

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

DCT INCORPORATED

and

UNITED GOVERNMENT SECURITY OFFICERS OF
AMERICA, LOCAL #243

Cases 17-CA-22392
17-CA-22433
17-CA-22462
17-CA-22552
17-CA-22590

and

VIRGINIA CAROL SANDERS, an Individual

17-CA-22459

and

BYRON MALCOM, an Individual

17-CA-22479

and

TED WOOTEN, an Individual

17-CA-22557

and

WILLIAM WHITAKER, an Individual

17-CA-22664

and

MARCUS COUGHRAN, an Individual

17-CA-22665

Charles T. Hoskin, Esq. for the General Counsel.
Mr. Fred B. Grubb and *Mr. Peter J. Quist (Gallagher,
Flynn LR, LLC)*, of Burlington, VT, for the Respondent.

DECISION

Statement of the Case

JOHN H. WEST, Administrative Law Judge: Upon charges and amended charges filed by United Government Security Officers of America, Local # 243 (Union) and individually by Virginia Carol Sanders, Byron Malcom, Ted Wooten, William Whitaker, and Marcus Coughran, a Consolidated Complaint, a Second Consolidated Complaint, and an amendment to the Second Consolidated Complaint were issued, respectively, on January 20, 2004, March 26, 2004 and April 8, 2004. Collectively the complaints and the amendment thereto, all of which will hereinafter be referred to as the complaint, allege that DCT Incorporated (Respondent or DCT) (1) violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), by (a) in or about November 2003 changing the payday for the unit from Thursday to Friday, (b) on or about January 1, 2004 failing to continue in effect all the terms and conditions of employment in the

applicable collective bargaining agreement by failing or refusing to pay lead employees at a rate of \$16.83 per hour, (c) on or about September 16, 2003 and on or about October 10, 2003, at Respondent's facility, interrogating employees about the employees' union activities, (d) on or about October 1 or 8, 2003, at Respondent's facility, telling employees that it had no intention of signing a collective bargaining agreement with the Union, (e) on or about November 7, 2003, at Respondent's facility, denying the request of its employee Randy Gilliland to be represented by the Union during an investigatory interview which he had reasonable cause to believe would result in disciplinary action being taken against him, (f) on or about November 7, 2003, conducting the interview with Gilliland even though it denied his request for union representation during the meeting, (g) on or about November 12, 2003, removing Union literature from the bulletin board on which Respondent has allowed other nonwork-related materials to be posted, (h) on or about December 30, 2003, at Respondent's facility, making disparaging comments to employees about the Union and its International Representative, (i) on or about December 30, 2003 threatening employees with unspecified reprisals and with legal action because they engaged in union activities, (j) on or about November 12, 2003 terminating its employee Malcom, (k) on or about November 14, 2003, suspending its employee Sanders, (l) on or about November 17, 2003 terminating Sanders, (m) in or about December 2003 and in or about January 2004 failing or refusing to promote its employee Wooten to a lead position, (n) on or about January 22, 2004 reassigning its employees Whitaker and Wooten to remote posts, (o) on or about January 30, 2004 terminating its employees Whitaker and Coughran, (p) on or about February 18, 2004 reassigning its employee Wooten to a remote post, because he, like the employees named in (j), (k), (l), (m), (n), and (o) above, assisted the Union, engaged in concerted activities and to discourage employees from engaging in such activities, (q) on or about January 22, 2004 reassigning Whitaker and Wooten to remote posts and isolated work areas and on January 30, 2004 terminated Whitaker and Coughran because Whitaker, Coughran, and Wooten filed unfair labor practice charges with the National Labor Relations Board (Board), gave testimony to the Board in the form of an affidavit, otherwise cooperated in the Board's investigation of the unfair labor practice charges, and because Whitaker and Coughran cooperated with the Board in the formal settlement of unfair labor practice charges in Cases 17-CA-22210, 17-CA-22271 and 17-CA-22275, and (r) terminating Sanders on or about November 17, 2003 and Whitaker and Coughran on or about January 30, 2004 because they engaged in concerted activities with each other for the purposes of mutual aid and protection by discussing alleged violations by Respondent of the Federal Aviation Administration (FAA) policies restricting the disclosure of security passwords to government-owned computers, for complaining to the FAA about the alleged violations, and for participating in the FAA's investigation of the alleged violations, (2) violated Section 8(a)(1) and (3) of the Act by the conduct described in (1)(j), (k), (l), (m), (n), (o), and (p) above in that it discriminated in regard to the hire or tenure or terms or conditions of employment of its employees thereby discouraging membership in a labor organization, (3) violated Section 8(a)(1) and (4) of the Act by the conduct described 1(p) above in that it discriminated against employees for filing charges or giving testimony under the Act, and (4) violated Section 8(a)(1) and (5) of the Act by the conduct described in 1(a) and (b) above in that it failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act.¹ The Respondent denies violating the Act as alleged.

¹ As the complaint alleges and the Respondent admits, the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and reserve employees performing security work as defined by Section 9(b)(3) of the National Labor Relations Act, as amended, in the classification of Escort Patrols, Security Officers, and Leads, at the Mike Monroney

Continued

A trial was held in this matter on May 18 – 21, 2004, and on September 20 – 22, 2004 at Oklahoma, City, Oklahoma. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for General Counsel and the Respondent, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with a principal office and place of business in McAlester, Oklahoma, and an office and place of business at the Mike Monroney Aeronautical Center in Oklahoma City (referred to herein as Respondent's facility or MMAC), has been engaged as a security services provider. The complaint alleges, the Respondent admits, and I find that (a) during the 12-month period ending December 31, 2003, Respondent, in conducting its business operations purchased and received at its Oklahoma City facility goods and materials valued in excess of \$50,000 directly from sources located outside the State of Oklahoma, (b) at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and (c) at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

MMAC is operated by the FAA. The Respondent has a 4 year contract with the FAA, which ends December 31, 2004, to provide security services at MMAC.² Cheryl Bernardi, who owns 52 percent of the Respondent, is its President, and David Tolman, who owns 48 percent of the Respondent, is its Vice President. Bernardi testified that the Respondent's employees at some of its other locations are represented by unions,³ DCT's relationship with those unions is good, and she did not care whether DCT's employees at MMAC joined a union because through the Service Contract Act, DCT is reimbursed for whatever wage rate is approved in the collective bargaining agreement, if it is approved by the Department of Labor. On cross-examination Bernardi testified that at the inception of the Union's two organizing drives at MMAC, described below, Tolman filed unfair labor practice charges against the Union; and that on neither occasion did the Board issue a complaint on these allegations, "[o]f course not." (transcript page 1045). On redirect Bernardi testified that the charges against the Union had to do with union supporters engaging in union activity when they

Aeronautical Center, Oklahoma City, Oklahoma, excluding office clerical, Sergeants, Lieutenants, Captains, managers, and all other employees.

Also, as the complaint alleges and the Respondent admits, on July 7, 2003, the Union was certified as the exclusive collective bargaining representative of the unit, and at all times since July 7, 2003, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

² DCT also provides security services for the FAA in Denver, for the United States Navy in South Carolina, the United States Army in Oklahoma and Texas, the Environmental Protection Agency (EPA) in Florida and Oklahoma, and Earth Resource Observation Service Center in South Dakota. Respondent's security employees at some of these locations are represented by labor unions which have collective bargaining agreements with DCT.

³ Five letters of support from unions, Respondent's Exhibits 30 – 34, regarding a proposal of the Respondent were received. The Union involved in this proceeding was not asked for a letter of recommendation.

should have been working.

James Carney, who is a Senior Vice President of the International Union, testified that 2.5 years before he testified herein on May 18, 2004, the Union, at the behest of Coughran, had an organizing drive at MMAC, which did not succeed; that a second organizing drive about one year later, April 2003, was successful; and that Whitaker was very involved in the April 2003 organizing drive.

Coughran testified that he telephoned the Union in October 2002; that during that organizing drive he had employees sign union authorization cards; that he stood outside the FAA Center along the road the DCT employees use and held up signs encouraging membership in the Union; that he was told by management that he was not to pass out union authorization cards on the Center, or to speak with anybody about union activities on the Center; that he stopped his organizing efforts in 2002; that in the Spring of 2003 he again attempted to organize DCT employees at MMAC in that he passed out union authorization cards, union flyers, and he convinced Pete Milan, Sanders, and Whitaker to help him organize and get an election; that before he started organizing in 2003 he told Captain Al Griffin that he was going to engage in organizing activity; that Griffin told him that it was his prerogative to organize and Griffin asked him what some of the problems were and why he was trying to have a union represent the employees; that he told Griffin that the issues included money, insurance, and having a procedure for write ups and terminations; and that a day or two later he attended another meeting in Captain Griffin's office, which meeting is described below.

Whitaker testified that he became a member of the Union in April 2003; and that he, Coughran, and Milan organized for the Union in April 2003.

Bernardi sponsored Respondent's Exhibit 25, testifying that the document was in Griffin's file and a copy was sent to DCT. The document reads as follows:

Note to File of Marcus Coughran
Al Griffin

Coaching session
April 2003

After a report from Randy Gilliland about Sgt. Coughran being overbearing towards Gilliland, I spoke to Sgt. Coughran about supervision and leadership style.

I explained that we had to use a communication style which did not put people off but would lead them to a solution or resolution to whatever issue with which we were dealing. I explained to Coughran that his military background and strong, outgoing personality, when combined with his imposing physical presence, would cause many employees to react very negatively to harsh orders or verbal reprimands when delivered in an aggressive style. I further advised Coughran that most people would perceive his voice commands as being aggressive unless he was very careful and tactful in his presentation when dealing with employees. He stated he understood the need to moderate his delivery and appreciated the advice.

Coughran testified that he did not recall this meeting with Griffin in April 2003.

General Counsel's Exhibit 15 is a three-page transcript DCT created of a recorded April 25, 2003 telephone conversation between Bernardi and Tolman, on the one end, and, on the

other, Griffin, Coughran, Milan, and Whitaker. When called by Counsel for General Counsel, Tolman testified that at the time of this telephone conversation Griffin was the project manager and the highest ranking DCT official at MMAC. As here pertinent, the transcript reads as follows:

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David [Tolman]: I want everyone to know that this conversation is being recorded from both ends so that way there is no misinterpretation. Then later on if anyone says that something was said and it wasn't, it'll be in this recording. The first thing we want to discuss with you guys there are, is the union or union activity. We as [a] company do not
10 have a problem at all with you organizing and having a union, those are your rights. You're more than welcome to do that. We don't have a problem with it. We deal with a number of unions around the country now. However, what we do have a problem with is when your using DCT's time to solicit for your union activities along with the government telephone system, the government provided radio system,
15 **Cheryl** [Bernardi]: Government computers
David: the government provided computers and basically we have signed documentation from witnesses that states that you three are involved and doing this on company time.
Cheryl: So basically, because this is happening during work time and this is non-work related materials, I think you've been handing out a memo from me that this is forbidden and it is forbidden by the NLRB and right now we are telling you that all activities that are non-work related should cease immediately. I know that Mr. Coughran knows what the rules are because we've been through this before. DCT follows the rules and we expect the union to follow the rules.
20 **David**: And in light of all this, I want you three to know that DCT will be filing, by the end of today, an unfair labor practice charge against you three and your union and we will push that to the extent of the NLRB laws.
Cheryl: So I guess that's basically what we wanted to tell you. You know you do have the memo stating that and the rules and regulation governing that. So, it is imperative that you do cease activities and that those activities can only happen on your own time and not on any government provided or DCT provided equipment or time.
25 **David**: And that also means that when you're off the site, that you can't call back and talk to individuals when they're working on the job also.
Cheryl: You have to call them at home.
30 **David**: On their own time, on your own time.
Cheryl: If anyone has any questions they can pick up the phone and talk to us. Actually, we probably need everybody that's there to pick up the phone at least and tell us that they understand what we have said.
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40 **Milan**: I understand what you are saying. I don't believe I am guilty of any of your charges at this time and I won't do it in the future.

Coughran: ... I am fully aware of the rules an[d] I understand what you are saying and on the same note I have not provided or asked anybody to sign on anything on duty or
45 on property.

Whitaker: I understand.
Cheryl: Okay and did you have anything else you wanted to say?
Whitaker: No Ma'am.
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Whitaker testified that after this conference call he asked Captain Griffin "[y]ou mean we

can talk about hot rods, hot dogs, and football, but we can't talk about the Union," (transcript page 311) and Griffin said "That's correct" (transcript page 312). On cross-examination Whitaker testified that before this conference call he believed that if no customers were coming through, the security officers could talk about whatever they wanted to talk about.

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General Counsel's Exhibit 16 is a memorandum on DCT's letterhead, dated April 25, 2003, which reads as follows:

Subject: Solicitation and Distribution of Non-Work Related Materials

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Solicitation and distribution of union activity and/or other materials are forbidden in work areas and on company time (Stod[d]ard-Quick Manufacturing Co., 138 NLRB 615 (1962)). This includes face-to-face canvassing of employees for an outside nonemployment purpose.

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Union organizers or other unauthorized persons discovered on the premises will be asked politely to leave.

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DCT does not allow solicitation and distribution of any materials that are not work related.

If anyone is aware of any non-work related materials being distributed, they should immediately contact the Project Manager.

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Cheryl Bernardi
President [Emphasis added]

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General Counsel's Exhibit 17 is a memorandum dated May 3, 2003 from Captain Griffin to Tolman regarding "VIOLATIONS OF COMPANY POLICY BY SGT. MARCUS COUGHRAN AND WILLIAM WHITAKER." When called by Counsel for General Counsel, Tolman testified that the report refers to, among others, the union activities of Coughran and Whitaker. On the last page of the memorandum, Griffin makes the following recommendations:

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1. Issue final written reprimand to both Coughran and Whitaker.

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2. Issue final written reprimands and reassign both Whitaker and Sgt. Coughran to a remote post such as TRW or VTD on the 05:30 to 12:00 shift, where contact with other employees would be minimal. Leave Coughran at Sgt. level rank and pay. *Benefit: No adverse job action as pay, status, conditions, hours remain substantially unchanged. This would break up the group and lessen the chance of retaliation toward those who submitted reports.*

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3. Issue final written reprimands and reassign both to other remote posts and reduce Coughran in rank and pay. *Benefit: same as above but with adverse action of loss of pay and rank based upon dishonesty and trust issue with a supervisor.*

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4. Terminate both Whitaker and Coughran based upon above egregious behavior. *Benefit: same as above and further completely removes the problem. I believe this can be supported based upon the pattern and practice of violations after assurances by all parties on several occasions and our verbal warning during the meeting of 4/25/03. The list of violations now includes unauthorized materials on post; use of government equipment (phone) for non-work purposes, leaving assigned posts (Whitaker) and*

dishonesty. These are compounded by the leadership position of Sgt. Coughran, who, by virtue of his position placed additional pressure on a subordinate when requesting their help by joining the union. [Emphasis in original.]

5 In response to a question of the Respondent's representative, Tolman testified that the Respondent did not terminate Whitaker and Coughran based on this memo from Captain Griffin immediately after receiving it. When he testified later as the last witness called by Respondent, Tolman testified that he never acted on any of these disciplinary recommendations.

10 According to the testimony of Sanders, the most active union supporters in May 2003 were Coughran, Whitaker, and Milan. Sanders testified that during this time period she helped pass out Union literature at the Metro Tech Aviation Career Center, which is about five blocks from MMAC.

15 Bernardi sponsored Respondent's Exhibit 26, which is a memorandum dated May 8, 2003 which she and Tolman signed. It reads as follows:

Memo to File:

20 Cheryl and I were informed that Sgt. Coughran had been making fun of employees and did not like women working as security officers at the FAA. Cheryl and I held a counseling session with Sgt. Coughran and discussed his behavior towards employees and told him that DCT would not tolerate harassment of employees. Mr. Coughran informed us that he would be more aware of his actions and that any harassment on his
25 behalf would stop.

Coughran testified that he did not recall having this meeting, and he did not think that he ever had this meeting.

30 Bernardi sponsored Respondent's Exhibit 27, testifying that the document was in Al Griffin's file and a copy was sent to DCT. The document reads as follows:

35 TO: File of Marcus Coughran
From: Al Griffin
RE: Employee Treatment
Date: 5/15/03

40 This date I spoke to S/O Coughran about his radio procedure and treatment of employees. I cautioned Coughran about sounding angry or snappish on the radio. Coughran stated he had been annoyed by Officer Gilliland's mistake on an escort assignment. Then Coughran said he was annoyed that Officer Lozano did not respond to a call for escorts. Lozano had explained she did not want to be tied up on a long escort at ILS because she was the last Visitors Center escort. She had been directed by Sgt. Malcom to tell ILS that very thing.

45 I advised Coughran that her orders came from HQ and I agreed with her not going out on a long escort at the time. I further cautioned Coughran about unprofessional radio behavior toward his employees. We discussed the fact that his strong demeanor would be intimidating to other employees and he must find a better leadership style.

50 Coughran testified that while he had a meeting with Griffin, the meeting did not take place the way this memorandum reads and it is not accurate.

When called by Counsel for General Counsel, Tolman testified that Coughran and Whitaker were first fired in June 2003. Both filed unfair labor practice charges with the Board and these charges resulted in a settlement. At the time DCT was represented by attorney Patrick Cremin who is with the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson. Tolman testified that Gallagher, Flynn was not involved in any way in the settlement discussions.

Whitaker testified that DCT first fired him on June 16, 2003; that the Company told him that he was terminated for discussing discipline with other employees; that 4 days before Griffin told him that he was being disciplined for entering a women's restroom when he was sick and even though Whitaker put a note on the door of the restroom ("Out of Order," transcript page 313), and there was no one in the restroom when he entered it, Griffin was considering it under the broad stroke of sexual harassment; that he disputed that he had ever sexually harassed Kim Impson and he told Griffin that he did not agree with the title and he would pursue all options to have the title changed; that he used the women's bathroom because he was very sick that week, he knew that there was only one female in the building and he knew that she had not arrived at work yet, and the area was confined and easy to clean up; that he did not see Impson or anyone else in the bathroom; that while he was vomiting into the toilet he heard the restroom door open and close; that he did not think that if someone just opened the door and looked in but did not enter the room that that person would have been able to see him; that after he left the restroom he saw Impson standing in a room off the hallway which was not her office; that she looked at him as he walked by; that he told Coughran about the discipline; that the day after he used the women's restroom he saw a male mail room employee entering the women's restroom, he showed him the warning he had received and told him that it probably would not be a good idea; that there are approximately 20 males in the involved building and only 1 male bathroom, which has 1 toilet and 3 urinals; that he contacted Occupational Safety and Health Administration (OSHA) regarding the adequacy of rest room facilities; that he received a letter back from OSHA which indicated that DCT was contacted, DCT agreed to remedy the situation, and no further action would be taken; that shortly after the letter, DCT moved some men out of the building and some females into the building; and that Captain Griffin told him that he was terminated because he "had talked about the sexual harassment complaint, which was my discipline, [a]nd by doing that, I had created an offensive and hostile work environment for the alleged victim of the sexual harassment" (transcript page 320). On cross-examination Whitaker testified that it was his understanding that he was disciplined after Impson complained about him being in the ladies rest room; that he did not recall any discussion with Impson about him being in the ladies rest room; and that while the facility is an FAA facility, DCT, as a contractor, is assigned that space.

Officer Chad Pavlicek testified that Impson came into the office and asked him and another officer if they knew who was in the ladies room and he told her he believed that it was Officer Whittaker; that Impson then went and discussed the situation with the Captain; that he believed it was Whitaker because he was not on the drive and he had seen Whitaker walk back that way; that after the incident Whitaker told him that he had an upset stomach; and that he knew of Whitaker using the ladies rest room several times before this incident. On cross-examination Pavlicek testified that he did not remember Whitaker being sick at all that day; that there was only one men's' bathroom and one women's' bathroom in the involved building, the ILS North facility; that at that time there were about 10 men and 2 women working in that facility; and that he was not sure if Whitaker was the only man who was forced to use the women's bathroom when the men's bathroom was full. Subsequently Pavlicek testified that he personally observed Whitaker using the ladies bathroom several times before the incident in question; that before Impson moved into the building there were two females there, namely Officer Kim

Tollison and Sergeant Lozano; that he did not recall ever observing any other male using the ladies bathroom; and that he never used the ladies bathroom. On recross Pavlicek testified that when Impson was in the building, Lozano was also in the mailroom; and that the men's bathroom is also used by people in addition to the 10 male employees.

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Impson, who is the administrative assistant to the project manager, testified that she saw the "out of order" pink Post It note on the women's restroom door; that the janitorial people always put a large rope and sign across the door; that she entered the restroom to wash her hands; that when she walked in the stall door was closed, and there were boots facing the stall door; that while she washed her hands, she heard a male clear his voice; that she told the officers at the front desk that there was a male in the women's bathroom and when the person came out they should tell him not to use the women's restroom; that she went into a classroom to see who it was as they came out of the women's restroom, and it was Whitaker; that she then told the Captain who went to discuss it with Whitaker's supervisor; that she did not hear any evidence of Whitaker being sick in the stall; that she forwarded an e-mail to the President of the Company complaining "of sexual harassment for a male being in the bathroom" (transcript page 1308); and that after Whitaker was reprimanded she had several people come to her and tell her that Whitaker had shown the reprimand, others asked her what she had done to him, and it created a very uncomfortable situation for her. On cross-examination Impson testified that she was the only women in the building at the time.

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Coughran testified that DCT fired him on June 19, 2003; that he had received a discipline from Captain Griffin about 3 months before that for telling other officers that they should not go into the women's restroom or they would be written up like Whittaker for sexual harassment; that Bernardi, with Captain Griffin present, told him that he was fired for harassing other officers; that he had not been disciplined before this for harassing other officers; that during the meeting with Bernardi and Captain Griffin he disputed that he had harassed other officers; and that he filed an unfair labor practice charge. On cross-examination Coughran testified that before he was terminated he witnessed Bernardi and Tolman telling about 10 DCT employees in a parking lot at MMAC that they opposed the Union.

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Bernardi testified that she and Tolman were standing out on the drive at MMAC one day when three security officers approached; that the officers said that they did not want a union but they needed something done about their high insurance rates; that she said that she sympathized with them and "[w]e all have to pay high insurance rates, ... I'm sorry ... I don't know what else to tell you" (transcript page 1025); that neither she nor Tolman called this meeting; and that neither she nor Tolman made any derogatory comments about the Union to these employees.

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According to the testimony of Carney, the Board conducted an election for DCT's employees at MMAC in June 2003. Whitaker testified that in June 2003, after he was terminated, he voted in a Board conducted election. Coughran testified that although he was terminated, he voted in the Board election and DCT did not challenge his eligibility to vote in that election. And Impson testified on cross-examination that DCT sent her to be the Company's observer at the NLRB election.

On July 4, 2003 Sanders received a promotion to sergeant which was signed by Project Manager Griffin, Respondent's Exhibit 6.

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Harold Drain, who is an attorney, testified that he represented Whitaker from June 2003 through August 2003; that Whitaker came to him and stated that he was fired from DCT for sexual harassment; that he looked at the charge and concluded that it was "bugus"; that

Whitaker had already contacted the Board; that he and Whitaker were looking to pursue a case against DCT for defamation based on the "bogus" claim of sexual harassment; that he participated in settlement negotiations concerning a potential lawsuit; that he was looking for a global settlement of all outstanding claims, including the defamation and some possible other issues that they was looking into; that Patrick Cremin and an attorney from Cremin's office participated in the discussions; that Kyle Killam, who represented Coughran, was present at the meeting with DCT's counsel Cremin and his assistant; that at the meeting with Cremin and his assistant, they discussed all of the issues related to the termination, including the labor issue and the defamation claim and they wanted to try to settle all of the claims; that with respect to a global settlement, Whitaker was offered \$25,000 to settle all claims but Whitaker turned it down; that shortly after Whitaker turned the offer down, Cremin said that all offers were off the table; that he advised Cremin that they intended to pursue damages because since a sexual harassment charge was on Whitaker's record, he would have a tough time finding suitable employment; that there was no global settlement; and that after Cremin took the global settlement off the table, he acted as a facilitator between Whitaker and the Regional office of the Board. On cross-examination Drain testified that this was his first Board case; that it was his understanding that Whitaker was sick, the men's restroom was occupied, he had to throw up, he went to a lady's rest room which was small, knocked on the door, put a note on the door, while he was in the lady's rest room throwing up somebody came in, and ultimately he was charged with sexual harassment; that he did not know whether Whitaker was working when he told opposing counsel that with the sexual harassment claim Whitaker would have a tough time finding suitable work; that he was out of the loop regarding any employment Whitaker found in that Whitaker dealt directly with the Board; and that he was not aware that Whitaker did find suitable employment with another security firm, namely Safety and Security Services, Inc. (SSSI) on about June 26, 2003.

Killam, who is an attorney, testified that he represented Coughran regarding a settlement with DCT and he attended a meeting at the Board's Regional office in Tulsa, Oklahoma; that he was retained by Coughran 2 days before this meeting; that Drain, Cremin, and a legal assistant to Cremin were present at this meeting; that wrongful terminations and the Board claim were discussed at this meeting; that the gist of the conversation by Cremin was specifically how much money is this going to take to make this go away; that the proposal was for \$30,000 and the removal of any derogatory statements; and that Cremin said that the offer would be submitted to DCT. On cross-examination Killam testified that Charles Hoskin, who as noted above is an attorney with the Board, was at the meeting at the Board's Regional office in Tulsa; that he had never participated in any Board proceedings as an attorney representing an alleged discriminatee seeking back pay; that there was no discussion at this meeting about whether or not Coughran and Whitaker had any employment at that time; that he did not recall any such discussion whatsoever regarding whether or not Coughran and Whitaker had any employment at that time; that he did not have any communication, oral or written, with the Board regarding Coughran's back pay; that the last offer that Cremin made was for \$25,000 and Coughran and Whitaker would have to waive reinstatement; that he advised Coughran that this was probably going to be the best offer because if he was rehired, more than likely he was going to be fired again; and that he was a sole practitioner at the time.

Hoskin testified that he investigated the back pay concerning Coughran and Whitaker in early to mid-July 2003; that he determined gross back pay for these two alleged discriminatees during separate telephone conversations with Coughran and Whitaker regarding what they were earning as employees of DCT during the time period prior to their termination; that they told him that they each averaged about 40 hours a week at DCT and they told him their wage rate at DCT; that they told him that they had interim employment, their hours, and how much they made; that there was also a discussion of interim expenses in that (1) Whitaker told him that (a)

in his interim employment he had to purchase a weapon for between \$600 and \$700, (b) he had to cash out his 401(k) due to the financial bind that his termination put him in and that the cash out had tax consequences, and (c) cash that he obtained from his credit card company to live during the time, and (2) Coughran had to purchase a \$600 to \$700 weapon for his interim employment, he had to take money out of his 401(k) with tax and fee consequences, and he mentioned something about credit cards; that he initiated settlement discussions in mid-July 2003 by forwarding a letter to Tolman since at the time DCT was not represented by an attorney with respect to the alleged unfair labor practices; that in the letter he estimated gross back pay, noting the basic formula that the interim earnings and expenses would be taken into account to reach the ultimate figure; that DCT retained Cremin; that he had a conference call with an associate of Cremin, Marshall Wells, along with Drain, and then a face-to-face conference in July 2003 with Cremin, Drain, Killam, and Cremin's assistant at the Board's Tulsa office; that at this meeting (a) a global settlement of the Board claims and the civil claims was discussed with Cremin offering a lump sum if Coughran and Whitaker dropped all charges and claims, and (b) he told Cremin how he calculated the gross back pay figure, explaining that Coughran and Whitaker had interim employment, interim earnings, and interim expenses; that after this was discussed, Cremin said "how much is this going to cost me for it all to go away"; that either at the end of this meeting or shortly thereafter Cremin offered a global settlement of somewhere between \$15,000 and \$20,000 to each alleged discriminatee; that the day after the offer was made, Cremin telephoned him and told him that the offer was off the table; that Coughran and Whitaker were reinstated in the first couple of weeks in August 2003, before their back pay was settled; that over the course of those weeks he and Cremin had many discussions about back pay, how to arrive at a figure, and the differences they had as to what the ultimate figure should be; that about mid-August 2003 they finally arrived at a figure of between \$3,000 to \$4,000; that they had some disputes, one of which was how to calculate gross back pay; that Cremin took the position that Coughran and Whitaker worked 32 hours a week for DCT, which is the standard work week, he told Cremin that they worked overtime and therefore put in 40 hour work weeks, and they reached a compromise on this issue; that Cremin took issue with a 401(k) tax penalty being a legitimate expense and they agreed that interim expenses would essentially wipe out the interim earnings and they would just go with the 36 hours a week gross back pay as a compromise; that Cremin agreed to zero out the interim earnings and interim expenses, they arrived at a back pay figure, the parties entered into a bilateral settlement agreement, General Counsel's Exhibit 18, and all sides signed; and that Cremin signed the agreement for DCT.

On cross-examination Hoskin testified that Coughran and Whitaker began working for another security firm in the latter part of June 2003; that he relied on their representations made by telephone for what they earned during their interim employment; that both Coughran and Whitaker made \$12 an hour at SSSI, with the former working 20 to 24 hours a week and the latter working 16 to 20 hours a week; that while a respondent could ask Counsel for General Counsel to see the records of interim earnings, here DCT did not request any records before signing the settlement agreement; that a complaint issued in August 2003 prior to the settlement agreement being reached; that Coughran and Whitaker were reinstated before the complaint issued; that he was not aware whether any compliance forms were sent to Coughran and Whitaker; that the interim expenses involving the 401(k) tax liability and fees was about \$1,400 (about a 20 percent tax and a 7 percent fee); that he did not ask DCT for records to document how many hours Coughran and Whitaker worked for DCT; that within a few days after he sent the July 14, 2003 above-described letter to Tolman he spoke with Cremin and told him that Coughran and Whitaker had interim employment; that he recalled Drain stating that with the allegation of sexual harassment on the record, his client Whitaker would have a tough time finding suitable employment; that Drain said this in the context of a badge of shame which is going to follow Whitaker for the rest of his life and hurt his ability to get a job, and this was the

basis for Whitaker's civil claim; that at the same time he and Cremin were discussing interim earnings and interim employment; that there was no secret that Whitaker found interim employment within days after he left DCT; that he and not Drain spoke with DCT's representative about interim earnings; that in the telephone conversation he said that there were interim earnings and they may have discussed back pay; that at the face-to-face meeting the civil claims, back pay, and reinstatement were discussed; that in subsequent telephone calls he and Cremin came to the agreement about how to figure the settlement; that Cremin's skepticism was not about the interim earnings but rather about the interim expenses in that he doubted that 401(k) penalties could be interim expenses; that he told Cremin that it was his understanding that it could be, and to resolve the differences he and Cremin decided to use 36 hours a week, and zero out interim earnings and interim expenses or just take them off the table; that he advised Cremin that Coughran and Whitaker were working at SSSI and making a specific amount of money; and that it was his understanding that Coughran and Whitaker could not have gotten their jobs at SSSI without guns.

General Counsel's Exhibit 26 is a letter dated July 16, 2003, from Bernardi to MMAC Supervisors which, as here pertinent, reads as follows:

It is DCT policy that DCT employees at MMAC are paid on every other Friday. When the payroll information is available and DCT personnel have sufficient time, pay checks are generally distributed on Thursday as a convenience for our employees. However, officially pay day is on Friday.

Due to problems with timesheets and changes in pay procedures, pay checks will be distributed on Friday this week.

When called by Counsel for General Counsel, Tolman testified that this letter does not reflect any changes in the payday policy at MMAC; that this memorandum was drafted because DCT received a complaint from Ms. Hazel Hill, who is an agent of the Department of Labor, indicating that Whitaker said that DCT had changed its payday and it had not; that the complaint was not that DCT was not paying employees for time worked; that two different things were discussed with Hill and the second matter related to employees not being paid for the 15 minutes they spent in checking out their weapons in the morning but he could not recall if this complaint was filed before or after Whitaker was fired for the first time in June 2003; and that he learned that Whitaker was the one who had complained concerning paychecks from Hill who would not tell him who complained about employees not being paid for the 15 minutes they spent in checking out their weapons in the morning.

Wells, who is an attorney with the Hall, Estill, Hardwick, Cable, Golden, and Nelson, PC firm (Hall and Estill) in Tulsa, testified that Cremin is his immediate supervisor; that he participated in a telephone conference regarding the DCT settlement discussions on July 28, 2003 because Cremin was not available; that Hoskin and Drain, who represented Whitaker, and Bernardi and Tolman participated in the conference call; that during this conference call he brought up the fact that Whitaker and Coughran had jobs and Drain said that he did not represent Coughran and he could not speak for him but Whitaker absolutely did not have a job; that he did not remember Hoskin correcting Drain; that he took notes of this and his subsequent telephone conversation with Bernardi and Tolman and drafted an e-mail to Cremin, Respondent's Exhibit 43; that he is sure, as indicated in the email, that Drain denied that Whitaker had obtained any alternative employment; that he did not participate in any conferences relating to Coughran and Whitaker after this; and that it was not until Cremin told him in December 2003 that he learned that Coughran and Whitaker obtained alternative employment.

Regarding the July 28, 2003 conference call, Bernardi testified that Hoskin said that they needed to discuss interim earnings and Drain said that his client, Whitaker, had been unable to gain any employment because DCT had defamed him and he believed that his client would never be able to get employment in that industry.

Deborah McClendon, who is a paralegal who works for Cremin, testified that she attended a meeting with Cremin, Hoskin, Drain and Killam; that she took notes of the meeting, Respondent's Exhibit 42, which are dated "7-30-03"; that backpay was discussed at this meeting and page three of her notes indicates \$4,128.96 for Whitaker and \$4,556.16 for Coughran; that Hoskin gave the amounts during this meeting; that she wrote "offset," "fulltime job elsewhere," and "working – but part time" in her notes because Cremin said he understood that one had a full-time job and the other had a part-time job, and Hoskin said if that is the case, then there will be an offset to the backpay; that Hoskin said that he did not know that to be the case but if in fact, they did have any other interim earnings, they would be offset against the back pay; that she wrote "Kyle Killam, want to get back to work" because either Killam or Drain said Whitaker and Coughran wanted to get back to work; that she did not recall any discussion of interim expenses at this meeting; that when she and Cremin got back to their office they called Bernardi on the speakerphone and told her that opposing counsel made a global settlement offer without reinstatement of \$75,000; and that Cremin told Bernardi that Whitaker and Coughran did not have jobs, they wanted to get back to work, and overtime had to be calculated.⁴ On cross-examination McClendon was asked if after this meeting she was involved in discussions with Cremin in which it was agreed to settle the case. She testified that she did not recall.

Cremin, who as indicated above, is an attorney with the Hall and Estill firm, testified that Respondent's Exhibit 44 is a letter from Hoskin to Tolman which refers to backpay for Coughran and Whitaker; that Tolman faxed the letter to him; that he and McClendon participated in a settlement conference on July 30, 2003 with Hoskin, Drain, and Killam, and Respondent's Exhibit 45 are his notes of the conference, which notes are erroneously dated "7/29/03"; that he brought up the idea of a global settlement of \$25,000 per case with no reinstatement; that the counter offer was \$75,000 per case; that he said the he had heard that Coughran and Whitaker were employed full-time and Hoskin said if that were the case, then that would be an offset; that Drain said that Whitaker was not employed and he could not find a job because DCT had accused him of sexual harassment and made him virtually unemployable; that Killam did not know what Coughran's situation was; that on page two of his notes he wrote that Killam said "The guys have talked about wanting to get back to work" and he thought this meant that Coughran and Whitaker were not working; that he did not recall Hoskin correcting Drain when Drain said that his client was not working; that during this meeting Hoskin did not say that it was his understanding that Coughran and Whitaker had found employment; that Killam had just

⁴ Page 4 of McClendon's notes, as here pertinent, contain the following:

6.00 – 7.00 hour a job – 20 hours a week

C 6-19-03 Date of hire

W 6-16 03

a little over 6 weeks

\$3,500 actual backpay each

W – record damaged

if job back - \$30K / call it even

believes he can prove malice/intent

The following appears in the margin "45 – 50K"

This amount is not 100% of backpay as I have calculated it. However, I understand that you've made this offer based on some differences we have over the backpay period and the applicable hours per week for Coughran and Whitaker.

5 Cremin testified that the numbers were based on the only information that he had that Coughran and Whitaker did not have interim earnings except the part-time job that Coughran had, which Cremin did not think was an appropriate deduction because he had it before.

10 General Counsel's Exhibit 29 is the proposed settlement agreement with a cover letter from Hoskin to the Union, dated August 20, 2003. As here pertinent, the cover letter reads as follows:

15 The Region is prepared to approve a settlement agreement which follows. Marcus Coughran and William Whitaker are going to sign on to the agreement, though they are understandably disappointed that the backpay amounts reflected in the settlement agreement are not 100 % of their estimated backpay. However, the region will approve the agreement because the backpay amount is a reasonable resolution of some
20 disagreements with DCT concerning the backpay period and hours worked per week by Coughran and Whitaker. Moreover, the cease and desist portions of the settlement, reflected in the Notice to Employees, address every issue we would seek in an eventual Board order. Unlike a Board order, however, the settlement puts a remedy in place now. The settlement agreement does contain a 'non-admissions' clause, but that language does not appear on the Notice to Employees and the Region reserves the right to use
25 evidence from the investigations if it has to investigate future unfair labor practice charges against DCT.

Your approval of the settlement agreement will bring all parties in agreement and move the case to the compliance stage. [Emphasis in original]

30 General Counsel's Exhibit 18 is the settlement agreement between DCT, the Union, Coughran, Whitaker, and the Board. The signature page has the following dates: "8/19/03," "8/20/03," and "8/22/03."

35 Drain testified that he signed General Counsel's Exhibit 18, the settlement agreement; and that he was not involved in the calculation of the back pay figure and he did not have any discussions with the Board concerning the basis for the back pay figure. On cross-examination Drain testified that when he signed the settlement agreement he had no reason to believe that the amount Whitaker received was improper; that since about August 22, 2003 when he signed the settlement agreement he has not had any contact with Whitaker, and he did not know what
40 has happened with respect to this matter since then; that there was one occasion when he sent a letter to DCT replying to what he perceived as an attempt to intimidate Whitaker but he was not sure of the timing of the correspondence; and that Cremin wrote back indicating that he had a right to contact Whitaker in that Whitaker was working for DCT.

45 Killam testified that he signed General Counsel's Exhibit 18, the settlement agreement; and that he was not involved in the calculation of the backpay figure, and he was primarily involved to broker a settlement to get Coughran's job back, as well as compensation for the wrongful termination.

50 Whitaker testified that Drain entered into the settlement agreement, General Counsel's Exhibit 18, on his behalf; that since he was certified in two States as a police officer, he knew that the sexual harassment charge would affect his ability to pursue that career again, and so he

retained Drain; that he did not retain Drain to purely settle the Board claim but rather to handle the civil claim; that in conversations with Hoskin between June and August 2003 he discussed back pay; that he first discussed back pay with Hoskin about 3 weeks after he was fired; that he had interim employment during the 6 or so weeks that he was off work in 2003; that he reported this to Hoskin by telephone almost immediately, telling him how much he was earning in terms of hours (16 to 20) and wage rates (\$12 per hour); that he did not provide, nor was he requested to provide, any documentation to support this during the settlement of the case; that with respect to interim expenses, he advised that Board about the cost of a gun,⁵ Federal and State tax implications from early withdrawal of 401(k) funds, and credit card checks; that he purchased a gun he was familiar with, namely, a model 1911 Kimber .45 caliber semi-automatic for \$670; that this is the weapon he used in police and other security work and he had been trained on this weapon; that during this same time period he had discussions with the Board concerning the hours per week that he worked for DCT prior to his termination; that he told the Board that his post was a 32.5 hours per week post plus he received on average 2 hours a week training and also overtime that was available for a total of approximately 40 hours per week; that he neither was asked for nor did he provide any documentation to the Board to show that he worked about 40 hours a week for DCT; that Drain advised him that DCT was offering a global settlement of \$25,000 if he was willing to walk away; that the offer was taken off the table before he could respond; that the amount indicated in General Counsel's Exhibit 18 is the amount of back pay he received before taxes; that he authorized his attorney to sign the settlement agreement; and that when he was reinstated he was Vice President of the Union, Coughran was President, Sanders was Secretary/Treasurer and Peter Milan was a steward.

On cross-examination Whitaker testified that he found employment as a security guard with SSSI about 2 weeks after he was terminated on June 16, 2003 by DCT; that SSSI did require that his sidearm conform to CLEET's regulations; that when he worked on the Plano, Texas and Blanchard Police Departments he carried a stainless, model 1911 Kimber .45 caliber handgun but that gun was stolen from his apartment about one month after he began working for DCT; that he filed a police report regarding the theft⁶; that he worked for SSSI from June 26, to August 1, 2003, averaging 27.5 hours a week; that at DCT he worked an average of approximately 32.5 hours a week plus about two hours of training a week; that he told Hoskin that he found some employment as a security guard and how much he was earning shortly after he started working for SSSI; that he did not periodically update Hoskin to tell him that he was working more than 16 to 20 hours per week; that he made \$2,179 before taxes working for SSSI⁷; that he received back pay of \$3,470 before taxes from DCT; that he was not familiar with CLEET regulation that specifies the type of gun that can be used; that regulation 390:35-13-1D specifies that "[n]o armed security guard ... shall carry a type of firearm in which he has not been formally trained to handle or operate"; and that he had also been trained and did carry a .38 caliber Smith and Wesson.

On redirect Whitaker testified that he was never trained to use a .22 caliber pistol as a security guard and that would not be an adequate weapon for such a carry; that General Counsel's Exhibit 36 is the receipt for the Kimber handgun he purchased on "6-26-03" for \$662;

⁵ He testified that he also owns a small framed .22 caliber semi-automatic pistol but he could not use it for security work because the Council of Law Enforcement Education and Training in Oklahoma (CLEET) would not allow it; and that he was licensed by CLEET in 2003 and when he testified at the trial herein.

⁶ General Counsel's Exhibit 35, dated "06/15/02."

⁷ Whitaker testified that Respondent's Exhibit 3 are all documents related to his employment at SSSI.

5 that it was his understanding that the training he received at DCT was mandatory; that after he was reinstated, Bernardi forwarded a letter to him on August 28, 2003 which confirmed that the \$3,740 covered all of his back pay, General Counsel's Exhibit 37, and that it was "not appropriate for ... [him] to seek to ignore your legally binding settlement agreement by going to yet another governmental agency [(the Department of Labor)] in order to get pay for three additional hours which you did not get in the negotiations under the NLRB settlement."

10 Subsequently Whitaker testified that if he had the option, he preferred to use the Kimber model 1911 because it has a grip safety and a thumb safety; and that he did not even consider purchasing a Smith & Wesson because anyone can shoot it by just pulling the trigger.

15 Coughran testified that in reaching the settlement he dealt with Hoskin at the Board; that he was reinstated about August 19, 2003; that with respect to the settlement, he gave the Board information, pay stubs and his hours, with respect to his interim earnings at SSSI; that he told the Board about his expenses, namely a weapon he purchased for between \$700 and \$800 and the penalties he paid for cashing his 401(k); that he was not directly involved in negotiations; that he relied on Hoskin to settle the case; that Killam represented him to the extent that if he won the Board case, Killam was going to file a civil lawsuit; that he thought that he was entitled to more than he received in the settlement; that it was his understanding that there was a disagreement regarding the hours worked in that DCT took the position that he worked 32.5 hours a week and indicated that he had been working about 40 hours a week including training; and that there was a compromise on the hours worked. On cross-examination Coughran testified that he gave Hoskin a verbal report on the amount he made at SSSI, telling him that he made \$12 an hour and worked between 16 and 23 hours; that he considered anything over 32.5 hours a week at DCT as overtime; that he told Hoskin that he worked a 32.5 hour week at DCT and he worked some overtime; and that he had a receipt for the gun he purchased but he neither brought it to the trial nor did he turn over the document to the Respondent pursuant to its subpoena.

30 Cremin testified that he signed the settlement agreement on August 19, 2003 and it was his understanding that there were no interim earnings; and that, with respect to his conversations with Hoskin

35 I recall conversations, about interim expenses, because I disagreed with Chuck that taxes that they paid, for early - - I guess you call it withdrawal or like, cashing in - - a 401(k), I believe, were not appropriate expenses, would not - - should not be added, to the back pay. I have no memory of Chuck telling me they were working.

40 I do remember him talking, about some negligible or minimal or nominal back pay, which was offset, by the expenses, interim earnings - - minimal or negligible interim earnings, which I thought had to do with Mr. Coughran because I was under the distinct impression, based on what Mr. Drain had told me, that Whitaker could not get work because of having to put, on his application, he was fired, for sex harassment.
[Transcript page 1233]

45 Cremin further testified that he could not remember if he learned about the purchase of guns being an interim expense during these conversations or later; that there were some expenses and he may have thought it was related to Coughran getting a uniform or something; that Hoskin is mistaken in testifying that he thought he told Cremin on July 14, 2003 that Whitaker and Coughran had interim employment since Hoskin never told him that; that Hoskin's testimony that he told Cremin that both Coughran and Whitaker were working at SSSI and making a specified amount of money is absolutely not correct in that he did "not know who SSSI

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is" (transcript page 1235), he did not know what amount of money, he was never told they were making any amount of money; that Drain said that Whitaker had been denied unemployment because he was fired for sexual harassment; and that people do not get unemployment if they are employed and this is one more reason he assumed Whitaker was unemployed "other than
5 being told he was unemployed" (transcript page 1236). On cross-examination Cremin testified that he thought that Wells, who works for his firm, brought up the subject of a global settlement before he brought it up; that a global settlement has nothing to do with interim earnings or interim expenses in that it is a cash figure that will get rid of everything and the employees would waive reinstatement; and that he signed the settlement agreement "because I relied on
10 the Board." (transcript page 1248) Subsequently Cremin testified that either Whitaker or Coughran cashed in his 401(k) but he did not think he asked the amount of the tax liability because he did not believe that it was an appropriate measure of damages; that somewhere along the line he heard about guns "but really, I think, I have only heard about that since this - - whatever this is" (transcript page 1250). Cremin also gave the following testimony:

15 JUDGE WEST: You testified you thought that you recollected something about getting a uniform. What was that ?

20 THE WITNESS: I assumed when Coughran had expenses that it would have to do with some uniform that he was wearing. I did not know he was - - I do not remember anything, about a gun, at all, but I know I have heard about a gun, but I think I have heard about it, probably, through Mr. Grubb is where I heard that .

25 JUDGE WEST: But you think that there were expenses involved and discussed, other than the - - cashing in of the 401(k) and you think that, that involved a uniform?

30 THE WITNESS: That might have something to do with he - - I remember something vaguely, in my mind, about a uniform shirt. I do not know if that meant - - if that was after they were trying to come back or it had something to do with an expense but I do have a uniform shirt somewhere in my memory. It ain't very big but it is there.

JUDGE WEST: Just one uniform shirt?

35 THE WITNESS: Yep. That is why I assumed it was one of them because some person had a problem with a uniform shirt. I remember that . Maybe, that was an expense that he had. He had to wear a uniform shirt to be a Guard somewhere.

40 JUDGE WEST: Now, this was Coughran. If he had to purchase a shirt, to be a Guard somewhere, it was your understanding that the employment that he had, after he was terminated, was a continuation of employment that he had while he was working with DCT?

45 THE WITNESS: Yes, but it might have been a few more hours than he had when he was working at DCT because he had more time.

JUDGE WEST: And then, the question would be, why would he have to purchase a shirt?

50 THE WITNESS: I do not know. I just have - -

JUDGE WEST: After working part-time already.

THE WITNESS: That is why I am saying, maybe, I am wrong. Maybe, the uniform shirt had something to do with coming back to work for us but I remember an issue, in this Case because it is the only time I ever had a uniform shirt at issue, except on one other DCT Case where the guy could not work because he was too big and it would have had to have been, about an 8X - - too big. [Transcript pages 1250 – 1252]

Bernardi testified that she authorized Cremin to enter into the settlement agreement regarding Whitaker and Coughran; and that

It was my understanding that neither one of them had any employment, during that period of time, that when the NLRB came up with their figures based on the hours - - and I think the hours were based on 36 hours a week and I told Mr. Cremin that they did not work 36 hours a week; they worked 32.5 hours a week and we would pay them 100% of their earnings, for that time. [Transcript page 1256]

Bernardi further testified that if she had known that Whitaker and Coughran had interim earnings she never would have entered into this settlement agreement; that Respondent's Exhibit 50 is a payroll record register for Whitaker and Coughran which shows between January and June 2003 neither one worked overtime; and that Respondent's Exhibit 51 are the payroll records showing the actual hours each employee works during a two-week period and, as here pertinent, are the underlying documents to Respondent's Exhibit 50.⁸ On cross-examination Bernardi testified that it is not overtime when an employee works beyond his regular shift but rather overtime is working beyond 40 hours.

After he returned to work Coughran fulfilled his duties as President of the Union, including contract negotiations, picketing just beyond the North Gate at the FAA Center, and handling grievances, settlements, and arbitration.

Sanders testified that when Coughran came back to work in August 2003 she asked him if he needed any help with the Union and he asked her to be Secretary/Treasurer; that she became an Executive Board member and an official; and that as Secretary/Treasurer she would (1) write letters to DCT and Federal agencies, including the FAA, (2) pass out dues information, dues check off cards, and applications for membership, (3) organize pickets and picket, (4) collect money, (5) negotiate, and (6) edit the monthly Union newsletter, which she mailed, e-mailed, and posted on the bulletin board outside the gunroom near the dispatch area in the headquarters building.

According to the testimony of Wooten, who is a DCT Security Officer, when Griffin was fired by DCT in August 2003, he asked Bernardi about the position and she told him that while DCT still had his resume⁹, he should submit a new one. Wooten testified that Captain Don Thompson received the position of Project Manager. Also Wooten testified that he joined the Union on August 28, 2003. On cross-examination Wooten testified that while he was familiar with the Statement of Work (SOW) for the FAA, MMAC – Security Guard Service, he never acquainted himself with the requirements for being a Project Manager at MMAC; that he was

⁸ Respondent's Exhibit 51 also includes the pay periods ending from June 14, 2002 to December 27, 2002.

⁹ Wooten testified that in October 2002 he found out that he did not get the project manager's job he applied for when Tolman told him at Captain Butler's going away party that he had chosen Al Griffin to be the new Project Manager and Captain and that if he had received Wooten's resume a few days earlier, he would have been the new Project Manager.

not aware that page 4 of the SOW indicates that 'The Project Manager shall have four years management experience in facility protection at a level commensurate with the scope of this contract' (transcript page 760); and that he was not familiar with the SOW requirement that the Project Manager 'must be satisfactory to the CO (Contracting Officer) and SSE' (transcript page 5 763).

10 Negotiations between DCT and the Union regarding a collective bargaining agreement began on September 11, 2003. When called by Counsel for General Counsel, Tolman testified that he was present in the September 2003 negotiations when the subject of the sergeant job classification came up and DCT took the position that four specified sergeants should not be in the collective bargaining unit; and that the Union filed an unfair labor practice charge with respect to this matter. In response to a question of one of Respondent's representatives, Tolman testified that there are a total of about 12 sergeants at MMAC.

15 Carney testified that he was the lead negotiator for the Union in its negotiations with DCT over a collective bargaining agreement; that the first negotiation session was on September 11 or 12, 2003; that the issue of sergeants was discussed from the beginning all the way to the very end; that he found it strange because in the certification the Union had 20 recognition of the sergeants and DCT's position at the outset of negotiations was to eliminate the sergeants from the bargaining unit; that he asked Tolman whether DCT's desire to eliminate sergeants from the unit was born out of a personal motive, being that Coughran and Whitaker had been reinstated through an informal Board settlement, and at the September 11 or 12, 2003 negotiation session Tolman stated that it was personal; and that since DCT continued to want to eliminate sergeants from the unit, he filed a unfair labor practice charge with the Board and the 25 Union began to picket at MMAC. On redirect Carney testified that the Union's proposal to define these positions as lead officer or corporal was an effort to resolve the sergeant issue.

30 Whitaker testified that the first face-to-face negotiating meeting occurred on September 11, 2003; that the issue of sergeants came up at this meeting and there was some disagreement as to whether they should be included in the bargaining unit in that the company wanted sergeants to be part of management and the Union wanted them to be in the collective bargaining unit; and that this issue was placed on the back burner so that the parties could continue on with negotiations.

35 Sanders testified that at the first negotiation session DCT took the position that sergeants were members of management who had hiring, firing, and disciplining authority and they should not be in the unit; that she disagreed in that the Union had already been certified, and although she was a sergeant and had submitted documents to DCT on September 12 and 40 13, 2003 regarding the insubordination of Officer Brenda Lozano, nothing had been done; that Coughran, who was at this negotiation session, was also a sergeant; and that Tolman was adamant about not wanting sergeants in the bargaining unit, pointing at her and Coughran and stating "because of you two is ... why we have a problem" (transcript page 455). On cross-examination Sanders testified that Respondent's Exhibit 7 is the document that she gave to Bernardi, when Sanders was a sergeant, regarding the misconduct of Officer Brenda Lozano, 45 and while Bernardi indicated in Respondent's Exhibit 8 that she would consider Sanders' recommendation to move Lozano, what Bernardi did was to promote Lozano to sergeant over many other people.

50 Bernardi testified that DCT did not agree to lead officer wage rates of \$16.83 in September 2003; and that leads were not discussed until October 2003.

Tolman testified that contrary to Carney's testimony they did not reach an agreement

regarding officer wages in September 2003; that toward the end of the second day of negotiations Carney proposed a wage for officers and a wage for corporals, regarding the issue of whether sergeants were going to be in the unit; that he told Carney that DCT did not have corporals on the MMAC job site; and that Carney then ended that negotiation session.

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DCT's Security Officer James Ray Howell, who had worked for DCT for 4 years, testified that on September 16, 2003, he made his first union dues payment by hand to Sanders at 11:45 a.m. in the Visitors Center at MMAC; that he was not on duty at the time in that his shift began at 12 noon; that when he paid Sanders his dues she was eating lunch; that on his way to the Visitors Center that day Sergeant Lozano asked him why he was there that day and was he going to be working there that day; that he told Lozano that he was going into the Visitors Center to pay his dues; that later that day he was told to go to the office of Captain Henry Butler, who is the Project Manager; that when he met with Butler no one else was present but the office door was open and Impson was outside at her desk; that Butler told him that he did not have a problem with him being in the Union and he wanted to know if he paid his dues that day; that he told him that he had and Butler asked him where; that he told Butler in the Visitors Center and Butler asked him to whom; that he told Butler "to the treasurer" (transcript page 166) and Butler said that was all he needed to know; that just after he arrived back at his post Butler telephoned him and told him that he needed to write a statement of all that was said in the office; that about 2 or 3 minutes later Butler came to his post and asked him for the written statement; that he telephoned Carney and asked him if he should write the statement, and Carney told him that he should; and that General Counsel's Exhibit 31 is his signed written statement of what was said in Butler's office on September 16, 2003, which statement he gave to Butler. In addition to his testimony with respect to what was said, the statement goes on to indicate: "He then asked 'inside?' I then replied yes. I just walked and handed her the money and turned around and left. The Captain then said that was all he wanted to know. I then went back to work." On cross-examination Howell testified that he had indicated that Sanders' shift ended at 12 noon; that Carney had given him his business card during an earlier visit to MMAC; that, as he testified on direct, he thought that he was in trouble and this is why he telephoned Carney; that Butler wanted the statement that day and Butler leaves work at 3 p.m.; that he gave the statement to Officer David LaFlamme to give to Butler; that he telephoned Carney after Butler telephoned him asking him to write a statement; and that since September 16, 2003 he has not had a conversation with any DCT supervisor or manager regarding this matter. Subsequently Howell testified that he never specifically identified the person who he described as the treasurer to Butler.

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Butler testified that someone telephoned him, he could not recall who, and told him about what was happening at the Visitors Center; that he called Howell into his office and asked him about the incident; that Howell said that he did pay his union dues; that he was concerned because this was not something that should be done while Sanders was being paid or on Company time; that Sanders should not have been eating her lunch just prior to getting off for the day at noon; that he notified Tolman who told him to get a statement from Howell as to what happened; that he did not have any conversations with Sanders about this incident and he did not discipline her or Howell over it.

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Respondent's Exhibit 2 is an e-mail from Sanders to Carney dated "9/24/2003" and the reply e-mail from Carney dated September 26, 2003. Both reference a "bluff" but do not explain exactly what it was. On cross-examination Carney testified that he could not recall what the bluff was that was referred to in these e-mails.

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Sanders testified that about 2 weeks after the September 2003 Union newsletter, General Counsel's Exhibit 38, was distributed, Bernardi spoke to her in the Visitors Center

asking her what the Union's intention was in writing the September 2003 newsletter in that it referred to "unscrupulous, greedy bosses"; that she told Bernardi that the Union's intention was to give employees reasons to join the Union, she was referring to bosses in general, and she got this wording from another union; and that when she offered to show Bernardi a copy of the information she obtained from the other union, Bernardi told her that it was not necessary in that her attorney was looking into the matter and she would get a copy of everything. On redirect Sanders testified that a day or two after the newsletter was posted on the bulletin board Lieutenant Bolz complained to her that she thought that Sanders was including her in the category of unscrupulous bosses. The sentence in the newsletter at issue reads as follows: "Union contracts provide workers with enforceable rights and in these times, can provide workers with some degree of protection from unscrupulous, greedy bosses." It is preceded by the following sentences: "As you are all aware, negotiations are on-going between DCT, Inc. and UGSOA Local #243. Don't give up hope sometimes no news results in good news." And it is followed by:

Unions are the most single, powerful voice for workers and play a major role in the fight against racial, sexual, and other forms of discrimination and favoritism, which many of us have experienced over the years. we have made many tentative agreements in various areas of concern of the members and we are sure you will be pleased with the overall outcome. Patience is a virtue!

Bernardi testified that she had employees telephoning her about the newsletter so she and Tolman went to MMAC; that she asked Sanders if she really thought that she was unscrupulous and greedy; that Sanders said that was not meant for her, it was general literature Sanders got at a fair from the UAW; and that she told Sanders that she was looking into it and she was really upset that Sanders would put literature out like this.

Sometime in September or October, 2003 Whitaker was summoned to a meeting in the Captain's office. He was asked if he wanted *Weingarten* representation and he had Wooten attend as his representative. Whitaker testified that Bernardi, Tolman, Captain Butler and DCT's representative Fred Grubb were present; that Grubb introduced himself and then asked him if he had interim employment after he was fired on June 30, 2003; that he told Grubb that he did have interim earnings; that Grubb asked him if he reported these interim earnings to the NLRB, and he replied that he had; that Grubb asked him if he was sure "[b]ecause he needed to know who to go after" (transcript page 349); and that he told Grubb that he was sure "it was my first rodeo, and I disclosed everything to the NLRB" (*Id.*). On cross-examination Whitaker testified that he could have the date of this meeting wrong in his affidavit (In the affidavit he referred to September 12, 2003.); and that he did not know before this meeting what it was going to be about.

DCT's employee Larry Todd Musser, who has worked for the Respondent for 2 years and works as a security officer from 11 p.m. to 7 a.m. (the midnight shift), testified that early in October 2003 Lieutenant Anthony Pitt, his supervisor, told him

that he had just got off of the phone after talking for a couple of hours with the owner of the Company, Mr. Tolman.

....

He said he was going to pretend like he was bargaining with the Union until the last minute, and then say that he couldn't - - they couldn't come to an agreement, so the Union would dissolve within the next year. Because they would have waited for - - they

didn't get a contract. And so they would have to wait for another year to renegotiate. And that the Union would dissolve in that time. [Transcript pages 152 and 153]

5 Musser also testified that later that same night Pitt told him and another officer who was with Musser, Officer Randolph, that "Tolman was intoxicated and was very angry at the Union and that he was going to make sure that it was gone, basically." (transcript page 153) On cross-examination, after having his recollection refreshed by one of the representatives for DCT regarding his affidavit to the Board, Musser testified that Pitt told him that "Tolman said everyone would get paid the regular wage for training instead of minimum wage, as the
10 Company had intended to do" (transcript page 155) and "Tolman was ranting about having to hire back Marcus Coughran and Bill Whitaker." (*Id.*) Musser also testified that his affidavit to the Board does not reflect a second meeting with Pitt in the presence of Randolph later that same night, speculating that "[t]hey probably didn't ask me that question at the time [of the affidavit]." (transcript page 157)

15 According to Wooten's testimony, Lieutenant Pitt told him to apply for a supervisor's position. Wooten testified that he submitted his resume and he became aware in the first part of October 2003 that Captain Thompson had it; that subsequently when he asked Thompson about the resume, Thompson said that he had to put in on the back burner and the fact that
20 Wooten had joined the Union was "the biggest problem" (transcript page 715); that during this period he was aware that two sergeants positions were filled; that he filed a charge with the Board; that Bernardi asked him if he was aware that he could not be a supervisor and be in the Union and he told her that he was not aware of this; that Bernardi asked him "Would you accept a Lieutenant or a Sergeant position to get out of the Union" (transcript page 717); that he told he
25 would not; and that he then withdrew the charge.

Thompson testified that he remembered that while driving on MMAC Wooten flagged him down and asked him if he had his resume; that he told Wooten that he had the resume and he would take a look at it; that "I didn't know where he stood at the time or whatever, but at no
30 point did we ever talk about anything having to do with the Union" (transcript page 1337); and that Wooten did not say "you haven't submitted my resume because I'm in the Union." (*Id.*)

35 According to the testimony of Malcom, there was a supervisors meeting in October 2003. Malcom testified that he was a sergeant with DCT at MMAC; that he saw a memorandum with a list of the names of the supervisors who were to attend and his name was not on the list; that he asked Lieutenant Satepehtaw why his name was not on the list and she told him that she did not know but he should ask Captain Thompson; that Captain Thompson told him that he was not supposed to attend that meeting because Thompson did not feel like it was something that he would be interested in; and that every supervisor and sergeant was on the list but most
40 of the site supervisors, except Sergeant Lozano, were not on the list.

Respondent's Exhibit 1 is an e-mail from Carney to Bernardi dated "10/2/03" titled "Leads/further Negotiations." As here pertinent the e-mail reads as follows:

45 The Union offers the following sites as leads, per our discussion.

Site Sgts (two) @ Visitors Center 0530 a.m. to 1830 p.m.
Site Sgts (two) @ ILS North 0530 a.m. to 1830 p.m.
There are only 4 Site Sgts. The other 3 Sgts are Shift Sgts

50 Site Sgts to be re-titled as Lead Officers

....

Leads will get \$0.50 per hour above the officer's base rate. (negotiable)

5 Description of duties somewhere in the CBA:
 Leads will be permitted operate within the Bargaining Unit without the express
 authority to Hire, Fire, or Recommend Discipline.

10 With your agreement to the above, the Union will withdraw the issue before the NLRB as
 a show of good faith.

Bernardi testified that DCT did not agree to Carney's proposal of 50 cents per hour
 above the officer base rate.

15 With respect to General Counsel's Exhibit 22, which is a letter dated October 20, 2003,
 from Wells to the Board, Tolman testified that the letter reflects an agreement between DCT and
 the Union to resolve the unfair labor practice mentioned in the next preceding paragraph; and
 that under the terms of the agreement four sergeants were reclassified as lead positions and
 they remained in the bargaining unit. Carney testified that he signed this settlement agreement.
 20 On cross-examination Carney testified that the agreement specified that the four sergeants who
 were to be reclassified to lead positions were to retain the same rate of pay \$0.25 per hour more
 than base guard pay. On redirect Carney testified that the term lead officer was a product of the
 negotiations leading up to this settlement and this non-Board settlement. Bernardi testified that
 General Counsel's Exhibit 22 is that settlement agreement entered into so they could get on
 25 with negotiations; that DCT changed the four sergeants who wanted to remain in the bargaining
 unit to lead positions; that lead officers have less responsibility than sergeants; and that DCT
 wanted the position of lead created because if all the sergeants were in the bargaining unit,
 there would only be a project manager and three lieutenants to manage a force of
 approximately 100 security officers, and that would not work.

30 General Counsel's Exhibit 23, which is handwritten, reads as follows:

Security Officer \$15.58
 Lead Officer \$16.83

35 agreed upon 10/27/03 over conference phone call. Begins Jan. 1, 2004 – Dec. 31, 04.

DCT proposes 50 ... [cents] an hour increase Jan. 1, 2005 for both Security Officers and
 Lead Officers.

40 Cheryl Bernardi

To James Carney – 303-650-8510

45 When called by Counsel for General Counsel, Tolman testified that he had discussions with
 Bernardi during this negotiation conference call, which General Counsel's Exhibit 23 covers;
 that he saw Bernardi draft this document; that he was aware that the document was faxed to
 Carney on the same day that they had the conference call; that there was a time when the
 parties agreed to a different wage rate than what is reflected in General Counsel's Exhibit 23;
 that he could not remember the date of these discussions between DCT and the Union but he
 50 knew that they occurred before the collective bargaining agreement was signed on
 approximately December 16, 2003; that he, Bernardi, and DCT's representative, Grubb, were
 involved in these discussions on behalf of DCT; that the Union was represented by Carney,

Sanders, Whitaker, Wooten and Coughran; and that there was a written agreement produced as a result of those negotiations, and the Union signed off on it. In response to questions by Respondent's representative, Tolman testified that he did not see Bernardi write the entire memo because he left and went outside when she started writing it.

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Carney testified that Bernardi faxed him General Counsel's Exhibit 23 at the conclusion of the October 27, 2003 phone negotiations; that he Whitaker, and Sanders participated in the conference call for the Union; that Bernardi, Tolman, and he believed the Project Manager participated in the conference call for DCT; and that he was happy that they settled the wage rates for both sergeants and the leads so he made it a point to ask Bernardi to make sure that she faxed him the agreement so that he would know that they had agreement on these items.

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Whitaker testified that he participated in negotiations in October 2003 by a conference call; that he, Carney, and Sanders represented the Union; that DCT was represented by Tolman, Bernardi, Captain Thompson and maybe Captain Butler; and that General Counsel's Exhibit 23 reflects a tentative agreement during this negotiation regarding lead officers.

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Sanders testified that during the last week of October 2003 she was involved in negotiations where the Union and DCT came to an agreement on \$16.83 an hour; that the negotiations were conducted during a telephone conference call; that she, Whitaker, and Carney represented the Union during the conference call, and Bernardi, Tolman, and she believed Captain Thompson represented DCT; that during the conference call DCT agreed to pay \$16.83 to leads; and that between this conference call and the time of the ratification vote on the collective bargaining agreement by the members, she was not involved in any negotiations with DCT as to a different agreement on lead pay. On cross-examination Sanders testified that she was the official note taker for the Union during negotiations; that Respondent's Exhibit 10 are her notes of the telephone conference call negotiation on October 27, 2003; and that her notes for this session indicate that Bernardi said "[w]e will agree to \$15.58 hour plus 25 cents more for lead. Will increase 50 cents second year increase." (transcript page 521). On redirect Sanders testified that she and Carney were not in the same room during these negotiations in that she was home and Carney was in Colorado; and that at one point she asked Carney if the rate for leads was \$16.33, as she had written in Respondent's Exhibit 10, and Carney told her that it was \$16.83 but she forgot to make this correction.

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Bernardi testified that she made the statement quoted in the next preceding paragraph. Bernardi also testified that at \$16.83 an hour the leads would have been paid more than the sergeants, who made 25 cents more an hour than security officers, and Lieutenants, who made 75 cents more an hour than security officers; that she made a mistake on General Counsel's Exhibit 23 in that in adding 25 cents to get \$15.83 she wrote \$16.83 instead of \$15.83; that she was getting ready to leave for a flight, she was in a hurry, and she was upset over the negotiation session; that during the session Carney claimed that Tolman had agreed to \$15.58 an hour and Tolman denied this and left the office; that she put Carney on hold and she walked out of the Captain's office and asked Sergeant LaFlamme, who works downtown in the Federal Building as a security officer, how much he was paid; that LaFlamme said that he was paid \$15.58 an hour; that she told Carney that LaFlamme said he was paid \$15.58 an hour and DCT would then pay the leads 25 cents more an hour; that she scribbled General Counsel's Exhibit 23 down, gave it to Kim to fax to Carney, and she and Tolman left; and that there was no discussion about leads getting \$16.83 an hour and the only discussion was about leads getting 25 cents more an hour than security officers.

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On cross-examination Sanders testified that Respondent's Exhibit 9, which is dated October 28, 2003, memorializes her change from sergeant to lead as a result of negotiations

between DCT and the Union; that three of the other sergeants, Coughran, Milan, and Rex, also became leads pursuant to this negotiated agreement; that the leads received \$.25 an hour more than base guard pay; that she objected to this settlement and she refused to sign Respondent's Exhibit 9 since she did not believe that the document reflected what they had agreed upon; and that Carney signed the agreement. On redirect Sanders testified that she believed that Captain Thompson delivered Respondent's Exhibit 9 to her to sign. On recross Sanders testified that Respondent's 15 is a copy of the document Thompson brought for her to sign; and that if one adds 25 cents more per hour for lead officers, more than base guard pay, that would be the \$15.83 per hour.

Respondent's Exhibit 24 is a memorandum of understanding dated October 28, 2003 from Captain Thompson to Coughran covering his change, along with others, from sergeant to lead pursuant to an agreement between DCT and the Union. Coughran signed the memorandum of understanding which, as here pertinent, indicates that he would "... retain the same pay at .25 per hour more than base guard pay." On cross-examination Coughran testified that before that he was not a member of management, he was never invited to management meetings, he was a site supervisor; that as a sergeant he had no authority to hire, fire, or discipline; that as a sergeant he wrote out whether he and officer worked in the office or outside and they rotated positions; that while he had the authority to write up an incident report, any officer at MMAC had that authority; that while he may have taken an officer aside to address a problem any officer could have done the same thing; and that while he wrote up work assignments, they all rotated there. On redirect Coughran testified that to the extent he scheduled the five officers at his post in Spring 2003, including himself, everyone would rotate during a specific time period; that he did not have to use any independent judgment to determine who should rotate, or who is best to work outside as opposed to inside; that this scheduling was routine; and that regarding the incident reports, he never recommended any specific discipline and no one from management ever asked him to make such a recommendation. On recross Coughran testified that he and his officers could tell escorts that they had to escort someone.

Bernardi testified that Coughran was a shift supervisor before the ILS and Visitors Center; and that DCT's contract with the government has specific requirements for shift supervisors, namely 2 years supervisory experience, and 6 months supervisory experience for site supervisor, General Counsel's Exhibit 54.

Respondent's Exhibit 35 is a memorandum dated October 28, 2003 from Captain Thompson to Officer Rex describing the settlement agreement regarding leads, which memorandum of understanding is signed by Rex. Among other things the memorandum indicates that as a lead he would "retain the same pay at .25 per hour more than base guard pay." Bernardi testified that after the October 27, 2003 conference call she told the project manager to notify the lead officers that an agreement had been reached, and that Respondent's Exhibit 36 is a similar letter to Milan regarding the settlement agreement.

Bernardi testified that the settlement agreement for 25 cents more an hour than security officers was not included later in the collective bargaining agreement because of her mistake.

Lieutenant Shannon Satepeahaw testified that in October 2003 she was involved in an incident where Officer Randy Gilliland requested a *Weingarten* representative; that the incident started with his supervisor, Sergeant Lozano, complaining that Gilliland was not following procedure when he escorted people in that he stayed with visitors instead of going back to pick up more visitors; that this caused a problem in that there was a backup and visitors had to wait unnecessarily; that she told Gilliland that he was not being disciplined and all she was doing

was talking to him and asking him nicely to do his job correctly; that Gilliland took out a card and told her that he wanted his representative; that she explained to him that he was not being disciplined and Gilliland told her that he did not have to talk to her and he started to walk away; that she walked after him and told him that he needed to sit down; that they talked about it and they Gilliland left the room and that was it; and that she neither followed Gilliland nor disciplined him over this matter. On cross-examination Satepehtaw testified that "you are not being disciplined" were not the first words out of her mouth; that Gilliland had engaged in this conduct repeatedly and she had spoken to him on numerous occasions about it; that Gilliland had a disciplinary problem on that and other days in repeatedly refusing to listen to her; and that when Gilliland walked off from her while she was talking to him that was insubordination. On redirect Satepehtaw testified that she had spoken to Gilliland numerous times and she had not disciplined him those times; and that when Gilliland walked away from her and was insubordinate he did not again take out his *Weingarten* card.

According to the testimony of Whitaker, in November 2003 Coughran resigned as President of the Union for personal reasons. Whitaker became President of the Union, and Wooten was appointed Vice President.

Coughran testified that he served as President of the Union until November 2003; that he resigned because his relationship with Bernardi and Tolman was not very good; that after receiving some threatening telephone calls from an unknown individual, he decided that the Union would probably grow a lot better if he stepped down; that he continued to be involved in collective bargaining negotiations; and that the issue of certain sergeants came up during negotiations in mid to late November 2003 or early December 2003 in that Tolman wanted four of the sergeants to become leads.

Whitaker testified that in November 2003 he engaged in unfair labor practice informational picketing with Coughran, Sanders, Wooten, Milan, Mr. Leary and others; that he believed that the picketing lasted for a couple of weeks; and that he was involved about three fourths of the time.

Carney testified that there was a negotiation session scheduled for November 3, 2003; that DCT cancelled this session; that shortly thereafter Grubb was appointed by DCT as their lead negotiator; and that it was agreed that the parties would meet in December, 2003.

Sanders testified that on November 3, 2003 she met with Bernardi, Tolman, and Thompson in the Captain's office in the DCT area; that they showed her some log sheets which are filled out at the Visitors Center on a daily basis and asked her why several areas on the log sheet had not been filled out; that she explained the process to them, namely, that she could only write down information that was given to her; that because of inadequate training the two new officers who were stationed on the drive and who were overwhelmed with people on Mondays, did not give her the information to log in; that they had to handwrite information regarding the vehicle, its tag number, and who the person was; that at the end of this meeting Tolman asked her for her computer user name and password; that Bernardi said that Glenn McClain, who works for the FAA, had given permission; that the FAA owns the computer and she was assigned her user name and password by the FAA information and technology (IT) department, with written instructions that the password is not to be given to anybody, even the IT people who supplied the password to her; that she told Bernardi and Tolman that she did not feel comfortable giving them this information; that Bernardi told her that Whitaker and Coughran had done it and Bernardi repeated that McClain had given permission for this information to be received; that she gave them the information; that Bernardi and Tolman did not explain why they needed the information; that later that day she received a telephone call at home from Milan

and Kathy Roberts who told her that Bernardi and Tolman came to the Visitors Center, attempted to log on to the computer with her information, and they asked another employee to put her information onto the computer so they could log on; and that she telephoned the FAA IT department at FAA, explained the situation, and was told that there were procedures that
 5 needed to be followed if Bernardi and Tolman felt that they needed to have the information, and they were neither allowed to ask her for her user name and password nor were they allowed to use her information to log onto the computer. Sanders' log indicates that her meeting with Bernardi, Tolman, and Thompson took place on November 5, 2003, Respondent's Exhibit 12.
 10 On cross-examination Sanders testified that a guard would have to justify her or his usage of the computers at MMAC as a business reason for business purposes; and that she never saw Chris Quintero with Tolman when the latter was accessing certain computers.

On November 4, 2003, according to the testimony of Sanders, she was unable to access her computer and she telephoned the IT department and told them that she was locked out of
 15 her computer. Sanders testified that she was aware of the fact that after three unsuccessful attempts to access the computer it locks up and only the IT people can reset the password after she supplies information regarding three secret questions; that later that day Sergeant Kerry Sloan asked her to write down her computer user name and password again, they needed that information, and the information they had was not right; that she told Sloan she could not do that, and Sloan telephoned someone and told them that Sanders was refusing to give the
 20 information; that she explained to Sloan that she was not refusing but rather the FAA would not allow her to do this; that Bernardi telephoned her a few minutes later and asked her why she was not complying with the request; that she told Bernardi that she had discussed the matter with FAA's IT department and she gave Bernardi the name and telephone number of the person
 25 she spoke with; that Bernardi telephoned her back and told her that she was correct and there were procedures which had to be followed; that Bernardi asked her if they followed the procedures, would she give them the information; that she told Bernardi that as long as she followed the procedures, the information would be given to her; that the main procedure was that an FAA official had to be present when they requested the information to access the
 30 computer; that Bernardi told her that DCT employee Millard Hart would be at MMAC tomorrow to try to access the computer; and that she told Bernardi that as long as DCT followed procedure, the information would be provided. Sanders' log indicates that these events took place on November 6, 2003, Respondent's Exhibit 12.

On cross-examination Sanders testified that on November 4, 2003 she telephoned
 35 Lieutenant Satepeahtaw to advise her that a group had arrived, she was not aware that a group was supposed to arrive, and she requested Lieutenant Satepeahtaw to look in her red book to see if she had received a copy of something announcing this because she did not have a copy of it; and that what she told Lieutenant Satepeahtaw is contained in Respondent's Exhibit 11.
 40 Respondent's Exhibit 11 reads as follows:

November 4, 2003

Re: Situation/ Incident Report

On November 3. 2003 at approximately 0930-1000, I, Lt. Satepeahtaw, went to the
 45 Visitors Center to deliver an AMP 300 Redbook Memo to Ofc. Carol Sanders. I remember it was in reference to an AME Seminar. I handed this memo to Sanders and began walking out the door to return to HQ. Sanders asked me to take some unrelated
 50 items to HQ

This morning on November 4, 2003, Sanders called me to advise me she never received

5 the AME Seminar memo. Sanders explained the seminar persons and their responsible party were on site at the Visitors Center, and also that they were upset. Sanders told me that she did not get a copy because she said Sgt. Sloan had had the memo and had lost it when she was 'messing' in the Redbook. Sanders stated Ofc. Lozano told her she had a copy of this memo and that Lozano would be bringing it to the center. A copy of this memo, as well as Ofc. Sander's report is attached.

10 In conclusion, I feel that Ofc. Sanders deliberately manipulated a standard operational function which caused undue hardship to all persons involved. Sanders' attitude was argumentative and uncooperative with trying to execute the required functions of the Visitors Center.

Lt. Satepeahtaw

15 On November 5, 2003, according to the testimony of Sanders, Lieutenant Satepeahtaw came to the data entry office at the Visitors Center. Sergeant Brenda Lozano subsequently joined Satepeahtaw. And later Hart came to the data entry office at the Visitors Center. Sanders testified that Hart sat in her chair and when she asked him what he was doing he did not answer her; that she told Satepeahtaw that she was not following the required procedure; that there were no FAA people present; that Satepeahtaw told her to back off; that she telephoned Coughran and asked him to come to the Visitors Center and be her union representative; that Coughran told her that he could not leave his post, and he asked her if he could speak with Satepeahtaw; that Satepeahtaw said that "she ... [did not] have to talk to you or any of your people" (transcript page 469); that she then telephoned the FAA IT department and the special agent; that she told the IT department what was occurring; that she called Special Agent Earl Hill who was not in so she spoke with Special Agent Richard Todd; that she then spoke with Special Agent Hill, who she had spoken with the day before after she spoke with Bernardi; that she started to read what was on the Weingarten card to Satepeahtaw but Satepeahtaw said that she did not want to hear it; and that Satepeahtaw, Lozano, and Millard then left. Sanders also testified that she spoke with Coughran and Whitaker after work, asking them if they had the same conversation with Tolman, which they did, and she discussed the FAA rules and told them that she had telephoned the FAA and she was going to meet with Special Agent Hill. Sanders' log indicates that these events took place on November 7, 2003, Respondent's Exhibit 12.

35 Satepeahtaw testified that she was with Harp when he logged onto Sander's computer using a little device; that with the device, Harp did not need a password; that no one logged on for him so that he could get into the computer; that when Sanders, who was on the other side of the room, saw Harp doing something underneath her desk to the computer she used, she came over and told Harp that he had no business at that computer; that she told Sanders to "back off ... he was doing his job" (transcript page 1106); that she told Harp that he needed to sit in Sanders' chair; that Sanders took out her Weingarten card and she told Sanders that she was not subject to discipline; that Sanders telephoned someone and tried to give the telephone to her; that she refused to talk on the telephone; that Sanders said that they had no business being on her computer, it was Government property; that Sanders read the information off her Weingarten card; and that the computer is located in the Visitors Center and there were three civilian/customers present who heard all that was going on. On cross-examination Satepeahtaw testified that she had no idea what procedures Harp used to access the computer used by Sanders.

50 Coughran testified that Tolman asked him to give his password to a man who was with Tolman; that he discussed with Whitaker and Sanders that since the FAA issued the passwords to them he believed that it was a violation when Tolman had him turn over his password and

they needed to pursue that; that subsequently while he was at his post he received a telephone call from Sanders who stated that Lieutenants Satepeahtaw and Bolz had approached her at her post in the Visitors Center and requested she give her password to them; that Sanders told these Lieutenants that it was a violation and she needed a Union representative present; that Sanders asked him to come to the Visitors Center; that he told her that he could not leave his post unless he was relieved; and that when Sanders tried to hand the telephone to Bolz so he could talk to her about going to the Visitors Center he could hear Bolz (or possibly Lieutenant Satepeahtaw) saying 'I don't give a F about the Union, and I don't want him down here, and I'm not going to talk to him' (transcript page 881).

Pavlicek testified that Coughran told him that Sanders was upset and she wanted him to come to the Visitors Center over a computer issue, he did not want to be involved, and he did not want to leave his post at that point in time. On cross-examination Pavlicek testified that he did not recall if Coughran said that he could not be relieved, and if he was not relieved he did not want to be involved without being relieved from his post properly.

Bernardi testified that she and Tolman had a meeting with McClain, his supervisor Kenneth Doerksen, and Luis Franco, all of whom work for COTR; that during this meeting the performance of the security officers was discussed and the fact that data entry by the security officers was 3 to 4 months behind was brought up; that it was suggested that the security guard's internet usage on the government computers should be checked¹⁰; that Tolman asked all of the security officers for their passwords and DCT's controller, Harp, from McAlester came to MMAC and downloaded the security officers' internet files; that this was done with the FAA's knowledge and approval; that Harp got the password from everybody except Whitaker, who could not remember his; that Sanders password did not work the first day so Harp went back the next day; that on the second day Sanders telephoned her in McAlester and told her that she was not supposed to give out her password according to a specified regulation number and she gave her a telephone number of the FAA computer office to call; that she called the FAA computer office and was told that employees were not supposed to give out their password but they could log on so that DCT could access the information; that she called Sanders and told her that she was right but would she log on so that Harp could access the information; that she guessed that Sanders logged on because Harp got the information; that Coughran telephoned her and told her that Sanders wanted him to be her representative with respect to the password situation and he said that he could not leave his post; and that she told him that someone could watch his post and he told her that he did not want to be involved.

Harp testified that he went to MMAC for two days beginning on November 5, 2003 to get information off the FAA computers to determine if the computers were being used improperly; that Tolman gave him several employees' user IDs and passwords; that DCT is responsible for whatever happens to the FAA computers that DCT employees are using; that Tolman told him that FAA was aware of what they were doing and the FAA did not have any problem with the fact that DCT was checking on its employees to make sure they were not doing anything that they were not supposed to be doing; that to his knowledge no employee was disciplined as a result of his investigation; that he determined that one employee, Roberts, who is a data entry person, was having a difficult time getting her work done during the day and he discovered that

¹⁰ Affidavits given by McClain and Doerksen, respectively documents 15 and 16 in Respondent's Deposition Exhibit 1 to Joint Exhibit 1, to the FAA during its investigation of this matter corroborate this testimony in that McClain and Doerksen indicated that they told Tolman and Bernardi during a meeting over delayed data entries that the internet usage should be checked.

5 she was spending an inordinate amount of time playing and surfing on the Internet, and emailing her friends; that when Whitaker could not remember his password, Quintero of the FAA said he would help them get the password; that he had a problem with Sanders' password and the computer locked up; that he telephoned the FAA computer help desk, told them who he was and what he was doing, asked them to reset the password and they told him that they could not do that because it was their policy not to do it; that the following day he went to Sanders computer with Lieutenant Satepeahtaw; that when he started to work on Sanders' computer she came over and told him that he could not do that and the FAA would not like this; that 10 Satepeahtaw told Sanders he had the permission of the FAA and to stand down; that Sanders asked to call her Union representative and Satepeahtaw told Sanders she could call whoever she wanted; that Sanders called someone who could not leave their post; that Sanders read her Weingarten rights from a card; and that it took him a few minutes to do the review and he did not find anything incriminating on the computer. On cross-examination Harp testified that when 15 he got to Sanders' computer on the second day he did not introduce himself to Sanders and tell her what he was there for. On redirect Harp testified that Satepeahtaw did not tell Sanders what he was doing and Sanders was not told who he was at any time while he was there. Subsequently Harp testified that after he obtained the information from Sanders' computer on the second day he was advised that Bernardi spoke with the FAA information and technology 20 people and Bernardi was told that the position that Sanders was taking with respect to releasing her password was the correct position.

25 Sergeant Lozano testified that she was with Harp when he got information off Sanders' computer; that Sanders told Harp that it was an FAA computer and he was not allowed to do what he was doing; that it took Harp 10 minutes to get the information he needed; that Satepeahtaw asked Sanders to calm down; and that Sanders called someone and asked the person to come to her station.

30 The last time Bernardi was called as a witness by the Respondent she testified that after Harp left her computer Sanders telephoned her and said that they were not supposed to do this and she was not supposed to give out her password because it violated a specified regulation which Sanders quoted to her; that she was not sure which day this occurred; that at her behest Sanders gave her the telephone number of FAA IT who told her that Sanders was correct in that she was not supposed to give out her password; that the IT spokesperson told her that Sanders could log on and then DCT could get the information; and that she telephoned Sanders, told her 35 that she was correct, and apologized, telling Sanders that she was informed that Sanders could log on and then DCT could get the information.

General Counsel's Exhibit 10, which is dated November 7, 2003, reads as follows:

40 On 11-7-03 at approx. 9:45 a.m., I met with Officer Gilliland and asked him about an escort that he had earlier from the Visitors Center. I explained to him that he had been instructed about how to properly perform an escort from the Visitors Center, entering the building from the rear door, picking up the paperwork and the visitor and exiting the building with the visitor through the front door or the back door. I explained to him that it 45 had been reported that he exited the building through the rear door while sending his visitor through the front door, losing sight of the visitor.

I asked Ofc. Gilliland if he had lost sight of an escort while at the Visitors Center earlier this morning, and he said 'I want a Union Rep, I am not talking to you.' I advised him that 50 this was not a union issue, it is a performance issue, and repeated my question. He refused to talk to me.

Sgt. Kerry Sloan

General Counsel's Exhibit 11, which is dated November 7, 2003, reads, as here pertinent,¹¹ as follows:

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I then asked Ofc. Gilliland why he took the keys with him on the escort instead of turning them over to me as he had been asked to do, and he replied, 'I forgot!'

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This is becoming more and more of a habit with Ofc. Gilliland. He conveniently forgets his job and instructions given to him by supervisors only, but he always remembers his union rights.

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Sgt. Lozano then tried to ask a question of Ofc. Gilliland, and he said, 'I am not talking.' Sgt. Lozano said, 'yes, you are' and he said 'no, I'm not,' and removed his union card from his pocket. He placed the card about 10 inches in front of Sgt. Lozano's face and stated, 'I want a union rep present now.' Sgt. Lozano tried to inform him that this was not a union issue and he needed to stay and discuss the issue. Ofc. Gilliland refused.

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Sgt. Lozano then instructed Mr. Gilliland make his way to the classroom and wait for the Lt. When asked several questions, Ofc. Gilliland said 'I want a union rep' and even asked Ofc. Chad Pavlicek if he was a rep and he said no. At his point, Ofc. Gilliland is sitting and has his left hand placed in his right breast pocket. I told him to remove his hand from his pocket and he did, pulling out his union card and placing it on the table in front of him. I informed him to put it back in his pocket and he removed it to his lap. He then pulled out a leaflet of some type and began reading that . After a couple of minutes, I asked Ofc. Gilliland what he was reading, and with an attitude he lifted the item and showed it to me from across the room.

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I then stated that I could not read the item from across the room, and to tell me what it was. With more attitude, he said in a stern voice, 'daily bread' and I instructed him to put the leaflet in his pocket.

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Sgt. David LaFlamme

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On November 7, 2003 Gilliland, who is a DCT escort and a member of the Union, had a meeting with Sergeants LaFlamme, Lozano, and Sloan.¹² Gilliland testified that he ran out of

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¹¹ The first two paragraphs of the memorandum summarize an incident where Gilliland forgot to turn in the keys for company truck when he was no longer using it. While the memorandum begins with "On the above date and time..." there is a typed date but no time given other than the following fax information: "NOV-7-2003 11:40A"

45

¹² One week earlier, according to the testimony of Gilliland, his supervisor, Sergeant Lozano, and Lieutenant Satepehtaw met with him and Satepehtaw told him that she had had a lot of complaints about his driving and not taking escorts. Gilliland testified that he took out his *Weingarten* card, General Counsel's Exhibit 40, and he asked for union representation; that Satepehtaw got upset and said "Put it back in your pocket. That card doesn't mean anything. I am a woman, and I have got more rights than your Union" (transcript page 669); that he got up to get Security Officer Scott Rex, the Union representative who was in the same building and approximately 25 feet away; that Satepehtaw told him to sit down or she would send him home; that Satepehtaw then told him that she was going to watch him, he should not use the FAA phone or his cell phone while he was on duty, and he should not talk to Rex or Bob

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Continued

gasoline in the pick up truck he uses to transport escorts; that he told Sergeant Lozano and she got angry; that earlier that day Lozano told him that she had a complaint from a Lieutenant that his pick up truck was dirty; that when he told Lozano about the gasoline, she yelled at him; that he took another pick up truck to pick up an escort; that Sergeant LaFlamme called him and asked him where the keys were to the truck which needed gasoline; that he found the keys in his pocket and he told LaFlamme that he was sorry and as soon as the escort was over he would bring the keys to LaFlamme; that when he gave the keys to LaFlamme at ILS North, Lozano was present and she started yelling and told him to meet her in the classroom; that Lozano, LaFlamme, and Sloan came into the classroom and started asking him questions; that he took out his *Weingarten* Rights card and asked for a representative; that the sergeants said “No” (transcript page 677); that LaFlamme and Sloan told him to put the card away, it did not mean anything; that the sergeants started writing reports on him in front of him; that the sergeants then telephoned Bernardi and he overheard their part of the conversation¹³; that as the sergeants left the room LaFlamme told him that he was going to lock the room but if anyone wanted to get in he should open the door; that he took out his *Weingarten* card and would not talk to LaFlamme; that LaFlamme said “Okay, that’s another complaint. I am going to write on your report, and call it insubordination” (transcript page 679); that he read a bible that he carries on him to calm down; that about 5 minutes later the sergeants came back in the room, and LaFlamme asked him what he was reading; that LaFlamme told him to put the bible back in his pocket; that the sergeants started writing more reports and in about 5 or 10 minutes they started asking him questions again; that he again showed them his *Weingarten* card and told them he needed a representative; that the sergeants asked for his keys and radio and told him to go home; that the sergeants followed him to his vehicle, which was about 50 feet from ILS North; that he went to a store parking lot and telephoned Coughran at work, Coughran spoke with Lieutenant Satepeahtaw, and Coughran told him that Lieutenant Satepeahtaw said that he was not fired and he could come back to work on Monday; that he went back to MMAC later that Friday to pick up his paycheck and he stopped and talked to Rex and Bob; that Lozano yelled at him that he could not talk with them and he was to leave; that he told Lozano that he was not on duty and she told him that it did not matter: and that Lozano and LaFlamme told him to leave. On cross-examination Gilliland testified that he could not recall what the sergeants were saying to him when he pulled out his *Weingarten* card.

Officer Pavlicek testified that Gilliland asked him to represent him and Gilliland showed his union card but he refused because Sergeant Lozano told him that it was not a disciplinary action, she just wanted to talk to Gilliland.

Sergeant Lozano testified that Gilliland had locked his vehicle keys in his vehicle, she asked him to go inside and have a seat, Gilliland became very upset, pulled out a card, and that was all she remembered about the incident; that Gilliland went into the classroom and Sergeant LaFlamme spoke to him and Gilliland became very upset; and that LaFlamme needed to do some maintenance on the vehicle and he needed the keys. On cross-examination Lozano testified that she did not believe that Gilliland was ever left alone in the classroom, and Sergeant Sloan was in there; that before this incident Gilliland had made mistakes and they had some

anymore on the job; that he then left to take an escort; and that when he went to pick up the escort he saw a DCT pick up truck parked in the middle of the field, which was unusual. On cross-examination Gilliland testified that in an affidavit to the Board he indicated that he saw Satepeahtaw and Lozano in the parked truck but he testified that he assumed that it was them and he could not see that far.

¹³ A week later Bernardi told Gilliland, according to his testimony, that she had told the sergeants to send him home.

problems with Gilliland; that she reported these problems to the Company before; and that apparently prior to the key incident she had problems with Gilliland not taking his calls.

5 On November 7 or 10, 2003 Sanders, according to her testimony, met with Special Agent Hill in his office. Sanders testified that during this meeting no other DCT employees were present but there were other FAA employees present; and that she told Hill what happened during the 3-day period, namely November 3, 4, and 5, 2003, regarding her computer user name and password.

10 Regarding Sergeant Malcom's termination in November 2003, Tolman testified, when called as a witness by Counsel for General Counsel, that he was aware that Malcom was terminated, he did not have any role in Malcom's termination, and Bernardi was involved in the decision making process in terminating Malcom; that Malcom was terminated for discussing management business decisions with people outside management; that management had an announced management meeting, Malcom came into the meeting, Malcom left the meeting, and later Bernardi found out that Malcom told Coughran and Whitaker about a management meeting; that DCT was not aware at the time Malcom was terminated that he was a union supporter; and that after Malcom was terminated, Bernardi told him that Malcom had a conversation with Whitaker and Coughran about the management meeting but she did not say how she found out,¹⁴

25 According to Malcom's testimony, on November 12, 2003 he took some paperwork to the Captain's office. Malcom testified that Bernardi was there, and she asked him to stay for a supervisors meeting; that Tolman walked into the office and said "Don't worry, this isn't about you[w]e just have some things to go over [y]ou are doing a good job" (transcript page 611); that Bernardi said "[y]es, you are doing a very good job" (*Id.*); that 15 to 20 minutes later the meeting took place in the Captain's office; that Bernardi, Tolman, Captain Thompson, Lieutenants Lozano, Satepehtaw, and Bolz, Sergeants Sloan and Pavlicek, and DCT's representative, Grubb, were present; that the topics discussed included union negotiations, Grubb' role in the negotiations, what DCT expected from the negotiations, and calling Whitaker and Coughran in to talk with and possibly terminate them regarding what they believed were fraudulent claims with respect to their earlier terminations; that Satepehtaw and Lozano handed Bernardi a sheet of paper with what appeared to be his name on it and Bernardi looked at him; that the meeting adjourned and Tolman asked him and Pavlicek to come back at 10 or 35 10:15 a.m. in case it was necessary for them to escort Whitaker and Coughran off MMAC; that when he left the Captain's office he put himself on a code 17 which is a perimeter patrol and which took about 20 minutes; that he carried a radio on the patrol but he did not have contact with either Whitaker or Coughran during the patrol; that he did not talk with Whitaker or Coughran during the time he was gone from the Captain's office; that on his way back to the 40 Captain's office Officer Scott Wilson stopped him and asked him what was going on; that he

¹⁴ In its Notice of Determination, General Counsel's Exhibit 9, the Oklahoma Security Commission indicated, as here pertinent, as follows:

45 THE EMPLOYER STATES THE CLAIMANT WAS DISCHARGED FOR UNDERMINING THE COMPANY BY ACTIVELY SUPPORTING THE UNION AND GIVING INFORMATION WHICH WAS SUPPOSED TO BE CONFIDENTIAL. THE EMPLOYER ALSO STATES THAT CLAIMANT MISSED MANY DAYS OF WORK. THE CLAIMANT DENIES MISSING ANY WORK AND STATES HE DID SUPPORT THE UNION. THE CLAIMANT'S SUPPORT OF THE UNION IS NOT NECESSARILY EQUIVALENT TO UNDERMINING THE COMPANY. WILLFUL MISCONDUCT [a prerequisite for disqualifying for benefits] ON THE 50 PART OF THE CLAIMANT IS NOT EVIDENT.

told Wilson that it was nothing he could talk about; that he reported back to the Captain's office at 10 a.m.; that Pavlicek was there when he got back to the Captain's office; that he and Pavlicek waited in the classroom area until they brought Whitaker and Coughran into the Captain's office; that Satepeahtaw came out of the Captain's office and told him and Pavlicek that they were not needed and they could go back on patrol; that he went to get his lunch and Satepeahtaw called him on the radio and told him to return to the Captain's office; that Bernardi and Thompson were in the office; that Bernardi had a piece of paper with dates on it in her hand and she said that he called in too much and they were letting him go for calling in too much; that he told Bernardi that he had never called in a single day since he had been there; and that the following conversation then took place:

And at that time, she slid the piece of paper across the desk, and she said, 'Well, do you support the Union?'

And I said, 'Well, yes, I pay dues to the Union.'

And she said, 'Well, are you a supporter of the Union then?'

I said, 'Well, I suppose so.'

She said, 'Well, we are letting you go, because, you know, we don't want anybody on our management team who supports the Union.'

I told her at that time, I said, 'Well, just a little bit earlier, you and David both told me that I was doing a good job,' and I said, 'And, just a few weeks ago Captain Thompson told me I was doing a good job, as well.'

She turned to Captain Thompson and said, ' Well, is that true?'

And then, he asked when it was and I told him that it was during the Air Show, and then he acknowledged that he had told me that during the Air Show.

And then, she told me, 'Well, we are still letting you go.'

And I said, 'Well, you are not giving me the opportunity to step down?'

And she said, 'Well, what do you mean?'

I said, 'Step down as a Supervisor or step down from the Union.'

And then she said, 'Well, I don't know.' She then stepped out of the room and then came back a few minutes later and said, 'No, we are letting you go.' [Transcript pages 618 and 619]

Malcom further testified that during this meeting Bernardi did not give him any other reason why she was firing him; that every day he had taken off had been approved; that he had not been disciplined for taking those days off; that he had never been warned that he was taking too many days off; that most of the days he took off were trades in that someone took his shift and then he took that person's shift; that General Counsel's Exhibit 9, which as noted above is the Notice of Determination of the Oklahoma Employment Security Commission, includes the recitation of DCT's reasons for termination which are in addition to the reasons that Bernardi gave him during his termination meeting in that the notice indicates "THE EMPLOYER STATES

THE CLAIMANT WAS DISCHARGED FOR UNDERMINING THE COMPANY BY ACTIVELY SUPPORTING THE UNION AND GIVING INFORMATION WHICH WAS SUPPOSED TO BE CONFIDENTIAL"; that before this the Company had never told him that he had disclosed confidential information; and that he believed that Pavlicek was promoted to sergeant on or about November 12, 2003 after he resigned from the Union. On cross-examination Malcom testified that he was hired on January 21, 2002, Respondent's Exhibit 16, and he became sergeant on or about November 28, 2002, Respondent's Exhibit 17; that on weekdays and on weekends he worked the morning shift starting at 7 a.m.; that at the commencement of this meeting participants were told that the information discussed was confidential; that he understood that he was not to discuss this confidential information outside the meeting room; that DCT supervisors at MMAC, including the Captain (apparently referring to Captain Thompson) and Lieutenants Bolz and Satepeahaw, knew that he was a union member but he did not know if Bernardi, Tolman or Captain Butler knew this; and that he did not miss any days because when someone worked his shift he worked their shift. On redirect Malcom testified that certainly on the day she fired him Bernardi knew that he was a member of the Union.

With respect to whether he functioned as a supervisor while he was a sergeant at DCT, Malcom testified that as a sergeant he was paid 25 cents more an hour than DCT's security officers; that he wore the same uniform as security officers, except that he had brass sergeant's stripes on his collar; that he was not a site sergeant; that he patrolled, answered calls, and carried paperwork as did security officers Wilson, Gary Brock, and Larry Morefew; that during the week he did not have authority to hire, or to interview, nor was he asked to give any recommendations with regard to hiring any particular individuals; that during the week he did not have authority to terminate or discipline, and Lieutenant Bolz filled out the schedules; that on weekends he did not have authority to hire, fire or suspend, and while he did not have an immediate supervisor on site, the Lieutenants and Captain were on call all of the time and he was verbally advised that if there was a serious disciplinary problem, he was supposed to call them; that he did not draft the schedule during the week or the weekend, and during the weekend if someone did not come to work, there was a list of people to call to see who was available; that he did not compile the list; that there were occasions when he asked someone to work later until he could find someone to work the remainder of that shift or, using the list, get someone to come in earlier; that he had no role in approving or denying vacation time; that under Captain Griffin supervisor meetings were held once a month; that he attended such meetings; and that after Griffin left, the meetings were sporadic. On cross-examination Malcom testified that when he was the sergeant in charge he would have the responsibility to issue weapons; that some of the security officers were allowed to issue weapons¹⁵; that while on weekends he was the only supervisor on-site at MMAC, he was not the site supervisor, and he still had to report to his Lieutenant and Captain; that if his Lieutenant and Captain were not available by telephone, he would have to make the ultimate call as to what to do to resolve a security situation; that he has called and requested people to come in to work when there is a call-off but he never made it mandatory since he did not have the authority to tell the employee that he or she had to come to work; that the person he called could decline to come in to work; that as a supervisor he did not pick the people to call but rather he referred to the list which had already been made out; that there was an established standard to first call the part-time people on the list and, if he could not find someone, then call the people who worked 32 hours; that he tried to call the most reliable people first; that up to the last couple of weeks of his employment with DCT security officers could deliver documents to the FAA and then the policy was changed so that the Captain and the Lieutenants performed that function; that with respect to the management meetings under Captain Griffin, Officer LaFlamme was invited to and did attend

¹⁵ Wilson, Morefew, Mel Gibson, and dispatcher David Killmer.

such a meeting; and that he was the only sergeant to join the Union. On redirect Malcom testified that on weekends he was always able to find a Lieutenant or Captain so he did not have to make the ultimate call on a security matter.

5 Bernardi testified that she considers sergeants to be members of the management team; that the statement of work for DCT's contract with the FAA at MMAC indicates that "[t]he contractor shall assign one shift supervisor per shift and the individual shall have the responsibility for the designated period and/or shifts" (transcript page 1001); that on weekends the highest ranking officer on the shift will be the sergeant; that Malcom was a shift supervisor
10 on weekends, and he was the highest ranking member of management on the shift on weekends; that Malcom received sergeant's pay when he was not the shift supervisor; that on the day Malcom was terminated she called a management meeting to discuss the collective bargaining agreement and a confidential matter, namely the possible termination of Coughran and Whitaker; that those who attended this meeting were told that what was discussed during
15 this meeting was confidential; that sergeants were invited to this meeting; that those attending were told that Coughran and Whitaker were going to be called in separately and asked whether they revealed to the NLRB that they had interim earnings because DCT believed that they committed fraud against DCT, and that they might be terminated depending on their answers; that "[b]ecause Sergeant Malcom was seen talking to William Whitaker and Marcus Coughran
20 confirmed to me that Sergeant Malcom told him everything that was said in our meeting and what he was supposed to say" (transcript page 1006); and that Coughran

called me in. He called me in and he said, 'Cheryl, why are you trying to get me?' And I said, 'I'm not trying to get you.' I said 'Someone has committed fraud against this
25 company. I don't know whether it was you or the NLRB, but someone has committed fraud, and we're trying to find out who it is.' And at that time, Marcus said, 'Well, I know everything that was said in your meeting.' And I said, 'Yes, I know.' I said, 'Sergeant Malcom told you.' And he goes, 'Yes.' [Transcript page 1006]

30 Bernardi further testified that Malcom had been given instructions that after the management meeting ended he and Sergeant Pavlicek were told to stay just outside the project manager's office because they might be needed to escort Coughran or Whitaker or both off the Center; that she, Grubb, and Thompson met with Whitaker and his union representative, Wooten, and this
35 meeting took about 5 to 10 minutes or less; that Whitaker said that he told Hoskin all of the information; that she, Grubb, and Thompson then met with Coughran for 5 minutes and he also said that he revealed to Hoskin all of the interim earnings he had while he was not working for DCT; that she found out that Malcom did not stay outside the project manager's office and Sergeant Pavlicek went to find him; that Pavlicek told her that he found Malcom talking to
40 Whitaker on the north side of the ILS building at the Center which is where DCT's offices are located; and that Malcom was not supposed to be there.

Pavlicek testified that he had just become a sergeant before attending the management meeting at MMAC in November 2003, with Grubb present; that it was indicated during the meeting that there were some confidential things that were going to be discussed and
45 everything needed to stay in that room; that when the meeting was over Tolman asked him and Sergeant Malcom to stand by in case there was a problem when management spoke with Coughran and Whitaker; that he and Malcom were asked to stay in the front office by the classroom; that he stayed in that area but Malcom left that area right after being told to stay there; that Tolman subsequently asked him to locate Malcom and he saw Malcom at ILS
50 speaking with Whitaker; and that he could not hear what was being said; and that he went back and told Tolman what he had just seen.

DCT employee Killmer testified that he has been the day shift dispatcher for about 2.5 years; that the main bulletin board is in the dispatch area about 10 feet behind his work station; that he has seen many things posted on the bulletin board including thank you cards, ads for motor vehicles, pretty much anything the employee wants to post; that on November 13, 2003 he saw Tolman take something off the bulletin board after saying “this can’t be up here” (transcript page 102); that after Tolman left the area he checked the bulletin board and noticed that the union literature was gone; that within 3 to 7 days right-to-work documents and antiunion literature was posted in the area on the bulletin board formerly used for union literature; and that he had no idea who posted the right-to-work documents and antiunion literature. On cross-examination Killmer testified that employees who supported the Union could still put up union literature after Tolman took it down; that is what happened; and that Coughran and employee Wilson asked him what had happened to the union literature that had been on the bulletin board.

Whitaker testified that he has seen birth announcements, trucks for sale, altered cartoons and just about everything on the bulletin board near dispatch at headquarters; that he is not aware of any DCT policy which prohibits union literature from being posted on that bulletin board; that one day when he went to check his weapon he noticed that their union material had been taken down; that this occurred before the collective bargaining agreement was signed; and that in place of the removed literature he noticed several sheets dealing with an employee’s rights in a right-to-work state. On cross-examination Whitaker testified that while in an affidavit he gave to the Board he indicated that the employer replaced the notice regarding the next union meeting with a pamphlet on worker’s rights in a right-to-work state, he had no knowledge as to who put the pamphlet on the bulletin board.

On November 13, 2003, when she went to clock out, Sanders saw a note on the wipe-off board indicating that she should see Lieutenant Bolz. Sanders testified that she met with Bolz in the Lieutenant’s office in the headquarters building; that Lieutenant Satepeahtaw was also in the office at her desk, which is set back-to-back with Bolz’s desk; that Bolz asked her to read and sign a document which (a) explained how call off is detrimental to the Company, and (b) indicated that she had called off on Monday of that week; that she explained to Bolz that she had worked on that Monday; that Bolz told her that she had asked for the day off; that she explained that she had asked for the preceding Saturday off, Lieutenant Satepeahtaw had granted the request, and it was not a call off; that she had discussed with two other officers that she needed to take Saturday off, they said that they needed extra hours, it would not put them in an overtime situation, and they offered to take her place; that when she told Satepeahtaw that she needed the time to complete some information for juvenile services with respect to her son who was in the hospital, Satepeahtaw told her that it was a personal reason; that Bolz said that she would change the document to reflect that it was Saturday November 8, 2003; that she wrote her rebuttal on the document because it was not a call off; that she wrote a letter to Bernardi that she did not believe that it was a call off since she had permission to take the day off; that she was told that a personal reason is not a good enough reason to take a day off from work; that during the November 13, 2003 meeting Bolz handed her an envelope; that Satepeahtaw was there but her back was toward Bolz and Sanders “the whole time” (transcript page 481); that Wooten was present when Bolz gave her the envelope; that Bolz did not say anything about the envelope, which was sealed; that she looked at the front and back of the envelope; that there was nothing handwritten on the envelope but in the top left hand corner there was DCT’s return address; that she had no idea what was in the envelope and she put it in her back pocket while she was writing the rebuttal to the call off document; that Bolz made her a copy of the call off document; that several employees were waiting outside the building, including Coughran, Kathy Dowd, Whitaker, and Wooten, who had walked out ahead of her; that the employees had seen her name on the board and they asked her what went on; that she

showed them her copy of the call off document; that she then pulled out the envelope from her right back pocket and Whitaker asked her what it was; that she opened the envelope and pulled the document one half to three quarters of the way out; that Concentra was on the top of the document and Whitaker and Dowd said that is a drug test form; that she put the envelope back in her pocket; that she read the document later that evening when she got home; that she did not see anything attached to the document; that she had never taken a random drug test before while she was employed by DCT (emphasis added); that the document specifically indicated that it was a random drug test; that the document did not indicate when she was to take the drug test; that she did not receive any information as to when she was to take the drug test; and that she was not asked to sign anything to indicate that she had received that envelope. On cross-examination Sanders testified that Respondent's Exhibit 13 is the call-off statement with her rebuttal; that Satepeahtaw approved Officer LaGroan working her shift; that Respondent's Exhibit 14 is a copy of an e-mail she sent at 9:13 p.m. on November 13, 2003 to Bernardi regarding Respondent's Exhibit 13; that she got off work at 12 noon that day, went to college, ran a few errands and was home by 4 p.m.; that she did not call off on November 8, 2003; that she made arrangements on November 7, 2003 for another officer to come to work for her with approval; that Bolz also gave her an envelope but they did not discuss the envelope; that she went 100 feet from where she was given the envelope to where she opened the envelope; that when she received the envelope there was nothing attached to the outside of the envelope; that she had heard of people taking random drug tests but she never heard that there were time limits placed regarding when they were required to take the test; that she was not aware that the people who receive notification of their random drug tests receive notice that they had to take that test prior to the start of their next shift¹⁶; that DCT does not have a random drug testing policy; that she is aware that people receive notices to take random drug tests but she has never reviewed one of the notices; that while she was writing her rebuttal Wooten was speaking to Bolz, and she believed that Wooten overheard her and Bolz speaking; that when she was writing her rebuttal there was no discussion between her and Bolz; that Wooten was present when Bolz pushed the envelope to her with her right hand while she was pulling something out of a notebook, handing something to Wooten, and talking with Wooten; and that she could not testify as to what Mr. Wooten observed or whether he observed anything, "that would be hearsay anyway" (transcript page 563).¹⁷

¹⁶ At this point one of the representatives for DCT asked Sanders "you're just not aware of the rule in which people have to take tests before they are supposed to show up on the next tour" (transcript pages 559 – 560, emphasis added) The following then took place:

JUDGE WEST: -- question. [As to] ... whether this witness was aware of the 'rule,' is the rule contained in anything other than the notice?

MR. QUIST: The rule - -

JUDGE WEST: Any document other than the notice?

MR. QUIST: The rule is - - has been, and will be, be able to introduce these notices, the rule is consistent with every notice that has been given that the test must be taken prior to the time of the next shift.

JUDGE WEST: That doesn't answer my question. My question - -

MR. QUIST: Does - -

JUDGE WEST: - - is, is what you referred to as the rule contained in any document other than the notice itself?

MR. QUIST: No.

JUDGE WEST: Thank you. [Transcript page 560]

¹⁷ At this point in her cross-examination the following took place:

BY MR. QUIST: Here's an envelope that has your name on it. Here's another envelope that has your name on it. Is it your testimony that Mr. Wooten observed Lieutenant

Continued

Whitaker testified that he regularly met Sanders after work where they check in their weapons; that one day about a week before she was fired, she had an envelope she brought from inside; that he asked Sanders what the envelope was; that Sanders opened the envelope in his presence and it contained a drug test form which he glanced at; that Sanders said that is what she thought it was; and that he witnessed Sanders open the envelope, take the contents of the envelope out, the only document in the envelope was the form he glanced at, and there was no Company document in the envelope. On cross-examination Whitaker testified that he was not privy to any conversation Sanders may have had with DCT representatives regarding the random drug test envelope and he did not see Sanders receive the envelope from DCT representatives inside the building; that he did not see whether Lieutenant Satepeahtaw witnessed Lieutenant Bolz handing this information to Sanders; that he has never been given a random drug test; and that he was not aware that the employee was required to take the random drug test before his or her next shift.

Lieutenant Satepeahtaw testified that she shares a small office (10 feet by 10 feet) with Lieutenant Bolz; that there are three desks (The third desk is used for computers.), two desk chairs, two tables, and a file cabinet in the room; that her desk is about 3 feet from Bolz's desk; that she recalled a conversation between Bolz and Sanders regarding attendance issues, and Bolz gave Sanders an envelope; that she was in the room for the entire 15 minute conversation; that Sanders was arguing with Bolz over an absentee form that she had just signed, then Bolz handed an envelope to Sanders who then left the room; that she saw the envelope and there was a piece of paper attached to the outside of it; that there was no doubt that something was attached to it; that she was positive that Wooten was not in the room while Bolz and Sanders had their discussion; that Officer LaGroan attempted to step into the room while Bolz and Sanders were talking but she had him step back out of the room; and that she saw Sanders walk out of the room with the envelope and the letter attached. On cross-examination Satepeahtaw testified that during the 15 minutes Sanders and Bolz were talking, she did not do any paperwork but rather answered approximately three telephone calls; that she did not take notes during the telephone calls; that "[j]ust off and on" (transcript page 1113) she looked at Bolz and Sanders while they were having their conversation; that she was not on the telephone when Sanders left the room; that she watched Sanders leave the room; that if she sat at her desk facing the desk, she would be facing North and Bolz, whose desk is against the opposite wall (the south wall) would be facing South when she sat at her desk, General Counsel's Exhibit 56 (In other words, if they were both sitting facing their desks they would have their backs to each other.); that Sanders was standing on the West side of Bolz's desk; that while she was

Bolz slide an envelope over to you like this?

....
 JUDGE WEST: All right. For the record, with respect to what just occurred, there was an envelope passed to you?

THE WITNESS: Yes, sir.

JUDGE WEST: On the witness stand with a piece of, apparently a piece of paper attached?

THE WITNESS: No, sir, there was nothing attached to the envelope.

JUDGE WEST: So when it occurred in the office that day, there was nothing attached to the envelope?

THE WITNESS: Correct.

JUDGE WEST: Did the envelope have your name on it?

THE WITNESS: No, sir, it did not.

JUDGE WEST: It did not. Thank you. [Transcript page 563 - 564]

5 talking on the telephone she was not facing her desk but rather she was facing the West wall in the office; that she was facing the West wall when Sanders was standing West of Bolz; that she was facing sort of Southwest at the time and she could see to South in the direction of Sanders; that she stayed in her desk chair the entire time Sanders was in the office; that when she was not on the telephone she was listening to the conversation; that Sanders was "signing a form, about absenteeism [e]xcessive absenteeism" (transcript page 1123, emphasis added); that she did not recall whether Bolz was doing paperwork prior to Sanders coming into the office; and that she did not recall whether there were any other papers on Bolz's desk at the time. On redirect Satepehtaw testified that she was about 3 feet from where Sanders was standing and Bolz was sitting; and that Sanders was about 1 foot away from her when Sanders left the office holding the envelope in her right hand. Subsequently Satepehtaw testified that she was not aware beforehand that Bolz was going to be giving Sanders the envelope to take a random drug test; that she saw Bolz hand the envelope to Sanders and Sanders pull it from Bolz's hand; that Sanders used her right hand to yank the envelope from Bolz's hand; that then Sanders walked out of the office with the envelope; that Sanders received the envelope after she had written her own comments on the disciplinary form "[y]es, had to have been" (transcript page 1128, emphasis added); that she was aware that Sanders was writing something on the form and she "did not see ... [Sanders] sign [she] did not recall ... [Sanders] signing the disciplinary form" (transcript page 1128, emphasis added); that Sanders had completed writing on the disciplinary form when the envelope was handed to her; that she did not believe Bolz told Sanders to read the notice or made any comments about the notice but she did not recall; and that Bolz handed Sanders the envelope and said nothing at all about the envelope because Bolz was not given a chance to. On further redirect Satepehtaw testified that Bolz was not given a chance to because "[w]hen Sanders finished signing whatever it was she was signing, Lieutenant Bolz handed her the envelope. She yanked it, from Lieutenant Bolz's hand and went right out the door." (transcript page 1129, emphasis added).

30 Bolz testified that at 10 a.m. on November 13, 2003 Impson gave her the paperwork for Sanders and Lowery to take a random drug test; that both envelopes had a memo attached to them; that after she clocked out for the day about noontime, Sanders came to her office; that since Sanders missed the prior Saturday, she had an excessive absentee form, Respondent's Exhibit 41, for her to sign; that Sanders told her that she had another officer work for her on that Saturday and she should not receive the form; that she wrote on the form that Sanders refused to sign the form; that Sanders asked her if she could write on the paper and when she answered yes Sanders wrote something; that Sanders was standing on the West side of her desk; that Satepehtaw was sitting at her desk at the time; that Wooten did not walk into the room when Sanders was in the office; that she took the drug test form out of her leather binder toward the end of her discussion of the absentee form with Sanders; that she "slid ... [the drug test paperwork] over to ... [Sanders]" (transcript page 1148); that Sanders grabbed the envelope and was still arguing and went out of the office; that her hand was still on the paperwork when Sanders grabbed it; that she did not tell Sanders what was in the envelope because Sanders was still discussing the absentee notice; that the excessive absentee form is not a discipline; that she was sure that the memo was attached to the paperwork she gave to Sanders; that Sanders crumbled it up in her fist and ran out of the office; and that the memo was attached to the envelope with a paper clip. On cross-examination Bolz testified that Sanders told her that she had made arrangements with Lieutenant Satepehtaw for another employee to cover her shift; that she does not typically give verbal instructions when she gives the paperwork to an employee for a random drug test; and that Sanders walked briskly out of the office.

45 Subsequently Bolz testified that she probably discussed with Satepehtaw the fact that she was going to give Sanders the paperwork for a random drug test but she did not recall; that while she was discussing the absentee form with Sanders she thought Satepehtaw was on the phone at one point and maybe doing some paperwork but she did not know; that when

Satepehtaw answers the phone or talks on the phone she normally faces the north wall in the office; that she slid the paperwork for the drug test to Sanders on the surface of the desk after Sanders had completed writing on the absentee form; and that Sanders crumbled it up in her right hand and walked out of the office.

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Butler testified that he is involved in pulling people's names for random drug tests; that DCT has a little box with poker chips in it and each poker chip has an employee's badge number on it; that once a month he reaches in and picks out two poker chips and if those numbers are active then the employee drawn takes a random drug test; and that Impson and whoever else happens to be in the office is present when he draws. Subsequently Butler testified that the paperwork the employee brings back from Concentra to DCT indicates whether the drug test was negative. On redirect Butler testified that on November 13 and 14, 2003 he was not at MMAC because he had left for two weeks before he came back to work as Captain permanently; and that the paperwork which the employee brings back to DCT "indicat[es] it [the test] has been taken and there is nothing to worry about right now. Later on, there could be something. They will call me, if it is." (transcript page 1180)

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When called by the Respondent Bernardi testified that employees are chosen for a random drug test as follows: "Badge numbers are on poker chips that are put in a box and shook up and someone draws a badge number. Then at that time, Kim takes the drawn badge number. If they have that badge number, then they are assigned to go take their random drug test." (transcript page 1000)

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Impson testified that DCT has a box with chips with badge numbers on them; that when a badge number is drawn she fills out the paperwork for a random drug test, which consists of a memorandum and a piece of paper that goes to the clinic; that the random drug test goes in the sealed envelope which has the employee's name on it and the memorandum explaining the hours of the clinic and the details about when to return the paperwork is folded up, the employee's name is written on it and it is attached to the envelope; that she gives the paperwork to a supervisor to give to the employee; that the employee is supposed to bring back a receipt from the clinic showing that the employee took the test; that the employee is supposed to bring this receipt back before the employee begins his or her next shift; that she copies the receipt, puts the copy in the employee's file, and forwards the original to the home office; that Sanders was chosen for a random drug test "In the same - - the same pattern as everyone else. There were two officers drawn" (transcript page 1312); that usually the captain draws the names but "I think Ms. Bernardi was there one day and we let her draw - - ... but I don't know" (*Id.*); that she did not recall if it was Bernardi; that the other officer who was drawn was Officer Lowery; and that she gave an envelope containing the clinic paperwork that was sealed with Sanders' name on it and a memorandum with instructions attached to the envelope with a paper clip also with Sanders' name on it, Respondent's Exhibit 52, to Bolz around 11 a.m. On cross-examination Impson testified "I don't draw the badge numbers. The Captain does." (transcript page 1328); that she did not know that Bernardi drew the number for Sanders' drug test; that normally the Captain draws the number but on occasion Bernardi is there when the badge numbers are drawn; that she did not know that Bernardi was there on November 13, 2003 to draw Sanders' badge number; that she did not know who drew that day; and that she witnessed it but she did not know who drew that day; and that it could have been Bernardi.

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Donald Thompson testified that he was Captain and Project Manager for two weeks; that during the time he was Captain, Sanders was chosen for a random drug test; that he did not think that he was in the room when Sanders' name was drawn; and that he was in the room when Officer Lowery's name was drawn. Subsequently Thompson testified that he witnessed Impson draw Lowery's name in the presence of Captain Butler; that he thought that this drawing

took place in the second week of October 2003; that if Lowery received notification that he should take a random drug test on November 13, 2003 the drawing would have taken place immediately before that; and that the day he was present for the drawing, Impson was the one who reached in and drew the poker chip with the badge number on it and she just drew one while he was there. On redirect Thompson testified that he was Captain during the month of October 2003; that page 11 of General Counsel's Exhibit 7 shows that a drawing for Lowery to take a random drug test occurred on October 8, 2003; that further down in that exhibit it specifies Lowery for November 13; that he was present for that as Captain; that he "definitely was probably present for the October 8 drawing" (transcript page 1346) because he was Captain then¹⁸; and that he was not Captain on November 13, 2003. On recross examination Thompson testified that Respondent's Exhibit 52, which is a copy of the memorandum that Sanders allegedly received attached to her sealed envelope to take the random drug test, indicates that he was Captain on November 13, 2003. Subsequently Thompson testified that his name appears on Officer Lowery's November 13, 2003 memorandum, General Counsel's Exhibit 37, which was attached to his sealed envelope for his random drug test; and that he recalled one drawing for Lowery and he could not recall exactly the date.

Bernardi, who testified again after Impson and Thompson testified, gave the following testimony:

We were there - - and I believe it was the same day that Kim prepared the memo - - we were at MMAC. Kim and I were the only ones in the office at the time and Kim Impson said it's time for our monthly drawing for the gift certificate [low absenteeism] [Kim] asked me ... do you want to draw for the gift certificate and I was in her office and I said sure. Then Kim said do you want to do the drawing for the random drug testing and I said no, I don't want to draw for that. I said let me take it and I'll have an officer draw. So I walked out of Kim's office through the training room and I went into the ILS their front desk and Officer Brim was working and I asked Officer Brim to draw out two badge numbers. Officer Brim took out two poker chips with the badge numbers. I took them back to Kim, gave them to her, and she checked on the computer and one of them was Officer Lowrey and the other badge number that was drawn was an inactive badge number. So I went back again and I told Officer Brim I'm sorry, we'll have to do this one more time because that wasn't a good number. So he drew again. He drew a badge number. I took it back to the office. Kim looked it up and it was Carol Sanders. And I distinctly remember that this is the only time that I have ever been there for a drawing. Capt. Thompson ... we were there because Capt. Thompson was going to resign as captain. [Transcript page 1379]

Bernardi further testified that Thompson was the Captain on November 13, 2003 when Sanders received her memorandum attached to the sealed envelope holding her random drug test form; that Butler was the Captain on October 8, 2003 the date of one of Lowery's memorandums regarding a random drug test; and that she did not know why Thompson would have been in a position to witness the drawing of Officer Lowery's name on October 8, 2003. Subsequently Bernardi testified that Impson "was present when I drew for the gift certificate, because that wasn't ... anything that I was concerned about as far as being an officer in the company" (transcript page 1386); that the drawing of Sanders' name took place at Officer Brim's desk and

¹⁸ One of the representatives for Respondent was directed to clear up the fact that the copy of Lowery's October 8, 2003 memorandum for a random drug test, Respondent's Exhibit 37, specifies Captain Henry Butler. The representative indicated that this inconsistency would be cleared up by Tolman.

there is just one room in between Impson's office and Brim's desk; and that Impson did not witness the drawing of Sanders' name.

5 On November 14, 2003 Sanders worked her normal shift. Sanders testified that when the employees clock in and clock out there is a supervisor present; that during her shift on November 14, 2003 no supervisor talked to her about her drug test or indicate that she should not be at work that day; that after her shift that day she went to school, ran some errands, and went home; that Bernardi telephoned her at home about 3:50 p.m. and asked her why she was refusing to take her drug test; that she told Bernardi that she was not refusing to take her drug test, she had some things to do and she was planning on taking it on Monday; that Bernardi told her that she was supposed to take it before she came back to work; that while she was speaking with Bernardi, she looked at the envelope again and there was nothing in the paperwork which referenced the time and date of the random drug test; that she told Bernardi what she saw and did not see on the form; that Bernardi said that she should have received another sheet, an instruction sheet; that she told Bernardi that she did not receive such a sheet; that Bernardi said that she did; that she told Bernardi that she did not; that she told Bernardi "Cheryl, I've never lied to you before and I'll never lie to you. I'm not gonna start lying to you now ... I did not receive anything, there's nothing here with instructions" (transcript page 488); that Bernardi told her that she would verify what Sanders said and she would get back to Sanders; that a few minutes later Bernardi called back and said that she was being faxed a paper "as we spoke," (*Id.*) "she told me that she was, the fax, she was receiving the fax at that time" (transcript page 489); that Bernardi said she was going to review it, and at that point Bernardi suspended her and told her not to return to work until Bernardi telephoned her; that Bernardi asked her what she was trying to hide and she told Bernardi that she was not hiding anything, and if she had been given instructions, she would have followed them; that after speaking with Bernardi she telephoned Concentra to see if they were open; that she was told by the Concentra representative she spoke with that they did not close until 9 p.m. and if she got there before 5 p.m. they could give her a drug test; that she went immediately to Concentra and took a drug test; and that Concentra gave her a form in an envelope, which she was told not to open, and she gave the envelope to Lieutenant Curt Cloud at about 4:50 p.m. on November 14, 2003 indicating that she had taken the drug test. Sanders further testified that she was never told the results of the drug test that she took on November 14, 2003.

35 General Counsel's Exhibit 47 is the drug test result form for the drug test Sanders took at Concentra at 4:50 p.m. on November 14, 2003, which shows a "**NEGATIVE**" result. In other words, Sanders passed the drug test.

40 Bernardi testified that this is not the drug test that Sanders was ordered to take in that Sanders took this one on her own after she was suspended; that DCT was billed for Sanders' drug test and it paid the bill; and that while she was upset about it, it was still DCT's obligation to make sure that its vendors are paid.

45 Lieutenant Curt Cloud testified that on November 14, 2003 at about 5:30 p.m. he received the paperwork for a drug test for Lead Sanders; and that he put the sealed envelope in another sealed envelope and put it in the "in-vac" (transcript page 1094) for his Captain to pick up in the morning.

50 Impson testified that on November 14 when Lowery brought his receipt in to work between 2:30 and 3 p.m. it made her realize that Sanders had not turned her receipt in; that she telephoned the Lieutenants' office but they did not have Sanders' receipt; that the captain was not there so she telephoned Bernardi who asked her to telephone the clinic to find out if Sanders had the drug test done; that she telephoned Bernardi back and told her that Sanders

had not taken the drug test; that Bernardi asked her if this had ever happened before (It had not.) and for Sanders' home telephone number; that Bernardi called her back and told her that she had spoken with Sanders, who was going to take the random drug test on Monday; that Bernardi said that she would probably suspend Sanders; that later Bernardi called her again and asked her to tell the supervisor on duty that they needed to find someone to cover Sanders' shift on Monday November 17, 2003; that during the first conversation Bernardi asked her to fax a copy of Sanders' memorandum and she faxed it to Bernardi; and that according to the receipt Sanders brought to DCT on November 14, 2003, General Counsel's Exhibit 57 (and 47), she took the drug test at 4:50 p.m. that day.

Tolman testified that Respondent's Exhibit 52, which is the notice which was allegedly attached to the sealed envelope containing Sanders' random drug test form, specifies that "The clinic hours are 7 a.m. to 9 p.m. Monday through Friday." Tolman further testified that as demonstrated by the memorandums in Respondent's Exhibit 37, which are copies of the notices regarding random drug tests, Concentra did not have "an hour of operation earlier than 9 p.m." (transcript page 1394)

General Counsel's Exhibits 12 and 13 are memoranda, both of which are dated November 14, 2003, which refer to reprimands of Gilliland for two instances of alleged failure to follow proper procedures the day before and insubordination.

Beginning on November 17, 2003, Sanders picketed for 5 days, for 12 hours a day. She testified that others who picketed included Whitaker, Coughran, Milan, and others; that the picketing occurred at the corner of Southwest 59th and McArthur, which is several hundred feet from MMAC and near the main gate to MMAC; that the supervisors who drove by included Captains Thompson and Butler, both of whom were project managers, Chad Pavlicek and Lieutenant Satepeahtaw; and that she was told that the pan and tilt camera located atop one of the buildings in MMAC was pointed at the pickets. On cross-examination Sanders testified that when she picketed she watched the camera move in the direction of the pickets, and she was told by unnamed guards when they got off work that the cameras were put on the pickets the first thing in the morning by Killmer, who is a dispatcher, but she had no personal knowledge that DCT trained the camera on the pickets.

Bernardi testified that DCT does not have any control over any camera at MMAC; that there is possibly one camera that could have been pointed to where the picketers were; that McClain, the COTR, has control over that camera, and the controls and monitor are in his office; that she did not ask McClain to turn the camera on the picketers; and that she has never engaged in surveillance of any employees' union activities. On cross-examination Bernardi testified that she was in McAlester on November 17, and she received complaints from the government that DCT had picketers at the FAA Center; and that Tolman may have telephoned DCT at MMAC to find out why DCT employees were picketing.

Sanders was terminated by DCT on November 17, 2003. She testified that she left the picket line on November 17, 2003 to attend a meeting at the Board at about 11 a.m.; that she telephoned her home number to check her messages and there was a message from Bernardi indicating that she was terminated, she could pick up her last check the next day, and if she had any questions she could telephone Bernardi; that she did not telephone Bernardi; and that no one from DCT gave her any other reasons for her termination. On cross-examination Sanders testified that at the time of her termination she was a lead officer and Sergeant Sloan, who had been with DCT 28 days, was her sergeant; that her answer machine indicated that Bernardi left the message at 11 a.m.; that she did not know whether Bernardi was aware that she was outside MMAC picketing that day; that Bernardi was aware of her union membership, being on

the Executive Board and being a union official; that other employees who were identified with the Union were not terminated by DCT, namely Milan, Dowd, Scott Rex, Pavlicek, Tina Nitzel, and Wooten; that Wooten is a Charging Party in this proceeding; that all of these individuals had or were seeking Union offices; that when she testified at the trial herein Milan was the President
5 of the Union; and that Wooten was President before Milan.

Regarding Sanders' termination in November 2003, Tolman testified, when called as a witness by Counsel for General Counsel, that he was aware that Sanders was terminated, he did not have any role in her termination, and Bernardi was involved in the decision making
10 process in terminating Sanders; that DCT's Drug-Free Workplace Policy, General Counsel's Exhibit 2, which is a corporate-wide policy, was in effect at MMAC when Sanders was terminated¹⁹; that the policy indicates that employees are subject to random drug testing, among other types of testing; that the involved contract between DCT and the FAA, General Counsel's Exhibit 3, as here pertinent, indicates "... each security guard shall be tested for
15 drugs at the time of initial selection for duty at the Aeronautical Center and at least once per year on a random basis each year thereafter"²⁰; that annually DCT is required to submit the results of drug screens and random testing to the FAA; that other than General Counsel's Exhibits 3, 4, and 5 he was not aware of any other written policy in place which reflect DCT's policy on random drug testing; that DCT's Drug-Free Workplace Policy, General Counsel's
20 Exhibit 2, does not detail the procedures for random drug testing; that DCT does have procedures for random drug testing but he did not believe that the procedures are written anywhere; that at MMAC Henry Butler, who is a Captain and Project Manager, is in charge of the random drug testing and he would be in charge of keeping track of what the procedures are; that at MMAC two people a month are randomly drawn and notified in writing to take their drug
25 test "before they report to work, back to work, before the next shift" (transcript page 45); that he has never been present for the random drawing; that the written notice for a random drug test that the employee receives indicates the timeframe in which the employee must take the random drug test; that he did not know of a time when the written notice did not reflect the time frame in which the drug test is to be taken; that General Counsel's Exhibits 3, 4, and 5 do not
30 speak to the timeframe within which employees must take their random drug test; that the employee must take a random drug test before he or she comes back to work on the next shift and that is written "in a memo to them when they are gone" (transcript page 47); that General Counsel's Exhibit 7, which is a summary of the records that DCT maintains with respect to drug tests between January 1, 2002 and May 17, 2004, was provided to General Counsel in
35 response to a subpoena; that General Counsel's Exhibit 7 shows (a) on page 11 that Charlotte Grove at MMAC was given notice of a random drug test on "1/24/2003" and she took the test on "1/27/2003" in that Grove was given the memo on Friday afternoon, she had a swing shift, the clinic was closed Saturday and Sunday and she took the test on Monday prior to coming back to work, (b) on page 11 that Wanda Smith at MMAC on "6/14/2003," a Saturday, was given notice
40 of a random drug test, the clinic was closed on Saturday and Sunday, and she took the test on Monday "6/16/2003," and (c) on page 11 that David Smith at MMAC was given notice of a random drug test on "9/12/2003" and he took the test on "9/15/2003" in that Smith worked the evening shift, the clinic was closed Saturday and Sunday and he took the test on Monday; that Sanders was terminated in connection with what DCT contends is a violation of their random
45 drug testing policy in that "she refused to take a random drug test" (transcript page 52); that it

¹⁹ Counsel for General Counsel stipulated that Sanders signed an acknowledgment that she received, read, and understood the policy.

²⁰ Additionally, Statements of Work for MMAC, which is FAA's definition of the work it wants
50 performed, include language with respect to the testing of employees for drugs. General Counsel's Exhibits 4 and 5.

was his understanding that Sanders in fact did take a drug test but he did not know if she took the test the day after she received the drug test notice; that on page 11 of General Counsel's Exhibit 7 it is indicated that Sanders was given written notice to take a random drug test on "11/13/2003" and she took the test on "11/14/2003"; and that he was aware that Sanders filed
 5 for unemployment after she was terminated by DCT in November 2003.²¹ In response to a question of Respondent's representative, Tolman testified that the employee has to take the drug test prior to coming back on their next shift and the employees know this because their lieutenant gives them a document explaining this.

10 When called by Counsel for General Counsel, Bernardi testified that Sanders was terminated because she did not go take her drug test, she did not follow procedure; that employees at MMAC receive a memorandum which tells them when they are supposed to take the drug test; that the time frame the employee is given to take the test is based on the employee's schedule; that the employee's schedule dictates when they are to take a drug test;
 15 that the written statement of this matter, General Counsel's Exhibit 32, indicates, as here pertinent "I told [her (Sanders)] the purpose of a random drug test was not to wait until drugs may be out of someone's system by waiting several days"²²; that the memo advises the

20 ²¹ General Counsel's Exhibit 8 is a decision of the Appeal Tribunal of the Oklahoma Employment Security Commission. As here pertinent it reads as follows:

The claimant was discharged for allegedly refusing to take a drug test. The claimant was not advised that there was a specific time by which she was required to be drug tested, and was suspended before she went to take the test. The employer's drug testing policy (Employer Exhibit 2) does not specify which employees are subject to testing, which
 25 substances may be tested, the testing methods to be used, or confidentiality requirements.

....

30 Although the employer contends that it provided the claimant with a document notifying her that she needed to be drug screened by a specific time and that time had passed, the employer presented no firsthand evidence that the claimant received such a document. Even if the claimant had been advised that she needed to be drug screened by a specific time, the employer's drug testing policy does not comply with the Standards for Workplace Drug and Alcohol Testing Act because it fails to specify which employees are subject to testing, which substances may be tested, the testing methods to be used, and confidentiality requirements. The claimant's failure to take a drug test that does not comply
 35 with the Standards for Workplace Drug and Alcohol Testing Act is not misconduct. Benefits are allowed.

40 One of the representatives of the Respondent submitted that this decision was in error because the Oklahoma Employment Security Commission erred in believing that DCT fell under the State rather than the Federal drug testing guidelines. He indicated that the decision has been appealed.

²² General Counsel's Exhibit 32 reads as follows:

November 14, 2003

45 I just received notice that Carol Sanders did not take her random drug test she had been drawn for on November 13, 2003. Ms. Sanders received the proper paperwork to take to the clinic stating that she was taking a random drug test along with a memo stating that she was to take the test prior to returning to work on November 14, 2003. The memo stated the location of the clinic where she was to go to and also stated the times the clinic was open (7 a.m. to 9 p.m.). Ms. Sanders worked until 12 noon and had her paperwork in hand for her random drug test and left the MMAC. She had until 9 p.m. to
 50 go to the clinic to take her drug test.

When Kim called and told me that Ms. Sanders had not returned her paperwork showing
 Continued

employee that they are to take the random drug test prior to returning for their next shift; that General Counsel's Exhibit 33 is a summary of the disciplinary action taken by DCT at various of its facilities, including MMAC, in 2002, 2003 and 2004; and that DCT does not have a progressive discipline policy. In response to a question of one of DCT's representatives,
 5 Bernardi testified that since she became President of DCT in 1991 no one other than Sanders at any of their facilities has failed to submit to a random drug test.

When called by the Respondent, Bernardi testified that on Thursday Sanders name was drawn for a random drug test; that Impson telephoned her about 3 p.m. on Friday and told her
 10 that the other officer who was chosen, Lowery, had brought his drug screening paperwork back to her and Sanders had not brought her paperwork back before her shift as she was instructed; that she told Impson to check to see if anybody had her paperwork and to telephone Concentra to see if Sanders went to any of its clinics to take her random drug test; that Impson telephoned her back and told her that no one had Sanders paperwork and Concentra indicated that
 15 Sanders as of that time Friday had not been to any of their clinics to take her drug screening; that she then telephoned Sanders and asked her why she did not take her drug test; that Sanders said that she was going to take the drug test Monday; that she told Sanders that it was a random drug test, she could not wait until Monday, she had a memorandum that indicated to her that she had to take it before she came back to work on her next shift; that Sanders said
 20 that she did not get a memorandum; that she told Sanders she would check on that; that she then telephoned Impson, asked her how she knew that Sanders got the memorandum, and told

that she had taken her drug test, I had Kim call the clinic and confirm that Ms. Sanders
 25 had not been there to give her sample. The clinic confirmed that she had not been at any of their clinics to take her drug test. I then called Ms. Sanders and asked her if she had taken her random drug test. She stated no had not. I asked her why and she stated she thought she would take it on Monday. I told [her] that she had paperwork stating that she had to take the test prior to returning to work on Friday November 14, 2003. She denied that she received that memo but admitted that she had the other paperwork. I asked her
 30 why she would think that she could wait until Monday when she was selected for a random test to be taken prior to Friday. I told [her] the purpose of a random drug test was not to wait until drugs may be out of someone's system by waiting several days. I then told her that I would check on what the memo actually stated. I received a copy of the memo and it is clear. I also confirmed that the memo was handed to Ms. Sanders
 35 and I was told that it was personally handed to her.

We have never had anyone not take their random drug [test] as directed. Ms. Sanders has signed the Drug-Free Workplace Policy that states refusal to voluntarily submit to a drug test will result in termination, this includes random testing. She has admitted to me
 40 that she did not intend to submit a sample until Monday – four days after she was [supposed to] submit the sample.

I called Ms. Sanders and have suspended her until further notice. I told her that I will continue to investigate this violation and will contact to notify her whether she will be terminated or be allowed to return to work. I also told her that [if] she is allowed to return
 45 to work, DCT will pay her for the days she missed.

Cheryl Bernardi

November 17, 2003

After consulting [with] counsel, DCT has decided to discharge Carol Sanders as of
 50 today. I called Carol Sanders house ... and left a message that she was discharged as of today and that she could pick up her last check tomorrow after FEDEX came and after she returned her uniforms and equipment.

Cheryl Bernardi

her to fax the memorandum; that Impson told her that she handed the envelope with the memorandum attached to Bolz who personally handed it to Sanders when she gave Sanders a procedural notice about excessive absenteeism; that she read the faxed memorandum, Respondent's Exhibit 52,²³ and she spoke with Bolz, and so from her standpoint she believed that Sanders had received the memorandum; that she asked Impson to check her file to see if anyone had not taken a drug test; that Impson telephoned her back and told her that everybody had followed procedure and this had never happened before; that she telephoned Sanders back and told her that she was suspended until the matter was further investigated; and that she felt that the matter needed further investigation because she

wanted to check to make sure that we ..., that nothing had slipped through the cracks, that we hadn't allowed someone ... to take it afterwards or ... if someone didn't follow procedure, if Concentra had messed up, so we were just double checking everything to make sure that it was all okay before I terminated her because I was ... it was very serious. [Transcript page 995]

Bernardi further testified that when she told Sanders that she was suspended she thought that Sanders said "okay" (transcript page 995) and she did not remember what else Sanders said; that she then talked to one of her representatives, Grubb, telling him that Sanders never offered to go and never said that she forgot; that she sent an e-mail to Grubb and she could not remember what time; that she terminated Sanders on Monday; that neither the fact that Sanders went on the picket line on Monday nor the fact that she was Secretary of the Union entered into her decision to terminate Sanders; that about 260 of DCT employees at other facilities are covered by random drug test procedures and no employee has done what Sanders did; and that DCT maintains a copy of the memorandums that are given to employees at MMAC to take a random drug test, Respondent's Exhibit 37.

Subsequently Bernardi testified that Respondent's Exhibit 37 does not include a copy of the notice which was given to Sanders; that normally if the results of a random drug test are negative, DCT is notified within a day or so; that she was not aware that at 5:10 p.m. on November 14, 2003 Sanders turned over her drug testing papers to Lieutenant Cloud; that Impson leaves work at 4 or 4:30 p.m.; that DCT closes its office at 4 p.m.; that she found out Monday that Sanders took her drug screening; that she learned the results of Sanders drug test on Monday November 17, 2003; that she did not believe that she knew that Sanders test was negative before she terminated Sanders; that she terminated Sanders on the morning of November 17, 2003 but she was not sure of the time; that even if she knew before she terminated Sanders that the drug test results were negative, that would not have changed her conclusion with respect to terminating Sanders because when she first asked Sanders why she did not take the test, Sanders did not say that she had forgotten or that she would go down and take the test; that if Sanders had made an offer to go and take the test or if Sanders said that she had made a mistake, she probably would have allowed Sanders to take the test; that the fact that the test was negative did not matter to her because Sanders did not take the test until after she was suspended; that during one of her conversations with Sanders on November 14, 2003 she did not ask Sanders what she was trying to hide; and that Sanders told her that she had never lied to her and never would but she could not remember if it was during the latter conversation with Sanders on November 14, 2003.

²³ The fax date and time is "NOV-14-2003 04:45P FROM:DCT MMAC 405 681 5020 TO DCT HOME OFC P:1/1." As noted above, General Counsel's Exhibit 47, which is the Concentra drug test result form, indicates that the sample was collected from Sanders at 4:50 p.m. on November 14, 2003.

After Sanders was terminated Wooten was assigned to the lead position. Wooten testified that he was Vice President of the Union at the time; that he worked the lead position for about 2 to 3 weeks; that after the first week in the lead position he told Bolz that he wanted the position and she told him to re-submit his resume again; and that Tim McClellan, who had more seniority than him, received the lead position. On cross-examination Wooten testified that McClellan was very qualified for the lead position; and that McClellan was approved to be lead.

Carney testified that General Counsel's Exhibit 28 are the tentative agreements the parties signed during the December 2003 sessions; that at the outset of the December 2003 negotiations Grubb introduced a proposal from DCT that effectively removed all the tentative agreements up to that point; that it was very frustrating to open up the negotiations with a new negotiator for DCT, Grubb, who was pulling back all the tentative agreements so he threatened to file a Board charge and he may in fact have filed one but he was not sure; that during the first day of the December 2003 negotiations Grubb eventually agreed to restore the tentative agreements, to return to the status quo before there was a break up, and as demonstrated by General Counsel's Exhibit 28 Grubb initialed the same wage rates that Bernardi had faxed to him, General Counsel's Exhibit 23; that General Counsel's Exhibit 28 is an excerpt of all the tentative agreements in that there were more tentative agreements reaffirmed at this December 2003 negotiation session than those in General Counsel's Exhibit 28; that in December 2003 Coughran, Whitaker, Sanders, and Wooten were on the Union's bargaining committee; and that when Coughran resigned from the Presidency of the local union, Wooten, who was Vice President of the local, took Coughran's place.

Whitaker testified that he, Coughran, Sanders, Wooten (beginning in November 2003), and Carney were on the Union's bargaining committee from September through mid-December 2003. According to Wooten's testimony, when Coughran stepped down as President of the Union at the end of 2003, Whitaker became President of the Union and he became Vice President of the Union. Wooten, who began working for the Respondent on June 13, 2002, testified that he became involved in contract negotiations in December 2003.

By letter dated December 12, 2003, General Counsel's Exhibit 53, Bernardi instructed Butler to discharge Security Guard Art DiVecchio for carrying his personal weapon while at MMAC, which according to the letter, is grounds for dismissal and possible penalties under the law. Other Company documents referring to DiVecchio include (1) a February 13, 2002 Bernardi letter, General Counsel's Exhibit 48, to him instructing him in the future not to make any unauthorized purchases, (2) a memorandum dated "5/10/03," General Counsel's Exhibit 49, to file from Captain Griffin referring to DiVecchio losing control of a box of DCT weapons and his resignation over the incident, (3) a letter dated May 19, 2003, General Counsel's Exhibit 50, from DCT's Human Resources Manager to the Oklahoma Employment Security Commission explaining how DiVecchio left seven DCT weapons in a range parking lot, which weapons were retrieved by a range customer and turned into the range manager, (4) a November 19, 2003 memorandum, General Counsel's Exhibit 51, from Lieutenant William Dodd to Captain Butler referring to an incident when DiVecchio turned in a weapon at MMAC which was not a DCT weapon, and (5) a memorandum from Lieutenant Dodd to Captain Butler, General Counsel's Exhibit 52, which indicates that on "12/12/03" he found an unsecured weapon on the bathroom floor, which weapon was assigned to DiVecchio, and that one hour later DiVecchio came to claim the weapon. Bernardi testified in response to questions of Counsel for General Counsel, that DCT rehired DiVecchio after he resigned and she could not recall any problems with DiVecchio after he was rehired; and that she did not know whether Captain Butler issued any discipline to DiVecchio over the November 19, 2003 incident.

General Counsel's Exhibit 25 is the collective bargaining agreement between the Union and DCT which Tolman and Bernardi signed on December 16, 2003, and which, according to its first page, appears to be effective from December 2003 to December 31, 2004. When called by Counsel for General Counsel, Tolman testified that the agreement became effective on
5 December 31, 2003; that while on page 28 of the agreement "Lead Officer: \$16.83 is printed, he placed a line through "\$16.83"; that he did not cross "\$16.83" out during collective bargaining negotiations; that he wrote "15.83 discuss" next to the "\$16.83" he crossed out; that Bernardi wrote "DCT wanted all officers to receive same rate of pay" above and next to where he wrote "15.83 discuss"; and that he wrote "15.83 discuss" after he signed the agreement.

10 Carney testified that the next to last page of General Counsel's Exhibit 25 is the execution page which shows that the collective bargaining agreement was executed on or about December 16, 2003; that there was an oral understanding with respect to the wage rates for Security and Lead officers in September, the understanding was affirmed in writing in October
15 2003, and in December Grubb initialed the wage rates showing that they were reaffirmed; that three times the \$16.83 an hour for the lead officers was discussed and negotiated and they were in all his retypes up to that point and they were not contested; that DCT executed the collective bargaining agreement on December 16, 2003; and that at no time between early
20 December 2003 and December 16, 2003 did DCT ever take the position that lead officers should be paid \$15.83 an hour. On cross-examination Carney testified that there was an oral understanding in September regarding the wages; that he faxed just the signature page of the collective bargaining agreement to Bernardi and Tolman; that he e-mailed the final draft of the agreement to Grubb who e-mailed back that he reviewed it and it was fine; that subsequently
25 the agreement was ratified and then he faxed the signature page to Bernardi for execution; that he believed that there was a time constraint in that DCT had to submit a modification of their government contract to get reimbursed for the labor cost adjustments and DCT had to get it to the Federal government by a certain time; that Lewis Franco, the contract officer imposed a deadline to submit the agreement pursuant to the Service Contract Act and the Federal Requisition Regulations for DCT to get a modification to its government contract; and that during
30 negotiations Grubb expressed concern about paying higher wages and then not getting reimbursed by the FAA.

Whitaker testified that the collective bargaining agreement was signed in the middle of
35 December 2003; and that the lead pay in the collective bargaining agreement was \$16.83 per hour.

Sanders testified that during the ratification vote, the collective bargaining agreement was discussed with the members; that the wage rates for leads in the document that was
40 discussed with the members was \$16.83; that she did not know about the handwritten information on General Counsel's Exhibit 25; and that the lead pay rate, \$16.83, was discussed with the members at the ratification meeting.

Bernardi testified that she believed that the contracting officer sent the collective bargaining agreement to the Department of Labor which approved it with the \$16.83 for leads;
45 and that this amount would have been reimbursed if the agency found that there was no variance, but when she found out she had made a mistake she e-mailed the contracting officer and advised him that leads were only supposed to receive \$15.83 an hour and that would be corrected.

When called by Counsel for General Counsel, Tolman testified that on or about
50 December 30, 2003 he attended meetings with employees at MMAC where he discussed the collective bargaining agreement that he had signed; that he discussed with the employees the

lead officer rate of pay; and that since the beginning effective date, lead officers have been paid \$15.83 per hour.

5 Whitaker testified that he attended a mandatory employee meeting in the last two weeks of December 2003; that there were about 10 or 15 employees at the meeting he attended; that there were other meetings for the different shifts; that the meeting he attended lasted 1 hour; that the Company indicated that they did not know what they were signing when they signed the collective bargaining agreement; and that Bernardi said that once she had seen the collective bargaining agreement she cried for an entire day over the lead officer's pay, and the Union
10 tricked the Company.

Wooten testified that on December 30 he attended a mandatory employee meeting; that there were about 25 officers present, including Whitaker; that Bernardi spoke stating that there was a mistake in the collective bargaining agreement in that leads were only supposed to make
15 25 cents more an hour than officers; that Tolman said that those involved in the negotiations were all sneaks and Carney was a liar; that he initiated a discussion on the 401(k), indicating that he wanted out of it and he wanted the \$2.36 put in his paycheck; and that Tolman said "Well, I will just keep your \$2.36 myself.... if you don't want that \$2.36, I will keep it" (transcript pages 730 and 731). On cross-examination Wooten testified that this meeting took place at ILS
20 North; and that he was not sure if he had any conversation with Lieutenant Dodd on December 30, 2003 or the morning of December 31, 2003 regarding DCT's 401(k) plan.

Coughran testified that DCT reviewed the collective bargaining agreement with the employees at a meeting at MMAC, with Bernardi telling the employees that he and other
25 employees and the Board were lying about some things that were said, some agreements that were reached, and there was a mistake made, the employees knew it and they were lying about it; and that according to the agreement lead officers were supposed to make \$16.83 an hour but Bernardi stated that it was supposed to be \$15.83 and that is what DCT paid while he worked there.
30

Bernardi testified that contrary to Coughran's testimony, she did not tell the employees that the NLRB was lying at the meetings she held for the three shifts; that she went through the highlights with the employees and she indicated the mistake she made on the fax regarding
35 lead officers' pay and DCT was only going to pay the 25 cents more an hour to the leads; that she told the employees that the Union negotiating committee knew that she made a mistake and they did not bring it to her attention; and that she never called anyone a liar.

On rebuttal Whittaker testified that after the contract was entered into, he attended a meeting with management concerning the contract; that all of the employees who got off at
40 noon were there, including Wooten, Coughran, Brim, and Ricky Putman; that Bernardi and Tolman conducted the meeting; that the 401(k) plan was discussed and it was indicated that the employees had to choose between the insurance available or the 401(k) plan and the employees could not opt out of the 401(k) plan; that Wooten expressed concern over this, indicating that he wanted to opt out of the 401(k) plan and the insurance plan and DCT would
45 have to give him his money; that Tolman said "no, I'll just keep your money" (transcript page 1401); and that then Bernardi said that no one here is going to keep your money but the employees had to choose one or the other. On cross-examination Whitaker testified that it had yet to be determined whether Tolman lied to the employees during this meeting; that the issue probably would be decided during the forthcoming arbitration proceeding; that he believed
50 Tolman lied when he said the he was going to keep Wooten's money; and that Wooten was also concerned about why the money the employees earned took so long before it was actually deposited in the 401(k) plan but he was not sure if this was raised during this meeting.

Coughran testified that he requested to talk with Bernardi in December 2003 and while they were talking Tolman came into the room; that he told Bernardi that he wanted to talk to her alone and Tolman said that he was an owner of the Company also and he was going to stay; that Tolman then said ‘Mr. Coughran, I don’t like you. I never have. I don’t hold grudges, but I do
5 have enough money and enough power to get rid of my problems’ (transcript page 878); and that he told Tolman ‘I don’t like you either, but that doesn’t change the fact that we’re both men and we’ve got to deal with this Union and the Company, and we need to sit down and talk about what we need to do in the future to make this run right’ (*Id.*).

10 Bernardi testified that Coughran did ask to talk to her; that Tolman, who was present, wanted to participate in the conversation; that Coughran said that he did not want Tolman there; that Tolman said that he was part owner of the company and he could be there; that Coughran said that he did not want Tolman in the meeting; that Tolman told Coughran that he did not like
15 him and Coughran told Tolman that he did not like him either; that at that point she asked Tolman to step out so that she could talk to Coughran; and that Tolman did not say that he had enough power or money.

20 On December 31, 2003, according to the testimony of Wooten, Tolman telephoned him at the Visitors Center. Regarding this conversation, Wooten testified as follows:

immediately, David Tolman starts cussing me, calls me a son-of-a-bitch, ‘You better
keep your f---ing mouth shut about me or I will take you to court and sue you for
everything that you have got.’ [Transcript page 732]

25 Wooten further testified that when he asked Tolman if he was threatening him Tolman said “It’s not a threat, it is a promise, you mother f---er.” (transcript page 733)

30 Bernardi testified that she overheard Tolman’s portion of this conversation and she heard Tolman say “If you keep slandering me and accusing me of stealing your money, I will sue your ass,” (transcript page 1031) and that was all Tolman said that could be considered a “cuss” word. (*Id.*)

35 Lieutenant William Dodd testified that he sent the following memorandum, Respondent’s Exhibit 53 dated “12/31/03,” to Captain Butler:

On 12/31/03 at about 0515 hrs. as officer Wooten & officer Brim, while awaiting
for their shift to start (not on the clock) were complaining about the meeting on 12/30/03
with the owners! Officer wooton [sic] was complaining that the meeting was illegal
40 because nonunion members were allowed to know what was in the contract, and further stated that David was lying about the 401k money.

45 Officer Brim was complaint [sic] that an ex-employee (Macomb) who had a person from the state unemployment office recorded a DCT employee per a phone conversation state that Macomb was fired due to he was in the union.

I just thought you mite [sic] want to know this thing that was discussed this
morning. Being that Officer Wooten stated that they were filing charges against DCT.

50 Lt. Dodd

Dodd further testified that his shift ends at 7 a.m. and that is when he submitted the

memorandum; and that at approximately 10 a.m. Tolman telephoned him at his residence about the memorandum.

5 Tolman testified that after he received Dodd's memorandum he telephoned Dodd to find out if he had any additional information; that he then spoke with Bernardi and asked her if it would be all right if he personally telephoned Wooten; that he telephoned Wooten at his post and he asked Wooten what he supposedly lied about regarding the 401(k); that Wooten said that he did not have a clue about this allegation; that he told Wooten that he had a document indicating that Wooten said he lied about the 401(k); and that Wooten told him that he did not
10 know where he was getting his information. Tolman testified as follows about this conversation:

15 I told him, Mr. Wooten, I am sick and tired of you slandering me. ... the next time you slander me I am going to have - - I am personally going to have my attorney file a slanderous lawsuit against you. And he said are you threatening me. And I said, Mr. Wooten, I'm telling you what I'm going to do. This is not a threat. I am telling you what is going to happen. I - -

....

20 At the very end of the conversation, I said, Mr. Wooten if you slander me one more time, I'm going to sue your ass. And I hung up the phone.

Tolman further testified that he did not use the profanity Wooten testified about. On cross-examination Tolman testified that the Union filed a grievance over this issue regarding the
25 401(k) and the matter is going to arbitration.

Respondent's Exhibit 29 is an official reprimand, dated December 31, 2003 from Captain Butler to Coughran which Coughran read but refused to sign. The document reads as follows:

30 This is an official reprimand for violation on December 30, 2003 of the DCT Inc. Guard Manual, Chapter 2, Items 8 and 17.

35 Item 8: 'Insubordination toward the client, supervisors or management personnel.'
Item 17: 'Disorderly conduct, abusive or offensive language, quarreling, fighting or attempting to intimidate someone. This would also include interfering with normal, efficient operations.'

40 You also violated Section C.3.27 (Disorderly Conduct) of the Statement of Work: 'Disorderly conduct, use of abusive or offensive language, quarreling, intimidation by words, actions, or fighting shall not be condoned. Also included is participation in disruptive activities, which interfere with normal and efficient Government operations. The Government reserves the right to direct the Contractor to remove an employee from the work site for failure to comply with the Disorderly Conduct clause.'

45 Any such violation by you in the future could result in time off without pay or termination.

DCT security guard Bobby Phillips testified that in November 2003 DCT changed its payday in that the employees used to be paid on Thursdays and DCT began paying its employees on Friday; and that the change for him meant that he had to make a 72 mile trip to
50 get his check. On cross-examination Phillips testified that he did not recall what day of the week the checks were dated when he received them on Thursday; and that he would not dispute it if company records showed that the checks were dated for Friday on each of the weeks but he

received them on Thursday and he was able to cash them. Subsequently Phillips testified that he used to cash his paycheck on Thursday at the FAA Credit Union which was on base; and that when he went to the FAA Credit Union he made a deposit and he had an account there for a long time.

5

Regarding the change in payday, Wooten testified that after the mandatory employee meeting DCT, without negotiating with the Union over this change, changed the payday from Thursday to Friday; that before the change the check was there at headquarters when he clocked out and turned his handgun in on Thursdays; that with the change, the checks were distributed at ILS North and they could not be picked up until 1:30 p.m. whereas he got off at 12:00 noon; and that before this he has been able to pick up his paycheck on Thursdays and sometimes on Wednesdays since he started working for DCT on June 13, 2002. On cross-examination Wooten testified that he did not know whether the paychecks had always been dated on a Friday; that he believed that this was one of the things that he and Bernardi discussed where Bernardi became angry over something and made this change; and that when the employees received their paychecks on Friday they were forced by management to leave the Center after they got off from work at 12 noon and they had to come back at 1:30 p.m. to pick up their paychecks.

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Bernardi testified that Phillips was correct in his testimony that DCT did sometimes give paychecks out on Thursdays if the payroll was finished on time and Impson was able to get them to the employees on time; that Respondent's Exhibit 38 gives all the pay dates for the security officers at MMAC since DCT first took over the contract and the exhibit indicates that the payday has always been Friday; that at the beginning of the contract management explained to the security officers that the actual payday is Friday but since the employees work shifts DCT would try to get the paychecks handed out on Thursday; and that paychecks were handed out on Thursday until DCT had a complaint from McClain, the FAA Contracting Officers Technical Representative (COTR), which is DCT's boss on the government side, that DCT guards during working hours, in uniform, driving security vehicles were going through the drive-through at the credit union. On cross-examination Bernardi testified that at the first meeting with employees on January 1, 2001 they were told that DCT reserved the right to hand out paychecks on Friday.

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Regarding Wooten's application for a lead officer position in December 2003 or January 2004, Tolman testified, when called as a witness by Counsel for General Counsel, that it was his understanding that Wooten wanted to be a lead officer and DCT submitted his paperwork to the FAA stating that DCT recommended him to be a lead officer at MMAC; and that to his knowledge, prior to that time Wooten had not been a lead officer at MMAC.

40

Sanders testified that in January 2004 Special Agent Hill telephoned her and asked to speak with her; and that she gave a statement to Hill regarding her earlier conversation with him which is covered in her log, Respondent's Exhibit 12.

45

Bernardi testified that the wage rate that went into effect on January 1, 2004 for security officers under the collective bargaining agreement is \$15.58 per hour; that DCT had not been reimbursed at the time of her testimony on September 20, 2004 from the FAA for the full \$15,58; that DCT had been reimbursed for the Department of Labor wage determination minimum of \$14.42 an hour; that DCT has honored the collective bargaining agreement and annually for 2004 DCT will not be reimbursed for \$240,000; and that DCT found out that the FAA did not intend to pay the full amount in January 2004 right after the collective bargaining agreement went into effect.

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On cross-examination Wooten was shown a letter dated January 5, 2004 which he had never seen before and which indicates 'DCT, Incorporated is proposing Officer Ted Wooten as an additional Shift Supervisor effective January 12, 2003.'²⁴(transcript page 765) Wooten testified that his resume that was submitted with the letter was an old resume and it did not have the many times he worked as a lead officer at the Visitors Center when the lead officers did not come to work.

Bernardi testified that the procedure for promoting an officer involves DCT submitting the individual's resume with a letter to the COTR in accordance with the contract; that COTR sends back a letter indicating to DCT whether the applicant is qualified and whether the person can hold the position of supervisor; that if the FAA indicates that the person is not qualified DCT cannot promote the person; that she was involved in the application of Wooten and Captain Butler submitted the papers; that she felt that Wooten was qualified for the lead position; that the FAA indicated that Wooten did not meet the requirements of the contract, and the FAA would not approve him for a supervisor; and that even though she felt that Wooten was qualified for the lead position she could not promote him.²⁵

Captain Butler testified that he submitted Wooten's name to the FAA for promotion to site supervisor at MMAC by letter dated January 5, 2004, Respondent's Deposition Exhibit 10 to Joint Exhibit 2; that the FAA denied the promotion; that DCT could not have promoted Wooten at that point; and that he would submit Wooten again for promotion if he gets more qualifications so that he meets the standard.

On January 8, 2004, the Respondent, which was now represented by Gallagher, Flynn, filed a Motion to Vacate and Rescind Settlement Agreement, for Recoupment of Funds Paid and for Dismissal of Complaint in Case Numbers 17-CA-22271 and 17-CA-22275, General Counsel's Exhibit 19. Briefly, Respondent argued that Coughran and Whitaker, who were reinstated to work with DCT on or about August 11, 2003 pursuant to a Settlement Agreement which was the subject of the motion, through their attorneys, Killiam and Drain, respectively, and Counsel for General Counsel Hoskin mislead DCT regarding interim earnings.

Drain testified that he received DCT's motion, and he believed that he told Cremin and Hoskin that he was no longer on the case.

On January 13, 2004, according to his testimony, Whitaker was told by Captain Butler to go, along with Coughran and Mark Brown, to Earl Hill's office. Hill identified himself as a Special Agent of the FAA. Whitaker gave a written, signed statement, General Counsel's Exhibit 34, to

²⁴ As noted on page 1 of Respondent's Deposition Exhibit 10 to Joint Exhibit 2, Butler was proposing Wooten as a "site supervisor."

²⁵ Page 2 of Respondent's Deposition Exhibit 10 to Joint Exhibit 2 is a letter from Quintero, of the FAA, to Captain Butler dated January 9, 2004, which reads as follows:

We have reviewed your proposal to promote Officer Ted Wooten as a site supervisor and offer the following response:

Officer Wooten is not a qualified candidate and does not appear to meet the requirements of the Contract Number ... Certification of Contract Guard, Site Supervisor requirements, i.e., guard experience must be two years with six months of supervisory experience in facility protection at a level equivalent to the scope of work of this contract.

We cannot concur with your request at this time. I would not recommend the above candidate as acceptable. Should there be extenuating circumstances or experience not shown on the request then a new request should be supported by the new data.

Hill, who also signed the statement, regarding whether anyone ever asked him to provide his user id and password for the government owned computer which he uses; and that Tolman asked for his computer password after he was reinstated but at that time he had forgotten the password. Tolman's request and another incident involving a computer are referred to in
 5 Whitaker's statement.

By affidavit dated January 13, 2004, Respondent's Exhibit 28. Coughran advised FAA Agent Hill, *inter alia*, that Bernardi and Tolman asked him for his computer user id and password, and they did not tell him why they needed this information.
 10

General Counsel's Exhibit 46 is the reassignment list effective January 26, 2004. Wooten, who was moved to the Foster Gate, testified that when these changes went into effect there was no discussion by a supervisor or manager about this being cross-training; that before this reassignment he had worked in the Visitors Center for 8 or 9 months; that during a typical
 15 shift in the Visitors Center he worked with about six co-workers; and that at the Foster Gate he did not work with any co-workers, he would have to be relieved to take a break, and he was not allowed to rotate out of the position which had been done in the past. On cross-examination Wooten testified that all of those who were reassigned were union members.

By letter dated January 30, 2004, General Counsel's Exhibit 21, Bernardi advised
 20 Whitaker as follows:

As you know, we have been investigating the possibility that DCT Incorporated was lied to during the negotiations that ultimately led to the settlement of cases 17-CA-22271 and
 25 17-CA-22275. Back in November, you met with Mr. Grubb to discuss this issue. Also present at that meeting was myself, Mr. Tolman, and Ted Wooten – your Weingarten Representative.

During this meeting Mr. Grubb asked if you had worked during the interim period when you were not employed by DCT. You said you had and that you had informed Mr.
 30 Charles Hoskin of the NLRB of that fact early on in his investigation of the above referenced charges.

We have asked the National Labor Relations Board to consider vacating the Settlement Agreement. DCT entered into the Agreement with the understanding that you had no, or very minimal, earnings during the interim period. Based on our investigation, and the
 35 investigation of the NLRB to date, this is clearly not the case.

Based on the information that we have received, either Mr. Hoskin is lying when he says you never told him the extent of your interim employment, or you lied when you said that
 40 you did. We choose to believe the Field Attorney for Region 17 of the National Labor Relations Board.

As a result, your employment with DCT Incorporated is terminated effective immediately.
 45

When called by Counsel for General Counsel, Tolman testified that this letter contains all of the reasons that Whitaker was fired by DCT on that occasion; that Coughran was fired on the same day²⁶; that Coughran's termination letter is identical to Whitaker's in every respect; that the reasons reflected in Whitaker's letter are the same reasons Coughran was fired; and that when
 50

²⁶ Coughran received the same letter from Bernardi, General Counsel's Exhibit 55.

Coughran and Whitaker were fired for the second time on January 30, 2004, he was aware that Coughran was involved with union organizing at DCT.

5 Whitaker testified that he was fired again on January 30, 2004 when he was working at the VDT Gate, Post 10; that he was sent to the VDT Gate about one week before his
 10 termination; that Sergeant LaFlamme posted the reassignment and he did not give any reasons for the reassignment; that he had a discussion with Captain Butler who told him that it was for training purposes; that while at his previous post he had a lot of interaction with several
 15 coworkers, at the VTD Gate he did not work along side any coworkers; that he did not receive any training at the VTD Gate (Whitaker referred to the Foster Gate and indicated that he was referring to either gate); that he was President of the Union when he was fired this time; that Bernardi gave him General Counsel's Exhibit 21, indicating that she believed that the NLRB was going to revoke the settlement; that he told her that he did not agree and he asked her what happens if the NLRB rules in his favor; and that she said "[w]ell you're still fired" (transcript page 351).

20 On cross-examination Whitaker testified that since he began working at MMAC on May 15, 2002, he has worked at the north, south, Foster, 1, 2, 3, and 5 gates, and at the VTD, ILS, Visitors Center, and posts 6 and 7; that DCT assigned these posts without his consent; that
 25 DCT has the right to move employees around to different posts; that there is a management rights clause in the collective bargaining agreement; and that except for the VDT Gate, Post 10, he was asked if he wanted to work at a designated post to earn some extra money.

30 Coughran testified that on January 30, 2004 he met with Bernardi who handed him a letter and a paycheck and stated that DCT no longer needed his services; that Bernardi did not tell him why DCT no longer needed his services; that months earlier he and his union representative, Wooten, met with Bernardi, Tolman, and Grubb; that Grubb asked him if he had interim employment after he was terminated in June 2003 and he told Grubb that he did in that he worked at SSSI; that Grubb told him that if he lied about this he would have been terminated and escorted off the Center; and that Grubb said that DCT had documentation that he had worked and they were going to pursue legal action.²⁷

35 ²⁷ On cross-examination Coughran testified that his DCT application, Respondent's Exhibit 20, incorrectly indicates that he left his position with the Correctional Services Corporation at Central Oklahoma Correctional Facility (COCF) because the company was sold; that his application with SSSI, dated June 20, 2003, Respondent's Exhibit 19, does not identify COCF as a prior employer; that on Standard Form 85P, U.S. Office of Personnel Management's Questionnaire for Public Trust Positions, Respondent's Exhibit 21, which he filled out for his
 40 DCT job at FAA's Center, he checked off "No" to the question has any of the following happened to you in the last 7 years, namely, fired from a job, quit a job after being told you'd be fired, left a job by mutual agreement following allegations of misconduct or unsatisfactory performance, or left a job for other reasons under unfavorable circumstances; that the dates on Form 85P for his employment at COCF are inconsistent with the dates he has on the DCT
 45 application; that on Optional Form 306 Declaration for Federal Employment, part of Respondent's Exhibit 21, dated "10/08/01" he checked "No" on item 11, namely "During the last 5 years, were you fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management?"; that he was not employed at COCF in 1996 (it was 1998) as he indicated on the DCT application and on the
 50 Federal form; that, as indicated in a memorandum dated November 25, 1998 from Warden Howard Ray, of COCF, to him, page two of Respondent's Exhibit 23 (Page one was placed in
 Continued

Wooten, according to his testimony, became President of the Union in February 2004 when Whitaker was fired for the second time.

5 On February 12, 2004, the Regional Director for Region 17 of the Board denied
Respondent's January 8, 2004 motion indicating that Coughran's and Whitaker's interim
earnings were disclosed to Respondent during settlement negotiations and DCT was aware that
Coughran and Whitaker had worked throughout the backpay period; that Coughran's and
10 Whitaker's interim earnings were less than what they would have earned if they had worked for
DCT during the involved period, and the interim earnings were not sufficient to deduct from their
gross backpay, due to their offsetting interim expenses; that it did not appear that either
Coughran or Whitaker received more backpay than they were entitled to receive; and that there
was no basis for concluding Coughran, Whitaker, Killam, Drain, or Hoskin engaged in any fraud
in connection with the settlement of these cases. General Counsel's Exhibit 20.

15 On February 18, 2004 there was another reassignment. Wooten testified that this time
the notice, General Counsel's Exhibit 47, indicated "cross-training" (transcript page 740); that he
saw the notice on the bulletin board when he turned his handgun in; that he was reassigned to
the VTD Gate which is where Whitaker was working when he was fired; that he said "VTD Gate"
20 out loud and he noticed Lieutenant Satepehtaw standing 6 feet away; that Satepehtaw smiled
and winked, he asked her why she was smiling and winking at him, and Satepehtaw walked off
without saying a word; that before she became a supervisor Satepehtaw always greeted him
with a smile and a wink; that before he saw this notice on the board there was no discussion
from DCT about this move being related to cross-training; that prior to seeing this memo he has
25 never been subjected to cross-training; that the VTD Gate is completely off Center and it is
approximately 1 mile to the first building; that this reassignment was effective February 23,
2004; that at the VTD Gate he checked people's badges and he made sure that they had a
vehicle pass before they came on Center; that this is what he did at the Foster Gate; that the

30 the rejected exhibit file.), he was suspended without pay pending an investigation for
unprofessional conduct and inappropriate conduct with offenders (All of the inmates at the
involved facility were female.); that he was told that an investigation was going to be conducted
on drug seller allegations from inmates and sexual harassment on inmates; that he telephoned
Ray and resigned the position before he received a letter dated December 14, 1998 from Ray
35 indicating that he was terminated "based upon your performance during the 6 month
probationary period," Respondent's Exhibit 22; and that he resigned because he was never
contacted about an investigation, he was tired of waiting, he decided not to go back to the
position, and he needed to get on with his life and get a job. On redirect Coughran testified that
he was never confronted with any specific allegations of specific acts of sexual misconduct,
40 drug dealings, or drug use at the involved facility; that he was never questioned by management
at the facility about these allegations; and that he has never been notified that there have been
any conclusions that he sexually harassed anyone, or used or sold drugs at the involved facility.
On recross Coughran testified that he telephoned Ray to ask him about the investigation, Ray
told him that it had not been concluded, and he told Ray that he would not be back, he was
45 resigning, and he wanted to get on with his life; and that the allegations were false and he was
not worried about them.

DCT Security Officer Kerry Sloan testified that Coughran was one of her supervisors at
COCF; and that he was escorted out of the facility because he had inmate relations. Sloan
subsequently testified that she worked at COCF for 4.5 years; that female inmates accused
50 guards of inappropriate sexual conduct often in that type of facility; that her Major told her on the
day Coughran was escorted out or shortly thereafter that the investigation was completed.

work he did in the Visitors Center was a little different; that he was alone at the VTD Gate; and that to take a break at the VTD Gate he had to be relieved. On cross-examination Wooten testified that all of those who were reassigned were union members, except one; that Whitaker was moved to the VTD Gate just before he was fired; and that he worked at the VTD Gate for a little over two months, and when he testified at the trial herein he was working at Post 3 in the Warehouse.

When called by Counsel for General Counsel, Tolman testified that in January and February 2004 employees at MMAC were cross-trained or reassigned; that the cross-training involved assigning people to different posts; that he was the one who decided to do the cross-training in January and February 2004; that Project Manager Henry Butler made the decision with respect to individual employees; and that General Counsel's Exhibit 27 reflects the people to be moved for cross-training.²⁸ In response to questions of Respondent's representative, Tolman testified that Article 5.1E of the collective bargaining agreement, General Counsel's Exhibit 25, means that DCT can move people from post to post if it so desires; and that he did not tell Captain Butler to pick the employees based on their union affiliation or even pick any particular employee.

Bernardi testified that she was told that there was going to be cross-training at MMAC and she said that was okay; that she then received an e-mail from the Union, Respondent's Exhibit 40, indicating that there would be a massive breach of security because of the massive post changes; that she telephoned DCT at MMAC and was told that about 30 people were being moved, she told them about the Union e-mail, and she told them to scale the move back a bit; that she was told that 20 people were going to be moved for cross-training purposes and no one's time of work would be affected; that the employees would be switched to different posts to get some experience at different posts; and that Project Manager Butler was responsible for implementing this cross-training.

Satepeahtaw testified that she participated in discussions regarding the cross-training of officers at the beginning of 2004; that she did not recall the reasons why cross training was being discussed; that she, Impson, and Bolz once discussed moving people because some officers were getting too relaxed at some of the posts and they would let people they knew go through without checking their badges thoroughly; and that Captain Butler did not participate in these discussions.

Bolz testified that she participated in discussion with Impson, Butler, Satepeahtaw, and Pavlicek regarding cross-training employees early in 2004; that Butler called the meeting; that they discussed the fact that some of the security officers had worked in the same area for an extended period of time; that at the first meeting dealing with this subject matter they discussed cross-training 35 to 40 security officers, without changing the employees' schedules; that union support was not a factor considered in any discussion she participated in; that she did not know whose decision it was to start the cross-training; that a couple of days later she attended a second meeting, with Butler and with Impson possibly being in the room; that it was a quick meeting in that Butler just gave her a piece of paper with seven or eight names on it and she moved these people; and that Butler did not tell her how these people were chosen.

Project Manager Butler testified that he participated in discussions in early 2004 regarding the cross-training of employees at MMAC; that DCT had tried earlier to cross-train

²⁸ The subject of the memorandum is "1/26/04 Post Change List." It was agreed that this does not represent the complete list of cross-training.

employees but it did not work because it had mostly 8 hour employees and the changes would have resulted in changing peoples' days off; that with the employees who worked 6.5 hour shifts early in 2004 DCT could move them without changing their days off or their working times; that initially DCT decided to cross-train 40 to 45 employees who worked 6.5 hour shifts; that he
 5 discussed cross-training with his assistant, Impson, and with Lieutenants Satepeahtaw and Bolz; that he identified the 40 to 45 employees and presented this to Tolman and Bernardi; that the Union, probably through Coughran, Whitaker, and Wooten, complained to him; that Tolman or Bernardi told him that complaints had been received; that he and Lieutenants Satepeahtaw and Bolz got together and reduced the list to eight or nine; that "there was no set thing"
 10 (transcript page 1166) in choosing the eight or nine and they were chosen based on "the location of where they were in" (*Id.*); and that he did not recall what criteria or how he chose these eight or nine employees. Subsequently Butler testified that he chose the eight or nine with Satepeahtaw and Bolz; that there was no particular method as to how they chose the eight or nine; that Coughran had spent his whole term at Isle S North and he needed to learn something
 15 else; that there were other employees who knew only one job but they were probably not included in the eight or nine chosen but they may have been; that he Satepeahtaw and Bolz "just sat down and decided that they could move this one here, move this one there, that type of thing" (transcript page 1178); that the three of them actually discussed it; that he could not say that there was a criteria but rather the moves were made so the employees could learn
 20 something new; and that to his knowledge there were no specific recent complaints which occasioned the moves. On redirect Butler testified that the first time he worked for DCT at MMAC the FAA mentioned that DCT should cross train; and that it was also mentioned when he worked for DCT the second time, he could not remember when it had been brought up, but he believed that McClain, who works for FAA, brought it up.

25 Impson testified that she was involved in one or two discussions about cross-training of employees in 2004; that Captain Butler, and Lieutenants Satepeahtaw and Bolz were at these meetings; that the fact that there were complaints from the Government about ILS and the Visitors Center and the officers working there was discussed; that they felt that they should
 30 cross-train some people and move some people around; that the Captain had talked with the owners of the Company; that initially there were 30 to 40 people, all 6.5 hour Monday through Friday employees involved since their shifts were all the same; that either Tolman or Bernardi told her that there were complaints from the Union that it was a security risk; and that she assumed that the Captain then picked the six employees to be cross-trained because the
 35 Captain told her who the six were but he never said why he picked these particular people. On cross-examination Impson testified that she assumed the complaints which led to the cross-training were in writing but she did not know this or what the complaints were; that she did not know that Coughran, Whitaker or Sanders were members of the Union; and that she had seen their names and Wooten's as officers of the Union on some Union document or literature.

40 Gary Flatt, who is a security dispatcher on the swing shift (3 p.m. to 11 p.m.) at DCT, testified that in mid- to late March 2004 while at work he received a telephone call from a company called Concentra at about 7 to 7:30 p.m.; that he told the caller that drug test
 45 paperwork is not available in the evenings in that supervisors do not have access to it and she would have to call back and talk with Impson or Captain Butler; that he was aware that one of his coworkers, Bobby Phillips, took a drug test that night; and that he told Lieutenant Cloud, his supervisor, about the conversation with Concentra, and Cloud said that was correct.

50 Phillips testified that in April 2004 he was given an envelope by the dispatcher or his lieutenant to take an annual physical and drug test; that he went to Concentra in the evening after work; that when the envelope was opened at Concentra it was empty; that without the paperwork he could not take the physical or the drug test; that he telephoned Lieutenant Cloud

from the clinic that evening but because of the hour the lieutenant was not able to obtain the paperwork from Impson's office, which was locked; that the next day he told Captain Butler that there was nothing in the envelope; and that he took his physical and drug test the next day. On cross-examination Phillips testified that he telephoned Lieutenant Cloud about 6 p.m. from Concentra. On redirect Phillips testified that when he telephoned from Concentra dispatcher Flatt answered first, he got Lieutenant Cloud, and Cloud told him that there was nothing he could do because Impson had already left the office.

Lieutenant Cloud testified that he recalled an incident regarding Phillips' annual drug test; that Dispatcher Flatt told him that Concentra wanted to speak with him; that he spoke with either a nurse or receptionist at Concentra who informed him that Phillips would be returning without his paperwork because their computer system was down; that he did not recall speaking with Phillips over the telephone while he was at Concentra; that he was not aware that Flatt had a somewhat detailed conversation with Concentra; that he was in a position to see whether or not Flatt had a detailed phone conversation with Concentra; that Flatt had a telephone call and then he said Lieutenant Cloud, you have a telephone call, it is Concentra, and they want to speak to a Supervisor; and that he did not remember Flatt having a lengthy conversation with Concentra. On cross-examination Cloud testified that the phone calls that go to dispatch are recorded by the the FAA; that while he works in his office, which is right next to dispatch, he does not spend time listening and timing phone calls to the dispatcher; and that this early evening telephone call could have been a little longer than he suggested on direct. On redirect Cloud testified that Flatt does not have supervisory authority. Subsequently when asked "[w]as it your understanding that, although Mr. Phillips was not going to return with the paperwork because their system was down, the sample was still collected" (transcript page 1093) Cloud testified that

They led me to believe that he accomplished his obligation and that they did not have any paperwork, to send to us. That is what - - that is what I was led to believe, by that statement but they did not get into detail. They just wanted to give - - let me know that he would not have any paperwork coming back and I took that to mean, so he is not in trouble in the morning and I briefed my Supervisor. [*Id.*]

Further, Cloud testified that it was his understanding that Phillips took the drug test that day.

Joint Exhibit 2, as here pertinent, is the deposition of Christopher Quintero which was taken on May 17, 2004. Collectively, in response to questions of Hoskin and Quist, who is one of the Respondent's representatives, Quintero testified that he reviewed Wooten's application (a letter and a one-page resume) for lead officer position; that he concluded that Wooten did not have sufficient experience in that he had not been a guard for the required 2 years (Wooten had 1.5 years experience.); that he communicated this to DCT in a letter dated January 9, 2004; that the contract between the FAA and DCT gives the FAA the authority to determine whether or not certain people meet the qualifications to be assigned to certain positions; that the FAA's determination is a final determination as of that date; that he has never known DCT to promote an individual after the FAA determines that the person is not qualified; and that if DCT promoted an individual against the FAA's determination, DCT would be in violation of the contract.

Analysis

Paragraphs 5(d), (e), and (f) of the complaint collectively allege that in or about November 2003, Respondent changed the payday for the Unit from Thursday to Friday, the payday relates to wages, hours, and other terms and conditions of employment and is a mandatory subject for the purposes of collective bargaining, and Respondent made this change

without notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct. Counsel for General Counsel contends on brief that as demonstrated by General Counsel's Exhibit 26, before the change, paychecks were generally made available to the involved employees on Thursdays, albeit the check was dated on Friday, as a matter of convenience to employees; that Respondent's own internal memo, General Counsel's Exhibit 26, indicates that prior to November 2003, "pay checks are generally distributed on Thursday"; that it is irrelevant what date DCT chose to put on the paychecks; that the issue is whether DCT could unilaterally change the day of the week it routinely issued the paychecks to the employees; that the testimony of Phillips illustrates why the Board has long held that employees pay and issues related to employee pay are mandatory subjects of bargaining; that the record is clear that Respondent changed the day the pay checks were routinely issued at the time it was obligated to first notify the Union of its intention to make the change, and then bargain in good faith concerning the change; and that since the Respondent did neither, it violated Section 8(a)(5) of the Act as alleged in paragraph 5(d), (e), and (f) of the complaint. Respondent on brief argues that Bernardi testified that the reason the day the pay checks were handed out was changed is that there was a complaint from the FAA about DCT guards going through the government's credit union during working hours, in their security vehicles, with their uniforms on; and that the testimony of the two witnesses called by General Counsel is conflicting in that while Wooten testified that after signing the collective bargaining agreement, DCT changed the date pay checks were given to employees, Phillips testified that in November 2003 DCT changed the day employees received pay checks from Thursday to Friday.

The Respondent does not deny that sometime after the Union won the election the Respondent changed its practice so the pay checks were distributed on Friday instead of Thursday. General Counsel's Exhibit 26 shows that the practice of distributing pay checks on Thursdays existed before the election and, indeed, when it was not followed that one time the Respondent believed that it was necessary to explain why. Bernardi testified that the practice was changed after the Union won the election because of the above-described alleged complaint from FAA. A written complaint was not introduced. And the individual who allegedly complained was not called as a witness. Moreover it was not demonstrated that the employees were told at that time about any problem, let alone given the chance to explain or change the conduct alleged. And no memorandum like General Counsel's Exhibit 26 was produced explaining the permanent change in the policy. The Respondent was aware that the change in the day the pay checks were distributed would create some hardship for its employees. As General Counsel's Exhibit 26 points out, Respondent itself acknowledged "pay checks are generally distributed on Thursday as a convenience for our employees." Section 8(d) of the Act requires employers and collective-bargaining representatives to bargain about "wages, hours, and other terms and conditions of employment." As pointed out in *Venison New York, Inc.*, 339 NLRB 30, 30-31 (2003),

Matters are subject to this mutual duty to bargain if they are 'plainly germane to the "working environment"' and 'not among those "managerial decisions which lie at the core of entrepreneurial control.'" [Footnote omitted]

There is no question that the payment of wages is a mandatory subject of bargaining. But, in the circumstances extant here, is the day of the week on which distribution of the pay check occurs a mandatory subject of bargaining? Since the pay checks have a Friday date on them, could the employees derive an economic benefit by receiving them on Thursday? In my opinion the date on which the employees receive the pay check must not be viewed solely in terms of economic benefit. As noted above, Respondent was aware that receiving the pay checks on Thursday was a matter of convenience to the employees. Respondent revoked its longstanding policy

without any explanation to the employees. And it did so in a manner that had to be viewed as retaliatory by the employees in that not only did it change the distribution day to Friday but also those of its employees whose shift ended at noon were not given their pay checks when they got off from work at noon on Friday. Rather, they were required to leave MMAC and return an hour and a half later to pick up their paychecks. It was not disputed that the unilateral change in the distribution day of the pay checks caused at least one of the involved employees to suffer the expense and loss of time required to drive 72 miles to pick up his paycheck on Friday. The Respondent did not establish a legitimate reason for this change that is unrelated to the exercise of Section 7 rights. In these circumstances, I believe that Respondent unlawfully, unilaterally changed a term and condition of employment, namely changing the day the employees receive their pay checks, without affording the Union an opportunity to bargain over this issue. As alleged in the complaint, the Respondent violated Section 8(a)(1) and Section 8(a)(1) and (5) of the Act with this conduct.

Paragraphs 5(h), (i), and (j) of the complaint collectively allege that since on or about January 1, 2004, Respondent has failed to continue in effect all the terms and conditions of employment contained in the collective bargaining agreement which it entered into on or about December 16, 2003 and which is effective until December 31, 2005 by failing and refusing to pay lead employees at a rate of \$16.83 per hour, without the Union's consent, and notwithstanding the fact that the lead pay rate is a mandatory subject for the purposes of collective bargaining. Counsel for General Counsel contends on brief that while the Respondent alleges that it was tricked with respect to the \$16.83 per hour for leads, and the Union was lying and cheating with respect to this wage rate, the evidence demonstrates that (1) Bernardi tentatively agreed in her fax to Carney on October 28, 2003 to pay lead officers \$16.83 an hour, (2) Grubb, Respondent's chief negotiator, reiterated this agreement on December 5, 2003, when he initialed \$16.83 for lead officers, and (3) this agreement on \$16.83 to lead officers was finalized in the collective bargaining agreement signed by Respondent later in December 2003; that subsequently Respondent was not happy with the prospect of paying lead officers \$16.83 an hour and it took unilateral action instead of bargaining with the Union over a proposed reduction to the agreed-upon wage rate; and that this type of unilateral action violates Section 8(a)(5) of the Act. Respondent on brief argues that as Sanders testified, nowhere in her official notes of the October 27, 2003 telephone negotiation is there any reference to paying lead officers \$16.83 an hour; that Coughran and Sanders did not try to correct the lead officer wage rate of \$15.83 an hour in the reclassification notices to them; that as Bernardi testified, the wage rate of \$15.83 per hour for lead officers was part of the settlement agreement with the Board and was the wage rate that was to be included in the collective bargaining agreement; that DCT relied upon the union to type the collective bargaining agreement in accordance with the wishes of both parties; and that due to time constraints Bernardi had Carney fax her the signature page of the collective bargaining agreement.

There are three signed or initialed documents in the record indicating that Respondent agreed to pay \$16.83 per hour to lead officers. Bernardi signed her October 28, 2003 fax, Grubb, who was Respondent's chief negotiator and its lead representative at the trial herein, initialed the \$16.83 tentative agreement on December 5, 2003, and both Bernardi and Tolman signed the signature page of the collective bargaining agreement on December 16, 2003. If there was a mistake on the part of the Respondent, it was a repeated mistake. And in the circumstances extant here it involved, if it was a repeated mistake, repeated negligence on the part of the Respondent. In my opinion, Respondent should be bound by the terms of the collective bargaining agreement. The Respondent argues that it relied upon the union to type the collective bargaining agreement in accordance with the wishes of both parties. Respondent's chief negotiator initialed the \$16.83 per hour for lead officers tentative agreement after Bernardi signed a fax indicating \$16.83 per hour for Lead Officers. In view of these two

documents, it appears that the Union did type a collective bargaining agreement that was in accordance with the wishes of both parties. Additionally, Grubb, Respondent's lead representative at the trial herein and its chief negotiator, did not dispute that he was e-mailed the final draft of the collective bargaining agreement and that he e-mailed back that he had reviewed it and it was fine. The grounds Respondent cites for its unilateral action do not demonstrate conclusively that the position that Respondent is taking is correct. Respondent has not shown why the collective bargaining agreement it signed should not be enforced, notwithstanding the fact that leads would be paid more than some of the people who Respondent describes as supervisors. Respondent violated Section 8(a)(1) and Section 8(a)(1) and (5) of the Act as alleged in paragraphs 5(h), (i) and (j) of the complaint.

Paragraph 6(a) of the complaint alleges that on or about September 16, 2003, Respondent, by Henry Butler, at Respondent's facility interrogated employees about the employees' union activities. Counsel for General Counsel contends on brief that at the time Captain Butler, the Project Manager who was the highest ranking officer at MMAC and who had the authority to fire or discipline, interrogated Howell in the Captain's office, the labor relations atmosphere at MMAC was tainted in that the Union's two lead organizers had been fired and, by way of a Board settlement, reinstated, and Respondent had issued a work rule which prohibited employees from "solicitation and distribution of any materials that are not work related" (General Counsel's Exhibit 16); that with respect to the nature of the information sought, Butler's questions went to one of the most basic aspects of the relationship between a union and a member, namely the payment of dues; that Butler asked Howell when, where, and to whom he paid his dues; that albeit Butler told Howell he had no problem with him being in the Union, Butler did not tell Howell that the answers to Butler's questions would not get him in trouble; and that the meeting was far from casual with Howell being summoned to Butler's office and ordered to write a statement concerning their meeting and submit it to Butler. Respondent on brief argues that apart from this one incident, there were no other conversations with any members of DCT management regarding this issue; that General Counsel did not offer any other testimony or evidence of any other issues where Howell, or any other union member, was questioned about his or her union activities²⁹; that this meeting lasted only a few minutes; that Butler was concerned that union business was being conducted on company time; and that neither Howell nor Sanders, who was not spoken to about this incident, was disciplined in any way as a result of this incident.

Under *Rossmore House*, 269 NLRB 1176 (1984), Howell was not shown to be an active union supporter. While Respondent argues that Butler only wanted to ascertain whether union business was being conducted on company time, it is the manner in which Butler tried to make this determination which caused this problem. Butler testified that he could not recall who told him about what was happening at the Visitors Center. Obviously Sergeant Lozano told him. And just as obviously Lozano told him all he needed to know to make this determination. Sanders was the Secretary/Treasurer of the Union. It was not a secret. Even Impson eventually admitted that she knew that Sanders was an officer of the Union. Howell testified that he described the person he gave his dues to only as the Treasurer. Howell's statement, General Counsel's Exhibit 31, also refers to the person to whom he gave the money as "her." Butler knew from Lozano that Howell was not on the clock when he went into the Visitors Center and paid his union dues to Union Treasurer Sanders, who was on the clock at the time. Butler already knew all that he had to know before he summoned Howell. So what was the purpose of the interrogation? Was Butler putting Howell on notice that he was aware of the fact that Howell

²⁹ What about Bernardi's interrogation of Sanders' with respect to the Union newsletter she wrote? Doesn't Respondent consider that a union activity?

supported the Union and was now making his first dues payment? Was Butler building a case against Sanders, which case Tolman told him to drop? Did Tolman, after being told that Butler interrogated Howell, realize that there was a problem, and that is why he told Butler to get a statement of what was said in Butler's office during the interrogation of Howell? Howell testified
 5 that he thought that he was in trouble and that is why he telephoned Carney and asked him if he should write the statement. Butler's interrogation was coercive and it interfered with employee rights. Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(a) of the complaint.

10 Paragraph 6(b) of the complaint alleges that on or about October 1 or 8, 2003, Respondent, by Anthony Pitt at Respondent's facility, told employees that it had no intention of signing a collective bargaining agreement with the Union. Counsel for General Counsel contends on brief that Pitt held the rank of Lieutenant for the time period that included October
 15 2003 and he was the only supervisor on the graveyard shift; that Pitt's responsibilities included relaying policy changes from the FAA's security officers, AMP-300 and AMP-700, to employees; and that Musser testified that Lieutenant Pitt would brief employees each shift in one-on-one discussions. Respondent on brief argues that Musser's testimony is hearsay since Lieutenant Pitt was terminated by DCT; that General Counsel elected not to subpoena and question
 20 Lieutenant Pitt but rely on the uncorroborated testimony of Musser; and that Musser's hearsay testimony is in direct conflict with the fact that negotiations proceeded and a contract was reached just months after this alleged phone conversation took place.

Musser's testimony is not hearsay. Rule 801(d)(2) of the Federal Rules of Evidence reads:

25 (d) *Statements Which Are Not Hearsay.*- A statement is not hearsay if –

....

30 (2) Admission by Party – Opponent. – The statement is offered against a party and is (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship....

35 It does not matter that Pitt was subsequently terminated. Throughout this proceeding Respondent took the position that sergeants are a part of management. As a practical matter if sergeants are a part of management, lieutenants should also be considered part of management. Moreover, Respondent, as here pertinent, gave the following answer to paragraph 4 of the complaint which alleges that Bernardi, Tolman, Griffin, Butler, Pitt, Lozano and LaFlamme have been supervisors of Respondent within the meaning of Section 2(11) of the
 40 Act and agents of Respondent within the meaning of Section 2(13) of the Act:

45 DCT admits that the individuals identified in paragraph 4 of the Consolidated Complaint have held the positions set forth opposite their respective names and have been supervisors of DCT within the meaning of Section 2(11) of the Act. DCT denies that all of said individuals were agents of DCT within the meaning of Section 2(13) of the Act. [Emphasis added. With the wording used by Respondent, some of the individuals could be agents. Respondent did not specifically indicate who was not an agent.]

50 While the fact that Pitt was a supervisor at the time of his conversation with Musser is sufficient for the Rule, Respondent did not specifically deny in its answer that Pitt was an agent. Section 102.20 of the Board's Rules and Regulations indicates, as here pertinent, as follows:

... any allegation in the complaint not specifically denied in an answer filed ... shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

5 So it would appear that since Respondent did not specifically deny in its answer that Pitt was an agent, it, in effect, admitted that he was an agent. While Respondent tries to make an issue out of the fact that General Counsel did not call Lieutenant Pitt as a witness, this begs the real question. Why didn't Respondent call Lieutenant Pitt as a witness? Since it was not shown, in view of the fact that Respondent fired him, that it is reasonable to assume that Pitt is favorably disposed toward Respondent, no adverse inference will be drawn from Respondent's failure to call him. But a question remains, why didn't Respondent have Tolman specifically deny this allegation during the times he testified at the trial herein? Musser's testimony was not denied either by Pitt or Tolman. It stands unrefuted. The fact that a collective bargaining agreement was entered into by the Respondent might have more to do with the efforts of Bernardi than Tolman. Musser testified that, inter alia, Pitt told him that Tolman was ranting about having to hire back Coughran and Whitaker. As found below, Coughran and Whitaker were subsequently unlawfully terminated again. Musser's testimony is credited. Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(b) of the complaint.

20 Paragraph 6(c) of the complaint alleges that on or about October 10, 2003, Respondent, by Cheryl Bernardi, at Respondent's facility, interrogated employees concerning the employees' union activities. Counsel for General Counsel contends on brief that Sanders production and distribution of the newsletter to co-workers was protected by Section 7 of the Act, *Champion International Corp.*, 303 NLRB 102, 105 (1991); that Bernardi, who was the highest ranking company official, traveled from McAlester to MMAC to confront Sanders; that Bernardi questioned Sanders about the newsletter for the express purpose of taking action against her in the form of a 'slander' lawsuit; that Bernardi added to the intimidating atmosphere by telling Sanders that Respondent's attorney would look into the matter and "get a copy of everything"; that the Board has held that a threat to file a lawsuit against an employee engaged in protected activity violates Section 8(a)(1) of the Act, *Clyde Taylor Co.* 127 NLRB 103 (1960) and *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977); that under these circumstances a reasonable employee would have felt coerced in the exercise of their Section 7 rights; and that Bernardi violated Section 8(a)(1) of the Act by her interrogation of Sanders about the newsletter. Respondent on brief argues that Bernardi's conversation with Sanders did not violate the Act in that the conversation only "lasted for 3 to 5 minutes and was comprised mostly of 'general chit chat' Tr. 439"³⁰; that the newsletter talks about unscrupulous bosses; that any reasonable person would conclude that this could be directed at DCT's management team; that Bernardi merely stated that her attorney was looking into the matter; that this can hardly be considered any kind of a threat; and that General Counsel offered no evidence to suggest that this or any other behavior had the effect of chilling protected concerted activity on the part of the union members.

45 Bernardi, a former school teacher, had to be aware that the sentence at issue began with "Union contracts provide workers" Neither Bernardi nor Tolman were named in the involved portion of the newsletter. The involved sentence, notwithstanding the two preceding sentences, was a general statement. It did not specifically refer to DCT, DCT employees, or DCT bosses. It refers to "Union contracts." DCT was negotiating one collective bargaining agreement. As pointed out by Counsel for General Counsel, Sanders production and distribution of the newsletter to co-workers was protected by Section 7 of the Act. Nothing in the newsletter

50 _____
³⁰ Respondent's brief, page 28.

would cause Sanders to lose the protection of the Act. This was a needless confrontation. There was no reason for Bernardi to question Sanders about the newsletter. I agree with Counsel for General Counsel that under these circumstances a reasonable employee would have felt coerced in the exercise of their Section 7 rights. It is not clear what Respondent is relying on for its assertion on brief that the involved conversation “was comprised mostly of ‘general chit chat’ Tr. 439” There is no discussion of the involved conversation on page 439 of the transcript. Respondent violated the Act as alleged in paragraph 6(c) of the complaint.

Paragraphs 6(d), (e), and (f) of the complaint collectively allege that Respondent, by David LaFlamme and Brenda Lozano at Respondent’s facility, denied the request of its employee Randy Gilliland to be represented by the Union during an investigatory interview; that Gilliland had reasonable cause to believe that this interview would result in disciplinary action being taken against him; and that LaFlamme and Lozano conducted this interview on November 7, 2003 with Gilliland even though Respondent denied his request for Union representation. Counsel for General Counsel on brief points out that the Court in *NLRB v. Weingarten*, 420 U.S. 251 (1975) held that an employee has a Section 7 right to union representation in a situation which the employee reasonably believes will result in discipline and the employee requests representation. Counsel for General Counsel contends that Gilliland was being subjected to an investigatory interview; that Lozano’s version of events is improbable and incomplete; that Lozano did not testify as to what LaFlamme said and LaFlamme did not testify; that since there is nothing on the record to suggest that Sergeant LaFlamme was not available to Respondent during the trial herein, an adverse inference should be drawn that, had he testified, LaFlamme’s testimony would have been consistent with Gilliland’s; that the only testimony on record concerning what LaFlamme said during the meeting with Gilliland comes from Gilliland who testified that LaFlamme was angry and was asking him questions when Gilliland showed his *Weingarten* card to no avail; that when Gilliland showed his *Weingarten* card a second time to LaFlamme, LaFlamme told Gilliland “OK, that’s another complaint. I am going to write on your report and call it insubordination”; that LaFlamme’s reference to “another complaint” leads to the reasonable inference that LaFlamme had presented Gilliland with a complaint; that all of this occurred while Gilliland was in a room with three supervisors; that under the circumstances, it is reasonable to conclude that Gilliland was faced with an investigatory interview and had a reasonable belief that the interview could lead to discipline; and that LaFlamme’s denial of Gilliland’s request was a violation of Section 8(a)(1) of the Act. Respondent on brief argues that General Counsel presented no evidence to suggest that any employee had ever been disciplined for the action at hand, namely leaving keys in the truck; that Gilliland’s testimony confirmed that this happened before without discipline; that no reasonable employee at DCT would believe that being questioned by his supervisor about why he left the keys in the car would result in discipline; that Gilliland’s own testimony that he pulled out his *Weingarten* card without hearing what his supervisor said to him makes it clear that he had no idea what the meeting was actually going to be about; that Pavlicek declined to represent Gilliland because Lozano told him that this was not a disciplinary matter and she just wanted to talk to Gilliland; that this is similar to *Southwestern Bell Telephone Co.*, 338 NLRB 552 (2002) because the employee could not have reasonably believed that the meeting in question would result in discipline; and that the standard is not what the employee subjectively believed but rather the standard is whether an employee would reasonably believe that the meeting would result in discipline.

As pointed out by Respondent, in *Southwestern Bell Telephone Co.*, supra at 552, the Board indicated that

the *Weingarten* standard is an objective one. Thus the standard is not what ... [the employee] subjectively believed. Rather, under *Weingarten*, the standard is whether

an employee would reasonably believe that the meeting would result in discipline.

5 Gilliland reasonably believed that the involved meeting with Sergeants LaFlamme, Lozano, and Sloan on November 7, 2003 would result in discipline. Approximately a week before the incident in question, Lieutenant Satepehtaw and Sergeant Lozano spoke with Gilliland about shortcomings in his performance. While they did not discipline him at the time, Satepehtaw did not specifically deny that she told Gilliland, when he at that time asked for a union representative, that he should sit down or she would send him home, and that she was going to watch him. As memorialized by General Counsel's Exhibit 10, earlier on November 7, 2003 (It could not have occurred after the incident in question because Gilliland was sent home at the end of the incident in question.) Sergeant Sloan spoke to Gilliland regarding what she perceived to be a shortcoming in his performance. When Gilliland asked for a union representative, Sloan, according to her own memorandum of the event, told Gilliland that it was "not a union issue," it was a performance issue. Sergeant LaFlamme's memorandum of the involved incident, General Counsel's Exhibit 11, indicates that "Sgt. Lozano tried to inform ... [Gilliland] that this was not a union issue...." Gilliland's testimony or what occurred when he was with LaFlamme and the other sergeants is credited. On the one hand, his testimony is very specific and extensive. On the other hand the testimony of the witnesses called by Respondent was brief, in part mistaken, and in part suspect. Indeed LaFlamme did not even testify. Counsel for General Counsel's request for an adverse inference is granted. Of the two of the Respondent's witnesses who did testify about this incident, Lozano and Pavlicek, the latter's involvement was minimal in that he testified that he refused to represent Gilliland because Lozano told him it was not a disciplinary action. It is interesting that Pavlicek got the terminology correct in that, as noted above, both Sloan's and LaFlamme's memorandums do not refer to it not being a disciplinary action but rather both refer to it not being a "union issue." Lozano does not corroborate either Pavlicek's terminology or the fact that she discussed the situation with him at the time, and LaFlamme's memorandum indicates that "Ofc. Gilliland said 'I want a union rep' and even asked Ofc. Pavlicek if he was a rep and he said no." LaFlamme's memorandum does not indicate that Lozano told Pavlicek that it was not a disciplinary action. Rather according to LaFlamme's memorandum Lozano was the one who was saying, albeit to Gilliland, that this was not a "union issue." Lozano's testimony indicates that she did not have her facts straight. Both Gilliland's testimony and LaFlamme's memorandum show that the problem occurred because Gilliland neglected to leave the keys for the first escort vehicle in the vehicle but rather when he left in the second escort vehicle he kept the keys for the first escort vehicle in his pocket. Contrary to the testimony of Lozano, and Respondent's assertion on brief, Gilliland did not lock the keys for the first escort vehicle in that vehicle. With respect to what occurred with Gilliland on November 7, 2003, Lozano did not specifically deny that (a) she yelled at him when he told her about the first escort vehicle needing gasoline, and again when he returned to give the keys to LaFlamme, (b) Gilliland was told to go into a classroom where she and two other sergeants started yelling at him and asking him questions, (c) at this point in time Gilliland took out his *Weingarten* card and asked for a union representative, (d) the President of the Company, Bernardi, was then telephoned in the presence of Gilliland, (e) Gilliland again took out his *Weingarten* card. (f) LaFlamme then told Gilliland "Okay, that's another complaint, I am going to write on your report and call it insubordination," (g) the three sergeants again started asking him questions and Gilliland again showed them his *Weingarten* card and asked for a representative; and (g) the sergeants then asked him for his keys and radio and told him to go home. If there was any doubt as to whether it was reasonable to believe at the outset of this meeting that it would result in discipline, and in my opinion it was reasonable to believe at the outset that the meeting would result in discipline, this was a continuing situation with Gilliland continuing to ask for representation and the sergeants continuing to ask Gilliland questions after involving Bernardi

and advising Gilliland that he was being reported for insubordination. Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 6(d), (e) and (f) of the complaint.³¹

5 Paragraph 6(g) of the complaint alleges that on or about November 12, 2003, Respondent removed Union literature from the bulletin board on which Respondent has allowed other nonwork-related materials to be posted. Counsel for General Counsel contends on brief that the Board in *Honeywell, Inc.*, 262 NLRB 1402 (1982) indicated that if an employer permits its employees to use its bulletin board for the posting of notices relating to personal items, it may not validly discriminate against notices of union meetings which employees also posted; that here the record shows that prior to November 12, 2003 Respondent allowed employees to post various types of items on the involved bulletin board; that on November 12, 2003 Tolman approached the bulletin board on which the Union had posted some of its literature and said “This can’t be up here”; that Kilmer then noticed that the Union literature was gone; and that Respondent thereby discriminated against Union notices on the bulletin board in violation of Section 8(a)(1) of the Act. Respondent on brief argues that this is a de minimus allegation; that at the time, the existence of a bulletin board for the Union to use was a subject of negotiations; and that Tolman believed that the Union was implementing a practice that had yet been agreed to by the Company.

20 Tolman denied neither that he removed union literature from the bulletin board on November 12, 2003 nor that employees post notices relating to personal items on this board. The fact that the parties were negotiating for the use by the Union of a separate bulletin board at the time does not justify the removal the union literature by Tolman on November 12, 2003 from the Company bulletin board. Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(g) of the complaint.

30 Paragraph 6(h)(i) of the complaint alleges that Respondent by Tolman on or about December 30, 2003 at Respondent’s facility, made disparaging comments to employees about the Union and its International Representative. Counsel for General Counsel contends on brief that Tolman’s comments to the employees at the December 30, 2003 meetings, where he told them that Carney was a liar and the Union negotiators were all sneaks, and the Respondent was not going to pay the \$16.83 an hour to leads, amounted to telling them that support for the Union was futile. Respondent on brief argues that the only testimony presented was that of Wooten; and that Wooten’s testimony is unsubstantiated, uncorroborated and should be given no weight.

As pointed out by Counsel for General Counsel, the Board in *Sears, Roebuck & Co.*, 305

40 ³¹ Certain arguments made by Respondent on brief, namely, (a) that Gilliland’s testimony confirmed that this happened before without discipline, and (b) that Gilliland’s own testimony that he pulled out his *Weingarten* card without hearing what his supervisor said to him makes it clear that he had no idea what the meeting was actually going to be about, warrant analysis. Respondent does not provide a record cite for its assertion that this happened before without discipline, and the following contrary testimony appears at page 688 of the transcript:

45 Q. Had you ever forgotten to give them the keys before?

A. No. Not to my recollection.

I am getting confused now.

50 Regarding (b), Gilliland did not testify that he did not hear what his supervisor said to him before he requested a union representative for the first time. Gilliland testified that he did not recall what was said other than Lozano yelling at him and telling him to meet her in the classroom, and then having all three sergeants yelling at him.

NLRB 193 (1991) indicated that words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1) but such a violation can be found where there are other coercive statements, especially those tending to convey to employees the futility of their efforts to have the union as their collective bargaining representative. In my opinion, here where the collective bargaining agreement had been signed and Tolman was disparaging the Union representative at the same time he was telling the employees that the Respondent was not going to comply with an important provision of the collective bargaining agreement did convey the futility of the employees' efforts. Accordingly, Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(h)(i) of the complaint.

Paragraph 6(h)(ii) of the complaint alleges that Respondent by Tolman on or about December 30, 2003, during a telephone conversation to Respondent's facility, threatened employees with unspecified reprisals and with legal action because they engaged in Union activities. Counsel for General Counsel contends on brief that Tolman simply denies that he used cuss words; that other evidence in the record points to Tolman's short fuse and propensity to lash out at employees, i.e. when he told Coughran that he did not like him and he had enough money and power to get rid of his problems; that before he spoke with Wooten, Bernardi admonished Tolman to be nice; that Tolman's own testimony is sufficient to sustain an 8(a)(1) violation in that Tolman admits he told Wooten that he was sick of Wooten slandering him and if he slandered him one more time, "I'm going to sue your ass"; and that in view of the fact that Wooten was engaged in protected activities, Tolman's admission is sufficient evidence on which to find Respondent violated Section 8(a)(1) of the Act, *S. E. Nichols Marcy Corp.*, 229 NLRB 75 (1977). Respondent on brief argues that Wooten's accusations, which were heard and documented by Lieutenant Dodd, could not be construed as protected activity; that even if it was protected activity, it would have to be considered a de minimus claim since (a) the alleged threat happened after the collective bargaining agreement was already signed and two days before it was to go into effect, and this alleged threat could not influence either an election or the collective bargaining process, and (b) this was an isolated instance; and that just days after this incident Wooten was recommended to the FAA for a promotion to the position of lead officer.

On December 30, 2003, Tolman invited criticism when, in response to Wooten's question during a meeting with employees, Tolman said that he would keep for himself the money Wooten no longer wanted to invest in the 401K plan. Bernardi realized the inappropriateness of Tolman's statement at that time and she told the employees present that no one here is going to keep your money. Wooten and Whitaker testified about Tolman's statement. Tolman does not deny saying that he was going to keep Wooten's 401K money, and Bernardi does not deny that she said no one here is going to keep your money. When Tolman was advised that Wooten did in fact subsequently criticize him while discussing the meeting with another employee, Tolman, with Bernardi's approval, confronted Wooten over the telephone, and threatened him. Contrary to Respondent's assertion on brief, this was not an isolated incident. Bernardi conceded that when Tolman and Coughran were having words she had to ask Tolman to leave the room so that Coughran could talk to her. Bernardi conceded that Tolman told Coughran that he did not like him. Bernardi did not concede that Tolman told Coughran that he had enough power and money to get rid of his problems. Coughran's testimony is credited. With the approval of Bernardi, Tolman confronted Wooten about his alleged comments to another employee, regarding what Tolman said at the December 30, 2003 meeting. And when Wooten would not admit or apologize, Tolman threatened him with a lawsuit if he engaged in the same conduct again. Even if Wooten told another employee that he thought Tolman was a liar regarding what Tolman said about the 401K plan at the December 30, 2003 employee meeting, in the circumstances extant here Wooten did not lose the protection of the Act. Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(h)(ii) of the complaint.

Paragraph 7(a) of the complaint alleges that on or about November 12, 2003, Respondent terminated its employee Malcom because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for General Counsel contends on brief that Respondent fired Malcom because he supported the Union; that the only issue here is whether Malcom is a supervisor within the meaning of Section 2(11) of the Act; that the record reflects, at most, that Malcom had authority to perform routine administrative functions and, in the case of an emergency or serious discipline situation during weekend shifts, was required to contact on-call supervisors; that the record shows insufficient evidence that Malcom completed any tasks with any independent judgment; that while Malcom attended some supervisory meetings, these types of secondary indicia are insufficient to establish Malcom's Section 2(11) status; and that Respondent has failed to meet its burden of proof that Malcom was a supervisor during the relevant time period. Respondent on brief argues that Malcom was a supervisor within the meaning of Section 2(11) of the Act; that Malcom possessed several of the indicia specified in the Act's definition of a supervisor in that he was a shift supervisor and under the statement of work and the contract between DCT and the FAA shift supervisors 'ensure that each post is staffed as required, that employees are properly uniformed and present a neat appearance, and that each employee is familiar with their post and duties. The shift supervisors shall provide supervision of Contractor personnel to ensure compliance of all contract requirements'; that Malcom used independent judgment to ensure compliance with all contract requirements; that Malcom testified that he had authority (a) to switch names around and coordinate assignments, (b) to reprimand, (c) to send someone home, and (d) to find replacements if employees called in sick; that Malcom regularly attended management meetings; that when Malcom was shift supervisor on weekends, he was the only supervisor on site supervising DCT employees and he exercised all supervisory functions over DCT officers on Saturday and Sunday; that if he had to call employees to ask them to come in he used independent judgment; that it was Malcom's responsibility to make sure that things were done correctly and that shifts ran okay; that Malcom received sergeant pay even when he was not acting as shift supervisor over the weekend; that the Board has long held that a supervisor may be discharged for union activity, with exceptions which are not pertinent here; and that there is no need to go into the evidence as to the reason Malcom was fired because a discharged supervisor had no protection and, therefore, no recourse under the Act.

With respect to the termination of Malcom, a threshold issue in determining if his termination is a violation of the Act is whether he is a supervisor. Section 2(11) of the Act reads as follows:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As pointed out by the Respondent, the possession of any one of these indicia is sufficient to confer supervisory status as long as the authority is carried out in the interest of the employer and requires the exercise of independent judgment, *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003) and *Health Care & Retirement Corp.*, 328 NLRB 1056 (1999). The burden of proof is on the party claiming supervisory status. Here that would be the Respondent. A review of the evidence of record shows that Malcom could not (1) hire, (2) transfer, (3) suspend, (4) lay off,

(5) recall, (6) promote, (7) discharge, (8) assign,³² (9) reward, (10) discipline other employees, (11) responsibly direct other employees, (12) adjust employee's grievances, or (13) effectively recommend such action. Malcom did not use independent judgment. Rather, his authority was of a routine or clerical nature. As a sergeant, Malcom had the bronze stripes but he was paid on an hourly basis and received little more than a security officer. Respondent argues that the statement of work and the contract between DCT and the FAA has certain requirements and this makes Malcom a supervisor. Whether Malcom is a supervisor is determined not by what DCT and the FAA say but rather by what DCT does. Did DCT give Malcom supervisory authority? I do not believe that DCT did. Respondent on brief claims that Malcom could switch names around and coordinate assignments. A review of the transcript page cited by the Respondent, page 602, shows that Malcom testified that

What I would do - - during the weekends, the shift assignments would already be made out before I came in. I would come in and sometime - - usually I would wait until the afternoon, and I would pull out the assignment for the next day, and then I would go in there and switch the names around and coordinate the assignments.

But then at page of 605 of the transcript Malcom testified that he had no role in drafting the scheduling during his duties on the weekends. It appears that the switching of the names and the coordination of assignments is an administrative function done in accordance with an assignment sheet that someone else made out. With respect to discipline, Malcom testified on page 602 of the transcript that

I could - - during the weekend, I could kind of reprimand somebody or say, 'hey, you know, such and such is wrong. This is how it needs to be done,' or say 'Hey, you are spending too much time messing around. You need to go out and do your patrol.'

If there was anything serious, then generally, I would make a call to the Lieutenant or the Captain.

And at page 603 of the transcript Malcom testified that he did not have authority to discipline an officer who was not doing his patrol, and he could not suspend anyone. With respect to sending someone home Malcom speculated that in extreme situations he could send someone home and then telephone the Captain. The extreme situations he described would be an officer coming in intoxicated or exhibiting some severe mental problems. As demonstrated by Sergeants Lozano, LaFlamme, and Sloan, when they, together, were confronted with what they perceived to be a problem with Gilliland, they telephoned Bernardi before sending him home. It was not shown that the extreme circumstances described by Malcom ever materialized. And if they had, and if Malcom sent the employee home, this alone or when considered in conjunction with other evidence of record would not mean that Malcom was a supervisor under the Act. He would be acting to avoid a dangerous situation, namely having an intoxicated or unbalanced individual in possession of a firearm, and even then he would telephone the Captain. This would not involve the use of independent judgment on the part of Malcom. With respect to Respondent's claim that the fact that Malcom attended supervisor meetings made him a

³² The assignments are not made by Malcom, and there is rotation but this is done according to routine. On weekends if someone calls in sick, Malcom telephones other employees, according to a list he does not make up and according to a specified order, and asks the employee if they would come into work. That Malcom tries to call the most reliable employees first is not enough to prove independent judgment in that he is just asking the employees if they want to come to work and the employee can refuse to come in.

supervisor, it is noted that Malcom was specifically excluded from at least one supervisor meeting and LaFlamme, who was a security officer at the time, was invited to attend another such meeting. Additionally, Malcom's testimony that once Griffin was gone the supervisors meetings were sporadic was not disputed. Respondent did not show that the type of meeting held on November 12, 2003 was a standard format for a supervisory meeting. In other words, Respondent has not shown that at other than this one meeting, confidential matters, vis-à-vis routine matters, were discussed at supervisors meetings. The fact that Malcom attended some of these meetings does not confer supervisory status in view of the lack of other indicia. The fact that on weekends Malcom was the only "supervisor" on site does not confer supervisory status when the Lieutenants and Captain are on call and Malcom was under instructions to call the Lieutenants or Captain regarding serious disciplinary matters. Additionally, when Malcom telephoned employees to see if they would be willing to come to work albeit they were not scheduled to, Malcom could only request and the employee could refuse. While an employer, with exceptions not pertinent here, can lawfully discharge a supervisor for union activity, an employee who does not actually have supervisory authority cannot lawfully be terminated for union activity. While DCT may call sergeants supervisors, this does not mean that Malcom had supervisory authority even on weekends. Bernardi did not specifically deny Malcom's testimony regarding what she told him when she discharged him. Malcom's testimony is credited.

As set forth in *Fluor Daniel, Inc.*, 304 NLRB 970, at 970 (1991),

In *Wright Line*, 251 NLRB 1083 (1980) en' d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989 (1982),⁴ the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a 'motivation factor' in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.⁵ The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence.⁶ The finding may be inferred from the record as a whole.⁷

⁴ Approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁵ *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966).

⁶ *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *White-Evans Service Co.*, 285 NLRB 81, 82 (1987).

⁷ *ACTIV Industries*, 277 NLRB 356, 374 (1985); *Heath International*, 196 NLRB 318, 319 (1972).

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, General Counsel must establish union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement, which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

Here Malcom engaged in union activity and he admitted it to Bernardi when she questioned him about it and then terminated him. Anti-union animus is demonstrated by Respondent's April 25, 2003 memorandum to its employees, after DCT became aware of the Union organizing attempt, indicating that "DCT does not allow solicitation and distribution of any

materials that are not work related.” This is an overly-broad no-solicitation and distribution rule. Anti-union animus is also demonstrated by Tolman’s inebriated tirade to Lieutenant Pitt, which was relayed to employees Musser and Randolph, that Tolman was going to be sure that the Union was going to be gone. Tolman did not deny having this conversation with Pitt.

5 Additionally, anti-union animus, as far as Malcom’s termination is concerned, is demonstrated by all of the violations which occurred before Malcom’s termination. Malcom suffered an adverse action, his termination, because of his union activity. Counsel for General Counsel has made a prima facie case.

10 Has the Respondent shown that the same action would have taken place notwithstanding Malcom’s protected conduct? As noted above, when a Respondent’s stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one. Here Bernardi did not say anything at Malcom’s termination meeting about Respondent’s allegations that Malcom gave information to employees that he

15 was supposed to keep confidential. On the one hand, Tolman testified that he did not play any role in Malcom’s termination; and that Bernardi never told him how she found out that Malcom told Whitaker and Coughran about the confidential meeting. On the other hand, Pavlicek testified that Tolman asked him to locate Malcom, and he returned and told Tolman that he saw Malcom speaking with Whitaker. Tolman does not corroborate Pavlicek. Bernardi testified that

20 Pavlicek told her that he saw Malcom speaking with Whitaker. Pavlicek does not corroborate Bernardi’s testimony that he told her what he allegedly saw. While Bernardi testified that Coughran told her that Malcom told him about the confidential meeting, Bernardi does not testify that she learned this before she terminated Malcom. Malcom could have told Coughran after Malcom was fired. Since Bernardi did not even testify that she mentioned this to Malcom when she terminated him, even if her testimony about learning about this is credited, it has not been

25 shown that this was even a consideration in Malcom’s termination when he was terminated. Tolman was upset that contractual provisions had to be made for the four sergeants who originally supported the Union. When Bernardi was put on notice that Sergeant Malcom supported the Union she told him he was terminated. Malcom’s union activity, albeit minor in comparison to that of Coughran, Whitaker and Sanders, was a thorn in Respondent’s side because Respondent was trying to promote the image that sergeants were supervisors, without giving them the authority a supervisor normally possess. Malcom was terminated because he supported the Union and he paid union dues. Respondent argues that it has the right to terminate Malcom for his union support because he was a supervisor. The problem with that

30 approach is that while DCT might say that Malcom is a supervisor, the facts indicate otherwise. Respondent has not shown that on November 12, 2003 it would have taken the action it did absent Malcom’s protected conduct. Respondent violated Section 8(a)(1) and Section 8(a)(1) and (3) of the Act as alleged in paragraph 7(a) of the complaint.

40 Paragraphs 7(b) and (c) and 9(a) and (b) of the complaint collectively allege that on or about November 14 and 17, 2003, respectively, Respondent suspended and then terminated its employee Sanders because she assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for General Counsel contends on brief that Sanders was active in forming the Union, she served as its Secretary/Treasurer

45 during all relevant time periods, she participated in collective bargaining negotiations from September to December 2003, she published and distributed the Union newsletter, and she picketed outside MMAC on November 17, 2003; that additionally Sanders engaged in the protected activity of reporting DCT’s violation of the FAA computer security rules after discussing this matter with Coughran and Whitaker; that Respondent was motivated by animus

50 toward Sanders in that the timing of her termination is suspect since she was fired on the very day she initiated a picket line near MMAC and a short time after Sanders ‘blew the whistle’ on Respondent for violating the FAA’s computer security policy; that Respondent’s justification for

the suspension and termination are pretextual; that Sanders was assertedly suspended and fired for failing to take a random drug test prior to returning to work for her next shift; that the testimony of Phillips shows that Respondent's failure to include all forms with its drug testing paperwork was not an isolated occurrence; that Bernardi did not give Sanders the benefit of the doubt, and suspended and terminated her in short order; that while Bernardi justified her decision to suspend Sanders, indicating that the purpose of a random drug test was not to wait until drugs may be out of someone's system by waiting several days, Respondent had no problem giving employees Charlotte Grove, Wanda Smith, and David Smith an entire weekend before they were required to take their random drug test; that this coupled with Respondent's complete lack of any written policy regarding the timeliness of random drug tests suggests that, except for Sanders, Respondent had little concern with ensuring that employees were ordered to take random drug tests and did so in enough time to ensure that drugs were not out of their system; that even assuming arguendo that Sanders bears some blame for failing to take her drug test before she returned for her next shift, Respondent failed to show Sanders its characteristic leniency for work rules violations; that Respondent on numerous occasions tolerated serious work rule violations by employees, i.e. the Deviccio situation set forth above; that the record clearly reflects disparate treatment which supports a finding that Respondent's stated reason for supporting and firing Sanders was pretextual, *Baradville Electric, Inc.*, 309 NLRB 337 (1992); and that Respondent has not met its burden to rebut the prima facie case. Respondent on brief argues that Sanders was acting as an "officious intermeddler" (Respondent's brief page 34) in her actions concerning the alleged computer password violations; that Sanders tried to impede Respondent's investigation of computer usage; that impeding a legitimate investigation by DCT, undertaken at the request of the FAA, cannot be considered protected activity; that General Counsel offered no evidence to suggest that DCT knew who was being interviewed by Agent Hill in the investigation of this matter, which still had not been resolved at the time Respondent's brief was drafted; that Sanders was terminated for her refusal to take a random drug test; that Impson confirms that Sanders' name was drawn according to established procedures, she gave Bolz the envelope and attached memorandum indicating that Sanders was to take the test and return to work with the completed paperwork before she returned to work on November 14, 2003; that Bolz testified that she gave Sanders the envelope with the memorandum attached; that Bernardi testified that no one has ever refused to take a random drug test at MMAC or any of DCT's other facilities; that Sanders did not express regret or remorse for not taking the mandatory random drug test; that

[g]iven Ms. Sanders' command in her testimony of FAA procedures, the union contract, and company rules, and given the fact that since 2001 employees have had to return with paperwork prior to the beginning of their next shift, it simply is not credible for Ms. Sanders to assert that she was not aware of a procedure that had been in affect for so many years affecting so many employees [Respondent's brief page 38, note 34;]

that Sanders was promoted to Sergeant after her organizing activity began and it was known that she was a Union supporter; that Sanders, most likely in anger and petulance, directed toward DCT over her unhappiness at having to sign a non-disciplinary attendance form, did something that no DCT employee had ever done, namely refused to take a random drug test; and that the fact that she finally decided to take the test should carry no weight because (1) when she was suspended she did not even have the authority to take it, (2) since she knew for at least a day that this was a drug test, it could no longer be considered random, and (3) it was not until after she had been suspended, and finally confronted with the severity of what she had done, that she decided to take the test.

Sanders was engaged in union activity, including the filing of a charge with the Board on November 6, 2003 as Secretary / Treasurer of the Union against the Respondent alleging bad

faith bargaining, Respondent knew it, the record demonstrates the anti-union animus of Respondent, and Respondent took an adverse action against Sanders in that it suspended and terminated her. Counsel for General Counsel has made a prima facie case.

5 Has Respondent demonstrated that the same action would have taken place
notwithstanding Sanders' protected conduct? The procedures with respect to Sanders "random"
drug test were flawed from the outset. Impson was not a credible witness because she denied
that she did or even could make the drawing for a random drug test. Thompson credibly
contradicted Impson. And Impson hedged her testimony about Bernardi's role in the drawing of
10 Sander's name for a random drug test. Only after Impson testified that Bernardi might have
been involved in the drawing of Sanders' for a random drug test did Bernardi retake the stand to
testify that indeed she was involved. Bernardi testified that she was concerned about being an
officer of the company and drawing for a random drug test and that is why she had Officer Brim
15 make the drawing which occurred exactly one week after Sanders filed a charge with the Board
on November 6, 2003 as Secretary / Treasurer of the Union against the Respondent alleging
bad faith bargaining. The approach Bernardi claims she took was questionable at best. Bernardi
testified that out of the presence of Impson she had Officer Brim actually draw Sanders' badge
number. Brim did not take the badge number to Impson. Rather Bernardi returned with the
20 badge number to Impson. Brim did not testify so we have only Bernardi's word for what
occurred.³³ We have Bernardi, according to her testimony, eventually returning to Impson's
office, with just one room between her office and the desk where Brim was located, with a poker
chip containing Sanders' badge number. Notwithstanding the fact that Bernardi testifies that the
drawing occurred out of the presence of Impson and Impson did not witness the drawing of
Sanders' number, Impson testified that she witnessed this drawing but Impson says nothing
25 about Brim. Also Impson testified that on occasion Bernardi is present when badge numbers are
drawn. But Bernardi testifies that this was the only time she was there for a drawing. Up to this
point, the drawing of Sanders' name can only be described as irregular and suspect. Apparently
there are no written rules with respect to how names are drawn for a random drug test, who can
participate in the drawing, and how the choice is achieved. We have only Bernardi's testimony
30 with respect to how Sanders' number was chosen. Bernardi is the person who twice exchanged

³³ Since Brim is not a supervisor or a member of management, it would not be proper to
draw an adverse inference from Respondent's failure to call him as a witness. However,
35 General Counsel has made a prima facie showing. The burden of coming forward with evidence
that Sanders would have been terminated absent her union activity and concerted protected
activity is on the Respondent. One would expect that in view of this Respondent would have
called Brim as a witness if his testimony would support the testimony of Bernardi. The selection
procedure was irregular. Bernardi's testimony demonstrates that she appreciated the fact that
40 her participation would make the drawing suspect. Yet Respondent did not call Brim to testify. In
other words, assertedly over her concern for the propriety of her role in the drawing, Bernardi
involved Brim without a witness other than herself being present. Nonetheless, Respondent now
chooses not to involve Brim in the explanation under oath of what did or did not occur. Only
Bernardi's testimony is offered up to explain what allegedly happened. The problem is that
45 Bernardi has a major monetary stake in the outcome of this proceeding. The problem aside from
that is that Bernardi is not a credible witness to begin with. She did not explain her role when
she initially testified. Only after Impson let the cat one half way out of the bag to protect herself
as much as she believed she could without revealing all, did Bernardi reveal the fact that she
played a role in the drawing. The question is how much of a role did she play. We are left with
50 only the testimony of Bernardi to make that determination. Again the burden of coming forward
is on the Respondent once Counsel for General Counsel, as he did here, makes a prima facie
case.

words with Sanders over the union newsletter and over Sanders' correct approach with respect to not releasing her computer user ID and password. And Impson, as noted above, contradicts Bernardi with respect to what happened regarding the drawing of Sanders' number.

5 As with the selection procedure, there is no written rule the employee can read regarding
the fact that once selected for a random drug test and given the paperwork to take the random
drug test, the employee has to take the test before his or her next shift. The only written
notification of such requirement is the memorandum that is supposed to be attached to the
10 envelope containing the employee's random drug test paperwork. While Respondent has
employees sign a document showing receipt and awareness of Respondent's general drug
testing policy (Which does not include anything about an employee having to take the random
drug test before his or her next shift.), Respondent does not have employees sign for the receipt
of the random drug test paperwork, including the notice that he or she is required to take the
test before his or her next shift.

15 With respect to Sanders' random drug test, on the one hand, we have Impson testifying
that she wrote Sanders' name on the outside of the envelope and on the memorandum notifying
Sanders that she had to take the test before her next shift. But as concluded above, Impson is
not a credible witness. Also, Bolz testified that the envelope she gave Sanders had the
20 memorandum attached to it. But Bolz is the one who tried to make an issue out of a non-issue
when she confronted Sanders about the above-described union newsletter. As noted above, the
sentence in the Union newsletter which Sanders published and distributed at issue in paragraph
6(c) of the complaint, which is treated above, reads as follows: "Union contracts provide workers
with enforceable rights and in these times, can provide workers with some degree of protection
25 from unscrupulous, greedy bosses." Why would Lieutenant Bolz complain to Sanders that she
thought that Sanders was including her in the category of unscrupulous greedy bosses? Bolz
did not deny that she told Sanders that she felt that she was included. Again, the newsletter
spoke to "unscrupulous, greedy bosses." As pointed out by Bernardi at page 984 of the
transcript, "[t]he Lieutenants only made 75 cents more an hour" apparently than security
30 officers. If Bolz is a supervisor who is paid on an hourly basis and is only making 75 cents more
an hour than security officers, it is not reasonable for her to take that position that
"unscrupulous, greedy bosses" referred to her. She could not be a "greedy boss" because she
does not derive any economic benefit from the labors of Respondent's employees. It was not
reasonable for Bolz to take the position she took with Sanders regarding the newsletter unless
35 Bolz was put up to it by Bernardi.³⁴ Bolz testified that she slid the envelope with the attached
memorandum to Sanders, and Sanders crumbled it up and left the office with it in her right
hand. Why Sanders would crumble it up is not clear since neither Bolz nor Satepehtaw testified
that they told Sanders what the envelope contained, and neither Bolz nor Satepehtaw testified
that Sanders looked at it while she was in the office. Satepehtaw did not testify that she saw
40 Sanders crumble the envelope up or Bolz slide the envelope to Sanders. Satepehtaw claims
that she did not miss what was going on between Bolz and Sanders because, instead of facing
north toward her desk while talking on the telephone, she was facing southwest. But the
witnesses were sequestered and Bolz later testified that normally Satepehtaw faces toward her
desk when she is on the telephone. Sanders' testimony that Satepehtaw had her back toward
45 Bolz and her the whole time she was in the Lieutenant's office is credited.

On the other hand, Sanders testified that there was no memorandum attached to the

50 ³⁴ It is more likely that Bernardi rather than Tolman put Bolz up to confronting Sanders over
this non-issue. It was Bernardi and not Tolman who confronted Sanders over the union
newsletter.

envelope and the envelope did not have her name on it. When Sanders got outside she took the envelope out of her back pocket and Whitaker asked her what it was. Sanders opened the envelope to find out what it was. If there had been a memorandum attached, why would there have been a need to open the envelope to find out what it was all about? The document had
5 Concentra at the top and Whitaker and Dowd said that it was a drug test form. Whittaker corroborates Sanders testifying that he asked Sanders what the envelope was; and that Sanders opened the envelope in his presence and it contained a drug test form. Again why would it be necessary for Sanders to open the envelope if the memorandum was attached? Whitaker did not testify that there was a memorandum attached to the envelope. Whitaker did
10 testify that he had never been given a random drug test and he was not aware that the employee was required to take the random drug test before his or her next shift. Sanders also had never taken a random drug test before and she was not aware that the employee was required to take the random drug test before her next shift. On brief Respondent helps make the case for Sanders when it argues that

15 [g]iven Ms. Sanders' command in her testimony of FAA procedures, the union contract, and company rules, and given the fact that since 2001 employees have had to return with paperwork prior to the beginning of their next shift, it simply is not credible for Ms. Sanders to assert that she was not aware of a procedure that had been in affect for so
20 many years affecting so many employees [Respondent's brief page 38, note 34]

The collective bargaining agreement is in print. The company rules are in print and they have no reference to the requirement that an employee take the random drug test before his or her next shift. And Sanders made it a point to verify the correct FAA procedures when a question arose
25 as to the method utilized by Respondent. Sanders impressed me as being a conscientious employee and as Respondent itself points out on brief, if there are written rules, written procedures or written collective bargaining procedures, Sanders made it a point to be aware of them. But with random drug tests there is no published rule for all employees to read that the employee has to take it before his or her next shift. Therefore there was nothing for Sanders to
30 read which would put her on notice about this requirement other than the memorandum that was supposed to accompany the random drug test paperwork. If Sanders did not receive the memorandum, either through negligence or intentionally, with the random drug test paperwork, she would not have any way of knowing about the requirement. Sergeants do not give out the paperwork for random drug tests. So it is understandable how Sanders would not be aware that
35 the employee is required to take the random drug test before their next shift. Sanders' and Whitaker's testimony about what happened on November 13, 2003 regarding the random drug test paperwork which Sanders had in her possession is credited. The testimony of Impson, Bolz, and Satepeahtaw that the random drug test paperwork given to Sanders on November 13, 2003 included a memorandum notifying Sanders that she had to take the random drug test before
40 her next shift is not credited. I have considered the possibility that Bolz, in view of the fact that she needlessly confronted Sanders regarding the Union newsletter, opened the original envelope and put the Concentra form in another envelope without Sanders' name on it and without the memorandum attached. But then the question would be why would Bolz have put the Concentra form in a different envelope. Just removing the memorandum notifying Sanders
45 that she had to take the random drug test before her next shift would have been sufficient. Just as Bolz was doing Bernardi's bidding regarding the Union newsletter, so to here again Bolz was doing Bernardi's bidding. Contrary to the suggestion of Counsel for General Counsel, what occurred was not a mistake like the Phillips situation. What occurred here was orchestrated by Bernardi, with Impson, Bolz, and Satepeahtaw playing their roles.

50 The evidence of record regarding what happened on November 14, 2003 also contains some apparent if not outright contradictions. Bernardi testified that she had Impson check

various things and she reviewed the notice or memorandum faxed to her before she suspended Sanders on November 14, 2003. Sanders testified that Bernardi told her that she was reading the fax of the notice as they spoke on the telephone. This was the telephone conversation during which Bernardi suspended Sanders. After this telephone conversation Sanders (1) discussed the matter with her husband who advised her to go and take the test immediately, (2) then telephoned Concentra to determine when she could take the test (This would not have been necessary if Sanders had the Company memorandum or notice to look at.), (3) then drove to Concentra, (4) then found parking at Concentra, (5) then walked into the facility, (6) then approached someone at Concentra and explained why she was there, and (7) then gave a specimen. According to Bernardi's testimony and the evidence or record, Sanders did this all, namely, steps (1) through (7) in a total of 5 minutes. As noted above, the fax time on the copy of the memorandum, Respondent's Exhibit 52, which Bernardi supposedly received and read before she suspended Sanders has the following fax stamp: "NOV – 14 – 2003 04:45P FROM: DCT MMAC 405 681 5020 TO DCT HOME OFC P: 1/1." In other words, the document was faxed to Bernardi at 4:45 p.m. Also as noted above, General Counsel's Exhibits 47 and 57, which are Sanders' drug test result form and the specimen collection form, respectively, indicate that the specimen was collected at 4:50 p.m. (or 16:50 military time) on November 14, 2003.³⁵ Bernardi did not review and read the memorandum before she suspended Sanders. Bernardi

³⁵ While there was no showing that the time on DCT's fax machine was synchronized with the clock at the involved Concentra Medical Center, it is highly unlikely that Sanders could do (1) through (7) in a few minutes. We know from General Counsel's Exhibits 47 and 57 the address of the involved Concentra Medical Center where the specimen was given or collected, namely 200 Quadrum Drive, Oklahoma City, OK 73108. Also we know that MMAC is part of the Will Rogers World Airport, and is located about 7 miles from 200 Quadrum Drive. We know that the sample was collected at 4:50 p.m. on November 14, 2003 and Lieutenant Cloud testified that Sanders dropped off the paperwork at 5:30 p.m., or approximately 40 minutes after she gave the specimen. Sanders was driving in rush hour traffic on a Friday night. Assuming that Sanders went straight from the involved Concentra Medical Center to MMAC and assuming that Sanders lives, for the sake of argument, about 5 miles from the involved Concentra Medical Center, it would have taken her about 20 to 25 minutes to get to the involved Concentra Medical Center. In other words, she would have left her house about 4:25 p.m. or 4:30 p.m., well before the memorandum was faxed to Bernardi. While General Counsel's Exhibits 47 and 57 demonstrate that Sanders was mistaken as to the time she returned the Concentra paperwork to MMAC, her testimony indicates that (1) through (7) plus dropping the Concentra paperwork off at MMAC took a total of approximately 1 hour. It is noted that Sanders did not go to the Concentra Medical Center which is specified in the memorandum which was supposed to be given to her. If Sanders had the memorandum, it apparently would follow that she would not have had to telephone Concentra to find out its hours and she would not have gone to the Concentra Medical Center at 200 S. Quadrum Drive since the memorandum normally given to employees to take the random drug test, Respondent's Exhibit 37, specifies the Concentra Medical Center at 6101 W. Reno Avenue is to be used. The W. Reno Avenue Center is approximately 2 miles closer to MMAC than the one located on Quadrum Drive. Perhaps Sanders chose the one on S. Quadrum Drive because it was listed first in the telephone directory or perhaps she chose it because it was closer to her residence, if that was the case. Perhaps her choice of a different Concentra Medical Center than is specified in the DCT memorandum that was supposed to accompany the random drug test paperwork would explain the fact that she was told that while they were open to 9 p.m. she should be there before 5 p.m. to get the drug test. Perhaps conditions at that Concentra Medical Center that night precluded giving drug tests after 5 p.m. Everything Sanders did points to the fact that she did not receive the memorandum with the random drug test paperwork on November 13, 2003.

did not care about reading the memorandum before she suspended Sanders. According to Bernardi's testimony, she would have asked Impson to fax her a copy of the memorandum during her third telephone conversation with Impson about this matter on November 14 2003. According to Impson's testimony, during the first conversation Bernardi asked her to fax a copy
5 of Sander's memorandum and she faxed it to Bernardi.

With respect to Sanders' termination on November 17, 2003, Bernardi hedged as to whether she knew that Sanders had passed the random drug test when she terminated Sanders. Since Lieutenant Cloud received the envelope with the paperwork back from
10 Concentra at about 5:30 p.m. on November 14, 2003, Respondent was placed on notice at that time that Sanders had taken the random drug test, even though Lieutenant Cloud did not open the envelope. But Bernardi testified that even if she knew that Sanders passed the random drug test, she still would have terminated Sanders because Sanders did not say that she had forgotten or made a mistake or that she would go down and take the test. Regarding Bernardi's
15 expectation that Sanders would say that she had forgotten or made a mistake, this is not a reasonable expectation if Sanders did not receive the memorandum and, therefore, Sanders did not forget or make a mistake. With respect to Sanders saying on November 14, 2003 that she would go down and take the test, this is exactly what Sanders did. At 5:30 p.m. on November 14, 2003 Respondent knew that Sanders went down and took the random drug test.
20 Respondent knew this before Bernardi terminated Sanders. But in truth, Bernardi was not looking for an apology from Sanders or an indication that she would take the test. The evidence leads to the inescapable conclusion that Sanders was set up from the outset with the irregular drawing, the missing memorandum, the fact that Impson, Bolz, and Satepehtaw lied about what happened, Bernardi telling Sanders that she reviewed a copy of the memorandum or
25 noticed before she suspended Sanders, Bernardi testifying that she expected Sanders to say that she forgot or made a mistake when all along Bernardi knew that this was not the case, Bernardi not caring that Sanders took her random drug test 29 hours after receiving the Concentra drug test form and the same evening that Bernardi explained to her what the policy was, Bernardi not caring that Sanders passed the random drug test, and Bernardi terminating
30 Sanders even though Respondent knew that Sanders took the random drug test. Sanders was treated disparately. Grove, Wanda Smith, and David Smith were given more time between their notification and when they took their random drug tests. While Bernardi told Sanders that "the purpose of a random drug test was not to wait until the drugs may be out of someone's system by waiting several days" this is just what Respondent did by giving Grove, Wanda Smith and
35 David Smith notice of a random drug test when it knew that they would not be able to take the test for days for 2 to 3 days. Here Sanders took the test the next day after she received the Concentra paperwork without the notice or memorandum telling her when she had to take the test. As noted above, here Sanders took the test the same evening that she was finally put on notice about the requirement that she take the test before her next shift. Pains are taken to
40 preserve the chain of custody regarding the specimen. Yet an employer can defeat these measures if it can manipulate the notification procedure so that it can claim that an employee should be terminated even though she passed her random drug test. Respondent has not shown that Sanders was given the proper notification regarding when to take the test. Respondent could have its employees sign a receipt for the random drug test paperwork with a
45 specific indication the employee received the notification for when to take the test. As noted above, the employees are required to sign a receipt for the testing program in general which does not refer to how much time the employees have to take their random drug test. Interestingly Respondent on brief argues that since Sanders knew for at least a day that this was a drug test, it could no longer be considered random. On the one hand, as noted above,
50 Sanders took her random drug test 29 hours after receiving the Concentra drug test form without the memorandum, and the same evening that Bernardi explained to her what the policy was, which policy Sanders did not know about before Bernardi told her because Sanders never

5 received the memorandum explaining it. On the other hand, Grove received her notification on
January 24, 2003 and took the random drug test on January 27, 2003, Wanda Smith received
her notification on June 14, 2003 and took the random drug test on June 16, 2003, and David
Smith received notification of his random drug test on September 12, 2003 and took his random
10 drug test on September 15, 2003. Is Respondent now arguing that these other random drug
tests were not random? Respondent itself was responsible for the delay in the taking of these
three other tests since the Respondent gave the notification with the realization that these three
employees could not take the random drug test the same day they received notification. Surely
Respondent must appreciate the fact the random in random drug test refers to the selection
15 process. In other words, the employee does not take the test as a part of an annual physical.
Instead by some method the employee is randomly selected for the drug test. But it is easy to
understand Respondent's "confusion" on brief since it appears that Sanders was not randomly
selected; Sanders was chosen because, in addition to other things, exactly one week before
she signed a charge with the Board against Respondent alleging that Respondent did not
bargain in good faith.

Also interesting is Respondent's assertion on brief that Sanders was acting as an
"officious intermeddler" in her actions concerning the alleged computer password violations; and
that Sanders was trying to impede Respondent's investigation of computer usage. As Bernardi
20 admitted, Sanders' understanding of the FAA rules regarding user I.D. and passwords was
correct. Bernardi verified this with the FAA IT section herself. And Bernardi was told by the FAA
IT section of an acceptable alternative approach. Yet the next day Harp did not use the
acceptable alternative approach specified by the FAA IT section. Instead, with his own method
Harp accessed Sanders' computer and he would not explain to Sanders what he was doing with
25 the FAA computer she used. One or two day before this the computer that Sanders used was
locked up after Respondent worked on it, and it required the intervention of the FAA IT section,
at the behest of Sanders, to get it operating again. Respondent argues that the computer
investigation was undertaken at the request of the FAA. Harp did not find anything incriminating
on Sanders' computer and so it would appear that the only thing she was trying to protect was
30 the integrity of the FAA system. Far from being an "officious intermeddler" who was out to
impede Respondent, Sanders correctly understood the requirements of the FAA rules and tried
unsuccessfully to get Respondent to abide by the rules. Sanders agreed to the acceptable
alternative approach of the FAA IT section as relayed by Bernardi. Yet the next day the
Respondent did not use this approach but rather "steamrolled" Sanders when she asked what
35 Harp was doing with the FAA computer she used. Harp appreciated the sensitivity of the
situation because the day before when he locked up Sanders computer the FAA IT section told
him, when he called them, that notwithstanding his explanation of what he was doing, they
would not reset the password on Sanders computer because it was their policy not to do that.
Yet the next day Harp, according to Satepeahtaw, went under Sanders desk and used a little
40 device so that he did not have to use a password or log onto the computer. The fact that the
investigation was authorized by the FAA does not mean that the methods utilized by
Respondent to conduct the investigation were authorized by the FAA. Indeed, it appears that
Respondent's methods did not comply with the FAA requirements. And even when Respondent
was told how to comply, it chose not to do the right thing. The fact that Respondent describes
45 Sanders as an "officious intermeddler" regarding this matter demonstrates that Respondent is
still smarting from what occurred. Sanders discussed this situation with Milan, Roberts,
Coughran, and Whitaker at the end of the day when Tolman first asked for their user IDs and
passwords. Sanders discussed the FAA rules with Coughran and Whitaker and told them that
she had telephoned the FAA and was going to meet with Agent Hill. As noted above, Sanders
50 engaged in union activity. She also engaged in concerted protected activity with respect to the
computer usage investigation in that she was not pursuing her own personal interests, she was
only asking that the FAA rules for the computers the employees used be complied with, and this

was done after she had discussed the matter with other employees. Bernardi was aware that Sanders was complaining to the FAA about the improper methods Respondent was using to access the computers. Respondent violated Section 8(a)(1) and 8(a)(1) and (3) of the Act as alleged in paragraphs 7(b) and (c) and paragraphs 9(a) and (b) of the complaint.

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Paragraph 7(d) of the complaint alleges that in or about December 2003 and in or about January 2004, Respondent failed or refused to promote its employee Wooten to a lead position because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for General Counsel, after conceding that Respondent forwarded Wooten's application for a lead officer position to the FAA and the FAA determined that Wooten had insufficient experience to qualify for the position, contends on brief that nonetheless, Respondent has final authority over whether to promote Wooten or even to follow up with Wooten concerning the FAA's determination; that when Wooten asked Captain Thompson what the problem was regarding his application, Thompson said that the Union was the biggest problem; and that this demonstrates that the motivating factor in Respondent's decision not to promote Wooten was Union animus and a violation of Section 8(a)(3) of the Act. Respondent on brief argues that the evidence shows that Respondent did everything it could to promote Wooten to lead officer but the FAA rejected his candidacy; and that as the deposition of Quintero, of the FAA, indicates, it would have been a violation of DCT's contract with the FAA if DCT promoted someone after they were rejected by the FAA, and he never knew DCT to have promoted anyone after the FAA had rejected the candidate.

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As noted above, the FAA representative, Quintero, in a deposition, testified that the contract between the FAA and DCT gives the FAA the authority to determine whether or not certain people meet the qualifications to be assigned to certain positions, the FAA's determination is a final determination as of that date, and if DCT promoted an individual against the FAA's determination, DCT would be in violation of the contract. In light of this, Respondent did not violate the Act as alleged in paragraph 7(d) of the complaint.

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Paragraph 7(e) and paragraphs 8(a) and (c) of the complaint collectively allege that on or about January 22, 2004, Respondent reassigned its employees Whitaker and Wooten to remote posts because they assisted the Union and they filed charges with the Board, and to discourage employees from engaging in these activities. Counsel for General Counsel contends on brief that in January 2004 Respondent decided to transfer some employees based on imprecise criteria and no objective standards; that Whitaker and Wooten were transferred from posts where they interacted with numerous employees throughout the day to remote single-man gates where they interacted with one to two employees who relieved them for two 10 minute breaks per shift; that Whitaker and Wooten were Union officers at the time of their transfer; that Respondent's second transfer resulted in Wooten being transferred to another remote one-man post; that while Respondent justified the transfers as part of a cross-training plan, Wooten and Whitaker testified that they learned no new skills at their new posts; that in light of the significant evidence of animus weaved throughout this matter, Respondent's transfer of Wooten and Whitaker to remote posts establishes a prime facie case of discrimination; that Respondent was unable to rebut the case; and that the one Respondent witness who took responsibility for devising the job transfers, Captain Butler, testified that there was no particular method to decide who was transferred. Respondent on brief argues that the collective bargaining agreement gives the Respondent the right to assign and reassign individuals to posts as the company so desires; that Butler reasonably decided that cross-training employees on different posts makes sense; that Counsel for General Counsel has offered no testimony to suggest that any harm was done to Whitaker and Wooten; that apart from merely stating that the posts were remote, General Counsel presented no evidence to suggest that that was the case; and that the involved posts had to be manned by DCT and the fact that Whitaker and Wooten may disagree with their

assignment does not make the assignments a violation of the Act.

5 While the involved collective bargaining agreement might give DCT the right to reassign employees, the reassignment cannot be made for an unlawful reason. Here Whitaker and Wooten engaged in Union activity and Respondent knew it, and both filed unfair labor practice charges against Respondent. As noted above, there is a great deal of anti-union animus on the part of the Respondent, including the violations of the Act which occurred before the involved reassignments. The transfers were adverse actions in that, as pointed out by Counsel for General Counsel, Whitaker and Wooten were transferred from posts where they interacted with numerous employees throughout the day to remote single-man gates where they interacted with one to two employees who relieved them for two 10 minute breaks per shift.

15 Has the Respondent shown that the reassignments would have occurred absent these employees' union activities, and the fact that they filed charges with the Board? As indicated above, on May 3, 2003 DCT's then Project Manager at MMAC forwarded a memorandum, General Counsel's Exhibit 17, to Tolman recommending that Whitaker and Coughran, who engaged in union activity, be reassigned "to remote posts such as TRW of VTD ... where contact with other employees would be minimal." (emphasis added) At first Tolman testified that Respondent did not terminate Whitaker and Coughran based on this memorandum immediately after receiving it. Later when called as Respondent's last witness, Tolman testified that he never acted on any of that Project Manager's disciplinary recommendations. Wooten's testimony that when these changes went into effect there was no discussion with him by a supervisor or manager about the reassignment being for cross-training was not refuted. Also Respondent did not refute Wooten's testimony that before the reassignment he worked with about six coworkers and after the reassignment to the Foster Gate he did not work with any coworkers, he would have to be relieved to take a break, he was not allowed to rotate out of the position which had been done in the past, and all of those reassigned were union members. Respondent did not refute Whitaker's testimony that at his previous post he interacted with several coworkers but after he was reassigned to the VTD, he did not work alongside any coworkers, and that he did not receive any training at the VTD gate. Once again Respondent's witnesses contradict each other. Butler testified that he and Lieutenants Satepehtaw and Bolz got together and reduced the list to eight or nine employees for reassignment. Bolz testified that she attended two meetings regarding the reassignment of security officers. At the first meeting the discussion focused on 35 to 40 security officers. At the second meeting, according to Bolz's testimony, Butler just gave her a piece of paper with seven or eight names on it and Butler did not tell her how these people were chosen. Satepehtaw also did not corroborate Butler with respect to how those who were reassigned were chosen. And finally, Butler could not adequately explain what criteria was used, how he chose those who were reassigned, or what method was used to make the choice. As pointed out in *Fluor Daniel, Inc.*, supra, when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. As indicated above, in May 2003 the then Project Manager recommended to Tolman that union activists be reassigned to remote posts where contact with other employees would be minimal. Tolman at one point testified that he did not act on the Project Manager's recommendation immediately. It appears that Tolman, to some extent, eventually did act on those recommendations. Respondent has not shown that it would have taken the same action it did absent Whitaker's and Wooten's union activity, and their filing of unfair labor practice charges with the Board. Notwithstanding the fact that Captain Butler told Whitaker, along with Coughran and Brown, to go to FAA Special Agent Hill's office, in my opinion this is not enough to demonstrate that Respondent was aware of the role that Whitaker played in the complaints and investigation of the alleged FAA computer security violations by Respondent. Respondent violated Section 8(a)(1), Section 8(a)(1) and (3), and Section 8(a)(1) and (4) of the Act as alleged in paragraphs 7(e) and 8(a) and (c) of the complaint.

5 Paragraphs 7(f), 8(b) and (c), and 9(a) and (c) of the complaint collectively allege that on or about January 30, 2004, Respondent unlawfully terminated its employees Whitaker and Coughran because they assisted the Union, they filed charges with the Board and cooperated with the Board in the informal settlement of their cases, and they engaged in concerted activities, and to discourage employees from engaging in these activities. Counsel for General Counsel contends on brief that Coughran and Whitaker built the Union at MMAC from the ground up; that Respondent knew about Coughran's and Whitaker's union, Board and other concerted protected activities; that Coughran and Whitaker filed unfair labor practice charges with the Board against Respondent; that Coughran, Whitaker, and Sanders discussed Respondent's computer security violations and reported the violations to the FAA; that Coughran and Whitaker were officers of the Union, and they picketed with coworkers near Respondent's facility in November 2003; that there is anti-union animus on the part of Respondent and this was clearly demonstrated in one of Respondent's first responses to Coughran and Whitaker's union activities, namely to ban solicitation and distribution of any non-work materials; that shortly thereafter, Respondent disciplined Coughran and Whitaker for discussing workplace discipline, which is itself a protected activity, *Triana Industries, Inc.*, 245 NLRB 1258 (1979) and *Kinder-Care Learning Centers*, 299 NLRB 1171, 1172 (1990); that Coughran and Whitaker lost their jobs and were reinstated; that anti-union animus is also demonstrated by the extensive violations of the Act found herein; that the record demonstrates that Counsel for General Counsel has made a strong prima facie case that Coughran and Whitaker were fired for discriminatory reasons; that Respondent's claimed business justification, namely that it had a reasonable basis for concluding that Coughran and Whitaker lied to the Board and/or Respondent during the settlement of their earlier cases and thereby defrauded Respondent, does not rebut Counsel for General Counsel's prima facie case; that on the contrary, the record shows that (a) Coughran and Whitaker did not lie to the Board or Respondent during the settlement of the earlier case, and (b) Respondent was fully satisfied with the settlement of the earlier cases, which was a clear product of compromise to resolve disputes concerning the calculation of backpay; that in his August 1, 2003 e-mail to Cremin, Respondent's Exhibit 46, Hoskin wrote "bringing interim earnings to zero to account for arguable interim expenses"; that in terminating Coughran and Whitaker, Respondent was not interested in an analysis of the settlement agreement to determine if Coughran and Whitaker had lied because it did not wait for Region 17 to complete its review of the settlement and Respondent's Motion to Dismiss; and that in terminating Whitaker on January 30, 2004, Bernardi summed up any meaningful analysis when she told him he was still fired even if the Board dismissed Respondent's Motion. Respondent on brief argues that "the evidence shows that DCT ... terminate[d] ... [Coughran and Whitaker] based on the fact that they had gained a monetary settlement through clear and fraudulent misrepresentations" (Respondent's brief page 41); that as Tolman testified, their identical termination letters, General Counsel's Exhibit 21, contain all the reasons why they were terminated (The next-to-last paragraph of the letter reads: "Based on the information that we have received, either Mr. Hoskin is lying when he says you never told him the extent of your interim employment, or you lied when you said that you did. We chose to believe the Field Attorney [Hoskin] for Region 17 of the ... Board." [Emphasis added]); that the settlement agreement was entered into by DCT based on its mistaken impression that Coughran and Whitaker had no interim earnings; that DCT did not immediately terminate Coughran and Whitaker when it decided that they had received backpay through fraudulent misrepresentations; that the "sole reason for their termination was because they were not truthful regarding their interim earnings" (Respondent's brief page 46); and that "it is not relevant whether or not ... [Coughran and Whitaker] withheld important information (it is clear that they did), or whether Mr. Hoskin withheld important information (it is possible that he did). What is relevant is that is that the decision to terminate Mr. Coughran and Mr. Whitaker obviously had absolutely nothing to do with their union activities" (Respondent's brief, page 47).

5 Coughran and Whitaker engaged in union activity and the Respondent was aware of this. As noted above, on April 25 Tolman and Bernardi had a conference call, as here pertinent, with Coughran and Whitaker during which (a) Tolman told the two employees that he had a
10 problem with using DCT's time, and the government telephone and radio systems to solicit for the Union, and (b) Bernardi told the two employees that all non-work related activities which were happening during work time should cease immediately. After this conference call Whitaker asked Captain Griffin "[y]ou mean we can talk about hot rods, hot dogs, and football, but we can't talk about the Union," (transcript page 311) and Griffin said "That's correct" (transcript
15 page 312). That same day Bernardi issued a memorandum indicating, among other things, that "DCT does not allow solicitation and distribution of any materials that are not work related." General Counsel's Exhibit 16. Eight days later DCT's MMAC then Project Manager, Griffin, submitted a memorandum to Tolman in which he refers to the union activities of Coughran and Whitaker, and recommends, among other things, the reassignment of Coughran and Whitaker
20 to a remote post such as TRW of VTD where contact with other employees would be minimal. A little over a month later both Coughran and Whitaker were terminated, the latter for discussing discipline with other employees, and the former, who also discussed discipline with other employees, allegedly for harassing other officers. Employees discussing the disciplining of one employee for the mutual aid and protection of employees is a protected activity. Tolman testified
25 that both filed unfair labor practices with the Board and both were reinstated pursuant to a settlement agreement. Tolman did not even deny the testimony that on an occasion when he was intoxicated and very angry at the Union he "was ranting [to Lieutenant Pitt] about having to hire back Marcus Coughran and Bill Whitaker." (transcript page 155) Upon their reinstatement Coughran and Whitaker were on the Union's team negotiating a collective bargaining
30 agreement. Without question Coughran and Whitaker engaged in union activity and they filed charges and cooperated with the Board, and Respondent was aware of it. As noted above, notwithstanding the fact that Captain Butler told Whitaker and Coughran to go to FAA Special Agent Hill's office, in my opinion this is not enough to demonstrate that Respondent was aware of the role that these two employees played in the complaints and investigation of the alleged
35 FAA computer security violations by Respondent. The evidence with respect to anti-union animus on the part of Respondent is overwhelming. It is set forth above and does not need to be repeated here. Coughran and Whitaker suffered adverse action in that both of them were terminated a second time. Counsel for General Counsel has made a prima facie case.

35 Has Respondent shown that it would have terminated Coughran and Whitaker even if they had not engaged in union activity and filed charges and cooperated with the Board in its investigation. General Counsel has made a prima facie case and now the burden of going
40 forward with evidence that Coughran and Whitaker would have been terminated absent their protected activities is on Respondent. I do not believe that it has meet its burden. Once again Respondent's approach is flawed. Although it filed a Motion to Vacate and Rescind the Settlement Agreement it entered into with respect to Coughran and Whitaker, Respondent did not care about the merits of its argument seeking such relief. Bernardi indicated as much when she told Whitaker that even if the Board ruled in his favor, he was still fired. Paragraph
45 numbered 12 of Respondent's Motion to Vacate and Rescind Settlement Agreement, for Recoupment of Funds Paid and For Dismissal of Complaint, General Counsel's Exhibit 19, reads as follows: "Upon information and belief, the NLRB, through its agent Hoskin, was made aware of Claimants' [Coughran and Whitaker] employment with SSSI early on in the investigation of Claimants' charges." Since Respondent's lead attorney at the time, Cremin, testified at the trial herein that he "not even know who SSSI is," (transcript page 1235) it
50 appears that Respondent is conceding that Coughran and Whitaker told Hoskin early on in the investigation about their employment with SSSI. This also seems to be indicated by the fact that the next two numbered paragraphs, 13 and 14, refer to Hoskin failing or refusing to divulge the

Board's standard net backpay computation and (ii) an agreement to 'zero out' interim earnings in light of Coughran's and Whitaker's claims for interim expenses.

5 (c) A review of Coughran's and Whitaker's interim earnings records shows that the interim earnings claims made by Coughran and Whitaker during settlement negotiations were substantially the same as their actual interim earnings. It appears that Coughran and Whitaker worked throughout the backpay period, but did so for fewer hours per week, and for a lower hourly wage, than they did working for DCT.

10 (d) The Region's computation of Coughran's and Whitaker's exact interim earnings, in accordance with standard Board procedures, indicates that their interim earnings were not sufficient to deduct from their gross backpay, due to their offsetting interim expenses.

15 (e) It appears that neither Coughran nor Whitaker received more backpay than they were entitled to receive.

20 (f) There is no basis for concluding that Coughran, Whitaker, Coughran's counsel Killam, Whitaker's counsel Drain or Field Attorney Hoskin engaged in any fraud in connection with the settlement of these cases.

25 Nothing in the record before me would cause me to disagree with these conclusions of the Regional Director in the above-described Order.

As noted above, Respondent did not wait for a ruling on its Motion to Vacate the settlement agreement before it terminated Coughran and Whitaker on January 30, 2004, allegedly for not telling Hoskin about interim earnings, which is contrary to an argument it made 30 3 weeks before in its Motion to Vacate. Respondent has failed to show that Coughran and Whitaker were not truthful regarding their interim earnings. Anticipating such a conclusion, Respondent now argues on brief that "it is not relevant whether or not ... [Coughran and Whitaker] withheld important information ... [rather] [w]hat is relevant is that the decision to terminate ... [them] obviously had absolutely nothing to do with their union activities." This 35 argument flies in the face of the law and logic. As set forth in *Fluor Daniel, Inc.*, 304 NLRB 970, at 970 (1991) "when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." Here, as noted above, the burden of coming forward to rebut General Counsel's prima facie case is on the Respondent. Certainly Respondent does not 40 believe that it can meet this burden by taking the approach it now takes, namely since I say it is so, it is so. Respondent has the burden of proving with credible evidence that it is so. Respondent's stated motives for its actions are false. Accordingly, an inference is warranted that the true motive is an unlawful one that the Respondent desires to conceal. Respondent violated Sections 8(a)(1), 8(a)(1) and (3), and 8(a)(1) and (4) of the Act as alleged in paragraphs 45 7(f), and 8(b) and (c) of the complaint.

Paragraph 7(g) of the complaint alleges that on or about February 18, 2004, Respondent reassigned its employee Wooten to a remote post because he assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. As noted 50 above, Wooten testified that this time the notice indicated that the reassignment was for cross-training; that before he saw this notice on the board there was no discussion from DCT about this move being related to cross-training; that he was reassigned to the VTD Gate, which is

where Whitaker was working when he was fired; that at the VTD Gate he checked people's badges and he made sure that they had a vehicle pass before they came on Center, which is what he did at his previous assignment at the Foster Gate; that he was alone at the VTD Gate; and that to take a break at the VTD Gate he had to be relieved.

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As concluded above, while the involved collective bargaining agreement might give DCT the right to reassign employees, the reassignment cannot be made for an unlawful reason. Wooten engaged in Union activity and Respondent knew it. Also as noted above, there is a great deal of anti-union animus on the part of the Respondent, including the violations of the Act which occurred before Wooten's second reassignment. This transfer was an adverse action in that, Wooten, who before the last unlawful reassignment worked with six coworkers at his former post, was again reassigned to a remote single-man gate where he interacted only with the employees who relieved him.

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Has the Respondent shown that it would have reassigned Wooten to the VTD Gate absent his union activity? As noted above, DCT's MMAC Project Manager back in May 2003 recommended to Tolman that union activists be assigned to a remote post such as VTD where contact with other employees would be minimal. That is what was being done here. The justification Respondent advanced for the reassignments was not only unsupported by credible evidence of record but the evidence Respondent relies on is contradictory. As pointed out by Wooten, while this time the notice indicated that the reassignment was for cross-training, he did not receive any training and he performed the same function at the VTD Gate as he performed at his prior assignment. The Respondent has not shown that it would have assigned Wooten to the VTD Gate absent his union activity. Respondent violated Section 8(a)(1) and Section 8(a) (1) and (3) of the Act as alleged in paragraph 7(g) of the complaint.

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Paragraphs 8(a), (b) and (c) of the complaint collectively allege that on or about January 22, 2004, Respondent reassigned its employees Whitaker and Wooten to remote and isolated work areas and on or about January 30, 2004, Respondent terminated its employees Whitaker and Coughran because they filed unfair labor practice charges with the Board, gave testimony to the Board in the form of an affidavit, otherwise cooperated in the Board's investigation of the unfair labor practices and because Whitaker cooperated with the Board in the informal settlement of unfair labor practice charges in Cases 17-CA-22210, 17-CA-22271 and 17-CA-2227. These allegations are treated above.

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Paragraphs 9(a), (b), and (c) collectively allege that on or about November 17, 2003, Respondent terminated its employee Sanders, and on or about January 30, 2004, Respondent terminated its employees Whitaker and Coughran because on or about November 5, 2003, Respondent's employees Sanders, Whitaker, and Coughran engaged in concerted activities with each other for the purposes of mutual aid and protection by discussing alleged violations by Respondent of the FAA policies restricting the disclosure of security passwords to government-owned computers, for complaining to the FAA about the alleged violations, and for participating in the FAA's investigation of the alleged violations. These allegations are treated above.

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Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, Respondent committed unfair labor practices

contrary to the provisions of Section 8(a)(1) of the Act:

5 (a) In or about November 2003, Respondent changed the day the paychecks were given to its employees from Thursday to Friday without notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

10 (b) Since on or about January 1, 2004, Respondent has failed to continue in effect all the terms and conditions of employment set forth in its collective bargaining agreement with the Union by failing or refusing to pay lead employees at a rate of \$16.83 per hour without the Union's consent.

(c) On or about September 16, 2003, Respondent, by Henry Butler, at Respondent's facility, interrogated an employee about the employee's union activities.

15 (d) On or about October 1 or 8, 2003, Respondent, by Anthony Pitt, at Respondent's facility, told employees that it had no intention of signing a collective bargaining agreement with the Union.

20 (e) On or about October 10, 2003, Respondent, by Cheryl Bernardi at Respondent's facility, interrogated an employee concerning the employee's union activities.

25 (f) On or about November 7, 2003, Respondent, by David LaFlamme and Brenda Lozano, at Respondent's facility, denied the request of its employee Randy Gilliland to be represented by the Union during an investigatory interview when he had reasonable cause to believe that the interview would result in disciplinary action being taken against him, and LaFlamme and Lozano conducted the interview after denying his request.

30 (g) On or about November 12, 2003, Respondent removed Union literature from the bulletin board on which Respondent has allowed other nonwork-related materials to be posted.

(h) On or about December 30, 2003, Respondent, by David Tolman, at Respondent's facility, made disparaging comments to employees about the Union and its International Representative.

35 (i) On or about December 30, 2003, Respondent, by David Tolman, during a telephone conversation to Respondent's facility, threatened an employee with unspecified reprisals and with legal action because he engaged in Union activities.

40 (j) On or about November 12, 2003, Respondent terminated its employee Malcom.

(k) On or about November 14, 2003, Respondent suspended its employee Sanders.

(l) On or about November 17, 2003, Respondent terminated its employee Sanders

45 (m) On or about January 22, 2004, Respondent reassigned its employees Whitaker and Wooten to remote posts.

(n) On or about January 30, 2004, Respondent terminated its employees Whitaker and Coughran.

50 (o) On or about February 18, 2004, Respondent reassigned its employee Wooten to a remote post.

(p) On or about January 22, 2004, Respondent reassigned its employees Whitaker and Wooten to remote and isolated work areas, and on or about January 30, 2004, Respondent terminated its employees Whitaker and Coughran because they filed unfair labor practice charges with the Board, gave testimony to the Board in the form of an affidavit, otherwise
 5 cooperated in the Board's investigation of the unfair labor practices and because Whitaker cooperated with the Board in the informal settlement of unfair labor practice charges in Cases 17-CA-22210, 17-CA-22271 and 17-CA-2227.

(q) On or about November 17, 2003, Respondent terminated its employee Sanders, because on or about November 5, 2003, Respondent's employee Sanders engaged in concerted activities with Whitaker and Coughran for the purposes of mutual aid and protection by discussing alleged violations by Respondent of the FAA policies restricting the disclosure of security passwords to government-owned computers, for complaining to the FAA about the
 10 alleged violations, and for participating in the FAA's investigation of the alleged violations.
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4. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act:

(a) On or about November 12, 2003, Respondent terminated its employee Malcom.
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(b) On or about November 14, 2003, Respondent suspended its employee Sanders.

(c) On or about November 17, 2003, Respondent terminated its employee Sanders
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(d) On or about January 22, 2004, Respondent reassigned its employees Whitaker and Wooten to remote posts.

(e) On or about January 30, 2004, Respondent terminated its employees Whitaker and
 30 Coughran.

(f) On or about February 18, 2004, Respondent reassigned its employee Wooten to a remote post.

5. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (4) of the Act: on or about January 22, 2004, Respondent reassigned its employees Whitaker and Wooten to remote and isolated work areas and on or about January 30, 2004, Respondent terminated its employees Whitaker and
 35 Coughran because they filed unfair labor practice charges with the Board, gave testimony to the Board in the form of an affidavit, otherwise cooperated in the Board's investigation of the unfair
 40 labor practices and because Whitaker and Coughran cooperated with the Board in the informal settlement of unfair labor practice charges in Cases 17-CA-22210, 17-CA-22271 and 17-CA-2227.

6. By engaging in the following conduct, Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (5) of the Act:

(a) In or about November 2003, Respondent changed the day the paychecks were given to its employees from Thursday to Friday without notice to the Union and without affording the
 50 Union an opportunity to bargain with the Respondent with respect to this conduct.

(b) Since on or about January 1, 2004, Respondent has failed to continue in effect all the

terms and conditions of employment set forth in its collective bargaining agreement with the Union by failing or refusing to pay lead employees at a rate of \$16.83 per hour without the Union's consent.

5 7. Respondent has not committed any other unfair labor practices alleged in the complaint.

Remedy

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

15 The Respondent having discriminatorily discharged Malcom, Sanders, Coughran, and Whitaker, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³⁶

20 The Respondent will be required to expunge from its records any reference to the unlawful discharges of Malcom, Sanders, Coughran, and Whitaker.

25 The Respondent having unlawfully failed to continue in effect all the terms and conditions of employment set forth in its collective bargaining agreement with the Union by failing or refusing to pay lead employees at a rate of \$16.83 per hour without the Union's consent, it must make lead officers whole, with interest, for any loss of earnings since on or about January 1, 2004.

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁷

ORDER

35 The Respondent, DCT Incorporated, of McAlester, Oklahoma, its officers, agents, successors, and assigns, shall

40 ³⁶ While it appears that Coughran was not as careful or candid as he should have been in filling out the paperwork described above when he applied for a job with Respondent, Coughran should not be denied reinstatement since (a) Respondent has not shown that it terminates employees for conduct such as that engaged in by Coughran on their application paperwork, (b) if there was any substance to the allegations apparently made by female inmates, who according to Sloan often accused guards of inappropriate conduct, Coughran would have been charged with criminal acts, and it was not shown by Respondent that he was, and (c) to the extent that Coughran's testimony was challenged by Respondent, it did not call the warden of the involved facility as a witness to refute Coughran's testimony.

45 ³⁷ 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. 50 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

5 (a) Changing the day the paychecks are given to its employees from Thursday to Friday without notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

10 (b) Failing and continuing in effect all the terms and conditions of employment set forth in its collective bargaining agreement with the Union by failing or refusing to pay lead employees at a rate of \$16.83 per hour without the Union's consent.

(c) Interrogating, by Henry Butler, an employee about the employee's union activities.

15 (d) Telling employees that it has no intention of signing a collective bargaining agreement with the Union.

(e) Interrogating, by Cheryl Bernardi, an employee concerning the employee's union activities.

20 (f) Denying the request of an employee to be represented by the Union during an investigatory interview when he has reasonable cause to believe that the interview would result in disciplinary action being taken against him, and conducting the interview after denying his request.

25 (g) Removing Union literature from the bulletin board on which Respondent has allowed other nonwork-related materials to be posted.

(h) Making disparaging comments to employees about the Union and its International Representative.

30 (i) Threatening an employee with unspecified reprisals and with legal action because he engaged in Union activities.

(j) Unlawfully terminating its employee Malcom.

35 (k) Unlawfully suspending its employee Sanders.

(l) Unlawfully terminating its employee Sanders

40 (m) Unlawfully reassigning its employees Whitaker and Wooten to remote posts.

(n) Unlawfully terminating its employees Whitaker and Coughran.

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

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

50 Within 14 days from the date of the Board's Order, offer Malcom, Sanders, Coughran, and Whitaker full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

APPENDIX

NOTICE TO EMPLOYEES

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

10 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

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

20 WE WILL NOT change the day the paychecks are given to you from Thursday to Friday without
notice to UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL #243 and
without affording UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL #243
an opportunity to bargain with us with respect to this conduct.

25 WE WILL NOT fail to continuing in effect all the terms and conditions of employment set forth in
the collective bargaining agreement we have with UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL #243 by failing or refusing to pay lead employees at a rate of
\$16.83 per hour without the consent of UNITED GOVERNMENT SECURITY OFFICERS OF
AMERICA, LOCAL #243.

30 WE WILL NOT interrogate you about your union activities.

WE WILL NOT tell you that we have no intention of signing a collective bargaining agreement
with UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL #243.

35 WE WILL NOT deny your request to be represented by UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL #243 during an investigatory interview when you have
reasonable cause to believe that the interview would result in disciplinary action being taken
against you.

40 WE WILL NOT remove the literature of UNITED GOVERNMENT SECURITY OFFICERS OF
AMERICA, LOCAL #243 from the bulletin board on which we have allowed other nonwork-
related materials to be posted.

45 WE WILL NOT make disparaging comments to you about UNITED GOVERNMENT SECURITY
OFFICERS OF AMERICA, LOCAL #243 and its International Representative.

WE WILL NOT threaten you with unspecified reprisals and with legal action because you
engage in union activities.

50

WE WILL NOT discharge or otherwise discriminate against any of you for (a) supporting UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL #243 or any other union, (b) for engaging in concerted protected activities, or (c) for filing an unfair labor practice charge, giving an affidavit, or otherwise cooperating with the National Labor Relations Board.

5

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

10

WE WILL, within 14 days from the date of this Order, offer Byron Malcom, Virginia Carol Sanders, William Whitaker, and Marcus Coughran full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

15

WE WILL make Byron Malcom, Virginia Carol Sanders, William Whitaker, and Marcus Coughran whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

20

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Byron Malcom, Virginia Carol Sanders, William Whitaker, and Marcus Coughran, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

25

WE WILL make all lead officers whole for any loss of earnings suffered as a result of our having unlawfully failed since January 1, 2004, to continue in effect all the terms and conditions of employment set forth in our collective bargaining agreement with UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL #243 by failing or refusing to pay lead employees at a rate of \$16.83 per hour without the consent of UNITED GOVERNMENT SECURITY OFFICERS OF AMERICA, LOCAL #243.

30

DCT Incorporated

35

Dated _____ By _____
(Representative) (Title)

40

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.

8600 Farley Street, Suite 100, Overland Park, KS 66212-4677

(913) 967-3000, Hours: 8:15 a.m. to 4:45 p.m.

45

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, (913) 967-3005.

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