JD–73–14
Gaithersburg, MD

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

COSTCO WHOLESALE CORPORATION

and Case 5-CA-122612

TEAMSTERS LOCAL 311, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

John D. Doyle, Jr., ESQ., and Timothy P. Bearese, ESQ.,
for the General Counsel.
Paul Galligan, ESQ., of New York, New York
for the Respondent.
James R. Rosenberg, ESQ., of Baltimore, Maryland
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eric M. Fine, Administrative Law Judge. This case was tried in Washington, D.C. on September 18, 2014. Teamsters Local 311, International Brotherhood of Teamsters (the Union) filed the charge on February 14, 2014, against Costco Wholesale Corporation (the Respondent).[1] The General Counsel issued the complaint on May 28, 2014, alleging Respondent violated Section 8(a)(1) of the Act by Respondent's officials on December 4, denying employee Margaret Ntim's request for union representation and proceeding to interview Ntim at a meeting where Ntim had reasonable cause to believe the interview would result in disciplinary action against her.

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs filed by the parties, I make the following:[2]

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[1] All dates are in 2013 unless otherwise indicated.

[2] In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation,* 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). All testimony and evidence has been considered. If certain testimony or evidence is not mentioned it is because it is cumulative of the credited evidence, not credited, or not essential to the findings herein. Further discussion of the witnesses' credibility is set forth below.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Gaithersburg, Maryland (Respondent's facility) has been engaged in the sale and distribution of merchandise and services at its warehouse facilities. During the calendar year ending December 31, 2013, a representative period, Respondent derived gross revenues in excess of $500,000, and purchased and received at its Gaithersburg, Maryland facility products, goods and materials valued in excess of $5,000 directly from points located outside of Maryland. Respondent admits and I find it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent admits that: Joe Portera, executive vice-president; Anthony Fontana, regional vice-president; Kevin Goulet, regional loss prevention manager; Chris Moore, general manager; Yolanda Brooks, assistant manager; and Conrad Anim, acting front end manager are statutory supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act, respectively. Of the named individuals, only Moore testified at the hearing. Moore is the general manager and therefore Respondent's highest level official working at its Gaithersburg warehouse, of which the record contained estimates of about 350 union represented employees working at that location.

The Union is party to a collective-bargaining bargaining relationship with Respondent, and the most recent collective-bargaining agreement has effective dates from March 15, 2013 through February 1, 2016. The collective-bargaining agreement states it is applicable to Respondent's employees working at its warehouses in Maryland, New Jersey and New York and West Henrico, Virginia. The agreement is between Respondent and the Eastern Area Teamsters Costco Wholesale Negotiating Committee representing Local Unions 210, 311 and 592, and certain other Teamsters locals if agreed to by the parties. The agreement reads at article IV:

> (a) Right to Discharge
> It is mutually agreed that the Employer reserves the right to discharge any employee for sufficient and proper cause. Sufficient and proper cause for discharging an employee shall include but is not limited to theft, dishonesty, gross insubordination, intoxication, possession of or working under the influence of illegal/dangerous drugs/substances and/or narcotics, refusal or continued failure to observe posted or issued Employer rules or procedures, or actions endangering the safety of others. It is agreed that the Employer has the sole right to set forth in all Employer rules and procedures, the breach of which will be cause for discharge or other disciplinary actions.

The agreement also states that:

> The Employer reserves the right to issue unpaid disciplinary suspensions for up to ten (10) working days for violations that would normally result in termination.
> ***

> The Employer shall have the option to give an employee an immediate investigatory suspension for a maximum of three (3) scheduled working days for a violation which would normally result in termination, as described in the Employer's rules and regulations, until the Employer has decided what final action is to be taken as a result of the violation.

The agreement contains in Appendix C the employer's rules and regulations. It contains a category labeled "major offenses". It states pertaining to major offenses that "discharge will be the normal action taken. However, a written warning or a disciplinary layoff could be used if there are mitigating circumstances, such as a long service employee with an excellent previous record." The agreement states that the violation of any of the following will be considered cause for immediate discharge. Included in the dischargeable offenses listed are:

> 1) Acts of dishonesty towards the Employer, customers, fellow employees, or organizations servicing the Employer; including but not limited to grazing. Grazing includes, but is not limited to shelf stock, RTV merchandise (including merchandise being destroyed for credit), merchandise returned at membership, and any packages that become open by either members during the course of the day or damaged while merchandising (i.e., blade cut, defective seems, etc.) Also included are Food Court and Fresh Food products and any ingredients used in their preparation);
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> ***
>
> 7) Removal from office or warehouse of any Employer merchandise or Employer property unless paid for, or with signed authorization from Management;

The agreement contains the following statement on the outside of the back cover:

> KNOW YOUR RIGHTS
>
> "*Weingarten Rights*"
>
> The U S Supreme Court has ruled that a Union Steward is entitled to be present at an investigatory meeting between an employee and management if the employee reasonably believes that a disciplinary action might result. The Court in the Weingarten case determined that this right arises only in situations where the employee requests representation and does not apply to such conversations as when a supervisor gives instructions or needed corrections of work techniques.
>
> In subsequent decisions, the Courts and the National Labor Relations Board have ruled that an employee is entitled to consult with a Union Shop Steward before the investigatory interview; that a Union cannot invoke the employee's Weingarten rights, and; that only you can assert this right. An employee does not have a right to Union representation if the decision to issue discipline <u>has already</u> been made and the purpose of the meeting is to issue and explain that discipline.
>
> There must be a reasonable probability of discipline resulting from the interview. If the purpose of the interview is merely to hand you a warning already drafted and not to conduct an interview which might lead to that warning, you would be subject to discipline for insubordination.
>
> THEY ARE YOUR RIGHTS BUT
> YOU
> MUST ASK FOR THEM

B. The current case

1. The General Counsel's witnesses

a. *Ntim's testimony*

Ntim testified as follows: Ntim has been employed by Respondent for 9 years, and is currently employed as a cashier/stocker. Ntim works at Respondent's Gaithersburg warehouse. Ntim is a member of the Union as are all of the employees at the Gaithersburg location.

On Sunday evening, December 1, Ntim was at work. While at work, Ntim shopped and then left her basket while waiting for her break to take her purchases out of the warehouse. At break time, while exiting the warehouse, Ntim gave her receipt to Assistant Manager Brooks to check Ntim out. Brooks told Ntim there were two extra items in the basket not reflected on the receipt, and Ntim was accused of stealing. Brooks took the two items out of the basket and gave Ntim her receipt. Ntim took her break and then returned to work. Around 30 to 40 minutes later, Acting Front End Manager Amin called Ntim and the two proceeded upstairs to a management office. Amin asked Ntim what happened and she said she shopped, then left her basket and was doing returns. When Ntim came back, she was rushing to take the basket to her car and return to work. Amin told Ntim to give a statement. Ntim asked Amin to write the statement for her. Amin wrote the statement for Ntim, and then gave it to her to read, and she signed it and gave it to Brooks.[3] Amin and Brooks were in the room when Ntim gave the statement. Amin wrote the statement, but Ntim told him what to write. Brooks upon receiving Ntim's statement gave Ntim a write-up stating suspension pending termination. Brooks told Ntim to punch out and go home. Ntim punched out and left Respondent's facility before the end of her shift. She testified she was suspended at that time.

In Ntim's December 1 written statement, she stated she paid for four items and then packed them in a box, and placed the box in a shopping cart. Ntim then returned to work to do returns. After returning to work, Ntim took a break and took the box with the purchased items to the check out to put them in her car. Brooks was at the door and Ntim gave Brooks her receipt. However, Brooks found two items in the Ntim's box that were not paid for. Upon Brook's inquiry, Ntim stated she did not know how the two items got in Ntim's box and Ntim stated she did not pay for them. Ntim ended her written statement by stating, "I left the basket. I did not put them in my box, and did not know how they got into my box." The "Employee Corrective Consultation" issued on December 1 to Ntim by Brooks, stated the action taken was Ntim "is being suspended, pending termination." It reported the time of the incident was 7:54 p.m. It accused Ntim of being in direct violation of major offense 1, which involved acts of dishonesty including grazing. It stated that Ntim was being checked out and two items underneath a beach towel were found and not paid for totaling $33.98 in value.

Ntim testified that on December 1, she punched out, went to the parking lot and called shop steward David Cole, who is also an employee of Respondent. Ntim told Cole what happened, about the write-up Brooks gave her, and she told Cole she was on suspension pending termination. Cole gave Ntim the phone number of one of the union officials to call the next day. Cole told Ntim to call him back to let him know what happened. Ntim testified she called the union official the next day but the call went to his voice mail which stated he was on

[3] Ntim testified she did not write her statement on December 1 because of language difficulty. Ntim testified she is from Ghana and English is not her native language. She testified she did not feel comfortable writing in English.

vacation. Ntim called Cole back and let him know. Cole told Ntim to call Penny, another union representative and talk to her.

Ntim testified that she thought the next day she received a call from Warehouse General Manager Moore, but the call went to Ntim's voice mail. Moore stated on the voice mail that he wanted to have a meeting with Ntim the following day at 2 p.m. at the store. Upon receiving the voice mail, Ntim called Cole and told him that Moore said he wanted to meet with Ntim the next day at 2 p.m. and she asked if Cole could come with her. Cole told Ntim he was going to call Shop Steward Barbara Wagner, also an employee of Respondent, and they would all meet at the store at that time and go to the meeting.

Ntim testified the next day when she arrived at the store she called Cole to let him know she was there. When Cole arrived, Ntim and Cole went upstairs to the management office and met Wagner. Ntim estimated this was around 1:30 to 2 p.m., and she thought the date of the meeting was December 4.[4] Ntim testified when they arrived at the office there were a lot of people in the office. Ntim testified Cole was standing next to her and Wagner was standing close to the doorway. Ntim testified they went in the office and Moore came out of an office and asked what are you guys doing here. Ntim testified when Moore asked this question, he was talking to Cole and Wagner. Ntim testified when Moore asked that question, "I think they make a gesture, said they are with me." When asked who made the gesture Ntim testified, "I don't actually remember. It's been a while, so I don't know if it was Barbara or David, but one of them did." Ntim then testified one of the shop stewards said they are with Ntim. Ntim testified that Moore then went into the payroll office, came out of the office, and went back to his office.

Ntim testified Moore then called Wagner and Cole to one of the offices. Ntim could not hear what transpired between Moore and the shop stewards while they were in the office. Ntim testified that after 5 to 10 minutes the shop stewards came out and told Ntim they were leaving. At that time, Wagner told Ntim that her answers should be short such as yes, no, I don't know, and I don't remember.

Moore then called Ntim into a room which Ntim referred to as security office. In the room were Regional Loss Prevention Manager Goulet, payroll clerk Janet Quinones, Moore and Ntim. Quinones is a member of the bargaining unit, but she is not a union representative. Ntim had never met Goulet before. Ntim testified as follows: Goulet was at the head of the table and he spoke first at the meeting. Goulet said the statement Ntim wrote and what Respondent had against her did not match. Goulet said if Ntim changed her statement and said she took what was in her basket the Company is lenient and would give Ntim's job back to her. Goulet had a yellow sheet in his folder. Ntim responded that if Goulet wanted her to write a statement she would go home to write it and bring it in the next day. Goulet said he would write a statement for her, and Goulet started writing the statement. After Goulet finished, he gave the statement to Ntim to sign. Ntim read the statement and told Goulet "that that was not what I said; I have my statement, so I stick by my statement." Ntim testified after she said this, Goulet kept pushing her to sign the statement he wrote and change her statement. Ntim testified she read the statement Goulet wrote and it was a full sheet of yellow paper about the same length as her original statement.

[4] While Ntim's initial chronology places this meeting as taking place on Tuesday, December 3, she testified the meeting took place on Wednesday, December 4, which is confirmed by other witnesses.

Ntim testified Goulet's statement differed from Ntim's original statement. Ntim testified it had been a long time and she did not recall what the statement Goulet wrote said. However, she remembered the first two lines which stated she was changing her statement and whatever was in the basket she took it. After Ntim told Goulet that she would not sign his statement, Goulet continued to press her to sign it. Ntim told Goulet that she had given them a statement and they were intimidating her to change it. Ntim said she was not going to change it and she stopped talking. Ntim did not talk again. Ntim testified, "He was still there talking and talking. I didn't pay him no mind. And he got mad and got out of the room." Ntim testified that Goulet sometimes raised his voice while talking to her. After Goulet left, Moore, Quinones, and Ntim remained in the room. Moore then said what they have against Ntim did not match her statement and that she needed to change her statement. Ntim did not reply. After a while Moore said that Ntim was on suspension pending termination and she should go home. Moore said Ntim had brought Wagner and Cole but there was nothing they could do for her with the evidence they have against her. Ntim testified that, during the meeting, Moore asked her to change her statement about three or four times, and Goulet asked her to change her statement several times and he made more than four requests for her to change it. Ntim testified that Goulet was in the room about 40 to 45 minutes while she was there and that she stayed about 15 to 20 minutes after he left. She estimated the meeting was about an hour long. Ntim testified that the statement she gave to Amin on December 1 is accurate. Ntim testified that at the end of the meeting on December 4, she stuck with that statement.

Ntim testified that, during the meeting, they told her they have something on camera against her. Ntim responded that whatever they have on camera they should use against her as she was not going to change her statement. Ntim testified both Goulet and Moore said they had something on camera against her. She testified Goulet said it first, and that when Goulet left Moore said it. Ntim testified that during the meeting she did not ask that the union stewards be present. She explained that she had brought the stewards with her, but when they came to the office Moore talked to them and told them to leave.

Ntim testified she thought she met with Moore again on December 10 and she went back to work on December 11. Ntim was not paid from December 1 to December 10. Ntim testified the meeting on December 10 was also in the security office and present were herself, Moore, and union steward Wagner. Ntim testified when she arrived Wagner was already there. Ntim did not ask Wagner to be there. Ntim learned of the meeting by receiving the phone call from Moore. Ntim testified that, during the meeting on December 10, Moore said Ntim should convince him why he should give her job back to her. Moore said Ntim had two suspensions prior to the December 1 suspension and she had a consultation where the member said she was talking on her phone and with all that why should he give her job back. Ntim testified she did not say anything, and she could not recall what Wagner said, but she thought Wagner said something. Ntim received a new "Employee Corrective Consultation" on December 10, signed by Moore and witnessed by Wagner. It stated in essence that Ntim made two purchases on company time when Ntim was not on break. It stated "Another similar violation of this matter will result in a suspension, pending termination." Ntim also received and signed a typewritten, "Addendum to consultation that was given on 12/1/13." It stated she was to return to work from her suspension on December 11, 2013. "Her time out will be considered disciplinary unpaid time for a violation that would normally result in termination." It included a list of rules pertaining to employee purchases, cited a prior suspension, and stated, "One more suspension prior to June 8, 2014 would result in termination."

Ntim identified a statement which she gave to Cole concerning the December 4 meeting. She testified that her husband typed the statement. Ntim testified her husband is also from

Ghana, but he writes better English than she does. Ntim testified that she dictated the statement to her husband concerning the December 4, meeting, and that she did not tell him everything that was said in the hour long meeting to report in the statement. Ntim testified she thought she gave the statement to Cole during the same week as the December 4 meeting with Moore and Goulet. Ntim testified she called Cole after the meeting and he told her she should write a statement. The statement reads as follows:

> I got to the store today for the meeting with the union reps. When I got there, Chris, the store manager told me that the union reps were not needed at this time because there was nothing that the reps could do for me and that they only wanted to ask a couple of questions. After the reps left, Chris told me he wanted me to write another statement because the one that I wrote earlier was not truthful. I told him that my statement was correct and that I wasn't going to change it. Chris said he wanted me to change my statement because my statement didn't match with the evidence that they had.
>
> Kevin asked me how the items got into my basket several times and I told him that I did not put them in there. He kept asking me if I put the items in there and said maybe I put them in there myself. Chris told me he needed another statement from me and I told him I had already given them my statement. Chris told me he could write a new statement for me to sign and I said no. After a while going back and forth about signing the letter, I was let go. All these events happened on December 4, 2013 at the Gaithersburg Costco.

Ntim had testified when she entered the security office on December 4, Goulet spoke first. She testified Goulet told her to tell the truth and her statement did not match what they had, and if she admitted what she did she would get her job back. When it was pointed out to Ntim that in her statement to the Union she stated it was Moore who made those remarks, Ntim testified Moore made the remarks contained in her statement while they were in the hall before they entered the security office. She testified there were no witnesses to Moore's remarks. When asked why she did not mention Moore's remarks on direct examination, Ntim explained, "I said it's been a while now. Not everything that I can remember. But whatever comes on my mind, that's what I say." Ntim testified that both Moore and Goulet informed her during the meeting that they had video evidence of her stealing.

Ntim testified that she had a suspension prior to December 1. She, at first, denied writing her own statement concerning that suspension. However, she was shown a four line handwritten statement dated June 8, and admitted the statement was in her handwriting. Ntim was suspended in June 2013 for her showing a colleague a video on her phone containing child pornography. Ntim testified she did not place the topic of the video in her four line handwritten statement because she could not write that well. Ntim's pre-hearing affidavit to the Board agent in this case stated she had a picture on her phone and she showed it to one of her supervisors, Alausan. It states it was of a baby being molested. Ntim stated in the affidavit that she has three children and Alausan has a baby girl, and she was showing him the picture to tell him to be careful to make sure it does not happen to his baby.

b. The testimony of the Union stewards

Barbara Wagner works for Respondent as a sales auditor. She has held that position for over 10 years and has been a union steward for over 10 years. Wagner testified Ntim contacted Wagner in December 2013 and stated Ntim had been documented on a Sunday night. Ntim said she had been written up and suspended and was waiting to hear back from Moore.

Wagner told Ntim to find out the conclusion concerning her suspension and they would file a grievance, if they felt it was necessary. Wagner told Ntim that if Moore communicates and wants to talk to Ntim again that Ntim should call Wagner so that Wagner could be present.

Wagner testified she thought the next time she spoke to Ntim was Wednesday, December 4. Ntim called Wagner around 10:00 a.m. to inform her that Moore had called her and wanted to speak with her that afternoon at 1:00 p.m. Wagner testified she arrived at the warehouse around 12:55 p.m. Wagner entered the warehouse and walked to where she found Ntim and Cole standing. Wagner was off from work that day. Wagner testified they went upstairs into the main administrative office. Wagner testified Moore approached them and said he would be right with them. Wagner testified she sat down in a chair inside the door of the administrative office. She testified that Ntim was leaning against the counter next to her and Cole walked away.

Wagner testified that, several minutes later Moore came back and directed Wagner and Cole into Moore's office. Wagner testified when they entered the office Goulet, the regional loss prevention manager, was in the office. Wagner testified she had met Goulet either the day before or two days earlier. When they were in the office Moore said they decided to continue Ntim's suspension for up to 10 days. Wagner testified Moore said he wanted to review Ntim's statement with her and at that time neither Wagner nor Cole were needed and they should leave. While stating that, Moore opened the door to his office and motioned with his hand, which had a manila folder in it, and signaled for Wagner and Cole to walk out the door at which time Wagner nodded at Cole and they walked out the door. Wagner testified that Goulet did not say anything during the meeting.

Wagner testified that after she left the room she went back into the main administrative office where Ntim was waiting for them. Wagner testified she told Ntim that Moore wanted to talk to her, that she should keep her answers to yes or no, keep her answers short and to the point and not to contradict her prior statement. Wagner told Ntim that if she does not remember something to say she did not remember. Then Wagner and Cole left the building.

Wagner testified she was present for a December 10 meeting when Moore gave Ntim two documents, a counseling document and an addendum outlining check stand procedures. Wagner testified that present for this meeting were Wagner, Ntim, and Moore. Wagner testified Ntim notified her of the meeting and Moore asked her to be present. Wagner testified the documents that were given to Ntim that date were written prior to the meeting. Wagner testified the meeting lasted about 10 minutes. Wagner testified that she did not recall Moore saying anything to Ntim along the lines of that she should convince him why she should get her job back. Wagner testified that Moore gave Ntim a counseling notice, and he said they were going to return Ntim to work her next working day because they were not 100% positive that it was Ntim who committed the infraction and they were giving her the benefit of the doubt. Wagner testified that was the substance of the meeting and Moore also went over the addendum which he also posted for everyone to see. Ntim and Wagner signed the documentation.

David Cole works for Respondent as a cashier. Cole has been a union steward for 6 years, and he has worked for Respondent for 20 years. Cole testified Ntim called him during the evening at home in December 2013. Ntim told Cole that she had been suspended from work. Ntim told him the circumstances and stated they were going to call her back later. Ntim asked if Cole would come to the meeting when she came back to the building and Cole said he would. Cole testified Ntim called him a couple of days later to give him the time of the meeting with Moore. Ntim asked Cole if he would come and he told her yes. Cole testified he came to the

facility and met Ntim. They went to the stairs where they met Wagner and then went upstairs to the main administrative office. Cole did not think he was working that day. Cole testified he was the last one to go through the door and Ntim and Wagner were off to the side. Cole testified he was still standing near the door and Moore came around from his office going into the payroll clerk's office. Moore looked at Cole and asked why he was there. Cole said he was there for the meeting. Cole testified he looked over to where Ntim was and Ntim and Wagner were there. Cole testified, "I said the meeting, I gestured over, looked at her, and he acknowledged where I was looking and said, oh, okay."

Cole testified Moore finished what he was doing with the payroll clerk and then went back into his office. Moore then came back and asked to see Wagner and Cole in his office. Cole testified they followed Moore to his office and there was another man sitting there who from Cole's testimony was Goulet. Cole testified while in Moore's office they discussed the reason the stewards were there and Cole testified Moore said they were continuing the investigation and the stewards being there was not necessary at that time. Cole testified Wagner asked how the suspension was worded because they were not sure if it was a 10 day suspension or a 3 day suspension. Cole testified, "I guess he said he wasn't quite sure, the way it was worded, the document was worded, either, but he had to confer, look at it to find out. And in that conversation he said that, well, you know, until we finish the ongoing investigation that we have now, that we weren't needed and that we could go." Cole testified Moore kind of gestured to the door indicating the stewards could leave, that this was his ongoing investigation at the time, "I guess we weren't to be there at that particular time when they were having that and that we, you know, he kind of like gestured to the door that we could go." Cole testified that, after they left Moore's office, Cole and Wagner went to speak to Ntim. He testified Wagner told Ntim to be truthful, that her statements should be short, yes and no and to the point. Cole testified the stewards then left.

2. The testimony of Respondent's witnesses

a. Moore's testimony

Christopher Moore has worked for Respondent for 24 years. Moore's current position is general manager of Respondent's Gaithersburg, Maryland location. Moore testified there are three union stewards who work at Gaithersburg and he described his relationship with them as open and friendly. Moore testified his understanding of employees' *Weingarten* rights is obtained from the language on back of the parties' collective-bargaining agreement. Moore testified the summary is probably not the entire *Weingarten* rules, but it indicates that an employee is entitled to representation if they ask for it. He testified it states the employee has to request representation themselves and the request cannot be invoked by the Union. Moore testified it states that if the employee suspects further discipline, they can have representation.

Moore testified a suspension pending termination is when the Respondent has all the evidence they need from their investigation and they are going to suspend and turn the termination decision over to the vice presidents. Moore testified his immediate supervisor is Vice President of the Northeast Region Anthony Fontana. Moore testified in the case of a suspension pending termination Moore turns over all the information to Fontana. Moore testified the number of years of service an employee has determines how high up the chain of vice presidents the decision of whether to terminate an employee is to be made. If an employee has over one year but less than three the decision is made by the regional vice president. If the employee has over three and less than 15 years the decision is made by the senior vice president. Moore testified Fontana reports to Senior Vice President Jeff Long.

Moore testified if an employee is issued a suspension pending termination and the Respondent decides not to terminate, the employee can be given a disciplinary suspension of up to 10 days under the collective-bargaining agreement. Moore testified there is also a term in the collective-bargaining agreement called suspension pending investigation. Moore testified if an employee is suspended pending investigation with the possibility of termination, the investigation can last three days. Moore testified if an employee is suspended pending investigation, it means the Respondent did not have all the facts at the time and they need to conduct further interviews or look at other evidence. Moore testified if someone is suspended pending termination then the Respondent has everything they need. There is nothing else to discover and they go forward with the suspension pending termination. Moore testified suspension pending termination does not mean an employee is going to be automatically terminated. Moore testified something that could change that would be a decision by the vice presidents to grant leniency. Moore testified that if they suspend someone pending termination they most likely will not meet with that employee again. However, Moore testified they met with Ntim after all the documents were sent to the vice president because, although Ntim signed her written statement on December 1, it was written for her by Amin.

Moore testified Ntim works as a cashier at Gaithersburg, and he thought she had been there over 10 years. Moore testified that on Sunday, December 1, there was an incident concerning Ntim brought to his attention. Moore was off from work that day, but his assistant Brooks was working. Moore testified Brooks called him around 7:30 p.m. and advised him there was an incident with an employee attempting to leave the building with two items not paid for. Brooks provided Moore with the details. Moore asked Brooks to make a statement herself about the incident, and to get a statement from Ntim. Moore testified that, after he received all the details about what took place, Moore told Brooks to suspend Ntim pending termination. Moore identified the "Employee Corrective Action" signed by Brooks and Ntim dated December 1 as the corrective consultation given to Ntim showing Ntim was suspended pending termination.

Moore testified that, on Monday, December 2, Moore came in and reviewed Brooks and Ntim's written statements, and the December 1 corrective consultation to Ntim. Moore testified he forwarded the three documents to Fontana, along with Ntim's background information, which included her years of service, position, and past discipline. Moore's December 2, email to Fontana states, "I suspended cashier Margaret Ntim yesterday for dishonesty. (attempted theft)" Moore went on to state, "Margaret attempted to leave the building with two unpaid items. She was stopped by AGM Yolanda Brooks. At first she pretended to look for another receipt. Later she said she did not know how the items got there. Statements from Margaret & Yolanda attached."[5] Moore included a summary of Ntim's prior discipline. Moore stated in the email:

[5] Brook's handwritten statement concerning the incident is dated December 1. Brooks stated that around 7 p.m., Ntim approached the door with a box of items. Ntim handed Brooks the receipts and Brooks took the items out of the box to verify their purchase. Brooks stated in her statement, "I proceed to remove the items and as I lifted up the beach towel, something fell to the bottom of the box and it was two items (Bio-Oil and Vaseline Spray N Go). I begin to search the second receipt and could not these two items on it. I said to Margaret what is this, I don't see these on your receipt. Margaret started digging in her coat pocket and then her pants pocket, I assume for her receipt. I asked Margaret again where was the receipt for these two items and she just looked at me (not saying a word). I said Margaret I don't like the way this look, that you have two items that you didn't pay for. Margaret then said, I don't know why these are here, I didn't pay for them."

> Previous current consultations:
> 6-8-13: suspended for creating Immoral conditions. She showed graphic video of child pornography to other employees. The investigation revealed several instances of Margaret's sharing pornographic material from her phone.
> 4-14-13: leaving the premises during working hours.

Moore went on to state in the email:

> Margaret has been given numerous coaching regarding rudeness to members and repeated coaching for using her cell phone while on the register.
> She was also coached on exceeding the limits of purchasing mvm items. She was buying large quantities of restricted mvm items on several transactions per day. (Coaching per Rich Wilcox)
> Margaret displays a very cavalier attitude towards Management and Supervisors.
> I will call to discuss.

Moore testified, on Tuesday, December 3, he called Fontana, and asked if he had reviewed the documents pertaining to Ntim. Fontana said he did and that based on his reading of the information Ntim "would be most likely reinstated." Moore testified he told Fontana that Moore wanted to make sure that Fontana understood the statement Ntim signed on December 1 was written by Anim, because Ntim indicated she could not write. Moore told Fontana that Anim did not put a disclaimer on the statement stating Anim wrote it on behalf of Ntim. Moore testified Fontana suggested to Moore that he might want to call Ntim in and have her verify this is her statement.

Moore testified he called Ntim on December 3, and left her a voice mail asking her to return his call. Moore testified that, after his call to Ntim, he went down the hall and spoke to payroll clerk Janet Quinones, and said he may need her later this afternoon as a witness for a meeting with Ntim. Moore did not hear back from Ntim on December 3. On the morning of December 4, Moore again called Ntim, but she did not answer. Moore left Ntim a voice mail that he would like to meet with Ntim at about 1 p.m. that day, and he testified he asked Ntim to call back to confirm. Moore testified Ntim did not return the call.

Moore testified that at about 1:05 p.m. on Wednesday, December 4, union steward Cole came to Moore's office and stood in the doorway. Moore testified he asked Cole what he was doing there as Moore "knew he wasn't scheduled at that time." Moore testified, "He said to me I was asked to be here." Moore testified Cole looked down the hallway to the outer office and he kind of smiled. Moore testified that Cole "went with his head like that pointing down the hallway." Moore testified he got up and went down the hallway and saw Ntim sitting in the chair outside the payroll office. Moore told Ntim that he did not realize she was there. Moore asked if she could wait a minute, because Moore was not prepared because he did not know Ntim was coming. Moore testified Ntim sat down and Moore went back into his office.

Moore testified that, on December 4, Goulet, the regional loss prevention manager, was at the Gaithersburg location doing an investigation on cell phone fraud. Moore testified Goulet is from the New York area. Moore testified Goulet's being there was happenstance. However, Moore also testified that when Goulet arrived on the morning of December 4, Goulet read the witness statements and corrective consultation pertaining to Ntim. Moore testified that, on December 4, when Moore realized that Ntim was there and stewards Cole and Wagner were there for her that Moore went to Goulet and told him that Ntim was there with the steward. Moore testified he had previously spoken to Goulet about the Ntim situation.

Moore testified Goulet said he did not have any experience on how it went in union buildings in Maryland, but Goulet had dealt with unions in New York. Moore testified he took a copy of the union contract and read the back page concerning *Weingarten* rights to see if Cole had a right to be in the meeting with Ntim. Moore testified, "I understood that he wanted to be in the meeting. I didn't understand that he was invited by Margaret." Moore testified, "I didn't know she asked him to be there, but I knew that he wanted to come into the meeting." Moore testified he informed Goulet that Cole was on the premises and he knew Cole wanted to attend the meeting.

Moore testified that, upon reading the *Weingarten* language on the back of the contract, he, "determined that there was two things that weren't satisfied in the situation to allow David (Cole) to come into the meeting." Moore testified they were that the employee had not requested representation. He testified, "They had not invoked their right and the Union couldn't invoke the right for them.[6] But maybe more importantly was I knew that there was no more investigation. I knew that there was no more disciplinary action other than what had already been determined from Margaret that was going to take place by this meeting. This meeting was to clarify a statement that was written for her that I wasn't sure that she wanted it to be her statement. And with that in mind, I didn't see any reason that David needed to be in the meeting." Then the following exchange took place:

> JUDGE FINE: What was the discipline that had already been determined?
> THE WITNESS: She was suspended. That's the discipline.
> JUDGE FINE: You hadn't decided whether to fire her or not?
> THE WITNESS: Correct.
> JUDGE FINE: So that was an undetermined decision.
> THE WITNESS: Correct.
> JUDGE FINE: And she could have been fired, correct?
> THE WITNESS: That was a possibility.
> JUDGE FINE: Okay. Go ahead, sir.
> MR. GALLIGAN: Just so it's clear, it's not the witness' decision on termination. I think you asked the question you hadn't made that decision. I just want to make it clear that this witness does not make termination decisions.
> JUDGE FINE: Right. Well, did you know whether there was the decision -- did anybody relate to you that she was going to be fired?
> THE WITNESS: No. Anthony Fontana actually told me that she would be reinstated.
> JUDGE FINE: She'd be reinstated.

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[6] While Moore testified that Ntim did not request union representation for the meeting, when he was asked if the Company notified anyone from the Union that the meeting with Ntim was going to take place, Moore responded, "No." When asked how he thought the union stewards learned of the meeting, Moore testified, "I guess Margaret (Ntim) told one of them at least." Moore, at one point, testified that when Moore saw Cole in the office on December 4, Cole told Moore that Cole "was asked to be here." Moore testified that Cole "motioned his head down the hallway towards the outer office." Cole testified that Ntim was in the outer office along with many other people. When asked if when Cole made his gesture if Moore understood that he was indicating he was there for Ntim, Moore testified, "No. He was at my door making that motion. I didn't know which one of 350 employees that he was here to represent." However, Moore testified that "Once I walked down the hall and saw Margaret there, I put two and two together." Moore testified that once he saw Ntim, he knew Cole was talking about her when he gestured, and that when he met with Wagner and Cole he knew they were there to represent Ntim.

THE WITNESS: Correct. I was told that on Tuesday, when I talked to Anthony. He said she's going to be reinstated. It had to have final approval from Jeff Long. But in his experience with these situations, she was going to be reinstated.
JUDGE FINE: So then why did you need to interview, why you were there?
THE WITNESS: I felt it was a matter of proper housekeeping to make sure that that statement that is going to go forward with this situation for a long time is accurate and it did not have that addendum on it that said this statement was written for me by Conrad Anim. And I felt that without that, Margaret could say that that wasn't her statement.
JUDGE FINE: So you had a question which was, was this written by you or whoever.
THE WITNESS: I knew it was written by Conrad, but the question was is there anything in the statement that you disagree with; do you want this statement to be your statement?[7]

Moore testified that he did not believe that *Weingarten* applied to this situation. Moore testified that he went out to the main office, and he asked Cole to come in the office with him. Moore testified he noticed Wagner was also in the office at that time. Moore testified he also invited Wagner to come to the office with him thinking she was there for the same purpose as Cole. Moore testified, "I brought them in my office and I said, guys, I said, I don't see any reason for you to be a part of this meeting. And Barbara said, well, we're allowed to be a part of it because whenever you're doing an investigation, we can be there. I said, Barbara, I said, there is no investigation, the investigation is over. Margaret has been suspended pending termination. And Barbara said, oh, I didn't know that; I haven't seen the corrective counseling on this. I thought she was suspended pending investigation. I said, no, it's pending termination. She goes, okay, she goes, well, how long is she suspended for. And I said the Company can have her out on suspension, disciplinary suspension for 10 days in lieu of termination. And then she said, well, I thought it was 3 days. I said, no, you're thinking of an investigatory suspension. This is a disciplinary suspension. She said, well, she said, I'll have to check the contract on that." Moore went on to testify as follows:

JUDGE FINE: But if I were to hear suspended pending termination, I would think that the employee is going to be terminated.
THE WITNESS: Costco is a very lenient company. There's many infractions that are considered major offenses that you can be terminated for, but you're not always terminated for them. There are things to consider. There are length of service. There are how you react to what took place. Do you show remorse or are you combative. There's all these factors that go in. We're not really an at-will company that just has a black and white that says you do this, you're gone.
JUDGE FINE: So if you're suspended pending investigation, what does that mean?
THE WITNESS: It means we have to gather more evidence in order to determine a decision.
JUDGE FINE: Decision as to what?
THE WITNESS: As to whether you can be terminated or not.
JUDGE FINE: It would seem to me suspended pending termination would be more severe than suspended pending investigation.
THE WITNESS: I would agree.

[7] Moore later testified when he spoke to Fontana, Fontana said if the decision was his, Ntim would be reinstated. Moore testified he understood from that conversation that the decision had not yet been made. When asked if it was possible that Ntim would have been terminated, Moore testified, "It was possible from the beginning, yes." Moore testified the decision as to whether Ntim would be terminated would be made by Long. Moore testified he understood the communications he had with Fontana would be passed to Long.

JUDGE FINE: Well, if you weren't sure whether you were going to terminate her, didn't you just put her under suspended pending investigation?
THE WITNESS: Because there was no more investigation to be done. She violated a major offense. And all the documentation information that we needed was there. It was a terminable offense. There was no question about it. And the only decision to be made is whether you're going to be lenient and allow her to return to work.
JUDGE FINE: But you're saying you had already determined to be lenient and allow her to return to work before you met with her.
THE WITNESS: I hadn't determined that, but my vice president said that she would be returning to work.
JUDGE FINE: But that wasn't his final decision.
THE WITNESS: That's correct. Well, it was his final decision, but it wasn't -- it had to go to the senior vice president.
JUDGE FINE: It wasn't the Company's final decision.
THE WITNESS: Correct.
JUDGE FINE: So the senior vice president could have said, no, she's going to be terminated?
THE WITNESS: He could have. I think the --
JUDGE FINE: Would he have received the results of your meeting?
THE WITNESS: The meeting we were going to have with Margaret that day?
JUDGE FINE: Yeah.
THE WITNESS: The meeting we were having with Margaret that day was just to confirm her statement. So after the meeting with Margaret that day, I simply advised Anthony that the statement remains the same, which was most likely going to be the result of the meeting anyway.
JUDGE FINE: And if she changed the statement, which was one of the questions you asked her, correct?
THE WITNESS: The question we asked her is this accurate; is this what you want?
JUDGE FINE: And if she said it wasn't, he would have received the new statement, correct?
THE WITNESS: Yeah, that would be possible.[8]

Moore testified that after Wagner stated she would have to check the contract concerning Moore's representation as to the length of the suspension; Moore, Cole and Wagner left the room and went down the hall. Moore testified that was when he asked Ntim to come with him to the private meeting room. Moore testified that when he saw Ntim, Quinones' office was next to where Ntim was sitting. Moore testified he told Quinones they were ready, and asked her to accompany him to the meeting. Moore testified he was not sure Wagner and Cole had let Ntim know they were not going to be at the meeting, so Moore stated to Ntim that, "Barbara and David are not going to be coming into the meeting. I said this is not a meeting about further investigation or discipline. This is simply a meeting to clarify your statement, and I don't think they would be of any help." Moore testified when he told Ntim why the shop stewards were not going to be at the meeting, she did not say anything and she did not object. Moore testified Ntim did not say before the meeting that she wanted a shop steward there.

Moore testified that when they went into the meeting room, it was Moore, Ntim and

[8] Moore testified that his understanding of the term suspension pending termination is that termination is possible. Concerning Ntim, Moore directed that a suspension pending termination be issued on December 1. He testified based on that directive there was a possibility of termination sometime within 10 days after December 1.

Quinones first, and then Goulet came in.[9] Moore testified he introduced Goulet to Ntim and then Goulet reintroduced himself and told Ntim that Goulet was the regional loss prevention manager. Moore testified Goulet explained to Ntim that he was in charge of stopping loss to the Company and he was going to get some clarification on her statement because she did not write it, and they did not put on the statement written on your behalf by Anim. Moore testified Ntim said, "okay." He testified Goulet then proceeded to go line by line reading what Ntim had written in the statement, and each time Goulet asked is this correct, is this what you meant, and Ntim said, "Yes".[10] However, Moore testified when they got to the point about how the items got into Ntim's box that were being removed from the building for which Ntim did not have a receipt, Ntim changed what was written for her by Anim. Moore testified as follows:

> Q. What did she say?
> A. She said I put the items in the box, I don't know why, I don't know when. Rather surprising to hear that. Kevin said you realize this was wrong. She goes, yes, I do. He said, well, we're going to have to have you change your statement. She said, okay, she goes can I go home and write a new statement. Kevin said, no, we need you to write it here with us today. She said that she couldn't write well. So Kevin says, well, as long as you're okay with it, I'll write it for you. She agreed. And he proceeded to start from the beginning and write a new statement.
>
> We went over everything about where she was, when she went to the door, how many receipts she had, where she put the items, and he completed the statement. He gave it to her to read. She said, no, she says, I'm not going to sign this, this is not what I meant. Then there was a lot of discussion regarding the fact that she just said this to all of us a few minutes before and now she was saying it wasn't what she meant. And that went back and forth for some time until Margaret sort of just shut down.

When asked if Goulet read the statement out loud when it was completed, Moore testified, "I believe so." Pertaining to the statement written by Goulet, Moore testified, "I would characterize it as she admitted to putting the items in the box that were attempted to be removed from the building without a receipt." Moore testified that as per the statement

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[9] Moore testified he called Quinones to the meeting because, "I felt we needed a female witness. We always try to get a female into the office when there is two males talking to a female." When asked why Moore did not ask Wagner to be the female witness, Moore testified, "I had already asked the payroll clerk to be the witness, number one." Moore went on to explain that number two, pertaining to Wagner being the female witness, "It seems that she came under the premise to be in the meeting as a steward to represent Margaret. It didn't occur to me that she would make the best witness in that case."

[10] Moore testified it was his understanding that the December 4 meeting with Ntim would just be a matter of housekeeping just to confirm her statement. He testified it was his concern that the statement did not specify that Anim wrote the statement for Ntim. However, he testified that neither he nor Goulet told Ntim that all she needed to do was state that Ntim spoke the words in the statement and Anim wrote them for her. Moore testified, "I don't think we said that exact phrase, no." Moore testified that this would not have satisfied his concern. Moore testified, "I also felt that Margaret didn't write that statement. Someone else wrote it for her. And I've seen this happen before where other people write statements for people and then they go back and look at them later, and they say, oh, I really didn't say that, that's not what I meant. So part of the confirmation is, yes, to put that addendum on there; but part of it also would be to just re-look at it and make sure it's what you want it to say."

drafted by Goulet that Ntim was attempting to leave the building without having paid for the two items. Moore testified that after Goulet read the statement, Ntim said, "no, I'm not going to sign, that's not what I meant."

Moore testified that by shutting down he meant that Ntim would not say anything. Moore testified Ntim had her cell phone in her lap and she just stared at the cell phone. Moore testified Ntim was looking at her cell phone for 5 or 10 minutes giving periodic responses. He testified Goulet said there is nothing further for Goulet to do and he left the room. Moore testified that Moore said to Ntim that the statement she gave and signed that Amin wrote for you is going to become your statement, and she could not make any changes to it after this point. Ntim said ok. Moore said thank you and the meeting was over.

Moore testified they started the December 4 meeting, by Moore stating to Ntim that "we're here to confirm that this statement is what you want it to be because it was written for you by somebody else and you signed it." Moore testified that he turned everything over to Goulet and that Moore never asked Ntim anything about her December 1 statement.[11] Moore testified that, during the December 4 meeting, while Goulet was writing Ntim's statement that "Each time he wrote a piece, he would confirm with Margaret, and there would be a confirmation of sort of a nod or yes." Goulet would ask Ntim if this was accurate. Moore testified that at one point in the meeting, Ntim said to Goulet "no, that's not my statement. I don't agree with that. I'm not going to sign it. And Kevin (Goulet) would ask her, well, why, what changed. And she was unresponsive and just looked down at her phone. There was complete silence." Moore testified that, during the meeting, Moore never asked Ntim to sign the statement. Moore testified, "It all was done by Kevin." When asked if Moore thought the statement Goulet wrote for Ntim was accurate, Moore' initial response was, "I don't recall that I actually looked at it." When asked if Goulet read the statement to Ntim, Moore testified, "I believe he did, yeah." Moore testified he heard Goulet read the statement to Ntim, and he thought what Goulet read correctly reported the new story of what Ntim told. Moore testified Ntim refused to sign the new statement. When asked what happened to the statement Goulet wrote, Moore testified, "Probably put in the file, I assume, his file, I don't know. Probably in his file." Moore testified Goulet still works for Respondent working out of one of its New York buildings. Goulet, although the principal questioner of Ntim during the December 4 meeting, was not called as a witness, nor was the statement he wrote for Ntim placed into evidence.

Moore testified that, on December 4, following the meeting with Ntim, Moore notified Fontana there were no changes from the meeting and Ntim had confirmed her December 1 statement. When asked if he told Fontana that Ntim gave a different story at the meeting, but refused to sign it, Moore testified, "I don't think I went into that detail. I said her statement remains the same."[12] When asked why he would not have told Fontana that Ntim made a significant statement that deviated from the prior statement, Moore testified, "I think Kevin (Goulet) maybe informed him of that." However, Moore testified Goulet was not present when Moore called Fontana. Moore testified he thought Goulet informed Fontana of the

[11] However, Moore also testified concerning the statement Goulet wrote for Ntim on December 4, "I think when they were going back and forth regarding the statement, I may have interjected something here or there, but it was very little. I may have said, well, Margaret, you did say that to us 5 minutes ago, something like that, confirming that I heard what she had said."

[12] When later asked if Moore told Fontana that Ntim gave a new statement where she admitted putting the two disputed items in the box, but Ntim refused to sign it, Moore testified, "I don't recall that I did."

change in Ntim's statement because Goulet is "the regional loss prevention manager and he did most of the interviewing. He would normally have to recap what he did." Yet, Moore testified he did not know if Goulet actually called Fontana. Moore testified he did not say anything to Fontana about Ntim changing her statement. Moore testified, "I said that we talked to her for some time, and we ended up with the same statement." Moore testified that Ntim, "definitely changed her story at one point," but Moore never related this to his supervisor. Moore testified he would have told Fontana if Ntim had changed her December 1 written statement during the meeting. Moore testified that when he spoke to Fontana, he understood that Fontana would speak to Long. However, Moore testified he was not sure if Fontana informed Long that a meeting took place on December 4. Moore testified, "So the fact that there was no change in the statement, I'm not sure Anthony (Fontana) would even mention it to him." Moore testified that Fontana and Long work out of Respondent's Sterling, Virginia office.

Moore testified that, either December 5 or 6, the Thursday or Friday following the meeting with Ntim, Moore called Fontana to find out if the decision had been reached yet concerning Ntim's employment. Fontana said no that Long had not been able to look at the details yet. Fontana said Long would probably look at it on Saturday. Moore testified that also on December 5 or 6, he received a complaint from Local Union President Penillipe Arhar where Arhar called Moore and accused him of violating Ntim's *Weingarten* rights to union representation concerning the December 4 meeting. Moore testified that on Saturday, December 7, he received a call from Fontana who stated Moore should reinstate Ntim.

Moore testified, following his call with Fontana, Moore called Ntim on December 7, but her phone was not accepting messages. Moore testified that on Monday, December 9, he reached Ntim and said he would like to meet with her the following day. Moore testified that on Tuesday, December 10, Ntim came in and Moore invited union steward Wagner for the meeting. Moore testified that, during the meeting, he informed Ntim that she was going to continue to be an employee and her time served would be a disciplinary suspension unpaid. He testified the suspension was for dishonesty. Moore testified that once he told Ntim she could come back to work there was a matter of her violating the check stand procedures so on December 10, Ntim was given a new corrective consultation for making purchases while on the clock. Moore testified Respondent knew Ntim was on the clock when she made the purchases because they keep track of break times and Ntim was not on break when the receipts showed her items were purchased. Moore also gave Ntim a typewritten page during the December 10 meeting, labeled "Addendum to consultation that was given on 12/1/13." Moore testified he felt they had to clarify the result of the corrective consultation that was given on December 1 so he wrote in the December 10 addendum that Ntim's "time out was considered a disciplinary unpaid time for violation that would normally result in termination." Moore testified he advised Ntim that she had been suspended previously and that one more suspension prior to June 8, 2014 would result in termination. Moore testified that for purposes of clarification he listed some of the major check stand policies in the addendum, which he had Ntim sign. Moore testified that at no point during the meeting did he ask Ntim to convince him as to why she should get her job back. Moore testified he drafted the consultation to Ntim dated December 10, on December 10, along with the addendum that date. Moore testified he drafted the two documents after he received the go ahead from Fontana.

b. Quinones' testimony

Janet Quinones has worked for Respondent as a payroll clerk for over 23 years at the Gaithersburg location. Quinones is in the bargaining unit. She is not a union representative. However, she has acted as a witness for meetings between employees and management at

management's request. Quinones' immediate supervisor is Administrative Manager German Garcia (ph.), with whom she shares an office. Quinones testified Garcia is the equivalent of a staff level manager. Quinones explained that a front end clerk reports to a lead person, then the lead person reports to an area manager, and the area manager reports to a staff level manager. Quinones testified that as payroll clerk she reports directly to a staff level manager.

Quinones testified she met with Respondent's counsel Paul Galligan 2 days before the trial to prepare for her testimony. When asked if Galligan assured her that there would be no reprisal if Quinones refused to talk to him, Quinones testified, "We didn't even discuss that. He just said it was my choice." Quinones testified that Moore and Richard Arriola were in the room with her when she met with Galligan to prepare her testimony. She testified that, during the meeting, Galligan asked her if she was willing to talk to them stating that she did not have to, and she said yes. Galligan then asked Quinones the questions he asked her while she testified at the hearing.

Quinones testified that in December on a Tuesday, Moore asked Quinones to sit in on a meeting with Ntim that day, if Ntim returned Moore's call. However, the meeting did not actually take place until the following day. Quinones testified that, on a Wednesday, Ntim came to the administrator's office and was sitting in the chair outside the office. Quinones testified that when Ntim came into the office that Quinones was right behind the wall. She testified that whenever the door opens she has to stand up to see who was there to assist them. Quinones testified Ntim came in by herself and shops stewards Cole and Wagner came in right after Ntim. Quinones testified Moore came around the corner and said to Ntim that he did not realize she was here. Moore said he was not ready for Ntim right now. Moore went back into his office for about 5 to 10 minutes and then came out to get Ntim. Quinones did not hear any conversations between Moore and the shop stewards.

Quinones testified that when Moore came out of his office he said to Ntim that he was ready for her. Quinones testified she followed Moore and Ntim down the hall to the conference room known as the security office. Quinones testified Goulet, the north east regional loss prevention manager, also came into the conference room after Quinones entered the room. Quinones testified Goulet was there to investigate some cell phone issues.

Quinones testified that, in the conference room, Goulet introduced himself to Ntim. Goulet pulled out some papers and asked Ntim if this was her statement from the night in question. Ntim said yes. Quinones testified Goulet started reading the statement to Ntim. Once Goulet finished reading the statement he asked Ntim again if this was her statement and she said yes. Quinones testified that she did not remember exactly what Goulet said next, but throughout the conversation Ntim started playing with her cell phone a little bit. Quinones testified that one of Ntim's responses to Goulet's question was, "I could have put it there, I don't remember." Quinones testified that Goulet then asked Ntim if she would be willing to write another statement telling exactly what she just said. Ntim asked if she could go home and write it because she had trouble writing in English. Goulet said no it had to be done there. Quinones testified Ntim just sat in silence for a little bit playing with her cell phone. Goulet asked Ntim if she wanted to tell him what to write and he would write it for her. Ntim said that would be fine. Quinones testified they started writing a statement, with Goulet doing the writing. When Ntim said she was done, Goulet asked her to sign it and Ntim refused saying that was not what she meant. Goulet then asked her if she was sure that was not what she meant, that was what she said, and what is it that she meant. Quinones testified Ntim would not talk about anything else, but was just playing her cell phone. Then Goulet left the room. Quinones testified then Moore told Ntim that he was there to have her clarify her statement and this was her last chance to do

that. Quinones testified that Ntim said she had nothing else to say. Quinones testified that was all that happened in the meeting that she recalled.

Quinones later testified that, during the December 4 meeting, after Goulet read Ntim's statement to her and was asking if that was the way it happened, Ntim made the statement that "she may have put it there, she couldn't remember." Quinones testified this part of the conversation involved "The two pieces of merchandise that was in the shopping cart that she did not pay for." Quinones testified that when Ntim said, "I may have put it there, I don't remember," Goulet asked Ntim to write that on there because that was not part of the original statement. Quinones testified that then Goulet wrote a separate statement on another piece of paper from Ntim's original statement. When asked if she could recall what Goulet wrote, Quinones testified, "I don't remember. I can show you, if it was shown to me, I mean tell you that that was –". Quinones testified the statement Goulet wrote was about three fourths of the page in length. She testified she was there when Goulet read it back to Ntim but Quinones did not recall what it said. Quinones testified that Ntim said that was not what she meant. Quinones testified that Goulet did not make up the statement that Ntim told him what to write. Then when asked what Ntim said, Quinones testified "I don't remember." Quinones testified it took Goulet about 15 to 20 minutes to question Ntim about what to put down in the new statement. Quinones testified Goulet read Ntim the statement, but she refused to sign it. Quinones testified the statement Goulet wrote contained Ntim's statement that she may have put it there, but she did not remember. Quinones testified that other than that she did not recall what was in the new statement. When asked if Ntim's statement at the meeting constituted an admission of theft, Quinones testified, "I don't know. She was across the board. I don't know."

C. Credibility

Respondent argues in its brief that Ntim is not a credible witness. Respondent cites purported contradictions and/or omissions from a two paragraph typed statement that Ntim provided the Union summarizing the events of the December 4 meeting and Ntim's testimony at the hearing. Ntim testified the statement to the Union was typed by her husband, a special education teacher, who was also not born in this country. The statement was provided during the week of the December 4 meeting. In the statement, Ntim stated, "After the reps left, Chris (Moore) told me he wanted me to write another statement because the one that I wrote earlier was not truthful. I told him that statement was correct and that I wasn't going to change it. Chris said he wanted me to change my statement because my statement didn't match with the evidence that they had." Ntim testified at the hearing, when questioned on cross-examination, that Moore made these remarks alone to her, and it was before they entered the room for the meeting. Ntim had previously testified on direct that when she sat down for the meeting with Goulet, Moore, and Quinones that Goulet started the meeting by stating that the Company is lenient, for Ntim to tell the truth, and that Ntim's statement did not match what the Company had against her. Ntim testified Goulet said if Ntim changed her statement to reflect that Ntim took the extra items in her basket, the Company is lenient and would give Ntim her job back. First, I do not find it a contradiction that both men would make similar remarks to Ntim, since they obviously met and discussed the matter prior to the meeting based on admissions in Moore's testimony. The fact that Ntim's two paragraph statement prepared by a layperson and drafted by her husband on her behalf, neither of whom were born in this country, did not describe every statement made during what Ntim described was an hour-long meeting does not serve to discredit Ntim. See, *Gold Circle Department Stores*, 207 NLRB 1005, 1010 fn. 5 (1973), relating to omissions from a prehearing affidavit taken by a Board agent. Thus, I am not impressed with Respondent's argument that, in the circumstances here, that Ntim's omissions of certain details

in the statement to the Union undercuts Ntim's overall credibility. Rather, I view the statement given to the Union to constitute Ntim's best efforts to summarize the meeting.

I also do not find, as contended by Respondent, anything nefarious in Ntim's requesting Amin to write her December 1 statement for her in view of her professed difficulties in writing English. Ntim testified on September 18, 2014, and I do not find her inability to recall at that time that she had previously handwritten a four-line statement on June 8, 2013 concerning an unrelated incident undercuts her credibility as Respondent contends. When shown the four line statement Ntim quickly admitted that she had written it. Moreover, a reading of the statement compared to the subsequent detail that she went into in her affidavit concerning that incident serves to confirm Ntim's testimony that she had difficulty writing in English.[13] On the whole, given the breath of her testimony, I found Ntim to be a credible witness to the extent her memory would permit.

On the other hand, concerning Moore, I do not find the purpose of the December 4 meeting with Ntim was as benign as Moore attempted to portray it. First, on December 2, Moore sent an email to Fontana concerning Ntim that seemed to emphasize Moore's view of negative aspects of Ntim's employment history with Respondent. In addition to listing two prior consultations and describing past coachings to Ntim, Moore went on to state, "Margaret displays a very cavalier attitude towards Management and Supervisors." Thus, by his own description, when Moore called Fontana on December 3, to discuss Ntim and was told by Fontana, Ntim ""would be most likely reinstated," Moore did not accept Fontana's remark but went on to point out to Fontana what Moore suggested were shortcomings in the December 1 statement that Anim, a management official, had written for Ntim. Thus, I find based on Moore's testimony that it was at Moore's urging that Fontana, who appeared to be satisfied with the information to that point told Moore that he might want to have Ntim verify her statement.[14]

From the tone of Moore's December 2 email, and from his failure to accept Fontana's initial pronouncement concerning Ntim's status; I have concluded that it is likely that Moore had a view going into the December 4 meeting of getting Ntim to change her December 1 statement as Ntim testified. Moreover, Moore testified he had discussed Ntim's circumstances with Goulet

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[13] I do find, as Respondent asserts that, during the December 10 meeting, Ntim incorrectly testified that Moore told Ntim she should convince him on why she should get her job back. Wagner, who attended the meeting, did not confirm this aspect of Ntim's testimony, and I have concluded that Wagner would have recalled those remarks if Moore made them. I do not find this discrepancy sufficient to discredit Ntim's testimony as to what transpired on December 4, or sufficient to discredit Ntim, who I otherwise found to be a credible witness.

[14] The only evidence disclosed of the content of Moore's conversations with Fontana and with Goulet are based on Moore's testimony. In the circumstances here, since I have credited Ntim's testimony as to the aggressive nature of Goulet and Moore's questioning her on December 1, I have concluded Moore's description of his conversations with Fontana and Goulet to be self-serving and questionable. See, *Shattuck Denn Mining Corp. v. NLRB,* 366 F.2d 466, 470 (9th Cir. 1966), holding "it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book." While this case does not involve allegations of discrimination pertaining to discipline, Moore's motive in the manner Respondent's officials conducted the December 4 meeting and Moore's instructing the stewards not to attend that meeting are in play.

on the morning of December 4, as well as provided Goulet with materials relating to Ntim at that time. Noting that Goulet, the principal questioner of Ntim on December 4 on behalf of Respondent was not called as a witness, nor was the statement he purportedly transcribed on her behalf entered into evidence, I have concluded that Goulet joined Moore in attempting to get Ntim to alter her statement as Ntim testified. In this regard, Brooks' December 1 statement concerning the events of December 1, attempted to portray Ntim as purposely taking the two items in question, in that Brooks stated they were under a towel, that when shown the items Ntim attempted to look for a receipt and only belatedly stated she did not know how the items got there. Ntim would not have had access to Brooks' statement prior to the December 4 meeting. Thus, I view it as more than happenstance that Ntim testified that Moore and Goulet told her that Respondent's evidence did not support Ntim's version of events. In this regard, Brooks' statement did not support Ntim, and I have credited Ntim's testimony that both Goulet and Moore informed her that Respondent had such evidence on December 4.

There were other aspects of Moore's testimony that did not ring true. Moore testified that in telling the stewards that they did not need to be at the December 4 meeting, he had concluded that Ntim's *Weingarten* rights were not being violated stating that Ntim did not request a union steward. Yet, he admitted that he did not inform the stewards of the meeting, and therefore their appearance there could have only been at Ntim's request. Moreover, according to his chronology, Moore concluded that Ntim did not request the stewards' attendance before Moore even spoke to Ntim. Thus, Moore could not have known that Ntim did not request the stewards' presence at the time he testified he concluded she did not. By Moore's own admission, he told the stewards to leave before Moore even spoke to Ntim. By his actions, Moore revealed a predetermined intent to deny Ntim union representation.

Moore also testified that while Ntim was being interviewed by Goulet the following transpired, "She said I put the items in the box, I don't know why, I don't know when. Rather surprising to hear that. Kevin said you realize this was wrong. She goes, yes, I do. He said, well, we're going to have to have you change your statement." Thus, according to Moore, during the meeting Ntim confessed to stealing the items. Yet, Moore's testimony was not supported by Quinones, who I have concluded would have recalled such as statement by Ntim if it was made. In fact, Quinones, despite the somewhat difficult circumstances in which she testified, testified that Ntim only stated, "I could have put it there, I don't remember." Finally, Moore, who claimed Ntim had made such a direct admission of wrongdoing during the December 4 meeting, testified that he failed to inform Fontana about it during their phone call following the meeting. I do not believe that Moore would have failed to transmit such a fact to his superior if it had in fact occurred as Moore testified. Thus, noting that Goulet was not called to testify to verify Moore's story, studying Moore's demeanor, and the inherent improbabilities of his description of events, I have found Ntim to be the more reliable witness of the two as to the events on December 4.

I also find Quinones account of the December 4 meeting to be less than reliable. She did not profess a strong recall of the event. Moreover, while she was in the bargaining unit, she was present at the meeting at Moore's request. Quinones also testified that, as payroll clerk, she shares an office with German, who she described as fairly high up Gaithersburg's supervisory staff. Quinones' office was also in close proximity to Moore's, who had used her as a witness for management at other meetings. Quinones was pre-tried 2 days before the hearing by Respondent's counsel Galligan, who allowed Moore to sit in the pre-trial session. This was hardly a neutral setting for Quinones to feel comfortable to truthfully relay what happened on December 4, when Moore the general manager of the location, who had a vested interest in the outcome, was allowed to sit in on Quinones questioning. Moreover, when asked if Galligan,

during her pre-trial, assured Quinones there would be no reprisal if Quinones refused to talk to him, Quinones testified, "We didn't even discuss that. He just said it was my choice." See, *Johnnie's Poultry*, 146 NLRB 770, 775 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). The General Counsel did not seek to amend the complaint concerning Quinones pre-trial, and I make no affirmative finding of a violation here concerning it. On the other hand, the circumstances under which Quinones was called to testify, Quinones' position with Respondent, along with her demeanor and the quality and content of Quinones' testimony have allowed me to credit Ntim's version of events over that provided by Quinones and Moore.

D. Analysis

In *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 256-259 (U.S. 1975), in enforcing a Board order that the respondent employer violated Section 8(a)(1) of the Act by denying an employee's request for union representation during an interview that may have resulted in disciplinary action, the Court adopted several principles that had been applied by the Board. It should be noted the facts in the *Weingarten* case reveal that a violation of the Act was found although the employee received no discipline for the incident that resulted in the in the unlawful interview. In *Weingarten* the Court stated:

First, the right inheres in s 7's guarantee of the right of employees to act in concert for mutual aid and protection. In *Mobil Oil,* the Board stated:

> 'An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for 'mutual aid and protection.' The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.' Ibid.

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forgo his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.[FN5] Thus the Board stated in Quality:

> We would not apply the rule to such run-of-the-mill shop-floor conversation as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.' 195 N.L.R.B., at 199.

Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his representative, or having no interview and forgoing any benefits that might be derived from one. As stated in Mobil Oil:

> The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources.' 196 N.L.R.B., at 1052.

A respondent employer labeling of an interview "investigatory" or "disciplinary" is not determinative of a employee's right to union representation. For the Board has held that employees are entitled to *Weingarten* representation in either "investigatory" or "disciplinary" interviews except for "those conducted for the exclusive purpose of notifying an employee of previously determined disciplinary action." See, *Baton Rouge Water Works Company,* 246 NLRB 995, 997 (1979). In *Baton Rouge* the Board stated at 997:

> We stress that we are *not* holding today that there is no right to the presence of a union representative at any "disciplinary" interview. Indeed, if the employer engages in any conduct beyond merely informing the employee of a previously made disciplinary decision, the full panoply of protections accorded the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach.

Thus, even in circumstances when an employer meets with an employee to inform them of previously determined disciplinary action, if the employer then proceeds to question the employee to support its decision, the employee is entitled to union representation. See, *Titanium Metals Corporation*, 340 NLRB 766, 774 (2003), enfd. in relevant part 392 F.3d 439 (D.C. Cir. 2004).

In *New Jersey Bell Telephone,* 300 NLRB 42, 48-49 (1990), enfd. 936 F.2d 144 (3rd Cir. 1991), the following principles were set forth concerning an employee's request for union representation for a meeting in which the employee reasonably fears disciplinary action:

> An employee has the protected right to union representation at an investigatory interview which the employee reasonably believes may result in disciplinary action. *NLRB v. J. Weingarten*, 420 U.S. 251(1975); *Montgomery Ward & Co.*, 273 NLRB 1226, 1227 (1984). However such a "right arises only in situations where the employee requests representation." *Weingarten*, supra at 257. *Appalachian Power Co.*, 253 NLRB 931, 932-933 (1980); *Pick-N-Pay Supermarkets*, 247 NLRB 1136, 1138 (1980); *Montgomery Ward*, supra.
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> When an employer is presented with such a request, it must either grant the request, present the employee with the option of continuing the interview unrepresented or forgoing the interview altogether, or deny the request and terminate the interview. *Montgomery Ward*, supra; *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Co.*, 251 NLRB 850, 857 (1980); *Lennox Industries*, 244 NLRB 607, 608(1979).
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> In applying the above principles to the facts herein, the only significant issue in dispute, is whether Lynch made an adequate request for union representation. In making such determination, the test is whether the statements made by Lynch, here her

question whether she should have union representation was sufficient to put Respondent on notice of her desire for union representation. *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977); *NLRB v. Illinois Bell Telephone Co.*, 674 F.2d 618, 622 (7th Cir. 1982), *Montgomery Ward*, supra at 1227.

Although phrased in terms of a question, inquiries virtually identical or similar to those made by Lynch have uniformly been held to be sufficient to put the Employer on notice as to the employees' desire for representation. *Illinois Bell Telephone Co.*, 251 NLRB 932, 938 (1980), affd. 624 F.2d 618 (7th Cir. 1982) (question by employee, if she should have someone present from the union); *Southwestern Bell*, supra at 1227 (question whether employees should obtain representation. The Board held that while that inquiry was not as forthright as another employee's request that "he would like to have someone there that could explain to me what was happening," it was nonetheless "sufficient to put the Employer on notice as to the employee's desires" Id. at 1223); *Bodolay Packaging Machinery*, 263 NLRB 320, 325-326 (1982) (question by employee if he need a witness); *Postal Service*, 256 NLRB 78, 80-82 (1981) (employee asked if he needed his union representative).

Similarly, in *Consolidated Edison Co., of New York, Inc.,* 323 NLRB 910, 916 (1997), it was stated:

Weingarten rights arise only when the employee requests representation. *Weingarten*, supra at 257. However, the Board has made clear in a series of cases that such requests, to trigger *Weingarten* rights are liberal, and need only be sufficient to put the employer on notice of the employee's desire for union representation. For example, the request can be phrased as a question, such as in *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977), where the Board held that one employee's question asking the supervisor "if they should obtain union representation" was sufficient to put the employer on notice as to the employee's desires. Id. at 1227, 1223. In that same case, another employee's question: "I would like to have someone there that could explain to me what was happening" was also deemed sufficient. Id. at 1223. Similarly, in *Illinois Bell Telephone Co.*, 251 NLRB 932, 938 (1980), affd. 674 F.2d 618 (7th Cir. 1982), a question by an employee asking the supervisor if she should have someone present from the union was deemed both a request for advice and an expression of a desire for union assistance, sufficient to trigger her *Weingarten* rights. Accord: *New Jersey Bell Telephone Co.*, 300 NLRB 42, 48-50 (1990); *Postal Service*, 256 NLRB 78, 80-82 (1981). In *Bodolay Packaging Machinery*, 263 NLRB 320, 325-326 (1982), a question by an employee to a supervisor asking if he needed a witness was deemed sufficient. This case is important since several of the employees under investigation asked questions almost identical to this question.

Under *Weingarten*, the employee's request for union representation need not be repeated at the interview if it was made to the person conducting the interview prior to the interview, *Lennox Industries*, 244 NLRB 607, 608 (1979); *Amoco Oil Co.*, 278 NLRB 1, 8 (1986), or if communicated by another person to the person conducting the interview prior to the interview. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

In *Montgomery Ward & Co.,* 273 NLRB 1226, 1227 (1984), enfd. 785 F.2d 316 (9th Cir. 1986), the Board stated as follows:

In determining whether an employee's request is sufficient to invoke *Weingarten* protections, the Board has held generally that the request must be sufficient to put the

employer on notice of the employee's desire for representation. *Southwestern Bell Telephone Co.*, 227 NLRB 1223 (1977). The Board has also held, however, that when an employee requests a representative who is unavailable, the employer can deny the request and is not required to postpone the interview, secure an alternative representative, or otherwise take steps to accommodate the employee's specific request. The Board has held that in such circumstances the employee has the right and, indeed, the obligation to request an alternative representative in order to invoke the *Weingarten* protections. *Coca-Cola Bottling Co.* of *Los Angeles*, 227 NLRB 1276 (1977).

Applying these concepts, we assume for purposes of this decision that the person Steele requested as a representative was a statutory supervisor and ineligible to serve as a *Weingarten* representative. Nevertheless, we find that Steele's request put the Respondent on notice that he desired representation. That the Respondent knew of Steele's desire for representation is reflected by the response that Steele could see no one and that the recording would serve as his representative.[FN9] The Respondent's reply was preemptive and effectively prohibited Steele from making a further request for representation. Accordingly, Steele was precluded from exercising an employee right, recognized in *Coca-Cola*, to request an alternative representative after the employer lawfully denies an initial request for a particular representative. In effect, the Respondent told Steele that no matter who he requested as a representative, he would have to be content with a tape recording of the interview. In short, we find that Steele's request, in light of the Respondent's preemptive denial, was sufficient to invoke the *Weingarten* protections.

In the current case, the facts reveal that on Sunday evening, December 1, Ntim shopped while at work. Upon leaving the warehouse during her break, Ntim gave Assistant Manager Brooks a receipt for the items in Ntim's basket; however, Brooks discovered two items in the basket that were not included on the receipt and Ntim was accused of stealing. Ntim was subsequently called to the office by Acting Front End Manager Amin and asked to give a statement concerning the incident. Ntim, who was not born in this country, stated she did not write well, and asked Amin to write the statement for her. Amin wrote the statement for Ntim, and then gave it to her to read, and she signed it and gave it to Brooks. Amin and Brooks were in the room when Ntim gave the statement. Brooks upon receiving Ntim's statement gave Ntim a write-up stating suspension pending termination. Brooks told Ntim to punch out and go home.

In Ntim's December 1, statement she stated she paid for four items, packed them in a box, placed the box in a shopping cart and then returned to work. When it was time for her break, Ntim sought to take the purchased items to her car; however, upon inspection by Brooks, Brooks discovered that two items were in Ntim's box that were not paid for. Ntim stated in her written statement that upon Brook's inquiry, Ntim replied she did not know how the two items got in Ntim's box and that Ntim did not pay for them. Ntim ended her written statement by stating, "I left the basket. I did not put them in my box, and did not know how they got into my box."

Brooks also gave a written statement on December 1 concerning the incident. Brooks stated that around 7 p.m., Ntim approached the door with a box of items. Ntim handed Brooks the receipts and Brooks took the items out of the box to verify their purchase. Brook stated she lifted up a beach towel contained in Ntim's box, and two items fell to the bottom of the box which were not recorded on Ntim's receipts. Brooks stated in the statement, "I said to Margaret what is this, I don't see these on your receipt. Margaret started digging in her coat pocket and then her pants pocket, I assume for her receipt. I asked Margaret again where was the receipt for these two items and she just looked at me (not saying a word). I said Margaret I don't like the way this look, that you have two items that you didn't pay for. Margaret then said, I don't know

why these are here, I didn't pay for them." The "Employee Corrective Consultation" issued on December 1 to Ntim by Brooks, stated the action taken was Ntim "is being suspended, pending termination." It accused Ntim of being in direct violation of major offense 1, which involved acts of dishonesty including grazing, which under the collective-bargaining agreement was a terminable offense.

General Manager Moore testified Brooks called him around 7:30 p.m. on December 1 and advised him there was an incident with an employee attempting to leave the building with two items not paid for. Brooks provided Moore with the details. Moore instructed Brooks to make a statement concerning the incident, and to obtain a statement from Ntim. Moore testified after receiving Brooks report, Moore told Brooks to suspend Ntim pending termination.

Ntim's credited testimony reveals that upon being notified she was suspended on December 1, she went to the parking lot and called union steward Cole, who is also an employee of Respondent, and informed him of what took place, about the write-up she had received and that she was on suspension pending termination. Cole confirmed Ntim's testimony concerning the phone call, and he also credibly testified that Ntim asked Cole to accompany her to a meeting when Ntim returned to the building and Cole said he would.

Moore testified that on Monday, December 2, Moore reviewed Brooks and Ntim's written statements, and the December 1 corrective consultation to Ntim. Moore testified that, according to procedure, he forwarded the three documents to Regional Vice-President Fontana, along with Ntim's background information, which included her years of service, position, and any past discipline. Moore's December 2, email to Fontana states, "I suspended cashier Margaret Ntim yesterday for dishonesty. (attempted theft)" Moore went on to state Ntim attempted to leave the building with two unpaid items. Moore stated Ntim was stopped by Brooks. Moore stated, "At first she pretended to look for another receipt. Later she said she did not know how the items got there." Moore included a summary of Ntim's prior discipline, which included two consultations one of which had resulted in a suspension in June 2013. Moore also stated in the email that Ntim "has been given numerous coaching regarding rudeness to members and displays a very cavalier attitude towards Management and Supervisors."

Moore testified, on Tuesday, December 3, he called Fontana concerning the documents pertaining to Ntim. Moore testified Fontana said based on his reading of the information he had received Ntim "would be most likely reinstated." Moore testified he told Fontana that Moore wanted to make sure Fontana understood the statement Ntim signed on December 1 was written for her by Anim because Ntim indicated she could not write. Moore told Fontana that Anim did not put a disclaimer on that statement stating Anim wrote it on behalf of Ntim. Moore testified Fontana suggested to Moore to call Ntim in and have her verify this is her statement.

Moore testified he called Ntim on December 3, and left her a voice mail asking her to return his call. Moore testified that, after his call to Ntim, he went down the hall and spoke to payroll clerk Quinones, and said he may need her later this afternoon as a witness for a meeting with Ntim. Moore testified he asked Quinones to attend the meeting with Ntim because, "I felt we needed a female witness. We always try to get a female into the office when there is two males talking to a female." This statement by Moore reveals that, as of Tuesday December 3, it was Moore's intent to have Regional Loss Prevention Manager Goulet attend the meeting with Ntim and Quinones. Moore and Quinones testified that Goulet, who works out of New York, was in Gaithersburg to investigate some cell phone issues. However, I have also concluded that one of Goulet's assignments while in Gaithersburg was to attend and conduct

the ensuing interview with Ntim. In this regard, while the meeting with Ntim did not take place until Wednesday, December 4, Moore's testimony reveals that on December 3, by asking Quinones to attend the meeting, he was making preparations for Goulet's attendance. Moreover, union steward Wagner testified that she had met Goulet on December 2 or 3 revealing Goulet had arrived at the Gaithersburg prior to December 4. Moore testified he did not hear back from Ntim concerning Moore's phone call on December 3.

Moore testified that on the morning of December 4, Moore again called Ntim, but she did not answer. Moore left Ntim a voice mail that he would like to meet with Ntim at about 1 p.m. that day, and he testified he asked Ntim to call back to confirm. Moore testified Ntim did not return the call. Moore also testified that when Goulet arrived at the Gaithersburg facility on the morning of December 4, Goulet read the witness statements and corrective consultation pertaining to Ntim.

Ntim's testimony as to the chronology of Moore's phone calls leading to the December 4 meeting is somewhat hazy. She testified that she thought the next day following her December 1 suspension she received a call from Moore, but the call went to Ntim's voice mail. Moore stated on the voice mail that he wanted to have a meeting with Ntim the following day at 2 p.m. at the store. Upon receiving the voice mail, Ntim called steward Cole and told him that Moore said he wanted to meet with Ntim the next day at 2 p.m. and she asked if Cole could come with her. Cole told Ntim he was going to call steward Wagner, also an employee of Respondent, and they would all meet at the store at that time and go to the meeting. Cole confirmed that Ntim called him to give him the time of the meeting with Moore, and that upon Ntim's request, Cole told her he would accompany Ntim to the meeting. Wagner's testimony as to how she arrived at the December 4 meeting is more precise. Wagner testified that Ntim called Wagner around 10 a.m. on December 4 to inform her that Moore had called her and wanted to speak with her that afternoon at 1 p.m. Wagner testified she arrived at the warehouse around 12:55 p.m. Wagner's chronology as to the date and time of Ntim's December 4 call to her, coincides with the chronology given by Moore as to the scheduling of the December 4 meeting. Based on the credited testimony of Ntim, Cole, and Wagner, I find that Ntim reached out directly through separate phone calls to each Cole and Wagner, requested that they accompany Ntim to the December 4 meeting, and they agreed to do so.

Ntim's testimony reveals that on December 4, she arrived at the Gaithersburg warehouse in the afternoon, where she met Cole and Wagner, and they went upstairs to the office area. Ntim testified when they arrived at the office there were a lot of people in the office. Ntim testified Cole was standing next to her and Wagner was standing close to the doorway. Ntim testified they went in the office and Moore came out of an office and asked what you guys are doing here. Ntim testified when Moore asked this question, he was talking to Cole and Wagner. Ntim testified when Moore asked that question, "I think they make a gesture, said they are with me." When asked who made the gesture Ntim testified, "I don't actually remember. It's been a while, so I don't know if it was Barbara or David, but one of them did." Ntim then testified one of the shop stewards said they are with Ntim. Ntim testified that after that was said Moore went into the payroll office, came out of the office, and went back to his office.

Cole testified that on December 4, he, along with Ntim and Wagner went upstairs to the main administrative office. Cole testified he was standing near the door and Moore came around from his office going into the payroll clerk's office. Moore looked at Cole and asked why he was there. Cole said he was there for the meeting. Cole testified he kind of looked over to where Ntim and Wagner were. Cole testified, "I said the meeting, I gestured over, looked at her, and he acknowledged where I was looking and said, oh, okay." Wagner testified she

arrived at the warehouse around 12:55 p.m. on December 4. Wagner met Ntim and Cole there and they went upstairs into the main administrative office. Wagner testified Moore approached them and said he would be right with them.

Moore testified that at about 1:05 p.m. on December 4, Cole came to Moore's office and stood in the doorway. Moore testified he asked Cole what he was doing there as Moore "knew he wasn't scheduled at that time." Moore testified, "He said to me I was asked to be here." Moore testified Cole looked down the hallway to the outer office and he kind of smiled. Moore testified that Cole "went with his head like that pointing down the hallway." Moore testified he got up and went down the hallway and saw Ntim sitting in the chair outside the payroll office. Moore told Ntim that he did not realize she was there. Moore testified he asked Ntim if she could wait a minute, because Moore was not prepared as he did not know Ntim was coming. Moore testified Ntim sat down and Moore went back into his office.

Moore testified that, on December 4, when Moore realized that Ntim was there and that stewards Cole and Wagner were there for her that Moore went to Goulet and told him words to the effect that Ntim was there with the steward. Moore testified Goulet said he did not have any experience on how it went in union buildings in Maryland, but that Goulet had dealt with unions in New York. Moore testified that Moore took a copy of the union contract and read the back concerning *Weingarten* rights to see if Cole had a right to be in the meeting with Ntim. Moore testified, "I understood that he wanted to be in the meeting. I didn't understand that he was invited by Margaret." Moore testified, "I didn't know she asked him to be there, but I knew that he wanted to come into the meeting." Moore testified he informed Goulet that Cole was on the premises and that he knew Cole wanted to attend the meeting. Moore testified that, upon reading the *Weingarten* language on the back the contract, he, "determined that there was two things that weren't satisfied in the situation to allow David (Cole) to come into the meeting." Moore testified they were that the employee had not requested representation. He testified, "They had not invoked their right and the Union couldn't invoke the right for them. But maybe more importantly was I knew that there was no more investigation. I knew that there was no more disciplinary action other than what had already been determined for Margaret that was going to take place by this meeting. This meeting was to clarify a statement that was written for her that I wasn't sure that she wanted it to be her statement. And with that in mind, I didn't see any reason that David needed to be in the meeting."

While Moore testified that Ntim did not request union representation for the meeting, when he was asked if the Company notified anyone from the Union that the meeting with Ntim was going to take place, Moore responded, "No." When asked how he thought the union stewards learned of the meeting, Moore testified, "I guess Margaret (Ntim) told one of them at least." Moore at one point testified that when Moore saw Cole in the office on December 4, Cole told Moore that Cole "was asked to be here." Moore testified, at first, concerning Cole's statement that Cole was asked to be at the meeting, that Cole's gesture to Moore did not immediately reveal that Cole was there for Ntim. However, Moore testified that "Once I walked down the hall and saw Margaret there, I put two and two together." Moore testified that once he saw Ntim, he knew Cole was talking about her when he gestured, and that when he met with Wagner and Cole he knew they were their represent Ntim.[15]

[15] I have credited Ntim over Moore concerning Cole's gesture towards Ntim, when Moore asked Cole as to why Cole was there on December 4. In this regard, Ntim testified she could see one of the stewards making a gesture, stating they were with Ntim, and in fact the stewards told Moore that is the case. Thus, since Ntim could see the gesture and hear the conversation I have concluded that Moore knew the stewards were there for Ntim at the outset of the

Concerning Moore's statement that Ntim's discipline had been determined prior to the December 4 meeting, Moore initially testified as follows:

> JUDGE FINE: What was the discipline that had already been determined?
> THE WITNESS: She was suspended. That's the discipline.
> JUDGE FINE: You hadn't decided whether to fire her or not?
> THE WITNESS: Correct.
> JUDGE FINE: So that was an undetermined decision.
> THE WITNESS: Correct.
> JUDGE FINE: And she could have been fired, correct?
> THE WITNESS: That was a possibility.

Moore then testified that Fontana had told Moore on December 3 that Ntim was going to be reinstated. However, Moore testified that it was not Fontana's decision to make whether Ntim would be reinstated. He testified that decision had to be made by Senior Vice President Long, who Fontana reported to, and as of December 4, according to Moore's chronology, Long had not reviewed the incident. Moore later testified when he spoke to Fontana, Fontana said if the decision was his, Ntim would be reinstated. Moore testified he understood from that conversation that the decision had not yet been made. When asked if it was possible that Ntim would have been terminated, Moore testified, "It was possible from the beginning, yes." Moore testified the decision as to whether Ntim would be terminated would be made by Long. Moore testified he understood the communications he had with Fontana would be passed to Long. Moore also testified that if Ntim changed her December 1 written statement during the December 4 meeting that it was his understanding that any changes in the statement would have been passed to Long for his consideration as to whether to terminate Ntim.

Ntim testified when Moore saw Ntim with the shop stewards near the administrative office, one of the shop stewards said to Moore they are with Ntim. Ntim testified that Moore then went into the payroll office, came out of the office, and went back to his office. Ntim testified when Moore returned Moore called Wagner and Cole to one of the offices. Ntim could not hear what transpired between Moore and the shop stewards while they were in the office.

Wagner testified that when Moore came back to the area where he saw Ntim and the stewards, that Moore told Wagner and Cole to follow him. Wagner and Cole went into Moore's office, and Goulet was already in the office.[16] Wagner testified that while they were in the office, Moore said they decided to continue Ntim's suspension for up to 10 days. Wagner testified Moore said he wanted to review Ntim's statement with her and at that time neither Wagner nor Cole were needed and they should leave.[17] While stating that, Moore opened the door to his office and motioned with his hand, which had a manila folder in it, and signaled for Wagner and Cole to walk out the door at which time Wagner nodded at Cole and they walked out the door.

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exchange. While I have made this determination, Moore eventually admitted, that shortly after seeing Cole, he knew both Cole and Wagner were there to represent Ntim.

[16] Cole confirmed Moore directed Wagner and Cole to Moore's office, and Goulet was there.

[17] Cole testified they discussed the reason the stewards were there and Moore, said they were continuing the investigation and the stewards being there was not necessary. I find Cole confirmed Wagner's testimony concerning Moore's statement that the stewards were not needed and they should leave. I find Cole's testimony that Moore stated they were continuing the investigation was Cole's recollection of Moore's statement more precisely reported by Wagner that Moore and Goulet wanted to review Ntim's statement with her.

Similarly, Cole testified that Moore stated that the stewards were not needed and they could go. Cole testified Moore kind of gestured to the door indicating the stewards could leave. I have credited the above aspects of Wagner and Cole's testimony. In this regard, concerning his meeting with Wagner and Cole, Moore testified that he did not believe that *Weingarten* applied to this situation. Moore testified he asked Cole and Wagner to accompany him to Moore's office. Moore testified, "I brought them in my office and I said, guys, I said, I don't see any reason for you to be a part of this meeting. Thus, I have credited Wagner's testimony that when Moore brought the stewards into the office he told them that Moore and Goulet wanted to review Ntim's statement with her, that Wagner and Cole were not needed, and that they should leave. Moore thereafter, unceremoniously waived the stewards out the door.[18]

Wagner testified that, after she left Moore's office, she went back into the main administrative office where Ntim was waiting. Wagner testified she told Ntim that Moore wanted to talk to her, that she should keep her answers to yes or no, keep her answers short and to the point and not to contradict what she had already said, because she had already given them the statement. Wagner told Ntim that if she does not remember something to say she did not remember. Then Wagner and Cole left the building. Similarly, Cole testified that, after they left Moore's office, Cole and Wagner went outside to speak to Ntim. He testified Wagner told Ntim to be truthful, that her statements should be short, yes and no and to the point. Cole testified the stewards then left. Ntim testified when the shop stewards returned from their meeting with Moore, they told Ntim they were leaving. At that time, Wagner told Ntim that her answers should be short such as yes, no, I don't know, and I don't remember.

Moore testified that, following his meeting with the stewards, Moore asked Ntim to come with him to the private meeting room, which both Ntim and Quinones referred to as the security room. Moore testified that he was not sure that Wagner and Cole had let Ntim know they were not going to be at the meeting, so Moore stated to Ntim that, "Barbara and David are not going to be coming into the meeting. I said this is not a meeting about further investigation or discipline. This is simply a meeting to clarify your statement, and I don't think they would be of any help."[19] Ntim testified that, during the December 4 meeting with Moore and Goulet, she did not ask that Wagner be present. She explained that she had brought the stewards with her, but when they came to the office Moore talked to them and told them to leave.

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[18] Cole and Moore testified there was a discussion during the meeting with a little more detail concerning Ntim's suspensions status, such as the length of the suspension, with Moore adding there was also a discussion of the contractual language as to the type of the suspension. I did not find this aspect of either of their testimony to have much bearing on the outcome of the case, and noting the discrepancies on this point, I did not find this aspect of either witness' testimony on this point to be particularly convincing. In this regard, I concluded Cole's testimony was vague due to lack of recall concerning specifics and Moore's testimony was somewhat self-serving in an effort to support his exclusion of the stewards from Respondent's meeting with Ntim.

[19] I have credited this aspect of Moore's testimony that he told Ntim that the stewards were not going to attend the meeting with Ntim before the meeting started. I find this to be an admission by Moore, as well as the most likely time he would have made such an announcement to Ntim. I also find it in line with the witnesses' testimony that is based on Moore's directive that the stewards did not attend the meeting. Further, Ntim made the following statement in her written statement to the Union following the December 4 meeting, "I got to the store today for the meeting with the union reps. When I got there, Chris, the store manager told me that the union reps were not needed at this time because there was nothing that the reps could do for me and that they only wanted to ask a couple of questions."

Ntim's credited testimony reveals the following: Moore called Ntim into a meeting in the security office, in attendance were Ntim, Goulet, Quinones, and Moore. Goulet was at the head of the table. Goulet said the company is lenient and the statement Ntim wrote and what Respondent had against her did not match. Goulet said if Ntim changed her statement and said she took what was in her basket the Company would give Ntim's job back to her. Ntim responded that if Goulet wanted her to write a statement she would go home to write it and bring it in the next day. Goulet said he would write a statement for her, and Goulet started writing the statement. After Goulet finished, he gave the statement to Ntim to sign. Ntim read the statement and told Goulet "that that was not what I said; I have my statement, so I stick by my statement." Ntim testified after she said this, Goulet kept pushing her to sign the statement he wrote and change her statement. Ntim testified she read the statement Goulet wrote and it was a full sheet of yellow paper about the same length as her original statement. Ntim testified Goulet's statement differed from Ntim's original statement. Ntim testified in the first two lines of Goulet's statement Ntim was changing her prior statement and now stating whatever was in the basket she took it. After Ntim told Goulet that she would not sign his statement, Goulet continued to press her to sign it. Ntim told Goulet that she had given them a statement and they were intimidating her to change it. Ntim said she was not going to change it and she stopped talking. Ntim did not talk again. Ntim testified, "He was still there talking and talking. I didn't pay him no mind. And he got mad and got out of the room." Ntim testified that Goulet sometimes raised his voice while talking to her. After Goulet left, Moore, Quinones, and Ntim remained in the room. Moore then said what they have against Ntim did not match her statement and that she needed to change her statement. Ntim did not reply. After a while Moore said that Ntim was on suspension pending on termination and she should go home. Moore said Ntim had brought Wagner and Cole but there was nothing they could do for her with the evidence they have against her. Ntim testified that, during the meeting, Moore asked her to change her statement about three or four times, and Goulet asked her to change her statement several times and he made more than four requests for her to change it. Ntim testified that Goulet was in the room about 40 to 45 minutes while she was there and that she stayed about 15 to 20 minutes after he left. She estimated the meeting was about an hour long. Ntim testified that the statement she gave to Amin on December 1 is accurate. Ntim testified that at the end of the meeting on December 4, she stuck with that statement.[20]

Moore testified he introduced Goulet to Ntim and then Goulet reintroduced himself and told Ntim that Goulet was the regional loss prevention manager. Moore testified Goulet explained to Ntim that he was in charge of stopping loss to the Company and he was going to get some clarification on her statement because she did not write it, and they did not put on the statement written on your behalf by Anim. He testified Goulet then proceeded to go line by line reading what Ntim had written in the first statement, asking her whether it was correct. Moore testified that, during the meeting, Goulet also wrote a new statement for Ntim. Moore testified that "Each time he wrote a piece, he would confirm it with Ntim."

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[20] Ntim testified that, during the meeting, Goulet and Moore separately told her they had something on camera against her. Ntim responded that whatever they have on camera they should use against her as she was not going to change her statement. I have credited this aspect of Ntim's testimony. While there is no evidence that Respondent had Ntim on film stealing the disputed purchases, I found her testimony credible that both Goulet and Moore pressured Ntim to change her statement. In this regard, Brooks' statement concerning the December 1 incident portrayed Ntim as attempting to purloin the two items, something Moore specifically conveyed to Fontana when he forwarded Fontana the materials relating to the incident.

However, in the end Ntim refused to sign Goulet's statement. While Moore initially proclaimed that Goulet did all of the questioning of Ntim, he later testified concerning the statement Goulet wrote for Ntim, "I think when they were going back and forth regarding the statement, I may have interjected something here or there, but it was very little. I may have said, well, Margaret, you did say that to us 5 minutes ago, something like that, confirming that I heard what she had said." Quinones testified that during the meeting, Goulet introduced himself, and then read Ntim's prior statement to Ntim. Goulet then told Ntim based on their conversation that she needed to write another statement, and he refused Ntim's request to go home and write the statement stating it had to be done there. Goulet then offered to write the statement for Ntim and, according to Quinones took 15 to 20 minutes to question Ntim, about the new statement which she refused to sign. Thus, by admission of Respondent's witnesses, Goulet engaged in an extensive interview of Ntim about her prior statement, as well as about a new statement, which Goulet and Moore attempted to convince her to sign.

Following the December 4, meeting, that same day, Moore reported the results to Respondent vice president Fontana. Moore testified he told Fontana that Ntim had not changed her initial statement. While Moore also testified that, during the meeting, that Ntim admitted to taking the two items but refused to alter her written statement, he contended he never relayed that information to Fontana. Moore admitted that at that time, a final decision had not been rendered as to whether Ntim would be terminated, as that determination had to be made by Long, who had not yet reviewed the matter. Moore admitted that if Ntim had amended her statement to admit to attempting to steal the items, he would have presented that information to Fontana, and expected that information to be presented to Long to be considered as to whether to discharge Ntim. Moore also testified he expected Goulet to have separately reported the results of the meeting to Fontana.

Moore testified that, either December 5 or 6, the Thursday or Friday following the meeting with Ntim, Moore called Fontana to find out if the decision had been reached yet concerning Ntim's employment. Fontana said no that Long had not been able to look at any of the details yet. Fontana said Long would probably look at it on Saturday. Moore testified that also on December 5 or 6, he received a complaint from Local Union President Arhar where Arhar called Moore and accused him of violating Ntim's *Weingarten* right to union representation concerning the December 4 meeting. Moore testified that on Saturday, December 7, he received a call from Fontana who stated Moore should reinstate Ntim.

Moore testified that on Tuesday, December 10, Ntim came in and Moore invited union steward Wagner for the meeting. Moore testified that, during the meeting, he informed Ntim that she was going to continue to be an employee and that her time served would be a disciplinary suspension unpaid. He testified the suspension was for dishonesty. Moore testified that once he told Ntim she could come back to work there was a matter of her violating check stand procedures; so on December 10, Ntim was given a new corrective consultation for making purchases while on the time clock. Moore testified Respondent knew Ntim was not on break when she made the purchases because they keep track of break times and Ntim was not on break when the receipts showed her items were purchased. Moore also gave Ntim a typewritten page during the December 10 meeting, labeled "Addendum to consultation that was given on 12/1/13." Moore testified that he felt they had to clarify the result of the corrective consultation that was given to Ntim on December 1 so he wrote in the December 10 addendum that Ntim's "time out was considered a disciplinary unpaid time for violation that would normally result in termination." Moore testified he advised Ntim that she had been suspended previously and that one more suspension prior to June 8, 2014, would result in termination. Moore testified that for purposes of clarification he listed some of the major

check stand policies in the addendum, which he had Ntim sign. Moore testified he drafted the consultation to Ntim dated December 10, on December 10, along with the addendum he had Ntim sign on that date. Moore testified he drafted the two documents after he received the go ahead from Fontana.

Thus, Moore's chronology reveals that the union protested a violation of Ntim's *Weingarten* rights to Moore, prior to a determination being made as to whether Ntim would be discharged. That protest may have impacted on Respondent's decision not to discharge Ntim. Moreover, while the final decision was not to discharge, Ntim was given two new forms of disciplinary action on December 10, arising out of the December 1, incident. Moore crafted the two new forms of discipline on December 10, following the December 4, meeting where Ntim was denied union representation.

I find that Respondent violated Section 8(a)(1) of the Act by denying Ntim's request for union representation for the December 4 meeting conducted by Goulet and Moore. On December 1, Ntim was found by Brooks to be leaving Respondent's premises with two items for which she did not have a receipt. At the time, Ntim denied knowledge as to how the two items wound up in her basket. Nevertheless, Brooks, at Moore's directive, placed Ntim on suspension pending termination and the write-up given to Ntim listed the reason for the suspension as a major offense, which under the collective-bargaining agreement was a dischargeable offense. Ntim, at the time, had not been discharged, nor had she been told the length of her suspension. Moore admitted that there was a possibility that Ntim would be discharged for the offense, and the final extent of her discipline would not be determined until senior vice president Long had reviewed the matter and made a decision, which had not been done as of the December 4 meeting. Immediately, upon being placed on suspension, Ntim contacted union steward Cole and asked that he attend any follow up meeting with her, which he agreed to do. Thus, when Moore summoned Ntim to the 1 p.m. meeting on December 4, she had a reasonable fear of disciplinary action. Prior to arriving at the meeting, Ntim asked stewards Cole and Wagner to attend the meeting with her.

On December 4, at around 1 p.m., Cole and Wagner accompanied Ntim to Respondent's Gaithersburg administrative office area, and Moore upon seeing Cole asked what he was doing there. Moore testified that Cole responded that he was asked to be there, and then gestured toward Ntim who was sitting in plain view down the hall. Moore testified that he understood Wagner and Cole were there to attend the meeting with Ntim. Moore then retreated to his office and had a discussion with Goulet who was planning to attend the December 4 meeting as the principle questioner of Ntim. Moore informed Goulet that the union steward was there. Yet, Moore concluded that the stewards were not entitled to attend the meeting with Ntim with one of his reasons being that Ntim had not requested their attendance. Moore then called Wagner and Cole into a separate meeting with Goulet, and told them their attendance at Ntim's upcoming meeting was not necessary as Ntim was already suspended pending termination, and Respondent was only going to question Ntim about a statement she had already given. Moore then waived the stewards out the door.

I find Moore's assertion that the Ntim had not requested the steward's attendance at the meeting to be plainly undermined by what transpired. First, Moore reached this conclusion before ever speaking to Ntim, and therefore he dismissed the stewards from the meeting before giving Ntim the opportunity to verbally request their presence. Second, Moore admitted that he did not alert the Union of the December 4, meeting, prior to the meeting, and therefore he concluded that the stewards could only have been there at Ntim's request. Finally, Moore admitted that Cole confirmed this conclusion when Cole informed Moore that Cole was asked to

be there on December 4. Moore's dismissing the stewards, in these circumstances, reveals a fixed intent not to allow them to attend the meeting. Moore capped his actions when he testified that he told Ntim, just prior to meeting with Ntim on December 4 that, Wagner and Cole "are not going to be coming into the meeting. I said this is not a meeting about further investigation or discipline. This is simply a meeting to clarify your statement, and I don't think they would be of any help." Thus, Ntim's bringing the stewards to attend the scheduled meeting, in the circumstances here, was sufficient to place Moore on notice that Ntim desired union representation, as revealed by Moore's informing Ntim prior to the meeting that the stewards would not be permitted to attend, and by his informing the stewards of the same. In view of Moore's actions, Ntim was not required to repeat what would have been a futile second request to Moore. See, *Montgomery Ward & Co.,* 273 NLRB 1226, 1227 (1984), enfd. 785 F.2d 316 (9th Cir. 1986); *Consolidated Edison Co., of New York, Inc.,* 323 NLRB 910, 916 (1997); and *New Jersey Bell Telephone,* 300 NLRB 42, 48-49 (1990), enfd. 936 F.2d 144 (3rd Cir. 1991), and the cases cited therein.

The meeting to which Ntim was summoned to by Moore on December 4, did not take place to merely present her with a predetermined discipline. In this regard, Ntim had previously been presented with a written suspension pending termination. Moore admitted that as of the December 4 meeting with Ntim there had not been a final determination as to whether Ntim would be discharged for the events of December 1. Moreover, at the December 4, meeting, no final discipline was presented to Ntim. Rather, as per Ntim's credited testimony and admissions by Respondent's witnesses, Goulet questioned Ntim extensively about her December 1 statement, and attempted to re-write that statement for her to having her admit taking the two unpaid for items. As per Moore's testimony, had they succeeded in getting Ntim to change her statement the new statement would have been forward to upper management for review in determining whether to discharge Ntim. Thus, Respondent was furthering its investigation during the December 4 meeting of the events that took place on December 1, in order complete its decision on how to discipline Ntim. In fact, following the December 4, meeting, Respondent administered additional discipline to Ntim on December 10. Clearly, given the nature and purpose of the December 4, meeting Ntim was entitled, as per her request, to have union representation. See, *Baton Rouge Water Works Company,* 246 NLRB 995, 997 (1979); and *Titanium Metals Corporation*, 340 NLRB 766, 774 (2003), enfd. in relevant part 392 F.3d 439 (D.C. Cir. 2004).

Having determined that Respondent denied Ntim's request for union representation for a meeting of an investigatory nature from which she could reasonably expect discipline, I note Respondent also failed to give Ntim the options that she did not have to attend the meeting, or that she could attend at her choice without union representation, and Respondent did not elect to cancel the meeting. See, *Montgomery Ward & Co.*, 273 NLRB 1226 (1984); *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Co.*, 251 NLRB 850, 857 (1980); and *Lennox Industries*, 244 NLRB 607, 608(1979). Respondent in failing to present Ntim these options and then proceeding with the meeting violated Section 8(a)(1) of the Act.

Respondent argues in its brief that even if Respondent's proceeding with the December 4, meeting with Ntim was a technical violation of the Act, it was de minimis. Here, Ntim placed multiple phone calls to union stewards in order to be accompanied to a meeting with Moore, the result of which could have resulted in her termination. Moore, thereafter, sent the stewards away, and then Ntim was alone in an hour long meeting with Warehouse Manager Moore, Regional Loss Prevention Manager Goulet, and Quinones, who shared an office with an upper level management official and who had been invited to attend the meeting at Moore's request. Thereafter, Goulet and Moore proceeded to question Ntim in a joint effort to get her to admit

stealing two items, the admission of which could have resulted in Ntim's discharge. In *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 256-259 (U.S. 1975), in enforcing a Board order that the employer violated Section 8(a)(1) of the Act by denying an employee's request for union representation during an interview that may have resulted in disciplinary action, the Court cited Board's decision in *Mobil Oil* Corporation, 196 NLRB 1052 (1972), with approval. There, the Board stated, "it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.' Ibid." The Board and the Court concluded that such conduct as Respondent exhibited here is a serious violation of the Act, a conclusion with which I agree. Accordingly, Respondent's defense is rejected, and I find it has violated Section 8(a)(1) of the Act as stated.

CONCLUSIONS OF LAW

1. Costco Wholesale Corporation (the Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Teamsters Local 311, International Brotherhood of Teamsters (the Union) is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act on December 4, 2013, by conducting an investigatory meeting with employee Margaret Ntim, from which she reasonably expected disciplinary action, while denying her request for union representation at the meeting.
4. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in an unfair labor practice, Respondent must cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act. I note that bargaining unit here spans several of Respondent's locations in different states. Moreover, Goulet, Fontana, and Long, who were involved the decision to discipline Ntim, had responsibilities far beyond Respondent's Gaithersburg, Maryland facility. Goulet, in particular, who was charged with responsibility of investigating items of theft was directly involved and participated in the decision to deny Ntim's request for union representation. The record reveals that Goulet was stationed in New York, and Fontana and Long in Virginia. However, there was no request by the General Counsel or the Charging Party in their briefs to require a notice posting beyond Respondent's Gaithersburg location, nor any evidence that the denial of Ntim's right to union representation would have been broadcast to employees beyond that location. Given the fact that the General Counsel did not seek a notice posting beyond Gaithersburg, and I am not aware of any prior offenses by Respondent concerning the issue here, I am limiting my recommended order concerning the notice posting to posting the attached notice solely at Respondent's Gaithersburg location.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[21]

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[21] 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

ORDER

The National Labor Relations Board orders that:

Respondent, Costco Wholesale Corporation its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Denying employees' requests for union representation during investigatory meetings or interviews when the employees reasonably believe that the interview might result in disciplinary action.

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

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

(a) Within 14 days after service by Region 5, post at its facility in Gaithersburg, Maryland copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business, or is no longer providing services at the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at that facility at any time since December 4, 2013. Similarly, Respondent shall duplicate and mail, at its own expense copies of the attached notice to all employees who are on layoff, and former employees who have left Respondent's employ who worked at the Gaithersburg facility on or after December 4, 2013. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means to all bargaining unit employees employed at the Gaithersburg, Maryland location represented by Teamsters Local 311, International Brotherhood of Teamsters, and all other Teamsters affiliates as defined by the collective-bargaining agreement who are working out of the Gaithersburg, Maryland location.

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waived for all purposes.

[22] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in all the notices ordered herein 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."

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

Dated, Washington, D.C. December 16, 2014

_____
Eric M. Fine
Administrative Law Judge

APPENDIX
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any 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 deny employees' represented by Teamsters Local 311, International Brotherhood of Teamsters, or any other labor organization, requests for union representation during investigatory interviews when the employees have a reasonable basis to believe the interview may result in disciplinary action.

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

COSTCO WHOLESALE CORPORATION
(Employer)

Dated _____ By _____
(Representative) (Title)

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

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-2700
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-122612 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.