UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AVALONBAY COMMUNITIES, INC.,	)	
	)	
Employer,	)	
	)	
-and-	)	Case No. 2-RC-238385
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 30, AFL-CIO,	)	
	)	
Petitioner.	)	
	)	

PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND CERTIFICATION OF REPRESENTATIVE AND ITS REQUEST TO STAY CERTIFICATION PENDING THE BOARD'S REVIEW

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INTRODUCTION

In accordance with Section 102.67(f) of the Rules and Regulations of the National Labor Relations Board ("Board"), Petitioner International Union of Operating Engineers Local 30, AFL-CIO ("Local 30"), by its attorneys, Brady McGuire & Steinberg, P.C., respectfully submits this brief in opposition to the Request for Review of the Decision and Certification of Representative issued by the Regional Director of Region 2 dated April 30, 2020 ("*RD Dec.*") and Stay of Certification Pending Board Review ("*Er. Req. Rev.*").

PRELIMINARY STATEMENT

The Employer owns and operates six (6) residential apartment complexes in Westchester County, New York (hereinafter referred to as "communities"). *Tr. at 17:11-17; 35:16-18*. On

March 26, 2019, Local 30 filed a petition to represent the maintenance supervisors and technicians working for the Employer at these communities. *Bd. Ex. A*. Pursuant to the Stipulated Election Agreement, on April 23, 2019, "all full-time and regular part-time maintenance technicians in classes I, II and III employed by the Employer at The Avalon Green-500 Town Green Drive, Elmsford, NY 10523; Avalon Ossining-217 North Highland Ave., Ossining, NY 10562; Avalon Mamaroneck-746 Mamaroneck Ave., Mamaroneck, NY 10543; Avalon Bronxville-125 Parkway Road, Bronxville, NY 10708; Avalon White Plains-27 Barker Ave., White Plains, NY 10601; and Avalon Somers-49 Clayton Boulevard, Baldwin Place, NY 10505" were provided with the opportunity to vote on whether they wished to be represented by Petitioner. *Bd. Ex. B*. Included within the unit of employees permitted to vote, but subject to challenge, were the four (4) maintenance supervisors. *Bd. Ex. B*.

The tally of the votes was 18-5 in favor of Local 30 with the ballots cast by the maintenance supervisors collected and challenged by the Employer. *Bd. Ex. C*. On April 30, 2019, the Employer filed its objections to the election. On October 3, 2019, Regional Director John J. Walsh, Jr. issued a "Decision on Objections and Notice of Hearing" which overruled Employer's Objections Nos. 3 through 9 but directed a hearing on Objections Nos. 1 and 2 since he "determined that certain evidence described in the Employer's offer of proof could be grounds for setting aside the election." *Bd. Ex. C*. On October 16, 2019, the Employer filed a Request for Partial Review of the Regional Director's Decision on Objections to Election with the Board and sought a stay of the post-election hearing and certification. By Orders dated October 23, 2019 and October 24, 2019, the Board denied the Employer's request for review and a stay, respectively.

Commencing on October 17, 2019 and continuing thereafter on four (4) more days, a hearing was held before Region 2 on the issues of (1) whether the maintenance supervisor

position was that of a statutory supervisor under Section 2(11) of the National Labor Relations Act (the "Act") and (2), if so, whether the maintenance supervisors engaged in objectionable conduct during the critical period leading up to the election which interfered with the employees' freedom of choice in deciding whether or not to vote for Local 30. *Bd. Ex. C*.

At the conclusion of the hearing and after the filing of post-hearing briefs, on December 20, 2019 the Hearing Officer issued his Report on Objections ("*HOR*"). In response thereto, the Employer filed a brief in support of its Exceptions to the Hearing Officer's Report on Objections. On January 24, 2020, Petitioner filed its Answering Brief in Response to the Exceptions filed by the Employer. On April 30, 2020, the Regional Director's Decision was issued adopting the Hearing Officer's recommendation and overruling the Employer's objections. *RD Dec. at 1*.

BACKGROUND INFORMATION

Between March 26, 2019 and April 23, 2019, twenty-four (24) maintenance technicians and four (4) maintenance supervisors were employed by the Employer. *Bd. Ex. A*. The number of maintenance technicians at each of the communities was as follows: two (2) each at Bronxville, Ossining and Somers; three (3) at Mamaroneck; seven (7) at White Plains; and eight (8) at Green (Elmsford). *Er. Ex. 32*. The four (4) maintenance supervisors were employed at the following communities: (1) Jonathan Wilson - Ossining; (2) Brian Pieragostini - Somers; (3) Jeff Ryska - White Plains; and (4) Denilson DaSilva - Mamaroneck. *Tr. at 41:17-42:19; Er. Ex. 32*. In addition, either a senior maintenance manager and/or a maintenance manager was assigned to oversee the work of the maintenance supervisors and technicians at each of the communities. *Tr. at 39:6-11; Er. Ex. 32*.

Maintenance supervisors and maintenance technicians work together at each of the communities in order to diagnose and repair an array of issues "in such areas as HVAC, electrical, plumbing, major appliances, carpentry, emergency systems, flooring, hardware

accessories, masonry, painting/wallpaper, water features (pools, spas, etc.) and waste management systems." *Pr. Exs. 4 & 5*. Testimony from multiple witnesses at the hearing confirmed that maintenance supervisors working alongside technicians in order to: (1) prepare an apartment for a new tenant (referred to at the hearing as an "apartment turnover"); (2) execute resident repair and maintenance requests; (3) perform preventive maintenance; and (4) otherwise maintain and service each of the communities to the satisfaction of its residents as well as the Employer's management. *Tr. at 254:1-4; 319:18-22; 322:24-323:3; 370:6-9; 559:3-7; 577:12-14.*

The record developed at the hearing also showed that maintenance supervisors share a number of responsibilities with maintenance technicians, including: (1) improving resident satisfaction (*Er. Ex. 1, ED 1; Pr. Ex. 4, ED 8; Pr. Ex. 5, ED 7*)[1]; (2) performing resident service requests (*Er. Ex. 1, ED 4; Pr. Ex. 3 ED 6; Pr. Ex. 4, ED 8; Pr. Ex 5, EDs 2 & 7*); (3) performing preventive maintenance (*Er. Ex. 1, ED 5; Pr. Ex. 5, ED 4*); (4) performing apartment turnovers (*Er. Ex. 1, ED 5; Pr. Ex. 3, ED 3; Pr. Ex. 4, ED 4; Pr. Ex. 5, ED 3*); (5) inspecting community grounds (*Er. Ex. 1, ED 8; Pr. Ex. 5, ED 9*); (6) collecting and removing trash and debris (*Er. Ex. 1, ED 9, Pr. Ex. 3, ED 4; Pr. Ex. 4, ED 6; Pr. Ex. 5, ED 8*); and (7) performing "hot works" such as brazing, soldering and welding (*Er. Ex. 1, ED 17; Pr. Ex. 4, ED 12; Pr. Ex. 5, ED 11*). Maintenance supervisors and technicians are required to wear the same uniforms, while maintenance managers and other management employees do not wear Employer issued shirts and ID badges. *Tr. at 148:19-149:3*; *Tr. at 241:7-14*; *Tr. at 559:23-560:4*. Finally, maintenance

[1] "ED" is an abbreviation for the term "Essential Duty" which appears in each of the job descriptions identifying specific essential job responsibilities for: maintenance supervisors (*Er. Ex. 1*); maintenance technicians I (*Pr. Ex. 3*); maintenance technicians II (*Pr. Ex. 4*); and maintenance technicians III (*Pr. Ex. 5*).

supervisors and technicians both access the Employer's electronic work order system known as "MRI" in order to obtain and execute work assignments. *Tr. at 600:5-13*.

ARGUMENT

POINT I

THE REGIONAL DIRECTOR PROPERLY CONCLUDED THAT THE HEARING OFFICER'S RECOMMENDATION SHOULD BE ADOPTED AND THE EMPLOYER'S OBJECTIONS OVERRULED

As concluded by the Regional Director, the credibility findings made by the Hearing Officer were "correct by a clear preponderance of all relevant evidence." *RD Dec. at 2, fn. 2 citing Stretch-Tex Co., 118 NLRB 1359, 1361 (1957)*. To that end, the Regional Director "carefully reviewed the Hearing Officer's rulings" and found that "they are free from prejudicial error." *RD Dec. at 2*.

A. The Regional Director Correctly Concluded that the Hearing Officer Appropriately Weighed the Record Evidence

With regard to the manner in which the Hearing Officer weighed the evidence, the Regional Director reviewed the record "with attention to particular references in Employer counsel's Exceptions and Brief in Support of Exceptions" and concluded that "the Hearing Officer carefully considered all of the testimony and documentary evidence, and correctly applied established principles in his evaluation of the probative value of testimony and documentary evidence." *Id*. In response to the Employer's specific claim (which is renewed it its Request for Review) that the Hearing Officer "ignored" the testimony of maintenance supervisor DaSilva regarding his purported recommendation to promote a technician when he was previously employed as a maintenance supervisor, the Regional Director reviewed and cited to the Hearing Officer's detailed description of this witness's testimony and "explained his evaluation of it in the context of the law." *Id. at 3*.

As relating to the use of leading questions which resulted in witnesses providing answers in "a conclusive manner that maintenance supervisors possessed the authority of supervisors as defined in Section 2(11) of the Act," the Regional Director provided specific examples of such testimony as well as how the Hearing Officer detailed such testimony and "when he found it not to be probative, clearly explained his reasoning." *Id*. That clear explanation, as identified by the Regional Director, included citations to the relevant Board case law including *Peacock Productions of NBC Universal Media, LLC, 364 NLRB No. 104, slip op. (Aug. 26, 2016)* and *Champion River Co., 314 NLRB 1097, 1098 (1994)*. *R.D. Dec. at 3-4*. Similarly, the Employer's reliance on documentary evidence to establish indicia of supervisory status without testimony and "examples drawn from the work experience of employees in the contested classification" did not provide a degree of evidence that the Hearing Officer could rely on. To that end, the Hearing Officer also cited and relied upon the leading Board cases of *Chi Lakewood Health, 365 NLRB No. 10, slip op. at 1 (2016)* and *Oakwood Healthcare, 348 NLRB 686, 690 fn. 24 (2006)*.

As relating to the overall testimony of witnesses, the Regional Director noted that the case law precedence of *Peacock Productions* stood for the proposition that the testimony of employees in the petitioned-for unit was more relevant and could be relied upon "more heavily" than "contrary testimony from a nonunit staff member." *RD Dec. at 5 citing Peacock Productions, 364 NLRB No. 104, slip op. at 2, fn. 5*. For instance, the Employer relies heavily upon the testimony of maintenance manager Perez and senior portfolio maintenance director Meehan who both testified that when they previously worked as maintenance supervisors (in Westchester County and Connecticut, respectively), they "prioritized and assigned work to Maintenance Technicians based on the nature of the work to be performed, urgency of the situation, . . . and experience or skills of Maintenance Technicians." *Er. Req. Rev. at 10 & fn. 11*.

Such testimony, as explained by the Regional Director, was appropriately weighed "from witnesses with more current experience over those testifying to events in the distant past, and testimony about the communities at issue in the case over that involving other communities." *RD Dec. at 5*.

In ultimately agreeing with the Hearing Officer's analysis regarding the evidence submitted, the Regional Director reminds us that "[a]s the party with the burden, it is incumbent on the Employer to present probative evidence." *Id. at 6 citing Phelps Community Medical Center, 295 NLRB 486, 490 (1989)*. In this case, the Regional Director held that: "[The Employer] did not carry this burden." *RD Dec. at 6*. Finally, during the course of the hearing, the Hearing Officer was very specific as to the types of documents that the Employer should be producing to support its case. *Tr. 336:22-350:18*. The failure of the Employer to satisfy its burden of proof, to a certain extent, by not producing specific documents to support its contentions has nothing to do with the Hearing Officer, and, as detailed hereafter, the Request for Review should be denied.

B. The Regional Director Properly Concluded that the Maintenance Supervisors are not Statutory Supervisors Based upon the Record and the Hearing Officer's Recommendation

It is undisputed that the burden of establishing that the maintenance supervisors possessed supervisory authority under Section 2(11) of the Act rested with the Employer. *See NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 710 (2001)*; *Entergy Mississippi, Inc., 367 NLRB No. 109, slip op. 2 (2019)*. As correctly stated by the Regional Director, "the burden is not met when the record evidence 'is in conflict or otherwise inconclusive.'" *RD Dec. at 7 quoting Phelps Community at 490*. As outlined in the Regional Director's decision, the Employer did not meet its burden in this case. *RD Dec. at 7*. Therefore, it is respectfully submitted that there is no basis for granting the Employer's Request for Review.

1. The Probative Evidence Did Not Establish that Maintenance Supervisors Directly Hire Maintenance Technicians

The Regional Director properly concluded that: "[t]he Hearing Officer found that the probative evidence did not establish that maintenance supervisors directly hire other employees. He found, further, that while there was evidence of maintenance supervisors participating in the hiring process, by interviewing candidates and providing an assessment of their fitness for open positions, this participation did not rise to the level of 'effective recommendation,' under the Act." *RD Dec. at 7*. As noted by the Regional Director, "every example of the hiring process evidenced in the record herein includes a higher-level manager interviewing candidates on his own or in conjunction with the maintenance supervisor -- in no instance was the maintenance supervisor the ***only*** representative of the Employer to meet the candidate before hiring." *RD Dec. at 8 (emphasis added)*.

For instance, maintenance manager Perez testified on cross-examination that maintenance supervisor Pieragostini, while participating in the interview of someone being hired for the position of maintenance technician, did not have the unilateral authority to hire the candidate. *Tr. at 246:7-12*. Perez also testified that he had to obtain approval from upper management before calling a candidate to offer him a job. *Tr. at 247:7-15*. Pieragostini testified that he provided "input" concerning candidates for employment (*Tr. at 278:21-279:1*), including the case of the hiring of "Ignacio", but his maintenance manager still had to conduct an independent interview of the candidate before offering a job. *Tr. at 279:18-280:1*.

Maintenance supervisor DaSilva testified that he participated in interviews with maintenance manager Rizai (*Tr. at 364:23-365:6*), and although he shared his thoughts on the candidate with Rizai, DaSilva testified that he never issued nor signed an offer of employment letter. *Tr. at 406:13-19*. Maintenance supervisor Wilson testified that while he was present at

interviews, he had not done so since being transferred to Ossining (*Tr. at 586:11-12*) and, regardless, he did not have the authority to hire anyone. *Tr. at 588:6-8*. Further, the testimony of senior portfolio maintenance director Meehan was that any offer of employment required his final approval. *Tr. at 160:25-161:4*. These facts, along with the relevant Board case law as outlined by the Regional Director in his decision, supported his finding that "the Employer has not shown maintenance supervisors have authority to hire or effectively recommend hiring within the meaning of the Act." *RD Dec. at 8*.

2. Work Assignments made by Maintenance Supervisors Did Not Involve the Requisite Independent Judgment which would Establish Assignments as an Indicia of Supervisory Status

The Employer also failed to satisfy its burden of proving that in accordance with *Oakwood Healthcare, Inc., 348 NLRB 686 (2006)*, maintenance supervisors "assign" maintenance technicians by "designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee" while using "independent judgment." *Oakwood, at 692-93*. As noted by the Regional Director:

> The Hearing Officer found that the maintenance supervisors have little, if any, input in designating technicians to particular communities or shifts, and that the hours of work are for the most part set by the Employer at a higher level. He found further that the record evidence did not show that the maintenance supervisors use independent judgment in making determinations about overtime assignment and vacation approval. ***The record evidence of delegation of tasks from maintenance supervisors to technicians likewise did not show independent judgment as the case law has explained it***. ***The maintenance tasks performed by technicians are typically of a routine and repetitive nature, allowing for one technician to replace another on a given task, and the technicians' skill sets do not vary significantly***. Thus, the Hearing Officer found that the maintenance supervisors are not required to exercise significant discretion, to the degree they "assign" tasks.

RD Dec. at 9 (emphasis added).

The Regional Director correctly found that the maintenance technicians "are generalists who maintain apartments." *Id. at 10*. The Regional Director wrote that "[t]here is no evidence

that they are distinguishable to a significant degree by special skills such as plumbing or electrical work." *Id*. To that point, maintenance manager Pieragostini testified to the manner in which work is routinely assigned and how maintenance technicians reserve the right to switch assignments on their own:

> I assign when each thing should take place, so that way the guys can see their day. The guys, depending on their day, or the day of the thing will look at it, and depending on what's happening ***they'll decide***, hey, I started painting this one, you take the maintenance on this one, if it just started. Or if it's need be, I could say, hey, I want one of you to take this unit as maintenance, because they may be more knowledgeable in handling the maintenance of a certain —

Tr. at 275:18-25 (emphasis added). Similarly, maintenance manager Perez testified, not to specific skills of each technician, but instead that work assignments were made by reviewing the MRI system and making assignments "depending on the priority." *Tr. 201:24-25*. Once again with no reference to particular skills, maintenance supervisor Da Silva testified that "we usually assign the daily based on what's happening in the community." *Tr. 357:7-8*. Finally, maintenance supervisor Wilson testified that assignments are made to technicians based upon the "maintenance needs of the assigned community to ensure the physical condition of the community." *Tr. 576:23-25*.

Although he could not testify to specific examples concerning the assignment of work by any maintenance supervisor employed in Westchester County, Meehan testified that when he worked as a maintenance supervisor in Connecticut many years ago, he assigned work to technicians. *Tr. at 22:11-13*. This testimony, however, had nothing to do with the current situation and as recognized by the Regional Director, could be provided its appropriate weight since it was testimony "based on memories of conditions as they existed years ago, or in a remote location." *RD Dec. at 5*.

Finally, the hours worked by maintenance technicians (along with maintenance supervisors) are set by the Employer. *Tr. at 219:5-9*. The Regional Director confirmed that "the Employer acknowledges that the maintenance department hours are preset." *RD Dec. at 9*. Accordingly, the Regional Director concluded that "[t]he Hearing Officer correctly found that the assignments by the maintenance supervisors are similarly largely based on the known skills of the technicians and thus do not involve the requisite independent judgment which would establish the assignments as an indication of supervisory status." *Id. at 11*.

3. The Employer Failed to Produce Sufficient Evidence to Establish that Maintenance Supervisors "Responsibly Direct" Maintenance Technicians

In concluding that maintenance supervisors do not responsibly direct technicians, the Regional Director recognized that the Employer "did not establish that the maintenance supervisors used independent judgment in directing the technicians, because the work of the technicians is largely repetitive and the manner of performance of the work is largely proscribed by the Employer at levels above that of the maintenance supervisors." *RD Dec. at 11*. The job descriptions for maintenance supervisors and each level of technician show that supervisors and technicians collectively perform hands-on work in order to maintain the grounds, facilities and apartments in each community. *Er. Ex. 1* (duties of a maintenance supervisor include addressing "the maintenance needs of assigned community to ensure the physical condition of the community"); *Pr. Ex. 3* (duties of maintenance technician I include maintaining "all grounds, including sidewalks, public walkways and stairways, building exteriors, and garden areas in a neat, clean and attractive condition"); *Pr. Exs. 4 & 5* (duties of maintenance technicians II and III include conducting "apartment Preventative Maintenance (PM)").

The Employer's reinvented argument concerning "merit increases establishing accountability" must be disregarded in its entirety because it does not rely upon the record

developed at the hearing. *Er. Req. Rev. at 25-27*. Instead, it is an argument unsupported by the record. No one testified as to how any "merit wage" was ever supposedly calculated for any of the maintenance supervisors. As the Hearing Officer's report states: "it is unclear how different categories are weighed in determining the overall score, and therefore that exhibit provides little insight." *HOR at 7.* Accordingly, this argument should not be considered at this time. *See Rules & Regulations Sec. 102.67(e)* ("Such request may not raise any issue or allege any facts not timely presented to the Regional Director.")

The key component of finding supervisory responsibility over directing work requires that "the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." *Oakwood, 348 NLRB at 691-92*. Witnesses testified that the Employer never reprimanded a maintenance supervisor for failing to direct work. *Tr. at 253:22-25; 262:21-263-6; 263:14-18*. As stated by the Regional Director: "the record is devoid of actual examples linking the maintenance supervisor's ratings or bonuses to the work of technicians under them." *RD Dec. at 12*.

Based upon each of the factors discussed above, it is respectfully submitted that the Regional Director properly concluded that he was "not persuaded that the evidence shows maintenance supervisors to be held responsible for the technician's work, or that they otherwise 'responsibly direct' the work of technicians." *RD Dec. at 12*.

4. The Record is Devoid of Sufficient Evidence that Maintenance Supervisors Have the Authority to Promote or Reward Maintenance Technicians

The Regional Director correctly concluded "that there was no reliable evidence establishing that maintenance supervisors promote, or effectively recommend promotion, of

technicians." *Id*. In support of its argument to the contrary, the Employer relies on two (2) "promotion" examples testified to during the hearing. *Er. Req. Rev. at 32*. In connection with the first "promotion", the Hearing Officer's report details maintenance supervisor DaSilva's testimony that he participated in the interview of Lucas Peterle for a promotion with his maintenance manager, Ralph Capozzi. *HOR at 28*. Thereafter, "Capozzi 'sat down' with Peterle to describe the position and presumably speak to him about it." *Id*. DaSilva never saw Peterle's application for the promotion position and did not testify to interviewing the candidate alone. *Tr. at 363:24-365:9*. Without the Employer calling senior maintenance supervisor Capozzi to testify, the Hearing Officer properly concluded that it was impossible to determine whether he followed a "promotion recommendation from DaSilva." *HOR at 28*. The other "promotion" example relied upon by the Employer at the hearing also lacked necessary facts to support its contention that maintenance supervisor Pieragostini effectively recommended the promotion of Manuel Alfaro from the maintenance technician II position to the maintenance technician III position. *HOR at 27*. Pieragostini testified that while he had prepared evaluations in the past, those evaluations were subject to review after they were uploaded to the Employer's computer system and he never made any decision concerning a wage increase for a maintenance technician. *Tr. at 318:10-22*.

In reviewing the record, the Regional Director concluded that "the few purported examples of promotion cited by the Employer, upon closer inspection, reveal involvement of a higher level manager." *RD Dec. at 12*. Since higher level management was involved, the Regional Director explained that the "evidence does not establish that maintenance supervisors, on their own authority, make promotional decisions." *Id*. Finally, the Regional Director concluded that the evidence presented concerning maintenance technician evaluations was insufficient "to establish that maintenance supervisors prepare those evaluations." *Id. at 13*.

Once again, the insufficiency of the evidence produced by the Employer led to the Regional Director to decide that the Employer failed to prove that "maintenance supervisors have the authority to promote or reward employees." *Id*.

5. Maintenance Supervisors Do Not Discipline or Discharge Maintenance Technicians

In order to "confer supervisory status based on the authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. *RD Dec. at 13 quoting Veolia Transportation Services, 363 NLRB No. 98 slip op. (Jan. 20, 2016)*. The Employer once again failed to carry its burden of proof as explained by the Regional Director: "[t]he record does not support finding the Discussion Records to constitute a step in the Employer's progressive discipline policy." *RD Dec. at 13*. During the hearing, the Employer offered into evidence six (6) "associate discussion records" signed by maintenance supervisors in Westchester County between April 25, 2013 and June 28, 2017 as well as a single "verbal counseling record" opened by maintenance supervisor Wilson dated February 13, 2018 which he testified to was done at the direction of his maintenance manager. *Tr. at 616:22-25*. With regard to the "verbal counseling record," the Regional Director concluded that "warnings indicating an employee has performed poorly do not prove supervisory authority if they do not have a place in a progressive discipline policy or otherwise include recommendations for future discipline." *RD Dec. at 13 citing Williamette Industries, 336 NLRB 743, 744 (2001)*. As was the finding of the Hearing Officer based on the testimony and exhibits submitted by the Employer, the Regional Director concluded that there could not be a finding that the Employer had a progressive discipline policy which relied upon verbal warnings issued by maintenance supervisors. *RD Dec. at 13*. Further, there was no evidence deduced at the hearing showing how any of these "discussion records" were relied upon by management in reprimanding or otherwise

disciplining maintenance technicians. In fact, the Regional Director held that merely placing a "discussion records" in a technician's personnel file, did "not amount to evidence that the Discussion Records served as a basis for, or warning of, future discipline." *Id*.

6. The Employer's Mere List of Purported Secondary Indicia Does Not Support its Request for Review

The Employer's contention that "maintenance supervisors possess numerous indicia of supervisory status, which provide strong corroborating evidence that maintenance supervisors are Section 2(11) supervisors" is not supported by the record in this case. *Er. Req. Rev. at 35-36*. As stated by the Regional Director in his decision: ". . . I am not persuaded that secondary indicia here function to endow the maintenance supervisors with supervisory status." *RD Dec. at 14*. The record supports this conclusion.

a. Maintenance Supervisors' Training

During the course of the hearing, the Employer submitted into evidence "Manager Course Completion Reports" for each of the four (4) maintenance supervisors which purport to identify "management" courses taken by them. *Er. Ex. 30*. For calendar year 2019, the maintenance supervisors all took "workplace harassment prevention for managers" and three (3) of the maintenance supervisors took "people manager orientation." *Er. Ex. 30*. However, subsequently submitted "Course Completion Reports" for each of the maintenance supervisors as well as the maintenance technicians show that they completed many identical courses including required OSHA training classes every year. *Er. Ex. 31*.

b. Time Keeping

The Employer renews a previous claim that maintenance supervisors "enter their time online rather than using biometric devices." *Er. Req. Rev. at 35*. This statement, however, is not entirely accurate. During the hearing, Meehan testified as follows:

Q: Okay. Timekeeping. The Kronos time system is what employees use to punch in

and punch out. Fair to say? Have I got that right?
A: Yes.
Q: Okay. Is that used by the maintenance techs and the maintenance supervisors?
A: Maintenance techs, that's the only way they can punch in and punch out. Maintenance supervisors can use that ***or*** they can also use the web-base system.

Tr. at 164:10-18 (emphasis added). Therefore, contrary to the Employer's claim, maintenance supervisors are not limited to entering their time only online. As testified to by Meehan, maintenance supervisors may use the Kronos-biometric time keeping system.

c. Review and Approval of Time Cards, Overtime and Vacation Requests

The Hearing Officer's report found that "the approval of the timecards and vacation and overtime requests appears to be largely pro forma and done as a matter of course." *HOR at 31*. In support of this determination, the report cited *Golden Crest Healthcare Center*, *348 NLRB 727 (2006)*, which held that supervisory status is not indicated by routine and clerical authority to verify employees' time cards.

The only testimony elicited on the "approval process" came from maintenance manager Perez. *Tr. at 211:6-8*. The exhibit referenced by the Employer in its Request for Review consists of four (4) random weekly time sheets which identify "time card approval" by a maintenance supervisor. *Er. Ex. 38*. The "approval" provides no commentary on the assignment of overtime to any of the four (4) maintenance technicians to whom each time sheet applies. Instead, "time card approval" reflects that the maintenance supervisor confirms the actual hours worked by each of these maintenance technicians. *Tr. at 583:16-20*.

With regard to the Employer's claim that maintenance supervisors "approve vacation time requests" (*Er. Req. Rev. at 35-36*), the record was developed on this point to a greater extent than the one (1) page of the transcript cited by the Employer. The record shows that maintenance supervisors were tasked with documenting vacation or other leave as sought by maintenance technicians in log books. *Tr. at 422:16-25*. Maintenance supervisor DaSilva

testified to a simple process in which vacation is allowed so long as no other employee has already requested the same days off. *Tr. at 421:16-25*. He also testified to occasions where maintenance technicians would go directly to a maintenance manager to request time off. *Tr. at 422:9-12*. Maintenance supervisor Wilson testified that he referred requests for vacation and other time off to his maintenance manager. *Tr. at 601:6-11*.

d. Evaluation of Maintenance Technicians' Performance

To support this purported category of supervisory authority, the Employer references two (2) year end performance reports for maintenance technicians. *Er. Req. Rev. at 36*. In one report, the document is signed under the title "Manager's Signature" by maintenance manager Rizai. *Er. Ex. 7*. The other report is signed under that same title by maintenance supervisor Pieragostini. Er. Ex. 6. Despite twenty (24) maintenance technicians being employed by the Employer at its six (6) Westchester communities only these two (2) reports were produced during the course of the hearing.

e. Rates of Pay

The Employer contends that maintenance supervisors receive a higher rate of pay than maintenance technicians.[2] *Er. Req. Rev. at 36.* Maintenance technician Balfe and maintenance supervisor Wilson testified that their hourly rates of pay are $24.25 and $36.00, respectively. *Tr. at 558:23-25 & 572:23-24*. They also testified that their overtime rate is at time and one-half. *Tr. at 559:1-2 & 572:25-573:4*. The range of hourly rates of pay for the following titles effective February 24, 2019 was:

Maintenance Technician I - between $17.19 and $18.30
Maintenance Technician II - between $19.00 and $20.22
Maintenance Technician III - between $22.33 and $27.79
Maintenance Supervisor - between $27.30 and $36.42

[2] Senior portfolio maintenance director Meehan testified that maintenance supervisors and technicians are paid an hourly rate while maintenance managers are salaried employees. *Tr. at 173:16-21*.

Er. Ex. 44. It should be noted, and contrary to the Employer's contention, there is at least one maintenance technician III who is paid a higher hourly rate than at least one maintenance supervisor. As recognized in the Hearing Officer's report, ". . . maintenance supervisors are paid hourly and at a similar rate (albeit slightly higher) to that of technicians, with at least one technician III ***earning more than*** a maintenance supervisor." *HOR at 31 (emphasis added)*.

f. Cell Phone Reimbursement

The Employer contends that maintenance supervisors "receive reimbursement for cellphones whereas Maintenance Technicians do not receive reimbursement." *Er. Req. Rev. at 36.* Reimbursement, however, is not provided as a matter of course. Instead, maintenance supervisors are required to request reimbursement should they use their personal cell phones for work related matters. *Tr. 175:14-16*. No testimony was solicited from any of the maintenance supervisors that they have ever requested or received such reimbursement.

g. "Viewed as Leaders"

In support of the rather innocuous statement that maintenance supervisors "are viewed as leaders" (*Er. Req. Rev. at 36*), the Employer relies upon a single word answer of "yes" to the leading question of "Is it also fair to say that the technicians in Westchester look up to you as a leader?" *Tr. 641:21-23*. This stand alone response from maintenance supervisor Wilson coupled with the unexplained citation to the witness's 2017 and 2018 performance evaluations provide no basis to support the Employer's contention that the position of maintenance supervisor is covered by Section 2(11) of the Act.

h. Attendance at Management Meetings

The sole piece of evidence submitted by the Employer in connection with the attendance of maintenance supervisors at management meetings where maintenance technicians were not

present, is a single leadership training session held at a Marriott Hotel that maintenance supervisor Wilson confirmed he attended. *Tr. 629:7-15*. However, that event was neither identified with a date nor subject matter. Wilson also testified that he once was invited by email to attend a corporate management retreat in 2018 but that invitation was quickly rescinded by an email which stated that "it was done in error." *Tr. at 602:11-19*.

i. "Held Out to the Public as Supervisors"

It is undisputed that "while maintenance supervisors wear an ID badge that lays out their title, they are required to wear the same uniform as technicians." *HOR at 31*. Maintenance managers do not wear ID badges (*Tr. at 239:17-20*; *173:19-21*) and only hourly paid employees are required to wear badges. *Tr. at 26:3-5*; *558:23-25 & 572:23-24*. The testimony of senior portfolio maintenance director Meehan was that only hourly Avalon Bay associates are required to wear badges. *Tr. at 26:3-5*. Maintenance supervisors and maintenance technicians are hourly employees. *Tr. at 558:23-25 & 572:23-24*. Maintenance managers are salaried positions. *Tr. at 173:19-21*.

For each of the reasons outlined above, *supra Point I,* it is respectfully submitted that the Employer has failed to carry its burden of proof with respect to each of the Section 2(11) indicia it continues to try and rely on in claiming that the maintenance supervisors are statutory supervisors under the Act. Accordingly, its Request for Review of the Regional Director's Decision does not raise substantial issues warranting review and should be denied.

POINT II

THE REGIONAL DIRECTOR PROPERLY CONCLUDED THAT THE ELECTION WAS NOT TAINTED BY THE CONDUCT OF THE MAINTENANCE SUPERVISORS

In its Request for Review, the Employer returns to the same two (2) claims made during the hearing and within its multitude of filings throughout this case, that the maintenance

supervisors solicited authorization cards and made retaliatory threats regarding the housing benefits available to employees. *Er. Req. Rev. at 37-46; see also HOR at 36-37.* The Regional Director concluded, however, that "I find that even were the maintenance supervisors found to be supervisors under Section 2(11) of the Act, their conduct, as revealed by the relevant evidence at the hearing, was not objectionable and did not materially affect the outcome of the election. *RD Dec. at 14*.

A. The Record Evidence Concerning the Employer's Argument of Supervisory Taint

To reach this conclusion, the Regional Director concurred with the Hearing Officer's determination that maintenance supervisors were involved in discussions with maintenance technicians about Local 30's organizing campaign, but "the Union did not conduct its campaign 'by and through' the maintenance supervisors" and "there was no evidence precisely establishing the timing of the discussions about the Union between maintenance supervisors and technicians." *Id*.

1. The Purported Solicitation of Authorization Cards and Discussions about Local 30

In connection therewith, the Regional Director addressed in detail the Employer's argument concerning the purported solicitation of authorization cards by maintenance supervisors. For instance, with regard to the testimony of maintenance supervisors Wilson and DaSilva, which centered upon the return of perhaps as many as three (3) cards in a birthday card envelope, the Regional Director concluded that "the record is devoid of direct testimony as to who (a technician or maintenance supervisor) DaSilva gave cards to, who signed those cards, who returned them to DaSilva, how many cards were returned to Wilson, and if those cards were even signed at all." *RD Dec. at 15*. This statement alone identified five (5) questions that the Employer left unanswered at the hearing. Most importantly, at no point during the hearing did

the Employer even question DaSilva about his purported solicitation of authorization cards. *Id*. The failure of the Employer to solicit direct testimony on this key point from its own witness is a prime example of its inability to satisfy the burden of proof in this case. Therefore, as the Regional Director explained, the Employer's attempt to place blame on the Hearing Officer is meritless since the Hearing Officer advised the Employer that he could question the witness regarding who handed out the cards. *RD Dec. at 16 citing Tr. at 384*. In fact, the multitude of witnesses called by the Employer could have been asked "as to whether DaSilva solicited signed union cards from technicians." *RD Dec. at 16*. Only the Employer can explain why it failed to ask this simple question.

Regarding supposed "widespread" pro-union discussions as alleged by the Employer (*Er. Req. Rev. at 36*), the Regional Director reviewed the evidence which showed that while Wilson and Ryska indicated that they favored Local 30, maintenance supervisors DaSilva and Pieragostino held the opposite opinion. *RD Dec. at 16*. With regard to the latter point, maintenance technician De Carvalho testified that DaSilva and Pieragostini spoke with him and expressed their lack of support for Local 30's organizing campaign. *Tr. at 525:11-13*. During the hearing, maintenance supervisor Wilson testified that he shared three (3) experiences with coworkers: (1) an altercation with a manager that led to his suspension; (2) being hospitalized for carbon monoxide poisoning; and (3) having been transferred to Ossining. *Tr. at 606:17-607:17; 609:1-7*. Wilson also testified that he told his coworkers: "But my decision doesn't affect your decision. My beliefs in what took place has got nothing to do with you all. So I just wanted to specify what actually took place and it has nothing to do with them." *Tr. at 607:1-4*. There was no testimony that Mr. Wilson ever directed, demanded or suggested that any coworker vote in favor of union representation.

A significant portion of the Employer's argument rests upon what Wilson said and who heard it during the April 22, 2019 employees' only meeting. *Er. Req. Rev. at 43*. Wilson described the meeting as "a shouting match." *Tr. 605:13*. Maintenance supervisor DaSilva described the meeting as "chaotic". *Tr. at 399:22-400:2*. He also testified that Wilson "didn't speak much" during the meeting. *Tr. at 390:16-25*. Maintenance technician Savino testified that Wilson never made a "direct statement as to his opinion" concerning whether anyone should vote for the union. *Tr. at 543:4-6*. Maintenance technician De Carvalho testified that during the meeting maintenance supervisor Pieragostino suggested that the employees "just basically form our own union." *Tr. at 510:3-6*. Also, the Regional Director found it significant that "Ryska was also known to be planning to leave his position, and in fact he was no longer working in any capacity for the Employer by the time of the election." *RD Dec. at 16.*

2. Testimony Concerning the Housing Benefits

As noted by the Regional Director, the Employer provides rent discounts to employees who live in one of the communities. *RD Dec. at 17*. While a very limited number of unit employees use the housing benefits, the testimony concerning the Employer's purported threat to eliminate the housing benefits if maintenance supervisors and technicians voted in favor of organizing was found to be "unclear" as to "what was said, and by whom." *Id*. For instance, maintenance technician Riera testified that he "heard technician Balfe and Maintenance Supervisor Ryska say that Senior Maintenance Portfolio Director James Meehan had said the Employer would take housing benefits away from employees and that 'everybody was going to end up on the streets.'" *Id*. Additionally, maintenance technician De Carvalho testified that Ryska and technician Anthony Pagnotta had said that Meehan would "retaliate." *Id*. However, Balfe testified that he did not relay any threat from Meehan and instead when specifically asked about whether the housing benefit could be lost, he said "he did not think employees would lose

them." *Id*. Further, maintenance supervisors DaSilva and Pieragostini did not testify as to saying or hearing anything about the housing benefit, and in fact DaSilva testified that he "did not even recall whether Ryska or Wilson said anything at the meeting [about the housing benefit], which he described as chaotic, with multiple people speaking over each other." *Id*. Finally, maintenance technician Savino did not testify about the housing benefit issue. In addressing the Employer's objections to the manner in which the Hearing Officer considered the testimony of Riera and De Carvalho, the Regional Director explained:

> I find that the Hearing Officer had a clear basis for discounting the testimony of Riera and De Carvalho relating to the pervasiveness of reference by maintenance supervisors to the possible loss of housing benefits. Multiple other witnesses failed to corroborate the "thought" expressed by De Carvalho that other employees were scared that the Employer would take away the housing benefit. In fact, they testified to having no memory whatsoever of the "threat". Furthermore, the Hearing Officer did not, as the Employer claims, ignore Riera's testimony. Rather, he considered it and evaluated it in the context of all the testimony about the issue, including much testimony which did not corroborate Riera's characterization of Ryska's housing concerns being communicated at some point the presence of "everyone," or De Carvalho's stated thought that employees in general were fearful because Ryska said Meehan would take away housing benefits.

RD Dec. at 18. In finding that he was in agreement with the Hearing Officer, the Regional Director stated: ". . . that maintenance supervisors' statements about possible loss of housing benefits were not pervasive. The weight of the testimony indicates that a few comments about the housing benefits were made during general discussions covering numerous other work place issues." *Id*.

3. The Margin of Victory

It is undisputed that setting aside the challenged ballots of the maintenance supervisors, eighteen (18) votes were cast for Local 30 and five (5) votes were cast against the union. *RD Dec. at 18*. If the four (4) challenged ballots were added to the losing tally, "it would have to be shown that at least five votes for the Union were the result of unlawful coercion, and would have been cast against the Union to change the result of the election." *Id*. As explained hereafter, the

Employer has failed to carry its burden that at least five (5) votes were affected due to supposed supervisory taint.

B. The Regional Director Properly Applied the *Harborside* Framework

As detailed in the Regional Director's decision, he explained and then applied the legal framework in the governing case of *Harborside Healthcare, Inc., 343 NLRB 906 (2004)* to determine "whether laboratory conditions for a fair election have been undermined." *RD Dec. at 18*. In reaching his conclusion that the conduct of the maintenance supervisors "was not coercive, and did not interfere with employees' free choice in the election, and did not materially affect the outcome of the election", the Regional Director relied upon the fact that the the relevant case law was applied to the facts as developed by the record at the hearing. *Id. at 19*.

1. The Regional Director Correctly Found that Any Pro-Union Conduct of the Maintenance Supervisors Did Not Tend to Coerce or Interfere with the Maintenance Technicians' Exercise of Free Choice in the Election

a. The Nature and Degree of Supervisory Authority

Based upon the record and discussed in great detail throughout his decision, the Regional Director found that the maintenance supervisors did not "possess significant supervisory authority" and that any maintenance supervisor being looked on as a "leader" by technicians could not serve as a basis for interference with free choice since under *Harborside*, such interference would have to emanate from supervisory authority and not leadership attributes. *Id. citing Harborside, 343 NLRB at 912*.

b. The Nature, Extent and Context of the Conduct in Question

The Regional Director explained that the Employer failed to meet its burden of showing that the "'nature, extent, and context,' of pro-union conduct by maintenance supervisors would reasonably be found to have coerced or interfered with the employees' exercise of free choice in the election." *RD Dec. at 19.* In connection with the Employer's claim that the maintenance

supervisors "engaged in 'inherently coercive' conduct by soliciting union authorization cards" from the maintenance technicians, the Regional Director held that the Employer's reliance on *Madison Square Garden, 350 NLRB 117 (2007)* and *Chinese Daily News, 344 NLRB 1071 (2005)* was misplaced. In the former case, statutory supervisors circulated a flyer which included their names and solicited union authorization cards from employees. In the latter case, statutory supervisors "watched employees under their direct supervision sign union authorization cards, and then collected the cards" which was deemed inherently coercive conduct. *RD Dec. at 20*. Herein, as explained by the Regional Director, the Employer did not carry its burden because there was "no direct evidence that any maintenance supervisor solicited cards from any technician." *Id*. Particularly, the Employer did not prove that maintenance supervisor DaSilva solicited authorization cards from technicians. *Id*.

Further, the Employer's contention that maintenance supervisors "Ryska, DaSilva, and Wilson participated in widespread prounion discussions with Maintenance Technicians regarding authorization cards throughout the critical period" (*Er. Req. Rev. at 37-38)*, is unsupported by the record. In fact, maintenance supervisor Wilson did not solicit cards from any technicians (*Tr. at 632:10-12; 635:8-10*); maintenance supervisor DaSilva received an authorization card from maintenance technician Balfe (*Tr. at 383:17-22*); and while DaSilva contacted Wilson for authorization cards, there was no direct evidence as to whether signed cards were returned to Wilson inside a birthday card envelope and how many cards were actually contained therein. *Tr. at 632:3-9*. As stated by the Hearing Officer in his report:

> Thus, we are left with the mystery of who DaSilva spoke to after he received the authorization cards from Wilson, who signed the cards, how many cards were signed, if the cards were signed at all, if DaSilva actually spoke to anyone or just returned blank cards, and if DaSilva solicited cards from his direct subordinates.

HOR at 38.

This mystery is in no way solved as the Employer claims in its Request for Review. *Er. Req. Rev. at 38-40.* First, the testimony of maintenance supervisor Wilson that it relies upon for the purported collaboration between DaSilva and Wilson does not provide any evidence as to whom DaSilva met with in White Plains or from whom he possibly received signed authorization cards. Instead, Wilson's testimony was that upon providing DaSilva with authorization cards, "he got cards, went to White Plains and spoke," and some days thereafter DaSilva handed Wilson a birthday card with an unknown number of possibly signed authorization cards inside which Wilson considered to be "confidential." *Tr. at 632:3-9*. The only testimony relied upon by the Employer from DaSilva is that he worked for three (3) years as a maintenance supervisor in White Plains through July of 2019. *Tr. at 352:21-353:3*. As found by the Regional Director: "[t]o the degree DaSilva communicated in any respect with employees at White Plains about the Union, he was likely not the maintenance supervisor at that location at the time. The evidence indicates that DaSilva was transferred from that location as of March 18, more than a week before the petition was filed and more than a month before the election was held." *RD Dec. at 20*.

The Employer once again makes the unsubstantiated argument that maintenance supervisors engaged in "pressure tactics" which included making a "threat" that employees could lose housing benefits if they voted for the union. *Er. Req. Rev. at 41*. While the Employer relies upon *First Lakewood Associates, 231 NLRB 463 (1977)* to support its position, the Regional Director held that the testimony in the record did "not clearly indicate that maintenance supervisors relayed a *threat*." *RD Dec. at 21 (emphasis in original)*. Instead, the evidence showed that there was "a rumor that Meehan had said employees would be losing housing benefits." *Id*. As explained by the Hearing Officer:

> Lastly, the Employer argues that Ryska engaged in impermissible coercion because he conveyed the "false threat" that the Employer would discontinue housing benefits if

> employees voted in favor of the Union. However, testimony on the subject is a bit vague -- painting a confusing picture as to who said what, what was said, and who heard these statements. Technician Riera testified that he heard comments about the Employer potentially removing housing in response to organizing from both Ryska and fellow technician Balfe during the campaign. However, Riera clarified that he first heard the comment from Balfe. Similarly, Technician De Carvalho testified that he heard similar things from Ryska, but also from a fellow technician, Anthony Pagnotta. Additionally, Riera testified that at the April 22, 2019 employees-only meeting, the "whole housing" issue was indeed raised again, presumably by Ryska. However, Technicians De Carvalho and Savino testified that they did not recall Ryska speaking at that meeting. As such, the testimony is vague, unspecific, and it is unclear who actually heard any statements made by Ryska.

HOR at 40-41. In connection with this testimony concerning the housing benefits, the Regional Director properly concluded that threats of the type made in *First Lakewood* and *Harborside*, were "significantly different both in severity and in kind from any of the comments purportedly made by the maintenance supervisors here." In contrasting the facts of *First Lakewood*, the Regional Director found that: (1) the potential harm of losing a 20% housing discount was relatively slight as compared to the loss of an apartment; (2) there was insufficient evidence that maintenance supervisors relayed a "threat" while the testimony showed that both maintenance supervisors and technicians had mentioned a "rumor" about Meehan discontinuing the housing benefits; and (3) the Employer's argument seemed to focus on the fear created over Meehan's alleged comment as compared to an actual threat about the potential loss of the housing benefits. *RD Dec. at 21*. In concluding that *First Lakewood* did not support the Employer's position, the Regional Director stated: "[e]ven were the evidence clear that the rumor of the housing benefit cut came from maintenance supervisors, this supposed attempt at manipulation does not amount to conduct the Board has found to be unlawfully coercive. *Id*.

Similarly, the Regional Director found that the facts surrounding the actions of the statutory supervisor in *Harborside* also did not support the Employer's position in this case because therein "a statutory supervisor told employees they 'had to' attend all union meetings,

badgered them to vote for the union, and repeatedly threatened employees with discharge." *Id*. In distinguishing the current matter, the Regional Director explained that the evidence presented was "significantly different both in severity and in kind from any of the comments purportedly made by the maintenance supervisors here" since none of the maintenance supervisors threatened any technician with the loss of his job if he did not vote for Local 30 or any of the other litany of threats imposed upon the employees by the statutory supervisor in *Harborside*. *Id*. Most significantly, the Regional Director disagreed with the Employer's contention that invocation of Meehan's name by "low-level supervisors" some how transformed "the repetition of a rumor into a coercive threat." *Id. at fn. 19*. Accordingly, it is respectfully submitted that the evidence does not support the first prong of the *Harborside* standard.

2. The Regional Director Correctly Found that the Conduct of the Maintenance Supervisors Did Not Materially Affect the Outcome of the Election

The Regional Director's decision acknowledges that the Hearing Officer found that even if the maintenance supervisors were statutory supervisors under the Act and had engaged in coercive conduct under the first *Harborside* prong, "any such conduct could not be found to have materially affected the outcome of the election." *RD Dec. at 22*. To begin with, the Regional Director acknowledged that the Employer's principal argument was that the purported "coercive conduct" of the maintenance supervisors was "widespread" and "impacted more than five employees." *Id*. The evidence proffered on both of these claims was insufficient to support the Employer's allegation. In connection with the Employer's continuing contention that Ryska had influence over nine (9) employees at two (2) communities (*Er. Req. Rev. at 46-47*), the Regional Director found that it was "limited by his impending departure from the Employer." *Id*. The bases for the Regional Director's conclusion is discussed above and throughout his decision.

The Employer also contends that DaSilva had influence over the maintenance technicians he supervised previously at the White Plains community and then currently at the Willow community. *Id. at 47*. However, DaSilva testified that he did not support Local 30's organizing campaign, as corroborated by the testimony of maintenance technician De Carvalho and, therefore, the evidence does not support the Employer's argument. *RD Dec. at 22*.

Finally, the Employer contends once again in its Request for Review that Wilson had influence over ten (10) maintenance technicians comprising the eight (8) employees he had previously supervised at the Green community and the two (2) employees he was currently supervising at the Ossining community. *Er. Req. Rev. at 47.* To support its argument, the Employer claims that maintenance technicians from a number of communities heard Wilson airing "his grievances and attempted to persuade coworkers that AvalonBay could not be trusted." *Er. Req. Rev. at 48 citing Tr. at 509, 540-542, 636-37*. This claim, however, as explained by both the Hearing Officer and the Regional Director was not supported by the facts. As explained above, Wilson testified that his comments reflected three (3) specific events that had transpired between himself and the Employer. *See supra II.A.1*. The "employees only meeting" that the Employer so heavily relies upon was not an organized affair with individual speakers addressing the group. *Er. Req. Rev. at 48*. Instead, at least two (2) witnesses described the meeting as being either "a shouting match" or "chaotic." *Tr. at 607:1-4; Tr. at 399:22-400:2*. Another witness, maintenance technician Savino testified, as previously stated above, that Wilson never made a "direct statement as to his opinion" concerning whether anyone should vote for the union. *Tr. at 543:4-6*.

Beyond these facts, the Regional Director also reviewed the same case law that the Employer relies upon in its Request for Review for the proposition that the Region's analysis of the second *Harborside* prong is wrong. *Er. Req. Rev. at 49-50*. In addressing *Terry Machine*

Co., 356 NLRB No. 120 slip op. (Mar. 28, 2011), the Regional Director explained that supervisor conduct did not materially affect the outcome of an election where an employer's campaign "otherwise made clear the pro-union supervisors did not represent the employer's position" and therefore "sufficed to mitigate the solicitations by the pro-union supervisors." *RD Dec. at 23 citing Terry Machine, slip op. at 5*. In contrast, the Regional Director properly found that in the instant case, "the evidence shows that the Employer held several meetings related to the Union campaign, and that employees were asked, by maintenance supervisors who were not in favor of the Union, to give the employer more chances and consider organizing independently rather than with the Union." *RD Dec. at 23; HO Report at 44 (". . . the Employer herein mounted an antiunion campaign that involved various meetings with high-ranking officials and attorneys. Wilson testified to five such meetings with all staff. Other witnesses alluded to the Employer's plea to employees to give them a 'chance' in response to unionizing"); Tr. at 307:22-308:5 (testimony of maintenance supervisor Pieragostini questioning the need for the employees to vote for Local 30)*. In concluding that *Terry Machine* was properly applied, the Regional Director found and, this finding is reiterated herein, that "[w]hat evidence there is of the Employer's communicated anti-union position suffices to mitigate the scant evidence of pro-union coercive conduct by two maintenance supervisors." *RD Dec. at 23*.

The Regional Director also explained that the Employer's reliance on *Mid-Wilshire Healthcare Center, 349 NLRB 1372 (2007)* was misplaced and it is respectfully submitted that it continues to be the case in the pending Request for Review. In *Mid-Wilshire*, the Regional Director explained that "the conduct consisted of speaking favorably to one employee about the union, allowing employees to speak with union representatives during work time, and having a union pen and flyer in his office, which at least two employees saw." *RD Dec. at 23*. However, as explained by the Regional Director, the Board concluded that "the limited evidence of an

anti-union campaign by the employer sufficed to establish that employees would have known the employer opposed the union." *Id*.

The Employer renews the same argument it made to the Regional Director that a single footnote found in the *Mid-Wilshire* decision should be relied upon because "no employees testified as to the content of any meetings AvalonBay held regarding the election, much less testify regarding any 'unionbusters' campaign by AvalonBay." *Er. Req. Rev. at 49*. As found by the Regional Director and as the record established, there was such evidence of the Employer's anti-union animus:

> . . . the Employer communicated its anti-union views to its employees, including uncontradicted testimony that there were five meetings between managers and all staff at which the Union was discussed, and that employees were aware the Employer wanted them to give it a "chance." H.O. Report at 44. I note there is also specific testimony that Maintenance Supervisor Brian Pieragostini countered pro-union comments by others by relating, "facts that Avalon had stated," to technicians, and by, "pointing out that Avalon had said that they'd like us to give them a chance . . ." Tr. 549.

RD Dec. at 24. As correctly noted by the Regional Director, his decision was not one based upon "pure speculation" (*Er. Req. Rev. at 50*), "but rather uncontradicted testimony" which "suffices as evidence of mitigation under the circumstances of this case." *RD Dec. at 24*. As discussed herein, it is respectfully submitted that the Regional Director properly found that there was "insufficient evidence to establish that the conduct in any manner reasonably tended to interfere with the employees' free and uncoerced choice in the election." *Id*.

CONCLUSION

Wherefore, Petitioner International Union of Operating Engineers Local 30, AFL-CIO respectfully requests that the Employer's Request for Review of the Regional Director's Decision and Certification of Representative be denied and its Request to Stay Certification Pending Board Review be denied as moot.

Dated: Tarrytown, New York
June 11, 2020

Respectfully submitted,

BRADY McGUIRE & STEINBERG, P.C.

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CERTIFICATE OF SERVICE

I, James M. Steinberg, certified that on June 11, 2020, I caused a copy of the attached Opposition to the Employer's Request for Review of the Regional Director's Decision and Certification of Representative and Request to Stay Certification Pending the Board's Review to be filed with the National Labor Relations Board's Office of the Executive Secretary by e-filing at www.nlrb.gov and upon Counsel for the Employer and the Regional Director for Region 2 by electronic mail at the following addresses:

Avalon Bay Communities, Inc. c/o
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-and-

John J. Walsh, Jr.
Regional Director, Region 2
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Dated: Tarrytown, New York
June 11, 2020

/s/ James M. Steinberg

James M. Steinberg, Esq.