Success Village Apartments, Inc. ***and*** **International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO.** Cases 34–CA–10622, 34–CA–10623, 34–CA–10624, 34–CA–10713, 34–CA–10731, 34–CA–10735, 34–CA–10754, 34–CA–10831, 34–CA–10834, and 34–CA–11047

September 29, 2006

DECISION AND ORDER

BY MEMBERS LIEBMAN, KIRSANOW, AND WALSH

This case involves allegations that the Respondent, Success Village Apartments, Inc., committed numerous unfair labor practices from the summer of 2003 to the fall of 2004.[1] The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by retaliating against employees Dennis Brown, Lloyd Reid, and Tony Teja for their union activities. He also found that the Respondent violated Section 8(a)(4) and (1) by retaliating against Brown, Reid, and Una Boulware for their testimony in a prior Board proceeding.[2] Finally, the judge found that the Respondent violated Section 8(a)(5) and (1) by making several changes in terms and conditions of employment without first giving the Union notice and an opportunity to bargain over the changes.

1. We agree with the judge that the Respondent violated the Act by engaging in numerous acts of retaliation against Boulware, Brown, Reid, and Teja[3] because of their union activities[4] and/or their prior Board testimony. In particular, we affirm the judge's finding that the Respondent imposed a new "Conflict of Interest" policy, threatening to terminate Boulware if she did not cease her off-duty brokerage practice selling co-op units, because Boulware testified in *Success Village I*.[5] In finding this violation, we do not rely on the judge's conclusions regarding the importance of Boulware's testimony to the finding of a violation in *Success Village I*, as the judge's decision in that case had not yet issued when the Respondent initiated its unlawful conduct against her.

2. We also affirm the judge's finding that Maintenance Manager Phil Segneri implicitly threatened to fire Boulware on September 15, 2003, in retaliation for her prior testimony, when Segneri told Boulware that termination was "coming soon" during an argument about Boulware's completion of a work assignment. Although Segneri denied knowing about Boulware's testimony at the time of the threat, the judge generally discredited his testimony regarding the incident and found that the Respondent offered no credible explanation for Segneri's behavior. Segneri's knowledge of Boulware's testimony is also indicated by the timing of the threat, which followed on the heels of the Respondent's unlawful prohibition on Boulware selling the units. Further, Segneri's knowledge is indicated by his close working relationship with Property Manager Dennis Callahan, who undisputedly knew about Boulware's testimony and notified her about the "Conflict of Interest" prohibition. As demonstrated by his numerous retaliatory actions against Teja, Reid, and Brown, Segneri bore considerable animus towards union supporters. Under these circumstances, it is reasonable to infer that Segneri's statement to Boulware,

[1] On May 16, 2006, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] See *Success Village Apartments, Inc.*, 347 NLRB 1065 (2006) (*Success Village I)*.

[3] The Respondent contends that various allegations concerning Tony Teja should be dismissed because the General Counsel should have consolidated those allegations for litigation in *Success Village I.* We find no merit in this contention. Indeed, in *Success Village I,* the Respondent had opposed adding allegations to those being litigated there, arguing that another complaint, which could include such allegations, was going to issue.

[4] We affirm the judge's reliance in this case on Administrative Law Judge Steven Davis' recitation in *Success Village I* of substantial background evidence of statements by the Respondent's officials showing their union animus and intent to retaliate against employees who were prominent union supporters. As further evidence of animus, we rely on the unfair labor practices that the Board found in *Success Village I.*

In addition to the reasons set forth by the judge for finding that the Respondent violated Sec. 8(a)(3) by disciplining Tony Teja for his refusal to place a parking violation sticker on a car, we rely on evidence demonstrating that the Respondent treated Teja more harshly than other employees who similarly refused to follow orders.

We affirm the judge's finding that the Respondent unlawfully issued a written warning to Dennis Brown on December 18, 2003, for allegedly failing to shovel the sidewalks as instructed on December 16, and for allegedly leaning on a snow shovel for 10 to 15 minutes during the workday. We find it unnecessary to pass on the judge's separate finding that Maintenance Manager Phil Segneri violated the Act by initiating a confrontation with Brown over his alleged failure to follow instructions on December 16, as such a finding would be cumulative.

[5] For reasons set forth by the judge in his decision, we affirm his finding that the Respondent violated the Act by issuing a written warning to Boulware and suspending her on December 18, 2003, and by issuing a written warning to Boulware on October 13, 2004. We also observe that the unlawful warning on December 18, 2003, issued 2 days after the Union filed charges naming Boulware as a discriminatee in the present case, and that the unlawful warning on October 13, 2004, issued shortly before the hearing in this case, in which Boulware was likely to be a prominent witness, was scheduled to open. We find the timing of these events further suggests the Respondent's animus towards employees, like Boulware, who participated in Board proceedings.

that termination was "coming soon," was motivated by similar animus against an employee who testified in support of unfair labor charges against the Respondent.

We agree that the Respondent violated Section 8(a)(5) of the Act by unilaterally implementing the "Conflict of Interest" policy, by removing a phone from an employee work area, and by prohibiting employees from making local calls on worktime. Unlike the judge, however, we do not find that the Respondent violated the Act by unilaterally implementing a new parking policy.

The Respondent's cooperative apartment complex consists of 97 buildings spread over approximately 64 acres. The complex has a main building which houses a large meeting room, a management office, a business office where the clerical employees work, a maintenance area, and a boiler room. Maintenance employees report to the main building at the start of the workday to punch the timeclock and receive their work assignments. They also return to the building to punch out at the end of the workday.

Until September 4, 2003, employees had been permitted to park their vehicles in available spaces across the street from, or alongside of, the main building. On that day, employees were told that, effective immediately, they were required to park their vehicles in a newly constructed parking lot that was located approximately 200 yards behind the main building. The parking lot, which contains about 50 spaces, had been constructed to help remedy a lack of sufficient parking in the complex. Around the same time the lot was completed, the Respondent assigned existing parking spaces to particular residents, including the spaces across from the main building which had previously been utilized by the employees.[6] It is undisputed that the Respondent did not notify the Union prior to informing employees of the new parking policy.

Relying on *United Parcel Service,* 336 NLRB 1134 (2001), the judge found that employee parking is a mandatory subject of bargaining, and that the Respondent therefore violated Section 8(a)(5) and (1) by unilaterally implementing the new parking policy. The Respondent, however, argues that the parking policy's effect on working conditions was de minimis, and it therefore had no obligation to bargain with the Union over the change. We agree.

An employer is required to bargain over issues concerning employee parking when those issues have a significant, substantial, and material effect on terms and conditions of employment. Compare, *United Parcel Service,* supra (employer required to bargain over effects of relocating parking lot 1-1/2 miles from its facility, increasing employees' commuting time by 40 minutes), with *Advertiser's Mfg. Co.,* 280 NLRB 1185, 1193 (1986) (no bargaining required where employer prohibited employee parking in first row of parking lot). Here, the only change resulting from the Respondent's new parking policy is that employees now have to walk approximately 200 additional yards from their vehicles to the main building.[7] We do not find that this constitutes a substantial change in conditions of employment. See *Berkshire Nursing Home, LLC,* 345 NLRB 220 (2005) (ban on parking in employer's lot not material where only effect on employees was a minor inconvenience in having to walk several minutes to employer's facility).[8] Accordingly, we reverse the judge and dismiss this complaint allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Success Village Apartments, Inc., Bridgeport, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing existing terms and conditions of employment for bargaining unit employees by implementing a "Conflict of Interest" policy concerning off-duty employee participation in residential co-op resales and including the sanction of termination for violation,

[6] It is unclear from the record whether any of the parking spaces alongside of the main building were assigned to residents.

[7] Although the judge also found that the parking change caused some inconvenience to maintenance employees who used their personal vehicles to drive to worksites throughout the complex, there is little evidence to support this finding. Michael Langston, a union business agent who was formerly employed by the Respondent, testified that it was common practice for employees to use their own vehicles, rather than those owned by the Respondent, to drive around the complex. However, Langston ceased working for the Respondent in 2001, and admitted that he did not know whether employees continued to use their vehicles for work purposes since he left the Respondent's employ.

[8] Member Liebman finds that the facts here are distinguishable from those in *Berkshire Nursing Home,* supra, in which she dissented. In that case, the employer unilaterally imposed a parking policy that resulted in employees having to park in a lot that not only was further from the entrance to the employer's facility, but that also was not as secure or as safe in hazardous weather as the lot in which they had previously been allowed to park. In the circumstances presented here, however, she finds that the relatively short additional distance the employees had to walk as a result of the new parking policy did not result in a material change in working conditions.

by prohibiting employees from making personal local calls during worktime, and by removing the telephone from an employee work area, without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes.

(b) Discriminatorily changing work policies, threatening termination, harassing, and warning employees in retaliation for their testimony in Board proceedings.

(c) Sending employees home during the middle of a workday, denying them light-duty work, issuing warnings, ridiculing, harassing, suspending, terminating, or otherwise discriminating against them because of their union activities.

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

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

(a) Rescind, at the request of the Union, the unilateral changes made by the Respondent, including a "Conflict of Interest" policy prohibiting unit employees from engaging in off-duty co-op real estate sales, prohibiting unit employees from making local personal calls during worktime, and removing a telephone from an employee work area.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

(c) Make its employees whole for any losses they may have suffered as a result of the unlawful unilateral changes, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, offer Tony Teja full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(e) Make Una Boulware, Lloyd Reid, and Tony Teja whole for any losses of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, warnings, suspensions, and other discriminatory actions involving Una Boulware, Dennis Brown, Tony Teja, and Lloyd Reid, and within 3 days thereafter notify the employees in writing that this has been done and that the discriminatory actions will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Bridgeport, Connecticut, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 25, 2003.

(i) 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.

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

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change the terms and conditions of our employees in a bargaining unit represented by the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO, by implementing a "Conflict of Interest" policy prohibiting off-duty employee participation in residential co-op resales and including the threat of termination for violation, by prohibiting employees from making personal local calls during worktime, or by removing the telephone from an employee work area, without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes.

WE WILL NOT discriminatorily change work policies, threaten termination, harass, and warn employees because they have testified in proceedings of the Board.

WE WILL NOT send employees home during the middle of a workday, deny them light-duty work, issue warnings, ridicule, harass, suspend, terminate, or otherwise discriminate against them because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, at the request of the Union, rescind the unilateral changes in terms and conditions of employment that we have made.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by us, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

WE WILL make affected unit employees whole for any losses they may have suffered as a result of the unlawful unilateral changes.

WE WILL, within 14 days from the date of the Board's order, offer Tony Teja full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Una Boulware, Tony Teja, and Lloyd Reid for any losses of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL**,** within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, suspensions, warnings, and other discriminatory actions involving Una Boulware, Tony Teja, Dennis Brown, and Lloyd Reid, and WE WILL**,** within 3 days thereafter, notify each of them in writing that this has been done and that these actions will not be used against them in any way.

SUCCESS VILLAGE APARTMENTS, INC.

Rick Concepcion, Esq., for the General Counsel.
Marc L. Zaken, Esq., of Stamford, Connecticut, for the Respondent.
Thomas W. Meiklejohn, Esq., of Hartford, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Hartford, Connecticut, on December 6–10, 2004, January 25–28, 2005, February 1–3, March 14–17, 21–24 and 28 and 30, 2005. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 376, AFL–CIO (the Union or UAW) filed a number of charges and amended charges in the captioned cases which resulted in complaints being issued on January 29, 2004, March 17, 2004, and culminating in an order further consolidating cases, second amended consolidated complaint and notice of hearing (the complaint) issued July 23, 2004. The complaint was further amended at hearing and based on charges filed after the hearing began, another complaint was issued on February 24, 2005. I granted a motion to consolidate this case with the others on March 14, 2005. In general, the complaint alleges that Success Village Apartments, Inc. (Respondent or Success Village) has engaged in conduct in violation of Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act). Respondent filed timely answers, wherein it admits, inter alia, the jurisdictional allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Bridgeport, Connecticut, has been engaged in the operation of a nonprofit cooperative apartment complex. During the 12-month period ending May 31, 2004, the Respondent derived gross revenues in excess of $500,000, and during the same time period it purchased and received at its facility goods valued in excess of $50,000 directly from points outside Connecticut. The 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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Success Village was built in 1941, to provide temporary housing for workers during World War II in defense related industries in Bridgeport, Connecticut. The complex consists of 924 apartments in 97 buildings spread over 64 acres and straddles the Bridgeport, Stratford town lines with about one third of the complex in Stratford, Connecticut. It was owned by the federal Government and managed by the Bridgeport Housing Authority. It was to be torn down when the war ended; however, in the 1950s, it was decided to turn the complex into a cooperative. A mortgage was taken out for about $3 million and the complex was sold to the cooperative. Units were sold to buyers for $300 to $400 a unit. The units now sell for from $50,000 to $90,000. The complex now houses primarily low to middle income owners, many on fixed incomes or pensions. The owners are subject to a monthly common charge and a separate charge for electricity. The cost of living in Success Village is about 30 to 40 percent less than in other comparable housing in the Bridgeport area.

The complex has a central heating plant located in the main building which also houses, on the main floor, a community hall which is a large meeting room, a management office, and a business office where the clerical employees work. Below the main floor is the maintenance area which contains a carpenters' shop which is adjacent to the boiler room.

A nine-member board of directors, all of whom are residents of the development and elected by the residents, runs the Respondent. The board has monthly meetings.

Since about 1975, the Union has represented the Respondents employees in the following appropriate unit:

> All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

The last collective-bargaining agreement between the parties ran from June 1, 1999, through May 31, 2002. The contract contains a list of wages for various "labor grades," specifically mentioning leadman, bookkeeper A, plumber 1A, fireman 1A first shift, carpenter, carpenter's helper 1B, mason, groundsman, plumber 1B, bookkeeper assistant, bookkeeper A, and fireman 1B. In 1999, about 20 employees worked for the Respondent. By the fall of 2001, there were about 13 to 17 employees. By the time the events that caused the instant case to be heard, this number had been reduced to 10 employees. The Union has two on-site agents who are the Respondent's employees. They are the shop chair and the shop steward.

The property has been managed over the years by several management companies. Prior to 2001, as far as the evidence in this case reflects, the relationship between the Respondent and the Union had been good enough to have not resulted in proceedings before the NLRB. As will be set forth below, in the summer of 2001, the board of directors decided to obtain a new management company to remedy certain problems it had with the operation of the complex. Chief among its concerns was its belief that the employees were not working hard and were inefficient, and attempts to address that situation in the past were met with vigorous union opposition, including the filing of a significant number of grievances. In a meeting in June 2001 wherein the Respondent attempted to convince the Union to agree to certain changes to the contract in effect and to certain personnel changes, civility between the parties died and Union President Russ See informed the president of the Respondent's board that the Union would bankrupt Respondent with legal expenses by filing grievances, and then walked out of the meeting.[1] Following this aborted meeting, Respondent hired as its new property manager, WC&F Real Estate and Development Corporation. WC&F is owned by Frank Callahan and will be referred to as WC&F or Callahan. At about the time Respondent hired Callahan, he made a number of suggestions to change procedures with respect to the employees to achieve greater efficiencies. He also recommended to the board, that based on its history with the Union and if it wanted to make changes, that it retain a labor attorney, recommending Marc Zaken. Thereafter, Respondent interviewed and hired attorney Zaken.

At material times to this case, Callahan was the property manager, and George Heil or Phil Segneri were its maintenance managers. Leeann Istvan was Respondent's resale committee chairperson and for much of the time, president of the board. All four individuals were supervisors within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

Subsequent to the hiring of Callahan and Zaken, Respondent embarked on a course of action with respect to its union employees that resulted in the filing of ULP charges and the issuance of multiple complaints by Region 34. The first group of these complaints were consolidated for hearing and were heard beginning in 2003.

[1] At some point in the record of the instant case, the Respondent's legal fees resulting from the grievance filings and the trial of the first Success Village case were said to exceed $600,000.

B. The First Success Village NLRB Proceeding

Judge Steven Davis heard the case in which Success Village was the Respondent in Hartford, Connecticut, over 9 months in 2003 and 2004 with the hearings ending in February 2004. His case (*Success Village 1*) involved many of the same managers, board of directors members and employees who are involved in the instant case. Many of the events alleged to have been violations of the Act in the instant case occurred within the same time frame as was involved in *Success Village 1*. Judge Davis issued his decision on June 30, 2004. Many of the findings made by Judge Davis are applicable to the instant case and are set out below.

1. The issue of employer animus toward the Union

Judge Davis' decision reads, at pages 33–35:

> Certain board members met with Attorney (Marc) Zaken on July 12, 2001 prior to his being retained. A memo entitled "project rope-a-dope" was prepared thereafter which stated that the purpose of the meeting was to "obtain information regarding the ousting of Success Village Union employees." The memo further stated that Callahan met with the board and "stated the need of his organization due to all the union problems we are encountering." Callahan stated that "with the proper personnel at the helm, Success Village will be running smoothly within a short time." A confidential memorandum concerning legal advice given to the board was prepared. The Respondent objected to that memo and its offer in evidence was rejected as being subject to the attorney client privilege.
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> June Prescott, a member of the Respondent's board of directors, testified that it was never the board's plan to oust the Union from Success Village. She stated that the term "ousting" in the memo related to the board's belief that upon the expiration of the contract on May 31, 2002, the Union would no longer be the employees' representative, and that the Union would be "through" and "ousted" as of that date, and that then the Respondent "had nothing more to worry about." She referred to the confidential memo as being not "for everyone's eyes. In other words, this was our problem until we solved it." Board member Barbara Ignaitiuk stated that she believed that upon the contract's expiration, the Respondent could fire the employees and hire others. However, at the meeting with Zaken on July 12, the Board was informed that it had to bargain in good faith with the Union even though the contract bore an expiration date.
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> As set forth above, on October 19, 2001, as set forth in the credited testimony of (Union President Russ)See and (leadman Joseph) Otocka, (board member Robert) Marcinczyk told See that "as long as I'm president, for as long as I'm president I'm going to get rid of this union." Otocka testified that he heard board president Marcinczyk say essentially, that "he was going to do everything he could in his two year term of office there to get rid of Russ (See) and the UAW." I do not credit Marcinczyk's testimony that he merely told See that he would beat him at his own game. Even assuming he said that, such a comment tends to support a finding that Marcinczyk sought to eliminate the Union from Respondent's premises.
>
> Board member Willie Lawrence signed a memo in July, 2002, which stated, inter alia, that the board based many of its decisions "on how to discourage the employees and how to get rid of the union" based on suggestions made by board members Tortorello and Bica. Lawrence wrote that Tortorello "hated" the idea that (Union shop chair and employee Dennis) Brown was allowed to attend Union meetings on company time. "He felt that we shouldn't allow it no matter what the contract said." Lawrence testified that he could not say that the Board "exactly discussed getting rid of the union per se, what we was trying to do is trying to get more work out of the employees and just trying to figure out a way to do that. I don't remember discussing any other thing." He had no recollection of any matter in the memo aside from what was written there. He first stated that he did not know that (Union representative Michael) Langston was a union agent. He believed that clerk Ceil Johnson wrote his statement, and then he signed it. He further stated that he did not read it when he signed it. He also said that he hand-wrote the statement and Johnson then typed it. Then he said that Johnson hand wrote it and he signed it. He also stated inconsistently that he was a board member, and was not a board member when he signed it. In fact, he was not on the board when he signed it, and then he said he was not certain if he was on the board at that time. He noted that he has urged the board to hire more employees to get the work done.
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> Board member Judith Cannizzio stated that Marcinczyk discussed "getting rid of the Union" at a number of board meetings, adding that he said that the "cost to keep them there was too much and that they wanted to more or less get rid of them and go to seasonal work or whatever and outside help, outside contracting . . . instead of union employees."
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> She stated that "rope-a-dope" was a "code word" so that the Union members would not know what they were talking about. Cannizzio also stated that Marcinczyk said that he wanted to get rid of (Dennis) Brown and make him a seasonal employee "because he was a shop person and because they wanted to get rid of who they could that was union." The other board members agreed with this plan.
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> Cannizzio stated that prior to the summer of 2001, the relationship between the Union and the Respondent was good, with the employees working well and few grievances being filed. She conceded hearing some complaints, which were not "drastic" complaints, that the employers were not performing their work. She also noted that in the fall of 2002, residents complained that more workers were needed.
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> Cannizzio is a union member at her job, and has been a friend of See for more than 15 years. She showed him copies of board minutes and spoke with him about the topics discussed at board meetings. She claimed that the discharges of (Union member employees) Kelly and Agnant were because they were Union members, and also stated

that the Respondent sought to eliminate Union employees in the boiler room so they could automate some of their duties.[2]

Callahan testified that Marcinczyk's meaning of the term "rope-a-dope" in the July memo signified the course of events if the Respondent attempted to make its operation more efficient: the Union would file grievances causing the Respondent to pay large legal fees, and then the Respondent would "give in." Board member Ignatiuk gave similar testimony. Marcinczyk testified that the term was a reference to a prizefight in which one boxer became exhausted in punching the other who leaned against the ropes. He applied it to the current situation, in which the Respondent expected to get a "deluge" of grievances, but that the Respondent would absorb them and then "win the fight legally." He denied that it was a plan to get rid of the Union.

(Dennis) Brown testified that when he was out of work due to an injury in August, 2002, he and (employee Raul) DeSousa were scheduled to meet with an NLRB agent. The agent cancelled the meeting, and Brown went to the shop where he told (Respondent's then Maintenance Manager George) Heil that DeSousa would not have to meet with the Board agent since the meeting was cancelled. At that time, Callahan entered the room and said "oh, this damn union is in here again. I got a business to run here. I can't be fooling around with this union." Brown conceded that his pre-trial affidavit did not include this exact exchange, but it did state that Callahan said something about the union being "in here again," and that "he had a place to run and this union kept coming in."

Heil's pretrial affidavit stated that board members Marcinczyk and Tortorello complained often about Brown's grievance activities. Heil's affidavit also stated that he believed that Callahan or some of the other board members "had it in for Brown" because he filed many grievances and utilized "Union time" on the Respondent's time.

Heil testified that the believed that Callahan "had it in" for all the Respondent's employees, and he also believed that Callahan is attempting to "get rid" of the Union. Heil's credibility is subject to question. He first testified that he come to the hearing alone, in his own car, and that he followed Callahan and Zaken. Then he testified that he came to the hearing in the same car as Zaken and Callahan, and then stated that Callahan followed them in his own car. He admitted that he gave false testimony that he drove lone because he believed that it "was not the right thing to say" because it may have been a "conflict of interest" for him to have traveled to the hearing with the Respondent's attorney and principal. It should be noted that at the time of the hearing, Heil was no longer employed by the Respondent. He further testified that, on substantive matters, his testimony was inconsistent with his pre-trial affidavit. Nevertheless, he stated that other than his testimony concerning his trip to the hearing, the rest of his testimony was truthful. As noted below, I credit Heil's testimony concerning the Respondent's attitude toward the Union. Heil was the on-site full-time manager of the WC&F who enjoyed the confidence of Callahan. The fact that he lied about how he came to the hearing does not detract from his testimony in chief as to the matters about which this hearing was concerned.

The above synopsis of the evidence concerning the Respondent's attitude toward the Union and toward its employees who were represented by the Union has a common thread. There was a dislike of the Union because of its aggressive stance regarding grievances. If the Respondent sought to oppose a grievance it had to incur legal fees and increased costs. The board believed that it was powerless to oppose the Union, and therefore resented it and its members. In retaining Callahan and Zaken, the Respondent sought to "oust" the Union, and if it could not do so, it would attempt to change the relationship with the Union. Callahan testified repeatedly that he was hired upon a promise to change the relationship between the Respondent and the Union, and to change the operation in order to make it more efficient. He sought to make these changes immediately upon his hire, and, as testified repeatedly by Callahan, affected the employees directly.

I credit Heil's testimony concerning the Respondent's attitude toward the Union. Such testimony was consistent with that of board member Prescott who believed that the board wanted to "oust" the Union, and board president Marcinczyk's statement that as president, he would do everything he could to get rid of the Union, and Lawrence's testimony that the board wanted to get rid of the Union. Although the testimony of Heil and Lawrence were at times confused and inconsistent, their essence, that the Respondent sought to rid itself of the Union was consistent and credible.

2. Violations of Section 8(a)(5) of the Act found by Judge Davis in *Success Village 1*

Judge Davis found that Respondent violated Section 8(a)(5) by:

a. in September 2001, unilaterally instituting a new phone use policy prohibiting employees from using the phone located in the downstairs maintenance shop to make long distance calls;
b. in January 2002, unilaterally instituting a new copier and fax use policy;
c. in July 2002, unilaterally subcontracting Unit employee work;
d. on July 2002, unilaterally implementing a new time card discrepancy discipline policy;
e. on and since August 20, 2002, unilaterally changing the sick leave accrual policy;
f. on October 4, 2002, unilaterally subcontracting Unit work;
g. on various other dates between October 1 through November 30, 2002, unilaterally subcontracting Unit work;

[2] Board members Lawrence and Cannizzio were removed from the board following the hearing in *Success Village 1*.

h. engaging in bad faith bargaining during the 2002 contract negotiations by insisting, as a condition of continued bargaining, that the Union agree to conduct negotiations in separate rooms though an intermediary. In this regard, the Judge found that after only four negotiation sessions, Respondent prematurely and unlawfully declared impasse, then "effectively foreclosed bargaining from continuing," and;

i. on July 3, 2002, unilaterally implementing a new locker and lock policy.

3. Violations of Section 8(a)(3) found by Judge Davis in *Success Village 1*

In order to prove a violation of Section 8(a)(3), the General Counsel must show that union activity was a substantial motivating factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity, and an adverse personnel action caused by such animus or hostility. *Wright Line,* 251 NLRB 1083 (1980). Inferences of knowledge, animus, and discriminatory motivation may be drawn from circumstantial evidence as well as from direct evidence. *Flowers Baking Co.,* 240 NLRB 870, 871 (1979); *Washington Nursing Home,* 321 NLRB 366, 375 (1996). Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense and show that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line,* supra.

Using a *Wright Line* analysis, Judge Davis found several violations of Section 8(a)(3) affecting Dennis Brown and Lloyd Reid, two of the discriminates involved in the instant case. He additionally found that Respondent harbored antiunion animus against employee Tony Teja, an alleged discriminatee in the instant case. Specifically, Judge Davis found:

a. Judge Davis found that on December 7, 2001, within three months of Dennis Brown becoming the Union's steward and within one month of becoming its Shop Chair, Respondent unlawfully laid off Brown until May 2002. In reaching this conclusion, the Judge first found that Brown's Union activities, primarily his grievance filing activities, were a motivating factor in his December 2001 layoff. In this regard, Judge Davis noted that "the Respondent, through its board members, expressed a significant amount of animus toward Brown because of his union position or activities on behalf of the Union. The Judge then specifically found that board President Marcinczyk "wanted to get rid of Brown because he was the shop chair," and also found that board members Marcinczyk and Tortorello "complained often about Brown's grievance activities." Finally, with regard to Callahan, the Judge specifically found that in addition to Marcinczyk, Tortorello and certain other board members, "Callahan . . . had it in for Brown because of his Union activities."

b. Judge Davis found that on October 18, 2002, Respondent unlawfully laid off Brown a second time from October 18, 2002 through May 2003. In this regard Judge Davis credited board member Cannizzio who, according to the judge, "flatly stated that the board authorized Brown's layoff in the fall of 2002 because he was the Union shop chairperson."

c. Judge Davis found that on July 3, 2002, Respondent unlawfully issued a written warning to Brown, ostensibly for taking too long to write grievances.

d. Judge Davis further found that on July 12, 2002, Respondent unlawfully issued a second written warning to Brown, ostensibly for leaving his workstation without authorization.

e. Judge Davis found that Respondent also unlawfully refused to provide asbestos awareness training to Brown.

f. Judge Davis found that during the summer of 2002, Respondent unlawfully imposed more onerous working conditions on Brown by assigning him and only one other employee to work on the in-walks as a two man crew.[3] In this regard, the Judge found: "There is no question that the work of breaking up in-walks, involving jack hammering and removing concrete is physically demanding work—more so than other jobs assigned to other unit employees." With regard to Callahan, the Judge found that "Respondent, especially Callahan, who directed (this) assignment to Brown, bore animus against him." Judge Davis later found that Respondent again imposed more onerous working conditions on Brown during the summer of 2003, by, again, assigning Brown and only one other employee to work on the in-walks as a two man crew. Judge Davis noted that "no credible reason was advanced as to why additional employees could not have been assigned, as they had in the past, to such work." Judge Davis also discredited (Respondent's current Maintenance Manager Phil) Segneri's generalized claim that Brown was a poor worker in the following manner: "Regarding Segneri's claims of Brown's laziness, presumably neutral employees Andrade and Pavliscek describe him as a good worker." The Judge also discredited Segneri's claim that he needed to be "watching them (Brown and employee Tony Teja) constantly," by finding that "the manner in which Segneri watched Brown (and presumably Teja) exceeded the bounds of which could be considered proper supervision under the circumstances and amounted to harassment."

g. Judge Davis found that Respondent, on August 30, 2002, unlawfully reduced the amount of Brown's sick leave accrual.

h. Judge Davis found that Respondent, though Segneri, unlawfully suspended employee Lloyd Reid on July 24, 2003. In reaching this finding, the Judge credited Reid

[3] In-walks are short connector sidewalks running from main sidewalks to the front and back of certain apartment units at Success Village. Respondent has an ongoing project to replace a number of these in-walks. This requires breaking up the old concrete in-walk with a jack hammer, carting away the debris, placing forms for new concrete, and pouring and smoothing the replacement concrete. Prior to assigning this work to Brown and one other employee, Respondent had had the practice of assigning this work to four man crews.

over the competing testimony of Segneri regarding the events of July 24 and 25, 2003, and found the following facts: On July 24, 2003, Segneri assigned Reid to break up a sidewalk and prepare it for concrete forms. Reid went to the garage for his equipment and, after realizing that he did not have a back brace, reported to Segneri that he needed a back brace and safety glasses. Segneri gave Reid a "worn, used" brace, which Reid refused to wear because of its poor condition, at which point Segneri told Reid that he had no more braces and directed Reid to either wear the used brace or go home. As a result, Reid went home at about 9:00 am and was paid only until noon even though the evidence showed that there was other work Reid could have performed that day. The Judge also found that on the following day, July 25, 2003, Segneri first engaged Reid in an unprovoked confrontation, and then gave him conflicting orders regarding garbage removal, i.e., directing Reid to pick up garbage in a specific area, then assigning Reid to pick up garbage in a different area before Reid had an opportunity to perform the first garbage removal. Judge Davis concluded: "I find the General Counsel has made a showing that Reid's suspension was motivated by his position as a shop steward. This is made clear in that suspension itself, and the events which occurred just after the suspension, which demonstrate the unreasonable antagonism demonstrated by Segneri toward Reid. Thus, Segneri's action in suspending Reid although there was work for him to do that day shows that Segneri dealt with Reid in an unreasonable way which can only be explained by his animus toward him as the shop steward. In addition, the day after the suspension, Segneri engaged Reid in an unprovoked confrontation, and later gave Reid two jobs in rapid succession, asking him why he had not finished the first. It is significant to note that Reid was speaking to Brown when asked that question by Segneri.

i. Although Tony Teja did not testify during the first trial, the evidence of animus based on the grievance filing activities he and Brown had engaged in was sufficient to lead Judge Davis to find that Respondent disciplined employee Raul DeSousa because of those activities. Specifically, Judge Davis found that "a reasonable inference could be drawn that the Union activities of the two men (Brown and Teja) was a motivating factor in the issuance of DeSousa's warning letter . . . Brown and Teja were the two Union officials in the facility, and the Respondent's animus toward the Union and Brown have been amply set forth above . . . Under these circumstances, I find that the Respondent has not established that it would have issued that (disciplinary) letter in the absence of the Union activities of Brown and Teja."

C. The Consolidated Complaint Allegations in the Instant Case

The complaint alleges that Respondent has engaged in conduct in violation of the Act in the following specific ways:

1. Respondent violated Section 8(a)(1), (3), and (4) of the Act, by Segneri, harassing its employee Antonio Teja, by the following conduct:

(a) Since on or about June 23, 2003, assigning him more physically demanding work and watching him more closely and more frequently while he works;

(b) Since on or about August 7, 2003, requiring him to change his clothing before punching in on the time clock;

(c) On or about August 22, 2003, threatening him with suspension and imposing more onerous working conditions on him;

(d) On or about September 22 and 23, 2003, assigning him to perform work without the use of customary or adequate equipment;

(e) On or about November 12, 2003, ridiculing him in the presence of other employees;

(f) On or about December 17, 2003, ordering him to perform unnecessary work in the rain, assigning him work outside his normal responsibilities under adverse working conditions, and suspending him.

(g) On or about April 21, 2004, assigning him a more onerous working assignment, giving him contradictory work orders, and calling the police.

(h) Issuing a September 23, 2003 suspension;

(i) Issuing three separate written warnings dated December 18, 2002, and;

(j) Terminating Teja on April 21, 2004.

2. Respondent violated Section 8(a)(1), (3), and (4) of the Act, by Segneri, harassing its employee Dennis Brown by the following conduct:

(a) On or about December 16, 2003, by ridiculing, swearing at and provoking him to retaliate; and

(b) On or about December 17, 2003, ordering him to perform unnecessary work in the rain.

(c) On or about December 18, 2003, Respondent issued Brown a written warning.

3. Respondent violated Section 8(a)(1), (3), and (4) of the Act, by Segneri, harassing its employee Lloyd Reid by the following conduct:

(a) On or about February 10, 2004, sending him home early;

(b) On or about March 12, 2004, sending him home early and refusing to let him work on light duty through March 19, 2004;

(c) On or about April 1, 2004, sending him home early, calling the police and suspending him.

(d) On or about April 6, 2004, refusing to allow him to use the telephone.

(e) Disciplining Reid by warning and suspending him on April 7, 2004 and by suspending him on April 16, 2004.

4. Respondent violated Section 8(a)(1) and (4) of the Act by harassing its employee Una Boulware by:

(a) On or about August 28, 2003 implementing a "Conflict of Interest" policy with regard to the sale of real estate; and

(b) Since on or about September 15, by Segneri, at the Respondent's facility, threatening her with termination.

(c) By issuing her a written warning and a one day suspension on December 18, 2003.

(d) By issuing her a written warning on October 13, 2004.

5. Respondent has violated Section 8(a)(1) and (5) of the

Act by:

(a) Since on or about September 4, 2004, Respondent implemented restrictions on Unit employee parking.

(b) Since on or about December 1, 2003, increasing the costs of Unit employees' medical insurance plan;

(c) Since on or about April 6, 2004, removing the telephone from an employee work area and prohibiting employees from making personal calls during work time.[4]

(d) Since on or about August 28, 2003, Respondent implemented a "Conflict of Interest" policy with regard to the sale of real estate.

D. The Alleged Violations of Section 8(a)(1), (3), and (4) of the Act Involving Una Boulware

1. Boulware's background and her job duties

Una Boulware has been employed by the co-op for about 33 years. Her title is accounts receivable, bookkeeper 1-B, rent clerk, and resale procedure clerk. She has held the resale procedure clerk position for 20 to 25 years. She works in the office and reports to Frank Callahan and occasionally to Phil Segneri. Boulware's work hours are 8:30 a.m. to 4:30 p.m., Monday through Friday, with an unpaid lunch hour from noon to 1 p.m. Boulware has been a union member since the Union began representing Success Village employees in or about 1975. She has never held formal union office, though in a letter preceding negotiations for a new contract in May 2002, she was named by the Union as an alternate steward. Prior to Callahan taking over the management of Success Village, Boulware had had only one disciplinary problem in her long years of employment with Respondent and that one had been resolved in her favor.[5]

Another employee in the office is bookkeeper Ceil Johnson, who shares some duties with Boulware and has other independent duties of her own. From the office in which Boulware works, there is a window to a hallway, called the rent window. In the hall next to this window is a bulletin board where notices of units for sale or rental are posted. At the rent window, tenants pay their rent or co-op common charges and can request information of or file a complaint or repair order with the office staff. For years the two women were allowed to answer virtually any question that anyone coming to the rent window or phoning the office might ask, including information about units for sale or rent. However, beginning in 2002, certain restrictions began to be placed on the topics Boulware and Johnson could discuss with the public. These restrictions primarily dealt with the so-called "resales."

Each year a certain number of units at Success Village are sold by their current owners to new owners. These are called resales.[6] Many of these resales are accomplished without the assistance of a realtor and many involve the use of realtors. As Success Village is a cooperative, these resales must be approved by the board of directors. In a cooperative, purchasers buy a leasehold and a share of co-op stock rather than title to a unit. The co-op owns all the assets of the co-op. The co-op has developed a procedure to process resales which begins with a resale application form. One of Boulware's primary duties is to supply the resale application forms and information packets relating to the forms to prospective buyers and to thereafter meet or speak by telephone with them to make sure all the information called for gets in their files and the files are complete. Getting the information called for is the responsibility of the applicant and Boulware does not participate in the collection process except to tell them what is needed. The information called for to receive approval is primarily financial in nature to insure the prospective buyer can afford to live in the co-op and pay the common charges and other costs of living there. Prior criminal records and immigration documents are also considered in the approval process. Obviously, if a mortgage is involved, a mortgage commitment must be supplied.

In addition to making sure information filed by applicants gets into their files, Boulware types up certain other paperwork necessary to effectuate a sale. Once or more a month, she presents the files considered complete to the co-op's resale committee or its liaison.[7] The resale committee is comprised of four board members and occasionally some nonboard member resident volunteers. The resale committee reviews the contents of the application files and if they agree the files are complete, has Boulware schedule meetings where the prospective buyers would be interviewed by the committee.[8] The number of such interview meetings is dependent on the number of completed files. The committee usually heard about four a meeting, with each interview taking about 15 minutes. Meetings were scheduled when there were about four to six application packages ready for consideration. Various records introduced in the record reflect that on occasion more than four application files are considered by the committee in a given meeting. A factor that might dictate hearing an application as soon as possible rather than putting it off to another meeting is whether the prospective buyer's mortgage commitment is about to expire. The recommendations of the resale committee are given to the full board of directors and are ruled upon once a month at the monthly board meeting.

The resale committee through its liaison with Boulware selects the date for the interview meeting or meetings and dictates

[4] This last act of Respondent is also alleged to have violated Sec. 8(a)(3) of the Act.

[5] In 1983, Respondent discharged a clerical employee named Fay Stupak for embezzlement. Because Stupak worked in the same business office where Boulware worked, Respondent also discharged Boulware on a theory that Boulware may have known about Stupak's illegal activities, but did not report those activities. Ultimately, a three-person arbitration panel unanimously found that Boulware was unaware of Stupak's unlawful activities and was unjustly discharged. The same panel ordered Respondent to reinstate Boulware and remove the discharge from her record. I would also note that Boulware was given a warning in August 2002 about punching in after her start time, but within Respondent's grace period, and was given a similar warning again in December 2003. Callahan testified that after the warnings, Boulware has been punching in on time. These warnings are not at issue here.

[6] Boulware testified that there about 75 to 85 resales a year at Success Village.

[7] There is no credible evidence that Boulware in any ways slows or impedes the completion of files or holds back from review otherwise complete files.

[8] If an application file is found not to be complete in this review process, it is returned to Boulware with instructions to have it completed and submitted again as soon as it is complete.

the number of applicants to be interviewed. Boulware then calls the applicants and schedules them for a specific interview time on the date selected by the committee. The resale committee's chairperson at the time of hearing was board member Leeann Istvan. She testified that she wanted only four applicants to be interviewed at any one meeting and left it to Boulware to select the applicants to be interviewed at a particular meeting in the event there were more than four applicants with complete files. Clearly, however, Istvan had the power to make this selection process herself.

Boulware does not have the authority to make any recommendations or provide any input to the resale committee about the prospective buyers. She has no discretion to pick which applications were to be considered by the committee. She is not present at the interview meetings. If Boulware is not at work, Ceil Johnson performs the work of the resale clerk. Once an applicant is approved by the resale committee and the board, Boulware prepares some further documents and the file is sent to an attorney for closing.

2. Boulware's private part-time real estate activities

Boulware became interested in selling Success Village units in 1996 and obtained her realtor's license in that year. In that year, she also became employed by Taj Real Estate Company as a licensed realtor. She first began selling real estate for Taj in 1996 and she is still employed by that company, though she has not sold any Success Village units since August 28, 2003, when she was prohibited from doing so by the Village's board. Her position with Taj is part time and all work performed for them is outside of her work hours at Success Village. She interviewed and showed units to prospective buyers in the late afternoons and evenings after work at the co-op and on weekends. Her sales activities were limited exclusively to units at Success Village. She testified that realtors other than those employed by Taj sell units at Success Village. She successfully sold co-op units from 1996 until August 28, 2003, when the co-op banned her from engaging in private real estate transactions at Success Village, citing a conflict of interest.

Boulware testified that when she was called to assist a seller she encouraged them first to list the unit on the Success Village office bulletin board. Prior to being banned from selling units at Success Village, Boulware would post listings on the bulletin board of units for which she was the listing agent. When she first became a realtor in 1996, the then property manager for Success Village, Diane Dodge, encouraged her activities in this regard. Dodge included a notice of Boulware's new real estate business in a newsletter sent to tenants, including the members of the then board of directors. From the outset of Boulware's real estate business, Dodge told her that her real estate business must be conducted on her own time and must not interfere with her job at Success Village. She understood from the outset that she should not speak to prospective buyers and sellers during working time, she could not show units during working time, she could not solicit clients on working time and she could not give preferential treatment to clients. Dodge's successor, Granfield Management, knew of her real estate activities and voiced no objection. After Granfield, the board of directors managed the property for a period of time before contracting with WC&F, and during this time voiced no objection to Boulware's real estate activities.

All work with respect to her private real estate business is done at her home or at Taj's office, using her own office equipment or that of Taj. The only use of Success Village equipment she uses for her sales is the use of its copying machine to make copies of certain forms. The co-op copier is used to copy these forms for all applications, regardless of the realtor involved. The business card she gave her clients or prospective clients listed only her home phone or Taj's office phone, not the Success Village number. Boulware credibly testified that she informed her clients to call her at home or at Taj's office. She further testified that if she were contacted or called at work by a prospective client or an existing client, she informed them she could not perform her real estate business at work and instructed them to call her at home. She testified that there were three forms she prepared for all resales. For her clients, she performed the typing of these forms at home rather than at the office, where she typed the forms for all other clients. In a remarkable stretch to justify the Respondent's ban on Boulware's real estate business at the co-op, Callahan characterized this home work as a conflict because it would speed up her clients applications at the expense of other, nonclient applicants. In truth, the only result that her work at home in this regard accomplished was to free up more time at the office for her to work on nonclient files. Her work at home thus directly benefited the co-op and the applicants not represented by Boulware. If Boulware's intention was to speed up her clients' applications at the expense of others, she would have performed this work at the office, doing her clients' applications first. It is also more than a little strange that Callahan objected to her working on her client's files at home rather than at the office, when she had been instructed not to perform her private real estate work at the office on worktime.

Prior to August 28, 2003, Boulware had never been accused of performing her private work on co-op time, had not been disciplined or warned about not handling all applications in a timely manner, had not been accused of favoring her clients over other applicants and had never been told her activities constituted a conflict of interest. Boulware listed among her clients several board members, including Andrew Narolewski and Mary Jane Soltis and none of them claimed she had misused her position with Respondent to further her real estate business or had engaged in any practice which could be considered a conflict of interest.[9]

WC&F took over management of the co-op in the summer of 2001 and voiced no objection to Boulware's real estate business until August 2003, 2 months after she testified against the co-op in the first Success Village case before the Board. WC&F had knowledge of her real estate dealings at Success Village from the beginning of its management of the co-op. As noted above, Boulware had also sold units involving 2003 board members Soltis and Narolewski, without any complaint from them about

[9] Boulware's first sale at Success Village occurred in 1996 and her last was in 2003 after she was banned from sales there. She sold from 12 to 16 units a year from 1996 to 2003. She earned about $15,000 to $19,000 in commissions in each of those years.

any potential or real conflict of interest. Until after her June 2003 NLRB testimony, no board member had ever expressed any concerns about her private real estate dealings. On June 13, 2003, Boulware testified against the interests of the co-op in the first Board case, relating details of a confrontation between a board member and the president of the Union. The judge in that case relied at least in part on Boulware's testimony to find a violation of the Act by Success Village. This testimony is discussed in more detail below.

3. Boulware testifies for the General Counsel in *Success Village 1*

In his decision in *Success Village 1*, Judge Davis set out his findings as they relate to Boulware's testimony in his case. Though the transcript of that proceeding is relied upon by the parties in the instant case for certain things, for the purpose of demonstrating the effect of Boulware's testimony on the Respondent, I will only rely on Judge Davis's findings with respect to this testimony. At pages 8 and 9, he wrote:

> On December 6, (2001), (UAW Representative) Langston faxed a letter to Callahan which stated that the Union would not meet if the Respondent had more than one board member present. When Callahan received the fax he immediately called and faxed the Union, saying that since the board intended to have more than one member present, the December 7 meeting was cancelled. Although Brown was aware that the meeting was cancelled, he could not reach any of the Union agents. Apparently, the Union did not get these messages and Langston and See entered the office for the meeting. Callahan told them the meeting was cancelled.
>
> I credit the testimony of Langston and See that, as they left the office and stood on the visitor side of the rent window, board member Marcinczyk yelled at See that he should tell the employees here how he "fucked us over at jai alai," caused it to close, and that he would "end up fucking this place up" as he had at Milford." See replied that he was "not fucking this place. If anyone is fucking this place you are." Marcinczyk then called See an "asshole." See asked if he wanted to "take this outside?" Board member Skonieczny then slid the rent window shut, after which Marcinczyk told See that his "mother is an asshole."[10]
>
> Employee Boulware testified that she heard Marcinczyk tell See "why don't you tell them what you did to us at the Jai-Alai, you sell us out?" See called Marcinczyk a "jerk," and Marcinczyk replied "like your mother." See asked him to repeat that remark outside, at which time the rent window was then closed by a board member. Marcinczyk testified that he was upset at losing his job at the Milford Jai-Alai, and resented See for doing nothing for the workers there while fighting so hard for the Respondent's employees.
>
> On December 10, the Union sent a letter which stated that due to the disregard of the third step grievance procedure and the "shameless, unprofessional behavior" of the board members at the last three third step grievance meetings, and in order "to circumvent further hostility, the Union would refer all present and future grievances to arbitration."
>
> The complaint alleges that on December 7, 2001, Marcinczyk disparaged Union representatives in the presence of unit employees.
>
> I credit the mutually corroborative testimony of the General Counsel's witnesses that Marcinczyk yelled that See would destroy the Respondent as he had Milford, and made a scurrilous remark about See and his mother. Employee Boulware was present during this exchange. Although she did not testify to Marcinczyk's remarks that See would destroy the Respondent, she did say that Marcinczyk accused See of "selling out" the employees at Milford.
>
> I find that Marcinczyk's remarks were not merely personal, as asserted by the Respondent, but were an effort to denigrate the Union in the eyes of the employees. By telling See in Boulware's presence that he would destroy the Respondent, and by calling See vulgar names, Marcinczyk undermined the Union. Such comments had a reasonable tendency to interfere with employees' rights to remain represented by the Union. . . . Citations omitted. . . . I reject the Respondent's argument that See was at fault because he invited Marcinczyk outside. That invitation came only following Marcinczyk's improper remarks. I accordingly find and conclude that Respondent violated Section 8(a)(1) of the Act by disparaging the Union, as alleged.

Boulware's testimony was clearly instrumental in Judge Davis's finding of a violation and perhaps as important, a clear rebuff of Board President Marcinczyk. Her testimony clearly put her on the side of the Union in the ongoing, bitter dispute between the Respondent and the Union. That the strongly protected conduct of testifying in NLRB hearings led to retaliation by Respondent is obvious from the events which shortly followed her testimony.

4. Respondent's response to Boulware's testimony

Respondent's response to Boulware's testimony on behalf of the General Counsel was almost immediate and devastating to Boulware's income. Board President Leeann Istvan testified that at a closed door board meeting[11] following this testimony, board member, Vickie Recko, raised the issue of real estate agents posting sales notices on the co-op bulletin board, which Istvan testified was meant only for residents selling their own units. According to Istvan, Recko called the telephone numbers listed on the notices and found several real estate agents were listed, including Taj. Istvan testified that the board had a hunch

[10] Judge Davis's fn. reads: "Langston stated that both men were 'in the heat of anger' and that See's comment may be interpreted as an invitation to fight, but he did not believe that a fight was about to ensue."

[11] No minutes of closed door meetings were kept though according to board member, Istvan, they were supposed to have been made and saved. She testified that at the closed meetings Callahan is present, and sometimes Segneri. Unfair labor practice charges are discussed at these meetings.

that Boulware was advertising on the bulletin board. Istvan testified that at the time of Recko's investigation, this was not an allowable practice though it had been in the past. In fact, the practice had been going on for untold years. There is no exhibit or board of directors' written memo or order in this record changing this longstanding practice prior to Boulware's NLRB testimony. That harming Boulware was the intention of this "investigation" by Recko is obvious from what followed. In the same timeframe, Respondent changed one of its resale forms to, for the first time, call for the name of the real estate agent involved in the sale to be named. Istvan admitted that the change was made specifically to let the board know which applicants were represented by Boulware.

On or about August 28, 2003, Boulware received a memorandum from Frank Callahan directing her to cease acting as a realtor for transactions at Success Village, and threatening termination if she continued her real estate business involving Success Village. The memorandum reads:

> The Board of Directors of Success Village has determined that your representation of individuals who are or may be purchasing or selling an apartment at Success Village is a conflict of interest with your duties as an employee of Success Village.
>
> Specifically, as an employee of Success Village, you are responsible, among other things, for communicating with prospective buyers about the application process, processing applications from prospective buyers of an apartment, performing a credit check on prospective buyers, scheduling meetings between prospective buyers and the Board's Resale Committee, and assembling all required paperwork for Board approval.
>
> You have been acting as an agent of buyers and sellers of apartments at the Co-op. This presents a conflict of interest with your position as an employee of the Co-op in at least two significant respects.
>
> First, you have been performing work on behalf of buyers and sellers during the time you should be, and are paid to be, performing work for Success Village. Second, you may, and there is the appearance that you will, give more favorable treatment in the application process where you represent one of the parties to the transaction.
>
> The Board has directed me to give you notice that you are no longer permitted to act as an agent on behalf of either buyers or sellers of apartments at Success Village and remain an employee of Success Village.
>
> If you continue to represent buyers or sellers of apartments at Success Village, then the Co-op will terminate your employment due to this conflict of interest. The Board expects that it will not need to take such action, and that you will cease your representation of buyers and sellers of apartments at Success Village at once.

When Boulware received the memo, she contacted union business agent for Success Village, Michael Langston. Langston testified that this matter had not been discussed with him prior to the issuance of the memo. Neither the union shop chair nor the steward had been advised of this impending action.

Langston replied to Callahan's August 28 memo with a letter dated October 9, 2003, which reads:

> This is in response to your memorandum of August 28, 2003 regarding resale conflict of interest to Una Boulware. Your memorandum states that Una has been performing real estate business during working hours. Una has been employed at Success Village for over 20 years and at no time has she ever done anything during working hours, except her assigned duties as an employee of Success. You also state that she will give preferential treatment to applicants. There is no proof that she has ever done this and she is not part of the application approval process so she is not in a position to give favorable or preferential treatment to anyone.
>
> The Union views this memorandum as further harassment and intimidation of Union employees by Success Village and demands that this memorandum be rescinded immediately.

Callahan replied to Langston in a letter dated October 31, 2003:

> I am writing in response to your letter dated October 9 2003 regarding Una Boulware. We disagree about whether Ms. Boulware has performed her outside real estate business on Success Village Apts. working time.
>
> Nevertheless, we accept your representation that she will not perform her real estate business in the future while on Success Village's working time. If, however, Ms. Boulware does not conform to your representation, and does continue to perform her real estate business while on Success Village's working time, Success Village will take appropriate action as set forth in my August 28, 2003 letter.
>
> We also disagree as to the conflict of interest presented by Ms. Boulware engaging in real estate business involving properties at Success Vill. Apts. Inc. While Ms. Boulware does not approve applications to purchase properties, she does prepare supporting documentation for the Board's approval, and she acts as the liaison between Success Village and the applicant with regard to scheduling, supporting documentation and other matters.
>
> Therefore, it is a conflict of interest for her to perform her duties as an employee of Success Village and also represent any party to a transaction involving a property at Success Village Apts., Inc. If she continues to ignore this conflict of interest, Success Village will take appropriate action as set forth in my August 28, 2003 letter.

5. Respondent's explanation for issuing the conflict of interest memo

When she was given the August 28 conflict of interest memo, Boulware and Dennis Brown met with Callahan and Segneri. They asked where there was conflict of interest. Callahan said she could favor one applicant over another, and Boulware said she had no input into what the board did with the

applications.[12] Boulware asked when she had ever favored one applicant over another. Callahan said nothing and Segneri added that the potential for conflict is always there. The conversation then ended.

Of course in a hearing such as this, where motivation is one of the primary inquiries, the matter does not simply stop there. In this hearing Callahan and Istvan offered testimony about the motivation for issuing the conflict of interest memo.

With respect to Boulware's selling of real estate, Callahan testified that two or three people had come in and wanted to talk with him and the resale committee. One of them, a man who Callahan characterized as livid, complained that he had posted his unit on the bulletin board to sell himself, and that Boulware had "bugged" or "badgered" him to get the listing. He did not give it to her. Then, when he found a buyer, he claimed that Boulware had contacted the buyer saying she could get him a much better apartment at a better price. The man complaining kept his deal together, but he was angry at Boulware. Callahan did not record that name of this person and cannot recall it. The same is true of the date of the alleged incident. Callahan did not confront Boulware about this alleged complaint. He claims to have discussed it with the board of directors, but not with Boulware. No direct discipline, written or oral warning resulted from this alleged complaint, but Callahan testified it played a part in the decision to stop Boulware from privately dealing in real estate at Success Village.

Boulware credibly denied that she ever did anything like what she is accused of doing. I believe her. Having just been involved in a NLRB hearing where the importance of detailed, recorded factual information is paramount and at a time when every unusual activity Respondent's employees engage in is being reviewed by its labor attorney, it is inconceivable that Callahan would not have recorded the date of this alleged complaint and the name of the person making it. It is inconceivable to me that the board would not have demanded it as it opens them to liability from the seller because of a co-op employee's action. I instead believe and find that Callahan testimony in this regard is untruthful and was manufactured to create a "legitimate" reason for the action taken against Boulware.

Callahan then testified that other people would come in and "talk that they had been dealing with Una (Boulware) and had interference with Una." He then asserted that if he walked by where Boulware was talking with the public, they would stop until he was gone. He also testified that when Boulware was on vacation, he would answer her phone and have someone ask for Una and when told she was on vacation, say they would wait until she got back. He suspected they were calling about real estate. Again, these vague, unsupported alleged conversations and observations do not rise to the level of evidence that can be considered as having any weight whatsoever. Moreover, Johnson testified that she had never observed Callahan answering the office phone when Boulware was out.

At this point in his testimony, Callahan switched from his assertions of "proof" of Boulware's misdeeds with respect to her real estate dealings, to pure speculation. Callahan testified that Boulware can control the pace of an application's progress from filing to hearing before the resale committee by deciding when to call prospective buyer to get them to supplement their applications. He testified that she prioritizes the files on her own. He also testified that if she is not in the office and an applicant calls in and leaves a message for her, she can prioritize which ones she calls back and when.

He testified that Boulware selects which files are ready and which files the resale committee will hear. If the resale committee only wants to hear four, she selects the four to be heard. This is not correct. Boulware is to give and there is no showing that she has not, all complete application files to the resale committee. The committee checks them for completeness and then selects a date for interviews. Boulware is given the files back and told to schedule interviews. If there are more completed applications than the committee wants to hear at one time, it can let Boulware make the selection or make the selection itself. Boulware has no independent authority in this regard beyond what the resale committee gives hers. Callahan claims that Boulware can delay a file for a month if she wants though he did not articulate what advantage this would give Boulware or her clients. Callahan claims sellers not represented by Boulware call up and complain about the speed of the transactions. How he knows they are not represented by Boulware is a mystery as is Callahan's complete lack of knowledge about when these alleged calls were made, who was making the call or any other information which would lead me to give the allegations credence. Callahan did not testify that he followed up on these alleged complaints by simply inquiring of Boulware about the files which formed the basis for the complaint. Again, I do not believe Callahan and will not credit his totally unsupported and unverifiable testimony.

Callahan also contended that because Boulware types three required forms for her clients at home, she is somehow favoring them. As noted earlier, this does not make sense because by doing them at home, she frees up more time at work to work with the applicants for which she is not the broker. If indeed Boulware's aim was to favor her clients, she could do this typing at work which would then slow the process for nonclients. Boulware has never been disciplined nor admonished for not timely assisting applicants she does not represent as a realtor.

In some testimony about Boulware that I do credit, Callahan testified that there was no independent evidence that Boulware had given more favorable treatment to her clients versus applicants she did not represent.

Board President Leeann Istvan testified that she had known for several years that Boulware was a licensed realtor dealing in Success Village units, based upon a newsletter distributed by a prior management company. She learned that Boulware worked for Taj after she began working on the resale committee. Istvan was under the belief that Boulware could perform her private

[12] I would note that in the Success Village resale process, applicants are not competing with one another for approval. Virtually all applicants who meet the written requirements for approval are approved. The only potential way that Boulware could favor her clients over nonclients would come from situation where there were more complete applications than the resale committee wanted to hear at a particular meeting. Arguably she could make sure that her client-applicants were interviewed at the meeting and the overflow applicants would be heard at a meeting within a day or week or two later. This potential conflict, however, was never shown to have ever happened in reality.

real estate business on her own time and that everyone was to be treated equally, her clients and applicants who were not her clients.

Based on some general observations, Istvan testified that she came to the conclusion that Taj files were complete before others, stating that Taj files always came first.[13] Istvan remembers a couple of rejected files where Boulware was the realtor. Istvan testified that she went to Boulware with one of these two files and pointed out that the committee felt the file did not demonstrate that the purchaser had enough money to pay the common charges and still have enough money to live on. According to Istvan, Boulware yelled at her and told her she could not reject the file. Istvan told Boulware to come up with proof she had enough money and the application would be reconsidered. According to Istvan, Boulware again screamed at her that she could not do that. Istvan testified that when files other than Taj files had been rejected, Boulware had no comment. As with Callahan's testimony with regard to alleged problems with Boulware, there was no specificity in Istvan's testimony and no way to check its veracity. Boulware denies this happened and I believe her. No record was made of this alleged incident and even Callahan did not testify that he knew about it. Moreover, Istvan would have given Boulware the alleged rejected file only when she was serving as liaison for the resale committee, a post she has held only after Boulware was banned from selling Success Village units.

Istvan in another context overheard Segneri speak to Boulware and Ceil Johnson in an aggressive tone and complained to Callahan about it. If she would complain about aggressive treatment of an employee by a supervisor, why would she not complain about aggressive behavior by an employee toward herself, a board member. I simply do not believe Istvan's testimony about her alleged confrontation with Boulware.

Istvan testified that files other than Taj are sometimes incomplete, missing tax forms, commitment letters, gift letters, inspection reports, pay stubs, and credit reports. This, according to Istvan, has been the case before and after Boulware was prohibited from selling real estate at Success Village. Boulware is supposed to ensure that all required forms are in the files before they are given to the resale committee as complete. Istvan testified that Taj files are always complete. She testified in response to a totally leading question by Respondent's counsel that Taj files are pushed forward in the resale process whereas everyone else's files are pushed aside as incomplete. On the other hand, she could not point to a single instance where this occurred in her entire time on the resale committee.

[13] Based on the evidence presented to me, there is no way of knowing which application files were complete first, Taj or any others, without going through an exhaustive examination of all files over a period of time, a task clearly not undertaken by Istvan. As for files which were routinely presented to Istvan and the resale committee for review, Istvan had the very real authority to make the selection of which files would be heard and when. If, and I do not believe it to be true, Boulware would select her client's files over nonclient's files to set for an interview in the event not all could be heard at once, this could have been stopped at once by the simple act of Istvan exercising her right to make this selection. Istvan did not exercise this right, which leads me to believe there was no problem in this regard.

Istvan testified that Callahan at some unknown date, told her that a seller had complained to him that Boulware had almost cost him a sale by stealing his buyer. She said this alleged incident was part of the basis for the prohibition against selling Success Village units imposed by the board on Boulware. I have already concluded that Callahan was lying about this alleged incident and it was manufactured evidence for this hearing, as I believe is also the case with Istvan.

Istvan testified that during the 14-month period between June 2002 and August 2003, she observed that when she entered the office, Boulware would quickly cut off conversations on the phone or with persons at the rent window. She had no way of knowing what the conversations were about and specifically did not know whether they were related to real estate transactions. She also testified that during the same 14-month period, she would see Boulware in the hall next to the rent window talking to people in front of the bulletin board where units are posted for rent or sale. When Boulware became aware of Istvan's presence, she would stop talking. Assuming, arguendo, that Istvan did make such observations, until Boulware testified against the co-op in June 2003, this alleged practice did not bother Istvan sufficiently to even cause her to ask Boulware what she was doing or what she was talking about. It certainly did not bother her enough to suggest to the co-op's board that they ban Boulware from her real estate practice.

With respect to General Counsel's Exhibit 12, the "Conflict of Interest" directive, the following exchange on the record took place between Istvan and Respondent's counsel, Zaken, at Transcript 3222–3223.

> Q. "Now there was a . . . this memo that was given to Ms. Boulware, that was discussed with someone? Was there a meeting to discuss that issue."
>
> Q. JUDGE NATIONS, "Which memo, sir?
>
> A. ZAKEN, "I'm talking about, I think its 12. General Counsel's exhibit 12. Why don't you take a look at that?
>
> A. ISTVAN: "The [this] was discussed with the board of directors.
>
> Q. ZAKEN: OK. And were you present in the board of directors [meeting] on the time this was discussed."
>
> A. ISTVAN: "No."
>
> Q. ZAKEN: "Someone else was?"
>
> A. ISTVAN: "Yes."
>
> Q. ZAKEN: "But you were on the board?"
>
> A. ISTVAN: "I was on the board."

Though Istvan testified that the directive was discussed with the board at a meeting at which she was not present and for which no minutes were presented, she proceeded to testify in response to Zaken's questions about the meeting. Istvan testified that the board felt that Boulware was spending time doing her own work instead of the co-op's work and was being paid to work for the co-op, not herself. Again, though not present for the discussion, Istvan testified that her perceived preferential treatment of Taj applications versus all others played a role in the decision to issue the directive. She also testified that at some time she brought up Boulware's alleged reaction to a rejection of a Taj application. Istvan testified that she brought up her perceptions that Boulware would cut off conversations

with others when she saw Istvan. Istvan testified generally that the board objected to real estate agents, including Boulware from putting for sale notices on the office bulletin board, which she said was reserved for members. Respondent's counsel inquired whether other board members had expressed similar observations to her. I reject such testimony as blatant hearsay in the absence of their direct testimony subject to cross. The board members she was going to offer evidence about were Vickie Recko, Bob Marcinczyk, and Vinny Tortorello. Istvan denied having knowledge that Boulware testified in the first Success Village case in June 2003 or that the board has discussed that testimony. I believe this is a blatant lie. I have already dealt with Istvan's other reasons for issuing the conflict of interest memo.

On cross-examination, Istvan testified that the reasons for the issuance of the prohibition were that the board felt that Boulware was selling real estate on company time, being on the phone, or talking to people at the rent window about real estate deals. Rather incredibly, Istvan testified that Boulware is not to talk to the public at the rent window. As Boulware's job entails collecting rent and common charges at the window and giving out application forms to prospective buyers and then collecting numerous bits of information from these prospective buyers, this statement by Istvan is absurd. In response to another similar question by the General Counsel, she reiterated these were the reasons Boulware was told to stop selling real estate. When asked how she gained this knowledge that Boulware was selling real estate on company time, she answered that it was because of all of the phone calls Boulware made or took, and the fact that she talked to people at the rent window. She added that a couple of buyers in the interview meeting said that Boulware sold their units during the daytime. It was perfectly okay for Boulware to sell units during the daytime on weekends, holidays, or on vacation. There was absolutely no evidence that Boulware ever left her desk and the office during her work hours, and went to a unit to achieve a sale.

Istvan also testified that a female buyer said that she spoke on the phone to Boulware during the day about selling her apartment. Boulware indicated that she had been called by prospective clients at work and had told them that she could only speak to them after work. There is no showing that this was not the case here.

I believe and find that the only reason that Respondent issued the conflict of interest memo was in retaliation for Boulware's testimony at the NLRB hearing with the clear intent of punishing her for giving the testimony. I believe and find that the reasons advanced by Respondent were pretexual, unsupported by any credible evidence, or just pure speculation. From what can be discerned from the record evidence, there was absolutely no interest in Boulware's real estate activity in the 7 years prior to her testimony. Even assuming there would be a legitimate reason to scrutinize this activity to determine if Boulware was abusing her position, no investigation was undertaken. Boulware was not interviewed by Callahan, the resale committee, or the co-op's board about any misgivings they may have had about her activities. Buyers were not asked in the interview process about any problem they may have encountered with Boulware in the application process. No board member or management official observed Boulware in the conduct of her duties for the co-op to determine if she was giving more favorable treatment to her clients versus nonclients. No records were kept of alleged incomplete files being presented as complete by Boulware, and no records were kept of the number of such files which were Taj files versus non-Taj files. No investigation was undertaken to determine if Taj files were process more swiftly than non-Taj files. No records of any complaints about Boulware were made, even though the one alleged by Callahan would have been egregious behavior by Boulware.

The timing of the issuance of the conflict of interest memo, absent any recorded complaints prior to Boulware's testimony, is telling. There has been no proven incident other than her testimony which would give rise to the issuance of the memo. See *Grand Central Partnership,* 327 NLRB 966, 974 (1999); *Pepsi-Cola Bottling Co.,* 301 NLRB 1008, 1057 (1991); *Lampi LLC,* 327 NLRB 222 (1998). It is well established that an employer violates Section 8(a)(4) of the Act by discriminating against an employee for having testified against it in an NLRB hearing. *S.E. Nichols,* 284 NLRB 556, 590 (1987), enfd. 862 F.2d 952 (2d Cir. 1988), cert. denied 490 U.S. 1108 (1989). Here, the discrimination was two fold, first it deprived Boulware of substantial income from commissions and second, it gave Respondent grounds for immediate termination if it found evidence of any further real estate business conducted by Boulware. That Respondent intends to continue to discriminate against her may be found in the following disciplinary action taken against her for doing her job much the way she has always done it without complaint.

6. Boulware is threatened by Segneri for "insubordination"

A few weeks after Boulware received the August 28, 2003 memo, she was involved in an incident with Segneri on September 12 and 15, 2003. On Friday, September 12, in the office, Segneri told Boulware to update the membership list for an upcoming membership meeting.[14] To update the list for a membership meeting, it has to be checked to insure that all units sold since the last update have the correct owners listed, and checked to make sure that all accounts were currently paid.[15] Segneri asked if she knew what to do and she said she had been doing it for 30 years. Segneri asked how long it would take and she responded that she did not know. During the course of that day, Segneri asked her repeatedly how long the task would take and she would reply she did not know. Boulware testified that she was attempting to update the list while completing her normal duties. She testified that the list was not due until Tuesday, September 16, 2003. On Monday, September 15, Segneri came in the first thing in the morning and asked when she was going to have the list ready. She told him to stop harassing her, that she knew her job. Segneri said that she had been doing the job wrong for years and that he had no confidence in her. She replied that if she had been doing her job wrong and he had no confidence in her, why didn't he fire her. He replied that that was coming soon. Boulware asked Ceil Johnson if she had heard that comment and Johnson said she

[14] There are several such meetings a year.

[15] Tenants who were not current with operating charges could not vote or participate in the membership meeting.

had. Boulware testified that Segneri never asked her to drop everything else and finish the list.

At this point, she prepared a written statement covering the events of September 12 which reads as follows:

> On Friday, September 12, 2003, Phil Segneri, Maintenance Manager, gave me an assignment. He asked me if I understand what to do. I told him I have been doing this work for the past 32 years. Several times on Friday, he asked me if I was doing the work and how long it will take to finish. I told him I don't know how long it will take.
>
> On Monday, September 15, 2003 on or around 9:15 AM, Phil approached me asking me the same questions. I told him to stop harassing me I know my job. He told me I had been doing my work wrong and he don't have any confident (confidence) in me. I said to him since you don't have any confident (confidence) in me and I don't know what I am doing, why don't you fire me. He said to me, don't worry that is coming soon. He then walked away.

This statement is signed by Boulware and cosigned by Ceil Johnson, who testified that she overheard the confrontation.

Segneri testified that Callahan asked him to oversee the compilation of an updated membership list. Segneri was apprehensive about the assignment because the office procedures he had observed about posting checks for co-op monthly charges were in his opinion haphazard and dilatory. He testified that when he was asked to oversee the production of the list there was a large stack of checks for co-op charges not yet posted. Segneri testified that he tried to show Boulware a better way to prepare the list, but she yelled and screamed at him that she had been doing it for 32 years and knew how to do it. He testified that when he asked why the checks had not been posted, Boulware screamed, "Who the hell you think you are? You're not in charge of the office, you're in . . . and just yelling in general disruption and screaming and on that particular instance, one of the Board members was there, a girl by the name of Leeann (Istvan)." According to Segneri, Istvan complained of Segneri's treatment of Boulware to Callahan. Following this complaint, Callahan told Segneri to leave the office staff alone. Istvan confirmed that she overheard this conversation and did complain to Callahan about Segneri's treatment of Boulware. Istvan made no mention of Boulware screaming or cursing. Boulware denied that she did either and I credit her denial.

In response to Boulware's accusation that Segneri threatened to fire her, Segneri unconvincingly first testified that he explained the progressive discipline policy of the co-op and noted that she could get to the last step before she knew it. He told her she was being insubordinate and it would lead to her termination. On cross-examination, Segneri admitted that he used words similar to what Boulware wrote. In their interaction, Segneri found insubordinate that Boulware gave him answers which he found unsatisfactory. On cross, he also admitted to yelling at Boulware. He stated that the more he is challenged by someone, the more resolute he becomes and the louder his voice gets, and the more agitated he becomes. According to Segneri and Callahan, following this incident, Segneri was instructed to cease giving supervision to Boulware. However, both Boulware and Ceil Johnson testified that Segneri continues to give them regular direction.

On this subject, Callahan testified that he would prefer that Boulware update the list as sales are completed rather than waiting until 2 or 3 days prior to the meeting to update the list. Callahan characterized the wait as stressful. According to Callahan, Boulware's position is that is the way she has always done it and feels comfortable doing it. Callahan testified that he has instituted changes in the way Boulware currently does the list and with the help of Ceil Johnson, can do the list in 3 or 4 hours instead of 1-1/2 days as was the case before. Strikingly, Callahan managed to effect this change without screaming or threatening to fire Boulware.

I find that threat by Segneri to be as Boulware described. In fact, Boulware had been preparing membership lists for years. There was no contention that she failed to prepare the list in question by the due date. I cannot find that was any justification for Segneri's explosive threat to fire Boulware for any answer she gave him. It is telling that Istvan, certainly no fan of Boulware, jumped to Boulware's defense in this instance. Lacking any other, rational explanation for Segneri's threat, I find it a continuation of Respondent's retaliation or Boulware's testimony against the co-op and a separate violation of Section 8(a)(4) of the Act.

7. Boulware's December 18, 2003 suspension

When Callahan become property manager in 2001, he observed the office staff answering questions posed by people at the rent window, including questions about units. The persons most often answering these questions were Boulware and Ceil Johnson. At the time, there was no direction from management that the office employees should not answer questions and no direction had been given concerning what kinds of questions they could answer. Similarly no direction was given to the office staff concerning what kinds of questions they could answer over the phone. Keep in mind this had been the case for many, many years. Callahan testified that Boulware's job is not to answer questions about buying and selling units, those questions are to be referred to the board. He objected to the time she spent doing this. He objected to her walking outside to the hall and talking to people about listings on the bulletin board next to the window. He believes without any real proof that she was conducting personal real estate business at work.

About a year after his initial observations, Callahan had his then maintenance manager, George Heil, issue a warning memo to Boulware about this situation. On July 3, 2002, Boulware received a letter from George Heil, referencing office procedure, that reads:

> On several occasions, you have been observed giving advice and answering questions in front of the bulletin board where units are listed for sale. This is not part of your duties at Success Village and must be discontinued immediately. Any questions should be referred to the sellers or Resale Committee. If a potential buyer asks what is available direct him/her to the board. No further comment is necessary. Your current actions take time away from your job and opens the Co-operative to potential liability if

> you say or do anything that is incorrect. Please consider this letter a warning.

Boulware testified that when she received this warning, she told Heil that the office is always helping the tenants to sell these units. It was always the office procedure to assist them. Boulware testified, "When someone comes to the window and asks a question as far as the availability of units, if it's a first floor or may be a second floor, what we usually do is try to explain to them what floor it would be, what section it would be, and at that time when this notice was given to me I remember talking to the people. I believe it was a group of people, I'm not sure how many people . . . how many there were. But they wanted to know about where is the townhouses and where is the ranch style. And how could they tell how many rooms it was. So that's . . . I was doing, it was just explaining to them the amount of rooms and where it was." "It wasn't any particular listing. They were . . . they were just in general wanting information as to . . . which is the ranch or what is the . . . there wasn't any particular unit they were looking at. They were just asking questions."

Nothing came of this memo or warning for well over a year, until after Boulware testified before the Board in June 2003. Callahan testified that the warning given to Boulware in July 2002 represented a change in practice from what had been allowed before and a change in procedure. No notice was given to Ceil Johnson about this change even though she had been observed answering questions of the public.

Prior to the time Boulware was prohibited from selling real estate, Johnson who works about 12 feet from Boulware, has never heard her conduct her personal business in the office. Johnson testified that since August 2003, she and Boulware have also been prohibited discussing anything to do with resales. All questions are to be referred to the resale committee. She testified that the office receives calls regularly from people asking questions relating to resales and she tries to get off the phone as quickly as possible because she and Boulware can no longer answer their questions.

By letter dated December 18, 2003, Callahan wrote Boulware:

> You were observed during the week of December 1, 2003 talking to an interested buyer at the rent window. You told him, "Please call me." You were warned that selling units at Success Village was a conflict of interest and disciplinary action would occur if you continued. You have obviously continued and you are thus suspended without pay for December 30, 2003.

Boulware was called into Callahan's office along with Dennis Brown and given the letter by Segneri. Boulware denied making the comment referenced in the letter and asked who had accused her of doing so. The management officials refused to give this information and Brown said he was refusing to accept the letter and he and Boulware left. Subsequently, by registered mail, Boulware received a letter directed her not to report to work on December 30, 2003, and she did not report. Boulware denies having made the statement causing her suspension. She likewise denies engaging in any new sales activity after August 28, though she did process sales previously made after that date as part of her regular duties at Success Village.

Testifying on direct examination as to the reason for the suspension, Callahan testified that Leann Istvan told him she had walked by the rent window and heard Boulware say to person standing there, "Please call me." Istvan interpreted this as a situation where Boulware was conducting real estate business. No one asked Boulware or the person what they were talking about, they just suspended her. Callahan admitted that he did not know the subject matter of the conversation. Callahan did not know the reason the person was speaking to Boulware. On cross, Callahan testified that from later conversations with Istvan, he believed that Boulware was speaking with an African American male. After being asked repeatedly on cross about what Istvan told him, Callahan suddenly said, "[O]h, wait a minute there, . . . I think when we were . . . you know, as the whole case came up we were talking about it and I think she said something before 'Please call me,' she said that he said, 'When can I see the apartment?' and that was the first time I've heard that." According to Callahan, "That's what she told me like in the last couple of weeks when we were just discussing that she'd be testifying, etcetera and . . . but that's the first time I heard that." This sudden burst of memory on Istvan's part came during preparation for her testimony in this case in a meeting with Callahan and Respondent's attorney. Callahan testified that there is no evidence that Boulware has shown any apartments at Success Village since December 1, 2003. For that matter, there is no evidence that she has shown an apartment since she was told not to in August 2003.

Istvan also testified about this suspension. Istvan testified that following the August 2003 issuance of the selling prohibition to Boulware, she observed a male at the rent window starting to ask Boulware about an apartment, wanting to see it. Istvan testified that as soon as she walked into the office, Boulware said, "I'll call you later" and then shut up. On cross, Istvan testified that she was in the office hall and one person, a black man, was at the rent window. She did not recognize him as a resident and could not remember if he ever came before the resale committee. She testified that the man asked Boulware if he could see an apartment. Istvan then entered the office, and Boulware who was at her desk next to the window said, "I'll call you later." Istvan discussed this incident with Callahan, but not Boulware, the stranger in the hall or with Ceil Johnson who was in the office at the time.

As with much of the testimony of Callahan and Istvan, I simply do not believe it. Callahan was the first to testify about the conversation Istvan allegedly overheard. Based on his direct testimony, one would have to believe that he issued a suspension on the speculation that Boulware telling someone at the rent window to "Please call me" constitutes some proof that Boulware was again actively selling real estate. Evidently it must have come to him that this might seem specious to a neutral observer, and he conveniently remembered on cross Istvan had subsequently told him, in preparation for her testimony in this case, that the man was inquiring about an apartment. Istvan did not testify that the man was told by Boulware to call her, but that she would call him. Because of their changing stories, their total lack of any investigation with either Boulware or

Ceil Johnson, I believe and find that Istvan and Callahan were again making up evidence that could not be verified one way or the other. I do not credit their testimony. I find that it was simply a continuation of the serious harassment Respondent began directing toward Boulware after her testimony.

I find further support for my finding in this regard in the wording of the suspension. I put in the July 2002 warning to Boulware about what she could talk about with the public to have it in front of the reader. It is significant to me that Boulware was not disciplined for violating this warning, but for violating the conflict of interest memo which I have already found unlawful. There is no mention of the July 2002 warning contained in the suspension. I believe and find that this suspension was simply a continuation of Respondent's unlawful discrimination against Boulware for her NLRB testimony in violation of Section 8(a)(4).[16]

8. The October 13, 2004 warning to Boulware

Boulware received a warning on October 13, 2004, from Success Village, reading:

> Prior to the last three Resale Committee meetings, you were told to only schedule four individuals to meet with the committee. At the first meeting you scheduled seven buyers and two at the same time. At the second meeting you scheduled five buyers and again two different buyers at the same time.
>
> You have also been instructed to not schedule a buyer for a resale meeting unless their file is totally complete. You have been employed for SVA for over 30 years, you should understand what complete means. We also have to spend time writing clear and concise procedures and directions for you to follow on what constitutes a complete file.
>
> If this complete lack of attention to procedures and insubordination to directions from management and Board members continues you will be suspended.

Callahan testified that since about April 2003, the resale committee has only wanted to hear four interviews a meeting and it is Callahan's understanding that this desire has been communicated to Boulware. Callahan testified that he learned of this alleged problem from board member Leeann Istvan. Istvan has been on the resale committee since April 2003 and had been the committee member liaison with Boulware for about 2 or 3 months when this warning was issued. Callahan also testified that Board member Bob Marcinczyk was present and confirmed Istvan's assertions. Callahan issued the warning without asking Boulware about the matters contained in it.

Istvan also testified about the warning for over scheduling and failure to properly ensure files are complete. She testified that she would periodically ask Boulware if any files were complete and ready for interview. If Boulware has complete files, she turns them over to Istvan and she and the rest of the resale committee inspect them. If the committee agrees the files are complete, they are returned to Boulware and she is told to make appointments for the interviews on a date selected by the committee. If incomplete files are found they are returned to Boulware with instructions about making them complete. When these incomplete files are completed, the file is again submitted to the committee for review. If it is then complete, it is scheduled for an interview. The committee strives to have all applicants with complete files interviewed before the monthly board meeting, where they are formally ruled upon. Istvan testified that there are usually two to three interview meetings per month.

Istvan testified that she sets the date for interviews, sets the number of applicants to be interviewed which she indicated was to be no more than four a meeting. Assuming there are more than four files, Istvan testified that Boulware selects the files to be heard and the interview time. Istvan has the power to make the selection of which files are going to be scheduled for interview for any meeting. Thus for any instance in which the resale committee is given five or more complete files for review, Istvan can select which files are to be heard at any date she sets for an interview meeting or meetings.

Istvan testified as above that there has been a standing order against scheduling more than four interviews per resale committee meeting.[17] In fact she testified that for each meeting in 2004 between April 24 and November 2004, she specifically directed Boulware to schedule no more than four interviews. Boulware introduced calendar entries which qualify as her notes on the subject that contradict some of Istvan's testimony in this regard. Istvan testified that for a resale committee meeting prior to the issuance of the October 2004 warning, Boulware had asked if more than four applicants could be scheduled and Istvan had said no. At the meeting in question, seven applicants showed up and the committee felt constrained to hear all of them.[18] According to Istvan, she told Boulware the next day that Boulware could not do that again.

Istvan testified that the other meeting involved five applicants, one of which only a rescheduled leasehold change, which involves very little committee time. Boulware testified that she had been given permission to schedule in this leasehold change, but Istvan denied giving Boulware permission to do so. On redirect examination, Istvan changed the number of scheduled interviews for this meeting to five applicants, with the leasehold change being the sixth applicant appearing. Istvan testified that following this meeting, she complained directly to Callahan.

[16] I also find that there is no demonstrable proof that Boulware engaged in her private real estate business at Success Village after August 28, 2003. Some real estate paperwork was introduced evidently in an effort to show Boulware had some part in sales of Success Village units after the memo, and generally in 2004. I listened carefully to the testimony about them and find they have no real significance in the record. If Respondent actually believed that it could prove that this material showed Boulware was actively still engaged in real estate sales at the co-op, I have no doubt that it would have disciplined her with a suspension or termination. It has no bearing on the "Conflict of Interest" directive or the December suspension.

[17] I do not believe that Istvan was sufficiently qualified to testify about what Boulware was told in this regard until she was made resale committee liaison. Accordingly, I limit my acceptance of her testimony in this regard to those instances in which she met with Boulware for the purpose of setting interviews.

[18] On cross-examinations, this number changed to six.

Boulware testified that after receiving this warning, she queried Istvan about the matter the next day and pointed out to her that the leasehold change had been approved by Istvan. According to Boulware, Istvan said, "I told Frank (Callahan) this was OK." Boulware then asked her to initial the files for all future meetings that are scheduled.

Boulware testified that she had liaisoned with Istvan since July 2004. Boulware testified that the resale committee chairperson, Istvan for all material times, selects the number of files that will be heard at a particular meeting. Istvan and before her Vickie Recko were given the files ready for interview. Boulware testified that they tell her how many to schedule. If there are, for example, seven files ready, she will ask how they want them scheduled. If they say schedule no more than four and set two meetings, she will put four files down for one meeting and three for the other. Boulware testified that it is never her decision as to how many files are to be heard at a meeting. Boulware supplies the committee chairperson the files she believes to be ready and the chairperson reviews them, then that person decides how many will be heard at the meeting or meetings and schedules the meeting or meetings. Boulware also testified that since Istvan has been chairperson she has wanted no more than four applications scheduled for any given meeting.

Boulware's calendar of scheduled meetings for 2004, shows the following meeting dates and number of interviews scheduled: 1. January 9, five interviews; 2. April 1, seven interviews; 3. May 10, five interviews; 4. July 9, four interviews; 5. July 29, five interviews and two additional ones scratched off; 6. August 3, five or six interviews; 7. August 5, sevem interviews, Boulware testified that these were heard over 2 days, five on 1 day and four the next; 8. October 8, five interviews, plus the leasehold change. The calendar also reflects that board member Marcinczyk was the liaison for many of these meetings. Boulware's calendar refutes in my opinion the notion that there had been a longstanding practice of scheduling only four applications for a meeting. Marcinczyk seemed to have no problem with scheduling more than four. I do accept Istvan's representation that she only wanted to hear four applicants at a time.

With respect to the August 5 calendar, it is confusing. If the interviews were all for one meeting, there would be seven interviews with at least two sets of interviews set for the same time. The General Counsel submitted her calendar for August 4, which contains cryptic entries that Boulware interpreted as meaning a meeting was held on August 4 and another on August 5. I believe that someone made a mistake with this meeting and do not believe Istvan's motivation in complaining about it was part of Respondent's continued retaliation against Boulware.

Johnson was present for a conversation between Boulware and Istvan about the discipline Boulware received for over scheduling applicants for the Resale meeting. Johnson heard Boulware say to Istvan, "Leeann, I told you that there was two extra resales and, you told me to go ahead and put them in. Now I got a disciplinary letter." According to Johnson, Istvan replied, "I told Frank there were two added sales to that group," adding that she had told Callahan that she had told Boulware to add them to the others being heard.

With respect to the completeness of files, Callahan estimated that one file in ten submitted to the resale committee is incomplete. How he would be in possession of that information is a mystery in this record. He is not shown to have actively participated in any part of the resale process and Istvan did not testify about such a number. I give it no credence.

Boulware testified that the mention in the warning about completeness concerns one file in which she mistook a prequalification letter for a commitment letter. The committee reviewed this file before meeting on it and did not find the mistake until the meeting. Istvan brought the file to Boulware after the meeting and Boulware apologized for the mistake. This was the only file that Istvan had pointed out a mistake and it was a file that had been reviewed previously by Istvan. The complaint given Boulware also asserts that though Boulware had been doing the job for thirty years, "[W]e also have to spend time writing clear and concise procedures and directions for you to follow on what constitutes a complete file." There was no evidence offered to support this allegation in the warning. With no proof whatsoever of a problem with completeness, Respondent issues this warning. Had it not issued this portion of the warning, I would have let the other half stand, as I believe without really know, that Boulware did make a mistake in the scheduling.[19] I can certainly find no evidence of insubordination as stated in the warning. Johnson has never heard Boulware scream at or become insubordinate to Callahan or Istvan. Because this was a warning threatening suspension, which involves a week, if the co-op's progressive discipline is following, I find it overly harsh and strongly suggestive of Respondent's continuing motivation to retaliate against Boulware because of her earlier testimony. Again, I conclude that the warning was unlawfully motivated and is thus another violation of Section 8(a)(4) of the Act.

E. Allegations of Violations of Section 8(a)(3) and (4) of the Act

Union Business Agent Michael Langston worked at Success Village, primarily as a boiler man until his resignation in 2001 and subsequent employment with the Union. Langston was a union steward at Success Village for 15 of the 20 years he was employed by Success Village. In the steward position, Langston handled grievances and contract negotiations. He sat in on or participated in six separate sets of contract negotiations. There is also the union position of shop chair at Respondent's complex. Since Langston's departure from Respondent in 2001, the shop chair and steward positions have been held by Respondent's employees Dennis Brown, Tony Teja, John Kelly, Lloyd Reid, and Joe Otocka. Joe Otocka voluntarily left Respondent's employ in November or December 2001. Boiler tender John Kelly became union steward on December 10, 2001, and served in that capacity until his employment was terminated in January 2002. Brown and Reid were found by Judge Davis in *Success Village I* to be the targets of gross discrimination by Respondent motivated by union animus. Teja

[19] Wisely, to protect herself in the future, Boulware has the resale committee's liaison sign off on each file that is scheduled for a particular interview meeting.

was also found by Judge Davis to be a union member included in a short group of union employees for whom Respondent harbored such animus.

Langston sent Respondent a letter dated May 13, 2002, in which he announced that Dennis Brown would be shop chairman and Lloyd Reid would be the steward, and both would serve on the negotiating committee for a new collective-bargaining agreement. The letter also notes that clerical worker Una Boulware will serve as alternate.[20] Brown and Reid did participate in those negotiations. There was a time when it was necessary to use an alternate in the negotiations. Because of the work needs of Respondent, Tony Teja served in that capacity rather than Boulware. Teja attended two or three negotiating sessions

General Counsel's Exhibit 11 reflects the names of union officers at Success Village since October 2001:

Shop Chair

10/1/01–12/10/01	Dennis Brown
12/10/01–05/01/02	Tony Teja
5/1/02–10/16/02	Dennis Brown
10/17/02–5/5/03	Lloyd Reid
5/6/03–Present	Dennis Brown

Steward

10/01/01–11/30/01	Joe Otocka
12/10/01–1/11/02	John Kelly
1/11/02–10/6/02	Lloyd Reid
10/17/02–5/5/03	Tony Teja
5/6/03–Present	Lloyd Reid

When Langston left the employment of Success Village in September 2001, WC&F had been property manager for about 2 months. Langston testified that the shop chair and stewards participate in the grievance handling process and in disciplinary matters. They are the union officials who file grievances with the management company's maintenance manager, first George Heil and since his departure in 2003, Phil Segneri. Since WC&F became property manager in August 2001 to the date of hearing, about 67 grievances had been filed, ostensibly in furtherance of the Union's campaign to bankrupt Success Village. The grievances were filed by Brown, Reid, and Teja in their positions as union officials, as set out above.

As is discussed below in detail, Respondent's animus found by Judge Davis toward union officers Brown, Reid, and Teja continues unabated. Many disciplinary actions taken toward the three men are for matters excused or ignored when committed by other, nontargeted employees. To me, it is clear that Respondent has attempted to "cut off the head" of the union dragon in an attempt to weaken the Union and gain control of the other employees. If any question lingers that Respondent still harbors animus against Brown, Reid, and Teja, the following bit of testimony by Segneri in the instant case is enlightening:

> Segneri testified that Brown, Teja and Reid "were the people who were putting up all of the resistance, who were putting up all of the problems, who were creating all of the problems, who went out of their way to create problems and issues. Occasionally, they would bring in Reinaldo or excuse me, Raul (DeSousa) occasionally. Raul had no official status but I would see him huddling with them and occasionally he would—I can remember one time that Raul was complaining about it's a lead man's job. That was the first time that had ever come up. . . .The lead man problem was initiated by Dennis (Brown) because I told Dennis to do certain things and he said that's a lead man's job and I'm only taking orders from a lead man or words like that. The next thing I know after he's talking to Raul, Raul mentions something lead man. I said listen, get it through your head right here, right now, there is no lead man and so when I give an instruction, I give the instruction and if I tell it to him and tell him to tell you it's the same as if I'm telling you so I don't want to hear that argument anymore, just do what you're told and in Raul's case he did.

Judge Davis found as I have set out above that Respondent harbored animus toward the Union and acted on that animus. Though I will certainly discuss each allegation below based on the evidence adduced in this case, as many of allegation in the instant case are similar to those addressed in Judge Davis's case, I also will consider Respondent's history of committing an extensive number of unfair labor practices since the new board and property manager entered the scene in 2001. *NLRB v. DBM, Inc.,* 987 F.2d 540 (8th Cir. 1993); *Reeves Distribution Services,* 223 NLRB 995, 998 (1976). This is particularly true in this case where that history shows extreme hostility to the Union and certain grievance filing employees. Significantly, everyone who played a role in the current set of allegations, specifically Callahan and Segneri (and behind them, current board members Marcinczyk and Tortorello) was found by Judge Davis to be individually imbued with unlawful union animus against essentially the same set of employees at issue in the current case, Dennis Brown, Lloyd Reid, and Tony Teja.

The evidence adduced herein reflects that Respondent continued to treat the three on-site union officials as compared to the other union employees in starkly different ways, with the issuance of discipline in direct proportion to the level of the employee's union activity. I find that Respondent has failed to provide any credible rational explanation for the vast disparity in treatment between these two groups of employees.[21] Moreover, the patently pretextual reasons proffered by Respondent for its personnel action further establish unlawful animus. When a respondent's stated motives for its actions are found to be false, the circumstances warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. *Flour Daniel, Inc.,* 304 NLRB 970, 971 (1991); *Fast Food Merchandisers,* 291 NLRB 897, 898 (1988); *Shattuck Denn*

[20] There was no alternate steward position named in the existing collective-bargaining agreement.

[21] In the discussions that follow in this section, numerous specific examples of disparate treatment are related in the discussion tied to one discriminatee or the other. The examples relate to all discriminatees and are relied upon in the findings related to all three discriminatees.

Mining Co., 362 F.2d 466, 470 (9th Cir. 1966). Thus, proof that a respondent's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, from which the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose, as the Supreme Court phrased it, as "affirmative evidence of guilt." *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133, (2000).

For the reasons set out in Judge Davis's decision and based on the proof that was adduced independently in this record by the General Counsel, I find that he has made a prima facie case under *Wright Line,* and that Respondent was under the burden of showing that it would have taken the same action had it not harbored unlawful union animus toward Brown, Teja, and Reid. In almost every instance, the General Counsel adduced evidence in support of and argued that Respondent's actions set out in the complaint with respect to these three men were violations of Section 8(a)(3) of the Act. The complaint, however, alleges that these actions were also violations of Section 8(a)(4) of the Act. Brown and Reid testified prominently and adversely to Respondent's positions in the first *Success Village* case. The testimony of these two men convinced Judge Davis to conclude that each had been unlawfully discriminated against. Considering the almost instant and harsh reaction that Respondent had to Boulware's testimony, I believe and find that to the extent that I find that an action of Respondent against Brown and Reid was unlawful and in violation of Section 8(a)(3) of the Act, I believe such action was also prompted by their cooperation with and testimony before the Board in the first case, and thus also a violation of Section 8(a)(4). Teja's participation in the first case was limited to being named as a discriminate. He did not testify and thus I cannot make the same findings with respect to him.

1. The 8(a)(3) allegations related to Dennis Brown

Dennis Brown has been employed by Success Village since 1994. He has worked as a carpenter there for the last 5 years. Prior to becoming a carpenter, he worked as a boiler tender. As a carpenter his normal duties include hanging doors, sheet rocking, taping, tile work, jack hammering and framing walk-ins, repairing or replacing locks, painting, and general maintenance. He also performs groundsman duties, cutting grass, removing snow, concrete work, and picking up garbage. Brown currently reports to the current maintenance manager, Phil Segneri, and prior to that, to Segneri's predecessor, George Heil. Brown's normal work hours are 8 a.m. to 4 p.m., Monday through Friday. Brown has no regular assigned duties and is assigned work on a daily basis by Segneri. Most of his work assignments are based on written work orders prepared in response to resident complaints and repair requests. On occasion, Segneri directs Brown and other employees to do a task without a work order. Brown injured his knee in the spring of 2004 and had been on worker's compensation continuously to the date of hearing. Since October, 2001, Brown has been the union shop chairperson and continues to hold that position even when out of work with his disability. In his position as shop chairman, he has written up a number of grievances. As noted earlier, Lloyd Reid and Tony Teja have also written up grievances. As noted earlier, since Callahan took over as property manager, Respondent has been found to have unlawfully discriminated against Brown in seven separate ways, including unlawful layoffs, onerous job assignments, and spurious warnings for poor work performance. The instant complaint alleges this discrimination continued resulting in two incidences of alleged harassment on December 16 and 17, 2003, and the issuance of a written warning on December 18, 2003.

a. Events of December 16, 2003

Brown testified that on Monday December 15, 2003, he began with trash duty, then was assigned to shovel snow on Success Avenue for about a quarter of mile of sidewalk. The snow had been walked on, packed down and could not be blown away. He was to shovel it. He shoveled from 10:30 a.m. to 4 p.m. While shoveling, Brown, as was his practice, took periodic breaks to catch his breath. These breaks are usually about 5 minutes long.[22] Brown denied taking any unauthorized break of 15 minutes or longer while shoveling snow.

On Tuesday, December 16, Brown, Teja, and Greg Pavliscek were told to salt sidewalks in an area of the complex that encompasses about 20 acres. According to Brown, Segneri told him to put three 80-pound sacks of salt, 240 pounds of salt in all, in a wheel barrow and go to the area and begin salting. Citing his bad knee and back, Brown refused to push more than 160 pounds. There was another incident shortly thereafter when Segneri again wanted Brown to move 240 pounds of salt at one time across the office parking lot to load a truck to be driven by Louis Andrade. Brown again refused until the truck was driven up to the salt storage area. Fully realizing that part of Brown's duties entailed moving sacks of salt, I still find it telling that Segneri wanted the 59 year old, injured Brown to load a truck for Andrade who was in his twenties.

None of the three employees assigned to the salting job were assigned by Segneri to salt a particular area in the 20-acre section of the Village encompassed by Segneri's order. The three employees were left to make that decision themselves. Brown testified that he understood his order to be to spread the salt until all the sidewalks in the assigned area had been salted. Brown spread the salt with a coffee can. Brown testified he then salted as ordered and finished about 11 a.m. He returned to the office. Pavliscek had finished his section and was already there. Brown saw Pavliscek speak with Segneri and when Segneri left, Brown asked Pavliscek what they had talked about. Pavliscek said that Segneri had inquired if the men had completed the assignment and Pavliscek had replied affirmatively. Segneri approached and asked Brown if the job were done and Brown said that it was done, they had salted the area. Segneri then sent Pavliscek on an assignment in one of the co-op's trucks. Brown went to the bathroom. When he came out Segneri was gone. Brown had no job assignment at this point. About 11:10 a.m., Lloyd Reid came in and told Brown Segneri was mad at him for not finishing his morning assignment. Brown retorted that he had finished it.

[22] Other witnesses confirmed that they too take frequent breaks while shoveling snow. Any one who lives in the northeast, as I do, can also attest to the need to take frequent breaks while shoveling snow, especially packed or heavy snow.

Segneri came in a little later and asked Brown if Reid had not told him he had not finished his job assignment. Brown acknowledged having talked to Reid, but denied the salting was not finished. According to Brown, Segneri then said he did not shovel, and Brown retorted that he had not been told to shovel. Segneri said he had been so told.

According to Brown, Segneri continued to say that he had told Brown to shovel and had told him to take a shovel. Brown continued to deny this and accused Segneri of calling him a liar. According to Brown, Segneri then got in his face and said, "[O]h, you think you're a tough guy, huh? What do you think, you can take me? I've dealt with tougher guys than you." Brown then asked Segneri why he was acting like a child. According to Brown, Segneri then said he was "fucking lazy" and always looking to get out of work. Brown told Segneri to stop swearing at him. According to Brown, Segneri responded that he could swear at him any time he wanted. Brown then told Segneri, "[Y]ou are breaking my balls because I did exactly what you asked me to do. You asked me to salt. You did not ask me to shovel. This stuff is like ice out there. You can't shovel ice anyway. You can chop it, but you can't certainly shovel any." According to Brown, Segneri calmed down and told him to shovel and Brown shoveled the rest of the day. According to Brown, Reid observed this confrontation.

Reid testified that he overheard part of the exchange. Reid testified that he heard Segneri tell Brown that he was "fucking lazy" and that he did not want to work. Brown replied that Segneri should not swear at him. According to Reid, Segneri then said he would swear at him or anyone he wanted to swear at. He then overheard Brown say, "You did not tell me to do that." To which Segneri replied, "Yes, that's exactly what I told you to do. Go and shovel the sidewalks." Reid described Segneri's demeanor as very loud and very aggressive. Reid did not hear Brown swear at Segneri. Reid testified that Brown left to shovel.

Segneri testified about this incident. He testified that on December 16, he assigned Teja, Brown, and Pavliscek to shovel sidewalks in the portion of the complex on the south side of Success Avenue, about 20 buildings in all. According to Segneri, he told them to take salt, shovels and wheelbarrows with them. The sidewalks had been walked on with snow on them and in places it was packed and very icy. The salt was to soften these spots into slush which then could easily be removed with a shovel. During the early morning, he saw Brown and pointed out that the walks near building 87 were not clear. Later in the morning, Segneri accompanied another employee, John Netsel, to a building in the area where the other men were removing snow. Segneri testified that the walks near building 87 were still not clear. He saw Lloyd Reid and told him to tell Brown that Segneri expected the area to be completely cleaned of snow by noon. About 11 or 11:30 that morning, Segneri found Brown at the office. Brown told him he had completed the shoveling assignment. Segneri disagreed, noting that he had just left building 87 and the sidewalks were still covered with snow. Brown then said that he was only to spread salt and shoveling was not an order he had been given. A heated argument ensued, with both men swearing at the other. During the argument, Segneri inquired of Reid if he had passed on Segneri's message to Brown and got a yes response. The argument ended with Brown being instructed to finish the shoveling or go home. According to Segneri, Brown went home claiming to be sick. This is clearly incorrect as Brown followed Segneri's direction and did shovel that afternoon. He was given a warning 2 days later in part for his actions or lack thereof on the morning of December 16, and that warning mentions nothing about refusing Segneri's direction to return to the area and shovel, or going home rather than carrying out the order. Segneri in his testimony, though not his log entry for this day, added that Pavliscek had no problem following his instructions that morning.[23]

From the foregoing testimony and log entries, I believe the truth is that Brown, Reid, and Teja were only initially ordered to spread salt. That Segneri ultimately wanted what packed snow and ice had turned to slush removed after the salt worked is probably also true. The salt would have taken some time to make slush. It would have been impossible for the three men to actually shovel a twenty acre site in the morning. Segneri's notes indicated that he encountered Teja just before he found Brown in the office, that Teja considered his work done and was putting away his *salt and wheelbarrow,* with no mention of a *shovel.* This omission means to me that Teja, like Brown, had not taken a shovel when he went on the morning assignment as a shovel is not needed to spread salt. Curiously, the log makes no mention of Pavliscek being sent back out as were Teja and Brown. As Segneri did not know what areas each man had worked in, especially Teja and Pavliscek, it would have been logical for all three men to be sent out again to shovel. Segneri

[23] Segneri maintains a daily log of things that happened that to him are important. Most of his testimony about specific events is based upon what he wrote in his log, as he could not independently remember many, if any, details about the events. These log entries were usually made a day after the events in question occurred. He made a log entry for December 16, 2003, which reads:

> I instruct Brown, Teja, and Pavliscek to take wheelbarrow, snow shovel and salt and clear all walks @ (buildings) 77–97—I told them to spread salt 1st on ice & then go back & remove slush. At 9:30 I see Brown @ B92—Many walks were not cleared—I was back @ 92 about 10 & Brown was walking @ 87—I inquired that I saw him working @ 92, then he left—but several walks were not cleared—He reiterated that he "did everything." I went to B87 with Netsel about 11:00 to check pump—I notice walks @ 87-88 not cleared—told Lloyd to tell Brown to clear all walks @ 87-88. I stopped Tony, who was putting his salt and wheelbarrow away & told him I saw several walks near Granfield not cleared. Please clear them all. I returned to shop about 11:30. Went downstairs & Brown is just standing, leaning on telephone pad—I asked L (Reid) if he gave Brown my instructions. Brown yelled back "I did everything" —I replied—no you didn't—I just left 87 & 88 & the sidewalks are not cleared—He yells back—"That's a different order!" You just told me to spread salt & I did—I reiterated "go clear all the walks—He persisted in talking back & arguing—yelling and coming within 2" of my face—Calling me names and challenging me. Being agitated I did use a profanity and told him to "go clear the F— walks." He kept up his insubordination and insolence and now demanded that I not use profanity and give him due respect. Strange, he didn't see fit to respect my authority but yet he demands I respect him. I told him to clear the walks or go home.—He never stopped yelling, arguing, alibying [sic] or whining—I disengaged."

in his testimony indicated that Pavliscek had no problem with his instructions that morning. Segneri did not testify that he had inspected the entire area involved, that he knew which area that Pavliscek worked in and thus I cannot understand how he could make this statement about Pavliscek. It must be noted, however, that at this point in time, Brown and Teja were clearly ongoing targets for Segneri's anger and Pavliscek had yet to make his way into this select group.[24]

I also find it strange that as Brown did not take a shovel with him in the morning why Segneri did not point out to Brown that he was missing a vital tool when he first encountered him in the assigned work area early in the morning. I believe the reason is that he did not instruct Brown or Teja or Pavliscek to shovel that morning.

In conclusion, I find that confrontation between Segneri and Brown on December 16, 2003, to have its beginning in Segneri's faulty instructions to Brown at the outset of the day, and its actual cause, Segneri's ongoing frustration with Brown because of his union position. Brown did nothing to cause the confrontation as he believed that he had accomplished what he had been assigned. It escalated because Segneri became loud, aggressive and called Brown "fucking lazy" and accused him of not wanting to work. As I find Segneri to be the cause of both the beginning of the confrontation and its escalation, I find it constitute harassment of Brown based primarily on Segneri's distaste for Brown's union activities. As I have found that Brown was not specifically assigned a shoveling assignment that morning, a warning based on a failure to shovel in the morning is fatally flawed in this respect. The failure to issue such a warning to Teja and Pavliscek further supports my finding that the warning had as its motivation Respondent's ongoing unlawful discrimination against Brown and had little or nothing to do with Brown's actual job performance. I also find that the aggressive confrontation between Segneri and Brown constitutes unlawful harassment in violation of Section 8(a)(1) and as this harassment played some role in the warning given Brown 2 days later, Section 8(a)(3) and (4) of the Act.

b. Events of December 17, 2003

On the next day, December 17, 2003, it was drizzling with some light rain. Brown and Teja were given a written work order by Segneri that assigned them to remove any traces of snow from the "office bldg." Brown looked at the work order and asked Segneri, "Phil, we have snow in the building?" Segneri took the order and struck out "office bldg." and in its place wrote "entire complex." Brown testified that he had never before been given an order to clear the entire complex, which Segneri testified was 64 acres. He likewise had never been given an order to shovel snow in the rain. It was drizzling at the time and heavy rain was forecast. In any event, Brown objected to the order, telling Segneri that it was going to rain heavily off and on all day and the snow would be washed away. According to Brown, Segneri said that is your job for the day. Brown then said, "[W]ell, that's beautiful." Segneri replied, "[Y]es, it is beautiful and I'm going to enjoy every minute of it." Brown left and shoveled for 4 hours. During the period he shoveled, the rain intensified and alternated between heavy and light rain. Brown used a snow shovel as the mechanized equipment would not work with wet snow. There was not showing that any other employees other than Teja and Brown were ordered to shovel snow on that day. At about noon that day, Segneri found Teja, not in his rain gear and soaking wet. He gave him a ride back to the office to change into his rain gear and then sent him back out to shovel some more. Brown was assigned indoor work on the afternoon of the December 17. I find that both Teja and Brown were given this order as continuing harassment. Snow clearing had been ongoing for several days. To shovel snow in the rain under these circumstances makes no sense except as harassment. Segneri's comments to Brown when the order was given strongly support a finding that harassment was the reason for the order. I find that the order was motivated by an unlawful intent to harass the two employees and accordingly constitutes a violation of Section 8(a)(1) and (3) of the Act with respect to Teja and Section 8(a)(1), (3), and (4) with respect to Brown. Testimony from other witnesses shows that other employees had never been assigned snow cleaning in the rain unless it was to free drains and run-offs. Neither explanation was offered here.

c. The December 18, 2003 written warning to Brown

On December 18, 2003, Brown received a letter from Callahan disciplining Brown. It reads:

> You were observed over the past two days leaning on your shovel for 10 to 15 minutes during the work day. The manager, Phil Segneri, had instructed you to put down ice melt on the sidewalk. When Mr. Segneri asked you why you had not shoveled the snow off the sidewalk, you replied that you had only been told to put down the ice melt, but had not been told to shovel the snow. With your years of experience at Success Village, you should not have to be told to shovel the snow after putting down the ice melt.

[24] Segneri's log has a passage written in the same time frame, September 2003. It says, "Greg (Pavliscek) has crossed over." He had overheard Brown telling a group of unit employees, evidently including Pavliscek, "I don't know who's doing it but whoever is doing it better stop because you're helping the Co-op, not the workers." Segneri was also afraid that the newer unit employees would see that the older workers were "getting away with murder," and that is why he would not let someone else take a job when the employee assigned the work did not want to do it. He cited as an example Reid's not wanting to work in a crawl space on January 14, 2004. Segneri testified that he was fearful because Brown had been talking to Pavliscek. Segneri went on to testify that Brown and Reid were plotting all the time. He would find them talking to one another on worktime and when he asked what they were doing, they would reply, "Union business." Segneri testified that he understood legitimate union business to be time spent on grievances or meetings with management about discipline. He did not understand it to mean anytime they just wanted to stop working and talk.

In September 2003, Segneri observed Pavliscek come into the yard early, about 3:50 p.m. The employees had been told they work until 4:30 p.m. Fearing the Union had poisoned the mind of what had been a good worker, he told Pavliscek, "Greg, that's not allowed and if you do it again, you're going to get suspended and you know, the time is a week and the time after that is termination, use your own judgment." "You know, I've been fair with you right along but you're not being fair with me. You can't do it because if you can do it, everyone else can do it so don't show up in this yard until 20 after 4:00." He considered this a verbal warning.

> It is apparent that you are deliberately avoiding doing work.
>
> As has been previously told to you, the Co-op wants eight hours of work for eight hours of pay with two breaks and lunch. If you do not turn around your performance, you will be suspended and ultimately terminated.

Aside from the allegation about taking breaks, the warning deals with the events of December 16 which I have discussed above. I would further note that Callahan did not speak to Brown about anything connected with the warning.

The allegation about taking 10- to 15-minute breaks could relate to any day between December 15 and 17, as Brown shoveled snow during some part of each of these 3 days. Callahan testified that one of these days, as he drove by building 87 he saw Brown leaning on his snow shovel. This observation lasted 1 to 2 minutes. Callahan also testified that an unidentified resident had called to complain about an employee leaning on a snow shovel on Success Avenue. Brown had shoveled snow on Success Avenue on December 15. According to Callahan, the caller did not identify the employee by name, but described him generally and gave a description of his clothing. Callahan testified that he realized the employee was Brown because of the caller's description of the jacket the employee was wearing. Though Callahan could not recall at the hearing what type jacket it was or its color, he testified that when he saw Brown at building 87 the next day, he recognized the jacket Brown was wearing as the one described by the witness. Callahan rather amazingly then testified that the caller had accused Brown of leaning on his shovel on two or three occasions without saying how long Brown leaned on the shovel, doing nothing. Callahan testified that he did not ask.

Callahan then testified that he estimated the time that Brown leaned on his shovel as 10 to 15 minutes a time, even though he had only observed Brown doing this for 1 to 2 minutes and the complaining caller had not specified any length of time Brown was leaning on his shovel. Based on his testimony, Callahan was forced to admit he did not have any real foundation for the part of the warning alleging Brown leaned on his shovel for 10 to 15 minutes. As with his testimony with respect to Boulware, I believe Callahan was again seeking to come up with something, truthful or not, to support his desire to punish Brown.

The second paragraph of the warning states: "Your poor and very unacceptable work performance has continued since your return to work in May, 2003." Brown testified that from his recall date in May 2003 through the date the warning being discussed, neither Callahan nor Segneri had informed him in any manner that his work was poor or unacceptable. Respondent introduced no evidence to contradict this testimony.

This "warning" has been shown to either be based on a false premise and on Callahan's speculation and not on the facts as they exist. As was the case with Boulware, and as will be shown to be the case with Reid and Teja, Respondent did not investigate anything before issuing a warning. An employer's failure to fully investigate an allegation by obtaining the employee's side of the story is evidence of unlawful motivation, because it shows that the employer is more interested in issuing the discipline than uncovering the truth. *Clinton Food 4 Less,* 288 NLRB 597, 598 (1988); *Kidde, Inc.,* 284 NLRB 78 (1987).

Accordingly given Respondent's demonstrated animus toward Brown, I find inescapable the conclusion that this warning was motivated by union animus and the reasons given in the warning are both pretextual and untrue. Accordingly, I find that Respondent violated Section 8(a)(1), (3), and (4) of the Act by issuing the warning to Brown.

On February 9, 2004, Brown received a disciplinary warning from Callahan, reading:

> On two snowstorms on the weekends of December 6 and December 13, 2003, you were unavailable for emergency snow removal. In accordance with Article 5, Sections 6 & 7 of the Collective Bargaining Agreement, you must be available for a reasonable amount of overtime and respond to a reasonable amount of call backs to perform emergency work. This was not the case on these two weekends and you thus caused an emergency situation at Success Village. This letter is a warning that you must make yourself available on the C0-op's schedule, for overtime snow removal.
>
> The above actions on December 6 and 13 are poor work performance at Success Village. These actions will not be tolerated and any further examples will be dealt with in a disciplinary manner.

No charge was filed with the Board over this warning, which was given to all employees, including Reinaldo Tapanes and Teja, who did not respond to Respondent's calls on December 6 and 13, 2003. However, a charge was filed with the Region relating to alleged unilateral changes in procedures relating to overtime and snow removal. To the best of my knowledge, no complaint had issued over this charge when the instant hearing ended.

2. Allegations related to 8(a)(3) and (4) allegations involving Lloyd Reid

As of the date of hearing, Lloyd Reid had been employed by Success Village for 16 years. He is a carpenter primarily engaged in repairing walls and floors, painting, and other carpentry work at the Village. From time to time, he also does plumbing, electrical work, trash hauling, sidewalk construction, leaf pick up, grounds work, and snow removal. In his plumbing duties he worked with fellow employees Reinaldo Tapanes and Louis Andrade. Several documents entered into the record in this case which were authored by residents and former property managers reflect that Reid was considered to be an excellent and hard working employee by both. Segneri and Callahan each testified in the first Success Village case that Reid was either a very good or reliable worker. Prior to the arrival of Callahan in August 2001, it is undisputed that Respondent had only issued one discipline to Reid, a one-time warning for not wearing safety glasses. That laudable record would change under Callahan.

Reid was involved in the first *Success Village* case and testified on behalf of the General Counsel. Reid has served in union offices at the co-op between September 17, 2002, through May 5, 2003. In his union positions he filed grievances and attended

grievance meetings. He also participated in negotiations for a new contract in 2002. He testified in the first *Success Village* case on September 14, 2003, and on February 3, 2004.

Ruling on allegations pertaining to Reid in the first case, Judge Davis found that Respondent unlawfully suspended Reid for a day, finding that the General Counsel had proven that Reid's suspension was motivated by his position as shop steward. He wrote further: "This is made clear in that the suspension itself, and the events which occurred just after the suspension, which demonstrate the unreasonable antagonism demonstrated by Segneri toward Reid. Thus, Segneri's action in suspending Reid although there was work for him to do that day shows that Segneri dealt with Reid in an unreasonable way which can only be explained by his animus toward him as the shop steward. In addition, the day after the suspension, Segneri engaged Reid in an unprovoked confrontation, and later gave Reid two jobs in rapid succession, asking him why he had not finished the first. It is significant to note that Reid was speaking to Brown when asked that question by Segneri."

In the instant case, Respondent is alleged to have unlawfully sent Reid home early on several occasions, refused to give him light-duty work following an injury, and suspending him on several occasions between January 14 and mid-April 2004. These allegations will be discussed below in chronological order.

a. Reid is sent home early on or about January 14, 2004[25]

Reid, like several other of Respondent's employees, is required to occasionally work in the crawl spaces of the co-op's buildings. Because of asbestos dangers in these areas, he is required, inter alia, to wear an air mask specially fitted to his face. The air mask comes with two filters. In mid-January 2004, he was assigned certain duties that caused him to enter the crawl spaces of two buildings. He went to the first building assigned him, put on his air mask and did what he had been assigned. He found that it was very hot in the crawl space due to a steam leak in the basement. When he finished at that building and exited it, he was "stuffy" and began sneezing.

When went into the next assigned building and put on the mask, he found that he could not breathe. He returned to the office and changed filters in the mask and still could not breathe. He reported this to Segneri who told him that if he could not use the mask, he should go home. Reid asked for other work, but Segneri said there was none and sent him home at about 8:40 a.m. He said that Segneri's tone of voice this day was loud and aggressive. On the following day, Reid reported to work and was assigned work not requiring the use of the mask.

Segneri testified that on January 14, 2004, Reid had been assigned a repair job in a crawl space in a building's basement which required he wear his respirator mask. According to Segneri, Reid came back to the office from this job and complained of the heat in the basement and breathing problems. Segneri testified that he offered Reid new filters for the mask. Respondent showed Reid a page from notes kept by Segneri that indicates that Reid had a breathing problem on January 14, 2004. The note says, "Lloyd says he can't breath under building. I gave him a new filter for his respirator. Now he says he needs to go to the doctor because it's 3 degrees outside and thinks it's 100 under building." The timecard relating to this day shows Reid left at 9:28 a.m. It also has a notation on it reading "4 hours sick."[26]

There does not appear to be a serious question about whether other work was available for Reid on this day. There were unaddressed work orders and an ongoing inventory program that Reid could have worked on. Reid testified that there is usually a lot of work to do in the units in the winter including wall repairs and painting. But Segneri testified that he simply did not think it was fair to let Reid out of this assignment and give it to another employee. Thus, he offered Reid the choice of doing the job or being sent home. This policy that Segneri followed on January 14, 2004, evidently only applied to Reid, Brown, or Teja. Segneri's logs for July 31, 2003, show that employee Raul DeSousa came back from a job he had been assigned and refused to do further work on the assignment because his dust mask was inadequate. DeSousa wanted to go to a hardware store and get a better one. Instead, Segneri gave him another job and assigned a different employee to finish DeSousa's job. DeSousa was not disciplined nor was he sent home.

At page 62 of his decision in the first *Success Village* case, Judge Davis wrote: "Reid was then assigned to break up a sidewalk and prepare it for concrete forms. Reid went to the garage for his equipment and realize he did not have his back brace on. He reported to Segneri that he did not have a back brace or safety glasses. Segneri gave him a "worn, used" brace. Reid refused to wear it because of its poor condition. Segneri said that he had no more braces and that he should wear it or go home. At 9 a.m., Reid reported this incident to Brown and then went home. He was paid until noon that day. Thereafter, Segneri gave Reid safety glasses, and a new back brace, which Reid used to perform heavy work." Judge Davis found this action by Respondent was a violation of Section 8(a)(3) of the Act.

I find that Respondent, by Segneri, unlawfully sent Reid home on January 14, 2004, as he did on July 24, 2003. His only reason for not assigning him other work on that day was that it was not fair to other employees. Judge Davis did not buy this

[25] The complaint alleges that the events discussed in this section occurred in mid-February 2004, after Reid testified in the first *Success Village* case. However, Respondent's timecards for Reid and Segneri's log entries suggest that these events actually occurred on January 14, 2004, before Reid testified. I have not reviewed the prior transcript to see what Reid testified to in September 2003 in the first *Success Village*. Had Reid not been a target of Respondent's unlawful discrimination before January 2004, I would attach some significance to the timing of the alleged discrimination and the date of Reid's testimony. But, as found by Judge Davis, Respondent had unlawfully discriminated against Reid by suspending him on July 24, 2002, a date approximately 1-1/2 years before January 14, 2004.

[26] After sending Reid home, Segneri checked the temperature in the crawl space where Reid had been and found it to be 75 degrees. Segneri testified that because of the humidity, the conditions in the crawl space were uncomfortable but workable. He noted that Reid could have cut off the steam in the building and waited for the temperature to drop to an acceptable level, but he did not do that.

argument and neither do I. Not only was DeSousa treated differently under very similar circumstances, but so was employee Reinaldo Tapanes. Segneri's log entry for November 7, 2003, reads as follows:

> R(einaldo) takes a fit—won't go under building—sore knee wants to quit. I get Dennis. He finds a couple of problems and is working on them. Reinaldo lied to me about radiator valve in 92-17—said he in new—I checked—he didn't.

Because of Segneri's demonstrated animus toward Reid, the disparate treatment afforded Reid vs. DeSousa and Tapanes, I find that Respondent's reasons for not assigning Reid other work on January 14, 2004, are pretextual, untrue, and reflective of its animus toward Reid. Accordingly, I find that Respondent's actions in this regard violated Section 8(a)(1) and (3) of the Act. As noted, Reid testified against Respondent in the first *Success Village* case in February 2004 and his troubles with Respondent accelerated.

b. Reid's injury in March 2004 and Respondent's actions related to the injury

Reid testified that he was injured on the job on March 4, 2004. All medical forms related to this injury show that the injury happened and was reported to the Respondent on March 11, 2004. I credit these forms with regard to the date of the injury. Reid injured his elbow while working and was sent to a medical clinic, Concentra. Concentra assigned Reid to physical therapy and gave him certain work restrictions: "no repetitive lifting over ten pounds; not to use an impact or power tool with his left hand; and limited use of left arm." Reid returned to work that day and gave Segneri the light-duty letter from the clinic.[27] After an initial assignment that Reid could not perform alone with his injury, Segneri assigned employee Louis Andrade to assist him. Segneri then assigned Reid tasks that he could perform. Reid continued work on March 12, 15, and 16, 2004, without any problem. Reid testified that his injury never worsened and he could have continued to perform jobs at the co-op within his restrictions until fully well. According to Reid, on March, 17, 2004, while still on restrictions, Segneri assigned him to blow snow with a snow blower. Reid told Segneri the blower was too heavy for his injured arm. Segneri told him that if he could not use the snow blower, to go home and not return until his arm was well. Reid punched out and went to his doctor for a scheduled therapy session. At the session the doctor gave him a new note again restricting the use of his left arm to lifting 10 pounds. Respondent timecards reflect that Reid was on workmen's compensation for March 17, 18, and 19, 2004, and then he went on a week long vacation.[28] He was cleared by Concentra to return to work on March 28 and returned on Monday, March 29, 2004.

The General Counsel introduced a document dated January 28, 2003,[29] making permanent certain snow cleaning assignments. It assigned Reid to the New Holland piece of machinery, which he could handle with his injury. Though Segneri in his testimony agreed that Reid could have used this machine even with his injury, Segneri did not assign Reid to use it on March 17, 2004, before sending him home. All employees were given on ongoing assignment in March 2003 to do inventory work when they had nothing else to do. Reid did perform some work pursuant to this assignment in September 2004, but none in March 2004. Reid was ready to work within the limits of his restriction between March 17, 18, and 19, 2004. The General Counsel introduced a number of work orders covering this period which assigned work that Reid could have performed even with his restriction. There were several other orders that could have resulted in work by Reid assisting another employee. He had assisted other employees on several occasions between March 4 and 12, 2004.

Segneri vaguely remembered Reid having an elbow injury that kept him from working for a period of time. Though he found work for Reid within the scope of his restrictions for several days following Reid's injury, Segneri testified that there is no light duty and employees with restrictions are sent home until they can work normally. Segneri testified that he was told of this policy by Callahan when he told Callahan he had put an unidentified employee on light-duty work at an unspecified time. He believes that he learned of the policy during the first 3 or 4 months of his employment. As noted above, despite this alleged policy Segneri put Reid to work for a few days following his injury and being placed on restrictions.

Segneri testified that employee Louis Andrade was injured on the job on September 15, 2003. On the next day, Andrade was assigned what Respondent calls "light duty weed whacking." This assignment was completely in conflict with Andrade's restriction to sit 100 percent of the time. Segneri stated that Andrade might have been able to use the co-op's riding lawnmower and meet the restriction. On the next day, Andrade and another employee were assigned the job of erecting two signs inside the complex. This job required pounding a steel pole into the ground with a sledge hammer and then affixing the sign to the pole with screws. There is a letter in the co-op's files written by Ceil Johnson to an insurance carrier, stating that Andrade was assigned work in the office until he was cleared by doctors to return to normal work. This letter was obviously sent with Segneri and Callahan's approval as Johnson has no authority to write such a letter without their ap-

[27] Segneri testified on at least a couple of occasions that he was not in loop to receive restrictions placed on the employees under his supervision. Ceil Johnson testified to the contrary that Segneri is given a copy of any restrictions the day the co-op receives the restrictions from Concentra. Reid also credibly testified that he handed his restriction letter to Segneri on the day Reid got the letter. I credit Johnson and Reid and find that Segneri had notice of Reid's restrictions from the outset.

[28] Ceil Johnson testified that Reid did not get paid worker's compensation for March 17, 18, and 19, 2004. She testified that he failed to get such pay because the co-op's insurance carrier invoked a rule that lets it deny such claims because Reid came back to work for a few days after the injury. She remember the reason that Reid was sent home on March 17, 2004, was that he said he could not operate a snow blower and Segneri sent him home until he could work without restriction.

[29] Segneri signed this document and he was not employed by the co-op in 2003. I believe the correct date to be January 28, 2004.

proval. Segneri testified that this letter is untrue and that Andrade never worked in the office. Segneri testified that Andrade worked a few days after the injury and then came to him with a swollen knee. Andrade returned to the doctor and then stayed home several days until his injury healed.

I believe that Respondent's no light-duty work defense arose after the fact of Reid being sent home. This was not a case of there being no work within his job description that he could perform. Indeed work was found for him to perform. No reason was advanced for not assigning similar work for the few days remaining before his vacation. No reason was shown why Reid could not have operated the New Holland to which he was permanently assigned. This machine is, inter alia, used in snow removal. I have already found that I do not believe Segneri did not know of Reid's injury until the snow blower assignment. I credit Reid that Segneri knew of the restrictions on the day of the injury.

If there existed a no light-duty rule, then there is no valid reason for assigning Andrade, evidently more seriously injured than Reid, to work for several days until Andrade himself asked to go home until he was healed. If there had existed a no light-duty rule, there was no reason for assigning Reid to work for over 2 days following his injury. I find that Respondent had in place no rule against assigning light-duty work to injured employees with restrictions. I find that it was established that there was work available within the scope of Reid's restrictions on the day he was sent home. In the absence of some legitimate reason for Respondents effective suspension of Reid on March 17, 2004, was motivated by union animus as were his suspensions in July 2003 and January 2004. Accordingly, I find that the March 2004, 3-day suspension constitutes a violation of Section 8(a)(3) and (4) of the Act.

c. Reid is suspended for not performing overtime work

(1) Respondent's overtime requirements and Reid's past performance of overtime

As will be discussed in detail below, Reid received what amounts to a 2-day suspension for April 2 and 6, 2004, for refusing an overtime requirement. Under the parties' expired contract, an employee is not obligated to work overtime on every occasion he is asked to do so, even if the overtime request relates to emergency situations. Rather, under the expired contract, an employee is only obligated to work a "reasonable" amount of overtime, including during emergency circumstances. Specifically, article 5, section 6 of the parties' expired contract provides in relevant part:

> Employees shall have an obligation to respond to a reasonable number of callbacks to perform emergency work. Any employee called back for such emergency work shall be guaranteed a minimum of at least one (1) hours' pay at the rate of time and a half his regular hourly rate for all hours worked thereafter. The Co-op shall post a call back list on a bulletin board in a designated location and all employees who wish to be called back for emergency work must sign up and indicate their name and telephone number.

Article 5, dection 7, of the expired contract, adds:

> Employees shall have an obligation to work a reasonable amount of overtime. Opportunity to work scheduled overtime shall be equalized insofar as practicable among the employees in a group engaged in similar work as long as they are able to perform the work for which the overtime is required.

Thus, as noted above (1) employees are only obligated to work a reasonable amount of overtime, regardless of whether or not the overtime request arises from or relates to an emergency circumstance; (2) in the event of emergencies, Respondent has the obligation to first select from those employees who posted their interest in performing such work on an overtime basis; and (3) employees have some discretion in deciding whether or not to accept or reject requested overtime, as reflected by the fact that the contract relies on "reasonable" rather than "mandatory" language concerning callbacks, as well as the fact that employees can decide in the first place whether or not to sign up for emergency overtime work.

Reid lived across the street from the co-op's office and because of this proximity was often called back for overtime work. Reid believed he had performed the most overtime of all of the co-op's employees over the last few years. Ceil Johnson testified, based on her payroll duties, that Reid had in fact performed the most overtime from June 2003 through April 2004. Respondent's 2003 payroll records show that its eight maintenance employees earned overtime that year in the following descending order: (1) Lloyd Reid: $3,685.23; (2) John Netsel: $1,567.41; (3) Greg Pavliscek: $920.27; (4) Reinaldo Tapanes: $784.37; (5) Raul DeSousa: $484.98: (6) Tony Teja: $313.67; (7) Louis Andrade: $244.84; and (8) Dennis Brown: $18.42. Respondent's 2004 payroll records for Reid and Reid's weekly timecards show that Reid worked 2 overtime hours for the payroll period ending January 4, 2004; worked 9-1/2-overtime hours for the payroll period ending January 11, 2004; worked 2 overtime hours for the payroll period ending January 18, 2004; worked 10-1/2-overtime hours for the payroll period ending January 25, 2004; and worked one-half overtime hours for the payroll period ending February 1, 2004. Only two employees, Louis Andrade and Greg Pavliscek, worked more overtime hours in 2004 than Reid.

(2) The events of April 1, 2004, and Reid's refusal of an overtime assignment

With the foregoing as a frame of reference to Reid's ordinary willingness to work overtime, I will move to the incident giving rise to Reid's suspension. In addition to his work at Success Village, Reid is employed on a part-time basis to do general maintenance for a local church. During the winter he usually works for the church 8 to 9 hours a week and in the summer, about 15 hours a week. He sometimes worked there in the evenings and on Saturdays and Sundays. Before his testimony before the Board in February 2004, it had been management's practice to allow him to do his church work even if it conflicted with overtime work Success Village wanted to assign him. In the timeframe around April 2004, he was regularly performing about 7 hours of overtime work at Success Village.

On April 1, 2004, Segneri assigned Reid to check out a report of a bad odor coming from the basement of building 64.

He went to the building and entered the basement. He smelled an odor that caused him to think an animal was decomposing somewhere in the basement. He checked the basement out and did not find anything he thought could cause the odor. He returned to the office and got some odor killing powder and went back to building 64 and spread it throughout the basement. He wrote what he had done on his work order and went on to other assignments. About 4:15 p.m. he returned to the office and shortly thereafter, Segneri asked about building 64. Reid told him what he had done. Segneri told him that the problem was a broker sewer main and he should return to the building and aid Greg Pavliscek, who was already there to fix the problem. Reid told Segneri that it was not a sewer line problem because the odor was different. He also told Segneri he was leaving for his part-time job at the church. Segneri told him that if he left then he was "finished working here" and that "you're out of here."[30] Reid repeated that it was not the sewer and that he indeed was leaving for his part-time work. Segneri told him to leave the premises, that he was "done working here." According to Reid, Segneri was aggressively coming toward him and so he went from the maintenance area to the office upstairs to wait until his scheduled 4:30 p.m. departure time. Segneri came to the office and told him to leave, again repeating that he was done working there. Reid said he was not leaving until his shift was over at 4:30 p.m. Segneri grabbed Reid's timecard from the rack where it was kept and punched Reid out. Segneri then walked toward his office with the card and told Reid that tomorrow he would not have a card to punch. Then Segneri told him to leave or he would call the police. Reid did not move and Segneri called the police. At 4:30 p.m. everyone in the office was leaving and Reid joined them. *As he passed Segneri's office, Segneri told him not to return until the matter was resolved with Callahan.* The last part of the confrontation between Reid and Segneri was overheard by Una Boulware and Ceil Johnson, who corroborated Reid's account. Reid's timecard for that day shows that Segneri punched him out at 4:22 p.m. At the time Reid was living in a unit across the street from the office and observed the police arrive about 15 minutes later. The police found the office locked and left.

Segneri testified that on April 1, 2004, management received a complaint from a resident of building 64 about a terrible odor, and the suggestion that something had died in the basement of the building. Segneri assigned Reid to solve the problem and did not hear about it again until about 3:15 or 3:30 p.m. that day. At that time the resident called again, complaining nothing had been done about the smell. Segneri assigned Pavliscek, who was nearby at the time, to check the problem out. Pavliscek did as he was told and reported back that he thought the problem was a broken sewer pipe because there was standing water in the basement and it had a terrible odor. Pavliscek noted that someone had thrown some deodorant powder on the water. Segneri assigned Pavliscek to take a pump and pump out the water and find its source. About 4:10 p.m., Reid came back to the office. Segneri asked him to go help Pavliscek pump out the water. Reid refused, noting that he had to go to a part-time job at 4:30 p.m. Segneri told Reid he did not care about his personal life, that he was required to perform a reasonable amount of overtime in an emergency and this constituted an emergency. He pointed out the job had been assigned to him that day. Reid continued to refuse to go and Segneri said he was off duty as of that minute. *He told Reid not to come back to work "until you speak to Frank (Callahan) and I about this very thing because this is not allowable behavior."* Segneri's daily log reflects that Segneri also told Reid that if he refused the assignment and left, Segneri would consider it a resignation. Segneri walked upstairs to the office and saw it was about 4:20 p.m. Segneri got Reid's timecard and wrote that that Reid left at 4:20 p.m. Reid came upstairs and refused to leave. According to Segneri, Reid was complaining to Boulware about the matter and generally bad mouthing Segneri. Segneri overheard him and told him to leave or he would call the police, which he had Ceil Johnson do.[31] The office staff and Reid left at 4:30 p.m. before the police arrived.

Segneri testified that the problem with building 64 turned out to be a leaky valve and the smelly water had just accumulated.[32] Segneri informed Callahan about the incident by phone that evening.

(3) Events of April 2–5, 2005

Reid did not report to work the next day, Friday, April 2, 2004. Segneri testified that he expected Reid to meet with himself and Callahan that day and did not consider his parting instructions to Reid the day before to be a suspension. Segneri also testified that he believes that Callahan called Reid on Friday, April 2, 2004. Considering the instructions he gave Reid on Thursday afternoon, I find it very strange that Segneri would testify that he expected Reid at work on Friday morning. Even based on Segneri's recitation of the events of April 1, 2004, I can only come to the decision that Reid was certainly suspended if not fired on that date.

According to Callahan, after Reid was sent home, Segneri told him that he had informed Reid not to come back until we (meaning Callahan, Segneri and Reid) discuss it. Callahan asked when Reid was coming back and Segneri said on Friday, the next morning. Callahan testified that Reid did not show up the next day. Callahan testified that it was a miscommunication between Reid and Segneri and that Segneri did not suspend Reid. Reid testified that he believed he had been suspended and I find that belief to be fully supported by the credited evidence.

[30] Reid testified that on previous occasions when his part-time work interfered with doing overtime at the co-op, Segneri would let him go to the part-time job without a problem developing. Indeed, another employee Raul DeSousa was shown to work at a local hospital every night.

[31] Johnson denies calling the police.

[32] On the first day of this problem, after Pavliscek reported that he thought the problem was a broken sewer pipe, an outside contractor was called in and did not come until the following day. With regard to pumping out the water, Pavliscek could have done that by himself without the need for Reid's assistance. Respondent also offered no evidence why it did not assign its plumber Reinaldo Tapanes to the project when it was told by Pavliscek that the problem was a broken sewer pipe. The was no showing that Reid's refusal to perform overtime on April 1 in any way exacerbated the smelly water problem or in any way lengthened the solving of the problem.

Callahan testified that he spoke with Reid on the phone that Friday morning[33] and Reid seemed confused. According to Callahan, he asked Reid to come in and Reid told him that he was busy doing something else and would return on Monday. I do not credit Callahan's testimony in this regard. Reid denies talking with Callaghan, with Segneri or any other management figure at the co-op until Monday, April 5, 2004. Though it was represented at hearing a telephone billing record would be introduced to support Callahan's testimony, no such record was introduced. Indeed subsequent written documents discussing the incidents in question make no mention of a Friday contact. Thus, I find that Respondent's management made no attempt to contact Reid at all about this matter.

Reid testified that on April 2, 2004, following Segneri's instructions, he did not report to work and stayed at home all day that day. He had heard nothing from Segneri or Callahan that would indicate he was to show up for work on April 2. He received a call from the shop chair, Dennis Brown, on Saturday, April 4, telling him to report on Monday and the two of them would find out what was going on. At 8 a.m., Monday, Reid and Brown met with Callahan. Reid told Callahan what had happened on Thursday, April 1. Brown asked if Reid were going to be paid for Friday and Callahan said he would have to check with his attorney. At this point in the conversation, Segneri showed up and according to Reid, told the others that the problem in building 64 was not a broken sewer, but rather, standing water. Reid was not paid for 15 minutes on April 1 and for the entire day on April 2.

(4) Reid is given a written discipline and suspension on April 7, 2004

On April 7, 2004, Callahan gave Reid a written warning referencing poor work performance. It reads:

> Last Thursday, April 1, 2004, Phil Segneri assigned you to determine the cause of a bad smell in Bldg. 64. In the late afternoon, Phil asked you what you had done at Bldg. 64, and you said that you had put down a chemical to treat bad odors caused by what you believed to be a dead animal. This did not solve the problem. Phil instructed you to go back to Building 64 and assist Greg (Pavliscek) with a problem of standing water in the basement at Building 64. You refused, and stated that you had a part time job to go to.
>
> Phil reminded you that your work time at the Co-op is until 4:30 P.M. and also that you are required to be available for reasonable overtime. Since you continued to refuse to go back to Building 64 to complete the job and get rid of the odor, Phil punched you out at 4:22 P.M. Phil also told you that you were not to go back to work until Phil and I discussed with you your refusal to go back to Building 64.
>
> On Friday, April 2, 2004, you did not report for work. On Monday, April 5, 2004, I asked you why you did not come to work last Friday. You said you thought Phil had suspended you last Thursday. This is not correct. You were told to discuss the matter with Phil and me on Friday. I was in the office at 8 a.m. expecting to meet with you last Friday, but, you did not show up.
>
> I have determined that you were insubordinate last Thursday when you refused to follow Phil's instruction to go back to Building 64 to complete the job. You are required to work until 4:30 p.m. and also work a reasonable amount of overtime. You refused to work a full day, and also refused to complete an assignment you had been given earlier in the day, but had not fixed.
>
> Therefore you are suspended for April 12, 2004. You will return to work on April 13, 2004. Also, you will not be paid for April 2, 2004, since you did not report to work that day.
>
> If you continue to have poor work performance, more serious discipline will be taken.

Reid denied being told by Segneri on Thursday April 1, 2004, to return the next day to discuss the events of April 1 with Callahan. He received no phone call the evening of April 1 or at anytime on April 2 to report to work to discuss the problem with Callahan. I credit Reid's testimony in this regard. Nothing in the suspension set out above mentions a Friday call to Reid and indeed, notes that Callahan on Monday inquired why Reid had not worked on Friday, information he would have had, had he spoken to Reid on Friday. Thus, based on the facts I have credited above, I find that Reid was suspended for 15 minutes on April 1, 8 hours on April 2, and 8 hours on April 12, 2004, all for refusing Segneri's overtime request of April 1 and for then following Segneri's instructions on April 2, 2004. There was no showing that Reid had been disciplined for refusing an overtime assignment before his suspension in April 2004.

As with many of Respondent's actions in which Segneri was involved, this one demonstrates an overt and extreme hostility on the part of Segneri toward Reid, much as he has shown toward Brown and Teja. Other employees, notably Tapanes, Netsel, and DeSousa, have refused job orders from and sometimes even cursing Segneri without causing an apparent ruffle in his behavior. Yet with in seconds of Reid telling him that he had to go to his part-time job that evening and would not accept the overtime assignment, Segneri was yelling and threatening termination. At the time of the refusal to accept overtime, the problem at building 64 seemed to be a broken sewer, something Reinaldo Tapanes would be better suited to deal with than Reid. There was nothing about the problem that demanded that Reid deal with it over any other employee. There was nothing shown about the problem that actually required anyone to help Pavliscek that evening pump out the basement.

The warning and suspension given Reid over this incident speaks of Reid's insubordination. Callahan must define insubordination as Reid exercising his right under the expired contract to refuse overtime. Reid did nothing on April 1, 2004, to cause Segneri to lose control of his temper and send Reid home, arguably from the language employed, for good. I find that Respondent has shown no emergency existed that required Reid, as opposed to any of the other maintenance employees, to perform overtime on April 1. Because of the hostility exhibited

[33] Callahan testified a little later that the call took place at the end of the workday.

by Segneri, I find that the reaction to Reid's refusal was Segneri and Respondent's animus based on Reid's serving as a union official, and for giving adverse testimony against Respondent in the first *Success Village* case. Respondent's reaction based on animus did not stop with Reid being sent home on the first. Reid was clearly told not to return until the matter was resolved with Callahan. I find that this was an effective, on-going suspension until Callahan or Segneri called Reid back in. Brown's intervention got Reid back in to work on the following Monday. As I have found, Callahan lied about calling Reid on Friday, April 2. There was no showing that other employees had been similarly treated for refusing overtime at the end of a workday.[34] The entire disciplinary incident began with Segneri's antagonistic and nearly hysterical response to Reid's refusal of overtime, his suspension or near termination of Reid, his ordering him home less than 10 minutes before the end of the workday, and calling the police without any cause to do so. It was followed by Callahan letting Reid stay home on Friday and lying about calling him Friday to return to work for a meeting, and then issuing him another suspension over the events he claimed that Segneri had not suspended Reid on April 1. Nothing about this incident make sense from any normal business perspective. It only makes sense in that it appears without question to be another step in Respondent's ongoing and unlawful attempt to punish and/or rid itself of the union officials it has clearly targeted. Accordingly, I find that Respondent has been shown to have violated Section 8(a)(1), (3), and (4) of the Act by each of the actions set forth in the complaint with respect to these three suspensions.

d. Reid is suspended over his use of a co-op phone on co-op time

For at least the past 20 years, Respondent has maintained a telephone in the downstairs maintenance shop near the employees' locker room, area within the main office building. It is undisputed that Respondent has always allowed its maintenance employees to have unrestricted use of this telephone (or the phones in the business office) in order to make or receive local personal calls while on duty. In this regard, according to Langston, this phone was always present during his 20-year tenure with the co-op, and maintenance employees made phone calls all the time on this phone while on duty, and also used the phone to receive calls while on duty that were transferred to them from the office clerical employees in the business office.

Brown, Teja, Reid, and Boulware all corroborated Langston's testimony. In this regard, Boulware testified that throughout her tenure with Respondent, unit employees have always been permitted to make or receive local personal calls while on duty; that she often transferred personal calls for on-duty employees from her desk to the phone in the downstairs maintenance area; that she had never been informed by Respondent to cease transferring personal calls to on-duty maintenance employees; that she had never heard Respondent inform any employee they could not use the phone downstairs while on duty to make or receive such personal calls while on duty; that she had made personal calls while on duty; and that she had never heard of any employee ever receiving discipline for using the downstairs phone to make or receive personal calls because they were on duty at the time of the call.

Similarly, Brown testified that Respondent has always allowed employees to use the downstairs phone to make or receive personal calls while on duty; that he and other employees had made such calls in the presence of management; and that Respondent has never approached him as shop chair to discuss a cessation to that practice. Significantly, Brown testified that unit employees have used the downstairs phone for personal calls in Segneri's presence. According to Brown, under such circumstances, Segneri has allowed the employee to continue their phone calls without repercussions. Dennis Brown corroborated the testimony of Langston and Boulware about Respondent's practice with respect to employee use of its telephones. In his position as shop chair, he has not been notified by management that employees cannot use the co-op phones for personal local calls or taking incoming calls during working hours. Brown was present for the Segneri—Reid incident. Brown testified that about 3 or 4 minutes after 8 a.m., Reid made a phone call. Segneri came in and began giving out work assignments. He noticed Reid on the phone. He asked Reid if it were personal business and said that he could not use the phone for personal business. Reid made a motion with his hand as if to say, wait a minute, and finished the call with a minute or so, then hung up. According to Brown, Segneri said, "[T]hat's it, the phone's out of here." Segneri ripped the phone out and took it upstairs. It was returned about 2 weeks later.

It is undisputed that prior to the events of April 6, 2004, Respondent has never notified the Union or its on-site stewards that employees could no longer use the downstairs phone to make and/or receive local calls while on duty. In this regard, Langston and each of the three on-site stewards, Brown, Teja, and Reid, each testified they never received such notice. Further, it is undisputed that, prior to April 6, 2004, Respondent never requested to bargain with the Union about discontinuing this longtime practice.

On April 6, 2004, there was another incident between Segneri and Reid. Reid had awakened that day to find his refrigerator broken. So he went to work at 8 a.m., punched in and went downstairs and used the phone there to call a repair person. According to Reid, he was giving this person directions to his apartment unit when Segneri walked up and asked him if he was engaging in a private or company call. Reid told him his refrigerator had broken and he was trying to get someone to fix it. Segneri ordered him to get off the phone, stating he was not supposed to make private calls on company time. Reid ignored this directive and gave the person directions to his unit. Then he got off the phone. Reid testified that he was on the phone about 1 minute after being told to get off the phone by Segneri. According to Reid, Segneri then yanked the phone cord from the wall and took the phone upstairs to his office. The phone was put back in service about 2 or 3 weeks later. Reid testified that before this incident employees were allowed to make and receive personal calls on the Company's phones. Reid himself has made such calls in the presence of supervisors without any

[34] Other employees had been discipline for failure to report to work in weekend snow removal emergencies during the winter months. But Reid was never among those employees who refused to show up for snow emergencies.

objection from them. The General Counsel pointed out that Reid mopped up water under his refrigerator and around his kitchen before reporting to work on time, noting that he could have, as a unit owner, filed a complaint and had one of the maintenance employees mop for him.

Segneri testified that on April 6, 2004, he was in the basement of the office building giving out work assignments at about 8 a.m. or a little after. He observed Reid on the telephone. Segneri testified that he gave out everyone else's assignment first to give Reid time to get off the phone. When the assignments had been given, Segneri was surprised to find Reid still on the phone. Segneri testified that Reid was on the phone at least 16 minutes and 5 or 6 minutes after being told to hang up. Segneri testified that Reid had a cell phone and could have called after getting his assignment. He approached Reid and asked whether the call was business or personal. Reid made a gesture that Segneri took as indicating that Reid did not want to be bothered. Segneri again asked the nature of the call and Reid said it was personal. Segneri told Reid to terminate the call and call back at break or at lunch. He also pointed out that Reid could have called the person on his cell phone on the way to his job assignment. Reid did not hang up and Segneri became frustrated. When Reid did hang up, Segneri told Reid that he was not going to let this happen again and unplugged the phone and took it to his office. He testified that he had intended to get the phone anyway because his had broken and he was going to use the basement phone until his was repaired or he got a new one. Segneri testified that he put the phone back in the basement the next day when his office phone was replaced. The phone was removed from the basement on April 6, 2004, and an invoice for fixing the problem with Segneri's office phone reflects an order was placed and work performed on April 22, 2004. This time frame is consistent with the testimony of Brown and Reid that the phone was missing in the maintenance area for 2 to 3 weeks.

Segneri testified that personal calls were not allowed on co-op worktime. This is a general belief that he has from his experience and knows of no specific rule so stating. Segneri agreed that he caught employee John Netsel making personal calls on his cell phone on a number of occasions over a substantial period of time. He testified that on those occasions he told Netsel to hang up and not make personal calls on co-op time. Though caught doing so repeatedly, no discipline was given to Netsel over this issue until a catchall discipline was given Netsel just before he resigned or was terminated in June 2004.

On April 16, 2004, Reid received from Segneri a written warning denoted "Disciplinary Suspension. It reads:

> On Tuesday, April 6, 2004, I observed you making a telephone call shortly after 8:00 am. I asked you if it was a personal call and you replied that it was. I then told you to hang up, and place the call on your break time or your lunch. You refused this direct order and continued your personal call for several minutes. This is insubordination.
>
> Your work performance continues to be unsatisfactory. You recently installed a trap incorrectly, and you also take an unreasonably long time to complete the garbage removal.
>
> Therefore, you are suspended without pay for one week commencing on April 26, 2004. You will return to work on May 3, 2004.
>
> If you continue to be insubordinate and have poor work performance, more serious disciplinary action will be taken.

Reid denies that Segneri said he could make the call at break or lunch. Reid denied being told before this warning that he had incorrectly installed a trap or that he had taken an unreasonably long time to complete the garbage removal. Reid testified that he asked Segneri about the trap installation and was told by Segneri it had happened some time ago in either building 92, 93, or 94. Reid responded that he had never installed trap in any of those buildings. Segneri did not answer him nor did he supply Reid with the work order that was allegedly done incorrectly. Segneri did not explain what he meant about Reid taking too long to perform garbage removal. Reid testified that he rarely performs garbage removal and was doing it in April 2004 because Pavliscek had lost his drivers' license.

Segneri's testimony indicated that in response to a problem in building 93 on or about April 6, 2004, it was discovered that someone had installed the wrong type trap. Segneri ordered the correct one and a couple of days later, he sent Reid to install it. Unfortunately, Reid installed it backwards. Following another complaint from a resident, Segneri checked the trap, found it in backwards and had Louis Andrade correct the mistake. Reid was not at work that day and Segneri told him of the mistake at some point after the fact. The repair cost the co-op 1 hour of Andrade's time. Allegedly based on the phone incident, the incorrect trap installation and the time it took Reid to pick up trash,[35] he was suspended for a week on April 16. Segneri testified that he believed he was following progressive discipline, and as Reid had been previously suspended 1 day for the refusal to work overtime, a week suspension was the next step before termination. Segneri testified on cross that Reid's insubordination during the phone incident was the primary reason for this discipline. Reid served this week-long suspension from April 26 through May 3, 2004.

Looking first at wrong trap incident. I believe Reid when he testified that he was not involved in the incorrect trap installation identified by Segneri. But even if he had been involved, Segneris response to the incorrect installation only speaks to his unlawful animus toward Reid. Segneri's testimony in the paragraph above notes that someone had installed the wrong trap and Reid was sent to fix the problem. No discipline was shown to have been given this unnamed employee. For that matter until Reid received the suspension under discussion, the matter had never been brought up with him. Other employees incorrectly installing traps, and Tapanes was shown to be among them, were not disciplined for this action.

I totally disbelieve the general allegation in the suspension about the time it took Reid to perform trash duty. As with so

[35] At some point in April, Reid was assigned trash duty because Pavliscek lost his driver's license. Segneri testified that Reid, like Teja, took 4-1/2 days to do the trash.

many complaints about Reid, Teja, and Brown, there is no proof offered to substantiate the complaint. Reid was not regularly assigned trash duties and I doubt that he could do it as fast as Pavliscek who had been performing such duties for months. But if you are going to issue suspensions in an antiunion environment, some modicum of proof is necessary to support allegations on which suspensions are based. Here, there is no such credible proof.

As far as the phone incident is concerned, the only thing I can find that triggered it was Segneri's ongoing hostility toward Reid. Reid had a clear household emergency, but that made absolutely no difference to Segneri. Oddly, his testimony about the event indicated that he would have been happy to overlook Reid making the call on company time on his cell phone after he accepted his work assignment for that day. Clearly then, Segneri's was responding to Reid not immediately hanging up when told to do so. That Segneri was unwilling to hear why Reid felt it necessary to complete the call is telling. Reid stood up to him, and Reid will pay. No other employee who failed to hang up when told to do so was disciplined. No other employee who failed to follow such an order triggered a response so over-the-top as did Segneri's as he removed the phone for 2 weeks and instituted a policy whereby employees could not make or receive private phone calls on co-op time even though they had had this privilege for years.

In the first *Success Village* case, on February 4, 2004, Segneri characterized Reid as generally reliable, adding that he and Reid had not had any reason to have arguments, or discussions or loud words for several months. Segneri then stated, "He is capable although sometimes he will tell me that he doesn't know to do something. I say fine, then I'm going to come with you and I will teach you. But we never get to that point. He always manages to get it done without me having to teach him. But I'm not complaining because I do not necessarily care if he does it my way or his way, as long as it is done properly. I believe that he should have the latitude, and he does. He's generally capable." In the instant hearing, Segneri's opinion was that Reid was totally unreliable.

Segneri testified that he treated employees differently with respect to discipline, being more lenient with an employee like Tapanes who Segneri said was never a discipline problem, whereas Reid was a problem. He would be willing to overlook Tapanes making job related errors whereas he would discipline Reid for the same mistake. Segneri's notes reflect specific instances where Tapanes performed work incorrectly almost exactly like Reid. Reid was disciplined, Tapanes was not. DeSousa falls into the same category as Tapanes, and is not given written discipline for poor performance or for lying to Segneri.[36]

One wonders what kind of a "problem" Reid presented that called for this admitted disparate treatment between employees. In the first *Success Village* case, Segneri characterized employee John Netsel as a slob, a sloppy worker and not reliable at all. He added that Netsel was always on break and not working and is always tardy in coming to work. That description would lead one to believe he would be on the "problem" side of Segneri's dividing line between employees and would, like Reid, be disciplined on every occasion possible. Not so. Witness just some of the evidence adduced in this record about Netsel.

On June 26, 2003, Netsel was helping prepare walks for paving and walked off the job at 3 p.m. and went to the breakroom where he was found by Segneri about 3:40 p.m. Segneri's notes indicate Segneri felt that Netsel owed the co-op 20–30 minutes for his unauthorized extended break. Netsel was not given a written warning for this incident.

On September 10 and 11, 2003, according to Segneri's log, Netsel performs incompetently in a carpentry job he is assigned and in his regular boiler duties, resulting in tenant complaints. The log also notes Netsel takes far more time to perform a task than is necessary. He is not given a warning for his poor performance on these days.

On July 24, 2003, Segneri's logs show that Netsel stripped off several brass nuts (presumably on a boiler) and incorrectly cuts open some sheet metal coverings. Then he left work without telling Segneri at 3 p.m. Netsel was not disciplined for leaving the boilers unattended. Segneri testified that Netsel had Callahan's approval to leave early.

On November 24 or 25, 2003, Segneri's logs show that Netsel went to his car and was asked why by Segneri. Netsel does not answer. He stayed at his car for an hour. Segneri asked what he had done and Netsel told Segneri he had topped off the salt. Segneri did not believe him and put paint on the salt to be able to prove Netsel lied the next time he gave this excuse for not working. Netsel was not disciplined for the unauthorized break or failing to respond to Segneri's question.

Some notes produced by Respondent pursuant to subpoena were introduced that show a resident complained about the quality and slowness of work performed by favored employee Raul DeSousa on November 14 and 17, 2003. Based on the fact that no written discipline was produced for this incident, I find that DeSousa was not disciplined for poor performance on these dates. For that matter, there appears to be no written discipline given DeSousa.

On April 7, 2004, Netsel received a written warning for consistent tardiness and for (1) not completing boiler logs; (2) not performing work assignments and having to be found on the property and told to go back to work; (3) talking on his cell phone on nonemergency calls; (4) having to have his work checked for completeness and quality; (5) driving the co-op truck to get pizza without permission; (6) leaving the property without punching out; and (7) working through lunch hour without permission in violation of Connecticut law. Netsel was suspended 2 weeks by this warning.

I find it interesting that Netsel had been doing virtually everything listed in the warning for months with the full knowledge of management and no action had been taken to discipline him. Segneri made a point of disciplining employees as close in time to the infraction as possible. Netsel was caught on May 20, 2004, again failing to complete boiler logs and performing required chemical analyses and not working when he was supposed to be. He was not discipline for these instances of poor

[36] Respondent's leniency toward DeSousa will be discussed in the portion of this decision dealing with Tony Teja.

performance though this incident followed the April 7, 2004 warning.

On June 7, 2004, Netsel was given a warning with the threat of termination and a prohibition against the use of his cell phone on duty. As noted Segneri had caught Netsel talking on his cell phone on co-op time on numerous occasions and no discipline resulted on those occasions.

The General Counsel asked Segneri if Netsel acted with complete impunity at Success Village and Segneri responded that Netsel was given every opportunity to correct his errant behavior.

On June 10, 2004, Netsel was terminated for continued tardiness and absenteeism.

I find that Reid's suspension was given for pretextual reasons and the true motivation for Respondent's actions was its ongoing unlawful animus toward Reid. As Segneri admitted, Reid would be discipline whereas other employees would not for the same activity. Based on the foregoing, the only "problem" Reid constituted to Respondent was his prominent position in the Union and his willingness to testify against the Respondent in Board proceedings. I find that Respondent issued this discipline to Reid based upon unlawful animus toward Reid based upon his union activities and/ or upon his testimony against Respondent in the first *Success Village* case. Accordingly I find that Respondent has violated Section 8(a)(1), (3), and (4) of the Act.[37]

3. Allegations of 8(a)(3) violations involving Tony Teja

a. Teja's background at Success Village

Tony Teja worked for Success Village from April 1983 until his termination on April 21, 2004. His last position with the co-op was as a groundsman. In the past, he had held other positions, including roofing and tending the boilers. In his job as groundsman, Teja handled garbage duties, leaf removal, snow removal, in-walk construction, and cleaning of the office building. When he was tending the boilers from 1989 until 2002, he turned the boilers on and off, tested water and chemically treated the boilers as needed. As a boilerman, he worked at night, from 11 p.m. until 7 a.m. The important season for boiler tenders are the cold weather months, typically from about mid-October to mid-April. During this time, the boilers are in constant use and must be tended regularly. In the other months, they are used almost exclusively for heating water. As Teja worked the night shift, he was also responsible for cleaning the office. In the summer, because the boilers did not need as much attention, Teja would work with the grounds crew. His schedule in the summer changed to days, 8 a.m. to 4:30 p.m.

Teja testified that when Callahan's company took over management of Success Village in August 2001, his relationship with Callahan was good. Teja testified that Callahan called him his Red Sox buddy as they were both fans of the team. Teja was union shop chair from December 10, 2001, until May 1, 2002. He took this post while the usual shop chair, Dennis Brown was laid off, a layoff found unlawful in the first *Success Village* case. During his time as shop chair, Teja filed about 23 grievances, some information requests, and attended disciplinary interviews.

Teja testified that after he became shop chair, his relationship with Callahan became "cold."[38] While he was shop chair, he met with Callahan about a grievance and Callahan signed off on it. Teja was in the office and went to copy the grievance on the office copy machine. A co-op board member was present and told Teja he needed Callahan's permission to use the copy machine. Callahan spoke to him from his office and said that he needed something from the Union and that Teja could not use the machine until he heard from the Union.

Teja testified that prior to becoming shop chair, groups of Board members would never come to the boiler room at the same time and watch him work. Then in January 2002, three board members, Robert Marcinczyk, Vincent Tortorello, and Hank Skonieczny came to the boiler area and sat around reading books and magazines and watching Teja. Callahan offered an explanation for the board members actions. An expensive replacement piece of the boiler had recently cracked during a curing process. According to Callahan, the board members were observing the curing process for another replacement to ensure that the process was done correctly and to be able to know that if the process failed again, whose fault it was. I would note parenthetically that these board members were deeply involved in establishing the "rope-a-dope" scheme.

Teja attended two bargaining sessions for a new contract while shop chair. At these sessions, appearing for the co-op were Callahan, the three board members who had watched him work and another board member, Vickie Recko. Teja took notes at these sessions. On occasion between June 2003 and the date of his termination, Teja distributed Union informational leaflets to residents' units.

Teja had some conversations with board members regarding "Project Rope a Dope." These members were Willie Lawrence and Hank Skonieczny. He spoke with Lawrence in June 2002. Lawrence told him that the co-op was trying to get rid of the Union and the project was called "rope-a-dope." Lawrence told him that Teja and Dennis Brown were the targets of the action because of their union activity. Teja testified that board member Skonieczny told him to "watch yourself, they're after you." The member mentioned the board and management company as "they." Segneri's predecessor as maintenance manager, George Heil, gave similar advice to Teja.

Unlike Boulware, Brown, and Reid, Teja had disciplinary problems predating the arrival of Callahan and crew. He also was given disciplines or warnings on a number of occasions after Callahan's arrival that are not alleged to have been given in violation of the Act. Of all the alleged 8(a)(3) discriminatees

[37] The issue of whether Respondent unlawfully implemented a unilateral change to its phone policy use is discussed at a later point in this decision. If it is ultimately decided that such action occurred and violated Sec. 8(a)(5) of the Act, then Reid's suspension also violates Sec. 8(a)(3), (4), and (5) as the policy change was the most significant factor named suspending Reid. *Consec Security,* 328 NLRB 1201 (1999), citing *Great Western Product, Inc.,* 299 NLRB 1004 (1990).

[38] I would note parenthetically that this was shortly after Teja returned from a termination changed to a 30-day suspension for performance mistakes in the boiler room that cost the Respondent about $15,000. The termination was rescinded and changed to a suspension without pay as a result of an arbitration decision.

in this proceeding, Teja is the only one that Respondent can rationally argue would have been disciplined and terminated even if he had not engaged in protected activities. In the following subsections of this part of my decision, I will first deal with each of the alleged violations, then discuss a number of other disciplines and warnings given Teja that are not included in the Complaint. For ease of the reader's reference, I will repeat the instant complaint allegations involving Teja at this point, rather than having the reader refer back to the beginning of this decision. The complaint alleges that:

> Respondent, by Segneri, harassed its employee Antonio Teja, by the following conduct:
>
> (a) Since on or about June 23, 2003, assigning him more physically demanding work and watching him more closely and more frequently while he works;
> (b) Since on or about August 7, 2003, requiring him to change his clothing before punching in on the time clock;
> (c) On or about August 22, 2003, threatening him with suspension and imposing more onerous working conditions on him;
> (d) On or about September 22 and 23, 2003, assigning him to perform work without the use of customary or adequate equipment;
> (e) On or about November 12, 2003,ridiculing him in the presence of other employees;
> (f) On or about December 17, 2003 ordering him to perform unnecessary work in the rain, assigning him work outside his normal responsibilities under adverse working conditions, and suspending him.
> (g) On or about April 21, 2004, assigning him a more onerous working assignment, giving him contradictory work orders, and calling the police.
> (h) By suspending Teja on September 23, 2003, warning him on December 18, 2003 and terminating his employment on April 21, 2003.
>
> *b. Did Respondent, by Segneri, unlawfully harass Teja by since on or about June 23, 2003, by assigning him more physically demanding work and watching him more closely and frequently while he worked?*

In the first *Success Village* case, though Teja did not testify, Judge Davis found that Respondent harbored animus toward Teja as it did toward the other two union officers, Brown and Reid. Judge Davis also found that Respondent unlawfully harassed Brown by assigning him the job, either by himself or as part of a two-man team, of breaking up in-walks and hauling away the debris. In making this finding, Judge Davis wrote:

> There is no question that the work of breaking up in-walks, involving jack hammering and removing concrete is physically demanding work—more so than other jobs assigned to other unit employees . . . I cannot find that the Respondent has shown that it would have assigned the same work to Brown in the same manner in the absence of his union activities. The work of jack hammering and removing debris was clearly arduous and onerous, and in the past it had been performed by a crew of four. No credible reason was advanced as to why additional employees could not have been assigned, as they had in the past, to such work. I believe that the only answer lies in the Respondent's desire to harass Brown because of his Union activities.

The current complaint alleges that since June 23, 2003, Respondent unlawfully harassed Teja by assigning him to more physically demanding work and watching him more closely and more frequently while he works, specifically with regard to jack hammering duties. This allegation is primarily based on the fact that beginning July 25, 2003, through the remainder of the summer of 2003, Respondent assigned Teja to jackhammer in-walks by himself, rather than as part of Respondent's four- to eight-person crew that traditionally performed such work. Though I agree with the allegation that Teja was unlawfully harassed by Segneri in the manner alleged, the date at which this harassment started seems to me incorrect. In the first *Success Village* case, from Judge Davis recitation of the facts on this subject, it appears that during parts of May and June 2003, Brown primarily and Teja as assistant did in-walk work and helped train two new, younger men who were hired primarily to do the in-walks.[39] These new employees were Louis Andrade and Greg Pavliscek. Teja was also regularly doing garbage duties. Then Segneri came to work for Respondent around June 23, 2003.

Teja testified about differences in jack hammering before and after Segneri came to Success Village. Immediately prior to his coming, there were two men assigned to a jackhammer crew and before that, four men. At the time of Segneri's employment, Teja was working mostly on garbage duty. Shortly thereafter, Teja went on vacation from July 4 until 25, 2003. Upon his return from vacation, Segneri assigned Teja and Brown to work on the in-walks separately, each having to jackhammer and remove debris by themselves. The younger employees, Andrade and Pavliscek were given other, less arduous duties. Teja testified that he saw the younger men work on in-walks only on a couple of occasions after July 25, 2003. On these occasions, Andrade and Pavliscek would be working as a two man team. On two occasions after Segneri was employed, Segneri ordered him to jackhammer in the rain. As the jackhammer was electric, Teja grieved this order as being hazardous. Segneri told him it was safe and told him to do as he said.

Before Segneri was employed, the pattern of jack hammering was to finish one building at a time and then go to another building. After Segneri came, there was no pattern. He would have Teja jackhammer some walks at one building then go to a building in another area. Segneri gave no reason for changing the old pattern. Teja pointed out that is was difficult moving the equipment used in this job from place to place, noting it weighed about 100 to 125 pounds, excluding the wheelbarrow

[39] Brown and Teja were in their 50s and Pavliscek and Andrade were in their 20s.

used to move it. Teja testified that Segneri watched him work, something he did not do with other employees.

With regard to the in-walk sidewalk construction, Reid testified that it used to be that teams were assigned this work which requires jack hammering out the old sidewalk. Four or five people would jackhammer and remove the concrete broken up. The jack hammering, being the most strenuous part of the job, would be rotated among all the people on the team. Now, since Segneri's arrival, one person is assigned both jobs, usually either Teja or Brown. They are required to do this all day, whereas before someone would jackhammer about 20 minutes or so, then the jack hammering would be done by someone else for about 20 minutes and then shift again.

Segneri testified about in-walk construction and changes he made with respect to this job upon being hired in June 2003. He introduced the co-op employees to plastic, reusable forms to replace the wooden ones the employees put together for each walk saving many hours of work. He also changed the base of the walks from dirt to gravel to extend the life of the in-walk. He introduced the use of wire mesh and got the employees professional concrete finishing tools. He changed the practice of using two men to jack hammer old in-walks and remove the rubble to a single person. He began renting a tree stump grinder to removes tree roots from the in-walk areas, saving time and eliminating the dangers of using an axe. This move saved hours of manual labor.

Segneri testified that in almost all cases of changing two man jobs to one man jobs there was initial resistance from the employees, especially the ones who had been employed at Success Village for a long time.[40] The primary employees resisting change were Teja and Brown. According to Segneri in his testimony relating to Teja's in-walk assignment, since Brown had returned to work, he no longer was confrontational with Segneri, and just accepted job assignments and accomplished them.[41] On the other hand, he testified that Teja was confrontational to the end. He testified that Reid and Tapanes both eventually accepted change and his direction without argument.[42] Newer employees did not know another way to do a job and accepted his direction from the outset. The newer employees when Segneri came on board were Greg Pavliscek, Louis Andrade, and David Leone.

At the time Segneri was hired by the co-op, Teja was assigned to trash duties. According to Segneri, he observed Teja on his job and found that he took about 4 days a week to do trash. He recalled an instance when he asked Teja when he was taking trash to the dump and Teja said, "After lunch." Segneri told Teja he was going to accompany him to the dump. Teja went home for lunch that day and did not return. A few days later, he followed Teja around without Teja's knowledge and determined that there was a better way to pick up trash. Segneri implemented changes and saw the time it took to do trash drop to 1 to 1-1/2 days. Teja was picking up only one kind a trash at a time, leaving metal items sometimes for 2 or 3 weeks, causing tenant complaints, Segneri began the procedure of picking up all kinds of trash on each run. Segneri also went to the dump and asked questions and got pamphlets with the dump rules. He discovered that there was another unused dump near Success Village that took all types of trash. He directed that employees use this dump. Teja resisted these changes and when he went on an extended vacation, Segneri put Pavliscek on trash duties and explained the new procedures to him. Pavliscek did the trash run in 1-1/2 days. However, Segneri's logs from this period of time indicate that Pavliscek was being helped on the trash run by Andrade, rather than having to complete the run by himself as had been the case with Teja.[43] When Teja came back from vacation in late July 2003, he was removed from the trash run and put to work jack hammering. Dennis Brown was assigned to work with Teja at about the same time.[44] Andrade and Pavliscek, previously assigned this work, were given other assignments. Segneri testified that he found Teja stubborn and obstinate. He also considered Teja to be argumentative and insolent, who either ignored Segneri's directions or argued about them.

Segneri admits to watching Teja and Brown more closely than other employees. He testified that if he watched Teja break up an in-walk it would take about 20 minutes. If he left, Teja would take 2 hours to do the same task. Segneri believed it was Teja's mission to waste time and not work.

For the same reasons that Judge Davis found that Brown had been unlawfully harassed by Respondent the previous summer by assigning him the in-walk work, I find that Respondent likewise unlawfully harassed Teja in the summer of 2003. There was no good reason advanced for assigning Teja the in-walk duty by himself rather than as part of a team. There was no good reason advanced for assigning him this arduous work rather than leaving it with the two young men recently hired specifically to do this work. Segneri had been on the job less than 2 full weeks observing the employees when Teja went on vacation. Whether his discovery of the new trash dump where no waiting was involved was before or after Teja went on vacation is not clear in the record. What is clear is that Respondent was not willing to work with Teja to see if his performance on trash duties would improve using the new dump and other more efficient methods of dealing with trash that Segneri devised. Instead, it chose to punish and harass him by assigning him the least desirable job possible at Success Village. There is absolutely no logic to assigning two relatively old men to do arduous physical labor and removing two young men from that job, especially when the younger men had been hired only recently

[40] Segneri made many, many changes in work procedures upon his arrival, most of which were common sense changes about which no one would argue were motivated out of union animus. However, his decision to change many jobs that had previously been two-man jobs to one-man jobs was met with resistance.

[41] Contrast this assessment of Brown's alleged behavior with the assessment Segneri gave when discussing Brown's job performance in December 2003, set out in a previous section of this decision.

[42] This bit of testimony about Reid certainly conflicts with the facts of record about Segneri's view of Reid.

[43] A good part of the time savings that Segneri found when Pavliscek took over the garbage detail can be attributed to switching to the new trash dump. The testimony indicates that hours could be wasted waiting in line at the previous dump.

[44] This was Segneri's testimony. I believe it more accurate to say that Brown and Teja were both doing in-walk work at this time, but separately and not as a team.

to do the work. I find that the only reason Teja was given this work was in retaliation for his activities on behalf of the Union and his visibility as a recent union official. Segneri admitted that he watched Teja (and Brown) more closely than other employees. Based on subsequent events, I find that this increased attention was primarily motivated by a desire to find ways to discipline him rather than to improve his performance. I find that the 2003 work assignment and the increased surveillance of Teja were unlawful and violated Section 8(a)(1) and (3) of the Act.

c. Did Respondent, by Segneri, since on or about August 7, unlawfully harass Teja by requiring him to change his clothing before punching in on the time clock?

On August 7, 2003, Teja reported to work and went to the office to punch in.[45] Segneri was there and told him he could not punch in until he was dressed for work. He testified that Segneri was loud and angry when Segneri gave him the clothing directive. Teja was wearing, as usual, his work pants, a t-shirt and sneakers. He had to put on his work shirt and work boots. These were kept in his locker in the bottom floor of the office building. He testified that it took him about 2 minutes to accomplish the clothing change. In his 20 years at Respondent, this was the first time he had been told that he should change into work clothes before punching in. Teja testified that he normally comes to work at 8 a.m.

Teja testified that fellow employee, boilerman John Netsel, had a consistent problem with tardiness and showed up whenever he felt like it. He also testified that Netsel on occasion punches in before changing clothes for work and sometime does not change into work clothes at all. He has never seen Netsel admonished or disciplined for these practices. These observations were affirmed by the testimony of other witnesses. As noted in the section of this decision devoted to Reid, Netsel followed these practices and other poor employee practices for months before being fired for tardiness and absenteeism.

Langston testified that employees were required to wear a uniform consisting of pants shirts, and safety boots. Boiler tenders and plumbers are also assigned overalls. Langston testified that during the time he worked with Tony Teja as a boiler tender, Teja would report for work in his street clothes. Teja would first punch in, then change into his work uniform. He said the changing process took 3 to 5 minutes. Langston testified that the majority of employees punched in before changing from street clothes to work uniform. He specifically named several employees he had observed following this practice. Langston testified that though management had observed his practice in this regard, he was never advised by management that he should change into his uniform before punching in nor was he present when any other employee was so advised. After Langston became business agent, he was not given such notice. The first he heard about the matter came when he heard that on or about August 7, 2003, that Tony Teja had been so advised. Prior to that date, to the best of his knowledge, no employee had been disciplined for punching in before changing into work clothes. There are no written rules requiring employees change clothes before punching in.

Brown testified that Teja would report to work in his uniform, but would put on his work boots at work. Teja would normally punch in upon arrival then go downstairs and put on his boots. Prior to the incident with Teja, Brown in either his capacity as a maintenance employee or as a union official, had never had a manager tell him that employees should punch in only after being fully dressed for work. Other than the incident with Teja, he had never learned of an employee being disciplined for punching in before getting dressed for work.

Reid testified that Teja sometime wears his work uniform to work sans work shoes and sometimes comes in wearing street clothes entirely. Reid testified that it takes Teja about 2 to 3 minutes to change into his work uniform and shoes. Reid named some other employees he had observed and supervisors had observed, punching in and then changing clothes for work. During the time he was a steward or shop chair, no one in management told him that employees should punch in only after being fully dressed for work. Reid knows of no rules requiring being dressed for work before punching in. Teja is the only employee he knows of who has been disciplined for punching in and then changing into work clothes. Reid has observed Segneri yell at Teja to change his clothes before punching in and has observed Teja yelling back at Segneri. Reid has never seen Segneri give any other employee this order.

Segneri's testimony would place this event occurring on August 22, 2003. He testified that he observed Teja, after the 8 a.m. start time, come to his locker area and change into his work boots. He told Teja to be at work and fully dressed for work by 8 a.m. According to Segneri, after he told Teja this, Teja showed up dressed and ready to work on time. Segneri had a practice of writing an acknowledgment of his counseling in his log book. He would then have the offending employee sign the acknowledgement. He wrote such an acknowledgement for Teja to sign on August 22, 2003, and Teja refused to sign it. Segneri denied that either Teja or Brown told him that this was a matter that would have to be negotiated with the Union.[46] Segneri testified that this incident was the first he observed where an employee punched in before dressing for work. This is clearly not entirely true. Segneri's log revealed he caught employee Netsel engaging in this practice and also working in his street clothes. Netsel was not disciplined for this activity even though it was observed on more than one occasion, until Netsel was given a wide ranging discipline just before his termination or resignation months later.

I believe and find that Segneri took the action complained of in this complaint allegation because of his animosity toward Teja based upon Teja's union activity and position and for no

[45] There is a question in my mind whether this date is correct. The General Counsel relies on Teja's testimony to establish the date. He also refers in his brief to the fact that Segneri asked Teja to sign an acknowledgment in his log book that he had been counseled about punching in before changing into his work clothes. The acknowledgement appears on a page dated August 22, 2003. I do not consider the date to be particularly significant as Segneri readily acknowledges that he did warn Teja to change clothes before punching in. I will discuss Segneri's log entry in the next section.

[46] The Union did, however, file a charge alleging an 8(a)(5) violation over the incident.

legitimate reason. Based on the testimony set out above, many employees followed the same practice as did Teja without any adverse consequences following as a result. There was no effort made by Respondent to require all unit maintenance employees to be fully dressed for work before punching in even though the evidence shows that many employees punched in before being fully dressed for work. Netsel was not even given a warning for working without being properly dressed, but then, Netsel never held Union office. Following this incident with Teja, other employees were not warned about similar behavior. I believe that the only reason Teja was singled out was his union position and that is an unlawful reason, and violates Section 8(a)(1) and (3) of the Act.

d. Did Respondent, by Segneri on or about August 22, 2003, threaten Teja with suspension and impose more onerous working conditions on him, directing him to sit in the sun?

Teja testified that on August 22, 2003, he reported for work and after changing and punching in, went to the garage and got the jackhammer and other tools he needed for jack hammering in-walks. He had been doing this work the previous day and anticipated doing it this day. Segneri approached and told him that he knew his day's assignment as it had been given the day before. Teja denied having this information and asked Segneri where he wanted him to work. According to Teja, Segneri told him to break up sidewalks behind building 74. Teja testified that he had already broken up the sidewalks in front of this building and they had not yet been replaced. To break up the back walks would leave the residents without access to their units. Teja testified that he told this to Segneri and then suggested he work at building 75 instead. Teja made no mention of this reason for not working at building 74 in his affidavit. Segneri responded by telling Teja to do what he told him to do.

Teja saw Dennis Brown working at building 76 and called him over. Teja testified that he told Brown what was going on and Brown attempted to explain to Segneri that they did not break up walks in front and back of buildings at the same time. Segneri repeated his order to Teja and Brown repeated his objection. Segneri then said he would find something for Teja to do and told Brown to break up the in-walk when he finished what he was working on. Teja accompanied Segneri back to the office where he was given the job of sitting on the steps at the back of the office. Segneri told Teja to keep children from playing on the steps. There were no children present. Teja said it was hot and muggy that day. Teja sat there until lunch, when he punched out and went to lunch. He returned at 12:30 p.m. and stayed until 1:30 p.m. when he went home suffering from heat exhaustion. During the morning, Segneri came by him on several occasions, but said nothing. Teja viewed the incident as punishment.

Brown testified that on August 22, 2003, he was to dig an area for in-walk frames and frame the new walk-ins at building 76. Segneri called to him to come to the adjacent building, 74. Segneri and Teja were there together. Segneri said that Teja did not want to work that day. Teja disagreed. According to Brown, Segneri said that he had instructed Teja to jack hammer in-walks in the rear of building 74 and that Teja had demurred. Brown pointed out that the in-walks in the front of building 74 had been taken out and that the co-op had never taken out the in-walks in the front and back of buildings at the same time as it seriously impeded the residents' ability to get in and out of their units.

According to Brown, Teja complained that he wanted to work, but that Segneri had not given him clear instructions. The three men went to see exactly where Segneri wanted the jack hammering done.[47] Segneri then told Teja to jack hammer or go home. Teja did not jack hammer and Brown testified that at this point, Segneri told Brown to jack hammer the rear walks of building 74 when he finished making forms for building 76. Brown said he would and left. Segneri later testified that when Brown finished with building 76, he went home rather than begin the jack hammering assignment.

Shortly after the meeting with Teja and Segneri, Brown observed Teja sitting on the rear steps of the co-op's office. Brown walked over to Teja and asked what was happening. Teja told Brown that Segneri had ordered him to sit there and that would be his job for the day. Segneri then drove up and Brown asked Segneri why he had Teja sitting in the hot sun. Segneri said that he would answer for it. Teja stayed on the steps until noon and then went home, complaining of being "fried."

According to Segneri's log for August 22, 2003, at 8:45 a.m., Segneri saw Teja and Brown talking, not working, near building 74. Segneri then approached Teja and asked, "What's the problem? He says he doesn't know what I want him to do—I was very explicit yesterday afternoon because he argued with me without listening to the directive. He just doesn't want to work and lies constantly about misunderstanding or that he wasn't told. I'm finally tired of his lies, shirking and alibis and tell him to put the tools way. He's not working the rest of the day. At that point, he begins to assemble the tools for work—I tell him to put the tools away—he [is] not doing this work today. I realize that I must pay him for 4 hours anyway so I tell him to 'guard the rear door.' I think others will pressure him to work if they have to do his work while he does nothing. Dennis is summoned by Tony and thinks I'm stupid. I tell Dennis he will do the jack hammering at 73 for Tony after Dennis finishes on 76. Dennis finished 76 and goes home. Tony leaves also."

In his testimony on this subject, Segneri testified that on August 21, he had assigned Teja to jackhammer the rear in-walks of building 73 beginning on the morning of August 22. According to Segneri, Teja denied having been given this assignment. Segneri's log for the day before, August 21, at 2 p.m., states: "Tell Tony (Teja) to begin breaking in-walks on back of 73. He decides to go home—sick." Segneri testified that Teja then objected, asking if Segneri wanted to cripple the tenants front and back, since the front in-walks of this building had already been jackhammered. Segneri said that Teja was correct, and then instructed him to go the front of the building behind 73, which is number 74, and jackhammer those in-walks. At this point, according to Segneri, Teja did nothing. Segneri reiterated his instructions several times and Teja was unresponsive.

[47] At another point in his testimony on this subject, Brown testified that only he and Segneri walked to the area that Segneri wanted broken up, and that Teja remained where he was.

Segneri then told Teja they had nothing for him to do that day and instructed him to go home.

Then Segneri remembered that employees had refused work before hoping to get another assignment and also that he was already having to pay Teja for the morning under the contract, so he assigned Teja to "guard" the back door from vandalism from neighborhood children until noon. Segneri testified that he said to himself, "[t]his is a golden opportunity for me to teach him and other people a lesson and so I will give him something to do and I'll let the other people work and watch him doing nothing and see what kind of peer pressure might be brought to bear on him to do his job, if any." Teja then called over Brown who was shop chair at the time. Teja told Brown what he was being assigned to do and Brown took issue with it. Segneri then assigned Brown to do the jackhammering that he had first assigned to Teja, when Brown finished the assignment he was then working on. According to Segneri, both Brown and Teja went home at noon.

I credit Teja and Brown's version of the events of the day and find that Segneri was attempting to have Teja break up walks behind a building that already had the front walks broken up. Segneri's testimony in this regard is totally inconsistent with his log notes and with his actions. I believe that Segneri's animosity toward Teja, which had already been shown at the beginning of the day, simply overcame logic.

Though Segneri would probably prefer otherwise, Success Village is not Marine boot camp. Arbitrary and capricious punishment is not a normal response to an employer—employee situation. I believe and find that rather than accepting the obvious, that is, that he had erroneously assigned Teja to in-walk work that would leave residents without access to their units, Segneri seized upon the "golden opportunity" to ridicule the former union officer. As there is no logical explanation for Segneri's actions in this regard, I find that it was just another of the ongoing manifestations of Respondent's animus toward Teja and the other union officials and former officials, Brown, Teja, and Reid. Consequently, I find that Respondent violated Section 8(a)(3) of the Act by doing so.

e. Did Respondent, by Segneri, on or about September 22 and 23, 2003, assign Teja to perform work without the use of customary or adequate equipment and suspend Teja?

In mid-September 2003, some of Respondent's employees were assigned to move dirt and rocks accumulated by excavation for a new parking lot built at one end of a large field behind the office. This job involved moving dirt to the site, dumping and spreading it, and removing rocks that would be large enough to damage the co-op's lawnmowers. At different times Dennis Brown, Tony Teja, and Lloyd Reid worked on this project. Reid operated the New Holland machine hauling dirt to the site and Brown and Teja raked and smoothed the dirt and removed the rocks. The dirt was evidently not prescreened and contained a lot of rocks and other debris. The rocks removed from the dirt were taken by wheelbarrow to a fenced area near the office. The project took 2 to 4 days, depending upon which witness was testifying about the project. This variance in testimony is not crucial, as all witnesses agree that the significant event occurred on the last day of the project, when Teja was given an order and refused to follow it.

On the first day when Reid was finished with dumping dirt, all three men raked and removed rocks and other debris. On the second day of the project, Reid was assigned other duties and Brown and Teja continued with the raking and rock removal. According to Brown, the rocks were raked out and wheeled over to one side and placed in piles, then wheeled to the fenced in area. Brown testified that there were large rocks, 7 or 8 inches in diameter, medium rocks and small rocks. Both Brown and Teja found it more efficient to use a rake to extract smaller rocks and a shovel or their hands to remove large rocks. When the bulk of the work had been done by the end of the second day, only Teja was assigned for a third day to finish grooming the area using a shovel and a wheelbarrow. On this third day, according to Brown, it was raining very hard.

Teja testified about this project, evidently believing it stretched over 4 days. He testified, as pertinent, that on the third day he was assigned to finish the job by himself. He was to use a rake, shovel, and wheelbarrow. He testified his job was to rake out the stones, shovel them into the wheelbarrow and then smooth the dirt with the rake. Teja describe the day as sunny. According to Teja, on this third day, Segneri approached him while working and took away his rake, saying he did not need it anymore. Segneri took the rake back to the office area. Teja testified that he was using the rake when Segneri took it. For the rest of the day, Teja used his shovel to stack rock into piles containing large, medium, and small rocks. On the fourth day, it was raining hard and Teja was assigned to continue the job. He had only a shovel and wheelbarrow. He planned to shovel the rock piles into the wheelbarrow and thus finish the job. He had just begun working when Segneri came up in his truck and instructed him not to use the shovel, but pick up the rocks with his hands and put them in the wheelbarrow. Teja did not comply saying it was much easier to use the shovel rather than his hands. Segneri repeated his order. Teja told him that his order was ridiculous and it was faster using the shovel. Segneri repeated his order a third time. Teja then stood looking at Segneri for about 30 seconds. Segneri asked him if he were going to pick up the rock with his hands and Teja said no. Segneri then said for Teja to punch out and go home, adding that he nothing else for him to do that day.

Before he left, Teja talked with Brown, telling him what happened. Segneri was present for this conversation. Segneri told Brown that he gave three direct orders to Teja and that he ignored them. Segneri did not change his mind and Teja punched out and left. At no time did Segneri explain the reasons for his order to Teja to not use the shovel. Teja received a suspension without pay for the remainder of that day and a written warning for refusing a direct order.

Brown testified that on the day in question, it raining very hard. Brown observed Teja and Segneri having a confrontation. About 10 minutes later, Segneri came to him and said he needed to come to the office. Brown asked why and Segneri said that Teja had refused three direct orders and was being sent home for insubordination. Brown and Segneri went to the office and Segneri told Teja that he was being sent home for refusing three direct orders. Teja said it was not three direct or-

ders, it was the same order given three times. Teja said he could not use his shovel and rake and had to pick up the rocks by hand and he was not going to do it. Brown testified that the type work Teja was doing had not been done in the rain before.[48] Brown testified that it would have been more efficient for Teja to use his rake and shovel to pick up the rocks. On cross, Brown testified that Segneri told him that he had given Teja an order to use his hands, not the shovel or rake, to pick up rocks. Teja confirmed to Brown that he did not follow this order, calling it idiotic.

Segneri testified about these events. On the third day of preparing the area for grass, only Teja was still assigned to this task. According to Segneri, only 12 to 15 feet of dirt was left to be raked and rocks removed. Segneri testified that he observed Teja standing in one place for a long time. He went to ask why. He found Teja just raking little pebbles over and over. Segneri told him to forget the shovel and rake and just pick up the large rocks in the area remaining and be done with it.[49] Teja ignored him and he took the shovel away and repeated his order two more times. Teja continued to ignore him. Segneri then told Teja to just pick up the large rocks or go home. Teja continued to refuse and Segneri punched him out. These events occurred about 8:30 a.m. that day. Segneri testified that the rocks in question were about the size of a baseball or softball and it was easier to pick them up by hand than it was to use the shovel. Segneri only wanted the large rocks to be picked up as the area had already been raked. The large rocks posed a danger to the lawn mowing machinery. Brown and Teja then came to the office to discuss the matter. Teja admitted refusing Segneri's order and was sent home. Segneri denied seeing any piles of large rocks which Teja could shovel.

Brown testified that he had heard employee plumber/groundskeeper Reinaldo Tapanes refuse an order from Segneri on several occasions. The orders were for Tapanes to work under a building and Tapanes said, "Fuck you, I ain't doing that. I'm not going underneath the building, get somebody else to do it." Tapanes was not disciplined for this confrontation. Brown has heard Tapanes swear at Segneri on two or three occasions. Tapanes is not a union official. On cross-examination, Brown testified that he did not know whether or not Tapanes ultimately followed Segneri's order.

Brown recalled another occasion when Callahan told Tapanes he could not go on his vacation. Tapanes told Callahan he could "fuck" himself, and "you can kiss my dirty Cuban ass." No discipline resulted from this incident.

No one denied that Tapanes had both sworn at Callahan and Segneri and had refused a direct order, though Segneri testified that Tapanes always ultimately did what he was told. Clearly however, Tapanes had never been sent home, effectively suspended, for refusing to follow Segneri's orders.

The facts surrounding this incident are not in conflict, except for the parties' memory of the number of days the project took. It is clear that on the next to last day, Segneri took away Teja's rake and on the last day, at the very start of the morning, took away his shovel. As was the case with the preceding section of this decision, I find that Segneri's behavior transcends the bounds of a normal business response. Teja's explanation that he needed the shovel to put the piles of rocks into his wheelbarrow is logical and makes sense. Taking away his shovel is neither logical nor makes sense. As was the case with making Teja sit on the steps of the office, I find that Segneri's actions in the this instance has much more to do with a desire to harass and punish Teja than it does with getting the job at hand done. For someone who professes to want to have every job accomplished in the most efficient way possible, Segneri's action in taking away Teja's tools indicates to me that that was not the reason the tools were taken away. There was also no attempt to explain to Teja why he did not need a shovel when the orders were first given. I find this to be another example of unlawful harassment of a former union official and an attempt to give Respondent an excuse to suspend Teja. Segneri's acceptance of Tapanes' refusal to follow an order and acceptance of Tapanes' swearing at him in the process stand in stark contrast to his reaction to Teja's response to his illogical and rather unbelievable instructions. I find that the discipline given to Teja on this day was in violation of Section 8(a)(3) of the Act.

f. Did Respondent, by Segneri, ridicule Teja in the presence of other employees and did it unlawfully discipline Teja by warning him on December 18, 2003, about accompanying other employees to the leaf dump?[50]

Three events occurred at the end of October 2003 and during November 2003 which gave rise to the issuance of a warning to Teja on December 18, 2003, and to the allegation that Segneri ridiculed Teja in the presence of another employee. All of these events occurred during the annual leaf pickup in the fall of 2003. The employees in each case were Teja and Louis Andrade who had been assigned the leaf pick up duties. As noted earlier, since Callahan came on board and especially since Segneri had been hired, many jobs at Success Village had been converted from two-man jobs to one-man jobs. One such conversion involved driving to the various dumps with garbage or leaves. In addition, Teja had been singled out for special instructions in this regard.

On the subject of his garbage duties, Teja had received another, earlier warning, this one issued by Callahan on January 23, 2003. It states that on January 3, 2003,[51] Callahan gave Teja

[48] A number of witnesses testified that it was customary to let employees work on inside projects during heavy rain. The exceptions to this practice were the garbage run and emergency situations. The maintenance employees had been issued rain gear and according to Callahan were expected to work in the rain though even he indicated that he did not mean very heavy rain. Though forcing Teja to work in the rain may be argued at further evidence that Respondent was out to punish Teja, the thrust of the complaint allegation in question is the removal of Teja's tools and the order to pick up rocks by hand.

[49] Segneri's log for September 23, 2003, indicate that Segneri had taken away Teja's rake the previous day because Teja was wasting time. The log for this day reflects that about 8:30 a.m., Segneri observed Teja shoveling dirt and small rocks, not picking up large rocks as instructed. Then the confrontation described in the paragraph above ensued.

[50] Teja was also given two other warnings on December 18 2003, which will be discussed in the next section of this decision

[51] The warning states 2002, but this appears to be a mistake.

specific instructions including two that directed him to pick up leaf bags at locations in the complex and to pick up three tires at a specified location. Teja had also been told to have then maintenance manager, George Heil, inspect the truck before he went to the dump. The warning goes on to note that at 2:30 p.m. that day, Callahan discovered that the leaves and tires had not been picked up. An attempt was made to find Teja by Callahan, Heil, and Shop Chairman Lloyd Reid. They were unsuccessful. About 4 p.m., Teja returned and said he had gone to the dump. In a meeting held on January 7 with Teja, Callahan, Heil, and Reid, Callahan asked why Teja had gone to the dump and Teja said he had spoken with Heil. Heil denied this conversation. Teja did not deny the instructions given him by Callahan. The warning concludes with the admonishment that Teja is not to leave Success Village either for gas or to go to the dump unless: "1. Either George Heil or I have inspected the truck; and 2. Either George Heil or I have given you permission to go to the various dumps." This warning is not alleged to have violated the Act. It is noted because I believe it clearly put Teja on notice that he was not to go to the various dumps unless specifically assigned to do so.

In the fall of 2003, Teja was assigned to help rake and dispose of leaves. The leaves are raked into piles near curbs and then vacuumed into a large box mounted on a pickup truck. When the box is full, the vacuum is disconnected from the truck and the leaves are taken to a dump and the box is tipped up hydraulically and the leaves unloaded. Segneri assigned Andrade and Teja to this task, with Andrade assigned to drive and Teja to assist in raking and loading the leaves. He specifically told Teja to rake while Andrade went to the dump and disposed of the leaves. Segneri considered it a waste of time to have another person accompany the driver to the dump as only one person is needed. He gave the instruction about which employee was to do what when they were first assigned to leaf duty.

The December 18, 2003 warning here discussed addresses two incidents. One, on October 31, 2003, involved Segneri observing Teja in the leaf truck with Andrade on the way to the dump. Segneri asserts that Teja had been instructed that the run did not require two men and that Teja had been instructed not to go. The second incident was similar except it happened on November 17, 2003, when Callahan found Teja on the way to the leaf dump accompanying the driver.

Teja testified about these two incidents. On October 31, Louis Andrade and Teja were picking up leaves in the leaf truck. Andrade was the driver and Teja was helping. Teja left the complex with Andrade to go to the leaf dump. Segneri pulled them over and told Andrade to go to the dump. He told Teja to go back to the complex and rake leaves. Segneri added, "One man goes to the dump and I don't want two guys going." Teja complied with this order. Teja testified that Segneri had given this instruction to all affected employees after Segneri came to the co-op.

On November 17, 2003, Teja was assigned leaf pick up with Andrade. They picked up leaves in the complex and when the truck was loaded, Andrade asked Teja to accompany him to the dump. They began to leave the complex when Callahan saw them, stopped them and told them that only one person goes to the dump. Callahan instructed Teja to return to the complex and rake leaves until Andrade returned. Even if Teja is correct in his assertion that he was invited by Andrade to ride to the dump with him, Andrade was not in a supervisory position over Teja and could not countermand Segneri's standing order in this respect.

Teja acknowledged having been given instructions by Segneri before these events that only one person would go to the dump. He acknowledged that he had been given a written warning by Callahan on January 23, 2003, which contained instructions not to go to the dump without either Callahan's or the maintenance manager's prior approval.

I cannot find that this warning was unlawfully given. Teja knew he was not to accompany Andrade to the leaf dump and chose to ignore this direction twice in less than a month. An incident cited by the General Counsel on brief as disparate treatment is unconvincing. In that case, Segneri found Lloyd Reid and Reinaldo Tapanes, both qualified to do plumbing jobs, going to a plumbing job together without receiving permission to do jointly what had been designated as a one man job. As he did with Teja, Segneri pulled Tapanes off the job and gave him another assignment. The General Counsel states that no discipline was given to Reid or Tapanes over this incident. For that matter, no discipline was given to Teja for his first transgression of the directive not to go to the leaf dump with Andrade. Even though I believe and have found that Respondent harbored union animus toward Teja and disciplined him at virtually every opportunity, I find that Respondent would have warned him about accompanying Andrade to the dump even if it did not have such animus.

On the subject of ridiculing Teja, the evidence reflects that on or about November 12, 2003, Andrade and Teja were raking leaves and vacuuming them into the truck when Segneri stopped by. Segneri addressed Andrade and gave him instructions. Then Segneri angrily told Andrade, "Don't listen to anything this man (Teja) has to tell you. Just do what I tell you to do." Teja testified that Segneri was pointing at him while speaking to Andrade. Teja could think of nothing that occurred that day to prompt Segneri's outburst. Teja testified that Andrade began laughing, but that Segneri was angry. As noted earlier, Andrade was a relatively new employee at the co-op and was junior in seniority to Teja.

No explanation was offered for this outburst. I find it, like putting Teja on the office steps for a morning, was nothing more than an attempt to ridicule, demean and punish Teja for his Union activities. Consequently, the outburst violated Section 8(a)(1) of the Act.

g. Did Respondent unlawfully assign Teja to do unnecessary work in the rain and work outside the scope of his normal responsibilities, warn him and suspend him, on December 17 and 18, 2003?

On December 18, 2003, Teja received from Segneri three separate written warnings signed by Callahan.[52] One of these warnings is discussed in the section preceding this one. The

[52] I note that about the same time, Boulware and Brown were also given warnings or other discipline.

next accuses him, on December 16, 2003, of using a snow blower to clean roads and sidewalks that did not have snow on them and using a rake to clear snow. The warning states his actions were ineffective, and constituted poor and unacceptable work performance. It threatens suspension and termination if continued.

Callahan testified that the origin of this warning was a phone call from a resident complaining of an employee raking leaves in the snow and using a snow blower when there was no snow to blow. Assuming arguendo that Callahan actually received such a complaint, no record of the name of the resident making the complaint was kept. The resident did not appear at the hearing. Callahan did not personally observe the matter complained of and neither he nor Segneri conducted even a cursory investigation in the matter.

On the day in question December 17, 2003, Teja was assigned an area in which he was to snow blow snow off sidewalks. Teja testified that Segneri told him to take the snow blower and other tools he needed. It began raining and the snow was turning to slush. Because of this, the snow blower would not work and he had to shovel the slush. He could only use the blower where there was piled snow. To move from one spot to another, he ran the snow blower as it is self-propelled. He had a rake with him to get leaves out of the snow and off the sidewalks. He testified that there were a lot of leaves. He finished the area by breaktime, around 10 a.m. Segneri's logs for the involved time period indicates that leaves were being raked in the same area that Teja was accused of using a rake to rake leaves in the snow. The logs also reflect there was a snow fall in the same timeframe. Teja testified that when he got the warning, he attempted to speak with Segneri about it, but Segneri would not listen. Neither Segneri nor Callahan asked Teja about the matter addressed in the warning before issuing it.

I find that there is no credible basis for this warning. It is supported only by another one of Callahan's "ghost" resident's purported complaints. Because no name was provided for this resident, no investigation was conducted into the truthfulness of the purported complaint, and Teja's attempt to explain his actions on this day were rebuffed, I find it to be without any rational foundation and yet another manifestation of Respondent's ongoing animus toward Teja. Accordingly, I find the warning to be in violation of Section 8(a)(1) and (3) of the Act.

The second warning given Teja on December 18, 2003, addresses a claim that Teja, on December 17, 2003, refused a direct order from Segneri to put a parking violation sticker on a car parked in the complex in violation of the co-op's parking regulations. Teja was suspended by Segneri for the rest of the day for this refusal to follow his order.

As noted above, Teja was removing snow on the morning of December 17, 2003.[53] When he left the office it was not raining. But as he shoveled it started raining and he got soaked. He started back to the office area with his equipment. Segneri drove by and stopped, asking what was the problem. Teja said he was wet and was going to change his clothes. Segneri offered him a ride back to the office. Just before they pulled into the office, Segneri stopped and pulled out a parking violation sticker. Segneri pointed out a car and told Teja to put the sticker on its windshield. Teja testified that he said, "You are taking me back to the shop. Why would you send me out into the rain to put a parking sticker on a windshield that is not going to stick." Segneri directed him to put the sticker on the car telling him to dry the windshield with his shirt. Teja continued arguing with him and said that it was not his job and that "we don't do that anyway."[54] In his unemployment compensation hearing, he testified that the only reason he gave for not doing what he was asked beyond his belief the sticker would not adhere to the wet windshield was, "[h]e offered me a ride to go back to the shop to change my clothes because I was soaking wet and get my rain gear and on the way, he finds a little detail for me to do. In the rain." According to Teja, Segneri did not put the sticker on the car. In his unemployment compensation hearing, he told the hearing officer that Segneri did put the sticker on the car. Segneri said he was tired of Teja's insubordination for failing to follow his order. He sent Teja home for the day. In an affidavit given the Board on May 10, 2004, Teja asserted that he told Segneri at the time that putting stickers on cars is not an employee thing, but rather a management thing.

Segneri gave his version of this incident. Segneri testified that he gave Teja a ride to the office to get his rain gear. According to Segneri, Teja had been instructed to take his rain gear with him that day as rain was in the forecast. Teja had not done so. That morning it began raining and while driving around, Segneri found Teja walking back to the office to get the rain gear. Segneri gave him a ride. When they got to the office, Segneri found a car illegally parked, partially blocking the drive to the rear of the office. Segneri got a parking sticker and asked Teja to put it on the windshield of that car. The car was on the passenger side of the truck in which Teja and Segneri were riding. Teja refused saying he was not putting a sticker on anyone's car. Segneri then got out and and stickered the car. Segneri believes that Teja then got his rain gear and went back to work. Segneri suspended him for insubordination over this incident. At the time of this incident, John Netsel was the only employee that Segneri had ever heard put parking stickers on cars. Netsel evidently enjoyed doing so and asked for this duty. Other than Netsel, to the best of his knowledge only he, Segneri, and board members had done this in the past.

I credit Teja's testimony in this hearing that he did point out to Segneri at the time he was asked to place the sticker that it was a management responsibility and not a responsibility of employees. I am not sure what issues are important in unemployment compensation hearings and it may well have been irrelevant to mention this objection. In any event, according to someone who should know and is definitely not aligned with the employees or the Union, Segneri and Callahan were aware that employees were not to put the parking stickers on resident's cars.

Board member Leeann Istvan testified that parking stickers are issued by members of the parking committee and by management, and not by employees. She specifically testified that

[53] Under the discussion of Brown being given this same order, I have found that Respondent violated Sec. 8(a)(1) and (3) of the Act.

[54] Teja testified that management had always put the stickers on cars as it would make the tenants angry at the employees.

issuing parking sticker is not part of the employees' job. She testified that Callahan and Segneri were aware of this.

According to Callahan, union employee John Netsel asked to ticket cars in the complex and did so routinely for 3 or 4 months. Callahan received no complaints about Netsel's activity from the Union, and no claims that this activity was beyond the scope of bargaining unit work. There was no showing that union officers had any knowledge of Netsel's activities in this regard. Certainly, when learning of Teja's discipline for his refusal to sticker a car, the issue was raised by the Union. Callahan testified that the unit members routinely put notices to tenants around the complex. Callahan believes this function to be equivalent to putting stickers on cars. I disagree. As can be seen from the testimony below, giving parking tickets can really upset residents.

In this regard, Langston testified that both Respondent's parking committee and management were responsible for placing violation parking stickers on illegally parked cars. According to Langston, unit employees have never been responsible for placing such stickers on illegally parked vehicles. Langston described an incident that occurred in about 1988 or 1989 while he was still employed by Respondent, during which a unit employee was asked by management on a one-time basis to place such a sticker on a car. The resident who owned the car became agitated with the unit employee, which led to an altercation leaving the employee shaken. According to Langston, following that incident, management abandoned asking employees to place parking stickers on cars.

Boulware recited an incident with Segneri and a resident named Lee. Lee came to the office incensed about his car being towed. The confrontation between Lee and Segneri escalated to the point that Segneri took off his coat and shirt and in a T-shirt challenged Lee to fight.

In conclusion on this point, I find that Respondent knowingly directed Teja to perform a task that was not within his scope of responsibility nor the scope of responsibility of any unit maintenance employee. Accordingly, Respondent cannot claim that the warning issued or the suspension leveled was lawful. Even if one believes that Segneri was unaware that unit employees did not put parking stickers on cars when he sent him home, Segneri and Callahan did not rescind the suspension or warning thereafter. I believe this is further proof that Respondent's motive was as found by Judge Davis in the first case, that is, unlawful animus. I find that Respondent's actions in this regard violated Section 8(a)(1) and (3) of the Act.

h. Did Respondent unlawfully discharge Teja on April 21, 2004

On April 27, 2004, Teja was given a letter stating the reasons Respondent terminated his employment. It reads:

> I am writing in response to your request for a letter setting forth the reasons for your termination from employment with Success Village Apts., Inc. effective 4/21/04.
>
> You were terminated due to your long history of poor performance, insubordination, carelessness, lateness and misconduct, culminating in your repeated refusal to follow Phil Segneri's instruction that you remove specific trash from building 24 on Success Ave on April 16, 2004 through April 21, 2004.
>
> You received several previous disciplinary warnings and suspensions, but you were either unable or unwilling to improve and correct your performance.

Callahan testified that the string of events leading to Teja's termination started with him. On Friday, April 16, 2004, Callahan received a complaint from a resident of building 24 stating that bags of trash or leaves had not been picked up in front of the building. Callahan spoke with Segneri about the matter and Segneri said that he had talked with Teja about the matter. Callahan replied that the bags had not been picked up. On the Monday following, April 19, the bags still had not been picked up. Callahan again mentioned the matter to Segneri.

Segneri offered testimony on the events leading to Teja's termination. According to Segneri, on Friday, April 16, 2004, Callahan told him that a resident had complained that bags of trash or leaves had not been picked up at building 24 and that there were uncollected leaves across the street from the office. Segneri told Teja, who was on the trash truck that month to pick them up. According to Segneri, Teja did not pick these items up on Friday. On the following Monday, Teja was jack hammering in-walks as the co-op did not pick up trash on Mondays, instead waiting until after the towns of Bridgeport and Stratford picked up trash on Tuesdays. Segneri on this date mentioned to Teja again to pick up the leaves when he returned to trash pickup the next day. Segneri was not at work on Tuesday. On Wednesday, Teja was again on trash duty. Callahan told Segneri that the resident in building 24 had again complained that the leaf bags were still in front of the building. It was about 11 a.m. according to Segneri. He found Teja in the office parking lot and directed him to go pick up some bags of leaves that were across the street from the office. According to Segneri, Teja said he could not do that because Segneri's car was blocking the way. Segneri told him to go do what he had been told. He indicated for Teja to just pick up the bags and throw them on the truck. He then told Teja to pick up trash on Success Avenue from court D to court A.

About 2 p.m., Segneri had occasion to leave the complex. He noted that Teja had picked up the leaves across from the office. He exited on Success Avenue and immediately saw that the bags of leaves in front of building 24 were still there. Segneri remembers telling Teja to get the leaves across from the office first, get the leaves in front of building 24 second and do the rest of Success Avenue last. This specific instruction with respect to building 24 is not contained in Segneri's log for the day nor was it noted in his testimony given at a Connecticut unemployment compensation hearing. (See R. Exh. 21, pp. 15–18; R. Exh. 59.) It was also not noted in his first recitation of his directions to Teja. Teja denies being told about picking up leaves at building 24 until perhaps when he was having a confrontation with Segneri later in the day. I credit that denial. Segneri was shown to have often given unclear instructions and forget what instructions he had given. Though a log entry for April 21 indicated that Callaghan spoke to Segneri about the leaves and Segneri writes that he told Teja to pick them up on Friday, there is nothing in the Friday entry to indicate that he

did this. I believe the best evidence is that Teja was told to pick up trash the entire length of Success Avenue without further explicit instructions.

Segneri went looking for Teja and found him on top of the truck in front of building 73 or 75, which are side by side. At this point, it appears that Teja was complying with Segneri's direction to pick up all trash on Success Avenue between court D and court A. He was found by Segneri dealing with trash on Success Avenue a block or less from building 24.

According to Segneri, he told Teja to stop what he was doing and go get the bags of leaves in front of building 24, which was less than a block away. Teja ignored him.[55] Segneri then told Teja that if the did not get off the truck and stop what he was doing, he was going to be terminated. Teja got off the truck but instead of driving down to building 24, he began picking up trash in front of building 75. Segneri was driving away when he noticed that Teja was ignoring his instructions. He turned around and returned to where Teja was parked. He again told Teja to stop what he was doing and go to building 24 for the leaves, then return and continue picking up trash on Success Avenue. According to Segneri, Teja argued that he would be at building 24 in a few minutes. Segneri told him that he wanted him there now, not in a few minutes. Teja just ignored him and kept on doing what he was doing. Segneri said out loud, "[N]o problem, park the truck, you are terminated." He told Teja to return the truck to the office, clean out his locker and leave.

Segneri returned to the office and later Teja came in. Segneri instructed him to return all co-op material that Teja had signed out for. Teja told him to "drop dead," that he had not signed for anything and was not paying for anything. Segneri testified that Teja was lying as he had the sheet Teja had signed. Teja then inquired about getting paid for vacation he had coming. Segneri told him that would be taken care of within the next couple of days. He then told Teja to leave the premises or he would call the police. Teja ignored him and he told the office staff to call the police. They came and removed Teja.

Segneri testified that he was aware of Teja's disciplinary history, at least that part of it which occurred after he became employed at Success Village. He denied having any conversations with any board members about trying to get rid of Teja. He testified that he and Callahan had discussed Teja and his disciplinary history and at the time of Teja's termination, Teja's foot was on the "banana peel." Segneri was unaware of any grievance Teja may have filed. Teja had not held any union positions since Segneri had been hired.

Teja also testified about these events. Teja testified that on April 21, 2004, he was instructed by Segneri to pick up trash in court D. General Counsel's Exhibit 5 is a map of the complex. As pertinent, court D constitutes about 30 to 40 percent of all the units in the complex. There is a U or horseshoe shaped private road that runs through court D with both entrances to the road opening onto Success Avenue, a major public street that bisects the complex. The U shaped road is about 3 to 4 city blocks around. The office is part of court D. Building 24 is the primary location involved in this part of the case. It faces Success Avenue and is the first building on Success Avenue just beyond the buildings surrounded by the U or horseshoe shaped private road.

On the April 21, according to Teja he began at the office and worked his way around the horseshoe shaped road. He testified that about 10 a.m., Segneri drove up to him and told him to pick up trash on both sides of Success Avenue from one end to the other. This about a distance of 3 to 4 city blocks in each direction. Teja estimated Success Avenue is a mile long within the complex, but that appears exaggerated when the map's scale is used. Teja also testified that Segneri told him to put all kinds of things in the truck, household trash, metal and discarded appliances, and leaves and wood. Segneri also instructed him to pile the trash 3 feet above the top of the sides of the truck and use the tarp to cover it. According to Teja, as a last instruction, Segneri told him to finish court D when he finished Success Avenue, if there was room in the truck.

At noon that day, Teja returned to the office area, changed clothes and went to his mother's house for lunch. Teja testified he came back from lunch at 12:30 p.m. and went back to work picking up trash on Success Avenue. Teja then testified that at about 2:15 p.m. that day, Segneri drove up and pulled up behind the trash truck on Success Avenue. Teja testified that he was on top of the truck tamping down the trash which he stated was already 2 feet above the sides. Teja testified that Segneri had a window in his truck down and was screaming something about not finishing court D. Teja yells back that he is doing what he was told. Then he climbs off the truck. Segneri is still in his truck. According to Teja, when he approached Segneri, Segneri said that he did not finish court D. Teja tells him that he was told to drop court D and do Success Avenue. According to Teja, Segneri denied ever giving him that instruction. They exchanged similar accusations for a few seconds. Then Teja asked him if he was changing his mind without telling Teja, something Teja claims Segneri did often. Teja claims that he then told Segneri he would go and finish court D. But then Segneri told him to park the truck and leave, that he was all done.[56]

Teja testified that he then returned to the office and went in and found Segneri talking to Tapanes. Teja asked Segneri to repeat what he had said on the street and Segneri told him to clean out his locker, hand in his uniform, that he was all done. Teja pleaded that all he had done was what Segneri told him, but Segneri again told him to leave. Teja went to punch out but his card was not in the card rack, but instead inside of Segneri's locked office. Teja began talking to Boulware and Johnson who were in the office. He conversed with them about 20 to 25 minutes. Segneri came in and asked what Teja was doing there. Teja responded that he wanted something in writing explaining why he was terminated. Segneri told him he did not need that then. Teja asked for his timecard and Segneri said he had it. According to Teja, Segneri again told him to leave, and told

[55] Segneri's notes of the events of this day support his testimony. About the only real difference between the notes and testimony is that the notes indicated that when first told to get off the truck and go directly to building 24, Teja did not ignore Segneri but argued with him that he had a plan.

[56] Teja claims that Segneri had driven around and had observed what he was doing a couple of times after their 10 a.m. talk.

him he no longer had medical coverage. Teja refused to leave without anything in writing. Segneri called the police who came about 20 minutes later. The police talked to Segneri and then told Teja he would have to leave. Teja got his truck and parked at Lloyd Reid's unit to seek his assistance as a union representative. Teja told Reid what happened and left.

Teja denied being given any instruction whatsoever about picking up trash in front of building 24 on April 21, other than that building is on Success Avenue and would have been included in his general instructions to pick up Success Avenue. Teja testified that at the time he was fired on Success Avenue, he was going toward building 24 and it would have been on his right. Teja also testified that he was about four buildings away from building 24, near building 75. If that is true, looking at General Counsel's Exhibit 5, in the 4 hours since, by his testimony, he had been given the assignment of picking up Success Avenue, he had done nothing since there are only four buildings on Success Avenue before building 24. He was given the assignment on the U-shaped road. It is only logical that he would have started at the point where he said that Segneri gave him the instructions. Or if he went the other way, down Success Avenue, building 24 would have been the first building he came to.

As noted, according to Teja, Segneri never mentioned building 24 that day. In testimony given in an unemployment compensation appeal, Teja testified that when Segneri confronted him on Success Avenue about 2:15 p.m., Segneri was yelling and screaming at him about not finishing court D and not picking something up at building 24. Teja testified in that hearing that he told Segneri he did not tell him anything about building 24 prior to approaching him on Success Avenue. Teja testified on cross in this case that he was not himself at the unemployment compensation hearing, explaining the discrepancy in his testimony there and here. Teja denied being given any instruction on April 16 through 21 to pick up anything specifically at building 24.

Evidence from almost every witness attests to the fact that trash at Success Village has been for many years and is still a problem. I will discuss this point only because a reader of this decision might be left with the impression that having two bags of leaves in front of unit for about a week might be an earth shaking event. It is not. In addition to the once weekly pickup of trash by the towns or cities of Bridgeport and Stratford, there is regular pickup of trash by the co-op itself. According to the testimony, trash of all sorts can be found throughout the complex every day. There is a problem with people ignoring the trash day and putting out trash whenever they want. There is a problem with residents putting out heavy items, like furniture and appliances, that the cities will not take. Board member Istvan testified that trash in the complex has been a problem for the 54 years she has lived in the complex. She testified that it is common to see trash and bags of leaves on lawns all the time, not just on trash collection day. Trash and trash pickup are a common topic at membership meetings. She testified that the problems with trash are about the same now as they had been in the past. The point is that Teja's failure to pick up the two leaf bags was perhaps a source of such intense frustration on the part of Segneri, that he felt firing Teja was the appropriate response, but that failure would not even be a blip on the co-op's trash problem radar.

Respondent's letter to Teja giving the reasons for his firing states that Teja's past disciplinary record played a part in the determination to fire him. Considering the manner in which Teja was fired I do not believe that is true. I believe that Segneri just lost his temper and fired him, rather than suspending him as he had done on previous cases when his frustration and animus toward Teja hit the boiling point. In any event, I have reviewed Teja's disciplinary history. That portion of the history set out in the complaint has been discussed above. The portion of that history not so involved is discussed below.

(1) Teja's disciplinary history not directly involved in the complaint

a. Teja had been terminated by Success Village in October 2001, before he assumed union office. Callahan was the manager and Teja was working in the boiler room at the time. The boilers are in the basement of the office building. The boilers heat water and make steam to heat the buildings. The boilers can run on oil or natural gas and can be switched back and forth between the two fuels. Teja had been instructed to change the fuel from natural gas to oil on October 1, 2001. About October 18 or 19, 2001, management discovered that Teja had failed to make the fuel switch. Management terminated him for this failure to make the switch. In about mid-November, in accordance with the ruling of an arbitration panel, Respondent called him back to work and changed the termination to a suspension. Teja was not awarded lost wages for the 5 weeks he was out of work.

The letter reducing the termination to a suspension reads as follows:

> Upon review at Step 3 of the Grievance procedure of your termination from disobeying a direct order, it is now determined that we will change the termination to disciplinary suspension without pay to Nov. 15, 2001. . . . This reduction of termination to a disciplinary suspension was solely due to your years of service to Success Village Apts., Inc.
>
> Your failure to comply with the order to switch from gas to oil between Oct. 1 and Oct. 18, 2001 cost the Co-operative $15,000.00 in penalties to Santa Fuel as well as a gas bill in excess of $14,000.00. While you were on suspension the Co-operative discovered additional problems with your maintenance of the boilers. The co-operative had to pay over $5,000.00 in emergency repairs to burners and pumps. Your statement prior to termination to the burner repair company that you had no problems with the burners in the boiler room was totally incorrect. In addition, Boiler #5 is about to incur $8,200.00 of repairs that should have been done prior to your closing it up in September, 2001. In addition, gaskets and sealants to the front shelf were not done by you which must now be done.
>
> The total inadequacy of Boiler #5 caused it to run inefficiently and thus increased fuel expense to the Co-operative. In total all of your actions discussed above have caused the Co-operative to spend over $30.000.00 in expenses.

A review of your file indicates that you have had numerous similar problems in the past. More specifically:

November 18, 1996—Careless work on pumps.

April 3, 1997—Careless action caused oil spill, Cost $2,505.85.

Feb. 16, 2000—Inadequate completion of shift reports.

May 11, 2000—3 day suspension due to damaged law mowers—Cost—$1,500.00

November 28, 2000—Complaint concerning your failure to fulfill requirements of your job as boilerman.

Jan 10, 2001—Failure to perform boiler room functions.

Your actions of Oct. 2001 and your history of poor performance and carelessness in the boiler room leaves us no choice to indicate to you that this is your last warning concerning your performance. Any further detrimental actions by you will be cause for immediate termination."

Teja claims to have had an agreement with Respondent's then Maintenance Manager Jim Elliott that the co-op would not switch to oil until the oil supplier checked out the boilers' oil systems. Teja admits that Elliott told him to make the switch and that he did not do it. He also testified that the supervisor denied any agreement with Teja.[57] I assume that the arbitration panel considered this position in making its determination. On an appeal to arbitration, the arbitration panel held that the co-op did not have just cause to terminate Teja, but upheld his suspension without pay, though benefits for the suspension period were awarded. This incident is not alleged in this complaint to have violated the Act. It is from time-to-time mentioned in other warnings given to Teja, but those warnings to the extent they are alleged to have been violations have been evaluated on the merits of the specific incidents and actions alleged to have given rise to the warning and the October 2001 discipline plays no part in my evaluation.

Following Teja's return to work in November 2001, Teja was notified that his attempt to attain the position of fireman (boilerman) 1a was unsuccessful and he would remain a fireman (boilerman) 1b. The decision not to promote Teja was attributed to his past boiler room performance.

b. In January 2002, after Dennis Brown had been laid off and Teja made shop chair, he was given a letter from Respondent. As most pertinent, the letter served as a written warning to Teja for allowing Brown on three occasions to be in work areas of the co-op while on lay off. The letter states that Teja, in his position as shop chair, had been told three times that the board of directors did not want any nonemployees in work spaces. The letter also states that if Brown or any other laid-off union member wanted to meet with Teja, they could do so in the co-op's conference room. Callahan testified that Brown and Teja were meeting in the basement maintenance area and Brown also spoke with other employees. Judge Davis held in the previous case that the Respondent had lawfully denied union representatives access to work areas. I can see no difference in the situation in his case and the situation in this one. Moreover, the Respondent had made available a convenient place for Brown to meet with Teja. No violation was alleged with respect to this memorandum and I would dismiss one if it were alleged.

The warning also complains that Teja left the boiler room unattended for a period of an hour or so to attend an unemployment hearing without getting someone to cover for him. Teja testified that he notified Callahan 2 days in advance of this hearing that he would attend. I agree with Teja that it was management's function to replace him and not his. I believe this warning to Teja is without merit. Boiler man John Netsel left work (and thus the boiler untended by anyone) one day at 3 p.m. without telling Segneri and was not disciplined in any fashion. Segneri testified that Callahan had notice of his leaving. I cannot find that Callahan testified on this subject. I cannot see that Teja's actions were as bad as Netsel's and if the warning were alleged in the complaint as a violation, I would agree. However, this warning was not alleged as a violation.

c. On March 8, 2002, Teja was given a written warning for leaving the facility on February 25, 2002, without turning on the boiler that supplies hot water to the co-op, leaving it without hot water for 4 hours that day. Though Teja agreed that the co-op did not have hot water for a period of time on the Febriaru 25, he denied not turning on a boiler to supply hot water as he left. In vague testimony, he seems to accuse a Board member of going into the boiler room and turning off the boiler. He based this on hearsay from the retired co-op longtime garbage man, Joe Jones. Jones told him the next day that he (Jones) had observed a board member named Joe Olbrys coming down the stairs and walking into the boiler, and he never saw him come out.

On September 23, 2003, Netsel left the facility and evidently turned off two boilers with the result there was no hot water the next morning. When Netsel reported to work (late as usual) he was confronted by Segneri and Netsel denied turning off the boilers. Segneri wrote in his log for that day, "He's been caught lying in the past. I instructed him not to leave the BR (boiler room) unless he checks with me. I'll check boiler room from now on." As opposed to Teja, Netsel did not receive a warning letter or any other form of written discipline over this incident. Segneri incredibly testified that he had no way to prove or disprove Netsel's assertion that he did not turn off the boilers. He testified in this manner even though his own notes indicate clearly he believed Netsel was lying. He could not prove that Teja was lying about turning on a boiler when he left his shift, but that did not stop management from giving him a written warning. Had Teja's warning been alleged as a violation, I would find one based on Respondent's antiunion animus toward Teja and the disparate treatment afforded Netsel.

d. On August 5, 2002, there was a warning issued to Teja alleging that on July 3, 2002, he was observed sitting on the steps at building 58 and not performing his work. It also alleges that on July 5, 2002, Teja was talking to a resident for 10 minutes instead of performing his work. Though this warning was al-

[57] The General Counsel relies on the testimony of a board member who testified against Respondent at the first *Success Village* case. Judge Davis made no fact findings with respect to her testimony regarding the Teja October termination and suspension. I did not hear the testimony and will make not independent findings with respect to it based on transcript pages from the prior record. She did not testify in the arbitration hearing nor did she testify in this proceeding.

leged as a violation in the previous *Success Village* case, Judge Davis found no violation. Teja did not testify in the earlier proceeding for reasons never made clear in the instant record.

e. A complaint allegation in the previous hearing that since July 26, 2002, that Teja was unlawfully denied asbestos training was also dismissed by Judge Davis. There was also an allegation that, inter alia, Teja suffered, since December 20, 2002, reduced paid time for engaging in representation functions. This allegation was also dismissed.

f. In May 2002, Teja was still working as a boilerman on the overnight shift. On May 27, 2002, he was given a letter calling into question whether he altered his timecard for May 10 and whether he had actually worked that night as his altered timecard would suggest. Teja admitted writing in his hours on that night, but asserted that it was a punch error and that he had worked the hours written on the card. Teja agreed that the punch machine was working that night and that he did not punch his card. He testified that he had realized he had not punched in that evening about 11:15 p.m. He claims to have come to work at 10:30 p.m. that evening. He claims he did not punch in when he realized his mistake because he did not want to appear to have been late for work. He then claims that he did not punch out the next morning as he got busy and worked over the end of his schedule. He testified that he would not get paid for unauthorized overtime and thus saw no reason to punch out. He also asserts he was having car trouble and it clouded his thinking. He testified that he made the write-in entries on his timecard on May 10.

Teja testified that Callahan had an occasional practice of calling him on his shift to check to see if the boilers were functioning and what the water temperature was. On May 21, 2002, Teja was given a written warning and suspension by Callahan. After reiterating much that is outlined above, the warning reads:

> Your story is not credible for several reasons. I personally telephoned the boiler room several times on the morning of May 11 at around 3:30 A.M. to 4:00 A.M. and you did not answer the phone.[58] I then personally went to the boiler room at Success Village Apts., Inc. at around 4:15 A.M. to 4:30 A.M. and you were not there. I also personally looked at your time card at that time and it was blank. I also looked at the boiler room log, and that also was blank for your shift.
>
> I have concluded that you have falsified your time card and the boiler room log. These are serious infractions that by themselves warrant serious disciplinary action. Also, such severe discipline is warranted in light of your disciplinary history at Success Village Apts., Inc. You have had a history of carelessness and misconduct in the boiler room, including seven (7) written disciplinary warnings, a 3 day suspension, and a previous termination in the fall of 2001 that was reduced to a 30 day suspension with a final warning letter.
>
> Accordingly, you are hereby suspended without pay effective immediately until June 14, 2002, at which time you will be returned to work and demoted to a groundskeeper position. . . . As noted to you in my letter dated May 14, 2002, you will not be paid for the May 10–11 shift, as your answer was not satisfactory.

As can been seen from the foregoing, Teja was suspended for 30 days, demoted to groundskeeper and put on day shift. This event occurred after Teja had served as shop chair for several months. A charge was filed with the Board alleging that Teja's suspension and demotion were discriminatorily motivated. This charge was subsequently withdrawn. Teja did not testify at the first *Success Village* trial. At the first trial, Callahan testified to what is in the letter set out above and he added that upon coming to work on May 11, 2002, he found that Teja's card and the boiler room log, both of which had been blank a few hours earlier, had been filled in. On redirect examination in this case, Teja denied not going to work for any part of the night on May 10–11, 2002. The General Counsel in the first *Success Village* trial conceded that the government did not dispute Callahan's testimony about this event. I do not rely on this concession. I heard both Callahan and Teja on this subject. I credit Callahan's version of the events of May 10 and 11, 2002, and find the best objective evidence supports Callahan's testimony over that of Teja in this regard. This matter was grieved and is awaiting arbitration.[59]

g. On February 9, 2004, Callahan gave Teja a warning for not being available for snow removal on December 6 and 13, 2003, both Saturdays. Teja and other employees are required to be available for a reasonable amount of overtime. Teja refused these assignments though he had worked no overtime since he was relieved of his boilerman duties in May 2002. This warning is not alleged to have been a violation of the Act.

h. On April 7, 2003, Callahan issued a written warning to Teja for: (1) Refusing to shave his beard to be fitted for a respirator, a requirement for working in crawl spaces; (2) refusing to supply his drivers license in response to the direction of the coop's insurance carrier, thus making him ineligible to drive coop vehicles; and (3) having made himself ineligible to work in the boiler room by falsifying his time card. The warning suggests that he is jeopardizing his continued employment by making himself ineligible for any jobs available to him. This warning was not alleged to have violated the Act. On cross examination of Segneri, it was shown that Reinaldo Tapanes did not supply the driver's license information until May 7, 2004. He was not given a written warning about his late filing. On the other hand, it was shown that he was out of work for a period of time after being asked. Teja was not just dilatory in this regard, but actually refused to supply the information. To the best of my knowledge, Teja did produce his drivers' license after the

[58] Callahan testified that he called on his house phone and on his cell phone. His cell phone records support his testimony.

[59] Langston testified that the grievance arbitration process broke down for grievances filed prior to May 31, 2002, for two reasons. First the Union stopped allowing the Respondent to have more than one representative at the grievance meeting. The second reason was that the Respondent wanted to stop using the Connecticut State Board of Mediation and Arbitration for arbitrations and instead use AAA. The Union was unwilling to make this change. The union asked the Connecticut State Board of Mediation and Arbitration that all pending grievances be put on hold.

warning issued. I believe this warning was also grieved and is caught up in that process.

Segneri obviously knew of Teja's past discipline in those instances in which he played a part. He was not shown to be aware of the ones issued prior to his employment by Respondent in June 2003. As I have found that all but one of the disciplines issued by Segneri and which are involved in the complaint were unlawful, he would not be privileged to rely on them in his decision to terminate Teja. Segneri's motivation in firing Teja and Respondent's allowing the termination to stand upon review, is called into question by Respondent's treatment of other employees who engaged in poor work performance and were not disciplined, much less fired for their actions. Some of such evidence of disparate treatment can be found in the discussion the disciplines issued to Reid and Brown at an earlier part of this decision. Some other such evidence is offered below.

2. Evidence of Respondent's treatment of other employees who were not union officials

In the first *Success Village* case Segneri described Raul DeSousa as a competent carpenter, except he is a very, very stubborn person, and if it is not his way, it cannot be the right way. Segneri also testified at that hearing that he caught DeSousa lying to him on more than one occasion and there are instances in Segneri's logs where he details DeSousa's poor quality of work and lying. In his logs, Segneri describes DeSousa as complaining bitterly and constantly. Another log entry states: "Raul challenges me on every directive—wants to litigate everything on the spot—I've warned him several times about insubordination stemming from his stubbornness—argumentative—insolent." Another entry from August 14, 2003, reads: "He's obstinate and refuses to listen. Just keeps yelling that I want to make him a slave." DeSousa did not receive any discipline for any of his actions. After being confronted with his logs, Segneri testified that DeSousa had changed completely and improved significantly. One wonders when this amazing turnaround took place.

General Counsel's Exhibit 121 is a section of Segneri's logbook that indicated that employee Raul DeSousa was working in a locked unit and Segneri knocked on the door to talk to him. He got no answer. He went to a window and could not see DeSousa or hear any sound come from the unit. He honked his truck's horn several times, but DeSousa did not open the door. He assumed DeSousa was taking a nap on worktime. Later in the day, he saw DeSousa and confronted him about not answering. DeSousa said he was hammering and did not hear the knocking. Segneri testified that he had listened at a window and heard no hammering. Segneri then took away from DeSousa the key to the unit. DeSousa then went to the unit and spoke to its owner, who was told that DeSousa could not finish the work in the unit because Segneri had taken the key. DeSousa left work early that day. The resident became very agitated and complained to Segneri. He then sent DeSousa to the unit because the owner left the door unlocked. Segneri then had a duplicate key to the unit made and gave the key to DeSousa. In a later log note made in the same timeframe, Segneri criticizes the quality of DeSousa's work on this job. Segneri did not discipline DeSousa because he could not prove he was napping.

With respect to Reinaldo Tapanes, Segneri wrote in his logs, "R (Reinaldo) takes a fit. Won't go under building. Sore knee. Wants to quit. I get Dennis. He finds a couple of problems and is working on them. Reinaldo lied to me about radiator valve in 9217. Said he put it new. I checked. He didn't. He did halfway up the pipe." Tapanes was not disciplined for this incident, for swearing at Segneri, or for doing work incorrectly.

In Segneri's log, there was another entry from October 2003 involving Raul DeSousa and Louis Andrade. They were assigned to put up sheet rock panels in building 96 sometime in the early afternoon. The two employees put up one sheet between 2:15 and 3:30 p.m. Then the two returned to the office, in their minds finished working for the day. Segneri confronted them and asked why they were back and DeSousa told him it was wash up time. Segneri warned them about quitting early, but did not discipline either man. He writes rhetorically, "They all ignore me, now what?"

Callahan testified that employee Reinaldo Tapanes occasionally refused orders and cursed management, but would get over it and do what he had been told to do. Tapanes has never been disciplined for cursing at management or for refusing an order from management, even though he did both.

Reid has seen Tapanes refuse an order from Segneri and then curse at him. Reid also observed Tapanes when Callahan refused his vacation request, prompting Tapanes to tell Callahan that he was going on vacation, that Callahan was a "fucking asshole" and that Callahan could "kiss his fucking Cuban ass. Nothing came from this outburst except that Tapanes did not go on vacation when scheduled, but Respondent reimbursed him for the cost of his airline ticket.

On October 25, 2003, Segneri wrote in his notes, "John (Netsel) standing in lunch (room) talking and not repairing pumps as I've directed him to do. Continuous problems like this. Gave him last verbal warning in presence of D.B. (Dennis Brown). The next offense will result in a one day suspension for insubordination. Next occurrence will result in one week suspension and any subsequent occurrence will result in summary termination. Witness Ceil Johnson." Netsel refused to sign this statement.

As part of his boiler man duties, Netsel was required to maintain regular logs, to perform a function called a blowdown, and to make regular chemical analyses of the water in the boiler. The latter two functions could affect the boilers efficiency and failure to do so could damage the boilers and cause them to have to be repaired by an outside company at the cost of several thousand dollars. Netsel failed to do all three functions for significant period of time. An outside agency tested the boilers and it became clear that Netsel had been lying to management about what he was doing. Segneri's notes indicate that he recommended immediate termination for Netsel for these failures and lies, but Netsel was not even given a written warning. The notes indicate that Callahan overruled the recommendation. Netsel was ultimately fired months later for tardiness, having been late to work every day for over 2 months.

With regard to other examples of Netsel's tolerated behavior, see pages 33 and 34 of this decision.

3. Conclusions with respect to Teja's termination

I do not believe that Teja was an exemplary employee, but, then, almost all of the maintenance employees have been shown in this record to have made mistakes, refused orders, or otherwise engaged in poor work performance. More than any other factor, I believe the disparate treatment of employees who were not union officers compared with the treatment of Brown, Reid and Teja almost forces a finding that Teja was fired by Segneri and that the termination was approved by Callahan because of their clear animus against Teja for his union activities. No rational person would have not disciplined Netsel for actions that could have caused thousand of dollars and then fired Teja for not dropping what he was doing and immediately picking up two bags of leaves that he would have picked up shortly anyway. Should the reader think that Respondent's problems with Netsel were just a one time affair, he or she would be wrong. Netsel was consistently late for work, was caught often not working when he should have been, worked out of uniform and was frequently caught talking on his cell phone on company time, all things Respondent believed to be evidence of poor performance. When he was finally disciplined, months after the fact, he was only suspended. He was not fired for any of these things, just for tardiness.

I am convinced that if any of the other maintenance employees who had not served as a union officer had done what Teja did, no discipline whatsoever would have resulted. I believe that Teja at the time he was fired was doing what he had been told to do, pick up trash on Success Avenue. If indeed, Teja had been told to pick up the two bags of leaves, it was only during the confrontation with Segneri on Success Avenue. Under these circumstances, how he could have known the alleged importance of that task is beyond me. I believe that Respondent seized on the two bags of leaves in front of building 24 as an excuse for taking such drastic action. I believe it was nothing more than the next step in Respondent's unlawful efforts to get rid of Brown, Reid, and Teja. It was just Teja's time to get the axe that had previously been dropped on Brown. As I find that Respondent's animus played a major role in Teja's discharge, as it had in almost all of the disciplines involved in the complaint, I find the discharge to be unlawful and a violation of Section 8(a)(3) of the Act.[60]

F. The Alleged Violations of Section 8(a)(5) of the Act

In the first *Success Village* case, Judge Davis was confronted with a number of alleged 8(a)(5) allegations. Having found in that case that no proper impasse in bargaining occurred, he found that Respondent was unable, legally, to implement its contract proposals. He further found that Respondent cannot rely upon its implemented contract proposals to support the various changes it made in the terms and conditions of employment of its employees. The same is equally true in the instant case.

In the first case, Respondent argued that the Union waived its right to bargain concerning the changes by virtue of certain clauses in their collective-bargaining agreement, specifically the management rights clause, the "zipper clause," a clause prohibiting any prior practice except those specifically enumerated, and clauses concerning waiver of a breach of the agreement and providing that no act or omission of the Respondent shall be used to establish a past practice of the parties. Thereafter in his decision, Judge Davis explored and ruled on this argument and related arguments in a reasoned review of the facts and the applicable law. I have read and agree with his findings in this regard and see no useful purpose in rewording this section of his decision. It is completely applicable to many of the issues in the instant case and I adopt it as my own as set out below. The relevant provisions of the contract are as follows:

> Article 2—Management:
>
> It is agreed that the rights of the management of the Co-op have been bargained and that, except as otherwise provided by this agreement, the Co-op retains the sole and exclusive right to fully manage and conduct its business affairs, which rights include specifically, but not being limited to, the following: the exclusive right to fully direct and assign its employees, including but not limited to, the right to hire, promote, demote, transfer, lay off for lack of work or other business reason deemed sufficient to the Co-op; discharge or discipline for just cause, and to maintain discipline among employees; the determination of services to be performed; the standards of quality of work to be maintained; the type and quantity of machines, tools, equipment and methods to be used; to maintain and enforce rules of conduct and safety; to introduce changes in methods; to establish work standards; to determine the size of its work force; to determine the number of hours per day or per week operations shall be carried on; to allocate or assign work; and to generally manage the Co-op's business as it deems best.
>
> Article 18, General Provisions
>
> Section 6—This agreement constitutes the entire contract between the Co-op and the Union, and settles all demands and issues with respect to all matters subject to collective bargaining. Therefore, the co-op and the Union, for the duration of this Agreement, waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter which is subject to collective bargaining, whether or not such subject is specifically referred to herein.
>
> Section 7—No prior policy, practice or procedure of the Co-op shall be required to be continued except for those specifically enumerated in this Agreement, including the Appendix B. This provision (and Sections 8 and 9 of

[60] The complaint alleges that on the day in question Respondent further violated the Act by giving Teja a more onerous work assignment, giving him contradictory work orders and calling the police. I do not agree. The work assignment given him was his usual one, that is, picking up trash. The contradictory orders have a bearing on my decision as to whether the termination was justified, but do not constitute an independent violation. Calling the police was necessary because Teja refused to leave. Though his reason for being ordered to leave was unlawful, Teja's actions caused the police to be called.

this Article) shall not apply to the issue of subcontracting and transfer to [sic} work, which shall continue as heretofore. Thus, the Union and/or the employee shall have no right to demand of the Co-op anything not provided for in this Agreement.

Section 8—The waiver of any breach or condition of this Agreement by either party shall not constitute a precedent in the future enforcement of all the terms and conditions herein.

Section 9—No act or omission of the Co-op prior to the signing of this Agreement or during this Agreement shall be used in any way to establish any "past practice" of the parties.

Appendix B contains a list of 15 paragraphs providing for various terms and benefits for employees including permitting a washer/dryer, locker room, lunchroom, and radio and television set in the maintenance area; and providing that if a holiday falls on a Friday, payday will be on Wednesday.

I begin with a discussion of the legal principles applicable to alleged unilateral changes. I will then apply the law to the specific changes alleged.

An employer's duty to bargain with the union representing its employees encompasses the obligation to bargain over the following mandatory subjects—wages, hours, and other terms and conditions of employment. *First National Maintenance Corp. v. NLRB,* 452 U.S. 666, 679–682 (1981). An employer violates Section 8(a)(5) of the Act when it makes a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining, at a time when the employees are represented by a union. *Fresno Bee,* 339 NLRB 1214, 1214 (2003). The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union. *Chemical Workers Local 1 v. Pittsburg Plate Glass Co.,* 404 U.S. 157, 159 (1971); *Taino Paper Co.,* 290 NLRB 975, 977 (1988). The burden is then on the employer to show that the unilateral change was in some way privileged. *Cypress Lawn Cemetery Assn.,* 300 NLRB 609, 628 (1990).

A "term and condition of employment," even though not expressly provided for in the collective-bargaining agreement cannot be unilaterally altered or abolished by the employer without affording the Union notice and an opportunity to bargain. Thus, a unilateral change constitutes an unlawful refusal to bargain unless, as the Respondent contends, the Union has waived its right to bargain over this matter. "The right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has been waived the party asserting waiver must show that the right has been clearly and unmistakably relinquished. Whether such a showing has been made is decided by 'an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement.'" *TCI of New York,* 301 NLRB 822 , 825 (1991).

However, waivers of statutory rights are not to be "lightly inferred." *Georgia Power Co.,* 325 NLRB 420 (1998). "National labor policy disfavors waivers of statutory rights by a union and thus a union's intention to waive a right must be clear before a waiver can succeed." *C & P Telephone Co. v. NLRB,* 687 F.2d 633, 636 (2d Cir. 1982). "We will not interfere from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.,* 330 NLRB 1363, 1365 (2000).

"The Board finds a waiver of the statutory right to bargain based on language contained in the contract if the contract language is specific regarding the waiver of the right to bargain regarding the particular subject at issue. Thus, the Board looks to the precise wording of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver." *Allison Corp.,* supra at 1365.

The Respondent argues that the Union, because it agreed to the zipper clause, waived its right to bargain during the term of the contract over mandatory subjects not addressed in the contract and not raised during bargaining. "The clear and unmistakable waiver test applies equally to alleged waivers contained in zipper clauses as it does to those contained in other contractual provisions." *Michigan Bell Telephone Co.,* 306 NLRB 281, 282 (1992).

The Board has held that a contract clause must specifically include the subject at issue and that the parties' bargaining history must show that the matter at issue was fully discussed and consciously explored during negotiations, and that the Union consciously yielded or clearly and unmistakably waived its interest in the subject matter before a waiver will be found. *Mt. Sinai Hospital,* 331 NLRB 895, 910 (2000), citing *Johnson-Bateman Co.,* 295 NLRB 180, 184–188 (1989). Here, none of the contractual provisions establish, on their face, prior union consent to the actions taken by Respondent, nor a waiver of the Union's right to advance notice and an opportunity to bargain about such actions. *Mt. Sinai,* supra at 184. "Generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights." *Johnson-Bateman Co.,* supra.

"In order to establish the waiver of a statutory right as to a specific mandatory bargaining subject, there must be clear and unequivocal contractual language or comparable bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union consciously yielded or clearly and unmistakably waived its interest in the matter. Absent such evidence, the Board has consistently found that a general management-rights clause does not constitute a clear, unequivocal, and unmistakable waiver by the union of its statutory right to bargain about an employer's implementation of a work rule not specifically mentioned in the clause." *Hi-Tech Cable Corp.,* 309 NLRB 3, 4 (1992).

In general, a zipper clause is an agreement by the parties to preclude further bargaining during the term of the contract. If the zipper clause contains clear and unmistakable language to that effect, the result will be that neither party can force the other party to bargain, during the term of the contract, about matters encompassed by the clause. That is, the zipper clause will "shield," from a refusal to bargain charge, the party to whom such a bargaining demand is made. Similarly, under such a clause, neither party can unilaterally institute, during the term of the contract, a proposal concerning a matter encompassed by the clause. That is, the zipper clause cannot be used as a "sword" to accomplish a change from the status quo. *Michigan Bell Telephone,* supra at 282.

Here, as in *Pepsi Cola,* 241 NLRB 869 (1979), I find generally, as set forth below, that the Respondent used the zipper clause as a sword, and not as a shield, to "unilaterally institute" changes in terms and conditions of employment. The Respondent first unilaterally changed the employees' existing working conditions, then used the zipper clause as a "sword" to justify its refusal to discuss the unilateral changes made to the status quo.

A zipper clause does not mean that a union has clearly and unmistakably relinquished its right to bargain over all mandatory subjects of bargaining. Rather, the Board and the courts have interpreted such a clause as a curb on the union's right to demand bargaining during the life of a collective-bargaining agreement about the terms and conditions of employment which are contained in the agreement. The Board and the courts have not interpreted the presence of a zipper clause as a grant to an employer to unilaterally change existing terms and conditions of employment. See *GTE Automatic, Inc.,* 261 NLRB 1491, 1492 (1982); *Angelus Block Co.,* 250 NLRB 868, 877 (1980).

I cannot conclude that the zipper clause clearly and unmistakably waived the parties' rights to bargain over mandatory subjects not mentioned in the contract. There was no evidence of the specific matters discussed in negotiations leading up to the execution of the contract which expired in May 2003. Where the zipper clause does not contain clear and unmistakable language, there is no waiver of the right to bargain. Each party has the right, and the opposing party has the duty, to bargain about subjects not covered by the contract and not discussed in contract negotiations. *Michigan Bell,* supra.

It must also be noted that here, as in *Suffolk Child Development Center,* 277 NLRB 1345, 1351 (1985), in finding that a zipper clause did not act as a waiver, the Board noted that the benefits at issue continued for nearly 11-1/2 years after the contract became effective, and thus the clause was not intended to strike all prior agreements. Thus, the Respondent permitted the practices which are alleged to have occurred, in the face of the various clauses. *Aeronica, Inc.,* 253 NLRB 261, 264–265 (1980).

Applying the above principals generally to the changes instituted by Respondent, I can find no specific language in any of the contractual clauses, except for subcontracting which will be discussed below, which refers to the "particular subject at issue." The clauses are all worded generally. For example, the management-rights clause, set forth above, speaks generally about the Respondent's ability to run its business, but does not expressly mention the new policies at issue here, such as the phone use policy, copier, and facsimile use policy, timecard discrepancy policy, reduction of paid time for union officials, and the lock and locker policy.[61] The zipper clause is also phrased in general language. The clause which states that no prior practice will be required to be continued except those specifically enumerated, similarly does not identify which prior practices must be discontinued.

E. I. du Pont & Co., 294 NLRB 563 (1989), relied upon by the Respondent is easily distinguishable. The changes implemented by the employer in that case were all the subject of proposals made to the union during the term of the agreement, and as to which, the employer offered to bargain about. In addition, the past practice urged by the union in that case conflicted with specific terms of the contract which involved employees engaged in union representation during working time. The circumstances in that case are thus completely different than the instant case in which no offer to bargain was made, and no specific term of the contract mentioned the express changes made here.

As set forth above, I cannot find that the Union by such general language in the contractual terms, clearly and unmistakably waived its right to bargain about these longstanding practices, or consciously yielded its interest in these matters.

In addition to Judge Davis's analysis and reasoning set out above and adopted herein, I would note that it is well-established Board law that a zipper clause does not survive an expired contract. *Burns International Security Services,* 324 NLRB 485, 488 (1997), relying on *Ironton Publications,* 321 NLRB 1048 (1996). Additionally, a union does not acquiesce in an employer's unilateral conduct, when as here, the employer's action is implemented without giving the union any prior notice and opportunity to bargain, thus, presenting the union with a fait accompli. See *Intersystems Design Co.,* 278 NLRB 759 (1986); *Pinewood Care Center,* 242 NLRB 816, 822 (1979); *Caravelle Boat Co.,* 227 NLRB 1355, 1358 (1977). As the Board has consistently maintained, "A union cannot be held to have waived bargaining over a change that is presented as a fait accompli . . . An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hospital,* 336 NLRB 1021, 1023 (2001).

The foregoing analysis is applicable to each of the changes in the instant case which Respondent unilaterally implemented as a fiat accompli, without prior notice to the Union and without an opportunity to bargain. These changes are discussed below.

1. Conflict of interest

As noted in more detail in the earlier section of this decision dealing with Respondent's violations of Section 8(a)(4) with respect to Boulware, from the early 1970s to present, Boulware

[61] These specific enumerated changes were the ones involved in Judge Davis case. In the instant case, the changes involved and subject to the analysis and reasoning set out above are the changes involved in the conflict of interest memo, the phone use prohibition, and the employee parking restrictions.

worked full time as Respondent's resale process clerk, and from 1996 through August 28, 2003, she also held a part-time realtor position with Taj wherein she openly and actively served as a realtor to Success Village residents who wanted to sell their units. From the inception of Boulware's real estate activities, Respondent was aware of her activities in this regard. Indeed, at the inception of the business in 1996, the then property manager of the co-op informed all residents of the business in a newsletter circulated to the residents. Board member Leeann Istvan testified that she had read this newsletter and had been aware since that Boulware was actively selling co-op units. Until the conflict of interest memo was given to Boulware on August 28, 2003, Boulware had never been informed by the Board, any property managers, including Callahan, or any resident, that there was any concern, general or specific, about a potential or real conflict of interest between Boulware's duties with Respondent and her private real estate activities.

Respondent's implementation of the conflict of interest policy, as with all other unilateral changes it implemented as alleged in the complaint, was accomplished without prior notice to the Union and without an offer to bargain. The new policy had an immediate and very substantial impact on Boulware, causing her to lose thousands of dollars in annual commissions she would have continued earning based on her past demonstrated performance. This new policy constitutes a change in a mandatory subject of bargaining because it was a work rule that subjected Boulware to discipline, termination, if she failed to follow it; and because it was a restriction on part-time employment for a unit employee.

In the preceding section, the principals governing employer's responsibility to bargain over mandatory subjects of bargaining are laid out, as well as the principals governing waiver and the effects of management-rights clauses and zipper clauses. Going next to the particular policy here under consideration, the Board has held that work rules that can be grounds for discipline are mandatory subjects of bargaining. *King Scoopers, Inc.,* 340 NLRB 628, 628 (2003); *Praxair, Inc.,* 317 NLRB 435, 436 (1995); *Womac Industries,* 238 NLRB 43 (1978); *Murphy Diesel Co.,* 184 NLRB 757, 762 (1970), enfd. 454 F.2d 303 (7th Cir. 1971) ("Plant rules, particularly where penalties are prescribed for their violation, clearly affect conditions of employment and are mandatory subjects of bargaining."); *Ford Motor Co.,* 441 U.S. 448, 498 (1979) (Mandatory subjects of bargaining are those subjects that are "plainly germane to the 'working environment'").

In *Edgar P. Benjamin Healthcare Center,* 322 NLRB 750, 751 (1996), The Board noted in regard to conditions of employment:

> The element that is critical to finding that an employer's policy to be a condition of employment is not whether the subject of the policy is related to job performance, but whether the policy has the potential to affect continued employment of the employees who become subject to it.

In this case, Respondent has made it abundantly clear that it will discipline Boulware, including terminating her, for any violation of the policy. Indeed, it suspended her, acting on an unfounded speculation that she might still be engaging in her real estate business after August 28, 2003. Respondent's unilateral implementation of this policy, which newly subjected Boulware to discipline, without first bargaining with the Union violated Section 8(a)(1) and (5) of the Act. *King Scoopers, Inc.,* supra; *Edgar P. Benjamin Healthcare Center,* supra; *Cotter & Co.,* 331 NLRB 787, 796 (2000) ("work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining, and respondent's unilateral implementation of such rules without bargaining to impasse . . . violated Section 8(a)(5) of the Act").

Moreover, placing restrictions on an employee's ability to work part time is also a mandatory subject of bargaining. *Frank Leta Honda,* 321 NLRB 482, 496–497 (1996). See also *Peerless Pubublications,* 231 NLRB 224 (1977); *Capitol Times,* 223 NLRB 651 (1976) (both of which, read together, stand for the proposition that restricting outside employment is a mandatory subject of bargaining, even in the context of an otherwise valid code of ethics policy). Because the sole purpose of Respondent's policy was to punish her and eliminate Boulware's, or any other co-op employee's part-time real estate business of selling Success Village real estate, Respondent had the statutory duty to first bargain with the Union before implementing such a policy.

To the extent that Respondent might argue that its unilaterally implemented conflict of interest policy was justified based on the merits of the decision, i.e. that it reasonably believed a conflict of interest existed between Boulware's duties for Respondent and her duties as a realtor, such argument is unavailing. In this regard, the burden is on the employer to show that the unilateral change was in some respect privileged. *Cypress Lawn Cemetery Assn.,* 300 NLRB 609, 628 (1990). As the Board stated in *Van Dorn Plastic Machinery Co.,* 265 NLRB 864 (1982):

> The Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms and conditions of employment. Once the General Counsel has made a prima facie showing of an 8(a)(5) violation—as he had done here, a respondent must demonstrate why the refusal to bargain was privileged. In the instant case, Respondent was responsible for showing that "compelling economic considerations" warranted its acting unilaterally. This had not been done here.

There were no compelling economic considerations or sound business considerations shown by Respondent in this case to justify the unilateral implementation of its new conflict of interest policy. There was no credible evidence that any pressing, legitimate business concern was present or significant event occurred that would excuse Respondent from its bargaining obligation. Respondent simply chose for its own reasons not to bargain and that is not a lawful excuse. The reasons it chose to implement the conflict of interest policy have been found by me to by unlawful, in violation of Section 8(a)(1) and (4) of the Act.

2. Parking

Callahan testified that there was nothing in the expired collective-bargaining agreement about parking. As far as this record demonstrates there were no proposals with respect to employee parking put forth in the failed negotiations for a new contract. Callahan testified that parking began to be a problem at about the time he was hired in August 2001. He testified that there are 924 units at the complex and only 940 to 950 parking spaces. With the age of the complex's tenants beginning to drop, and more two car families moving in, the board decided that assigned parking and new parking areas were necessary. The co-op began marking parking spaces and a new parking lot containing 50 spaces was constructed in the field behind the office in court D. This lot was completed in the summer of 2003. A process was put in place to register cars and issue numbered parking permits keyed to numbered parking spaces. As a corollary to this process, parking violation stickers were prepared that notified the offending car owner that his or her car would be towed.

On September 4, 2003, Phil Segneri, on behalf of management, issued the following notice: "Effectively immediately, all employees are to park their vehicles in the new parking lot in the back of the office." As noted, Success Village had a field behind the office which was surrounded by apartments. A portion of this field was paved over providing new parking spaces. The office itself had limited parking in front, on one side and in the rear. The new parking lot was connected to the office building by a sidewalk. Estimates of the distance from the office to the new lot varied widely, but I find that it is about 200 yards from the office to the first parking spaces in the new lot.

During Langston's employment at Success Village, employees could park their cars anywhere on the property except in fire lanes and in a space designated for oil deliveries. Langston testified that in the past, employees used parking spaces in front of, behind, and on the side of the office as well as those in front of adjacent buildings. The practice of employees was to park as close to the office as possible.[62] Under the policy implemented on September 4, 2003, employees can no longer use these spaces and must only use the new lot. This causes some inconvenience to employees walking to the office and for those maintenance employees who use their cars during the day in the course of their work. The inconvenience comes from the simple fact of having to walk further to work and in the lost time engendered by the longer walk, as well as increased exposure to the elements. The evidence in this case also shows that Respondent has been keeping increasingly closer attention to tardiness, warning at least Boulware and Teja about being one to 3 or 4 minutes late over a period of time, though their arrival times were within the contractual grace period. The further distance to walk could have the potential for discipline if it caused an employee to be tardy. That being tardy having to walk 200 yards through snow or in a storm, as opposed to walking a matter of feet, is a real possibility.

Langston testified that at no time during contract negotiations for a successor contract to the one which expired in May 2002, and in the interim period thereafter until the employer implemented its new parking policy for employees, did the matter of changing parking spaces for employees come up as a topic for bargaining. According to Langston, the September 4 notice was the first notice the Union or employees had about an impending change in parking for employees. Respondent does not dispute that no prior notice was given the Union, its on-site steward or shop chair, or to the unit employees before implementation of the new parking rules. Since Callahan testified that the parking changes had begun to be devised by the board of directors in 2001.

Employee parking is a mandatory subject of bargaining. *United Parcel Service,* 336 NLRB 1134 (2001). Moreover, "an employer has a duty not to change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union." *NLRB v. Katz,* 369 U.S. 736, 745–747 (1962). An employer may not unilaterally eliminate a past practice, even if the practice has not been embodied in a term of a collective-bargaining agreement. *Arvinmeritor, Inc.,* 340 NLRB 1035 (2003).

The Respondent may have had a legitimate, nondiscriminatory reason for implementing the parking restrictions for both employees and residents alike. However, I find that it was not privileged to implement the restrictions with prior notice to the Union and affording the Union an opportunity to bargain over the restrictions. This is especially true as it appears that Respondent knew it would be implementing changes for at least a year, if not more, prior to the expiration of the prior contract and the implementation of the changes in unit employee parking.

I refer the reader to the previous sections relating to the principals governing waiver, management-rights clause, zipper clauses and the law governing presenting unilateral changes in mandatory subjects of bargaining as a fait accompli. The reasoning and law set forth in those sections apply equally here and thus, I find that by unilaterally placing restrictions on unit employee parking, Respondent violated Section 8(a)(1) and (5) of the Act.

3. The unilateral removal of Respondent's phone and prohibition on local calls

In the first *Success Village* case, Judge Davis addressed an allegation that Respondent violated Section 8(a)(5) of the Act by restricting the use of co-op telephones by unit employees to make long distance calls without permission. After evaluating all the evidence adduced relating to the subject, he found, at page 21 of his decision:

> As set forth above, in September 2001, a new rule was implemented, restricting employees' use of the phone by prohibiting their making long distance phone calls without permission. Prior to September 2001, no written rule existed concerning this matter, and employees were permitted to make such calls. Specifically, long distance calls to the Union's office were permitted prior to the new rule.
>
> An employer has a duty not to change past practices for employees who are represented by a union until it has bargained to impasse on that subject with the union. *NLRB v. Katz,* 369 U.S. 736, 745–747 (1962). An employer may

[62] This testimony was corroborated by Boulware, Brown, and other employee witnesses.

not unilaterally eliminate a past practice, even if the practice has not been embodied in a term of a collective-bargaining agreement. *Arvinmeritor, Inc.,* 340 NLRB [1035, 1039] No. 124, slip op. at 5 (2003). But the activity must be "satisfactorily established by practice or custom, an established practice, a long standing practice." *Exxon Shipping Co.,* 291 NLRB 489, 493 (1988).

A policy regarding telephone usage is a mandatory subject of bargaining. *Pepsi-Cola Bottling Co. of Fayetteville,* 330 NLRB 900, 903 (2000). *Illiana Transit Warehouse Corp.,* 323 NLRB 111, 122 (1997). In *Santa Rosa Blueprint Service,* 288 NLRB 762, 764 (1988), the employer's reason for limiting the use of the phone was similar to that here—increased phone bills. The Board found that the "change in telephone policy 'affected all employees and constituted a substantial modification of a privilege which had been an existing condition of employment,'" citing *Brown & Connolly, Inc.,* 237 NLRB 271, 281 (1978); See *Advertising Mfg. Co.,* 280 NLRB 1185, 1191 (1986).

The use of phones by employees was therefore a term and condition of their employment, and thus a mandatory subject of employment subject which the Respondent was not at liberty to unilaterally alter without first notifying the Union and affording it an opportunity to bargain. *Illiana Transit,* supra; *Pepsi-Cola Bottling Co. of Fayetteville,* supra.

It is undisputed that the employees were permitted to make long distance calls to the Union prior to the change. It appears to have been a longstanding practice. Such use was discontinued without notice to the Union. I find that the change was a "substantial modification of a privilege which had been an existing condition of employment," *Brown & Connolly,* supra. The fact that employees could continue to make local calls to Langston's cell phone does not alter the fact that the change was substantial. Langston's circumstances may change, and business agents may change, and the availability of his continued availability by local cell phone is uncertain. There is no reason that the Union should make accommodations in its availability simply because the Respondent changed this longstanding practice.

I accordingly find and conclude that the Respondent's unilateral institution of a new phone use policy violated Section 8(a)(5) of the Act. [End of quote from Judge Davis' decision.]

As discussed in the section of his decision dealing with 8(a)(3) violations relating to Lloyd Reid, on or about April 6, 2004, while talking on the co-op's downstairs phone with a repairman, Reid was told to hang up by Segneri. Lloyd refused. After hanging up certain actions were taken by Respondent. Those directly affecting Reid have already been dealt with in this decision. But two of the actions affect all unit employees. First, Respondent, through Segneri, unilaterally established a new rule prohibiting personal phone calls by unit employees on the co-op's phones or unit employee's cell phones during working hours.

Langston testified that during his employment, employees had an unrestricted privilege to use the co-op phones to make local calls. In the office building, there were phones upstairs where there were offices and a meeting room and one downstairs where the employees changed and the boilers were situated. Employees use the downstairs phone to take incoming calls and make outgoing calls. They would occasionally use an upstairs phone as well. During his employment at the co-op, no manager ever instructed employees that they could not make or receive local calls on co-op phones during working hours.

Langston testified that in his role as a business agent for the Union at the co-op he was never informed by management that it was changing it practice of allowing employees to make or take local calls on co-op phones during working hours. Una Boulware testified that employees, including herself, receive personal calls on the co-op phones and are allowed to take them. She calls for the employee on the intercom and if the employee is available he or she takes the call. If the employee is not available, she takes a message. Employees are also allowed to make outgoing local calls on co-op phones.

It is clear that from the evidence adduced in this case as well as found by Judge Davis in his case, that unit employees had long enjoyed the privilege of making local calls during working hours on the co-op's phones. The only defense offered for suddenly implementing a rule prohibiting this established past practice that was not offered in Judge Davis's case was that by using the phones for personal business on co-op time was that an employee would be stealing time. As the economic excuse offered by Respondent in Success Village was not a sufficient excuse to avoid its bargaining obligation, its stealing time excuse is equally unavailing here. For all the reasons and case law relied by Judge Davis, which I adopt, I find that by making and unilaterally implement the new rule restricting co-op phone use by unit employees on worktime, Respondent has violated Section 8(a)(5) of the Act.

The second action taken by Segneri with regard to the downstairs phone affect at least the unit maintenance employees for a period of time. After Reid hung up, Segneri removed the phone and took it to his office. He testified that he kept it about 2 days before returning it. The testimony of other witnesses pegged this time as 2 to 3 weeks. I have already credited the longer time in an earlier discussion of the testimony related to the incident. The phone was removed by Segneri in a fit of anger immediately upon Reid hanging up. Though Segneri testified that he removed the phone to replace his malfunction phone, it appears that this was not the true reasons. His testimony reveals that he discovered the downstairs phone did not work in his office almost immediately. But he did not immediately return the phone. He did not even order service to fix his broken phone for 16 days after he removed the downstairs phone. I believe that keeping the phone for 2 or 3 week before returning it was meant to send a message to the maintenance employees and for no legitimate reason. I also find that the time the phone was kept in his office a sufficiently long period of time, 2 to 3 weeks, to remove it from the category of de minimus violations. Clearly he did not give notice to the Union that he was removing the phone nor did he offer to bargain with the Union over the phones removal. For the approximate 3 week period,

the phone was missing, the unit maintenance employees must have believed that they had lost the phone for good. Further, they were deprived of the phone for that period for any calls they may have needed to make. For all the reasons I found that Respondent's implementation of a rule restricting the co-op's phones use as set out above, I find that by Segneri's actions in removing the downstairs phone for the period found, Respondent has violated Section 8(a)(5) of the Act.

4. The unilateral changes with regard to health insurance

Employees health insurance is a mandatory subject of bargaining. *Garrett Flexible Products,* 276 NLRB 704 (1985); *Gentzler Tool & Die Corp.,* 268 NLRB 330 (1983). The two issues here are whether Respondent unlawfully refused to bargain with the Union about premium increases to the existing plan by: (a) failing to provide the Union with timely notice about increases and (b) refusing to bargain further with the Union about the matter after November 26, 2002, though having received a request to bargain.

Under the expired 2002 contract, article 11 dealt with employees' health insurance. When this contract went into effect in 1999, Success Village went from a Blue Cross Plan to an Oxford Health Plan. The contract noted the premium levels the Village had been paying under the old plan and the contract stated that it would continue to pay this level of premiums toward the cost of the new plan. The contract then provided that commencing December 1, 1999, the employees and the co-op shall evenly share the cost of any premium increase above the amounts stated in the contract.

There was also a provision added that stated: "(f) If there is a substantial increase in the cost of this plan, the parties agree to examine plan alternatives."

Langston, who was present when this section was negotiated understood that as soon as the co-op learned of a premium increase the Union would be notified and the parties would explore alternatives. Union President Russ See testified that he negotiated article 11, section f and testified that it was his understanding from negotiations in 1999 that Success Village would notify the Union as soon as it learned that a substantial premium increase was in the offing. As far as the record is concerned there are no bargaining notes, no side letter nor memorandum that memorializes this understanding. By 2003, the management company had changed from the one in 1999 and so had the co-op's attorney. Clearly, Callahan was not privy to this "understanding." There is no letter from the Union to the co-op making a demand for bargaining under section 11f before 2003. There were premium increases in 2001 and 2002, but the Union did not complain that it did not get timely notice of these increases.[63]

Callahan testified the employees health insurance policies have a renewal date of December 1 of each year. In 2003, the insurance provider was still Oxford and that provider sent the co-op a renewal notice with revised premiums dated September 29, 2003. The co-op also uses an independent insurance broker, Allen Jackson, who sends the co-op an analysis of the existing plans relative to other available plans from Oxford and other insurance providers and rates for these plans. Jackson testified that he meets with the co-op's property manager once a year to discuss policy renewal. As Success Village renews December 1 of each year, it has been his practice to meet with the property manager in October of each year. According to Jackson, he met with Callahan to review employee health insurance options on October 9, 2003. He had received the Oxford rate quote in September and had done an analysis of options to the plan in place based on his knowledge of the number, age and dependent status of the co-op's covered employees. He told Callahan that normally he would need 15 days notice before December 1, to change from one Oxford plan to another, and 30 days notice to change from an Oxford plan to one offered by another insurance company. He qualified this statement to say that 15 days notice might suffice in either case. The renewal date was fixed and was not subject to change.

According to Callahan, he met with Jackson on October 23, 2003, based on his daily appointment calendar. Callahan testified that he was told by Jackson that if Success Village wanted to switch plans, notice would have to be given between November 15 and 20, 2003. The packet of information about the insurance renewal that Jackson sent Callahan in 2003, contains on the first page clear statement that any requests for plan changes must be received 15 days in advance of the renewal date which was December 1. Callahan testified that Jackson had told him verbally that such requests for changes must be received between November 15 and 20, 2003.

It was Callahan's understanding that under the contract, he was to give notice to the Union of premium increases and if the Union requested, Callahan and the Union would look at alternatives with the purpose of lowering the premiums.

On November 5, 2003, Langston received a faxed letter from the co-op notifying the Union of premium increases, naming the employees affected and stating the amount of premium increase for each employee. It ended by saying that the co-op and employees would share the increases equally, effective December 1, 2003. In many cases the increases were about 30-percent higher that the existing premiums. Langston testified that this was the type of substantial increase that would trigger the provisions of section 11(f). The General Counsel pointed out that the letter did not state that the co-op needed to make any changes by November 15–20, 2003, a matter known to Callahan. On the other hand, it should have been obvious to the Union that if the next years plan was to go into effect on December 1, time was of the essence if alternative plans were to be explored and a change were to be made.

By mid-November, Callahan had not heard from the Union and he spoke with Jackson telling him to renew the existing plan.

On November 26, 2003, Langston wrote Callahan a letter, acknowledging receipt of the November 5 letter and asking if the co-op had explored any alternatives. On behalf of the Union, he also requested bargaining over the proposed increases.[64]

[63] Callahan testified without contradiction that the 2002 increase was 19 percent, certainly a fairly significant increase.

[64] This letter from Langston does not complain that the Union was not given timely notice of the premium increases by the co-op.

Callahan received this letter on November 26. November 26 was the Wednesday before Thanksgiving in 2003. The next business day in 2003 was December 1.

By letter dated November 26, 2003, Callahan faxed Langston the following:

> I am writing in response to your letter dated November 26, 2003 regarding health insurance premium increases. As your letter acknowledges, Success Village advised the Union on November 5, 2003 that the new health insurance premiums under the Oxford plan would take effect on December 1, 2003. If you had contacted me at that time, Success Village and the Union could have examined plan alternatives before the increases went into effect, and another plan could have been considered. However, you waited three weeks to request information about plan alternatives, and to bargain over increases until November 26, 2003, the day before Thanksgiving and virtually the last business day before the increase become effective on December 1, 2003.
>
> Neither the Union nor Success Village proposed to make any changes to the Oxford Health insurance plan during the negotiations for a new contract that took place in 2002. Thus, under both the expired agreement, and the contract imposed at impasse, Success Village must provide the Oxford plan to its employees, and Success Village and the bargaining unit employees are to evenly share the cost of the premium increases. Since Success Village did not receive a timely response to the November 5, letter advising the Union of the premium increases, Success Village had no alternative under the contract but to commit to continue the Oxford plan for another year, effective December 1, 2003. Accordingly, the new rates will be effective December 1, and Success Village and the employees will share those increases, as per the contract.
>
> While Success Village did examine plan alternatives prior to sending the Union the November 5, letter, and would have been willing to discuss those alternatives with the Union, the Union did not make a timely request for information about plan alternatives nor a timely request to discuss this matter. At this point, it is simply too late to elect a different health insurance plan. If you would like to see the information we collected regarding plan alternatives, please make an appointment to review the documentation at my office during normal business hours.

This letter was received by the Union on December 1, 2003. Langston testified that other employers whose employees are represented by the Union usually give 90 to 180 days advance notice of premium increases. However, because of the dates Oxford sends the premium increase information, in 2003, the end of September, and the time it takes to analyze the information and compare it to other plans, mid-October was the absolute earliest that the co-op could have given notice. If Jackson's memory was correct, the earliest date would have been October 9, 2003, and if Callahan's appointment calendar was accurate, October 23, 2003, would have been that date. As much animosity toward the Union that Callahan has been shown to have, it was still in his best interest to give the Union timely notice. The co-op had to share equally any premium increases with the employees.

To try to determine when Callahan actually met with Jackson, I rely on General Counsel's Exhibit 45, the packet of information supplied the co-op by Jackson in 2003. The packet shows that Oxford's renewal proposal was sent to Jackson on or about September 22, 2003. Material contained in the packet show that most of the analyses were prepared on October 9, 2003. Thus, I seriously doubt that Jackson presented the material to Callahan on October 9 and find that Callahan's date of October 23, 2003, was the correct date of the meeting.

Following his letter dated November 26, 2003, Callahan did not hear from the Union again until after December 1, 2003. After December 1, 2003, the co-op did not receive a request from the Union to look into canceling the Oxford plan and switching carriers. Instead, he received a charge filed with the Board in December 2003.

There was also substantial evidence of the parties' dealings over health insurance in 2004. In 2004, Callahan again met with Jackson on October 25, 2004, and received the broker's packet of plan analyses. The proposed increase for the existing plan was 9 to 10 percent. On October 29, 2004, the co-op faxed to Langston the proposed rate increases. Langston responded on November 3, requesting any information the co-op had about plan alternatives for the years 2001—2004. This information was given to Langston on November 8. According to Callahan, Langston was told that the co-op would need to know right away what it wanted to do. Langston acknowledges receiving the information on November 8, but denies being told that an immediate response was necessary.

On November 10, 2004, Langston wrote back to Callahan acknowledging receipt of the material earlier requested and requesting addition information on plan alternatives. Callahan called him and told him that he had all the information available to the co-op and learned from Langston that the Union was looking at alternatives. Callahan then alerted Jackson that there could be a request coming for a plan alternative. The broker requested to be notified as soon as possible.

On November 17, 2004, Callahan received a letter from Langston stating that the Union was looking at alternatives to the existing health insurance plan and requested that another broker, Jim Goodman, replace the co-op's current broker. Callahan spoke with Langston informing him that the co-op was not changing brokers. On November, 18, 2004, Callahan wrote Langston advising him of the December 1, due date and urging him to notify the co-op by the next week of the Union's decision.

On November 23, 2004, Callahan received a letter from Langston advising that the Union had made a decision to change policies and stated that to do so, the co-op would have to switch brokers to Jim Goodman. It advises also that the Union was scheduling a membership vote for November 29 on the issue of health insurance.

On November 24,[65] Callahan wrote the Union requesting information about what plan the Union was considering and asking

[65] The letter, though dated November 24, has a fax date of November 23, and I believe that is the date it was sent to Langston.

for a time for the membership vote. He also noted that the co-op needed an immediate response to effectuate a change in plan.

On November 24, Langston sent a relatively antagonistic letter accusing the co-op and its board of directors of acting in bad faith, and then naming the plan the Union was considering, an Oxford HMO plan versus the existing Oxford point of service plan.

Callahan believes the union membership met on November 29 or 30, but did not vote. He called Langston after the meeting and demanded something in writing about what the Union wanted. Langston referred him to the Union's president, Russ See. See denied having any knowledge about what was going on and said he was calling Langston. Shortly thereafter, Callahan received a faxed letter from See naming an Oxford HMO plan. Callahan then called the broker and because of the prior notice that a late change might be in the offing, the broker was able to make the change requested by the Union.

By letter dated November 30, 2004, the Union, by its president, Russell See, requested the co-op to switch to a different Oxford plan and designated the one it wanted. The employees had voted that day to approve the switch.

While on vacation in Florida, Jackson received a call from Callahan on or about November 30, 2004, indicating a different Oxford plan was wanted, identifying the new plan. Jackson called his office and someone there called Oxford that day and the change was made.

Jackson offered some additional testimony about what can be accomplished in plan changes. He testified that because of the size of his company, he can make a change from one Oxford plan to another Oxford plan with one business day's notice. Obviously this is true as he did it in 2004. He testified that on and after December 1, he cannot make such a change. There is also the possibility of canceling the Oxford plan after it goes into effect and taking another company's plan 30 to 60 days down the line. There is no showing that any of this latter material was ever explained to Callahan. In fact, Callahan appeared surprised when he heard this testimony. For that matter, I do not believe anyone involved with this hearing knew this was true until Jackson testified. Had the Union known it, it would have made a request to continue looking at other plans.

I do not find that Respondent violated the Act by its actions in 2003 with respect to health insurance for unit employees. The key to finding to the contrary would be a finding that the delay between the co-op receiving notice of the premium increase from Jackson and its passing along this information to the Union was so excessive that it violated the expired contract's provisions, or was a per se violation of failing to timely provide information, or was purposeful. I do not find that any of these findings can be made on the evidence of record. There was an approximate 7 business days delay between the meeting with Jackson in 2003 and the date Callahan faxed the Union notice of the 2003 increase. The timing of the notice was not shown to be materially different from the dates notices when sent in 2001 and 2002. As noted the 2002 notice reflected a 19-percent increase. In those years, no complaints about the timing of the notices were made by the Union. I do not find any evidence to convince me that Respondent purposely delayed sending notice because of union animus. Not changing plans hurt the co-op financially to the same degree that it hurt employees.

Moreover, by waiting 3 weeks to respond to the co-op's November 5, 2003 notice, the Union must take part of the blame for there not being enough time to explore alternative plans. By not making a more timely request to bargain, waiting until the day before Thanksgiving, the Union effectively tied everyone's hands. I do not believe that Callahan knew in 2003 that plans could be changed even after the Oxford plan renewed. I credit him with believing in that year, that the December 1 deadline was fixed and nothing could be done after that date. The Union in 2004 sought the aid of its own insurance broker. It could have done so in 2003 and proposed alternatives before the December 1 deadline. It could also have learned from its own broker that the plan could be changed later and proposed to do so. It did neither.

Based on the credited evidence, I do not find that Respondent violated Section 8(a)(5) of the Act by its handling of the employees' health insurance in 2003.

CONCLUSIONS OF LAW

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

2. The Union, a labor organization within the meaning of Section 2(5) of the Act, is the exclusive representative of the employees in the following appropriate unit within the meaning of Section 9(a) of the Act:

> All production, maintenance and clerical employees, including plumbers, electricians, boiler tenders, firemen, general maintenance, file clerks and bookkeepers, regularly employed by Respondent, but excluding foremen, managerial employees, confidential secretaries, and guards and supervisors as defined in the Act.

3. By unilaterally implementing a "Conflict of Interest" policy on August 28, 2003, with regard to the sale of real estate by Respondent's employees, Respondent violated Section 8(a)(1) and (5) of the Act.

4. By unilaterally implementing restrictions on unit employee parking on September 3, 2003, Respondent violated Section 8(a)(1) and (5) of the Act.

5. By unilaterally implementing a prohibition on unit employees from making personal calls during worktime and removing the telephone from an employee work area, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By implementing a "Conflict of Interest" policy on August 28, 2003, with a threat of termination to Una Boulware; by threatening Una Boulware with termination on September 18, 2003; by issuing Una Boulware a written warning and 1-day suspension on December 18, 2003; and by issuing Una Boulware a written warning on October 13, 2004, Respondent has violated Section 8(a)(1) and (4) of the Act.

7. By assigning Antonio Teja more physically demanding work and watching him more closely and more frequently while he works since July 25, 2003; by requiring him to change his clothing before punching in for work on the timeclock since August 22, 2003; by threatening him with suspension and imposing more onerous working conditions on him on August 22, 2003; by assigning him to perform work without the use of customary or adequate equipment on September 22 and 23,

2003, and suspending him on September 23, 2003; by, on December 17, 2003, ordering him to perform unnecessary work in the rain, assigning him work outside his normal responsibilities under adverse working conditions and suspending him; by issuing him two warnings on December 18, 2003; and by terminating him on April 21, 2004, Respondent has violated Section 8(a)(1) and (3) of the Act.

8. By ridiculing Antonio Teja in the presence of another employees on or about November 12, 2003, Respondent has violated Section 8(a)(1) of the Act.

9. By ridiculing, swearing at, and provoking Dennis Brown to retaliate on December 16, 2003; by ordering him to perform unnecessary work in the rain on December 17, 2003; and by issuing Dennis Brown a written warning on December 18, 2003, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

10. By sending Lloyd Reid home early on January 14, 2004; by sending Lloyd Reid home early on March 17, 2004, and refusing to let him work on light duty through March 19, 2004; by sending him home early, calling the police and suspending Lloyd Reid on April 1, 2004, and further warning him and suspending him on April 7, 2004; by refusing to allow Lloyd Reid to use the company telephone and then warning and suspending him on April 16, 2004, Respondent has violated Section 8(a)(1), (3), and (4) of the Act.

11. By warning and suspending Lloyd Reid for a violation of its unilaterally implemented prohibition against unit employees making personal calls on co-op time, Respondent has violated Section 8(a)(1) and (5) of the Act.

12. The Respondent did not violate the Act by any other actions alleged in the complaint.

13. The unfair labor practices which Respondent has committed affect commerce within the meaning of Section 2(6) and (7) of the Act.

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.

Having found that the Respondent has unlawfully made certain unilateral changes, I shall order that it rescind, at the request of the Union, the unilateral changes it made, including the new policies it instituted. The Respondent shall also be ordered to make whole its employees, and specifically Una Boulware, for any losses they suffered as a result of these changes and policies. *Fresno Bee,* 339 NLRB 1214 (2003); *Dynatron/Bondo,* 333 NLRB 750, 754 (2001).

The Respondent, having discriminatorily suspended Una Boulware on December 18, 2003; and suspended Lloyd Reid on January 14, 2004; unlawfully denied Lloyd Reid light-duty work and suspended him on March 17, 2004, though March 19, 2004; suspended Lloyd Reid on April 1, 2, and 7, 2004; suspended Lloyd Reid on April 16, 2004, for 5 days; and suspended Tony Teja on September 23, 2003, it must make them whole for any loss of earnings and other benefits, suffered as a result of the discrimination and suspensions, as prescribed by *F. W. Woolworth Co.,* 90 NLRB 289 (195), plus interest, as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The Respondent having discriminatorily discharged Tony Teja, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., supra, plus interest as computed in *New Horizons for the Retarded*, supra.

In addition, Respondent must remove from its files any reference to the unlawful warnings, suspension, and termination of Tony Teja; any reference to the unlawful warnings and suspension of Una Boulware; any reference to the unlawful warning and suspensions of Lloyd Reid; and the unlawful warnings of Dennis Brown and notify each of them that this has been done and that the warnings, suspension, and termination will not be used against them in any way.

[Recommended Order omitted from publication.]