

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**GARY KREZMAN ELECTRIC, INC.,  
d/b/a G & S ELECTRIC  
The Respondent**

and

Case 20-CA-32108

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 340, AFL-CIO  
The Charging Party**

*John Ontiveros, Esq. and David Reeves, Esq.,  
San Francisco, California, for the General Counsel.*

*William S. Gregory, Esq.,  
Sacramento, California, for the Respondent.*

*Mr. Frank M. Albert, Lead Organizer,  
Sacramento, California for the Charging Party.*

**DECISION**

**Statement of the Case**

**CLIFFORD H. ANDERSON, Administrative Law Judge:** I heard the above-captioned case in trial in Sacramento, California on June 7 and 8, 2005, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 20 of the National Labor Relations Board (the Board) on April 27, 2005, based on a charge filed by the International Brotherhood of Electrical Workers, Local 340 (the Charging Party or the Union) against Gary Krezman Electric, Inc., d/b/a G & S Electric (the Respondent) on October 4, 2004, and docketed as Case 20-CA-32108.

The complaint, as amended at the hearing, alleges, and the answer denies, inter alia, that the Respondent through its agent, Mr. Gary Krezman, on or about March 26, 2004, interrogated prospective employees concerning their union affiliation and sympathies in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) and denied a raise to and terminated its employee, Mr. Gino DeRobertis, on or about April 6, 2004 in violation of Section 8(a)(3) and (1) of the Act.

## Findings of Fact

Upon the entire record herein, including helpful briefs from the Respondent, the General Counsel and the Charging Party, I make the following findings of fact.<sup>1</sup>

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### I. Jurisdiction

The Respondent is and has been at all times material a California corporation with an office and place of business in Sacramento, California where it has been engaged as an electrical contractor in the construction industry. During the year ending September 20, 2004, the Respondent in conducting its business operations purchased and received at its Sacramento, California facility goods valued in excess of \$50,000 directly from points outside the State of California.

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Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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### II. Labor Organization

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The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. The Alleged Unfair Labor Practices

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#### A. Background

The Respondent is an electrical contractor with a varying employment complement, usually comprising, at busy periods, some 20-25 electricians working on half a dozen jobs at any given time. Mr. Gary Krezman, its owner, has run the company for some 25 years and was himself a union electrician in the years preceding. The Respondent uses office-based project superintendents to monitor individual jobs and on site foremen on larger jobs. Mr. Dennis Rowe is one of the Respondent's project managers and Mr. Robert McAnulty is one of the Respondent's foremen. The Respondent has no history of labor organization representation of its employees.

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The Charging Party is a labor organization which primarily represents electricians in the construction industry in the Sacramento, California area. It also seeks to organize electrical contractors in its area. As part of that effort, for some time it has placed volunteer or paid organizers in the employ of unorganized contractors to evaluate, facilitate and encourage those employers' employees support for the Union.

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The Union undertakes this organizational effort in two ways as described by Union organizer Frank Albert. The Union sometimes has its supporters openly identify themselves to the employers to which they are applying for employment as agents or allies of the Union and those applicants also inform those employers of their intention to organize the employers' electrician employees. In other cases, including the matter as issue herein, the Union has its agents and supporters conceal their union sympathies and Union affiliation from the hiring

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<sup>1</sup> As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

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employer during the employment application process. This latter technique is known as “salting a job”<sup>2</sup> and the person placed covertly into an unorganized employer’s employment in such circumstances is known as a “salt”.

5 In order to conceal the union sympathies of a covert union job applicant or salt from the employer during the application process, the applicant typically omits any reference in his job application or resume of employment by the union and, in some cases, omits any references to prior employment with electrical contractors who are under contract with the Union substituting fictitious employment relationships to fill in the gaps created by the omissions. Thus a union salt’s job application or resume employment history of electrical contractor employment, while honestly reciting the actual skills of the applicant, is fabricated or fictitious typically utilizing the names of contactable, out of business, distant or out of business electrical contractors as previous employers so that the applicant’s job application past employment history or resume job history entries may not be easily checked and revealed as false.

15 Once hired, the salt speaks to fellow employees of the advantages of membership in the union and of the desirability of working for an organized employer under a union contract and seeks to evaluate the possibility of a successful union organizing campaign among employees. The salt also tries to be an excellent employee, first to present an image of skill and industry to fellow employees and thus to gain their confidence and support, and second to avoid or diminish the possibility of discharge by the employer who, discovering the salts support for the Union and/or identity as a salt, might resent or resist the idea of organization and desire to terminate the salt.

25 In order to make it difficult for an employer to fire them on a pretext, the salts attempt to establish objective evidence of employer approval of their work before their union and salting activities are discovered. Thus, for example, union salts often seek a wage increase early in their employment in order to establish, by the receipt of such an increase, that the employer considered them good employees.

30 Salting is neither a rare nor a relatively unknown practice in the construction industry. The International Brotherhood of Electrical Workers, of which the Union is an affiliate, and its constituent locals, have in recent years maintained active salting programs. The existence of this widespread practice and indeed the meaning of the esoteric term “salt” is commonly known within the domestic electrical contractor community, both organized and unorganized. The various settings and circumstances which occur have often come before the Board which has authored a substantial body of decisional law in the area.

## 40 B. Events

### 40 1. The Respondent’s Hire of DeRobertis

45 The Respondent’s work is largely seasonal. In the spring of 2004, one of the Respondent’s ongoing jobs was underway was at a local church (the church project or the

<sup>2</sup> *Tualatin Electric, Inc. v. NLRB*, 84 F.3d 1202 (9<sup>th</sup> Cir. 1996), n. 1 at 1202:

“Salting a job” is obtaining employment with a non-union employer and then organizing its employees for the union. The term may be derived from the phrase “salting a mine,” which is the artificial introduction of metal or ore into a mine by subterfuge to create the false impression that the material was naturally occurring.

See also *Tualatin Electric, Inc.*, 312 NLRB 129 (1993), ALJD n. 3 at 130.

project). The church project was the responsibility of Project Manager Rowe<sup>3</sup> and was directed on site by Forman Robert McAnulty. In early spring 2004, the church project required additional staffing so in late March 2004, the Respondent placed its standard “wanted” advertisement seeking electricians in the local newspaper.

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Mr. Frank Albert, the Union’s lead organizer at all relevant times, testified that the Union on or about March 22, 2004, hired Mr. Gino DeRobertis, a journeyman electrician and member of the Union, as an organizer. Mr. DeRobertis had until that time been working as an electrician for an employer under contract with the Union. The Union at that time was interested in organizing employers of a size and type similar to the Respondent. Reading the newspaper advertisement of the Respondent that it was seeking electrical employees, Albert in conjunction with newly hired DeRobertis determined to “salt” DeRobertis into the Respondent’s employ for purposes of organizing the Respondent’s electrical employees.

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Mr. Albert testified that, consistent with the Union’s past practice in such situations, Albert and DeRobertis prepared a resume to be used by DeRobertis in seeking employment with the Respondent. The resume was conventional and correct respecting its general information concerning DeRobertis and its description of his electrical skills. With respect to DeRobertis’ prior employment history, however, the resume was a fabrication. While the employment history of the resume was drafted to truthfully explicate the electrician skills and experience DeRobertis actually possessed, it did not contain his actual employment history of working for organized employers who obtained their electrical employees from the Union’s hiring hall. Nor did it reveal the fact that DeRobertis was currently employed by the Union as an organizer. Rather, an employment history was created listing three unorganized employers as DeRobertis’ former employers which employers were chosen because they were out of the area or otherwise likely uncontactable and/or no longer in business.

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On March 26, 2004, Mr. DeRobertis went to the Respondent’s offices indicating he was answering the newspaper advertisement seeking electrical workers and obtained and filled out the Respondent’s application for employment form. He noted on the application that he was not currently employed for wages. Rather, he noted that he had for a few months been assisting his wife in her child day care business, but needed a “real job”. In the space provided for entering his former employers, he entered the three electrical contractors listed on his resume noting that the first two listed contractors he had worked for were “out of business” and “moved out of state” respectively. The Respondents preprinted application form states in all capital letters immediately over the applicant signature line in part: “I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR IS CAUSE FOR DISMISSAL.” [Capitalization in the original.] DeRobertis submitted the application and resume and sought an interview.

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Mr. DeRobertis testified that immediately after submitting his filled out application and resume to the company, Mr. Gary Krezman interviewed him alone. Initially DeRobertis recalled that Krezman asked him if he was the son of Ron DeRobertis and that DeRobertis said that he was. Krezman continued in DeRobertis’ testimony:

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And then he asked me why I wasn't union like my father. I told him, well, I tried before to get in, and they didn't really talk to me. So I went and gave up on it. And he asked me what my father thought about that. I told him that we don't really talk any more.

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<sup>3</sup> The complaint alleged and the answer denied that Mr. Rowe is a supervisor. There is no doubt he has a substantial role in the effective recommendation of the hire and fire of employees working on the projects under his direction and control. I find he is a supervisor.

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DeRobertis testified he believed that Krezman was trying to figure out if he was “union” or not.

DeRobertis testified that the interview then turned to his skills and experience as an electrician and his possession of working tools. DeRobertis’ desired starting wage was discussed with DeRobertis proposing a starting wage of \$22 per hour. DeRobertis recalled: “We settled on [\$]18 [dollars per hour] with the understanding that we’d talk about a raise later.” The interview concluded with Krezman telling DeRobertis that he would start the following week. DeRobertis testified to what happened next:

I went in the back to fill out some various paperwork. Gary [Krezman] came back again as I was filling out the paperwork. And he asked me if I knew what the union market share was. I told him I didn’t know what that meant. He thought -- he told me he thought I would with my dad being in the union. And then he went off and I finished the paperwork.

Mr. Gary Krezman testified that he is not necessarily involved in interviewing each electrician applicant: three individuals in the firm share that responsibility. Nonetheless, on March 26, 2004, when DeRobertis submitted his application and was ready to be interviewed, Krezman was the only one available and for that reason interviewed DeRobertis. Krezman testified that during the interview he learned of DeRobertis’ basic qualifications, his possession of tools of the trade and a truck. DeRobertis told him he had 10 years experience in light commercial electrical work. These were all significant and positive factors supporting his hire.

Krezman during the interview recognized the DeRobertis family name having worked many years earlier with a DeRobertis as electricians for an area electrical contractor whose electrical employees had long been represented by the Union and whose father before him Krezman knew, had also worked for the contractor. Krezman testified he had not seen his former coworker DeRobertis at that point in some 26 years. Confirming Gino DeRobertis’ lineage, Krezman testified he asked DeRobertis why he was not “working with his dad”. Krezman specifically denied asking DeRobertis if he were a member of the Union. He recalled that DeRobertis answered his questions by stating that he had “tried to get into the union several times, but they wouldn’t talk to him so he just kind of let it go.”

Krezman testified that after his interview with DeRobertis ended, he spoke to Project Superintendent Dennis Rowe who said he needed workers on the Church Project. Krezman then called DeRobertis and hired him for that position.

## 2. DeRobertis’ Employment and Termination

### a. DeRobertis’ Initial Employment

DeRobertis reported for work early in the following week and was assigned, with other new employees, to the Church Project working under the direction of Forman Robert McAnulty. DeRobertis testified he worked full days at the Church Project performing normal electrician duties, listening to fellow employees’ views regarding the Union at lunch and breaks, and reporting on these activities to Lead Organizer Frank Albert in the evenings.

DeRobertis testified that at the time he received his first paycheck he was initially surprised to have gotten one so quickly and further surprised at the substantial amount of the

check. DeRobertis on Friday, April 2, 2004, called the office and reported that his check was so large he feared he had been laid off.<sup>4</sup> He further testified:

5 Gary [Krezman] called me back and told me, No, I was not laid off. I said, good, I thought maybe you had a problem with my work. And he said, No, your work is fine. You're doing a good job out there. Guys like you. I said, okay. And went from there. He said that they'd look into it, and if it was too much, then we'd just make it up on the next check.

10 Mr. Krezman did not recall a conversation with DeRobertis on that date or about that subject.

## b. April 5, 2005

### 1) DeRobertis' Phone Call to Krezman

15 DeRobertis testified that on Monday, April 5, 2004, just after work started, he called Krezman and asked for a raise. He testified:

20 I told Gary [Krezman] I'd like to get a raise. I'm just looking for \$22 an hour. Gary told me he couldn't give me 22. He'd give me 20. I said okay. I asked him if that started that day? Gary told me it did. Said thanked [sic] him and hung up.

Q Okay. Did you think -- did he say anything to you that made you think the raise was conditional?

A No, he did not.

25 Q Did he say he was going to get back to you about the raise?

A No, he did not.

Krezman testified that he received a telephone call that morning from DeRobertis seeking a \$2 raise and that he simply told DeRobertis he would get back to him.

### 2) Krezman and the Office Staff's Activities following the "Raise Request" Telephone Call

35 After his conversation with DeRobertis, Mr. Krezman testified he checked the financial records of the Project concluding that the job was not doing well financially and that it would not support a raise for DeRobertis at that time. But, Krezman testified, contemplating DeRobertis as a potential "long term" employee, a raise in the future was a possibility so he determined to check DeRobertis' job references.

40 During his testimony, Krezman also adopted his earlier recitation of events set forth in his Board affidavit:

45 Early on Monday, April 5, 2004, morning, Gino [DeRobertis] called me at about 6:45 a.m. and asked me for a two-dollar raise. I told Gino I would have to get back to him later in the day. I said this because the [Project] was not my job, and I needed to talk to Dennis Rowe to see how Gino was doing on the job because Dennis is in contact with the foreman on the job. At \$20 per hour, I wanted to know if Gino could run work on his own. Dennis told me that he thought Gino was doing fine. Dennis had no objection to the raise.

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<sup>4</sup> There is no dispute that DeRobertis asked for, McAnulty granted, and DeRobertis took, time off on Friday, April 2, 2004, relating to family funeral which took place that weekend.

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Mr. Krezman also submitted a position statement to the Board in response to the charge dated October 18, 2004. The statement in part addresses this telephone call and subsequent events:

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On April 5, 2004 Gino [DeRobertis] called me at 6:50 am. He asked me for a \$2.00 per hour raise. I told Gino that I would consider his request and reply to him. I then checked the job reports, job costs and bid costs for the [Project]. I determined it would not be economically possible to give Gino a raise while working on the [Project].

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However, if Gino proved to be a good employee I would have considered giving him a raise in the future. Therefore on April 5, 2004 I decided to check the references he put on his job application.

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Mr. Krezman did not personally check DeRobertis' references. Rather he instructed an office clerical employee, Ms. Mindy Krezman, his daughter, to contact the employers listed by DeRobertis and confirm that he had worked for those employers. Ms. Krezman testified that sometime after lunch she was instructed by her father to contact DeRobertis' references and was given DeRobertis' resume with his prior employers listed on it. Ms. Krezman made various efforts to contact the listed employers but was unable to do so. She reported her actions to her father. Both Ms. Krezman and the other office employee, Office Manager Michelle Medina testified that up to that time, they had never been asked to check applicant job references.

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One of the prior employers listed on DeRobertis' resume was Pede Electric. The phone number provided on the resume was for the Pede residence. Following an initial call placed before Mr. Herman Pede arrived home at the end of the work day, Mr. Krezman and Pede spoke by telephone sometime around 4:15 pm. Krezman and Pede had worked with one another for an organized electrical contractor over twenty years before and Pede knew Krezman's father and uncle. In the telephone call the two initially exchanged greetings and social courtesies. Krezman testified that he asked Pede if Gino DeRobertis had ever worked for him and that Pede said he had never activated his contractor's license and never employed others. He confirmed that DeRobertis had never worked for him although he noted that he had worked with DeRobertis when the two were working for another contractor. Krezman specifically and categorically denied that any reference was made in the call to union organizing or salting, specifically denied that he asked Pede if DeRobertis had salted G & S Electric, and specifically denied that Pede told him that he had been salted by DeRobertis or that he was told by Pede that it was a good assumption that DeRobertis had salted him.

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Krezman testified that during the investigation of the instant Board charge in late 2004 he had given Pede's name and phone number to the investigating Board agent. Sometime thereafter in about May 2005, Krezman testified he had a second telephone conversation with Pede. He testified that in the latter call he "wanted to know if Herman [Pede] knew anything about Gino [DeRobertis] and if he was an organizer or a salt for the union." He recalled that Pede:

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[T]old me that -- he started to get real vague, you know, about it. I could tell he didn't want to talk to me at that time, but he did say, yeah, you can pretty much make that assumption.

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The telephone call ended soon thereafter.

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Mr. Herman Pede testified about the April 5, 2004 telephone conversation with Krezman:<sup>5</sup>

5 Well, at some point along the conversation, he said – he asked me blank if Gino DeRobertis ever worked for me under Pede Electric? And I said, No, I said, No, he hasn't. I says, I've worked with Gino at Placer Electric for the past couple of years, and couple years back, but I've never activated my license, so I've never -- Pede Electric has never come into play. But Gino has worked with me. ... [H]e -- he kind of asked me, it got around to the point where he asked me if I thought maybe Gino was salting him. ...  
10 And I said, well, Gary, I says, that's probably an astute evaluation.

Pede also testified that Krezman called him a second time well after both the event and the Board investigation in which the two spoke of DeRobertis' rationale in applying to Krezman for employment. Pede could not recall if he had said that DeRobertis was an organizer or a salt in that call.  
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After his April 5, 2004, call with Pede, Krezman testified he determined to terminate DeRobertis. He explained:

20 I felt if someone can't tell me the truth to begin with, then what kind of a dishonest person are they? We do a lot of work around the public, I did not want an employee like that working for me.

Q So you decided to fire him?

A Yes, I did.

25 Q Was there any reason, other than the false application, for you decision to fire him?

A No, that was the only reason.

Krezman's position statement adds that he called the various employer phone numbers and could contact none save Mr. Herman Pede, who told him that he had never employed DeRobertis. The statement further recites that Krezman checked contractor licensing records and determined DeRobertis could not have been working for the other contractors listed for the periods stated. He noted: "As a result of the foregoing inquiries I concluded that Gino [DeRobertis] had misrepresented material facts on his job application. For that reason I decided on April 5, 2004, to discharge him."  
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35 At the time he took this decision, Krezman testified he did not know that DeRobertis was a union salt, a union employee, or that he or the Union had a specific plan involving organizing the Respondent. Krezman testified he had learned from McAnulty earlier that day that a union agent had been at the Project, but he did not connect either DeRobertis or DeRobertis' request for a raise with that fact.  
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Krezman testified that he determined to have a check prepared for DeRobertis and have it brought out to the job the next day and given to DeRobertis as part of his termination.<sup>6</sup> Office

45 <sup>5</sup> The parties stipulated:

Herman Pede gave an affidavit to the Board in December 2004 that contained a reference to a conversation with Mr. Gary Krezman, wherein Mr. Krezman asked if Mr. Pede thought he was being salted and Mr. Pede responded that that would be an astute evaluation.  
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<sup>6</sup> Mr. Krezman and Office Manager Medina each testified that they believed that it was a requirement that any employee who is terminated be given his or her final pay immediately.

Manager, Ms. Michelle Medina, handles payroll for the Respondent. She also leaves at the end of the work day at about 4:30 pm. She testified that as she was preparing to leave on April 5, 2004, at about 4:30 pm, Gary Krezman told her: "I was going to come in the next morning and that I was going to write Gino [DeRobertis] a check." Krezman testified that he could have given the instruction the evening of April 5 or the morning of April 6, but believed it was on April 5. His affidavit sets the time of the event as the morning of April 6.

Krezman testified he then telephoned DeRobertis and after some delay when DeRobertis was not at home and a second call was necessary told DeRobertis "that I couldn't give him a raise at that time." He recalled the call was short and did not extend beyond the information given. Gino DeRobertis described the call differently:

And Gary [Krezman] told me that he was not able to give me my raise. He was taking away my raise because it wasn't in the job. I told him that he -- that did he know the union to come out that day. Gary said he did. I asked him if the wages on the flyer were correct? And he told me I would know better than him. I asked him what did that mean. He said you would know. I told him I don't know how I would know. And he told me because your dad was in the union. I told him -- I reminded him I don't talk to my dad. The line went silent. I thanked him and hung up.

Q How would you describe Mr. Krezman's demeanor?

A He seemed angry.

### 3) DeRobertis' Actions and Activities at the Project following the April 5 Early Morning "Raise Request" Telephone Call

After his morning conversation with Krezman about the raise, DeRobertis telephoned his fellow organizer Albert, reported his conversation with Krezman including the fact that he had received the requested raise,<sup>7</sup> and added that he felt there was "some support out here for the union. Some guys had been talking about it." DeRobertis asked Albert to "show up with a flyer" at the Project.

That same day, at the lunch break, DeRobertis and a fellow employee were seated at the front of the job when Albert arrived. Albert approached the two and, without any hint of recognition between DeRobertis and Albert, handed the two Union flyers,<sup>8</sup> chatted with them for 5 to 10 minutes, and then went into the adjacent contractor trailer office where Forman McAnulty and an agent of the General Contractor were located.

Mr. McAnulty testified that Albert entered the trailer at around 9:30-10:00 a.m. where he was talking with the general contractors' superintendent and spoke to the two. McAnulty described the event:

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Thus having a check prepared and given to DeRobertis was a necessary part of his termination in their belief.

<sup>7</sup> Albert testified:

[DeRobertis] called to let me know that he had just got off the phone with Gary Krezman, the owner of G&S Electric, and that he had negotiated a wage increase. . . . I asked him, I said, that's great, when is it effective. He told me it was effective immediately. I asked him are you sure? And he said yes.

<sup>8</sup> The flyer was a one-page text document describing in laudatory terms the contractual benefits of employment under the Union contract and encouraging employees interested in being represented to contact Albert whose phone number was listed.

[Albert] stated he was from the union, and he wanted to talk to us about the union and joining. And, basically, I asked -- I asked him to leave, and if he wished to talk to the people, they were free to talk to him, but to do it off of company time, before work, after work or during lunch.

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At that point Albert left. The General Contractor's agent did not testify.

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McAnulty testified that he was not aware of any specific policy the Respondent had in place respecting union solicitation of employees. Further, he did not recall receiving the Union flyer described above. Later that day, he had no specific recollection of the time, McAnulty telephoned Rowe and Krezman, although the record is somewhat ambiguous respecting whether or not he called both or just one of the two, and told them that "somebody had come by from the union".

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At the end of lunch, DeRobertis and the other employees gathered in the area where they received their afternoon work assignments discussing the Union flier and their differing opinions respecting the Union. DeRobertis testified that the men and Forman McAnulty discussed their impressions and experiences with the unions. McAnulty, in DeRobertis' recollection, reported he had been an IBEW Local union member years before but was currently happy with his terms and conditions of employment. DeRobertis took a middle of the road position and a few other employees made their own views known. Assignments were made. As the workers dispersed to begin their afternoon assignments, McAnulty, in DeRobertis' memory, commented to him:

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Bob [McAnulty] then asked me that Gary [Krezman] had told him he worked with my dad and why wasn't I union like my dad? And I told him that I had tried to apply and got the runaround and just didn't work out.

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Forman McAnulty denied having these conversations. Thus he testified he did not have the conversation with DeRobertis and the employees about unions as described above and further denied he made the remarks DeRobertis attributed to him regarding hearing from Krezman about DeRobertis' father. Krezman testified that up to that time he had not informed McAnulty of his conversation with DeRobertis concerning DeRobertis' father. McAnulty denied knowing that DeRobertis' father was "in the union". No employees testified.

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At the end of the work day, DeRobertis went home and learned from his wife that Krezman had telephoned him. He returned the call. DeRobertis described the call:

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And Gary [Krezman] told me that he was not able to give me my raise. He was taking away my raise because it wasn't in the job.

I told him that he -- that did he know the union to come out that day. Gary said he did. I asked him if the wages on the flyer were correct? And he told me I would know better than him.

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I asked him what did that mean. He said you would know. I told him I don't know how I would know. And he told me because your dad was in the union.

I told him -- I reminded him I don't talk to my dad. The line went silent. I thanked him and hung up.

Q How would you describe Mr. Krezman's demeanor?

A He seemed angry.

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Q Okay. During this conversation, did he mention that he checked your references?

A No, he did not.

Q Did he mention that you were terminated?

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A No, he did not.

DeRobertis immediately telephoned Albert and reported the event to Albert. Albert told him they would meet before work at the Project the next day.

Krezman testified he telephoned DeRobertis that afternoon because in their earlier call he had told DeRobertis he would get back to him later that same day and it was therefore courteous to do so. He simply told DeRobertis that he was not going to receive the raise and essentially nothing else was said.

### 3. DeRobertis' Termination – April 6, 2004

On Tuesday, April 6, 2004, Ms. Medina came to work at 7:30 am. She asked either Krezman or Rowe for DeRobertis' time, i.e. his hours worked, precedent to preparing his final check.<sup>9</sup> She received the necessary information and prepared the check. The Respondent's Payroll Check Journal recorded the time of DeRobertis' check's completion as 7:50 am. Rowe thereafter took the check to the Project.

DeRobertis and Albert arrived at the Project perhaps a half hour before work started and together passed out flyers brought by Albert.<sup>10</sup> DeRobertis was wearing a Union shirt, hat and suspenders. When work started DeRobertis joined the other employees at the area for receiving work assignments. Forman McAnulty arrived and said to DeRobertis according to DeRobertis' testimony: "I see you went and saw the union guy last night." DeRobertis said that he had but asked is he had a problem at G & S because he had had his raise taken away. McAnulty did not reply to this but rather returned to the job trailer.

Mr. McAnulty testified that he did not see DeRobertis wearing union items that day. He testified he had been handed a copy of the Union flyer described above. He testified:

I remember asking the people working there with this -- that morning if anybody had gone down and talked to the union. And Gino [DeRobertis] was the only one that said Yes.

After this conversation, McAnulty sent a copy of the union handbill he received by facsimile transmission to Krezman at the Respondent's main office.

DeRobertis worked till break. At that time he was approached by Dennis Rowe, who had arrived at the job, and Robert McAnulty. DeRobertis described his final time on the job:

<sup>9</sup> McAnulty testified he was contacted earlier that morning by the office and asked for DeRobertis' hours worked because the Respondent was going to prepare a check for DeRobertis and was told they were going to let DeRobertis go that morning.

<sup>10</sup> The flyer was a one-page text document captioned in larger font: G & S Electric UNFAIR. Its text in oversize double or triple spaced centered font asserted:

Gino went to work for G& S Electric for \$18.00 per hour. 'The Boss' told Gino: "We're very happy with your work And earned a \$2.00 raise Later that same day a Union Rep. visited the job. Gino talked to the Union Rep. Later that evening 'The Boss' called Gino to say We're taking your raise away At first he was mad at the Union Rep. But the Union Rep didn't treat him UNFAIR! G & S Electric Treated Gino UNFAIR! Please ask 'The Boss' at G& S Electric to treat Gino fairly!

Dennis [Rowe] asked if I was Gino. I said I was. He handed me my check. I asked him if I was fired. He said, Yes, I was. Get my tools and leave. I got my tools. I went outside and put them in my truck. I came back and asked Dennis why I was fired, and Dennis told me that I was -- he didn't have to tell me why I was fired, but he would. I was fired for lying on my resume.

Rowe, in McAnulty's memory, told DeRobertis that he was terminated for falsification or lying on his application.

DeRobertis gathered his possessions and left the job. He has not been offered reemployment by the Respondent.

### **C. Analysis and Conclusions**

#### **1. Allegations of the Amended Complaint and Basic Positions of the Parties**

##### **a. Allegation of Violation of Section 8(a)(1) of the Act - Paragraph 6 of the Complaint**

Paragraph 6 of the complaint alleges that about March 26, 2004, the Respondent by Gary Krezman, interrogated prospective employees concerning their union affiliation and sympathies. This is alleged to be a violation of Section 8(a)(1) of the Act. The General Counsel, with the concurrence of the Charging Party, argues that DeRobertis' version of his employment interview with Krezman conducted on March 26, 2004, should be credited and Krezman's questioning found to violate Section 8(a)(1) of the Act. The Respondent advances the different version of the conversation testified to by Krezman urging that this version of events be credited and the complaint allegation dismissed as unsupported by the facts.

##### **b. Allegation of Violations of Section 8(a)(3) of the Act**

#### **1) The Wage Increase Rescission Allegation – Paragraph 7(a) of the Complaint**

Complaint paragraph 7(a) alleges that the Respondent on April 5, 2004, rescinded a wage increase that it had given employee Robert DeRobertis. The General Counsel, with the concurrence of the Charging Party, argues once again that DeRobertis' version of his telephone conversations with Krezman be credited, thus establishing that Krezman granted DeRobertis a wage increase on the morning of April 5, 2004 and withdrew or rescinded that increase that evening. The General Counsel then advances the same argument and evidence proffered in support of the DeRobertis discharge allegation, discussed below, to urge a finding that the raise was rescinded because of Krezman's discovery that DeRobertis was a union salt.

Once again the Respondent advances the different version of the telephone conversations testified to by Krezman urging that these versions be credited and the complaint allegation dismissed initially for want of proof that a raise had ever been granted and, second, for the reasons the Respondent asserts in defense of the discharge allegation below, argues all actions taken against DeRobertis were taken free from any and all impermissible considerations.

#### **2) The DeRobertis Discharge Allegation – Paragraph 7(b) of the Complaint**

Complaint paragraph 7(b) alleges that on or about April 6, 2004, the Respondent terminated DeRobertis because he joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities in violation of Section

8(a)(3) and (1) of the Act. The General Counsel’s theory of a violation respecting the DeRobertis discharge is that the Respondent, through Krezman, discharged DeRobertis because Krezman discovered that DeRobertis was a Union salt who was attempting to organize his employees. The General Counsel argues that Krezman’s testimony respecting his motivations should be discredited and any asserted claim by the Respondent that DeRobertis was discharged for falsification of his resume or employment application should be rejected as pretext.

The Charging Party agrees with and adopts the General Counsel’s argument above, but goes further. The Charging Party argues that, even were the Respondent’s argument that DeRobertis was discharged for false statements concerning his prior employment made during the employment application process, the violation must stand, since those statements were made by DeRobertis in an effort to conceal his status as a salt or Union member and organizer and are therefore protected activity under the Act citing, *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F 3d. 1110 (7<sup>th</sup> Cir. 2002).

The Respondent argues that Krezman simply terminated DeRobertis when he discovered that DeRobertis’ résumé’s recitation of his prior employers was a complete falsification. The Respondent argues that Krezman had long held the view that such falsifications by his employees were a basis for immediate termination and that his employment application forms explicitly so stated. Thus, the Respondent argues the discharge allegation is without merit and should be dismissed.

## 2. Resolution of Conflicting Testimony

The parties rely on their own witness’s versions of several important conversations between Krezman and DeRobertis and between Krezman and Pede with each side advancing the veracity of its own witnesses’ version of events and urging the opposing witnesses be discredited. As a threshold to the analysis below, the credibility of the witnesses involved must be considered and their conflicting versions of critical conversations resolved.<sup>11</sup>

### a. The Krezman-Pede Conversations

The telephonic conversation between Messrs. Krezman and Pede on the afternoon of April 5 is set forth in some detail above. The critical difference in the versions of the telephone call is Pede’s recollection of the exchange in which Krezman asked him: “if I thought maybe Gino [DeRobertis] was salting him”, to which Pede answered: “that’s probably an astute evaluation.” Krezman denied he asked the question attributed to him and further denied that salting by DeRobertis was mentioned at all in the conversation.

Krezman testified to a subsequent conversation with Pede after the instant charge had been filed in which salting was in fact discussed. The Respondent argues that Pede may have

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<sup>11</sup> An orderly and intelligible written decision requires a linear or step by step presentation of the issues, the evidence and resolution of the allegations. Credibility determinations are in some cases appropriately discussed before other contentions are considered. Such a written decision does not reflect the actual manner and order in which the evidence and argument are considered and the final decision taken. Credibility resolutions, like many other elements and aspects of an unfair labor practice case, require consideration of the entire record. They are not made, as is the order of presentation herein, before other evidence and argument is considered, but are rather taken as part of the final consideration of the record and final analysis and conclusions made in the case.

5 confused that latter conversation with the earlier conversation here in dispute. That argument is effectively rebutted by the fact that Pede provided an affidavit to the investigating Board agents that tracked his testimony herein, which affidavit was taken and dated a time well before Pede's second conversation with Krezman occurred. It was thus impossible for Pede's written report of his first conversation to have been distorted by the content of the subsequent second conversation. On this entire record herein, I find it is unlikely that Pede would have been confused or mistaken in attributing the question respecting salting to Krezman. Rather the question before me at this point in my view is whether or not Pede testified honestly respecting the April 5, 2004 conversation.

10 The record is clear that while Pede certainly knew DeRobertis and thought well of his work, Pede had not kept in active contact with DeRobertis nor was he aware of or participant in anyway in the Union's salting campaign. While Pede was a member of the Union who worked for employers under contract to the Union, the record does not indicate he had any closer connection to the Union. There is insufficient record evidence to establish Pede as a partisan who might shape or fabricate his testimony to favor the Union. Pede was a passive participant in the matters in controversy who did not initiate any aspect of his participation. He had not agreed to provide a reference for DeRobertis. He was initially contacted at his home and simply answered the questions put to him by Krezman, an individual he had worked with in times past and whose family members were known to him. Thus I find there is no persuasive evidence of bias or hostility on the part of Pede toward Krezman or the Respondent.

25 Finally, I found Pede to be an open and direct witness who created the impression he was testifying honestly concerning matters he specifically recalled. His demeanor was persuasive, his memory of events was substantial. Thus, I have found that Pede was an unbiased witness, testifying honestly about a matter he recalled, and concerning which he was unlikely to be mistaken. I believed his testimony, have confidence in its honesty, and fully credit it. I was impressed with Mr. Pede.

30 Mr. Krezman, as discussed in greater detail in my consideration of the Krezman-DeRobertis conversations below, had important inconsistencies between his written statements to the Board and his testimony of events. He also was less certain and consistent in his testimony concerning the entire series of disputed events. I also found that his demeanor did not convince me that he was testifying from a memory of events and occurrences, but rather suggested he was denying or forgetting portions of events which might undermine or be inconsistent with the Respondent's defense.

40 Between the testimony of the two, I found Pede the superior witness to Krezman. I specifically credit Pede over Krezman regarding the April 5, 2004 conversation where their testimony differs. I find therefore that the conversations the two had on that date occurred as was testified to by Pede.

#### **b. The Krezman-DeRobertis Conversations**

45 Messrs. Krezman and DeRobertis had a conversation on March 26, 2004, during DeRobertis' application process. In that interview, Krezman recognized the DeRobertis family name and established that Robert was the son of the senior DeRobertis with whom Krezman had worked with many years before when both were employed by an electrical contractor under contract with the Union.

As set forth in greater detail supra, DeRobertis testified that Krezman: “asked me why I wasn't union like my father.” As DeRobertis recalled, at the end of the conversation Krezman left him briefly only to return and ask:

5 [I]f I knew what the union market share was. I told him I didn't know what that meant. He thought -- he told me he thought I would with my dad being in the union. And then he went off and I finished the paperwork.

10 Krezman recalled a different shorter version of the conversation. He recalled asking DeRobertis why he was not working with his father, in a context free from any reference to the Union. He denied making any reference to the Union.

15 The two individuals had both a morning and an evening telephone conversation on April 5, 2004. In the first, DeRobertis asked for a raise. DeRobertis specifically testified that he sought a \$4 raise, the two agreed upon a \$2 raise, and that Krezman told him his raise started that day. Krezman testified that DeRobertis asked for a \$2 raise and that he did not grant the raise but rather told DeRobertis he would get back to him later that day.

20 Respecting the second telephone conversation held by the two men that day, DeRobertis testified:

25 And Gary [Krezman] told me that he was not able to give me my raise. He was taking away my raise because it wasn't in the job. I told him that he -- that did he know the union to come out that day. Gary said he did. I asked him if the wages on the flyer were correct? And he told me I would know better than him. I asked him what did that mean. He said you would know. I told him I don't know how I would know. And he told me because your dad was in the union. I told him -- I reminded him I don't talk to my dad.

30 Krezman testified that his second telephone call with DeRobertis was short and that he simply told DeRobertis that he could not give DeRobertis a raise at that time.

35 Mr. DeRobertis is a paid organizer and salt for the Union. He is an employee of the Charging Party that filed and advances the instant charge. By virtue of his position, he is a partisan and advocate in this matter. He was also at the time the events in question occurred a new employee of the Union engaging in his first covert organizing effort under the guidance of his colleague, Frank Albert. As the two testified, the Union's salting campaign involves its salts undertaking a variety of techniques, practices and protocols in the salting process, on the salted job, and in talking to the salted employer's agents. Filled with instructions and undertaking his first salting mission, DeRobertis would have been attentive and alert to the specifics of  
40 conversations he had with Krezman, the owner of the Respondent. One may argue that DeRobertis may have shaped his testimony given his association with the Union, but it would be far more difficult to persuasively argue that he was likely not paying attention to or simply forgot the things said to him by Krezman during the conversations in dispute. Simply put, it was part of his job as a salt to remember the things said to him and I believe on this record that he  
45 did.

50 DeRobertis testified that as part of the Union's salting plan to establish objective evidence of his good working skills in the eyes of the salted employer, he asked for and was granted – effective that day – a raise by Krezman. Again, since his wage increase request was something he had learned should be made in his role as a Union salt, it is very likely he would pay attention to Krezman's answer to his request. DeRobertis, corroborated by Albert, also testified that he immediately notified Albert of having received the raise. At least in part in

consequence of that fact, Albert testified he came to the jobsite at lunch that day with Union flyers. These post-event actions, especially his reporting to his superior Albert of his being “sure” he had just received a raise, are convincing evidence that DeRobertis at the time he spoke to Albert believed that he had been granted the raise by Krezman and evidence that he did not believe that his raise request was at that point simply under consideration by Krezman.

Mr. Krezman as the owner of the Respondent is also a party and like DeRobertis not a neutral witness. The General Counsel sought to demonstrate that the Respondent and Krezman were anti-union and opposed to any employee representation by the Union of the Respondent’s employees and further opposed to hiring Union employees. To support this proposition, the General Counsel adduced testimony of March 1999 events in which a dozen or so Union organizers and volunteers attempted to apply for employment with the Respondent in a context where it was obvious they were Union agents who intended to attempt to organize the Respondent’s employees. The Respondent turned the Union agents away on the first occasion and locked the office door on a later occasion. While evidence of animus is relevant and material, I was not particularly impressed by the 1999 events insofar as they bear on the 2004 matters at issue. The Respondent offered credible testimony that the mass nature of the Union’s entrance into the Respondent’s office was in and of itself dissuading.

Further, the 1999 animus evidence offered does not significantly go beyond the administratively noticeable institutional distance/competition between the Union and organized contractors and unorganized contractors such as the Respondent. There was also the testimony of Krezman about his own attitude and understanding of the Union’s salting process:

Q Are you familiar with the term union salt?

A Yes.

Q And how do you define that term?

A Where the union would plant people in your company and disrupt your company and try to get your employees to join the union.

Q Okay. So there the union puts one of its agents into your company as an employee, and that employee/agent tries to organize the employees?

A Right.

There is no doubt and I notice administratively as well as specifically find on this record that there is an element of competition and conflict between the Union and its organized contractors and the non-union electrical contractors in the Union’s geographical area. Thus, a Union member is not normally allowed under Union rules to work for an unorganized contractor and, in consequence, employees of the Respondent and other non-union contractors would more likely be former or non-Union members rather than active Union members. There is also competition between the groups. Available commercial work won by unorganized contractors is not done by organized contractors employing Union members. The Union would like to convert unorganized shops to organized shops and obtain contract wages and benefits for their Union employees. Owners and managers of unorganized contractors, especially those with a long experience in the electrical contracting industry like Krezman, are well aware of the tensions between the two sides of the industry.

DeRobertis’ testimony respecting the events in controversy was direct, crisp and quite certain. With normal variation, his testimony was consistent during direct and cross examination. He created in me the impression he was testifying without reserve or agenda from a sound memory of events. I found him a persuasive witness with a sound demeanor.

Mr. Krezman was not an equally persuasive witness. His testimony was simply much less direct and complete leaving the impression that he was considering or in some cases dismissing the rigor of the questions posed and muddling the answers to them. More importantly, considering all his assertions in the case, both in his testimony and in his Board affidavit and written position statement submitted to the Board, there were important factual variations and differences in his various recitations of what he said during the events in controversy and his motivations in taking the actions that he did which variations he did not convincingly explain. These inconsistencies significantly undermined his credibility.

More specifically, Krezman, unlike DeRobertis whose job in part was to commit to memory all that took place during his hiring process and on the job, was running a company and did not necessarily focus on the specifics of his conversations with DeRobertis. It was to be expected that his memory would not be as sharp regarding such details as DeRobertis'. But well beyond that, Krezman's testimony was marred by the shifting versions of what he did on April 5 after DeRobertis call and his reasons for taking the actions he did. His demeanor was also inferior to that of DeRobertis in that he did not seem to be attempting to a serious degree to recite from his memory the events under inquiry. DeRobertis was far the superior witness.

Based on all the above, the record as a whole and the relative demeanor of the two, I find and conclude that DeRobertis' testimony concerning his contacts and communications with Krezman should be credited over Krezman's differing version of events. Thus where the two differed respecting these events, the testimony Krezman is discredited.

### **c. The McAnulty – DeRobertis April 5, 2004, Lunch Break Conversation**

As described above in some detail, Albert came to the jobsite on the morning of April 5, distributed Union literature and spoke to McAnulty. McAnulty testified he had informed Krezman and or Rowe of this fact, i.e. told them: "somebody had come by from the union", but did not recall the time of the call or calls. At the end of the lunch period, as was customary, the employees gathered to receive their afternoon work assignments. In that gathering, DeRobertis and other employees discussed the Union.

There is a critical difference in the versions of McAnulty and DeRobertis regarding this end of lunch meeting. No other participants testified. DeRobertis testified to a discussion, however brief, of Union benefits. After the employees received their assignments and departed, DeRobertis testified that McAnulty: "asked me that Gary [Krezman] had told him he worked with my dad and why wasn't I union like my dad?". McAnulty specifically and categorically denied having a conversation with employees about the Union or having the private conversation with DeRobertis described by him. McAnulty denied knowing at that time that DeRobertis' father was "in the Union." Krezman corroborated this by testifying that he had not told McAnulty anything about DeRobertis' father.

Much of the argument of the parties concerning this testimonial conflict reprises those arguments made and discussed above. The General Counsel has alleged and the Respondent denied that McAnulty is a supervisor. He is the highest representative of the Respondent regularly on the job and granted DeRobertis a day off without gaining prior approval from higher representatives. I find he is a supervisor. No complaint allegation is directed to his conduct however and my supervisory finding is of little or no significance to the result herein. The government seeks to establish an anti-union motivation on the part of McAnulty but I find only that the record establishes he is a former union member with many years working for a non-union contractor as a forman.

I have previously found DeRobertis a credible witness with a convincing demeanor. McAnulty, too, was a credible witness with a sound demeanor. Between the two however, I find that DeRobertis had by far the superior memory of events. This is likely so in part because as discussed, supra, DeRobertis was tasked by the Union to attend to and recall the things said and done in his undercover salting role. Also important however, McAnulty in his testimony had trouble recalling the specific actions he took on April 5. Thus, he initially denied, then recalled, having reported the Union agent's jobsite visit to Krezman and could not place a time to the call. I find that McAnulty, although honest in his testimony, did not have a complete or certain memory of the day's events. Given this conclusion, and based on the demeanor of the witnesses and record as a whole, I find the events of the day occurred as testified by DeRobertis. Where DeRobertis recalled specific events that McAnulty denied, I find that McAnulty has forgotten the events. Thus, I credit DeRobertis over McAnulty where the versions of the two differed. I note that this implicitly further discredits Krezman who denied telling McAnulty anything about DeRobertis' father. I have earlier discredited Krezman respecting the initial conversation with DeRobertis concerning his father and do so again here to the extent it is necessary to do so.

### 3. Analysis and Conclusions

#### A. Paragraph 6 of the Complaint – Krezman's Interrogation of DeRobertis Allegation

I credited Mr. DeRobertis over Mr. Krezman, as described above, and found that Krezman asked DeRobertis, then an employment applicant, why he was not union like his father. While in many settings and in the context of Krezman's acquaintance with DeRobertis' father, such questioning could be non-coercive, I do not find it so here. Mr. Krezman's version of the exchange was benign, but that version has been discredited. Rather, as I have found above, Krezman not only asked why DeRobertis was not union, he recurred to the theme at the end of the interview process, returning to comment to DeRobertis, as DeRobertis testified and I have credited above: "And he asked me if I knew what the union market share was. I told him I didn't know what that meant. He thought -- he told me he thought I would with my dad being in the union."

In such a context I find the statements of Krezman during the course of the job application process was inherently coercive and unlawful. *Brandeis Machinery*, 342 NLRB No. 46 (2004); *Lackawanna Electrical Construction, Inc.* 337 NLRB 458 (2002). I find therefore that Krezman violated Section 8(a)(1) of the Act during his interview of DeRobertis. I further find that complaint paragraph 6 is sustained.

#### B. Complaint Paragraph 7(c) - DeRobertis Termination Allegation

There is no dispute that DeRobertis was discharged on April 6, 2004. The Respondent contends the discharge was based on DeRobertis' admitted falsification of his resume and job application recitation of his previous employers. The General Counsel and the Charging Party contend the Respondent's asserted reason for firing DeRobertis is but pretext to conceal the Respondent's true motive, that DeRobertis was a salt intent on organizing the Respondent's employees.

The Board in *Naomi Knitting Plant, a Division of Andrex Industries Corp.*, 328 NLRB 1279,1281 (1999), restated its *Wright Line*, 251 NLRB 1083, 1089 (1980), enf.d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), standard for analysis of discharge cases:

As established by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to set forth a violation under Section 8(a)(3), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show:

- (1) that the employee was engaged in protected activity,
- (2) that the employer was aware of the activity, and
- (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue, which the expertise of the Board is peculiarly suited to determine.

*FPC Moldings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enforcing 314 NLRB 1169 (1994) (citations omitted).

There is no doubt that DeRobertis as a salt and an employee under the definition of the Act and protected against unfair labor practices. *NLRB v. Towne & Country*, 516 US 85 (1995). There is no doubt that DeRobertis was engaged in union activities by obtaining employment with the Respondent in order to organize the employees and by talking to employees about union representation once employed.

The burden is on the General Counsel to show by a preponderance of the evidence: (1) that the Respondent – here its owner and agent Mr. Krezman – was aware of DeRobertis' union activity and (2) that that union activity was a substantial or motivating reason for his discharge.

The General Counsel and Charging Party's scenario is essentially as follows. Mr. Krezman, initially suspicious of DeRobertis as a possible union organizer given his father's long employment in an organized shop, had his suspicions increased further by DeRobertis' wage increase request and McAnulty's report that a Union agent had been at the project that morning. Acting on his suspicions, Krezman initiated an investigation of DeRobertis' prior employment references and, through his phone conversation with Pede, confirmed his suspicion that DeRobertis was a Union salt. Immediately thereafter and in consequence of DeRobertis' salt status, Krezman initiated the process by which DeRobertis was terminated.

As noted above, the Respondent led by skilled counsel strongly disputed the factual underpinnings of this scenario and offered testimony in support of its defense. Thus, Krezman denied that he asked DeRobertis about the Union in his hiring interview, denied any discussion of salting had occurred in his discussion with Pede and denied that he had learned of the Union agent's appearance at the jobsite before he took the decision to fire DeRobertis. McAnulty denied that he had referred to Krezman's earlier conversation about DeRobertis' father in talking to DeRobertis after lunch on April 5. Regrettably for the Respondent however, this testimony on which the Respondent's defense significantly depends has been explicitly discredited above and the contrary testimony of DeRobertis and Pede, supporting the General Counsel's case, has been explicitly credited. The contested facts have been resolved against the Respondent.

There is additional evidence supporting the government. First, the discrediting of the Respondent's defenses of ignorance of, or even suspicion of, DeRobertis' Union salt status supports the finding of an improper anti-salt motive. Further, additional evidence suggests the check of DeRobertis' prior employers was well out of the ordinary. Mr. Krezman did not do so

regularly on his own and the Respondent's clerical staff had never been asked to check on an employee or employment applicant's previous employers before checking on DeRobertis. There was thus no pattern of checking employees' prior employment history. If this is so, there is little support for the Respondent's claim that full and honest disclosure of that history is so important that discharge must be the punishment for falsification. And, importantly as discussed supra, Krezman gave shifting explanations of and for his actions taken on April 5, 2004, after receiving DeRobertis wage increase request. All this evidence combined with that discussed above leads me to explicitly find that the initiation of the investigation of DeRobertis' prior employers was motivated by Krezman's suspicions that DeRobertis was a salt and not for any other reason. Thus, I discredit the testimony of Krezman that the investigation of DeRobertis prior employment was associated with his raise request. Rather I find it arose from Krezman's suspicion that DeRobertis was a Union salt. It was in that investigation that the DeRobertis references were discovered to be false and, at least from Pede's perspective under Krezman's questioning, DeRobertis was confirmed to be a Union salt.

The General Counsel's case does involve the use of circumstantial evidence to establish the Respondent's anti-salting motive, but I find the evidence described in part above is persuasive. It is argued by the government and well supported by the record given the credibility resolutions made above, that Mr. Krezman did not terminate DeRobertis because of his resume entries, but rather did so because of his status as a Union salt. When the reasons offered for an action are inconsistent and are discredited, an alternate theory of motivation is more likely. Here, as revealed in Pede's credited testimony, Krezman's suspicions of DeRobertis' status as a salt were given apparent confirmation at the time he made his determination to fire DeRobertis. Given all the above, the testimony of the witnesses, the credibility resolutions made, and the record as a whole, I find that the General Counsel has established that DeRobertis status or suspected status as a Union salt was a substantial or motivating reason for his discharge.

Once this showing by the General Counsel has been made, the burden shifts to the Respondent to demonstrate that the same action -- here the discharge -- would have taken place even in the absence of the protected conduct. The Respondent argues that it would discharge any employee found to have falsified his or her prior employment history and, further, that it would have discharged any employee who retained other employment while working for the Respondent. The General Counsel reprises his earlier arguments as described above.

I found above and repeat that finding here that the Respondent undertook the investigation of the prior employment history of DeRobertis because of Krezman's suspicion that DeRobertis was a Union salt. Had he not been a salt, presumably no suspicions would have been engendered, no prior employer reference checks would have been made and the false entries would not have been discovered. I conclude that, had not Krezman come to believe he was being salted, DeRobertis' recitation of prior employers would not have been put to the test and the falsifications used to justify his discharge. DeRobertis status and/or suspected status as a Union salt was the cause of his discharge and that he would not have been discharged had there been no such suspicion.

Further, however, even were the results of the prior employment check initiated for anti-union reasons a valid factor to be considered, there is no convincing evidence that the Respondent considered the confirmation of prior employment of significance. One prior employee apparently would have been discharged had not law enforcement intervention cut his employment short. But regular checks of employee application references were simply not made on any regular basis by the Respondent. And DeRobertis had gotten good job ratings by that point in his employment with the Respondent. I simply am not persuaded by the

Respondent's argument and evidence, and explicitly do not find, that the Respondent in fact considered employee applicants' prior employers or the possibility that those prior employers as listed in resumes on application forms were falsified in the application process was a matter of significance.

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Finally, the Charging Party urges that I find that a falsified prior employment history submitted to an employer by a union salt seeking employment is such an inextricable element in the protected process of salting that it must be considered in itself a protected activity for which an employer may not discharge a salt citing *Hartman Bros. Heating & Air Conditioning. v. NLRB*, 280 F 3d. 1110, 1112 (7<sup>th</sup> Cir. 2002):

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The question presented in this case, left open in *Town & Country*, [516 US 85 (1995),] is whether a Salt may lie to get a job. We think that he may, at least if the lie concerns merely his status as a salt union organizer, or union supporter, and not his qualifications for the job. Cf. *Frazier Industrial Co., v. NLRB*, 213 F3d 750, 760 (D.C. Cir. 2000). A lie about his union status or union organizing objective is not material, because as *Town & Country* held, an employer cannot turn down a job applicant because he is a salt or other type of union organizer or supporter.

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The General Counsel does not join in this argument. The General Counsel notes at footnote 15 of its post-hearing brief at 14:

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In fact, there is some case law from the federal courts that falsifying an application, in itself, is protected activity under the Act. See generally *Wright Electric v. Oulette*, Case A03-1683 (Minn. Ct. App. September 14, 2004), cert. denied, US Sup. Ct., No. 04-1230, 6/20/05; *Hartman Bros. Heating v. NLRB*, 280 F 3d. 1110 (7<sup>th</sup> Cir. 2002). However, the General Counsel in this matter does not argue this position, but notes it only to state that the federal courts have gone further to protect a salt's submission of a falsification resume to gain employment as a salt.

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The General Counsel in advocating what the law under the Act is, or should be, is not bound to follow or advocate broad protections of the Act just because the federal court "have gone further to protect" salting employees than the General Counsel thinks proper. The General Counsel need not acquiesce in such advocacy by charging party unions and clearly, the General Counsel opposes the broad view of protection of salting advocated by the Union here. The General Counsel under the Act has plenary control of the complaint and the theory of violation advocated. In essence the General Counsel has veto power over a Charging Party's independent theory of a violation. When the General Counsel states: "the General Counsel in this matter does not argue this [protected fabrication] position", that statement preempts the Charging Party's advancing the position before me. I am simply foreclosed to consider a theory of a violation opposed by the government. This being so, I shall not consider the argument of the Charging Party in this regard. This case will be resolved under the General Counsel's "pretext" theory alone.

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Having found the General Counsel has sustained his burden of showing that the Respondent fired DeRobertis because of his protected status as a salt, and having further found the Respondent did not meet its burden of showing that DeRobertis would have been discharged even had he not been a salt or suspected of being one, I find DeRobertis' discharge was improper and in violation of Section 8(a)(3) and (1) of the Act. I therefore sustain the General Counsel's complaint paragraph 7(b).

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### C. Complaint Paragraph 7(a) - DeRobertis Raise Rescission Allegation

Complaint paragraph 7(a) alleges that the Respondent on April 5, 2004, rescinded a wage increase that it had given DeRobertis under the same anti-salting motivation theory discussed above. The Respondent challenges both the assertion that a raise was ever given and further challenges the unlawful motivation theory. The constituent parts of the argument necessary to resolve this allegation have been earlier considered. First, I have found, crediting DeRobertis, that Krezman told him he was receiving an unconditional raise and also told him it was effective that same day in the phone conversation held on the morning of April 5, 2004. I find Krezman's unequivocal statement establishes that the raise was awarded. I make this finding even though there is no evidence that payroll changes were instituted. I find that the subsequent events of the day made it unnecessary to make such arrangements.

There is no dispute that Krezman told DeRobertis later the same day that he would not receive a raise. The decision respecting the withdrawn raise was made by Krezman at the same time and for the same reasons as the decision to discharge DeRobertis. That decision has been found improper above. Applying the identical analytical framework, I also find for the same reasons, that the raise was lost because of DeRobertis' suspected salt status and not for any other reason. I therefore find that the rescission of the raise was a violation of Section 8(a)(3) and (1) of the Act. I shall therefore sustain paragraph 7(a) of the complaint.

### REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices. Further the language on the Board notices will conform to the Board's recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), that notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found.

I shall direct the Respondent to reinstate Gino DeRobertis to his former position,<sup>12</sup> terminating if necessary those hired to fill his position, and to make DeRobertis whole, with interest, for any and all losses of wages and benefits the employee would have received, but for the Respondent's wrongful termination of him. The make whole remedy shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The wage increase given on April 5, 2004 shall be restored and that fact considered in the make whole calculations.

The Respondent argues that it would not knowingly hire or rehire an employee who is concurrently holding other paid employment and therefore should not be obligated to reinstate DeRobertis, if he is a paid employee of the Union. The Respondent's argument seemingly is solely directed to paid employment. There is no record suggestion that a time consuming unpaid hobby or interest would disenfranchise a job applicant or cause the discharge of an existing employee. Little League coaching, for example, is not a disqualifying sideline employment.

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<sup>12</sup> DeRobertis was hired for a specific project, but such project employees of the Respondent also go on to other projects. Mr. Krezman testified he was considering DeRobertis as a potential "long term" employee. It is appropriate to determine to which job and for how long DeRobertis would have been employed in each instance at the compliance stage of these proceedings. I note that several other employees were hired along with DeRobertis for the project at issue herein.

The Court in *NLRB v. Towne & Country*, 516 US 85 (1995), made it clear that the paid employment by a labor organization of a salt does not for that reason create a conflict with full time electrical contractor employment allowing an employer to refuse the union organizer employment. In the instant case, the duties of a paid salt, or at least the duties of DeRobertis as a salt on this record, were to be a full time employee of the employer to be organized putting in a full day's work and honoring all obligations of a good employee and, when on his non-work time, to organize the employer's employees.

It is clear from the above that the Respondent may not successfully argue that the simple fact that DeRobertis receives remuneration from the Union is a basis for refusing to rehire him. And it seems clear that, based on the record evidence of DeRobertis' Union salting duties and assignments, that the Respondent may not successfully argue that DeRobertis will not be able to perform as satisfactory employee in future because of his work obligations as a paid employee of the Union. To the extent the Respondent is arguing that DeRobertis may be refused re-employment because he is intent on organizing the Respondent's employees on his own time, that fails first as a matter of venerable decisional law and second is not supported by the Respondents past practice of not considering the time requirements of outside non-work related interests of its employees.

Based upon all the above and the record as a whole, I reject the Respondent's argument that DeRobertis has no right to reinstatement should he be or have been a paid organizer at the time of his reinstatement.

### Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

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

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act on March 26, 2004, by interrogating a job applicant about his union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act on April 5, 2004, by rescinding the wage increase granted Gino DeRobertis and by terminating him on April 6, 2004.

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

**ORDER**

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.<sup>13</sup>

The Respondent, Gary Krezman Electric, Inc., d/b/a G & S Electric, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating job applicants respecting their union activities

(b) Rescinding employee Dino DeRobertis' April 5, 2004, wage increase because of his union activities,

(c) Terminating employee Dino DeRobertis because of his union activities,

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

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

(a) Offer, in writing, immediate and full reinstatement to Dino DeRobertis to the position he previously held discharging as necessary any replacement employee or, if the job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with interest as set forth in the Remedy section of this decision.

(b) Rescind the withdrawal of Dino DeRobertis' April 5, 2004, wage increase and include that increase in calculating the make whole sums required herein.

(c) Remove from its files any reference to the rescission of DeRobertis' wage increase and his termination and notify him in that this has been done and that this unlawful conduct will not be used against him in any way.

(d) 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 records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

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<sup>13</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

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(e) Within 14 days after service by the Region, post copies of the attached Notice at its Sacramento facility set forth in the Appendix<sup>14</sup>. Copies of the notice, on forms provided by the Regional Director for Region 20, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, 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 in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the California 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 the closed facility at any time after April 6, 2004.

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(f) 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.

Dated, San Francisco, California, September 13, 2005.

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Clifford H. Anderson  
Administrative Law Judge

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<sup>14</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

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## APPENDIX

### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

After a trial before an Administrative Law Judge at which we appeared and presented evidence and argument, the National Labor Relations Board has determined that we have violated the National Labor Relations Act and has ordered us to post this Notice and to abide by its terms.

Federal labor law embodied in Section 7 of the National Labor Relations Act gives employees and employee applicants the following rights:

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

We give you the following assurances:

**WE WILL NOT** interrogate job applicants about their union activities and sympathies

**WE WILL NOT** rescind employees' raises because of their union activities

**WE WILL NOT** terminate employees because of their union activities

**WE WILL NOT** in any like or related manner interfere with, restrain or coerce employees and or employee applicants in the exercise of the rights guaranteed them in Section 7 of the Act.

**WE WILL** offer our employee Dino DeRobertis, in writing, immediate and full reinstatement to his previous position, terminating, if necessary, any replacement employee or, if his job no longer exists, to a substantially equivalent position, without prejudice to his or seniority or any other rights or privileges previously enjoyed, and **WE WILL** make the him whole, with interest, for any loss of his rescinded raise and other earnings and benefits suffered as a result of our discrimination against them.

**WE WILL** remove from our files any reference to our unlawful rescinding of the wage increase and termination of employee Dino DeRobertis and **WE WILL** notify him in writing that this has been done and that our unlawful conduct will not be used against him in any way.

**WE WILL** 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 records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

**WE WILL NOT** in any like or related manner violate the National Labor Relations Act.

GARY KREZMAN ELECTRIC, INC. d/b/a  
G & S ELECTRIC

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

901 Market Street, Suite 400, San Francisco, CA 94103-1735  
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5139

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**GARY KREZMAN ELECTRIC, INC.,  
d/b/a G & S ELECTRIC  
The Respondent**

and

Case 20-CA-32108

**INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 340, AFL-CIO  
The Charging Party**

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