UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302

and

REBEKAH SILVA, an Individual

and

TIFFANY KELLY, an Individual

and

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 8

19–CA–32298
19–CA–32319
19–CA–32435

Peter G. Finch, Esq., for the General Counsel.
David A. Hannah, Esq., for the Respondent.
Janet A. Irons, Esq., for Charging Party Silva.
Ms. Mary L. Maloy, for the Charging Party Union.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. This case was tried in Seattle, Washington, on October 26, 27, and 28, 2010, pursuant to a consolidated complaint that issued on July 30, 2010.[1] The complaint alleges that the Respondent violated Section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act (the Act) by actions that it took following the successful arbitration of a grievance filed by the individual Charging Parties. The answer of the Respondent Union denies any violation of the Act. I find that the Respondent violated the Act substantially as alleged in the complaint.

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

[1] All dates are in 2010 unless otherwise indicated. The charge in Case 19–CA–32298 was filed on January 8 and was amended on March 30 and May 28. The charge in Case 19–CA–32319 was filed on January 22 and was amended on April 14, May 27, and June 30. The charge in Case 19–CA–32435 was filed on March 26 and was amended on May 27.

Findings of Fact

I. Jurisdiction

The Respondent, International Union of Operating Engineers, Local 302 (Local 302) is an unincorporated association engaged in the representation of employees in bargaining with employers from its office in Bothell, Washington, where it annually collects and receives dues and initiation fees in excess of $1 million and from which it annually remits dues and initiation fees in excess of $1 million to its international headquarters in Washington, D.C. Local 302 admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Local 302 admits, and I find and conclude, that Office & Professional Employees International Union, Local 8 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Overview

The Union has, since April 1978, been recognized by Local 302 as the exclusive collective- bargaining representative of employees in the following appropriate unit:

> All office employees employed by Respondent at the Bothell office, excluding elected officers, elected or hired business representatives, staff assistants and organizers, confidential employees, and supervisors as defined in the Act.

The Union and Local 302 are parties to a collective-bargaining agreement effective from January 1, 2008, until December 31, 2010, that was signed on March 10, 2008. Early in 2008, Charging Party Silva organized a protest at which the Union distributed handbills at a Local 302 membership meeting informing the members that the Union had rejected the last and final offer of Local 302 and requesting that Local 302 negotiate a “fair and equitable” contract.

In 2009, the unit represented by the Union consisted of five office employees: Office Manager Monica Paullus, receptionist Tiffany Kelly, dues representative Sabrina Kihne, dues representative Rebekah Silva, and contract administrator Elle Ray.

Silva had been hired in September 2005 and was the contract administrator until April or May 2006 when she was asked to become a dues representative. The contract administrator job involved keeping track of all contracts including their expiration dates and reopener provisions and dealing with Local 302 representatives relating to the contracts. Silva received no evaluation or discipline relating to her performance as contract administrator.

Silva, working as a dues representative at Bothell, was responsible for various reports including reports from Local 302 satellite offices located in Yakima, Washington, and Juneau, Anchorage, and Fairbanks, Alaska, and retiree reports.

There was no shop steward for the Bothell unit in 2007. In June 2007, Silva expressed interest in being the shop steward to Union Representative Mary Maloy. She underwent training and became the shop steward of the unit in October 2007.

This case comes before the Board following the successful arbitration of a grievance

filed by the Union on behalf of Charging Parties Rebekah Silva and Tiffany Kelly. In 2009, Silva and Kelly were suspended for 10 days following Kelly obtaining and making a copy of the timesheet of Office Manager Monique Paullus. In December 2008, Kelly had been disciplined regarding her attendance by Malcolm Auble, the recording secretary/treasurer of Local 302. Auble informed Kelly that Paullus had "perfect" attendance. When retrieving a key from Paullus' desk, as she was entitled to do in the course of her job duties, Kelly saw and copied Paullus' timesheet, which showed that Paullus had less than perfect attendance. She brought that fact to the attention of her shop steward, Silva, by email. Local 302 monitors employee emails and learned of what had occurred. When Kelly was initially questioned about copying the timesheet, she was untruthful, but she thereafter confessed. Shop Steward Silva also was untruthful, protecting Kelly by denying that she was aware of Kelly's action. On March 3, 2009, both were suspended for 10 days. Grievances were filed and, on August 10, 2009, a charge was filed with Region 19 for the Board. Region 19 deferred the matter to the contractual grievance-arbitration procedure. Silva and Kelly testified at the arbitration as did Malcolm Auble, who had imposed the discipline.

The arbitration was held on September 15, 16, and 17, 2009. At that time, Silva was on a 6-month leave of absence that had begun on June 5, 2009. Kelly, who had been assigned several of Silva's job duties, was working.

On December 4, 2009, Silva returned to work from her leave of absence. Kelly, who had less seniority than Silva, was laid off. The layoff of Kelly is not alleged as an unfair labor practice. Silva, who prior to her leave of absence had various duties as dues representative, was assigned Kelly's chief job duty as receptionist in addition to most of her former duties.

On December 14, 2009, following the layoff of Kelly, the arbitrator ruled in favor of Silva and Kelly.

The issues herein relate to discipline issued to Kelly after the arbitration proceeding, discipline issued to Silva upon her return from her leave of absence and thereafter, as well as her discharge, and new restrictive personnel policies about which Local 302 refused to bargain. The complaint further alleges that Local 302 failed to consider Silva for the position of contract administrator, a bargaining unit position vacated by former employee Elle Ray, and refused to provide the resume of the individual awarded that position. I shall first deal with those subsidiary issues and then address the remaining issues alleged in the complaint.

B. The Contract Administrator Position

1. Failure to consider

The General Counsel contends that Local 302 failed to consider Silva for the position of contract administrator and that, if she had been awarded the position, Tiffany Kelly should have been recalled from layoff.

On January 19, Beverly Colegrove, the accountant for Local 302 who is responsible for financial records and payroll, informed the Union that Local 302 was seeking an assistant bookkeeper. Colegrove testified that she had needed an assistant for "quite some time." Colegrove was asked, "Why, up till last year, was an assistant not hired?" Colegrove nonresponsively replied, "[I]t became more apparent … if I were to walk out … and get hit by a bus, we did not really have anybody to fill in for my position." Colegrove did not explain how her job duties had been handled in the past on occasions when she was absent or on leave.

The Union sent the resumes of four members. One was interviewed, but rejected by Colegrove. On February 10, Local 302 hired Lucy Miyamoto as assistant bookkeeper. Miyamoto was a friend of Colegrove and had been the personal banker for the Union. In August 2009, Miyamoto had informed Colegrove that she was going to be laid off. No witness addressed the creation or filling of the new position at a time that Local 302 was experiencing financial difficulties sufficient to have caused the layoff of Kelly.

In early February, contract administrator Elle Ray ceased to be employed by Local 302. Ray's cessation of employment is not an issue in this proceeding.

On February 23, the contract administrator position was posted for 3 days pursuant to Section 4.7 of the collective-bargaining agreement which provides, in pertinent part:

> . . . [N]otice of all job vacancies for jobs shall be posted on all bulletin boards of the Employer. This notice will remain on the bulletin board for three (3) working days . . . . Only those employees who make application during the three (3) day period may be considered for the job.

Silva submitted her application by email at 11:23 p.m. on February 25, which was after the end of the third working day. On February 25, at the close of the business day and before Silva expressed any interest in the position, the contract administrator position was awarded to assistant bookkeeper Lucy Miyamoto.

Executive Assistant Sandra Early and Secretary Auble had discussed the possibility that Silva would apply for the position insofar as she held that position when she was initially employed. Both agreed that she should not be chosen as the contract administrator. Whether their determination was based upon discriminatory reasons is immaterial insofar as Silva was not excluded from the hiring process. *FES*, 331 NLRB 9, 15 (2000). Silva did not make timely application for the position. I shall recommend that the allegation relating to failure to consider Silva for the contract administrator be dismissed.

Although dismissing the foregoing allegation, I note that, notwithstanding Colegrove's purported need for an assistant, Miyamoto worked in that capacity for less than 3 weeks. There is no evidence of any effort to obtain an assistant bookkeeper after Miyamoto became the contract administrator. Although the failure of Silva to apply made the matter moot, I question whether Miyamoto was hired in order to assure that a unit employee other than Silva was awarded the position.

2. The information request

The complaint alleges that Local 302 refused to provide the Union with relevant information, the resume of Miyamoto. On March 3, Maloy verbally requested information relating to Miyamoto including her resume and job application. By email on March 4, Early advised the Union that Miyamoto had verbally applied for the contract administrator position on the first day of the job posting. Pursuant to the contact, the Union had been provided Miyamoto's date of hire, classification, and rate of pay. On March 24, by email, Maloy repeated her request. On March 26, Early refused, stating that the "additional information" did not relate to "any live dispute between the parties." Maloy explained that the request was to "monitor compliance with the contract." Early again responded, stating that Local 302 was under no obligation to provide Miyamoto's resume." The final communication, also on March 26, was from Maloy, repeating that, until the Union received the requested information it was unable to determine whether the Respondent had been in compliance with the contract.

"An employer, pursuant to Section 8(a)(5) of the Act, has an obligation to provide requested information needed by the bargaining representative of its employees for the effective performance of the Respondent's duties and responsibilities." *NLRB v Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). "An employer must furnish information that is of even probable or potential relevance to the union's duties." *Conrock Co.*, 263 NLRB 1293, 1294 (1982). Information sought by a Union relating to bargaining unit employees is presumptively relevant. *Tire America*, 315 NLRB 197, 198 (1994). The resume sought by the Union was relevant insofar it would establish Miyamoto's qualifications. The refusal of the Respondent to provide the foregoing information violated Section 8(a)(5) of the Act.

C. Preliminary Matters

The complaint alleges and the answer denies that Office Manager Monique Paullus is a supervisor as defined in the Act. It is undisputed that Paullus is, and has been, included in the bargaining unit. The record does not reflect the authority of the office manager at the time recognition was extended to the Union or whether the authority of the person in that position increased over the three decades since 1978. Board precedent recognizes that supervisors may be included in the bargaining unit by agreement of the parties with the caveat that conduct by such supervisors may not be attributed to the employer absent evidence of employer involvement with regard to that conduct. *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956).

No unlawful acts are attributed to Paullus, but the record is clear that she was a supervisor at least until January 21 when executive assistant Sandra Early, rather than Secretary Auble, was assigned the oversight of Local 8 unit employees. The minutes of a staff meeting of Local 8 unit employees on September 16, 2008, state that Auble informed the employees that "[a]ll Vacation/Sick Leave is to be approved by Monique [Paullus] your direct supervisor (it will then be placed on Malcolm's [Auble] Calendar and Shared Calendar.)" I do not credit Auble's denial of the foregoing remarks, set forth in a document that he admits he reviewed. Prior to taking her leave of absence on June 4, 2009, Silva had been taking prescribed medication that caused her to become drowsy. On May 1, 2009, Auble issued a written warning to Silva for falling asleep. The discipline stated that he considered an April 9, 2009, conversation in which Paullus spoke to Silva to have constituted "your verbal warning." On October 4, 2009, Auble disciplined employee Tiffany Kelly for being insubordinate to "your supervisor Monique Paullus" for allegedly failing to inform Paullus of her intent to attend the arbitration of her grievance.

When Silva and Kelly were suspended, their keys to the office of Local 302 were taken from them. Kelly testified without contradiction that, upon completion of their 10-day suspensions, they asked for their keys but were told in an email from Paullus or Auble that they "weren't going to be getting them back." Kelly explained that, insofar as she had no key, she was "escorted out" of the building each day by Kihne who would "watch and make sure that I left the building." Kihne, although denying that she "escorted" Kelly out of the building, acknowledged that, because Kelly had no key, she "would have to leave before I could leave."

Following the filing of the grievance relating to her suspension, but prior to the arbitration, Silva, as noted above, was warned on May 1 for falling asleep. She explained to Auble that she had experienced a reaction to medication that she had been prescribed. On May 11 she was warned for having sent out a mailing without postage. Business Agent Bob Franssen, who had requested the mailing, called the business office after the mistake occurred stated that he was "ok with the error" and wanted to "make sure that no one 'get in trouble for this.'" Auble ignored Franssen's request and issued a warning to Silva.

In June, Silva was directed by her physician to take a leave of absence. She returned from that leave of absence on December 4, 2009.

Silva, although having been employed in 2005 and working as a dues representative since 2006, was not given access to the raw data relating to the reports with which she worked. Thus, she was unable to correct simple typographical errors, such as transposed figures, once she made a data entry. In 2007, after Kihne was hired on May 1, 2007, Silva spoke with Paullus requesting that she be given authority to correct her own errors. Paullus told her that she would speak with Auble in that regard. She reported to Silva that Auble "said that he was going to give that ability to Sabrina [Kihne]," a new employee. The record does not establish the date this occurred. Silva began training to become shop steward in June, 2007. Whether Auble was aware of that fact is not established. Because Silva did not have authority to correct any mistake, typographical or otherwise, she had to bring any mistake to the attention of Paullus or Kihne. No management official of Local 302 explained why Silva, who had become the shop steward for the unit in October 2007, was not given the authority to correct her own errors.

D. Facts

On October 1, 2009, less than 2 weeks following the conclusion of the arbitration, Kelly was disciplined for alleged attendance problems and insubordination.

The discipline for attendance, a documented verbal warning, relates to an incident of tardiness on July 29, 2009, and 2 sick days on August 24 and 25, 2009, for which Kelly did not present a contemporaneous physician's excuse. On August 24, the physician's office directed Kelly not to come in with regard to her symptoms. A later appointment was postponed due to the arbitration. When she saw her physician thereafter, Kelly obtained a note from her physician that she provided to Auble. When Auble issued the attendance discipline he refused to accept the note, stating that he "didn't feel that the doctor would give me a doctor's note so much further after the . . . original absence." Auble did not deny making that comment. He admitted that if the reason for an attendance violation was "verifiable," that it "is usually not a problem." Documentary evidence confirms that absences for medical reasons were excused.

The discipline for insubordination, a written warning, relates to Kelly having not followed the chain of command in December of 2008 by directly contacting Business Manager Daren Konopaski regarding bringing her daughter to work on a day that schools were closed because of snow and again in late December 2008 regarding snow day procedures. Kelly again contacted Business Manager Konopaski in August 2009 and on September 1, 2009, concerning a doctor's note. Konopaski had, at a staff meeting shortly after his election in 2008, stated that he had an open door policy. Neither Konopaski nor any other manager contemporaneously informed Kelly that her contact was inappropriate, and none of the foregoing incidents were discussed with her at the time. The warning cites Kelly for the foregoing contact and then cites her for having informed her "direct supervisor," Paullus, that she would only be attending the arbitration during her direct testimony. Kelly disputes the foregoing, testifying that she informed Paullus that she would come in and "be there until I was needed in the arbitration." Paullus did not address the foregoing incident, and I credit Kelly.

On October 9 Maloy and Kelly met with Auble and Paullus at a first step grievance meeting. Maloy stated the Union's position that both disciplines "were retaliation towards the arbitration." Auble responded that "he was tired of hearing that and . . . how long were we going to play that card."

On December 4, 2009, the day that Silva returned to work from her leave of absence,

Kelly was laid off. The letter memorializing the layoff states that Local 302 had experienced "a significant decrease in reportable working hours . . . with a corresponding decrease in dues revenue." The foregoing decreases caused Local 302 "to look at several adjustments in personnel, and the front office in Bothell is no exception."

Also on December 4, after Kelly was laid off, Silva was informed of 39 errors in retiree reports that she had committed prior to her leave of absence. On December 7, she was issued a written reprimand for those errors. Sabrina Kihne explained that, shortly after Silva began her leave of absence, she discovered two or three errors in the retiree reports for which Silva had been responsible. She brought this to the attention of Paullus who directed her to speak with Auble. Auble requested Kihne to check the reports for the previous 2 months. She did so and estimated that that she found 10 or 12 errors. Thereafter, at Auble's request, an audit of the reports from 2006 to June of 2009 was conducted by the Welfare and Pension Administrative Service that revealed a total of 39 errors.

The foregoing audit was unprecedented. Silva had regularly complained to Paullus regarding errors in the reports she received from the satellite offices in Alaska. Paullus would typically reply, "[I]t's always been like that." Silva recalled one occasion upon which she and Paullus spoke about the errors with Auble, who stated that he would "talk to the supervisor of the staff of Alaska." There is no evidence that any audit was performed or that any employee was disciplined.

When the errors were brought to Silva's attention, they were not specifically discussed or analyzed. Silva was given a stack of documents reflecting the errors. She took the documents home to review, but she was then directed to return the documents insofar as they contained sensitive information, such as members' social security numbers. Thereafter the documents were returned to her in a green binder.

On January 21, Local 302 promulgated a Comprehensive Policy Statement for Local 8 Represented Employees (the Policy Statement) that applied only to employees in the bargaining unit and, inter alia, modified certain polices and promulgated a restriction upon arriving more than 15 minutes prior to the beginning of the workday or failing to leave "promptly" at the end of the workday. The foregoing restriction prompted the contract administrator, Elle Ray, to ask if she would be permitted to go to the restroom before leaving work.

Beverly Colegrove, the accountant for Local 302, explained that the restriction regarding reporting to work early or remaining after work was imposed pursuant to a suggestion by a representative of the Department of Labor in order to avoid "the appearance that they were there to be on the job" and entitled to overtime pay. No document reflecting that suggestion was offered into evidence, and the foregoing explanation was not stated to the Union. Although referring to an "appearance" that an employee was on the job, Colegrove acknowledged that there were nonwork areas at the offices of Local 302 including an employee breakroom. Arrival more than 15 minutes before the beginning of the workday without permission or remaining "after the end of a work shift" without permission were specifically designated in the Policy Statement as violations of the attendance policy for which employees were subject to discipline.

Union Representative Maloy was invited to the staff meeting at which the Policy Statement was promulgated, but was not advised of the purpose of the meeting or provided with the Policy Statement prior to its presentation at the meeting. The meeting was conducted by the attorney for Local 302, David Hannah, and executive assistant Sandra Early. All members of the Local 8 unit were present. The employees were informed that Early was replacing Auble in their chain of command. The employees and Maloy were given copies of the Policy Statement, and

Early read it to them. Attorney Hannah stated that the new policy packet "was in response to the arbitration." Maloy noted that the policy contained changes from preexisting policies. The employees were requested to sign the Policy Statement. Maloy protested, stating that the Union was "going to go on record right now to request to bargain over the effect of these changes." Hannah responded, saying that he expected Maloy "to say something like that." Maloy asked why the Policy Statement was being issued and Hannah, restating his earlier comment, responded that it was "a reflection of the arbitration or has to do with the arbitration." Hannah did not testify. I credit Silva and Maloy.

On February 3, Maloy repeated her request to bargain when both she and Hannah were present regarding another matter. Notwithstanding her request, Local 302 required the unit employees to acknowledge receipt of the Policy Statement on February 4. Thereafter there was an exchange of emails between Auble and Maloy relating to bargaining dates. On February 19, with no dates agreed upon, Auble wrote Maloy stating that he had reviewed Maloy's email and "did not find anything that obligates Local 302 to engage in either effects bargaining or decision bargaining." Maloy responded, noting that Hannah had acknowledged the Union's right to bargain "over the changes and past practices." Attorney Hannah, on February 20, responded, stating that he had only acknowledged the right of the Union to request bargaining, that Local 302 had evaluated the Union's request and that its response was as contained in Auble's letter "declining that request." On February 20, Maloy repeated the request of the Union and stated that the request was to bargain regarding the effects of the changes.

On January 25, Silva was disciplined by Early for allegedly attempting to remove the green binder that contained the documents reflecting 39 errors, which, as already noted, had been taken from her but then returned to her in the binder. The discipline, a typed verbal counseling, was prepared by Early based upon a report she received from Kihne prior to any conversation with Silva. On January 22, Paullus sent Early an email reporting that Kihne told her that, on January 21, Silva "mentioned she would like or was going to take" the green binder home. An email statement by Kihne reports that Silva had "picked up the green notebook . . . and started to prepare to take it home with her." Silva credibly denied that she attempted to take the binder home, that she simply said, "I wonder if . . . it's okay to take the binder home." Kihne responded that she could not, "[Y]ou can't take anything out of the office." Silva's testimony is consistent with the report of Paullus. Silva explained to Early that asking a question and "putting it in your hand" are two different things, but that Early, who had already prepared the discipline, stated that was "how she understood it to be." The Union had instructed its members, even if they disagreed with the facts as stated in a disciplinary document, to sign and date the document in order to "avoid an insubordination type situation," and then file a grievance. Thus, Silva signed and dated the document.

On February 24, Silva, at her request, met with Early. Silva complained of being unable to competently handle her work insofar as, in addition to her former duties, she had been assigned Kelly's duties as the receptionist who was responsible for handling incoming telephone calls, as well as 9-day letters, a task formerly handled by Kihne, and billings for "no-doughs" and applicants, a task formerly handled by Paullus. (The 9-day letters and "no-doughs" were notifications regarding delinquent payments.) It appears that Early investigated and confirmed the accuracy of Silva's report insofar as her summary of the meeting, with added notes, reflects that on February 25, the following day, Kihne and Paullus reassumed those former duties.

Silva told Early that she felt the work environment was adversarial. Early responded that it was "absolutely my right to continue to file grievances but she felt that . . . it would raise the resentment level with my coworkers even more as time went on." Early's notes of the meeting confirm that Silva asserted that the work environment was the "epitome of hostility." Although

her notes do not reflect her grievance filing response, she did not deny making that statement.

Following Silva's return to work on December 4, 2009, Local 302 monitored her work, keeping a record of any errors that she made. Executive assistant Early confirmed that, because Silva "couldn't make changes to the data, she had to bring those errors to the attention of Ms. Kihne or Ms. Paullus for them to make the corrections." Although Early initially claimed that, upon assuming responsibility for the unit employees from Auble that she was to "continue that collection of investigation," she later was asked, "Did you elect to provide Ms. Silva with some period of time so that you could get a picture of her work performance over a period of time?" Early responded that she felt that "a three month period of time after return from a six month leave of absence was sufficient . . . [for Silva] to get back up to speed on their job duties." That response suggests that the scrutiny of Silva was preplanned prior to her return to work following the arbitration and involved management officials in addition to those who, in December, were in her reporting chain of command.

Silva was never advised that her performance was being consistently monitored or that she had purportedly been given 3 months to "get back up to speed." Early testified that she received reports of Silva's errors from Paullus "probably three times a week."

The absence of collegiality among the clerical employees that Silva characterized as an adversarial relationship, reported by Early in her notes of the meeting on February 24 as the "epitome of hostility," is fully consistent with Paullus reporting to Early three times a week of Silva's alleged deficiencies.

Notwithstanding reports of errors, Early did not inform Silva of her mistakes, the continuing monitoring, or a need to improve her performance. Indeed, it was Silva who, on February 24 requested the meeting with Early regarding her work situation. Even at that meeting, Early did not inform Silva that Local 302 was monitoring her performance and compiling the errors attributed to her.

On March 9, Silva was called to a meeting by Early at which Union Representative Maloy was present. Paullus was present as note taker for Local 302. Business Representative Darren Konopaski was present at Early's request as an observer. The meeting began with Early handing over a stack of documents that she stated reflected 146 errors committed by Silva from December 7, 2009, through March 5. The meeting notes made by Paullus reflect that Union Representative Maloy began reviewing the documents. Early interrupted her stating, "I only have an hour, I am only glad to meet at another time and go through them." Neither Silva nor Maloy were provided the documents when the meeting ended.

Whether the reported errors included those reported by Silva herself, who could not correct her own typographical errors, is immaterial insofar as Early performed no analysis in that regard. She acknowledged that some of the errors reported on the list were identified by Silva. Asked whether she could, at the hearing herein, "tell us . . . how many of the errors were self-identified by Rebekah [Silva]," Early answered, "No I can't." Early was then asked, "It's just the fact that she had them, was enough?" Early answered, "Yes."

The Respondent attached to its brief a "Declaration" by Paullus with an attachment that addresses the 146 errors presented to Silva. Counsel for the General Counsel filed a motion to strike the foregoing, and the Respondent filed a response to which the General Counsel filed a reply. The declaration of Paullus and her notations relating to the 146 errors was prepared following the hearing. It is not part of the record herein. Insofar as Early's testimony establishes that she did not know how many of the errors Silva had identified herself and that it did not

make any difference to her, analysis of whether Silva identified a particular error is immaterial. The motion to strike is granted.

After denying Maloy the opportunity to review the errors at the March 9 meeting, Early recited various criticisms of Silva relating to having to be reminded of procedures and not "taking the initiative to learn the procedures." Following a discussion of Silva having been assigned Kelly' job duties, Maloy noted that Kelly's duties were "brand new" to Silva, that she was not filing grievances, and that "[t]his is clearly retaliation." Early responded that it was not retaliation. Silva recalls that Maloy stated that she felt that Silva "was being set up to fail."

Due to Early's time constraints, the March 9 meeting was not concluded. Early stated her intention of "calling another meeting" on March 23. Early acknowledged that, prior to the meeting, she discussed with Auble giving Silva a 30-day timeframe in which to improve her performance or be subjected to discipline, but would reserve judgment until after the meeting. Pallus' notes confirm that Early stated that she "felt we should get together now to address [the errors] and perhaps a warning in 30 days." Silva recalls that Early stated her intention to "give me an additional 30 days to try and correct my work, but they were going to schedule a meeting for two weeks out to discuss if discipline was even needed." Early did not deny making that comment. Termination was not mentioned. At worst, Silva was to receive a warning.

In the meeting, Early stated that she considered Silva to have acted unprofessionally insofar as, at the arbitration of her grievance, she "heard and watched my sarcastic tone when answering questions." Early claims that her comment was prompted by reports from Pallus and Kihne that Silva "was not behaving very professionally in the office." Rather than cite whatever reports they made, Early admits citing what she perceived as Silva's "very sarcastic tone of voice at times, particularly during cross examination and condescending tone of voice" when testifying at the arbitration. Union Representative Maloy confirms that Early commented upon the way that Silva had "talked to Malcolm" at the arbitration. When Early addressed this issue in her testimony, Counsel for the Respondent called her attention to February 24. Maloy was not present at the February 24 meeting. Maloy's corroboration of Silva's testimony confirms that Early's comment was, as alleged in the complaint, made on March 9.

At the hearing, Local 302 presented a list of errors committed by Pallus and Kihne, neither of whose work had been scrutinized on a daily basis. Early testified that the lists were generated at the time she prepared the report on Silva. She acknowledged that the list for Pallus had been created by Pallus herself and that the source documents reflecting the errors attributed to Kihne had been generated by "either or both" Pallus and Kihne. Silva did not have access to source documents. Early confirmed that the lists of errors that Paullus and Kihne had attributed to themselves did not include any typographical errors. Silva could not correct typographical errors. The lists of Paullus and Kihne were not the product of 3 months of daily scrutiny. Any contention that Silva was not singled out has no merit.

On March 10, Early "shadowed" Silva. Citing Silva's looking for a receipt that was, according to Early, on Silva's desk, Early concluded that Silva's time management was "worse than I thought." Although agreeing with counsel for Respondent that she reported her observations to "Mr. Auble or Business Manager Konopaski," Early did not state whether she reported to either or both of them, and she did not state what she reported. The termination letter of March 29 does not reflect any deficiencies by Silva observed during the job shadowing. Auble mentioned no report from Early in his testimony. Konopaski did not testify. The absence of any reference to substandard performance by Silva on March 10 in the termination letter, which cites the January 25 counseling that Local 302 claims was not discipline, suggests that no report was made. Early did not testify to any involvement in the discharge decision. I do not

credit Early's testimony that she made a report.

Following the March 9 meeting, Silva consulted her physician with regard to "stress and anxiety." The physician prescribed another leave of absence. On March 16, Silva and Maloy came to Early's office to present the note from Silva's physician for a medical leave of absence on March 16th. Early was absent, but they spoke by telephone and the leave was granted. The followup March 23 meeting did not occur, thus neither Maloy nor Silva had any opportunity to review the errors attributed to Silva.

On March 29, while on her leave of absence, Silva received a letter, delivered by a courier, discharging her. The letter refers to various incidents over a 2-year period, from February 2008. The termination letter of March 29 incorrectly states that Silva and Maloy "were provided an opportunity to be confronted by these errors and to comment on them at the March 9 meeting."

The Local 302 Policy Statement sets out the steps of the progressive discipline system:

Documented coaching and counseling
Written warning
One-day suspension
Three-day suspension
Termination

Executive assistant Early, Silva's supervisor, did not explain the failure to conduct the follow-up meeting on March 23. Although Silva was on a leave of absence, she could have been contacted regarding her availability for that meeting. Early did not testify to any involvement in the discharge decision. Although Auble acknowledged having input into the decision, stating that he provided "the bases that are contained in the letter," he did address the decision of Local 302 to discharge Silva without giving Silva and Maloy the opportunity denied to them on March 9 to review the documents. The termination letter is signed by Business Manager Daren Konopaski who was present as an observer at the March 9 meeting. Thus he was aware that the meeting was not concluded, that Early had agreed that Maloy and Silva were to be given time to review the documents, that another meeting was to be held, and that Silva was to be given 30 days in which to improve her performance. Konopaski did not testify.

E. Analysis and Concluding Findings

The complaint alleges that the discipline of Kelly and Silva and the discharge of Silva violated Section 8(a)(1), (3), and (4) of the Act. The changed policies and refusal to bargain over their effects are alleged as violations of Section 8(a) (1) and (5). The complaint also alleges that three statements violate Section 8(a)(1) of the Act.

The central issue herein is the discharge of Silva. I shall first address the 8(a)(1) and 8(a)(5) allegations, and then the discipline and discharge issues.

1. Statements alleged as violating Section 8(a)(1)

The complaint alleges that the attorney of the Respondent violated the Act by stating that the revision of the Respondent's policies was a result of the arbitration. Attorney Hannah did not testify. Although Colegrove testified that the prohibition with regard to arriving early or not leaving promptly resulted from a suggestion by a representative of the Department of Labor, her claim of a suggestion is unsubstantiated by any document. Hannah told the employees that

the changes were "in response to the arbitration." No further explanation was offered. Informing employees that more restrictive personnel policies are being imposed in response to employees having exercised their right to file grievances and pursue them to arbitration as provided in the collective-bargaining agreement is coercive and violates Section 8(a)(1) of the Act.

The complaint alleges that the Respondent violated the Act by informing an employee that her participation in an arbitration was unprofessional. The credible testimony of Silva establishes that Early told Silva that her actions were unprofessional because she "heard and watched my sarcastic tone when answering questions." Early admits stating to Silva that, at the arbitration, she used a "sarcastic tone of voice at times." The Respondent argues that criticism of the manner in which Silva participated does not violate the Act. I disagree. Testifying on her own behalf was not unprofessional. The transcript of the proceeding that Early herself made reflects no sarcasm. Neither the arbitrator nor any counsel cautioned Silva with regard to the tone of her testimony. Early's statement to Silva on March 9 that she considered her conduct at the arbitration hearing to be unprofessional, predicated upon her judgment of the tone of Silva's testimony, effectively informed Silva that her participation in the arbitration was unprofessional. The Respondent, by informing an employee that her participation in an arbitration was unprofessional, violated Section 8(a)(1) of the Act.

The complaint alleges that, on October 9, 2009, Auble "admonished" Kelly for asserting that the Respondent's actions were in retaliation for her activities in support of the Union. The exchange in which Maloy asserted that Kelly's discipline was retaliation and Auble responded that he was "tired of hearing that" and asking how long the Union was "going to play that card" occurred at a grievance meeting where both parties were advocating their respective positions. There was no admonition to Kelly. I shall recommend that this allegation be dismissed.

2. The Policy Statement

The complaint alleges that the promulgation of the Policy Statement provision prohibiting "reproduction and/or removal of sensitive materials . . . either in hard copy or electronically" was being interpreted as restricting employees from printing or keeping email messages relating to their terms and conditions of employment and that requiring employees to leave "promptly" after their work shift interfered with employee Section 7 rights in violation of Section 8(a)(1). The complaint further alleges that the Policy Statement constituted a mandatory subject of bargaining and that promulgation of the Policy Statement without notice to or bargaining with the Union violated the Act.

The Board recognizes that employers "have a substantial and legitimate interest in maintaining the confidentiality of private information." *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). Insofar as rules relating to confidentially do not address employees' discussion of their wages or conditions of employment, "employees would not reasonably construe the rule as precluding them" from discussing their wages and conditions of employment. Ibid. I find that the rule relating to sensitive materials is not invalid on its face. The Union requested to bargain effects. As hereinafter discussed, and contrary to the position taken by the Respondent in its email exchanges with the Union, the Respondent does have an obligation to bargain.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that rules requiring employees to leave the employer's premises immediately after the completion of their shift would be considered valid only if the rule "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." Colegrove admitted that the offices of the Respondent

include nonwork areas including a breakroom. In early 2008, unit members had handed out leaflets at a Local 302 membership requesting that Local 302 negotiate a "fair and equitable" contract. The Policy Statement, by its terms, applies only to employees represented by the Union, Local 8. There is no evidence that the no-access rule was disseminated to all employees. Thus, under *Tri-County Medical Center*, supra, the rule is invalid. Even if I were to credit Colegrove's explanation of an undocumented "suggestion" by a representative of the Department of Labor regarding an appearance that an employee could be working, that proffered business reason would not justify a denial of access by off-duty employees to nonwork areas. *Lafayette Park Hotel*, supra at 829. The reason for the restriction stated to employees was that the rule was "in response to the arbitration."

By imposing unlawfully broad restrictions upon access to nonwork areas of the Respondent's facility only upon off-duty employees represented by the Union, the Respondent violated Section 8(a)(1) of the Act.

As reflected in the exchange of emails following the January 21 promulgation, the Union sought to bargain regarding the effects of the policies. Notwithstanding the request of the Union on January 21, a request that was repeated on February 3, the Respondent required unit members to acknowledge their receipt of the unilaterally imposed policies on February 4. Thereafter, the Respondent contended that it had no obligation to bargain.

The Respondent unilaterally imposed new restrictions upon unit employees by, inter alia, prohibiting them from arriving early to work or not leaving "promptly" and subjected them to discipline under the attendance policy for violations of that policy. The Union requested bargaining, a request denied by the Respondent. "It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representing a reasonable and meaningful opportunity to discuss the proposed modifications." *Flambeau Airmold Corp.*, 334 NLRB 165 (2001). Any argument that the foregoing did not constitute a substantial and material change is refuted by the inclusion of the access restrictions as infractions subject to discipline under the Respondent's attendance policy.

By refusing to bargain with the Union regarding the effects of its changed policies relating to unit employees, the Respondent violated Section 8(a)(5) of the Act.

3. The discipline and discharge allegations

The complaint alleges that the discipline administered to Kelly on October 1 violated the Act. Kelly received a verbal warning relating to attendance and a written warning relating to her contact with Business Agent Konopaski and alleged insubordination to her "direct supervisor," Paullus. The complaint further alleges that the discipline issued to Silva on December 7 and January 25 and her discharge on March 29 violated Section 8(a)(1), (3), and (4) of the Act.

In assessing the evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find that the filing of grievances over their suspensions by Silva and Kelly and their participation in the arbitration proceeding constituted protected union activity of which the Respondent was fully aware. The discipline of Kelly and discipline and discharge of Silva constituted adverse employment actions.

The Respondent bore animus towards employee grievance filing activity. An employer's cooperative relationship with its employees' collective-bargaining representative does not preclude finding that an employer bears animus towards employees who assert their

representational rights relating to grievance filing. *New Orleans Cold Storage Co.*, 326 NLRB 147 at fn. 1 (1998) enfd. 201 F.3d 592 (5rh Cir. 2000).

In this case, the Respondent's relationship was less than cooperative. The Respondent refused to bargain regarding the effects of its changed policies. Although, at the hearing herein, Colegrove gave an explanation unrelated to the arbitration as the basis for restricting employee access to the facility, that explanation was not given to the Union. Attorney Hannah stated to the employees that the Policy Statement was being issued "in response to the arbitration."

Further evidence of the Respondent's animus is established by Early's informing Silva, on February 24, that she felt that her grievance filing activity raised "the resentment level" with her coworkers and, on March 9, that her participation in the arbitration had been unprofessional.

Additional evidence of the animus of the Respondent towards employees who filed and pursued grievances is establish by circumstantial evidence including specifically the failure of the Respondent to return their keys to the office to Silva and Kelly after they served their suspensions or to return a key to Silva after the arbitrator ruled in favor of Silva and Kelly.

An inference of discriminatory motivation may be established without direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Factors that the Board has relied upon in finding discriminatory motivation include suspicious timing, *Electronic Data Systems Corp.*, 305 NLRB 219 (1991), failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain, *K & M Electronics*, 283 NLRB 279, 291 (1987), and failure to follow its own progressive discipline policy, *Guardian Automotive Trim, Inc.*, 340 NLRB 475 at fn. 1 (2003).

I find that the animus of the Respondent toward employee grievance filing activity was a substantial and motivating factor for Respondent's actions against Silva and Kelly. *Manno Electric*, 321 NLRB 278 (1996). Thus it was incumbent upon the Respondent to demonstrate that the same action would have taken place even in the absence of the protected conduct.

The complaint alleges that the Section 8(a)(3) allegations relating to Silva and Kelly also constituted n 8(a)(4) violations. As hereinafter discussed, I am satisfied that the retaliation against Silva and Kelley was as result of their grievance filing activity and participation in the arbitration proceeding. The unfair labor practice charge in Case 19–CA–32051 was not filed until August 10, 2009, and it was deferred to arbitration. There is no direct or circumstantial evidence establishing animus by the Respondent related to the filing of unfair labor practice charges or cooperation in Board proceedings. I have found no case authority permitting the finding of a derivative 8(a)(4) violation. Thus, I shall recommend dismissal of the 8(a)(4) allegations.

a. The discipline of Kelly

As discussed above, on October 1, within 2 weeks of her testimony at the arbitration, Kelly was issued a verbal warning for attendance and a written warning for failing to follow the chain of command and insubordination.

With regard to the verbal attendance warning, Kelly's uncontradicted testimony establishes that she presented Auble with an excuse from her physician which he refused to accept because he "didn't feel that the doctor would give me a doctor's note so much further after the . . . original absence." If Auble had any question regarding the authenticity of the document that Kelly presented, he would have called the physician. Documentary evidence

confirms that absences for medical reasons were excused. Auble did not address his rejection of Kelly's medical excuse.

Regarding the written warning for not following the chain of command and insubordination, Auble cited Kelly for having contacted Business Manager Daren Konopaski some 9 to 10 months earlier, in December 2008, and again in August and September 2008, prior to her testimony at the arbitration. No one contemporaneously informed Kelly that her contact was inappropriate, and Kelly understood, from comments he made at a staff meeting, that Konopaski had an open door policy. The warning also cites Kelly for having allegedly informed her "direct supervisor," Paullus, that she would only be attending the arbitration during her direct testimony. Kelly, who I have credited, informed Paullus that she would come in and "be there until I was needed in the arbitration." Paullus did not address the foregoing incident.

The failure of Auble to address his refusal to accept the medical excuse presented by Kelly or to explain why, insofar as he doubted its authenticity, he did not contact her physician, is compelling evidence that he was retaliating against this employee who had challenged the suspension that he had imposed. The foregoing conclusion is confirmed by his dredging up her contact with Business Manager Konopaski, conduct not established to have been inappropriate or commented upon at the time it occurred. Kelly told Paullus that she would "be there until I was needed in the arbitration." Paullus did not deny the foregoing comment, which I have credited. Whether Paullus, who the Respondent denies was a supervisor, somehow assumed that Kelly would be "needed" at the arbitration of her grievance only when giving direct testimony is not established because Paullus did not address this incident.

The discipline of Kelly was retaliatory. The Respondent has not established that the discipline would have been issued in the absence of Kelly's protected union activity. The Respondent, by disciplining Kelly for absences for which she should have been excused, permitted contact with the business agent, and insubordination that did not occur, violated Section 8(a)(3) of the Act.

b. The discipline of Silva

On December 4, 2009, the day she returned from a 6-month leave of absence, Silva was confronted by Auble with 39 errors for which she was allegedly responsible, all of which had been compiled pursuant to an unprecedented audit that covered several years. Although errors regularly appeared in reports from the satellite offices in Alaska, there is no evidence of an audit being conducted to quantify the errors nor is there evidence of any employee having been disciplined previously for data entry errors. Although the first step of the Respondent's disciplinary system provides for a documented coaching and counseling, Silva, who had never been disciplined for data entry errors, was not counseled or coached. Kelly was disciplined within 2 weeks of her testimony. Silva was issued a written warning as soon as she returned to work. The Respondent did not establish that the discipline, which was inconsistent with its progressive discipline policy, would have been issued in the absence of Silva's protected grievance activity and participation in the arbitration. By issuing a written warning to Silva because of her protected activity, the Respondent violated Section 8(a)(3) of the Act.

On January 25, Early issued a typed verbal counseling to Silva for allegedly attempting to remove the green binder that contained the documents reflecting 39 errors, which, as already noted, had been taken from her but then returned to her in the green binder. As already discussed, Silva was asked to acknowledge receipt of the counseling and did so. The Respondent, notwithstanding the progressive discipline policy providing that the first step thereof is a "[d]ocumented coaching or counseling," argues in its brief that this did not constitute

discipline. The March 29 termination letter delivered to Silva makes reference to the verbal counseling. The counseling did constitute discipline.

Early, relying upon Kihne's report that Silva had "picked up the green notebook . . . and started to prepare to take it home with her," wrote the disciplinary counseling with no further investigation. Silva's explanation that she simply said, "I wonder if . . .it's okay to take the binder home," was consistent with report of Pallus that Kihne told Pallus that Silva "mentioned she would like or was going to take" the green binder home. Notwithstanding the distinction between asking a question and "putting it in your hand," and without confronting Kihne with the consistency between the report of Pallus and Silva's explanation that she only made a statement, Early issued the discipline, stating that was "how she understood it to be."

It is undisputed that the binder never left the office. Early's failure to obtain Silva's explanation prior to preparing the discipline and to investigate further when Silva's explanation was consistent with the report that she had received from Pallus confirms the Respondent's discriminatory intent. "The failure to conduct a meaningful investigation or to give the employee [who is the subject of the investigation] an opportunity to explain" are clear indicia of discriminatory intent. *K & M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). The Respondent "not only must separate its tainted motivation here from any legitimate motivation, but it must persuade that its legitimate motivation outweighs its unlawful motivation so much that the Company would have imposed the discipline even in the absence of any union activities." *Formosa Plastics*, 320 NLRB 631, 648 (1996). The Respondent has not done so. The record establishes that the discipline issued was discriminatorily motivated, and the Respondent has not demonstrated otherwise. By issuing a verbal counseling to Silva on January 25, the Respondent violated Section 8(a)(3) of the Act.

c. The discharge of Silva

Silva was discharged by a letter dated March 29 delivered by a courier. At that time she was on a medically prescribed leave of absence effective March 16 for stress and anxiety. Upon her return to work from a previous leave of absence, Silva was confronted with 39 errors that had been compiled while she was on leave of absence and issued a written warning for those errors. Even if, contrary to my finding, that warning was not discriminatory, the progressive discipline policy for a first offense dictated counseling or coaching, not a written warning.

From December 7, 2009, until March 5, the Respondent compiled errors that Silva committed as reported by Paullus "three times a week." Silva was not informed that her performance was being monitored. She was never, notwithstanding the reports of Paullus, spoken to regarding her performance, the monitoring of which she was unaware. On February 24, aware that she was not performing fully competently, Silva requested a meeting with Early. Early did not disclose to Silva that her performance was being monitored. She did relieve her of responsibilities for 9 day letters and "no-doughs" the following day.

The Respondent offered no evidence regarding the reason that Silva had been denied access to raw data and was therefore unable to correct her own errors. Even simple typographical errors had to be corrected by Paullus or Kihne, both of whom had access to raw data and who, through Paullus, were reporting any mistakes that Silva made. Auble did not address why, in 2007, he refused to give access to raw data to Silva but did give that access to Kihne. Shop steward Silva's status as a second class employee was exacerbated when, at the time she and Kelly were suspended, her keys to the office were taken from her. They were never returned.

On December 4, because Kelly had been laid off, Silva was assigned the duties of the receptionist, a duty she had never previously performed and that involved the constant interruptions of telephone calls and dealing with members who came to the office. Union Representative Maloy's comment on March 9 that Silva was being "set up to fail" was true.

Auble was not in the meeting on March 9, and he did not testify to having received any report of that meeting. Business Manager Konopaski was present, thus he was aware that Silva and Maloy had been denied the opportunity to review the documents relating to the errors attributed to Silva at that meeting but had been assured that they would be given the opportunity to do so at a subsequent meeting 2 weeks out, on March 23. He also was aware that Early, on March 9, informed Silva and Maloy that she intended to give Silva "an additional 30 days to try and correct my work, but they were going to schedule a meeting for 2 weeks out to discuss if discipline was even needed." Paullus' notes reflect that Early mentioned "perhaps a warning."

On March 16, Silva and Maloy came to Early's office to present the note from Silva's physician for a medical leave of absence on March 16th. The leave was granted.

The Respondent did not address or explain why it would grant a leave of absence to Silva on March 16 and on March 29, 13 days after the granting of that leave of absence, discharge her. Although the termination letter states that Silva and Maloy "were provided an opportunity to be confronted by these errors and comment on them," it is undisputed that no such opportunity was provided because of Early's time constraints. The Respondent offered no testimony regarding why the meeting "two weeks out" was not held. Even with Silva on a leave of absence, she and Maloy could have been given that opportunity. The litany in the termination letter relating to Silva's job performance does not mention any report of Early's observation of Silva on March 10, and I have not credited her testimony that any such report was made. "By dredging up old wrongs, the Respondent herein gave strong evidence that its asserted reasons were not its real reasons and that its real reasons were discriminatory in character." *International Automated Machines*, 285 NLRB 1122, 1131(1987).

Early did not consider the 146 errors to have constituted cause for discharge. If the errors had been cause for discharge, Silva would have been discharged on March 9. Similarly, if her overall job performance warranted discharge, she would have been discharged on March 9. The second step of the discipline procedure calls for a written warning. Termination was not mentioned at the March 9 meeting. Silva's credible testimony and the notes taken by Paullus reflect that the most severe discipline mentioned was a warning.

The Respondent's brief argues that Konopaski "had no choice but to follow Mr. Auble's recommendation and terminate Ms. Silva's employment." Although Auble testified that he gave "input" to Konopaski regarding the termination letter, the bases cited in the termination letter, he did not testify that he made any termination recommendation. Auble was not Silva's supervisor. Early was Silva's supervisor. Early did not testify to having recommended termination. The record contains no evidence of any termination recommendation or the date thereof.

Although the arbitration occurred in September 2009 and the award, favorable to Silva and Kelly, issued in December 2009, the Respondent remained conscious of Silva's grievance filing activity. On February 24, Early told Silva that she felt that her grievance filing activity raised "the resentment level" with her coworkers. On March 9, Early accused Silva of using a "sarcastic tone when answering questions" at the arbitration. Early's comments, made in the presence of Business Agent Konopaski, confirm that Silva's participation in the grievances relating to her suspension and the suspension of Kelly remained in the consciousness of the Respondent on March 9.

At that meeting, Union Representative Maloy stated that "[t]his is clearly retaliation," and that Silva "was being set up to fail." Maloy's comments suggested that the Union would consider further discipline against Silva to be retaliatory and, implicitly, that grievances would be filed to protest any discipline.

Konopaski, on March 9, heard Early's criticism of what she perceived as Silva's unprofessional conduct at the arbitration and Union Representative Maloy's contention that the actions against Silva were retaliatory and that she was being "set up to fail." On March 9, Early referred to giving Silva an additional 30 days to improve her performance and "perhaps a warning," which would have been consistent with the Respondent's progressive discipline system.

No witness explained why, after Silva had been told on March 9 that she was to be given an opportunity to review the errors attributed to her, given an additional 30 days to improve her performance, and possibly issued a warning, that the Respondent abandoned its progressive discipline policy and decided to discharge her. The record does not establish whether the Respondent, by Konopaski alone or in consultation with Auble and Early, decided that it could avoid further grievances filed by Silva with no repercussions by discharging her when she was on her medical leave of absence. Konopaski, who issued the termination letter, did not testify.

The record establishes that, despite having been told that she was to be given an opportunity to review her alleged errors and given an additional 30 days to improve, Silva was discharged. There was no mention of termination on March 9, only a possible warning. Neither Auble nor Early testified to making any recommendation for discharge. Konopaski did not testify. The absence of any explanation for the Respondent's precipitous abandonment of its progressive discipline policy, contrary to what the affected employee had been told on March 9, compels an adverse inference that, if an explanation had been given, it would reveal that the Respondent was motivated by animus towards Silva's protected grievance filing activity.

The Respondent has not established that it would have discharged Silva in the absence of her protected grievance filing union activity. The Respondent, by discharging Rebekah Silva, violated Section 8(a)(3) of the Act.

Conclusions of Law

1. By promulgating an unlawfully broad no- access rule that applied only to employees represented by the Union, informing employees that its new and revised policies were "in response to the arbitration," and informing an employee that her participation in an arbitration proceeding was unprofessional, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By warning Tiffany Kelly and by warning and discharging Rebekah Silva the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By failing and refusing to bargain the effects of its new and modified policies with the Union and failing and refusing to provide the Union with requested relevant information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent must rescind the unlawfully broad no-access rule and bargain the effects of its new and revised policies with the Union. The resume of Lucy Miyamoto that was requested by the Union is in the record, and it need not be resubmitted.

The Respondent must rescind the unlawful discipline issued to Tiffany Kelly and Rebekah Silva and inform them that this has been done and will not be used against them.

The Respondent having unlawfully discharged Rebekah Silva, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from March 29, 2010, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).[2]

The Respondent will also be ordered to post and email an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, International Union of Operating Engineers, Local 302, Bothell, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating an unlawfully broad no access rule that applies only to employees represented by the Union.

(b) Informing employees that new restrictive policies were in response to an arbitration.

(c) Informing an employee that her participation in an arbitration proceeding was unprofessional.

(d) Warning and discharging employees because they engaged in protected grievance filing activity.

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[2] The brief of the General Counsel acknowledges that backpay should be tolled until September 1, 2010, when Silva was cleared by her physician to return to work.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Failing and refusing to bargain the effects of new and modified policies with the Union.

(f) Failing and refusing to provide the Union with requested relevant information.

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

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

(a) Rescind our unlawfully broad no-access rule.

(b) Notify and give Office & Professional Employees International Union, Local 8, the opportunity to bargain before making changes policies relating to the terms and conditions of employment of unit employees. The appropriate unit is:

> All office employees employed by Respondent at the Bothell office, excluding elected officers, elected or hired business representatives, staff assistants and organizers, confidential employees, and supervisors as defined in the Act.

(c) Within 14 days from the date of this Order, rescind the discriminatory discipline issued to Tiffany Kelly and Rebekah Silva.

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

(e) Make Rebekah Silva whole for any loss of earnings and other benefits suffered as a result of her discharge, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of this Order, remove from our files any reference to the unlawful warnings of Tiffany Kelly and the unlawful warnings and discharge of Rebekah Silva, and within 3 days thereafter, notify Tiffany Kelly and Rebekah Silva in writing that this has been done and that the discipline and discharge will not be used against them in any way.

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

(h) Within 14 days after service by the Region, post at its facilities on the, copies of the attached notice marked “Appendix.” Copies of the notice, on forms provided by the Regional Director for Region 19 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 addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone

out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 1, 2009.

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

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

Dated, Washington, D.C., January 24, 2011.

_____
George Carson II
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT promulgate an unlawfully broad rule prohibiting access by off-duty employees who are represented by Office & Professional Employees International Union, Local 8.

WE WILL NOT tell you that new restrictive policies were in response to an arbitration.

WE WILL NOT inform you that your participation in an arbitration proceeding is unprofessional.

WE WILL NOT warn or discharge you because you engage in protected grievance filing activity.

WE WILL NOT fail and refuse to bargain with the Union regarding the effects of new and modified policies.

WE WILL NOT fail and refuse to provide the Union with requested relevant information.

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

WE WILL rescind our unlawfully broad no-access rule.

WE WILL notify and give Office & Professional Employees International Union, Local 8, the opportunity to bargain before making changes in policies relating to your terms and conditions of employment. The appropriate unit is:

> All office employees employed by Respondent at the Bothell office, excluding elected officers, elected or hired business representatives, staff assistants and organizers, confidential employees, and supervisors as defined in the Act.

WE WILL, within 14 days from the date of the Board's Order, rescind the discriminatory discipline issued to Tiffany Kelly and Rebekah Silva.

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

WE WILL make Rebekah Silva whole for any loss of earnings and other benefits suffered as a result of her discharge, with interest.

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

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 302

(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.nlrb.gov.

915 2nd Avenue, Federal Building, Room 2948, Seattle, WA 98172-1078

(206) 220–6300, Hours: 8:15 a.m. to 4:45 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, (206) 220–6284