

**United Federation of Teachers Welfare Fund and  
United Industry Workers, Local 424. Cases 2-  
CA-27180 and 2-CA-27375**

October 22, 1996

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND FOX

On May 16, 1996, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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,<sup>1</sup> and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United Federation of Teachers Welfare Fund, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with reprisals if they utilize the Union to represent them regarding discrimination allegedly practiced against them at the Respondent's facility.

(b) Threatening its employees with discharge because they utilized the Union to represent them regarding the discrimination allegedly practiced against them at the Respondent's facility.

(c) Decreasing its employees' work responsibilities and terminating employees because they utilized the

Union to represent them in meetings with the Respondent.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, offer Valquira Green full reinstatement to her former job as communications coordinator or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Valquira Green whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a 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 due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 7, 1994.

(f) Within 21 days after the service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, we agree with the judge that an adverse inference may properly be drawn from the Respondent's failure to produce material witnesses, but in doing so we rely solely on the fact that those witnesses, all of whom were members of the Respondent's management, "may reasonably be assumed to be favorably disposed" to the Respondent. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

<sup>2</sup>We shall modify the judge's recommended Order in accordance with our recent decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

<sup>3</sup>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."

## 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with reprisals if they utilize United Industry Workers, Local 424 (the Union) to represent them regarding discrimination allegedly practiced against them at our facility.

WE WILL NOT threaten our employees with discharge because they utilize the Union to represent them regarding discrimination allegedly practiced against them at our facility.

WE WILL NOT decrease the work responsibilities and terminate employees because they utilize the Union to represent them in meetings with us regarding alleged discrimination being committed at our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Valquira Green full reinstatement to her former job as communications coordinator or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Valquira Green whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Valquira Green, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

UNITED FEDERATION OF TEACHERS  
WELFARE FUND

*Yvonne L. Brown, Esq.*, for the General Counsel.  
*Joel Spivak, Esq. (Mirken & Gordon, P.C.)*, for the Respondents.

## DECISION

## STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. Upon the basis of a charge and amended charge filed on February 7 and March 24, 1994, respectively, in Case 2-CA-27180, and a charge and amended charge filed on April 26 and June 23, 1994, respectively, in Case 2-CA-27375, by United Industry Workers, Local 424 (Local 424 or the Union) against United Federation of Teachers Welfare Fund (the Respondent or the Welfare Fund), complaints and notices of hearing in these cases were issued on April 28 and July 29, 1994, respectively, alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer timely filed, the Respondent denied the material allegations in the complaints. By Order dated July 29, 1994, these cases were consolidated for the purposes of hearing.

A hearing in these consolidated cases was held on January 24-26, 1996. Subsequent to the close of the hearing the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

## FINDINGS OF FACT

## I. THE BUSINESS OF THE RESPONDENT

The Respondent at all times material is and has been engaged in the business of providing health insurance and other benefits to the members of the United Federation of Teachers (the UFT) with an office and place of business in New York, New York. During the preceding 12 months the Respondent in its business operations derived gross revenues in excess of \$500,000 and purchases and receives at its facility goods and products valued in excess of \$50,000 directly from points located outside the State of New York. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

United Industry Workers, Local 424 is a labor organization within the meaning of Section 2(5) of the Act. After Board certification of the Union on December 3, 1993, as the collective-bargaining representative of the Respondent's office and clerical employees in the appropriate bargaining unit, negotiations for a collective-bargaining agreement were held from January through April 1994 between the parties, resulting in an agreement effective May 15, 1994, through November 30, 1996.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaints allege that the Respondent threatened Valquira Green with reprisals if she utilized the Union to represent her at a meeting with management regarding discrimination allegedly practiced against her, threatened to discharge her because she utilized union representation in this regard, decreased Green's work responsibilities, and then

discharged Green because she sought such union representation, in violation of Section 8(a)(1) and (3) of the Act.

#### A. The Evidence

Valquiria Green was hired by the Respondent on July 28, 1993, as a communications coordinator. Her duties, in substance, were to interact with outreach coordinators in various parts of the country in planning events, schedules, seminars, and trips for United Federation of Teachers retirees; to work with the director of retiree programs to implement special projects (retiree luncheons), expediting registration procedures and event planning; and attending membership, delegate, and executive board meetings. In performing her duties, the communications coordinator is involved in various writing and editing projects in which she compiles information, prepares announcements, and writes and/or edits columns, etc., regarding the Si Beagle Learning Center Course Programs, the UFT New York Teachers publication, newsletters, and the annual report. The communications coordinator has an office, a secretary, and a computer, and is paid \$32,500, annually.

Green testified that on her first or second day of work her supervisor, Candy Cook, the Welfare Fund director of retiree programs, questioned her qualifications and experience and told her that Sandra March, the special UFT representative to retiree programs, had raised doubts whether Green was "capable of doing the type of writing that we needed, because we needed writing from a certain point of view," and that Green was not suited for the position because she was a "foreigner."<sup>1</sup> According to Green, from the beginning of her employment Cook would give her an assignment and say, "I want to see if you can do this job."

Green testified that from July through October 1993 her work was reviewed by Cook, March, and Jeanette DiLorenzo, the retired teachers chapter leader in 1993, and both Cook and Green's supervisor. Green related that March continuously criticized her work often making only minor changes, and was mean, disruptive, and abusive to her. Green stated that while both March and Cook treated her "like dirt," Cook professed to like her and wanted to protect her from March.

According to Green, she was not always given the information she needed to successfully complete an assignment nor the specifics to do so. As a result, Cook was at times dissatisfied with the result stating, "Maybe Sandra March is right, maybe you can't do the job." However, despite Cook's expressed uncertainty about Green's ability to perform the work, she continued to give Green new assignments, including writing assignments. Green stated that Cook never told her that there was a problem with her grammar or her ability to complete assignments in a timely fashion.

Green testified that she complained to Cook on several occasions about the way she was being treated and asked Cook to give her a fair chance to do her job, and if Cook then decided that Green was unsuitable for the position then to fire her. According to Green, Cook's response was, "Okay, okay." Green added that she did not think her job was in jeopardy at the time. Moreover, Green approached March in October or November 1993 to see if something could be re-

solved but was told by March, "I don't have time for this now."

Green testified that since the situation did not improve in October 1993 she went to see Karen Watson, then director of personnel for the UFT, and complained of harassment. Green related that Watson told her that she had suffered the same type of harassment at March's hands when she first started working at the UFT, and advised Green to request written guidelines regarding her duties and for an evaluation from her supervisor. Since nothing changed, Green returned to Watson 2 weeks later and gave Watson permission to speak to Mel Hester, general manager of the UFT, about her situation, as someone who would possibly help her. Subsequently, Watson told Green that she would have to speak to Hester herself, since after her conversation with Hester, Watson did not think he intended to intervene.

Additionally, Green spoke to DiLorenzo at the end of October or the beginning of November 1993 about the alleged discrimination against her and was advised by DiLorenzo to stay clear of the bickering between Cook and March. It was also now agreed that Green's work would be checked by DiLorenzo and Cook before it was submitted to March. Moreover, Green's repeated requests for a formal evaluation of her performance made from October through early December 1993 brought no response.

Green testified that she had a conversation with Hester in the conference room of the personnel department at the end of November, beginning of December 1993. Green told Hester that Watson had suggested that she speak to him and that she was being harassed by Cook and March because of her national origin. Hester, who is Jamaican and black, told Green that he did not feel discriminated against and recommended that Green should gain the confidence of her supervisors by learning as much as she could and by pleasing them.

By memorandum dated December 3, 1993, after a third request for an evaluation by Green, Cook advised Green that, "Your continuation with this program is dependent on successful execution of these responsibilities," with a list of the projects and activities being attached to this memo. Cook also stated that "I will re-evaluate your work in January and discuss the matter further with you." While Cook testified that she had conveyed to Green that she did not think it was working out very well prior to giving Green the "list of responsibilities," Green denied that Cook ever told her this. Additionally, this was the first time that Green had been provided with a detailed explanation of her job duties. However, according to Green, despite this, the situation regarding her employment with the Respondent did not improve.

In early January 1994, Green announced two meetings on the same date in the New York Teacher, one in Brooklyn and one in Manhattan. The Brooklyn meeting, incorrectly announced for January 26, 1994, was actually scheduled to take place on February 18, 1994. Green brought this to Cook's attention apparently prior to the events. Cook told her not to worry about the mistake because there was plenty of time to inform the members before the meeting date and to correct the mistake.

On January 19, 1994, Green complained of harassment by Cook and March to the Human Rights Commission. Green also contacted Frank DeFilippi, area director for the Union, who advised her to request a meeting with Hester and, "I

<sup>1</sup> Cook denied telling Green this.

put a letter together—Frank DeFilippi dictated a letter to me and I hand delivered it to Mel Hester” on January 24, 1994. The letter, addressed to the head of the personnel department, stated, “Be advised that I . . . am requesting a meeting with you and my union representative.” The letter contains obvious errors in sentence construction and perhaps grammar.<sup>2</sup> Prior to January 24, 1994, there had been no discussion or mention of the Union between Green and Hester.

Cook testified that early in January 1994 she had sent a memorandum to Executive Director of the Welfare Fund Jeffrey Kahn, during 1993 through November 1994, explaining that Green would have to be terminated and requesting a replacement. This memorandum was never produced at trial. Moreover, according to Hester and Cook, they met with DiLorenzo on January 24, 1994, to discuss the problem of Green’s work performance. Cook and DiLorenzo explained the situation with Green to Hester and asked him whether he could find a position for Green at the UFT.

Green testified that Hester called her on January 31, 1994, in response to her letter and initially asked, “Why I was involving the Union in this?” Green responded that her requests for assistance to Watson and himself had produced no results and “now I want my Union representative at this meeting.” According to Green, Hester told her that “involving the Union was a mistake, that it would hurt me more, that I had no right to involve the Union, especially since I didn’t have a contract, and that the Union wasn’t going to do anything for me.” Green stated that Hester told her that they could work something out off the record, without the Union being present, but if the union representative was there, everything would have to be on the record. Green related that Hester told her that “the situation had changed very rapidly where I was working and that people were getting very angry . . . because I had included everyone in my complaint and that they were tired of defending me.” Green added that Hester was trying to convince her to meet with him alone that day without the union representative, but she advised Hester that she could not because she had some assignments to finish. However, Green did agree to meet with Hester alone the following day, February 1, 1994.

Concerning this conversation, Hester testified that he called Green on January 31, 1994, to remind her of the scheduled meeting that day and to point out that she worked for the Welfare Fund, not the UFT, and he therefore could not discuss this matter as a grievance. Hester stated that he had told Green “the distinction between the Welfare Fund and the UFT [was] critical,” and if Green understood that she would appreciate why he had requested to meet with her on an informal basis. Hester also testified that Local 424 was not mentioned during this conversation nor did Green insist on the presence of her union representative at the meeting arranged between them for the following day.

After concluding her conversation with Hester, Green called DeFilippi and advised him that she had consented to meet with Hester the next day without the Union’s presence. DeFilippi told Green that he was going to contact Hester, which he did, and it was agreed between them that DeFilippi would attend the meeting between Green and Hester on February 1, 1994.

<sup>2</sup>Green testified that she did not proofread the letter after preparing it because she was “totally distraught that day.”

### 1. The February 1, 1994 meeting

Green testified that Hester called her on February 1, 1994, prior to the scheduled time of the meeting and asked her not to tell DeFilippi about this telephone call. According to Green, Hester told her, “You made a big mistake involving the Union and everything that is discussed now has to be on the record.” Hester also added, “There are consequences for decisions we make.” Before ending the conversation, Hester again warned Green not to tell DeFilippi that he had called. Hester acknowledged making the call, but testified that it was again just to remind Green about the meeting and to tell her that DeFilippi would be present. Hester denied that anything else was said.

Green, DeFilippi, and Hester met that day at 5:30 p.m. Hester identified himself as general manager of the UFT and that he was speaking on behalf of Sandra Feldman, chairperson of the Welfare Fund. Hester testified that he also told Green and DeFilippi that he had no involvement with the Welfare Fund or its administration, only responsibilities at the UFT. However, Green testified that Hester never told her that he did not work for the Welfare Fund, but only for the UFT.

Green testified that she explained to Hester that she was being harassed and abused on the job and having problems. According to the testimony of both Green and DeFilippi, Hester stated that there was nothing wrong with Green’s job performance, her writing, grammar, and syntax were good. Green stated that Hester said the problem was that Sandra March did not like her and wanted her fired, and something about Green not being union material. Hester told them that Cook and DiLorenzo were getting tired of defending her, and Green asked, “Defending me from what, if no one is harassing me?” Hester advised them that they were creating a job for her at the UFT and that her only option was to accept the new position or be terminated as of that day.

Green testified that Hester described the new position as involving phones and helping homeless teachers and that Green would be able to use her skills and training, have a computer and office, but no assistant and that her salary and benefits would remain the same. Hester advised them that the new job was not a bargaining unit position and that if the Union insisted on it being so, Green would be terminated. Green related that at one point Hester turned to her smiling and said, “You wanted the Union, you have the Union, so now get them to help you.” Green requested time to consider the new position and Hester told her that she had until Thursday, February 3, 1994. Hester also told her to finish an assignment involving the *Retiree*, then take Thursday and Friday off, and report to his office for work on Monday, February 6, 1994.

Hester denied telling Green that she was terminated or having mentioned Sandra March at this meeting. Hester testified that he told Green that the problem was her writing and that he pointed out the grammatical errors in her letter of January 24, 1994, requesting the meeting, and said, “If this is what you’re doing for them you’ve got problems.” However, both Green and DeFilippi testified that Hester never exhibited the letter nor discussed it at this meeting. Hester explained that the new position, although he did not have a job description at the time of this meeting, was well above that of clerical workers and that because of the existing contract

with OPEIU and the UFT he could not make it a union position.

Green appeared for work at the Welfare Fund on Wednesday, February 2, 1994, believing that this was her last day on the job there. Cook, who was away in Arizona, called the office and was told by Green that she had been terminated by Hester the previous day and asked if she should complete the *Retiree* assignment. Both Green and Cook testified that Cook registered some surprise at this news and Cook told Green that she would find out what Green was talking about and get back to her. Cook's calls to Hester, who wasn't in, and Tom Pappas, staff director for the UFT in January 1994, who said he would look into it, failed to bring Cook any clarification.

Green called Hester on Thursday, February 3, 1994, to advise him that she was accepting the job offer at the UFT. Green testified that Hester yelled at her that he had no obligation to give her a job and admonished Green for telling Cook about their conversation. Green responded that in view of Hester having said that Cook wanted her out, she thought Cook already knew about it. Hester now told Green to remain on the job at the Welfare Fund to finish all her current projects for as long as Cook wanted her there and that Cook would let her know whether she could keep her job. Hester's testimony about this conversation was that Green had called him on Wednesday, February 2, 1994, to say that she was accepting the job and Hester merely instructed her to finish her assignments with Cook and that when Cook was ready the new job would be there for her.

Green testified that on Monday, February 7, 1994, Green asked Cook if she could still keep her job and Cook told her that she would have to speak to Hester to find out. Green stated that that afternoon Cook told her that she had spoken to Hester and that it would be best for Green to be transferred to the other job. According to Green, Cook told her that she knew March discriminated against her but there was nothing Cook could do about it. Cook directed Green to complete her assignments, which Green did throughout the next few months.

Hester testified that at Pappas' suggestion he had called Cook to tell her that he had not fired Green, but instead had offered her a position with the UFT which she had accepted. He instructed Cook to let him know when she was ready to "release" Green.<sup>3</sup> Cook's testimony concerning this was that on February 7, 1994, she had met with Hester who told her that he had not in fact terminated Green. According to Cook, after Green had told her that day that Hester had offered her a position which Green was unsure of accepting, Cook advised Green to take the job. Cook related that after February 7, 1994, she discussed Green's situation with Kahn, and it was decided that Green could stay at the Welfare Fund and finish her projects until the UFT found a position for her.

Beginning in February 1994 many of Green's duties as communications coordinator were given to other employees, i.e., responsibility for the Si Beagle Learning Center registration, supervision of staff in Cook's absence, writing the column in the *New York Teacher*, editing duties for the *Retiree*, responsibility for compiling and updating the handbooks, and attendance's at meetings. Green testified that by the end of

March 1994 almost all of her responsibilities had been taken away and that she was "totally isolated, and no one was speaking to [her]." According to Cook she was not giving Green any new assignments because she knew that Green was leaving, and that for the next few months Green continued to work on flyers, newsletters, and that sort of thing.

On February 17, 1994, the Respondent was advised that the Union filed a charge with the Board on Green's behalf. On March 4, 1994, in a chance encounter on the subway between Green and Hester, Green testified that Hester indicated his extreme anger with Green because of the filing of the Union's charge stating, "This is the worst kind of lawsuit against a labor organization." While Hester acknowledged meeting Green on the subway he denied telling her that he was "angry beyond belief" about the charge.

In March 1994 Green was initially blamed for failing to note in the February or March issues of the *New York Teacher* the cancellation of a meeting scheduled in Florida on March 8, 1994. Approximately 500 people appeared unnecessarily for the meeting. Green testified that she never received notification of the meeting's cancellation from anyone. Upon being called into Cook's office and successfully explaining why she was not at fault, Cook told her, "Don't worry about it."

Cook testified that throughout the period February 7 to mid-April 1994 she called Kahn on a monthly basis to find out what the status of Green's new position was. Kahn advised her that the UFT was still working on the position and that Green could continue working with the Welfare Fund. Hester related that during this same period he was drafting the contents of the job being created for Green.

## 2. The April 22, 1994 meeting

A meeting was held on April 22, 1994, in Kahn's office with Green, Union Shop Steward Dan Burton, Kahn, Cook, and Bernie Ellison, the controller of the Welfare Fund, present. Cook explained the problems she had with Green; that Green was not writing DiLorenzo's column for which she was hired, with Cook having to dictate the contents thereof on one occasion. Green responded that she was not writing the column because March was not giving her the information she needed. Green acknowledged that Cook had dictated to her on one occasion and explained that this had occurred because Cook had not liked her writing style in that article. Kahn and Cook then made reference to the incidents involving the incorrect meeting date and canceled the Florida meeting for which Green was held accountable. Green explained that Cook had told her not to worry about these incidents, the first one involving the incorrect date had sufficient time to correct it, the second not being her fault because she was not notified of the cancellation. Kahn then informed Green that she was being terminated effective that day and that Hester had created a job for her at the UFT, and he gave her a job description of the newly created position. Green called Hester that same day to accept the position offered.

On the following Monday, Green reported to Karen Watson's office, where Hester met with her. Green testified that Hester called DeFilippi sleazy for filing charges against him and that DeFilippi was going to have to deal with Hester in the future because Hester is the person in charge of hiring and firing everyone for the UFT and Welfare Fund. Green stated that Hester told her to check the letter she had sent

<sup>3</sup> Hester also testified that Cook had called him and told him that Green believed that she had been fired.

him requesting a meeting with a union representative present because it contained several errors. Green added that this was the first time the errors in her letter were brought to her attention. Hester denied making these comments.

From April 23 to May 30, 1994, Green's only job duty at the UFT was to assist receptionists, by transferring excess calls to the correct department, on average receiving six or seven calls per day. While she received a salary of \$32,500 annually, she had no office, secretary, or computer. Although receptionists and telephone operators employed by the UFT are represented by Local 153, Office and Professional Employees International Union, AFL-CIO, Green did not attempt to become a member of Local 153 as Hester had previously told her that the position created for her was not a union position. Green worked at the UFT until May 30, 1995, when she returned to work at the Welfare Fund in an attempt to settle the case.

Green was rehired on May 30, 1995, as "information specialist" which is a bargaining unit position. Green testified that most of the time she does nothing at all. When she is given work, it is to contact members who have called the Welfare Fund seeking assistance, obtain demographic information and the purpose of the call, and record the information on a form which then goes to an administrative assistant. Green receives an annual salary of \$35,900, has no secretary, computer, or key to the department, with only temporary employees not possessing keys. Green shares a cubicle with the data processing employees in the information systems/data processing department and her work is unsupervised.

#### B. Analysis and Conclusions

The resolution of the issues presented in this case requires some determination as to the credibility of the respective witnesses here. After carefully considering the record evidence, I have based my findings on my observation of the demeanor of the witnesses, the weight of the respective evidence, established and admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole. *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V&W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills*, 223 NLRB 230 (1976). I tend to credit the account of what occurred here as given by the General Counsel's witnesses. Their testimony was given in a forthright manner, was generally corroborative and consistent with each other, and with other evidence present or lacking in the record.<sup>4</sup> In contrast the testimony of the Respondent's witnesses, especially that of Mel Hester's, was evasive, unsure, and inconsistent. However, this is not to say that I discredited all the testimony of the Respondent's witnesses as will be more particularly set forth hereinafter.

#### 1. The status of Mel Hester

Section 2(13) of the Act states:

<sup>4</sup>At times the testimony of Candy Cook, a witness for the Respondent, supported and corroborated that given by Green. Moreover, neither Jeffrey Kahn nor Jeanette DiLorenzo, were called as witnesses to refute the testimony of the General Counsel's witnesses when adverse to the Respondent's case nor to support own positions here, although important witnesses in this respect.

In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Under Board law, the test for agency is whether, under all the circumstances, employees would reasonably believe that the alleged agent was speaking for management and reflecting company policy. *House Calls, Inc.*, 304 NLRB 311 (1991); *Lovilia Coal Co.*, 275 NLRB 1358 (1985).

The record evidence establishes that at all relevant times Hester was significantly involved in Welfare Fund decisions and operations regarding personnel, business dealings, and management of the data processing department. Hester approved salaries and job descriptions for employees of the Welfare Fund, including employees in retiree programs, attended meetings of the board of trustees of the Welfare Fund where he participated in, and influenced the Respondent's business decisions. Hester additionally represented to Green and DeFilippi that he was acting on behalf of Sandra Feldman, chairwoman of the board of trustees of the Welfare Fund when they met on February 1, 1994. Hester also participated at the decision-making level in the reorganization of the Welfare Fund's data processing department.

Moreover, it would appear that the UFT provided general personnel services to the Welfare Fund. This included counseling services. Thus, the Welfare Fund's delegation of its personnel duties to Watson and Hester put Hester in a position to be identified with the Respondent's management in the eyes of the employees. Under all the circumstances here, I find and conclude that Hester was an agent of the Respondent acting on its behalf at all times material here. See for example *Montgomery Ward & Co.*, 228 NLRB 750 (1977); also *Gourmet Foods*, 270 NLRB 578 (1984).

The record evidence also indicates that Hester had apparent authority to act for the Respondent. In *Dick Gore Real Estate*, 312 NLRB 999 (1993), the Board stated:

In determining apparent authority, the Board applies the standard endorsed in *Dentech Corp.*, 294 NLRB 924, 925 (1989), quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988):<sup>1</sup>

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. Restatement 2d, *Agency* §27 (1958, Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.

<sup>1</sup> See also *Allegany Aggregates*, 311 NLRB 1165 (1993).

The burden of proving any type of agency relationship is on the party asserting the relationship. *Millard Processing Service*, 304 NLRB 770 (1991). From all of Hester's duties enumerated above, plus the fact that in effect the Respondent delegated its personnel duties to the UFT personnel department under the supervision of Hester, and in allowing Hester to deal directly with Green and the Union, despite the fact that Green worked for the Welfare Fund and the Union represented only Welfare Fund employees not UFT employees, the Respondent knew or should have known that its conduct was likely to create the belief that Hester had apparent authority to act as its authorized agent. I therefore find and conclude that the General Counsel has met her burden of establishing that Hester had apparent authority to act on the Respondent's behalf regarding Green and the Union at all times relevant here.

## 2. The alleged 8(a)(1) violations

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise their statutory right to engage in, or refrain from engaging in, concerted activity. Thus, when an employer engages in conduct which reasonably, may be said to interfere with the free exercise of employee rights guaranteed by Section 7 of the Act, the employer violates Section 8(a)(1) of the Act. *St. Mary's Hospital*, 316 NLRB 947 (1995).

The complaint alleges and the record evidence establishes that on January 24, 1994, Green by letter asked to meet with the Respondent's agent, Hester, and requested that the meeting be held between Green, the Respondent and the Union regarding alleged discrimination being committed against Green at the Respondent's facility.

Green credibly testified that on January 31, 1994, during a telephone conversation with Hester, he asked her why she had involved the Union in her problem and after she explained that he request for assistance in resolving it had brought no results and she therefore wanted union assistance at this meeting, Hester told Green that involving the Union was a mistake, that it would hurt her more, that she had no right to involve the Union especially since there was no contract, and that the Union wasn't going to do anything for her. Hester also told her that they could work something out off the record, without the Union's presence, but if the union representative attended it would have to be on the record. Hester advised Green that people were getting angry and fed up with her and that "they" were tired of defending her. Hester asked Green to meet with him alone, without the union representative. The threats, implicit in Hester's statements, of reprisal if Green were to utilize the Union to represent her violated Section 8(a)(1) of the Act since it tended to restrain and coerce employees in the exercise of their Section 7 rights.<sup>5</sup>

Green also credibly testified that on February 1, 1994, Hester called her told her she "made a big mistake involving the Union and everything that is discussed now has to be on the record and that there are consequences for decisions we make." This occurred the day after DeFilippi had advised

<sup>5</sup> Hester's conduct on January 31, 1994, in seeking to meet with Green alone and warning her not to insist on union representation tended to discourage employees from engaging in union activities.

Hester that he was going to attend the meeting scheduled that day between Hester and Green. At the meeting Hester told Green that she was terminated and that her only option was to accept a nonunion position with the UFT which was to be created for her subsequently. The Respondent's submission to Green of termination or the acceptance of a nonunion position, made to an employee who request and then utilized the presence of her union representative at a meeting despite the Respondent's efforts to have the Union excluded clearly had the tendency to discourage employees from engaging in union activity. I therefore find that the Respondent violated Section 8(a)(1) of the Act when it threatened Green with discharge because she utilized the Union to represent her since it tended to restrain and coerce employees in the exercise of their Section 7 rights.<sup>6</sup>

## 3. The alleged 8(a)(1) and (3) violations

The complaint alleges that the Respondent decreased Green's work responsibilities and discharged her because she requested the presence of a union representative at a meeting with the Respondent.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under the test announced in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), a discharge is violative of the Act only if the employee's protected conduct is a substantial or motivating factor for the employer's action. If the General Counsel carries the burden of proving unlawful motivation, then the employer may avoid being held in violation of Section 8(a)(1) and (3) of the Act only if it can show that "the same action would have taken place even in the absence of the protected conduct." *Wright Line*, above at 1089. Also see *J. Huizinga Cartage Co. v. NLRB*, 941 F.2d 616 (7th Cir. 1991).<sup>7</sup> However, when an employer's motives for its actions are found to be false, the circumstance may warrant an inference that the true motivation is an unlawful one that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). The motive may be inferred from the total circumstances proved. Moreover, the Board may properly look to circumstantial evidence in determining whether the employer's actions were illegally motivated. *Asociacion Hospital del Maestro*, 291 NLRB 198 (1988); *White-Evans Service Co.*, 285 NLRB 81 (1987); and *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692 (7th Cir. 1991). That finding may be based on the Board's review of the record as a whole. *ACTIV Industries*, 277 NLRB 356 (1985); *Heath International*, 196 NLRB 318 (1972).

<sup>6</sup> Interestingly, Hester told Green not to tell DeFilippi about his earlier call to Green that day. See *Gold Shield Security & Investigations*, 306 NLRB 20 (1992).

<sup>7</sup> An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *GSX Corp. v. NLRB*, 918 F.2d. 1351 (8th Cir. 1990).

In establishing a prima facie case of unlawful motivation as the first part of the *Wright Line* test, the General Counsel is required to prove not only that the employer knew of the employee's union activities or sympathies, but also that the timing of the alleged reprisals was proximate to the protected activities and that there was antiunion animus to "link the factors of timing and knowledge to the improper motivation." *Hall Construction v. NLRB*, 941 F.2d 684 (8th Cir. 1991); *Service Employees International Local 434-B*, 316 NLRB 1059 (1995).

On or about December 7, 1993, the Union was certified as the collective-bargaining representative of the unit comprised of certain employees including Valquira Green. Green's letter of January 24, 1994, requested a meeting with the head of the personnel department to include her union representative. Thus, the record evidence establishes that the timing of the Respondent's knowledge of Green's support for the Union was proximate to Green's protected activities. Moreover, aside from the fact that the Respondent engaged in various violations of Section 8(a)(1) of the Act, the record evidences other instances of hostility towards Green for seeking union representation, i.e., Hester's statement to Green that, "You made a big mistake involving the Union," "There are consequences for decisions we make," and "You wanted the Union, you have the Union, so now get them to help you."

Also, between about February 7 and April 22, 1994, the Respondent decreased Green's work responsibilities. While the Respondent asserted that this was because Green was to be subsequently leaving the Welfare Fund for a new position at the UFT, I find this disingenuous in view of the Respondent's unlawful conduct towards Green because she sought union representatives. Instead, I find this to be another instance of the Respondent's hostility toward Green for requesting union representation.

From all the above, I find that by a preponderance of the evidence the General Counsel had made a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to decrease Green's work responsibilities and to discharge her because she requested the presence of a union representative at a meeting with the Respondent, and was discriminately motivated. *Wright Line*, supra; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

In order to rebut the General Counsel's prima facie case, the Respondent must show that it would have decreased Green's work responsibilities and then discharged Green even in the absence of her union activities and support. The Respondent has the burden of presenting "an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place in the absence of the protected conduct." *Equitable Gas Co.*, 303 NLRB 925 (1991); *Chelsea Homes*, 298 NLRB 813 (1990).

The Respondent asserts that the reason for Green's discharge as a communications coordinator was her failure to perform her duties. A major criticism of Green's work was her alleged inability to write from the union point of view and was unable to satisfy DiLorenzo or March with the material prepared by her. However, the Respondent offered no examples of Green's supposed inability to write from the union point of view and was unable to satisfy DiLorenzo and

March, who were allegedly unhappy with her work.<sup>8</sup> The Respondent instead relied mainly on the errors in Green's letter requesting a meeting with her, the Respondent and the union representative, and a flyer which I do not find sufficient to establish the Respondent's contention. While Green candidly and honestly acknowledged problems while on the job, it would appear that these were partially founded in personality conflicts in the workplace.

Even if the Respondent was dissatisfied with Green's performance, the Respondent failed to establish that it would have reduced Green's work responsibilities and discharged her apart from her refusal to meet without the Union. When Green first requested a meeting including her union representative, Hester told her that she would be better off without the Union since things could then be resolved off the record. After DeFilippi contacted Hester to state that he would definitely attend the meeting, Hester told him, It does not have anything to do with her terms and conditions of employment *anymore*." Hester then called Green and told her that she had made a big mistake and she would pay the consequences. At the meeting the following day, Hester told Green that she was terminated and her only option was to accept a position to be created, but that the position was a nonunion one with the UFT. This is a compelling sequence of events upon which to reasonably conclude that Green would not have been discharged but for her refusal and failure to meet without the Union.

The Respondent asserts in its brief:

It is also clear that [Green] did not engage in union activity or ask for union representation until January 24, 1994. By that time the dye was cast and it was evident to everyone including Green that she was going to be discharged from her communications coordinator position at the Welfare Fund.

The record establishes that Green could not perform the job of communications coordinator. She could not write, she could not edit, she could not timely perform the writing, editing and administrative responsibilities of her job. Although she worked hard and tried to perform her tasks, she simply was not up to the position.

I do not agree.

The Respondent has failed to establish by a preponderance of the evidence that it considered or took any steps to effectuate Green's termination for poor performance prior to January 31, 1994. According to Cook, by October 1993, she had concluded that things were not working out with Green. Yet nothing was done to effectuate Green's discharge until after Green's union activities commenced. Moreover, despite Green's alleged shortcomings and her repeated requests for an evaluation of her work, the Respondent did nothing to document Green's alleged performance problems, although by memorandum dated December 3, 1993, Cook advised Green that her "continuation with this program is dependent on successful execution of these responsibilities." However, Cook herself testified and Green understood that the intent

<sup>8</sup> From the failure of a party to produce material witnesses obviously within its control without satisfactory explanation, the trier of the facts may draw an inference that such testimony would be unfavorable to that party. See *7-Eleven Food Store*, 257 NLRB 108 (1981), and cases cited there.

of this memo was to convey to Green that if she performed these responsibilities successfully, then she would continue to work for the Welfare Fund. Certainly, not an indication that Green was to be terminated. Moreover, the fact that Green was given new assignments thereafter, and that even after the decision to terminate her was conveyed to Green on January 31, 1994, Green was instructed to complete the assignments already undertaken, mitigates against the Respondent's assertions here.

While I admit that I found this to be a close question, I find that the strong prima facie case established by the General Counsel was not rebutted by the Respondent. In this connection the Respondent's burden is substantial. *Eddyleon Chocolate Co.*, 301 NLRB 887 (1991). In view of all the circumstances present in this case, the Respondent has not met its burden under *Wright Line* and therefore when the Respondent decreased Green's work responsibilities and discharged Green because she requested the presence of a union representative at a meeting with the Respondent it violated Section 8(a)(1) and (3) of the Act. *T&J Trucking Co.*, supra; *Prime Time Shuttle International*, 314 NLRB 838 (1994).

#### 4. The prior settlement agreement

The General Counsel states in brief that, "The alleged settlement agreement does not bar General Counsel from proceeding." While the Respondent did not discuss this in its brief, at the hearing in its opening statement the Respondent's attorney makes reference to the settlement agreement and "the Charging Party's attempt to utilize the Board, by refusing to abide by the settlement that was previously agreed to, and that in all respects has been complied with by Respondent."

The doctrine barring a Regional Director from proceeding on settled claims does not apply to non-Board settlement agreements. *Acto Bus, Inc.*, 293 NLRB 855, 856 (1989). The settlement agreement in this case was a private agreement between the parties, and was not signed or approved by the Regional Director for Region 2. Additionally, the Charging Party never requested to withdraw its unfair labor practice charges. Moreover, it would appear from the record evidence that Green has not been reinstated to a position substantially similar to the position she had before the Respondent unlawfully terminated her. Green's current position seems to lack any real responsibility, policymaking, or otherwise. The settlement agreement also does not provide for the posting of a notice, which is necessary to counteract the Respondent's message to employees which discourages them from engaging in their Section 7 rights.

#### IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent, set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing the free flow of commerce.

#### V. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered

to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully terminated Valquira Green, the Respondent shall be ordered to offer her full and immediate reinstatement to her former position, as communications coordinator discharging if necessary any replacement hired since her termination, and that she be made whole for any loss of earnings or other benefits by reason of the discrimination against her in accordance with the Board's decision in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).<sup>9</sup>

Because of the nature of the unfair labor practices found here, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

#### CONCLUSIONS OF LAW

1. The Respondent, United Federation of Teachers Welfare Fund, is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Industry Workers, Local 424, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by threatening its employees with reprisals and with discharge if they utilize the Union to represent them regarding discrimination allegedly practiced against them at the Respondent's facility.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act by decreasing the work responsibilities and terminating employee Valquira Green because she utilized the Union to represent her in meetings with the Respondent, and in order to discourage employees from engaging in such activities or other concerted activities.

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

[Recommended Order omitted from publication.]

<sup>9</sup>There is testimony in the record that Green suffered no loss of earnings or benefits due to her termination and subsequent transfer to another position. The General Counsel in her brief states, "To the extent Respondent has already provided Green a retroactive pay increase, General Counsel does not seek any backpay. However, if Respondent were to take legal steps to recover such payment from Green, General Counsel would modify its request accordingly. It would appear that this would best be determined at the supplemental hearing stage of these proceedings."