

United Federation of Teachers Welfare Fund and Daniel Barton and United Industry Workers Local 424 and Regina Tovbin. Cases 2-CA-28334, 2-CA-28414, 2-CA-28511, 2-CA-28597, 2-CA-31414, 2-CA-28388, 2-CA-28389, 2-CA-28444, 2-CA-28726, 2-CA-29125, 2-CA-29239, 2-CA-29240, 2-CA-29745, 2-CA-29762, 2-CA-29985, 2-CA-30493, 2-CA-31379, 2-CA-29094, and 2-CA-29361

November 26, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 10, 1999, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting 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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

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

Judith M. Anderson, Esq. and *Gregory P. Davis, Esq.*, for the General Counsel.

Joel Spivak, Esq. and *Arthur J. DiBerardino, Esq. (Mirkin & Gordon, P.C.)*, of Great Neck, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York, on 11 days between May 4 and June 23, 1998. The complaint alleges that Respondent United Federation of Teachers Welfare Fund violated Section 8(a)(1), (3), and (5) of the Act in numerous ways. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on October 20, 1998, and the reply brief filed by the Respondent on November 6, 1998, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office in New York, New York, is engaged in the business of administering benefits to

New York City teachers. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that United Industry Workers Local 424 is a labor organization within the meaning of Section 2 (5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The United Federation of Teachers Welfare Fund provides supplementary benefits to New York City teachers. The Fund supplements the teachers' medical plan, it provides disability and death benefits and it runs programs for retired teachers. Jeff Kahn was the director of the Fund until September 1995. Arthur Pepper is now the director of the Fund.² The Fund has several departments: a Disability and Death Benefit unit, a claims unit, an accounting department, a member services unit, a retiree division and an information services unit. A total of less than 100 people work at the Fund. Of those, approximately 35 employees have been represented by Local 424 since 1993, and about 35 others have been represented by Local 153, OPEIU since sometime in the 1960s.

Local 424 was certified as the representative of the following unit:

All full-time and regular part-time employees of the Employer, excluding all employees covered by the current collective-bargaining agreement between the Employer and Office and Professional Employees International Union, Local 153, AFL-CIO; all professional employees, supervisors and guards as defined in the Act.

The Welfare Fund and Local 424 negotiated a contract with a term from May 15, 1994, through November 30, 1996. Local 424's area director with responsibility for employees of the Fund is Frank DeFilippi. Members of the bargaining unit who were shop stewards and served with DeFilippi on the negotiating committee were Daniel Barton, John Amato, Richard Schluger, Eric Stone, and Regina Tovbin.

The Fund is a separate entity from the United Federation of Teachers. The UFT is the Union which represents New York City teachers.

The record shows that there is a history of acrimony in the relations between Local 424 and the Respondent Fund. In October 1994 Local 424 leafleted a UFT delegate meeting and distributed a document accusing the Respondent Fund of many unfair labor practices and "union busting." The document attacked the then president of the UFT and the UFT leadership. The president of the UFT is a trustee of the Respondent Fund. Other trustees of the Fund are employees of the UFT. Pepper, who did not attend the delegates' meeting, heard that there had been leafleting from a trustee of the Fund. The trustee was disturbed and told him that there was something going on at the Fund and that the employees seemed very upset. Pepper testified that when he came to the Fund in October 1994 as assistant director, one of the purposes for which he was brought in by the trustees was to get an accurate picture of what was going on and to settle the labor relations problems.³ Pepper meets with the trustees of the Fund four times a year. He does not report to

² Pepper joined the Fund as assistant director in November 1994 and he was named director in September 1995.

³ Pepper had been an advocate for the UFT and was familiar with labor relations.

¹ I granted the General Counsel until January 20, 1999, to file a reply brief.

them on a daily basis. Shortly after he came to the Fund in 1994 Pepper met with Local 424 Agent Frank DeFilippi and settled seven charges pending at the NLRB. Pepper settled an insubordination matter involving Barton that was then pending. In September 1995 right after Pepper became director of the Fund, there was a news broadcast featuring interviews with Barton, Tovbin, DeFilippi, Amato, and Pepper. Pepper could not recall much about the content of the broadcast by the time he testified in 1998, but he recalled that he was not happy about it. However, none of the trustees criticized his job performance and Pepper was not embarrassed.

B. Credibility of the Witnesses

Daniel Barton had excellent recall of the facts necessary to prove the General Counsel's case but he was uncooperative and resistant on cross-examination by counsel for the Respondent. Barton even tried to avoid giving the names of his direct supervisors when asked to do so by counsel for the Respondent. Barton constantly had to be pinned down to give the most obvious kind of information. Barton insisted on giving a version of the facts that was favorable to the General Counsel even when confronted with documentary evidence that showed his testimony to be inaccurate. I formed the impression that Barton would testify to anything that fit his view of the issues in the instant case without regard to the actual facts. I shall not rely on Barton's testimony where it is contradicted by more credible evidence.

Frank DeFilippi denied most facts that might be helpful to the Respondent and he often had to be prodded with documents that revealed the true state of his knowledge. DeFilippi was unwilling to recall the answers to questions posed by counsel for the Respondent and he constantly changed his answers in an effort to avoid being pinned down to a single answer. When testifying about certain events, DeFilippi admitted that what had occurred was different from what he had set down in writing concerning the events. I conclude that DeFilippi will write or say anything, no matter how outrageous the departure is from the facts as he knows them, and then he will change his testimony when confronted with the truth. I will not rely on DeFilippi's testimony where it is contradicted by more credible evidence.

Regina Tovbin was not a credible witness. She denied certain facts even when she was confronted with their existence in documents she herself had written. Tovbin resisted recalling facts that might be helpful to Respondent. After observing her closely during her very lengthy testimony, I came to the conclusion that she viewed her testimony as an acting exercise rather than as a serious occasion requiring accurate statements under oath. I shall not rely on Tovbin's testimony where it is contradicted by more reliable evidence. I note that Tovbin's testimony was replete with hearsay because she insisted on giving long, rambling and unresponsive answers.

Reuben Torres provided a resume to the Fund inaccurately claiming that he was the holder of a Bachelor of Science degree granted in 1990 by Jersey State College. When questioned about this, Torres said that he did not know how his resume came to be written in that manner. He characterized his false claim to a college degree as a "typo." Torres stated that he had not read his resume before he provided it to the Fund. I conclude that Torres does not understand the need to testify accurately. I shall not credit Torres' testimony where it is contradicted by more reliable evidence.

Pamela Wood was the most impressive witness to testify. She was responsive to the questions and cooperative with all counsel who questioned her. Her demeanor reflected her resolve to testify fully and accurately without any attempt to evade cross-examination. I shall credit Wood's testimony.

The other witnesses impressed me as cooperative and truthful. They recalled events to a greater or lesser degree, but it is expected that witnesses will recall some details imperfectly. I am convinced that these witnesses testified to the best of their recollections at the time of the hearing.

C. The Building Policy Issue

John Amato was employed as a computer programmer analyst in the information systems unit from 1989 to 1995. Amato was active in support of Local 424; he was a shop steward and he participated in the negotiations for a collective-bargaining agreement after the Union was certified. His direct supervisor was Pamela Wood, the manager of applications development at the Fund. Amato testified that in November 1994 Greta Warshaviak, director of the information systems unit, conducted a meeting during which someone said that there was a building policy that employees had to leave the building as quickly as they could after their shifts ended. Amato asked Warshaviak if there was a memorandum setting forth this building policy.⁴ She replied that a memo had been issued a long time ago and that she would try to find it. Amato never received a copy of this document. He did not recall being told that a memorandum did not in fact exist, nor could he recall whether there had been a meeting of the entire department to discuss the building policy. Local 424 Area Director DeFilippi testified that he had instructed Amato to make a request for information after Amato informed him that some employees were being told to leave the building at quitting time. DeFilippi testified that he attended a June 1995 conference with Fund Director Arthur Pepper and Amato where Pepper informed him that there was no building policy in writing. On direct examination by counsel for the General Counsel, DeFilippi testified that at this meeting he asked if the policy applied to all employees or just to his members and that Pepper gave him an evasive answer. On cross-examination by counsel for Respondent, DeFilippi recalled that he had a series of conversations with Pepper about the building policy after Amato filed his written request. After much prodding, DeFilippi acknowledged that Pepper had informed him shortly after November 1994 that there was no written policy and that employees had to leave at the end of the workday. DeFilippi did not ask Pepper to withdraw the policy and he did not demand negotiations about the policy.

Pepper testified that soon after he came to work at the Fund, Warshaviak informed him of a series of thefts of personal property and computer equipment. Warshaviak said that employees stayed around the workplace after hours. Pepper learned that other departments did not permit employees to stay after hours, and he told Warshaviak that employees should not be in the workplace without supervision. No employees should be permitted to remain after the office was locked at the end of the day. Pepper conducted a meeting with department employees in December 1994 where he told them to leave after their quitting time unless a supervisor was there and gave them permission to stay. This policy applied to all employees, not just to

⁴ Amato also sent a written request to Warshaviak dated November 18, 1994.

members of Local 424. Pepper stated that after he received a request for a copy of the policy he told Amato and then DeFilippi that no written policy existed. Pepper told both of them that all employees were supposed to leave at the end of the day unless a supervisor stayed with them.

The General Counsel alleges that Respondent unlawfully failed to furnish a written policy and unlawfully delayed responding to the Union's request for a copy of the policy. I credit Pepper that there was no written policy and that he promptly informed both Amato and DeFilippi of that fact. As shown above, DeFilippi admitted that shortly after the November 1994 request for information, Pepper told him that no written policy existed but that all employees had to leave the workplace at the end of the workday. I find that there was no delay and that the appropriate information was furnished to the Union. The General Counsel alleges that Respondent unilaterally announced and implemented a new building access policy without bargaining with the Union and discriminatorily applied the policy to union members. The evidence shows that other departments in which Local 424 members worked had required their employees to leave after their shifts ended, but that this rule had lately not been enforced in the information systems unit. Pepper instructed Warshaviak to enforce the rule after a series of thefts occurred. The evidence is clear that the policy applied to all Fund employees, not just to union members. I find that Respondent did not unilaterally institute a new rule and did not discriminatorily apply it to Local 424 members.

D. Reuben Torres

Reuben Torres worked in the information systems unit providing personal computer (PC) user support from November 1993 to April 1996. Torres was a shop steward from January to April 1996. On February 17, 1996, Torres filed a grievance alleging that he had been discriminatorily denied a promotion to end user/PC specialist. He requested promotion and retroactive backpay. Torres recalled that there was a first-step grievance meeting with Pepper and Shop Steward Barton at which Pepper promised to review the grievance and get back to Barton. On March 3, 1995, Shop Steward Amato filed a request for information in connection with Torres' grievance. Amato requested any documents which would show that Torres was not performing adequately, copies of any resumes received from job applicants for the position and the Fund's EEO-1 report. On March 28, Amato wrote to Pepper repeating his request for the information so that a step-2 grievance could be held. Amato testified that he got no response to his requests. Amato could not recall attending a meeting with Pepper about the Torres' grievance.

Pepper testified that after he received the March 3 information request, he informed DeFilippi that he had copies of the resumes but that the other documents requested by Amato did not exist. At about this time, Amato was away on jury duty. Following Amato's return to work in May, Pepper met with Torres, DeFilippi, and Amato. Pepper showed them the resumes that the Fund had received. He informed those present that Torres had lied about his education on his resume and that that Torres did not have the skills for the job. In spite of this, Pepper offered to give Torres the title he wanted without a salary increase, and he said that the Fund would pay for training to improve Torres' skills. All present shook hands on that settlement. On July 13, DeFilippi wrote to Pepper asking for a written settlement agreement. Pepper replied with a letter stating

that the agreement had been faxed to DeFilippi on June 21. Pepper again sent DeFilippi a copy of the agreement and stated, "Please read the attached settlement, propose any changes and return it to me for signature." DeFilippi returned a signed copy of a rewritten settlement which contained a number of changes. Among the changes was a provision that "in the event the employer grants a pay increase to others in the title PC End Use Support Specialist, Mr. Torres will receive an equal amount."

Torres testified that he discussed the settlement with Barton. The documentary evidence shows that he and Barton drafted a third proposed settlement agreement which provided that Torres would receive a raise along with the higher title. Torres stated that after he discussed the settlement with DeFilippi and Barton, he received a telephone call from Pepper. According to Torres, Pepper asked how he felt about the grievance and then said that he could not accept the settlement that Local 424 had provided and that the Union had lied and stolen.

Pepper testified that Torres had called him at the office and requested that Pepper telephone him at home. In response to Torres' request, Pepper called him on August 8, 1995, and spoke to him for 22 minutes. Torres told Pepper that he was not happy with the settlement because he wanted more money. Pepper replied that the settlement was what he had offered at the table and what they had all shaken hands on. Pepper said, "I don't believe you guys, you lie, we shook hands, everyone agreed, you looked me in the face and said you would accept the settlement." Pepper said he would abide by the settlement and that Torres would not get more money. Torres spoke about his relationship with his supervisor, Sonny Kapoor, and Pepper advised him to talk to Kapoor and learn from him. Pepper denied offering Torres more than the original settlement, he denied telling Torres that it was futile or bad to work with Local 424 and he denied threatening Torres.

Torres' failure to receive a promotion was never brought to arbitration and the Union filed no further requests for information. Eventually, Torres took a job with another organization.

The General Counsel asserts that Respondent refused to provide the union information relevant to the Torres grievance. I credit Pepper that he informed DeFilippi that the only information in the possession of the Fund consisted of resumes submitted for the disputed position. I credit Pepper that as soon as Amato returned from jury duty and a meeting was held, he gave the requested information to Local 424. The General Counsel alleges that Pepper told Torres that it would be futile to resolve pending grievances through the Union and that Pepper bypassed the Union and bargained directly with Torres. I credit Pepper that he telephoned Torres at home at Torres' request. I credit Pepper that Torres said that he was not happy with the settlement because he wanted more money. I credit Pepper that he told Torres that he would abide by the settlement they had shaken hands on and that Pepper expressed his exasperation that Local 424 was apparently not abiding by the agreement and had lied about its intention. Pepper's comments were not a threat that it was futile for Torres to rely on the Union. Indeed, Pepper told Torres that he fully intended to stick to the bargain that Local 424 had made on Torres' behalf.

E. Valquiria Green

The complaint alleges that the Fund bypassed the Union and dealt directly with Green and entered into a settlement agreement with Green providing that she cannot discuss the terms of the agreement with the Union.

In *United Federation of Teachers Welfare Fund*, 322 NLRB 385 (1996), the administrative law judge found that the Welfare Fund had violated Section 8(a)(1) of the Act by threatening Valquiria Green with reprisals and discharge if she utilized the Union to represent her and that the Fund had violated Section 8(a)(3) of the Act by decreasing Green's responsibilities and terminating her because she used the Union to represent her in a meeting with the Fund. Green had been a communications coordinator for the Fund since 1993, planning retiree events and writing documents to be sent to retirees. Green claimed that she was being harassed and discriminated against because she was a "foreigner." It is clear from the judge's decision that Green was subject to repeated criticisms regarding her work. Green's efforts to work things out with various supervisors and managers did not produce a solution.⁵ In January 1994, Green filed a charge with the New York City Human Rights Commission and she requested a meeting with the UFT general manager and her union representative, DeFilippi.⁶ The judge found that the general manager of the UFT threatened Green in connection with the requested meeting. Many of Green's duties were given to other employees to perform. In April 1994, Green was terminated by the Welfare Fund and she was given a position at the UFT. Local 424 filed various charges in connection with actions taken against Green beginning in February 1994. In May 1995, Green was rehired by the Welfare Fund in an attempt to settle the case. According to the judge's May 1996 decision, the Charging Party Union and the Welfare Fund had entered into a non-Board settlement agreement pursuant to which Green was rehired by the Fund. The Regional Director had not approved the settlement agreement and the Union had not withdrawn the charges. Therefore, the judge found that the Regional Director was not barred from proceeding with the unfair labor practice proceeding. The record before the judge showed that Green had not suffered any loss of earnings or benefits. The Board affirmed the judge's findings. On June 27, 1997, the Regional Office found that there had been compliance with the Board Order in the cases relating to Green and the cases were closed.

In the instant case, Green testified that after she was rehired by the Welfare Fund she went on maternity leave in November 1996. Green did not return to work at the Fund. On May 28, 1997, Green and the Welfare Fund entered into an agreement settling Green's complaints with the Equal Employment Opportunities Commission, the New York City Human Rights Commission and the NLRB. Green received an undisclosed sum of money from the Fund and she signed a general release. Green agreed that her job with the Fund was terminated as of May 15, 1997. Green and the Fund agreed not to disclose the terms of the settlement agreement to any nonparty, with certain exceptions not material herein. Green was represented by a law firm in the settlement agreement process.

Green testified that Shop Steward Barton and some people from Region 2 of the NLRB had asked her about the settlement agreement and that she had replied that she could not discuss it. Green said, "I was afraid to discuss it." Green was not asked who or what she was afraid of. I do not find that the record

contains any reliable testimony from which I can make any assumptions about Green's fear. There is no basis for the assertion in General Counsel's brief that Green was afraid of reprisals from the Fund if she discussed her settlement. DeFilippi testified that he telephoned Green and left a message asking for information about the settlement, but Green did not return his call. DeFilippi wrote to Pepper requesting information about the settlement. In response, he was informed that his request had been forwarded to Green's attorney. On July 31, 1997, Green's attorney wrote to Joel Spivak, Esquire, attorney for the Fund, describing an authorization obtained from Green. According to her attorney, Green

authorized me to permit you to waive the confidentiality provisions as contained in . . . the Settlement Agreement . . . for the limited purpose of making a copy of same available to the NLRB, provided however that any such copy made available to the NLRB be redacted as to the amount of payment she in fact received in settlement of the matter.

It is not her intention nor am I authorized to permit the release of a copy of the Agreement to her union.

I note that Joint Exhibit 2 in this proceeding is a copy of the settlement agreement and that the actual amount of the payment has been redacted from the exhibit.

As noted above, in May 1995 the Union herein entered into the informal settlement pursuant to which Green was rehired by the Fund. That settlement dealt with the unfair labor practice charges which the Union had filed on Green's behalf. Although the case went to trial because the Union did not withdraw the charges, the only practical remedies afforded by the judge's decision and the subsequent Board Order were the cease and desist language and the posting of a notice. Thus, any money Green received from the May 1997 settlement agreement with the Fund was on account of Green's outstanding claims with the EEOC and the City Human Rights Commission.

DeFilippi testified that he wanted to see a copy of the May 1997 settlement because he wanted to police the severance pay and out-placement provisions of the collective-bargaining agreement between the Union and the Fund. In fact, the Local 424 collective-bargaining agreement contains no such provisions. No showing has been made that the settlement agreement of May 1997 is presumptively relevant to the Union's duties as the representative of the unit.

The record does not show that Respondent requested the nondisclosure language in the settlement agreement and it is entirely possible that Green's attorney inserted the provision. Further, the record does not show that Respondent urged Green to refuse to furnish a copy of the agreement to the Union. All that appears on the record is that Green's attorney told the Fund's attorney that Green did not authorize release of the document to the Union. Thus, there is no evidence that Respondent coerced Green into abandoning union representation. Moreover, when Green was negotiating the settlement agreement with the Fund, her focus was on settlement of the EEOC and City Human Rights cases in which there is no evidence that the Union was representing her. The NLRB case was about to be closed. Green's part in the negotiations was conducted by her private lawyer. The General Counsel seems to take the position that it was incumbent on the Fund to bring the Union into these negotiations. It is hard to understand what practical use this would have been to Green: since she did not request the

⁵ These managers and supervisors are not individuals involved in the instant case.

⁶ The judge found that Mel Hester, general manager of the UFT, had apparent authority to act on behalf of the Welfare Fund in its dealings with Green.

Union's participation I must assume that she did not think the Union's presence would enhance her chances of a favorable outcome. The focus of the negotiations was on the non-NLRB matters and I can see no reason why the Fund would need the Union's approval to settle these cases. It is important to emphasize that the Union had already participated in the non-Board settlement of the NLRB case it had brought on behalf of Green. Indeed, the compliance phase of that case was closed by the Regional Office on June 27, 1997.

F. Voluntary Early Retirement Incentive Program

The General Counsel urges that the Fund took unilateral action in violation of Section 8(a)(1) and (5) of the Act by instituting an early retirement plan without giving notice to or bargaining with Local 424. The Respondent urges that Local 424 waived its right to negotiate over the terms of the plan.

The collective-bargaining agreement between Local 424 and the Fund provides that:

Employees in the bargaining unit who meet the eligibility requirements are covered by the UFT and UFT Welfare Fund Employees Pension Plan.

During the negotiations for the contract, Local 424 had been presented with a summary description of "The United Federation of Teachers and the United Federation of Teachers Welfare Fund Employees Pension Plan." This Pension Plan covers employees of the UFT and employees of the Respondent Welfare Fund. Some of these employees are not represented and the rest are represented by various unions including Local 424. The summary description of the plan stated that the Pension Plan is administered by a pension committee appointed by the administrative committee of the UFT, by the board of trustees of the Welfare Fund and by the Teachers Representative Union. There is a separate Pension Fund established to pay the benefits specified in the plan. The pension committee also administers the Pension Fund.

DeFilippi testified that during the negotiations for the collective-bargaining agreement he requested and received a summary plan description and the actual trust document of the Pension Plan. DeFilippi testified that he was informed that there was a pension committee that made decisions with respect to the Pension Plan. DeFilippi stated that he was aware that the Pension was an independent organization and that it was controlled by trustees. DeFilippi testified that he knew that Respondent Welfare Fund and its director did not control the Pension Plan.

The summary plan description given to the Union during the negotiations provided:

The Pension Committee reserves the right to amend or modify the Plan (in whole or in part) at any time and from time to time.

There is no dispute that during the negotiations, Local 424 informed Respondent in writing that, "The union accepts the Funds current pension plan on behalf of unit employees." (Sic.)

Pepper testified that in August 1996, Jeff Goldstein, the administrator of the Pension Plan, told him that the trustees of the Pension Fund were considering an early retirement incentive and asked whether Pepper had any objection. Pepper did not object. Thereafter, Goldstein gave Pepper a list of people eligible to participate in the early retirement scheme. Pepper telephoned DeFilippi to inform him that the Pension Plan was of-

fering the incentive and Pepper told DeFilippi which unit members would be eligible. DeFilippi did not demand bargaining over this benefit nor did he demand that it be withdrawn.

On September 25, 1996, the pension committee of the UFT and the UFT Welfare Fund Employees' Pension Plan sent a letter to employees of both the UFT and the Fund concerning a voluntary early retirement incentive program. The program was to be available to participants in the Pension Plan who met certain age and service criteria. The program offered extra retirement benefits to those employees who chose to retire early on a voluntary basis.

DeFilippi stated that neither the pension committee nor the Respondent Welfare Fund notified Local 424 in advance of sending this letter to employees. However, DeFilippi said that before September 25 he had heard "rumors" that an early retirement incentive would be offered. After DeFilippi received a copy of the committee's letter, he did not object to the offer of early retirement benefits and he did not request bargaining about the offer. In January 1997, Local 424 filed a charge alleging a refusal to bargain.

As stated above, I do not find that DeFilippi is a reliable witness. I credit Pepper that he telephoned DeFilippi and informed him which of the Local 424 unit members would be eligible to take advantage of the early retirement benefit. Indeed, this phone call is probably the "rumor" that DeFilippi testified he had heard before receiving the letter on September 25.

Respondent asserts that the early retirement incentive offer was not formulated by Respondent. The incentive was planned by the pension committee of the Pension Fund and it was offered by them directly to employees. Respondent points out that during the collective-bargaining negotiations, the Union accepted the Pension Plan on behalf of the unit employees with full knowledge that the pension committee reserved the right to change the plan. According to Respondent, this amounted to a waiver of the Union's right to negotiate over changes in the plan. Finally, Respondent argues that the change effected by the Pension Plan affected only a few people and was not a material change.

The early retirement incentive program offered by the pension committee of the Pension Plan was clearly a modification in the terms of the plan. Local 424 had accepted the Pension Plan during negotiations with full notice that the pension committee reserved the right to amend or modify the plan. During the collective-bargaining negotiations Local 424 had the opportunity to bargain for a different pension plan for its members, but it chose to accept the plan that currently covered unit employees. Since that plan included a pension committee which had the power to amend the Pension Plan, it could be argued that Local 424 thereby consented to any modifications the pension committee might make in the future. See *Mary Thompson Hospital*, 296 NLRB 1245, 1349 (1989). Moreover, DeFilippi testified that he had actual knowledge that Respondent Welfare Fund did not control the pension committee and that the management of Respondent could not vote on decisions relating to the Pension Plan. DeFilippi testified with specificity that he is familiar with the provisions of pension plans and that he knows that such plans are administered by independent bodies. However, in *Trojan Yacht*, 319 NLRB 741 (1995), the Board held that there was no valid waiver of the right to bargain over modification of a pension plan because the language of the consent to future modifications was not incorporated by reference into the collective-bargaining agreement. I need not de-

cide the issue on this basis. As discussed above, I have found that before September 25, 1996, Pepper notified DeFilippi that certain unit members would be eligible to take advantage of the retirement incentive. The Union thus had the opportunity to bargain about the incentive before it was announced to the employees. Between the day that Pepper telephoned DeFilippi and January 1997, DeFilippi did not request that the benefit be withdrawn nor that there should be bargaining about it. As the Board held in *Associated Milk Producers*, 300 NLRB 561, 563 (1990), "The Union's filing an unfair labor practice charge did not relieve it of its obligation to request that the Respondent bargain over the proposed change." I find that Local 424 waived any right to bargain about the early retirement incentive by failing to request negotiations for over four months after it learned of the incentive.

G. Vacation Policy

The General Counsel alleges that on January 20, 1998, the Fund unilaterally changed its vacation policy without affording Local 424 an opportunity to bargain, that the Fund failed to furnish information requested by the Union from April 1 through May 28, 1998, and since May 28 delayed in furnishing the requested information.

Pepper testified that he attended a grievance meeting in early January 1998 at which Shop Steward Barton was representing the grievant. After the meeting, Pepper told Barton that Respondent would change its policies on vacation scheduling. Pepper told Barton that the week before Christmas, Barton was the only employee working in members services and that it was unfair to expect one person to cover the whole unit. On January 20, 1998, Pepper sent a letter to DeFilippi stating:

Pursuant to the last paragraph of Article 22 of the Contract, we have determined that to maintain an efficient and balanced staff, we can no longer permit four employees to take vacation at the same time in the Member Services/Disability Unit. In the past, up to three employees have requested and have been granted a full week off and additional employees have requested and been granted individual days off, all during the same week. Such scheduling has resulted in four of the nine employees in the department being on leave at the same time. This is particularly critical when there are also employees who call in sick during the same period, thus leaving the staff in a position where it cannot perform its job. We have determined that the foregoing scheduling is inefficient for the Welfare Fund and burdensome on the remaining staff.

Effective this year, employees will be permitted to schedule their vacation with one employee allowed to be off a full week and one or more employees permitted to take individual and separate days in the same calendar week. Thus, no more than two employees (rather than four) may take simultaneous vacations. In addition, employees may take a maximum of two consecutive weeks vacation at any time. This scheduling will provide an efficient and balanced staff and is in accord with the operational requirements of the Welfare Fund.

If you have any questions, please do not hesitate to contact me.

On January 22, DeFilippi replied with a letter accusing Pepper of changing the policy in order to retaliate for a grievance filed by a unit member and asserting that the previous practice

was not burdensome as claimed in Pepper's letter. DeFilippi closed by stating:

If you execute the plan outlined in your letter, further charges will be filed against the fund with the National Labor Relations Board.

On February 3, Pepper wrote to DeFilippi as follows:

Notwithstanding the contract language, I contacted both you by letter and Dan in person to discuss this matter. As usual, instead of responding with comments or proposals to resolve the issue, you made an apparent attempt of intimidation by threatening additional NLRB charges. . . .

However . . . if you have something constructive to add to the issue, contact me in the next few days. Otherwise, I will assume that you prefer to file charges rather than resolve the issue to the benefit of the employees and the Welfare Fund. In the meantime, we must move forward in scheduling vacations to maintain an efficient and balanced staff at all times.

DeFilippi continued the correspondence on February 5 by writing:

Your January 20, 1998 letter to us does not ask for any type of discussion, it appears to mandate a change and you seek to answer any questions we may have.

Far from being intransigent we have been requesting to bargain with the fund for more than a year now and the fund has refused to do so. We would like nothing more than to discuss and bargain terms and conditions of employment with the fund of which your vacation scheduling would be part of. [Sic.]

Article 22 of the collective-bargaining agreement provides, inter alia:

Requests for vacation time shall be submitted in writing to the Employer on such advance dates as are established by the Employer.

Within each department, seniority will apply to vacation selection, subject to the operational requirements of the Employer to maintain an efficient and balanced staff. The Employer's discretion in determining its requirements shall prevail unless it is determined to be arbitrary or capricious.

Barton testified that in the latter part of March 1998 employees Romaine Benny and Shirley Jordan complained to him that the new vacation scheduling policy had prevented them from scheduling their vacations as they had been used to do.

The General Counsel asserts that Pepper's letter of January 20 announced a *fait accompli* and contained no offer to meet or negotiate about the change. Pepper's further letter of February 3 was no better, according to the General Counsel, because it stated that the Fund would "move forward" in scheduling vacations according to its new policy.

The Respondent argues that it offered to discuss the vacation scheduling matter with the Union but that DeFilippi did not accept the offer. Respondent urges that DeFilippi's letter demanded negotiations for a new collective-bargaining agreement and did not address the vacation issue.

I credit Pepper that in early January 1998 he gave Shop Steward Barton oral notice that the Fund intended to change vacation scheduling practices to deal with a perceived problem

created by overlapping employee vacations. I find that Pepper's letter of January 20 gave Local 424 notice of proposed changes and invited DeFilippi to call to discuss the changes. Although the letter did not in so many words offer to bargain, all that is required is that the employer give the Union notice of proposed changes and an opportunity to bargain. This the letter certainly did. Then, on February 3 Pepper specifically invited DeFilippi to attempt to resolve the issue through discussions. Although Pepper's letter was not couched in the friendliest terms, it clearly invited "comments and proposals" from the Union. I do not agree with the General Counsel's suggestion that Pepper's use of the phrase "move forward" precluded any bargaining with the Union. I find that the import of the letter as a whole was to inform Local 424 that although there was still time to discuss the issue, the Fund would take steps to implement a new vacation scheduling plan unless it received some word from the Union. It must be recalled that up to the date Pepper wrote his letter the Union had not requested a meeting and discussions; the Union had only threatened to file another unfair labor practice. Indeed, even after Pepper's February 3 letter DeFilippi did not request to meet and bargain. He replied to Pepper on February 5 with a complaint that the Fund was not negotiating a new contract and he referred to the vacation issue only in the context of his complaint about a new collective-bargaining agreement.

The Board has held that a union agent's subjective impression that an employer has presented the union with a fait accompli does not relieve a union of its obligation to request bargaining. Only objective evidence, such as implementing a change before giving notice to a union or informing a union that a request for bargaining would be futile, excuses a union from testing an employer's good faith with a demand to bargain. *Haddon Craftsmen*, 300 NLRB 789, 790-791 (1990). It is not unlawful for an employer to present a change in conditions as a decision already made where the decision is still executory and no steps have been taken to implement it. *Southern California Stationers*, 162 NLRB 1517, 1543 (1967). In *Haddon*, supra, the Board said:

[I]t is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it. . . . [W]hen a union receives notice that a change in terms and conditions of employment is contemplated, it must fulfill its obligation to request bargaining over the change or risk a finding that it has lost its right to bargain through inaction. . . . In this case, the Union waived its right by permitting days to pass before the notice was posted and weeks to pass before the change was effected without requesting bargaining. [Citations omitted.]

In the instant case, the Union had notice by January 20, both orally and in writing, that the Respondent was working on a plan to change vacations scheduling practices. But the Union did not request bargaining over this issue. DeFilippi contented himself with a sharp exchange of letters threatening an unfair labor practice and complaining over the failure to negotiate a complete successor contract, but he did not request bargaining at any time before March when employees began complaining of the change. I find that the Union waived its right to bargain over the change in vacation scheduling practices.

On April 1, Barton sent Pepper a letter requesting certain information relating to the vacation scheduling dispute; the letter

mentioned preparations for filing an unfair labor practice charge and a grievance. Pepper replied with a note stating that he would be out of the office until April 20 and that he would address the information request when he returned. On April 21, Pepper denied Barton's request for information on the ground that there was no pending grievance relating to vacation scheduling and that any new grievance on the issue would be untimely. Finally, on June 3, Pepper responded to the information request.

The information requested by Barton related to the occasions, cited by Pepper, when too many employees were out of the office and the workload on the remaining employees was claimed to be burdensome. Barton also requested information about the vacation policies applicable to nonunit employees of the Fund. The Respondent asserts that Pepper either furnished or provided access to all the available information. Nevertheless, the Respondent argues that it was under no legal obligation to provide the information because there was no pending grievance to which the information was relevant and no grievance could timely be filed by the time Barton made his request.

I have reviewed the documents provided to the Union and I credit Pepper's testimony that he complied with the Union's request for information to the extent possible. Where documents did not exist, Pepper explained that fact to the Union. Some of the documents were in the General Counsel's custody and some were too voluminous to duplicate. In those instances, Pepper offered to arrange for access so that the documents could be inspected. To date, the Union has not made any effort to view these documents.

There remains the issue of Pepper's initial refusal to provide the documents and the delay in providing them from April 21 to June 3. Most of the information requested by Barton related to the scheduling of vacations by unit members. The Union is presumptively entitled to this information. In addition, Barton requested information regarding vacation policies applied to non-Local 424 represented employees of the Fund. This information would have been helpful in evaluating the change in vacation policy being implemented for Local 424 members especially as it related to the Fund's claim that too many employees were on vacation at the same time. I find that the requested information was relevant and that it would have assisted the Union in representing the unit members; therefore, the Union was entitled to that information. *August A. Busch & Co.*, 309 NLRB 714, 720 (1992). By initially refusing to provide the information requested by Barton and by delaying the ultimate response to the request, Respondent violated Section 8(a)(5) of the Act.

H. Daniel Barton

1. Increase in workload

At the beginning of 1995, Local 424 Shop Steward Daniel Barton was a benefits specialist for the Respondent Fund in the disability section. Barton received claims for the Fund, performed an initial review, entered the data on the computer system, sent claims for medical review or additional information and assisted UFT members with problems relating to their claims. After Barton was transferred to the general membership section of the Fund in November 1995, he answered telephone inquiries about benefits, insurance, and claims and he dealt with member correspondence.

Pepper testified that on March 14, 1995, Barton told him that his supervisor, Diana Williams, had performed unit work. Apparently, Williams had spoken to a doctor who was a medical advisor to the Fund concerning a disability claim. Barton said that Williams should not have spoken to the doctor because it was his job to make decisions about disability claims and other benefits. Pepper replied that managers and supervisors had the right to speak directly to doctors about the claims. After Barton had continued the discussion for a while, insisting on his point of view, Pepper asked him if he didn't have enough work to do already. The discussion continued back and forth and, finally, Pepper said, "We'll have to take a look at the procedures." Barton then asked, "are you threatening me?" Pepper replied, "like I'm going to kick your ass Dan? Dan go back to work." Pepper testified that he laughed and that Barton went back to work. Pepper denied that he told Barton that he was filing an excessive amount of grievances or spending too much time on Union activities and he denied saying that someone should look into Barton's work.

Barton testified that he had discussed Williams' performance of unit work with Pepper and that the two disagreed about Williams' right to do certain tasks. According to Barton, Pepper said that Barton did not have very much work to do because Barton was able to spend so much time on grievances, and Pepper said that someone should look into Barton's work. Barton asked whether Pepper was threatening him and Pepper said, "[Y]ou mean like I'm going to kick your ass." Barton continued to press his point of view about Williams performing unit work. Barton testified that Pepper told him to go back to work and then followed him out of the door twice repeating, "I don't think you have enough work to do, I think we need somebody to look into what you're doing."

The General Counsel asserts that by Pepper's statements, Respondent threatened Barton with increased scrutiny of his work in order to discourage him from filing grievances.

Pepper's testimony and Barton's testimony about the March 14 incident are remarkably similar. Pepper candidly admitted a reference to kicking Barton's ass, an intemperate remark that does not redound to his credit. I have found that Pepper is a more credible witness than Barton. I find that Pepper told Barton that he would look into the medical review procedures in response to Barton's complaint that Williams was doing unit work. I do not find that Pepper said that he would scrutinize Barton's work because of his grievance activity.

Barton filed a grievance on April 7, 1995, alleging that as an administrative benefit specialist it was his function rather than the job of Supervisor Williams to participate in the medical review of disability claims. Ultimately, the grievance was sustained.

Barton testified that as a benefits specialist in the disability section his duties were as follows: he spent 25 percent of his time entering disability claims data into a personal computer, he spent 15 percent of his time answering correspondence with UFT members and doctors, he spent 15 to 20 percent of his time responding to telephone inquiries and the remaining 35-40 percent of his worktime was devoted to reviewing medical claims and conducting interviews with UFT members in the office. Barton testified that correspondence from members was received by the Fund's mailroom where a supervisor would place the initials of an employee on the document. After an administrative assistant had logged the piece of mail into a book it would be distributed to the employee who had been

assigned to deal with it. Barton testified that right after his March 14, 1995, talk with Pepper about Williams performing unit work, his volume of assigned correspondence increased. Barton testified that he could tell that his work was increasing because "I could feel it." He stated that he took the correspondence log book and did a tally from March 10 to 25 and found that he was "receiving more correspondence than several of my fellow workers." Barton said that until the end of June, "I felt like I was getting more." In contrast to this vague testimony about the correspondence assigned to him, Barton recalled readily that during the 2-week period he examined he was also handling 250 disability claims. Barton did not compare his workload for the 2 weeks he tallied with his workload in any other periods prior to or after March 10 to 25 nor did he check to see whether his fellow workers were also receiving more work than they had received prior to or following the 2-week period.

Pepper testified that he did not direct Barton's supervisors to assign more work to him during this period. Pepper himself has no role in assigning correspondence to the employees. The supervisors rotate the daily task of reading letters as they come in and they assign the work of responding to the letters according to the subject matter.

The General Counsel asserts that the Fund assigned additional work responsibilities to Barton because of his union activities.

I cannot find any unfair labor practice based on Barton's vague and unsupported feeling that he was assigned more correspondence. Throughout the very lengthy testimony in this case it was abundantly clear that Barton was exact and meticulous in preserving every scrap of evidence that might prove that the Respondent engaged in an unfair labor practice. In this instance, Barton did not give any figures at all about how many pieces of mail he was being given as opposed to the number of letters assigned to the other employees.⁷ I find that the General Counsel has not shown that the Respondent assigned additional work to Barton.

2. Grievance handling

Article 4, section 4 of the collective-bargaining agreement provides:

Employees shall not engage in Union activities on work time except in connection with the grievance and arbitration procedure, as specifically provided in this Agreement or as otherwise mutually agreed.

Article 6 provides, inter alia:

DISCIPLINARY INTERVIEWS The Employer recognizes the reasonably exercised right of an employee, upon request, to have a shop steward present at a disciplinary interview by management wherein a response by the employee is required and wherein it is reasonably anticipated that disciplinary action will result to that employee.

Article 7 of the contract provides for meetings among employees, stewards, and supervisors once a grievance has been filed.

Barton testified that on April 7, 1995, he wanted to go to the information services department to assist employee David Martin with a possible grievance. Martin's regular shop steward,

⁷ For aught that appears from Barton's testimony, he was getting only one more letter a day than anyone else.

John Amato, was on jury duty. Barton consulted with Supervisor Williams who told him that he could go to the other department but not for "too long."⁸ Barton went to information services and told Supervisor Greta Warshaviak that he was there to see Martin about an investigation. Warshaviak expressed the opinion that Martin had to use his lunch hour for the investigation. After asking Barton to wait for about 10 minutes, Warshaviak told Barton that he could speak to Martin for 20 minutes. Barton went to Martin's office and the two discussed Martin's problem for 20 minutes. Martin resumed work and Barton continued to sit next to Martin looking through some papers Martin had given him. Barton testified that since Warshaviak had said he could speak to Martin for 20 minutes, he was not prohibited from staying in Martin's office as long as he was not speaking to Martin. After a while, Warshaviak came in and told Barton that Pepper wanted him back right away. Barton testified that he telephoned Pepper and was told by the latter to return right away, to take his lunch between 1 and 2 p.m. and to present himself at Pepper's office at 2 p.m. with a union steward for a disciplinary matter. Barton stated that he did not get a steward but that he brought three employees with him as witnesses to Pepper's office at 2 p.m. Pepper told Barton that he was only allowed one witness. When Barton asserted that he could bring as many people with him as he wished, Pepper said he could not see Barton. No meeting took place that day.

Pepper testified that on April 7 Warshaviak informed him that Barton had gone to a grievance in the information services department. Pepper was surprised because he was not aware of any grievance and he called Warshaviak to ask whether there was a grievance he did not know about. Warshaviak said that there was no grievance but that Barton had come over to meet with Martin. Pepper instructed Warshaviak to tell Barton that he could have 20 minutes for his investigation. After 1 hour had gone by and it was close to Barton's lunchtime, Pepper called Warshaviak who informed him that Barton was still in her department. Pepper telephoned Barton and instructed him to take his lunch hour because other employees' lunch schedules would be thrown off if Barton were not at work at his regularly scheduled time. In addition, Pepper asked Barton to see him at 2 p.m. Pepper wanted to meet with Barton because he had abused the permission that had been granted to him to meet with Martin for 20 minutes. After speaking to Barton, Pepper telephoned DeFilippi. Pepper told DeFilippi that they had a problem in that Barton had walked off the job saying there was a grievance when no grievance had been filed. DeFilippi agreed that he would meet with Pepper and Barton to resolve the issue in the future. Thus, when Barton came to see Pepper at 2 p.m., Pepper told him that no meeting would be held at that time. At a later date, DeFilippi met with Pepper and they agreed that a shop steward could not walk off the job whenever he wanted without checking with his supervisor to make sure there was adequate coverage.

DeFilippi testified that during work hours a shop steward must have permission to leave his job in order to investigate a

grievance. According to DeFilippi, Barton could not unilaterally decide to meet with other employees.⁹

Williams is no longer employed by the Fund.

The General Counsel alleges that the Respondent interfered with Barton's processing of a grievance when Pepper called Barton out of the information services department, asserting that Pepper's call "was clearly meant to disrupt Barton's investigation and processing of the employee's grievance."

The testimony shows that both DeFilippi and Barton agree with the Fund's position that shop stewards must have permission to investigate possible grievances during their worktime. Barton had obtained Williams' permission to absent himself, but not for "too long," and Warshaviak had explicitly told him that he had 20 minutes to investigate with Martin. Nevertheless, Barton continued to sit in Martin's office past the 20 minutes allotted to him. Pepper called Barton away when his absence threatened to interfere with other employees' lunch schedules and with the coverage in the office. Barton's position, that he somehow thought it was permissible to stay in Martin's office as long as he did not speak to Martin, is pure sophistry. A reasonable person would interpret Warshaviak's instruction as limiting his time in the information services department to 20 minutes. The General Counsel has not shown why 20 minutes was not long enough for Barton to investigate the possible grievance with Martin. There is nothing on the record to show that Barton could not have taken the papers from Martin's office for future use. Pepper's instruction that Barton should leave information services and continue with his scheduled activities was proper under the contract language. I do not find that Respondent violated the Act when Pepper directed Barton to leave the information services department.

3. Removal of personal computer and discipline

The General Counsel asserts that the Respondent threatened to remove and did remove a computer from Barton's office because of his activities as a shop steward, and that the Respondent imposed excessive discipline on Barton.

On February 8, 1995, Pepper received a memo from Kathy Woelfel, a member of the Local 424 bargaining unit in the disability department:

At 1:00 p.m. today, I received a call from a member regarding disability. I was unable to help the member because once again, Dan Barton's computer was inaccessible. This time the entire computer was locked. This has happened on numerous occasions whether Dan is in the office or out to lunch. I spent almost 15 minutes trying to locate this claim and did not locate the document.¹⁰ I informed the member that I would have to call her back when I located all of the paperwork. She was very unhappy with my answer. . . .

This situation is very frustrating to me. It takes me entirely too long to locate files when Dan's computer is not available to me either because he is inputting personal work or it is locked or in a mode that I cannot escape.

I am asking you to please look into this matter. . . .

⁸ Barton testified that he needed supervisory permission to investigate grievances during his worktime.

⁹ On rebuttal by the General Counsel, DeFilippi gave some testimony about a grievance at the end of April. However, the testimony is not clear and it does not seem to relate to this incident.

¹⁰ There existed a notation on a piece of paper for every claim that was entered into the computer.

P.S. At 1:25 p.m. Anna Jones was at Dan's computer and was unsuccessful because it was still locked while Dan was out to lunch.

Before personal computers were introduced, the Fund functioned with three mainframe computers. When personal computers were acquired, they were not immediately given to all employees. Barton was one of the first employees to receive a personal computer because he was entering disability claims information into such a computer. The personal computer sat on a corner of Barton's desk. As office procedures changed, it became part of the duty of all disability department employees to consider and review disability claims, and to answer UFT members' questions about pending claims.¹¹ Eventually, all employees required access to the personal computer in Barton's office.

As set forth in Woelfel's memo, there were numerous instances when other people could not gain access to the computer in Barton's office while a UFT member was on the telephone asking about a pending claim. Further, Pepper testified that on occasion he himself could not use the computer in Barton's office to research a claim when Barton was speaking on the telephone and the computer was locked up. After Pepper received Woelfel's complaint, he spoke to both Woelfel and Jones about the problem. Pepper told Woelfel that he would deal with the issue of access to the personal computer on Barton's desk. A few weeks after receiving the Woelfel memo, Pepper spoke to Barton and informed him that there was an access problem and that the computer would be removed to a location outside Barton's office. Pepper told Barton that Woelfel and Jones used the computer almost as much as he did and that they needed access to the computer all day long. Barton asked how he would do his work, and Pepper replied that he would speak to the information services department about the issue. Pepper denied that he moved the personal computer out of Barton's office because of his Union activities. Pepper denied telling Barton that the computer was being moved because Barton filed grievances, and he denied saying that he would put an end to Barton's memoranda.

It took quite a while for information services to arrange for a proper table and new wiring for the personal computer, and the computer was not moved until about July 11, 1995. On the day that Pepper was informed by information services that the computer would be moved, Pepper told Barton about the change. Pepper testified that Barton again asked how he would perform his work and Pepper said they would talk about it after the computer was placed in the new location. Later the same day, Pepper and Barton's direct supervisor, Diana Williams, went to Barton's office and Pepper asked Barton to come over to the personal computer to discuss how Barton would do his work. Pepper was intending to tell Barton that the secretary could hold Barton's telephone calls while he went over to use the computer. But, Barton did not want to go with Pepper and Williams to the new location; he waved Pepper off and said that Pepper did not have to tell him how to use the computer. Pepper asked Barton a few times to come over, but Barton refused. Then Barton said to Pepper, "Are you asking me or telling me." Pepper said, "I'm telling you to come over here now." When Barton asked whether he had a choice, Pepper said, "We all

have choices in this life, are you coming, yes or no." Barton responded, "No." Pepper and Williams then walked away. Pepper suspended Barton for 5 days as a result of this insubordination. Pepper testified that he based his decision to suspend Barton on a discussion the two had had when Pepper first came to work at the Fund. At that time, Barton was involved in a case arising out of a prior act of insubordination against Williams. Pepper settled the matter after Barton told him that he knew what insubordination was and that he would not be insubordinate in the future.

Barton testified that on May 3, 1995, he typed three requests for step-2 grievances on the personal computer in his office while on his break or lunch hour. According to Barton, after his requests were distributed to management by interoffice mail, Pepper came to his office and said that the personal computer would be moved out of Barton's office "so that everyone can have access to it." Barton protested that this was not a good idea and that the move should be negotiated with the Union, but Pepper answered that the computer would be moved. Barton testified that Pepper's only motive for moving the computer was his union activities which were particularly heavy around May 3, 1995. However, on cross-examination, Barton conceded that he had produced a steady stream of grievances and unfair labor practice charges from the time he became a shop steward in May 1994.

Barton testified that all members of his department required access to the computer. At first Barton testified that there was no lock on the personal computer. Then he testified that there was a key but that the computer was never locked. Then he said that as far as he knew the computer was never locked. When asked a direct question whether he had ever locked the computer, Barton said, "I don't think so." Barton, who professed to recall the May 3 events with exactitude, was thus unable to recall with the same precision whether he had ever locked the computer that sat on his desk.

Barton testified that on July 11, 1995, he was in his office when Pepper came in followed by Torres. According to Barton, Pepper said that he was having the personal computer moved and "I'm going to put an end to this memo nonsense." Later, according to Barton, Torres remarked that Barton was the only one who had ever lost his computer.

Barton testified that after the computer was moved Pepper and Williams came to his office, and Pepper told Barton to come to the new computer location saying, "I want to show you where we set up the computer. And, I want to show you how it works." Barton said, "I don't really want to come back there with you. Are you asking me to come back there or are you telling me to come back there?" Pepper said, "I'm asking you." Barton replied, "I'd rather not come back there." At that, Pepper left. On cross-examination, Barton recalled that Pepper said, "I want you to come back . . . where we put your computer." Barton testified that Pepper did not "direct" him to go to the computer, "What he said was not an order." Barton stated that he did not go over to the computer with Pepper because he already knew how to work the computer and Pepper's request sounded "very strange" and made him "uneasy." Barton said he had a "sixth sense" that the request was "unusual" but he maintained that if Pepper had ordered him he would have gone.

Barton's 5-day suspension was grieved and arbitrated. The arbitrator found that Barton "understood what was expected of him" and that his defense that Pepper never gave him a direct

¹¹ Even the Fund pharmacist needed computer access to check whether a member was truly on disability.

order was “semantics.” The arbitrator found that Barton was insubordinate and that his action constituted grounds for discipline. The arbitrator found that Barton was not being disciplined for his political beliefs or union activities. The arbitrator awarded, without further explanation, that the appropriate penalty for Barton was a suspension without pay for 3 days.¹²

I do not credit Barton’s evasive answers about whether the computer was locked nor do I believe that Barton had actual recall that Pepper spoke to him on May 3 about moving the computer. I credit Pepper that he moved the computer from Barton’s office because other employees complained that they could not gain access to it and because Pepper himself had been left to cool his heels in Barton’s office when the computer was locked and Barton was on the telephone.

I note that although Torres testified on behalf of the General Counsel in the instant case he did not corroborate Barton’s testimony about Pepper’s alleged retaliatory remark. I credit Pepper, whom I have found to be a reliable witness, that he did not tell Barton that the computer was being removed because of any “memo nonsense.”

The evidence shows that Pepper and Williams, both supervisors of Barton, came to his desk and that Pepper repeatedly asked Barton to go over to the new computer location but that Barton refused. Barton’s assertion that he did not go because he was not given an order is unavailing. There is no requirement that Pepper use magic words in order to be obeyed by Barton. It was clear to Barton that Pepper wanted him to walk over to the computer. There is nothing in a request to accompany two supervisors to a computer which would reasonably make an employee feel strange or uneasy. I conclude that Barton was insubordinate.

The General Counsel urges that the 5-day disciplinary suspension was excessive and was imposed in retaliation for Barton’s union activities. As stated above, the arbitrator reduced the suspension from 5 to 3 days but he did not offer any discussion or rationale to support the reduction. The record does not show that Barton’s 5-day suspension was disproportionate to discipline imposed on other employees. I have found above that Barton was insubordinate. I have also found that the Respondent did not retaliate against Barton for his union activities. I do not find that the Fund violated the Act by imposing excessive discipline on Barton because he engaged in union activities.

4. Rescinding Barton’s leave on May 9, 1995

On April 24, 1995, Barton submitted a request for personal leave to Supervisor Williams stating that he would be out of the office from 12:30 to 3 p.m. on May 4. Williams approved the request on the same day after correcting Barton’s calculation of the time chargeable to his personal leave and the time chargeable to his lunchbreak. Barton testified that on May 3 he passed Pepper in the corridor and told him that he was taking time off the next day “to go down to the Labor Board . . . to file charges.” Pepper told him to let the supervisor know and have it approved and Barton replied that he had already done that. On May 4 Barton told Supervisor Walter Canteel that he was leaving at 12:30. Canteel asked whether Williams knew and Barton said that Williams knew about it already. Barton returned to the office at 4:20 p.m. and he checked in with Wil-

liams. Because Barton had used more time than he had originally asked for, Williams instructed him to fill out another leave request. Barton filled out another form which Williams approved after correcting Barton’s calculation of the chargeable time. Williams wrote at the bottom of the form that Barton should be charged 2 hours and 30 minutes and that he did not sign out. On May 8, Barton received a memo from Pepper stating that on May 4 both Williams and Canteel had asked him where Barton was and that neither had been notified of Barton’s absence. The memo stated that Barton had not signed out on the daily logsheet. The memo concluded, “Please be reminded of the procedures which require log-out. ‘Except for employees who depart in accordance with their regular work schedules, employees must sign out showing the time of departure.’”

Barton testified that the practice required him to sign out only if he were leaving for the day and not returning to the office. Accordingly, Barton sent a memo dated May 12 to then Director Jeff Kahn stating that Pepper had sent him a disciplinary memo that was inaccurate. Barton’s memo informed Kahn that Williams had been notified of his absence by his request for personal leave. The memo continued:

I have also been advised that departure sign-out has not been administered in a consistent manner. I believe that as a Union Steward I am being held to a higher standard and discriminated against. . . .

In order to verify the fairness and consistency of the sign-in procedure and prepare for the certain forthcoming grievance concerning this matter, I am requesting copies of all sign-in/out sheets for all members of UIW-Local 424 and OPEIU-Local 153 for the period July 1, 1994 to May 10, 1995.

I am also requesting from you the names of all Welfare Fund employees who have been given written disciplinary notices by Mr. Pepper for not following sign-out procedures or for not giving prior notice of the use of personal time to their division supervisor.¹³

The complaint alleges that on or about May 9, 1995, the Respondent harassed employees by rescinding approval for personal leave because of their activities as shop stewards for the Union.

Barton testified that his request for leave was never rescinded. Barton was paid for all the time he took as personal leave. There is no evidence in the record that Barton filed a grievance relating to the events of May 4 or the subsequent memo from Pepper.

I do not find that the Respondent harassed Barton by rescinding approval of his personal leave.

5. Refusal to process a grievance

Pepper testified that on May 15, 1995, he and Kahn met with Barton to discuss a pending grievance about Williams performing unit work. A few minutes after the meeting ended, DeFilippi telephoned Pepper and told him that he had heard from Barton that a step-2 grievance was scheduled for that afternoon. DeFilippi said that he was 100 miles away and did not want to drive all the way in to New York City. Pepper replied that he had not changed his mind since the two had last discussed the

¹² Contrary to the assertion in the General Counsel’s brief, the arbitrator did not find that the 5-day suspension was “excessive.”

¹³ Barton testified that he received some but not all of the information he had requested. However, the General Counsel has not alleged any violation of the Act in connection with the information request.

grievance. Pepper said that he was going to deny the grievance at step 2 no matter who represented the Union; in his view it was a loser. DeFilippi said that he would send Barton to the step 2 meeting.

Pepper testified that it was his custom to discuss the merits of a grievance with DeFilippi prior to the step-2 and step-3 meetings. By the time the meeting was held, DeFilippi would always be familiar with his view of the grievance. Pepper denied telling DeFilippi that if Barton presented the grievance it would be denied.

DeFilippi testified that on May 15 Pepper telephoned him to ask about a number of step-2 grievances. DeFilippi told Pepper that he could not meet with him that day and said that Barton would handle the grievances. Pepper replied that he did not want to deal with Barton. He said that if Barton came in he would reject the grievances. On cross-examination, DeFilippi said that he and Pepper often discussed step-2 grievances before the step-2 meeting was held. Pepper would inform DeFilippi what his position was and what he intended to do unless he heard something new or different at the step-2 meeting.

Barton testified that he was called to a meeting to discuss a grievance with Kahn and Pepper. After a while, it became clear to him that "it sounded like a step 2 grievance." Barton said that DeFilippi should be there to handle it or that he should decide whether Barton could handle it. At Barton's insistence, the meeting ended with management intending to contact DeFilippi. Barton then received a telephone call from DeFilippi saying that he was too far away to be present at the meeting. DeFilippi told Barton, "Pepper had told him that if I handled the grievance they were going to turn it down anyway." Barton testified that when he went to the step-2 grievance, Pepper denied the grievance without further discussion.

The complaint alleges that Respondent threatened to refuse to process employee grievances if they were presented by Barton and summarily denied grievances without regard to merit because they were presented by Barton.

I have found above that Pepper was a reliable witness and that DeFilippi and Barton were not credible witnesses. I find, based on Pepper's testimony, that he and DeFilippi had discussed the grievance on prior occasions and that on May 15 Pepper informed DeFilippi that he had not changed his mind about the merits of the grievance. I find that Pepper told DeFilippi that it did not matter whether DeFilippi came to the step-2 meeting because Pepper was going to deny the grievance in any event. I do not find that Pepper said that he did not want to deal with Barton and that if Barton came to the meeting he would deny the grievance. I do not find that Pepper denied the grievance for the reason that Barton was present at the step-2 meeting.

Although basing my finding solely on the credibility of the witnesses, I must point out the inherent contradiction in the General Counsel's position. Barton's testimony was very clear that Kahn and Pepper had asked to meet with him to discuss a grievance on May 15 and that the discussion ended only because he said that he was not authorized to handle step-2 grievances. Manifestly, management was willing to discuss grievances with Barton and management took the lead in scheduling grievance meetings with him.

6. Directing shop steward to stop discussing terms and conditions of employment

Michael Dubin has been the chief financial officer of the UFT for 12 years.¹⁴ At one time Dubin had been the controller of the Respondent Welfare Fund and in that capacity he had worked with Barton. Dubin testified that as chief financial officer of the UFT he is not involved in negotiations with the Respondent's employees and he exercises no managerial authority over them.

Dubin often walked with Barton from Pennsylvania Station to the building housing the UFT and the Fund offices. On one such occasion in June 1995, Dubin and Barton were walking to work when Barton began telling Dubin about the Union and mentioned a new collective-bargaining contract. Barton asked Dubin whether he had heard about "outsourcing" at the Fund and Dubin answered that it was a possibility. Dubin had heard that the Fund had prepared a request for proposal in an effort to procure a new computer system for the Fund. One of the responses received by the Fund was a suggestion by IBM for the outsourcing of computer time. Under this scheme, employees of the Fund would dial in to use a computer rather than using the computer onsite. This proposal had nothing to do with the removal of employees or any subcontracting.

Dubin testified that on June 14, 1995 Fund employee Kathy Woelfel told him that Barton was quoting him as speaking about outsourcing employee jobs at the Fund. Then, Dubin's assistant Angela Paino heard a similar rumor from someone else at the Fund. Later on June 14, Dubin met Barton in the office building lobby near the elevator. Dubin asked Barton to stop misquoting him and to stop using his name in connection with the outsourcing of employee jobs at the Fund. Barton replied, "What are you going to do about it?" Dubin again told Barton to stop, saying that he could speak on his own behalf and did not need anyone to speak for him. Barton replied, "Let's go outside, I'll kick your ass." Dubin responded in kind. Then Barton blocked the entrance to the elevator. Dubin asked Barton to step aside and told Barton to stop using his name and misquoting him. Barton refused to move aside so that Dubin could enter the elevator. Dubin brushed past Barton to get on the elevator. Finally, both Dubin and Barton were restrained by the building attendants.

Dubin denied that he said that the Union would never get another collective-bargaining agreement and he denied telling Barton that the Fund would remove employees from the unit before they ever got a contract. In fact, Dubin has never discussed outsourcing employee jobs at the Fund.

Barton testified that on June 10 Dubin told him that he believed the Union would never get another contract. According to Barton, when he insisted that they would get another contract, Dubin replied that he "understood they're going to outsource the work . . . before they'd ever let us have another contract." Later that afternoon, Barton called DeFilippi and told him that Dubin said they would never get another contract and the Fund would outsource the work if necessary. Barton testified that on June 14 he said good morning to Dubin at the elevator when Dubin said, "I hear you've been quoting me all over the place. . . . you better keep your mouth shut and stop quoting me all of the time." Barton said that when the elevator arrived Dubin told him to get out of the way and pushed him. Barton grabbed Dubin and pushed back, saying, "You better

¹⁴ Dubin is an accountant.

keep you god damn hands off of me.” Barton stated that he told Dubin either, “If you ever do that again, I’m going to smash your face in” or “I’m going to push your face through the back of your head.” After a security guard intervened, Dubin told Barton that he would “regret this.” According to Barton, he replied, “Get fucked.”

On cross-examination, Barton acknowledged that he had seen a letter from IBM to Information Services Supervisor Pam Wood dated June 9, 1995. The letter had been given to DeFilippi who had then shown it to Barton. The letter stated, “[O]utsourcing will only allow UFT access to the Claims processing system, UFT personnel must, themselves, continue to run and use the application.” Barton evaded questions related to the actual state of his knowledge about outsourcing, but he acknowledged that the Union did not grieve the subcontracting of unit work. Barton estimated the size of the unit at 35 to 40 employees, of whom 6 or 7 do work on computers. Barton could not explain how the purported subcontracting of six or seven jobs could relieve the Respondent of the necessity of bargaining for a new contract.

DeFilippi testified that he received a copy of the IBM letter to Wood about outsourcing computer time. In addition, Pepper told DeFilippi that the Fund was not subcontracting work.

The General Counsel does not allege that Respondent engaged in any unfair labor practices as a result of Dubin’s conversation with Barton on June 10, 1995. Thus, there is no allegation relating to Dubin’s purported comment that Respondent would outsource the jobs rather than enter into a new contract with the Union. The complaint alleges that Dubin unlawfully told Barton on June 14 to cease discussing the terms and conditions of employment of unit employees.

I credit Dubin. I find that on June 10 Barton asked Dubin whether he had heard about outsourcing and that Dubin told Barton what he knew about the IBM outsourcing proposal. I do not find that Dubin said that unit employees’ jobs would be outsourced or that he said that Respondent would avoid signing a new contract with the Union. I credit Dubin that on June 14 he told Barton to stop misquoting him. Dubin’s demand that Barton cease misquoting him was clear: there was no suggestion that Barton should cease inquiring about outsourcing or cease discussing outsourcing with the employees. Dubin only wanted Barton to stop linking his name with a fake story about subcontracting jobs. Moreover, Dubin is not an agent of the Welfare Fund; Dubin is not employed by the Fund and does not participate in bargaining with Fund employees. The record does not show generally that officials of the UFT have any control over the Respondent’s labor relations. There is no suggestion in the record that Dubin could affect Barton’s job in any way. It is not controlling in this case that in 1994 the general manager of the UFT was given apparent authority to deal with Valquiria Green in an unrelated matter.¹⁵ The evidence shows that Dubin and Barton had often walked together from the train station to the office. When Dubin told Barton to stop misquoting him, he was doing it as an acquaintance and not as a supervisor or manager. I do not find that Respondent engaged in any violation of the Act by Dubin’s demand that Barton stop misquoting him.

¹⁵ That case is set forth above in the discussion about the Green settlement agreement.

7. Transfer of Barton, reduction of his duties and surveillance

On July 21, 1995, DeFilippi wrote to Pepper complaining that the computer, which Barton used, had been moved to 3 feet from Woelfel’s workstation. The letter said that Woelfel had written letters to the Union requesting limited contact with Barton and that Barton had also requested limited contact with Woelfel.¹⁶ DeFilippi asked that the computer be moved.

Barton testified that until November 3, 1995, his office was a cubicle located inside a larger office. The cubicle consisted of two walls about 5-1/2-feet high enclosing a space bounded by two other walls. Before November 3, Pepper notified Barton that he was being transferred from the disability unit to the general members services unit. Pepper told Barton that the reason for the move was a conflict with Woelfel who was becoming a supervisor in the disability unit. Barton said that he had no idea what Pepper was referring to. Pepper responded that he did not want Woelfel supervising Barton. Barton’s new workspace was a cubicle. The major difference from his old location was that one of the solid walls enclosing the space had a window that looked into John Medrano’s office. Medrano was a supervisor, but not Barton’s supervisor. However, Medrano had the authority to sign Barton’s leave slips. The window was covered with vertical blinds which were kept closed except for a space Barton calculated as measuring about three inches at the bottom center of the window where the blinds met. Barton testified that Medrano could thus see the back of his head and could see whether anyone was in the office talking to him. In particular, according to Barton, Medrano could see whether any bargaining unit members were in his office discussing problems they were having on the job. There is no indication that Medrano could hear anything through the glass window. At the new location, Barton’s desk was next to those of other administrative benefits specialists like himself.

Barton testified that while he worked in the disability section, 25 percent of his time was spent typing information about incoming claims, 15 percent of his time went to correspondence, 15 to 20 percent of his time was devoted to answering telephone inquiries and the rest of the time he worked on medical claims. All of the work Barton did with respect to claims was reviewed by a Fund medical advisor with the exception of routine maternity claims. After November 3, when Barton worked in the general membership services unit, he answered telephoned questions on all Fund matters, he advised members on insurance, he handled correspondence and he assisted members with claims problems. Barton described the difference between his disability work and his general member services work as follows: he no longer was required to type claims into a personal computer and he handled general claims rather than just disability claims. Barton stated that at both jobs he was responsible for answering members’ questions and dealing with correspondence. Barton testified that he felt that the workload in the new area was easier and the work itself was less difficult. Barton could not give any specifics to substantiate his feeling except that he had a little more free time on the new job.

Pepper testified that as a result of a conversation with DeFilippi about the personality clash between Barton and Woelfel, he had decided that Woelfel should not be Barton’s direct supervisor when she became the supervisor of the disability unit. Pepper decided to move Barton to general members services on

¹⁶ Woelfel was a member of the bargaining unit.

the other side of the floor away from Woelfel. Pepper stated that his decision was not based on Barton's activities as a shop steward. Pepper testified that the old work cubicle and the new work cubicle are much the same. He stated that Medrano's vertical blinds may not meet exactly in the middle of the window because they are broken. Pepper said that Barton's new job was much like his old job except that it involved fewer clerical functions and more interaction with UFT members. Both jobs involve answering the same general questions by telephone and by mail.

Barton testified that there was no union or shop stewards' meeting on November 3, 1995. Pepper testified that he did not know of any shop stewards' meeting near Medrano's desk on November 3, 1995.

The General Counsel alleges that the Respondent Fund transferred Barton to another work area and decreased his work responsibilities because of his activities as a shop steward. The complaint alleges that on November 3, 1995, Pepper and Medrano engaged in surveillance of the union activities of employees attending a shop steward's meeting.

I credit Pepper and I find that the Respondent transferred Barton out of the disability unit because both Barton and Woelfel had requested limited contact with each other and because Woelfel was about to become the supervisor of the unit. Barton's new duties may have been slightly less onerous than his former ones, as claimed by Barton, but I also credit Pepper that the new duties were less clerical and involved more interaction with members. I do not find that the new duties involved a decrease in responsibility, although they may have involved a change. I do not find that Barton's move from disability to general member services was due to Barton's union activities.

Although Barton testified that he believed that Medrano could see him through a 3-inch gap in the vertical blinds, I do not believe that Medrano could engage in surveillance of Barton while he was speaking to other employees in the manner claimed. I credit Pepper that the blinds were defective and I do not credit Barton that they were being deliberately held open with a paper clip. The picture of the blinds introduced by the General Counsel does not show any paper clip. If Medrano could see the back of Barton's head in a 3-inch gap, then the entire open space would have been filled by Barton's head which was surely wider than 3 inches. In order to see whether anyone else was speaking to Barton, Medrano would have had to put his head close to the blind-obstructed window, and he surely would have been observed by anyone sitting in Barton's office. I do not find that Barton's new desk location was chosen so that supervisors could engage in surveillance.

8. Interrogating Barton on March 15, and denying personal leave on March 18, 1996

On March 15, 1996, Barton gave Supervisor Diana Williams a request for 1 day off with pay for "Union Business-NLRB." Williams approved the request. Pepper testified that his secretary informed him that Barton had put in a form for union business at the NLRB and she asked whether Pepper had something on his calendar. Pepper said that he was not aware of a case at the NLRB, and he instructed his secretary to ask Barton whether there was an NLRB case.¹⁷ Pepper stated that the Fund granted employees a day off with pay to attend NLRB

hearings and arbitration hearings. Barton informed Pepper's secretary that there was no NLRB hearing but that he was just going to the NLRB. Pepper then decided that Barton's request for 1 day's leave with pay should be denied because there was no hearing at the NLRB. Pepper returned Barton's form with the notation "Day Denied." Later on March 15, Barton prepared another form requesting time off with pay for March 22. The form asked for 3-1/2 hours for "Union Business-NLRB." Barton gave the form to supervisor Lorna Baptiste who approved the request. Barton was suspended from work before March 22, 1996.

Barton admitted that he was always given paid leave to attend arbitrations and NLRB hearings. When Barton requested time off to file charges or give affidavits, he would request personal leave time or vacation time and his leave bank would be charged for the hours he spent away from work. Barton recalled that Pepper's secretary had asked him whether there was a hearing scheduled for March 22. Barton testified that no one interrogated him about his NLRB activities on March 15. Barton testified that he did not request personal leave on March 18.

The General Counsel alleges that on March 15, 1996, the Respondent interrogated Barton about his activities before the NLRB and on March 18, 1996, denied Barton personal leave in violation of the Act.

I do not find that the Respondent interrogated Barton on March 15, 1996. I find that Barton's request for time off with pay was properly denied because he was not attending an arbitration or an NLRB hearing. Barton did not submit a request for personal leave, that is a request for time off to be charged to his leave bank, and thus no such leave was denied.

9. Surveillance, refusal to admit shop steward and excessive discipline

Joseph Vigilante testified that in 1996 he was the operations manager of the Fund, with responsibility for computer hardware and software. At that time, Vigilante's superior was Hugo Kiendl, the director of the information services unit. Pam Wood was the manager of applications development, with responsibility for computer programming, training, and support.

In March 1996, Kiendl was concerned about employee tardiness and he asked Vigilante and Wood to look at employee timesheets for the last 6 months. Kiendl asked for a report on repeated employee lateness. Vigilante and Wood prepared a report covering the entire staff of the information services unit, including employees represented by Local 424 and by the other union. The report showed that four employees were repeatedly tardy: these were Ed Opong, Reuben Torres, Regina Tovbin, and Nigel Reid. On March 18, 1996, Vigilante and Kiendl scheduled meetings with the four employees to tell them of their findings. No discipline was contemplated; management merely wanted to inform the employees of its findings.¹⁸ First, Vigilante and Kiendl met with Opong who was accompanied by Shop Steward Torres. Opong questioned the accuracy of some of the dates and Vigilante asked Wood to check them. The second meeting concerned Torres who was accompanied by Shop Steward Tovbin. After a discussion about some of the dates, the meeting ended. At this point, Wood reported to Vigilante that there had been typographical errors in two of the

¹⁷ If there had been a hearing, Pepper would have been expected to attend.

¹⁸ Torres testified that management was going to take lateness more seriously in the future.

dates supplied to Opong. Vigilante wanted to give Opong this information and he asked Opong to go to Kiendl's office. Vigilante then went to fetch Shop Steward Torres who had been present at the first meeting with Opong. The glass door to Torres' office was closed and Vigilante could see that Torres was in his office with Tovbin and Barton. Vigilante opened the door and asked whether there was a problem.¹⁹ Barton replied that he was the grievance coordinator and that he was gathering information. Vigilante said that he was not aware of any grievance and then he asked Torres to join the group in Kiendl's office for a continuation of the meeting with Opong. At this point, Barton told Vigilante to use Tovbin. Vigilante replied that he wanted Torres to come in because he had been present for the first part of the meeting. It would be simpler to have the same shop steward present for the continuation of the earlier meeting. Barton raised his voice and insisted that Tovbin go to the meeting. Then Barton said that he himself would attend. Vigilante did not object to Barton's presence.

Vigilante and Barton went to Kiendl's office.²⁰ Kiendl was seated behind his desk, with Wood standing to his right. Barton stood on one side of the door. Opong sat on a small chair just inside the door. Vigilante, who was the last person to enter the office, closed the door and stood in front of it. There was no other place left for him to stand. After a few moments there was a knock on the door; when Vigilante opened the door he saw Tovbin. Vigilante told her that there was already a shop steward present and he shut the door. Barton said that Tovbin must be let in. Screaming, "I'm not going to let you do this to me. You can't lock my shop steward out of the meeting," Barton lunged towards Vigilante and pushed him away from the door into the adjoining wall. Vigilante caught his foot on the door stop affixed to the wall and he stumbled. The door stop broke. Barton tried to open the door but by this time Vigilante had righted himself and resumed his position in front of the door. Wood told Barton to sit down and to calm down. Barton screamed at her that she should calm down. Vigilante then told Opong about the typographical errors in some of the dates given to him earlier that day and the meeting ended with Barton yelling that he would report Vigilante to the NLRB.

Wood testified that during this meeting she saw Barton step forward and grab Vigilante by the shoulders, throwing him to the side of the door. Barton may have succeeded in opening the door a few inches before Vigilante rebounded off the wall adjoining the door and the door was slammed shut.

After this incident, Vigilante and Wood told Pepper what had happened and he instructed them to put it in writing.

The next day, all of the participants except Barton met with Pepper separately and told him about the incident. Later, Pepper met with all those present with the exception of Barton and they reenacted the confrontation. After this, Pepper met with Barton and a shop steward. Barton told Pepper that he had never touched Vigilante and that Vigilante had opened the door and it had hit him, causing him to stumble. Pepper testified that because of Barton's physical assault on Vigilante, he suspended Barton for 30 days.

Barton's testimony about the events of March 18 was generally at odds with the testimony of all the other witnesses. I

¹⁹ Vigilante testified that he was asking whether there was a work related problem, not a union problem.

²⁰ Kiendl's office was small, with room for a desk, a few chairs and a few people standing against the wall and door.

have found above that Barton was not a credible witness and I shall not rely on his testimony with respect to the March 18 events. Tovbin also testified about March 18. I have explained above that I do not find Tovbin to be a credible witness and I shall not rely on her testimony. I note in passing that the testimony of Tovbin and Barton differed in very important respects concerning the events of March 18, including what happened in Torres' office and in Kiendl's office.

A grievance was filed about Barton's suspension. Barton was awarded reinstatement with full backpay. The arbitrator credited Tovbin, a witness whom I find to be unreliable, and he apparently based his decision on a decision by another arbitrator in an unrelated case with facts that differ markedly from the instant case. Interestingly, the arbitrator noted that Opong's testimony supported the Fund's version of the facts.²¹

Article 6 of the collective-bargaining agreement provides, *inter alia*:

The Employer recognizes the reasonably exercised right of an employee, upon request, to have a shop steward present at a disciplinary interview by management wherein a response by the employee is required and wherein it is reasonably anticipated that disciplinary action will result to that employee. The Union recognizes that this right does not extend to non-disciplinary meetings between an employee and management for the purpose of consulting, advising, counseling, evaluating, supervising or directing the employee in his/her work.

The complaint alleges that Vigilante engaged in surveillance of a grievance meeting in Torres' office, unlawfully refused to admit Shop Steward Tovbin into a grievance meeting, and unlawfully imposed a 30-day suspension on Barton.

I do not find that Vigilante engaged in any surveillance of Barton, Tovbin, and Torres in Torres' office on March 18. Torres' office had a glass door and I find that Vigilante walked right in and asked whether there was a problem. Vigilante had no way of knowing what the three shop stewards were discussing and it was not unreasonable for him to assume that they were talking about work. Vigilante did not inquire whether they were discussing union business and he did not ask for specifics of their discussion. Vigilante had a legitimate purpose for entering Torres' office; he had to invite Torres to the continuation of the meeting with Opong in order to give Opong an answer concerning dates he had questioned.

The meeting with Opong to which Tovbin wished admittance was not a grievance as stated in the complaint.²² Furthermore, there is no evidence in the record that Opong could reasonably expect discipline to be imposed as a result of the meeting. The credible evidence shows that management wished to draw certain of its employees' attention to the fact that they had been late repeatedly, but there is no evidence that warnings would be placed in personnel files nor that any other action would take place. Nevertheless, management did permit Opong to be accompanied by a shop steward. The General Counsel apparently believes that two shop stewards were necessary despite the fact that the parties' own contract provides that "a shop steward" shall be present at disciplinary meetings. Barton was present in Kiendl's office; he is manifestly a shop steward. Not one witness stated that Opong himself had requested that Tovbin be present at the meeting. It is clear that

²¹ Opong did not testify in the instant case.

²² The General Counsel's brief calls it an "investigatory meeting."

the right to union representation in a disciplinary meeting is “triggered only” by an individual employee’s request. *Prudential Insurance Co.*, 275 NLRB 208, 209 (1985). This incident is not one where the Respondent refused to meet with the Union’s designated representative as in *Missouri Portland Cement Co.*, 284 NLRB 432 (1987), cited by the General Counsel. In that case, the employer agreed that it had to meet with various employee committees but it argued that the union officers could not be on the committees. The Board found that the Union had never waived its right to designate who should serve on the committees. In the instant case, the Union has agreed that “a shop steward” shall represent employees in disciplinary meetings. Even if I had found that the meeting was a disciplinary meeting, I would find that Opong was indeed represented by a shop steward since Barton had designated himself to represent Opong. The contract did not give the Union the right to have more than one shop steward in the meeting.

I find that Barton put his hands on Vigilante’s shoulders and pushed Vigilante away from the door in order to open it and admit Tovbin. I find that as a result of this assault by Barton Vigilante stumbled and broke the door stop. I do not credit Barton that Vigilante hit himself with the door and stumbled into the wall, breaking the door stop. The General Counsel has not presented any evidence that other employees who pushed a supervisor received a lesser discipline than that imposed on Barton. Indeed, many collective-bargaining agreements provide that an employer may bypass a progressive discipline provision and may immediately discharge an employee for assaulting another person on the job.

10. Removing materials from a bulletin board

Barton testified that there are three bulletin boards at the Fund. On direct examination by counsel for the General Counsel, he stated that one is a general board on which both management and employees can place articles, one is for Local 153 members and one is for Local 424 information. Barton said that he is responsible for maintaining the Local 424 board and that he alone determines what material can be posted on it. In early September 1996 Barton saw a “Federal Labor Board notice” on the Local 424 unit employees’ bulletin board which he believed to be either a decertification notice or an election notice. Barton removed the notice because he had not put it up. Within a half hour, Supervisors Lorna Baptiste and Joe Wohl called the employees into the corridor and said that someone had removed the decertification notice. Baptiste said that it was a Federal offense to remove the notice and that anyone caught doing that would be severely disciplined. Barton testified that soon after this meeting ended he saw a photocopy of the original notice on the bulletin board and he again removed that document from the bulletin board.

The collective-bargaining agreement provides in article 15:

The Fund agrees to grant the Union reasonable access to Employer bulletin boards normally utilized by employees for announcements to its members.

On cross-examination, Barton testified that the Respondent routinely placed its postings for job openings and its bid sheets for vacation schedules on the Local 424 unit employees bulletin board. Barton acknowledged that the bulletin board in question would be the place normally used if the Fund were directed to post a notice aimed at Local 424 unit employees.

The General Counsel does not discuss the fact, which Barton freely admitted in his testimony, that the notice was an official notice of the NLRB notifying unit employees of a decertification petition. The General Counsel urges that Barton alone controlled the material to be placed on the bulletin board. The General Counsel argues that the Fund violated Section 8(a)(1) when it posted an official NLRB notice on the bulletin board utilized by Local 424, and that it violated Section 8(a)(1) when it announced that any person caught removing the notice would be severely disciplined.

I find, based on Barton’s testimony and on the language of the collective-bargaining agreement, that the bulletin board was an employer bulletin board on which the Respondent regularly posted various materials for the use and information of the Local 424 unit members. The Union did not have exclusive control over what was posted on the bulletin board. To the contrary, the contract speaks in terms of providing the Union with “reasonable access to Employer bulletin boards.” Thus, it was entirely appropriate for the Respondent, when directed by the NLRB to post a decertification notice for the Local 424 unit, to place that notice on the Local 424 unit employees’ bulletin board. It was not an interference with the rights of employees to threaten to discipline anyone caught removing the official notice.

I. Regina Tovbin

1. Training and assignments

Regina Tovbin was a senior programmer analyst for the Respondent Fund from November 1985 until May 1996. Tovbin worked in the information systems department, sometimes referred to as the IS department. Her direct supervisor at the time relevant to the instant case was Pamela Wood, the manager of applications development. Wood supervised four programmers, one trainer, and one person who wrote functional specifications. Wood was the person responsible for assigning work to Tovbin at the time relevant to the instant complaint. Wood’s superior was Greta Warshaviak, the director of the IS department. At some point, Hugo Kiendl replaced Warshaviak.

Regina Tovbin served as a shop steward. According to Tovbin’s supervisor, Pamela Wood, many employees spoke to her about problems on the job and wrote memoranda about work-related issues, but Tovbin wrote more memoranda than the other employees complaining about working conditions. Tovbin filed grievances concerning insubordination and overtime. Tovbin filed a grievance about out of title work; this grievance was upheld in arbitration after Tovbin resigned from the Fund. Wood acknowledged that she hoped employees under her supervision would speak to her about their problems. On one occasion in August 1995, Wood had asked Tovbin to make a presentation to her fellow employees about a course she had taken. Tovbin had complained directly to the Union which then wrote to Respondent stating that Tovbin did not want to speak about her course work and that it was not her responsibility to do so. Wood would have preferred that Tovbin come to her first and try to work out the difficulty. She sent a memorandum to Tovbin stating, “I wish you had spoken to me about it before you felt the need to involve your Union.”

Wood testified that the information services department provides services to the other departments from 8 or 8:30 a.m. to 6 p.m. Wood had to be sure that there was constant coverage in the department because some users of information need imme-

diate help. When a request for services comes to Wood, she gives the task to a programmer based on her evaluation of the skills required to do the job and the existing workload of all the programmers. Wood determines the priorities for the programmers' work. An employee who keeps changing his work schedule makes it hard for her to maintain complete coverage.

Wood testified that when she began work at the Fund in January 1994, three mainframe computers ran the business of the Fund. The mainframe computers stored all the data required by the Fund, all the programs that were used to update the databases and all the programs used to request information from the databases. At that time, the personal computer (PC) was just being introduced into the office. A personal computer is a self-contained unit that can produce spreadsheets and it can run word processing and data bases. The PC can be used as a "dumb terminal," that is, the PC can be hooked to the mainframe computer to show a screen from the mainframe but not to process data from the mainframe. A personal computer can also run without being attached to a central mainframe computer.

The complaint alleges that Respondent failed to provide Tovbin with training necessary to perform her job responsibilities on the PC from October 15, 1995, through April 25, 1996; that on February 14, 1996, Respondent assigned a PC task to Tovbin with an unrealistic completion date, required skills in which she had not been trained, and for which she did not have appropriate software; and on February 1, 1996, failed to give PC work assignments to Tovbin.

Wood stated that all employees in the information systems department were given a PC because she wanted them to become familiar with the PC and what it was capable of doing. In addition to the PC installed in each employee's office, all programmers had access to the common PC which was connected to a mainframe computer. The common PC could do download projects, that is, it could take information from the mainframe into the PC and then it could create reports using the information. A software package called P.K. Harmony was used to download information from the mainframe to a PC. The common PC was configured with P.K. Harmony already installed so that it could perform download projects. If a programmer wished to use his or her own PC to access the mainframe, the P.K. Harmony software could be installed with a diskette. The programmers were not given training in downloading. According to Wood, a person in a senior programmer analyst title has the capability to analyze business problems and to design software and write a computer code that will solve those problems. A programmer is the most knowledgeable person about computers. Such a person can read the user manual for downloading and figure out how to perform the task. If extra help is needed, the software manufacturer has a hotline which the programmer can call. Furthermore, Supervisor Sonny Kapoor had shown Tovbin where to find the icon that ran P.K. Harmony on her PC. Wood recalled that Tovbin had complained that P.K. Harmony was not working on her PC. Wood could not tell what was causing the problems and she twice gave Tovbin a new PC to deal with the situation.

Wood testified that a PC comes equipped with a commercial software package tailored to the user. One does not need a lot of formal training to use a PC. Because PC operating systems are user friendly the average person can figure out how to use a

PC without a class.²³ According to Wood, most of the programmers were comfortable using a PC after 3 weeks.

Wood stated that each programmer's office had two direct lines from the mainframe computers. Most programmers had two lines to the Ultimate central computer where information was stored. Tovbin had one line to the Ultimate machine and a second line to the Spirit computer which ran the accounting systems for the UFT and the Fund.²⁴ These lines were connected to a dumb terminal on her desk.²⁵ The dumb terminal displayed information from the mainframe computers and it could be used to enter data on the mainframes, but the dumb terminal did not do the work of the mainframes. Tovbin had chosen to use her PC as a stand alone; that is, it was not connected to the mainframes and it only ran PC programs. In the spring of 1995 Tovbin asked for a third line from her office to the Ultimate machine. Wood had been denying all requests for more Ultimate lines because there were over 650 users of the Ultimate machine and there was no more room to add lines. Eventually a way was found to connect the single Ultimate line to Tovbin's PC as well as to the dumb terminal on her desk. After this, Tovbin could work on the mainframe either at her PC or at the dumb terminal on her desk. Because she had only one line to the Ultimate computer, she could not have two sessions running on the mainframe at one time.

On cross-examination by counsel for the General Counsel, Wood explained that Tovbin had chosen to have both lines from the mainframe computers connected to the dumb terminal on her desk because she did not want to sit at her PC to work on the main system. Tovbin wanted to keep both mainframes attached to the dumb terminal. She wanted the capacity to have two mainframe sessions running on the terminal so that she did not have to get up from her desk and cross the office to her PC to look at another session. Because Tovbin did not want to give up the two mainframe lines connected to the dumb terminal on her desk, she asked for a second line from the Ultimate computer to her PC. The first request written by Tovbin in May 1995 asked for another line from the Ultimate mainframe to her PC and an "AB box" to switch the line to her PC. This request was denied because there were no more lines available. On October 22, 1995, Tovbin submitted a second request. This time Tovbin asked to have the Ultimate and Spirit machines connected to the PC while also keeping them connected to the terminal on her desk. Tovbin would be able to work on one mainframe on her desktop terminal and one mainframe on her PC at the same time. A technical employee named Carlos Roman figured out how to do this and the job was completed on November 21, 1995.

Wood testified that the IS department sent its programmers to seminars and training programs. Tovbin received the following training relevant to the issues herein:

May 1995	Introduction to PC/Windows
June 1-2, 1995	Microsoft Visual Basic
August 14-17, 1995	IBM Technology College
February 1996	COMMON Regional Event

²³ A technical person who must support the hardware on a PC requires special training in a school. The programmers at the Fund were not required to work on the hardware of the PC.

²⁴ Tovbin was responsible for more work on the Spirit machine than other programmers.

²⁵ These terminals, which were present in each programmer's office, were not PC machines.

May 1996

Microcomputer Concepts²⁶

The record shows that this is a greater amount of training than that received by other senior programmer specialists in the IS department. Wood testified that she never refused any request by Tovbin for any specific class or other form of training. Wood denied that she based any decision about providing training on the fact that Tovbin engaged in union activities.

Wood testified about the work assignments she distributed to the programmers. When Wood came to the IS department, Amato had been doing sporadic PC tasks and he continued doing all of the PC tasks for a while. Programmer Gabe Rutkowski was given his first PC task in late 1994 or early 1995. According to Wood, there were not that many PC tasks to be done. Tovbin filed a grievance in August 1995 over her lack of PC assignments and Wood attended a grievance meeting in October. Wood gave Tovbin her first PC assignment on October 20, 1995. PC assignments involved downloading information from a mainframe computer. Wood knew that Tovbin wanted to do a downloading task and Wood had decided that she would give Tovbin at least one such assignment before the technology became obsolete. Wood knew that the Fund would soon be using new AS400 computers with a different download technology.

In October 1995, Tovbin's PC did not yet have the connection from the mainframe computer so that material could be directly downloaded to the PC. Wood testified that Tovbin could use the common PC that was available to all programmers who had to download from a mainframe machine. Wood directed Tovbin to Amato who would explain to her that she could use the common PC or a PC borrowed from another programmer. The PC task requested Tovbin to produce a PC diskette report of information stored on the mainframe. Wood stated that this was a typical downloading assignment. Tovbin was given a few days to perform the task although Wood believed it would take less than 1 hour of working time. The assignment was given on October 20 and Tovbin closed it out on October 26. Tovbin did not tell Wood that she needed more training and she did not say that she did not understand the task and that she had not been able to perform it. Tovbin's memorandum about the assignment shows that she performed the work on Amato's PC.

Amato, who testified on behalf of the General Counsel, said that he helped Tovbin with this October assignment. Amato stated that Tovbin performed the task on the PC in his office. He recalled that she found the job difficult because her level of PC knowledge was very limited.

Wood testified that the next few PC assignments were given to other programmers for various reasons: Tovbin was on an extended trip out of the country, other programmers had experience in providing specialized information and after Tovbin returned from her trip she was busy completing other assignments. On February 14, 1996, Wood received a request from the communications department to download a data base to a diskette so that it could be placed on a Microsoft access data base. This was exactly the same type of job Tovbin had performed in October. Although the source of the data was different, the technology and the format of the file were exactly the same. Wood gave the job to Tovbin who completed it on Feb-

ruary 28. Wood testified that after Tovbin received the assignment, she told Wood that she could not do it, that she did not have the proper equipment and that she had not been trained properly. Wood reminded Tovbin of the previous assignment and said that she should be able to do it. She told Tovbin to ask the other programmers for help and she told her to call the software hotline. Wood denied that she criticized Tovbin or discouraged her. Although Wood had given Tovbin 2 days to complete the job, she did not discipline Tovbin for taking much longer than the allotted time.

In the period from October 20, 1995, to April 12, 1996, the evidence shows that Tovbin received two PC assignments, Tang received three such assignments, Amato received one PC assignment, and Rutkowski received six PC assignments.²⁷ Tovbin was away from the office from December 6, 1995, through January 19, 1996, during which time three requests for PC work were received by the IS department.

On February 28, 1996, Wood gave Tovbin a "batch assignment." The IS department was preparing for the new AS400 computer system and it was necessary to insure that the new computer matched the functionality of the three existing mainframe computers. To that end, Wood asked Tovbin to prepare file layouts of the tapes that IS received from and sent back to the Board of Education, the Teachers Retirement System, and the city of New York. Tovbin was to record the layout of each tape and provide a brief description of what the tape represented so that IS would know what information came in on each tape and what information was sent to the various government entities. Wood gave Tovbin details about each tape she was to examine. Wood testified that Tovbin was asked to provide discrete information, not an indefinite amount of material. Furthermore, each tape that came to an IS mainframe computer was unloaded with a utility that provided details on exactly what information was contained in each separate field of a tape. Tovbin could thus go to the tape unload process and print it out; this would provide exactly the information that Wood had asked for. There was no necessity for Tovbin to read thousands of lines of data; at the most Tovbin had to read 10 or 20 lines of code from the top of each program.

Wood spoke to Tovbin a number of times about the assignment. She instructed Tovbin how to access the load utility in order to find the definition of the records on each tape. According to Wood, any programmer knows how to use the load program. Wood emphatically denied that there was any misunderstanding on Tovbin's part about exactly she was being asked to do. For example, Tovbin was not asked to document the programming logic of the Ultimate system. Wood testified that Tovbin had performed similar batch processing tasks in the past. She had performed jobs on the Spirit system that required tape handling to see what was on a tape. Wood said that as the person who had written the program that created tapes from the accounting system, Tovbin was capable of doing the job and she understood all along what the project entailed. Wood testified that she reached the conclusion from reading various memoranda prepared by Tovbin that she understood the task but that she was asking other people to do parts of the job for her. In fact, Tovbin's ability to communicate to others what parts of her assignment she wanted them to do proved that Tovbin actually knew what was being asked of her.

²⁶ Tovbin resigned before she could attend this scheduled training event.

²⁷ Amato left the Fund in December 1995.

Wood testified that the two weeks she gave Tovbin in which to complete the assignment was a reasonable amount of time. Wood believed that Tovbin could have done the job in one week. Wood gave Tovbin certain back up material and she told Tovbin that Vigilante and Warshaviak were prepared to help her with the assignment. Tovbin complained to Wood that a previous similar project assigned to Tang had taken a long time to complete, but Wood said that was because IS did not have all the information about what services had been requested and the project stayed open for a long time. Wood said that the actual work was completed quickly by Tang once he knew what he was required to supply.

In the event, Tovbin never completed the batch assignment and Wood took it back from her. The work was not completed for long time; there was no one available to do it due to the press of other assignments. Tovbin was not disciplined for her failure to complete this assignment.

Tovbin testified at great length about the batch job. Tovbin's testimony was obfuscating and often incoherent. Many times Tovbin's testimony was at odds with documents she herself had prepared. I came to the conclusion that Tovbin engaged in a deliberate attempt to confuse the trier of fact. I credit Wood, based on her testimony and on the documents written by Tovbin and others. I find that Tovbin understood the batch assignment. Tovbin wrote several memoranda to her co-workers asking them to perform parts of the assignment for her. Although the task was somewhat difficult and time consuming, Tovbin had the skills and was being provided with information and assistance so that she could do the job successfully.

I do not find that the Respondent failed to provide Tovbin with necessary training, that the Respondent assigned her a task with an unrealistic completion date, required skills in which she had not been trained and for which she did not have software. I do not find that the Respondent unlawfully failed to give PC assignments to Tovbin.

2. Schedule changes and time off

From June 13, 1994, to April 26, 1996, Tovbin made approximately 84 requests to take time off or to adjust her hours of work in some manner. The vast majority of these requests were granted.

Wood testified that prior to the fall of 1995, employees could request an adjustment to their hours without giving a specific reason.²⁸ Although the form used to request an adjustment to working hours had a blank space for a "reason" Wood often approved the requests without any written reason being supplied. After the fall of 1995, Wood's supervisor Warshaviak told her that from then on employees must give a specific reason in writing on the form. Employees could no longer write "personal" in the blank space.²⁹

On February 15, 1996, Tovbin gave Wood a request for adjustment form asking to leave early the following day and giving as a reason "Personal—very urgent—just came up!!" Wood testified that she denied this request because Tovbin refused to give a reason other than "personal" and because Tovbin was proposing to skip lunch altogether. According to Wood, employees were permitted to make up time by working through

part of the lunchbreak, but they had to take at least one-half hour off for lunch.

On February 27, 1996, Tovbin requested to adjust her hours for March 5, the religious holiday of Purim.³⁰ On February 29, Wood approved Tovbin's request to arrive late at 9:45 a.m. and to leave early at 2:45 p.m. Tovbin had originally proposed to make up the time by skipping lunch altogether and by skipping both of her 15 breaks. Wood approved the request after Tovbin changed it so that she would take one-half hour for lunch and take both of her breaks. The rest of the time would be deducted from Tovbin's paycheck. Wood explained that employees are not permitted to skip breaks to make up for anticipated absences.³¹ On February 29, Tovbin submitted another request for adjustment of hours on March 5. This request proposed that Tovbin would come to work at 9:30 a.m. and depart at 3:30 p.m. and skip lunch altogether. Wood denied this request because Tovbin was requesting that she not take any lunch hour at all.

On March 7, 1996, Tovbin gave Wood a request to take 3 days of religious leave without pay and 1 day of vacation with pay. Wood told Tovbin that she did not have the authority to approve requests for leave without pay and she instructed Tovbin to speak to Pepper about the matter.³² Pepper testified that he denied Tovbin's request because she still had accrued vacation days in her bank. Pepper explained that employees who have accrued vacation days are not granted leave without pay; they must use up their vacation time first. When Tovbin protested to Pepper that he had permitted her to take leave without pay for religious purposes the preceding September, Pepper told her that he had done so only because she lied to him and said that she had no more vacation days in her bank. Later, Pepper found out that Tovbin had vacation days to her credit and she was saving them so that she could go away at the end of the year.

On March 15, 1996, Tovbin submitted a request for adjustment to normal working hours. Tovbin proposed that on March 18 she would leave 1 hour early and that on March 19 she would arrive 2-1/2 hours late. Tovbin wanted to make up the time by taking only one-half hour for lunch and adding extra hours of work on various days from the March 18th to the 22d. Tovbin gave as a reason that she wanted to see two doctors before a new medical plan took effect. There is no evidence that Tovbin was subject to a medical emergency. Wood denied the request telling Tovbin that she had a lot of work and that she was not getting her work done. Wood said that Tovbin could speak to Pepper about the matter.

When Wood became Tovbin's manager, she learned that Tovbin had to leave early on Fridays to observe the Sabbath. Tovbin informed Wood that she always left 2 hours before sunset. Wood asked Tovbin to check an almanac and inform her in advance what her hours would be in the wintertime so that Wood could plan ahead for coverage in the department. No other employee has been asked to furnish this type of in-

²⁸ An adjustment to normal working hours occurred when an employee took time off during normal working hours and made up the time by working extra hours during the same week.

²⁹ Tovbin's records show that even before the fall of 1995 she was writing a reason for each of her requests.

³⁰ On this day observant Jews are required to attend a reading of the Book of Esther in the morning and to partake of a festive meal beginning before sundown.

³¹ However, employees can use breaktime to make up for lateness due to transportation delays.

³² The evidence shows that only Pepper had the authority to approve leave without pay.

formation. The record does not show that any other employee has the same type of exactly predictable need to leave early.

Both Wood and Pepper denied that Tovbin's union activities played a part in their decision to deny any of Tovbin's requests for time off.

The complaint alleges that Respondent unlawfully denied Tovbin's requests on February 15, 16, and 17 and March 7 and 15, 1996. I credit the testimony of Pepper and Wood about the way they dealt with Tovbin's requests. The evidence shows that Tovbin's requests were handled in accordance with Respondent's procedures in effect at the relevant times. Despite a valiant attempt to show disparate treatment, the General Counsel has not convinced me that the Respondent discriminated in its treatment of Tovbin. Indeed, the voluminous documentary evidence shows that Tovbin requested more adjustments and time off than any other employee and that the vast majority of her requests were granted as a matter of routine.

3. Denial of information

On June 16, 1995, DeFilippi sent Pepper a letter about information requests from Local 424. The letter concluded:

In order to provide a more systematic approach which will better serve our members needs, I will direct our shop stewards to request information that is relevant to a specific grievance directly from you, verbally and by certified mail back-up.

In the event the information is not forthcoming, I will contact you directly to ascertain what the delay is

Copies of DeFilippi's letter were sent to Shop stewards John Amato, Dan Barton, and Richard Schluger. DeFilippi testified that he instructed the shop stewards to direct their information requests to Pepper.

DeFilippi stated that despite his agreement with Pepper to transmit all information requests directly to Pepper, the shop stewards reported that he was refusing to provide information. According to DeFilippi, he then told the shop stewards to request the information directly from the supervisors.

Barton testified that he probably saw DeFilippi's letter of June 16, 1995, but he could not recall anything about it. Barton stated that he had no idea what the letter pertained to. Barton said he never followed the steps outlined in the letter.³³ According to Barton, he always sent a request for information to a first line supervisor even though there was not one instance where a supervisor directly responded to his request for information. Barton testified that only Pepper or his predecessor Kahn had ever provided information in response to the Union's request. Barton said that he persisted in sending a first request to the supervisor knowing that there would be no response; then he sent a second request to Pepper about one week later.

On February 21, 1996, Barton sent a memorandum to Kiendl requesting information pertaining to a grievance filed by Tovbin about the failure to permit her to use breacktime in order to leave early. Barton asked Kiendl to provide attendance records, which would show the reason for early departure of other employees, and how their time was made up. Barton wanted the information for a step-2 grievance regarding Tovbin. Kiendl did not provide the information because the policy required that information requests be made to Pepper. Barton

testified that on March 11 he sent a request for the same information to Pepper via the interoffice mail. Barton stated that he never spoke to Pepper about the grievance or the request for information. Barton was out of the office on suspension from March 20 to April 22.³⁴ Tovbin resigned on April 25 and the Union did not pursue the grievance nor make any further request for information.

On February 21, 1996, Barton requested records for employees in the IS department relating to a possible grievance concerning disparate overtime assignments. Again, he sent the request to Kiendl, again he received no response, and again he directed his request to Pepper on March 11 via interoffice mail. This grievance related to an alleged denial of overtime to Tovbin.

On February 21, 1996, Barton wrote to Kiendl stating that Tovbin was being denied training and that the Union would be filing a grievance. He requested information pertaining to training for each employee in the IS department.

On March 11, Barton addressed a memorandum to Pepper complaining that Tovbin had been denied the use of the office fax machine for her correspondence. Barton said that a grievance alleging discrimination would be filed and he requested information regarding the transmittal documentation for the fax machine.

Pepper testified that he received copies of Barton's information requests after March 11. He was surprised to see that Barton had addressed the requests to Kiendl because of his agreement with DeFilippi that all requests for information would be sent to him directly. Pepper did not speak to Barton about all of the requests because he was suspended on March 19. Instead, Pepper telephoned DeFilippi to discuss the requests and to inform him that the Fund was putting together the documents for the Tovbin grievances. Pepper was going to wait until Barton returned from his suspension to deliver the information. In the event, Tovbin resigned 3 days after Barton returned to the office. The Union did not renew the request for information after Tovbin's resignation.

The complaint alleges that the Respondent refused to provide the Union with requested information relating to Tovbin's grievances.

I credit Pepper that he and DeFilippi had an agreement, memorialized in the latter's letter, that all requests for information would be made directly to Pepper. Barton testified that despite his consistent attempts, he never received information from supervisors and that he got all the responses to information requests from Pepper. I do not credit DeFilippi's testimony that the written agreement was not effectuated. Thus, I do not find that the Fund refused to provide information where the requests were improperly directed to line supervisors. I credit Pepper that he started to gather the information requested by the Union after March 11 and that he told DeFilippi that he would give the material to Barton after he returned from his suspension. I credit Pepper that he did not turn over the material because the Union did not ask for it after Tovbin resigned and because the Union did not further pursue Tovbin's grievances. I find that the requests for information were directly related to Tovbin's grievances. Tovbin submitted her resignation on April 25 and the Union did not tell Pepper that it nevertheless wanted the information. If Pepper's belief that the Union was no longer

³³ I note that in much of the correspondence to management, Barton styles himself "grievance chairperson."

³⁴ As discussed above, Barton was told that he was suspended on March 19.

interested in the material had been wrong, surely one telephone call from DeFilippi or a single memorandum from Barton would have alerted him. Pepper's telephone call to DeFilippi about the matter when Barton was suspended shows his good-faith willingness to supply the requested information. I do not find that the Respondent violated the Act by failing to turn over information relating to Tovbin's grievances.

4. Constructive discharge

The complaint alleges that the Respondent caused Tovbin's "termination" by assigning her tasks for which she did not have adequate training and did not have the appropriate software; by assigning her a task with an unrealistic completion date; by failing to provide her with necessary training; by failing to give her PC work assignments; by denying her requests to alter her hours, for emergency leave, for schedule changes and for religious days off without pay; by refusing to provide information to process her grievances; and by refusing to admit her to a grievance meeting.

Tovbin testified that she resigned because she saw files in Wood's office with her name on them and she saw her name next to some dates on Wood's PC. Tovbin believed that Wood was gathering information about her. When asked by counsel for the General Counsel why she had resigned, Tovbin testified:

I resigned because I had just really basically had enough. When I saw the folders there and I was sick to my stomach that people were plotting against me, and I . . . had been seeing my doctor in recent months and I wasn't sleeping well, I wasn't eating, I couldn't concentrate that well. I felt very humiliated many times over the course of the past few months. I felt I just couldn't take it anymore.

I have not found proof of any antiunion animus in Respondent's actions regarding Tovbin. I have found above that the Respondent did not engage in the unfair labor practices alleged with respect to Tovbin, and I conclude that the Respondent did not unlawfully cause Tovbin to resign.

I note that to support the assertion that the Respondent constructively discharged Tovbin, the General Counsel's brief relies on events not alleged in the complaint herein as unfair labor practices. In addition, the brief cites some testimony by Tovbin that I clearly indicated that I would not consider because it was hearsay. I shall not consider reasons for constructive discharge which were not alleged in the complaint and as to which the Respondent was not on notice.

5. Delaying payment of accrued sick leave

On April 12, Tovbin requested that a balance of 120 days of sick leave be paid to her in cash. On the morning of April 19, Tovbin addressed a memorandum to Pepper stating that she had been told that there was a discrepancy in her actual entitlement and that some days were in dispute. Tovbin claimed that Pepper would not release her check until he saw her in a disciplinary meeting.

DeFilippi testified that he was getting many telephone calls from Tovbin claiming that she was being persecuted; she was under stress and seeing people about her health. Tovbin told DeFilippi that she wanted to quit and that she wanted to cash in her sick leave. DeFilippi stated that he spoke to Pepper about the problem. Pepper informed him that there was a dispute over the number of days Tovbin was owed and that he wanted

to meet with her to straighten it out.³⁵ Pepper told him that the only question was how many days Tovbin was entitled to; he did not want to discuss anything else with Tovbin. Tovbin had informed DeFilippi that she did not want to meet with Pepper. She believed that there was a vendetta against her and that the meeting was a "trap" with the sick leave issue as "bait." However, she was willing to meet with a supervisor. Even though DeFilippi knew that Pepper wanted to see Tovbin for the sole purpose of determining the sick leave entitlement issue, DeFilippi wrote Pepper a letter on April 18 asserting that Pepper was conditioning Tovbin's ability to cash in sick days upon a "disciplinary meeting." DeFilippi asserted that Pepper was violating the Americans with Disability Act and that he could have "catastrophic results on Ms. Tovbin's well being." Pepper replied on April 19 stating:

If Ms. Tovbin wants to cash in her accumulated sick days, please have her contact me. This has nothing to do with any disciplinary meeting. However, her attendance record will be reviewed to determine how much sick leave she has remaining."

On April 19, DeFilippi suggested to Pepper that the Fund pay Tovbin for 100 days and argue about the rest later. He told Tovbin that she would get a check for 100 days sick leave. In fact, Tovbin received a check for 100 days before 11:30 a.m. Tovbin sent Pepper a second memorandum at that hour, complaining that she had only been paid for 100 days; she was sure that DeFilippi said that she would get a check for more than that number of days.³⁶ On April 25, Tovbin again wrote to Pepper complaining that she had not been paid for the amount being held due to a discrepancy. This was the day that Tovbin submitted her resignation later. On May 1, Tovbin again sent a memorandum to Pepper stating that she had been informed that she would not get the balance of her sick pay until she arranged a meeting with Pepper. She demanded interest at the prime rate from April 18.

The Fund paid Tovbin for the full amount of the 20 days in dispute on May 8.

The complaint alleges that the Respondent delayed payment of accrued sick leave to Tovbin because of her union activities.

I have found no evidence of antiunion animus with respect to Tovbin's activities. The evidence is clear that Tovbin requested payment of her sick leave accumulation on April 12. Although the Respondent had a question about her entitlement to the full 120 days she claimed, Pepper readily acceded to DeFilippi's suggestion of April 19 that Tovbin be paid for 100 days pending resolution of a possible discrepancy. Pepper wanted to meet with Tovbin to figure out her actual entitlement; this was not an unreasonable request. Tovbin refused to discuss the problem with Pepper; she was told the purpose of the meeting but she persisted in characterizing it as a disciplinary meeting called to "trap" her. Tovbin's reasoning is not clear. By May 8, even though Tovbin was not cooperating with the Respondent's reasonable request that she help straighten out the questions relating to her sick leave balance, the Respondent

³⁵ The question about sick days arose from an overseas vacation trip that was extended when Tovbin claimed to be sick. Tovbin had made certain statements to the Respondent that led it to believe that she had not been sick.

³⁶ Although I will not try to describe the dispute in detail, a reading of Tovbin's memos shows that even she was confused as to the number of days owed to her. She variously claimed 20 days or 23 days.

had paid her the full amount she claimed. Thus, it took less than a month to pay Tovbin everything she wanted. I find that Respondent did not unlawfully delay paying Tovbin for her accumulated sick leave.

J. Refusal to Schedule Contract Negotiations

On September 11, 1996, DeFilippi wrote to the Respondent requesting negotiations for a successor agreement to the contract expiring on November 30, 1996.

On October 1, the Fund's labor counsel replied to DeFilippi. The letter stated:

On September 9, 1996, the Welfare Fund was presented with a Petition signed by a majority of the bargaining unit employees which stated that they no longer wanted to be represented by Local 424. In addition, the employees filed a petition for an election at the National Labor Relations Board. Accordingly, until Local 424's representation status has been resolved, it does not make sense to open contract negotiations. Of course, the Welfare Fund will continue to recognize your union and the existing contract until the employees' choice has been determined.

I have found that the Respondent engaged in an unlawful refusal to provide information and a delay in providing the information from April 21 to June 3, 1998. This unfair labor practice could not have affected the employee petition presented to the Respondent on September 9, 1996. Thus I cannot find that the employee petition was tainted by any unfair labor practices. It was thus not unlawful for the Respondent to refuse to negotiate a new collective-bargaining agreement with Local 424 because a majority of the unit employees stated that they no longer wished to be represented by the Union.

CONCLUSIONS OF LAW

1. By refusing to provide information about vacation scheduling to the Union on April 21, 1998, and by delaying in providing the information from April 21 to June 3, 1998, Respondent violated Section 8(a)(5) and (1) of the Act.

2. The General Counsel has not proved that the Respondent engaged in any other violations of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I have found that the Respondent furnished the requested information to the Union after a period of delay. Therefore, I need not order it to do so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁷

ORDER

The Respondent, United Federation of Teachers Welfare Fund, New York, New York, its officers, agents, successors, and assigns, shall

³⁷ 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.

1. Cease and desist from

(a) Refusing to furnish requested information and delaying in furnishing to the Union requested information about vacation policies.

(b) In any like or related 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) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."³⁸ 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 immediately upon receipt 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 April 21, 1998.

(b) Within 21 days after 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

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 refuse to provide information to United Industry Workers Local 424.

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

³⁸ In the event that the Board's Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

