UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

SHUTTLE DRIVERS ASSOCIATION OF BWI	*	
Petitioner,	*	
and	*	**Case 05-RC-187864**
SUPREME AIRPORT SHUTTLE, LLC	*	
Employer.	*	

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EMPLOYER'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S ORDER DENYING
EMPLOYER'S MOTION TO REQUIRE PETITIONER'S COUNSEL TO WITHDRAW

Pursuant to Section 102.67 of the Board's Rules and Regulations, Supreme Airport Shuttle, LLC, (the "Employer") submits this Request for Review of the March 23, 2017 Order Denying Employer's Motion to Require Petitioner's Counsel to Withdraw issued by the Regional Director for Region 5 (the "Order") (a copy of which is attached hereto). Review is necessary because:

1) Substantial questions of law and policy are raised because of the absence of officially reported Board precedent relating to the issue presented by the Employer's underlying motion, which is an issue of first impression for the Board.

2) The Order misapplies governing legal principles and is grounded in a number of clearly erroneous factual findings which are prejudicial to the Employer.

PROCEDURAL BACKROUND

This Request for Review arises from a representation proceeding initiated by Petitioner Shuttle Drivers Association of BWI by petition filed on or about November 9, 2016. By letter to the Regional Director dated November 10, 2016 the Employer requested an order directing Petitioner's counsel John M. Singleton, Esq. ("Singleton") to withdraw from his representation of Petitioner in this matter. The Employer then filed a Motion seeking the same relief on November 17, 2016. The basis for the Motion was that Singleton's prior representation of the Employer created a disqualifying conflict under Rule 1.9 of the Maryland Attorney Rules of Professional Conduct ("MARPC"). The Motion was made pursuant to Section 102.177 of the Board's Rules and Regulations.

The Regional Director denied the Motion on November 18, 2016, holding that he lacked the authority under Section 102.177 to grant the relief sought by the Employer. The Employer appealed that decision to the Board on November 22, 2016.

In a February 7, 2017 Order, the Board, noting that the case presents an issue of first impression, held that the Regional Director does have the authority to rule on the Motion and, if warranted, to grant the relief requested, subject to the Board's review. Supreme Airport Shuttle LLC, 365 NLRB No. 27 (Feb. 7, 2017). The Board held that such authority exists independent of Section 102.177. The Board directed the Regional Director to conduct any investigation he deems necessary in order to decide the Motion, including, but not limited to, the solicitation of affidavits or the opening of an ancillary hearing. The Board further held that the Regional Director may examine MARPC 1.9 as well as the essentially identical standard reflected in Rule 1.9 of the American Bar Association's Model Rules of Professional Conduct.

On February 27, 2017, the Regional Director issued an Order directing the parties to submit any and all evidence and supporting arguments they wished to present on the merits of the Motion, including on three particular issues: (1) whether an attorney-client relationship existed between the Employer and Singleton under the MARPC, including when and how the relationship was formed, the scope of the relationship; and, if applicable, when and how this relationship was terminated; (2) assuming an attorney-client relationship existed between the Employer and Singleton, whether this case is "the same or a substantially related matter" as the scope of Singleton's putative representation of the Employer; and (3) any reason(s) why an evidentiary hearing is necessary to resolve the Motion. The Regional Director's Order further advised the parties that any evidentiary submission other than documentary evidence must be in the form of sworn testimony.

In response to the Regional Director's direction, on March 13, 2017, the Employer submitted a Memorandum of Law and Affidavit of David Mohebbi, the Employer's President, with accompanying exhibits. The Petitioner submitted an unsworn letter from Singleton which referred to various prior submissions the Petitioner had made since the Employer's initial November 10, 2016 letter, which included copies of emails between Singleton and other parties, correspondence from Singleton, and an unsworn affidavit of Patrick Benhene. Benhene formerly worked for the Employer in an administrative capacity and subsequently became a driver, and purports to be the president of the Petitioner.[1]

In the March 23, 2017 Order, the Regional Director denied the Employer's Motion. The Regional Director held that, assuming without deciding the existence of an attorney-client relationship, Singleton's representation of the Employer was not "substantially related" to his

[1] It is the Employer's position in the underlying representation proceeding that its drivers are independent contractors and/or statutory supervisors, not employees under the Act.

representation of the Petitioner. The Regional Director also held, in the alternative, that an attorney-client relationship between Singleton and the Employer never existed.

In a separate Order, the Regional Director announced the resumption of the underlying representation hearing for 9:00 a.m., April 13, 2017.

RELEVANT FACTUAL BACKGROUND

In July 2015 the Employer was awarded a contract by the Maryland Aviation Administration ("MAA") to be the exclusive provider of shared-ride ground transportation service at Baltimore-Washington International Thurgood Marshall Airport ("BWI"). (Mohebbi Aff. ¶ 4) The Employer began operating at BWI in October 2015. (Id. at ¶ 11) Within a few months of commencing operations, it had become apparent that the predecessor contractor, a company called Super Shuttle, was continuing to operate at BWI and offering competing service, which was negatively impacting the Employer's business. (Id. at ¶ 12) The Employer's President, David Mohebbi, sought to discuss this issue with MAA and BWI officials and to secure their assistance in enforcing the exclusivity right that the contract afforded to the Employer. (Id. at ¶ 13) Mohebbi scheduled a meeting for February 9, 2016, with MAA and BWI officials as well as attorneys from the Maryland Attorney General's Office which represents the MAA and BWI. (Id.)

Mohebbi was aware that Singleton had dealt with MAA and BWI officials in the past and had relationships with some of them. (Id.) He believed it would be beneficial for the Employer if Singleton were to counsel him and attend the February 9 meeting as one of the Employer's attorneys. (Id.) Mohebbi contacted Singleton in advance of the February 9 meeting, described the issue the Employer was facing and its impact. (Id. at ¶ 14) Mohebbi believed this conversation was a consultation with an attorney about a potential representation. (Id. at ¶ 15)

He shared confidential information about the Employer, discussed the Employer's view of its legal rights under its contract with MAA, and asked Singleton to attend the February 9 meeting as the Employer's attorney. (Id.) Singleton agreed and attended the meeting along with another Employer attorney who handles procurement matters for Mohebbi. (Id. at ¶¶ 16, 18) At the meeting, Singleton advocated on behalf the Employer to the MAA and BWI officials. (Id. at ¶ 19)

Not long after the February meeting, Singleton's office sent an invoice for the legal services he performed in connection with the meeting to Patrick Benhene who was working for the Employer in an administrative role. (Id. at ¶ 20) The sole entry in the invoice was for 4.4 hours of work at a rate of $350 per hour, for time spent travelling to and attending the February 9 meeting. (Id.) A few weeks later, Singleton's office re-sent the same invoice to Benhene, who forwarded it to Mohebbi "for your necessary action[.]" (Id.) Mohebbi issued a company check for the $1,540 in legal fees reflected on the invoice, which Singleton received and deposited in March 2016. (Id.)

In August 2016, Singleton sent Mohebbi a letter asserting that he represented the Petitioner and demanded the Employer's voluntary recognition of the Petitioner as the exclusive bargaining representative of the drivers providing Supreme Airport Shuttle service at BWI. (Id. at ¶ 21) Starting in September 2016, Singleton filed a number of unfair labor practice charges against the Employer and he filed the instant representation petition in November 2016 (see case nos. 05-CA-185123, 05-CA-187145, 05-CA-188559, 05-CA-189246). In response to Singleton's demand for recognition, Mohebbi reminded Singleton that he had previously represented the Employer and accepted payment from the Employer for his services, and

therefore his representation of the Petitioner and the drivers in matters adverse to the Employer was a conflict of interest. (Id. at ¶ 21)

In its submissions, Petitioner has offered confused and inconsistent accounts of separate occasions in which Singleton had contact with the Employer and in particular Petitioner has provided an erroneous account of the February 9, 2016 meeting. Petitioner's November 18, 2016 "Position Statement," submitted by Singleton, asserts that "[t]he meeting that occurred on February 10, 2016 was convened due to Mohebbi's challenge to the bid submitted by Super Shuttle claiming that somehow the Super Shuttle bid, which failed to include proposed compensation to BWI (as part of a concession contract) should be rejected." In this Position Statement, the Petitioner goes on to describe the issue being discussed at this February 2016 meeting with airport officials as whether the Employer would be chosen for the new shared-ride service contract or whether Super Shuttle, the predecessor, would continue to be the contractor for this service at BWI. The Benhene Affidavit, also submitted by Petitioner, seems to be consistent with the Position Statement, in that it refers to the Petitioner's and Employer's shared goal of eliminating the predecessor contractor Super Shuttle from BWI, and makes reference to the February 2016 meeting with airport officials, suggesting that Benhene believes that the subject of the February 2016 meeting was the Employer's purported challenge to Super Shuttle's bid.

Contrary to Petitioner's account, however, the February 2016 meeting (which occurred on February 9, not 10,) with airport officials had nothing to do with any challenge to either the Employer's or Super Shuttle's bid for the BWI ground service contract. That is because, as the Mohebbi Affidavit explains – consistent with the documentation Petitioner itself has submitted (see Mohebbit Aff. Exs. A and B, which were both submitted to the Regional Office by

Petitioner) – the BWI contract was awarded in *July 2015*. When Super Shuttle commenced a challenge to that award before the Maryland Board of Public Works (the procurement reviewing authority), the Employer did ask Singleton to support the award of the contract to the Employer by informing the BPW about Super Shuttle's poor treatment of drivers. (Mohebbi Aff. Ex. A) Singleton did submit a letter to the BPW in support of the Employer's award in August 2015 (and there was never a meeting or hearing on this issue because ultimately Super Shuttle abandoned its challenge) but the Employer does not contend that this interaction created an attorney-client relationship. In other words, contrary to the Petitioner's Position Statement, there was never any bid protest *by* the Employer, and the interaction between the Employer and Singleton regarding the potential challenge *to* the Employer's award occurred in August 2015 – *not* February 2016. The Mohebbi Affidavit and the relevant documentary evidence, comprised of emails submitted by Petitioner itself, demonstrate the errors in Petitioner's version of events and indicate that Petitioner's account of the factual background is simply not reliable nor credible.

ARGUMENT

I. REVIEW IS WARRANTED BECAUSE THERE IS NO OFFICIALLY REPORTED BOARD PRECEDENT RELATING TO THE ISSUES RAISED BY THE EMPLOYER'S MOTION AND DECIDED BY THE REGIONAL DIRECTOR, AND BECAUSE THE ORDER IS GROUNDED IN A NUMBER OF CLEARLY ERRONEOUS AND PREJUDICIAL FACTUAL FINDINGS.

In finding that (1) an attorney-client relationship did not exist between the Employer and Singleton, and (2) assuming such a relationship existed, Singleton's representation of Petitioner is not "the same or a substantially related matter" to his prior representation of the Employer, the Order misapplies governing law and rests on clearly erroneous factual findings that are

prejudicial to the Employer. Review should therefore be granted and the Order should be reversed.

A. The Order Raises A Substantial Question Of Law And Policy Because Of The Absence Of Officially Reported Board Precedent.

As noted in the Board's prior ruling in this matter and in the Order itself, this case appears to raise an issue of first impression for the Board. The Order does not cite, and the Employer is unaware of, any Board precedent addressing attorney disqualification under MARPC 1.9 or any analogous rule of another jurisdiction.

The Motion raises substantial questions of law and policy. The issue of attorney conflicts of interest based on duties to former clients is a significant one, as reflected by the existence of specific rules governing the issue in the MARPC, the ABA's Model Rules, as well as analogous rules in all or nearly all jurisdictions in the United States. The issue raised here -- whether and to what extent an attorney's prior legal representation of an employer precludes his subsequent legal representation of a labor organization in a matter involving that same employer – is a substantial one for parties covered by the Act. The Order determined that a client's imparting to an attorney confidential information about its business, including information regarding the nature of its economic relationship with individuals it has engaged as independent contractors, is not "substantially related" within the meaning of MARPC 1.9 to that attorney's subsequent representation of a labor organization in connection with organizing activity and representation proceedings before the Board against that same client. Putting to one side the merits of that ruling (which are addressed below), that issue is unquestionably substantial and important for parties and practitioners under the Act. In light of the absence of Board precedent, review of the Order is necessary and warranted to provide guidance to future parties and practitioners who find themselves in similar circumstances.

B. Review Should Be Granted And The Order Reversed Because The Order Is Grounded In Factual Findings That Are Clearly Erroneous And Prejudicial To The Employer.

1. The Order's Finding That An Attorney-Client Relationship Between The Employer And Singleton Did Not Exist Is Clearly Erroneous.

In finding that the Employer did not have an attorney-client relationship with Singleton, the Order misapplied the governing legal standards and disregarded substantial compelling and credible evidence establishing such a relationship.

As an initial matter, MARPC 1.9 provides, in pertinent part:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> …
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

The comments to Rule 1.9 explain the meaning of the terms "substantially related":

> [3] Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. . . . (Emphasis added.)

The Maryland Court of Appeals reviewed the standards for determining whether an attorney-client relationship exists under Maryland law in Attorney Grievance Commission v. Brooke, 374 Md. 155, 173 (2003):

> Many courts have adopted the following standard to assess whether the relationship has been established: An attorney-client relationship is said to have been created when (1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney's professional competence; and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.

(Citations omitted.)

The Brooke Court proceeded to recite the following standard from the Restatement (Third) of the Law Governing Lawyers:

> A relationship of client and lawyer arises when:
>
> (1) a person manifest to a lawyer the person's intent that the lawyer provide legal services for the person; and . . .
>
> (B) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . .

Id. at 174 (quoting Restatement (Third) of the Law Governing Lawyers ¶ 14 (2000). The Court of Appeals further noted that "[a]n attorney-client relationship, therefore, does not require an explicit agreement. The relationship may arise by implication from a client's reasonable expectation of legal representation and the attorney's failure to dispel those expectations." 374 Md. at 175 (emphasis added); see also Pennsylvania Nat. Mut. Cas. Ins. Co. v. Perlberg, 819 F. Supp. 2d 449, 453-54 (D. Md. 2011) (same).

Other courts have similarly recognized the importance of the client's subjective belief in determining whether an attorney-client relationship has been formed. See, e.g., Sumpter v. Hungerford, No. 12-727 Section "E", 2013 U.S. Dist. LEXIS 71119 *27-28 (E.D. La. May 20, 2013) ("The existence of an attorney-client relationship turns largely on the client's subjective belief that such a relationship exists.") BJCC, LLC v. Lefevre, 2012 U.S. Dist. LEXIS 11033 *44(M.D. Fl. July 28, 2012) ("The test Florida courts have used to determine whether a lawyer-client relationship exists in the absence of a formal retainer is a subjective one, and hinges upon

the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice. However, the subjective belief must be a reasonable one."); Tinn v. EMM Labs, Inc., 556 F. Supp. 2d 1191, 1192-93 (D. Or. 2008) ("In Oregon, an implied attorney-client relationship is established where 'the putative client [holds] a subjective belief that the relationships exists, coupled with an objectively reasonable basis for the belief'") (internal quotations omitted).

Here, the record evidence conclusively establishes both that the client – i.e., the Employer, acting through its president Mohebbi – held the subjective belief that it had formed an attorney-client relationship with Singleton, and that such belief was objectively reasonable. The Employer's subjective belief is established by the unrebutted sworn testimony contained in the Mohebbi Affidavit. Mohebbi, as the Employer's President acting on behalf of the Employer, sought assistance from Singleton, an attorney. (Mohebbi Aff. ¶¶ 13-15) He sought Singleton's assistance in persuading MAA and BWI officials to enforce the Employer's exclusivity rights under its contract with BWI. (Id.) This was a legal issue and a legal problem, and Mohebbi asserts that his purpose in contacting Singleton about this situation was to obtain legal representation in dealing with the MAA and BWI officials. (Id.) The assistance sought by Mohebbi –Singleton's attendance at the February 9 meeting – was within Singleton's professional competence, as Singleton himself has professed having significant experience in dealing with MAA officials. (See, e.g., Mohebbi Aff. Ex. B.) Further, Singleton at a minimum impliedly agreed to perform the requested service for the Employer by agreeing to appear at the February 9 meeting and actually advocating on behalf of the Employer at that meeting.

In short, Mohebbi contacted an attorney, described a legal issue and business problem that the Employer was having, and asked the attorney to represent and advocate for the Employer

at a meeting with government officials intended to ameliorate that problem. As set forth in his affidavit, based on these facts, Mohebbi reasonably expected legal representation from Singleton and that is what he received; Singleton never dispelled those expectations. (Mohebbi Aff. ¶¶ 15-16) To the contrary, Singleton, by attending the meeting and advocating on behalf of the Employer at the meeting, performed legal services that fully confirmed Mohebbi's reasonable expectations. Singleton's acceptance of the Employer's payment for his services only reinforced that conclusion.[2]

In failing to find that there was an attorney-client relationship based on the foregoing facts, the Regional Director committed clear error. There is no evidence submitted to the Regional Director that contradicts any of the evidence discussed above. The only sworn testimony concerning the communications between Mohebbi and Singleton, by a person with firsthand knowledge of those communications, is the Mohebbi Affidavit. While Petitioner submitted an affidavit from Patrick Benhene in opposition to the Motion, that affidavit is not notarized and thus does not constitute sworn testimony. Moreover, even if the Benhene Affidavit had been sworn to, it would still be insufficient to rebut the facts established by the Mohebbi Affidavit concerning Mohebbi's communications with Singleton because Benhene undisputedly was not party to those communications. Only Mohebbi and Singleton have direct knowledge of their communications with each other and, as discussed above, Mohebbi came away from their conversation with the reasonable subjective belief that Singleton was acting as his attorney, a belief confirmed by Singleton's advocacy on behalf of the Employer at the

[2] The scope of the representation sought and received by the Employer from Singleton was assistance regarding the failure of MAA and BWI to protect the exclusivity of the Employer's contract at BWI. Although Singleton did not perform any additional services for the Employer after the February 9, 2016 meeting, his representation of the Employer never formally terminated.

ensuing meeting with BWI and MAA officials and Singleton's acceptancw of payment by the Employer for his services.

The Order does not even address the Mohebbi testimony which blatantly supports the implication of an attorney-client relationship. For that reason alone, the Regional Director's finding that there was no attorney-client relationship was clearly erroneous.

After disregarding the unrebutted evidence satisfying all requisite elements of an attorney-client relationship, the Order compounds this error by citing external "facts and circumstances" that purportedly disprove the existence of such a relationship – but in reality do nothing of the sort.

First, the Regional Director found that "the Employer's acknowledgement that Singleton represented Petitioner prior to the BWI meeting weighs against its position here," that "[t]he Employer admits that in August 2015, it explicitly sought Singleton's assistance in his capacity as Petitioner's attorney," and that "[a]t that time, the Employer and Petitioner (through their respective counsel) collaborated" to defeat the prospective bid protest by Super Shuttle. (Order at 8) This finding itself is unsupported by any evidence. None of the documents cited by the Regional Director establish the Employer's awareness in February 2016 or thereabouts of any relationship between Singleton and Petitioner. The evidence demonstrates that the Employer was aware that Singleton had represented Super Shuttle's drivers in connection with issues related to Super Shuttle (for example, see M. Johansen's Aug. 23, 2015 email to J. Singleton which refers to Singleton's "clients" – i.e., the drivers – and not to any purported labor organization; and J. Singleton's Aug. 24 2015 email to D. Mohebbi referring to the "driver' [sic] request" – not to Petitioner or any other labor organization) – but there is no evidence supporting the notion that the Employer was aware of Singleton's purported prior representation of

Petitioner. Notably, Singleton's August 2015 correspondence to the BPW in support of the Employer's bid makes no mention of Petitioner or any other labor organization.

Indeed, there is no evidence that the Petitioner in this matter existed at the time the Employer first had contact with Singleton. While there had been two representation matters before the Board involving Super Shuttle, both cases resulted in the petition being dismissed, and there was no union at Super Shuttle when the Employer was awarded the BWI contract by MAA. And there certainly was no "Shuttle Drivers Association-BWI" at the Employer at the time of the February 2016 meeting in question. In short, there no evidence that the Employer was aware of a prior legal representation of Petitioner by Singleton; at most, the evidence demonstrates that the Employer understood that Singleton had represented some number of drivers in some unspecified context involving a different Employer (Super Shuttle).

But even if the Order was correct in finding that the Employer believed Singleton had represented some prior version of the Petitioner vis-à-vis Super Shuttle, the Order fails to explain why that belief should have any bearing on the existence of a subsequent attorney-client relationship between Singleton and the Employer – and, in truth, it does not have any bearing. There is no basis in logic or the evidence for finding that Singleton's past legal representation of Super Shuttle drivers, who were not unionized and not employees under the Act according to two prior decisions by the Regional Office, would in any way impact Mohebbi's belief that Singleton had become the Employer's attorney when Mohebbi asked Singleton to represent the Employer at the February meeting and Singleton acceded to that request. As the cases cited above make clear, it is incumbent on the attorney to dispel the client's reasonable subjective belief of an attorney-client relationship and the evidence demonstrates that Singleton took no action to dispel such expectations in this case.

Second, the Order cites the presence of another attorney of the Employer's at the BWI meeting as weighing against a finding of an attorney-client relationship. (Order at 8) No authority is cited for the notion that the presence of one attorney at a meeting would have any bearing on whether there exists an attorney-client relationship between a second attorney and that client. In this case, moreover, the evidence provides ample support for an alternative explanation regarding the Employer having two attorneys at the BWI meeting – namely, that the Employer believed Singleton had relationships with MAA and BWI officials and could therefore effectively advocate on the Employer's behalf with respect to the MAA's failure to enforce the exclusivity provisions of its contract. In other words, there was an eminently logical reason for the Employer's seeking Singleton's representation in addition to its regular procurement attorney at the BWI meeting. The Order simply disregard the possibility of that or any other benign reason

The Order further finds that the BWI meeting proceeded "for some time" before Singleton was able to gain entry to the meeting. (Order at 8-9) There is no evidence cited in support of this finding.

To the extent the Regional Director found the evidence on the foregoing issues to be conflicting, it would stand to reason that a hearing should have been ordered to resolve the dispute, or at least issuance of a request for supplemental clarifying information from the parties. No such request was made, however, and the Order stated that no hearing is necessary, without addressing any alleged factual disputes or countervailing factors presented by the Employer.

Third, while the Regional Director recognized that Singleton accepted payment of $1,540 from the Employer for his services in connection with the BWI meeting and that this fact supported finding an attorney-client relationship, he relied on other factors to "discount" the

value of this fact. None of those factors have any merit, however. To begin with, whereas Singleton addressed his invoice to Benhene, the Regional Director expressed his belief – without citing any evidence – that Singleton would have sent the invoice to the Employer if an attorney-client relationship existed. (Order at 9) Yet it is just as likely that Singleton was simply using an existing account in his billing system – i.e., his account for his work with the drivers under Super Shuttle – for generating the invoice for the Employer. Both theories are equally speculative and unsupported by any evidence however, and it was erroneous for the Order to rely on speculation in making this finding.

In addition, the Order cites the purported "dispute as to whether Singleton was present at the meeting" to represent the Employer or at the Employer's request to represent Petitioner and the drivers. Again, there is no documentary evidence and no sworn testimony supporting the finding that Mohebbi asked Singleton to attend on behalf of the drivers. Even if Benhene's affidavit were accepted as competent evidence, moreover, there he merely asserts that "Mohebbi asked me ask [sic] Mr. Singleton to attend the meeting along with the committee due to Mr. Singleton's past involvement with and familiarity with the state officials involved with the concession contracts." (Benhene Aff. ¶ 11.) That assertion – even assuming, arguendo, it is accurate – does not suggest that Mohebbi requested Singleton's presence as the attorney for the drivers; it simply states that Mohebbi requested Singleton's attendance because of his past dealings with MAA and BWI officials and does not in any way bear upon whom Singleton was representing. In any event, the Mohebbi affidavit establishes that Mohebbi called Singleton himself to request his representation at the BWI meeting, which constitutes unrebutted testimony that Singleton was at the meeting to represent the Employer.[3]

[3] At a minimum, there is conflicting testimony requiring supplemental submissions or a hearing.

In fact, while the Order cites Singleton's prior support for the Employer in August 2015 "in his capacity as Petitioner's attorney" as somehow relevant to the role Singleton played in the February 2016 meeting, in reality comparing the two episodes supports finding an attorney-client relationship in the latter case. For the February 2016 meeting, Mohebbi contacted Singleton directly, asked him to attend the meeting, and eventually the Employer paid Singleton for his time. For the August 2015 response to the bid protest, the Employer's attorney made the initial contact with Singleton, Singleton was acting for his existing clients the drivers, and the Employer did not pay Singleton for his time. The fact that Singleton issued an invoice and accepted payment from the Employer in the latter scenario demonstrates the difference between the two situations and indicates that Singleton himself believed he was performing work on behalf of the Employer in the latter case.

In finding otherwise, the Order fails to recognize the implications of its conclusion. Assuming, arguendo, that the Order were correct and Singleton was in fact representing the Petitioner at the BWI meeting as the Petitioner contends, and that Singleton accepted the payment from the purported employer of the Petitioner's members as some kind of gratuitous gift, those actions could have potentially serious consequences under the provisions of the Labor-Management Reporting and Disclosure Act concerning payments received by employee representatives. Singleton is an experienced labor lawyer and would be expected to be aware of the risk of violating these prohibitions by receiving a payment in that manner. The only plausible explanation is that he was in fact receiving payment from the Employer for his services rendered to the Employer.

2. The Order Erroneously Found That Singleton's Prior Representation Of The Employer Is Not "Substantially Related" To His Representation Of Petitioner In This Matter.

As the Order notes, MARPC 1.9 identifies essentially three ways that matters may be "substantially related" for purposes of the Rule: (1) where the two matters involve the same transaction, (2) where the two matters involve the same legal dispute, or (3) "if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent representation." See Comments to MARPC 1.9. Similarly, the United States District Court of the District of Maryland has framed the question as "whether there is a 'reasonable probability' that confidences were disclosed in the prior representation which could be used against the former client in the current litigation[.]" Strategene v. Invitrogen Corp., 225 F. Supp. 2d 608, 611 612-13 (D. Md. 2002) (quotations omitted).

The Comment to Rule 1.9 makes clear that the party seeking disqualification is not obligated to disclose the confidences that may have been shared with the attorney: "A former client is not required to reveal the confidential information learned by the attorney in order to establish a substantial risk that the attorney has confidential information to use in a subsequent matter." Courts have gone further to hold that "no actual receipt of confidences must be shown; such a standard would place an unreasonable burden on the moving party. The Court is concerned with possibility rather than actuality." Buckley v. Airshield Corp., 909 F. Supp. 299, 306 (D. Md. 1995) (citation omitted); Strategene, 225 F. Supp. 2d at 612-13 (granting

disqualification under Rule 1.9 on the ground that "confidences that might have been disclosed" during prior representation "could be relevant to the present action") (emphases added).[4]

Under this standard, Singleton's prior representation of the Employer is "substantially related" to the instant matter in which he is representing the Petitioner. To be clear, the Employer need not demonstrate that the scope of the prior representation and the current matter are the same or substantially related; rather, as the above-cited cases hold, the inquiry is whether there might have been confidences shared in the prior representation that could be relevant to the current representation. Singleton's current representation of the Petitioner in this matter relates to an effort to organize the drivers. By definition, that work involves persuading the drivers that they should opt for representation by a union in their dealings with the Employer and typically involves dissemination of information among the members of the proposed bargaining unit regarding the Employer's business and how they are being treated by the Employer. Information that may have been shared by Mohebbi with Singleton regarding the potential breach of the Employer's exclusivity and the impact that a competitor was having on the Employer's business could also be relevant to the organizing and representation work that Singleton is now performing for the Petitioner. That potentially revealed information would also be highly relevant for collective bargaining should the Petitioner succeed in the representation proceeding.

Further, as the voluminous group of emails submitted by Singleton shows[5], one particular focus of his has been the economic relationship between the drivers and the Employer. Information that potentially was shared by Mohebbi with Singleton regarding that economic

[4] While the Order distinguishes the above-cited cases on their facts, it does not take issue – nor could it – with the above-quoted legal propositions for which the Employer cited them in its Motion and for which they are cited here.

[5] In that regard, the Board is referred to the emails submitted to the Regional Director on November 22, 2016, which demonstrate that Singleton was closely involved in Petitioner's organizing drive and appears to have been one of the leaders of that effort.

relationship could be relevant to the dispute over independent contractor and supervisory status which are the issues being litigated in this representation case.

In finding that Singleton's prior representation of the Employer is not "substantially related" to the current representation of Petitioner, the Order misconstrues the law and creates its own interpretation of "substantially related" that does not comport with Rule 1.9. The Order focuses on the lack of a relationship between the exclusivity provision of the MAA contract and the relative success or failure of the Employer's business, on the one hand, and the issues in the instant representation case – i.e., the drivers' status under the Act as independent contractors, supervisors, or employees – on the other. (Order at 6) That is a misguided analysis, however. The comments to MARPC 1.9 and the above-cited cases make clear that the issue is whether the Employer might have provided confidential information to Singleton while he was representing the Employer that could be used in the instant matter to the Employer's disadvantage. The Order simply fails to address that possibility.

While the Order faults the Employer for the lack of "specifics to support its claim," that finding is contrary to the cases cited above which emphasize that the client need not substantiate its claim with such information; it is the "possibility" not the "actuality" that matters. The Order mistakenly puts the burden on the Employer to demonstrate "actuality," and makes no finding against the possibility that such confidences were shared by the Employer with Singleton.

As discussed above, it is entirely plausible that in discussing the MAA's failure to enforce the exclusivity provision and the Employer's business issues related to that legal problem, the Employer could have imparted information about the terms, characteristics and nature of the relationship between the Employer and the drivers which could be relevant to the employee-status issue presently pending in the representation hearing before the Regional

Director. The Employer could also have imparted information about the health of its business and its dealings with the drivers which could have assisted Petitioner in its organizing activities. The reasonable possibility that this information-sharing could have occurred is sufficient, under the legal standards discussed above, to make the two legal representations "substantially related" under MARPC 1.9.

Simply put, Singleton is in a position – and has been in such a position for some time – to use information he may have received through his representation of the Employer for the advantage of the Petitioner in the current representation proceeding. As such, the prior representation and the current representation are "substantially related" under MARPC 1.9 and disqualification is warranted.[6]

[6] The Order also notes that representation proceedings are non-adversarial. (Order at 6 n.4) To the extent this observation played a part in the Regional Director's analysis under MARPC 1.9, that was erroneous as well. While that is of course the Board's view of representation hearings themselves, there can be no serious question that the interests of the Employer and the Petitioner are adverse in this proceeding under any ordinary understanding of the term. In the same vein, under the Board's rules, there is no requirement for parties to representation proceedings to be represented by counsel. As Petitioner does not need to be represented by counsel, the concerns articulated in the Order about depriving a party of its chosen legal representative should not come into play here.

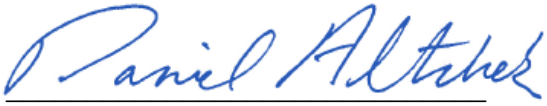
CONCLUSION

For the foregoing reasons, the Employer's Request for Review should be granted and the March 23, 2017 Order of the Regional Director denying the Employer's Motion should be reversed.

Dated: Baltimore Maryland
April 12, 2017

Respectfully submitted,

MILES & STOCKBRIDGE P.C.



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CERTIFICATE OF SERVICE

I, Daniel Altchek, certify that on April 12, 2017, I served a copy of the foregoing Employer's Request For Review Of The Regional Director's Order Denying Employer's Motion To Require Petitioner's Counsel To Withdraw vie electronic mail upon:

Mr. Charles L. Posner
Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
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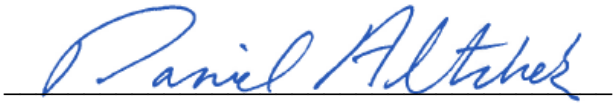

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

SUPREME AIRPORT SHUTTLE, LLC

Employer

and Case 05-RC-187864

SHUTTLE DRIVERS' ASSOCIATION OF BWI

Petitioner

ORDER DENYING EMPLOYER'S MOTION TO REQUIRE PETITIONER'S COUNSEL TO WITHDRAW

On November 17, 2016, Supreme Airport Shuttle, LLC ("Employer") filed a Motion seeking an order to require counsel for the Shuttle Drivers' Association of BWI ("Petitioner") to withdraw from his representation of Petitioner in this matter. The Employer alleges that Petitioner's counsel, John Singleton ("Singleton"), previously represented the Employer, resulting in a disqualifying conflict of interest pursuant to Maryland Attorneys' Rules of Professional Conduct (MARPC) 1.9.

I. Background

A. Facts

The Employer operates a shuttle service at Baltimore/Washington International Thurgood Marshall Airport ("BWI"). David Mohebbi ("Mohebbi") serves as the Employer's president. The Employer was awarded the exclusive shuttle service contract at BWI in 2015; prior to that, Super Shuttle of Baltimore ("Super Shuttle") operated as BWI's exclusive shuttle service. Petitioner claims to represent a majority of the Employer's shuttle drivers. Most of these drivers previously worked for Super Shuttle until they were hired by the Employer after it took over the shuttle service contract in 2015. Singleton has represented Petitioner since 2011 in various disputes between it and Super Shuttle.

Soon after taking over the BWI shuttle service contract, a dispute arose concerning the Employer's contract. On February 9, 2016, a meeting concerning this dispute ("the BWI Meeting") was held with officials from the Maryland Aviation Administration ("MAA") and the Maryland Office of the Attorney General (OAG). The Employer and Petitioner agree that Mohebbi wanted Singleton to attend the BWI meeting because of Singleton's past involvement and familiarity with various officials who would be in attendance. Singleton agreed to attend,

but when he arrived, he was told he could not join the other attendees. Later in the meeting, Singleton was allowed to join.[1]

Soon after the meeting, Singleton sent an invoice to Petitioner's president Patrick Benhene ("Benhene") for Singleton's professional services related to the BWI meeting. Benhene gave the invoice to Mohebbi, and Mohebbi paid it in full.

Singleton, on behalf of Petitioner, filed the representation petition in this matter on November 8, 2016.

B. Procedural History

By letter to the undersigned dated November 10, 2016, the Employer requested an order directing Singleton to withdraw from his representation of Petitioner in this matter. The Employer filed a Motion requesting the same on November 17, 2016. In its Motion, the Employer alleged that Singleton's representation of Petitioner in this proceeding violates MARPC Rule 1.9, "Duties to Former Clients." The Employer also alleged that under Section 102.177 of the Board's Rules and Regulations, the Board has the authority to impose sanctions on a party representative that engages in misconduct, including a violation of state ethical standards of conduct. Petitioner opposed the Employer's Motion.

The undersigned denied the Employer's Motion on November 18, 2016, stating that I lacked the authority under Section 102.177 of the Board's Rules and Regulations to grant the relief sought by the Employer. The Employer appealed that decision to the Board on November 22, 2016. On February 7, 2017, the Board issued an Order remanding this case to me. *Supreme Airport Shuttle, LLC*, 365 NLRB No. 27 (2017). After noting that this case presents an issue of first impression, the Board determined that I do, in fact, have the authority to rule on the Employer's Motion and, if warranted, to grant the relief requested, subject to the Board's review. The Board directed the undersigned to conduct any investigation I deemed necessary to decide the Employer's Motion, but left the mechanics of that investigation to my discretion.

On February 27, 2017, I issued an Order directing the parties to submit any and all evidence and supporting arguments they wished to present on the merits of the Employer's Motion, including on three particular issues: (1) whether an attorney-client relationship existed between the Employer and Singleton under the MARPC, including when and how the relationship was formed, the scope of the relationship; and, if applicable, when and how this relationship was terminated; (2) assuming an attorney-client relationship existed between the Employer and Singleton, whether this case is "the same or a substantially related matter" as the scope of Singleton's putative representation of the Employer; and (3) any reason(s) why an

[1] The record is unclear as to whether Singleton attended the meeting with representatives of Petitioner or not. The parties dispute the nature of Singleton's representations to officials from the MAA and OAG at the BWI meeting.

evidentiary hearing is necessary to resolve the Employer's Motion. The parties submitted their responses to my Order on March 13, 2017.[2]

II. The Parties' Positions

A. The Employer's Position

In support of its Motion, the Employer submitted a sworn affidavit from Mohebbi, alleging that he called Singleton a day or two in advance of the BWI meeting to seek his help and representation. During that conversation, Mohebbi "explained the situation with Super Shuttle, described the Company's view of its legal position regarding its right to exclusivity under the contract with MAA, [and] provided confidential information about the performance of the Company under the contract since taking it over in October 2015[.]" D. Mohebbi Aff. at ¶ 14. Mohebbi described that he understood he was speaking to Singleton about representing the Company during the BWI meeting, and Mohebbi "had the expectation that [Singleton] would represent the Company in mind when [he] shared confidential information about the Company[.]" *Id.* at ¶ 15. According to Mohebbi, Singleton agreed to attend the BWI meeting on the Company's behalf. *Id.* at ¶ 16.

Singleton then attended the BWI meeting, along with Mohebbi, representatives from the MAA and the OAG, and the Employer's attorney for procurement matters, Michael Johansen ("Johansen"). According to Mohebbi, Singleton advocated on behalf of the Employer at the meeting. *Id.* at ¶ 18-19. Sometime over the next few weeks, Benhene forwarded Mohebbi an invoice for Singleton's services related to the BWI meeting, which the Employer paid. *Id.* at ¶ 20. Mohebbi did not have any further contact with Singleton until he received a letter from Singleton on August 25, 2016, claiming that he represented the drivers, and they sought to form a union. *Id.* at ¶ 21.

Based on these facts, the Employer alleges that it established an attorney-client relationship with Singleton because Mohebbi "reasonably expected legal representation from Mr. Singleton and that is what he received; Mr. Singleton never dispelled those expectations," but in fact confirmed them by attending the meeting and advocating on behalf of the Employer at the meeting. Employer Memo. at 7.

The Employer also argues that Singleton's representation during the BWI meeting and the instant representation petition are "substantially related" because there is a substantial risk that Singleton obtained confidential information during his alleged representation of the

[2] The parties' submissions were originally due on March 3, 2017. I granted the Employer's timely request for an extension until 12:00 p.m. on March 13, 2017. Shortly before the deadline, Singleton filed a request for an extension of time to file Petitioner's materials due to an emergency medical issue involving a family member. The Employer's counsel did not object to Singleton's request. I granted Singleton's extension request. Singleton filed Petitioner's materials at approximately 1:00 p.m. on March 13, 2017. I have considered that filing in my decision in this matter.

Employer that he could now use to advance Petitioner's position in the instant case. *See* D. Mohebbi Aff. at ¶ 14; Employer Memo. at 10 (noting Mohebbi may have shared confidential information including "the potential breach of the Company's exclusivity and the impact that a competitor was having on the Company's business" and the "economic relationship between the drivers and the Company."). The Employer claims that this information is related to Singleton's work "persuading the drivers that they should opt for representation by a union in their dealings with the Company" and disseminating "information among the members of the proposed bargaining unit regarding the Employer's business and how they are being treated by the Employer." *Id.* at 9-10. The Employer further argues that the confidential information Mohebbi may have shared regarding the "economic relationship between the drivers and the Company. .could be relevant to the dispute over independent contractor and supervisory status which are the issues being litigated in this representation case." *Id.* However, the Employer provided no specifics to explain how this economic relationship could be relevant to the drivers' status.

Accordingly, the Employer argues that Singleton's current representation of Petitioner creates a disqualifying conflict of interest.

B. Petitioner's Response

Petitioner, referring in large part to its previous filings on this issue, denies that Singleton ever represented the Employer. According to Petitioner, Singleton agreed to attend the BWI meeting because Super Shuttle was challenging the Employer's bid for the BWI shuttle service contract. Petitioner claims that Singleton planned to present its complaints about the poor treatment and working conditions the drivers received under Super Shuttle. In this instance, Petitioner argues, the interests of Petitioner and the Employer were aligned: both wanted Super Shuttle out of BWI. In a sworn affidavit, Benhene testified that Mohebbi asked him to contact Singleton and request that he attend the BWI meeting. According to Benhene, Mohebbi agreed to pay Singleton's fees for attending the meeting "on behalf of [Petitioner.]" P. Benhene Aff. at ¶ 12.

The day of the BWI meeting, Singleton and representatives of Petitioner were initially denied entrance, allegedly because they were not listed on the agenda. *Id.* at ¶ 13; *see also* J. Singleton Feb. 9, 2016 email to D. Hilliard[3] ("I am on the third floor at BWI and the asset ag will not let me in the meeting that I was specifically asked to attend. Help[.]"). Later in the meeting, Singleton and representatives of Petitioner were called into the room. Singleton expressed concerns relating to the interests of the shuttle drivers, but not those of the Employer, "because in his opinion neither SuperShuttle nor Supreme had been fair with the drivers." P. Benhene Aff. at

[3] The State of Maryland website identifies dhilliard@bwiairport.com as Dale Hilliard, Chief, Policy and Corporate Affairs of the MAA. *See* Md. Manual Online, Dept. of Transportation, Md. Aviation Commission, *available at* http://msa.maryland.gov/msa/mdmanual/24dot/html/dot.html (last visited March 20, 2017).

¶ 14. When Benhene received the bill for Singleton's legal services at the BWI meeting, he forwarded the bill to Mohebbi for payment "[p]ursuant to Mr. Mohebbi's offer to pay [Petitioner's] legal fees incurred in connection with the February [BWI] meeting." *Id.* at ¶ 16.

Petitioner argues that at no point did Singleton represent the Employer, and even if the interests of the Employer and Petitioner were aligned, Singleton solely represented Petitioner's interests during the BWI meeting. Petitioner also asserts that it is "unaware of any confidential information related to the contract with MAA." Pet. Ltr. to C. Posner (Mar. 13, 2016).

III. Decision and Order

Rule 1.9 of MARPC reads:

> An attorney who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Determining whether disqualification under MARPC 1.9 is proper requires a two-part inquiry: first, the moving party must establish that an attorney-client relationship existed with the former client; and second, that the matter at issue in the former representation was the same or substantially related to that in the current action. *Pennsylvania National Mutual Casualty Insurance Co. v. Perlberg*, 819 F. Supp. 2d 449, 453 (D. Md. 2011) (citing *Stratagene v. Invitrogen Corp.*, 225 F. Supp. 2d 608, 610 (D. Md. 2002).

Courts have recognized that disqualification of counsel is a "drastic remedy since it deprives litigants of their right to freely choose their own counsel" and is permitted only where the conflict clearly "call[s] in question the fair and efficient administration of justice." *Victors v. Kronmiller*, 553 F. Supp. 2d 533, 551 (D. Md. 2008) (citing *Gross v. SES Americom, Inc.*, 307 F. Supp. 2d 719, 722–23 (D. Md. 2004)). For this reason, the moving party "bears a high standard of proof to show that disqualification is warranted." *Victors*, 553 F. Supp. 2d at 551 (citing *Franklin v. Clark*, 454 F. Supp. 2d 356, 365 (D. Md. 2006)); *see also Buckley v. Airshield Corp.*, 908 F. Supp. 299, 304 (D. Md. 1995) ("The high standard of proof is fitting in light of the party's right to freely choose counsel and the consequent loss of time and money incurred in being compelled to retain new counsel.") (quoting *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724, 729 (E.D. Va. 1990)).

I find it unnecessary to decide the question of whether an attorney-client relationship existed as the Employer claims, because the Employer has not established that Singleton's representation at the BWI meeting was "substantially related" to his representation of Petitioner in this representation proceeding. However, if required to determine the first prong of the inquiry, I would find that the Employer has also failed to meet its burden of showing the existence of an attorney-client relationship.

A. The Employer has not shown the matters are "substantially related" under Rule 1.9.

The comment to Rule 1.9 explains that matters are "substantially related" where they "involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

There can be no question that the BWI meeting does not involve the same transaction or legal dispute as Singleton's current representation of Petitioner: the BWI meeting was in reference to a possible violation of the exclusivity provision of the Employer's contract, while Singleton's representation of Petitioner in this case is in reference to its desire to become the bargaining representative of the drivers.

The Employer argues instead that the two matters are substantially related because there is a substantial risk that Singleton obtained confidential information that he could now use to advance Petitioner's position in the instant case, specifically with regards to the exclusivity provision of the Employer's contract, and its performance under that contract. D. Mohebbi Aff. at ¶ 14. The Employer claims the information Mohebbi allegedly shared relates to Singleton's representation of Petitioner because Singleton is attempting to convince the drivers to unionize, and because it relates to the dispute over the drivers' independent contractor and supervisory status. Employer Memo. at 9-10.

I find the Employer's arguments unavailing. As the Employer noted, the issue to be determined in this proceeding is whether the drivers in the petitioned-for unit are employees, independent contractors, or supervisors under the Act. Neither the exclusivity provision of the Employer's contract with MAA nor the relative success or failure of the Employer's business have any bearing on or relationship to the drivers' status as employees, independent contractors, or supervisors.[4]

In fact, the only issue that I perceive to be potentially related to the confidential information that Mohebbi may have shared with Singleton is whether the Employer meets the Act's jurisdictional requirements. However, even that attenuated relevance falls short of meeting the Employer's burden here because the Employer already stipulated that it engaged in the requisite level of interstate commerce to bring it under the jurisdiction of the Act. *See* Employer Stmt. of Pos. at 2 (Questionnaire on Commerce Information).

Finally, I find that the cases cited by the Employer are distinguishable from the instant proceeding. Both *Strategene* and *Buckley* are patent infringement cases where the attorney in question worked for a firm and represented a client in relation to obtaining a patent, but then

[4] I also note that representation proceedings are non-adversarial and investigatory in nature. Here, that investigation is directed at issues of employee status (whether the drivers are employees, independent contractors, or supervisors), not the success or failure of the Employer's business or enforcement of its contract provisions with the MAA.

switched firms and represented a client challenging the validity of that same (or closely related) patent. *See Strategene v. Invitrogen Corp.*, 225 F. Supp. 2d 608 (D. Md. 2002); *Buckley v. Airshield Corp.*, 908 F. Supp. 299 (D. Md. 1995). No such conflict exists here: Singleton's representation of Petitioner for the purpose of establishing a bargaining representative is entirely separate from enforcement of the Employer's exclusivity provision in its contract with the MAA.

In considering the parties' arguments, I have taken into account the Employer's heavy burden here, with a particular concern for potentially depriving Petitioner of its chosen representative absent a clear showing of a conflict. While the Employer has made a generalized claim that confidential information shared with Singleton had some relation to relevant issues in this proceeding – namely, the drivers' status as employees, independent contractors, or supervisors – it failed to identify (nor have I found) any specifics to support that claim. As a result, I find no relationship between the matters discussed in preparation for the BWI meeting and this representation proceeding. Because the matters are not "substantially related," the disqualification of Petitioner's counsel is unwarranted.

B. The Employer failed to establish the existence of an attorney-client relationship between the Employer and Singleton.

Moreover, if required to determine whether the Employer met its burden to establish the existence of an attorney-client relationship here, I would find it has not.

An attorney-client relationship is formed when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and (2) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services. *Attorney Grievance Comm'n v. Brooke*, 374 Md. 155, 174 (2003). The attorney-client relationship may arise from an explicit agreement or by "implication from a client's reasonable expectation of legal representation and the attorney's failure to dispel those expectations." *Id.* Because determining what constitutes an attorney-client relationship can be an "elusive concept," the existence or non-existence of the relationship can, and often must, be implied from the facts and circumstances of the given case, including whether legal advice was being sought by the client. *Attorney Grievance Comm'n v. Shaw*, 354 Md. 636, 650-51 (1999) (citing *Crest Investment Trust v. Comstock*, 23 Md. App. 280, 296 (1974) and *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396, 421 (1998)).

For example, the Maryland Court of Appeals found an attorney-client relationship existed despite the absence of a signed retainer agreement where the client "clearly expressed her desire to have [the attorney] provide her legal representation" by handing over documents necessary to the representation and remitting a $1,300 retainer fee. *Attorney Grievance Comm'n v. Kreamer*, 404 Md. 282, 319 (2008). In turn, the attorney manifested her intent to provide the legal representation by her actions, including accepting the papers and retainer fee, and withdrawing a $600 non-refundable engagement fee. *Id.*; *see also Attorney Grievance Comm'n v. Agbaje*, 438

Md. 695, 728-29 (2014) (attorney's actions supported a finding of an attorney-client relationship where he accepted a fee for legal services and identified himself as the client's attorney in an email to the client's employer); *Brooke*, 374 Md. at 175-76 (finding an ongoing attorney-client relationship where the attorney performed legal work for the client in the past, discussed drafting a will for the client in the attorney's law office, the attorney's secretary drafted the will using the attorney's legal forms, the will identified the attorney as the client's personal representative, and the attorney identified himself to the police as the client's attorney).

The Employer here does not claim, nor does the evidence show, any explicit, written agreement between the Employer and Singleton for the provision of, or payment for, legal services. Further, based on the facts and circumstances of this case, I would find there is insufficient evidence to support an implication of an attorney-client relationship.

As an initial matter, the Employer's acknowledgement that Singleton represented Petitioner prior to the BWI meeting weighs against its position here. The Employer admits that in August 2015, it explicitly sought Singleton's assistance in his capacity as Petitioner's attorney. At that time, the Employer and Petitioner (through their respective counsel) collaborated in order to advance a mutually advantageous position: both wanted to defeat the bid protest to ensure the Employer received the contract at BWI instead of Super Shuttle. *See* Employer Memo. at 7-8; J. Singleton Aug. 23, 2015 email to P. Benhene ("I talked at length yesterday with David [Mohebbi]. He wanted to have me write a letter to the Governor on the drivers' behalf stating that we had gotten along well in the past[.]"); M. Johansen Aug. 23, 2015 email to J. Singleton ("I represent Supreme Shuttle and David Mohebbi. We are assisting him to keep the BWI shared services award on track and approved at Wednesday's meeting of the [Board of Public Works (BPW)]. I understand from David that you may be attending on Wednesday, with some of your clients, to support award of this contract to Supreme Shuttle."); M. Johansen Aug. 23, 2015 email to J. Singleton (asking for letter to the BPW supporting Supreme Shuttle's bid noting "[i]t would be great if you could focus on Regency/Challenger/Supreme Shuttle's experience in surrounding markets (Reagan/Dulles) and the fact that they are an experienced company that treats its customers and drivers well."); J. Singleton Aug. 24, 2015 email to D. Mohebbi ("Pursuant to the driver' [sic] request, I will be attending the meeting this morning. .I can be supportive of your bid given my belief that we will have a good working relationship based on mutual respect and trust.").

Also weighing against a finding of an attorney-client relationship here is the fact that the Employer was already represented by Johansen, and Johansen was present at the BWI meeting in his capacity as the Employer's attorney. Further, Singleton was initially denied access to the meeting where the Employer and Johansen were already in attendance.[5] The Employer does not

[5] It is unclear from the record whether Singleton eventually entered the meeting with or without representatives from Petitioner. While not dispositive, if Singleton entered the meeting with drivers from Petitioner, that fact would also certainly weigh against a finding of an attorney-client relationship between Singleton and the Employer.

offer any explanation for why it proceeded with the meeting for some time before Singleton was permitted to join, even though Singleton was allegedly the Employer's counsel for this very meeting.

On the other hand, the parties do not dispute that the Employer paid, and Singleton accepted, a fee from an invoice Singleton sent for his professional services at the BWI meeting. While this is at least suggestive of an attorney-client relationship, other circumstances tend to discount its value.[6] First, Singleton unquestionably addressed the invoice to Benhene, not the Employer. I tend to think that, were there an attorney-client relationship, Singleton would have sent the invoice to the Employer. Second, as described above, there is a dispute as to whether Singleton was present at the meeting to represent the Employer at Mohebbi's request, or whether Mohebbi requested his presence to represent Petitioner and the drivers. And third, there is precedence for Singleton's appearance at BWI to advocate for the Employer's position while representing the drivers. As discussed above, Singleton appeared before the BPW in 2015 to support the Employer's bid for the shuttle contract, but did so in his capacity as Petitioner's attorney. At that time, the drivers shared the Employer's goal of terminating Super Shuttle's exclusive shuttle service contract at BWI. As a result, the Employer's payment to Singleton is not determinative to a finding of an attorney-client relationship here.

Based on the facts and circumstances in this case, I would find the Employer failed to establish that an attorney-client relationship existed between the Employer and Singleton.

I also find that because the resolution of any disputes of fact in this matter would not be determinative in my decision, no hearing is necessary on the Employer's motion. Accordingly, for the reasons stated above, I have determined that the Employer's motion to disqualify Petitioner's representative from participating in this proceeding should be, and it is, hereby dismissed.

ORDER: The Employer's motion to require Petitioner's counsel to withdraw from his representation of Petitioner or, in the alternative, to dismiss the petition, is dismissed.[7]

IV. Right to Request Review

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

[6] MARPC 1.8(f) recognizes that there are times when an attorney may accept compensation for representing a client from someone other than the client.
[7] The Region will separately issue an order scheduling the resumption of the hearing.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Issued at Baltimore, Maryland, this 23rd day of March 2017.

(SEAL)

/s/ Charles L. Posner

Charles L. Posner, Regional Director
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