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American Federation of Teachers New Mexico, AFL–CIO and Andrew Lotrich

American Federation of Teachers New Mexico, AFL–CIO and American Federation of Teachers Joint Employers and James D. Beaty. Cases 28–CA–064412 and 28–CA–074397

February 28, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

On September 25, 2012, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions, a supporting brief, an answering brief, and a reply brief. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions,² as

¹ The General Counsel and the Respondent have excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf’d. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The judge found that AFT-NM (hereafter referred to as the Respondent) violated Sec. 8(a)(1) both by denying employee Andrew Lotrich’s request for representation by IAM Local 794 during an investigatory interview, and by conducting the interview even though the Respondent had denied the request. We agree with the judge that the Respondent violated Lotrich’s rights to union representation, as set forth in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), but we find just a single violation for the entire incident.

We note that there are no exceptions to the judge’s dismissal of the allegation that the Respondent violated Sec. 8(a)(3) by laying off Lotrich. Because we affirm the judge’s dismissal of the allegations as to Lotrich’s subsequent suspension and discharge, we find it unnecessary to pass on the Respondent’s contention that Lotrich engaged in postdischarge misconduct that would in any event make him ineligible for backpay and reinstatement. We also find it unnecessary to pass on the judge’s dismissal of the allegation that the Respondent’s president, Christine Trujillo, violated Sec. 8(a)(1) by threatening Lotrich with unspecified reprisals by telling him that the Respondent accomplished a lot at the bargaining table when he did not engage in union activities, and the judge’s findings that the Respondent’s executive vice president, Kathy Chavez, violated Sec. 8(a)(1) by interrogating Lotrich about his union activity and by creating an impression that employee Tiffany Fiser’s union activities were being monitored. Finding violations based

modified,³ and to adopt the recommended Order as modified⁴ and set forth in full below.⁵

on these incidents would be cumulative of other violations found and, as such, would not materially affect the remedy

We further find, contrary to our dissenting colleague, that the judge correctly found that the Respondent violated Sec. 8(a)(1) by maintaining an overbroad provision in its collective-bargaining agreement with the Union that prohibits participation in the Respondent’s “internal politics,” including “the lobbying of AFT-NM Executive Council members on any items that are likely to come before them to be voted on including personnel matters.” Even in the context of the entire provision, employees would reasonably understand the provision’s ambiguous reference to “lobbying . . . on personnel matters” as encompassing concerted efforts to influence AFT-NM’s leadership on issues implicating terms and conditions of employment: e.g., complaints about management personnel; decisions involving hiring, promotion, or discipline; or questions of union representation and collective bargaining. Cf. *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 12 (2011) (finding unlawful employer rule prohibiting disclosure of information from “personnel files” because prohibition would reasonably include “discussions of wages and salary information, disciplinary actions, performance evaluations, and other information”). Faced with such ambiguity, employees might well err on the side of caution—given the related directive that breach of the provision is grounds for discharge—and refrain from engaging in Sec. 7 activity. As the judge found, the fact that the Union negotiated this provision does not by itself make it lawful, because the provision would reasonably be read to restrict Sec. 7 rights that the Union had no statutory authority to waive.

Member Johnson would reverse the judge and dismiss the allegation that the Respondent violated Sec. 8(a)(1) by maintaining a rule in its collective-bargaining contract with IAM Local 794 prohibiting employees in the bargaining unit represented by that union from engaging or being asked to engage in the internal politics of the Respondent. On its face, this negotiated provision is intended to prevent IAM Local 794 and employees it represents from interfering with the internal politics of another union, the employer Respondent AFT-NM, including issues relating to the Respondent’s selection and retention of officers and representatives. Employees would not reasonably view this restriction as interfering with their Sec. 7 rights to raise issues relating to their own terms and conditions of employment with the Respondent, including doing so by lobbying the Respondent’s executive council members. Consistent with the view that the contractual rule was lawful, Member Johnson would find that Chavez’ limited questioning of Fiser and Lotrich about possible violations of that rule did not constitute coercive interrogation. See *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 3 (2012), and *Bridgestone Firestone South Carolina*, 350 NLRB 526, 528 (2007).

³ We reverse the judge and dismiss the allegations that the Respondent violated Sec. 8(a)(1) by oral promulgation of overbroad and discriminatory rules in statements made by Chavez and Trujillo in separate one-on-one conversations with Lotrich. The record fails to show that these statements—that Lotrich had no right to call for a no-confidence vote during a union meeting, that he was being too vocal at the bargaining table, and that the parties accomplished a lot in negotiations when he was not present—were communicated to any other employees or would reasonably be construed as establishing a new rule or policy for all employees. See, e.g., *Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98, slip op. at 2 (2013) (dismissing allegation that statement directed solely at one employee and communicated to no other employee was an unlawful promulgation of a new rule); *St. Mary’s Hospital of Blue Springs*, 346 NLRB 776, 776–777 (2006) (supervisor’s comments reprimanding one employee could not reasonably be interpreted as establishing new work rule).

ORDER

The National Labor Relations Board orders that the Respondent, American Federation of Teachers New Mexico, AFL–CIO, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating an impression among its employees that their union activities are under surveillance.

(b) Interrogating employees about their union activity.

(c) Threatening employees with unspecified reprisals because they engage in union activity.

(d) Denying the requests of employees for union representation during investigatory meetings which they reasonably believe may result in discipline.

(e) Maintaining overly-broad and discriminatory collective-bargaining agreement provisions that prohibit employees from engaging in union and other protected concerted activities, including lobbying members of the Respondent’s executive council about personnel matters.

(f) 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) Notify International Association of Machinists & Aerospace Workers, AFL–CIO, Local Lodge 794 (IAM) that it will not enforce section 8.1 of the collective-bargaining agreement with that union.

(b) Within 14 days after service by the Region, post at its Albuquerque, New Mexico facility, copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 28, 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, the notices shall be distributed electroni-

cally, 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 the Respondent at any time since April 2011.

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

Dated, Washington, D.C. February 28, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

⁴ Respondent American Federation of Teachers New Mexico (AFT-NM) is the State affiliate of Respondent American Federation of Teachers (AFT). The General Counsel has not excepted to the judge’s dismissal of the allegation that AFT and AFT-NM refused to hire employee James Beaty in violation of Sec. 8(a)(3) of the Act. This is the only complaint allegation against AFT. However, the judge’s recommended Order is directed to both Respondents. We shall amend the Order to refer only to Respondent AFT-NM.

⁵ We shall modify the judge’s recommended Order to conform to our findings herein, and we shall substitute a new notice to conform to the Order as modified and to the Board’s standard remedial language.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

TEACHERS AFT NEW MEXICO

WE WILL NOT create an impression among you that your union activities under surveillance.

WE WILL NOT interrogate you about your union activity.

WE WILL NOT threaten you with unspecified reprisals because you engage in union activity.

WE WILL NOT deny your requests for union representation during investigatory meetings which you reasonably believe may result in discipline.

WE WILL NOT maintain overly-broad and discriminatory collective-bargaining agreement provisions that prohibit you from engaging in union and other protected concerted activities, including lobbying members of our executive council about personnel matters.

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

WE WILL notify International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 794 (IAM) that we will not enforce section 8.1 of our collective-bargaining agreement.

AMERICAN FEDERATION OF TEACHERS NEW MEXICO, AFL-CIO

Florence I. Brammer, Esq., for the Acting General Counsel.

Robert D. Fetter, Esq. and *Keith D. Flynn, Esq.*, of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Albuquerque, New Mexico, on May 22, 23, 24, and 25, 2012. Andrew T. Lotrich (Lotrich) filed a charge¹ in Case 28-CA-064412. Lotrich filed a first amended charge on November 17, 2011, and a second amended charge on November 23, 2011. James D. Beaty (Beaty) filed a charge in Case 28-CA-074397 on February 13, 2012. Beaty filed a first amended charge on April 9, 2012, and a second amended charge on April 18, 2012. Based on the allegations contained in Cases 28-CA-064412 and 28-CA-074397, the Acting General Counsel² (the General Counsel) issued an order consolidating cases, consolidated complaint, and notice of hearing on April 18, 2012.

The consolidated complaint alleges that American Federation of Teachers New Mexico, AFL-CIO (AFT-NM) during the time period from early May through October 18, 2011, engaged in various actions in violation of Section 8(a)(1) of the National Labor Relations Act (the Act.) Additionally, the consolidated complaint alleges that AFT-NM violated Section 8(a)(3) of the Act when it subjected Lotrich to lay off and refused to grant

Lotrich's request to transfer to another bargaining unit position on about August 17, 2011. Additionally, the consolidated complaint alleges that AFT-NM violated Section 8(a)(3) of the Act by terminating Lotrich on September 1, 2011. Furthermore, the consolidated complaint alleges that AFT-NM conducted a disciplinary interview with Lotrich after denying him the benefit of union representation.

The consolidated complaint additionally alleges that at all material times, AFT-NM and the American Federation of Teachers (AFT) are joint employers of the organized employees of AFT-NM. Specifically, however, only one allegation in the consolidated complaint relates to the conduct of AFT and that complaint section alleges that about November 16, 2011, Respondents AFT and AFT-NM refused to hire Beaty in violation of Section 8(a)(3) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

AFT-NM, a New Mexico nonprofit corporation affiliated with Respondent AFT, with an office and place of business in Albuquerque, New Mexico, has been engaged in organizing unrepresented employees and representing its members and other employees in collective bargaining with various employers concerning wages, hours, and other terms and conditions of employment. AFT-NM has been chartered by, and has been an integral part of AFT, a multistate labor organization that maintains its national headquarters in Washington, D.C. During the 12-month period ending September 12, 2011, Respondent AFT-NM collected fees and dues and initiation fees in excess of \$500,000 and remitted from AFT-NM's facility in excess of \$50,000 in dues and fees to AFT's facility located in Washington, D.C.

Respondents AFT and AFT-NM admit, and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Furthermore, I find that the International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 794 (the Union) and AFT-NM Collective-Bargaining Organizing Project Staff Association (CBOPSA Union) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Description of Respondents' Operations*

Respondent AFT is a national union representing primarily schoolteachers and support staff. Respondent AFT-NM is the State affiliate of AFT and represents approximately 29,000 employees in 30 bargaining units in the State of New Mexico. During the time period that is relevant for this proceeding, Christine Trujillo (Trujillo) served as the State president for AFT-NM, as well as a national vice president for AFT. Kathy Chavez (Chavez) also served as an AFT national vice president working out of the Albuquerque AFT-NM office as well as executive vice president for AFT-NM. Trujillo and Chavez

¹ All dates are in 2011, unless otherwise indicated.

² For brevity, references to the Acting General Counsel will be cited as the General Counsel.

were two of approximately 50 elected national vice presidents for AFT.

In approximately August 2011, AFT-NM implemented a staff restructuring and reorganization. Just prior to the restructuring, AFT-NM employed five field representatives, six organizers, and an administrative assistant. There was one additional position identified as State affiliate political organizer (SAPO) that was vacant at the time of the restructuring. Charging Party Andrew Lotrich (Lotrich) was employed as one of the five field representatives and Charging Party James Beaty (Beaty) was one of the six organizers that worked for AFT in what was termed the Collective-Bargaining Organizing Project (CBOP.) CBOP was a national program of AFT that was created to provide individual State organizations with needed assistance in organizing their membership. It was funded by the AFT, as well as from contributions from individual members. AFT-NM worked with the national AFT field representative who oversaw the project. In August 2011, Matt Aber-Towns was the AFT national representative who oversaw the CBOP program and Jennifer Kaseman was AFT's regional director for the southwest and mountain region.

Lotrich was represented by the International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 794 (IAM Local 794). Beaty was represented by the Collective Bargaining Organizing Project Staff Association (CBOPSA). Counsel for the Acting General Counsel asserts that AFT-NM discriminated against Lotrich because of his activities in support of the IAM and that AFT-NM and AFT discriminated against Beaty because of his activities in support of the IAM and CBOPSA.

B. The 8(a)(1) Allegations Unrelated to Discipline

The consolidated complaint alleges that during April, May, and June 2011, AFT-NM engaged in a number of violations of Section 8(a)(1) of the Act. These allegations are addressed below in the chronological order of the events surrounding the alleged violations. All of these allegations relate to incidents involving Andrew Lotrich.

1. Lotrich's union activities

Lotrich was initially hired by AFT in January 2004 as a CBOP organizer. In August 2004, Lotrich became a staff representative for AFT-NM. During the time that Lotrich worked as a CBOP organizer, there was no bargaining representative for the CBOP organizers. Lotrich's duties as a staff representative included external organizing, or growing, or building new locals as well as internal organizing that involved building up numbers for existing locals. He was also involved in grievance handling, arbitrations, and contract negotiations. Lotrich testified that he was not only involved in legislative lobbying at the New Mexico State legislative sessions, but he also trained AFT-NM locals on how to lobby their legislators. In addition to his other duties, Lotrich served as the lead organizer for a program identified as the Early Childhood Organizing Project (ECOP) that began in 2009.

When Lotrich became a staff representative in August 2004, there was an employer-recognized staff union that was not affiliated with any national labor organization. In 2008-2009, the employees chose to be represented by the IAM in an NLRB

conducted election. Lotrich served as one of three employees who served on the negotiating team from 2010 to 2011. At the time of his termination in September 2011, the parties were scheduled to return to the bargaining table after AFT-NM had failed to ratify an earlier reached tentative agreement. The Respondents were represented in bargaining by Trujillo and by AFT Regional Director Jennifer Kaseman.

2. Complaint paragraph 5(a)

Complaint paragraph 5(a) alleges that about April or early May, Respondent, acting through Kathy Chavez, created an impression among AFT-NM's employees that their union activities were under surveillance, threatened employees about their union activities, and threatened them with unspecified reprisals because they engaged in union activities.

a. Trujillo's April 18, 2011 staff meeting

Prior to April 18, 2011, Trujillo told her staff that there were shortfalls in membership and she urged her staff to increase organizing efforts. At the end of a regularly scheduled staff meeting on or about April 18, 2011, Trujillo became tearful and talked again about the membership shortfalls. She speculated that the membership shortfall was so severe that AFT-NM would probably not be able to make payroll. She told her staff that rather than laying off any of her staff, she would sacrifice her position and resign. Employee and staff member Joe Hill testified that Trujillo had been their "rock" and they were not accustomed to seeing her cry. In describing the employees' response to Trujillo's announcement, Lotrich recalled, "It hit us like a ton of bricks."

At the conclusion of the meeting, Lotrich asked Trujillo if the employees could have an internal staff meeting to discuss her announcement and she agreed. At the beginning of the meeting, Lotrich expressed his concern about the direction in which AFT-NM had been headed and he made a motion to hold a no-confidence vote for Kathy Chavez. In support of his motion, he mentioned that Chavez had health issues and that she was hardly ever in the office. Lotrich told the other employees that the motion would ensure that Chavez would not take over as president in Trujillo's place. Hill recalled that he told Lotrich that the staff didn't want to entertain that idea. Hill told Lotrich that the staff wanted to focus on saving Trujillo's job and not voting against Chavez. Staff member Eleanor Chavez quickly responded to Lotrich by saying that the no-confidence vote was too big a step to take and that they needed to talk about the different options available to them. Staff members Hill and John Ingram also agreed that they needed to discuss possible options to Trujillo's resignation because of the financial situation. As Lotrich testified, the motion for the no-confidence vote "went nowhere" and was never discussed again by the staff.

Neither the Respondent nor the General Counsel presented evidence or called witnesses to explain with any specificity what was actually encompassed by a "no-confidence vote." At the conclusion of the re-cross examination of employee Joe Hill, I asked the witness to explain what would have been the implications and result, had the employees followed through on the no-confidence vote. Hill responded that he had "no idea." Hill acknowledged that even if the employees in the union

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meeting had voted “no-confidence” for Chavez, he didn’t know what the employees could have done. The witness provided no further information in response to my questions. In followup to my questions, counsel for Respondents asked Hill additional questions about the implications of a no-confidence vote, however, Hill responded that he was confused by the question. Although counsel for the Respondent attempted to elicit testimony from the witness concerning the possible effect on AFT-NM locals if they learned of a no-confidence vote for Chavez by the IAM-represented employees, Hill simply responded that the locals had their own opinion of Chavez, adding, “I wouldn’t ask that, if I was you.” Thus, inasmuch as there was no clear explanation from Hill and no other witnesses were presented to explain the repercussions of the no-confidence vote, the evidence is inconclusive as to the ultimate significance of the no-confidence vote.

During the internal union staff meeting, the employees discussed various ways that they could help to reduce expenses including their taking a voluntary salary reduction of 12 to 16 percent; a reduction in insurance benefits; a reduction in the Albuquerque Teachers Foundation rebate; as well as the feasibility of bringing the CBOP organizers into the AFT-NM staff and thus eliminating the need for the separate CBOP program. After the meeting, Lotrich, Hill, and Eleanor Chavez met with Trujillo to share their ideas. Eleanor Chavez began the meeting with Trujillo by telling her how much they valued her and that they did not want to lose her. Lotrich then explained the cost-saving options that the employees had discussed in their internal staff meeting. After Lotrich explained the savings from each of the proposed options, Trujillo tearfully thanked the three employees. She told them that their support really meant a lot and she hugged each employee as they left her office.

b. The meeting with Kathy Chavez

Although Chavez did not attend the April 18, 2001 staff meeting, another person from Chavez’ office was present to take notes for Chavez. The following day, employee John Ingram approached Chavez and told her that she should know that there had been a union meeting called by Lotrich the previous day. Ingram told her that during the meeting, Lotrich proposed to have a “vote of no confidence” against her in order to save Trujillo’s job. Chavez admitted that she was upset and she told Ingram that Lotrich could not do that. Chavez testified that she felt that such an action was ridiculous and outrageous because the IAM collective-bargaining agreement prohibited employees from interfering with the internal affairs of AFT-NM. A few days later Chavez asked employee Tiffany Fiser if Ingram’s account of the union meeting was correct and Fisher confirmed that it was. After a few more days, employee Judy Johnston also approached Chavez and asked her if she was aware of Lotrich’s proposal on the “vote of no confidence.”

After first advising Trujillo of her intentions, Chavez called Lotrich for a meeting in her office. The meeting was attended by Lotrich, Trujillo, Chavez, and Joe Hill, who was present as Lotrich’s union representative. Lotrich testified that on the same day of the union meeting, he received an email from Administrative Assistant Liz Graving immediately summoning him to Chavez’ office. He testified that because he was out of

the office at the time, the meeting was rescheduled to the following morning. Both Chavez and Hill recalled, however, that the meeting with Chavez occurred approximately a week after the union meeting. Their testimony in this regard appears to be more accurate. Hill credibly testified that at the time of the meeting, Ernest Dow was the IAM representative for the AFT-NM employees. Because Dow was not available to attend the meeting, arrangements were made for Hill to stand in as Lotrich’s representative. Hill recalled that these arrangements were worked out after telephone calls between Trujillo and Hill as well as between Lotrich and Hill. Thus, the time line identified by Hill and Chavez appears more reasonable.

Chavez began the meeting by stating that she had heard a rumor that the staff had held a “vote of no confidence.” Hill recalled that Lotrich blurted out, “Who told you? John Ingram?” Chavez recalled that she had been very angry and that she told Lotrich: “How dare you do this to me Andy.” Chavez told Lotrich that she didn’t appreciate it and that he could not do this because it was illegal and against their contract. Lotrich recalled that when Chavez told him “how dare you call a no-confidence vote on me,” he asked her if she were directing him to divulge what occurred in a protected internal union meeting. Trujillo also testified that she took the position during the meeting that any questioning about the union meeting was unlawful and that she in fact threatened to leave the room if Chavez continued the questions. Trujillo testified that although Chavez attempted to ask questions about what happened at the union meeting, either Lotrich or Hill responded that they could not answer because the union meeting was protected activity.

Hill recalled that he asked Trujillo if the meeting was a disciplinary meeting and Trujillo confirmed that it was not. Hill suggested that Lotrich and he speak alone outside the meeting. During their conversation, Hill told Lotrich that because it was not a disciplinary meeting, they didn’t have to answer anything. Hill recalled that once Lotrich and he returned to the meeting, Chavez threatened to “nip the matter in the bud” and threatened that she would get even with Lotrich. Both Chavez and Trujillo confirmed to Lotrich and Hill that no disciplinary action was going to be taken.

c. Findings concerning paragraphs 5(a)(1), (2), and (3)

Chavez first learned what happened at the union meeting from a conversation initiated by Ingram. She also recalls that a few days later, she initiated a conversation with employee Tiffany Fiser and specifically inquired about what occurred during the union meeting. Chavez admits that Fiser initially told her that she was not free to share what occurred in the meeting because it was confidential. Because Chavez apparently already knew what happened, however, Fiser relented, and agreed to talk about the meeting. Chavez recalled that she specifically asked if Lotrich had tried to get a vote of no confidence against her and Fiser acknowledged that he had. Chavez also admits that during the meeting with Lotrich, Hill, and Trujillo, she told Lotrich that she didn’t appreciate what he did and she asked him if it were true that he had done so.

Based on Chavez’ testimony as well as the testimony of Trujillo, Hill, and Lotrich, it is apparent that Chavez told Lotrich and Hill that she was aware of what occurred during the union

meeting. Chavez also admits that she initiated the meeting with Fiser in which she not only asked what occurred during the union meeting, but she also indicated to Fiser that she was already aware of what occurred during part of the meeting. As is well settled, the test for whether an employer unlawfully creates an impression that an employee's union activities are under surveillance is whether the employee would reasonably assume from the statement that his or her union activities were under surveillance. *United Charter Service*, 306 NLRB 150 (1992). Furthermore, I note that the Board does not even require that an employer's words on their face reveal that the employer acquired its knowledge of the employee's activities by unlawful means. *Charter*, above at 151. Based on Chavez' statements to Fiser, Lotrich, and Hill, these three employees could reasonably conclude that their protected union activities were being monitored and thus such statements were violative of Section 8(a)(1) of the Act as alleged in complaint paragraph 5(a)(1). *Martech MDI*, 331 NLRB 487 fn. 4, 501 (2000).

Chavez does not deny that she asked both Lotrich and Fiser about Lotrich's actions during the union meeting. Citing *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57, slip op. at 10 (2011), counsel for the General Counsel asserts that directly questioning an employee about what he did or did not do in a union meeting is unlawful interrogation. I note, however, that the questioning of an employee regarding his or her union activities does not constitute a per se violation of the Act. Rather, the test for determining when an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed them under Section 7 of the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In considering the totality of the circumstances, the Board has considered such relevant factors to include, whether the interrogated employee was an open or active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Certainly, the fact that Lotrich was an active and open union supporter would be a factor that would diminish the potential coerciveness of Chavez' questions. This factor, however, is overshadowed by the fact that Chavez called Lotrich to report to her office with a representative of his choosing. The serious nature of the meeting is also reflected in the fact that Trujillo was present as well. The fact that Lotrich and Hill understood the significance of the meeting is evidenced by their questioning of both Chavez and Trujillo as to whether discipline was going to be issued. Thus, the undisputed record supports a finding that Respondent unlawfully interrogated Lotrich as well as Fiser as alleged in complaint paragraph 5(a)(2).

Both Lotrich and Hill testified that during the course of the meeting, Chavez told Lotrich that she would "get even with Lotrich." Hill specifically recalls that in telling Lotrich that she would get even with him, she also used the phrase that she would "nip it in the bud." Chavez testified that she was upset and angry with Lotrich when she called him into her office. She recalled that she told him that she wanted to find out if it

were true that he had called the no-confidence vote during the union meeting. She told him that if she found out that it was true she would call another meeting and she would "nip it in the bud." She went on to explain that this was an expression that she often used. Based on the overall testimony, I find that Chavez threatened Lotrich with unspecified reprisals as alleged in complaint paragraph 5(a)(3). This finding is based on the fact that Lotrich's testimony alleging this threat is supported by Hill's testimony. I found Hill to be a credible witness whose testimony was straightforward without apparent bias or exaggeration. Additionally, I found that both Hill's testimony and Lotrich's testimony were supported by Chavez' testimony admitting that she told Lotrich and Hill that she would "nip the matter in the bud" and that she would take further action if she found that Lotrich had pursued the no-confidence vote in the union meeting. Thus, I find that Respondent violated Section 8(a)(1) as alleged in complaint paragraph 5(a)(3).

3. Complaint paragraphs 5(a)(4), (5), and (k)

In complaint paragraphs 5(a)(4) and (5), and (k) the Acting General Counsel alleges that Respondent orally promulgated an overly-broad and discriminatory rule prohibiting employees from expressing their concerns about management and by orally promulgating an overly-broad and discriminatory rule prohibiting its employees from engaging in union activities by telling employees they had no right to call for a no-confidence vote during a union meeting. In order to fully consider these complaint allegations, it is also necessary to consider the specific section of the collective-bargaining agreement upon which Chavez relied when telling Lotrich that he could not initiate the vote of no confidence.

The collective-bargaining agreement between AFT-NM and the IAM contains specific actions that are prohibited and allowed for employees with respect to their individual political activities on behalf of, and in relation to, the Respondent. Specifically, section 8.1 of the collective-bargaining agreement provides:

AFT-NM employees shall not engage, nor be asked to engage, in the internal politics of the AFT-NM or its local affiliates or the AFT. This shall include, but not limited to, the lobbying of AFT-NM executive council members on any items that are likely to come before them to be voted on including personnel matters.

The contract section further provides that a violation of the contract provision shall be grounds for dismissal.

Counsel for the General Counsel submits that Chavez' reliance on the above-cited contract section cannot serve as a basis for legitimizing Chavez' comments to Lotrich about his initiating the no-confidence vote. Counsel asserts that Lotrich's action was protected activity regarding his and other employees' working conditions and prompted by a concern about what appeared to be Trujillo's impending resignation. Counsel argues that "no reasonable construction of this casual, protected comment as being "political" activity prohibited by contract can be drawn."

There is no dispute that Chavez' admonition to Lotrich involved his actions during a union meeting that occurred on

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nonworking time and within a meeting that was approved by Trujillo. There also can be no dispute that the Act provides employees the right to engage in activity for their mutual aid without employer interference. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). Chavez' statements to Lotrich clearly constituted a restriction on his protected and union activity and the promulgation of such a rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Accordingly, I find that Respondent violated the Act as alleged in complaint paragraphs 5(a)(4) and (5).

Citing the Board's decision in *Tawas Industries*, 321 NLRB 269, 276–277 (1996), counsel for the General Counsel argues that it is unlawful for an employer to maintain in its collective-bargaining agreement with a union an overly-broad and discriminatory rule that prohibits employees from engaging in Section 7 activity. I note that in *Universal Fuels*, 298 NLRB 254, 257 (1990), the Board held that a union cannot waive employees' right to protected communications even if the rule prohibiting such communications is included in a collective-bargaining agreement. Counsel for the General Counsel further argues that the provision described above in the existing contract between the IAM and AFT-NM fails to define "internal politics" or to assure employees that they still have the right to engage in protected activity regarding their terms and conditions of employment. Counsel's argument has merit and I find that the contractual language in issue is overly-broad and discriminatory and violates Section 8(a)(1) of the Act as alleged in section 5(k) of the complaint.

4. Complaint paragraphs 5(b)(1)–(3) and (g)

a. Underlying facts

Lotrich testified that during mid-May, Trujillo called him to her office. Trujillo told him that she needed his help and she needed him to work with her. Lotrich testified that she told him that Chavez had given her "all kinds of grief and pressure to do something" with Lotrich. Trujillo gave Lotrich a document with Lotrich's name at the top of the page that was entitled, "Progressive Discipline Plan." The body of the document included a background section documenting that Trujillo had received comments from AFT-NM leaders about Lotrich's aggressive interactions and negative behavior. The document specifically referenced Lotrich's physical behaviors, face mannerisms, and body language.

The second section of the document listed various ways that Lotrich could employ some specific behavior modifications. These suggestions included his listening to himself and identifying his own bodily reactions and expressions of anger. Further suggestions included developing exercises to cope with stress, tension, anger, and rage, as well as identifying people from home and work who could be supportive in helping him to deal more effectively with anger.

Trujillo suggested back-dating the document to March. Lotrich asserts that when he asked Trujillo about the reason for the document, she told him that it all stemmed from his comments to Chavez about his wanting to have a no-confidence vote. Lotrich also contends that Trujillo went on to tell him her

suspicions that Chavez wanted to form a coalition with AFT-NM Legislative Vice President and Secretary Tim Crone and Donna Swanson, who was one of the local presidents, and her belief that they intended to go after Lotrich because of the no-confidence vote. Lotrich testified that he agreed to work with Trujillo concerning this document because they were friends and that was the relationship they shared.

After meeting with Trujillo, and based on his discussion with Trujillo, Lotrich then prepared a Behavior Management Plan for himself dated March 21–May 11, 2011. Lotrich prepared the document as though it were written by Trujillo. The document included the following wording:

Andy Lotrich and I met on March 21, 2011 to discuss verbal concerns from Kathy Chavez and Donna Swanson, regarding comments made by individuals pertaining to alleged aggressive interactions with other individuals. The verbal concerns from Kathy Chavez and Donna Swanson pertain to various unidentified negative behaviors that make these individuals feel uncomfortable around Andy. They have relayed concerns that there is not a trust level, and that they don't know how to take Andy's physical presence, face mannerisms, and body language.

The two-page document prepared by Lotrich included a list of measurable and observable objections. In the document, Lotrich was charged with identifying potentially negative body reactions and expressions of frustration or anger in staff meetings. The plan provided that Lotrich would not speak with Chavez, Judy Johnston, and John Ingram while standing and would not speak individually with any of these three individuals without having a third person present. One of the items in the management plan was the admonition to have Lotrich "first say what he wants to say inside his head before he speaks." The plan provided that Lotrich must include Trujillo in all emails that he sent to staff and to local presidents with the exception of emails involving internal IAM communication. Because Lotrich had regular assignments that involved three female local presidents, Trujillo would contact these local presidents concerning their interaction with Lotrich and she would determine if they had any concerns. Trujillo would also contact other individuals with whom Lotrich worked to learn more about his interactions with them and she would also personally observe his interaction.

When Lotrich presented the finished document to Trujillo, there was also a final paragraph, documenting a meeting for Trujillo and Lotrich on May 11, 2011, concerning the back-dated plan. Drafted in Trujillo's words, the paragraph included a reference to Trujillo having observed Lotrich's attempt to modify his body language and interaction with training sessions and meetings. Specifically, the paragraph included the following wording:

I have noticed Andy Lotrich in staff meetings not being as vocal as he used to be and paying particular attention to his body language. I have seen Andy Lotrich make an attempt to find a chair to sit, or kneel down to speak with people so that he isn't speaking above them. In training sessions and other meetings, Andy Lotrich has kept his comments short and con-

cise and is always one of the last to speak, allowing others to speak before him. Although it wasn't one of my goals, Andy Lotrich has made a concerted effort not to get on Liz's bad side. Therefore, based on my observations, I feel Andy has met each one of the listed goals.

Trujillo testified that prior to her meeting with Lotrich, various individuals came to her regarding Lotrich's interaction with them. She testified that employees Lindsay Theo, Michelle Kavanaugh, Liz Gravning, Judy Johnston, Tiffany Fiser, and John Ingram all made specific complaints to her about Lotrich and she shared these comments with AFT-NM's executive officers. Trujillo recalled that employee and Union Steward John Ingram told her that Lotrich was so abusive that he had sought a personal security order against Lotrich. Although Ingram was called as a witness by AFT-NM, he did not testify concerning this alleged attempt to seek a personal security order. Trujillo also recalled that Liz Gravning told her that Lotrich scared her. When Gravning was called as a witness by AFT-NM, she mentioned only one incident in August 2011 when she felt intimidated during a conversation with Lotrich. Tiffany Fiser testified that she voluntarily quit her employment on May 31, 2011, and part of her decision to quit related to Lotrich. She testified that she felt intimidated and harassed by Lotrich and she recalled an incident in which Lotrich angrily threatened to get her fired because she had gone to the president concerning an issue with reverse dues deduction for a particular program. Michelle Kavanaugh testified that she complained to Trujillo about Lotrich because of a comment that Lotrich made to her in January and February 2011. Lindsay Theo testified concerning an incident involving Lotrich during a work-related meeting that she attended with him in Las Cruces, New Mexico. Theo testified in detail concerning her trip with Lotrich to meet with community group representatives in Las Cruces. She described the events of the meeting and how she came to be uncomfortable during the course of the meeting. When she became uncomfortable, she told Lotrich that she wanted to leave. She testified that Lotrich did not respond to her request and kept her in the meeting for another hour and 15 minutes after she first notified him of her discomfort. While she reported the incident to her supervisor, Matt Aber-Towns, she did not initially say anything to Trujillo. Theo testified that she had been reluctant to tell Trujillo because of Trujillo's and Lotrich's friendship. After witnessing the comment that Lotrich made to Kavanaugh in early 2011, Theo decided that she would tell Trujillo about her experience with Lotrich and she did so in March 2011.

After reporting these issues to the executive officers, Trujillo met with Lotrich and informed him of these same issues. She does not dispute that she allowed Lotrich to rewrite the plan and that she asked that it be back-dated to March. She testified that she wanted the March start date for the plan in order to demonstrate to others that she was effectively dealing with the issues with Lotrich. She testified that because she knew that others were very concerned, she created the document with Lotrich to show that he was on a growth plan.

In June 2011, AFT Regional Director Jennifer Kaseman conducted a brainstorming session for AFT-NM and AFT staff.

Lotrich testified that as he was walking down the hall to go into the meeting, Trujillo pulled him aside. Lotrich testified:

That was when I was walking down the hallway, and Christine said to me, Mjito, which is just a friendly term for, you know, my young one, come here, please. I need to talk to you real quick. So we went into Christine's office real quick. We didn't close the door. She just left it open, and she said, Andy make sure at this meeting you do not talk like Andy; they're watching you. Make sure that you limit everything you say when you enter the room. So I said okay. And so we entered the room.

*b. Conclusions concerning complaint allegations
5(b)(1) – (3), and (g)*

Citing the Board's decision in *SKD Jonesville, L.P.*, 340 NLRB 101, 101–102 (2003), counsel for the General Counsel asserts that by Trujillo telling Lotrich that Chavez was giving her all kinds of grief and pressure to have AFT-NM do something to him, AFT-NM threatened Lotrich with unspecified reprisals and threatened Lotrich with discipline because of his union activity on May 11, 2011. I note that the facts of *SKD Jonesville* involved a conversation in which a supervisor told an employee that it was not in her best interest to get involved with the union. Because the Board found that the supervisor made the comment following a reference to discharging other employees who had exercised their Section 7 rights, the Board concluded that the employee would reasonably have interpreted the remark as a threat that the respondent would retaliate against her in some unspecified way if she were involved with the union.

I find the circumstances of this case distinguishable from those in *SKD Jonesville* and I do so based on credibility. Lotrich testified that when he met with Trujillo, he asked her the reason for the progressive discipline plan that she presented to him on May 11. He contends that Trujillo told him that she had received grief and pressure from Chavez. Lotrich then added that Trujillo told him that it all stemmed from his actions at the union meeting in April. I do not find Lotrich's testimony in this regard to be credible. Although this alleged statement conveniently links the blame for any discipline or discussion of discipline to the earlier union meeting, such a statement is not consistent with the total record evidence or convincing in light of the undisputed facts of this meeting.

Lotrich does not deny that when Trujillo spoke with him and prepared the initial document, she included very specific remedial actions that Lotrich was to follow for the behavior management plan. There is no evidence that Lotrich challenged Trujillo concerning the need for the actions or that he denied the behavior addressed in the document. He, in fact, took the document and rewrote it to again to cover those same issues; listing specific remedial measures that he would take as well as identifying steps that Trujillo would take to monitor his actions. Although it appears Chavez is among the group of individuals with whom Lotrich agreed to modify his behavior to comply with plan, there is no other evidence that the behavior modification plan had any link to the union meeting or was initiated because of the union meeting. Furthermore, I find the testimony of Kavanaugh, Fiser, and Theo to be credible and to establish a

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basis for Trujillo to prepare the behavior modification plan for Lotrich.

Accordingly, inasmuch as there is no credible evidence in support of these allegations, I do not find merit to complaint allegations paragraphs 5(b)(1) and (2).

Counsel for the Acting General Counsel also asserts that when Trujillo called Lotrich aside prior to the AFT training meeting and told him not to talk like “Andy,” Trujillo’s statement restricted Lotrich in his ability to engage in Section 7 activity. Counsel asserts that such an overly-broad rule restricts Lotrich regarding what he is free to convey or to discuss with other employees at any time at work and thus is violative of the Act. Counsel also asserts that by making this statement to Lotrich, Trujillo created the impression that he would face some sort of adverse action and her statement constituted a threat of discipline and unspecified reprisals. I do not find the record evidence to support this conclusion. As discussed above, Lotrich does not deny that at the time that Trujillo told him not to talk like “Andy,” she had already met with him to discuss specific behavioral issues and to present him with a progressive discipline plan to address those issues. It is undisputed that Trujillo’s progressive discipline plan, as well as Lotrich’s behavior modification plan, included specific reference to the manner in which Lotrich interacted with other employees and managers. Lotrich even asserts that the seating arrangement for this meeting was prearranged by management and arranged in such a way to position Lotrich at a table away from employees Ingram and Johnston. There is no dispute that these are the two employees identified in the behavior modification plan as individuals with whom he was not to speak while standing or without a third person present. Thus, it is reasonable that Trujillo might have had concerns about how Lotrich would conduct himself in this meeting. In light of her earlier discussion with him on May 11, 2011, it is also reasonable that she would have pulled him aside to remind him to be aware of his behavior and to encourage him to modify his behavior in keeping with the behavior modification plan. Thus, I do not find that Trujillo’s comments to Lotrich prior to the training meeting to constitute violations of the Act as alleged in complaint paragraphs 5(b)(1), (2), (3), and (g).

5. Complaint allegations 5(c)(1) – (2), (d), (e), and (f)(1)

In May and June, 2011, the IAM and AFT-NM were bargaining for a contract and Lotrich served on the bargaining committee. Lotrich testified that prior to one of the bargaining sessions in June, Trujillo pulled him aside and told him, “Andy, you don’t need to be the vocal one at the table, watch what you say.” Lotrich contends that while he responded to Trujillo by telling her, “Christine, it’s bargaining,” he also made a conscious attempt to follow Trujillo’s suggestion. Counsel for the General Counsel submits that Trujillo’s comment to Lotrich created a restriction on his ability to freely engage in Section 7 activity at the bargaining table. Counsel further argues that such a statement also intonates that discipline will potentially be taken against him depending on how and to what extent he engaged in union activities.

I find merit to counsel for the General Counsel’s argument. As discussed above, it is apparent that during this time period,

Trujillo was acting as not only a friend to Lotrich, but also as a manager with concerns about Lotrich’s behavior and interaction with other employees and with management. Based on the record as a whole, it is likely that Trujillo’s comment to Lotrich may have been a continuation of her attempt to coach and to encourage Lotrich in modifying his behavior. Even if this had been her intent, her comment would nevertheless have reasonably tended to restrict Lotrich in his ability to engage in Section 7 activity at the bargaining table. Thus, Trujillo’s statement constituted the unlawful oral promulgation of an overly broad rule restricting protected activity as well as a threat of unspecified reprisals if he did not follow the rule. Accordingly, I find merit to complaint paragraphs 5(c)(1) and (2) as well as 5(d), (e), and (f)(1).³

6. Complaint paragraphs (f)(2) and (3)

In late June or early July 2011, Lotrich made an emergency trip to Socorro, New Mexico, to assist the Socorro local union with bargaining. When Lotrich returned to the AFT-NM office, he stopped by Trujillo’s office to give her a report on the bargaining session in Socorro. During their conversation, they also discussed the bargaining between AFT-NM and the IAM that occurred while Lotrich was in Socorro. Lotrich testified that Trujillo stated:

Andy, you know what. Last night’s negotiations went really, really well. It was nice not having you in the room. We got a lot accomplished.

Lotrich asserts that her demeanor did not indicate that she was joking with him.

Trujillo testified that during some of the bargaining sessions with AFT-NM and the IAM, “things got tied down.” She testified: “When Andy was there, we just could never make any movement.” She recalled that during the meeting when Lotrich was absent, the parties were able to get TAs (temporary agreements) on a number of issues. She also recalled that when Lotrich asked her about the meeting, she told him that they had been able to get a lot accomplished. She did not recall saying anything further. She denied that she told him that he couldn’t come to future meetings or that she told him to change his behavior during the meetings. She denied threatening him with discipline if he came to future meetings.

7. Conclusions concerning paragraphs 5(f)(2) and (3)

The General Counsel alleges that Trujillo’s statement to Lotrich constitutes not only an unlawful threat to Lotrich, but also constitutes the promulgation of an overly-broad and discriminatory rule that prohibits employees from engaging in union activities. I note that while Trujillo specifically denied that she threatened Lotrich or that she told him that he could not return to future bargaining sessions, she did not specifically deny the alleged statement when discussing Lotrich’s bargain-

³ Although the complaint includes two paragraph sections that are very similar relating to Trujillo’s alleged comments to Lotrich prior to a June 2011 bargaining session, Lotrich’s testimony does not establish that he had more than one conversation with Trujillo about his conduct at the bargaining table. Thus, the allegation contained in 5(f)(1) appears to be the same conduct addressed in 5(c) and (d).

ing absence. Trujillo readily acknowledged that it was her view that while the parties were unable to make any bargaining movement when Lotrich was present, the parties were able to reach a lot of temporary agreements on bargaining issues when Lotrich was not present. It is reasonable that she shared this view with Lotrich when she spoke with him in June 2011. As discussed above, Trujillo was actively trying to help Lotrich to modify his behavior in various aspects of his life. It is reasonable that she would have tried to explain to Lotrich how his behavior affected the bargaining process. In doing so, however, she restricted Lotrich in the exercise of his right to engage actively in protected activities. While I do not find that Trujillo's statement constituted a threat as alleged by complaint paragraph 5(f)(2), I find that the statement unlawfully prohibited Lotrich from engaging in union activity as alleged in complaint paragraph 5(f)(3).

C. Lotrich's Layoff, Suspension, and Termination

1. AFT and AFT-NM restructuring

AFT National Representative Aber-Towns testified that as early as March 2011, he was aware that AFT-NM was experiencing financial difficulties and that AFT-NM anticipated a large shortfall for fiscal year 2011–2012. On June 18, 2011, the AFT-NM executive board (also referred to as executive council) met at the AFT-NM union hall. Twenty-two of the executive board members⁴ were present. AFT Regional Director Jennifer Kaseman was present, as well as a new AFT associate. During the meeting, Kaseman gave a presentation on the current staffing and budget situation for AFT-NM. The board members were told that the staffing needs of the organization made up one-half of the budget. If AFT-NM remained at the current operations status, it would incur a \$156,000 deficit. Kaseman distributed a needs- assessment survey to each local president in order that the State federation could accurately assess the needs of the local. The survey requested information about what the locals needed concerning organizing, new member recruitment, leadership development, data, core recruitment, and communications. Kaseman explained that in early analysis, she believed that the CBOP program and the field staff could possibly undergo restructuring. When the floor was opened for discussion, many of the presidents expressed concern over the budget and the need for reorganization and possible reduction in force.

After receiving the survey results in late June, the executive council held a conference call and discussed the results of the survey and discussed the options open to them. Although the council discussed possible staffing restructuring for AFT-NM, no decisions were made at that time. Based on the survey results, the AFT, however, decided to terminate the CBOP program in late July. Aber-Towns testified that although the program had grown until approximately 2008, the Statewide membership had essentially flat-lined by July 2011. He further explained that with the financial difficulties for AFT-NM, it didn't make sense from a national perspective to continue the

CBOP program. All of the CBOP five organizers were laid off, including Beaty and Michelle Kavanaugh; Trujillo's daughter.

When the AFT-NM executive council met on August 13, the council voted to restructure the AFT-NM staff. The executive council is comprised of the AFT-NM officers as well as the presidents of all of the 30 locals throughout New Mexico. The council voted to restructure the staff by designating a staff director and a program director. Three new organizers would be hired and the number of field representatives would be reduced from five to three. The positions of State affiliate political organizer and administrative assistant would remain. The layoff of the field representatives was based on the seniority provisions of the collective-bargaining agreement between AFT-NM and IAM. Based on their seniority, Lotrich and Eleanor Chavez were laid off. In addition to her job as a field representative, Eleanor Chavez was also a sitting State representative.

2. Complaint paragraphs 6(a) and (b)

On August 17, 2011, Lotrich met with Trujillo, Kathy Chavez, and Union Steward Joe Hill. Trujillo gave Lotrich a letter confirming his layoff. The letter explained that when the executive council met on August 13, the council decided to restructure and reorganize the staff. The restructuring provided for the retention of only three of the field representatives and as Lotrich and Eleanor Chavez were lowest in seniority, they were laid off subject to recall.

During an earlier meeting with Hill, Trujillo indicated the purpose of her meeting with Lotrich. Having already learned about the layoff from Hill, Lotrich came to the meeting with his resume and a cover letter requesting a transfer to the open SAPO position. At the beginning of the meeting, Lotrich placed his iPhone on the table in front of him and recorded the meeting. Trujillo began the meeting by explaining to Lotrich how the executive council worked out the restructuring of the staff to deal with the \$156,000 budget deficit. She explained that under the restructuring, only three field representatives would be needed. Those senior field representatives would have to move to other areas of the State to continue their jobs. They would have only until September 6, 2011, to decide whether they would move or resign. She also explained to Lotrich that because the individual locals set servicing, organizing, and leadership development as their three top priorities, the work of the field representatives would change. The organizing function would be handled by organizers; who would be assigned to specific locals. Lotrich asked Trujillo why the field representatives were not just transferred into the organizer positions. Trujillo explained that the organizer positions were not in the collective-bargaining unit as yet and there was no contract language relating to these positions.

Lotrich continued to question Trujillo about all of the positions in the restructured staff. When Trujillo explained that the program director and the field staff director positions were management positions and not in the bargaining unit, Lotrich challenged Trujillo and questioned whether there had been a unit clarification process or a determination by the NLRB. Lotrich went on to argue with Trujillo that AFT-NM was in violation of the collective-bargaining agreement as well as the

⁴ The notes reflect that I. Williamson attended the meeting on behalf of member Kathy Jenkins.

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Act, Lotrich also questioned how AFT-NM could make the staff changes when it was \$156,000.00 in debt, asserting that he wanted to understand AFT-NM's financial situation. Trujillo explained that those are things that he needed to discuss with his union. She stated that he should please understand that the issue for the meeting was his layoff and not to sit and to negotiate.

Lotrich also argued that under the collective-bargaining agreement, Trujillo could not notify the senior staff of their transfer before he was notified of his layoff. Trujillo suggested that this is something that he could grieve under the contract. Lotrich then began again asking about the financial situation and the costs of creating regional offices under the restructuring. In response to his continuing questions, Trujillo at one point responded: "Ok Andy. I'm, let's stop, stop, stop." She suggested that if he wanted to pursue these issues, he should go through the discovery process with his Union and she again told him that she was not going to negotiate this issue with him in the meeting. Lotrich then asked if he could take the remaining leave that he had accrued and Trujillo agreed. Lotrich and Trujillo continued the meeting by discussing how he could wrap up his remaining paperwork.

Lotrich inquired about the open SAPO position and when it would be filled. Trujillo explained that Respondent hoped to have all of the positions filled by November 15, 2011. When Trujillo confirmed that the SAPO job description was essentially the same, Lotrich told Trujillo that he was requesting a transfer to that position. When Trujillo told him that he would have to apply for the position, Lotrich argued that under the collective-bargaining agreement, employees can request transfers to other bargaining unit positions and therefore he did not have to apply. Trujillo explained to him that the SAPO position was different because the AFT pays half the salary for the position and Respondents were going to do a national call for applicants for the job. Trujillo again told Lotrich that he could apply for the position if he wished to do so.

3. Conclusion concerning paragraphs 6(a) and (b)

The Acting General Counsel alleges that AFT-NM subjected Lotrich for layoff on August 17, 2011, and also refused to grant his request to transfer to a bargaining unit position on August 17, 2011, because of his union and concerted activities. As the General Counsel points out, the General Counsel bears the initial burden of showing that a respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). Thus, the General Counsel must make an initial showing that an employee's protected conduct was a motivating factor in an employer's decision to take adverse action against the employee. See *Williamette Industries*, 341 NLRB 560, 562 (2004). In making out a prima facie case, the General Counsel must show that (1) the employer took adverse employment action against an employee; (2) the employee engaged in union or other protected activity; (3) the employer knew of such activities; and (4) there is a link or nexus between

the protected activity and the adverse employment action. *Hays Corp.*, 334 NLRB 48 (2001).

a. Lotrich's selection for layoff

There is no dispute that Lotrich's layoff constituted an adverse employment action and that prior to his layoff, he actively supported the Union by serving on the Union's negotiating committee. Additionally, there is no question that Lotrich initiated the union meeting on April 18, 2011, in which he sought a no-confidence vote against AFT Vice President Chavez. It is the remainder of the *Wright Line* analysis, however, that fails to demonstrate the components necessary to establish a prima facie case. To complete the *Wright Line* analysis and to establish a prima facie case, the General Counsel must show that AFT-NM had knowledge of Lotrich's union activity and that there is a causal link between his protected activity and his layoff. In this case, these components are inextricably connected. AFT-NM presented credible evidence to show that it underwent a rather significant restructuring of its staff in mid-2011 in an attempt to deal with the \$156,000 budget deficit. Union Steward Joe Hill testified that even before the April 2011 staff meeting, Trujillo told the staff about the financial shortfall and urged the staff to get out, organize, and bring in new members. During the April 2011 meeting, Trujillo again discussed the financial status of AFT-NM with the staff. Hill recalled that Trujillo became tearful. She told employees that she would rather resign her position before she would lay off any staff. She added that there was such a significant shortfall, that AFT-NM was probably not going to be able to make payroll.

During the June 18, 2011 executive council meeting, AFT Regional Director Kaseman talked with the council about the predicted \$156,000 short fall and she explained that staffing made up one-half of the AFT-NM budget. At the end of the meeting, some of the local presidents expressed their concerns about the deficit and discussed the possibility of staff restructuring and reduction. Finally, on August 13, 2011, the executive council voted to reorganize the AFT-NM staff, which resulted in a total change in the number and the office locations of the field representatives. This was a decision that was not made by Trujillo or Kathy Chavez. It was made by all of the union officers as well as the presidents of the 30 locals. AFT-NM State Treasurer Joy Garratt participated in the August 13, 2011 council meeting. She voted in favor of the staff restructuring and she was aware that it would result in layoffs. She testified that when she voted for the restructuring, she was unaware that Lotrich was involved in an attempt to initiate a no-confidence vote during a union meeting. She testified that neither Lotrich's union activity, his involvement with the no-confidence vote, nor his position with the IAM was ever raised during any of the meetings she attended concerned the reorganization. She testified that these factors did not weigh in any way in her decision to vote for Lotrich's layoff. She asserted that she had been unaware of these factors. I not only find Garrett to be a credible witness, but I also find her testimony to be reasonable in light of the total record.

Counsel for the General Counsel asserts that Lotrich was vocal in his union activities and that Kathy Chavez was not happy

about his activity and that she directed coercive comments to him regarding his activity. Trujillo does not dispute that Lotrich was vocal in all that he did and there is no dispute that she attempted to coach him in how to relate to others. As discussed above, when she attempted to coach him with respect to his bargaining table behavior, her behavior constituted a violation of Section 8(a)(1). Chavez does not dispute that she was upset with Lotrich because of his attempt to get a no-confidence vote against her by fellow union members. As discussed above, I have found that her statements to him concerning his actions were also violative of the Act. Thus, there is no doubt that both Trujillo and Chavez had the requisite knowledge of Lotrich's union activity and there is little doubt that Chavez harbored some animus toward him for his actions in the union meeting. Their knowledge and any potential animus on the part of Chavez are not, however, sufficient to sustain a finding that the executive council discriminatorily decided to layoff Lotrich on August 13, 2011. There is no evidence that Lotrich's union activities were discussed or considered in relation to the executive council decision for staff restructuring. There is simply no evidence to show that any of the other AFT-NM officers or that any of the 30 local presidents located throughout the State of New Mexico had any knowledge of Lotrich's attempt to get a no-confidence vote against Chavez. Garrett credibly testified that she was unaware of Lotrich's union activities. Accordingly, I do not find that the General Counsel has established sufficient knowledge or the causal link between Lotrich's union activity and his layoff.

Furthermore, the record evidence does not reflect the requisite animus necessary to establish that Lotrich was selected for layoff because of his protected activity. Counsel for the General Counsel argues that Lotrich's selection for layoff was discriminatorily motivated. Interestingly, however, Judy Johnson was one of the individuals retained as a field representative after the restructuring. This is the same employee who was disciplined by Trujillo in April 2011 for allegedly spreading malicious and disparaging comments about two CBOP organizers; one of whom was Trujillo's daughter. The Union filed a grievance on April 6, 2011, in response to Johnson's 2-week suspension and the matter was the subject of an arbitration proceeding on September 19, 2011. Certainly, the argument may be made that Trujillo might have had as much or more animus toward Johnson because of her union activity than toward Lotrich. Furthermore, there is no dispute that Lotrich and Trujillo were friends. Lotrich's wife, Kelly Lotrich, testified that prior to her husband's layoff, she had been very good friends with Trujillo. She recalled that she attended specific social outings with Trujillo that included Halloween events for her children and Trujillo's granddaughter, as well as birthday parties, and dinner at Trujillo's home.

In cases where the General Counsel meets the burden of showing that an employee's protected or union activity was a substantial or motivating factor for the adverse employment action, a respondent can overcome a presumption that it has acted unlawfully by proving that it would have taken the same action even in the absence of the employee's protected activity. *Manno Electric, Inc.*, 321 NLRB 278 fn. 12 (1996). Even assuming that the General Counsel has established a prima facie

case, the overall evidence, however, reflects that Lotrich would have been laid off despite his protected activity. There is nothing to indicate that Lotrich was more senior than the three field representatives whose jobs were moved to other parts of the State. Furthermore, Lotrich was not the only field representative who was laid off as a result of the staff restructuring. Counsel for the General Counsel argues that AFT-NM has not sufficiently shown that the restructuring was necessary and asserts that Respondent's assertion of economic necessity does not insulate it from a finding of unlawful motivations, particularly in light of Chavez' threat to Lotrich. The General Counsel is correct in that AFT-NM did not offer voluminous exhibits documenting the full range of membership decline, increased costs for operation, or other complex business records documenting the entire process that brought about the budget deficit. The overall record, however, demonstrates that there was an established background and a reasonable necessity for the decision to restructure. Union Steward Hill confirmed that employees were told about the shortfall and the financial problems before May 2011 and before Lotrich tried to initiate the no-confidence vote. Trujillo tearfully told her employees that AFT-NM might not be able to make payroll and she talked of layoffs before Lotrich tried to initiate the no-confidence vote. Thus, it is simply implausible that the entire reorganization came about simply to give AFT-NM a reason to layoff Lotrich and not because of economic necessity. Accordingly, I do not find merit to complaint paragraph 6(a).

b. The refusal to grant Lotrich's request to transfer to another bargaining unit position

There is no dispute that when Trujillo explained the restructuring to Lotrich, he immediately requested a transfer to one of the new organizer positions that were going to be created. Counsel for the General Counsel contends that AFT-NM unlawfully refused his request. Lotrich also demanded that Trujillo explain the financial framework that would justify the expense for the two management positions that were to be a part of the reorganization. Lotrich further demanded that Trujillo explain the details of the newly created regional offices, including their location, the amount budgeted each month for the offices, and the resources allocated for the offices. Trujillo explained that because the meeting was not a negotiations session, she was not going to answer those kinds of questions.

Lotrich admits that Trujillo told him that the target date for filling the new positions would be November and therefore he would be able to get all of the paperwork necessary to apply for those positions. Thus, Lotrich's testimony reflects that although Trujillo denied his request for an immediate transfer to one of the positions that were going to be created in November, she did not deny Lotrich the opportunity to apply for those jobs.

Furthermore, the record reflects that just 13 days before Trujillo told Lotrich about his layoff, AFT closed the CBOP program and laid off all five of the CBOP organizers. There is no evidence that AFT-NM⁵ made any special allowances to allow

⁵ Although the CBOP organizers were employed by AFT rather than AFT-NM, I have found that AFT- and AFT-NM were joint employers during this period of time.

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any of these individuals to transfer into the vacant SAPO position or the organizer positions that were to be filled in November. There is no evidence that the laid-off CBOP organizers were given any special considerations in applying for these positions. Trujillo's daughter was one of those laid-off CBOP organizers. Thus, there is no evidence that Lotrich was treated any differently than the five CBOP organizers who were also laid off in August or any differently than Eleanor Chavez who was the other staff representative laid off as a part of the August reorganization. Thus, I find no merit to complaint paragraph 6(b).

4. Events leading to Lotrich's discharge

By August 2011, it had become common practice for the AFT-NM staff representatives to conduct a "school organizing blitz" in August of each year. Because it was a time when all of the public schools were going back into session, AFT-NM staff representatives, in conjunction with volunteers sent by the AFT from all over the country, went to targeted school sites and school districts to conduct internal organizing for new members. During the week of August 8, 2011, Lotrich was assigned to the Socorro School District in Socorro, New Mexico. He was initially scheduled to be in Socorro only from Monday night through Friday night. On August 5, 2011, Lotrich found out that one of the organizing events might be rescheduled for Saturday and he notified Trujillo of the possibility that he might need to extend his stay.

Lotrich testified that in previous years, the director for the blitz operation arranged the hotel accommodations for everyone participating in the blitz. He also contended that he never made his own hotel arrangements for his travel with AFT-NM and that AFT-NM Administrative Assistant Gravning always made them for him. Lotrich asserts that he discovered on the morning of August 8 that there were no hotel reservations for him. He testified that he then remembered that he had been camping the previous weekend and that his camper was still hooked to his truck. He decided to take his camper to Socorro. He asserts that Kathy Chavez and Aber-Towns agreed that he could. Because the event on August 13 ran longer than expected, he decided that it was better for him to stay an additional night at Casey's Trailer Park rather than driving in the dark.

On August 15, 2011, Lotrich gave Gravning an expense voucher covering his expenses for his work in Socorro. In addition to his claimed expenses for meals and his claim for reimbursement for total mileage, the voucher included a total expense of \$336 for 6 days' lodging at a daily cost of \$56. Lotrich testified that he gave Gravning the original receipt from Casey's as well as a modified receipt to show his additional costs for utilizing his personal camper. Lotrich acknowledges that the original receipt shows the cost for lodging to be \$26 for 5 nights with a total cost of \$130. He testified that he made a photocopy of the original document and changed the 5 nights to 6 and changed the daily rate to \$56; which brought the total to \$336. Lotrich testified that when he gave the receipts to Gravning, he told her that he was giving her an original receipt as well as a modified receipt to show additional expenses.

Gravning testified, however, that when Lotrich submitted his voucher listing his Socorro expenses, he included original re-

ceipts for all his expenses with the exception of his lodging expense. She testified that the only receipt that he gave her for lodging was the receipt showing a total expense of \$336. She recalled that when he gave her the receipt he made a point of telling her that he had saved the AFT-NM a lot of money. Later in the afternoon, Gravning began processing the voucher to make sure that all the receipts matched the dollar amounts and that the tips claimed did not exceed 20 percent. When she came to the lodging receipt, she noticed that the numbers appeared to be changed. She noticed that the number 6 appeared to be changed from the number 5 and that the number 56 appeared to have previously been another number and then changed to the number 56. She noticed that a lot of the writing on the receipt was Lotrich's handwriting. Seeing the word "Visa" on the receipt led her to believe that the bill had been paid by credit card. She testified that normally if an expense is paid by credit card, the credit card receipt will be attached with the original receipt. There was no credit card receipt attached. Gravning showed the modified receipt to an employee who worked near her to get an opinion. When the employee opined that the receipt had been altered, Gravning decided to conduct some additional investigation. She telephoned Casey's in Socorro and asked about their daily rates. The woman with whom she spoke at the trailer park told her that even with additional hookup charges for electricity and cable, the daily rate would never exceed \$27.

Because Trujillo was out of the office, Gravning spoke with Chavez the next day. When she told Chavez everything that she had done so far to verify the receipt, Chavez suggested that Gravning ask Lotrich for the original receipt and the Visa receipt. In an email dated August 16, 2011, Gravning asked Lotrich for the original receipt from the RV park and also for the Visa receipt. Approximately one-half hour after Gravning sent the email, Lotrich came to her and gave her his Visa statement for July, explaining that he would not have his August statement for another month. He pointed out a charge on the July statement for \$52 and asserted that this was the daily rate for Casey's. She recalled that Lotrich told her: "The RV park receipt I gave you is the only information I have in my possession." He also told her that he expected to be paid.

As discussed above in an earlier section, Lotrich was called into Trujillo's office on August 17 to receive his notice of the reorganization and his resulting layoff. During the course of the meeting that Lotrich recorded, Lotrich told Trujillo that he had an issue with Gravning because he had turned in his expenses and he was not getting expeditious payment. He told Trujillo that Gravning had an issue with his receipt from the RV park and that she had questioned the amount. When Trujillo asked him the amount, he told her that it was \$56 per day and he added that that was far less than he would have paid had he stayed at a hotel. He went on to add that he had a receipt from a previous stay at the RV park in July showing the amount as \$52 per day. He then volunteered that the reason that the previous stay was only \$52 rather than \$56 per day was because he had not had a TV when he stayed in July and there was a \$4 daily fee for a TV.

On that same day, Trujillo called Gravning into her office to give her the details of the reorganization including the upcoming layoff for Lotrich and Eleanor Chavez. When Trujillo told Gravning to pay Lotrich for his outstanding expenses, Gravning explained that she was having a problem with one of his receipts. Gravning showed Trujillo the receipt and then explained everything that had occurred thus far including her call to the RV park, her email to Lotrich, and her conversation with Lotrich. Trujillo then telephoned the RV park and asked that they fax the original receipt to the AFT-NM office. After receiving the original receipt, AFT-NM decided to suspend Lotrich.

5. The events of August 19, 2011

At 2:05 p.m. on August 19 2011, Trujillo sent Lotrich an email telling him that she had left a telephone message for him earlier at 1 p.m. She told him that it was the utmost importance for him to attend a meeting with her at 4 p.m. and he was to bring his steward with him. She explained that she had chosen 4 p.m. in order to accommodate his steward's availability as his steward was in Gallup, New Mexico. Lotrich, who was not in the office, responded by email at 3:26 p.m. telling Trujillo that he had just received her message and he was trying to arrange child care. He told her that as soon as he had coverage for his children he would be on his way.

When he arrived at the meeting, he told Trujillo that his steward, Joe Hill, was in Gallup and there was no way to get in touch with him. He added that IAM Union Representative Red Dow was in negotiations and he would not be available as well. Lotrich testified that Trujillo told him that she really needed to meet with him. Lotrich asserts that he told her that he would meet with her but he did not waive his right to have a representative. Trujillo handed Lotrich a prepared statement that contained a summary of issues and a description of the purpose of the meeting. The summary described the process by which the discrepancy in Lotrich's receipt had been discovered and the fact that AFT-NM had obtained an original receipt from the RV Park. The statement confirmed that the meeting was investigatory in nature and that no final determination had been made in the matter. Lotrich was instructed that he was on paid leave while AFT-NM conducted a 2-week investigation. Lotrich was instructed to return his communication devices and keys and to refrain from engaging in any business on behalf of AFT-NM.

Lotrich recalled that he responded by starting to explain how he came to request reimbursement for the additional \$30 per day for his lodging. Union Officer Doris Williams, who was sitting in on the meeting, suggested that Lotrich give his explanation in writing and Trujillo gave Lotrich 2 weeks to provide the information.

6. Complaint paragraphs 5(h), (i), and (j)

Complaint paragraphs 5(h), (i), and (j), allege that on August 19, 2011, AFT-NM denied Lotrich's request to be represented by the Union during an interview even though Lotrich had reasonable cause to believe that the interview would result in disciplinary action taken against him. Additionally, the complaint alleges that AFT-NM conducted the interview even though Lotrich's request was denied.

Trujillo testified that she asked Lotrich to come to her office at 4 on Friday afternoon because she had been directed to do so by the AFT-NMs counsel in Washington, D.C., and by the AFT-NM's executive board. She understood that it was urgent that she do so before the next working day. She further acknowledged that while acting Union Steward Hill knew that he might be called for such a meeting, neither he nor Union Representative Earnest Dow knew of the 4 p.m. meeting.

In *NLRB v. Weingarten*, 420 U.S. 251 (1975), the Supreme Court upheld the Board's opinion that Section 8(a)(1) provides employees the right to be accompanied and assisted by their union representative at meetings that the employee reasonably believes may result in disciplinary action. The right does not apply, however, in those situations where the adverse action has already been decided by the employer and the employee is merely informed of the adverse action. *LIR-USA Mfg. Co.*, 306 NLRB 298, 305 (1992). This situation is distinguished, however, from the circumstance in which the employer informs an employee of a disciplinary action and then questions the employee to seek information to bolster that decision. *Titanium Metals Corp.*, 340 NLRB 766, 774 (2003). In that instance, the employee's right to representation applies.

In the instant case, there is no indication that AFT-NM made any attempt to notify either the steward or the union representative that a meeting would be held with Lotrich at 4 p.m. on August 19. Clearly, Lotrich made the request for a representative to be present and specifically told Trujillo that he was not waiving his right to a representative. Counsel for the General Counsel submits that clearly the meeting was an investigatory meeting. Counsel argues that the fact that a pretyped suspension letter was handed to Lotrich at the beginning of the meeting does not negate the fact that an extremely detailed and interactive investigation ensued.

Additionally, the language of the document presented to Lotrich confirmed that the meeting was investigatory in nature and that no final determination had been made in the matter. Lotrich testified without contradiction that he attempted to explain the breakdown of the costs involved in his travel and how he had come to arrive at the \$56 daily rate that he claimed. Although Williams and Trujillo ultimately stopped him from continuing the explanation and directed him to prepare a written statement, there is no question that this interview was more than simply informing Lotrich of his suspension. Accordingly, I find that AFT-NM violated the Act as alleged in complaint paragraphs 6(h), (i), and (j).

7. The events following the August 19 meeting

In a 10-page document dated August 25, 2011, Lotrich gave a lengthy explanation describing the background, issue, and events related to the circumstances of his suspension. He included a calculation of how he arrived at the additional \$30 for daily lodging that he had included on the modified receipt. Although he had separately requested reimbursement for mileage for his truck, Lotrich explained that he was including mileage for the RV because he considered it to be a separate vehicle. On cross-examination, he acknowledged, however, that the camper did not have a separate gas tank. He testified that he had based this claim for additional mileage on the fact that the

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camper required its own insurance and license plates. In his document, he also included such items as toilet paper, water filters, and chemicals for the sanitation feature of the camper. He additionally included \$259.99 for the cost of a stainless steel mountable grill, \$249.99 for an innerspring mattresses, as well \$105.99 for a domestic brisk replacement shroud. Other items that he included as expenses were propane, a 30-amp cord, roof vent covers, air-conditioner filters, dome lights, and a sewer kit. Although Lotrich did not attach receipts for each of these items, he attached printouts from various internet sites showing the pricing for the items he had listed as expenses.

In addition to the listed expenses, Lotrich added that if the camper mileage were subtracted from the total, he was really only seeking reimbursement of \$14.70 per day for the wear and tear to his RV and he believed that was very reasonable when compared to hotel costs. He asserted that a hotel room in Socorro was approximately \$100 a night or a total of \$600 for the 6 nights. He contended in his written statement that because he had only requested reimbursement of \$336, he had saved the AFT-NM \$264.

On September 1, 2011, Lotrich initially met with Trujillo, Tim Crone, and Joe Hill. Kathy Chavez came into the meeting later. At the beginning of the meeting, Lotrich distributed copies of his August 25, 2011 document and the 29 pages of internet pages. He explained the documents that he distributed. After he did so, Trujillo presented Lotrich with a severance agreement. When he declined to sign it, Trujillo told him that he was terminated.

8. Conclusions concerning Lotrich's suspension and discharge

Counsel for the General Counsel asserts that Lotrich was suspended and then discharged because he engaged in union activities that were not liked by AFT-NM management. AFT-NM asserts that Lotrich was suspended and terminated because he attempted to embezzle money from AFT-NM through the falsification of reimbursement documentation and unrelated to any union or protected activity by Lotrich.

As discussed above, the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation and the case provides an analysis in determining whether there has been unlawful motivation. To establish the initial burden under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. Those elements include: (1) the existence of protected activity; (2) the employer's knowledge of the protected activity; (3) the alleged discriminatee has suffered an adverse action; and (4) a causal link or nexus between the protected activity and the adverse action. *Tracker Marine, LLC*, 337 NLRB 644, 646 (2002). In applying this analysis to Lotrich's suspension and discharge, I find that the General Counsel has met the necessary burden to establish a prima facie case of discrimination. Unlike the issue involving Lotrich's layoff as described earlier in this decision, all four elements of *Wright Line* have been met. Beyond the fact that Lotrich suffered an adverse action, Lotrich engaged in union activity that was clearly known to AFT-NM. The most

obvious example of Lotrich's union activity that would have likely antagonized AFT-NM was his conduct during the August 17, 2011 meeting concerning his layoff. As the taped conversation reflects, Lotrich challenged Trujillo on almost every point that she raised. He accused her of violating the collective-bargaining agreement as well as violating the National Labor Relations Act. He challenged the executive council's right to reorganize and questioned the financial necessity for the restructuring. He argued various portions of the collective-bargaining agreement as a basis for transferring him to another position in lieu of his layoff. Although the nexus between his protected activity and his suspension and termination is somewhat tenuous, I cannot ignore Kathy Chavez' threat to get even with Lotrich because of his attempt to get the no-confidence vote against her. While I have not found Chavez' threat to have a significant impact on Lotrich's layoff, I find that it carries more weight in assessing AFT-NM's motivation in suspending and terminating Lotrich. As discussed above, the decision to layoff Lotrich and Eleanor Chavez was made by a decisional body of more than 30 individuals. There is no evidence that Lotrich's union or protected activity was considered by this body in their decision to restructure the AFT-NM staff. It simply isn't reasonable to conclude that all of these decisionmakers were motivated to layoff Lotrich because of his conduct in the April 18, 2011 internal union meeting.

The field narrows, however, as to the individuals involved in the decision to suspend and terminate Lotrich. Chavez was present during an August 24, 2011 conference with AFT-NM officers as well as Kaseman and Aber-Towns from AFT. It was determined during that call that Lotrich would be offered a resignation settlement. If he refused the settlement, he would be terminated. Thus, while there is no direct evidence to show that Lotrich was suspended and terminated because of Chavez' animus for his union activity or because of his vigorous assertions of his rights during the layoff interview, an inference may be drawn from the record as a whole. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

Once the General Counsel has established a prima facie case and met its burden under the *Wright Line* analysis, the burden shifts to the respondent to establish that it would have taken the same action in the absence of the employees' union or protected activity. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must "persuade" that the action would have taken place even absent the protected conduct "by a preponderance of the evidence." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). Based on the record before me, I find that AFT-NM has met its burden under *Wright Line* and has demonstrated that Lotrich would have been suspended and terminated in the absence of any union or protected activity.

My findings are based on the following observations. If merit is to be found in the General Counsel's allegations that Lotrich was unlawfully suspended and terminated, a decisionmaker must not only conclude that Lotrich did not engage in fraudulent or deceptive conduct, but also that AFT-NM simply took action against Lotrich without a valid basis. Thus, the determination of whether Lotrich engaged in conduct

for which AFT-NM would have terminated him in the absence of any union activity rests heavily on a credibility analysis and specifically focuses on the credibility of Lotrich's testimony.

Lotrich admits that he made a photocopy of the original receipt that he received from Casey's RV Park and changed the numbers to reflect a receipt for \$336 rather than \$130. He maintains that when he gave this altered receipt to Gravning, he also gave her a copy of the original receipt showing the total cost as \$130. Gravning credibly testified that Lotrich gave her only the altered receipt for \$336. I find her testimony credible for a number of reasons. If Lotrich had given both receipts as he alleges and had explained why the receipts varied as he asserts, there would have been no reason for Gravning to send him the email on August 16, requesting a copy of the original receipt from Casey's as well as a copy of his Visa receipt.

Gravning's testimony was further corroborated by the owner of Casey's RV Park. Kathryn Casey testified that Gravning telephoned her in August 2011 and not only asked about the daily rate at the RV Park, but also asked for a copy of the receipt from Lotrich's stay at the park in August 2011. Casey sent AFT-NM the original receipt showing a total cost of \$130 for 5 days lodging at \$26 a day. When testifying, Casey not only identified the original receipt but she also identified the copy of the credit card receipt dated August 8, 2011, for \$130.

Gravning also credibly testified that after she sent Lotrich the email request for the original receipt as well as a copy of the credit card receipt, he provided neither receipt. Instead, he showed her a credit card receipt for his stay at the RV Park in July that reflected a total bill of \$52 and suggested that this demonstrated the usual daily cost at the park. He continued this deception when he met with Trujillo on August 17, 2011. Lotrich's recording of the meeting reflects that Lotrich initiated the conversation concerning his receipts. He volunteered that Gravning had raised an issue with his receipt from the RV Park. Lotrich's tape recording of the meeting confirms that Lotrich told Trujillo that his daily rate for the RV park was \$56 and he had a receipt from July documenting the rate as \$52. He told Trujillo that the reason for the lower rate in July was the fact that he did not have TV service and that there was a \$4 for TV service. During cross-examination, however, Lotrich admitted that Casey's does not have a \$4 fee for the use of a TV.

Lotrich's testimony was totally contradicted by the testimony of Kathryn Casey who testified that Lotrich was only charged \$130 for his lodging during the week of August 8. Casey also produced a copy of a credit card receipt for Lotrich for July 1, 2011. The credit card receipt amount was \$52. She additionally produced the RV Park receipt for this same charge showing that the \$52 was for 2 days lodging at \$26 a day. Thus, based on Casey's testimony, it is apparent that in both his conversation with Gravning and in the meeting with Trujillo, Lotrich used the receipt for his 2-day stay in July to misrepresent his alleged expense of \$56 per day for lodging.

The credibility of Lotrich's testimony was additionally weakened during cross-examination when he initially asserted that he had actually paid \$156 in total for his August 2011 stay rather than only \$130, as reflected on the original receipt. He testified that because he stayed 6 nights rather than 5, he paid \$156. When asked if he had a receipt for that sixth night, he

responded that because there was no clerk on duty when he left on Sunday, he had simply left an additional \$26 at the RV park office. Casey, however, testified that even if the additional payment had been left at the office for the sixth night, a receipt would have been generated. She confirmed that although she had checked all of her receipts for the particular dates that Lotrich stayed at the campsite, she found no additional receipt for the sixth night.

During continued cross-examination, Lotrich contended that in order to arrive at the alleged expense of \$336, he had simply estimated that the reasonable wear and tear fee for his camper approximated \$13 to \$15 per day. He admitted that he then arbitrarily picked an amount of \$10.52 a day for all the other expenses that he incurred and this brought the total to \$30 above the \$26 fee charged by the RV Park. Although this mathematical analysis creates the \$336 total that Lotrich included on the altered receipt, the alleged expense criteria have no foundation. Lotrich's rationale for claiming the \$336 began when Gravning challenged his altered receipt. In order to satisfy her questions, he produced the credit card receipt for \$52 from a previous 2-night lodging expense in July. He continued by volunteering this same story to Trujillo on August 17. Then, once he was suspended, he created a new analysis in his August 25, 2011 letter; proffering internet-quoted prices for various equipment and supplies. Although he asserts in his testimony that he gave Trujillo some receipts on August 17 to support these kinds of costs, he gave no specific information in support of this claim and there is no credible evidence to support this assertion. Finally, during his testimony, he again created a new analysis with new estimates for his alleged daily expenses.

The credibility of Lotrich's testimony is further challenged by his assertion at trial that Trujillo preapproved his additional costs for his Socorro lodging. Lotrich testified that on August 10, 2011, Trujillo met with him in Socorro to give him materials to distribute. He testified that during his brief meeting with her, he told Trujillo:

Christine, because I'm in my personal camper, there are additional costs above and beyond the actual campsite rental fee. There's the transportation-related costs, as well as, you know, other incidental costs, including propane and those sorts of things.

Lotrich testified that he asked Trujillo how she wanted him to submit those expenses to her and she told him to "Just figure it out." Lotrich testified that Trujillo's last directive to him was "Keep it low." Although this alleged conversation would support Lotrich's claim that Trujillo knew about and sanctioned the "camper usage expenses," it is not supported by other record evidence. When Lotrich prepared his August 25, 2011 10-page statement for Trujillo, he described his August 10, 2011 meeting with Trujillo. He stated in the document that during the conversation, Trujillo asked him if he were staying in Socorro. He asserts in the statement that he told her: "I am in my camper at Meyer's; this is why I am driving my red truck instead of my Pontiac." Lotrich included nothing more in the statement about his conversation with Trujillo. There is no reference to his having told her about the additional expenses for the camper or about her giving him authorization for those expenses.

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Lotrich admitted that he never raised this alleged authorization when he brought up the issue of the receipt in his meeting with Trujillo on August 17 or even in the August 19, 2011 meeting when he received in his notice of his suspension. Lotrich admitted that the first time that he told anyone that he had preapproval for the additional expenses was in his testimony at hearing. As an explanation for never having mentioned it previously, he testified: "Nobody ever asked about the preapproval."

Trujillo recalled her brief meeting with Lotrich in the parking lot of the Socorro gas station. Trujillo recalls that she asked him why he was in his truck. He told her that he was in his camper. She denies that he mentioned anything to her about his expense reports or any issues regarding his reimbursement or receipts. I credit Trujillo's testimony. It is reasonable that if Lotrich had received any kind of preapproval from Trujillo on August 10, he would have reminded Trujillo of the alleged approval at some point during the investigative process and certainly prior to the date of the hearing that occurred more than 9 months after his suspension.

As discussed above, Lotrich acknowledged that he altered the original receipt in order to receive \$206 more for his lodging than he paid to Casey's on August 8, 2011. His claim that he left another \$26 at the Park before leaving is unsupported by credible evidence. Although he constructed a rationale as to why he could have claimed for additional expenses, he did so after AFT-NM's decision to suspend or terminate him. The total record evidence reflects that at the time that AFT-NM made the decision to suspend or to terminate Lotrich, he had submitted only the altered receipt for his August lodging and the July receipt for \$52 that Lotrich used to falsely claim that the daily rate was \$52 without the service of a TV. Casey provided to AFT-NM copies of the original receipt from his August lodging, as well as the full receipt for his July lodging. Thus, based on what Casey verbally reported to AFT-NM as well as the copies of the receipts for July and August that she provided, AFT-NM had sufficient documentation to make a decision about Lotrich's continued employment.

Counsel for the General Counsel asserts that AFT-NM has treated other employees differently in similar situations; which would show motive and pretext. The overall evidence, however, does not show that Lotrich received disparate treatment for his conduct. AFT-NM contends that there has never been an issue regarding a staff representative attempting to embezzle money through the falsification of reimbursement documentation. The record contains only three other examples of discipline given because of irregularities in reimbursement documentation. Employee Judy Johnson was disciplined for going out of her jurisdictional area to attend a union event and for also upgrading her hotel room for the event. Prior to the time that Trujillo took office, employee John Ingram took an AFT-NM vehicle on vacation without prior permission. Beaty was suspended after it was discovered that he created a receipt to get reimbursement for a meal expense that he incurred. The meal had been at a restaurant in rural New Mexico that did not give receipts that complied with reimbursement guidelines. Although none of these employees were terminated, their conduct was significantly different from that of Lotrich.

Thus, based on the total record evidence, I find that AFT-NM has demonstrated that it would have suspended and terminated Lotrich in the absence of any protected or union activity and I find no merit to complaint paragraphs 6(c) and (d).

9. Respondent's argument that Lotrich engaged in postdischarge misconduct

AFT-NM argues that Lotrich engaged in postdischarge conduct that relieves AFT-NM from any obligation to reinstate Lotrich. Although, I have not found that AFT-NM unlawfully terminated Lotrich, I find no merit to AFT-NM's argument. AFT-NM contends that Lotrich sought to harm AFT-NM after his discharge by his deliberate conduct. Specifically, Respondent asserts that Lotrich sought to create his own union as well as a consulting business that would compete with AFT-NM. In making this assertion, Respondent relies on Lotrich's Facebook message to a friend in which he talked about his dream of starting his own union. At the time of the hearing, Stephanie Ly was the executive vice president for the Rio Rancho School Employees Union (RRSEU.) The RRSEU is a local of the AFT. In June 2012, she was scheduled to assume the position of AFT-NM State president as a successor to Trujillo. Ly testified that after Lotrich was laid off in August 2012, she telephoned Lotrich to "catch up." She did not know at the time of her call that he had been terminated. Ly testified that Lotrich told her that he had filed several grievances and that he was going to get AFT and in particular Trujillo and Chavez for mismanaging the Union. In the course of the conversation he told her: "We can form our own union." She recalled that during the conversation he talked about the method by which her local could disaffiliate from AFT and the kinds of costs that might be involved. In a later email, he offered Ly a compensation package. After Ly found out that he had been discharged, she declined.

Despite Lotrich's assertions in the Facebook message to his friend and in his conversation with Ly, Lotrich's attempt to start a consulting business or to start a new union proved unsuccessful. Although Lotrich filed the necessary paperwork in September 2011 to incorporate the new union in New Mexico, the corporation was no longer in good standing after November 4, 2011. Lotrich testified that it was not a recognized corporation and it had never had a bank account of any kind. Although Lotrich had initially hoped that the consulting business would complement the new union, the business never developed. He testified without contradiction that the consulting business never generated any income or had any clients.

In its decision in *Hawaii-Tribune-Herald*, 356 NLRB No. 63, slip op. at 2 (2011), the Board clarified the applicable standard for evaluating whether a discriminatee's postdischarge misconduct warrants forfeiture of the right to traditional remedies of reinstatement and backpay. The standard requires the employer to prove that the alleged misconduct is so flagrant as to render the employee unfit for further service or that there is a threat to the efficiency in the plant. In quoting from an earlier decision in *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976), enfd. 548 F.2d 391 (1st Cir. 1977), the Board further observed "an evaluation of post discharge employee misconduct requires sympathetic recognition of the fact that it

is wholly natural for an employee to react with some vehemence to an unlawful discharge.”

As counsel for the General Counsel points out, there is nothing involving Lotrich’s posttermination conduct that warrants the loss of reinstatement rights. There is nothing associated with his conduct that implicates any violence toward AFT-NM or its employees. There is no evidence that he would not be able to perform his job if he were reinstated. The General Counsel further submits that as a discriminatee, Lotrich has an obligation to mitigate his damages and he did so by trying to start a new business.

Although I have not found that AFT-NM unlawfully discharged Lotrich or that AFT-NM must reinstate Lotrich, he would not otherwise be in ineligible for reinstatement because of any alleged post discharge misconduct.

D. Whether Respondents Refused to Hire James Beaty

1. Background

As referenced above, CBOP was a national program of AFT that was created to provide individual state organizations with needed assistance in organizing their membership and it was funded by the AFT national, as well as from contributions from individual members. AFT-NM worked with the national AFT field representative who was hired to oversee the project. In August 2011, Matt Aber-Towns was the national representative of the AFT who oversaw the CBOP program.

2. Beaty’s union activities

Beaty was hired into CBOP as an organizer in July 2003. He continued in this position until he was laid off in August 2011. As a CBOP organizer, Beaty reported to both the AFT national representative and to Trujillo. At the time of Beaty’s layoff, he reported to AFT National Representative Matt Aber-Towns.

Prior to Beaty’s employment as a CBOP organizer, Beaty served as a business manager for the Painters Union, legislative coordinator for the Painters Union, secretary-treasurer for the Building and Trades Council, as well as the New Mexico Federation of Labor. Shortly after Beaty was hired as a CBOP organizer, the six organizers began discussions about having their own union representation. Beaty testified that because the organizers have been union members and worked with unions and because they were working for a local union, they decided that it would be good if they were unionized. On September 21, 2004, representatives of AFT-NM and the AFT signed a voluntary recognition agreement recognizing the Collective-Bargaining Organizing Project Staff Association (CBOPSA) as the collective-bargaining representative of the CBOP bargaining representative. Signing as representatives of the employer were Trujillo, Chavez, and Chuck Iannello, the AFT regional director for the Mountain States.

Beaty served as vice president, steward, and CBOPSA’s chief negotiator for the parties’ first contract negotiations. Beaty was also CBOP’s signatory on both the recognition agreement and the collective-bargaining agreement. In mid-September, Beaty was the only employee called as a witness for the IAM in an arbitration hearing involving an AFT-NM employee’s discipline for allegedly disseminating a false rumor about Trujillo’s daughter; a CBOP employee, and another

CBOP employee. The IAM received a favorable ruling from the arbitrator in a decision dated November 7, 2011.

3. Beaty’s application for a position with AFT-NM

In a letter dated July 5, 2011, AFT Regional Director Jennifer Kaseman notified Beaty that the AFT was terminating the CBOP program effective August 4, 2011. With the closure of the program, Beaty and the other four organizers were laid off on August 4, 2011. On July 18, 2011, Beaty sent an email to Trujillo reminding Trujillo that she had offered to write a letter of recommendation for him. He told Trujillo that he would take her up on her offer and he asked her when that letter might be ready. On the same day, Trujillo created a letter to be sent to the Communication Workers of America (CWA) concerning Beaty. She described Beaty’s experience and qualification and recommended him for a position in the CWA’s organizing project.

After his layoff, Beaty discovered a website entitled unionjobs.com. The site listed the positions for the AFT-NM’s restructured staffing. On August 27, 2011, Beaty emailed Trujillo his application for one of the organizer positions along with his resume. When the organizer position was still posted on the unionjobs.com website on September 20, 2011, Beaty resubmitted his application and resume in addition to submitting a writing sample and training agenda document. On September 27, 2011, Beaty sent an email letter to Kathy Chavez informing her that he had applied as an AFT national representative and asking her to write a letter of recommendation for him. He ended the email with a paragraph inquiring about her health and her family. He explained that he hoped that her stress level at work was diminishing. He added that he missed working with her and other staff, local presidents, officers, and members. He concluded by saying that he hoped to hear from her soon and signed, “Your hoodlum, Jim” along with a “smiley face” emoticon. On October 15, 2011, Beaty sent Trujillo another email with his application as an organizer as he had seen advertised on the website on October 5, 2011.

4. The selection process for the new AFT-NM positions

Respondent AFT-NM selected individuals for the newly created organizer positions through a designated hiring committee and standardized interview process. The hiring committee was comprised of the AFT-NM officers as well as incoming AFT-NM President Stephanie Ly. The AFT-NM officers serving on the hiring committee were President Trujillo, Vice President Chavez, Vice President Myrl Tillman, Treasurer Joy Garrett, Vice President Tim Crone, Secretary Doris Williams, Vice President Ryan Ross, and incoming President Ly. Although Matt Aber-Towns sat in on the interviews and facilitated the committee’s debriefing following the interviews, he did not vote in the selection process. Only the AFT-NM officers voted on the selection of the applicants.

Because many of the applicants for the AF-NM positions lived out of State, the hiring committee conducted the initial interview with applicants by telephone. All of the applicants were asked the same questions. Following each interview, the committee continued with a telephone debriefing in which the committee members discussed the applicant and evaluated the applicant’s responses. At the completion of the debriefing, the

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committee decided whether they wanted to bring the applicant in for a second interview.

On October 26, 2011, Beaty received an email from AFT-NM Administrative Assistant Liz Gravning, giving him the details for his telephone interview scheduled for November 2, 2011. At the beginning of Beaty's telephone interview, all of the committee introduced themselves to Beaty. Beaty recalled that most of the 20-minute interview involved his answering questions posed by Trujillo. At the end of the interview, Trujillo asked the other members if they had any questions. They did not.

After Beaty's interview, the committee held a short debriefing. Because Aber-Towns had been Beaty's supervisor in the CBOP program, Aber-Towns was asked to give his opinion of Beaty's work. Aber-Towns told the committee that based on his experience; he would not recommend their hiring Beaty. In support of his recommendation, he offered to show them an assessment that he prepared concerning Beaty in June 2011. He did not indicate whether any of the committee members asked to see the assessment. Stephanie Ly recalled that during the debriefing, the committee discussed whether they wanted to bring him in for a second interview. Ly recalled that she asked Aber-Towns to explain why he did not recommend Beaty. Aber-Towns explained for the committee how he had prepared the earlier assessment after observing Beaty's work earlier in the year. Ly also recalled that Aber-Towns additionally told the committee that he had tried to help Beaty to improve his work. After hearing from Aber-Towns, the committee unanimously voted to not offer Beaty a second interview. Although Trujillo conducted the interview with Beaty, she did not participate in the committee's debriefing of the interview. On November 15, 2011, Beaty received a letter signed by both Trujillo and Chavez informing him that he had not been selected for the position.

5. Conclusions concerning AFT-NM's failure to hire Beaty

Counsel for the General Counsel asserts that AFT-NM and AFT violated the Act by refusing to hire Beaty because of his union activities. Counsel points out that Beaty was active with CBOPSA and also testified at an arbitration hearing on September 19, 2011. Counsel concedes that there is no direct evidence of animus but contends that animus may be established by timing and associated circumstances. Counsel maintains that there is evidence of both suspicious timing and disparate treatment. In support of this assertion, Counsel points to the fact that applicant Isidora Herrera was hired as an organizer and he had also testified on behalf of the employer at the September hearing. Additionally, counsel for the General Counsel argues that another applicant who was hired had less experience.

The General Counsel is correct that animus may be established through the record as a whole and through circumstantial as well as direct evidence. In this matter, however, the overall record does not establish the animus necessary to support a finding of an unlawful failure to hire Beaty. Ly testified that when she voted to not hire Beaty, she was unaware that he had participated in an arbitration hearing between the IAM and AFT-NM. She credibly testified that during the committee's

deliberation, there was no mention of his testimony at this hearing or about any previous union activity on behalf of the CBOP union. Joy Garrett testified that while she was a member of the hiring committee, she did not recall sitting in on the telephone interview with Beaty. She was not aware that he had testified in an arbitration hearing. Vice President Myrl Tillman also testified that she was not aware that Beaty had testified in the arbitration hearing. Vice President Tim Crone additionally testified that while he participated in the committee's debriefing of Beaty's interview, he heard no mention of Beaty's having testified in the arbitration hearing or any mention of Beaty's activities with the CBOPSA union.

The Respondents argue that the hiring committee members would not have otherwise known about Beaty's testimony, as his testimony is not even mentioned in the arbitrator's decision that issued on November 7, 2011. Although Trujillo acknowledged that she knew about the testimony because she attended the arbitration, she did not participate in the debriefing discussion following Beaty's interview. She denies that she told anyone else on the committee about his having testified.

The arbitration involved discipline given to an employee for allegedly spreading false and malicious rumors about two other employees. One of the employees complained that he was the subject of teasing as a result of the disciplined employee's conduct. During the arbitration hearing, Beaty testified that employees commonly teased each other and that he had participated in such activity. He had testified that the teasing was just normal workplace banter and that he had not felt uncomfortable or considered the situation as a hostile workplace. Trujillo further testified that she did not consider Beaty's testimony to be adverse to the Respondents. Beaty testified that his testimony had been very short and he candidly admitted that he didn't know whether or not his testimony was adverse to the Respondents.

Thus, there is no evidence that at any time in their deliberations, the hiring committee discussed Beaty's prior union activities with CBOPSA or the fact that he had been called as a witness by the IAM for the arbitration hearing. I also note that Beaty was called as a witness by the IAM; a union with which he was not affiliated. It is also noteworthy that Beaty apparently had more than just a business relationship with Trujillo and Chavez. When he was laid off from the CBOP project, Trujillo offered to write him a letter of recommendation. When he accepted her offer, she prepared a letter immediately to send to the CWA recommending him for a position. Beaty's letter to Chavez on September 27, 2011, asking her to write him a letter of recommendation contained an additional paragraph inquiring about her health and her family. When Beaty reached out to both Trujillo and to Chavez, he apparently considered them to be friends. There is no indication that he perceived them to have any animosity toward him.

As discussed above, the Board has established a framework for analyzing allegations of adverse employment action that turn on employer motivation. *Wright Line*, 251 NLRB 1083, 1087 (1980). In order to make a prima facie case of unlawful discrimination, the General Counsel must prove by a preponderance of the evidence that (1) the employee was engaged in

protected activity; (2) the employer was aware of the activity; and (3) the activity was a substantial or motivating reason for the employer's action. *Ibid.* The application of this analysis does not establish a prima facie showing that AFT-NM failed to hire Beaty because of his protected activity. Although there is no dispute that Beaty testified in the arbitration proceeding, there is insufficient evidence to show that the individuals on the hiring committee other than Trujillo were aware that he had done so. Because Trujillo did not participate in the debriefing of Beaty's interview, there is no evidence to show that she shared this information with the other committee members as they evaluated Beaty's interview and deliberated about whether he should be given a second interview.

The General Counsel argues that it is significant that the AFT-NM hired Isidoro Herrera who also testified in the arbitration hearing as a witness for AFT-NM. As with Beaty, there is no evidence to show that any of the committee members, other than Trujillo, was aware that Herrera had done so.

As noted above, there is insufficient evidence to show that Beaty's arbitration testimony was in fact adverse to AFT-NM. *Wright Line* requires the General Counsel to prove a link between the protected activity and the adverse employment action. Based on the overall record, I do not find persuasive evidence to establish such a connection. Accordingly, I do not find that AFT-NM failed to hire Beaty because of his union or protected activity.

6. Whether AFT and AFT-NM were joint employers in failing to hire Beaty

Counsel for the General Counsel asserts that AFT-NM has a joint employer relationship with Respondent AFT and that these employers enjoyed this relationship as it pertains to AFT-NM's refusal to hire Beaty for an organizer position. Counsel contends that the evidence demonstrates that AFT played a significant role in the hiring of organizers by AFT-NM. Citing *NLRB v. Solid Waste Services*, 38 F.3d 93 (2d Cir. 1994), Respondents agree that a joint employer relationship may be found to exist where there is sufficient evidence that one company has immediate control over the other company's employees. In that case, the Court noted that relevant factors include commonality of hiring, firing, discipline, pay, insurance records, and supervision. Respondents argue that in considering such factors, there was no joint employer relationship. Counsel for the General Counsel points out, however, the analysis followed by the Board in *TLI, Inc.*, 271 NLRB 798, 799 (1984). In *TLI, Inc.*, the Board cited the decision of the Third Circuit in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (1982), in which the court found that where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are considered joint employers for purposes of the Act. The Board also held in its decision in *Laerco Transportation & Warehouse*, 269 NLRB 324, 325 (1984), that in order to establish such a joint employer status, there must be a showing that the employer meaningfully affects matters to the employment relationship such as hiring, firing, discipline, supervision, and direction.

Beaty credibly testified that when he was employed by AFT as an organizer with CBOP, he received directives in his work

from both the AFT national representative, as well from Trujillo. He regularly attended staff meetings with the AFT-NM officers and staff. AFT Regional Director Kaseman attended the June 18, 2011 executive council meeting when the council discussed the financial circumstances of AFT-NM and Kaseman presented her assessment of the situation. She even predicted that changes would likely be made in the CBOP program as well as in staffing. Aber-Towns acknowledged that he also participated in meetings and in conference calls with the AFT-NM officers in which the AFT-NM restructuring and staff realignment was discussed. He admitted that he assisted AFT-NM in the hiring process for the employees selected after the restructuring. He worked with the AFT-NM officers in devising job descriptions and also in choosing the questions that would be used to interview and to evaluate the applicants. Aber-Towns sat in on all of the interviews with applicants and then facilitated the discussions among the hiring committee after each applicant was interviewed. After the committee's interview with Beaty, Aber-Towns specifically recommended against his being hired. Although some of the committee asked Aber-Towns to explain his recommendation, the committee followed his recommendation and Beaty was not offered a second interview. I also note that both Kaseman and Trujillo represented management in AFT-NM's bargaining with the IAM.

Based on the record evidence discussed above, it is apparent that AFT actively participated with AFT-NM in decisions and processes that "meaningfully" affected such matters as hiring, supervision, and direction. Accordingly, I find that AFT and AFT-NM have been joint employers of the organized employees of AFT-NM as alleged in consolidated complaint paragraph 2(e). The consolidated complaint also alleges in paragraph 2(d) that AFT has exercised control over the labor relations policy of AFT-NM for the organized employees of AFT-NM. While I find that AFT-NM and AFT were joint employers with respect to the failure to hire Beaty, there is no record evidence to support a finding that overall AFT exercises control over AFT-NM's labor relations policy. Accordingly, I do not find merit to paragraph 2(d).

CONCLUSIONS OF LAW

Respondents American Federation of Teachers New Mexico, AFL-CIO (AFT-NM) and American Federation of Teachers (AFT) are employers engaged in commerce within the meaning of Section (2), (6), and (7) of the Act.

1. Respondent AFT-NM and Respondent AFT are joint employers of the organized employees of AFT-NM.

2. The International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 794 (IAM) and AFT New Mexico Collective-Bargaining Organizing Project Staff Association (CBOPSA) are labor organizations within the meaning of Section 2(5) of the Act.

3. By creating an impression among its employees that their union activities were under surveillance, Respondent AFT-NM violated Section 8(a)(1) of the Act.

4. By interrogating employees about their union activity, Respondent AFT-NM violated Section 8(a)(1) of the Act.

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5. By threatening employees with unspecified reprisals because they engaged in union activity, Respondent AFT-NM violated Section 8(a)(1) of the Act.

6. By orally promulgating an overly-broad and discriminatory rule prohibiting employees from expressing their concerns about management, Respondent AFT-NM violated Section 8(a)(1) of the Act.

7. By orally promulgating an overly-broad and discriminatory rule prohibiting its employees from engaging in union activities by telling employees they had no right to call for a no-confidence vote during a union meeting, Respondent AFT-NM violated Section 8(a)(1) of the Act.

8. By orally promulgating an overly-broad and discriminatory rule prohibiting its employees from engaging in union activities by telling employees it was in their best interest not to take vocal positions at the bargaining table during contract negotiations involving the IAM and Respondent AFT-NM, Respondent AFT-NM violated Section 8(a)(1) of the Act.

9. By orally promulgating an overly-broad and discriminatory rule prohibiting its employees from engaging in union activities by telling employees they were being too vocal at the bargaining table, Respondent AFT-NM violated Section 8(a)(1) of the Act.

10. By orally promulgating an overly-broad and discriminatory rule prohibiting its employees from engaging in union activities by telling employees that AFT-NM accomplished a lot at the bargaining table when they did not engage in union activities, Respondent AFT-NM violated Section 8(a)(1) of the Act.

11. By denying the request of its employee to be represented by the Union during an interview when the employee has reasonable cause to believe the interview would result in discipline, Respondent AFT-NM violated Section 8(a)(1).

12. By conducting a disciplinary interview with an employee even though AFT-NM had denied the employee's request for union representation, AFT-NM violated Section 8(a)(1) of the Act.

13. By maintaining an overly-broad and discriminatory provision in its collective bargaining agreement with the IAM prohibiting employees from engaging in union activities at work, Respondent AFT-NM has violated Section 8(a)(1) of the Act.

14. Respondent AFT-NM and Respondent AFT have not violated the Act in any other manner.

REMEDY

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

I recommend that within 14 days after service by the Region, Respondent AFT-NM be ordered by Region 28 to post at its Albuquerque, New Mexico, copies of an appropriate "Notice to Employees," a copy of which is attached hereto as "Appendix" for a period of 60 days in order that employees may be apprised of their rights under the Act and the Respondent AFT-NM's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I make the following recommended⁶

ORDER

The Respondents AFT-NM and AFT, Albuquerque, New Mexico, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating an impression among its employees that their union activities were under surveillance.

(b) Interrogating employees about their union activity.

(c) Threatening employees with unspecified reprisals because they engaged in union activity.

(d) Orally promulgating overly-broad and discriminatory rules that prohibit employees from engaging in union activity by:

(1) Prohibiting employees from expressing their concerns about management.

(2) Telling employees that they have no right to take certain actions during union meetings.

(3) Telling employees that it is in their best interest not to take vocal positions at the bargaining table during contract negotiations with the IAM.

(4) Telling employees that they are being too vocal at the bargaining table.

(5) Telling employees that AFT-NM accomplishes a lot when employees do not engage in union activity.

(e) Denying the request of employees to be represented by the Union during disciplinary interviews.

(f) Conducting disciplinary interviews with employees when employees have been denied union representation.

(g) Maintaining overly-broad and discriminatory collective-bargaining provisions that prohibit employees from engaging in union and protected activities.

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

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

(a) Cease to enforce section 8.1 of the collective-bargaining agreement between AFT-NM and the IAM that prohibits employees from engaging in union and other protected activity by barring them from engaging in internal politics of the AFT-NM executive council.

(b) Within 14 days after service by the Region, post at its Albuquerque, New Mexico facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by

⁶ 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.

⁷ If this Order is enforced by a judgment of a United States court of appeals the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondents customarily communicate with bargaining unit members 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 by the Respondent at any time since April 2011.

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

Dated at Washington, D.C. September 25, 2012

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 maintain and/or enforce overly-broad and discriminatory policies that prohibit you from engaging in activities on behalf of the International Association of Machinists & Aerospace Workers, AFL-CIO, Local Lodge 794 (the Union) or protected concerted activities during contract bargaining sessions or union meetings.

WE WILL NOT maintain and/or enforce overly-broad and discriminatory policies that prohibit you from expressing your concerns about management.

WE WILL NOT maintain or enforce our overly-broad and discriminatory policy in section 8.1 of our collective-bargaining agreement with the Union, which section prohibits employees from engaging in union and other protected concerted activities by barring them from engaging in internal politics of the AFT-NM executive council, including personnel matters.

WE WILL NOT create the impression that we are keeping your union activities under surveillance.

WE WILL NOT interrogate you about your union activity.

WE WILL NOT threaten you with unspecified reprisals because you engage in union activity.

WE WILL NOT refuse your requests for union representation and/or assistance during investigatory meetings which you reasonably believe may result in discipline.

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

WE WILL rescind section 8.1 of our collective-bargaining agreement.

WE WILL rescind any rules that prohibit you from engaging in union or other protected concerted activities during contract bargaining sessions and internal union meetings.

AMERICAN FEDERATION OF TEACHERS NEW MEXICO,
AFL-CIO AND AMERICAN FEDERATION OF TEACHERS