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April 14, 2023

Richard Hopper
Hopkinsville Solid Waste Enterprise
P.O. Box 569
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Via Email to RHopper@hswa.us

Re: *Illegal Demotion of Craig Hawkins for Opposing Fraudulent Kickback Scheme at HSWE, Non-Payment of Overtime Owed to Mr. Hawkins*

Dear Mr. Hopper:

I represent Craig Hawkins. He has asked me to respond to your letter dated March 29, 2023.

As you know, Mr. Hawkins has been employed by the Hopkinsville Solid Waste Enterprise for many years. Prior to 2018, Mr. Hawkins was employed by HSWE as a Commercial Equipment Operator III (colloquially, a truck driver). He was then promoted in 2018 to the position of Supervisor. As will be discussed below, the position of Supervisor is a non-exempt position under the FLSA, but a promotion from the position of truck driver. Mr. Hawkins held that position until some point in 2022. At that point, without informing him that it was doing so (Mr. Hawkins was on leave receiving “comp time” pay at the time), HSWE demoted Mr. Hawkins back to truck driver.

Mr. Hawkins’s demotion was in retaliation for Mr. Hawkins’ complaints regarding a corruption scheme at HSWE. This scheme, of which we believe you are and have been aware, is discussed further below.

However, to answer the question in your letter first, Mr. Hawkins is not willing to accept HSWE’s demotion of him and return to work as a Commercial Equipment Operator III, when his demotion was illegal and is based on his appropriate opposition to the theft that was going on at HSWE. He will not work for HSWE in the position of truck driver.

¹ Licensed in Tennessee and Kentucky.

Having answered that question, Mr. Hawkins would now like to back up and provide some context that would be useful to a reader of this letter who was not aware of the corruption scheme at HSWE. After providing this context, I will address Mr. Hawkins' claim and request that HSWE inform me whether HSWE wishes to discuss resolving Mr. Hawkins' claims or whether Mr. Hawkins should simply file his claims in an appropriate court.

I. The Theft Scheme

As you know, as you requested the records relating to Mr. Swatzell's billing be run immediately after Mr. Sicari left active employment and you took over HSWE, HSWE paid approximately \$1.6 million dollars over the course of ten years to a vendor operated by Mike Swatzell. Mr. Swatzell billed that amount to HSWE for alleged service welding dumpsters and similar metal box structures owned by HSWE. However, in reality, while Mr. Swatzell performed some welding, the real reason Mr. Swatzell billed HSWE so much money is because Mr. Swatzell had an arrangement with HSWE general manager Tony Sicari under which Mr. Swatzell would bill excessive amounts to HSWE, Mr. Sicari would approve the excessive billing and cause HSWE to pay Mr. Swatzell, and Mr. Sicari received kickbacks from Mr. Swatzell.

Mr. Hawkins has text messages between Mr. Swatzell and Mr. Sicari that substantiate their theft scheme. In general, they show Mr. Sicari expressing an incredible amount of attention to the timing and amount of the invoicing by and payment to Mr. Swatzell, as well as to when Mr. Swatzell could "meet up" with Mr. Sicari.

They also include information countering any innocent explanation for Mr. Sicari's interest. For example, on August 28, 2018, Mr. Sicari texted Mr. Swatzell "no invoice???" Mr. Swatzell responded "Migraine today". Mr. Sicari apparently did not get the hint of Mr. Swatzell attempting to have the text thread not incriminate the two of them, and responded "Ladonna doing checks today", prompting Mr. Swatzell to remind Mr. Sicari "we didn't have anything." In other words, on this particular week, Mr. Swatzell had planned on not stealing from HSWE because there was not even any minimal "cover" services provided that would justify an invoice, but Mr. Sicari had been expecting fraudulent invoicing so that he could receive his kickback. Mr. Sicari then responded "oh shit I'm sorry".

As another example, on May 8, 2019, Mr. Sicari texted Mr. Swatzell "did you get your invoice turned in today. I'm thinking of 54 for sponsorship for next Wednesday". On another occasion, Mr. Swatzell texted "I'm probably going to come get more cans to make it look good". Mr. Sicari responded "got it".

On yet another occasion, Mr. Swatzell texted Mr. Sicari "magic number?????" Mr. Sicari responded "how's \$4400.00 sound", to which Mr. Swatzell responded "almost like 4450". Mr. Sicari responded "sounds good".

In early January, 2020 shortly after Mr. Swatzell's text stating "momma says we need money", Mr. Sicari responded "that makes two of us lol sponsor week after next".

At the onset of covid, on March 16, 2020, Mr. Sicari texted the following to Mr. Swatzell:

Don't forget invoice today or tomorrow. My dr wants me to go home so I can be at home for 14 days to self quarantine since I am at high risk with diabetes high blood pressure and COPD most likely leave Wednesday morning be gone until April 1st just hang on to mine next week till I get back I will sure need it.

Apparently, Covid caused inconvenience even in fraudulent kickback schemes.

The following text exchange also occurred in 2020:

Swatzell: same number
Sicari: why not
Swatzell: I can go big
Sicari: what was it I forgot
Swatzell: 35
Sicari: leave it at that
Swatzell: ok
Sicari: no go \$4,200

In January, 2021, Mr. Sicari texted "just trying to make it through the bill you gave me today is that yours or a sponsor. Also, next week Ladonna's off Wednesday so you need to bill on Tuesday." Mr. Swatzell responded "that's Bonnie's and next week I'm just gonna give you yours and I keep the check". Mr. Sicari responded "ok".

I want to emphasis that this is just a sampling. Mr. Sicari and Mr. Swatzell were not the smoothest of criminals, and we believe that we will be able to substantiate the fraud scheme.

II. Mr. Hawkins' Claims

A. Demotion and Constructive Termination in Violation of K.R.S. 61.102

Mr. Hawkins has, in addition to information relating to the fraudulent scheme described above, received additional information relating to Mr. Sicari's demotion of Mr. Hawkins based on Mr. Hawkins' complaints relating to the fraudulent scheme.

Specifically, Mr. Hawkins complained on several occasions relating to the fraudulent scheme. You were involved in connection with one of those occasions. Specifically, when Mr. Hawkins became supervisor and began having access to budget documents, you specifically told Mr. Hawkins to never question Mr. Sicari relating to line items from which Mr. Swatzell was paid.

While Mr. Hawkins did not understand this at the time, he later developed suspicions that the fraudulent scheme was occurring. Despite your instructions, Mr. Hawkins protested to Mr. Sicari during a meeting that the budget would not be in as bad a shape as it was if HSWE didn't spend so much on Swatzell. Mr. Sicari did not respond during the meeting but immediately began conspiring with Mr. Swatzell to take action against Mr. Hawkins, who Mr. Swatzell and Mr. Sicari characterized as trying to "cut our throats" by questioning the theft scheme.

Specifically, Swatzell and Sicari had the following text exchange:

Swatzell sent invoice. Don't let Craig no [sic]
 Sicari ok
 Swatzell I really think he's up to something concerning cans...
 Better make sure he doesn't see what's on invoice. I'm telling he will
 cut our throats
 Sicari we have to watch him I don't trust him worth a shit neither should you.
 He is a sneaky fucker
 Swatzell I don't I've told you before...
 ...
 Swatzell: Craig was being my buddy yesterday like he doesn't know I knew what
 he did
 Sicari snake in the grass
 Swatzell yes sir
 Swatzell [Text of picture of metal with phrase "Fuck BLM!" welded onto the
 metal]
 Swatzell Welded on bottom of cans so when Craig hauls it through hoptown it
 may get interesting
 Sicari oh shit no you can't leave that on I'll get all kinds of bullshit
 Swatzell [after stating that "Fuck BLM!" picture was a "joke,"] second load this
 week
 Sicari looks great
 Swatzell just don't let him tell you he doesn't have boxes
 Sicari fuck him

On another occasion, Mr. Sicari had proposed laying off employees around Christmas time. Mr. Hawkins had gone to Mr. Sicari and told Mr. Sicari that Mr. Hawkins thought the employees should not be laid off at Christmas time but instead HSWE should simply spend less on Mr. Swatzell. Mr. Sicari responded by not laying off the employees, but this further enraged Mr. Swatzell and Mr. Sicari that Mr. Hawkins would suggest that they not steal from HSWE. On January 8, 2021, Mr. Swatzell texted Mr. Sicari "funny after I talked to you yesterday Craig texted me right after", to which Mr. Sicari responded "imagine that".

In short, unlike you, who were helping Mr. Sicari continue his theft scheme by telling employees not to question it,² Mr. Hawkins was actively opposing the theft of funds from HSWE. Mr. Sicari accurately saw this as a threat to his ability to continue to indefinitely steal from HSWE without accountability.

After Mr. Hawkins' home was destroyed by the December, 2021 tornado and he was on leave, Mr. Sicari met with Mr. Hawkins and profusely argued that Mr. Hawkins should take the full amount of "comp time" that he had accrued. Comp time is discussed further below. However, Mr. Sicari did not try to get Mr. Hawkins to take comp time out of any generosity to Mr. Hawkins.

² We understand that HSWE continues to pay Mr. Sicari, despite you having ascended to the helm of HSWE and having access to

Instead, while telling Mr. Hawkins to his face that he should use his compensatory time, Mr. Sicari falsely reported to others in HSWE that Mr. Sicari had not even talked to Mr. Hawkins and that Mr. Hawkins was not a good employee because he was not keeping in touch with HSWE.

Further, Mr. Sicari demoted Mr. Hawkins without even telling Mr. Hawkins that he had done so, and hired TJ Shephard to fill the position. Mr. Shephard questioned how long Mr. Shephard would be in the position, since Mr. Hawkins was the Supervisor and was simply taking comp time, and therefore would be expected to return, but Mr. Sicari told Mr. Shephard that Mr. Hawkins would not return, and that if he did, he would return as a Truck Driver, not a supervisor. HSWE also instructed Mr. Shephard and other employees to have no contact with Mr. Hawkins.

No one at HSWE bothered to tell Mr. Hawkins that he had been demoted from the time of his demotion, which we believe occurred in the summer of 2022, until you provided FMLA paperwork to Mr. Hawkins on or about November 3, 2022.

Further, in the meantime, although Mr. Sicari had previously informed Mr. Hawkins that he had comp time until December of 2022, Mr. Sicari engineered, while Mr. Sicari was on the way out of HSWE, an attempt to have HSWE terminate Mr. Hawkins' employment. Despite Mr. Sicari's efforts in this regard, Mr. Hawkins remained an HSWE employee, albeit one who had been demoted without notice during the time he was taking comp time.

In short, Mr. Hawkins believes that his demotion was prohibited reprisal against public employee for disclosures of violations of law, in violation of K.R.S. § 61.102, and that this demotion, together with the other actions HSWE has taken relating to Mr. Hawkins, constitute a constructive termination of Mr. Hawkins.

B. Non-Payment of Overtime Compensation.

In addition, HSWE violated overtime compensation laws relating to Mr. Hawkins. Specifically, Mr. Hawkins' "supervisor" position was not exempt under the Fair Labor Standards Act. Mr. Hawkins did not have as his primary duty of management of HSWE, but instead continued to be performing his work as a truck driver, as he had prior to the promotion. Mr. Hawkins did not have the authority to hire, fire, or otherwise make management decisions, as you, Mr. Sicari, and other members of top HSWE management repeatedly reminded him. Under these circumstances, Mr. Hawkins should have been paid overtime compensation for his overtime work. As you know, Mr. Hawkins worked many, many overtime hours. However, he did not receive any overtime compensation at all from the time he was promoted to "supervisor".

Instead, HSWE paid Mr. Hawkins forty hours of "comp time" per month, apparently on the theory that Mr. Hawkins was effectively working fifty hours per week, that there were four weeks per month, and that Mr. Hawkins being awarded forty hours of comp time would compensate him for the forty hours of overtime work performed per month.

Notably, true "comp time" is a benefit that is paid to persons who are not exempt from overtime compensation (i.e., are entitled to overtime compensation) as an alternative to overtime compensation in certain very limited, circumstances. Specifically, 29 U.S.C. § 207 (o)(3)(A)

provides that an employee “may accrue not more than two hundred and forty hours of compensatory time for hours worked after April 15, 1986.” The work must be in employment “of a public agency which is state, a political subdivision of a state, or an interstate governmental agency.” 29 U.S.C. § 207 (o)(1). Further, comp time is to be accrued at the rate of 1.5 times the number of overtime hours worked. The employer paying comp time must continue to accurately record the hours worked by the employee receiving compensatory time compensation.

Here, HSWE did not follow the law on pretty much any of these counts. HSWE allowed Mr. Hawkins’s comp time to accrue to great heights, as he essentially did not use it until the tornado. He was not alone in this regard. For example, as of January, 2022, Mr. Sicari had accrued 1,599 hours of comp time, and you had accrued 2,675.5 hours of comp time. Mr. Hawkins accrued, through the same date, 1,608.75 hours of comp time. Several other employees who, like Mr. Hawkins, were also probably misclassified as exempt, also accrued substantial hours in excess of 240 of comp time.

In addition to (a) not recording the hours worked in order to be able to correctly calculate the amount of compensatory time to provide in lieu of overtime wages, and (b) basing the number of comp time hours on (1) a one-to-one ration of (2) the estimated number of overtime hours worked (rather than 1.5 times the actual number of overtime hours worked), HSWE also violated the FLSA by (c) failing to pay overtime compensation when the compensatory time caps were met. At that time (when 240 hours of comp time accrued), overtime should have been paid to Mr. Hawkins for his work. Since HSWE did not pay the overtime compensation at that time as it should have done, HSWE should be liable not only for the unpaid overtime compensation, but also for liquidated damages in a like equal amount and attorney’s fees under 29 U.S.C. § 216(b).

I previously requested that you have HSWE’s counsel, if it has one, contact me, but I never received any communication from any lawyer or any other communication from HSWE.

Mr. Hawkins is willing to discuss his claims and the potential settlement thereof, if HSWE wishes to attempt to resolve these claims through settlement. However, if HSWE is not interested in resolving these claims, please let me know and I will file an action to pursue Mr. Hawkins’ claims.

Thank you.

Sincerely,

/s/ Mark N. Foster

Mark N. Foster