

International Association of Fire Fighters, AFL-CIO-CLC and Office & Professional Employees International Union, Local 2 and William Shoehigh. Cases 5-CA-20244, 5-CA-20466, and 5-CA-20325

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND RAUDABAUGH

On December 11, 1990, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief to the Respondent's exceptions. The Charging Party Union filed cross-exceptions and a supporting brief. The Respondent filed an answering brief to the Charging Party Union's cross-exceptions.

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

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

I. BACKGROUND

The Respondent is alleged to have violated Section 8(a)(5) of the Act by unilaterally implementing, in the absence of an impasse, its "final offer"—containing terms and conditions inconsistent with its prior bargaining offers—without affording the Union an opportunity to negotiate. The facts, provided in detail in the judge's decision, may be summarized as follows. In September 1988,² the parties began negotiations for a successor contract to their 1986–1988 collective-bargaining agreement. The parties exchanged written proposals and met in six sessions from September 27 through December 20. The two principal negotiators—Cheryl Gannon for the Union and Vincent Bollon for the Respondent—also met in several "side-bar" meetings during that period. By the conclusion of the De-

ember 20 session, the parties, over the 3 months of good-faith bargaining, had reached tentative agreement on some issues but remained apart on others.

On December 20, the parties agreed to meet again on December 23. However, on that Friday morning Gannon delivered a memo to Bollon's office informing him that because of certain actions of the Respondent the previous day the Union was "forced to reassess its position" on one outstanding issue—the proper salary levels for certain unit positions. Gannon's memo further stated that because she was unable, due to the upcoming holiday season, to contact the Union's president for guidance, the Union was "forced to postpone negotiations" until after January 3.

Within an hour of receiving Gannon's memo, Bollon gave her a 17-page document entitled "Agreement" with a covering memo stating that, because Gannon had unilaterally "cancelled" that day's scheduled meeting, it was clear that no further progress was being made and that a bargaining impasse had been reached. Accordingly, Bollon stated, the Respondent would "implement immediately the attached contract" to be effective at the close of business on Tuesday, December 27, the first workday following the impending holiday weekend. The next contact between the parties occurred on January 8, when the Union accused the Respondent of unilaterally implementing changes in terms and conditions of employment in the absence of an impasse. The Respondent answered by reasserting its claim of a December impasse, but it stated that it was willing to resume negotiations. The Union agreed with this proposal but stated that by entering into further negotiations it was not waiving its position on impasse.

The parties resumed negotiations on March 15, and eight sessions were held between that date and April 20. Following some settlement efforts during the summer, the Respondent, on September 18, 1989, reimplemented the contract of the previous December 27.³

The Respondent argued that it did not violate the Act. It contended: (1) that impasse had been reached on December 20, and the contract implemented on December 27 was consistent with its "final offer" of December 23; (2) that by failing to respond before December 27 to the December 23 assertion of impasse and the "final offer," the Union waived its bargaining rights under Section 8(a)(5); and (3) that even if the Respondent had violated the Act in December, its liability was tolled as of September 18, 1989, because

¹ We agree with the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(3) of the Act by issuing a verbal warning to employee Cheryl Gannon. His analysis is consistent with *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981).

We correct three inadvertent errors of the judge, none of which affect the conclusions reached in this case. First, Vincent Bollon, the Respondent's secretary-treasurer, testified he met with bargaining unit secretaries on December 22, 1988, not on December 16. Second, on December 23, 1988, Gannon did not place her memo to Bollon on his desk; she gave it to Bollon's secretary. Finally, the second sentence of Bollon's memo of December 23, 1988, set out at p. 17 of the judge's decision, should read, "It is clear that there are irreconcilable differences in the parties' positions and that we have reached an impasse on significant and material provisions of the contract."

² All dates are in the period from August 1988 through August 1989, unless otherwise specified.

³ Although the parties and the judge have used the term "reimplementation," the changes that the Respondent had put into effect soon after its initial implementation of its December 23 "contract" were not rescinded in the interim. The Respondent's action in September was a "reimplementation" in the sense that it was a restatement of intent to impose all the terms of the December 23 "contract," including those that had been in effect since the original implementation.

the parties had reached a good-faith impasse as of that date.

The judge found that the parties arrived at a bargaining impasse on December 23, because the Union, summarily and without valid reason, broke off negotiations without proposing another date for renewal of negotiations. In his view, the Union's reasons for abruptly cancelling the session were for the purpose of delay at a critical stage in the negotiations and thus pretextual. Nevertheless, he found that the "contract" attached to the Respondent's December 23 memorandum did not constitute a bargaining offer but was instead a notice of intent to implement the document. Therefore, according to the judge, the Union did not waive its right to protest the implemented contract by not communicating with the Respondent until January 8. The judge found that any such request would have been futile in view of the Respondent's stated intent. In concluding that the Respondent violated Section 8(a)(5), the judge found that the terms and conditions announced on December 23 and implemented on December 27 were not reasonably comprehended within the Respondent's last preimpasse proposals as they stood on December 20.⁴

As to the effect of the renewed 1989 negotiations on the December violation, the judge found that the Respondent did not bargain in good faith to a genuine impasse and thus remained in violation of Section 8(a)(5). Accordingly, the judge rejected the Respondent's contingent defense and found that the period for which the make-whole remedy is appropriate did not terminate in September 1989.

II. THE DECEMBER 1988 VIOLATION

We agree, for the following reasons, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing terms and conditions of employment on December 27, whether or not an impasse had been reached.⁵ If, as the judge found, the parties reached impasse on December 23 upon the Union's announcement of cancellation of the session scheduled for that date, the Respondent's memorandum of that date was transmitted after the impasse. Hence, the Respondent could only implement the last preimpasse offer of December 20. See *Storer Communications*, 294 NLRB 1056, 1093 (1989), and cases cited therein. We agree with the judge that the terms and conditions

⁴The judge found significant changes with respect to the following issues: the number of annual wage increases, grade structures for various unit positions, policy on floating holidays and unused compensatory time; the inclusion of a zipper clause, and a COLA for employee Alan Beer. The Respondent does not except to these findings as to the differences between its position on December 20 and the terms contained in the contract presented with the December 23 memorandum. In its exceptions the Respondent repeats its earlier contention that the terms implemented on December 27 were identical to those presented on December 23. That fact, however, is neither relevant nor in dispute.

⁵Thus we find it unnecessary to pass on the judge's impasse finding.

of employment announced as a fait accompli on December 23 and unilaterally implemented on December 27 were clearly inconsistent with the Respondent's last true offer to the Union which had been presented on December 20.

The Respondent argues, however, that even in the absence of impasse, it was free to implement the "contract" attached to the December 23 memorandum. The Respondent contends that the Union waived its right to complain about the Respondent's December 27 unilateral implementation of the new terms and conditions of employment contained in the "contract" by failing to request bargaining after notice of the Respondent's intent to implement that "contract" in its December 23 memorandum. We reject that contention.⁶

In *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), the Board reiterated the general rule that the defense of waiver is not available to an employer during the course of negotiations for a labor agreement to succeed an expired one:

[W]hen . . . the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation *at all*, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. [Emphasis in original.]

Neither of the two limited exceptions to this rule recognized by the Board and discussed in *Bottom Line*—continual avoidance or delay in bargaining by the other party and economic exigencies—apply in this case. First, in light of the parties' productive bargaining from September 27 through December 20, the Union's request to postpone the session scheduled for December 23 until immediately after the holiday season does not, of itself, constitute evidence of bargaining intransigence sufficient to justify the Respondent's unilateral changes implemented on December 27. Secondly, the Respondent does not contend, and we do not find, that any circumstances existed which would require implementation at the time the Respondent took such action. Accordingly, inasmuch as the Respondent's waiver argument assumes that the parties were not at impasse before implementation, we conclude that the Respondent's conduct was unlawful, as found.

III. THE 1989 BARGAINING

The Respondent excepts to the judge's make-whole remedy, including restoration of the status quo ante. It

⁶In doing so, we find it unnecessary to pass on the judge's finding that, because the memo and attached "contract" did not constitute an offer to bargain and thus a request to bargain would have been futile, the Union did not waive its right to protest the implemented contract.

contends that, even assuming *arguendo* it *had* unlawfully implemented changes in December, its liability was tolled as of September 18, 1989, because the parties resumed bargaining on this contract in March 1989, and, it argues, they eventually reached impasse on September 18. We adopt the judge's conclusion, for the reasons set forth by him in section III, D, of his decision, that the Respondent did not, during 1989, bargain in good faith to a genuine impasse.⁷ Therefore, his recommended remedy is warranted.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 7.

"7. By unilaterally implementing changes in wages and other terms and conditions of employment which are substantially and significantly different from its prior contract proposals, the Employer has failed or refused to bargain collectively with the Union as the exclusive representative of the employees in the above described appropriate unit and thus has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, International Association of Fire Fighters, AFL-CIO-CLC, Washington, D.C., its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

"(c) failing or refusing to bargain collectively in good faith with the Union as the exclusive representative of the employees in the following appropriate unit by unilaterally implementing changes in wages and other terms and conditions of employment which are substantially and significantly different from its prior contract proposals:

All office employees employed by the Employer, including those employees who are normally assigned to work less than five (5) full days each week; excluding those employees whose work is of a supervisory nature as defined by the NLRB, and the Secretary to the President and the Secretary to the Secretary-Treasurer and those em-

⁷The Respondent's reliance on *NLRB v. Cauthorne Trucking*, 691 F.2d 1023 (D.C. Cir. 1982), is therefore not well founded. In *Cauthorne* the court held that an employer's liability for remedying unlawful unilateral changes of employment conditions (if the changes do not violate an existing collective-bargaining agreement) should be tolled by a subsequent agreement or impasse reached through good-faith bargaining. Here, as the judge found, there was no such good-faith bargaining. The Respondent's intransigence in response to the Union's suggested modifications of the unlawfully implemented terms and conditions and the Union's effort to get undisputed matters reduced to writing was "inconsistent with [a party's] duty to seek an agreement." *Id.* at 1026 fn. 5.

ployees not covered by the jurisdiction of the OPEIU."

2. Delete paragraph 1(d) and reletter the subsequent paragraph accordingly.

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against employees because they discuss or concertedly complain about their supervision, work assignments, or other terms and conditions of employment, or claim rights under a collective-bargaining contract, or otherwise engage in union or concerted activities for the purpose of mutual aid and protection with respect to wages, hours, or other terms and conditions of employment.

WE WILL NOT threaten you with discharge, office closure, or other reprisal because you engage in union or other protected concerted activities.

WE WILL NOT fail or refuse to bargain collectively in good faith with Office & Professional Employees International Union, Local 2 as the exclusive representative of our employees in the following appropriate unit by unilaterally implementing changes in wages and other terms and conditions of employment which are substantially and significantly different from our previous contract proposals:

All office employees employed by the Employer, including those employees who are normally assigned to work less than five (5) full days each week; excluding those employees whose work is of a supervisory nature as defined by the NLRB, and the Secretary to the President and the Secretary to the Secretary-Treasurer and those employees not covered by the jurisdiction of the OPEIU.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer William Shoehigh immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any

loss of earnings and other benefits suffered as a result of the discrimination against him, with interest.

WE WILL rescind our notice of resolution of our executive board which we posted on or about May 16, 1989.

WE WILL, on request, bargain collectively with Local 2 as the exclusive representative of our employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL, if requested by Local 2, restore the salaries of the health and safety assistants to a Grade 9 level, and reimburse Alan Beer, Joe Vita, and any other employees who have held or presently hold such positions, for our failure to pay them at such level, with interest.

WE WILL, if requested by Local 2, restore the practice of permitting carryover of accumulated floating holidays and unused compensatory time, pursuant to the side letters of May 6, 1987, and compensate employees who were required to cash out accumulated floating holidays or unused compensatory time, with interest.

WE WILL, if requested by Local 2, rescind our self-designated "contract," or any specific provision or provisions of such "contract" which differ from the terms and conditions in effect under the 1986-1988 contract, and maintain such terms and conditions under the 1986-1988 contract unless and until changed in accordance with the law.

INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS, AFL-CIO-CLC

James P. Lewis, Esq. and *Sherrie Trede Black, Esq.*, for the General Counsel.

Joseph Reyna, Esq. and *Erick Genser, Esq.*, of Washington, D.C., for the Respondent.

Beth Slavet, Esq., of Washington, D.C., for the Charging Party Union.

John Coyle, Esq., of Washington, D.C., for the Individual Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Washington, D.C., on November 29 and 30 and December 1 and 11 through 15, 1989, January 16 through 19, February 5, 6, and 7, and March 20, 1990. The charge in Case 5-CA-20244 and the charge and amended charge in Case 5-CA-20466 were filed respectively on February 8, May 19, and June 21, 1989, by Office and Professional Employees International Union, Local 2, AFL-CIO (the Union). The charge in Case 5-CA-20325 was filed on March 22, 1989, by William Shoehigh, an individual. The consolidated complaints, which issued on March 24, April

26, and June 30, 1989, allege in sum that International Association of Fire Fighters, AFL-CIO-CLC (the Employer or Respondent), violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. The gravamen of the consolidated complaints is that the Employer allegedly: (1) unilaterally implemented its "final offer" without affording the Union, the bargaining representative of a unit of its employees, an opportunity to negotiate concerning the offer, and without a valid impasse in bargaining; (2) unilaterally implemented changed terms and conditions of employment prior to impasse, which were inconsistent with the Employer's prior proposals; (3) discriminatorily terminated employee William Shoehigh because of his union and concerted activities; (4) discriminatorily issued a verbal warning to employee Cheryl Gannon because of her union and concerted activities; and (5) threatened its employees with reprisal because of their union and concerted activities. The Employer by its answers to the respective complaints denies the commission of the alleged unfair labor practices. The Employer further asserts by way of affirmative defense that: (1) the Employer and the Union bargained to impasse; (2) the Union's actions after the Employer's declaration of impasse constituted a waiver of the Employer's duty to bargain; and (3) the Employer and the Union subsequently resumed bargaining and bargained to impasse before reimplementation of the Employer's final offer. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs.

On the entire record¹ and from my observations of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the parties, I make the following

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FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

The Employer, a labor organization, is an unincorporated association with an office and place of business in the District of Columbia. The Employer is engaged in the business of representing employees in collective bargaining with various employers located throughout the United States. In the operation of its business the Employer annually collects dues and initiation fees in excess of \$50,000 from its local unions located outside the District of Columbia. The Employer admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹By a ruling and Order dated June 19, 1990, I directed that the official transcript of proceedings be corrected in certain respects. In addition, I am further directing that the transcript be corrected as follows:

II. THE LABOR ORGANIZATION AND THE BARGAINING UNIT INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. Since about 1960 the Union has been the designated and recognized exclusive collective-bargaining representative of the Employer's employees in the following unit:

All office employees employed by the Employer, including those employees who are normally assigned to work less than five (5) full days each week; excluding those employees whose work is of a supervisory nature as defined by the NLRB, and the Secretary to the President and the Secretary to the Secretary-Treasurer and those employees not covered by the jurisdiction of the OPEIU.

The Employer contends that four confidential secretaries presently in the unit should be excluded, and asserts that on April 20, 1989, it filed a unit clarification petition requesting the Board to exclude those employees. I have not been informed that the Board has ruled on the petition. In the present proceeding the Employer did not present any evidence in support of its assertion that the secretaries should be excluded. I find that the above described unit constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The 1988 Negotiations, and the Alleged Unlawful Changes*

The Employer and the Union have been parties to a series of collective-bargaining contracts. The most recent contract was effective by its terms from October 16, 1986, to October 16, 1988, although the parties did not actually reach final and full agreement on a contract until October 16, 1987. On September 27, 1988, the parties commenced negotiations for a new contract.² Employer Secretary-Treasurer Vincent Bollon was the Employer's chief negotiator. Bollon was accompanied by Glenn Berger, his administrative assistant, and by Bollon's secretary, Elaine Duffy. Bollon assigned Duffy to take notes of the negotiating sessions. The Union's negotiating team initially consisted of Union Staff Representative Kathleen Kocan-Moore and four unit employees: Cheryl Gannon, Alan Beer, Marie Grimes, and Marian Hoepfl. Gannon, the Union's chief shop steward, was the Union's chief negotiator. The parties met in six sessions; specifically on September 27 and 28, October 28, and December 8, 14, and 20. Bollon and Gannon also met privately in so-called "sidebar" meetings. Because of illness, Kocan-Moore did not attend the December sessions. At the December 8 session Gannon informed the Employer that she had authority to negotiate without Kocan-Moore being present. In Kocan-Moore's absence, the Union's negotiating team consisted entirely of unit employees.

On August 26, about 1 month before the first negotiating session, the Union presented its contract proposals to the Employer. The Union proposed a 2-year contract, effective

October 1, 1988, to September 30, 1990, with annual wage increases of 2 percent (the first effective as of October 1) in addition to COLA as provided in the existing contract. The Union also proposed "An Employee Pension Plan with benefits equivalent to those of the Staff Representatives Pension Plan in effect as of January 1, 1988." These proposals (wage increases and improved pension plan) reflected the unit employees' desire to attain parity with the Employer's staff representative employees, who were represented for collective-bargaining purposes by their own labor organization. The Union understood that the Employer and the staff representatives had negotiated a 2-year contract which provided for a 5-percent wage increase. The staff representatives were also covered by a pension plan which was more favorable than that covering the unit employees in some respects, including a lower retirement age. The Employer and the staff representatives' union also negotiated 5-year vesting, although this was not legally required until July 1, 1989. By law, as of that date, a pension plan had to provide either 5-year vesting or 3- to 7-year vesting at a lower rate. (The prior requirement, governing the present unit plan, was 10-year vesting.) The Union also proposed greater longevity increases. The current contract provided for increases of 1 percent and 2 percent, respectively, after 10 and 15 years of service. The Union now proposed increases of 1, 3, and 5 percent respectively after 5, 10, and 15 years of service. The Union proposed 18 days of annual leave after 3 years, instead of 5 years of service. The Union also proposed that employees be paid 50 percent of unused sick leave upon retirement and 25 percent upon termination or layoff, instead of 20 percent and 10 percent respectively under the current contract.

The Union also presented proposals on job classification and job upgrade. The Union submitted a package proposal: (1) to reclassify the position of legislative assistant II (currently held by Cheryl Gannon) from Grade 6 to Grade 8; (2) a side letter agreement upgrading Michele Dove and Gary Sherman from research assistant II (Grade 6) to research analyst (Grade 8); and (3) to reclassify the positions of safety and health specialist (OSHA research assistants) currently held respectively by Alan Beer and Joe Vita, to Grade 8, with a side letter maintaining Beer and Vita at Grade 9 wages as long as they held those positions. The status of Beer and Vita had been a point of contention between the Employer and the Union. The Employer believed they were overpaid. The Employer previously tried to reclassify their status from a Grade 9 to a Grade 8A, which would be at a midpoint between a Grade 8 and a Grade 9. An arbitrator restored their salaries to Grade 9. In August 1987 the Employer again cut their salary. By an exchange of correspondence which was incorporated into the 1986-1988 contract, the parties agreed that the positions would be paid at a Grade 9 rate for the duration of the contract, without prejudice to their respective positions as to the proper grade, which would be negotiated for the next contract. In the current negotiations, the Union also submitted a package proposal on job upgrade, proposing side letters (1) upgrading Marion Hoepfl from accountant II (Grade 6) to accountant III (Grade 8) and (2) upgrading Jean Rhyne from secretary III (Grade 6) to secretary IV (Grade 7). (The evidence indicates that when dealing with the terms and conditions of employees by name rather than category, the parties utilized side letters instead of the text of the contract.)

² All dates herein are for the period of August 25, 1988, through August 24, 1989, unless otherwise indicated.

At the parties' first negotiating session (September 27) the Employer presented its counterproposals. The Employer, like the Union, had its agenda of goals. Secretary-Treasurer Bollon testified that the Employer's goals were in sum: (1) a zipper clause; (2) restoring the salary of the OSHA research assistants to a level in balance with other research assistants; (3) placing reasonable limits on steward and other union time; (4) assurance of a full day's work; and (5) conform the contract with those prevailing among other union employers in the Washington, D.C. area. Bollon testified that with respect to a zipper clause, the Employer was concerned about the side letters which were incorporated into the 1986-1988 contract. On September 27 the Employer submitted four written proposals. The first concerned attendance at work. The 1986-1988 contract (sec. 8.01) provided for a 32-1/2 hour workweek (9 a.m. to 4:30 p.m., Monday through Friday, with a 1-hour unpaid lunch. The Employer proposed that: "Employees shall be compensated only for time they have actually worked or for time taken in the form of approved leave with pay." The second proposal revised the language of the contract provision on steward time (sec. 11.08) to require prior supervisory approval. The third proposal was a zipper clause (proposed sec. 25.01). The fourth proposal (proposed sec. 27.01) captioned "Non-involvement in IAFF Internal matters," provided in sum that employees must remain neutral with respect to the Employer's elections, other political matters and organizational activities. The parties explained their proposals and answered questions. They discussed the Company's proposed zipper clause, although the witnesses differ as to what was said. Union negotiators Gannon and Beer and company negotiators Bollon and Berger testified concerning the negotiations. Gannon testified that Bollon said he didn't want side letters. Gannon said that the Union was concerned because they didn't know how such a clause might be applied, and asked what past practices the Employer wanted to end. Bollon said he would check and let them know. Gannon testified that Kocan-Moore did not comment on the proposal. Alan Beer corroborated Gannon's testimony concerning what she said. Bollon testified in sum as follows: Kocan-Moore said there was no way the Union would agree to a zipper clause. At this or a subsequent session, Bollon said he would withdraw the proposal if all issues were addressed. By "issues," Bollon was referring to the side letters in the 1986-1988 contract. Bollon said he wanted no side letters. Gannon said that the issues could be addressed in the contract. Berger testified in sum as follows: At the September 27 session Moore said the Union would not agree to a zipper clause. Gannon said they could address individual practices in the contract. Bollon said he did not want side letters.

In order to place the matter of the proposed zipper clause in proper perspective, it is necessary to consider the side letters to which Bollon referred. Four side letters, each dated May 6, 1987, were annexed to the contract. The first dealt with the matter of "floating holidays," a practice which was discontinued as of January 1, 1987, in accordance with the 1986-1988 contract. The side letter provided that notwithstanding the contract, the unit employees could carry forward their accumulated floating holidays without restriction. The side letter indicated that 15 unit employees had accumulated floating holiday time, ranging from a fraction of 1 day to slightly over 11 days. Another side letter concerned accumu-

lated unused compensatory time as of the date of signing of the contract. The contract itself did not permit carrying over of such time from year to year. The side letter permitted time accumulated prior to signing of the contract, to be carried forward without restriction. As of the current negotiations, this side letter was significant as to one employee. The side letter named three employees with prior accumulated compensatory time. One was now retired, and a second had accumulated about one-third of a day. Only Susan Sopourn had significant accumulated time. The matters of accumulated floating holidays and accumulated compensatory time, became issues in the negotiations. A third side letter was a clarification and minor revision of contractual provisions on sick and annual leave, which so far as indicated by the present record, was no longer an issue between the parties. The fourth side letter concerned the pay of employee Fran Kidwell, who has since retired. Therefore, as Bollon himself indicated in his testimony, the matter was moot. As indicated, there was an exchange of letters when the parties finally agreed to a contract, which dealt among other matters with the OSHA research assistants. The parties also agreed that: (1) the Union would withdraw pending unfair labor practice charges; (2) the Union would not picket the Employer or its functions during the existence of the contract; and (3) the parties agreed to delete from the arbitration clause of the contract, a provision that the arbitrator "shall have no authority to add to or delete or modify any terms or provisions" of the contract. Bollon indicated in his testimony that he did not regard this exchange of letters as "side letters," and the language of the letters also so indicates. The parties made clear in their correspondence that they would negotiate the grade of the OSHA research assistants upon expiration of the contract, and the Union made clear that it would not again agree to a picketing ban. The parties did indicate that the deletion from the arbitration clause was intended as an actual contract revision, and so further indicated in the current negotiations. In sum, the only "side letters" which presented issues in the negotiations, were those pertaining to accumulated floating holidays and accumulated unused compensatory time.

At the September 27 session, the parties also discussed ground rules for the negotiations. They decided that although they could make tentative agreements, no agreements were final until they reached a complete contract. The parties next met on September 28. The Employer presented a counterproposal on longevity increases and classifications of assistants. The Employer proposed to continue the current longevity increases. The Employer proposed, with respect to six assistant positions (one legislative, two research, one education, and two health and safety) that they be set at Grade 7, Step 1, that after 1 year they be set at Grade 7A (midpoint between Grades 7 and 8), Step 1, and after 2 years be set at Grade 8, Step 1. The parties made some tentative agreements. The parties agreed on a 2-year contract and continuation of COLA. The Employer accepted the Union's proposal on payout of unused sick leave, and the Union accepted the Employer's proposed language on steward time. The Union withdrew its proposal for a side letter on Dove and Sherman, opting to leave their status to a pending grievance proceeding. The Union said it would prepare alternative language on a noninvolvement clause. The Company subsequently withdrew its proposal. Bollon testified that it did so because the

language involved was too cumbersome. The Union questioned the Employer about its proposed language on attendance. Bollon said the problem was tardiness. The Union said it would present alternative language on tardiness beyond 30 minutes. The Employer rejected the Union's proposals on general wage increases, pension improvements, increased annual leave, and upgrades for Hoepfl and Rhyne. The parties discussed but failed to reach an agreement on grade levels for the assistants. Again the witnesses differed as to what was said about the Employer's proposed zipper clause. Gannon and Beer testified that Bollon withdrew the proposal. Bollon and Berger testified in sum, that Bollon said he would withdraw the proposal if all other contract issues were resolved.

I credit the testimony of Bollon and Berger that Kocan-Moore said the Union would not agree to a zipper clause. As a professional union representative, she was well aware of organized labor's antipathy toward such provisions. Alan Beer testified that the Union had a strong policy against zipper clauses. The Employer's proposed clause contained strict limiting language.³ Therefore, it is not surprising that the proposal would set off alarm bells in her mind. However, I credit Gannon and Beer as to the balance of the discussion, and specifically, their testimony that Bollon withdrew the proposal on September 28. At the hearing the Employer proffered through Bollon's testimony, alleged minutes of the negotiating sessions taken by Elaine Duffy. I rejected the offer, finding that testimony by Duffy was necessary to authenticate the alleged minutes. Nevertheless the Employer never produced Duffy as a witness, and offered no explanation for its failure to do so. The Employer subsequently used the alleged minutes for the ostensible purpose of refreshing Bollon's recollection. However, Bollon's demeanor on the witness stand demonstrated that he was using the alleged minutes as a script rather than a means of refreshing his recollection. Bollon studied the alleged minutes in careful detail, and even asked to reread them. In these circumstances, Bollon's testimony, insofar as he purported to use the alleged minutes to refresh his recollection, has no evidentiary value, except insofar as such testimony constituted admissions, or concerned undisputed facts. However, the General Counsel proffered in evidence certain handwritten papers purporting to be notes taken at negotiating sessions. Bollon identified two of these as being in his writing. One, dated December 8, purported to contain a review of the status of various proposals. The paper contained the notation "25-01 WD By M." I find that this notation constitutes an acknowledgement by Bollon that management had withdrawn the proposed zipper clause. Beer's notes and Gannon's notations indicate that Bollon withdrew his proposal on September 28. The purported minutes of Duffy fail to indicate any discussion of a zipper clause on or after September 28. This evidence further tends to corroborate the testimony of Gannon and Beer. If, as testified by Bollon, the Employer wanted a zipper clause in order to do away with side letters, then the clause was

practically unnecessary. The only side letters at issue were those dealing with accumulated floating holidays and accumulated unused compensatory time. These matters could be and were in fact taken up in the negotiations. I find that Bollon came to this realization, and withdrew the zipper clause proposal.

On September 28 Bollon and Gannon met in a side bar discussion. Gannon testified that they discussed several issues, including the status of the OSHA research assistants. She testified that they agreed on the concept of a freeze in resolving that matter, i.e., to freeze or "red circle" their salaries until they reached a grade level agreed upon by the parties. Alan Beer testified that when Gannon returned from the side bar, she reported that the Union was willing to freeze Beer and Vita's salaries until they reached a Grade 8A level, and the Company proposed to freeze their salaries until they reached a Grade 8 level. However Beer did not indicate that Gannon said this in the presence of the company negotiators. Bollon testified that Gannon proposed red circling Beer and Vita until they reached a midpoint between Grades 8 and 9, i.e., a Grade 8A. Bollon initially testified that he said he would look into it, but subsequently testified that he rejected both the red circling of Beer and Vita and the Union's proposal to reclassify the other assistants to a Grade 8, adding that they could deal with Beer and Vita in a side bar arrangement when they had a complete contract. Bollon further testified that they discussed lateral transfers. Gannon expressed concern that as a result of the Employer's recent reorganization (following the election of Alfred Whitehead as president and Bollon as secretary-treasurer), which involved transfer of secretaries, the Employer might use this opportunity to upgrade favored secretaries after the parties negotiated a contract. Bollon testified that he said this was not true, and the Employer would give a letter stating that it would not upgrade secretaries during the contract term. Bollon testified that the matter of transfers came up at the negotiating session, when they discussed Barbara Volel's transfer. Bollon testified that Gannon said transfers were acceptable if there were no salary reductions. Gannon, in her testimony, did not indicate they discussed lateral transfers at this side bar. In view of the inconsistencies in Bollon's testimony, I would be inclined to credit Gannon's version of the side bar. However, as resolution of this question depends upon consideration of subsequent developments, I shall defer such resolution at this point.

The parties did not meet again until October 28. This was the first of two lengthy delays in the negotiations. There were also no negotiating sessions between October 28 and December 7. Bollon testified that the parties scheduled 11 or 12 sessions, but held only 6, that he cancelled 1, but that other sessions were cancelled because of Kocan-Moore's other commitments, and later because of her illness. Gannon testified that the parties were unable to meet between September 28 and October 28 because Kocan-Moore was busy and Bollon still lived in New York. Bollon testified that he moved on October 29, although prior to the move he had a temporary residence in Washington and operated out of the Employer's Washington office. Kocan-Moore did not testify, although she was present at the beginning of this hearing. I find that the delay in negotiations during the period from September 28 to December 7 was caused principally by Kocan-Moore's unavailability, particularly after October 28.

³The proposed clause stated that: "The provisions written herein shall be the entire Agreement between the parties and will supercede all prior agreements, understandings or practices of any kind between the parties and shall govern their entire relationship and shall be the sole source of all rights or claims which may be asserted in arbitration hereunder or otherwise." The clause would replace a contract clause stating that: "The signing of this Agreement shall not act in any manner to reduce or abrogate any employee benefits in effect at the time of the signing of this Agreement."

In this regard I note that Bollon and Gannon were able to meet in side bar in November, which indicates their availability for negotiations.

The Union presented counterproposals at the October 28 session. The Union dropped its proposal for a longevity increase at 5 years' service, but otherwise adhered to its proposals on general wage increases (2 percent annually) and longevity increases. The Union proposed that the legislative, education, and 2 research assistants be classified at Grade 8, 24 months (the highest step in a grade), and that new employees in these positions would begin at Grade 8, Step 1. The Union thereby sought more than in its original proposal. The Union proposed in sum that the OSHA research assistants' salaries be frozen until they reached the level Grade 8A, 24 months, and that Grade 8A would become the Grade for those positions. The Union adhered to its proposal on Jean Rhyne, but proposed with respect to Marian Hoepfl, that she would be upgraded to accountant III, which would be reduced from a Grade 8 to Grade 7 position. The Union proposed a new section 14.05 dealing with transfers:

Section 14.05 No bargaining unit employee shall be upgraded to a higher job classification unless mutually agreed upon by the Employer and the Union. No bargaining unit employee shall be demoted or suffer a wage reduction unless the demotion is the result of disciplinary action in accordance with the provisions of Article VII of this agreement.

The Union also proposed a new section 8.02 dealing with attendance:

Section 8.02 Any employee who arrives unexcused between 9:00-9:30 am shall be permitted to make up such time. Any employee who arrives unexcused after 9:30 am shall not be compensated for such time not in attendance from 9:30 am until the employee's arrival. Under severe weather conditions (e.g. snow, etc), the Employer shall grant leave to employees in accordance with Federal government policy and conditions (e.g. office closing, liberal leave waiving 24-hour requirement, lateness, etc.).

Gannon testified in sum as follows with respect to the October 28 session: The Company rejected all union proposals except a 15-year longevity increase. Kocan-Moore questioned why the Employer proposed to reduce the OSHA research assistants from Grade 9 to Grade 7, although 2 years before the Employer took the position that they should be classified at Grade 8A. Bollon said that the side bar did not come into play until disposition of all other items. The Employer proposed, with respect to the Union's proposal on attendance, to change "9:30" to "9:15." They discussed the second sentence of that proposal (severe weather policy) but reached no agreement. They again discussed the fact that Barbara Volel, upon her transfer, had been demoted from a secretary IV to a secretary III. Bollon said she was no longer performing functions which warranted the higher rate. (The matter was eventually grieved to arbitration, and by award dated May 11, 1989, the grievance was denied). Alan Beer testified in sum as follows: After a caucus, the Employer rejected the Union's wage increase proposal. The Employer rejected the proposed section 14.05, on the ground that upgrades and

downgrades were matters of "management prerogative." The Employer also rejected the proposed section 8.02, arguing that there should be no compensation for tardiness of more than 15 minutes. Bollon said he was not familiar with the Government's snow policy, and suggested that the parties develop a policy through their joint standing committee. Kocan-Moore protested the proposed cut in salaries for the OSHA research assistants. Bollon "alluded to" the side bar of September 28, saying that there was a way to deal with Beer and Vita. He said the proposal to reduce the OSHA research assistants from Grade 9 to Grade 7 did not reflect a change in job titles or duties. The parties discussed the proposals on Rhyne and Hoepfl and the Volel transfer. Bollon said there would be no upgrades of executive secretaries. Bollon was the only company witness to testify concerning the October 28 session. He did not purport to give a complete account of the session. Bollon testified in sum as follows: He provided the Union with a copy of the Employer's Employee Assistance Program ("EAP") dealing with stress and substance abuse. They discussed the parties' proposals and the classifications of Rhyne, Hoepfl, and Volel. With respect to the Union's proposed section 8.02, the Employer proposed a cutoff time of 9:15 a.m., and that the joint committee develop an inclement weather policy. There was no agreement. The Employer rejected the Union's proposal on classifications, but Bollon asserted that (as he told Gannon in side bar) they could deal with Beer and Vita when they had a complete agreement. The Employer rejected the first sentence of the Union's proposed section 14.05, but proposed that none of the secretaries to the assistants (assistant to the president, executive assistant to the president, and assistant to the secretary-treasurer) be upgraded for the life of the contract. However, Bollon rejected the Union's proposal to upgrade Rhyne (secretary to his assistant) because the Union had proposed that none of the assistants' secretaries would be upgraded for the life of the contract. (Bollon thereby contradicted himself, as he indicated that the Employer, not the Union, made this proposal.) With respect to Hoepfl, Bollon said he would provide the Union with the pertinent job descriptions. Bollon's testimony concerning the October 28 session did not directly contradict the versions of Gannon and Beer. I find that the testimony of Gannon, Beer, and Bollon together reflects the substance of the October 28 session.

By a memorandum dated November 3 to Bollon, concerning "COLA adjustments for VITA and Beer," Gannon stated as follows:

This is to confirm that Local 2, OPEIU and the IAFF have agreed that the IAFF will withhold COLA adjustments due to employees Joe Vita and Alan Beer on October 1, 1988, pending an agreement on the collective bargaining agreement which includes a wage freeze for Vita and Beer. If the parties fail to reach an agreement providing for a wage freeze for Beer and Vita, the IAFF will pay the COLA adjustment retroactively to October 1, 1988.

Please let me know if this memorandum accurately reflects our agreement.

Bollon did not reply to the memorandum. He testified that the memorandum reflected their agreement in side bar discussion. Bollon further testified that he had two side bar con-

ferences with Gannon between October 28 and December 8. Bollon testified in sum as follows concerning the conferences: He proposed, in light of the fact that Beer was a longtime employee, that Beer be frozen at his present salary (at a Grade 9 level) until Grade 8 reached his salary. Vita would be frozen at a Grade 8A level (i.e., take a pay cut) until Grade 8 reached his salary. The Employer would consider these arrangements if the parties agreed on a total package. Gannon and Bollon agreed to COLA for Beer and Vita until the issue was resolved (if so, this would be contrary to the agreement indicated in Gannon's November 3 memo). They also discussed Bollon's statement that the Employer would not upgrade any of the secretaries to the assistants during the life of the contract. Gannon proposed removing the category of secretary IV from the contract. Bollon said he would consider the proposal. At the second side bar conference he rejected the proposal, saying that this would dead end the secretary IIIs. Gannon said she was getting heat about the matter and Bollon proposed that he talk to the secretaries, explaining that the Employer, not the Union, proposed no upgrading during the contract. Gannon did not testify concerning these side bar conferences. Under the 1986-1988 contract, COLA increases were due as of October 1, and they were paid beginning October 27, retroactive to October 1. Given the confused and contradictory testimony on the three side bar discussions (September 28 and the two discussions between October 28 and December 28) concerning the OSHA research assistants, I find that Gannon's November 3 memo is the best evidence of what was said and agreed upon by the parties concerning this matter. In sum, the parties agreed that the Employer would withhold COLA adjustments to Beer pending further negotiations, but they agreed on nothing else. The parties' subsequent conduct tends to confirm this arrangement. Beer did not receive COLA adjustments until December 27, when the Employer implemented its alleged final offer, and prior to December 27 the Union did not object. The parties did not rule out the concept of a wage freeze. However, Gannon's memo also indicates that they did not agree that a wage freeze would be an element of any contract. (The significance of the memorandum will be further discussed at a later point in this decision.) I credit Bollon's testimony concerning the parties' discussion of the secretaries to the assistants.

The parties next met in negotiations on December 8. Beer, Gannon, and Bollon testified concerning this session. The Employer proposed a new contract provision (sec. 6.08) stating as follows:

Section 6.08. Notwithstanding any other provision contained in this Article VI, or in this Agreement, the Employer shall at all times have the sole right and discretion to laterally transfer bargaining unit employees from their present position to other equivalent positions in the same grade covered by this Agreement. The affected employees shall not suffer a reduction in salary because of such transfer.

Beer testified in sum as follows: The parties discussed the proposed section 6.08, including the meaning of "equivalent" positions. The Employer said it was now considering an across-the-board wage increase, and proposed a 3-percent longevity increase at 15 years instead of the present 2 per-

cent. The Employer agreed to no downgrading of employees except for just cause, but said it had not prepared any language on downgrades. Bollon again said he could deal with the OSHA assistants as discussed in side bar. The parties discussed pensions, and the Union accused the Employer of running a caste system. They discussed snow policy, and Bollon said that the joint committee would meet to work out a policy. Bollon said that he did not regard the proposed language on tardiness (9:30 a.m. vs. 9:15 a.m.) to be a problem, because few employees showed up late after 9:15 a.m. Gannon testified in sum as follows: Bollon said the Employer was now considering a general wage increase, and agreed to a longevity increase. He said that if the Union struck the first sentence of its proposed section 14.05 (on upgrades) the Employer would agree to the second sentence (on demotion or wage reduction). Bollon requested the Union to name a new trustee for the pension plan. Bollon testified in sum as follows: The parties discussed the Employer's proposed section 6.08 on lateral transfers. Bollon answered the Union's questions and defended the merits of the proposal. Bollon argued that the Union's proposals to upgrade Rhyne and Hoepfl without any bidding process, were inconsistent with other union proposals. Bollon gave the Union the pertinent job descriptions on Hoepfl. He rejected the Union's proposal to upgrade Hoepfl, arguing that her job responsibilities and duties did not increase much. The parties again discussed wages, pensions, and the assistants. The Union rejected the Employer's proposal for a 3-percent longevity increase at 15 years. The Union again argued for a general wage increase, pointing to the increase negotiated by the staff representatives' union. Bollon said that if the parties came up with a "complete package," they could deal with the issues of wages and the assistants "as per some side bar discussions." There is no direct conflict between the versions of the three witnesses. I find, with one qualification, that their testimony together reflects the substance of the December 8 session. I do not credit Bollon's assertion that he said that wages could be resolved in accordance with a side bar discussion. The evidence fails to indicate that Bollon and Gannon discussed or reached an understanding on the matter of wages, in any side bar meeting. Bollon's testimony in this regard was based on the purported minutes taken by Elaine Duffy, which ostensibly refreshed Bollon's recollection. As previously discussed, such testimony has no evidentiary value. As indicated by the testimony of Beer, Gannon, and Bollon, the parties failed to reach any tentative agreements at the December 8 session. (Bollon testified that the parties agreed on prior approval of steward time. In fact, the parties agreed on this and other matters at their second session on September 28.)

The parties next met in negotiations on December 14. The Union presented a package proposal captioned "Memorandum of Agreement." The Union proposed that upon employer acceptance of this memorandum, all remaining proposals of the parties, not previously agreed upon, would be withdrawn. All provisions of the 1986-1988 contract not modified or replaced by new provisions would remain in effect. The Union proposed specific changes. With respect to attendance (hours of work-overtime), the Union proposed under section 8.02, that any employee who arrived late between 9 a.m. and 9:15 a.m. would be permitted to make up such time, but any employee who arrived after 9:15 a.m. would not be permitted to make up late time. The Joint

Labor Management Committee would develop an Inclement Weather Policy which upon mutual agreement would be incorporated into the contract. This proposal in sum met the Employer's verbal counterproposal of October 28 to the Union's then proposed section 8.02. The Union adhered to its outstanding proposal of 2-percent annual wage increases. The Union proposed longevity increases of 1 percent after 10 years and 3 percent after 15 years, thereby meeting the Employer's verbal counterproposal of December 8. With respect to the assistants, the Union proposed that the incumbent legislative and research assistants be upgraded to Grade 8, maximum step, and that employees hired into the positions of legislative, research, education, political action, or OSHA research assistant after October 1 would begin at Grade 8, Step 1. The Union proposed (as part of the contract) that Alan Beer would be frozen at his present rate (Grade 9) until he reached the maximum step of Grade 8A, and Joseph Vita would be reduced to Grade 8A, 18 month step, but would receive all increases retroactive to October 1, including the COLA increase of that date. (Grade 8A would be set at the midpoint between Grades 8 and 9, as the 1986-1988 contract did not contain a Grade 8A.) These proposals included concessions from the Union's October 28 proposal, under which OSHA research assistants would be set at Grade 8A, and both Beer and Vita would be frozen at Grade 9 until they reached the level of Grade 8A, 24 months. The Union also proposed a revision of its October 28 proposal on upgrades (sec. 14.05, first sentence). The Union proposed that the Employer would not upgrade unit positions or employees "unless the procedures for consideration of upgrades adopted by the IAFF Executive Board at its January 12-15, 1988 meeting (Summary of minutes page 10), have been complied with." The Union also proposed improvements in the pension plan, specifically, to reduce the retirement age and add a cost-of-living adjustment. This was a concession from the Union's initial proposal, in that the Union now proposed improvements which fell short of parity with the staff representatives contract. The Union adhered to its October 28 proposal on Marian Hoepfl and accountant III. The Employer did not submit any written proposals.

At the December 14 session the Employer orally proposed a 1-percent general wage increase. Alan Beer testified in sum as follows: The Employer also proposed to freeze Beer at his present salary until it reached the maximum level of a Grade 8, and to freeze Vita at Grade 8A until it reached the maximum level of Grade 8. Bollon did not refer to these proposals as a final offer. However when Gannon returned to the bargaining table from a side bar conference with Bollon, she said that the Employer would present the proposal on the OSHA research assistants as a final offer. The Employer adhered to its September 28 proposal for three-step annual upgrading (Grades 7, 7A, and 8) for the other assistants. The Employer rejected the Union's revised proposal on upgrades (sec. 14.05, first sentence), with the second sentence, on downgrades, remaining on the table. (The Employer agreed to the second sentence on December 8.) The Employer also rejected the proposed pension improvements. Bollon said that 5-year vesting was mandated by law and therefore not negotiable. Gannon suggested they await a meeting with a pension consultant (then scheduled for January 1989) because she thought the law provided for either 5- or 7-year vesting. Bollon insisted that the matter was not negotiable. Gannon

testified in sum as follows: The Union presented its comprehensive package proposal. The Employer adhered to its position on the assistants, and the parties adhered to their respective positions on lateral transfers, with the Employer rejecting the Union's proposed language on upgrades. Bollon said he was not prepared to discuss changes in the pension plan until he met with pension consultants and actuaries. He said he was scheduled to meet with them the following week. Gannon suggested that they postpone negotiations on the pension plan until after the meeting. Bollon said that the pension plan had nothing to do with the negotiations, and the only change he would make was one required by law, namely, a change to 5-year vesting. Gannon disagreed, explaining (and correctly so) that the law provided either for 5-year vesting or vesting over a period of 3 to 7 years. Bollon insisted there was only 5-year vesting, and that this would be done as of July 1, 1989. Bollon requested a side bar meeting with Gannon. He told Gannon he would put the Employer's wage offer on the table, but this would be a final offer. When they returned to the table, Bollon offered the 1-percent wage increase and the proposal on Beer and Vita as described above, as part of an agreement, but did not refer to these as a final offer. Bollon said he had a way of dealing with wages and the OSHA research assistants when they got closer to an agreement. Bollon asked for a copy of the Government's snow policy, and Gannon said she would get one. Bollon testified in sum as follows: After the Union presented its package proposal, the parties reviewed their positions. The Union rejected the Employer's December 8 proposal on lateral transfers (sec. 6.08). The Employer rejected the Union's proposal on upgrading, on the ground that this was a matter of employer prerogative. The second sentence of the Union's proposed section 14.05 (demotion or wage reduction) remained on the table. Bollon testified that it was his understanding that the employer executive board policy did not require negotiations with the Union. On pensions, the Employer rejected the Union's proposal for pension plan improvements. Bollon said that the Employer "was not prepared to make any pension improvements at this time until we had the whole issue of pension straightened out within the International." Gannon inquired about a pension committee meeting which was scheduled for the following week. Bollon said that the meeting was simply for the purpose of receiving financial reports, and was unrelated to the negotiations. Bollon said that the law required 5-year vesting (as of July 1, 1989), and that he would not negotiate vesting. Bollon later learned that the law provided for alternative 3- to 7-year vesting. Bollon admitted that the Employer negotiated 5-year vesting with the staff representatives union, to begin 1 year earlier than required by law. Gannon said that there was alternative 3- to 7-year vesting, but did not propose that alternative. However, Gannon said that the Union wanted 5-year vesting language in the contract. On the matter of attendance (Union's proposed sec. 8.02), the parties agreed on 9:15 a.m. as the cutoff time. The Employer was still awaiting receipt of the Federal guidelines on inclement weather. The Employer did not receive those guidelines any time in 1988, and the Joint Labor Management Committee did not meet during 1988. Bollon testified that he did not know whether the parties reached tentative agreement on inclement weather policy. Neither Bollon nor the other witnesses explained why the Employer was still interested in the

Government guidelines, in view of the fact that the Union's December 14 proposal concurred with the Employer's verbal counterproposal of October 28, that an inclement weather policy be developed by the Joint Committee.

Bollon further testified in sum as follows: The Union dropped its proposal to upgrade Jean Rhyne. (As the Union's package proposal made no reference to Rhyne, it follows that this was true.) However, the parties remained in disagreement on an upgrade for Hoepfl. On wages, the Union still proposed annual increases of 2 percent, although the parties reached tentative agreement on longevity increases. Bollon and Gannon had a side bar meeting. Bollon told Gannon he would put a "final" offer on wages and assistants on the table, and reiterated his position that there would be no upgrading of secretaries to executive assistants during the life of the contract. When the parties returned to the table, Bollon proposed, as part of a complete agreement, a 1-percent wage increase, a freeze on the salaries of Beer and Vita (as described above in Beer's testimony), and grade progression for the other assistants as provided in the Employer's September 28 proposal. Bollon did not, at the table, describe this as a final proposal. Bollon argued that the assistants were doing similar work and should be at the same level. Each party rejected the other's proposals, and there was no agreement on wages or the assistants' grades.

I find that the testimony of Beer, Gannon, and Bollon together reflects the substance of the December 14 negotiating session. With regard to the pension plan, I find that the Employer refused to negotiate over vesting. However, the Employer did not refuse to negotiate over other pension plan improvements. Rather the testimony indicates that the Employer took the position that it was unwilling to agree to increased pension plan benefits at this time.

Bollon proposed that the parties meet again on December 16. The Union said they would get back on this, but they did not. The parties next met on December 20. In the meantime, on December 16, the Union presented Bollon with a written request for information concerning overtime payments and out-of-classification payments since September 1, to secretaries in the bargaining unit. Bollon testified that on December 16 he met with three secretaries (including Jean Rhyne) to check out information he had compiled in response to the request. Bollon further testified that he told the secretaries it was the Employer's position, not the Union's, that there would be no upgrading during the life of the contract. Bollon was the only witness to testify concerning this conversation. The requested information was furnished to the Union on December 22.

As matters turned out, the December 20 bargaining session was the parties' last session before the alleged unlawful implementation of the Employer's "final offer" of December 23. Alan Beer testified in sum as follows: The Union rejected the Employer's proposals on general wage increase, grade levels of assistants, and wage freeze for Beer and Vita. The Employer adhered to its position on these matters. The Employer said it was rescinding the side letters on accumulated floating holiday and unused compensatory time. The Employer proposed that the employees could use or cash out the accumulated time. (This was the first time since the Employer withdrew its proposed zipper clause, that the parties discussed these matters.) The parties did not reach agreement. Beyond these matters there was little substantive dis-

ussion. The Union asked whether the deletion of the restriction on an arbitrator's authority was still operative. Bollon said he would get back to Gannon on this. The Union asked about a response to its information request on December 16. The Employer said it was working on it. The Employer requested that they meet on December 22. Gannon said she needed authorization to meet without a staff representative, although she had previously informed the Employer that she had full authority to negotiate in the absence of Kocan-Moore. The parties agreed to meet on December 23. The Employer said it would not continue negotiations into 1989. Gannon said she would take the Employer's package proposal to a vote by the unit employees. The employees were scheduled to meet on December 22. Gannon testified in sum as follows: The Union rejected the Employer's December 14 proposal, arguing that the Employer wanted more concessions. Gannon summarized the positions of the parties. Bollon said the Employer stood on its position on wage freezes for Beer and Vita. As testified by Beer, they discussed the arbitration clause and the Union's request for information. Bollon again said that pensions were not a bargaining issue, and the Employer would implement 5-year vesting as required by law. Gannon said the Employer would issue a directive for employees to use or cash out accumulated floating holiday and compensatory time by the end of 1989. They discussed the matter. Gannon accused the Employer of renegeing on their prior agreement, i.e., that there would be no more accrual, but existing accrual would be grandfathered. After a caucus, Bollon said the Employer was withdrawing its proposal on floating holidays, but adhered to its position on compensatory time. Gannon said she would take what they had on the table to the unit for a vote. Gannon proposed that they meet on January 4, 1989. Bollon said he would not bargain into the next year, and proposed December 22. Gannon said she would have to check with the Union. They agreed on December 23. Gannon initially testified that the meeting was contingent on the Union receiving the requested information, but subsequently testified that she did not recall any arrangement. (As indicated, the Employer furnished the information on December 22.) Marie Grimes (as indicated, a member of the Union's negotiating team) testified concerning the parties' discussion of the next session. Grimes testified that the Employer wanted to meet on December 22, that Gannon said they could not because of the unit meeting scheduled for that date, but the Union agreed to meet on December 23, "contingent upon our request for information." Bollon testified that the parties discussed the side letters. Gannon said the Employer kept asking for takebacks. Bollon said he stated from the beginning there would be no side letters, and that the Employer's auditors said the Employer was carrying too much accumulated time on its books. Bollon said that to conclude a contract, he would withdraw the proposal on floating holidays. The balance of Bollon's testimony followed his alleged refreshing of recollection after reading the purported minutes of Elaine Duffy. Bollon testified in sum as follows: The Employer adhered to its positions on assistants' grade levels and red circling of Beer and Vita. Gannon said she would take the proposals to the unit for a vote. She said she could not justify a contract with a (substantial) raise for herself and only a 1-percent increase for everyone else. Bollon did not say pensions were not a subject for bargaining. Bollon said he would

not bargain into 1989. (Bollon admitted that the parties had not discussed floating holidays and accumulated compensatory time since their first session.) The parties did not reach any agreements at the December 20 session. Administrative Assistant Glem Berger, who was also present at the December 20 session, testified in sum as follows: In response to Gannon's question, Bollon said that if the deletion on the limitation of the arbitrator's authority was part of the 1986-1988 contract, the deletion would remain. The parties' reviewed their positions. The parties remained apart on wages, assistants' grade levels, pensions, and accumulated floating holiday and compensatory time. The Union also rejected the Employer's proposal on lateral transfers. There was no movement by the parties. The parties argued over accumulated floating holidays and compensatory time. The Employer rejected the Union's pension plan proposal to lower the retirement age. Berger testified that the zipper clause was "still there . . . in our mind," but admitted that nothing was said about the clause at the December 20 session. The Employer said it did not want to continue negotiations into next year, and the parties agreed to meet on December 23.

I credit Gannon's testimony that the Employer, after a caucus, withdrew its proposal to rescind the side letter on floating holidays. Although Gannon was the only witness to so testify, Bollon's personal notes, the purported minutes taken by Duffy, and Beer's minutes of the negotiations, all indicate that the proposal was withdrawn. Bollon's notes contain the entry "W/D floating holiday." With regard to scheduling of the next session, I find that Gannon refused to meet on December 22 because she ostensibly lacked authority to meet on that date, but unconditionally agreed to meet on December 23. Alan Beer so testified, and his minutes so indicate. Gannon also admitted that she said she would have to check with the Union. In all other respects discussed above, I find that the testimony of the four witnesses together reflects the substance of what was said at the December 20 session.

Bollon testified that on December 20 he concluded that since the beginning of negotiations there had not been much movement on the issues of wages, pensions and assistants' salaries. He met with Employer President Alfred Whitehead, Executive Assistant to the President Harold Shaitberger, and Employer Counsel Joseph Reyna. Bollon proposed, and Whitehead concurred, that they prepare a "final, amended offer" to the Union for submission at the December 23 bargaining session, and that if no agreement was reached at that meeting, the parties would be at impasse. On December 22 Bollon and Reyna prepared this proposal. Also on December 22 the unit employees held their meeting. Gannon and Beer testified in sum as follows: Eighteen of twenty-five unit employees were present. Gannon reported on the negotiations. The secretaries, including Jean Rhyne, complained that the Union agreed to take secretary IV out of the contract, and to prevent employees from getting upgrades or promotions, during the contract term. Rhyne also complained that the Union withdrew its proposal for her upgrade, that the employees learned all this from the Employer, and that she was sick and tired of learning about the negotiations from management instead of the Union. Another employee also complained privately to Gannon in a similar vein. Gannon explained the Union's position, and in particular that the Union wanted to make sure that the contractual seniority and bidding procedure provisions were followed. She explained that

it was the Employer who proposed no upgrades during the life of the contract. The employees rejected the Employer's proposals, and voted to return to the negotiating table. The next morning (December 23) Gannon told Beer that the Employer was trying to disrupt the unit, that in view of what Rhyne said they had to reconsider their position on the secretaries, and that Gannon needed directions from Union President Donald Haines, but was unable to reach him. Gannon told Beer to prepare a memo postponing the December 23 bargaining session, which he did. Marie Grimes, who also testified concerning the December 22 meeting, testified that Rhyne said she would withdraw her request for an upgrade in view of the Employer's position (as described by Gannon), but the next morning told Grimes that she had changed her mind. Grimes reported this to Gannon, who then said she would cancel the bargaining session in order to talk to Haines.

On the morning of December 23, Gannon placed a memo on Bollon's desk, the text of which read as follows:

As we discussed yesterday, certain IAFF officials have been meeting with OPEIU bargaining unit members stipulating that upgrades for their positions were being halted due to OPEIU Local 2's positions at the bargaining table.

Today, I learned that the number of IAFF officials engaging in such practices is more widespread than originally discussed with you. As a result of this action and the strong sentiments echoed at the bargaining unit meeting held yesterday, OPEIU Local 2 is forced to reassess its position on the proper salary levels for certain secretarial positions.

Due to the holiday season, I have been unable to reach the President of OPEIU Local 2 to discuss the matter and formulate a position. Since I will not be able to meet with the Local 2 President until next week, I am forced to postpone negotiations scheduled for today. Furthermore, in light of these developments, the holiday season and the need for OPEIU Local 2 to possibly modify its bargaining position, you should be aware that Local 2 will be unable to meet for further negotiations until after January 3, 1988.

Upon receiving Gannon's memo, Bollon, together with Attorney Reyna, prepared on reply memo, attached a 17-page document captioned "Agreement," and within an hour delivered the document to Gannon. Bollon also delivered a copy to Alan Beer. Both employees were at work. The text of Bollon's memo was as follows:

In view of the fact that you have unilaterally cancelled our latest negotiating session, it is apparent from the long course of negotiations that neither party is making any further progress toward a resolution of this collective bargaining agreement. It is clear that there are irreconcilable differences in the parties' positions of the contract. Therefore, the International Association of Fire Fighters shall implement immediately the attached contract the terms of which shall be effective the close of business Tuesday, December 27, 1988.

With respect to your December 23, 1988 memo concerning alleged contacts between IAFF officials and bargaining unit members, I must strenuously deny that

IAFF officials have ever interfered with the negotiation process between OPEIU and its members. The IAFF has not sought to bypass OPEIU or undermine its position as the exclusive bargaining representative of its OPEIU Local 2 members.

The attached "contract" took the form of a complete collective-bargaining contract, including recognition, union security, checkoff and grievance and binding arbitration provisions, albeit without signature or other agreement by the parties. The document included, with changes, the terms and provisions of the expired contract. As tentatively agreed by the parties, the document purported to be effective for 2 years (October 1, 1988, through September 30, 1990) and the Employer's proposed section 11.08 on steward time. The Employer's proposal on noninvolvement previously withdrawn, was not included. The document included the Employer's proposed section 6.08 (presented on December 8) on lateral transfers. As indicated, the Union rejected, and the Employer never withdrew the proposal. The document retained the 1986-1988 contract language in section 14.05, concerning changes in job classifications. (As discussed, the Employer had rejected the first sentence of the Union's proposed sec. 14.05, but tentatively agreed to the second sentence on demotions and wage reduction.) The document also contained the following section 8.01A on attendance:

Section 8.01A. Any employee who arrives between 9:00 a.m. and 9:15 a.m. shall be permitted to make up such time. Any employee who arrives after 9:15 a.m. shall not be compensated from such time not in attendance from 9:00 a.m. until the employee's arrival. The employer shall develop a policy with the Labor Management Committee concerning severe weather conditions (until such policy is developed, the Federal Government guidelines shall be used).

The first sentence had been tentatively agreed upon at the December 14 session. The second part, including the portion in parentheses, had never been proposed in that form by either party. Rather the second part was an amalgam of the Union's proposal to use the Federal guidelines and the Employer's proposal that the joint committee develop a policy. The document carried over the prior termination of floating holidays and accumulated unused compensatory time, but did not include the side letters dealing with these matters, or any other side letters. Therefore the effect of this "contract" would be to eliminate the side letters on accumulated floating holidays and unused compensatory time, although on December 20, the Employer withdrew its proposal to rescind the side letter on floating holidays. The document also provided for payment of 50 percent of unused sick leave upon retirement and 20 percent upon termination. As indicated, the Employer had tentatively agreed upon 50 and 25 percent respectively. Bollon testified that the 20-percent figure was a typographical error, and was corrected in actual practice. The limitation on an arbitrator's authority (sec. 13.01, Step 4) remained deleted.

On wages, the document provided for longevity increases as tentatively agreed by the parties. The document provided salary scales for each of 2 years (effective October 1, 1988, and October 1, 1989, respectively). These scales provided for 1-percent general wage increases in each year of the contract,

although in negotiations the Employer proposed only one increase of 1 percent. (By a letter to the employees dated May 24, 1989, the Employer informed them they would be receiving a 1-percent increase effective October 1, 1989.) The document provided for COLA as tentatively agreed by the parties. However, the "contract" wage rates failed to include the COLA increase as part of the basis for the 1-percent increase, although the COLA increase would take effect first. Bollon testified that this was a mistake which later had to be corrected. The document contained the same language as the 1986-1988 contract with respect to pension plan, in sum, that the existing plan would remain in effect. The document also contained the Company's proposed zipper clause (withdrawn on September 28) in place of the former continuation of benefits language. Bollon testified that the Employer included the zipper clause because no agreement was reached, the Employer was not able to address all issues, and the Employer did not want side letters. As the Employer eliminated side letters in the "contract," including those pertaining to accumulated floating holidays and compensatory time, which were the only side letters really in issue, Bollon's assertion makes no sense.

The document also deviated from the Company's last offer concerning the grade levels of assistants. The document fixed the salaries of the legislative, research, education, and OSHA assistants at Grade 8. At the time (December 23) the only assistants on the Employer's payroll were Research Assistant Michele Dove, Legislative Assistant Cheryl Gannon, and OSHA Assistants Beer and Vita. The Employer, upon implementing the "contract," reduced Beer from Grade 9, 24 months to Grade 8, 24 months, and Vita from Grade 9, 18 months to Grade 8, 18 months. These actions substantially reduced their pay. Beer's weekly pay dropped from \$883.55 to \$700.42, and Vita's from \$841.54 to \$671.20. Beer never received COLA for the period from October 1 to December 27. (The record does not indicate whether Vita received COLA for this period.) The Employer never proposed in the negotiations, that the assistant's salaries be uniformly fixed at Grade 8. As indicated, the Employer throughout the negotiations proposed a 2-year progression period from Grade 7 to 7A to 8. The Employer's last offer with respect to Beer and Vita, submitted on December 14, was that Beer would be frozen at his present salary until it reached the maximum level of a Grade 8, and Vita would be frozen at Grade 8A until his salary reached the maximum level of Grade 8. Also as indicated, the parties, in accordance with Gannon's November 3 memo, agreed that if they failed to reach agreement on a wage freeze, Beer and Vita would receive COLA pay retroactive to October 1. Bollon testified that the Employer set all of the assistants at Grade 8 "because we wanted to be able to be fair and equitable to the employees."⁴

⁴In its May 24 letter to the employees, the Employer listed what it described as "improved Union benefits" under the implemented "contract." Under the heading "Downgrade and Lateral transfer," the Employer stated that "one secretary would have been 'red circled' so there would be no reduction in salary." The implemented "contract" did not indicate any red circling of a secretarial salary, and no direct evidence was presented that anyone's salary was red circled, other than Beer and Vita. The Employer may have referred to Barbara Volel who was reduced from a secretary IV to a secretary III. Volel filed a grievance, and on May 11, 1989, an arbitrator denied the grievance. I am not persuaded that General Counsel has proven a violation relevant to the subject matter of the complaint, i.e., the unilateral changes implemented by the Employer on or about December 27.

Neither the 1986 contract nor the Company's new "contract" contained any wage scale for a political action assistant. This was a newly created position. In mid-December the Employer interviewed alleged discriminatee William Shoehigh for the position. Employer Director of Government Affairs Frederick Nesbitt told Shoehigh that his salary level was being negotiated. On December 28 the Employer hired Shoehigh at a Grade 8. The parties did not in their negotiations discuss a salary level for this position. Bollon testified that the Employer made a typographical error by failing to include the political action and public relations assistants under the contract scale for Grade 8. The new "contract" also deleted or revised certain job titles which were contained in the 1986-1988 contract. None of these changes were discussed in the negotiations. In 1989 the Employer filled the positions of education assistant and research assistant at Grade level 8.

Cheryl Gannon testified that upon receiving Bollon's memo and the attached document, she met with the other members of the Union's negotiating committee. They did not know what to do. On December 27 she contacted Union President Donald Haines, who said they would have to contact the Union's attorney and filed an unfair labor practice charge. (The Employer's offices were open and Gannon was at work on December 27.) There was no contact between the Union and the Employer concerning the matter until January 8, 1989. After December 27 the Employer implemented the new wage rates, grade levels, and attendance policy (9:15 cutoff time). The Employer also informed the unit employees that accumulated floating holiday time would be cashed out by the end of 1989, and accumulated unused compensatory time by September 30, 1990.⁵ Bollon testified that when the Employer's executive board met on January 8, he presented a report on the negotiations and the current situation. The executive board gave Bollon "a vote of confidence," although it did not, as such, approve the new "contract." In December the Union knew that the executive board was scheduled to meet in January. By hand-delivered letter dated January 8 to Employer President Whitehead, Union President Haines accused the Employer of unilaterally implementing changes in terms and conditions of employment, although there was no impasse. By letter dated January 18, Bollon responded in sum that there was an impasse, but the Employer was willing to negotiate. By letter dated February 14, Haines asserted that without waiving its position, the Union was also prepared to negotiate. The parties then discussed dates for resumed negotiations.

*B. Analysis and Tentative Concluding Findings
Concerning Alleged Violations of the Employer's
Bargaining Obligations*

As a general rule, an employer is permitted to make unilateral changes in terms and conditions of employment when there is an impasse in negotiations regarding the subject matter or matters in question, i.e., when despite their best efforts to achieve agreement with respect to such matters, neither party is willing to move from its respective position. *Hi-Way*

⁵ In light of Bollon's testimony to this effect, the Employer's assertion in its May 24, 1989 letter to employees, that the side letter on floating holidays remained in effect, was false. In a position letter to the Board's Regional Office, Employer counsel stated that the Employer eliminated carryover of floating holiday pay.

Billboards, Inc., 206 NLRB 22, 23 (1973), revd. on other grounds 500 F.2d 181 (5th Cir. 1974). However, such changes must be reasonably comprehended within the employer's preimpasse proposals. Whether an impasse exists is a matter of judgment. The relevant factors in making that judgment include the bargaining history, the good faith of the parties in negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. sub nom. *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

The complaint does not allege that the Employer engaged in bad faith or "surface bargaining" in the 1988 negotiations. Rather, the General Counsel contends that the Employer unlawfully implemented its self-styled "contract" because (1) as of December 23 there was no impasse in bargaining, (2) even assuming that the Employer's December 23 communication to the Union constituted a final offer, the Employer did not afford the Union an opportunity to bargain concerning the Employer's "contract," and (3) the changes implemented by the Employer were inconsistent with the Employer's proposals prior to December 23.

I reject General Counsel's first argument. On December 23 the parties reached an impasse because the Union, summarily and without valid reason, broke off negotiations without even proposing a date for renewal of the negotiations. By the end of the December 20 session the parties had discussed and explored their respective opposing positions on the issues between them. They were making some progress, but were still apart on certain issues which one or both of them regarded as important. The Employer believed that they were approaching an impasse, but was willing to go through another bargaining session. The Employer prepared the "contract" document as a "final, amended offer" to present to the Union at the December 23 session. The fact that the Company prepared this document in advance of the session, does not mean that the Company would refuse to negotiate at that session. Both sides prepared written proposals before bargaining sessions. The document included some concessions to the Union, e.g., the assistants other than the OSHA research assistants would immediately be moved up from Grade 6 to Grade 8. If the parties met as scheduled on December 23, the document might have afforded a basis for further movement toward agreement. Gannon's ostensible reason for abruptly cancelling the session, namely, that she needed instructions from Union President Haines, was false, or at least inadequate. Gannon had assured the Employer that they could bargain without Staff Representative Kocan-Moore, because Gannon and her committee had full authority to negotiate a contract. If Gannon needed instructions from Haines, then she misrepresented her authority and thereby acted in bad faith. If Gannon needed instructions from Haines, then Haines should have been available at this critical stage of the negotiations. The Union knew that the Employer did not wish to bargain into 1989. Haines was not presented as a General Counsel witness, although the Employer called him concerning another allegation, and he did not corroborate Gannon's testimony that he was unavailable during this period of time.

The Union did have another problem. Although the parties had been meeting for nearly 3 months (with delays due

mainly to Kocan-Moore's absences), the Union's negotiating committee failed to keep the unit employees fully informed of the progress of the negotiations, and the committee also failed to keep informed of the employees' views concerning the negotiations. As the negotiations progressed, some employees began to suspect that Chief Negotiator Gannon would be the principal beneficiary of any agreed upon contract. Both sides were in agreement that sooner or later, the position should be upgraded. The unit employees aired their complaints at the unit meeting on December 22. The complaints, which centered on union withdrawal of its proposal to upgrade Rhyne, could have been resolved at the meeting. Instead, the Union used these complaints as a lever to tell the Employer, after nearly 3 months of negotiations, that the Union wanted to reevaluate its bargaining positions.

I find that the reasons advanced by Gannon for cancelling the December 23 session were a pretext. The Union wanted to delay further negotiations until after the Employer's executive board meeting scheduled for January 8. By December 20 the Union knew that negotiations were approaching an impasse, and that the Union was nowhere near its desired goal of attaining parity with the staff representatives' union. Therefore the Union wished to resort to a method which had worked in the past, namely, to go beyond the bargaining table and appeal to the Employer's international or local leadership or membership. At the time the 1986-1988 contract was negotiated, John Gannon (no relation to Cheryl) was Employer president. Alfred Whitehead was secretary-treasurer, and in charge of labor relations. By appealing to John Gannon, the Union was able to get more favorable terms than it could at the bargaining table. In September 1988 the Employer changed leadership. Whitehead became president and Vincent Bollon became secretary-treasurer. Whitehead designated Bollon as chief negotiator. Whitehead was determined that history would not repeat itself. Thus Whitehead testified that he told Cheryl Gannon that "I won't have done to [Bollon] what was done to me," namely, that in Whitehead's view, the two Gannons had undermined his position as the person in charge of labor relations. Throughout the first half of 1989 the Union sought to press its case before the Employer's international and local leadership and membership. These were legitimate labor relations tactics. However, they did not constitute legitimate grounds for cancelling a bargaining session and delaying further sessions, particularly at a critical stage in the negotiations.

However, I find merit in the General Counsel's second and third arguments. The Employer's December 23 memo and attached "contract" was not a bargaining offer, but a notice of intent to implement the document. The Employer did not say that it would implement the document unless the Union requested further bargaining. Rather, the Employer asserted that because the Union cancelled the December 23 session, and "we have reached an impasse," the Employer "shall implement immediately the attached contract," the terms to be effective at the close of business on December 27. Therefore the Union did not waive its right to protest the implemented contract by failing to request bargaining or otherwise failing to communicate with the Employer prior to January 8. In view of the Employer's stated intent, such a request would have been futile. However, the Union's silence is further evidence that the Union intentionally sought to delay re-

sumption of negotiations until after the executive board meeting.

If the Employer had implemented proposed charges within its bargaining proposals as they stood on December 20, I would be inclined to dismiss this case. However, the Employer did not, and the Employer thereby violated the Act by implementing changed terms and conditions of employment which were not "reasonably comprehended within the employer's pre-impasse proposals." The Employer implemented two annual 1-percent general wage increases, although in the negotiations it proposed only one such increase. The Employer, by its own admission, changed the grade structure for assistants in a manner never previously proposed by the Employer. Specifically, the Employer placed all assistants at the level of a Grade 8, thereby substantially lowering the salaries of the OSHA research assistants while increasing the salary levels of other assistants. The Employer also unilaterally set grade levels for assistants whose status had not been discussed and whose positions were not even listed in the implemented "contract." The Employer acted unilaterally by failing to give Beer COLA for the period October 1 to December 27, notwithstanding the memorandum agreement of the parties that Beer and Vita would receive COLA, retroactive to October 1, if the parties failed to reach agreement on a wage freeze. The Employer also unilaterally struck the side letter on floating holidays, and required cashing of accumulated floating holiday time by the end of 1989, notwithstanding that the Employer withdrew its proposal in this regard. As indicated, this change affected some 15 unit employees. The Employer also unilaterally included a zipper clause in its implemented "contract," notwithstanding that the Company unequivocally withdrew this proposal on September 28, and there was no subsequent discussion of the matter. This was not some theoretical provision which had no potential impact on the unit employees' terms and conditions of employment. The Employer ostensibly initially proposed a zipper clause in order to eliminate side letters. Aside from this clause, the implemented "contract" did eliminate all side letters. However, the zipper clause had broader import. For example, (as will be discussed), during the renewed negotiations in 1989 the Employer and the Union discussed an Employee Assistance Program (to deal with alcohol and drug problems), and an alleged unilateral change in the employee dress code. The 1986-1988 contract was silent on both matters. If the continuation of benefits clause were still in effect, the Employer could not change any existing practices without first giving the Union notice and an opportunity to bargain. However, under the zipper clause the Employer might well argue that both matters fell within the area of management rights. It is also immaterial, to the merits of the case, whether the Employer's unilateral actions gave benefits or took away benefits from the unit employees. The Employer's "contract" provisions on wage increases, grade levels, and attendance, if presented as proposals for bargaining, might well have generated movement toward agreement in these areas. In sum, the Employer unilaterally implemented substantially and significant changes in terms and conditions of employment, which were inconsistent with its prior proposals, without affording the Union an opportunity to bargain

concerning those changes. The Employer thereby violated Section 8(a)(5) and (1) of the Act.⁶

However this is not the end of the inquiry. The Employer contends by way of affirmative defense that the parties resumed bargaining on March 15, 1989, and bargained to impasse on or before reimplementing of the "contract" on September 18, 1989. The Employer argues that therefore even if there were a violation in December 1988, liability should be tolled as of September 18, 1989. In order to evaluate this defense, I shall at this point proceed to consider the renewed negotiations which took place in 1989.

C. The 1989 Negotiations

The parties resumed negotiations on March 15. Bollon and Gannon remained as the chief negotiators. In mid-August 1989 Gannon quit her employment, and Beer took over as chief union negotiator. Bollon, Gannon, and Beer testified concerning the negotiations. At the March 15 session the Union presented several documents. The Union proposed a revised section 14.05 which read as follows:

Section 14.05 Any position upgraded by the Employer shall be subject to job posting in accordance with Article VI of this Agreement, except that the provisions of Section 6.04 of this Agreement [on probationary period] will not apply when the incumbent employee (i.e. employee who held the position prior to proposed upgrade) is the successful bidder for the upgraded position. Until such time as a successful bidder is selected, the proposed upgraded position will not be declared vacant, but will be retained by the incumbent employee. No bargaining unit employee shall be demoted or suffer a wage reduction unless the demotion is the result of disciplinary action in accordance with the provision of Article VII of this Agreement.

The Union also submitted a proposed section 6.08 which stated as follows:

Section 6.08 Notwithstanding any other provision contained in this Article VI, or in this Agreement, the Employer shall at all times have the sole right and discretion to laterally transfer bargaining unit employees from their present position to other positions having the same job title in the same grade classification as specified in Appendix A. Any effected employee shall not suffer a reduction in salary, including overtime compensation and out-of-classification pay as a result of such transfer. In addition, a lateral transfer shall not be allowed if the effect would be that the employee will have fewer promotional opportunities in the new position.

The Union also presented a draft proposal on an Employee Assistance Program ("EAP"), captioned "Alcohol-Drugs." The Union also submitted a written presentation in support

⁶I do not agree with General Counsel's arguments (Br. 16) that the Employer acted unlawfully by failing to implement the second sentence of the Union's proposed sec. 14.05 (downgrading) upon which there was tentative agreement. The Employer simply carried over the existing language of sec. 14.05 of the 1986 contract. The Act prohibits an employer from making unilateral changes, but does not require the Employer to implement changes upon which there has been only tentative agreement. Moreover, both sentences were at least arguably parts of the same proposal, and there was no agreement on the first portion of the Union's proposed sec. 14.05.

of its proposal to upgrade Marion Hoepfl. The Union argued in sum that upgrading was warranted because Hoepfl's "job duties have increased dramatically." Beer testified that this presentation was based on information given by the Employer in response to the Union's December 16 request for information. At the March 15 session the Union also submitted a written request for a copy of the current pension plan, and any other written materials given to the trustees at their last meeting. The Employer did not present any proposals.

With regard to the March 15 meeting, Bollon testified in sum as follows: The Employer rejected the Union's proposed section 6.08 and all but the last sentence of section 14.05 as impinging on management rights. Bollon said that the Employer would meet with the Union if an employee were to be upgraded. The last sentence of section 14.05 remained on the table. On EAP, Bollon noted that the proposal contained a prohibition on use of employer funds for consumption of alcohol, and pointed out that alcoholic beverages were served at retirement parties. They discussed Federal funding of EAP. The parties discussed the Union's proposal to upgrade Hoepfl. Bollon said he would get back on it. With regard to pensions, the parties discussed 5-year vesting and the trustees' meeting. The parties did not discuss the pending unfair labor practice charge or implemented "contract." There were no agreements. Beer testified in sum as follows: Bollon admitted that he previously agreed to the last sentence of the Union's proposed section 14.05, which was left out of the implemented contract, but said he would deny it. Bollon said that the Union's EAP proposal was too restrictive. Beer argued that the Union's writeup on Hoepfl reflected her increased duties. The Employer did not respond. On pensions, Bollon said that the Employer would provide documentation on 5-year vesting. Gannon testified in sum as follows: The Employer said it would review and respond later to the Union's proposed sections 6.08 and 14.05 and EAP. The Union expressed concern about upgrades without bidding and reduction of Barbara Volel's pay. The Union said that employers who received Federal grant monies were required to establish an EAP. I credit Gannon's testimony that the Employer said it would respond later to the Union's proposed sections 6.08 and 14.05. Bollon's testimony that he rejected the proposals is, as will be discussed, inconsistent with the position he took at the third renewed bargaining session on March 17. In other respects I find that the testimony of Bollon, Beer, and Gannon together reflects the substance of what was said at the March 15 session.

At the next session on March 16, the Union submitted an additional and more detailed request for information concerning the pension plan. Bollon testified in sum as follows: He again rejected the Union's proposed sections 6.08 and 14.05. They discussed upgrades and promotions. The Union wanted posting. On EAP, the parties discussed developing a policy through their joint occupational health and safety committee, and they arranged to do so. They discussed amendments to the pension plan, including one which made the Union's observer a trustee. The 1986 contract and the implemented "contract" provided for a union appointed trustee (sec. 15.01). Bollon said there had to be 5-year vesting as of July. Beer testified in sum as follows: The Union unsuccessfully sought specific responses to its proposals. Bollon said that he preferred that the contract refer to an EAP without spelling out the program, and that he was not prepared to respond to

certain union proposals. The parties recessed to afford the Employer an opportunity to review the Union's proposals. During the recess Elaine Duffy of the employer team informed the Union that the Employer was cancelling the balance of the session. Gannon testified in sum as follows: They discussed EAP. They agreed that a policy should be developed. The Employer wanted to do this separately from the negotiations. They agreed that the contract should refer to a policy when it was developed. The Employer said it would obtain copies of EAPs from other labor organizations. The Employer said it wanted a complete package proposal from the Union before responding to any specific union proposals. As discussed with respect to the March 15 session, I do not credit Bollon's testimony that he rejected the Union's proposed sections 6.08 and 14.05. I also find that the Employer did not request a complete package proposal from the Union at this session. (Both Bollon and Beer testified that this occurred at the March 17 session.) In other respects I find that the testimony of Bollon, Beer and Gannon together reflects the substance of what was said and done at the March 16 session.

The parties next met on March 17. The Union presented three written proposals. The Union proposed a new section 18.02, a picket line clause. This provided in sum that employees would not be required to cross a picket line, and would not lose wages or benefits by reason of such refusal. The Union also proposed (in sec. 9.04) that accumulated floating holidays could be carried forward without restriction. The Union further proposed that the political action assistant be paid at the same rate as the legislative, education, and research assistants. Bollon testified in sum as follows: At this or the next session (March 22) he gave the Union the requested pension information. Bollon asked the Union for a complete package, in order for the Employer to meet the issues. The Union said they wanted to first address non-economic issues. The parties reviewed the status of negotiations. The Union said that anything in the implemented "contract" on which there was no counterproposal, was rejected. They discussed the implementation date. Bollon said it was December 27. On floating holidays, the Union said they had a tentative agreement. The Employer counter-proposed that employees could use or cash out accumulated floating holiday time by the end of 1989. (Bollon initially testified that he proposed use or cashout by the end of 1990, but subsequently admitted that the proposal was to the end of 1989.) There was no agreement. The Employer said it would consider the proposed picket line clause. The Employer agreed to the proposal on political action assistant, explaining that the omission in the implemented "contract" was inadvertent. The parties discussed 5- or 7-year vesting and amendments to the pension plan. Bollon agreed to 5-year vesting, saying that it should have been in the contract. Gannon said they could reach a contract notwithstanding the unfair labor practice charge. Beer testified in sum as follows: The Union presented its request for more detailed information on pensions. (The request was dated March 16.) The Employer had already responded to the first request (of March 15). The Union said it was abandoning its request for parity with the staff representatives union, and would agree to 5-year vesting, with documentation, and a union trustee (the plan did not contain a space for signature by a union trustee). On floating holidays, the Union questioned why the

Employer had gone back to its previous position. Bollon said that the Employer's position on that and several other items changed between December 20 and 23. Bollon referred to an auditor's report on liability by reason of accumulated floating holiday pay. The parties reached tentative agreement on the Union's proposal concerning political action assistant's salary. The Employer wanted a package proposal from the Union. The Union preferred to deal first with noneconomic issues. The Union reviewed the status of negotiations, and said it would present a new counterproposal on Rhyne. The Employer said that tentative agreements as of December 20 remained. Gannon testified in sum as follows: On floating holidays, Bollon said the Employer backed down from its former position because the auditors wanted to reduce outstanding liability. Bollon admitted that the Employer had the auditor's report in December, but asserted this was only a preliminary draft, adding that "I reevaluated my position on a lot of things on December 23rd." The Employer did not respond to the Union's proposed picket line clause. The parties tentatively agreed on the political action assistant proposal. The Union said it was abandoning all proposals to improve the pension plan, but wanted language on 5-year vesting. Bollon said this was not needed, because 5-year vesting was required by law. The Employer asked to break early because it was St. Patrick's Day, and the Union agreed.

As testified by Bollon, on March 17 he asked the Union for a package proposal in order to enable the Employer to meet the issues. Therefore, it is unlikely that on March 15 and 16 he would have categorically rejected the Union's proposed sections 6.08 and 14.05. Therefore as indicated, I credited Beer's testimony that Bollon did not respond to the merits of these proposals. I also credit Gannon's testimony that Bollon declined to document 5-year vesting. As indicated, I find that the Union requested detailed pension information at the March 16 session. In other respects I find that the testimony of Bollon, Beer, and Gannon together reflects the substance of what was said at the March 17 session.

The parties next met on March 22. The Union proposed that if one of the secretary IIIs were upgraded, then all three would be upgraded. The Union also proposed a memorandum of agreement on the pension plan. The memorandum provided in sum that the parties agreed to amend the plan to provide for 5-year vesting and a union trustee, effective no later than July 1, 1989. The Union also proposed that their contract should provide for a 1-percent wage increase effective October 1, 1989, on top of COLA adjustments. Bollon testified in sum as follows: They discussed the Union's proposal on secretarial upgrades. Bollon questioned how the proposal would impact on the pending unfair labor practice charge and two pending arbitration proceedings (including Volel's). He said the proposal would have been easier to implement if presented before December 17, but in light of implementation of the "contract," he did not know how it would affect the unfair labor practice case. Bollon suggested that if an arbitration award favored the Union, the Employer would have to upgrade the other two secretaries. Bollon said he would look into the matter, but counter-proposed that none of the secretaries to the executive assistants be upgraded for the life of the contract. On pensions, he said he would check how long it would take to amend the plan. Bollon said the proposed memorandum of understanding was "housekeeping" because the law required 5-

year vesting and the trustee was approved, although neither item was documented. He said he would take care of it. On EAP, Bollon said he was setting up meetings. He again requested a package proposal, and the Union said they would get back to him. Beer testified in sum as follows: On secretarial upgrades, Bollon said the Union's proposal would have been easy to agree to if presented prior to "contract" implementation, but he did not know how it would impact on the pending unfair labor practice case and arbitrations, and would check. Bollon proposed that no one would be upgraded. The Union said that since the Employer wanted an economic proposal, the Union would agree to the 1-percent general increase. On the Union's pension proposal, Bollon said he would have to check with the Employer's pension consultant. Bollon offered no explanation for the absence of a space for signature by a union trustee on the plan. Bollon described the concessions made by the staff representatives' union to get improved pension benefits. On EAP, the Union furnished Bollon with sample documents. Bollon said he was trying to set up a meeting and learn about other labor organizations' EAP programs. Gannon in her testimony substantially corroborated portions of the testimony of Bollon and Beer. She also testified that Bollon said it might take months to revise the pension plan. I find that the testimony of the three witnesses together reflects the substance of what transpired at the March 22 session.

The parties next met on March 23. This was a short session. Bollon testified in sum as follows: They discussed secretarial upgrades and pensions. Bollon said the Union's proposal on upgrades was not workable, in view of the pending arbitration proceedings. He preferred the Employer's counterproposal for no upgrades. (Eventually the Employer prevailed on the Volel grievance and the Union withdrew the second grievance.) The Union inquired about contacting the Employer's actuary, and asked whether the provision for a union trustee would be in the trust agreement or the contract. Bollon gave the actuary's name, and said that section 8.02 of the trust agreement dealt with trustees, and the Employer would make any necessary amendments. Bollon said they were close to an agreement, but was referring to the matter of a union trustee for the pension plan. Beer testified in sum as follows: On secretaries, Bollon said that the Union's proposal would force an upgrade of all the secretaries if the arbitrator ruled in favor of Volel. The Union said this was not true because the proposal dealt only with Employer determinations. Moreover the arbitrator would not upgrade Volel, but only restore her salary. However, the Union said it would rewrite its proposal to meet the Employer's concern. The Union and the Employer agreed that the secretaries seemed to feel that the Union was preventing them from getting upgrades. On pensions, Bollon said that the matter of the union trustee could be handled by amending the contract rather than the trust plan. Gannon said: "Well, it looks like I'm doing a slow waltz to impasse and you're trying to do a jitterbug to impasse." Bollon said he felt they were close to an agreement although (in the Union's view) the Employer had not responded directly to the Union's proposals. Gannon testified in sum as follows: Bollon rejected the Union's proposed memorandum of agreement on the pension plan, saying he would just amend the plan. He said it was not necessary to amend the trust agreement. He said he was waiting to hear from the Employer's pension consultant, who knew

that Michelle Dove was a trustee. Bollon said the Employer would amend the plan when the Employer responded to the Union's package proposal. I find that the testimony of the three witnesses together reflects what was said at the March 23 session. However, I credit Bollon's explanation that when he said they were close to an agreement, he was referring to the matter of a union trustee for the pension plan. Even at this point, the fifth session of renewed negotiations, the parties had not discussed some issues which divided them; and the Employer was still awaiting a package proposal from the Union. In these circumstances, it is unlikely that Bollon would opine that they were close to total agreement. I find that Gannon's remark about impasse reflected her appraisal of the course of negotiations. The Union was dealing intensively with one or a few issues at a time, while the Employer was generally taking a negative approach, i.e., rejecting or ignoring union proposals, without significantly moving from its prior positions.

The parties next met on March 27. The Union presented four written proposals. The first provided that the classifications of legislative, political action, public relations, research, and education assistants would be set at Grade 8, with length of service credit for the legislative and research assistants. The second was a proposed memorandum of agreement which reduced to writing the Union's proposal that if one secretary to an executive assistant was upgraded, then all three would be upgraded. The third provided in sum that the parties agreed the salary levels for the OSHA research assistants would be at least equivalent to those for any other professional unit position related to occupational safety and health, and the Employer would not employ any such professional at a higher grade level without the Union's agreement. The fourth provided that accumulated unused compensatory time could be carried forward without restriction. The Employer also presented four written proposals. The first purported to amend section 14.01 of the implemented "contract," on wage increase, by providing that the October 1, 1989, 1-percent wage increase would be on top of COLA adjustments. The second was a proposed memorandum of agreement which provided that the pension plan would be amended to provide for 5-year vesting, and the appointment of a union trustee would be reflected in section 8.02 of the trust agreement and (as it was) in section 15.01 of the collective-bargaining contract. The third was a proposed memorandum of agreement which provided that the secretaries to the executive assistants would not be upgraded to secretary IV during the life of the contract. The fourth provided for use or cashout of accumulated unused compensatory time by the end of contract term (September 30, 1990).

Bollon testified in sum as follows concerning the March 27 session: The Union presented its proposals and the parties reviewed their positions. They did not agree on a 1-percent general wage increase. At a later session (April 20) they agreed that the wage increase would be on top of COLA. The Employer rejected the Union's proposal on professional assistants' grade level, on the ground that this was already done in the implemented "contract." (The "contract," unlike the Union's proposal, did not refer to the political action and public relations assistants or to length of service credit.) The Employer rejected the Union's proposal on secretarial upgrades, and adhered to its counterproposal for no upgrades. There was no agreement. There was no agreement on the

pension plan. Bollon said it would take about 2 weeks to amend the plan. The parties discussed whether the contract or the plan should be changed. The Employer rejected the Union's proposal on the OSHA research assistants, because of a pending unit clarification proceeding (Case 5-UC-280) involving the Company's HAZMAT personnel. They were working under a government grant, and the Employer contended they were not part of the bargaining unit. The Board's Regional Director ruled otherwise, and at the time of the present hearing the matter was pending on appeal to the Board. There was no agreement on accumulated compensatory time. On the OSHA research assistants, the Union said it was adhering to its proposal of December 14, and the Employer adhered to the implemented pay level. The parties rejected each other's proposed section 6.08 (on transfers), and the Employer rejected all but the last sentence of the Union's proposed section 14.05, leaving the last sentence on the table. The Employer rejected the Union's proposed picket line clause and proposal to upgrade Rhyne, and said it would correct the error on sick leave. The parties discussed the effect of a negotiated contract on the unfair labor practice case.

Beer testified in sum as follows: The Union said that its proposals constituted a complete package. The Union conceded to the Employer on all matters except those covered by union proposals. However, the Union told Bollon that matters not covered by its proposals were rejected. The parties reviewed the implemented "contract," and agreed on those matters upon which there had been tentative agreement. The Union presented its proposals on wages in order to offer the Employer a complete package. On calculation of wage increase, the Employer agreed to calculate the wage increase on top of COLA, but never corrected the salary figures in schedule B to the implemented "contract." The Union's proposal on length of service credit would move Gannon and Dove from Grade 6, 24 months to Grade 8, 24 months instead of Grade 8, 6 months. This would accord with existing but unwritten policy. The Employer rejected the Union's proposal on the ground that it was already doing this. The Union's proposal on secretarial upgrades was a revision of its earlier proposal. The Employer rejected all of the Union's proposals, and late in the afternoon presented its counterproposals as described above. The Employer said that it was already implementing its counterproposal on accumulated compensatory time. Bollon said it would take 2 weeks to amend the pension plan to provide for 5-year vesting, but restated his view that it was not necessary to amend the plan to provide for 5-year vesting or a union trustee. Bollon asked whether the Union rejected the zipper clause, but the Union did not respond. The Union asked about changes in job titles for the OSHA assistants and the impact of EAP on sick leave. Bollon said he owed the Union a response on section 14.05. Gannon, in her testimony, corroborated portions of the testimony of Bollon and Beer. However, she testified that Bollon said he could not respond to the Union's proposal on OSHA research assistants until the outcome of the unit clarification case.

I find that the testimony of Bollon and Beer together reflects the substance of what transpired at the March 27 session. The evidence indicates that each side was conducting the negotiations with an eye to the pending unfair labor practice litigation. The Union did not, as requested by the Employer, present a package proposal. The Union presented in-

dividual proposals which together with its outstanding proposals and prior tentative agreements, purported to constitute a package proposal. However, the Union was ambiguous about whether it accepted or rejected the Employer's position on matters which were not the subject of a specific union proposal. The parties went through an item by item review of their positions, and to this extent clarified the situation. However, the Union did not at this time (or until April 20) make clear its position on a general wage increase. The Union declined to comment on the zipper clause. The parties failed to agree on pension plan language, although the Employer's proposal gave the Union what it wanted. The parties were in agreement on grade levels and length of service credit for the professional assistants other than the OSHA assistants, but the Employer refused to reduce their agreement to writing. The Employer's excuse was that it was already implementing these practices, although the grade levels of two assistants and length of service credit were not even written into the Company's implemented "contract." It is evident that both sides wished to preserve their positions in the litigation. The Union wished to show that there was much left to negotiate, and the Employer sought to show that there was nothing left to negotiate.

The parties next met in negotiations on April 19. They spent most of the time discussing peripheral issues, and little was accomplished. Bollon testified in sum as follows: The Union asked why it was not informed that the Employer transferred Marie Grimes to the public relations office. Bollon answered that the Employer needed an experienced person. The Union also questioned the Employer's dress code, specifically, that the Employer announced that male employees were required to wear ties through the summer. They discussed accumulated compensatory time. Bollon reported that he obtained an amendment to the pension plan for President Whitehead's signature. The Union said they were still awaiting Employer proposals on EAP and section 14.05. Bollon admitted that he owed this. However, he asserted that the Employer gave all its counterproposals on March 27, and was awaiting the Union's responses. Beer testified in sum as follows: Bollon did not bring any written material with him, and he did not have a response on section 14.05. Bollon said he was not sure whether Grimes' transfer was temporary or permanent, and he would get back to the Union on this, and also on the change in dress code. The Union said the dress code was a mandatory subject of bargaining. Bollon said he would give the Union the amended pension language. Gannon in her testimony corroborated portions of the testimony of Bollon and Beer. She also testified that Bollon said the Grimes transfer was not a part of the negotiations. I find that the testimony of the three witnesses together reflects the substance of the April 19 session.

The parties next met on April 20. The Employer presented a signed amendment to the pension trust plan, and a proposed contract clause (sec. 15.01) incorporating by reference the amended plan providing for a union trustee. The clause did not specifically refer to 5-year vesting. The Employer did not present any language on either section 14.05 or EAP. The Union presented contract language on an EAP and the text of a proposed EAP. The Union also presented a two-paragraph proposal on authorization of overtime compensation, and later in the session, a revision of the proposal. (As will be discussed, authorization of overtime compensation

developed as an issue in connection with the alleged unlawful discharge of William Shoenigh on March 21.) Bollon testified in sum as follows: He still owed the Union a response on section 14.05 and EAP. He did not recall whether they agreed on the pension plan language. He did not recall owing anymore information on the Grimes transfer. He told the Union he found no record of the Employer ever meeting with the Union on dress codes. There were no remaining outstanding information requests. However, the Union inquired about pension payment formula, and Bollon said he would check. The parties discussed the Union's proposal on overtime compensation. The Union revised its proposal but there was still no agreement. The parties also discussed the Union's EAP proposal. The parties had already made progress in their joint committee. They agreed on a contractor and that the Employer would bear the costs. However there was no agreement on the Union's proposal at this session. The Union announced that it was accepting a 1-percent general wage increase and the Employer's inclement weather provision, and withdrawing all prior pension proposals. The parties remained apart on the salaries of the OSHA research assistants and accumulated floating holiday and compensatory time. They had also not reached complete agreement on pensions. The Employer continued to reject all but the last sentence of the Union's proposed section 14.05. Beer testified in sum as follows: The Employer presented its amended pension plan, which was made effective retroactive to December 27, 1988. The Employer rejected all but the last sentence of the Union's proposed section 14.05, but still had no proposal of its own. The Union submitted its proposal on overtime authorization (which it amended on the basis of Bollon's comments) because of problems and the need for clarification. Each side presented proposed forms for this purpose, and they discussed the matter. There was not much discussion on the Union's EAP proposal. Bollon said the Employer would not revoke the new dress code, asserting that the parties never bargained over dress code. The parties tentatively agreed to meet next on May 1, but they did not. Gannon testified in sum as follows: Bollon presented a copy of the signed amended pension plan. He said that now the plan was amended to provide for 5-year vesting, and therefore contract language was unnecessary. Bollon rejected all but the last sentence of the Union's proposed section 14.05, but said the Employer would think about it. They agreed to meet next on May 1, but the Employer cancelled that session. I find that the testimony of Bollon, Beer, and Gannon together reflects the substance of what transpired at the April 20 session.

The parties did not meet again in "negotiations" until August 1. They corresponded in May and early June. The Union proposed mediation, the Employer proposed binding arbitration, and the Union counterproposed qualified interest arbitration. There was no agreement. In July the parties engaged in discussions for the purpose of settling the unfair labor practice case. The parties met in further negotiations on August 1 and 8. At the August 1 session the Union presented a package, including a proposal on contract term which originated in the settlement discussions. There was no agreement. Upon consideration of the testimony, I find that the August 1 and 8 sessions were so enmeshed with the July settlement discussions as to constitute a continuation of those discussions. I find that for the purposes of this case, the April 20 session should be viewed as the last negotiating session.

By letter dated September 18, 1989, the Employer informed the Union that it was reimplementing the implemented "contract" of December 27, 1988. The new implemented "contract" followed the text of the former document, with some changes. Specifically, the new document corrected the payout on accumulated sick leave for terminated or laid-off employees from 20 to 25 percent, expressly provided for a 1-percent wage increase on top of COLA (without actually correcting salary figures), added classifications of political action assistant and public relations assistant at Grade 8 (without entering their salary scale), and incorporated the Employer's proposed section 15.01 of April 20, on the pension plan. There were no other changes.

D. Concluding Findings Concerning the Effect of Renewed Negotiations on the December Violations

"Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In *Lehigh Portland Cement Co.*, 286 NLRB 1366 fn. 5 (1987), the Board held that the respondent therein "seriously undermined the Union's bargaining position by unlawfully implementing its proposals and maintaining the terms and conditions in these proposals during subsequent bargaining with the Union. Further negotiations in this context could not erase the effects of the violation." However in *NLRB v. Cauthorne Trucking*, 691 F.2d 1023, 1026 (D.C. Cir. 1982), the court held "that where an employer and a union have bargained in good faith, despite the employer's prior unilateral changes in wages or conditions of employment, the employer's ongoing liability for the unlawful unilateral changes terminates on the date when the parties execute a new agreement or reach a lawful impasse." Some Board decisions indicate that although "a make-whole order restoring the status quo ante is the normal remedy where an employer has made unlawful unilateral changes in its employees' terms and conditions of employment," there may be circumstances under which it is appropriate to toll the remedy. *Storer Communications*, 294 NLRB 1056 at 1057 (1989); *Southwest Forest Industries*, 278 NLRB 228 (1986), *enfd.* 841 F.2d 270 (9th Cir. 1988). The common denominator for all these cases is that at the very least (although there may be other requisite conditions) the remedy cannot be tolled unless and until the parties reach agreement on a new contract or bargain in good faith to an impasse.

Applying the foregoing principles to the facts of the present case, I find that the Employer did not bargain in good faith to a genuine impasse, and therefore that a continuing remedy is warranted. I make this finding because (1) the Employer's unremedied unilateral changes were of such a serious and substantial nature as to undermine the Union's bargaining position, and (2) the Employer's course of conduct in the resumed negotiations indicated that it was so wedded to the terms and conditions of its own implemented "contract" as to preclude meaningful good-faith bargaining. In sum, the Employer approached the resumed negotiations with a closed mind, determined that the negotiations could only substantially result in the Union's rubber stamp approval of the implemented "contract." With regard to the first factor, the Employer, after holding fast to its position on the grade

levels of assistants, proceeded to unilaterally cut the OSHA research assistants' salaries below the Employer's last offer, while giving the other assistants the Grade 8 sought by the Union. The Employer thereby divided the Union's bargaining strength by altering the status quo so as to satisfy some assistants while making deep cuts in the pay of others. The Employer also stole the Union's thunder on the matter of a general pay increase. After steadfastly refusing to agree to any general pay increase other than COLA, the Employer, toward the end of the 1988 negotiations, proposed a 1-percent general increase. However, the implemented "contract" provided for two such increases, which if offered in the negotiations might have generated movement toward agreement. With regard to the second factor, the Employer refused to negotiate even tentative agreements with the Union on matters not in dispute. The implemented "contract" did not set grade levels for the political action and public relations assistants, or provide for length of service credit. The parties were in agreement on these matters. Nevertheless the Employer refused to reduce their agreement to writing, preferring instead to unilaterally amend its own "contract," or unilaterally follow its own practice. The Employer in effect bootstrapped its refusal to bargain over the matter of a dress code, by relying on its own unilaterally imposed zipper clause. The Employer refused to bargain on the ground that the parties did not previously bargain concerning dress code. In the absence of a zipper clause, this would not be a valid position. Dress code was a term or condition of employment, and therefore a matter subject to negotiation. The Employer never responded to the Union's detailed presentation on an upgrade for Hoepfl, and never proposed alternative language on section 14.03 (upgrades), although it acknowledged an obligation to do so. The Employer also used the pending unfair labor practice proceeding as an excuse to avoid agreement on secretarial upgrades. The Employer's course of conduct demonstrates that it regarded the December 27 unilaterally imposed "contract" as an accomplished fact, and was unwilling to negotiate any significant changes in that document. Insofar as the Employer was willing to accept changes, the Employer in most instances chose to do so unilaterally. Therefore I adhere to my finding that the Employer violated Section 8(a)(5) and (1) of the Act, and I find that the Employer remained in violation of the Act.

E. Discharge of William Shoehigh

The complaint in Case 5-CA-20325 alleges that on or about March 20, Employer director of governmental affairs Frederick Nesbitt threatened employees with unspecified reprisals because they spoke on behalf of the Union's shop steward (Cheryl Gannon). The complaint further alleges that on or about March 20 employee William Shoehigh concertedly complained to the Employer regarding the wages, hours and working conditions of its employees, and that on or about March 21 the Employer terminated Shoehigh because of that complaint, because he joined, supported or assisted the Union, and to discourage employees from engaging in protected concerted activity.

Upon becoming president in September 1988, Alfred Whitehead reorganized the Employer's administrative operations. Whitehead appointed Harold Shaitburger to the newly created position of executive assistant to the president. In that position Shaitburger reported directly to Whitehead, and

had overall responsibility for several departments, including the department of governmental affairs. The Employer's membership consists mainly of career firefighters and emergency service personnel. Most are employed by State and local governments, although some work for the Federal government or in the private sector. Because of the nature of its representation, the Employer has a vital interest in legislation, at the various levels of government and in political and informational activity, on its own and together with other groups within and outside of the labor movement, to protect its members' interests and achieve its legislative goals. In furtherance of these goals the governmental affairs department plays a key role. Shaitburger previously headed the department. On October 28 the Employer appointed Frederick Nesbitt to head the department, and he commenced work on November 14. He was subsequently given the title of legislative director. Nesbitt did not previously work for the Employer. Secretary-Treasurer Bollon did not have direct line responsibility for the governmental affairs department. However, Bollon did have overall responsibility for personal matters and labor relations. He was responsible for dealing with employee grievances under the contract, and was sometimes involved in employee discipline, suspension, and termination. When Nesbitt took over the governmental affairs department, there were three other positions in the department (all bargaining unit positions). However, two were vacant. Cheryl Gannon had served as legislative assistant since September 1985. She was union shop steward and as indicated, became the Union's chief negotiator in December 1988. The positions of political action assistant and secretary were vacant. On December 28 the positions were filled. William Shoehigh commenced working as political action assistant and Tom Derkas as secretary (a nonprofessional, clerical position). The department now consisted of four persons, only one of whom (Gannon) had prior experience with the Employer.

The 1986-1988 collective-bargaining contract provided that: "The probationary period for new permanent employees shall be seventy (70) working days at the expiration of which the employee shall be placed on the employment rolls on a permanent basis provided the work of the new employee is satisfactory to the Employer." The union-security clause provided that employees would become union members after their probationary period. These provisions were carried over into the implemented "contract" of December 27. The contractual 70-day probationary period for William Shoehigh would have ended on Friday, April 7 (calculation excludes weekends and holidays). The Employer notified Shoehigh of his termination on March 21, the 57th working day of his employment. Shoehigh did not become a permanent employee or union member prior to his discharge.

The work of the three professionals in the governmental affairs department (Nesbitt, Gannon, and Shoehigh) overlapped, and in many respects each complemented that of the others. Their respective job titles provided only a partial indication of their respective areas of responsibility. Shortly after Shoehigh and Derkas reported to work, Nesbitt summoned the department employees and distributed a memo which purported to delineate the respective areas of responsibility of Gannon and Shoehigh. The memo indicated as follows:

DEPARTMENT OF GOVERNMENTAL AFFAIRS
AND POLITICAL ACTION INTERNATIONAL
ASSOCIATION OF FIRE FIGHTERS

LEGISLATIVE ASSISTANT—Cheryl Gannon
Legislative Fact Sheets—Write and Update
Draft Testimony
Draft Letters Requesting Legislative Information
Federal Regulations
Contacts with Hill Staff on Issues
Provide Technical Assistance to Hill
Work with Fire Service Caucus
Legislative Letter—Issues
Federal Update—Issues
Congressional Monitor—Hearings, Information
Congressional Record—Bills, Speeches
Legislative Articles for Journal
POLITICAL ASSISTANT—Bill Shoehigh
Legislative and Political Training Materials
Grass Roots Organization
Voting Record
Contacts with Grass Roots
Contact with Labor and LAC Program
Candidate and Campaign Evaluations
PAC Direct Mail—FIREPAC
Fund Raisers
Assist Candidates
Help Locals get Politically Involved
Survey Political Publications
Legislative Letter—Political Information
Federal Update—Political Information
Political Articles for Journal

As will be discussed, the memo was silent or vague as to several areas. The question of the respective functions of Nesbitt, Gannon, and Shoehigh is a key element in the General Counsel's contention that the Employer discriminatorily discharged Shoehigh.

Cheryl Gannon testified in sum as follows: As legislative staff assistant, her principal duties were to track legislation of interest to the Employer, attend hearings and meetings on Capitol Hill, draft testimony and correspondence to members of Congress, draft legislative alerts to firefighters in the field, and prepare legislative briefing materials. In November, Nesbitt asked her about her duties (which she described) and her likes and dislikes. Gannon answered that she liked going out, specifically, to hearings and meetings on Capitol Hill, and meeting with other lobbying groups, and did not want to be tied to research. However, she did not care for attending political fundraisers. Nesbitt said the department would expand its activities. He asked why no one was regularly attending the Monday morning AFL-CIO lobbyists' meetings. Gannon answered that the department had been shorthanded, and sometimes no one was available. Also former President Gannon and Shaitburger felt that the meetings did not sufficiently address the concerns of Fire Fighters or public employees in general. Nesbitt responded that the problem was that Fire Fighters had not been team players, but he would change this. In 1985, Gannon had an argument with another AFL-CIO lobbyist. However, the matter was adjusted, and Gannon attended the next weekly meeting. When Nesbitt presented her with the outline of job responsibilities, Gannon

commented that the outline was incomplete. Specifically, her indicated duties did not include work on the Employer's legislative conference (scheduled for March 1 through 3), attending meetings with outside coalition groups, and correspondence to members of Congress on legislative issues. (The legislative conference is attended by Fire Fighters from all parts of the nation, and is the major event of the year for the governmental affairs department, which arranges and conducts the conference.) Nesbitt responded that the memo was simply a general guideline. Gannon noted that the memo indicated she and Shoehigh would each do the writing in their respective areas.

Gannon further testified in sum as follows: After Shoehigh began work, he attended meetings of the Congressional Fire Service Caucus, although Shaitburger had told her this was her job. Also, Nesbitt began taking calls from Capitol Hill, although Gannon previously performed this function. Nesbitt took such calls even when he was not knowledgeable about the matters involved. After Gannon introduced Nesbitt to Hill Staff personnel, Nesbitt would take over dealing with them, leaving out Gannon. Either Nesbitt or Shoehigh would attend the AFL-CIO lobbyist meetings and other lobbyist meetings. Nesbitt also went with Shoehigh to political meetings. Gannon found that she was relegated to doing mainly writing and research. In December, before Shoehigh came on the job, Gannon complained to Shaitburger that Nesbitt was taking over the lobbying. She said that if her job was to consist of writing and research, she preferred to transfer to the research department where she could do really substantive work. Shaitburger assured Gannon that Nesbitt was learning the work, she should give him time, Shaitburger would talk to him, and Gannon would not be a "desk jockey." A few weeks later Gannon told Nesbitt that she wanted to keep working on Capitol Hill. Nesbitt assured her that there was enough work on the Hill for both of them. However, nothing changed.

Gannon further testified in sum as follows: Beginning about February 1 she spoke several times to Shoehigh about her problems. She mentioned that Nesbitt took her off an AFL-CIO Long Term Health Care Coalition meeting (going in her place), and that her written work was circulated in the department for review, although Shoehigh's was not. She also mentioned the AFL-CIO lobbyist meetings. Shoehigh said she was poorly treated, and suggested that she talk to Nesbitt, which she did. Nesbitt told her that he wanted Shoehigh to meet the lobbyists. Later he said that Gannon said she didn't like attending the lobbyists' meetings. Gannon said this was not true, and repeated her prior explanation. Nesbitt said he would reconsider, but continued to assign Shoehigh to the lobbyists' meetings, although Shoehigh was not familiar with the legislative issues. In mid-February Gannon told Shoehigh she thought she was being phased out, and would talk to Secretary-Treasurer Bollon. Shoehigh said he would back her up, and not be a pawn in any effort to phase her out. Gannon went to see Bollon and expressed her complaints. She also said that Nesbitt said she spent too much time on union business. Gannon also complained that Nesbitt told her to remove the union logo which she placed on her office correspondence. Bollon responded that he understood Gannon did good work, and he did not think she was being phased out. However, he would check. He also thought a policy should be developed concerning the logo.

Bollon asked if she minded if he spoke to Shoehigh. Gannon had no objection.

Gannon further testified in sum as follows: The legislative conference, for which the department was primarily responsible, took place as scheduled from March 1 through 3. On the last day Nesbitt told the department employees how well the conference went. He said he got compliments from Fire Fighter members, that it was the best conference ever, and that he was particularly pleased with the new employees Shoehigh and Derkas. Gannon never heard Nesbitt criticize Shoehigh, although he sometimes questioned Derkas as to why he was behind in filing. Gannon was on vacation during the week of March 6. The following week Bollon told her he spoke to Whitehead, who had spoken to Shaitburger. He said they denied that Gannon's work was changed. They said that Gannon didn't go to the AFL-CIO lobbyists' meetings because she said she didn't like them. Shaitburger said he had no bad feelings toward Gannon. Bollon said he would present the matter of the union logo to the joint labor management committee. At about 4 p.m. on Friday, March 17, Shaitburger summoned Gannon to a meeting at which Nesbitt and Shoehigh were present. Shaitburger said he understood that Gannon and Shoehigh each went to see Bollon and expressed concerns about job functions and the way work was handled in the office. Shaitburger asked Gannon to repeat her complaints, which she summarized. Shoehigh then spoke up. He said he was assigned legislative work within Gannon's area of responsibility, which made him feel uncomfortable, and that there was a lot of tension in the office. Nesbitt took notes, and was visibly angry. He said that Gannon's accusations were untrue, and that he permitted Gannon to go to the Family and Medical League Coalition Meeting. Nesbitt asked that Gannon and Shoehigh meet with him on Monday, March 20, and they did at about 11 a.m. that day. Nesbitt asked the employees to each give their complaints. Gannon again talked about work taken away from her and gave examples. Shoehigh again said there was tension in the office, and that Nesbitt was hostile to Gannon because of her union activities. Nesbitt, who again took notes, denied the last accusation. That evening Shoehigh told Gannon that he met with Nesbitt. The next morning (March 21), Nesbitt went to Employer Counsel Reyna's office and Gannon went to see Bollon. Gannon said she thought she or both she and Shoehigh were about to be discharged because of their complaints. Bollon said he would check it out. The next morning (March 22) Bollon summoned Gannon to his office. By this time Shoehigh had been discharged. Bollon said he spoke to Shaitburger and Reyna, and "they swore to me up and down that it was his work performance and nothing else." Bollon added: "Cheryl, you know that is bullshit, and I know it is bullshit, but there is nothing I can do about it, and I feel bad about it." Gannon said she would file a charge. No grievances were filed concerning the employees' complaints or Shoehigh's discharge.

William Shoehigh came to the Employer with a background of national political involvement, experience, and contacts. Shoehigh testified in sum as follows: He was interviewed by Nesbitt, Shaitburger, Bollon, and Whitehead, hired by Whitehead on December 14, and commenced work on December 28. Nesbitt explained that as political action assistant he would be involved in such functions as political action training for the membership, grassroots lobbying, attending

political functions, and coordinating PAC development. Nesbitt expected Shoehigh to show initiative, attend fundraisers and other political functions, and make himself known as a Fire Fighters' representative. The position was set at Grade 8, and Shoehigh could anticipate overtime compensation, as he would be required to attend fundraisers and other afterhours events. The position was subject to a 70-day probationary period. When Shoehigh began work, the emphasis was on preparation for the March 1-3 legislative conference. This included preparation of literature and an agenda, arranging speakers and handling the logistics. About January 10 Nesbitt transferred the work of preparing legislative fact sheets from Gannon to Shoehigh. About the same time Shoehigh began accompanying Nesbitt to the AFL-CIO lobbyists' meetings, at which legislative matters were discussed. In preparation for the legislative conference, the department prepared a handbook entitled "Political Action." Gannon prepared the initial draft, Shoehigh rewrote the draft, and Nesbitt made the final review. Initially, work on "Capitol Alert," the department's weekly bulletin, was divided, with Gannon doing legislative articles and Shoehigh the political articles. However, Nesbitt began giving Shoehigh legislative assignments. On several occasions Nesbitt asked whether Gannon was out on union business again. Gannon was in fact frequently away when involved in negotiations and grievances. In March, about the time that contract negotiations resumed, Nesbitt commented that he was finding it difficult to manage a union shop.

Shoehigh further testified in sum as follows: In January and February he and Gannon discussed the shifting of work from her to him, specifically, the legislative fact sheets and the AFL-CIO lobbyists' meetings. They agreed that the work belonged in Gannon's job description. Gannon expressed concern that her job was being phased out. They also talked about the union logo. In late January she said she was going to see Shaitburger, and if that didn't work she would talk to Bollon. Gannon met with Bollon in mid-February, and reported that Bollon wanted to see Shoehigh. Shoehigh agreed to meet Bollon after the legislative conference, and told Gannon he would discuss her concerns with Bollon. On March 10 Shoehigh met with Bollon, who asked about Gannon's concerns. Shoehigh explained about work being shifted away from Gannon to him, Nesbitt's remarks concerning Gannon's union activity, and the prohibition against the union logo. Shoehigh also used the opportunity to present his own problem which he had not discussed with Gannon, specifically, the matter of overtime compensation. Shoehigh presented a memo entitled "Outstanding Overtime Obligations," in which he expressed his desire to come to an understanding and develop a consistent policy concerning overtime compensation. The memo purported to list 15 functions which Shoehigh attended past working hours, including 6 which he was specifically assigned to cover. The memo did not specifically request compensation for any or all of these functions. Shoehigh had previously spoken to Nesbitt about overtime. Nesbitt said he thought Shoehigh attended these functions for professional development, and not to accrue overtime. Shoehigh disagreed. At their March 10 meeting Bollon said he would talk to Nesbitt.

Shoehigh further testified in sum as follows: At about 9 a.m. on March 17 Shaitburger summoned Shoehigh to his office. Shaitburger said Shoehigh made a mistake by seeing

Bollon first, that Shoehigh should have come to Shaitburger first and kept the matter within the department. He said Shoehigh was a good employee and shouldn't get off on the wrong foot. He said he would talk to Gannon and Shoehigh. That afternoon Shaitburger met with Nesbitt, Gannon, and Shoehigh. Shaitburger asked the employees' concerns about how the department was managed. Gannon asserted that work was being shifted away from her, Shoehigh was doing her duties, and reported snide remarks about her absences on union business, and she felt threatened. Nesbitt denied the allegations. The problem was not resolved. Shaitburger told Nesbitt to meet with the employees on March 20, and Shaitburger would follow up with them that day. Nesbitt met with the employees on the morning of March 20. Gannon and Nesbitt reargued their positions. Nesbitt said that Shoehigh was editor of "Capitol Alert," although he never previously said this. Shoehigh opined that there was an undercurrent of hostility from Nesbitt toward Gannon, apparently because of her union activity. Nesbitt angrily denied the accusation. At about 2 p.m. Nesbitt met alone with Shoehigh. Nesbitt took notes. Nesbitt said he was very upset that Shoehigh saw Bollon, that Shoehigh got Nesbitt in hot water with President Whitehead, who was ready to clean house and take the place down brick by brick. Shoehigh discussed the hostility toward Gannon and said he thought he was a pawn in a bigger scheme, and there was some hidden agenda. Nesbitt replied that if there was a hidden agenda or scheme, it was not Shoehigh's business to worry about it. He said that Shoehigh was putting himself in jeopardy by defending Gannon. Shoehigh said he was not comfortable with the situation and would not participate in it. Nesbitt responded that it was obvious they were going to have relational problems, he was not sure what action he would take, and Shoehigh was becoming a clockwatcher, specifically, that he should be more flexible about overtime. Nesbitt said he thought he had professionals in the department, "not f___ monkeys." This was the first time that Nesbitt criticized Shoehigh's work performance. Previously, Nesbitt complimented Shoehigh's performance, and after the legislative conference Whitehead and Shaitburger complimented the entire department. After the meeting Shoehigh told Gannon he thought he would be terminated. The next day (March 21) Shoehigh saw Nesbitt go to Attorney Reyna's office with his notes. At about noon Nesbitt summoned Shoehigh. Nesbitt announced that based on his review of Shoehigh's performance over the 60 days, he would not extend Shoehigh's probationary period. Shoehigh was terminated effective at the end of the day. Nesbitt stated that Shoehigh was a clockwatcher, there was a lack of quantity and quality of work done on time, Shoehigh showed lack of leadership in the department, and he did not keep Nesbitt abreast of his whereabouts at all times. Shoehigh argued this was not the real reason, that he was terminated for defending Gannon. Shoehigh demanded a written statement of the reasons for his termination. At this point Shoehigh took 2 hours of medical leave. He returned at 4:30 p.m. to get his paycheck. When he returned Nesbitt handed him a letter, the text of which stated as follows:

This is formal notice that I have decided not to continue your employment beyond the end of your probationary period. The decision is based on my observation

over the past sixty days of your work performance. The sole basis for not continuing your employment is your work performance and no other reason.

This discontinuation of your employment is effective the close of business today. In order to permit you a reasonable opportunity to seek other employment, you will receive two weeks' salary in lieu of severance pay. Any accumulated vacation pay will be paid to you on a pro rata basis.

Legislative Director Nesbitt testified in sum as follows: When he began Shaitburger explained the functions of the governmental affairs department. At the time the department included Gannon as legislative assistant and Gil Udell as political assistant. Udell was about to become an outside consultant. The secretary position was vacant. Shaitburger said there should be distinctions between the duties of the two assistants. President Whitehead told Nesbitt that he wanted him to establish a presence on Capitol Hill and in the labor movement, and to educate the membership politically and legislatively. Nesbitt was directly responsible to Whitehead and Shaitburger. Bollon was not in the chain of command. Shaitburger told Nesbitt that there was a 60-day review period for new employees. At that point, if not kept on, the employee would be given 2 weeks' notice. To Nesbitt's knowledge, this policy was first applied to Shoehigh. Nesbitt asked Gannon and Udell to prepare resumes of their respective duties, and he discussed Gannon's work with her. She said she lobbied on Capital Hill, drafted testimony and responses to Hill inquiries, initiated legislative ideas, and worked on the legislative conference. This concurred with Nesbitt's idea of the duties of a legislative assistant. Gannon said the work she liked best was Hill contacts and initiating legislation. She did not like evening political fundraisers and political work. She also did not like the Monday morning AFL-CIO lobbyist meetings, because they were not important, and she had a personal run-in with one lobbyist. This was acceptable to Nesbitt, because her dislikes came under the work of the political assistant. Nesbitt had attended the AFL-CIO lobbyist meetings as representative of another labor organization. The Employer usually was not present. Nesbitt sometimes saw Udell at the meetings but never Gannon. The item "Contact with Labor and LAC program" under the political assistants' duties, included the lobbyists' meetings.

Nesbitt further testified in sum as follows: When he interviewed and considered Shoehigh for the political action assistant position, he was impressed by Shoehigh's Labor and political connections. Nesbitt told Shoehigh there was a 70-day probationary period, at the end of which he would have to join the Union, that he would be evaluated at the end of 60 days, and if rejected would be given 2 weeks to find another job. When Shoehigh was hired Nesbitt reviewed the respective duties of the two assistants with them. There was some overlap of functions. Preparation for the legislative conference had priority. Nesbitt initially testified that he did not recall any discussion of the AFL-CIO lobbyists' meetings, but subsequently testified that he said that Shoehigh would substitute for him at the meetings. No meetings were scheduled until January 23, as the meetings were not conducted when Congress was not in session. Gannon did not object to Nesbitt's assignment of functions. Nesbitt asked

Gannon for her contacts on Capitol Hill, and to set up meetings for him with them. This was important, because Nesbitt was primarily responsible for representing the Employer's legislative interests on Capitol Hill. Nesbitt also had to decide which fundraisers to attend. Usually either he or Shaitburger would attend. However Nesbitt told Shoehigh that he needed to be available for evening fundraisers, and would be compensated for his attendance, although there would not be many such events. In fact, he never assigned Shoehigh to a fundraising event. Under Employer practice, Nesbitt must request presidential authorization for overtime assignments. Overtime was authorized for Shoehigh only during the legislative conference and on March 8. Nesbitt also gave Shoehigh certain specific assignments. He told Shoehigh to develop a grassroots lobbying manual, and give Nesbitt an outline. The current manual needed to be revised and updated. Nesbitt also told Shoehigh to develop ideas for a political action manual and for FIREPAC (political action fundraising). Shoehigh was also to prepare for the legislative conference, which took priority over the other assignments. They also discussed "Capitol Alert," the department's weekly bulletin. Gannon would write on legislative issues, and Shoehigh would write the political articles and edit the entire publication. In connection with the conference, Nesbitt assigned Shoehigh to do the conference book, entitled "Political Action," line up speakers and make a presentation on FIREPAC. Nesbitt told Shoehigh to revise Gannon's writeup for "Political Action," because it was too long and should have addressed issues rather than specific bills. Shoehigh did this assignment, and Nesbitt edited his work. Shoehigh did not do original research for "Political Action." Rather, Nesbitt gave him documents with which to work. On February 22 or 23 Nesbitt instructed Shoehigh to send congratulatory letters to the new chair and vice chair of the Democratic National Committee (DNC). Nesbitt regarded this as a priority matter, because the Employer did not back the new chair's election. Shoehigh never carried out this assignment. About March 1 Nesbitt told Gannon to do some research on new IRS rules concerning pensions. He assigned Gannon because she had expertise in this area. Nesbitt subsequently learned that Shoehigh was doing the research. Nesbitt asked why. Shoehigh said that Gannon was too busy. Nesbitt said it wasn't his responsibility, and he wasn't doing the work. Nesbitt gave him, specifically the grassroots lobbying and political action manuals, ideas about FIREPAC, and the letters to the new DNC chair and vice chair. Nesbitt again assigned Gannon to do the work. Gannon was on vacation the week of March 6, engaged in negotiations the following week, and completed the assignment on March 27, which took about 90 minutes.

Nesbitt further testified in sum as follows: During the second week of February Gannon questioned why only Nesbitt and Shoehigh were attending the AFL-CIO lobbyists' meetings. She said they were now more important and she wanted to attend. Nesbitt reminded her she said she didn't like going to the meetings. He saw no reason to change the practice. Gannon disagreed. With regard to the union logo, Nesbitt made a notation on a letter dated February 17, prepared by Gannon for his signature, that the logo should not be placed on any more letters. Nesbitt questioned whether the logo should be placed on correspondence to Capitol Hill. Bollon said there was no policy, but he would ask the joint labor-

management committee to formulate a policy. Thereafter there was no problem. Nesbitt heard nothing further about Gannon's alleged complaints until March 17. On that date Shaitburger told him that Shoehigh saw Bollon concerning organization, duties, and management in the governmental affairs department, although Bollon was not responsible for such matters. Shaitburger said they had a problem and should talk with the employees. At about 4:15 p.m. that day Shaitburger met with Nesbitt, Gannon, and Shoehigh. They discussed difficulties with the job descriptions, and Shaitburger mentioned that Gannon had spoken to Bollon about work taken away from her and dissatisfaction concerning how the department was run. Gannon reiterated her disagreement about the AFL-CIO lobbyists' meetings, but was unable to give any other specifics. Nesbitt questioned why Gannon gave Shoehigh her work if she had nothing to do, asserting that she was arguing both ways. Gannon did not answer. Shoehigh said he agreed with Gannon about the lobbyists' meetings, and that he took some of her work because she didn't have time to do it. They again discussed job responsibilities, but did not reach any resolution. Shaitburger said that Nesbitt, Gannon, and Shoehigh should meet on March 20, which they did (that morning). Nesbitt again asked Gannon for specific complaints, Gannon mentioned the AFL-CIO lobbyists' meetings, and Shoehigh again agreed with her. Nesbitt went over the job descriptions and made some small changes. Nesbitt initially testified that Gannon and Shoehigh did not indicate any other problems. However he testified that they discussed "Capitol Alert." Nesbitt told them that the legislative and political assistants each write their respective articles, but the political assistant edits the bulletin. Nesbitt mentioned the assignment on pension rules. He said the person given an assignment should do it, and if unable, should come to Nesbitt. Nesbitt said that Shoehigh did not do assigned work (as described above), and did work for which he was not qualified. They agreed to work together. Shoehigh did not say there was an undercurrent of hostility. However, he said that Nesbitt was frustrated with Gannon's absences for union activity. Nesbitt disagreed. He said the problem was that Gannon would be away without letting him know where she was, work was not getting done, and when he looked for her, he would be told that she was in negotiations or on a grievance or arbitration. Nesbitt found this frustrating. About March 1 he spoke to Bollon about the problem. Bollon said he would speak to Gannon. They arranged for Gannon to give advance notice and request permission to be absent. This arrangement proved satisfactory. Gannon would enter her commitments on the office calendar. Nesbitt initially testified that Gannon did not previously make such entries. However, upon being shown the office calendar, Nesbitt admitted that Gannon sometimes made entries of her union commitments. The March 20 meeting lasted from about 10 a.m. to 12:45 p.m. Shoehigh rushed out of the office, and Nesbitt remained to cover the office. Departmental policy required that during office hours at least one person should remain to take calls. However Nesbitt admitted that he did not know what arrangements had been made among the three staff employees concerning their lunchbreaks.

Nesbitt further testified in sum as follows: At about 2:30 p.m. on March 20 he met privately with Shoehigh to discuss his job performance. He said that Shoehigh should have told

him he spoke to Bollon, because Bollon did not have responsibility for the department. Shoehigh said he did not want to breach confidentiality. Nesbitt again referred to assignments not performed by Shoehigh. Nesbitt said that overall he was not satisfied with Nesbitt's performance. Shoehigh again mentioned the AFL-CIO lobbyists' meetings. Nesbitt said his decision stood. Shoehigh again mentioned Nesbitt's alleged frustration with Gannon's union activity, and Nesbitt restated his position. Nesbitt said that Shoehigh was taking too much time on "Capitol Alert." When Nesbitt referred to Shoehigh's obligation to edit the bulletin, Shoehigh said he could not tell a peer what to do and would not edit Gannon's work, because she did not get to edit his work. Nesbitt said they were both professionals and their job responsibilities were clear. When Shoehigh repeated his position, Nesbitt retorted that he hired professionals, not monkeys. Nesbitt reminded Shoehigh that he had to be flexible on fundraising events. Nesbitt said that Shoehigh failed to initiate new ideas, and seemed to be a "clockwatcher" because he left the office at 4:30, the end of the contractual workday (although Gannon and Derkas also did so), and ran out of the office at 12:45 p.m., after the staff meeting that day. Nesbitt did not say that President Whitehead was angry, or make the remark attributed to him by Shoehigh, and nothing was said about a hidden agenda or Shoehigh being used as a pawn. The meeting ended between 3:30 and 4 p.m. That evening Nesbitt spoke to Shaitburger, who was in Florida with Whitehead and Bollon. Nesbitt summarized his meeting with Shoehigh and Gannon, saying they had "cleared the air" and worked out some misunderstandings. Nesbitt initially testified that Shaitburger simply said "Fine," he was pleased that everything was ironed out, and there was no further discussion. However, Nesbitt subsequently testified that Shaitburger "re-minded" him that March 21 was Shoehigh's 60th day, and that Nesbitt had to make a recommendation and decision. Nesbitt did not, in his testimony, explain how Nesbitt, who was in Florida, happened to know Shoehigh's 60th day of employment (actually, as indicated, it was his 57th day), or why Shaitburger did not also mention Derkas, who began his employment on the same day as Shoehigh. The next morning (March 21), at about 9:15 a.m., Nesbitt telephoned Florida and spoke to Shaitburger. Nesbitt recommended that Shoehigh be terminated that day. Nesbitt gave a litany of reasons. He said that Shoehigh did not complete assignments, did unassigned work, did not keep Nesbitt informed of his Capitol Hill activities, he did not assume leadership (referring to "Capitol Alert"), did not initiate ideas, and his overall work was unsatisfactory. Nesbitt said that Derkas' performance was satisfactory and recommended he be continued. Shaitburger said he would talk to Whitehead. About one hour later Shaitburger called back. He said that Whitehead concurred in the recommendations, and that Shoehigh should not be continued past probation. At about 1 p.m. Nesbitt summoned Shoehigh to his office. Nesbitt said he reviewed Shoehigh's performance, and that it was unsatisfactory (as detailed above). Nesbitt initially testified that he said Shoehigh "was being terminated effective today." He subsequently testified that he said Shoehigh would not continue past the 70-day probationary period, and planned to discuss this, but Shoehigh stormed out of the office. As indicated, Nesbitt testified that Employer policy provided for a 60-day review, with 2 weeks' notice if the employee was not kept

on. However, at another point Nesbitt testified that he was not sure how Secretary-Treasurer Bollon handled the 2 weeks. Nesbitt further testified that Shoehigh became angry. He accused Nesbitt of getting at Gannon through him, said he would not be used, threatened to use his contacts to destroy the Employer's reputation, and walked out, saying "I'll see you in court." Shoehigh returned about 2:30 p.m., and demanded a 2-hour medical leave slip. Nesbitt complied. Shoehigh also demanded to be given a termination letter when he returned at 4:30 p.m. Nesbitt agreed, and did so. Because of Shoehigh's threats, he made the termination effective as of that day. Thereafter Nesbitt informed Tom Derkas that his work was satisfactory, and if this continued he would become a permanent employee after his 70-day probationary period. Nesbitt sent a memo to Bollon, recommending that Derkas' employment be continued, although as indicated, the Employer contends that Bollon was not in the department's line of supervisory authority.

Nesbitt's professed dissatisfaction with Shoehigh's work performance was a sham. On March 17 Shoehigh accompanied Nesbitt to a luncheon meeting with an outside contractor, to discuss fundraising ideas for FIREPAC. Nesbitt testified that he brought Shoehigh along to "get him involved in fundraising." In short, as of noontime on March 17, prior to the meeting in Shaitburger's office, Nesbitt anticipated that Shoehigh would not only stay on, but would assume increased responsibilities. Throughout the short duration of Shoehigh's employment, Nesbitt did in fact give Shoehigh ever increasing responsibilities. Indeed this was a principal source of Gannon's complaints, i.e., that Nesbitt gave Shoehigh assignments which encroached upon Gannon's area of legislative responsibility. Although Shoehigh was a new employee and Gannon worked in the department for over 3 years, Nesbitt assigned Shoehigh to edit "Capitol Alert." Gannon was on leave during the week of March 6 and engaged in negotiations the following week. This meant that Shoehigh was solely responsible for final preparation of the March 10 and 17 issues, including legislative articles, although Nesbitt insisted (in connection with research on IRS pension rules), that Shoehigh was not qualified to deal with such matters. In these circumstances, it bordered on the frivolous for Nesbitt to assert (as he did) that Shoehigh took too long on "Capitol Alert," and this constituted grounds for termination. The issues went out on time, and Nesbitt did not claim otherwise. It is undisputed that during most of Shoehigh's employment, preparation for and conduct of the legislative conference had top priority. It is also undisputed that at the conclusion of the conference Nesbitt praised all his staff, including Shoehigh for their work. If Nesbitt was serious in making an overall "60 day" appraisal of Shoehigh's performance, even if on balance it were negative, then it is probable that Nesbitt would have qualified his appraisals, e.g., by saying "you did a good job on the legislative conference, but" Nesbitt's one-sided diatribe against Shoehigh tends to indicate that Nesbitt was trying to build a case against Shoehigh rather than make a constructive evaluation. Nesbitt's emphasis on long-term, low priority projects also indicates that he was grasping at straws. Shoehigh's busy schedule during his brief tenure left little time for such projects. By memo dated December 21 to President Whitehead, Nesbitt described the grass roots lobbying and political action manuals and fundraising plans as "long term goals"

which “will either be accomplished or well under way within the year.” Shoehigh’s successor, David Billy, commenced work in late April. By January 16, 1990, Nesbitt had decided to combine the two manuals, but the document still was not complete. Nesbitt testified that he never set deadlines on either the manuals or the DNC letters. Moreover, Nesbitt admitted that Shoehigh was actively engaged in developing ideas for fundraising and political action. As indicated, Nesbitt and Shoehigh attended a meeting on March 17 for the purpose of developing fundraising ideas. On March 9 Nesbitt and Shoehigh attended an AFL–CIO conference on grassroots lobbying.

Some of Nesbitt’s criticisms were inconsistent and consequently illogical. Nesbitt argued on one hand that Shoehigh was a clockwatcher who showed no initiative, and on the other that Shoehigh failed to keep him informed of his Capitol Hill activities. As indicated, Nesbitt admitted that Shoehigh left the office at the same time as the other department employees, i.e. at the end of the contractual workday. If Shoehigh failed to keep Nesbitt informed of his Capitol Hill activities, this would indicate that Shoehigh exercised initiative by attending functions after working hours. Nesbitt in his testimony did not indicate where he got the idea that Shoehigh failed to keep him informed of his Capitol Hill activities. Nesbitt testified that he did not see Shoehigh’s memo on overtime until Bollon showed it to him on March 24 or 25 (after Shoehigh’s discharge) and did not examine it until about April 1. It is undisputed that Shoehigh gave Bollon a copy of the memo when they met on March 10, and that Bollon spoke to Whitehead and Shaitburger about the overtime problem. As indicated, the memo was addressed to Nesbitt and Bollon. If Nesbitt were credited, it would follow that the memo played no part in Nesbitt’s alleged performance evaluation and recommendation to terminate Shoehigh. Nevertheless the Employer, through Nesbitt’s testimony, went to great lengths to show that Shoehigh’s memo was unjustified. The Employer’s effort was unsuccessful. The evidence demonstrated that at most there was misunderstanding as to when and where Shoehigh was expected to represent the Employer at afterhours functions. The General Counsel presented strong evidence that Nesbitt specifically assigned Shoehigh to attend certain functions for which he was not given overtime compensation. One such function was a training session by Legi-Slate on-line services on January 18. Shoehigh testified that this was a training demonstration which was scheduled for 2 hours from 4:30 p.m. to 6:30 p.m., that he left the office at 4:15 p.m. to attend the function, and Nesbitt was informed of these facts. Nesbitt testified that he understood that Shoehigh would simply stop by Legi-Slate on his way home to pick up some information, and if he knew there would be a 2-hour session, he would have told Shoehigh to attend during the day. The office calendar indicated a “training/demo” for 4:15. Office calendar entries had to be approved by Nesbitt. A “training/demo” plainly connotes something more than stopping by to pick up papers. Then Department Secretary Derkas (he quit in October 1989) testified that they discussed the training session at a weekly calendar meeting of the department staff, and Nesbitt directed that the session be entered on the calendar. Derkas further testified that Nesbitt assigned Shoehigh to attend several of the functions listed in Shoehigh’s memo. I credit Shoehigh and Derkas. Moreover, it is immaterial for

the purpose of Shoehigh’s case, whether Shoehigh was in fact entitled to overtime compensation for the events in question. The 1986–1988 contract provided for overtime compensation, and the provisions were carried over into the Employer’s self-implemented “contract.” Shoehigh did not even demand specific overtime compensation. Rather, he simply asked for an understanding and policy for determining his compensation rights. By his memo, Shoehigh invoked an arguable, good-faith contract right, whether that right was based on the 1986–1988 contract, which remained in effect by operation of law, or the Employer’s December 27 “contract.” Therefore, Shoehigh engaged in protected union and concerted activity under the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); see also *Pennsylvania Electric Co.*, 289 NLRB 1200, 1211–1212 (1988). I do not credit Nesbitt’s assertion that he did not know about the memo until after Shoehigh’s discharge. As indicated, the memo was addressed to Nesbitt, and Bollon, Whitehead, and Shaitburger all knew about the memo. Even if Shoehigh did not personally hand the memo to Nesbitt, it is unlikely that Bollon, Whitehead, and Shaitburger would all have failed to mention it to Nesbitt. As previously discussed, some of Nesbitt’s criticisms are incomprehensible, unless he was referring to the memo. I find that when Nesbitt accused Shoehigh of being a clockwatcher and failing to keep him informed of Shoehigh’s Capitol Hill activities, he was referring to Shoehigh’s action in presenting the memo.⁷

However, this is not the end of the inquiry. In order to resolve other issues in connection with Shoehigh’s termination, it is necessary to consider the testimony of other Employer officials, including those involved in the events leading to the termination. Bollon testified in sum as follows: In mid-February Gannon came to see him. She was distraught. She felt her duties were being transferred to other employees. She mentioned the AFL–CIO lobbyists’ meetings and also mentioned the union logo. Gannon added that Nesbitt was harder on female employees, and mentioned an incident involving Michelle Dove. Bollon, who was familiar with the incident, disagreed. Gannon said she was getting less responsibility. She said she spoke to Shaitburger, but he wasn’t helping her. She asked Bollon to look into it, and he agreed to do so. Bollon spoke to Shaitburger about the logo, and about finding another job for Gannon. Shaitburger said he had already looked elsewhere. Bollon recommended that the Labor-Management Committee develop a policy on the logo. Bollon did not make any followup on these matters. In March Shoehigh requested to meet with him, and they did on March 10. Shoehigh said that Gannon recommended their meeting. Shoehigh discussed the union logo, the AFL–CIO lobbyists’ meetings, and Shoehigh reviewing Gannon’s work. Shoehigh also presented his memo on overtime, which occupied most of their discussion. Bollon said he was already dealing with the logo matter, and was looking into the AFL–CIO lobbyists’ meetings. Bollon marked those events to which Shoehigh said he was assigned after office hours, and said he would check on it. He did not say that Shoehigh acted improperly by talking to him about overtime. That same day

⁷The Employer, through Nesbitt’s testimony, also injected another after-the-fact rationalization for Shoehigh’s discharge. According to Nesbitt, Shoehigh sent a letter to the Department of Transportation which misstated the Employer’s interpretation of certain legislation. In fact, Cheryl Gannon prepared the letter, but was never criticized by the Employer for doing so.

Bollon spoke to Whitehead about the overtime matter. Within a week Bollon “probably” also spoke to Shaitburger about the overtime matter. On March 20 Bollon was in Fort Lauderdale, Florida, with Whitehead and Shaitburger. He overheard part of a conversation about Shoehigh’s 60-day evaluation. Bollon returned to his office about noon on March 21. Gannon said she thought she and Shoehigh would be terminated. Bollon said he would check. Two days later Bollon told her that Shoehigh was not terminated for the reasons she believed. Bollon did not make the remarks attributed to him by Gannon. He was not involved in the decision to terminate Shoehigh.

Executive Assistant Shaitburger testified in sum as follows: In January or February Gannon spoke to him about department assignments. She was concerned that she was doing more writing, her duties were more rigid, and she was spending less time on Capitol Hill. Shaitburger initially testified that he did not recall Gannon saying that her job was being phased out, but subsequently testified that in December Gannon did express such concern. On March 10 President Whitehead asked him if he knew that Shoehigh saw Bollon, and whether Shaitburger authorized overtime for Shoehigh. Shaitburger answered no to both questions (only Whitehead or Bollon could authorize overtime). Whitehead told Shaitburger to find out the situation from Bollon. Whitehead also referred to work assignments. Whitehead was not upset, but he was concerned about the overtime. On March 13 Shaitburger talked to Bollon, who said that Shoehigh discussed his overtime request, and also expressed concern about Nesbitt’s manner of assigning work and directing the department. Shoehigh said that Gannon should have gone to the AFL–CIO lobbyists’ meetings, and Nesbitt should have permitted the union logo on correspondence. Bollon showed him Shoehigh’s overtime memo. Shaitburger said he was concerned because all of these matters should have come to his attention first. Shaitburger initially testified that Bollon did not mention that Gannon saw him, and that he learned this later. However, Shaitburger subsequently admitted that he learned in February that Gannon spoke to Bollon about the AFL–CIO lobbyists’ meetings and the union logo. As indicated, Bollon also testified that he spoke to Bollon in February about his conversation with Gannon. In light of Shaitburger’s admission, it is evident that until March 13, Shaitburger showed no concern about deviations from the chain of command.

Shaitburger initially testified that he did not recall meeting alone with Shoehigh. However, he subsequently admitted that he did meet alone with Shoehigh on March 17. Shaitburger further testified in sum as follows: He asked why Shoehigh saw Bollon. Shoehigh outlined the problems concerning distribution of work and assignment to the lobbyists’ meetings. Shaitburger said he wanted to meet with the department. He indicated that Shoehigh should not have gone to Bollon, but he did not make the alleged remark about Shoehigh getting off on the wrong foot. Shaitburger informed Nesbitt of the meeting, and at 4 p.m. Shaitburger met with the department. He expressed concern that Shoehigh went to Bollon over matters of work assignment or whether the job was done right. Shoehigh should have come to Shaitburger, although Bollon was authorized to deal with contractual grievances. Shaitburger asked the employees about their concerns. Shoehigh explained that Nesbitt did not correctly as-

sign work, and referred to the lobbyists’ meetings. Shaitburger said he understood Gannon didn’t like those meetings. Gannon said she agreed with Shoehigh that the work was not assigned correctly, and she was not happy with changes in her job. Nesbitt disagreed with the employees. They did not discuss Shoehigh’s overtime claim. Shaitburger told them to meet on Monday (March 20). Shaitburger told President Shoehigh about the meeting. That evening Shaitburger telephoned Nesbitt at home. He emphasized the importance of another meeting to get the matter cleared up. He said he was not happy about a professional disregarding the chain of command. He asked: “Isn’t Bill’s probationary evaluation due?” Nesbitt answered that it was due on Tuesday (March 21). Shaitburger told Nesbitt not to let it slide. (As indicated, Nesbitt testified that Shaitburger reminded him on March 20 that Shoehigh’s evaluation was due.) Nesbitt did not at this or any previous time indicate that he was dissatisfied with Shoehigh’s work.

Shaitburger further testified in sum as follows: On the morning of March 20 he left for Fort Lauderdale with Whitehead and Bollon. That afternoon he called Nesbitt, who said he met with the employees and was now meeting with Shoehigh. Shaitburger called back about an hour later. Nesbitt said the morning meeting did not go well. Nothing was resolved and the employees’ positions were unchanged. Shaitburger said he hoped it would work out. Nesbitt then said that he met individually with Shoehigh for a 60-day evaluation. Nesbitt reported he told Shoehigh he was not pleased with Shoehigh’s activities, that he did not keep Nesbitt informed of his whereabouts and activities (referring specifically to events in the overtime memo, that he took on work not assigned, and did not complete assigned work. (Shaitburger thereby contradicted Nesbitt’s assertion that he was unaware of the memo.) Nesbitt said he would sleep on it, but was inclined to recommend against keeping Shoehigh beyond his probationary period. Shaitburger said he would check with Whitehead. That evening Shaitburger reported his conversation to Whitehead and Bollon. Whitehead said: “Do whatever you have to do.” On March 21 at about 8:30 a.m., Shaitburger telephoned Nesbitt and asked his decision. Nesbitt said he would not continue Shoehigh beyond the probationary period. Shaitburger told Nesbitt he had such authority from President Whitehead, and he should inform Shoehigh he would get 2 weeks’ severance pay and a letter of recommendation. Shaitburger and his colleagues returned to Washington, arriving at the Employer’s office about 1 p.m. Nesbitt reported Shoehigh’s outburst (as described by Nesbitt in his testimony). Shaitburger told Nesbitt to take care of the necessary paperwork and send a memo to President Whitehead informing him of his actions.

President Whitehead testified in sum as follows: About March 10 Bollon asked him who authorized the disputed overtime for Shoehigh. Whitehead said he didn’t know, would check with Shaitburger and would pay the overtime if authorized by Nesbitt (although only Whitehead and Bollon had authority to approve overtime). Whitehead checked and learned that Nesbitt did not authorize the overtime. They did not discuss any other matters concerning Shoehigh. On March 20, when Whitehead, Bollon, and Shaitburger were in Fort Lauderdale, Shaitburger told Whitehead they had a problem with Shoehigh, that he was “not cutting the mustard.” Shaitburger said something about

Shoehigh doing unauthorized assignments and not getting back to Nesbitt "on some other issues." Whitehead said if so, they should get rid of him. However, they should check with Attorney Reyna, write it up properly, and give Shoehigh 2 weeks' severance pay if necessary. He said if Nesbitt agreed, "it's a done deal."

The versions of Shaitburger and Whitehead concerning Shoehigh's discharge, present some problems. As indicated, Nesbitt testified that he made the decision to terminate Shoehigh, subject to executive approval. Shaitburger, in his narrative also testified that Nesbitt made the decision. However, when Shaitburger initially testified as an adverse witness for the General Counsel, he testified that he made the decision to terminate Shoehigh, based on Nesbitt's recommendation. Whitehead testified that he made the decision, based on Shaitburger's recommendation, and if Nesbitt agreed, it was a done deal. By memo dated March 22 to Whitehead, Nesbitt stated: "Based on the authority given to me by you, I have decided not to continue Bill Shoehigh's employment past the probationary period." However, none of the witnesses testified that Nesbitt and Whitehead communicated with each other concerning the decision. Rather, according to the Employer witnesses, Nesbitt communicated with Shaitburger. If Whitehead gave direct authorization to Nesbitt, this must have occurred on March 17, the last day that Whitehead was in the office prior to Shoehigh's termination. As indicated, Nesbitt and Shaitburger testified in sum that by telephone on the morning of March 21, Nesbitt recommended and Shaitburger authorized Shoehigh's termination. Nesbitt testified that this occurred in telephone conversations at about 9:15 and 10:15 a.m. Whitehead testified that he authorized Shoehigh's termination on March 20. Shaitburger's records indicate that he did not make any long distance calls to the office on March 21, although he made two calls on the afternoon of March 20. Shaitburger testified that he, Whitehead and Bollon checked out of their hotel between 8:30 and 8:45 a.m., and thereafter were on their way back to Washington. It is evident that Nesbitt and Shaitburger testified falsely, that Whitehead authorized Shoehigh's termination prior to March 21, and that if Nesbitt made any recommendation at all, that recommendation was made prior to March 21.

Before resolving the reason or reasons for Shoehigh's termination, it is necessary to consider one other matter, namely, the Employer's alleged 60-day review policy. The Employer went to great lengths, presenting testimony by an array of officials and supervisors to show the existence of such a policy. In fact, the testimony demonstrated that no such policy existed before Shoehigh's discharge, or was consistently followed afterwards, and if a review policy existed, it was not followed in Shoehigh's case. Whitehead, Bollon, and Shaitburger testified in sum that Whitehead initiated a 60-day review policy after Whitehead became president in September 1988. However, the Employer's department director witnesses (other than Nesbitt) who would be responsible for implementing such a policy, failed to corroborate their testimony. Randall Hudgins became director of research in December 1988. Hudgins testified that Assistant to the President David McCormack told him about the 70-day probationary period, but Hudgins did not learn about a 60-day evaluation until some time later (which he could not identify). Hudgins hired secretary Crystal Fry in late December or

early January. He kept her on without ever submitting a written evaluation. In early February Hudgins hired Dan Barr as a research assistant. Hudgins testified that he attended a staff meeting in early May at which President Whitehead discussed the probationary period and required 60-day written evaluations, and Hudgins prepared a written evaluation of Barr about 2 weeks later, recommending that he be continued. (There was in fact a department managers' meeting in early May.) In light of Hudgins' testimony, it is evident that Hudgins was not told about the alleged 60-day evaluation procedure until the staff meeting in early May, and the alleged Barr evaluation was backdated to May 4 in order to support the Employer's case. Dwight Horkheimer became manager of the education department on November 28, 1988. He also reports to McCormack. Horkheimer initially testified that McCormack told him about the 70-day probationary period, without indicating that anything was said about a 60-day evaluation. In response to a leading question from Employer counsel, Horkheimer testified that McCormack mentioned the 60-day period. However, Horkheimer also testified that McCormack instructed him to counsel new employees and discuss their performance on a weekly basis. Horkheimer testified that he hired an employee in July 1989 and terminated her at about her 50th working day because of unsatisfactory performance. Horkheimer testified that he counseled her on a daily basis. Horkheimer also testified that the probationary period was discussed at the May managers' meeting. Hudgins testified that in December 1989 he counseled, and in January 1990 terminated a probationary employee for absenteeism and tardiness, after 40 days of employment. In light of the testimony of Horkheimer and Hudgins, it is evident that unsatisfactory probationary employees could be terminated at anytime during their probationary period. It is also evident that the Employer expected its department managers to regularly counsel new employees, particularly if their performance was unsatisfactory. In Shoehigh's case, there was no criticism of his performance, but only praise, until shortly before his termination, after he indicated his support for Cheryl Gannon. Richard Duffy has been director of the department of occupational health and safety since 1985. Duffy, an evasive witness, initially testified that probation was discussed at a meeting at which attendance was also discussed, i.e., the managers' meeting in early May. Duffy then testified that probation was discussed many times, beginning in September 1988. Duffy testified that he was instructed to counsel employees who were not performing satisfactorily, and if the problem persisted, to notify Duffy's superiors. Again, no such practice was followed in Shoehigh's case. Duffy testified at one point that he was told to submit written memoranda, and at another, that he was not instructed concerning paperwork. The Employer failed to present any evidence that any probationary employee was given a 60-day evaluation prior to Shoehigh. Tom Derkas testified that when he began he was not told anything about the probationary period. As indicated, Shoehigh testified that he was told only that there was a 70-day probationary period. I credit their testimony. I find that there was in fact no such thing as a 60-day evaluation, that the Employer's department heads (other than Nesbitt) were not even told about such a procedure until early May, after Shoehigh's discharge, and that the ostensible 60-day review was simply a device to get

rid of Shoehigh when it became apparent that Shoehigh would not abandon his support for Gannon.

I am not persuaded that the Employer was engaged in a scheme to phase out Gannon's job. I credit the testimony of Nesbitt and Shaitburger that prior to January 1989, Gannon indicated a lack of interest in attending the AFL-CIO lobbyists' meetings. It is undisputed that prior to December either Shaitburger or Shoehigh's predecessor, Udell, attended the meetings. As the meetings fell within the category of legislative activity, it is unlikely that Gannon would have tolerated this situation without protest, unless she was not interested in attending the meetings. It is also unlikely that Shaitburger would remember an incident which occurred nearly 4 years earlier, unless the incident posed a continuing problem or was mentioned by Gannon to Nesbitt. Gannon became interested in the meetings only when it became apparent that they would play a more significant role in the department's program. Gannon never complained that Shoehigh was taking her place with respect to legislative matters on Capitol Hill, which was her principal work and the work she enjoyed most. Gannon did complain that Nesbitt was taking her place in contacts with Capitol Hill. However, Nesbitt was new to the department, and as Shaitburger pointed out to Gannon, as department head it was important for him to learn the work, in this case, by establishing his own relationship with and presence on the Hill. Nesbitt did assign Shoehigh to edit Gannon's written work. However, Shaitburger evidently regarded Gannon's writing style as too detailed and technical, and felt that Shoehigh, with his political savvy, could be helpful in this regard. Moreover, Gannon was often absent on union business, whereas Shoehigh had no comparable limitations on the time he could devote to his job. Gannon had ample work. She could have requested a transfer to another department. However, she did not.

This does not mean that Gannon lacked reason to complain about the manner in which Nesbitt assigned department work. Gannon had for some time worked virtually alone in the department. Now, with Nesbitt and Shoehigh actively at work and taking on increased duties, she felt that her status was being downgraded. Department work assignments were a term and condition of employment for both Gannon and Shoehigh. Gannon discussed her concerns with Shoehigh, and convinced Shoehigh that Nesbitt was using him as a "pawn" to undermine Gannon's position in reprisal for her union activity. Thereafter Gannon and Shoehigh, acting in concert and participation with each other, presented their complaints to Bollon, Shaitburger, and Nesbitt. By discussing Gannon's complaints and presenting them to management, Gannon and Shoehigh engaged in activity protected by Section 7 of the Act. *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984), enfd. 767 F.2d 930(T) (8th Cir. 1985); *Pacific Coast International Meat Co.*, 248 NLRB 1376, 1380 (1980); *C.J. Krehbiel Co.*, 227 NLRB 383, 385 (1976), enfd. 593 F.2d 262 (6th Cir. 1979); *Dreis & Krump Mfg.*, 221 NLRB 309 (1975), enfd. 544 F.2d 320, 327-328 (7th Cir. 1976); *NLRB v. Jasper Seating Co.*, 857 F.2d 419 (7th Cir. 1988). As these cases indicate, protected concerted activity may involve as few as two employees, and it is immaterial whether their position is correct or their actions reasonable or wise.

I credit the testimony of Gannon and Shoehigh concerning their meetings and conversations with Bollon, Shaitburger and Nesbitt. I specifically find that Nesbitt warned Shoehigh

that he was putting himself in jeopardy by defending Gannon, and that Bollon told Gannon that the reason given by the Employer for terminating Shoehigh, i.e., work performance, was bullshit. I further find, as discussed, that Nesbitt accused Shoehigh of being a clockwatcher and failing to keep Nesbitt informed of Shoehigh's Capitol Hill activities, because he indicated that he wanted overtime compensation. The testimony of the Employer officials involved in the events leading to Shoehigh's discharge (Whitehead, Bollon, Shaitburger, and Nesbitt), was demonstrably incredible. They falsely testified about the alleged 60-day evaluation policy and the timing of the decision to terminate Shoehigh, and Nesbitt testified falsely concerning his alleged dissatisfaction with Shoehigh's performance. Whitehead, Shaitburger, and Nesbitt contradicted each other as to who made the decision to terminate Shoehigh. As indicated, the testimony of Shaitburger, who played a key role in the Employer's version of the events, was replete with contradictions as to material matters. (For example, Shaitburger testified at one point that Gannon told him she did not want to attend the AFL-CIO lobbyists' meetings, at another point that she did not so indicate, and at a third, that she wanted to attend when issues of interest to her were discussed, e.g., family leave.) Gannon and Shoehigh in their testimony, tended to exaggerate the extent to which work was shifted from Gannon, and they contradicted each other on minor points in the sequence of events. However, these failings pale into insignificance when compared with the testimony of the Employer officials. Bollon told Gannon that the Employer gave a false reason for terminating Shoehigh, because Bollon knew the reason was false. When President Whitehead learned that Shoehigh was speaking out in defense of Gannon's position that Nesbitt was undermining or phasing out her job, he instructed Nesbitt (probably on March 17) that if Shoehigh persisted in pleading Gannon's case, Nesbitt should use the ostensible 60-day evaluation as a pretext to discharge Shoehigh. Whitehead and Nesbitt were also upset because they expected to get the benefit of Shoehigh's Capitol Hill connections at no extra cost to the Employer. Nesbitt warned Shoehigh that he was putting his job in jeopardy. When Shoehigh adhered to his support for Gannon and assertion that he was entitled to overtime compensation, Nesbitt carried out Whitehead's instruction and discharged Shoehigh. Shoehigh's alleged disregard of the chain of command in going to Bollon, was a sham. Bollon frequently involved himself in personnel matters. He never told Gannon or Shoehigh that they were wrong in going to see him. Indeed Bollon asked to speak to Shoehigh. Whitehead was angered at the substance of Shoehigh's grievances, rather than the fact that he addressed them to Bollon. Shoehigh was not insubordinate, nor does the Employer claim he was, or that he was discharged for insubordination. Shoehigh presented his views and those of Gannon, but did not refuse to carry out any work assignment. The Employer discharged Shoehigh because of his protected concerted activity in discussing Gannon's grievances with her and vocally joining with and supporting Gannon in presenting their views to management. The Employer thereby violated Section 8(a)(1) of the Act. The Employer also discharged Shoehigh in part because he asserted that there should be an arrangement under which he could receive overtime compensation for attending afterhours functions. The Employer thereby violated Section 8(a)(1) and

(3) of the Act. As Shoehigh was invoking an arguable, good-faith contract right, it is immaterial that he did not discuss his grievance with Gannon before talking to management. *NLRB v. City Disposal Systems*, supra.⁸ I further find that the Employer, by Nesbitt on March 20, violated Section 8(a)(1) by threatening him with loss of employment or other reprisal if he continued to support Gannon. As I indicated at the hearing, Shoehigh's work, principally that of a lobbyist (either directly or indirectly), involved exercise of the Employer's First Amendment right to petition the Government for a redress of grievances. I agree with the General Counsel that this would not preclude the Board from finding that his discharge was unlawful, or from directing the usual remedies of reinstatement and backpay. *Associated Press v. NLRB*, 301 U.S. 103, 130-133 (1937); *Passaic Daily News v. NLRB*, 736 F.2d 1543, 1556 (D.C. Cir. 1984), on remand 276 NLRB 605 (1985).

F. The Gannon Warning

The complaint in Case 5-CA-20466 alleges that on or about May 10, the Employer by Nesbitt violated Section 8(a)(1) and (3) by issuing a verbal warning to Cheryl Gannon because of her union and concerted activities, and to discourage employees from engaging in such activities.

As indicated, employees signed in on a daily attendance sheet as they reported to work, indicating time of arrival. In May 1989 feelings were running high on both sides. The resumed negotiations had foundered, and the parties were engaged in correspondence in an effort to find some way to accommodate their differences. Both sides were making propaganda pronouncements. In April the Union, led by President Haines, distributed literature, accusing the Employer of unfair labor practices, at the Employer's annual Congressional Fire Service Caucus dinner (attended by President Bush and other dignitaries).

Cheryl Gannon testified in sum as follows: On May 10, Department Director Nesbitt told her she had been signing in late in the morning, the contract said the employees had to be at work at 9 a.m., and she should be sure to sign in before that time. Gannon said she would. The daily attendance sheets indicate that Gannon signed in at 8:49 a.m. on May 10, but signed in late on 3 of the 7 previous workdays in May (at 9:12, 9:06, and 9:13 a.m., respectively). On these occasions, and even when she signed in on time, Gannon was among the last employees to sign the sheet. Gannon further testified in sum as follows: About 1 week later, Nesbitt told her she was late two additional times. (The daily attendance sheets indicate that Gannon signed in before 9 a.m. on all workdays from May 10 through 19, although Tom Derkas signed in late three times and David Billy, Shoehigh's successor, signed in late twice during this period.) Gannon said the accusation wasn't true, and Nesbitt should look at the attendance sheets. Nesbitt said that one day she got to her desk

at 9:02, and previously was seen talking to Alan Beer in the cafeteria, and on another occasion she got to her desk 1 or 2 minutes late. Gannon said she never heard of such a policy. Nesbitt said she had to be at her desk at 9 a.m., that President Whitehead told all the directors "to enforce the contract to the letter of the law." Gannon explained that she had a longstanding arrangement with Shaitburger (Nesbitt's predecessor) which allowed her some flexibility in arriving late and leaving early from work, because of her work on Capitol Hill. Nesbitt said he had no knowledge of the arrangement, that Gannon had to be at work at 9 a.m. and there would be no makeup time (although the implemented "contract" provided for makeup time for tardiness up to 9:15 a.m.). Gannon said she was being singled out, and that other employees were not at work at 9 a.m. Nesbitt asked who, and Gannon mentioned Derkas. Nesbitt asked if Gannon wanted him to reprimand Derkas. Gannon said she did not, and would have to file a grievance. Nesbitt said if this happened again, Gannon would be written up. Gannon did not file a grievance, she was not written up, and Nesbitt did not speak to her again about her attendance.

Nesbitt testified in sum as follows: On May 3 or 4 he attended a department managers' meeting (this was the same meeting at which the probationary period was discussed). The main topic of discussion was attendance. Whitehead and Bollon said that employees were signing and coming in late, they must be at their desks at 9 a.m., and the directors should make sure they were ready for work at 9 a.m. The employees could make up time if they came in before 9:15 a.m. No names of employees were mentioned. On Monday, May 8, Nesbitt told Gannon she was late three times, including that day (Gannon signed in at 9:13 a.m. that day). Nesbitt knew Gannon was late because he saw she was not at her desk at 9 a.m. Nesbitt said that the provision for makeup time did not excuse tardiness. Employees could make up time if not more than 15 minutes late, if there were extenuating circumstances. Gannon said she would come to work on time. However, Nesbitt said that she was late on two more occasions, on or about May 18 and 19 (although this was not reflected on the daily attendance sheets). Nesbitt went by his pen watch. He told Gannon she was 5 to 10 minutes late. He said he saw Gannon and Alan Beer coming from the cafeteria at 9:03 or 9:04 a.m. Gannon said the clock on the office wall showed 9 a.m. Nesbitt said that was not the official time, "the official time is at the desk," and Gannon was persistently late. Gannon then referred to her special arrangement with Shaitburger. Nesbitt was not aware of the arrangement, and said so. He said the contract clearly required all employees to be at work at 9 a.m. Gannon said that Derkas was late, and asked why Nesbitt didn't talk to him. Nesbitt said if Gannon was accusing Derkas of being late, Nesbitt would bring him in and Gannon could confront him. Gannon said she was not, but might file a grievance. Nesbitt said that was her prerogative, but he had counseled Gannon twice, and if she was late again, he would write her up. Nesbitt did not dock Gannon's pay or require her to make up the lost time. Thereafter Gannon was not late. Nesbitt counseled Derkas for tardiness during the week of May 22, and counseled David Billy twice in early June. At a managers' meeting in June, the Employer reiterated that employees must be at their desks by 9 a.m.

⁸On the basis of the timing of Shoehigh's discharge, and the statements made by Nesbitt and Bollon, demonstrating hostility towards Shoehigh's protected activities and a virtual admission that Shoehigh was discharged because of those activities (even without considering other evidence), the General Counsel presented a prima facie case that the Employer discharged Shoehigh because of his protected union and concerted activity. As the Employer's position that it terminated Shoehigh for poor work performance is not credible, it follows that the Employer failed to meet its burden of establishing that it would have discharged Shoehigh in the absence of such activity.

President Whitehead, Secretary-Treasurer Bollon, Shaitburger, and Department Directors Hudgins and Duffy testified concerning the managers' meetings at which tardiness was discussed. They testified in sum as follows: Whitehead observed a constant problem, in that employees were signing in late or were not at their desks at 9 a.m. He discussed the problem at the May managers' meeting. Whitehead said he wanted the personnel at their desks at 9 a.m., the employees should be so informed, and counseled for tardiness, and that progressive discipline should be applied in cases of continued tardiness. Nothing was said about exceptions to this policy. No names were mentioned at this meeting. Thereafter some supervisors continued to have problems with employee tardiness. Shaitburger named three employees whom he counseled for tardiness. Director of Research Hudgins testified that in December 1989 he counseled, and in January 1990 discharged an employee for tardiness and absenteeism. Bollon had continuing tardiness problems with two employees in his jurisdiction. He and his administrative assistant, Glenn Berger, counseled the employees. At the June managers' meeting Bollon informed Whitehead of the problem employees. Gannon's name was not mentioned. Shaitburger testified that under his arrangement with Gannon, when he was department director, she could come in late if she worked beyond 4:30 p.m. the previous day.

The Employer witnesses' testimony concerning counseling of employees other than Gannon was undisputed. Derkas did not deny that he was counseled, and the General Counsel did not present testimony by other employees who were allegedly counseled. However, Alan Beer testified that about 2 days after Gannon was reprimanded, Director Duffy told the occupational health and safety staff (Beer, Vita, and Harry Smith) that higher management said employees had to be at their desks promptly at 9 a.m. Beer commented that, "I guess they're looking for excuses to get me," whereupon Duffy responded, "Yeah, you and Cheryl." Duffy testified that following the department managers' meeting he spoke to his staff, telling them they had to be at work at 9 a.m., although the department did not have an attendance problem. Duffy denied Beer's testimony concerning the alleged references to Beer and Gannon. I credit Beer. As indicated, I have problems with the quality of Duffy's testimony, which was marked by evasiveness and contradictions. I have no comparable reservations with respect to Beer's testimony. If the complaint alleged that Duffy made an unlawful threat, I would be inclined to find a violation. However, the complaint does not so allege. Rather the complaint alleges that on or about May 10, Nesbitt unlawfully issued a verbal warning to Gannon.

In order to establish a violation, the General Counsel must show that the Employer either: (1) discriminatorily instituted a tougher attendance policy, and pursuant to such policy issued a verbal warning to Gannon, or (2) regardless of the Employer's general policy, the Employer singled out Gannon, discriminatorily, for an attendance warning, because of her union activities. I am not persuaded that either was the case. The Employer did have a tardiness problem among its staff, and Gannon was part of the problem. Gannon was late several times without justification in early May. Gannon did not claim that she was working beyond 4:30 p.m. during this period. As discussed in connection with Shoehigh's discharge, Gannon claimed she was not getting enough work.

I credit Shaitburger's testimony concerning his arrangement with Gannon. It is unlikely that Shaitburger would simply give Gannon *carte blanche* to come in late for work. Rather, it is probable, as testified by Shaitburger, that he permitted Gannon to come in late following days on which she worked beyond 4:30 p.m., usually by reason of her Capitol Hill commitments. The evidence further indicates that following the May managers' meeting the Employer vigorously sought to achieve prompt attendance by all its staff. Pursuant to that policy, the Employer counseled and disciplined employees to the extent necessary to improve attendance, including termination of an employee with a poor attendance record. Gannon reported to work on time, and thereafter nothing more was said to her about the matter. Indeed the Employer was lenient toward her attendance. Gannon had used up her sick leave. Nevertheless, the Employer tolerated her absences in June and July 1989, by reason of a medical problem. This was not the action of an Employer who was seeking a pretext to get rid of an unwanted employee. It is axiomatic that working time is for work. However, Gannon again displayed her tendency to see an Employer conspiracy lurking behind every tree and bush. I find on the basis of Director Duffy's remark to Alan Beer, that the General Counsel presented prima facie evidence that Gannon was discriminatorily warned about her attendance, although Duffy probably engaged in sarcastic humor. However, I find that the Employer carried its burden of establishing that it would have warned Gannon in the absence of her union activity. I find in the circumstances that Duffy's remark did not reflect the Employer's policy, and that pursuant to a nondiscriminatory policy the Employer warned Gannon about her attendance. Therefore, I am recommending that this allegation of the complaint be dismissed.

G. The Notice of Resolution

It is undisputed that on or about May 16 the Employer posted on the employee bulletin board a notice of resolution passed by its executive board, which stated as follows:

The Executive Board Unanimously Moves To Condemn The Tactics Undertaken By Local 2 OPEIU In Their Relations With The International Association Of Fire Fighters Including Letters To The International Vice Presidents, And Also To Condemn Personal Attacks On The President Of The International And His Family;

And The Executive Board Considers These Attacks To Be Industrial Terrorism And An Attack On The Integrity And Effectiveness And Very Existence Of The IAFF As An Organization;

The Board Therefore Unanimously Directs The Principal Officers To Take Whatever Measures Necessary To Bring Those Actions To A Conclusion, Up To And Including Discharge Of Responsible Employees And The Closure Of The IAFF Office, Until The Matter Is Resolved.

The complaint alleges that the Employer thereby violated Section 8(a)(1) of the Act. After hearing and considering evidence presented by the parties, and offers of proof of still more evidence, I granted summary judgment in favor of the General Counsel, stating as follows:

JUDGE ROTH: The allegations of paragraph five and eight of the complaint in Case 5-CA-20466 have been sustained by the evidence and an appropriate remedial order will be entered in my decision.

The posted resolution on its face threatens employees with discharge, office closure or other retaliation because of protected employee union and concerted activity.

At the very least, the resolution is ambiguous in this regard and it is settled law that such ambiguity must be construed against the employer who promulgated the document, and employees reading this notice could reasonably believe that the employer was threatening such retaliation against union tactics which would include legitimate collective bargaining, and also would encompass legitimate union propaganda and permissible propaganda.

I note further, I note in this regard that President Whitehead has testified that this literature consists of or does include personal attacks upon him.

I further note that the employer has failed to come forward with any probative evidence of union misconduct or unprotected conduct, although this finding is not necessary to the resolution of the merits of this allegation.

I adhere to that ruling. See *Universal Fuels*, 298 NLRB 254 (1990).

CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All office employees employed by the Employer, including those employees who are normally assigned to work less than five (5) full days each week; excluding those employees whose work is of a supervisory nature as defined by the NLRB, and the secretary to the president and the secretary to the secretary-treasurer and those employees not covered by the jurisdiction of the OPEIU, constitute a unit appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the Union has been and is the exclusive collective-bargaining representative of the Employer's employees in the unit described above.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Employer has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By discriminatorily discharging William Shoehigh, thereby discouraging membership in the Union, the Employer has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By unilaterally implementing changes in terms and conditions of employment which were inconsistent with its prior contract proposals, without affording the Union an opportunity to bargain concerning such changes, the Employer has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Employer has committed violations of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act. The Employer engaged in serious and substantial violations of three sections of the Act, involving disregard of fundamental employee rights. The Employer also has a recent history of other unfair labor practice conduct. In *Firefighters*, 297 NLRB 865 (1990), the Board found that the Employer violated Section 8(a)(1) by unlawfully encouraging and assisting employees to form a bargaining association. I find that the Employer's recent history and conduct as evidenced in this case demonstrates a proclivity to violate the Act and general disregard of employee rights. Therefore I shall recommend that the Employer be ordered to cease and desist from in any manner infringing upon the rights guaranteed in Section 7 of the Act.

I shall further recommend that the Employer be ordered to rescind its notice of resolution by its executive board. Having found that the Employer discriminatorily terminated William Shoehigh, it will be recommended that the Employer be ordered to offer him immediate and full reinstatement to his former job, or if it no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings and benefits that he may have suffered from the time of his termination to the date of the Employer's offer of reinstatement. I shall further recommend that the Employer be ordered to expunge from its records any reference to the unlawful termination of Shoehigh, to inform Shoehigh in writing of such expunction, and to inform him that its unlawful conduct will not be used as a basis for further personnel actions against him. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁹

The complaint does not allege that the Employer engaged in overall bad-faith or surface bargaining. However, as discussed, the Employer by unilaterally changing terms and conditions of employment which cut across the spectrum of issues between the parties, and by rigidly adhering to its own unlawful conduct in the resumed negotiations, effectively thwarted the conditions for meaningful good-faith bargaining. Therefore I shall recommend a general bargaining order, rather than one limited to the specific issues which were the subject of unilateral changes. I shall further recommend that the Employer be ordered, if requested by the Union, to restore the salaries of the health and safety assistants to a Grade 9 level, and reimburse Alan Beer, Joe Vita, and any other employees who have held or presently hold such positions, for the Employer's failure to pay them at such level, including cost-of-living adjustments. I do so with some hesitation, as the effect of this recommendation is to permit the

⁹Under *New Horizons*, interest on and after January 1, 1987, is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

Union to have its cake and eat it too, i.e., to retain increases for the other professional assistants while requiring restoration of the former grade level for the OSHA research assistants. However, the Employer created the problem by its own unlawful conduct, and must bear the cost. I shall further recommend that the Employer be ordered, if requested by the Union, to restore the practice of permitting carryover of accumulated floating holidays and unused compensatory time, pursuant to the side letters of May 6, 1987. The Employer shall compensate employees who were required to cash out accumulated floating holidays or unused compensatory time, by permitting them to elect either (1) restoration of same if they repay the amount of such cashout, or (2) compensation for the difference between the cashout rate and their pay rate at the time of Employer compliance with the Order herein. I shall further recommend that the Employer be ordered, if so requested by the Union, to rescind the Employer's self-designated "contract" in its entirety, or any specific provision or provisions of such "contract" which differs from the terms and conditions in effect under the 1986-1988 contract. The Order shall not be construed as requiring the Employer to cancel any wage increase or benefit without a request from the Union. See *McClatchy Newspapers*, 299 NLRB 1045 at 1046 (1990). Reimbursement for health and safety assistant's pay, accumulated floating holidays and unused compensatory time, shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed above. Restoration of pre-December 27, 1988 terms and conditions of employment, pursuant to the Order herein, shall continue until such terms and conditions are changed in accordance with the law. The Employer shall be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

The Respondent, International Association of Fire Fighters, AFL-CIO-CLC, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they discuss or concertedly complain about their supervision, work assignments or other terms and conditions of employment, or claim rights under a collective-bargaining contract, or otherwise engage in union or concerted activities for the purpose of mutual aid and protection with respect to wages, hours or other terms and conditions of employment.

(b) Threatening employees with discharge, office closure, or other reprisal because they engage in union or other protected concerted activities.

(c) Failing or refusing to bargain collectively in good faith with the Union as the exclusive representative of all its employees in the above-described appropriate unit.

(d) Unilaterally changing terms and conditions of employment of unit employees without affording the Union adequate and meaningful opportunity to negotiate and bargain concerning such changes as the representative.

(e) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Offer William Shoehigh immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the termination of William Shoehigh, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

(c) Rescind its notice of resolution of its executive board which it posted on or about May 16, 1989.

(d) On request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above, with regard to rates of pay, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(e) If requested by the Union, restore the salaries of the health and safety assistants to a Grade 9 level, and reimburse Alan Beer, Joe Vita, and any other employees who have held or presently hold such positions, for the Employer's failure to pay them at such level, as set forth in the remedy section of this decision.

(f) If requested by the Union, restore the practice of permitting carryover of accumulated floating holidays and unused compensatory time, pursuant to the side letters of May 6, 1987, and compensate employees who were required to cash out accumulated floating holidays or unused compensatory time, as set forth in the remedy section of this decision.

(g) If requested by the Union rescind its self-designated "contract," or any specific provision or provisions of such "contract" which differ from the terms and conditions in effect under the 1986-1988 contract, and maintain such terms and conditions under the 1986-1988 contract unless and until changed in accordance with the law.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and reimbursement due.

(i) Post at its Washington, D.C. place of business copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representa-

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tive, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable

steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.