

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

IN THE MATTER OF:)	
)	
ALLIANCE MECHANICAL, INC.)	
)	
Respondent,)	
)	
and)	NLRB Case No. 27-CA-21338
)	
ROAD SPRINKLER FITTERS LOCAL UNION)	
NO. 669, U.A., AFL-CIO,)	
)	
Charging Party.)	

CHARGING PARTY LOCAL 669’S BRIEF IN SUPPORT OF EXCEPTIONS

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669” or “the Union”), respectfully submits this Brief in Support of Exceptions to the July 23, 2010, decision issued by Administrative Law Judge James M. Kennedy in this case. For the reasons stated below, the ALJ’s decision should be reversed in part, and Respondent Alliance Mechanical, Inc. (“Respondent” or “Alliance Mechanical”) should be found to have violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (“NLRA” or “the Act”) by interrogating and refusing to hire discriminatee Aaron Hoffman because of his Union affiliation.

I. Statement of the Case

This case began in March of 2009 when Alliance Mechanical refused to hire Local 669 member Aaron Hoffman because of his Union affiliation. Beginning on August 19, 2009, Local 669 filed a series of Unfair Labor Practice charges with NLRB Region 27 alleging that Respondent violated the Act by illegally threatening and interrogating Mr. Hoffman, and then

refusing to hire him and/or consider him for employment because of his affiliation with Local 669. GC. Ex. 1(a) and (d). On January 28, 2010, the Region issued a Complaint on the Union's charges, and a hearing was held on April 28, 2010, in Eagle, Colorado, before Judge James M. Kennedy.

A. The Unfair Labor Practice Hearing.

At the hearing, Mr. Hoffman testified that he was looking for a job in March of 2009 and learned Alliance Mechanical, a sprinkler company located in Eagle, Colorado, was looking to hire. ALJD, P. 4.¹ As Mr. Hoffman was a journeyman sprinkler fitter, he stopped by Alliance's office and spoke with the office manager, who confirmed that the Employer was indeed hiring and gave him an application. Tr. 7-28.

After receiving the job application, Mr. Hoffman completed and submitted it in person to the Employer's secretary for consideration the next day. Tr. 27-29. On his application, Mr. Hoffman did not expressly indicate his membership in Local 669, but he listed several contractors whom he had worked for in the past that are well-known signatory contractors with the Union, Western States being one of them. GC Ex. 2.²

Mr. Hoffman followed up on his employment application with Alliance first by showing up at Alliance's office two times later that week. However, both times he was unable to speak with Mr. Aho as he was not in the office. Tr. 30-31. Mr. Hoffman then obtained Mr. Aho's cellular phone number from Alliance's secretary and called him the following week. Tr. 31.

Mr. Hoffman reached Mr. Aho on his cellular phone the following week. Tr. 31-32. During their brief conversation, Mr. Aho asked Mr. Hoffman whether he had worked for

¹ The Administrative Law Judge's decision in this case will be cited to as ALJD, P. ____.

² Mr. Aho undisputedly knew that Western States was a union sprinkler contractor. As he testified in his pre-trial affidavit, "[Hoffman] worked for Western States, which is a big indicator that he is Union." GC Ex. 8, P. 2.

Western States as he indicated in his job application. Tr. 33. When Mr. Hoffman responded that he did, Mr. Aho came right out and asked “are you union?” *Id.*

After that exchange, Mr. Aho told Mr. Hoffman, “I don’t hire union people.” *Id.* Mr. Aho proceeded to inform Mr. Hoffman that he did not like Rich Gessner, the Local 669 Business Agent in Colorado (Tr. 34) and reiterated twice that he (Aho) simply would not hire “union people.” Tr. 34.

Mr. Hoffman testified that Mr. Aho never asked him about his experience or qualifications – indeed, he did not ask Mr. Hoffman if he had any service experience and did not indicate what types of positions he was looking to fill at Alliance. Tr. 35. Instead, Aho just told Hoffman in no uncertain terms that he would not consider his application because of his membership in the Union, and Aho did not give him any more information. Tr. 34.

After Mr. Aho made it perfectly clear to Mr. Hoffman that he would not be considered for employment at Alliance because of his affiliation with Local 669, Mr. Hoffman reached the conclusion that any further attempts at getting hired by the Employer would simply be futile, and so he did not call Aho again. Tr. 36.

On the other hand, Mr. Aho told a different story about his interactions with Mr. Hoffman: Aho tried to explain away Mr. Hoffman's testimony by testifying that he (i) “believed” that he spoke with Mr. Hoffman about his job application in person, rather than over the telephone, although he could not say for sure that was the case (Tr. 83; ALJD, P. 6); (ii) was not looking to hire a sprinkler fitter but was rather exclusively looking to hire a “service technician” (Tr. 110); and (iii) surprisingly could not recall if he asked Hoffman whether he was Union. ALJD, P. 5.

However, the record in this case contains several critical pieces of evidence that are directly at odds with Mr. Aho's revisionist explanation of why he did not hire Mr. Hoffman. First, the evidence presented at the hearing confirms that Alliance had job openings at the time Mr. Hoffman applied for work. To that end, the Employer ran two employment advertisements for job openings between March and November of 2009, either of which Mr. Hoffman would have been qualified to fill. R. Ex. 1 and 2.

In the first advertisement, which ran from April 14 to April 20, Mr. Aho solicited job applicants with the following qualifications: "Certified backflow specialist Full-time ASSME, fire sprinklers, high school education or GED, good driving record." R. Ex. 1. The second advertisement, which ran from June 15 to July 14, sought a "fire sprinkler service journeyman[,]" and further specified that such an applicant "must be self-starter willing to help out in new construction if needed. Must be 5+ year journeyman with verifiable references or don't call." R. Ex. 2. That advertisement further specified that the applicant must be a "5 years journeyman lic [sic] sprinkler fitter. Do not call without verifiable references." *Id.* Finally, the ad also sought an applicant who had more than 15 years experience in the field. *Id.*

Moreover, the record confirms that the Employer hired at least three employees in response to these advertisements *after* Mr. Hoffman submitted his job application to and while it was still on file with Respondent. In August 2009, Mr. Aho hired at least two sprinkler fitter employees – one allegedly to perform work as a "helper" and to perform some service work and one to allegedly perform inspection work on existing sprinkler systems. GC Ex. 1(l), (m); G Ex 8; Tr. 71.

These exhibits are directly at odds with Mr. Aho's testimony throughout the hearing that he was only seeking to hire an employee with "service technician" experience. Tr. 110.

Remarkably, the employee that Aho hired as an “apprentice service technician” (Tr. 76), Mr. Skluzacek, had little to no experience in the sprinkler industry, as he was a friend of Mr. Aho’s who was *operating a bicycle shop* before Aho hired him to allegedly perform his service work. Tr. 91; ALJD, P. 9 n. 11. Indeed, Mr. Skluzacek’s employment application did not indicate that he had any service or sprinkler fitting experience whatsoever – although, somewhat tellingly Mr. Skluzacek’s application did *not* list any contractors that were signatory to collective bargaining agreements with Local 669 (or contain any other indicators of Union affiliation), and Mr. Skluzacek was not a member of Local 669 at the time that Aho hired him. GC. Ex. 6, P. 3, 5; Tr. 75-78.

Likewise, even the most cursory examination of the job application that Mr. Juan Rodriguez submitted to Alliance shows that he did not have (or similarly did not indicate that he had) a backflow certificate or any sales or sprinkler fitting experience or any Union affiliation either – indeed, other than a PO Box and telephone number, the only information his application contained was *the name of the elementary school he attended in Mexico*. GC Ex. 5, P. 1-7.

It is undisputed that Mr. Aho never called Mr. Hoffman to tell him that any of these positions were available at Alliance, and instead asserted in his Answer that it was Mr. Hoffman’s responsibility to somehow learn about and “reapply” for each of these job openings at Alliance. GC Ex. 1(l), (m). Tr. 82.

Finally, and perhaps most importantly, at the hearing the Union learned for the first time that Mr. Aho had been requiring his employees to sign yellow dog contracts directed *specifically* at Local 669 as a condition of their employment with Alliance. The example of one of these “contracts” that was introduced into evidence stated in no uncertain terms as follows:

I Julio Rodriguez Maraduaga readily admit to Ron Aho & sign that I am (was) a member of Union local 669 & agree not to converse with or try to recruit existing employees of

Alliance Mechanical to join local 669. I further admit that I am agreeing to work for Alliance unbeknownst to local 669, & further agree to accept the hourly pay to start of \$20.00 per hour with no additional benefits. Any repercussions' [sic] Fine etc. from local 669 agreeing to work for Alliance will be born on Julio. \$20 an hour may increase upon proving ability & knowledge to existing staff & Ron Aho. Termination can result or happen at any time because of lack of work, interference with four of Local 669, poor workmanship, personal problems with existing employees, etc. I also agree not to disclose any business or work practices to anyone outside of Alliance Mechanical. Any mischief or sabotage of work awarded to Alliance will result in legal action against you. Alliance holds no compassion to notify Local 669 as to your employment as it considers you no longer a member of local 669 while employed by alliance. GC Ex. 7. (emphasis in original).

B. The Administrative Law Judge's Decision.

On July 23, 2010, Judge Kennedy issued his decision in this case, partially sustaining the allegations in the Complaint. Specifically, the Judge held that (i) the General Counsel did not prove a refusal to hire violation with respect to Mr. Hoffman; (ii) the General Counsel did prove a refusal to consider violation with respect to Mr. Hoffman; (iii) the Employer violated the Act by requiring applicants and employees to sign an illegal yellow dog contract; and (iv) Alliance did not illegally interrogate or threaten Mr. Hoffman about his Union membership. ALJD, P. 9, 10.

With regard to the refusal to hire allegation, despite the overwhelming evidence in the record establishing that (i) Alliance was hiring employees at the time Mr. Hoffman applied for employment; (ii) Mr. Hoffman was a qualified applicant for any of the three positions that Alliance filled after it had received Mr. Hoffman's application for employment; and (iii) the rare existence of direct evidence that antiunion animus was the reason that he was not hired at Alliance, the ALJ held that Respondent *did not* illegally refuse to hire Mr. Hoffman. ALJD, P. 9. Instead, the ALJ concluded that Alliance's refusal to hire Mr. Hoffman did not violate the Act because in order to find such a violation, "*FES* requires there to be a job opening, and there was not ..." ALJD, P. 12.

In reaching this conclusion, the Judge held that while Respondent had hired three other employees since Mr. Hoffman applied for work with Alliance, Mr. Hoffman's application stating the position he was looking for was a sprinkler fitter and Mr. Aho's claim that he was not hiring sprinkler fitters but was rather seeking to hire a service technician was sufficient to overcome this direct evidence. In the ALJ's estimation, Mr. Hoffman did not indicate on his job application that he had the requisite experience to fill the positions Mr. Aho was seeking, and the two employees Mr. Aho hired in response to the job advertisements were better qualified than Mr. Hoffman for the positions they were hired to fill. ALJD, P. 11.

Despite an overwhelming amount of evidence to the contrary, the Judge discredited Mr. Hoffman's testimony that: (i) he claimed that he spoke to Aho on the telephone because Aho claimed – but was not sure – that he spoke to Hoffman in person; (ii) Mr. Hoffman denied that Aho told him he was not hiring installers (ALJD, P. 7); Mr. Aho's office manager Ms. Fuller *believed* that Mr. Hoffman came into the office in person to talk to Mr. Aho, although she was unsure of whether or not was actually the case (ALJD, P. 5); and (iii) Mr. Aho did not actually remember asking Mr. Hoffman about service experience, but rather equivocally claimed that he thought it was “more than a probability” that he did. ALJD, P. 7.

Based on the foregoing, the Judge concluded that there was no job opening for which Mr. Hoffman was qualified (ALJD, P. 10-12) and concluded that Alliance did not illegally refuse to hire Mr. Hoffman. *Id.*

That being said, the ALJ correctly concluded “[t]hat there has been a violation of Section 8(a)(3) by Respondent for failing to consider Hoffman for employment.” ALJD, P. 9. However, neither the remedial portion nor the Order of the ALJ's decision in this case provides for a refusal-to-consider remedy for Mr. Hoffman. ALJD, P. 14-16.

With respect to the yellow dog contract issue, the Judge held that there was no question that the yellow dog contracts that Mr. Aho was requiring his new hires to sign constituted serious violations of the Act. ALJD, P. 13. As Judge Kennedy correctly concluded:

Looking to the surrounding circumstances, it is clear that Respondent does maintain a policy which is designed to interdict employees who wish to utilize their statutory right to union membership, together with the connected activities, organizational or not, which the Act guarantees. Here, Respondent requires its employees who are union members to demonstrate that they will not engage in union activity while it employs them – the requirement that they signed the yellow dog contract. As noted above, these contracts are illegal. But they are more than simply illegal—they specifically require employees to cast off rights the Congress has provided for their protection. This undermines the Congressional purpose behind the Act. It cannot stand. ALJD, P. 13.

Given the foregoing, the ALJ recognized that “[a]t the time Hoffman filed his application Respondent required new hires to sign yellow dog contracts or to otherwise renounce union representation as a condition of being hired. Respondent offers no defense to the policy.”

ALJD, P. 13. The Judge then concluded that

Respondent’s policy is a continuing barrier to employees who wish to maintain their union membership or who wish to exercise the rights guaranteed them under Section 7 of the Act. It is tantamount to an unlawful refusal to consider for hire. As the Board said in *FES*, discriminatory refusals to consider for hire violate Section 8(a)(3) and (1) of the Act. I so find. ALJD, P. 14.

Thus, the ALJ ordered a make-whole remedy to everyone who applied for a job at Alliance since March, 2009 *except* Mr. Hoffman, concluding instead that “the policy did not result in the refusal to hire the alleged discriminatee, Aaron Hoffman, I do not find that Hoffman is entitled to any remedy at this stage.” *Id.*

Finally, the ALJ also concluded that Mr. Aho did not unlawfully interrogate or threaten Mr. Hoffman about his Union affiliation. ALJD, P. 9-10. Specifically, the Judge credited Mr. Aho’s denial that he asked Mr. Hoffman during their conversation if he was Union, concluding that Mr. Aho did not “need to interrogate Hoffman to learn about his Union status...” because

his Union affiliation was obvious from his employment application, and crediting Mr. Aho's contention that he would not have asked about Union membership because he hired Union members in the past. ALJD, P. 10. Accordingly, the Judge held that these allegations should be dismissed.

Charging Party Local 669 has filed Exceptions to the Decision and contends that it should be reversed on the grounds set forth in the Exceptions and below.

II. Questions Presented.

A. Whether Respondent illegally refused to hire Aaron Hoffman because of his Union affiliation. This issue relates to the following Exceptions: 1, 2, 4-7, 9-27, 29-42, 44-45, and 47.

B. Whether Respondent illegally interrogated and threatened Aaron Hoffman because of his Union affiliation. This issue relates to the following Exceptions: 2, 4-5, 28, 44, and 47.

C. Whether Aaron Hoffman is, at a minimum, entitled to a remedy for the Respondent's unlawful refusal to consider him for employment. This issue relates to the following Exceptions: 3, 8, 42-44, and 46.

III. Argument

A. FES Standard for Refusal to Hire Cases

Under the framework adopted by the NLRB in *FES*, 331 NLRB 9 (2000), the initial burden in a refusal to hire case lies with the General Counsel/Charging Party who must establish (i) that the Employer was hiring; (ii) that the applicants were qualified for the positions; and (iii) that anti-union animus contributed to the Employer's decision not to hire. *Id.* at 12. We will address each prong of this analysis below:

1. Alliance Mechanical was Hiring When Hoffman Applied for Work.

Despite the ALJ's conclusion to the contrary, the record below confirms that Alliance Mechanical was hiring in the spring and summer of 2009 when Aaron Hoffman submitted his job application (Tr. 81) and that it had at least three open positions that Mr. Hoffman could have been hired to fill.

For instance, in his Affidavit, Mr. Aho testified that he had hired two *installer apprentices* since March 2009. GC. Ex. 8, P.2. Then at the hearing, Aho testified that he hired three employees from March 2009 to November 2009, Tr. 71-72, and produced exhibits consisting of two separate advertisements for sprinkler fitter positions. Respondent's Exhibit 1 (R. Ex. 1) was a job advertisement dated June 15, 2009, for a "Fire Sprinkler Service Journeyman" to perform fire sprinkler inspections on residential and commercial buildings and requiring the applicant "to help out in new construction if needed." As set forth above, Respondent's Exhibit 2 (R. Ex. 2) was a job advertisement for a "Certified backflow teck [sic]" dated March 31, 2009, which the evidence confirms was right around the time Hoffman submitted his application.³

Of course, the record objectively established that Alliance hired three employees in response to these advertisements, none of which had any experience in the sprinkler industry. While Aho claimed that one of these individuals was being "groomed" to become a service technician, it is clear that Hoffman had more experience in the sprinkler industry than any of the other employees that Mr. Aho hired.

³ Charging Party must rely only on the limited employment records that Respondent produced at the hearing as evidence of who it hired since March 2009 as Alliance Mechanical failed to respond to the timely served subpoena Charging Party served prior to the hearing.

While the Charging Party does not dispute Respondent's testimony that service work is a separate skill from installation, we do dispute Alliance's claim that Hoffman, a journeyman sprinkler fitter, lacked those skills. Though Mr. Aho testified for the first time at the hearing that he was really looking for a "sales person" or sprinkler system "service technician," that was *not* the position for which he had advertised; his advertisement and posted requirements for the job were for a "Fire Sprinkler Service Journeyman" for which Hoffman was clearly qualified. R. Ex. 1. Aho's statements at hearing that a skilled sales person was what he was really looking for is nothing more than a post hoc justification for his failure to hire Hoffman. *Windstream Corporation and IBEW*, 352 NLRB 44, 48 (2008) (finding that new reasons being proffered were "self-serving, post-hoc justifications for the Respondent's actions that were the subject of the complaint.").

Finally, the ALJ concluded that Hoffman was qualified for at least one of these jobs by finding that Mr. Hoffman "had served a five-year apprenticeship and had undoubtedly performed the same sort of work assigned to Juan Rodriguez." ALJD, P. 11. Inexplicably, however, the Judge still concluded that there were no positions available for Mr. Hoffman at Alliance. ALJD, P. 11-13

Therefore, the first prong of *FES* has been met in this case, as there were at least three positions available at Alliance Mechanical. Accordingly, the ALJ erred in concluding that "at no point did Respondent have an opening which fit Respondent's requirements." ALJD, P. 11.

2. Aaron Hoffman was Qualified for the Advertised and Filled Positions

While the ALJ did not separately analyze the second prong of *FES* because he concluded that there were no job openings for Mr. Hoffman (ALJD, P. 11-12), the evidence confirms that it was likewise met in this case.

Hoffman’s testimony and application make it clear that he was qualified for both the “installer apprentice” position that Aho mentioned in his affidavit, the “Fire Sprinkler Service Journeyman” position that Alliance advertised for on June 16, 2009, and the “laborer” position Alliance advertised for which Aho testified might involve “some installing.” Tr. 74. With eleven (11) years in the sprinkler trade, Hoffman was clearly qualified for the positions for which Alliance advertised. Tr. 48.

The fact that Aho claims that he had no knowledge of these qualifications from the face of Hoffman’s applications is irrelevant, as *FES* does not place a burden on the General Counsel to prove the Employer’s knowledge of those qualifications. *Americlean*, 335 NLRB 1052, 1053 (2001). Rather, under *FES*, the Board places the burden on the employer raising such a defense to prove at the hearing that the applicant lacked the particular qualifications for the position(s) in question:

If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. *FES*, 331 NLRB at 12.

Clearly, Alliance did not carry that burden in this case, and given his finding that that Mr. Hoffman “had served a five-year apprenticeship and had undoubtedly performed the same sort of work assigned to Juan Rodriguez...” (ALJD, P. 11), the ALJ erred by concluding that Respondent did.

The General Counsel and Charging Party more than adequately demonstrated that Hoffman was qualified as a sprinkler fitter skilled in the “installation, maintenance, inspection, repair, service [of] fire protection systems.” Tr. 50. And, Hoffman *did* include service work on his application when he listed “TI” under the “Other Qualifications” section. GC Ex. 2.

Hoffman described “TI” or “Tentative Improvement” as performing inspections and upgrades on existing buildings where rooms have been changed or reconfigured. Tr. 38-39.

Additionally, when Mr. Hoffman's job application is compared against the other employees that Mr. Aho hired, it is clear that Mr. Hoffman's application stands out from the other applications in two distinct ways: first, Mr. Hoffman's application was *the only application* that actually listed any sprinkler experience and service experience whatsoever – Skulaseck's application only listed “pipefitting,” “plumbing,” “tool knowledge,” “basic construction,” “customer service,” undefined “sales,” various personal computer skills, and military air traffic control experience, while Mr. Rodriguez's application only listed the elementary school he attended in Mexico. Compare GC Ex. 2, 3 and 4. Second, Mr. Hoffman's application was the *only* application that listed any evidence of Union affiliation.

Aho repeatedly testified that it is difficult to find employees with adequate service experience, yet with Mr. Hoffman he had a journeyman applicant in the sprinkler fitter trade. Even if Aho's testimony that installer experience was not the same as service experience was credible, a point which we do not concede, Mr. Hoffman was clearly more qualified than any other applicant, especially given the undisputed evidence that Mr. Aho hired a service tech with *no experience* in the trade. Tr. 92; GC Ex 6; ALJD, P. 9 n. 11.

While Local 669 recognizes that the Board does not reverse an ALJ's credibility determinations lightly, *see Standard Drywall Products*, 91 NLRB 544 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951), in this case “a clear preponderance of all the relevant evidence establishes that the Administrative Law Judge's credibility resolutions were incorrect and without proper support in the record.” *Russell Stover Candies*, 221 NLRB 441 (1975). Indeed, when the undisputed facts that Alliance was hiring, the evidence contained on the employment

applications in the record, and the fact that the Judge also concluded that Mr. Hoffman was qualified to perform the same work as Mr. Rodriguez are viewed together, the ALJ's decision on this issue should be reversed even without disturbing his credibility findings.

Finally, any argument that Hoffman was *overqualified* for any of these positions is similarly untenable where Aho put on no evidence that he has a demonstrated practice against hiring overqualified candidates. *See Tambe Electric Inc.*, 346 NLRB 380, 382 (2006) *citing Hartman Bros. Heating*, 332 NLRB 1343, 1344 n. 9 (2000); *Germinsky Electric Co.*, 331 NLRB 1365, 1370-71 (2000); *Bay Control Services*, 315 NLRB 30 n. 2 (1994). Indeed, Aho acted surprised when Hoffman testified that he would have worked as a laborer, helper, or apprentice in light of his particular personal circumstances – further evidence that Aho never bothered to interview him about his skills because of his Union affiliation. Tr. 44-45.

Therefore, the second prong of *FES* has similarly been met in this case.

3. Antiunion Animus Led to Aho's Decision Not to Hire Hoffman

Only one witness' story remained consistent throughout this hearing – Aaron Hoffman. Hoffman's testimony that Aho interrogated him about his union affiliation before advising him that he need not apply has remained consistent throughout this process. Aho, on the other hand, has changed his story several times. Though Aho remembers that the conversation with Hoffman was in person, he failed to mention that there was another person who witnessed this supposed "in person" conversation until he called his office manager to testify at the hearing. Tr. 110-111.

Respondent continues to be unsure of exactly what was said in the conversation with Hoffman, and claims that he gets numerous applications for employment. Tr. 95. Even Respondent's after-the-fact witness similarly could not remember exactly what was said during

this alleged meeting in her office. Tr. 132-133. Hoffman on the other hand, recalled the conversation clearly and never wavered on exactly what was said. Tr. 33-35; 45.

Aho's anti-union animus was also on display at the hearing. During his testimony, he made it clear that as far as Union members go, "I don't need that trouble." Tr. 107. Indeed, though he repeatedly attempted to show he had hired union members in the past, that "record" was severely undermined by the yellow dog contract he had one former Local 669 member sign as a condition of employment with Alliance. GC Ex 7.⁴

Respondent also sought to include evidence of its own history with Local 669 and Business Agent Rich Gessner, lending support to Charging Party's claim that he told Hoffman on the phone he did not much care for Gessner and Local 669. Tr. 34; 59-66; 106-107. This testimony was further evidence that it is more probable than not that Aho interrogated Hoffman about his union affiliation and told him he "did this to himself" with regard to his status as a Local 669 member. Tr. 34.

And finally, based on the foregoing facts, even the ALJ correctly "recognize[ed] that Aho harbors union animus." ALJD, P. 3, 5. Therefore, the union animus prong of *FES* has likewise been established in this case.

4. The Employer's Shifting defenses Also Support a Finding that Alliance Illegally Refuse to Hire Mr. Hoffman.

Although the ALJ did not address this particular issue, Alliance's shifting defenses in this case likewise cut in favor of finding a refusal to hire violation, as well as finding that Mr. Aho illegally interrogated Mr. Hoffman about his Union affiliation.

⁴ In any event, the Board has rejected as a defense to anti-union animus an Employer's assertion that it has hired employees with union backgrounds in the past. *H.B. Zachry*, 332 NLRB 1178, 1183 (2000).

Specifically, Respondent's defenses prior to the hearing were that Hoffman's application was "no longer active" (Tr. 82) and that Hoffman was overqualified for the positions he ultimately filled. Tr. 82; G Ex 1(l), (m); GC Ex. 8. Then, at the hearing, Mr. Aho claimed that he was really always looking for a sales person who could do service work and that he never hired installer apprentices. Tr. 81; 89-90. Setting aside the argument that shifting defenses often confirm a discriminatory motive, these defenses can be rejected on their merits in any event. *Meaden Screw Products*, 336 NLRB 298, 302 (2001) (finding that "it is well-established that shifting of defenses weakens the employer's case because it raises the inference that the employer is 'grasping for reasons' to justify an unlawful discharge."). *See also Rochelle Waste Disposal, LLC*, 353 NLRB No. 38, slip op. at 39 (2008) ("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.").

With regard to Respondent's argument that Hoffman's application was no longer "active" because it was more than 45 days old when Alliance finally filled the sprinkler journeyman position, Charging Party submits that aside from being pretextual, this argument must fail due to the fact it would have been futile for Mr. Hoffman to follow up on his application with Alliance. After telling Hoffman repeatedly that he did not "hire union people," a reasonable person in Hoffman's position would not have much incentive to keep his application "up-to-date" because to do so was futile in light of those remarks by Mr. Aho. *Sunland Construction Inc.*, 311 NLRB 685, 686 (1993). While this defense might be valid in a situation where an applicant fails to follow an Employer's legitimate non-discriminatory application procedures, in this instance, any "application procedures" Alliance claims to have would be irrelevant because Mr. Aho made it clear to Hoffman from the outset that he would not hire him because of his union affiliation.

We addressed Respondent's "overqualified" argument above. However, at the hearing, the Employer focused on yet another defense that Hoffman was not qualified for a service position and he would not have hired him regardless of his Union affiliation. Tr. 11. This defense likewise must fail for the following reasons: to reiterate, as a sprinkler fitter journeyman with eleven years experience installing, maintaining, and repairing fire sprinkler systems, Hoffman was more than qualified for this position. Tr. 18-19. Mr. Aho's after-the-fact attempt at the hearing to make it seem as if a service and sales position was what he wanted all along in order to belatedly conform to the record is contradicted by his own Exhibit (R. Ex. 1), which was issued well before the controversy in this case developed; it says nothing of seeking to hire an applicant with sprinkler system sales experience. Perhaps most tellingly, Mr. Aho admitted that the person he ultimately hired to fill that position had no service experience and needed extensive training. Tr. 89-90; 92. To say that a friend with no sprinkler system experience was more qualified than Hoffman to perform service, inspections, and installation on automatic fire sprinkler systems simply defies credulity.⁵

Had Mr. Aho seriously considered Mr. Hoffman by giving him the opportunity to demonstrate his qualifications, he would have found an able and qualified candidate for this position. Mr. Aho claims that service experience was not listed anywhere on Mr. Hoffman's application – not only is this more evidence of pretext since there was no question about service work nor space for that description on the application (GC Ex. 2), but the person Mr. Aho ultimately hired had *even less* experience working with automatic sprinkler systems – and no experience in servicing those systems – on the face of his application. GC Ex. 6.

⁵ Once again, the objective nature of the evidence contained in the employment applications in the record are sufficient to reverse the ALJ's decision without disturbing the credibility determinations made in the decision, given that the analysis "is inconsistent with Board precedent." *See Double D Construction Group*, 339 NLRB 303, 305 (2003).

Thus none of Respondent's defenses serve to excuse its unlawful actions in this case. As a result, the ALJ should have rejected Alliance's post-hoc attempt to explain away its violations of the Act.

Accordingly, as all of the elements of *FES* have been established here, the ALJ's conclusion that Respondent did not illegally refuse to hire Mr. Hoffman should be reversed, and the Board should issue its traditional remedy in a refusal to hire case as set forth in *FES*, 331 NLRB at 14, including reinstatement to one of the positions that Alliance filled as well as providing him with a make whole remedy.

B. The ALJ's Conclusion That Mr. Aho Did Not Interrogate or Threaten Mr. Hoffman about His Local 669 Affiliation Should Be Reversed.

As set forth in greater detail above, the clear preponderance of the record evidence – especially the yellow dog contract which Mr. Aho specifically directed at Local 669, his testimony at the hearing that that as far as Union members go, “I don't need that trouble[]” (Tr. 107), the consistent testimony of Aaron Hoffman that Aho interrogated Hoffman about his Union affiliation, told him that he did not hire union people, and told him he “did this to himself” with regard to his status as a Local 669 member (Tr. 33, 34) – confirms that Alliance violated the Act by interrogating and threatening Mr. Hoffman as was alleged in the Complaint. Therefore, the ALJ's dismissal of these allegations should also be reversed. *Russell Stover Candies*, 221 NLRB 441 (1975).

C. Alternatively, the Board Should Order a Refusal to Consider Remedy for Mr. Hoffman.

Should the Board deny the Charging Party's Exceptions with respect to the refusal to hire issue in this case, Mr. Hoffman is still entitled to a refusal to consider remedy on two grounds.

First, the ALJ concluded in his decision “[t]hat there has been a violation of Section 8(a)(3) by Respondent for failing to consider Hoffman for employment.” ALJD, P. 9. However, neither the remedial portion nor the Order of the ALJ's decision in this case provides for a refusal-to-consider remedy for Mr. Hoffman. ALJD, P. 14-16. We urge the Board to correct this apparent oversight and include, at a minimum, the traditional *FES* refusal to consider remedies running to Mr. Hoffman. *See FES*, 331 NLRB at 10-11 n.18.

Second, with respect to the yellow dog contract issue in this case, the Judge independently concluded that

Respondent's policy is a continuing barrier to employees who wish to maintain their membership or who wish to exercise the rights guaranteed them under Section 7 of the Act. It is tantamount to an unlawful refusal to consider for hire. As the board said in *FES*, discriminatory refusal to consider for hire violate Section 8(a)(3) and (1) of the Act. I so find. ALJD, P. 14.

The ALJ ordered a make-whole remedy to everyone who applied for a job at Alliance since March of 2009 *except* Mr. Hoffman, concluding instead that “the policy did not result in the refusal to hire the alleged discriminatee, Aaron Hoffman, I do not find that Hoffman is entitled to any remedy at this stage.” ALJD, P.14.

This conclusion constitutes reversible error given the ALJ's findings that “the yellow dog contract policy was applied to Julio Rodriguez who came and went before Hoffman ever applied...” and “that at the time Hoffman filed his application Respondent required new hires to sign yellow dog contracts or to otherwise renounce union representation as a condition of being hired.” ALJD, P. 13. Therefore, as Mr. Hoffman was similarly adversely affected by the Employer's illegal policy, Mr. Hoffman should likewise be provided the same make whole remedy.

Finally, we note that the ALJ only recommended a make whole remedy with respect to the yellow dog contract issue beginning in March of 2009. However, the Employer had this illegal policy in effect since at least October of 2008. *See* GC. Ex. 7. Accordingly, the remedy should begin at that time.⁶

I. Conclusion

For the reasons stated above and in Charging Party's Exceptions, the ALJ's decision that Alliance did not illegally refused to hire Mr. Hoffman, or interrogate or threaten him about his Union affiliation should be reversed, Mr. Hoffman should be provided with a make whole and reinstatement remedy, and Respondent should be ordered to remedy its unlawful interrogation and threat to Mr. Hoffman. Alternatively, the Board should order Alliance to remedy its illegal refusal to consider Mr. Hoffman for employment.

Date: September 17, 2010

Respectfully submitted,

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⁶ And, since the Union was unaware of this policy until the day of the hearing in this case, Section 10(b) of the Act should not bar this particular remedy. *See Vanguard Fire and Security Systems*, 345 NLRB 1016, 1016-17(2005), *enf'd* 468 F.3d 952 (6th Cir. 2006).

Certificate of Service

I hereby certify that on September 17, 2010, I electronically filed Local 669's Brief in Support of Exceptions to the Decision of the Administrative Law Judge with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

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