

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34**

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| CONNECTICUT HUMANE SOCIETY and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26 | Case 34-CA-12557 |
| CONNECTICUT HUMANE SOCIETY Employer and INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 26 Petitioner | Case 34-RC-2351 |

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF TO THE BOARD**

Respectfully submitted,

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Brief in Response to the Exceptions and Brief in support thereof filed by Respondent.

I. STATEMENT OF THE CASE

On June 8, 2011, Administrative Law Judge Steven Fish issued his 78-page Decision in the instant case, finding that Connecticut Humane Society (herein called Respondent) committed numerous violations of Sections 8(a)(1) and (3). Judge Fish found that Respondent violated Section 8(a)(1) by, inter alia, coercively interrogating employees concerning their activities on behalf or support for International Union of Machinists & Aerospace Workers, District Lodge 26, AFL-CIO (herein called the Union), by creating the impression that the union activities of its employees are under surveillance, by informing and instructing employees that they cannot participate in union activities and to report union activity to management, by threatening 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 telling employees that they are being terminated because of their union activities. (ALJD 75, lines 26-34).¹ Judge Fish also found that Respondent violated Section 8(a)(3) by terminating its employees Bridget Karchere and Maureen Lord, and further found that their post-discharge comments posted on the internet and in several publications did not disqualify them from reinstatement. (See ALJD 59, lines 29-32; ALJD 75, lines 35-37). Finally, the judge

¹ References to Judge Fish's decision are cited as "ALJD - __," followed by the page and line number, where appropriate. References to Respondent's brief in support of its Exceptions are designated "R. Br. to Board at __," followed by the appropriate page number. References to the exhibits of the General Counsel and Respondent are cited herein as "GCX- __" and "RX- __," respectively, followed by the appropriate exhibit number or numbers. References to the official transcript of the hearing are cited as "Tr. __", followed by the appropriate page number.

found that Respondent's Objections to the election held in Case No. 34-RC-2351 are meritless, and must be dismissed. (ALJD 75, lines 44-51). Respondent excepts to all of these findings.

On August 5, 2011, Respondent filed 23 exceptions to the judge's findings and recommended order, and a supporting brief. For the reasons set forth below, and based upon the record as a whole, Counsel for the Acting General Counsel respectfully urges the National Labor Relations Board (the Board) to reject all of Respondent's exceptions and to affirm the Administrative Law Judge's rulings, findings and conclusions, and to adopt his recommended Order in its entirety.²

II. OVERVIEW

This is a case about a company's overreaction to a union campaign its President and CEO did not see coming, and how Respondent, so embittered when it lost the election its top official had lobbied personally against, lashed out by summarily firing two of its admittedly most valued workers: Bridget Karchere and Maureen Lord. Respondent admitted that it fired these two highly respected individuals for their "disloyalty" in connection with the union organizing campaign, but continues to insist that both individuals were managers within the meaning of the Act and that one (Lord) was also a statutory supervisor, privileging the harsh discipline. Respondent based its views upon a warped view of the protections of the Act, as it inflated and exaggerated the extent of the employees' duties and authorities -- as well as the extent of their union activities, which in fact were quite minor. The record revealed that Respondent clearly overreacted to the election loss by simultaneously filing obviously unmeritorious

² While otherwise in agreement with the judge's findings and recommended order, Counsel for the Acting General Counsel is not filing cross exceptions to Judge Fish's findings recommending dismissal of two alleged violations of Section 8(a)(1) occurring during the pre-election period. (ALJD 65, lines 3-19; ALJD 65, lines 21-52; ALJD 66, lines 1-29).

Objections to delay a bargaining obligation, pinning the blame on its failure to stay “union free” upon the pre-petition protected conduct of Lord and Karchere. The employer admitted that these two were properly punished for their conduct because they were part of management’s “inner circle,” but the record revealed that this circle was drawn much too wide so as to try to exclude statutory employees such as Karchere and Lord from the Act’s protections. Judge Fish found merit to virtually all of the Complaint allegations, recommended dismissal of the meritless Objections, and Respondent’s appeal followed.

III. RESPONDENT’S EXCEPTIONS ARE WITHOUT MERIT

As noted above, Respondent filed 23 Exceptions to the judge’s decision. Exceptions 1 through 11 concern Lord’s alleged supervisory and/or managerial status and attack the judge’s findings in several areas (detailed below). Exception 9 states that the judge “incorrectly concluded that Respondent failed to meet its burden of proof that (Lord and Karchere) were managerial employees.” Exception 12 alleges that the judge improperly drew an adverse inference against it for failing to call an admitted supervisor, Joann Freeman, to testify. Exception 13 simply excepts to the judge’s finding that Respondent violated the Act by terminating Lord and Karchere. Exceptions 14 through 20 concern attacks on the judge’s reinstatement remedy. Finally, Exceptions 21, 22 and 23 concern the companion representation case Objections.³

Respondent’s brief attached to its Exceptions reveals that its claims can be divided into three general categories: attacks on the judge’s credibility and factual findings, complaints that the judge considered the evidence from only one perspective, and complaints that he relied too heavily upon cases that Respondent finds inapposite.

³ Counsel for the Acting General Counsel agrees with the judge that Respondent’s Objections to the December 4, 2009 election should be dismissed, for all of the reasons contained within his decision. (See ALJD 66-75). Accordingly, Respondent’s Exceptions 21, 22 and 23 are entirely without merit.

Thus, although it tries hard to avoid this impression, Respondent bases its exceptions in large part upon the judge's credibility findings. For example, as detailed below, Respondent's Exceptions 2 through 9 attack Judge Fish's weighing of the evidence, such as the claim in #3 that the "judge failed to give appropriate weight to clear evidence that employee Gay-Marie Kuznir considered Maureen Lord to her supervisor" or the contention in #4 that the judge gave too little weight to Lord's authority to recommend hiring. In its brief, Respondent also devotes considerable effort challenging the judge's credibility findings concerning the testimony of CFO Ray Gasecki, who offered lengthy testimony concerning Karchere's supposed "independent" role in creating the Fox Memorial Clinic's budget shortly before she was fired. (See R. Br. to Board at 23-25, 27). However, the judge specifically discredited Gasecki on this matter:

Respondent also places significant reliance on Karchere's role in the preparation of the Fox Clinic budget. However, based upon my credibility findings detailed above, I have credited Karchere's version of her role in the preparation of this budget.... 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. (ALJD 47, lines 15-26).

It is well established that the Board has a long-standing policy of acceding to the judge's credibility findings unless the preponderance of the evidence convinces the Board that they are wrong. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Here, the clear weight of the evidence shows that Judge Fish's detailed credibility findings are all supported by the record evidence. Respondent's numerous exceptions to the judge's credibility findings are simply without merit.

With respect to the third category of exceptions herein, Respondent makes no effort to actually distinguish the hundreds of cases cited by Judge Fish in his decision

and offers no caselaw of its own, but simply suggests that the cases cited were improperly relied upon. For all of the reasons that follow, Respondent's exceptions are utterly meritless.

1. Respondent's Exceptions concerning Lord's alleged supervisory status (Exceptions 1-8)

Respondent's first set of exceptions challenge the judge's finding that Lord was not a statutory supervisor. In support of its contention that Lord functioned as a supervisor, Respondent makes three primary arguments: (1) that Lord conducted performance reviews, (2) that she had general oversight of clerical employee Gay-Marie Kuszniir, and (3) that she was critically involved in the hiring process.

With respect to Lord's role in writing of performance reviews, Respondent contends that, had she not been terminated in December 2009, she would have written Kuszniir's review (presumably at some point in January 2010). (R. Br. to Board, at 6). The judge considered this fact in his decision, but placed greater emphasis on the fact that the reviews Lord wrote did not affect employees' wages or job status, thus leading him to conclude (correctly) that Lord's supervisory status was not established by her role in preparing performance evaluations. (ALJD 41, lines 3-20). Moreover, Respondent also ignores (and did not except to the finding) the fact that "the record establishes that Johnston regularly changed portions of Lord's reviews, including making changes in Lord's scores for Kuszniir in the 2008 review prepared by Lord," a finding which severely undercut any possible reliance upon this matter. (ALJD 41, lines 22-24).

Respondent's next argument is that Lord "had general oversight for Ms. Kuszniir" (evidenced by her approval of Kuszniir's vacation requests), and its claim that "Lord was responsible for correcting Ms. Kuszniir if there were problems with her performance of

duties.” (R. Br. at 6-7). Respondent goes on to claim that Lord was Kuszniir’s supervisor, asking rhetorically several times in its brief: if Lord was not Kuszniir’s supervisor, who was? (R. Br. at 12, 14). The short answer is: not Maureen Lord! Respondent’s top personnel official, Executive Assistant to the president, Janice Marzano, testified that there were 4 “team leaders” who were supervisors in Newington, plus herself, Johnston, Gasecki, in addition to several other managers who, like her, worked “upstairs.”⁴ The answer to Respondent’s question is likely the Acting District Manager (Joanne Draper at the time), as she clearly was the one handing out all of the discipline in the relevant time period of June to December 2009. Thus Marzano, who maintains Respondent’s personnel files under lock and key and oversees Human Resources (Tr. 133-134, 244, 255), admitted that actual discipline in 2009 was issued by then-Acting District Manager Draper, whose write-ups also led to the terminations of four (4) additional employees in Newington. (Tr. 307-308). The record revealed that, unlike the single memo Lord issued to Kuszniir in December 2008, Draper issued memos to Team Leader Jackie Czerwinski in July 2009 in which she warned her that “failure to comply with these requests will result in further discipline.” (See GCX-15(a)). The tone as well as the heading of this and her follow-up memo to Czerwinski dated August 26, 2009 (“Performance Discussion”) is markedly different than the wording of Lord’s single memo to Kuszniir. (Compare GCX-14 to GCX-15(b)). Marzano was unable to point to a single instance in which anyone was ever warned, suspended or fired as a result of *any memo Lord wrote*. (Tr. 308). Respondent offered no evidence to suggest otherwise.

⁴ Marzano testified that at the relevant time the following were supervisors in Newington: President Johnston; CFO Raymond Gasecki; Alicia Wright (Public Relations); Wright’s assistant (unnamed); Melissa Zaluski (the Volunteer Services Director); herself; Lord; Karchere; and the four “Team Leaders” (Tr. 321-325), for a total of 12 supervisors.

Lord did not supervise Kuznir. To the contrary, Lord testified without contradiction that Kuznir, who worked down the hall from Lord on the second floor of the Newington facility, is primarily responsible for recording and acknowledging donations to the company, and providing data entry into the donor tracking system. (Tr. 130, 142). Lord testified without contradiction that she interacted with Kuznir between 10 and 15 percent of the day; Kuznir would enter the data from which Lord would generate reports “and track what she had entered into the system.” (Tr. 142). Lord testified that she provided technical support for Kuznir, answered her questions about recording donations, and helped her with “thank-you letters” to donors. (Tr. 130). Judge Fish noted these facts, which Respondent ignores, in his decision. (ALJD 31, lines 13-18).

In any event, Respondent’s newfound curiosity concerning Kuznir is of little consequence, as the judge -- applying the proper legal standard -- clearly considered and thoroughly rejected all of Respondent’s arguments. Which leads to an important point: Respondent apparently continues to fundamentally misapprehend the Board standard in cases involving alleged supervisory status, as evidenced by the claim that “the statute contains no requirement that such authority be exercised independently.” (R. Br. to Board at 12). Respondent’s argument seemingly ignores the reality that the Board, following the Supreme Court’s interpretation of the Act in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001)(possession of any of the 2(11) powers is sufficient to confer supervisory status if the authority is exercised with independent judgment and not in a routine matter), held, as the judge correctly noted, that in order to establish that someone “responsibly directs” employees under the Act it must be shown that the employer delegated to that purported supervisor the authority to

direct the work of that employee using *independent judgment*, plus the authority to take corrective action (if necessary), and that there is a chance for adverse consequences for the alleged supervisor if she fails to take such steps. See *Oakwood Health Care, Inc.*, 348 NLRB 686, 690-694 (2006) (see ALJD 41, lines 33-38). Thus, applying the appropriate and by now certainly firmly established legal standard, Judge Fish found that Respondent had relied upon a smorgasbord of routine functions that do not come close to proving supervisory status. Respondent, naturally, is unhappy with these findings, but has offered nothing new to suggest that they are in error.

For example, Respondent claims that Lord's "correction of Kuzsnir's production of donor acknowledgment letters was indeed the direction of a subordinate employee, in the interest of the employer, and with independent judgment." (R. Br. to Board at 7). However, as the judge aptly noted, he "need not decide whether Lord's conduct in correcting errors in Kuzsnir's preparation of letters for Johnston's signature of her role in instructing employees in the use of PetPoint involves the use of independent judgment since Respondent has clearly failed to demonstrate the exercise of the third crucial element of establishing responsible direction under *Oakwood Healthcare, supra*. Thus, Respondent has adduced no evidence that Lord faced the prospect of 'adverse consequences' due to a failure of Kuzsnir or any other employee to perform the tasks that Lord is allegedly responsible for directing them to perform." (ALJD 42, lines 5-13).

Respondent's next claim in Exception 1 is that Lord's "supervisory duties also included participation in the interview and hiring process". (R. Br. to Board at 8). Citing her attendance at a meeting in December 2009 (perhaps -- Respondent could not be bothered to pin down the date of this suddenly critical meeting through its witnesses who would presumably have known this fact) when current manager Karyn Corder

was interviewed, Respondent asserts that Lord “was a manager who was involved in the process of considering a candidate for the important role of District Manager.” (R. Br. to Board at 9) and that the judge “failed to credit this evidence as supporting the existence of Lord’s authority to recommend hiring decisions.” (R. Br. to Board at 12, Exception 5). Respondent must have skipped the judge’s thorough recitation of this “evidence”, in which Judge Fish recounted in great detail all of these arguments, but rejected them with his observations that: (a) Respondent presented no evidence that the group of managers that interviewed Cordner, especially Lord, made any sort of recommendation to actually hire her; (b) participation in the interviewing process is insufficient in itself to confer Section 2(11) status; and (c) Lord’s participation in the interview process of Cordner is irrelevant since undisputed supervisors (such as Cordner) are not considered employees of the employer. (ALJD 39, lines 26-40).

Respondent’s Exceptions 2 through 8 again focus on Lord, and the judge’s supposed “failure to find that she satisfied the statutory standard for supervisory status” (Exception 2). Counsel for the Acting General Counsel’s response to Exceptions 3 and 4 is contained above, as those exceptions mimic arguments Respondent makes in Exception 1. In Exception 2, Respondent simply invents “facts” to suit itself, as when it claims that Lord “disciplined” employees up until mid-2009 (the record reveals otherwise) and that she “directed the work of subordinates.” (R. Br. to Board at 11). In Exception 6, Respondent makes the utterly remarkable claim that Judge Fish, in analyzing the record evidence but refusing to find that Lord disciplined others, “was applying a hyper technical reading of the statutory criteria in order to reach a result that assured Ms. Lord the protection of the Act.” (R. Br. at 13). This serious allegation is simply remarkable for its audacity. Respondent has it backwards: *it* was the one that set

in motion the decision to fire two valued employees the instant it lost the December 2009 election, and *it* has been the one all along willing to stretch the facts to fit them to the end game it sought from that fateful moment. The judge has no “skin in this game”! Judge Fish’s lengthy and thought-out decision could not be more complete, yet Respondent, having little use for the facts, is reduced to attacking the judge’s integrity.

Exception 5’s repetitive claim that the judge failed to consider Lord’s role in the hiring of Cordner is described above. In Exception 7, Respondent claims that the judge “incorrectly relies on the conclusion that performance reviews were not used by Respondent in deciding wage increases or future discipline as part of the analysis of Lord’s supervisory status.” Again, Respondent makes no effort to cite a single case to contradict or even distinguish the numerous cases cited by the judge in his well-reasoned decision. (Compare R. Br. to Board at 14, to ALJD 42).

Exception 7 is a rehash of Respondent’s argument that the judge incorrectly “applied too narrow an interpretation of the performance review process” (R. Br. to Board at 14) in finding that Lord was *not* a supervisor. Again, Respondent cites no caselaw in support of its claims, or makes any effort to distinguish the cases cited in this regard by Judge Fish. See, e.g., *Pacific Coast M.S. Industries*, 355 NLRB No. 226, slip op. at 9, fn. 13 (Sept. 30, 2010) (“The authority to evaluate employees’ performance is not a Section 2(11) indicium; thus, as is the case here, ‘when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor.’”)

Finally, in Exception 8 Respondent repeats its claim that Lord simply must have been Kuszniir’s supervisor, and that the judge erred by failing to make such a finding. (R. Br. to Board at 14). Respondent’s exception is essentially another attack on the

judge's credibility and "weight of the evidence" findings, and thus, considering the record, is utterly meritless.

2. Respondent's exceptions regarding Lord's and Karchere's alleged managerial status (Exceptions 9-13)

Respondent devotes considerable effort in its brief to Exception 9: "The ALJ incorrectly concluded that Respondent failed to meet its burden of proof that (a) Maureen Lord and (b) Bridget Karchere were managerial employees." (R. Br. to Board at 15). Unfortunately for Respondent, its argument in this regard is as unavailing and baseless as its other attacks on the judge's decision.

A. Lord

Respondent's primary claim regarding Lord's alleged "managerial" status is summarized as follows: "The ALJ failed to give appropriate weight to significant evidence of Maureen Lord's managerial status in regard to major employer initiatives such as the Convio contract, Alpha Dog and PetPoint system (sic), and as a result incorrectly concluded that Ms. Lord was not a managerial employee." (R. Br. to Board at 19). In support of this argument, Respondent restates undisputed evidence presented at trial, all of which was thoroughly considered by Judge Fish in his decision. (see ALJD 43-46). The judge simply could not agree with Respondent that Lord's work on these projects "either singly or collectively established that Lord formulated, determined or effectuated management policies as defined by Board and Court precedent." (ALJD 44, lines 36-38). The judge noted that her work on PetPoint and Convio "demonstrates only that Lord used 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." ALJD 44, lines 45-

48, citing cases).⁵ Respondent objects, noting that the computers are necessary for it to carry out its business effectively. (R. Br. to Board at 16-18). Yet, if that was the standard, how would any employee who used her work computer effectively ever not be considered a manager and denied the Act's protections?

In Exception 11, Respondent contends that the judge "misconstrues the critical nature of Ms. Lord's work, and therefore misconstrues the authority she was vested with, when he attempts to downplay her 'advertising' responsibility, and as a result her managerial role in fund raising work." (R. Br. at 28). Respondent notes, accurately, that it is a non-profit, which Judge Fish noted early in his decision. (ALJD 2). Respondent's argument in support of this Exception is that if "Lord's efforts in fund raising were unsuccessful, Respondent would not have been able to maintain its animal care operations. The critical importance of her work demonstrates Lord's managerial status without question." (R. Br. to Board at 28). However, Judge Fish did not overlook or "misconstrue" these "efforts", as revealed by the time he devoted to this matter in his decision. (See ALJD 45-46). The judge clearly gave appropriate weight to all of these matters. Respondent is understandably unhappy with his apportionment of the weight the testimony deserved, but, once again, has cited no caselaw to contradict the cases cited by the judge.

Finally, Respondent's point in its brief that Judge Fish "examined Ms. Lord quite closely" concerning her resume (R. Br. at 15) is accurate: the judge in fact examined both Lord and Karchere *at length* following direct and cross examination by the parties, as the record reveals. The judge was determined to get all the facts, and did so, to enable him to write such a thorough decision. Respondent's arguments are without merit.

⁵ The record revealed that Gasecki admitted that "PetPoint" is a "tool". (Tr. 437).

B. Karchere

Respondent initially claimed in this litigation that Karchere, whose title was “finance assistant”, was a statutory supervisor and/or a manager within the meaning of the Act. At trial, Respondent essentially abandoned the “supervisor” claim, and did not brief that issue to the judge. It now relies entirely upon its claim that Karchere had the ability to “formulate and effectuate management policies”, citing *NLRB v. Meenan Oil*, 139 F.2d 311 (2nd Cir. 1998). (R. Br. to Board at 19). The judge found otherwise.

In support of its claim regarding Karchere’s alleged “managerial” status, Respondent relies upon the following: (1) her work on the “aged cat” program; (2) her role in the preparation of the Fox Clinic budget; (3) her role in payroll processing; (4) her ability (some day) to fill the shoes of the current CFO, Gasecki; (5) her place on the “organizational chart”; and (6) her attendance at manager’s meetings at some point in 2009.⁶ (R. Br. to Board at 19-26). The judge thoroughly considered and analyzed all of these claims.

With respect to Karchere’s work on the “aged cat” program, the judge acknowledged Respondent’s point that Karchere had effectively recommended to management that it offer a discount for aged length of stray cats. According to the judge, however, “[w]hile 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.” (ALJD 46, lines 46-51). As Judge Fish explained, the recommendation was not part of her job duties as finance assistant, and stemmed from her personal love of animals, and:

⁶ Respondent does not concede that this last factor evidences mere “secondary” indicia, as in a supervisory status analysis, claiming that “these (Monday manager’s meetings) were brainstorming opportunities, at which all members of the management team, such as Ms. Karchere, could ‘exchange ideas back and forth.’” (R. Br. to Board at 26).

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 939, 948-949 and numerous other cases cited above in my discussion of Lord’s status. (See ALJD 47, lines 9-13)(emphasis added)

Respondent fares no better in arguing that Karchere’s role with the Fox Clinic proved managerial status, as Judge Fish discredited Gasecki’s testimony:

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 there is a discrepancy between the testimony of Gasecki and Karchere concerning how much judgment and independence Karchere’s version 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 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. (ALJD 27-28)

Respondent’s exception is essentially another attack on the judge’s detailed credibility findings, which, under longstanding Board law, should not be disturbed unless the preponderance of the evidence convinces the Board that they are wrong. *Standard Dry Wall Products*, supra. Here there certainly is no reason to do so.

Respondent’s Exception 12 complains that the judge drew an adverse inference against it for failing to call Fox Clinic supervisor Joanne Freeman. (R. Br. to Board at 28). Respondent argues that Freeman was not Karchere’s supervisor (true) and “would

not have had knowledge of what Ms. Karchere did to prepare budget assumptions, as Mr. Gasecki would. Therefore, drawing an adverse inference based on a lack of testimony from an individual who would not have knowledge of relevant facts is not legally warranted.” Id. The problem with this argument is that in fact Karchere specifically testified (on rebuttal, after Gasecki had inflated her role in the budget) that she received the draft of the Fox budget from Freeman, that she did not make up the numbers herself -- as she received the figures from Freeman. (Tr. 592). The judge simply noted that:

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... leads to an adverse inference ... that Freeman’s testimony would not have supported Respondent’s version of the events in question. (ALJD 28, lines 17-22).

Based upon the above, the judge properly drew an adverse inference against Respondent on this matter. Moreover, although not reflected in the judge’s decision, the record revealed that Respondent failed to introduce as part of its multi-page exhibit regarding the Fox budget work (RX-27) the “very large” Excel spreadsheet that Karchere was given to work off of in preparing the budget. (Tr. 590, 592). As Karchere noted in her rebuttal testimony, Respondent’s December 7, 2009 exhibit lacked the all-important *attachment*, so it is impossible to determine what Karchere was working off of. (Tr. 592). She testified that she did not make up the numbers herself, as she received the figures from Freeman. (Tr. 592). Finally, her testimony put to rest the notion that she “created” the Fox Clinic budget for 2010, as the document purporting to be the budget assumptions (last page of RX-27) is not a final budget -- the budget was not even completed at the time Respondent terminated Karchere. (Tr. 594-595). Since

Respondent similarly chose not to introduce the final budget, once again a meaningful comparison of whatever she worked on and the final product was impossible.

Respondent's next argument concerns Karchere's role in payroll processing, claiming that she alone made the recommendation for implementing a change in the way Respondent processed the employee payroll. (R. Br. to Board at 20-21). Marzano, who has worked for Respondent for years and is the only one entrusted with employees' personnel files, would be surprised by Respondent's claim that Karchere, who had worked there just over a year when terminated, "was in fact the manager of the payroll function." (R. Br. to Board at 21). To the contrary, Karchere credibly testified as to her duties as assistant to the CFO: the bulk of her job duties consisted of doing "reconciliations, some ledgers, bank accounts... a lot of cash receipt posting, so it was just putting into the system what was processed for the day as far as money coming in." (Tr. 27). Karchere explained that the duties in the "payroll" area changed shortly after she started the job and met with Marzano and Gasecki to clarify that "there was supposed to be no HR involvement for my job..." (Tr. 26). Although requiring a good amount of skill, Karchere's job is highly clerical. She testified that in addition to cash receipt posting and analyzing animal data, she paid health insurance bills for employees and filed sales and use tax forms -- all of which Gasecki had to approve. (Tr. 30). She testified that she had no independent authority to change any company policies (Tr. 30) and basically performed administrative work for Gasecki. (Tr. 32). She admitted being the "primary administrative backup" for Gasecki, but only in the sense that if Gasecki was not there and a worker's comp claim needed to be called in for a

manager, she took care of that. (Tr. 32). She testified that this only happened once or twice. (Tr. 33).⁷

Although Gasecki sprinkled the word “independently” as much as possible in describing Karchere’s and Lord’s attributes, he was forced to admit that Karchere *did not make policy for payroll, and did not set benefit levels*. (Tr. 443). He admitted that she would not approve timecards in her role as finance assistant, but merely reviewed them for “aberrations.” (Tr. 428). He admitted that questions about benefit time were directed to Marzano, not Karchere. (Tr. 431).

With respect to Respondent’s next claim that Karchere was hired to “stand in the shoes” of Gasecki and was thus a manager for that reason, the judge noted in his decision that:

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 on 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 voicemail 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 was of such importance that, you know, somebody had to step in and solve the problem right away.’ (ALJD 23, lines 10-17; see also Tr. 416).

Judge Fish properly rejected Respondent’s claims that Karchere was somehow a manager simply because one day Respondent hoped she would assume Gasecki’s job. He correctly noted that “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

⁷ Karchere also testified that in practice the chain of command was very strict: if her direct supervisor Gasecki could not resolve a problem, she went to Marzano or Johnston. (Tr. 32, 68, 111). Karchere never made any decisions that a CFO would make on her own, and testified that she did not have that authority and was never told otherwise. (Tr. 110). She testified that with respect to projects she worked on she could not make independent decisions concerning their direction and how money was to be spent on such projects. (Tr. 63).

was a managerial employee. *Hanover House Industries*, 233 NLRB 164, 175 (1977).” (ALJD 47, lines 39-42, and other cases cited at ALJD 47). Moreover, it is well settled that mere substitution for a statutory supervisor, without any evidence of a change in duties or proof that she exercised any more authority than usual or used independent judgment while in that role, is wholly insufficient to confer supervisory status. See also *Talmadge Park*, 351 NLRB 1241, 1248 (2007) (citing additional cases).

Respondent’s next argument contained within Exception 9 is that Karchere forfeited the Act’s protections by virtue of her name appearing high up on an undated organizational chart created by Marzano. With respect to the organizational chart (RX-34), there is no evidence in the record suggesting that this chart had any real significance other than to show that president Johnston and attorney Clemow used it on November 2, 2009 to “draw lines” concerning who they thought should be included in the eligible voting Unit, and who should not be. Gasecki clearly testified on direct examination that, in terms of hierarchy at the company, after Johnston and himself, “the next person on the chart was Bridget Karchere and number four on the chart would have been Maureen Lord.” (Tr. 365). Respondent made it quite clear in its questioning of Gasecki:

Q (by Mr. Clemow): Would those -- and I just want to make sure we’ve got all the people who were on that level then. Is it your testimony that the -- at least the top four people in the organization after Mr. Johnston: yourself, Maureen Lord, Bridget Karchere and Alicia Wright, in some order?

A (by Mr. Gasecki): Yes, in some order, yes.

Q (by Mr. Clemow): And everybody would be lower down in that?

A (by Mr. Gasecki): Yes. (Tr. 366, lines 1-8).

Yet on cross examination Gasecki quickly became confused, backpedaling that he “didn’t think that’s what I said” (Tr. 434), thereby offering yet another example of the lengths Respondent resorted to at trial attempting to play up Karchere’s (and Lord’s) supposed authority. The notion that Karchere and Lord were somehow higher in the “animal kingdom” than Marzano, the de facto HR administrator who reports directly to the President, or higher than the District Manager (or Acting DM), who disciplines and discharges employees, is utterly ridiculous. It was so absurd that Judge Fish did not even mention it in his decision! Suffice it to say that the judge properly accorded no weight to this document, which proves nothing.

Finally, with respect to the “manager’s meetings” Karchere occasionally attended, the record revealed that Suzanne Dunlap (administrative assistant and office clerical employee), and Lexie Poole (public relations assistant, another office clerical employee) also attended these meetings. Are these clerical employees now considered managers too? In any event, Karchere testified that her role in those meetings was to provide occasional updates on the payroll system or data concerning the numbers of elderly cats. (Tr. 37). Gasecki ran the meetings, but rarely called on Karchere. (Tr. 38). Karchere testified that whenever employee relations or HR matters were ever raised, she would be dismissed from the room, along with Lord, Melissa Zaluski, and Lexie Poole. (Tr. 38-39). Lord corroborated this testimony. (Tr. 139-140). Gasecki admitted that initially Karchere was often too busy to attend manager’s meetings. (Tr. 403). Respondent’s arguments are entirely lacking in merit.

3. Respondent’s “reinstatement” Exceptions (#14-20) are similarly meritless

Respondent’s Exceptions to the judge’s reinstatement remedy are particularly specious. Having broken the law by firing two trusted and highly valued employees,

Respondent adds insult to injury, literally, by vigorously resisting any effort to reintegrate them to their former positions.

Respondent's primary contention in support of its position that neither Lord nor Karchere should be reinstated is that they crossed the line by making various comments on web sites, blogs, or as quoted by a local former newspaper reporter, who now operates his own blog, and by virtue of their statements can no longer be trusted to work for Respondent as part of management's team. (See Exceptions 15, 16; R. Br. to Board at 29-36).

The judge reprinted *all* of the offending remarks relied upon by Respondent in his decision. (See ALJD 48-55). After considering them in their totality, the judge properly found that Lord's and Karchere's post-discharge statements were made in the context of protesting their unlawful terminations. (ALJD 57, lines 26-28). Respondent challenges this finding (Exception 17; R. Br. to Board at 36).

The judge also found that, under the current state of the law in this area, the offending statements did not rise to the level warranting denial of reinstatement. (ALJD 55-57). Once again, Respondent, while excepting to this finding (Exception 18), makes no effort to distinguish a single case cited by the judge in his lengthy recitation of the facts and analysis of this argument. However, in its brief Respondent cites one case justifying its position: *Trus Joist MacMillan*, 341 NLRB 369 (2004), which, as seen below, is irrelevant to the analysis. All of Respondent's arguments are entirely meritless, for the reasons that follow.

First, Respondent appears confused concerning the correct legal standard that applies in post-discharge "comment" cases. The Board recently addressed this very issue. In *Hawaii Tribune-Herald*, 356 NLRB No. 63 (Feb. 14, 2011), the Board clarified

that in all cases alleging post-discharge conduct alleged to justify denial of reinstatement (as here), the Board applies the “unfit for further service” standard first articulated in *O’Daniel Oldsmobile, Inc.*, 179 NLRB 398 (1969), *not* under the principles flowing from *Jefferson Standard*, which involved disparagement by current employees.⁸ The appropriate standard recently announced by the Board is that “[w]hen seeking to be excused from his obligation to reinstate or to pay backpay to a discriminatee because of misconduct which was not a factor in the discriminatory action, an employer has a heavier burden than when he is merely seeking to justify the original discrimination. In the former case, he has the burden of proving misconduct so flagrant as to render the employee unfit for further service, or a threat to efficiency in the plant.” *Hawaii Tribune-Herald*, *supra*, slip op. at 2, citing *O’Daniel Oldsmobile, Inc.*, 179 NLRB at 405.

The Board in *Hawaii Tribune-Herald*, *supra*, slip op. at 2, observed the reality that:

Simply put, employees who are unlawfully fired, like Bishop, often say unkind things about their former employers. As the Board explained in *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), *enfd.* 548 F.2d 391 (1st Cir. 1977), an ‘evaluation of post discharge employee misconduct requires sympathetic recognition of the fact that it is wholly natural for an employee to react with some vehemence to an unlawful discharge.’ Employers who break the law should not be permitted to escape fully remedying the effects of their unlawful actions based on the victims’ natural human reactions to the unlawful acts.

Judge Fish carefully analyzed Respondent’s defense under the appropriate legal standard. (See ALJD 55-59). Respondent, however, hinges its defense in its Exceptions solely upon cases involving pre-discharge misconduct: *Atlantic Steel*, 245 NLRB 814 (1979) and cases applying the four *Atlantic Steel* factors, such as *Kiewit Power Constructors*, 355 NLRB No. 150 (2010); and *Trus Joist MacMillan*, *supra*. This is not

⁸ *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

the correct test. The *Atlantic Steel* test is mentioned in *Hawaii Tribune-Herald*, but only in the context of analyzing the pre-discharge conduct. See 356 NLRB No. 63, slip op. at 1. The Board clearly delineated in that case the pre-discharge and the post-discharge analysis; the case is significant for its clarification of the post-discharge analysis. Thus Respondent's reliance on *Trus Joist MacMillan* and the four-factor *Atlantic Steel* test is inapposite. Judge Fish noted this fact in his decision. (ALJD 55, lines 9-11).

With respect to Respondent's related arguments that by their quoted statements and blog remarks Karchere and Lord have "destroyed the trust" they once held, the judge fully laid out his rationale, supported by the caselaw, rebutting such a notion. (See ALJD 55-59). Regarding the offending statements, while certainly unflattering, none of the remarks are in the least bit threatening. As the judge correctly noted, 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." (ALJD 57, lines 19-21).

On a related point, Respondent argues that the judge ignored "evidence" offered by Gasecki that Lord and Karchere have "totally destroyed any opportunity for trust going forward, that they were fired for disloyalty and because they had broken the trust CHS management placed in them." (R. Br. at 35-36). This is a most curious argument. Respondent has been found to have illegally fired two statutory employees in direct retaliation for their union activities. The "trust" that they supposedly have broken was their perceived lack of loyalty to management, which was cited to each of them upon their respective terminations. They clearly had every right to support the Union effort and be free from harassment for doing so, yet they were in fact interrogated, threatened with discipline, etc. during the run-up to the election, then, when the Union won, both

received the ultimate penalty. Now they continue to be punished by Respondent for their “failure” to see the light. Respondent’s claims are simply remarkable.

Respondent also objects (#18) to reinstating Lord and Karchere because they are not just “two disgruntled, low level workers” and cannot be truly expected to reintegrate with the management team on a daily basis. (R. Br. to Board at 37). Under Respondent’s rationale, no striker who felt strongly about her cause and happened to express her feelings could ever be reinstated following a long or bitter labor dispute. Respondent, true to form, cites no relevant caselaw in support of its novel notion.

Finally, Respondent claims that Lord and Karchere’s comments were *not* made in the context of protesting their terminations. According to Respondent, “nowhere in their diatribes do they even mention their own dismissals.” (R. Br. at 36, Exception 17). This is yet another disingenuous claim, evidenced by the first line of the first exhibit Respondent entered into the record, a copy of an article written by a former *Hartford Courant* writer (now blogging at “CtWatchdog.com), which states: “Two recently fired workers from the Connecticut Humane Society – a multimillion dollar charity – are accusing its longtime president of unethical and improper behavior.” (See ALJD 48, lines 47-49; RX-1). Moreover, the January 5, 2010 article is entitled “CT Humane Society Under Fire From Dismissed Workers Who Tried to Unionize.” (RX-1). If that is not enough, attached to the letter (included in Respondent’s exhibit) was a response from Alicia Wright, Respondent’s Public Relations Director, who stated: “You should know that there is an ongoing effort to unionize some of the staff at the Connecticut Humane Society ... The union issue is being addressed by the Society and handled through the appropriate channel, the National Labor Relations Board.” (RX-1; see also ALJD 51, lines 45-52).

Respondent's argument that their quoted remarks had nothing to do with their terminations not only flies in the face of common sense but is contradicted by its own documents. Lord's and Karchere's remarks were clearly made *after* they were fired, and well after the Union had filed the charge that led to the instant litigation. While some of the comments admittedly also expressed unhappiness about the alleged lack of care and respect for animals (as well as humans) Respondent's top officials engaged in, the overall tone of the comments shows that they were quite obviously triggered by their terminations. Given all of the circumstances, the judge properly found the comments (as well as those made by Lord's friend, James Lubberda) were made in the context of protesting the unlawful discharges of Lord and Karchere. (See ALJD 53, lines 10-16; ALJD 57, lines 26-28).

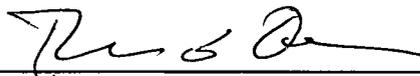
Based upon all of the above, and the reasons contained within Judge Fish's decision, there is no merit to any of Respondent's Exceptions.

IV. CONCLUSION

For all of the above reasons, Counsel for the Acting General Counsel submits that Respondent's exceptions are without merit, and respectfully urges the Board to affirm Judge Fish's decision in its entirety.

Dated at Hartford, Connecticut, this 18th day of August, 2011.

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

CONNECTICUT HUMANE SOCIETY

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 26

Case 34-CA-12557

CONNECTICUT HUMANE SOCIETY

Employer

and

INTERNATIONAL ASSOCIATION OF
MACHINISTS & AEROSPACE WORKERS,
AFL-CIO, DISTRICT LODGE 26

Petitioner

Case 34-RC-2351

DATE OF MAILING August 18, 2011

AFFIDAVIT OF SERVICE OF copies of **COUNSEL FOR THE ACTING GENERAL
COUNSEL'S ANSWERING BRIEF TO THE BOARD**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by UPS and E-mail upon the following persons, addressed to them at the following addresses:

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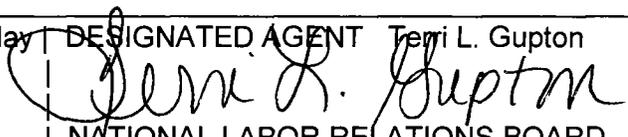
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Subscribed and sworn to before me this 18th day of August, 2011, at _____, CT. DESIGNATED AGENT Terri L. Gupton

of August, 2011


NATIONAL LABOR RELATIONS BOARD