Johnston instructed Karchere to cease immediately any involvement with the Union, that she should report anything to him that she hears and that she should try to achieve a reversal of the impact made by her union activity.

Johnston also informed Karchere that he would not be making any decision about any disciplinary action until after his return from a vacation. However, the success that Karchere had

in reversing the disloyal impact on coworkers may be involved in Respondent's final disciplinary decision.

Johnston started the conversation with Lord by asking if she knew Respondent's position in relation to the Union. She said that she did and was able to state such a position. Johnston told Lord that he had a credible source that Lord had been involved in supporting the Union. He asked for her response. Lord replied that she was uncomfortable continuing this discussion. Johnston ordered Lord to immediately cease any actions in supporting union activity and urged her to take steps to reverse her position on the issue. Johnston added that any disciplinary action would be based on Lord's success in reversing her support of the Union. Lord asked if there was anything specific that he would like her to do to reverse her position. Johnston replied that that was entirely up to her. Johnston added that he was canceling an educational conference trip that he had previously planned for Lord to attend.

During the course of the election campaign, Respondent issued four documents concerning the Union and the election to all employees. They were not signed, but were prepared by Johnston and were from the Connecticut Humane Society. They are as follows:

November 9, 2009

Bridget Karchere  
27 Bohemia Street  
Plainville, CT 06062

Dear Bridget:

I am writing to bring you up to date on recent developments affecting you and every other employee of the Connecticut Humane Society. A few weeks ago, the Machinists Union filed a petition with the National Labor Relations Board (NLRB) seeking to represent certain employees at each of our facilities around the state. The Machinists union is a labor organization that represents industrial workers at places such as Pratt & Whitney Aircraft and Electric Boat.

Following a meeting at the NLRB's office in Hartford on Monday, the following arrangements for a secret ballot election, in which eligible employees can vote for or against union representation, have been established:

*Eligible Voters*

Employees in the following job categories that will be eligible to vote in the election: Veterinary Technicians, Veterinary Assistants, Animal Care workers, and Receptionists (Customer Care workers). All other categories, such as Team Leaders, Assistant Managers and Managers, Assistant Director and Directors, and Administrative/Clerical workers and other supervisors are excluded.

*Election Date and Times*

The election will take place on Friday, December 4, 2009. Voting will occur at our Newington, Waterford and Westport facilities. Those assigned to the PetSmart store will vote in Waterford, and those working in the Fox Clinic will vote next door in the main building. Voting will take place between 9:30 a.m. and 10:00 a.m. in the garage of the Waterford facility, between 10:30 a.m. and 11:00 a.m. in the break room of

the Westport facility, and between noon and 1:30 p.m. in the dog training room of the Newington facility. Eligible employees will be released to vote during those hours.

In the coming weeks, we will be addressing issues we believe you should be considering in connection with this union-organizing effort. However, you should understand from the outset that the Connecticut Humane Society does not believe that employees need a union to represent them, and is convinced that a unionized workforce would negatively impact our ability to help animals, work with volunteers, and our almost 130 year old mission.

Finally, while we understand there may be strong feelings on both sides of this issue, we cannot allow the union election process to interfere with our important work. Employees should not engage in union activity or discuss union issues during working time, or in areas to which members of the public have access. Nobody should feel pressured to listen to union sales pitches or to take sides in this debate.

If you have any questions, please do not hesitate to ask.

November 19, 2009

Bridget Karchere  
27 Bohemia Street  
Plainville, CT 06062

Dear Bridget:

During the 50th year of the Connecticut Humane Society (1931) the state and the nation were suffering from the effects of the Great Depression. Unemployment was 15 million people or 30% of the work force and the economy was in shambles.

In the minutes of the Connecticut Humane Society Annual report for 1931 was written "We extend out sincere thanks to our many dedicated employees in pursuit of our mission. We also give our profound gratitude to the many contributors who have donated to our Society. For many years the contributors have donated to our cause at a considerable sacrifice to themselves during this time of Great Depression. They have given to us for our work and for the principles and ideals for which we stand."

During the exceedingly difficult time of the Great Depression, the employees of the Connecticut Humane Society did not turn to outsiders who represented unions. During these years the union concept was popular, but our employees stayed union free.

And, please remember that the Connecticut Humane Society relies on the generosity of donors. The last thing donors want to hear during this time of the Great Recession (2009/2010) is that their dollars are going to pay union dues, or fund inefficiencies caused by the union work rules.

Thank you for your continued dedication to our mission and the pets.

We wish you a Happy Thanksgiving!

November 27, 2009

Bridget Karchere  
27 Bohemia Street  
Plainville, CT 06062

Dear Bridget:

We worry that our employees do not understand the complexity of the union issue. It is a difficult issue for anyone who has not been associated with a collective bargaining unit to sort out.

We do want our employees to understand that only 8% of the companies out there have a union. That tells you something right away. Again, we are not anti-union but we do not feel that involving a union that represents machinists in our decision making would benefit the pets we serve, the public that comes here, or the contributors that support us.

Also, please remember that a union cannot guarantee the results of negotiating a collective bargaining contract. In contract negotiations, everything is on the table, including the benefits you now have. Principal among those benefits is your health insurance, the premium cost for which is significantly subsidized by your nearly 130 year-old Society. In our opinion, the benefits you currently receive are far more generous than that of other companies.

Finally, please remember that the only leverage a union has is the threat of a strike. If the union calls a strike you may have no reasonable choice but to join it. If that happens, you can be without wages, without health insurance, or you other benefits for weeks, or months, or longer. Some employees could even find themselves without a job when the strike is over. You can be sure that doesn't happen by voting "no" on December 4.

Thank you for your continued service to our mission and the pets.

December 1, 2009

Bridget Karchere  
27 Bohemia Street  
Plainville, CT 06062

Dear Bridget:

We worry that our employees do not understand that a union can promise anything they want in the weeks and days leading up to the election while we are prohibited from promising anything.

After the election, the union can only deliver what your 130 year-old union free Society is willing to agree to. The union will call their negotiating "proposals" but they amount only to requests. Of course, these requests will be made under a threat of strike.

Please remember that even if you signed a union card you can still vote to remain union free on December 4<sup>th</sup>. This is a secret ballot election and nobody will know how you voted.

And, most importantly, please remember the union election will be decided by a majority of those voting. So if you don't

vote you will be letting others decide your future and fate for you.

This will be one of the most important choices you will make for yourself.

So please vote, and we hope you will vote "no"!

Thank you for your continued dedication to our mission and the pets.

On December 2, Johnston met with employees from both Newington and Westport in a large conference room. There were from 20–30 employees present. Johnston told the employees once again that Respondent believed that a union would not be beneficial to the employees or the animals of the Connecticut Humane Society. Lord testified that Johnston reminded employees that nothing was guaranteed in a contract and that everything was up for negotiation, including benefits that the employees had, and those could all change. Karchere's testimony on this issue was similar, but slightly different. She asserts that Johnston said that benefits were up for grabs, that the employees had a very generous package and if the Union got involved, those benefits would be up for grabs.

Both Karchere and Lord recall that Johnston had setup a display in the front of the room. On one side, there was a trash barrel with sticks coming out of it with an "on strike" sign. On the other side of the room, there was a photograph of Respondent's employees helping out with animals during Hurricane Katrina with an American flag behind it. According to Lord, Johnston commented, pointing to the photograph, that this is a picture of what the Connecticut Humane Society is now and this over here, pointing to the trash barrel, is what could happen with a union.

Karchere's version of what Johnston said about the display was significantly different from Lord's. Karchere testified that Johnston said that he believed that the Company wouldn't agree and if the Company and the Union didn't agree, then the employees would have to strike and the animals would not be cared for. Karchere adds that Johnston pointed to the two displays and told the employees that they could choose this (the strike barrel) or this (CHS with the American flag).

Johnston did not testify.<sup>16</sup> Respondent did not call any witnesses, who were present at this meeting. The record does not reflect whether Marzano, Gasecki, or any other supervisors of Respondent were present at this meeting.

However, Clemow testified that he discussed with Johnston about giving speeches to Respondent's employees and what Johnston could and could not say. Clemow informed Johnston that when discussing strikes, he could point out that strikes are a possibility if negotiations do not go well, but that he couldn't say that strikes would be inevitable or were certain to happen. Johnston prepared written "talking points" that he intended to use in his speeches to employees. Clemow reviewed two drafts of these points, made some changes, and finally was sent a final draft of talking points that Johnston intended to use during

<sup>16</sup> The record establishes that Johnston was no longer employed by Respondent at the time of the trial.

speeches on November 12 and thereafter. These talking points, after final review by Clemow, read as follows:

Union Issue: Staff Discussion Points:

1. Antithetical to CHS Mission.....CHS not anti-union and no doubt that unions play some role in the only 8% of civilian companies out there .....but the Machinists union has no real connection to animal care and have represented Pratt & Whitney and Electric Boat where many jobs have been lost;

Of course, they will try to convince you that you need them, that you are powerless without them.....and if some of you decide you don't want a union you will have to pay union dues anyway.....a reduction on your wages;

2. Union is a business whose principal business purpose is to make money through the collection of dues.....they have no power to promise or guarantee your job....or even your current benefits.....they certainly don't have any interest in our 130 year old mission;

3. We currently have excellent benefits that many companies no longer offer: 10% cost on health care, sick time and sale of unused amount, 401 (k) benefit, pension, snow days, the day off for Veteran's Day..... (God Bless our veterans); if a union is brought in as an outsider and made part of the decision making, all current benefits, wages and applicable policies are ON THE TABLE.

4. Will hurt services to pets;

5. Will hurt use of volunteers;

6. Will hurt disaster response;

7. Hurts doing the right thing and presuming good faith as it includes an outside union business in decision making.

8. Unions cannot guarantee or promise changes in business conditions or benefits but can only negotiate. A STRIKE with a worker walkout is the principal leverage.....while on strike the workers earn no wages;

9. A strike takes workers away from caring for the animals and causes disruption of medical services to animals.....harm to reputation and business mission about serving animals;

10. Your choice.....associate with outsiders that emphasize secrecy, anonymous complaints and the exclusion of employees and have a union speak for you.....AND REMEMBER THEY CANNOT GUARANTEE THE RESULTS OF COLLECTIVE BARGAINING, YOUR JOB OR THE BENEFITS YOU NOW HAVE.....or continue a 130 year tradition of managing what's in the best interest of the pets.....the staff.....the public we serve, and operating with good faith and positiveness with an emphasis on open dialogue;

11. No evidence of widespread motivating factors exist in performance reviews, surveys or documents, or in discussions at weekly and monthly business meetings. No one going to President or other manager about concerns to discuss in a

good faith effort what the issues are.....apparently, discussion of issues is held by secret groups and provocative workers statements.....ALTHOUGH I CAN'T DO ANYTHING ABOUT THESE ISSUES RIGHT NOW.

12. It would be much more positive if issues had been brought to my attention for an OPEN DIALOGUE that may have resulted in addressing the issues (can't remedy these now BECAUSE OF LABOR LAWS);

Instead the opposite of open dialogue has occurred recently: The best example.....anonymous complaint to OSHA regarding the use of bleach to kill distemper and parvo germs whose aim was to embarrass the company and its dedicated staff.....surprise investigation.....disruption and confusion among the staff;

Another example: rumor mongering about the spending \$400 instead of \$1200 (75% discount) for a barn item replacement. By comparison, the CHS has spent in excess of \$10 million on pet shelters, state of the art medical equipment, cat condo's and a hospital to serve animals.....to give you and the pets the best facilities; a REGULAR program of maintenance to ratify public's trust, and yours, in our facilities.....ALL DONE WITH DISCOUNTS AND GIFTS BY PEOPLE WHO KNOW WE DEPEND ON THEM now future projects will be impacted by the union issue.....regional shelters and pet hospital.....what will the public think about making contributions to a union related workforce that has an effect on our MISSION?;

Another example: provocative remarks about members of our staff designed to mislead and create upset between managers and workers CREATING A WEDGE by sponsoring an atmosphere that breeds negativity, stating lies and using profanity and words such as "crack-whores" and questioning our approach concerning the presumption of innocence and acting with due process and good faith about an individual fighting for her home.....;THEIR APPROACH is better?.....thank you, but I'd rather be positive and presume good faith and give each employee their rights.....based on 130 years of doing the right thing.....not based secret conversations from outsider;

13. Those that worked by my side during Hurricanes Katrina and Rita know in their hearts the best of what the Ct Humane Society is and that those days are now in jeopardy.....OUTSIDERS and the people who weren't there think they know better.....that they will define for us our disaster response will be.....and what volunteers can go.....what employees can go.....what our 130 year old mission should now be;

14. Let me give you example of a recent local disaster over in Farmington: The continuing union difficulties and strikes involving the American Red Cross as reported in the newspaper is an example of a non-profit's mission suffering as a result of union turmoil. Recent action involving a union resulted in a complaint to the Department of Public Health about who should be collecting blood which ultimately resulted in 22 people being laid off (19 WERE UNION

MEMBERS),.....the reputation, the mission, and the patients and public will suffer because less blood will be collected blood.....BY THE WAY PLEASE TELL ME HOW THE UNION MEMBERS BENEFITED FROM THIS;

15. Your choice ladies and gentlemen the continuation of a 130 year mission and reputation for doing the right thing.....OR BRINGING IN OUTSIDERS WHOSE PRINCIPAL INTEREST IS MONEY.....not you, the animals, the volunteers, the mission or the public. Your choice on December 4<sup>th</sup>.

Thank you for your service to the animals.

Richard Johnston

November 12, 2009 and subsequent meetings hereafter

As noted above the election took place as scheduled on December 4. Neither Lord nor Karchere voted or attempted to vote.

As also noted, Respondent filed timely objections to the election based primarily on the conduct of Karchere and Lord in organizing for the Union. Respondent obtained a written statement from Patterson, dated December 16, in support of its objections, wherein she recounted her version of the discussions with Lord and Karchere concerning union meetings, as recounted above.

On December 18, Lord and Karchere were told to report to the board room. Lord entered the room first. Gasecki and Marzano were present. Gasecki informed Lord that Respondent was terminating her employment because of her support for the Union and that the trust that Respondent had for her was damaged beyond repair.

Lord left the boardroom and was escorted out of the building by Wright. Karchere was then called into the room. Gasecki told Karchere that she was involved in union organizing activities, so she could no longer be trusted by Respondent. Therefore, she was terminated. Karchere was also escorted out of the building and told to get off the property.

#### VI. THE STATUS OF KARCHERE AND LORD

##### *A. Karchere*

Karchere was hired on October 12, 2008, and her job title was "Finance Assistant." She worked at the Newington facility in a cubicle next to Lord and Lynette Watt-Gibson, the accounts payable clerk. Karchere reported directly to Gasecki, the CFO. She was paid a salary of \$40,000 per year and received a \$1000-signing bonus when she was hired. At that time, Karchere was given a "Position Description," which reads as follows:

#### POSITION DESCRIPTION

Position Title Finance Assistant

Reports To Chief Financial Officer, Connecticut Humane Society

Summary of Duties The incumbent is responsible for the essential accuracy, timeliness of technical reliability of the

General Ledger and subsidiary Journals for the Connecticut Humane Society and its subsidiary, The Fox Memorial Clinic with a strong technical understanding of Not-for-Profit Accounting. This position serves as the primary backup to the Chief Financial Officer and will perform duties in this capacity that require competent and complex presentations to the Board of Directors and/or other professional groups and individuals.

#### Primary Duties and Responsibilities

- To perform the job successfully, the incumbent will be required to demonstrate technical and accounting competency to perform these essential functions, in compliance with Company Policy and applicable law:
  - Identify problems and resolve them in a timely way;
  - Analysis, review and maintenance of general ledger and subordinate journals is essential;
  - Essential and thorough understanding of IRS Form 990;
  - Creation and analysis of Balance Sheet, Income Statement and Statement of Cash Flows and analyzing information skillfully;
  - Cash receipt processing, reconciliation, posting and deposit, and administration;
  - Perform Accounts Receivable duties including creation of invoices and posting of payments received;
  - Primary responsibility for preparation and confidentiality of ADP supported payroll including entry of payroll data, rates and benefits changes and statistical reports relating to payroll;
  - Preparation of Sales & Use tax filing and related filings;
  - Understanding of intercompany transactions and multi-corporation accounting environment, budgeting and forecasting;
  - Identify, analyze and resolve budget variances in a timely manner and analyzing information skillfully;
  - Assist in audit preparation, Fixed Asset lapsing schedules and other required audit information;
  - Preparation of bank statement reconciliations, including posting of adjusting entries;
  - Preparation of monthly statistical reports and analysis of trends;
  - Assist with Accounts Payable processing in absence of A/P associate;
  - Maintenance of Finance Department Policies & Procedures Manual;

- Preparation of monthly employee benefit related insurance invoices;
- Practice superior customer service within the guidelines of the Company “WAAG” program found in the Company’s Personnel Policies Handbook;
- Must speak clearly and persuasively in positive and negative situations, and make skillful group presentations and conduct productive meetings;
- Assist the CFO or President with any other task as may be needed or assigned.

Education Required Bachelor of Science Degree, Accounting or Finance, computer literacy.

Experience Required Minimum three to five years experience in corporate accounting environment with excellent written, verbal communication skills and the demonstrated ability to translate financial data into management tools to evaluate the Company’s fiscal and performance.

The majority of Karchere’s time while she was employed by Respondent consisted of performing reconciliations and working on ledgers, payroll ledgers, and bank accounts. She would do cash receipt posting, which involved putting into the system what was processed for the day with respect to money coming in.

Karchere performed at one time or another all of the functions in her position description with four exceptions. Bullet point seven, which refers to primary responsibility for preparation of payroll, including rates and benefit changes, was not performed by Karchere since she had informed Marzano and Gasecki that there was to be no HR involvement in her job.

Bullet point eleven mentions preparation of “fixed asset lapsing schedules.” That area was handled by Gasecki, and Karchere did not work on that area.

The fourth bullet point states the “creation and analysis of Balance Sheet, Income Statement and Statements for Cash Flows and analyzing information skillfully.” Karchere assisted Gasecki in these areas, but did not perform these functions independently.

While Respondent in its answer and in its objections asserts that Karchere is a supervisor, that position seems to have been abandoned at the hearing and in its brief. This is not surprising since Gasecki, Respondent’s witness, testified that Karchere did not supervise anyone. In any event, no evidence was adduced that Karchere exercised any of the indicia of supervisory responsibilities under Section 2(11) of the Act.

Respondent does vigorously assert, however, that Karchere was a managerial employee and did adduce evidence in support of that contention. Both Marzano and Gasecki testified that Karchere was considered the primary backup to CFO Gasecki. Indeed, her “position description” so provides. Further, in an employee newsletter, an article appeared, prepared by Marzano, announcing Karchere’s hire by Respondent. The article points out that in “conjunction with her duties as Finance Assistant, Bridget will serve as the primary back-up to the Chief Financial Officer.”

However, the record establishes that during her employment by Respondent, Karchere was never designated as nor did she serve as acting CFO. When Gasecki was out of the office on vacation or out sick, there was no change in Karchere’s responsibilities or functions. Indeed, Gasecki admitted that he was not out much and was never sick. When he was out for small vacations, he would leave a message on his voice mail that he would be out for a period of time and if the caller had any questions to direct them to Karchere. In fact, Gasecki conceded that during the brief times that he was out “nothing that was of such importance that, you know, somebody had to step in and solve the problem right away.”

Karchere received a performance evaluation on May 6, 2009, prepared by Gasecki. Page 3 of that document lists various “performance characteristics” and states that this section is to be completed on those individuals who manage or supervise others. These categories were not filled out for Karchere, and she received no ratings on these categories. In a section entitled, “Summary of Performance,” Gasecki made several relevant comments. “Bridget appears to be a dedicated employee, who is eager to learn and who cares about her job performance. She assumed the responsibilities for the task of payroll in the first month of 2009 and has done a good job learning the ADP system and the particulars of both the CHS and Fox businesses.”

On the next page of the evaluation entitled, “Summary of Developments,” Gasecki wrote: “During the coming year, it is expected that Bridget will (a) work towards achieving knowledge and experience that positions her as a true second to the CFO.”

In February 2009, Karchere recommended to Gasecki that Respondent change its payroll system from a manual timecard system to an automated card system. Karchere had experience with the automated system in her previous employment with ADP, the same vendor that Respondent was already using with the manual system. Karchere researched and evaluated systems and recommended that Respondent adopt a system called ADP Easy Labor Manager to replace Respondent’s manual system. Karchere along with Marzano and Lord met with representatives of ADP and obtained and negotiated cost figures for the system.

On February 20, Karchere wrote a memo to Gasecki (cc: to Marzano and Lord) attaching a cost analysis of the system and stated that she, Lord, and Marzano would be meeting to assess the amount of time that the software would save the staff and to more precisely gauge the benefits in implementing the program. Gasecki instructed Karchere to go back and speak with ADP and see if she could obtain any reductions in price. Thus, Karchere, Lord, and Marzano again met with ADP representatives and did obtain some slight modifications from the vendor. Lord, Marzano, and Karchere discussed the issue among themselves, and they all agreed that the system would be beneficial to Respondent and should be implemented.

Consequently, Karchere wrote a memo to Gasecki (cc: to Marzano and Lord) detailing the reasons why Respondent should utilize the software in question. She attached the revised copy of the cost analysis and concluded the memo as follows: “By reviewing the cost analysis attached, it is clear that the

implementation fee and monthly cost of this program is small in proportion to the value and time savings it generates. Because of the increase in accuracy and efficiency associated with these components, I recommend the implementation of this conversion with our current ADP payroll system.” Gasecki approved the recommendation, and the system was ultimately implemented in June.

Karchere was also involved in the implementation and administration of the system along with Lord. Karchere was responsible for communicating with supervisors and managers with respect to implementing the system and reminding them to submit to her information regarding employee time and attendance so she could pay the employee properly.<sup>17</sup>

Karchere also recommended to Gasecki the implementation of a tax credit program with ADP in August. Gasecki agreed, but when Gasecki discussed it with Johnston, Johnston asked what the tax credit was against. Upon further checking, it was ascertained that the tax credit for Respondent would be against income taxes and not payroll taxes as both Karchere and Gasecki had thought. Thus, there would be no benefit to Respondent since it is exempt from federal taxes anyway. Therefore, this recommendation of Karchere was not implemented.

Respondent conducted weekly managers’ meetings every Monday. These meetings were generally conducted by Gasecki and Marzano at the Newington facility. Present also were Wright, Zaluski, Lord, Freeman, team leaders, at times, Suzanne Dunlap, executive assistant to Johnston, and Karchere. Karchere stopped attending these meetings for some undisclosed period of time because she was busy doing payroll, which was due on Tuesdays.

On February 3, 2009, Gasecki emailed Karchere that Johnston “thought that she should start attending Monday managers’ meetings to further develop your knowledge of the organization.” Karchere responded in an email, “Thank you for the heads-up.” Thereafter, Karchere attended these meetings.

At the Monday meetings, various issues were discussed, such as animal data, building and maintenance issues, what was going on in the press vis a vis Respondent and updating the participants about ongoing projects. Personnel or HR issues were not discussed at these meetings. Karchere’s role at these meetings would primarily be to provide updates on the payroll system or animal statistics.

Respondent also conducted monthly management meetings at Newington, which included the district managers and assistant district managers from Westport and Waterford along with the same participants from the weekly meetings. Similar topics were discussed at these meetings, such as shelter statistics, budget and financial issues, plus current projects and events. Karchere attended approximately three of these monthly meetings.

At one of the weekly managers’ meetings attended by Karchere, she made a suggestion that Respondent offer a discount for aged length of stay cats. The issue of how to move older cats through the system was being discussed, and Gasecki indicated that Respondent should focus on a program for older

cats. Karchere indicated that in her view the focus should not be the chronological age of the cat, but on how long the particular cat was in the system. Thus, she argued that there are many reasons why a particularly cat might not be adopted, such as color, size, as well as age. Therefore, Karchere argued that Respondent should not focus on why a particular cat not been adopted, but merely consider the amount of time that the cat has been in the system without being adopted. This argument of Karchere was convincing to Gasecki and other managers present, and Gasecki asked Karchere to prepare a memo detailing her specific proposal. Karchere prepared a memorandum setting forth the reasons for her recommendation to offer a discount for cats, which had been in the system for 2–3 months and up. The memo also included a cost analysis and her predictions for cost savings if her proposal was adopted. The memo and attachment is set forth below.

#### Memorandum

Date: July 1, 2009

To: Ray Gasecki

From: Bridget Karchere

Re: Reduced adoption fees for cats with an aged length of stay, 2–3 months

Ray,

This memo is to address the proposed benefit of reducing the adoption fees of cats in our system with an aged length of stay; more specifically those who have been in the system for approximately 2–3 months and up.

It is particularly important to institute this discount policy at this point due to the increase in kitten population and feline availability in general. All of the branches, Newington, Waterford, and Westport are inundated with felines, and all are almost at maximum capacity which in turn means having to turn adoptable felines away.

In analyzing our shelter statistics I have come to the conclusion that the average length of stay has increased drastically during kitten season, more specifically the spring and summer months, for adult cats. If we look at our current inventory in June and compile an average length of stay based on these adoptable adult cats versus an average length of stay from January 2009 through June 2009 we can see a drastic difference in numbers. The average length of stay has soared 61% from a meager 19 day average to a 77 day average of current inventory in June.

Also, sales of cats pale in comparison to the sales of kittens for the month. Revenue reports pulled on June 29<sup>th</sup> 2009 reveal that the sales of kittens are ahead of adult cats by 64%. Differences in revenue show this dramatic variation as well; the tally for kitten revenue is \$28,200 for all districts with cats trailing behind at \$3,825.

I propose this reduction of fees to accomplish numerous results; first being to move cats more promptly through our system. This will increase revenue in a number of ways and be in keeping with our mission statement. We will be benefitting animals by finding them good homes sooner. And, we will

<sup>17</sup> Karchere had that same responsibility when Respondent utilized the manual timecard system.

provide the general population with a means to adopt a wonderful needy pet at a low cost.

Secondly, by reducing our fees on these aged stay felines we will increase our revenue stream by being able to take in new adoptable felines. This will in turn bring in a surrender fee and eventually an adoption fee on these new animals. If a cat on average stays 19 days in our system, by clearing out the cats that are stagnant in the system, approximately 77 days, we will have opened up the possibility to potentially place three more felines through our system per one aged stay cat. The potential implications of this throughput on revenue are tremendous; our revenue stream could potentially go from \$4,800 to approximately \$14,400 for adoption fees on the extra animal intake versus the stagnant population based on our current figures.

It is obvious that our surrender revenue would also increase; if we are taking in more animals per cage we will clearly be bringing [sic] in more surrender fees.

A great number of other humane societies and the ASPCA discount adult felines during kitten season. It seems this is a seasonal theme that these shelters replicate each year. They introduce new promotional themes to highlight the reduced cost of free cat adoptions. Some of the humane societies who have instituted this discount offer include: Nebraska; Nodaway County, Missouri; Springfield, Vermont; Oregon; Michigan; and Kandiyohi County, Minnesota.

It is with these factors in mind that I ask you to consider a reduction in adoption fees for aged stay cats. Please see the attached materials for reference on these figures and approximations.

Thank you,  
Bridget Karchere

Cat & Kitten Adoptions

|        | CATS      | KITTENS    | TOTAL #    | VARIANCE   | % VARIANCE |
|--------|-----------|------------|------------|------------|------------|
| Jan-09 | 192       | 206        | 398        | 14         | 4%         |
| Jun-09 | <u>52</u> | <u>239</u> | <u>291</u> | <u>187</u> | <u>64%</u> |
|        | 244       | 445        | 689        | 201        | 68%        |

Length of Stay-Cats

| Avg LOS<br>In Days | Avg LOS<br>In Days | Jan 09-Jun 09 | Current Inventory # | Variance | % Variance |
|--------------------|--------------------|---------------|---------------------|----------|------------|
| 19                 | 77                 |               |                     | 58       | 61%        |

Adoption Revenue Comparison

| Current Inventory Aged Stay Felines | Adoption Revenue Current Fee | Proposed Additional Intake | Proposed Revenue Current Fee |
|-------------------------------------|------------------------------|----------------------------|------------------------------|
| 64                                  | \$4,800.00                   | 192                        | \$14,400.00                  |

Implications of Proposed Adoption Fee Reduction

| Current Inventory | Adoption Fee | Discounted Adoption | Proposed Revenue |
|-------------------|--------------|---------------------|------------------|
|-------------------|--------------|---------------------|------------------|

| Aged Stay Felines          | Proposed Discount    | Fee              | Aged Felines           |
|----------------------------|----------------------|------------------|------------------------|
| 64                         | 50%                  | \$37.50          | \$2,400.00             |
| Proposed Additional Intake | Current Adoption Fee | Adoption Revenue | Total Adoption Revenue |
| 192                        | \$75.00              | \$14,400.00      | \$16,800.00            |

This proposal of Karchere was approved and adopted by Respondent and proved to be quite successful as Karchere had predicted.<sup>18</sup>

In early October, Karchere was assigned to prepare the 2010 budget for the Fox Clinic and present the budget to the Fox Clinic board. In that connection, Gasecki sent an email, dated October 9, to Freeman, the district manager of the Fox Clinic, requesting her budget estimates by October 16. The email also reflects that “Richard has asked that Bridget prepare the Fox budget this year, so she is working on it & I am assisting her.”

Between October and December, Karchere received a template from Gasecki of the 2009 Fox Clinic Budget as well as a rent calculation spreadsheet used by Gasecki in preparation for the 2008 budget. Karchere subsequently received from Freeman her estimates of increases or decreases in revenues and sales and discussed these numbers with Gasecki. Gasecki suggested to Karchere the percentages of increases in the budget. As Karchere credibly testified concerning her role in the process, “I took Joanne’s numbers, Ray helped me with the percentages and I plugged Joanne’s numbers in Ray’s percentages, checked the formulas, formatted the sheet and then checked the totals at the end to make sure that they were accurate with the formula.” She further asserted, “I got the figures and then I basically just has to make sure that—I did like the grunt work, formulas, formatting and plugging it in and just checking all those formulas.”

She consulted regularly with Gasecki and finally prepared a document dated 2010 Budget Assumptions and sent it to Gasecki. Since Karchere was terminated a week later, Gasecki prepared the actual budget based on the document submitted by Karchere. Although Karchere had previously been informed that she would be presenting to and discussing the budget with the Fox Clinic board, this did not occur since Karchere was terminated prior to the board meeting. Consequently, Gasecki presented the budget to the board of directors.

My findings with respect to Karchere’s role in connection with the preparation of the Fox Clinic budget are based on a compilation of the credited portions of the testimony of Karchere and Gasecki as well as documentary evidence. To the extent that there is discrepancy between the testimony of Gasecki and Karchere concerning how much judgment and independence Karchere demonstrated in this process and how extensively Gasecki was involved, I credit Karchere’s version

<sup>18</sup> While Karchere’s job responsibilities did not encompass animal care, she was interested in animal care issues. Indeed, she volunteered to walk animals during her lunch hour, and in fact had adopted herself several animals from Respondent prior to her employment. Indeed, one of the reasons for her accepting of the job at Respondent was her love of animals.

of the events in question. I found her more detailed and credible testimony to be more persuasive than the vague, conclusionary, self-serving, and unconvincing testimony of Gasecki concerning this issue. I note that when asked if he had directed Karchere as what percentage changes to include, he equivocally responded, "I don't recall that I did that." Thus, he did not deny that he had done so, and then he added that he might have sent Karchere information on what he was doing on the CHS budget. Later on in his testimony, Gasecki conceded that there might have been two or three times that Karchere came to him with questions with regard to percentage increases and "I would give her advice on them."

Further, the emails submitted by Respondent confirm extensive collaboration between Gasecki and Karchere concerning the preparation of the Fox Clinic budget. Thus, his testimony that "I had very little involvement" in the preparation of the budget is inaccurate.

Further, Respondent failed to call Freeman as a witness to dispute Karchere's testimony that she simply "plugged in" Freeman's estimates of increases or decreases in revenues and sales in the preparation of the budget assumptions. The failure to call Freeman, an admitted supervisor, as a witness leads to an adverse inference, which I find it appropriate to draw, that Freeman's testimony would not have supported Respondent's version of the events in question. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

#### B. Lord

Lord began her employment with Respondent as an administrative assistant to President Johnston and was promoted to the position of "manager of development technology" on August 6, 2001. She worked at the Newington facility on the second floor in a cubicle next to Karchere and Lynne Watt-Gibson, accounts payable clerk. Lord reported to Gasecki as did Karchere and Watt-Gibson.

The "Position Description" for Lord's job is as follows:

##### Summary of Duties

The incumbent has the overall responsibility for managing information systems and databases for the entire organization, including the management of any related third party relationships. In general, this position determines the needs of the user community and provides the systems to meet those needs, supports public relations, Internet and mail fundraising and operations and acts as a liaison between management, board, staff and vendors. Additionally, the incumbent will manage the Newington reception staff and their involvement in providing data entry support for the animal tracking system, *Shelter Buddy*.

##### Primary Duties and Responsibilities

- Evaluate use of technology in the organization and recommend improvements in technology (hardware and software upgrades)
- Manage computer database back-up and security systems
- Develop and maintain a disaster recovery plan

- Stay abreast of advances in technology and inform management in writing about these advances
- Manage, maintain and troubleshoot computer operations on a day-to-day basis
- Oversee communications network with outside support vendors
- Provide management of the animal tracking system and the related vendor relationship, including training and the ongoing development of its applications for CHS
- Oversee CHS and Fox Clinic website development with outside provider and manage daily maintenance to notify Public Relations of necessary content and graphics changes
- Oversee and support all other facility technology-related systems, including the telephone, lighting, HVAC and security systems
- Work with Team Leader to manage and develop the reception staff, including their data entry support of the animal tracking system
- Develop and implement revenue enhancing initiatives related to the use of technology, including increased website donations and use of the animal tracking system in support of regional consortiums and out-of-state rescues
- Other development tasks will include mail solicitation (fundraising) and liaison with direct mail vendors, gift acknowledgement and management of administrative assistant(s)
- Perform other tasks as may be assigned by the President or Chief Financial Officer
- Provide monthly reports regarding the above, as requested.

When Lord first assumed that position, the team leaders and employees of adoptions, incoming, and medical reported to Acting District Manager Joanne Draper. The team leader of customer service, Jackie Czerwinski, reported to Lord, as did four customer representatives or receptionists, who worked downstairs on the first floor. Gay Marie Kuznir, who worked on the second floor as an administrative assistant, also reported to Lord. Kuznir's primary job involved fundraising and consisted of entering donations into the donor tracking system and generating thank you letters to donors.

In June 2009, Respondent, due to a "reorganization," removed all supervisory responsibilities from Lord vis a vis the customer service employees, and from that point on the customer service employees reported to Draper. However, Lord continued to exercise some functions that could be construed as "supervisory" authority over Kuznir until Lord was terminated in December 2009.

The primary indicia of supervisory authority that Lord exercised over the customer service employees and Kuznir prior to June 2009, and would have exercised with respect to Kuznir subsequent to June 2009 had she not been terminated, was her involvement in the preparation of performance evaluations.

Prior to June 2009, Lord prepared annual evaluations for Kuznir and Jackie Czerwinski, the team leader for customer

service employees. Lord also collaborated with Czerwinski in the preparation of the annual evaluations for three or four customer service employees, who reported directly to Czerwinski.

These evaluations, which are referred to as “performance reviews,” are four-page documents, which have three separate sections. The sections are entitled performance characteristics, comments and examples and actions to be taken. The first category, which includes items such as “knowledge and understanding of work,” “motivations and initiative,” and “co-worker relations and customer interaction,” also has a rating system of 1 through 5. The second category is entitled “comments and example,” wherein the supervisor details in narrative form their comments and examples pertaining to employees’ performance in each “performance characteristics.” The final section includes what actions need to be taken by the employee to improve their performance in each category. Finally, the document includes a section entitled, “summary of developments,” where the supervisor writes a brief summary of what actions the employees need to work on in the coming year.

The performance reviews for the customer service employees lists Lord and Czerwinski as a “supervisor” of the employee and is signed by Gasecki as well as by Lord and Czerwinski. In practice, these reviews were prepared by Czerwinski, including the numbers from 1–5 in each category. Lord and Czerwinski would then discuss the reviews, and Lord would make some suggestions on the wording or phrasing of some of the narrative comments. Lord did not disagree with Czerwinski with respect to any of the numerical ratings assigned to each employee and did not recommend any changes in these scores. As Lord testified, “She (Czerwinski) was the one who worked with them directly, so I trusted her.”

The reviews were then presented to Gasecki, and he signed all of the reviews without making any changes or recommendations. The reviews would then be shown to Johnston for his review. Johnston would frequently make changes in the reviews’ narrative portions and would at times add a personal anecdote that Johnston remembered from an interaction with an employee that he wanted included on the review. Lord would make the changes suggested by Johnston and/or include the additional information that Johnston had detailed in the review before it is presented to the employee.

In the case of Kuznir’s review, Czerwinski was not involved, so Lord herself prepared the review, including the numerical scores. The reviews would then go to Gasecki and then to Johnston for his comments prior to being given to Kuznir.

The review prepared by Lord for Kuznir in December 2008 was ultimately signed by Lord and Gasecki and provided to Kuznir on January 23, 2009. In that review, the section entitled “overall performance,” Lord had recommended that Kuznir be scored a 3, which corresponds to “meets expectation of position.” Johnston disagreed with that number, and in his comments, he instructed Lord to reduce that score to a 2, which corresponds to “needs improvement.”

Prior reviews that Lord wrote for Kuznir were also changed by Johnston in terms of phrasing as well as in downgrading certain specific scores. However, the overall rating for Kuznir

was not changed in these prior reviews as it was in the 2008 review.<sup>19</sup>

The record reflects that the purpose of all of the reviews was to evaluate performance, to identify goals for future performance and to provide feedback. The reviews were not used by Respondent in calculating or deciding upon wage increases for its employees.

The customer service employees, who reported to Lord prior to July, worked on the first floor. These employees interacted with the public, processed animals entering the facility, answered questions of the public, and entered data concerning the animals into Respondent’s data entry system. As noted, these employees reported directly to Czerwinski, their team leader, who in turn reported to Lord. Lord would consult with Czerwinski concerning technical support of how employees were performing their data entry functions or questions about the employees were answering from the public.

Kuznir, whose classification was administrative assistant, primarily dealt with donations, wherein she recorded donations in the data entry system and generated thank you letters for donations. Lord would provide technical support to Kuznir in recording data and assisted her in preparing thank you letters. Lord and Kuznir interacted with each other 10–15 percent of their time on a given day. Kuznir would enter the donations data, and Lord would track what Kuznir had run and issue reports based on this data.

Prior to June 2009, Lord issued three documents entitled “Memorandum” to employees concerning their conduct at work. On April 24, 2008, Lord’s memo referenced a discussion between her and employee Tom Witt. The memo states that Witt had left blood on his workstation, requiring another worker to clean it when they took over the workstation. It further urges Witt to be careful to bandage any wounds and to be aware of keeping a clean and sanitary work area.

Lord also issued a memo to Witt, dated May 20, 2008, wherein she referenced a discussion between them, where Lord criticized Witt for his conduct in an argument between Witt and another employee.

On December 23, 2008, Lord issued a memo concerning her discussion with Kuznir. This memo reflected a discussion concerning “proper form and attention to detail on donor acknowledgement letters.” The memo further reflects that Lord indicated to Kuznir that she must be more careful in proofing letters and catching errors before presenting the letters to Johnston for his signature. The impetus for this memo came from Johnston, who had been complaining in voice mails to Lord about the errors in letters that had been prepared for his signature by Kuznir. Finally, Gasecki informed Lord that Johnston had directed that she speak to Kuznir about the proliferation of errors that Johnston had been receiving and that she should write a memo documenting their conversation. Accordingly, Lord issued the memorandum to Kuznir, as described above.

Notably, none of the memoranda issued by Lord to Witt or Kuznir made any mention of future discipline for the employees nor does the record reflect that either of the employees re-

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<sup>19</sup> Lord had prepared reviews for Kuznir for the years 2006 and 2007.

ceived any discipline based on the conduct described therein. Further, the memo issued by Lord to Kuznir was the only such memo issued by Lord to Kuznir either before or after June 2009.

In January 2008, when Lord still had responsibility for the customer employees, she and Czerwinski interviewed Angela Utaro, an applicant for a customer position reporting to both Lord and Czerwinski. After the interview, Czerwinski and Lord discussed the applicant, and both agreed that she should be hired. They made a recommendation to hire Utaro to Marzano and Johnston, and Utaro was hired without any further interviews.<sup>20</sup>

In early July 2009, Lord was asked by Marzano to participate in an interview with Marisa Evans, who was applying for a position as a certified vet tech. According to Marzano, she asked Lord to participate in the interview. Respondent was also considering Evans as a potential candidate for a district manager position since Evans had “a lot of experience.” Thus, Marzano testified that she wanted Lord’s input as to whether Evans would fit into the management team. Lord participated in the interview along with Marzano, Wright and Zaluski.

Marzano testified that after the interview the participants discussed Evans and that Lord replied that she “liked” Evans. However, Marzano did not indicate if Lord recommended that Evans be hired. In fact, Marzano conceded that Respondent had not made a decision on whether to hire Evans when Evans “dropped out” of consideration for the position. Thus, Evans was not hired by Respondent.

Marzano also testified that Lord was involved in the interview of Karen Cordner for the position of district manager in early November 2009. According to Marzano, Lord was a participant along with other “managers” in the interview and Lord as well as the other managers would give their opinions as to whether Cordner would be a “good fit” for the job. Marzano, however, did not testify as to what recommendation or input Lord gave to Respondent concerning the hiring of Cordner. When asked specifically about Lord’s role during the interview process of Cordner, Marzano testified as follows: “She would have participated in the interview process to not only answer any questions that the candidate or the applicant would have, but also to give the applicant some insight into the organization as a whole and to ask questions.”

Gasecki testified that he was hired by Respondent in April 2008. When he interviewed for the CFO position, he had three interviews. The first was solely with Marzano. The second interview was with a panel of managers, including Marzano, Lord, Wright, and Zaluski. The third interview, according to Gasecki, included a panel of “people,” who Gasecki did not name, plus Johnston. No further evidence was adduced concerning Lord’s participation in the hiring process of Gasecki. Thus, no evidence was presented that Lord made any recommendation concerning the hiring of Gasecki.

If Kuznir was going to be out for the day, she would either call Lord or Marzano. Respondent had a policy that vacations

for longer than 5 days in a calendar quarter had to be approved by the CEO. Lord was involved in recommending to Johnston that Kuznir be allowed to exceed the 5-day limit on several occasions. Most of the time, Respondent would approve Lord’s recommendations in this regard. However, on one occasion in 2009, Lord had recommended approval of 8 vacation days for Kuznir. Marzano and Gasecki met with Lord and expressed Respondent’s displeasure with granting Kuznir 8 days of vacation time. After some negotiation between Lord, Marzano, and Gasecki, Respondent approved 6 days of vacation for Kuznir.

Also, in an email exchange between Kuznir and Lord on August 7, 2009, Kuznir states, “But you are a boss.”

Lord summarizes her responsibilities at Respondent in a resume that she prepared and posted online. It states that she was “responsible for extensive growth of development strategy, most notably the implementation of online fundraising strategies, including developing and implementing social networking strategy. Major duties include management of an animal direct mail program, special events planning and the interfacing with donors. Also, [she] acted as IT manager for main and regional offices.”

More specifically, in 2004, shortly after she was hired, Lord was part of a team that developed the concept of online fundraising for Respondent, which had not existed before. The team included Steve Zulli, who was Gasecki’s predecessor as CFO, and the public relations director. The team sought to expand Respondent’s website to include an option for donors to make donations on the website directly. In that connection, the team evaluated two or three different companies to design the website and to implement fundraising strategies. They finally selected Convio as the vendor to utilize, and the team so recommended to the board. The recommendation was approved, and Convio was selected.

After Convio was chosen, Lord was the liaison between Respondent and Convio. She worked with the consultant from Convio, ran the reports about the donations and evaluated the success towards the goals that Convio had said Respondent could achieve. Convio would make suggestions concerning sending out emails and designing the website in a way that encourage more donations. Lord, the CFO and the public relations director would evaluate these suggestions and recommend them to the board.

Convio initially had signed a 3-year contract with Respondent. In 2007, Convio and Respondent entered into a new contract. Lord and the other members of the team evaluated the performance of Convio, as well as the proposals made by Convio, to renew its contract and recommended to the president and the board that the proposal be accepted. The president and the board agreed, and a new 3-year contract was signed on September 25, 2007, by Johnston on behalf of Respondent. Lord’s initials also appeared on the document, as well as Jeffrey Wands, the CFO at the time. Johnston had initiated a policy that the supervisory manager in charge of the function, for which the contract would serve, would be required to initial each contract that Johnston would sign. The contract lists Lord as the “principal contact” and “billing contact” for Respondent in connection with the implementation of the contract. Some of the specific strategies that Convio would suggest and that Lord

<sup>20</sup> The interview process also included a 1-day trial, where Utaro worked for Respondent for a day. Lord and Czerwinski observed her and concurred that she should be offered a position.

and the other members of the team would evaluate included how many times per year emails should be sent out and at what time of the year emails should be sent out to try and get the best response.

In 2009, Convio recommended to Lord that Respondent implement a new tool that would have allowed Respondent to closely integrate online donations with offline donations. Respondent's offline donations that were received by mail had been coordinated by Kuznir in a separate database. The new tool would have enabled all of Respondent's donations to be in one place. Lord thought that this was a good idea and discussed it with Gasecki. Gasecki also thought the concept was a good idea, but there had been no pricing information at the time. Lord was in the process of exploring different options for how Respondent could implement it and how much it would cost when she was terminated. The record does not reflect whether this proposal by Convio was ever implemented by Respondent.

On October 23, 2009, Lord sent a memorandum to Gasecki recommending personal fundraising software that had been suggested by Convio. The memo gives reasons why Lord thought that the proposal was worthwhile pursuing and included the cost of the product. Respondent did not follow Lord's recommendation in this regard because as Gasecki testified, "We weren't convinced that it would give us enough of a return."<sup>21</sup>

Respondent also raises money through a direct mail campaign. The vendor utilized by Respondent to implement the program was Alpha Dog. This direct mail campaign resulted in \$1.1 million in revenue for Respondent in 2009. Lord was responsible for managing the relationship between Alpha Dog and Respondent. She was, as she was with Convio, the liaison between Respondent and Alpha Dog. This role consisted of making sure Respondent got the mailings out on time according to the plan and monitoring the reports to see if Respondent was raising the amounts of money that Alpha Dog had projected. Lord also was making sure that Respondent submitted the necessary information to Alpha Dog by the deadlines required by the plan put in place by Alpha Dog.

Lord was also involved, along with Public Relations Director Wright, in reviewing and changing, if necessary, copies of letters prepared by Alpha Dog to be sent by direct mail under Respondent's name.

In 2005, during Hurricane Katrina, some employees of Respondent had been there assisting, presumably with regard to helping with animals. Someone suggested to Lord that Respondent include that fact in a mailing so that people might want to keep that in mind when deciding on whether to donate to Respondent. Lord proposed to Johnston that this be done, and the recommendation was approved.

Alpha Dog representatives would have two meetings a year with representatives of Respondent to discuss Alpha Dog's plans for direct mailing. Lord would be present, along with Johnston, the CFO, Wright, and Marzano, at times. Lord, since she was the liaison with Alpha Dog, discussed with Alpha Dog

representatives their proposal before the meetings with Respondent and then would ask Lord if anything is missing. However, Lord did not make any suggestions to what should be included in the proposal, but would comment on typographical errors that she found. Lord would also coordinate with Mike Monk, the CEO of Alpha Dog, in setting up the twice yearly meetings with Respondent.

During these meetings, the Alpha Dog representatives would present its plans for the next year. The group of Respondent's officials, including Lord, described above, would discuss it and eventually approve the plan proposed by Alpha Dog.

An email exchange between Lord and representatives of Alpha Dog in June 2009 reflects that Mike Monk, CEO of Alpha Dog, proposed a prospect test consisting of a modification of the frequency and content of Respondent's direct mailings. Monk stated in the email that "I need your approval this week if at all possible." The mail also reflects that he could call Lord the next morning to discuss his proposal.

A week later, Lord responded to Laura Klaus, another representative of Alpha Dog, as follows: "The package looks good. Let's go ahead with the test. As I discussed with Mike, this won't be an additional cost on top of our original plan, but we will be substituting some of the planned quantity with this. Let me know if you need anything else. Thanks."<sup>22</sup>

Another facet of Lord's responsibility involved maintaining Respondent's Facebook page and Twitter account. This was actually part of the Convio proposal, which Respondent implemented to utilize these social networking sites to publicize Respondent's operations. In that regard, Lord would consult with Public Relations Manager Wright and decide which items to post, and Lord would be responsible for actually posting updates on these sites.

Lord's primary responsibility was as manager of technology. She was in charge of all of Respondent's technological infrastructure, including its computer networks, PCs, software used by Respondent, internet connections, and its phone system. She worked with the outside vendor, which maintained Respondent's computer network to make sure that everything is functioning. If any employee had questions about or problems with their computer or software, if it could not be resolved by their supervisor, they would go to Lord for assistance.

Lord would also be involved in making recommendations to Respondent to expand or change its technology. In that regard, in 2006, Lord recommended that Respondent change the database that Respondent used to track animals. Lord believed that the prior system used by Respondent was inferior to "PetPoint," and she recommended that Respondent switch to PetPoint. The recommendation was accepted, and PetPoint became Respondent's shelter software. PetPoint tracks the animal from the time that it comes into the shelter and includes its medical history, how long the animal remains in the system and when it is adopted. The program also includes animal statistics about Respondent's operations, the animals that it receives and where they come from. PetPoint also records case receipts and it is a

<sup>21</sup> The record does not reflect precisely how or who made the decision not to accept Lord's recommendation to purchase and use this product.

<sup>22</sup> The record does not reflect whether Lord obtained authorization from anyone else at Respondent before approving the request of Alpha Dog to go forward with the test.

“point of sale system.” A large number of Respondent’s employees utilize PetPoint, and if they have questions or problems about it, they come to Lord for assistance. Lord also monitors the system and will notify employees if she sees errors in their use of the system.

On June 18, 2009, Lord recommended to Gasecki that they utilize a new internet monitoring system and attached a description of the product for Gasecki’s review. The record does not establish whether the particular recommendation was ultimately approved. Lord did testify, however, that Respondent switched to a “new database” in 2009 based on her recommendation, but did not provide any further details concerning this item.

Finally, Lord was assigned to the project of obtaining registration for Respondent with Charity Navigator, which is a rating agency for nonprofits and charities. Lord interacted with Charity Navigator in registering Respondent, obtaining and compiling the necessary information from various sources within Respondent to submit to the agency and filling out the application. This process resulted in Charity Navigator awarding Respondent a 4-star rating on July 1, 2009.

## VII. ANALYSIS

### A. Supervisory Status of Lord and Karchere

Section 2(11) of the Act, 29 U.S.C. § 152(11), defines the term “supervisor” as:

An individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct their, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

An individual need only possess *one* of these indicia of supervisory authority as long as the exercise of such authority is carried out in the interest of the employer, and requires the use of independent judgment. *Sheraton Universal Hotel*, 350 NLRB 1114, 1115 (2007); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003). It is not required that the individual have exercised any of the powers enumerated in the statute, rather, it is the *existence* of the power that determines whether the individual is a supervisor. *Arlington Masonry*, supra; *California Beverage Co.*, 283 NLRB 328 (1987).

Thus, while Section 2(11) of the Act requires only possession of “authority” to carry out the enumerated supervisory function, the evidence still must suffice to show that such authority actually existed. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). The burden of proving supervisory status falls on the party asserting it. *Sheraton Universal*, supra; *KGTV*, 329 NLRB 454, 455 (1999). The proof that is required to demonstrate the existence of supervisory authority must relate to the specific period of time, wherein the alleged supervisor had such authority. It is irrelevant if the individual possessed such authority at a different time. *Avante at Wilson*, supra at 1057.

Further, the Board has repeatedly observed, supported by the courts, that in making a determination of supervisory status,

such status should not be construed too broadly because an employee, who is deemed to be a supervisor, may be denied rights, which the Act is intended to protect. *Talmdage Park Inc.*, 351 NLRB 1241, 1243 (2007); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 (2006); *Avante at Wilson*, supra at 1058; *Tree-Free Fiber Co.*, 328 NLRB 389, 390 (1999); *East Village Rehabilitation Center v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999); *Williamson Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (6th Cir. 1987); *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970).

In applying the principles set forth in these and other cases, I conclude that Respondent has fallen short of meeting its burden of proof that either Karchere or Lord was a supervisor under Section 2(11) of the Act at the time that Respondent terminated them. As I have observed above, Respondent appears to have abandoned its prior position that Karchere was a statutory supervisor since its own witness conceded that Karchere did not supervise anyone. Moreover, no evidence was adduced that Karchere possessed or exercised any of the indicia of supervisory authority set forth in 2(11) of the Act. Accordingly, I find that Respondent has not demonstrated that Karchere was a 2(11) supervisor.

Respondent does vigorously assert that it has presented evidence to establish that Lord possessed and/or exercised several of the indicia of supervisory status in Section 2(11) of the Act. It asserts that Lord possessed and exercised the authority to effectively recommend hiring, direct the work of employees, issue disciplinary memoranda, and write performance evaluations for employees.

I do not agree that the evidence adduced at the trial concerning these issues established that Lord either possessed or exercised any primary indicia of supervisory responsibility during the relevant time period.

In that regard, I note that the evidence is undisputed that in June 2009, several months before her termination, a substantial portion of Lord’s alleged supervisory functions were removed as a result of a reorganization, wherein she no longer had responsibility for supervising customer service representatives. Therefore, much of the evidence presented concerning Lord’s pre-June authority concerning the customer service representatives is not relevant to the determination of her status in December 2009 when she was terminated. *Avante at Wilson*, supra at 1057; *Volair Contractors*, 341 NLRB 673, 674–675 (2004). However, I do agree with Respondent that since it is sufficient that it establish that Lord possessed authority to exercise any of the indicia of supervisory status set forth in 2(11) of that Act, that it is appropriate to consider Lord’s pre-June conduct with respect to Kuznir, since it is clear that she continued to supervise Kuznir, even after the June 2009 reorganization. For example, I conclude that had Lord not been terminated, she would have written Kuznir’s 2009 performance evaluation since the evidence discloses that Lord had performed this function in several prior years.

Whether Lord’s authority to write these performance evaluations as well as other evidence of her pre- and post-June 2009 conduct with regard to Kuznir and other employees is sufficient to establish supervisory status is another matter. It is to these issues that I now turn.

Respondent places significant reliance on what it characterized as Lord's participation in Respondent's hiring process, both before and after June 2009, to establish that Lord exercised and possessed the authority to effectively recommend hiring of employees. The evidence, however, discloses only a single instance, where it was established that Lord effectively recommended the hire of an employee by Respondent. That was Lord's role in the interviewing along with Team Leader Czerwinski of Angela Utaro in January 2008. There, Lord, after the interview, recommended that Respondent hire Utaro, and Respondent did so without any further interviews. This conduct would be evidence of Lord exercising her authority to effectively recommend hire, but it cannot be considered as relevant to Lord's status when she was terminated since this conduct was related to her supervisory role over customer service employees, which had ended in June 2009. *Avante at Wilson*, supra; *Volair Contractors*, supra.<sup>23</sup>

Respondent, apparently conceding the irrelevancy of the Utaro hiring, argues that Lord, subsequent to June 2009, continued to be involved in the hiring process. In that regard, in July 2009, Marzano asked Lord to participate in an interview with Marisa Evans, who was applying for a position as a certified vet tech. According to Marzano, Respondent was considering Evans as a potential candidate for a district manager since Evans had "a lot of experience." Marzano testified that she wanted Lord's input as to whether Evans would fit into Respondent's management team, and so that the managers present, including Lord, "could answer the applicant's questions as far as the whole company picture."

Marzano further testified that Respondent utilized a "three-interview" process, wherein three groups of managers would interview the applicant and give feedback to Respondent's decisionmaker, Johnston, as to the particular manager's opinion whether they thought the applicant would "fit." Lord interviewed Evans, along with Wright, Zaluski, and Marzano. There were also two other interviews with different managers, where Marzano also attended. One of the interviews, the last one, also included Johnston.

According to Marzano, Lord was present along with Zaluski and Wright at one of the three interviews with Evans. Marzano did not recall what Lord said during the interview, but recalled, "I'm sure she asked her questions. I don't remember anything in particular." The record reflects that after the interview, Wright, Zaluski, Marzano, and Lord met in the conference room for "feedback." Marzano testified further concerning the process and the opinions of the managers. "As I mentioned before, Maureen and other managers were part of an interview process and their input was requested in those cases. It wouldn't have been as strong as recommending someone for hire, but there would have been attention paid to their opinions,

<sup>23</sup> While Lord made one effective recommendation to hire Utaro in January 2008, I need not, and do not, decide whether this conduct or other pre-June 2009 evidence is sufficient to establish that Lord was a supervisor under Sec. 2(11) of the Act at that time. I do find, however, that her role in recommending Utaro's hire cannot be considered as relevant to her status post-June 2009 when she no longer supervised customer service employees, of which Utaro was one.

whether they thought this was a good fit for us." Marzano also testified that while she didn't remember anything in particular that Lord said about Evans during the feedback, she added that "we probably asked her what she thought," and Lord said that she "liked her." Marzano did not testify as what, if anything, she or the other managers, who participated in the interview along with Lord, said. Significantly, Marzano also did not testify as to whether or not this group of managers that included Lord made any recommendation to Johnston that Evans be hired. Marzano also did not testify whether or not she transmitted to Johnston Lord's comment during the "feedback" that she "liked" Evans. Further, Marzano conceded that Respondent had not made any decision whether or not to offer a position to Evans when Evans dropped out of the consideration for the job.

Based on the above facts, Respondent argues that Lord's involvement in the hiring process concerning Evans demonstrated that Lord still possessed the authority to effectively recommend hiring subsequent to June 2009. I disagree.

Indeed, Marzano's own testimony refutes any such conclusion. Thus, Marzano conceded that Lord's participation in this interview, along with other managers, was "not as strong as recommending" someone for hire, but merely that Respondent's decisionmaker, Johnston, pay attention to their opinion whether the managers thought the applicant was a good fit for the organization. This can hardly be construed as a recommendation to hire. More importantly, here the only comment made by Lord concerning Evans was that she (Lord) "liked" Evans, which does not even rise to the level of an opinion that Evans was a "good fit" for Respondent, much less to a recommendation that Evans be hired. Further, there is no evidence that Lord's comments about Evans were even communicated by Marzano to Johnston or that anyone, including Lord, had made a recommendation to Johnston that Evans be hired.

Finally, it is undisputed that Respondent never made any decision whether or not to offer a position to Evans. Thus, Lord's role in the interview process, concerning Evans, falls short of establishing that she had the authority to effectively recommend the hiring of employees.

I would also note that participation in the interview process, even where opinions or recommendations are given, is not necessarily sufficient to establish effective recommendations to hire, particularly, where as here, the decisionmaker (Johnston) also participated in the interview process. *Ryder Truck Rental*, 326 NLRB 1386, 1387 fn. 9 (1998); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989).

Respondent presented no evidence, that even if Lord's statement to Marzano that she liked Evans could be construed as a recommendation to hire, that Lord's purported recommendation would have carried more weight than that of the other interviewers or, indeed, any weight at all. *The Door*, 297 NLRB 601, 602 (1990).

Finally, the best that can be said for Lord's participation in this process is that she is part of a group recommendation that the applicant would be a good fit for the organization. This kind of a "recommendation" is considered to be merely an assessment of "compatibility," and does not support a finding of a hiring authority within the meaning of Section 2(11). *Talmadge Park, Inc.*, 351 NLRB 1241, 1244 (2007); *Tree-Free Fiber Co.*,

328 NLRB 389, 391 (1999); *Greenspan D.D.S., P.C.*, 318 NLRB 70, 76–77 (1995), enfd. mem. 101 F.3d 107 (2d Cir. 1996); *Anamag*, 284 NLRB 621, 623 (1987).

Respondent fares little better in its assertions that Lord's role in the interview process concerning Cordner and Gasecki also establishes that she possessed or exercised the authority to effectively recommend hire. Marzano testified concerning Lord's role in this interview process for Cordner, who was interviewed and ultimately hired for the position of district manager.

Marzano was uncertain as to the date of the interview of Cordner that Lord participated in, but an email introduced into the record places the interview on July 16. According to the email, Marzano, Wright, and Zaluski were also present. Similar to her testimony concerning Lord's role in the interviewing of Evans, Marzano asserted that Lord, as well as the other managers present during the interview, provided opinions as to whether Cordner would be a "good fit for the job." However, Marzano did not testify as to what Lord specifically stated during or after the interview and did not testify whether Lord either recommended that Respondent hire Cordner or even whether or not Lord felt Cordner would be a "good fit." Indeed, Marzano did testify that Lord "would have participated in the interview process to not only answer questions that the candidate would have, but also to give the applicant some insight into the organization as a whole and to ask questions." Further, Marzano did not even testify whether or not the group of managers, including Lord, who interviewed Cordner, made a group recommendation to hire Cordner or what other interviews were conducted before she was hired. As related above, Marzano testified that normally Respondent's interview process consisted of three separate interviews, including Johnston, the decision-maker.

In these circumstances, similar to my conclusions detailed above concerning Lord's role in the interviewing of Evans, her participation in the interview of Cordner provides no support for Respondent's assertion that Lord exercised or possessed the authority to effectively recommend hire of employees. Thus, as noted above, Respondent provided no evidence that the group of managers that included Lord, and who interviewed Cordner, made a recommendation to hire Cordner or even that they considered Cordner a "good fit." More significantly, no evidence was adduced that Lord herself made any such recommendations.

Moreover, as I have detailed above, participation in the interviewing process is insufficient in itself to establish the requisite 2(11) supervisory authority to recommend hire, even where such recommendations are made, particularly where as here, Johnston, the decisionmaker, also participated in an interview of the applicant. *Ryder Truck*, supra, 326 NLRB at 1387; *Talmdge Park*, supra; *Tree-Free Fiber*, supra at 391; *Greenspan DDS*, supra, 318 NLRB at 76–77; *Anamag*, supra, 284 NLRB at 623; *The Door*, supra, 297 NLRB at 602.

Additionally, even apart from the above analysis, Lord's participation in interviewing Cordner cannot be used to establish Lord's supervisory status under Section 2(11) of the Act since supervisors are not considered employees of the employer. *Volair Contractors*, supra. It is well settled that an individual must exercise supervisory authority over employees of the em-

ployer in order to qualify as a supervisor under Section 2(11) of the Act. *Franklin Hospital Medical Center*, 337 NLRB 826, 827 (2002) (purported supervisors supervised employees employed by outside vendors); *North General Hospital*, 314 NLRB 14 (1994) (attending physicians supervised interns and residents); *Great Lakes Sugar Co.*, 92 NLRB 1408, 1409–1410 (1951) (supervision over agricultural workers, who are excluded from the definition of employee under 2(3) of the Act). It, therefore, follows, and I so conclude, that Lord's role in hiring Cordner cannot be considered as indicative of 2(11) supervisory status, even if it had been established, which it has not, that Lord effectively recommended that Cordner be hired by Respondent.

For similar reasons, I also reject Respondent's contention that Lord's participation in the interview process for the hiring of Gasecki as CFO is supportive of her supervisory status. The evidence adduced on this issue reveals that in April 2008, Lord participated in a panel interview of Gasecki, along with Wright, Marzano, and Zaluski. Gasecki also had a third interview, including a panel of people, including Johnston. However, the record does not reveal whether Lord was present at the third and final interview. No further evidence was presented concerning this issue. Thus, once again, no evidence was presented that either the managers, who interviewed Gasecki, or Lord herself, made any recommendation to hire Gasecki. As detailed above, mere participation in the interviewing of applicants is insufficient to establish the exercise or the possession of the authority to effectively recommend hiring. *Ryder Truck*, supra; *Tree-Free Fiber*, supra.

Further, since the CFO is clearly a supervisory position, Lord's involvement in interviewing a candidate for such a position cannot be considered as relevant to 2(11) status. *Franklin Hospital*, supra; *North General Hospital*, supra; *Great Lakes Sugar*, supra.

In addition to Lord's alleged authority to recommend hire, Respondent also asserts that Lord effectively recommended discipline, which is 1 of the 12 indicia of supervisory authority in 2(11) of the Act. In that regard, Respondent introduced three memos, which it characterized as disciplinary, reflecting discussions that Lord had, all prior to June 2009, with two employees, one of whom was Kuznir. Two of the documents involved Lord criticizing Customer Service Representative Witt for leaving blood at his station and for arguing with another employee. The third memo, issued to Kuznir on December 23, 2008, reflects a discussion between Lord and Kuznir concerning "proper form and attention to detail on donor acknowledgement letters" and states that Lord indicated to Kuznir that she must be more careful in proofing letters before presenting the letters to Johnston for his signature.

The memos issued by Lord to Witt have no significance in assessing Lord's supervisory status, as I have detailed above, since they involved customer service employees, whom Lord no longer supervised subsequent to June 2009.

I agree with Respondent that Lord's memo to Kuznir can be considered even though it occurred in 2008 since it is relevant to whether she "possessed" the authority to discipline employees in 2009 as her supervisory responsibilities towards Kuznir did not change. However, I do not agree with Respondent that

Lord's memo to Kuznir establishes that Lord possessed the authority to discipline or to effectively recommend discipline. Significantly, Respondent has not showed that in the memo issued by Lord to Kuznir, or for that matter to Witt, Lord mentioned the possibility of any discipline for the employees involved if the conduct complained of continued or that the memos issued by Lord resulted in any further discipline by Respondent or that it was part of a progressive disciplinary process utilized by Respondent. In such circumstances, Respondent has not demonstrated Lord's supervisory authority to discipline employees. *Pacific Coast M.S. Industries*, 355 NLRB No. 226, slip op. at 4 (2010); *Williamette Industries*, 336 NLRB 743, 744 (2001); *Ken-Crest Services*, 335 NLRB 777, 778 (2001); *Vencor Hospital-Los Angeles*, 328 NLRB 1136, 1139 (1999).

Further, the one memo that Lord issued to Kuznir was instigated by Johnston through Gasecki, who informed Lord that Johnston had directed that she speak to Kuznir about the proliferation of errors that Johnston had been receiving in letters that had been prepared by Kuznir for Johnston's signature. Thus, this memo not only did not mention possible discipline for Kuznir, but does not demonstrate independent judgment since Lord was directed by higher management to issue the memo. *Ryder Truck*, supra, 326 NLRB at 1387.

Accordingly, Respondent has not come close to establishing that Lord possessed or exercised the authority to issue a recommend discipline.

Respondent also argues that Lord's role in the preparation of performance reviews establishes her supervisory status. The record establishes that Lord, along with Czerwinski, prepared performance reviews for the customer service representatives under their joint supervision. Once again, the conduct of Lord cannot be considered in assessing her post-June 2009 status since her supervision of customer service employees ceased at that time. I again agree with Respondent that Lord's preparation of performance evaluations for Kuznir in 2006, 2007, and 2008 can be considered in assessing Lord's status post-June 2009 since her supervision of Kuznir continued after Lord's supervisory authority over customer service employees was removed. However, the authority to evaluate employees' performance is not a 2(11) indicium. Thus, when the evaluation does not by itself affect the wages and the job status of the employee evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. *Pacific Coast M.S. Industries*, supra, 355 NLRB No. 226, slip op. at 2 fn 13; *Williamette Industries*, supra, 336 NLRB at 743, 744; *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999); *Vencor Hospital*, supra, 328 at 1139-1140. Here, Respondent has not adduced any evidence that the evaluations written by Lord for Kuznir, or indeed for the customer service representatives, played any role in the employees' job status or on any potential wage increases for these employees. Thus, Lord's supervisory status has not been established by her role in preparing performance evaluations.

Moreover, the record establishes that Johnston regularly changed portions of Lord's reviews, including making changes in Lord's scores for Kuznir in the 2008 review for Kuznir prepared by Lord. This finding further diminishes the significance

of Lord's role in preparing these evaluations in assessing her supervisory status. *Elmhurst Extended Care*, supra at 536-538 (employer has not established that the annual evaluations of charge nurses lead directly to personnel actions, which affect either the wages or the job status of the CNAs).

Respondent also contends that it has proven that Lord's direction of the work of Kuznir, as well as that of other employees, demonstrates her supervisory status. Once again, I cannot agree.

In order to establish that an individual "responsibly directs" employees under Section 2(11) of the Act, it must be established that the employer delegated to the purported supervisor the authority to direct the work of employees using independent judgment, plus the authority to take corrective action if necessary and that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. *Oakwood Health Care, Inc.*, 348 NLRB 686, 690-694 (2006). Here, Respondent relies on the evidence that Lord was responsible for directing and correcting Kuznir's work, particularly Kuznir's writing of donor acknowledgement letters, corrected her timecards, and approved Kuznir's vacation requests. Further, Lord instructed customer service employees subsequent to June 2009 on the use of Respondent's PetPoint system, and if an employee had a question about the use of the PetPoint system, they would ultimately go to Lord for direction, assuming that their immediate supervisor could not solve the problem.

Lord's correction of Kuznir's timecards does not evidence independent judgment, but is considered to be merely a routine clerical function not demonstrative of supervisory status. *Talmdage Park*, supra, 351 NLRB at 1244; *Webco Industries*, 334 NLRB 608, 610 (2001).

Similarly, while Lord does recommend approval of vacations for Kuznir, these recommendations do not involve the exercise by Lord of independent judgment since they are based on the availability of the dates or enforcement of Respondent's rules on frequency of vacation days and are routine and clerical in nature. *Dico Tire, Inc.*, 330 NLRB 1252, 1253 (2000); *Fleming Cos.*, 330 NLRB 277, 280 (1999); *North Shore Weeklies, Inc.*, 317 NLRB 1128, 1130 (1995).

I need not decide whether Lord's conduct in correcting errors in Kuznir's preparation of letters for Johnston's signature<sup>24</sup> or her role in instructing employees in the use of PetPoint involves the exercise of independent judgment since Respondent has clearly failed to demonstrate the existence of the third crucial element of establishing responsible direction under *Oakwood Healthcare*, supra. Thus, Respondent has adduced no evidence that Respondent holds Lord accountable for the performance of Kuznir or any other employee allegedly under Lord's supervision. It produced no evidence that Lord faced the prospect of "adverse consequences" due to a failure of Kuznir or any employee to perform the tasks that Lord allegedly is responsible for directing them to perform. *Lynwood Manor*, 350 NLRB

<sup>24</sup> I do note in this regard that Lord's role in this respect appears to have been circumscribed by Johnston's frequent complaints to Lord that Kuznir's errors were too extensive and needed to be corrected.

489, 490–491 (2007); *Golden Crest Healthcare*, 348 NLRB 727, 731–732 (2006); *Oakwood Healthcare*, supra at 695.<sup>25</sup>

Respondent also asserts that the evidence established that Lord possessed several secondary indicia of supervisory status, such as participation in management meetings, receipt of Respondent’s management memos, as well as the fact that employees considered her to be a supervisor.<sup>26</sup> Respondent further asserts that such indicia of supervisory status can be relied upon to support a finding of supervisory status. *Sheraton Hotels*, supra, 350 NLRB at 1118.

However, it is well settled that absent evidence of the existence of one of the primary indicia of supervisory status, secondary indicia are not dispositive. *Pacific Coast M.S. Industries*, supra, 355 NLRB No. 226, slip op. at 2 fn. 13; *Central Plumbing Specialties*, 337 NLRB 973, 975 (2002); *Ken-Crest Services*, supra, 335 NLRB at 779; *Training School at Vineland*, 332 NLRB 1412, 1412–1413 fn. 3 (2000).

Therefore, since I have found that Respondent has not demonstrated that Lord possessed or exercised any of the primary indicia of supervisory status, the evidence of secondary criteria, related above, is not sufficient to meet Respondent’s burden that Lord was a supervisor under Section 2(11) of the Act.

Accordingly, based upon the foregoing analysis and precedent, I conclude that Respondent has fallen considerably short of meeting its burden of proof of establishing Lord’s supervisory status at the time of her termination in December 2009.

#### *B. Managerial Status of Karchere and Lord*

While the Act makes no specific mention of “managerial” employees, it is undisputed that such employees are excluded from the Act’s coverage because their functions and interests are more closely aligned with management than with unit employees. *International Transportation Service*, 344 NLRB 279, 285 (2005); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 286 (1974).

Managerial employees have been defined as “those who formulate and effectuate management policies by expressing and making operative the decisions of their employer and who have discretion in the performance of their jobs independent of their employer’s established policies.” *Case Corp.*, 304 NLRB 939, 948 (1991), enf. 995 F.2d 700 (7th Cir. 1993); *NLRB v. Bell Aerospace*, supra. Accord, *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

While work, which is based on technical or professional competence, often involves the exercise of discretion and

<sup>25</sup> While the performance evaluation of Lord by Gasecki, dated January 2, 2009, does rate Lord in various areas of supervision, including direction of work, this evaluation was issued at a time that Lord was supervising customer service representatives (which ended in June) and appears to primarily be directed to this aspect of her responsibilities. More importantly, simply evaluating the purported supervisor on her performance in supervising employees is insufficient to establish “accountability” under *Oakwood Healthcare*, supra, absent specific evidence that Lord’s “evaluation” for direction of subordinates may have, either by itself or in combination with other factors, an effect on Lord’s terms and conditions of employment. *Golden Crest*, supra.

<sup>26</sup> This latter fact was allegedly established by Kuznir referring to Lord as “a boss.”

judgment, technical and professional employees are not the same as managerial employees. Technical and professional employees are not vested with management authority, merely because of their status, even though the work that they perform may have bearing on the direction of the company or where they make recommendations in order to reduce the employer’s cost of business. *Case Corp.*, supra, 304 NLRB at 939 and 948. Further, technical expertise involving the exercise of judgment and discretion does not confer managerial status upon the performer. *Case Corp.*, supra at 948; *General Dynamics Corp.*, 213 NLRB 851, 857–858 (1974).

It is also clear that as in the case of supervisory status, the party asserting managerial status has the burden of proving it. *George Mee Memorial Hospital*, 348 NLRB 327, 333 (2006). The definition of managerial employee has been construed narrowly since as with supervisory status those employees, who fall within that category, are denied substantial statutory rights. *Curtis Industries*, 218 NLRB 1447, 1448 (1975).

Applying these principles to the instant case, I conclude that Respondent has failed to meet its burden of proof that either Lord or Karchere were managerial employees under applicable Board and court precedent.

With respect to Lord, Respondent relies on Lord’s conduct as manager of development and technology, where in Respondent’s view she was “involved in the formulation, determination and effectuation of management policies.” *Point Park v. NLRB*, 457 F.3d 42 (D.C. Cir. 2006).

Respondent relies on Lord’s role in effectively recommending to Respondent that it change its database for animal tracking to use software from PetPoint. Lord believed that PetPoint was a superior system to the one used by Respondent at the time. Lord’s recommendation was accepted and the PetPoint system, which tracks the animals from the time that it comes into the shelter and includes various other animal statistics and receipts, has been utilized by Respondent since that time. Lord monitors the system and notifies employee if she sees errors in their use of the system and answers questions that employees may have about it.

Similarly, Lord was part of a team, along with Respondent’s CFO and public relations director, that developed the concept of online fundraising, which had not existed before. The team sought to expand Respondent’s website to include an option for donors to make donations directly. The team evaluated two or three proposals and selected Convio as the vendor to use. The team recommended approval of Convio to Johnston and the Board, and the recommendation was approved. Lord was the liaison between Convio and Respondent. Convio would make various suggestions concerning sending out emails and designing the website in ways to encourage more donating. Lord, the CFO, and the public relations director would evaluate these suggestions and recommend them to the board.

In 2007, the previous contract between Convio and Respondent was renewed after Lord and the other members of the team evaluated Convio’s performance and recommended that Convio’s proposal be accepted. Pursuant to Johnston’s instructions, Lord initialed the contract that Johnston signed on behalf of Respondent.

In 2009, Convio recommended that Lord implement a new tool that would have allowed Respondent to closely integrate online donations with offline donations. Lord and Gasecki thought it was a good idea, and Lord was in the process of obtaining pricing information for the tool when she was terminated.

In October 2009, Lord recommended that Respondent purchase personal fundraising software suggested by Convio. Respondent rejected Lord's recommendation to purchase that software because it did not believe that it would give Respondent "enough of a return."

Finally, Respondent relies on Lord's role in managing Respondent's relationship with Alpha Dog, the vendor used by Respondent in the direct mail advertising campaign. Respondent notes that this campaign generated over \$1 million in revenue for 2009. Lord's responsibilities for managing the relationship between Respondent and Alpha Dog included making sure that Respondent submitted the necessary information to Alpha Dog on a timely basis and monitoring reports to see if Respondent was raising the amounts of money that Alpha Dog had projected. She, also, along with Wright, would review and change, if necessary, letters prepared by Alpha Dog to be sent by the plan put in place by Alpha Dog.

Lord also made a recommendation, which was ultimately approved by Respondent, to include a reference to Respondent's efforts to aid animals during Hurricane Katrina in its mailings by Alpha Dog.

Lord was also present, along with Johnston, Gasecki, Wright, and Marzano, at twice yearly meetings with representatives of Alpha Dog to discuss Alpha Dog's plans for direct mailing. The group of Respondent's officials would discuss Alpha Dog's plans for the next year and approve the plan proposed by Alpha Dog.

I cannot agree with Respondent that the above-described evidence either singly or collectively established that Lord formulated, determined or effectuated management policies as defined by Board and court precedent.

The primary area of responsibility for Lord is that of managing Respondent's computer systems, which includes making recommendations for purchases of software and computer equipment and acting as a liaison between computer vendors utilized by Respondent, such as PetPoint and Convio.

Such conduct does not establish that Lord makes or effectuates policy decisions of Respondent. It demonstrates only that Lord uses her technical expertise with respect to computers, which is not considered to be making or effectuating management policies, but merely a tool in carrying out its business, which is animal care and not computers. *Nurses United for Improved Patient Healthcare*, 338 NLRB 837, 840 (2003) (clinical system coordinator, who uses her computer expertise in helping develop and implement software programs for employer, not a managerial employee); *International Transportation Service*, supra, 344 NLRB at 279 (payroll and billing representative, who deals with software contractor and has authority to order modifications to programs costing in excess of \$23,000, is not a managerial employee); *Bakersfield Californian*, 316 NLRB 1211, 1214-1215 (1995) (systems/pagination coordinator, who as computer specialist manages and makes

recommendations on purchases of hardware and software, is not managerial employee; Board concludes that although her responsibility for computer system requires technical skill and expertise, this skill does not involve formulating policy or acting independently of employer's established policy). See also *Case Corp.*, supra, 304 NLRB at 939 (no evidence that purported managerial employee (engineer) has discretion to deviate from employer's established policies).

Based upon the above precedent, it is clear, and I so find, that Lord's computer responsibilities and functions do not establish that she was a managerial employee.

Respondent also relies upon, as noted, Lord's responsibilities as "development" manager, which encompasses managing Respondent's direct mail advertising in conjunction with Alpha Dog, the vendor utilized by Respondent. While these responsibilities of Lord are not directly related to her computer skills, my conclusion with respect to these functions of Lord is the same.

Respondent is not in the advertising business, but in the business of animal care. *Nurses United*, supra, 338 NLRB at 840. Further, there is no evidence that whatever discretion that Lord exercised in managing Respondent's direct mail fundraising, she had the discretion to deviate from Respondent's established policies. *Case Corp.*, supra, 304 NLRB at 939; *Solartec Inc.*, 352 NLRB 331, 336-338 (2008) (fact that purported managerial employee had authority to recommend purchase and use of equipment and machinery and to negotiate with supplier, insufficient to establish managerial status since the recommendations of knowledgeable employee does not evidence employee's discretion independent of employer's discretion and approval).

Respondent's reliance on the fact that Respondent's receives over \$1 million in donations from the direct mail donations that Lord manages is misplaced. It is well established that even where recommendations of a purported managerial employee results in saving of money for or a change of direction of employer's policies that is insufficient to establish managerial status, particularly, where the recommendations must be approved by higher management. *Case Corp.*, supra, 304 NLRB at 948-949 (engineers, whose basic function is to make recommendations to reduce costs and save money for employer, are not managerial employees); *Pacific Mutual Insurance Co.*, 284 NLRB 163, 167-168 (1987) (senior benefits analyst, who has among other functions, developed cost cutting measures, not managerial employee since his recommendations were subject to approval of higher management and not shown that he had discretion to deviate from employer's establish policy); *Neighborhood Legal Services*, 236 NLRB 1269, 1273 (1978) (unit heads not managerial employees; executive director makes final decisions and whatever weight he may choose to give to unit heads viewed on policy issues are attributable to the unit heads' professional expertise); *Illinois State Journal-Register v. NLRB*, 412 F.2d 37, 42-43 (7th Cir. 1969) (district manager not managerial employee despite authority to recommend to company changes in policies and future plans); *Sampson Steel & Supply, Inc.*, 289 NLRB 481, 482-483 (1988) (warehouse supervisor, who can pledge employer's credit and who recommends purchase of large warehouse saws, held not

to be managerial, but a knowledge employee, who did not formulate or effectuate employer policies); *Lockheed-California Co.*, 217 NLRB 573, 574–575 (1975) (buyer, although they can commit company’s credit up to \$50,000 and also negotiates prices with suppliers, does not have discretion independent of established policy since higher authority must review and approve much of their recommendations); *Westinghouse Broadcasting Co.*, 216 NLRB 327, 329–330 (1975) (producers/directors of radio and TV stations, who were told they were members of management, and are involved in planning and production of local programs, not managerial since their recommendations must be approved by higher management officials); *General Dynamics*, supra at 857–859 (engineers, although they make recommendations that bear on company direction and affect company policy, not managerial since their decisions and discretion are based on engineers’ technical skills and must be approved by managerial superiors); *Westinghouse Electric*, 163 NLRB 723, 726–727 (1967), enfd. 424 F.2d 1151, 1158 (7th Cir. 1970) (engineers, whose work requires a high degree of technical competence and use of independent judgment with respect to matters of importance to the employer’s financial and other managerial interests, held not “managerial,” but professional employees); *Puget Sound Power & Light Co.*, 117 NLRB 1825, 1827 (1957) (power pool engineers are not managerial although they make recommendations, which lead to financial outlays); *Western Electric Co.*, 100 NLRB 420, 422 (1952) (stock maintainer and unit stock maintainer are not managerial employees, even though their functions are important to employer and understocking or overstocking may result in loss to it).

Accordingly, based on the above analysis and Board and court precedent, I conclude that Respondent has failed to meet its burden of proof that Lord was a managerial employee at the time that she was terminated.

Respondent also asserts that the evidence establishes that Karchere was a managerial employee since she “formulated and effectuated management policies.” Respondent relies upon Karchere’s role in recommending changes in Respondent’s payroll process as well as a change in Respondent’s “aged cat” program, plus her role in the preparation of the 2009 Fox Clinic budget. Based upon much of the same analysis and precedent detailed above in my discussion of Lord’s status, I again do not agree with Respondent’s contentions with respect to Karchere’s status.

The record does establish, as Respondent asserts, that Karchere in her role as Respondent’s “finance assistant,” effectively recommended that Respondent change its payroll system from a manual timecard system to an automated card system. This recommendation clearly had financial implications for Respondent and was based on Karchere’s previous experience at a former job with the automated system that she recommended.

This conduct of Karchere is similar to Lord’s responsibilities as computer manager and requires a similar conclusion. Karchere, although exercising her judgment in making this recommendation, was not effectuating management policy, but merely using her technical expertise in recommending a tool in carrying out Respondent’s business, which is animal care and

not payroll processing. *Nurses United*, 338 NLRB at 840; *International Transportation Service*, supra, 344 NLRB at 279 (payroll and billing representative not managerial employee); *Triad Management Corp.*, 287 NLRB 1239, 1248 (1988) (corporate financial manager not managerial employees. See also *Holly Sugar Corp.*, 193 NLRB 1024, 1026 (1971) (timekeeper not managerial employee although he exercises judgment and makes some decisions); *Pacific Far East Line, Inc.*, 174 NLRB 1168, 1169 (1969) (financial analyst, who consults with management about corporate financial matters, but does not formulate or effectuate management policies).

Respondent is correct that the evidence further discloses that Karchere effectively recommended to management that it offer a discount for aged length of stay cats. Karchere convinced management, contrary to Gasecki’s view, that Respondent should emphasize how long the cat was in the system rather than chronological age in deciding on the discount. While this recommendation can be construed as a recommendation relating directly to animal care policy, it is, in my view, insufficient to establish Karchere’s managerial status.

I note initially that this recommendation was not part of Karchere’s regular job or responsibilities as finance assistant. It stemmed from her personal interest in cats and is a suggestion that could have been made by any employee. *NLRB v. Meenan Oil*, 139 F.3d 311, 319–320 (2d Cir. 1988) (payroll personnel administrator not a managerial employee although she made recommendations to management on various issues. Court concludes that “her recommendations were spoken directly to management, but were not different in kind from any employee’s deposit in a suggestion box”).

More significantly, as was the case with Lord’s recommendations, Karchere’s recommendations concerning the aged pet discount as well as the change in payroll systems were subject to higher management approval. Thus, Respondent has not shown that Karchere had the discretion to deviate from Respondent’s established policies. *Case Corp.*, supra, 304 NLRB at 948–949, and numerous other cases cited above in my discussion of Lord’s status.

Respondent also places significant reliance on Karchere’s role in the preparation of the Fox Clinic budget. However, based on my credibility findings detailed above, I have credited Karchere’s version of her role in the preparation of this budget. Based on these findings, Karchere merely used Gasecki’s template of the prior year’s budget, received estimates of increases and decreases in revenues from Freeman, discussed the estimates with Gasecki and Gasecki suggested to her the percentages of increases to put into the budget. Karchere credibly testified, “I got the figures and then I did like the grunt work, formulas formatting and plugging it in and just checking all these formulas.”

Therefore, contrary to Gasecki’s testimony, Karchere did not exercise significant discretion, independence, or judgment in her preparation of the Fox Clinic budget. Therefore, her role in that task is far from sufficient to establish her managerial status.

Respondent also makes reference to the fact that management expected Karchere to eventually replace Gasecki, a CFO, and that she was the “primary back-up for Gasecki.”<sup>27</sup>

However, the record discloses that Karchere was never specifically designated as acting CFO, even when Gasecki was out. There was no evidence of any change in Karchere’s responsibilities in the rare occasions that Gasecki was out of the office. Indeed, Gasecki conceded that he was not out much and was “never sick.” He added that when he was out, he would leave a message on his voice mail to call Karchere if they had questions while he was out. Gasecki conceded that during the brief times that he was out “nothing was of such importance that, you know, somebody had to step in and solve the problem right away.”

In these circumstances, since Karchere had not performed any of Gasecki’s functions or even actually filled in for him, this evidence is not supportive of any finding that she was a managerial employee. *Hanover House Industries*, 233 NLRB 164, 175 (1977) (accountant, who was also “assistant to the vice president,” not a managerial employee since his duties were not co-extensive” with vice president); *Talmadge Park*, supra, 351 NLRB at 1245 (no evidence that when employee substituted for supervisor, his duties changed); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003) (filling in for supervisor does not establish supervisory status in absence of evidence that individual exercised independent judgment during that time).

I also place no significance on the testimony that Respondent may have contemplated offering Karchere the position of CFO to replace Gasecki at some undetermined and unspecified time in the future. Admittedly, this was never told to Karchere, and there is no evidence presented that Gasecki was expecting to retire or leave Respondent’s employ.

Accordingly, based upon the foregoing analysis and precedent, I conclude that Respondent has not met its burden of establishing that Karchere was a managerial employee at the time of termination or, indeed, at any other time during the course of her employment.

### C. The Termination of Lord and Karchere

Having found that Respondent has not met its burden of establishing that either Karchere or Lord were supervisors or managerial employees under the Act, there can be no doubt that it has violated Section 8(a)(1) and (3) of the Act by terminating them. Indeed, Respondent admits that it discharged both employees because they engaged in union activities. The fact that Respondent may have had a good-faith belief that the employees were supervisory or managerial or that it believed that the employees were “disloyal” is of no consequence. *Solartec*, 352 NLRB at 343. The mistaken belief that they were managerial or supervisory employees does not lessen the protection of the Act or excuse action that would otherwise be unlawful. *Id.*

<sup>27</sup> In that regard, an employee newsletter, issued shortly after she was hired, points out that in conjunction with Karchere’s duties as finance assistant, Karchere “will serve as the primary back-up to the Chief Financial Officer.”

Therefore, I find that Respondent has violated Section 8(a)(1) and (3) of the Act by terminating Lord and Karchere.

Respondent contends that both Karchere and Lord have lost their right to reinstatement as a result of their postdischarge conduct of criticizing Respondent’s operations as well as various management representatives and members of the board of directors.

In that regard, George Gombassy is a former newspaper reporter, who operates a website under the name, “Watchdog.” On January 5, 2010, Gombassy’s website included an article entitled, “Ct Humane Society President Under Fire From Dismissed Workers Who Tried to Unionize.”

The article refers to the discharges of Karchere and Lord and includes accusations of mismanagement of the Society by Lord and Karchere. It also includes a response from Respondent’s public relations director, Alicia Wright.

The article is set forth below:

Ct Humane Society President Under Fire From Dismissed Workers Who Tried to Unionize

By George Gombassy | Jan 5, 2010

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Two recently fired workers from the Connecticut Humane Society—a multimillion-dollar-a-year charity—are accusing its longtime president of unethical and improper behavior.

In written statements given to me by the two former workers—one a financial assistant, the other a manager—they accuse Richard Johnston of having his personal expenses paid for by the Newington-based charity as well as requiring paid staff to baby-sit his daughter when they were supposed to be working at the center. There is also an accusation that one board member has a conflict of interest in an ongoing project.

The two have given me permission to forward their complaints to state Attorney General Richard Blumenthal with the hope that he would order an investigation into the operations of the Society. I have forwarded the complaints to Blumenthal’s office.

Johnston, who has been president of the Humane Society for about 20 years, did not respond to requests for comment. He is a lawyer and a former state senator.

A Society spokeswoman declined to comment on any of the specific claims that have been made—including that a larger percentage of animals are euthanized than what is made public.

Instead, spokeswoman Alicia Wright blamed the allegations on an attempt to unionize the Society’s four centers and threatened libel action against anyone who made these claims or published them. Her complete statement is at the bottom of this column. The statement refers to one unsigned letter but Wright said the statement also covers the additional written allegations made by the former employees.

“You should know that there is currently an ongoing effort to unionize some of the staff at the Connecticut Humane Society,” Wright wrote to me. “It is not unusual in this context, for

unfounded allegations to be made to foster negativity towards management and for efforts to be made to share these statements with the community at large. The union issue is being addressed by the Society and handled through the appropriate channel, the National Labor Relations Board.”

The main accusations against Johnston and the management of the Humane Society are being made by Bridget Karchere, who was finance assistant and had intimate knowledge of the Society’s bookkeeping, and Maureen Lord, who worked at the Society more than eight years, including four as Johnston’s personal assistant.

Karchere of Plainville and Lord of Hartford were both fired on Dec. 18. A third employee, a male, was also fired last month. Karchere, Lord and others connected to the Society allege that the three firings were in retaliation for their union activities.

After conducting numerous secret meetings, the staff of the Society petitioned to be represented by the Machinists Union—the same group that represents many United Technologies workers. By a vote of 18–15 the backers of the union won. However, the Society is contesting the election.

The pro-union members claim to have support from about 20 of the workers, with some afraid of speaking out publicly. They have set up an organization called The Coalition for Positive Change and are contacting former workers to join their battle. They insist that their efforts are aimed at improving the lives of workers as well as the 8,000 animals its shelters handle each year, not for wage increases. They claim that Johnston and some of his managers act in tyrannical fashion finding ways to punish anyone who disagrees with them.

“This organization boasts to donors and the general public that it is a low kill shelter, that .85 cents of every dollar is spent on the animals. They also claim that their mission is to treat humans humanely as well. All of these statements are false; I will attest to this,” Karchere, the staff accountant, wrote me.

“First I will start off by saying that the number of former disgruntled employees of the humane society is almost innumerable. And, these employees are not disgruntled because they abused their jobs, didn’t follow the company’s mission statement, or treated the animals poorly and lost their jobs; rather they are disgruntled, damaged, and disgusted by how they were treated and what they were exposed to while working at the humane society. And, these former employees consist of Public Relation Directors, District Managers, Animal Care workers, Humane Educators, Chief Financial Officers, Administrative staff . . . the list goes on and on . . . it’s quite mind boggling.”

While the Society states in its reports that Johnston’s compensation from the Society is \$57,366 a year, Karchere said it is much higher when one includes all of his personal expenses that are paid by the nonprofit firm.

She claims that the Humane Society pays for Johnston’s magazine and newspaper subscriptions, real estate and attor-

ney license fees, parking tickets, gasoline for nonbusiness [sic] travel, and undocumented charges for liquor and gifts.

She also claims that some items are mischaracterized as being used to care for the animals to falsely improve its rating as a charity.

“Euthanasia numbers, on a study of the Newington Branch, show a significant increase due to the short staffing and lack of appropriate management from 2008 vs. 2009,” she wrote me.

Lord also claims that Johnston uses his company vehicle for personal use, including driving back and forth from Newington to Avon where his daughter goes to school. She claims that Johnston is the only employee not required to keep a log of his travels.

“For my entire 8 1/2 years at the Humane Society, Richard Johnston has used the society as his personal day care agency,” Lord wrote me. “When I first started at the Humane Society, I was the Assistant to the President and his daughter was pre-school aged. She came with him to the office most days and disrupted the work of many employees, who were expected to entertain her.”

“I was instructed on several occasions to take (her) outside for play/entertainment reasons. When I questioned whether I should do that since I had other work to perform for the company, Mr. Johnston implied that I didn’t have anything else to do that was more important than taking (her) outside.”

She claims that Johnston even violates the leash rules at the Society with his two dogs.

Lord said it a “potentially very dangerous situations with cars in the parking lot as well as other dogs that are being walked on the property. One would think he would have more concern for the safety of his own dogs, as well as the dogs residing in the shelter or belonging to clients. The shelter sometimes houses dogs that are aggressive and when an unrestrained dog approaches one of these dogs while being walked it is very dangerous for both dogs as well as the animal care worker who is restraining the aggressive dog.”

#### **The following is the response from the Humane Society**

Dear Mr. Gombossy:

The Connecticut Humane Society is proud of its 129 year history of “promoting humanity and kindness” for the animals, children and public that we have served so faithfully over the years.

We are issuing the following statement in response to your inquiry for an interview regarding an unsigned letter, which you have received and subsequently forwarded to us for consideration:

1. This unsigned letter contains anonymous allegations. Consequently, we hope that you give no weight to its contents. We will not be dignifying the contents with a reply.
2. In the case of this letter, many of the allegations are libelous and whomever states or distributes these allegations could

be subject to legal liability for defamation. We will immediately consult our attorneys about this.

3. You should know that there is currently an ongoing effort to unionize some of the staff at the Connecticut Humane Society. It is not unusual in this context, for unfounded allegations to be made to foster negativity towards management and for efforts to be made to share these statements with the community at large. The union issue is being addressed by the Society and handled through the appropriate channel, the National Labor Relations Board.

4. Finally, there has been a recent personnel termination from the Connecticut Humane Society staff. This action may have caused this individual to “strike out” in order to cause unfair retributive upset and damage. The Connecticut Humane Society cannot comment on any termination that may have occurred because this action is governed by privacy protections afforded the individual involved. These situations are always handled through the appropriate, legal channels. But again, if these allegations have been made by a disgruntled former employee, they are libelous in nature and should be given no credence.

Thank you for your thoughtful consideration of our position and for doing the right thing with regards to the letter in your possession.

Sincerely,

Alicia Wright

Public Relations Director

Two subsequent articles by Gombassy, dated February 7 and May 20, 2010, included a draft of a letter Karchere was intending to send to a representative of the board of directors (BOD) as well as a letter that Karchere sent to the “new” leaders of the BOD.

Thereafter, both Karchere and Lord filed numerous posts on Gombassy’s website, commenting on Respondent’s operations and its officials. Additionally, James Lubberda, who lives with Lord and he can be characterized as her “significant other,” also posted several blog entries on the same website, wherein he made some comments about Respondent’s management. Lubberda also sent an email to Chris White, who was a member of the BOD and became president of the BOD after the terminations of Karchere and Lord. This email reads as follows:

From: James Lubberda [james.lubberda@gmail.com](mailto:james.lubberda@gmail.com)  
Date: Thu, Mar 11, 2010 at 8:18 PM  
Subject: CHS  
To: [cwhite@mywesthartfordlife.com](mailto:cwhite@mywesthartfordlife.com)

Chris,

I have met you, though you won’t remember me. This is to officially inform you that I have heard of your subcommittee’s [sic] inability to reach a proper settlement that will change the way things are run at CHS.

This is also to officially inform you that, instead of Richard Johnston’s name, yours will be primary in my future postings on my

200+ facebook page, my twitter updates, and, given I have been both on

tv and radio commenting on this issue, I will focus on your name the next media appearance I get.

I hope things can be resolved sooner rather than later, as I like you as a person, but I cannot allow things to continue as they are without speaking out. And I am holding you personally responsible for the failure to work things out, because I know of your role, and am confident in your ability to make a meaningful change in CHS management.

All of these posts, including the letters sent by Karchere to the BOD, consist of essentially similar complaints about Respondent’s treatment of its employees, its allegedly unlawful discharge of Karchere and Lord, its reaction to the unionization of its employees and how management operates the facility. Some of the posts and letters include accusations against various individual managers, particularly Johnston as well as members of the BOD. It is these references that Respondent particularly objects to, and that it argues warrants a denial of reinstatement to Lord and Karchere.

The specific comments relied upon by Respondent are as follows:

Ms. Karchere:

If I were lying I would be acting like CHS management and the [Board of Directors].

Misuse of funds, harassment of employees, and animal abuse and neglect; and they continue to operate in this fashion

I can’t wait to see what the public does to these criminal managers and corrupt [Board of Director] members.

Everything he [Chris White, Chair of the CHS Board of Directors] says and does gets exposed, as do all the lies and corruption that management is cooking up at CHS.

This goes to show you, the people running the shelters are the same people Richard put in place . . . the place is the same with or without Richard. We need to clear this management and [Board of Directors] out now and fast!

Those managers are heartless, crazy, selfish, and in denial.

And one last retort I have for Karyn Cordner, from the CHS Board of Directors [and] now District manager, who by the way does not have the experience to run any shelter let alone be an animal care worker. . . .

The answer is your behavior staff are completely unqualified and so are you and your entire executive/management team.

The current management and [Board of Directors] were appointed by Richard [Johnston] and continue to manage as though he is still there. The only way to repair the damage that’s been done is to remove the obviously corrupt executives, managers, and Board members.

And of course, promote the wonderful, dedicated, and knowledgeable staff who truly keep that place going. Not the Richard yes men who continue to make poor decision and harass employees.

Ms. Lord:

[Regarding a newly formed “euthanasia team”]: The token team members who have not sided with these managers (who happen to be their superiors) are most likely not respected by the managers and are probably fearful to fully stand by their opinions for fear of disciplinary action. This is the same way the organization has operated for years.

[People] do not believe that things are getting better. Also, new policies are only as good as the people implementing them.

If people have been proven to make bad decisions time and time again, no policy will turn them into effective leaders.

Anyone who knows the first thing about running a business knows that demonizing and harassing employees can only hurt business. I am not exaggerating when I say demonizing. The things that I have heard managers at all levels say about employees. . . . Their behavior would be completely inappropriate even if the things they said were true, but it is even worse because they are absolutely untrue. It is absolutely essential for the entire management culture to change. Perhaps bringing in a competent new Executive Director . . . can change the practices of every one of these abusive managers and hold them accountable for their previous actions, other personnel changes may need to be made as well.

Mr. Luberda:

[T]his is not simply a question of a couple of disgruntled employees. It’s a testimony to a pattern of mismanagement, and, frankly, abuse, under Richard Johnston.

Based on my personal interaction with Chris White [Chair of the CHS Board], let alone the public evidence before us showing that, just like Richard Johnston, he has profited from CHS while enabling a toxic (literally) environment for staff and animals, I can assure you he is no better than Richard Johnston. I would strongly suggest boycotting his publications . . . until he steps down.

[Regarding Chris White] That, fundamentally, is the purpose of sharing this exchange on the heels of the sharing of Cathy’s quite separate exchange with him—to give more public evidence of his character which, as even the title of this blog post suggests, is, to say the least, questionable.

Respondent argues that both Karchere and Lord made “ugly, insulting statements about the executive leadership and governing structure of CHS, the same management that they would be expected to work with should they be reinstated.” It also asserts that Karchere and Lord lost the protection of the Act by their comments as described above. *Trus Joist MacMillan*, 341 NLRB 369, 371–372 (2004).

However, Respondent’s reliance on *Trus Joist MacMillan*, supra, is misplaced since that case was decided under a different rationale and standard applying *Atlantic Steel Co.*<sup>28</sup> principles, which are not appropriate here.

The Board has recently clarified this issue in *Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011), and made clear that the postdischarge conduct or disparagement must be evaluated under the standard of whether such conduct “was so flagrant as to render the employee unfit for further service or a threat to the efficiency of the plant.” *Id.* at slip op. 2, citing *O’Daniel Oldsmobile, Inc.*, 179 NLRB 398, 405 (1969).

Respondent responds by asserting that since Lord, Karchere and Luberda accused managers and board members of “lying, misusing funds, abusing animals, corruption and harassment” that they can no longer “function as members of a team when they have systematically poisoned virtually all their relationships.” Therefore, Respondent asserts that Lord and Karchere have rendered themselves “unfit for further service or a threat to efficiency” in Respondent’s organization. *Hawaii Tribune-Herald*, supra; *O’Daniel Oldsmobile*, supra.

Once again, I cannot agree with Respondent’s contentions. The first problem with Respondent’s argument is that it adduced no evidence from any witnesses of Respondent that anyone from Respondent believed that the conduct of Lord, Karchere, or Luberda made Lord or Karchere unfit for service or a threat to efficiency or that they (Lord and Karchere) have “poisoned their relationships” or that they can no “longer function as members of a team.” These sweeping contentions are simply made in Respondent’s brief without any evidentiary support that any management official or member of the BOD so believed. Since it is Respondent’s burden to prove its affirmative defense that reinstatement is unwarranted, it has failed to do so for this reason alone. *George A. Hormel & Co.*, 301 NLRB 47 (1991), *enfd.* denied on other grounds, 962 F.2d 1061 (D.C. Cir. 1992) (respondent failed to meet its burden of proof); *Berkshire Farm Center*, 333 NLRB 367 (2001) (Board reverses judge who simply found that misconduct occurred that justified denial of reinstatement without any evidence that employer would have terminated employee for engaging in such conduct); *Tel Data Corp.*, 315 NLRB 364, 367 (1994) (employer failed to meet its burden of establishing that it would have discharged employee for engaging in conduct discovered postdischarge); *Owens Illinois, Inc.*, 290 NLRB 1193, 1194 (1988) (respondent introduced no evidence to establish that misconduct of employee would have any impact on performance if reinstated); *Cf. Aldworth Co.*, 338 NLRB 137, 147 (2002) (employer met its burden by establishing, based on record evidence, that it would have terminated employee for engaging in the misconduct, not discovered until after the discharge). See also *Family Nursing Home*, 295 NLRB 923 fn.2, 928, 931 (1989) (reinstatement denied based on postdischarges assault of supervisor, where employer had adduced testimony that it considered conduct of employee to be a risk to patients, and respondent would not rehire her).

I, therefore, conclude that for this reason alone Respondent has failed to meet its burden of proof that the postdischarge conduct of Karchere or Lord disqualified them from the Board’s normal remedy of reinstatement and full backpay.

Apart from that issue, and even assuming that Respondent adduced the evidence that I believe would be required in order to at least arguably meet its burden, I conclude that Respondent has fallen short of establishing under Board and court precedent

<sup>28</sup> 245 NLRB 814 (1979).

that either Karchere or Lord were “unfit for further service or a threat to the efficiency” of Respondent as a result of their post-discharge conduct.

My examination of the relevant precedent reveals that generally this stringent standard necessary to disqualify discriminatorily discharged employees from reinstatement is met by conduct involving threats of violence or bodily harm or actual acts of violence. *Hadco Aluminum & Metal Corp.*, 331 NLRB 518, 521 (2000) (employee threatened another employee over the phone by stating “you’re going to be dead”); *Alto-Shaam, Inc.*, 307 NLRB 1466, 1467 (1992) (threat made to employee at home by discriminatee that she should strike “if you valued your life,” held to be threat of bodily harm); *Family Nursing Home*, supra, 295 NLRB at 923 (assault against employer’s director of nursing); *Roure Bertrand Dupont*, 271 NLRB 443, 444–445 (1984) (unlawfully discharged strikers throwing nails at truckdriver by employee of different employer; Board concludes that reinstatement should not be awarded to employee, who “purposefully disregards the safety of employees and non-employees and intentionally attempts to injure them and the public at large”); *Fairview Nursing Home*, 202 NLRB 318, 322 fn. 36 at 325 (1973) (discriminatee rammed a shopping cart into side of car of employee).

In contrast, the Board, supported by the courts, has been extremely reluctant to deny reinstatement to discriminatorily discharged employees for conduct consisting of statements made disparaging the business operations of the employer or the employer’s officials, particularly where the statements were made in the context of protesting their unlawful terminations. *Hawaii Tribune-Herald*, supra, slip op. at 21–22 (discharged employee criticized on a blog and at a meeting, employer’s management practices); *Dearborn Big Boy No. 3*, 328 NLRB 705, 709, 711–712 (1999) (employee cursed at supervisor twice using the F-word, and then when picking up her belongings, she called supervisor a stupid, f-cking bi-ch, and as she was leaving again called supervisor a s-o-b; all of these comments were made in the presence of customers in the store); *George A. Hormel & Co.*, 301 NLRB 47 (1991), enfd. denied on other grounds 962 F.2d 1061 (D.C. Cir. 1992) (discharged employee handed out leaflet attacking employer’s product and telling an employee that employer’s product “can kill people”); *C-Town*, 281 NLRB 458, 458 (1986) (employee made racially inflammatory slur directed towards her replacement); *Timet*, 251 NLRB 1180, 1180 (1980), enfd. 671 F.2d 973 (6th Cir. 1982) (letter distributed by employee accusing employer of providing “false testimony” at hearing before judge and accusing employer of “expressed and implied tyranny” does not disqualify employee from reinstatement, particularly since statements were made in context of protesting his unlawful discharge); *J. W. Microelectronics Corp.*, 259 NLRB 327, 327–328, 333–335 (1981) (discriminatee made racially derogatory remarks about white supervisor; employee said, “why should we listen to these people . . . and their lies . . . we know all Caucasians are animals”); *Teamsters Local 705*, 244 NLRB 794, 796–797 (1979), enfd. denied on other grounds 630 F.2d 505 (7th Cir. 1980) (accusation made by discharged employees in pamphlet that union secretary/treasurer was a thief, and union members’ pensions were being stolen); *Pincus Bros.*, 241 NLRB 805, 809 (1979),

enfd. denied on other grounds 620 F.2d 367 (3d Cir. 1980) (discriminatee published article in “dissident” newspaper accusing employer of being “crooks” and of stealing from employees); *Golden Day Schools*, 236 NLRB 1292, 1297 (1978), enfd. 644 F.2d 834, 841 (9th Cir. 1987) (discharged employees distributed flyer to parents of students while picketing; flyer disparages employer’s service and facilities including accusing it of serving spoiled food, having water fountain with dirty water, using unsafe buses and having children sleep on dirty cots; flyer also protests unlawful discharge of employees for organizing to protest the conditions complained of in leaflet; court sustained Board’s finding that reinstatement rights had not been forfeited even though leaflet used “harsh language and made serious charges, not all of them true,” 644 F.2d at 841–842); *Coors Containers Co.*, 238 NLRB 1312, 1320 (1978) (employees displayed sign stating “Boycott Coors – Scab Beer,” and when ordered by security guards to stop displaying sign, called security guards “mother-fuckers”); *Mandarin*, 228 NLRB 930, 931–932 (1977), enfd. sub nom. *M Restaurants, Inc.*, 621 F.2d 336 (9th Cir. 1980) (discharged employee, after judge’s decision, distributed letter to employees announcing judge’s decision that ordered him to be reinstated and included various attacks on employer’s manager referring to him as “pompous,” “arrogant” and accusing him of “lying;” letter also referred to manager’s “Jewish boss” and asserts that manager was “exploited by his Jewish boss to oppress his own countrymen”; Board observed that it did not condone any racial or ethnic slurs that these comments might imply, but finds that letter was insufficient to disqualify employee from reinstatement, particularly where it is part of protecting employee’s unlawful discharge); *O’Daniel Oldsmobile*, supra, 174 NLRB at 398, 404–405 (handbills distributed by unlawfully locked out employees disparaging employer’s business and warning customers not to “entrust their business to unqualified scabs”).

Here, there is no allegation that either Lord or Karchere engaged in any conduct that can be construed as threatening or engaging in violence or any other conduct justifying Respondent’s failure to reinstate them. I find that the assertions made on George Gombassy’s blog by Karchere and Lord and Luberta,<sup>29</sup> while at time harsh and unflattering, were little different than the comments described in the above cited cases,<sup>30</sup> where reinstatement was ordered.

I also note, as in many of the above cases, that the comments made by Lord, Karchere, and Luberta were all made in the context of protesting the unlawful discharge of Karchere and Lord.

Respondent argues that the attacks on Chris White, the current president of the board, were particularly outrageous since he had nothing to do with the decision to discharge the employees. However, this alleged fact has not been established by any

<sup>29</sup> I shall assume, without deciding, that Lord can be held responsible for the comments of her live-in boyfriend in assessing her fitness for reinstatement. I have serious doubts about such a conclusion, but I have considered Luberta’s statements as well as the comments of Lord.

<sup>30</sup> *Hawaii Tribune-Herald*, supra; *George Hormel*, supra; *J. W. Microelectronics*, supra; *Teamsters Local 705*, supra; *Pincus Bros.*, supra; *Golden Day Schools*, supra; *Mandarin*, supra.

evidence. Moreover, I note that the record discloses that although White did not become president of the board until after the discharges, he was a member of the board previously. Thus, he conceivably could have been involved in the decision to discharge Lord and Karchere. Further, the blogs reveal that White was involved in attempting to settle the issue of the discharges of Karchere and Lord, and indeed the accusation made by Karchere that White “lied” related to her assertion that White had lied about his efforts to meet with the discriminatees.

In this regard, Respondent asserts that the statements made by the employees had “no basis in fact or reasonable belief.” Respondent attempts to distinguish *Hawaii Tribune-Herald* in this respect since the Board therein relied in part on a finding that there was no evidence that the statements made by the discriminatee, were made “with knowledge of their falsity or reckless disregard for their truth or falsity.” Respondent notes in this regard that neither the General Counsel nor Charging Party showed that the employees’ statements had “any basis in fact or reasonable belief.” However, Respondent has misperceived its burden of proof. It is Respondent’s burden to establish that the employees’ conduct disqualified them from reinstatement and that the burden includes establishing that the statements were made “with knowledge of their falsity or reckless disregard for their truth or falsity.” Indeed, *Hawaii Tribune-Herald*, supra, is not to the contrary. The finding there that there was no evidence that the statements were made with knowledge of their falsity or reckless disregard for their truth or falsity “was based on the Employer’s failure to establish these assertions.” There was no finding made there that the employee had any basis in fact or a reasonable belief in his assertions.

Similarly, here, Respondent has adduced no evidence that any of the assertions made by Lord or Karchere were not based on facts or a reasonable belief of the employees. Contrary to Respondent’s contention, it is not the burden of the Acting General Counsel or the Charging Party to affirmatively establish that the employee statements were based on facts or a reasonable belief that they were true.

I note, however, that there is some evidence in the record that the employees did have some factual basis for some of their statements. Respondent relies on the assertion that employees accused management and BOD members of lying. However, as noted above, Karchere specifically accused White of lying when he allegedly told donors that he and the BOD had met with the discharged employees, including Karchere and Lord,<sup>31</sup> in an attempt to settle the issues. In fact, according to Karchere, no such meeting took place. Significantly, Respondent adduced no evidence from White or anyone else that Karchere’s assertions in this respect were untrue. Similarly, Respondent asserts that the employees accused Respondent of corruption, misuse of funds and criminal activities. Once more, Respondent adduced no evidence that any of the accusations made by Karchere or Lord in this regard were not true or were not based on a reasonable belief. Further, both Karchere and Lord expressed their extreme disapproval of Respondent’s conduct of spending large amounts of money that should have gone

<sup>31</sup> Employees other than Lord and Karchere were also terminated, but are not discriminatees here.

towards the care of animals on fighting the union and fighting the unlawful discharge allegations in the instant case. More specifically, Karchere notes in her post of June 19, 2010, that a former member of the BOD was a member of the law firm representing Respondent in this case as well as in the representation case, where Respondent is contesting the Union’s certification. Karchere notes in her post that Respondent is spending “in the ball park of around \$1000.00 an hour” on a partner in the law firm fighting the Union and the employees’ decision to unionize. Thus, while the assertion that this conduct by Respondent, assuming it to be true, is evidence of corruption or criminal activities may be construed as “hyperbole,” it is not unreasonable to argue that spending large amounts on legal fees rather than on animal care is misuse of funds and evidence of corruption. In any event, as I have observed several times above, Respondent has not introduced any evidence that any of the assertions made by Lord, Karchere, or Luberda were untrue or not based on a reasonable belief of the speaker.”<sup>32</sup>

Respondent also argues that the accusations made by Lord, Karchere, and Luberda about the competency of the managers and the BOD, as well as the accusations described above,<sup>33</sup> make their reinstatement a “threat to efficiency” of Respondent, *O’Daniel Oldsmobile*, supra. Respondent asks, “How can they function effectively as members of that team when they have systematically poisoned virtually all their working relationships?” I cannot agree with Respondent’s contention in this regard.

While there may very well be bitterness created by the employees about management, speculation on how that would affect future relations between the discriminatees and current management is insufficient to disqualify employees from reinstatement. *Owens Illinois, Inc.*, 290 NLRB 1193, 1194 (1988). The Board standard remedy for unlawful discharge is reinstatement, and speculation concerning possible “dysfunction” is insufficient reason to depart from the Board’s established remedy. *Lorge School*, 352 NLRB 119 (2008). While Respondent’s action in firing Lord and Karchere may have created bitterness and undermined their loyalty, but if so, Respondent has only itself to blame since Respondent unlawfully terminated them in the first place. *Lorge School*, supra; *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1089 (7th Cir. 1987).

Further, an important basis of reinstatement orders is the object that other employees be made aware through the discriminatees’ return to their former job that their rights to engage in concerted activities are protected by the Act. Thus, here, since the postdischarge assertions made by Lord and Karchere were part of their protesting their unlawful discharges and Respondent’s decision to oppose unionization of its employees, it is important that other employees be informed of their rights to engage in such activities. *Mandarin*, supra, 228 NLRB at 930. Therefore, despite the difficulties that could be engendered by reinstating employees, who have made the accusations detailed

<sup>32</sup> I note that in making this finding, I need not and do not decide whether or not if Respondent had made such a showing that it would be sufficient to disqualify the employees from reinstatement.

<sup>33</sup> Corruption, criminal behavior, lying, misusing funds.

above, about management<sup>34</sup> and the BOD, it is incumbent upon Respondent and the discriminatees “to attempt to work together harmoniously and forget past animosity.” *Mandarin*, supra (rejecting contention of employer that reinstatement would result in an impossible situation because discriminatee “villified, ridiculed and rebuked” manager); Accord, *Trustees of Boston University*, 224 NLRB 1385 (1976), enf. 548 F.2d 391, 393–394 (1st Cir. 1977).

Accordingly, based on the analysis, detailed above, and the precedent that I have cited, I conclude that Respondent has fallen far short of meeting its burden that either Lord or Karchere engaged in conduct that rendered them “unfit for further services or a threat to efficiency” should they be reinstated. I shall therefore order the normal reinstatement for both employees.

#### D. The Alleged 8(a)(1) Conduct

##### 1. The October and November Conversations with Lord and Karchere

On October 23, 2 days after the petition was filed, Johnston conducted a meeting of various individuals, including Lord, Wright, Gasecki, Zaluski, Draper, and two team leaders, Baker and Clavette.<sup>35</sup> Johnston informed the participants that Respondent had received a petition for a union election and that he was surprised. He informed those present that Respondent did not believe that a union would be beneficial to the employees or the pets and that this would be management’s stance, and those present would be expected to backup and support that position. Johnston asked if anyone at the meeting had heard anything about the Union. No one answered. Johnston added that if anyone heard anyone talking about the Union, they should give their names to Marzano.

Since Lord was present at this meeting, and I have found her to be an employee and not a supervisor or a managerial employee as Respondent contends, Johnston’s comments violated the law in several respects. By asking Lord if she heard anything about the Union, Respondent has coercively interrogated her in violation of Section 8(a)(1) of the Act.

In assessing the lawfulness of interrogations, the Board applies a totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984). Various factors are examined including whether the employer has a history of hostility to union activity; the nature of the information sought; the identity of the interrogator, i.e., his or her placement in the respondent’s hierarchy; the place and method of the interrogation; and the truthfulness of the interrogated employee’s reply. The Board also considers it highly significant whether the employees are open and active union supporters. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143 slip op. at 1 (2011); *Boulder City Hospital*, 355 NLRB No. 203, ALJD slip op. at 9 (2010); *Evergreen America Corp.*, 348 NLRB 178, 208 (2006). Here, I find that Johnston’s questioning Lord about whether she heard anything about the Union constituted coercive interrogation

since the inquiry was made by Johnston, the highest official of Respondent, *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69, ALJD slip op. at 15 (2010); *Boulder City Hospital*, supra at 9; *Gelita USA Inc.*, 352 NLRB 406, 410–411 (2008); Lord was not an open union supporter at the time of questioning, *Evergreen America*, supra, 348 NLRB at 208; *Demco New York Corp.*, 337 NLRB 850, 851 (2002); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 155 (1992); and Lord attempted to conceal her previous union activities by failing to respond to Johnston’s inquiry, *Camaco Lorain*, supra, 356 NLRB slip op. at 1 and 2; *Sproule Construction Co.*, 350 NLRB at 774 fn. 2, 780 (2007); *Evergreen America*, supra, 348 NLRB at 208; *Westwood Health Care Center*, 330 NLRB 935, 940–941 (2000); *Grass Valley Grocery Outlet*, 338 NLRB 877, 879 fn. 1 (2003).

Respondent further violated Section 8(a)(1) of the Act at that meeting when he instructed Lord that if anyone heard anyone talking about the Union, they should give their names to Marzano. *Wal-Mart Stores*, 340 NLRB 220, 223–225 (2003) (employer instructing department managers that they could not participate in union activities and they were to report union activity to management unlawful since department managers were not supervisors); *American Standard Cos.*, 352 NLRB 644, 653 (2008) (informing employees to survey union activities of other employee and to report such activities back to employer).

On November 4, 2 days after the scheduled representation hearing, which resulted in an agreement to hold an election, Gasecki asked Karchere to come into a conference room. Gasecki asked Karchere if she heard anything about the union activity, knew what was going on with that or what “situations might have provoked it.” I find for reasons similar to Johnston’s comments at the meeting, where Lord was present, that Gasecki’s comments constituted coercive interrogation. Karchere was not an open union supporter, *Evergreen America*, supra; *Demco New York*, supra, and the inquiry was made by a high ranking official of Respondent, *Camaco Lorain*, supra; *Boulder City Hospital*, supra.

Further, when Gasecki informed Karchere that if she heard anything (about union activities) to let him know, Respondent also violated Section 8(a)(1) of the Act by instructing her to report union activity to management, *Wal-Mart*, supra.

On November 6, Johnston engaged in more unlawful conduct during separate conversations with Karchere and Lord. Both meetings were in the small conference room. At Karchere’s meeting, in addition to Johnston, Gasecki and Wright were also present. Johnston informed Karchere that he considered her to be a manager and wanted to know what she had heard. Karchere replied that employees were upset with company policies, such as benefit time being taken in proper increments. Johnston repeated that Karchere was a manager and he expected her to take that position and “report anything” to him that she heard or saw. Once again, by instructing Karchere, a statutory employee to report to Respondent any union activities that she heard or saw, Respondent violated Section 8(a)(1) of the Act, *Wal-Mart*, supra. By questioning Karchere about what she had heard about the Union, Respondent engaged in coercive interrogation in violation of the Act. Karchere was not

<sup>34</sup> I do note, in this respect, that Johnston, who was the subject of most of the criticism and accusations made by the discriminatees, is no longer employed by Respondent.

<sup>35</sup> Karchere was not present.

an open union support, *Camaco Lorain*, supra; *Evergreen America*, supra, and the questioning was conducted by Johnston in presence of Gasecki, the two highest level officials of Respondent, *Salon/Spa at Boro*, supra; *Boulder City Hospital*, supra. Furthermore, the questioning was accompanied by other unfair labor practices, the unlawful instruction to report to Respondent any union activities. Where, as here, the interrogation is accompanied by other unlawful conduct, it is strongly indicative of coercive conduct, *Evergreen America*, supra, 348 NLRB at 208; *Parts Depot*, 332 NLRB 670, 673–674 (2000); *Advance Waste Systems*, 306 NLRB 1020 (1992).

Similarly, when Johnston in the presence of Gasecki asked Lord why the Union would argue at the representation proceeding that Lord should be included in the unit, Lord responded that she had no idea why the Union would do that. This questioning by Johnston in the presence of the other two highest company officials,<sup>36</sup> in addition to himself, of a nonopen union supporter<sup>37</sup> is coercive, particularly, where as here, Lord declined to answer truthfully, *Camaco Lorain*, supra, 356 NLRB slip op. at 1 and 2; *Sproule Construction*, supra, 350 NLRB at 774 fn. 2.

Respondent's unlawful conduct continued on November 13 when it had virtually identical but separate discussions with Karchere and Lord. In both conversations, Johnston, in the presence of Marzano and Gasecki, asked the employees if they were aware of or had listened to management's position on the Union previously stated, and whether they were prepared to support such a position. The employees replied that they were aware of that position and were willing to support it. Johnston informed both employees that he had been informed by a "reliable source"<sup>38</sup> that they had been involved in activities in support of the Union.

Karchere asked who and what was said about her. Johnston refused to respond to Karchere. She then denied engaging in any union activity. After Johnston asked for Lord's response to the accusation that she engaged in union activities, Lord replied that she was uncomfortable continuing the discussion. Johnston informed both Karchere and Lord that Respondent was contemplating future disciplinary action against them and its decision would be based on the success that they would have in reversing the support of other employees for the Union that they (allegedly) had accomplished by their union activity. Johnston also added that he was cancelling an educational conference trip that Respondent had previously planned for Lord to attend.

I find that Johnston's threat to discipline both Karchere and Lord unless they were successful in "reversing" their previous union support amongst employees is a clear violation of Section

<sup>36</sup> *Salon/Spa at Boro*, supra.

<sup>37</sup> *Camaco Lorain*, supra.

<sup>38</sup> While Johnston did not inform Lord or Karchere who the reliable source was, the evidence discloses that the source was Patterson. As noted above, Patterson, Respondent's district manager at its Waterford facility, informed Respondent that Lord and Karchere had phoned her and asked her to inquire whether employees at her facility would be interested in attending a meeting with union representatives.

8(a)(1) of the Act. *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1014 (1991).<sup>39</sup>

I also conclude that Respondent once again unlawfully interrogated Lord and Karchere when he asked them about the accusation from a "reliable source" that they engaged in union activities despite being aware of management's position on that subject. Once more, the questioning was asked by the highest ranking management representative, in the presence of the next two highest ranked officials, was made to nonopen union adherents, resulted in evasive and/or untruthful replies from employees and was accompanied by unlawful threats of discipline. Such questioning is clearly coercive under *Rossmore* standards. I so find.

The Acting General Counsel also asserts that Johnston unlawfully created the impression of surveillance of employees by informing Lord and Karchere that Respondent had received reports from a "reliable source" that they had engaged in union activities. *Studio 54*, 260 NLRB 1200, 1204 (1982).

This issue is not free from doubt. The Board's test for determining whether an employer has created an unlawful impression of surveillance as whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

Where an employer tells employees that it is aware of their union activities but fails to tell them the source of that information, Section 8(a)(1) is violated because employees are left to speculate as to how the employer obtained the information causing them reasonably to conclude that the information was obtained through employer monitoring. *Stevens Creek Chrysler*, supra at 1296; *Conley Trucking*, 349 NLRB 308, 315 (2007).

In contrast, where an employer tells employees that it learned of their union activities from another employee, the Board concludes that comments in such circumstances do not lead employees to believe that their union activities are under surveillance. *Park 'N Fly Inc.*, 349 NLRB 132, 133 (2007); *North Hills Office Services*, 346 NLRB 1099, 1103–1104 (2006); *Register Guard*, 344 NLRB 1142, 1144 (2005).

Here, Johnston informed Karchere and Lord that Respondent had obtained the information about their union activities from a "reliable source." He did not identify the reliable source and did not inform Karchere or Lord that its source was another employee. In the circumstances here, I conclude that Respondent's failure to identify its "reliable source" renders his comments coercive and unlawful. *Stevens Creek Chrysler*, supra, 353 NLRB at 1296 (employer must tell employees the source of their information about their union activities). See also *Ridgeview Industries*, 353 NLRB 1096, 1011 (2009) (employer did not inform employees of a legitimate source for the informa-

<sup>39</sup> I make no finding that Respondent's decision to cancel Lord's attendance at a previously scheduled educational conference was unlawful since the complaint makes no such allegation. Nor does the Acting General Counsel assert in its brief that such violation should be found or that the issue was "fully litigated."

tion). I find it significant here that Karchere pressed Johnston to disclose his “reliable source” but he failed to do so. In such circumstances, Karchere could reasonable believe that Respondent acquired its knowledge by surveilling her union activities. *Classic Sofa*, 346 NLRB 219, 221 (2006). Further, in both conversations with the employees, Johnston accompanied his comments about being aware of their union activities with unlawful threats to discipline the employees. Thus, Johnston apparently did not believe the employees’ denials that they engaged in union activities since he ordered them to “reverse” the union support that they allegedly had effectuated. *Classic Sofa*, supra (fact that employee denied engaging in union activities when confronted and employer continued to press issue could reasonably lead employee to believe that knowledge obtained by surveilling union activity). I conclude that Johnston’s accompanying threats conveyed the message to Lord and Karchere that they were being watched and their union activities were under scrutiny, and is supportive of my conclusion that by his comments, Johnston unlawfully created the impression of surveillance. *Beverly California Corp.*, 326 NLRB 232, 233 (1998) (employer did not identify source of information and made clear its displeasure with employee’s union activities); *Flexsteel Industries*, 311 NLRB 257, 257–258 (1993) (reference to employee’s union activities in contest of unlawful interrogation would reasonably lead employee that his protected activity was under surveillance); *United Charter Service*, 306 NLRB 150, 151 (1992) ( employer accompanied comments about knowledge of union activities of employees with unlawful threats).

Accordingly, I find based on the foregoing that Johnston’s remarks about his knowledge of the union activities of Lord and Karchere created the impression that their union activities were under surveillance and were violative of Section 8(a)(1) of the Act.

## 2. Johnston’s November 27 letter

As part of its campaign literature, Respondent issued a letter dated November 27, which included the following paragraph:

Finally, please remember that the only leverage a union has is the threat of strike. If the union calls a strike you may have no reasonable choice but to join it. If that happens, you can be without wages, without health insurance, or you[r] other benefits for weeks, or months, or longer. Some employees could even find themselves without a job when the strike is over. You can be sure that doesn’t happen by voting “no” on December 4.

The Acting General Counsel asserts that the letter’s statement that in the event of a strike “some employees could even find themselves without a job when the strike is over” is unlawful since it reasonably links the act of striking with the loss of jobs. *AP Automotive Systems*, 333 NLRB 581 (2001). I agree.

An employer does not violate the Act by informing employees that they are subject to permanent replacement in the event of a strike. *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982). Further, an employer need not fully explain the nature and scope of the Act’s protections for replaced strikers. *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 462 (2003); *Uni-*

*first Corp.*, 335 NLRB 706 (2001); *Quirk Tire*, 330 NLRB 917, 926 (2000), *enfd.* in part 241 F.3d 41 (1st Cir. 2001).

However, where an employer’s statements about permanent replacements make specific references to job loss, such statements are generally deemed to be unlawful since they convey to employees the message that their employment will be terminated. *Wild Oats Markets*, 344 NLRB 717, 740 (2005). Such comments are deemed to be inconsistent with and contrary to employees’ *Laidlaw*<sup>40</sup> rights. *Kentucky River Medical Center*, 340 NLRB 536, 546–547 (2003) (statement by employer that if there was an economic strike employees would be replaced, and if and when the strike is over, they had a position open for employees they would have a job, if there was no position for them, they would not have a job); *Fern Terrance Lodge*, 297 NLRB 8, 8–9 (1989) (“an employer has the legal right to permanently replace the striking employees and the replaced striker is not automatically entitled to his job after the strike ends,” found by Board to unlawfully imply that employees would be deprived of *Laidlaw* rights to be placed on preferential hiring list and wait for openings to occur); *Hajoca Corp.*, 291 NLRB 104, 105 (1988) (employees told that if they went on strike they could be permanently replaced and they would no longer have jobs with the employer).

Here, Respondent’s comments simply equated job loss with a strike without even mentioning the possibility of its hiring replacements. Such comments are clearly unlawful since they link striking with job losses and are far more coercive than the numerous cases that find threats of job loss unlawful, even where it is accompanied by lawful statements of an employer’s rights to hire replacements. *Wild Oats*, supra, 344 NLRB at 740 (“when unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced”); *Gelita USA Inc.*, 352 NLRB 406, 406–407, 409–410 (2008) (employer told employees that economic strikers would have no job protection if replaced); *Superior Emerald Park*, supra, 340 NLRB at 462–463 (employer informed employees that if they go on strike they might not have a job to return to because the company would not be required to rehire them if they had been permanently replaced); *Mediplex of Danbury*, 314 NLRB 470, 470–471 (1994) (employer informed employees that its Westport facility, after union was voted in, they went on strike, permanent replacements were hired and striking employees were terminated); *Kentucky River*, supra; *Baddour, Inc.*, 303 NLRB 275 (1991) (“you could end up losing your job by being replaced with a new permanent worker”); *Larson Tool & Stamping Co.*, 296 NLRB 895, 895–896 (1989) (employees could lose their jobs to permanent replacements).

Therefore, based on the above analysis and precedent, I find that Respondent has further violated Section 8(a)(1) of the Act by threatening job loss in its November 27 letter.

## 3. Johnston’s group meeting of December 2

The Acting General Counsel contends that Respondent violated Section 8(a)(1) by Johnston’s comments and conduct at

<sup>40</sup> *Laidlaw, Corp.*, 171 NLRB 1366 (1968) (permanently replaced strikers, who have made unconditional offers to return to work, are entitled to full reinstatement upon the departure of replacements).

the meeting he conducted on December 2 with employees from Newington and Westport. As I have related above in the facts, there are differences, some of them significant, between the testimony of Karchere and Lord concerning Johnston's statements at this meeting. They were the only witnesses to offer testimony concerning the events at that meeting. I credit Lord's version of Johnston's comments since I found her testimony more believable and was consistent with the talking points given to Johnston by Respondent's attorney prior to the speech and with the statements made by Respondent in its campaign literature.

In this regard, the Acting General Counsel asserts that an adverse inference should be drawn from Respondent's failure to call Johnston as a witness and/or from its failure to question Gasecki or Marzano about the meeting. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). I do not agree. It is not appropriate to draw an adverse inference from the failure of Respondent to call Johnston since his was no longer associated with or employed by Respondent at the time of the trial. *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 fn. 1 (1993). As for Respondent's failure to question either Gasecki or Marzano about the meeting, the record does not disclose whether either of these individuals was present at this meeting.

That leaves the testimony of Lord and Karchere, and as related above, I found Lord's version more credible.

Thus, I find that Johnston reminded employees that nothing is guaranteed in a contract and that everything is up for negotiation, including benefits that the employees had, and those all could change. The Acting General Counsel relies on Karchere's version, not significantly different, and that Johnston stated that benefits would be "up for grabs" if the Union was voted in.

The Acting General Counsel argues that Johnston's comments threatened employees with loss of benefits if employees supported the Union. *Heartland of Lansing Nursing Home*, 307 NLRB 152, 158 (1992). I disagree.

The comments made by Johnston were made in the context of an accurate description of the collective-bargaining process during which benefits currently enjoyed by employees can change. Such statements do not threaten a loss of benefits are not unlawful. *Wild Oats*, supra, 344 NLRB at 717-718. ("In collective bargaining you could lose what you have now"); *UARCO*, 286 NLRB 55, 58 (1987); *Jefferson Smurfit Co.*, 325 NLRB 280 fn. 3 (1998) (benefits could go either way as a result of collective bargaining, i.e., employees could get more or less).

I shall therefore recommend dismissal of this compliant allegation.

The Acting General Counsel also argues that Johnston's statements at the meeting unlawfully threatened the inevitability of strikes. *Valerie Manor, Inc.*, 351 NLRB 1306, 1310 (2007); *AP Automotive Systems*, supra, 333 NLRB at 501.

Based on my factual findings related above, I found based on Lord's credited testimony that Johnston, after reminding employees that nothing was guaranteed in a contract and everything was up for negotiation, pointed to a display that he had setup in the front of the room. On one side was a trash barrel with sticks coming out of it with an "on strike" sign. On the other side of the room, there was a photograph of Respondent's

employees helping out with animals during Hurricane Katrina. Johnston pointed to the latter photograph and said that is a picture of what the CHS is now and this over here, pointing to the trash barrel, is what could happen with a union.

I do not agree with the Acting General Counsel's assertion that Johnston's comments and Respondent's display conveyed to employees the inevitability of strikes. *Stanadyne Automotive Corp.*, 345 NLRB 85, 89-90 (2005), enfd. in pertinent part 520 F.3d 192 (2d Cir. 2008) (display of sign displaying plants closed where union represented employees, coupled with statements by officials of employer, such as "where unions exist, strikes occur" and that the particular union is "strike happy" held not to convey inevitability of strikes); *Novi American*, 309 NLRB 544, 545 (1992) (statement that the only way a union can pressure the company to agree to its demands is to call a strike held not to convey inevitability of a strike); *Blue Grass Industries*, 287 NLRB 274, 275 (1987) (slideshow depicting strikes did not convey message that strikes were inevitable since it did not amount to prediction that strikes occur at employer).

In my view, Johnston's comments, plus the display, consisted of lawful statements protected by 8(c) of the Act. He was simply explaining the collective-bargaining process and informing employees that if the Union was unable to convince Respondent during their negotiations to agree to the Union's demands, a strike "could" result. There is no implication in any of Johnston's remarks that Respondent would not bargain in good faith with the Union or that it would not agree to the Union's demands or that it would force the Union to strike. Indeed, the cases cited by the Acting General Counsel, *AP Automotive Systems*, supra, and *Valerie Manor*, supra, include similar findings in order to conclude that the employers there conveyed to employees the inevitability of strikes. *AP Automotive Systems*, supra (employer's position that it would not agree to union's demands and a strike would ensue held to convey inevitability of strike); *Valerie Manor*, supra, 351 NLRB at 1310-1311 (employer unlawfully threatened futility). *Devon Gables Lodge & Apartments*, 237 NLRB 775, 775-776 (1978), is also instructive. There, statements were made by supervisors to employees that if the union won there would be a strike because the owner intended to go down fighting, held to convey inevitability of strikes. The Board, in reversing the judge and finding violations, observed as follows:

We disagree. The speakers stated flatly, without qualification, that, if the Union won, a strike would occur. The logical inference from these statements is that no matter how negotiations progressed and no matter what the Union sought from Respondent the employees would nevertheless have to strike to obtain a contract. It is clear that the statements about the inevitability of a strike contained a threat that the Respondent would refuse to bargain in good faith in order to insure a strike. Certainly, Chesnik's statement that Connelly would go down fighting indicates that Respondent would itself act to induce a strike, no matter what position the Union took. Therefore, we find that the statements of Carlton and Chesnik that a strike was inevitable violated Section 8(a)(1) of the Act. [Id. at 776.]

Here, by contrast, Respondent did not state “without qualification” that if the Union won, a strike “would” (emphasis added) occur. Further, there is no indication in any of Johnston’s comments that Respondent would refuse to bargain in good faith with the Union or even that it would not agree to the Union’s demands.

Therefore, based on the above analysis and precedent, I shall recommend dismissal of this allegation in the complaint.

4. Respondent’s informing Lord and Karchere that they were terminated because of their union activities

It is undisputed that on December 18, Respondent, by Gasecki, informed both Karchere and Lord that they were being terminated because of their union activities. Such comments are independently violative of Section 8(a)(1) of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994); *NKC of America, Inc.*, 291 NLRB 683, 688 (1988). I so find.

E. The Objections

Respondent’s objections assert that objectionable conduct was established by virtue of the prounion activities of Lord and Karchere, who were, in its view, supervisors and/or managers.

Since I have found, as detailed above, that neither Lord nor Karchere were 2(11) supervisors or managerial employees as claimed by Respondent, I need go no further to recommend dismissal of the objections, I so recommend.

However, in the event that my findings concerning the status of Lord or Karchere are reversed, I deem it appropriate to express my views on the issues of whether their conduct upset the laboratory conditions for a fair election.

The Board utilizes a two-step inquiry to apply in cases involving objections to an election based on prounion supervisory conduct:

(1) Whether the supervisor’s prounion 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 prounion 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 Healthcare, Inc.*, 343 NLRB 906, 909 (2004).]

Respondent argues that the evidence establishes that the conduct of both Lord and Karchere meets the standards set forth in *Harborside*, supra; *Madison Square Garden CT, LLC*, 350 NLRB 117, 120–123 (2007).

I shall first examine Respondent’s contentions based on a finding, contrary to my conclusions set forth above, that Lord

was a statutory supervisor at the time that she engaged in prounion conduct.<sup>41</sup>

In examining the first prong of the *Harborside* analysis, I must decide whether Lord’s prounion conduct reasonably tended to coerce or interfere with employee free choice. In assessing that issue, *Harborside* makes clear that contrary to some prior precedent<sup>42</sup> in order to find that conduct reasonably tended to coerce or interfere with employee free choice, it is not essential that the prounion conduct include expressed threats or promises by the supervisors. 343 NLRB at 909, 913.

However, the principal prounion activity relied on by *Harborside* as well as by *Madison Square Garden* was the supervisor’s solicitation of authorization cards. Indeed, *Harborside* characterized supervisory solicitation of authorization cards as having “an inherent tendency to interfere with the employee’s freedom of choice to sign a card or not.” 343 NLRB at 911. The Board reasoned that “when a supervisor asked 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.

Further, *Harborside* created another exception to *Ideal Electric & Mfg. Co.*,<sup>43</sup> and found as in *NLRB v. Savair Mfg. Co.*,<sup>44</sup> where an election was set aside based on union’s promise of waiver of initiation fees, that objectionable conduct can be found on the basis of prounion card solicitation by supervisors, even if it occurred prior to the filing of the petition. Id. at 912.

Another, but related rationale for finding supervisory solicitation of cards to be inherently objectionable, was expressed in *Madison Square Garden*, supra, 350 NLRB at 120 fn. 10, where the Board noted that such solicitations requires an employee to make an observable choice, demonstrating support for or rejection of the union, similar to an unlawful interrogation by an employer.

Here, the record contains no evidence that Lord solicited the signing of cards or signatures on the union petition from any employees. Respondent argues that these principles are applicable here since Lord was present at union meetings and observed employees signing the petition and that employees, including Kuznir, who is under Lord’s supervision, observed Lord signing the union petition. Respondent further relies on Lord’s conduct in calling Patterson, Respondent’s district manager at its Waterford facility. In their first conversation, Lord asked Patterson to let her know if any of the employees at Waterford were interested in meeting with the Union and with Newington employees to discuss unionization and to consider signing a union petition in order to eventually have a union vote. Lord assured Patterson that the meeting would be “off-property,” so if employees signed the petition their jobs would be safe.

<sup>41</sup> Since Respondent concedes that Karchere was not a supervisor under Sec. 2(11) of the Act, I need not consider her conduct vis a vis supervisory status.

<sup>42</sup> *Pacific Physicians Services*, 313 NLRB 1176 (1994); *Sutter Roseville Center*, 324 NLRB 218 (1997); *Pacific Micronesia Corp.*, 326 NLRB 458 (1998).

<sup>43</sup> 134 NLRB 1275 (1961) (elections generally cannot be set aside based on conduct occurring before filing of the petition).

<sup>44</sup> 414 U.S. 270 (1973).

Immediately after this conversation, Patterson spoke individually to the eight unit employees at the Waterford facility, plus her assistant district manager, Brandon Guy. Patterson informed each employee that she had received a call from Lord, who had informed her that the Newington employees had met with a union representative. Patterson added that Lord had asked her to find out if any of the Waterford employees were interested in attending such a meeting. Patterson asked each employee how they felt about it. Each employee responded that they were not interested in attending such a meeting and that they were happy working for Respondent. They added, "Why don't they leave us along?" Lord followed up by calling a few days later. Patterson was not there, so Lord spoke with Guy and asked if the Waterford employees were interested in meeting with the Newington employees and the Union. Guy replied, "No."

A few days before September 23, Lord called Patterson at home. Lord asked Patterson if she had spoken to the Waterford employees about meeting with the Union and the Newington employees. Patterson replied that she had and that the employees at Waterford "wanted no part of the Union."

I conclude, contrary to Respondent's contentions, that none of Lord's conduct, including her attending union meetings, signing a union petition in the presence of employees, observing other employees, including Kuznir, signing the union petition or her conversation with Patterson, wherein she encouraged employees to attend union meetings, either singly or collectively, was the equivalent to solicitation of signing union cards or petitions, or that it reasonably tended to coerce or interfere with employee free choice.<sup>45</sup>

With regard to Lord's attending union meetings, signing the union petition in front of employees and observing other employees, including Kuznir, sign the petition, such conduct does not reasonably tend to coerce or interfere with employee free choice. *Northeast Iowa Telephone Co.*, 346 NLRB 465, 466-468 (2006) (supervisor attended union meetings, signed authorization cards in front of employees and spoke in favor of union at such meetings); *Stevenson Equipment Co.*, 174 NLRB 865, 866 (1969) (supervisors attended union meetings, informed employees about the meeting, signed cards in front of employees and employees signed in presence of supervisors).

Further, Lord made no comments directly to any Westport employees. To the extent that Lord's statements to Patterson about attending a union meeting that were transmitted to Westport employees can be attributed to Lord, I find that what was stated to employees by Patterson as coming from Lord was not objectionable. Essentially, all that Patterson told employees was that Lord had requested Patterson to ask employees whether they were interested in attending a union meeting, wherein they would discuss the signing of a union petition. Such comments,

<sup>45</sup> I note that both Charging Party-Petitioner and the Acting General Counsel contend that Respondent's objections should be dismissed on the grounds that all the conduct complained of by both Lord and Karchere occurred outside the critical period, i.e. prior to the filing of the petition. This position is incorrect. *Harborside* and *Madison Square Garden* make clear that card solicitation and other prouion conduct by supervisors relating to card signing can be considered as objectionable conduct, even if it occurred prior to the filing of the petition.

even if made directly by Lord to employees, do not reasonably tend to coerce or interfere with employee free choice. *Northeast Iowa Telephone*, supra; *Stevenson Equipment*, supra; *Terry Machine Co.*, 332 NLRB 855, 856 (2000) (supervisors encouraged employees to attend union meetings). See also *Harborside*, supra, 343 NLRB at 911, where Board observed that supervisor went beyond merely inviting other employee to union meetings. Board emphasized that supervisor told employee that he "had to" attend union meeting. This suggests that had supervisor merely asked employees to attend meetings (the conduct engaged in by Lord), it would not be objectionable.

Respondent further argues that Lord's comments to Patterson, wherein she informed Patterson that employees would be "safe" from possible retaliation if they attended a union meeting, constitutes a coercive "threat." I cannot agree.

In my view, these comments cannot be reasonably construed as threatening retaliation by Respondent or by Lord. She was assuring employees that the meeting would be held off premises and that Respondent would not know about it. Thus, they would be "safe" from any retaliation by Respondent.

More significantly, even if these comments by Lord to Patterson can be considered coercive, there is no evidence that Patterson communicated that portion of Lord's comments to any employees. Therefore, it cannot be considered as objectionable since no unit employees became aware of these statements by Lord.

Therefore, I find that Respondent has not met its burden of establishing the first prong of *Harborside*, i.e., that Lord, even if she is found to be a supervisor, engaged in conduct that reasonably tended to coerce or to interfere with employee free choice.

Even assuming that Lord's conduct, described above, was found to meet the first prong and coercive conduct was established, it would be necessary to evaluate the second prong of the *Harborside* standards and consider whether Respondent has established that Lord's conduct materially affected the outcome of the election. Respondent has fallen woefully short of meeting its burden in that regard. Respondent has not established that Lord had any supervisory authority over the employees, except for Kuznir, that were present at the meetings that she attended, wherein Lord signed the union petition and observed other employees sign or employees at Waterford, who were informed by Patterson that Lord had asked if they were interested in attending a union meeting. Such a failure of proof is crucial and is sufficient in itself to reject Respondent's assertion that Lord's conduct materially affected the outcome of the election. *Northeast Iowa Telephone*, supra, 346 NLRB at 467 (no evidence that managers signed their cards in front of employees under their supervision); *Glen's Market*, 344 NLRB 294, 295 (2005) (supervisors' solicitation of authorization cards from employees and requesting employees to distribute cards to other employees not objectionable because of lack of evidence that the two supervisors involved "had supervisory authority over the employees toward whom their conduct was directed"). Id. at 295.

An examination of *Harborside* and its progeny only reinforce this conclusion since each of these cases emphasize in finding objectionable conduct that the solicitation of union

cards or petitions by supervisors was directed towards employees under their direct supervision. *Harborside*, supra, 343 NLRB at 910 fn. 13 (emphasis on conduct affecting employees under direct supervision of supervisor, who solicited cards and threatened employees with job loss); *SNE Enterprises*, 348 NLRB 1041, 1042 (2006) (Board again emphasis that solicitation of cards by supervisors directed towards their subordinates, distinguishing *Glen's Market*, supra, on this basis); *Madison Square Garden*, supra, 350 NLRB at 122 (“it is undisputed that supervisors solicited union authorization cards from their direct subordinates”); *Chinese Daily News*, 344 NLRB 1071, 1072 (2005) (Board finds that supervisor’s “solicitation and collection of authorization cards from the book department employees whom he supervised was inherently coercive”) Id. at 1072 and at fn. 16.

I recognize that the majority opinion in *Millard Refrigerated Services*, 345 NLRB 1143, 1144–1147 (2005), relied in part on solicitation of one card by a supervisor, who was not the direct supervisor of the employee. It disagreed with the dissent’s contention that *Glen's Market*, supra, stands for the broad proposition that “supervisory conduct, no matter how coercive, targeted towards one, who is not the supervisor’s direct subordinate cannot be objectionable.” Id. at 1145. The majority concluded in *Millard Refrigerated* that there a group of supervisors working together engaged in coercive prounion conduct, which involved coercive threats and coercive interrogations, as well as solicitation of cards. The Board observed that the conduct “does not become nonobjectionable simply because some lines if supervision are crossed.” Id. at 1145, 1146. The decision also noted that most of the conduct was directed toward subordinates of the particular supervisors involved. Further, it found it appropriate to rely on the solicitation of cards by a supervisor, who was not the direct supervisor of the employee. The employee solicited testified that his supervisor, like the supervisor who solicited his card, was also busy soliciting and collecting cards. Thus, the Board concluded that the employee would reasonably conclude that his own supervisor was as desirous of the employee’s signature as the supervisor, who solicited him. Thus, in those limited and exceptional circumstances, the Board considered the one instance of card solicitation by a supervisor, who did not supervise the employee solicited, as part of a pattern of conduct. I also note that the observation of the majority about *Glen's Market* is *dicta* since it did not need to consider the one instance of supervisory solicitation to support its conclusion. I note that one prounion supervisor by himself solicited cards from 13 employees in his crew, which was enough by itself to warrant setting aside the election.<sup>46</sup> Id. at 1146.

Thus, I reaffirm my conclusion based on *Glen's Market*, supra, as well as the other precedent that I have cited,<sup>47</sup> that in order for supervisory solicitation or other prounion conduct to be objectionable, subject to the limited exception set forth in *Millard Refrigerated*, supra, that it be directed towards employees under the supervision of the prounion supervisor.

<sup>46</sup> That same supervisor also unlawfully interrogated an employee.

<sup>47</sup> *Harborside*, supra at 910; *Madison Square Garden*, supra at 122; *Chinese Daily News*, supra at 1072; *Northeast Iowa Telephone*, supra at 467.

Here, there is no evidence of any coercive or prounion conduct by any other prounion supervisor,<sup>48</sup> so the exception detailed in *Millard Refrigerated*, supra, is inapplicable. Lord’s conduct was not directed towards any employee under her supervision other than Kuznir. Therefore, based on the precedent cited above, I find that her conduct directed towards employees, such as observing them sign cards or encouraging employees to attend union meetings, cannot be considered objectionable and did not materially affect the outcome of the election despite the small margin of the Union’s victory. *Northeast Iowa Telephone*, supra, 346 NLRB at 467–468.

Part of Lord’s conduct, as described above, was “directed” towards Kuznir since Kuznir observed Lord signing the union petition, and Lord observed Kuznir signing the petition. However, Kuznir was not an eligible voter, her name was not on the *Excelsior* list, and she did not vote. Therefore, any prounion conduct by Lord towards her subordinate cannot have materially affected the results of the election. Further, even if Kuznir was an eligible voter, her one vote would not be sufficient to affect an election, which the Union won by 3 votes.

Accordingly, even if Lord was found to be a statutory supervisor, her prounion conduct was insufficient to warrant setting aside the election.

Respondent also contends, as I have noted above, that both Karchere and Lord are managerial employees under the Act.

The first issue to be considered is whether the *Harborside* principles are applicable to managerial employees. I have found no precedent discussing or deciding this issue. Respondent argues that the rationale of *Harborside* requires applying its principles to managerial employees. It notes that when the Board considers knowledge issues of union activities of employees, it will find that knowledge of a managerial employee of such activities is generally attributed to the employer. Respondent further points out that the rationale of *Harborside*’s conclusion that supervisory solicitation of cards is objectionable is that employees will reasonably be concerned that he or she “must provide the right response which will be viewed with favor, as opposed to the wrong response, which could be met with disfavor.” 343 NLRB at 911. Therefore, it argues that the pro-union solicitation by a managerial employee should also be considered “inherently coercive.”

While I find some cogency in that argument, I note that it ignores other significant aspects of *Harborside* and its progeny. That is the emphasis on the reasonable concern of employees that their responses to the solicitation could lead to rewards or penalty is derived from the Board’s view that the prounion supervisor had direct supervisory responsibility over the employee, who the supervisor solicited. *Glen's Market*, supra; *Northeast Iowa Telephone*, supra.

Indeed, managerial employees do not necessarily have the power or authority to affect the terms and conditions of employment of employees. I note, of course, that some and perhaps most managerial employees will also be considered supervisory employees. For example, here, Johnston and Gasecki would be considered both managerial and supervisory employ-

<sup>48</sup> I note that Respondent concedes, and I have found, that Karchere is not a supervisor under the Act.

ees. However, their authority to affect the terms and conditions of employment of employees is derived primarily from their supervisory status, and not their managerial status.

Here, both Karchere and Lord have no authority by virtue of their alleged managerial status to reward or punish employees or to otherwise directly affect their terms and conditions of employment. Respondent asserts that it established the managerial status of Karchere based on her effectively recommending policy changes in Respondent's payroll system and its discount policy concerning aged cats, as well as her role in the preparation of the Fox Clinic budget. As for Lord, Respondent relies on Lord's role in effectively recommending that Respondent change its database and software for tracking animals, managing its computer system and her role recommending changes in and managing Respondent's online and nononline fundraising. None of these functions of either Karchere or Lord directly impact on employees' terms and conditions of employment in the sense that employees would reasonably perceive that either Karchere or Lord had the power to reward or punish them for their support of or nonsupport of the Union.

I, therefore, find that the issue of whether managerial employees are subject to the *Harborside* principles is uncertain and has not been decided by the Board. I, therefore, find it unnecessary to decide whether *Harborside* is applicable to managerial employees since I conclude that, as detailed below, Respondent has not established that the conduct of Karchere or Lord was objectionable, even if they were to be considered managerial employees.

Thus, I shall assume without deciding that managerial employees are subject to *Harborside* principles in assessing whether their prounion conduct warrants setting aside an election. However, I find that Respondent has not established that the conduct of Karchere or Lord, singly or collectively, is sufficient to warrant setting aside the election, even if they are considered to be managerial employees.

Starting with Lord's conduct, I have already found above, that her prounion conduct, even assuming her supervisory status, does not warrant setting aside the election. That conclusion does not change assuming that she is a managerial employee. Her prounion conduct is of course the same. I have concluded that her conduct of attending union meeting, observing employees, including Kuznir, signing the union petition and signing the petition herself are not the equivalent of solicitation of union cards and does not reasonably tend to coerce or interfere with employee free choice. *Northeast Iowa Telephone*, supra; *Stevenson Equipment*, supra. That conclusion is equally applicable to assessing Lord's status as a managerial employee. I so find.

I also found above that since Lord had supervisory authority over only one employee, who was present at these meetings, and that employee (Kuznir) was not an eligible voter that Lord's conduct at the meetings, even if considered coercive, did not materially affect the results of the election. *Northeast Iowa Telephone*, supra; *Glen's Market*, supra. That conclusion is also warranted even if Lord is considered to be a managerial employee as well.

I have also considered that Lord's conduct in telephoning Patterson and asking her to inquire if employees at Westport

were interested in attending a meeting similarly did not reasonably tend to coerce or interfere with employee free choice, even though Patterson did transmit Lord's request to eight employees at that facility. *Northeast Iowa Telephone*, supra; *Stevenson Equipment*, supra; *Terry Machine*, supra; *Harborside*, supra at 911.

I do recognize in that regard that it could be argued that by in effect encouraging employees to attend a union meeting Lord has run afoul of part of the rationale for *Harborside's* conclusions. It could be concluded as Respondent argues that when Lord encouraged employees to attend union meetings, that the employees so requested were "put on the spot" to respond and would reasonably fear retaliation or reward depending on their response.

However, I find this argument unconvincing in the circumstances of this case. First of all, the employees were not spoken to directly by Lord, but only by Patterson, who relayed Lord's request to them. Therefore, the employees asked would not reasonably fear retaliation or reward from Lord since Lord was not present and would not be aware of the employees' response.

Furthermore, in my view, there is a considerable difference between a request to attend a union meeting and to sign a union card or a union petition. The former request is merely asking an employee to attend a union meeting and listen to the discussion. It does not necessarily request an employee to support the union or to commit themselves to doing so. In contrast, a request to sign a union card or petition is a request to commit oneself to support the union and would likely be construed by an employee to commit to voting for the union in the event of an election. Therefore, I conclude that a mere request by a manager or a supervisor to attend a union meeting would not have the same tendency to force employees to choose or to fear reprisals or rewards depending on their response to the request.

Additionally, I note here that the employees subject to Lord's indirect request worked at a different facility from Lord, and I find that Respondent has not established by any probative evidence that the Westport employees knew or believed that Lord was a managerial employee or that she had any potential to affect their terms and conditions of employment. In that regard, Respondent relies on testimony from Patterson that she believed that the employees knew that Lord was a manager because she would see Lord at monthly management meetings and when she reported to employees under her supervision on the results of the meeting, she would inform them that Lord had been present. I find this evidence insufficient to establish that employees knew or believed that Lord was a managerial employee, particularly, when Patterson conceded that the employees at Westport would have interactions with Lord only if they had a problem with computers. They would call Lord and she would come and fix it or resolve the problem. No evidence was presented that the Westport employees were aware of any of the activities of Lord that Respondent contends establish her managerial status.<sup>49</sup>

<sup>49</sup> Her role in effectively recommending changes in Respondent's computer system and software and her role in recommending changes in online and nononline fundraising.

Therefore, there is simply no basis for concluding that the Westport employees or indeed the other employees, who attended the union meeting, where Lord was present, had any reasonable belief that Lord had the ability to affect their terms and conditions of employment or to reward or retaliate against them.

Finally, although not determinative, I rely upon the reaction of the Westport employees to Lord's inquiries transmitted through Patterson. Patterson, after informing each employee of Lord's request, asked the employees how they felt about it. They all told Patterson that they were not interested in attending such a meeting, that they were happy working for Respondent and added, "Why don't they leave us alone?" In these circumstances, I find it highly unlikely that any of the Westport employees reasonably feared that Lord might reward them if they attended the meeting or might retaliate against them if they did not. I find it even less likely that any of these employees had any fears of reprisal or hopes of reward from Lord when they voted in the election a month and a half after their conversation with Patterson.

I, therefore, reaffirm my conclusion that Respondent has not met the second prong of the *Harborside* factors and has not established that Lord's conduct, even if coercive, materially affected the outcome of the election. Accordingly, I conclude that whether Lord is considered a supervisor, a managerial employee or both, her prouion activities does not warrant setting the election aside.

As for Karchere, she, like Lord, attended two union meetings, signed the union petition at one meeting in the presence of other employees and observed other employees signing the petition at both meetings. As I found above with respect to Lord, this conduct does not reasonably tend to coerce or interfere with employee free choice. *Northeast Iowa Telephone*, supra; *Stevenson Equipment*, supra. I find similarly with respect to Karchere's conduct, even if she is considered to be a managerial employee.

Karchere also telephone Patterson and reiterated what Lord had previously told Patterson about having a union meeting with union representatives and the Newington employees. Karchere gave Patterson her cell phone number and asked Patterson to give the cell phone number to the Waterford employees and to tell them that if they there were interested in such a meeting to call Karchere. Patterson agreed to do so, told employees about Karchere's call and offered them Karchere's number. Most of them did not even take the number or took it and threw it away. A day or so later, Guy, her assistant manager, informed her that Karchere had called Guy at the facility and asked Guy if the employees had been given her cell phone number since nobody had called her.

Similar to my findings with respect to Lord, Karchere's conduct consisting of essentially asking or at best encouraging the Westport employees to attend a union meeting. Such conduct does not tend to coerce or interfere with employee free choice. *Northeast Iowa Telephone*, supra; *Harborside*, supra; *Stevenson Equipment*, supra.

Thus, Respondent has not met its burden of establishing the first prong of *Harborside* based on Karchere's conduct. Even assuming that Karchere's conduct at the meetings or in her call

to Patterson can be considered coercive, Respondent has also failed to meet its burden of establishing the second prong of the *Harborside* standards that Karchere's conduct materially affected the outcome of the election. My discussion above with respect to Lord's conduct vis a vis this issue is equally applicable to Karchere. There is insufficient evidence adduced that any of the employees present at the meetings or at Westport would reasonably believe that Karchere had the power or authority to reward them if they attended or retaliate against them if they did not. I will not repeat my discussion concerning Lord's managerial status and this issue except to say that these conclusions are more forcefully applicable to Karchere. Similar to Lord, Karchere's functions, which Respondent asserts established her managerial status, were not shown to have been known to employees. Further, not a scintilla of evidence was adduced that Karchere had any authority to reward or punish employees or that employees would so believe.

Karchere's title is the "finance assistant," and her interactions with employees consist of dealing with payroll issues. The fact, as Respondent argues, that in an employee newsletter, Karchere was referred to as "primary backup to the CFO," hardly suffices as evidence that Karchere had any power or authority over employees, particularly since the record reveals that Karchere never actually acted in that capacity since Gasecki was rarely absent.

Further, at the first union meeting attended by Karchere, she asked the union representative if she was eligible to sign the petition since she did not handle animals and is a clerical employee. After Karchere described her job duties to Corey, he stated that since she was not a manager or a supervisor, she was eligible to sign the petition. While the opinion of Corey as to Karchere's duties is, of course, not binding or conclusive, the fact that he made that statement to employees can be relied upon to assess what employees reasonably believed about Karchere's status. I find that the employees present would have reasonably believed that she was a rank and file employee eligible to join the union, and not that she was a supervisor or manager with any authority or power to reward or punish them based on their decision whether to sign the union petition. Thus, Respondent has not shown that Karchere's prouion conduct materially affected the election results, even if such conduct were considered coercive.

Accordingly, based upon the above analysis and precedent, I conclude that Respondent has failed to establish that the prouion conduct of Karchere or Lord, singly or collectively, warrants the setting aside of the election.

I, therefore, recommend that the objections be dismissed.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating employees concerning their activities on behalf of or support for International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26 (the Union), by creating the impression that the union activities of its employees are under surveillance, by informing and

instructing its employees that they cannot participate in union activities and to report union activity to management, by threatening its employees with discharge, job loss or other discipline if they engage in activities on behalf of the Union or if they engage in a strike and by informing employees that they are being terminated because of their union activities, Respondent has violated Section 8(a)(1) of the Act.

4. By terminating the employment of Bridget Karchere and Maureen Lord because of their activities on behalf and support for the Union, Respondent has violated Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. Respondent has not violated the Act in any other manner as alleged in the complaint.

7. Respondent's objections in Case 34-RC-2351 are without merit and must be dismissed.

#### THE REMEDY

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

Respondent, having discriminatorily discharged Bridget Karchere and Maureen Lord, it must offer them reinstatement to their former positions of employment and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with the interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>50</sup>

#### ORDER

The Respondent, Connecticut Humane Society, Newington, Connecticut, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees concerning their activities on behalf of or support for International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26 (the Union).

(b) Creating the impression that the union activities of its employees are under surveillance.

(c) Informing or instructing its employees that they cannot participate in union activities or to report union activities of employees to management.

(d) Threatening its employees with discharge, job loss or other discipline if they engage in activities on behalf of the Union or if they engage in a strike.

(e) Informing employees that they are being terminated or have been terminated because of their union activities.

(f) Terminating or otherwise disciplining its employees because of their activities on behalf of or support for the Union.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Bridget Karchere and Maureen Lord full reinstatement to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Karchere and Lord whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Karchere and Lord, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Newington, Waterford and Westport, Connecticut facilities copies of the attached notice marked "Appendix."<sup>51</sup> Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 23, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 34 a sworn certification of a re-

<sup>50</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>51</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

It is also recommended that the objections filed by Respondent in Case 34-RC-2351 be dismissed and that a certification of representatives be issued.

Dated, Washington, D.C., June 8, 2011

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees concerning their activities on behalf of or support for International Association of Machinists & Aerospace Workers, AFL-CIO, District Lodge 26 (the Union).

WE WILL NOT create the impression that the union activities of our employees are under surveillance by us.

WE WILL NOT inform or instruct our employees that they cannot participate in union activities or to report union activities of employees to management.

WE WILL NOT threaten our employees with discharge, job loss or other discipline if they engage in activities on behalf of the Union or if they engage in a strike.

WE WILL NOT inform our employees that they are being terminated because of their union activities.

WE WILL NOT terminate or otherwise discipline our employees because of their activities on behalf of or in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order offer Bridget Karchere and Maureen Lord reinstatement to their former jobs, or if their jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority and other right or privileges previously enjoyed.

WE WILL make Bridget Karchere and Maureen Lord whole for any loss of earnings and other benefits suffered by them as a result of the discrimination against them, plus interest.

WE WILL within 14 days from the date of the Board's Order remove from our files any reference to the unlawful discharges of Bridget Karchere and Maureen Lord, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

CONNECTICUT HUMANE SOCIETY