

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NATIONAL AUTOMATIC SPRINKLER
INDUSTRY WELFARE FUND,

Respondent,

and

Case No. 05-CA-97998

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2,

Charging Party.

**RESPONDENT NATIONAL AUTOMATIC SPRINKLER INDUSTRY
WELFARE FUND'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.24 (2012), Respondent National Automatic Sprinkler Industry Welfare Fund ("Welfare Fund"), by and through the undersigned attorneys, respectfully moves for partial summary judgment with respect to certain allegations set forth in the Complaint in the above-captioned matter.

The Welfare Fund seeks summary judgment with respect to Paragraphs 6, 6(a), 6(b), 6(c), 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 12, 13(a), 13(b), 13(c), 14 and 15. These allegations are subject to the Board's deferral doctrine in *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), or *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Accordingly, for the reasons set forth in the accompanying Brief in Support, the Welfare Fund respectfully requests that the Board grant the motion. In so doing, the Board should dismiss Paragraphs 6, 6(a), 6(b), 6(c), 11(a), 14 and 15 in their entirety. The Board should also

dismiss paragraphs 11(b), 11(c), 11(d), 11(e), 11(f), 12, 13(a), 13(b), and 13(c), reserving jurisdiction for any motions showing (a) the dispute was not resolved with reasonable promptness pursuant to the grievance and arbitration procedure; or (b) that procedure was not fair or regular or it reached a result that is repugnant to the Act. Finally, the Board should direct a hearing with respect to the remaining allegations – Paragraphs 7, 8, 9, and 10. *See, e.g., General Dynamics Corp.*, 271 NLRB 187, 190 (1984) (granting partial summary judgment and deferring certain allegations to arbitration while proceeding with respect to other allegations).

Respectfully submitted,

DATED: June 17, 2013

By: 

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INDUSTRY WELFARE FUND,

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OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2,

Charging Party.

**RESPONDENT NATIONAL AUTOMATIC SPRINKLER INDUSTRY
WELFARE FUND'S BRIEF IN SUPPORT OF ITS MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, 29 C.F.R. § 102.24 (2012), Respondent National Automatic Sprinkler Industry Welfare Fund ("Welfare Fund"), by and through the undersigned attorneys, respectfully submits this Brief in Support of its Motion for Partial Summary Judgment.

I. INTRODUCTION

Federal law declares that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d). Several grievance disputes have arisen between the Respondent Welfare Fund and the union representing its employees, Charging Party Office and Professional Employees International Union, Local 2 ("Local 2"). The Welfare Fund and Local 2 have resolved some of the disputes – *i.e.*, those involving the termination and reinstatement of employee Lakishia Thomas – pursuant to the grievance and arbitration procedure set forth in the parties' now-expired collective

bargaining agreement. That resolution is embodied in two decisions issued by Arbitrator Andrew Strongin, both of which were decided adversely to the Welfare Fund. Nevertheless, the Welfare Fund has complied with those decisions. Local 2 has filed grievances relating to other disputes – viz., those involving the discipline of Lakishia Thomas, as well as alleged unilateral changes to break policies, personal cell phone usage and internet usage – pursuant to the grievance and arbitration procedure. While the underlying agreement may have expired, the Welfare Fund has repeatedly expressed its willingness to arbitrate all of Local 2's grievances.

Rather than comply with the parties' agreed-upon method for resolving grievance disputes, Local 2 has filed an unfair labor practice charge that generally protests the *same* issues that have either been resolved by Arbitrator Strongin or are the subject of Local 2's pending grievances. The Welfare Fund raised the deferral issue during the unfair labor practice investigation, pointing to the arbitration awards and the pending grievances. The Welfare Fund pointed out its compliance with those awards and reiterated its willingness to arbitrate the grievances. The Regional Director ignored the Welfare Fund and issued a complaint that largely recasts the parties' settled and pending contractual disputes as statutory unfair labor practices.

By issuing a complaint in this case, the General Counsel – and not the Welfare Fund – has failed to comply with Federal law and disregarded established Board precedent. Therefore, for the reasons set forth herein, the Welfare Fund respectfully requests that the Board grant the Motion for Partial Summary Judgment and dismiss the allegations in Paragraphs 6, 6(a), 6(b), 6(c), 11(a), 11(b), 11(c), 11(d), 11(e), 11(f), 12, 13(a), 13(b), and 13(c), because they are subject to the Board's deferral doctrines as set forth in *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), or *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971).

II. STATEMENT OF UNDISPUTED FACTS

A. Background

1. The Welfare Fund is a trust fund established pursuant to the Taft Hartley Act, 29 U.S.C. § 186(c)(5), with an office and place of business in Landover, Maryland. (Complaint [“Compl.”] ¶ 2(a), a true and accurate copy of which is provided as Exhibit 1; Answer [“Ans.”] ¶ 2(a), a true and accurate copy of which is provided as Exhibit 2.)

2. The Fund provides medical benefits to unionized sprinkler fitters throughout the United States, including medical, surgical, hospitalization, prescription drug, vision, dental and accident and sickness benefits. (Compl. ¶ 2(a); Ans. ¶ 2(a).)

3. The Fund is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, 29 U.S.C. §§ 152(2), (6) & (7). (Compl. ¶ 2(c); Ans. ¶ 2(c).)

4. The Office and Professional Employees International Union, Local 2 is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. § 152(5). (Compl. ¶ 3; Ans. ¶ 3.)

5. Local 2 has represented a bargaining unit of employees who work for the Welfare Fund since at least 1984; and, Local 2 has represented that unit pursuant to Section 9(a) of the Act since at least 1984. (Compl. ¶ 4(a); Ans. ¶ 4(b).)

6. The Welfare Fund and Local 2 have been parties to a collective bargaining relationship since at least 1984. (Compl. ¶ 4(a); Ans. ¶ 4(b).)

7. Pursuant to this collective bargaining relationship, the Welfare Fund and Local 2 have negotiated a series of collective bargaining agreements. (Compl. ¶ 4(b); Ans. ¶ 4(b).)

8. The most recent collective bargaining agreement between the Welfare Fund and Local 2 was effective by its terms from January 1, 2010 through December 31, 2012. (Compl. ¶ 4(b); Ans. ¶ 4(b).) A true and accurate copy of this agreement is provided as Exhibit 3.

9. Article 2, Section 2.01 of the most recent collective bargaining agreement defines the bargaining unit represented by Local 2. The section provides as follows:

The Employer recognizes the Union as the exclusive bargaining agent for all office employees employed by the Employer, including those employees who are normally assigned to work less than five (5) full days each week. Those employees whose work is of a supervisory nature, as defined by the National Labor Relations Board, and those employees not covered by the jurisdiction of the Office and Professional Employees International Union are not recognized.

(Ex. 3 at 1.)

10. Article 6, Section 6.04 of the agreement provides that, “[t]he Employer shall not discontinue the services of any employee except for just and sufficient cause.” (Ex. 3 at 4.)

11. Article 12 sets forth a three-step grievance and arbitration process that culminates with arbitration before an impartial arbitrator. (Ex. 3 at 10-11.)

12. Article 12 defines a “grievance” as “any controversy or dispute between the parties hereto relating to any matter of wages, hours and working conditions, or any dispute between the parties involving the interpretation or application of any provision of this agreement.” (Ex. 3 at 10.)

The Termination and Reinstatement of Lakishia Thomas

13. On December 10, 2012, Arbitrator Andrew Strongin issued an arbitration award with respect to a grievance filed by Local 2 protesting the Welfare Fund’s termination of Lakishia Thomas on March 28, 2012. A true and correct copy of the Arbitrator’s December 10, 2012 decision is provided as Exhibit 4.

14. In this December 10 award, Arbitrator Strongin issued a decision that provides as follows:

The grievance is sustained. Grievant shall be reinstated to her former position and made whole for her losses, subject to a one-day disciplinary suspension and associated warning for taking leave without the appropriate supervisory approval. The Arbitrator retains jurisdiction to resolve any questions that might arise over the application or interpretation of the remedial provisions of this Award.

(Ex. 4 at 12.)

15. The parties' collective bargaining agreement provides in Article 6, Section 6.07 as follows:

Any employee who has been disciplined or discharged, and who is subsequently exonerated, shall be reinstated without prejudice or loss of seniority and shall be compensated for any loss in wages, unless the grievance committee or the arbitrator determines otherwise. Any complaint relative to a discharge must be filed with the Employer within five (5) working days of the time the Shop Steward is notified of the discharge, or the matter will be considered closed.

(Ex. 3 at 4-5.)

16. The Welfare Fund reinstated Lakishia Thomas to her employment on December 26, 2012 to a position in the archive room that had the same wage rate and fringe benefits, but it was not the position of receptionist. (Compl. ¶ 11(a); Ans. ¶ 11(a).)

17. On December 27, 2012, counsel for Local 2 – David R. Levinson – sent an e-mail to Arbitrator Strongin protesting the Welfare Fund's assignment of Ms. Thomas to the archive room rather than to a receptionist position, stating that she has been assigned "tasks that involve substantial physical and manual labor" such as lifting boxes "onto a dolly and transporting them into an unheated garage" where the boxes are stacked for pickup to off-storage. A true and accurate copy of Mr. Levinson's December 27, 2012 e-mail is provided as Exhibit 5.¹

¹ The undersigned counsel received a copy of the December 27, 2012 e-mail from Levinson to the Arbitrator. Exhibit 5 is a true and correct copy of that e-mail.

18. On February 6, 2013, Arbitrator Strongin issued a Supplemental Remedial Order. A true and accurate copy of the Supplemental Remedial Order is provided as Exhibit 6.

19. In the Supplemental Remedial Order, Arbitrator Strongin directs Ms. Thomas' reinstatement to the Receptionist shall be effected immediately without further delay. (Ex. 5.)

20. The Welfare Fund reinstated Lakishia Thomas to her position as Receptionist in February 2013, which she has held through the present date. (Compl. ¶ 11(a); Ans. ¶ 11(a).)

21. Lakishia Thomas has not suffered any loss of wages or benefits from December 26, 2012 to the date that she was reinstated to the position of Receptionist. (Ans. ¶ 11(a).)

The Discipline of Lakishia Thomas and Alleged Unilateral Changes

22. On or about December 27, 2012, the Welfare Fund issued a verbal warning to Lakishia Thomas for using her personal cell phone to talk or text while she was punched in, *i.e.*, during working time. (Compl. ¶ 11(b).)

23. On or about January 11, 2013, the Welfare Fund issued a written warning to Lakishia Thomas for using her personal cell phone during working time. A true and accurate copy of the written warning, which also recounts the verbal warning, is provided as Exhibit 7.

24. On or about February 4, 2013, the Welfare Fund issued a one-day suspension to Lakishia Thomas for the inappropriate use of her personal cell phone during working time and for insubordination by failing to follow an instruction from a supervisor. A true and accurate copy of the memorandum setting forth the basis for the suspension is provided as Exhibit 8.

25. The memorandum, which was written by Fund Administrator Michael Jacobson to Lakishia Thomas, summarized the events leading to Thomas' suspension as follows:

On Friday, February 1, 2013, at 4:10 p.m., I directed you to report to your supervisor, Dan Curry. Instead of following my direction, you went into the restroom and began a conversation on your cell phone. You finally emerged at almost 4:30. When you began to approach the time clock, I asked you what Dan

had to say. From your response it was clear that you had not as of that time, reported to Mr. Curry; a fact I confirmed with Mr. Curry.

On December 27, 2012, Dan Curry told you that it was not acceptable for you to use your cell phone to talk or to text while you were punched in. On January 11, 2013, this verbal warning was reiterated to you in a written warning because you failed to heed the earlier warning and continued to use your cell phone while you were on the clock. You were advised that future acts of inappropriate cell phone use would lead to further disciplinary action and that such disciplinary action could include suspension or termination of your employment.

Your most recent decision, that it was more important for you to make a telephone call than to follow my direction to report to your supervisor, is unacceptable behavior. You are to follow directions from me or other supervisory staff promptly and professionally. Your failure to follow my direction and your decision to, instead, make a telephone call justifies additional disciplinary action. You are hereby advised that you are suspended for the day of Tuesday, February 5, 2013. Please understand that future acts of inappropriate cell phone use or insubordination will lead to further disciplinary action. Such further disciplinary action could include suspension or termination of your employment.

Upon your return to work on Wednesday, February 6th, you are to report to Dan Curry by 9:00 a.m.

(Ex. 8.)

26. On February 5, 2013, Local 2 filed three grievances protesting the actions taken by the Welfare Fund. True and accurate copies of the grievances are provided as Exhibit 9.

27. The first grievance was brought by Local 2 on behalf of Lakishia Thomas, alleging "harassment, retaliation against an employee who has been subsequently exonerated" in violation of Article 6, Section 6.07 (*see supra* at paragraph 15) and sought a remedy "to be made whole and to be treated fair and just in a safe work environment." (Ex. 9 at 1.)

28. The second grievance was brought by Local 2 on behalf of Lakishia Thomas, alleging "Employee was suspended without sufficient just cause, employer enforcing policies that have not been written or agreed upon in contract" in violation of Article 6, Section 6.07 and sought a remedy "to be made whole." (Ex. 9 at 2.)

29. The third grievance was brought by Local 2 as a “class action” and the grievance alleges “change[s] in working conditions and benefits without bargaining with Local 2 cell phone usage and internet usage” in violation of Article 18 and seeks a remedy “to be made whole.” (Ex. 9 at 3.)

30. Article 18 of the parties’ collective bargaining agreement provides as follows: “This Agreement represents the full Agreement between the parties with respect to wages, hours and conditions of employment which shall prevail during the term hereof.” (Ex. 3 at 14.)

31. The Welfare Fund has stated its willingness to arbitrate the three grievances. (*See, Ans., Affirmative Defenses.*)

32. On February 8, 2013, Local 2 filed an unfair labor practice charge against the Welfare Fund, which was amended and which led to the Regional Director’s issuance of the complaint in this proceeding. (Compl. ¶ 1(a); Ans. ¶ 1(a).)

III. ARGUMENT

A. Paragraphs 11(a) and 14 of the Complaint, as well as Paragraphs 6(a), 6(b), and 6(c), Should be Dismissed Pursuant to *Olin Corp.* and *Spielberg Mfg. Co.*

In the complaint, the General Counsel alleges certain unfair labor practices with respect to the reinstatement of employee Lakishia Thomas, which were also presented to Arbitrator Strongin for resolution pursuant to the parties’ grievance and arbitration procedure. In Paragraph 11(a), the General Counsel alleges “[f]rom on or about December 26, 2012, until on or about February 11, 2013, Respondent refused to reinstate its employee, Lakihsia Thomas, to her former position of receptionist and imposed more onerous terms and conditions upon her.” In Paragraphs 6(a) through 6(c), the General Counsel alleges certain statements and conduct on the part of the Welfare Fund’s Administrator, Michael Jacobsen, with respect to Thomas’ reinstatement to her former receptionist position. In his initial award, Arbitrator Strongin

directed that Thomas be reinstated to her “former position.” (Ex. 4.) After the Welfare Fund reinstated Thomas to a position in the archive room, as opposed to a receptionist position, Local 2 raised the matter with Arbitrator Strongin. (Ex. 5.) In so doing, Local 2 advised the Arbitrator of the Welfare Fund’s assignment of Ms. Thomas to the archive room rather than to a receptionist position, stating that she has been assigned “tasks that involve substantial physical and manual labor” such as lifting boxes “onto a dolly and transporting them into an unheated garage” where the boxes are stacked for pickup to off-storage. (*Id.*) Arbitrator Strongin issued a decision in which he directed Thomas’ reinstatement to the receptionist position. (Ex. 6.)

1. The Governing Legal Standard

The Board will defer to an arbitration award where (1) the proceedings appear to have been fair and regular, (2) all parties had agreed to be bound, and (3) the arbitrator considered the unfair labor practice issue that the Board is called upon to decide. *Dennison Nat’l Co.*, 296 NLRB 169 (1989); *Olin Corp.*, 268 NLRB 573, 574 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). There is no dispute with respect to the first two elements. The proceedings before Arbitrator Strongin were fair and regular. Both Local 2 and the Welfare Fund agreed to be bound to the Arbitrator’s decisions. The only question is where there are any genuine issues of material fact as to whether Arbitrator Strongin considered the unfair labor practice issue that the Board is called upon to decide. *Olin Corp.*, 268 NLRB at 574 (1984).

To answer this question, the Board considers whether (a) the contractual issue is factually parallel to the unfair labor practice issue and (b) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. *Olin Corp.*, 268 NLRB at 574. The burden rests with the General Counsel and the Charging Party to establish that these considerations are not satisfied in this case. *Id.* (stating “we would require that the party seeking to reject deferral

and consider the merits of a given case show that the above standards for deferral have not been met”). See also *United Parcel Service of Ohio*, 305 NLRB 433, 434 (1991) (holding General Counsel and charging party have burden of showing that contractual issue is not parallel to unfair labor practice issue and/or arbitrator was not presented with facts relevant to deciding unfair labor practice), *enforced, sub nom., Kane v. NLRB*, 8 F.3d 27 (9th Cir. 1993) (unpub. op.). Neither the General Counsel nor the Charging Party can satisfy that burden with respect to the allegations revolving around Thomas’ reinstatement to the receptionist position.

2. *Paragraphs 11(a) and 15*

The undisputed facts establish that Arbitrator Strongin considered the unfair labor practice issue contained within Paragraph 11(a) of the Complaint, and, through his supplemental decision (Ex. 6.), he resolved that issue. Arbitrator Strongin decided the question of whether the Welfare Fund failed or refused to reinstate Thomas to her former position as a receptionist, which is the subject of the allegation in Paragraph 11(a) of the Complaint. (*Id.*) The Arbitrator issued this decision after being informed by Local 2 that: the Welfare Fund did not reinstate Thomas to a receptionist position; the Welfare Fund reinstated Thomas to a position in the archive room; the position in the archive room required the lifting of boxes from their stacks, reviewing the boxes’ contents, transporting the boxes to an unheated garage and stacking the boxes for pickup by a storage vendor; and that, without the Arbitrator’s involvement, the question of Thomas’ reinstatement could not be resolved. (Ex. 5.) Arbitrator Strongin issued a supplemental decision directing the reinstatement of Thomas to a receptionist position.

The Board recognizes that the Arbitrator need only be “generally presented” with the facts relating to the unfair labor practice issue. *Anderson Sand & Gravel Co.*, 277 NLRB 1204, 1205 (1985); *Martin Redi-Mix, Inc.*, 274 NLRB 559, 560 (1985). The Board’s involvement at

this point “is not in the nature of an appeal by trial *de novo*.” *Dennison Nat’l Co.*, 296 NLRB at 170. “It is not necessary that the case have been presented to the arbitrator the way the General Counsel might have presented it with the benefit of hindsight. *Id.*”

In this instance, the factual question for both the statutory and contractual issues was whether the Welfare Fund wrongfully refused to reinstate Thomas to a receptionist position. Local 2 presented the basic facts to the Arbitrator. The Arbitrator’s resolution of the question as a contractual matter – directing Thomas’ reinstatement to her former receptionist position – resolved the statutory issue as well. *Chemical Leaman Tank Lines, Inc.*, 270 NLRB 1219 (1984). Thus, the Board should defer to the Arbitrator’s awards (Exs. 4 & 6) with respect to the allegation in Paragraph 11(a) and dismiss that allegation.

2. Paragraphs 6(a), 6(b), 6(c) and 14

Likewise, the Board should defer to the Arbitrator’s awards with respect to the claims made in Paragraphs 6(a), 6(b), 6(c) and 14 of the complaint. The paragraphs involve alleged statements by the Welfare Fund’s Administrator, Michael Jacobson that relate to Thomas’ reinstatement to the position in the archives room as opposed to her former receptionist position. For instance, Jacobson is alleged to have “threatened to keep an employee,” *viz.*, Lakishia Thomas, “in a more onerous work location because her supervisor preferred it.” (Ex. 1 at 3, ¶ 6(b).) Likewise, Jacobson is alleged to have “threatened an employee” – once again, Lakishia Thomas – “with unspecified reprisals unless she proved she wanted the job to which she had been reinstated through the grievance and arbitration procedure.” (*Id.* at 3, ¶ 6(c).)² While the

² The General Counsel pleads in Paragraph 6(a) that the Welfare Fund “interrogated its employees about their union membership, activities and sympathies.” The Welfare Fund believes that this allegation, as with Paragraphs 6(b) and 6(c), relate to Thomas’ reinstatement. In any event, the General Counsel bears the burden of proving that the allegation was not considered by the arbitrator. *United Parcel Service of Ohio*, 305 NLRB at 434.

General Counsel alleges that this conduct occurred on January 2, 2013, which was after Local 2 raised the issue relating to Thomas' reinstatement, Board precedent nevertheless provides for deference to the Arbitrator's awards.

Although the General Counsel frames the unfair labor practices in Paragraphs 6(a), 6(b) and 6(c) as involving interference with protected rights in violation of Section 8(a)(1) (*see* Ex. 1 at 4, ¶ 14), the alleged violations revolve around the contractual issue of Thomas' right to be reinstated to the receptionist position after the completion of the arbitration proceedings and the implementation of Arbitrator Strongin's award. Article 6, Section 6.07 of the parties' agreement provides that: "[a]ny employee who has been disciplined or discharged, and who is subsequently exonerated, shall be reinstated without prejudice or loss of seniority and shall be compensated for any loss in wages, unless the grievance committee or the arbitrator determines otherwise." Arbitrator Strongin's initial decision directed the Welfare Fund to reinstate Thomas to her former position. (Ex. 4.) The Arbitrator specifically directed Thomas' reinstatement to a receptionist position in his supplemental decision. (Ex. 6.) In so doing, the Arbitrator implicitly decided whether Thomas could be placed in a position with allegedly "more onerous work" and/or whether the Welfare Fund could refuse to reinstate her to the receptionist position.

Thus, the Board should defer to Arbitrator Strongin's decision with respect to the alleged threats relating to Thomas' reinstatement, even though Local 2 may not have provided evidence relating to those threats to the Arbitrator and despite the Arbitrator not expressly resolving the matter in his decision. *Derr & Gruenewald Constr. Co.*, 315 NLRB 266, 267 (1994). The thrust of the Arbitrator's decision resolved the issues relating to Thomas' reinstatement, and, the matter was resolved in a final and binding fashion. Indeed, the Welfare Fund has since complied with the Arbitrator's decisions and reinstated Thomas to her position as a receptionist, which she

continues to hold to this day. Therefore, the Board should dismiss the allegations contained in Paragraphs 6(a), 6(b) and 6(c), along with Paragraph 14, in accordance with the Board's established deferral doctrine in *Spielberg* and *Olin*.

B. Paragraphs 11(b), 11(c), 11(d), 11(e), 11(f), 12, 13(a), 13(b) 13(c) and 15 Should be Dismissed in Accordance with *Collyer Insulated Wire* and *United Technologies*

Not only does the Complaint implicate the Board's deferral doctrine in *Spielberg* and *Olin*, but it also implicates the Board's deferral policy in *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971). Several allegations involve conduct that is the subject of grievances filed by the charging party, Local 2, pursuant to the grievance and arbitration procedure set forth in the parties' collective bargaining agreement. Although that agreement may have expired, the Welfare Fund has reiterated its willingness to arbitrate the pending grievances.

1. The Governing Legal Precedent

The Board has recognized that, "[w]here an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery." *United Technologies Corp.*, 268 NLRB at 559. For these reasons, the Board finds deferral to be appropriate where: (1) the dispute arises within the confines of a long and productive collective-bargaining relationship; (2) there is no claim of employer animosity to the employees' exercise of protected statutory rights; (3) the parties' agreement provides for the arbitration of a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute at issue; (5) the employer has expressed a willingness to utilize arbitration to resolve the dispute; and (6) the dispute is eminently well suited to arbitration.

Wonder Bread, Div. of Interstate Brands, 343 NLRB 55 (2004) (citing *United Technologies Corp.*, 268 NLRB at 558). The Board is simply honoring the parties' mutually agreed-upon, contractual method for resolving their disputes by deferring those disputes to arbitration. *United Technologies Corp.*, 268 NLRB at 558.

The Board further recognizes that parties are required to arbitrate grievances filed after the expiration of their collective bargaining agreement when the underlying disputes arise under the provisions of the expired agreement. *United Chrome Prods., Inc.*, 288 NLRB 1176 (1988). A dispute "arises under" the provisions of an expired collective bargaining agreement if it occurs prior to the expiration of the agreement or "if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires." *Id.* at 1176-77. *See, generally, Indiana & Mich. Elec. Co.*, 284 NLRB 53, 61 (1987) (clarifying Board precedent with respect to duty to arbitrate post-expiration grievances).

2. Paragraphs 11(b), 11(c), 11(d), 11(e), 11(f) and 15

The complaint sets forth allegations relating to the Welfare Fund's discipline and alleged harassment of employee Lakishia Thomas. Paragraph 11(b) avers that, on or about December 27, 2012, the Welfare Fund issued a verbal warning upon Thomas "and applied stricter cell phone and break policies to her." (Ex. 1 at 3.) Paragraph 11(c) avers that, on or about January 11, 2013, the Welfare Fund issued a written warning to Thomas. (*Id.*) Paragraph 11(d) alleges that, on or about February 4, 2013, the Welfare Fund suspended Thomas. (*Id.*) Paragraphs 11(e) and (f) allege that the Welfare Fund subjected Thomas to stricter break policies and removed the internet from her work computer. (*Id.* at 3-4.) Finally, paragraph 15 alleges that the Welfare

Fund's conduct in the foregoing allegations – Paragraphs 11(b) through 11(f) – violates Sections 8(a)(3) and (1) of the Act. (*Id.* at 4.)

The undisputed facts satisfy each and every requirement for deferral pursuant to *Collyer and United Technologies*. The undisputed facts establish that the parties – the Welfare Fund and Local 2 – have been parties to a longstanding collective bargaining relationship (Ex. 2 at 3), as well as a series of collective bargaining agreements with the most recent agreement expiring on December 31, 2012. (Ex. 3.) The latest agreement contained a broad grievance and arbitration procedure covering “any controversy or dispute arising between the parties hereto relating to any matter of wages, hours and working conditions, or any dispute between the parties involving the interpretation or application of any provision of this Agreement.” (Ex. 3 at 10.) One such provision is Article 6, Section 6.07, which provides in relevant part that “[a]ny employee who has been disciplined or discharged, and who is subsequently exonerated, shall be reinstated without prejudice or loss of seniority and shall be compensated for any loss in wages, unless the grievance committee or the arbitrator determines otherwise.” (*Id.* at 4.)

The undisputed facts further establish that on or about December 27, 2012, which was after Thomas' reinstatement but before the expiration of the agreement, the Welfare Fund issued a verbal reprimand to Thomas. (Ex. 7.) The reprimand was for the inappropriate use of a personal cell phone during working time. (*Id.*) The Welfare Fund issued a written warning on or about January 11, 2013, for the *same* conduct, *viz.*, the inappropriate use of a personal cell phone during working time. (*Id.*) The Welfare Fund finally issued a one-day suspension on or about February 4, 2013 when, after being instructed to report to a supervisor, Thomas proceeded to use her personal cell phone to make calls during working time. (Ex. 8.)

The Charging Party, Local 2, filed grievances protesting the foregoing conduct as violations of the parties' expired collective bargaining agreement. (Ex. 9.) One grievance alleged "harassment [and] retaliation against an employee who has been subsequently exonerated" in violation of Article 6, Section 6.07. (*Id.* at 1.) Another grievance alleges "employee was suspended without sufficient or just cause" and "employer enforcing policies that have not been written or agreed upon in contract" in violation of Article 6, Section 6.07." These grievances clearly demonstrate the appropriateness for resolving the disputes pursuant to arbitration. *General Dynamics Corp., Quincy Shipbuilding Div.*, 271 NLRB 187, 189 (1984) (deferring Sections 8(a)(3) and (1) allegations to arbitration where charging party filed grievance protesting suspensions). Finally, there is no evidence of any hostility on the part of the Welfare Fund to arbitrating the exercise of protected activity (*i.e.*, filing grievances and arbitrating grievances).³ Rather, the Welfare Fund has repeatedly expressed its willingness to arbitrate these grievances in accordance with the parties' collective bargaining agreement. (Ex. 2.)

In light of the foregoing facts, the allegations relating to the discipline of Lakishia Thomas, as well as any alleged "stricter policies" are the subject of pending grievances filed by Local 2 pursuant to the grievance and arbitration procedure in the parties' collective bargaining

³ The Welfare Fund anticipates that, in opposition to this Motion for Partial Summary Judgment, the General Counsel may claim that the Welfare Fund has demonstrated hostility toward Lakishia Thomas because of her grievance-filing activity. The General Counsel may suggest that such hostility is evident based upon the allegation in the Complaint that the Welfare Fund did not comply with Arbitrator Strongin's first award and immediately reinstate Thomas to her position as a receptionist. The Board's precedent clearly precludes such a suggestion. *United States Postal Svc.*, 270 NLRB 1022, 1023 (1984) (rejecting claim that employer exhibited hostility toward discriminatee's grievance activities as evidenced by failure to comply with one grievance award, where evidence showed that parties continue to process grievances). Similarly, the General Counsel may claim that some of the alleged violations pertain to alleged threats made to Thomas in connection with her grievance-filing activity. Any such claim also fails under the Board's precedent. *United States Postal Svc.*, 270 NLRB 114, 115 (1980) (rejecting claim that employer's threats against employee for grievance filing activity are insufficient to establish that pursuit of grievance through procedure would be futile).

agreement. Therefore, the Board should defer the allegations in Paragraphs 11(b), 11(c), 11(d), 11(e), 11(f) and 15 to arbitration in accordance with *Collyer* and *United Technologies*.

3. Paragraphs 13(a), 13(b) and 13(c)

Finally, the General Counsel alleges that the Welfare Fund violated Sections 8(a)(5) and (a)(1). (Ex. 1 at 4.) More specifically, the General Counsel alleges in Paragraph 13(a) that the Welfare Fund “implemented unilateral changes concerning cell phones usage, internet usage and breaks.” (*Id.*) The General Counsel further alleges in Paragraphs 13(b) and 13(c) that the changes involve mandatory subjects of bargaining and that the Respondent did not provide Local 2 with prior notice of the changes and a reasonable opportunity to bargain over the changes. (*Id.*) Meanwhile, the undisputed facts reveal that Local 2 has filed grievances protesting the implementation of changes relating to cell phone usage, internet usage and breaks in accordance with the grievance and arbitration procedure set forth in the parties’ collective bargaining agreement. (Ex. 9.) As discussed in the previous section, *supra* at III.B.2, the Welfare Fund has repeatedly indicated its willingness to arbitrate these grievances. (Ex. 2.)

Once again, the undisputed facts satisfy each and every requirement for deferral pursuant to *Collyer* and *United Technologies*. The parties have an established collective bargaining relationship going back to at least 1984, the Welfare Fund has not demonstrated any hostility toward protected activities, the collective bargaining agreement contains a broad grievance and arbitration procedure (which clearly encompasses the dispute),⁴ the Welfare Fund has stated its willingness to arbitrate the dispute and the dispute is clearly amenable to arbitration, as is

⁴ Although the collective bargaining agreement does not contain any specific provision relating to cell phone usage, internet and breaks, that fact does not preclude a finding that the deferral is appropriate. *Wonder Bread*, 343 NLRB at 56 (finding deferral appropriate “even where no specific contract provision’s meaning is in dispute”); *Inland Container Corp.*, 298 NLRB 715, 716 (1990) (same).

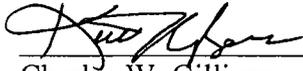
evidenced by the grievances filed by Local 2. Therefore, the Board should defer the allegations in Paragraphs 13(a), 13(b) and 13(c) to arbitration in accordance with *Collyer* and *United Technologies*.

C. Paragraphs 7, 8, 9 and 10 of the Complaint Should be Referred to an Administrative Law Judge for a Hearing

As set forth in Sections III.A. and III.B. above, a substantial portion of the complaint in this case should be deferred to either Arbitrator Strongin's awards or to the parties' grievance and arbitration procedure. There remain only a handful of allegations that would be left for an Administrative Law Judge to consider at this time. These allegations are found in Paragraphs 7, 8, 9 and 10 of the complaint. After the Board has dismissed the allegations subject to deferral, it should direct a hearing with respect to the remaining allegations. *See, e.g., General Dynamics Corp., Quincy Shipbuilding Div., 271 NLRB at 190* (granting partial summary judgment and deferring certain allegations to arbitration while proceeding with respect to other allegations).

Respectfully submitted,

DATED: June 17, 2013

By: 

Charles W. Gilligan
Keith R. Bolek
O'DONOGHUE & O'DONOGHUE LLP
4748 Wisconsin Avenue, NW
Washington, D.C. 20016
(202) 362-0041

Counsel for the Welfare Fund

CERTIFICATE OF SERVICE

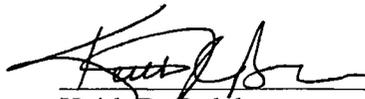
The undersigned hereby certifies that, on this 17th day of July, 2013, the following documents:

- (1) Respondent National Automatic Sprinkler Industry Welfare Fund's Motion for Partial Summary Judgment;
- (2) Respondent National Automatic Sprinkler Industry Welfare Fund's Memorandum in Support of Partial Summary Judgment, with nine (9) exhibits; and
- (3) Declaration of Michael Jacobson

were served via UPS overnight delivery on the following:

Wayne Gold
Synta Keeling
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street, 6th Floor
Baltimore, MD 21201

David R. Levinson
Levinson Law Office
3731 Fessenden Street, NW
Washington, D.C. 20016



Keith R. Bolek

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

NATIONAL AUTOMATIC SPRINKLER INDUSTRY
WELFARE FUND

Case 5-CA-97998

and

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Office and Professional Employees International Union, Local 2, herein called the Charging Party. It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq., herein called the Act, and Section 102.15 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, and alleges that National Automatic Sprinklerfitting Industry Benefit Funds, herein correctly called National Automatic Sprinkler Industry Welfare Fund, and hereinafter referred to as Respondent, has violated the Act as described below:

1. (a) The original charge in this proceeding was filed by the Charging Party on February 8, 2013, and a copy was served by mail on Respondent on February 11, 2013.

(b) The first amended charge in this proceeding was filed by the Charging Party on March 18, 2013, and a copy was served by mail on Respondent on March 19, 2013.

(c) The second amended charge in this proceeding was filed by the Charging Party on April 19, 2013, and a copy was served by mail on Respondent on April 22, 2013.

2. (a) At all material times, Respondent has been a trust fund with an office and place of business in Landover, Maryland, herein called Respondent's facility, and has been engaged in providing medical and dental benefits to unionized sprinkler fitters throughout the United States.

(b) During the past twelve months, a representative period, Respondent, in conducting its business operations described above in paragraph 2(a), performed services valued in excess of \$50,000 in states other than the State of Maryland.

(c) 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.

3. At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

4. (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All office employees employed by Respondent, but excluding supervisors, confidential employees, and guards.

(b) Since on or about January 1, 2010, and at all material times, Respondent has recognized the Union as the exclusive collective-bargaining representative of the Unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from January 1, 2010 through December 31, 2012.

(c) Since on or about January 1, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

5. At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act):

Dan Curry	–	I. T. Manager
John Eger	–	Assistant Fund Administrator
Michael Jacobson	–	Fund Administrator
Nia Padmore	–	Claims and Eligibility Manager
Missy Thomas	–	Claims Service Supervisor

6. On or about January 2, 2013, Respondent, by Michael Jacobson at Respondent's facility:

- (a) interrogated its employees about their union membership, activities, and sympathies;
- (b) threatened to keep an employee in a more onerous work location, because her supervisor preferred it; and
- (c) threatened an employee with unspecified reprisals, unless she proved that she wanted the job to which she had been reinstated through the grievance and arbitration procedure.

7. On or about January 3, 2013, Respondent, by Michael Jacobson at Respondent's facility, interrogated an employee about the circumstances of her medical leave requests and childcare arrangements.

8. In or around January 2013, Respondent, by an agent presently unknown to the undersigned, at Respondent's facility, engaged in surveillance of employees by installing surveillance cameras in the basement and/or garage in order to discover employees' union or protected concerted activities.

9. On or about February 11, 2013, Respondent, by an agent presently unknown to the undersigned, at Respondent's facility, engaged in surveillance of employees by installing a surveillance camera in the corner of the reception desk, in order to discover employees' union or protected concerted activities.

10. On or about February 19, 2013, Respondent, by an agent presently unknown to the undersigned, at Respondent's facility, engaged in surveillance of employees by installing a surveillance camera in a doorway of the reception area, in order to discover employees union or protected concerted activities.

11. (a) From on or about December 26, 2012, until on or about February 11, 2013, Respondent refused to reinstate its employee, Lakishia Thomas, to her former position of receptionist and imposed more onerous terms and conditions of employment on her.

(b) On or about December 27, 2012, Respondent issued an oral warning to its employee, Lakishia Thomas, and applied stricter cell phone usage and break policies to her.

(c) On or about January 11, 2013, Respondent issued a written warning to its employee, Lakishia Thomas.

(d) On or about February 4, 2013, Respondent suspended its employee, Lakishia Thomas.

(e) On or about February 11, 2013, Respondent applied stricter break policies to its employee, Lakishia Thomas.

(f) On or about February 14, 2013, Respondent removed the internet access from the computer of Lakishia Thomas.

12. Respondent engaged in the conduct described above in paragraph 11, because the named employee formed, joined, or assisted the Union, and to discourage employees from engaging in these activities.

13. (a) In or around February 2013, Respondent implemented unilateral changes concerning cell phones usage, internet usage, and breaks.

(b) The subjects set forth above in paragraph 13(a), relate to wages, hours, and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(c) Respondent engaged in the conduct described above in paragraphs 13(a) and 13(b), without prior notice to the Union, and/or without affording the Union an opportunity to bargain with Respondent with respect to the decision to implement changes to Respondent's policies on internet usage, cell phone usage, and breaks, and/or with respect to the effects of this conduct, and/or without first bargaining with the Union to a good-faith impasse.

14. By the conduct described above in paragraphs 6 through 10, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

15. By the conduct described above in paragraphs 11 and 12, Respondent has been discriminating in regard to the hire or tenure, or terms or conditions of employment, of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

16. By the conduct described above in paragraph 13, Respondent has been failing and refusing 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 in violation of Section 8(a)(1) and (5) of the Act.

17. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before May 10, 2013, or postmarked on or before May 9, 2013.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on July 22, 2013, at 10:00 a.m., E.D.T., in Hearing Room 5600 East, 1099 14th Street, NW, Washington, DC, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing,

Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this (consolidated) complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Baltimore, Maryland this 26th day of April 2013.

(SEAL)

WAYNE R. GOLD

Wayne R. Gold, Regional Director
National Labor Relations Board, Region 5
Bank of America Center -Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201

Attachments

**SUMMARY OF STANDARD PROCEDURES IN FORMAL HEARINGS HELD
BEFORE THE NATIONAL LABOR RELATIONS BOARD
IN UNFAIR LABOR PRACTICE PROCEEDINGS PURSUANT TO
SECTION 10 OF THE NATIONAL LABOR RELATIONS ACT**

The hearing will be conducted by an administrative law judge of the National Labor Relations Board who will preside at the hearing as an independent, impartial finder of the facts and applicable law whose decision in due time will be served on the parties. The offices of the administrative law judges are located in Washington, DC; San Francisco, California; New York, N.Y.; and Atlanta, Georgia.

At the date, hour, and place for which the hearing is set, the administrative law judge, upon the joint request of the parties, will conduct a "prehearing" conference, prior to or shortly after the opening of the hearing, to ensure that the issues are sharp and clearcut; or the administrative law judge may independently conduct such a conference. The administrative law judge will preside at such conference, but may, if the occasion arises, permit the parties to engage in private discussions. The conference will not necessarily be recorded, but it may well be that the labors of the conference will be evinced in the ultimate record, for example, in the form of statements of position, stipulations, and concessions. Except under unusual circumstances, the administrative law judge conducting the prehearing conference will be the one who will conduct the hearing; and it is expected that the formal hearing will commence or be resumed immediately upon completion of the prehearing conference. No prejudice will result to any party unwilling to participate in or make stipulations or concessions during any prehearing conference.

(This is not to be construed as preventing the parties from meeting earlier for similar purposes. To the contrary, the parties are encouraged to meet prior to the time set for hearing in an effort to narrow the issues.)

Parties may be represented by an attorney or other representative and present evidence relevant to the issues. All parties appearing before this hearing who have or whose witnesses have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.603, should notify the Regional Director as soon as possible and request the necessary assistance.

An official reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the administrative law judge for approval.

All matter that is spoken in the hearing room while the hearing is in session will be recorded by the official reporter unless the administrative law judge specifically directs off-the-record discussion. In the event that any party wishes to make off-the-record statements, a request to go off the record should be directed to the administrative law judge and not to the official reporter.

Statements of reasons in support of motions and objections should be specific and concise. The administrative law judge will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

All exhibits offered in evidence shall be in duplicate. Copies of exhibits should be supplied to the administrative law judge and other parties at the time the exhibits are offered in evidence. If a copy of any exhibit is not available at the time the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the administrative law judge before the close of hearing. In the event such copy is not submitted, and the filing has not been waived by the administrative law judge, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

Any party shall be entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. In the absence of a request, the administrative law judge may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case: 05-CA-097998

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements **will not be granted** unless good and sufficient grounds are shown **and** the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFC 102.16(a).
- (2) Grounds must be set forth in **detail**;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained by the requesting party and set forth in the request; **and**
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

COUNSEL FOR RESPONDENT:

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4748 WISCONSIN AVENUE, NW
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RESPONDENT:

MR. MICHAEL JACOBSON
NATIONAL AUTOMATIC SPRINKLER
INDUSTRY BENEFIT FUNDS
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COUNSEL FOR CHARGING PARTY:

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CHARGING PARTY:

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DONALD J. CAPUANO
RETIRED

MARTIN F. O'DONOGHUE
(1902-1973)
PATRICK C. O'DONOGHUE
(1930-1979)
JOSEPH P. BOYLE
(1954-1998)

May 9, 2013

Via E-Mail and First Class Mail

Mr. Wayne Gold,
Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 South Charles Street, 6th Floor
Baltimore, MD 21202

Re: National Automatic Sprinkler Industry Welfare Fund, Case No. 05-CA-97998
Respondent's Answer

Dear Mr. Gold:

Enclosed please find the original and four copies of the Respondent's Answer to the Complaint and Notice of Hearing in the above-referenced case. The Answer was filed using the National Labor Relations Board's E-Filing System on this date and a copy was sent to your e-mail address and to the e-mail address of the Charging Party's counsel, David Levinson.

If you have any questions, please feel free to contact the undersigned. Thank you for your time and attention to this matter.

Sincerely,

Keith R. Bolek
Counsel for the NASI Welfare Fund

Enclosure

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

NATIONAL AUTOMATIC SPRINKLER
INDUSTRY WELFARE FUND,

Respondent,

and

Case No. 05-CA-97998

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2,

Charging Party.

**RESPONDENT NATIONAL AUTOMATIC SPRINKLER INDUSTRY
WELFARE FUND'S ANSWER TO THE COMPLAINT
AND NOTICE OF HEARING**

The National Automatic Sprinkler Industry Welfare Fund ("Welfare Fund"), by and through the undersigned attorneys, respectfully submits this Answer to the Complaint and Notice of Hearing. The Welfare Fund answers as follows:

PREAMBLE

The Welfare Fund admits that the Complaint and Notice of Hearing is based on a charge filed by the Office and Professional Employees International Union, Local 2 ("Local 2"). The Welfare Fund admits that the complaint was issued pursuant to Section 10(b) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160(b) and Section 102.15 of the Rules and Regulations of the National Labor Relations Board ("Board"). While the complaint alleges that the Welfare Fund has violated the Act, the Welfare Fund denies that it has committed any violation of the Act.

ENUMERATED PARAGRAPHS

1. (a) The Welfare Fund admits the allegations contained in Paragraph 1(a).
- (b) The Welfare Fund admits the allegations contained in Paragraph 1(b).
- (c) The Welfare Fund admits the allegations contained in Paragraph 1(c).
2. (a) The Welfare Fund admits the allegations contained in Paragraph 2(a).
- (b) The Welfare Fund admits the allegations contained in Paragraph 2(b).
- (c) The Welfare Fund admits the allegations contained in Paragraph 2(c).
3. The Welfare Fund admits the allegations contained in Paragraph 3.
4. (a) Denied. The Welfare Fund admits that the bargaining unit is identified in Article 2, Section 2.01 of the collective bargaining agreement between the Welfare Fund and Local 2. Article 2, Section 2.01 states, “[t]he Employer recognizes the Union as the exclusive bargaining agent for all office employees employed by the Employer, including those employees who are normally assigned to work less than five (5) full days each week. Those employees whose work is of a supervisory nature, as defined by the National Labor Relations Board, and those employees not covered by the jurisdiction of the Office and Professional Employees and International Union are not recognized.”

(b) The Welfare Fund denies that “[s]ince on or about January 1, 2010, and at all material times thereafter Respondent has recognized the Union as the exclusive bargaining representative of the Unit.” The Welfare Fund admits that, since at least 1984, it has recognized the Union as the exclusive bargaining representative of the employees in the Unit. The Welfare Fund further admits that this recognition has been embodied in a series of collective bargaining agreements, the most recent of which was effective by its terms from January 1, 2010 through December 31, 2012.

(c) The Welfare Fund denies that “[s]ince on or about January 1, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.” The Welfare Fund admits that since at least 1984 the Union has been the exclusive bargaining representative of the unit pursuant to Section 9(a) of the Act.

5. The Welfare Fund admits the allegations contained in Paragraph 5.

6. The Welfare Fund denies the allegations in Paragraph 6.

(a) The Welfare Fund denies the allegations in Paragraph 6(a).

(b) The Welfare Fund denies the allegations in Paragraph 6(b).

(c) The Welfare Fund denies the allegations in Paragraph 6(c).

7. The Welfare Fund denies the allegations in Paragraph 7.

8. The Welfare Fund admits that a camera was installed in the archives room.

The Welfare Fund denies all remaining allegations in Paragraph 8.

9. The Welfare Fund admits that a camera was installed in a corner of the reception area. The Welfare Fund denies all remaining allegations in Paragraph 9.

10. The Welfare Fund admits that a camera was installed in the doorway of the reception area. The Welfare Fund denies all remaining allegations in Paragraph 10.

11. (a) The Welfare Fund admits that, on or about December 26, 2012, it reinstated its employee Lakishia Thomas to her employment, albeit not to the position of receptionist. The position to which Ms. Thomas was reinstated had the same wage rate and benefits as the receptionist position. The Respondent denies that it imposed more onerous terms and conditions of employment upon Ms. Thomas. The Respondent further admits that it reinstated Lakishia Thomas to the position of receptionist in February 2013, which she has held through the present date. The Respondent denies any remaining allegations in Paragraph 11(a).

(b) The Welfare Fund admits that on or about December 27, 2012, it issued an oral warning to its employee Lakishia Thomas stating that it was unacceptable for Ms. Thomas to use her personal cell phone to talk or text while she was punched in, *i.e.*, during working time. The Respondent denies any remaining allegations in Paragraph 11(b).

(c) The Welfare Fund admits that, on or about January 11, 2013, it issued a written warning to its employee Lakishia Thomas. The Respondent denies any remaining allegations in Paragraph 11(c).

(d) The Welfare Fund admits that, on or about February 4, 2013, it issued a one-day suspension to its employee Lakishia Thomas. The Respondent denies any remaining allegations in Paragraph 11(d).

(e) The Welfare Fund denies the allegations in Paragraph 11(e).

(f) The Welfare Fund admits that, on or about February 14, 2013, it removed the internet access from the computer of Lakishia Thomas. The Welfare Fund denies any remaining allegations in Paragraph 11(f).

12. The Welfare Fund denies the allegations in Paragraph 12.

13. (a) The Welfare Fund denies the allegations in Paragraph 13(a).

(b) The allegations in Paragraph 13(b) are legal conclusions to which no answer is required. To the extent an answer is required, the allegations are denied.

(c) The Welfare Fund denies the allegations in Paragraph 13(c).

14. The Welfare Fund denies the allegations in Paragraph 14.

15. The Welfare Fund denies the allegations in Paragraph 15.

16. The Welfare Fund denies the allegations in Paragraph 16.

17. The Welfare Fund denies the allegations in Paragraph 17.

AFFIRMATIVE DEFENSES

A. The allegations contained in Paragraphs 6(a), 6(b), 6(c) and 11(a) should be dismissed pursuant to the Board's deferral policy in *Olin Corp.*, 268 NLRB 573 (1984) and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) because the issue of the reinstatement of Ms. Lakishia Thomas was litigated by the parties pursuant to the grievance and arbitration procedure set forth in their collective bargaining agreement and resolved by Arbitrator Andrew Strongin in a decision dated December 10, 2012 and a supplemental decision dated February 6, 2013. Both of Arbitrator Strongin's decisions satisfy the requirements for deferral to arbitration awards as set forth in *Olin* and *Spielberg*.

B. The allegation contained in Paragraph 7 fails to state an unfair labor practice in violation of the Act, because the questioning of an employee about the circumstances of her medical leave requests and child care arrangements does not interfere with, restrain or coerce that employee in the exercise of her rights under Section 7 of the Act, 29 U.S.C. § 157.

C. The allegations contained in Paragraphs 11(b), 11(c), 11(d), 11(e), 11(f), 12, 13(a), 13(b) and 13(c) should be dismissed pursuant to the Board's deferral policy in *United Technologies Corp.*, 268 NLRB 557 (1984), and *Collyer Insulated Wire*, 192 NLRB 837 (1971) because the conduct arose prior to the expiration of the parties' collective bargaining agreement on December 31, 2012 and/or is covered by three (3), pending grievances filed by Local 2 that the Welfare Fund has agreed to submit to arbitration.

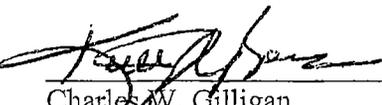
D. The allegations contained in Paragraphs 13(a), 13(b) and 13(c) fail to state an unfair labor practice in violation of the Act because any alleged change in cell phones, internet usage and breaks was not a material, substantial and significant change, thereby failing to give rise to any need to provide notice and an opportunity to bargain.

E. The Welfare Fund has legitimate, non-discriminatory reasons for disciplining employee Lakishia Thomas (*i.e.*, the verbal warning, written warning and one-day suspension alleged in Paragraphs 11(b), 11(c) and 11(d) of the Complaint) and that the Welfare Fund did not impose any discipline upon Thomas for the reasons stated in Paragraph 12 of the Complaint.

WHEREFORE, the Welfare Fund respectfully requests that the Complaint be dismissed in its entirety.

DATED: May 9, 2013

Respectfully submitted,

By: 

Charles W. Gilligan
Keith R. Bolek
O'DONOGHUE & O'DONOGHUE LLP
4748 Wisconsin Avenue, NW
Washington, D.C. 20016
(202) 362-0041

Counsel for the Welfare Fund

CERTIFICATE OF SERVICE

The undersigned certifies that the following document was filed with the National Labor Relations Board's E-Filing System on May 9, 2013:

National Automatic Sprinkler Industry Welfare Fund Answer to the Complaint
and Notice of Hearing

and the undersigned further certifies that a true and accurate PDF copy of the filing was served via-email on May 9, 2013 to the following:

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Keith R. Bolek

Office and Professional Employees International Union
Local 2

And

Automatic Sprinkler Industry Welfare Funds
And
NASI Local 669 Joint Apprenticeship Training Committee

January 1, 2010 through December 31, 2012

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AGREEMENT

THIS AGREEMENT is between the NATIONAL AUTOMATIC SPRINKLER INDUSTRY WELFARE FUNDS AND NASI LOCAL 669 JOINT APPRENTICESHIP TRAINING COMMITTEE, hereinafter referred to as the Employer, and the OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 2, Hereinafter referred to as the Union.

ARTICLE 1

Term - Modification

Section 1.01. The provisions of this Agreement shall become effective **January 1, 2010** and shall remain in effect until **December 31, 2012**, subject to modification or cancellation at the expiration date, or at the end of any subsequent year, upon sixty (60) days prior written notice sent by either party to the other by certified mail.

Section 1.02. Supplements or amendments made during the term of this Agreement must be reduced to writing, numbered serially and signed by the parties thereto, and then shall become a part of this Agreement.

ARTICLE 2

Recognition

Section 2.01. The Employer recognizes the Union as the exclusive bargaining agent for all office employees employed by the Employer, including those employees who are normally assigned to work less than five (5) full days each week. Those employees whose work is of a supervisory nature, as defined by the National Labor Relations Board, and those employees not covered by the jurisdiction of the Office and Professional Employees International Union are not recognized.

Section 2.02. It is agreed by the Administrator of the Fund Office and Director of Apprenticeship of the Joint Apprenticeship Committee that an employee covered by this Agreement who is secretary to the Administrator or Director of Apprenticeship will be guaranteed a job with the Employer without loss in pay and will in the future receive any increases negotiated by the Union if the Administrator or Director of Apprenticeship is replaced and it develops that the new Administrator or Director of Apprenticeship would prefer another secretary.

Section 2.03. When bargaining unit employees are temporarily transferred to perform non-bargaining unit work, they shall receive a differential of \$2.00 per day for all days worked in such non-bargaining unit position.

ARTICLE 3
Union Shop

Section 3.01. All employees coming under the terms of this Agreement shall become members in good standing of the Union after thirty (30) days and will remain members in good standing for the term of this Agreement. The probationary period set forth in Section 6.02 shall remain unchanged. An extension of the probationary period, not to exceed thirty (30) days, may be granted if mutually agreed upon by the Union and the Employer.

Section 3.02. The Employer will check-off monthly dues and initiation fees as designated by the Secretary-Treasurer of the Union, as membership fees in the Union, on the basis of individually signed voluntary check-off authorization cards. Once each month the proceeds of these deductions will be paid to the Secretary-Treasurer of the Union.

Section 3.03. The Employer will give to the Shop Steward a list of the employees who have satisfactorily passed their probationary period. The Shop Steward will be responsible for having this employee sign a payroll deduction card which will be turned over to the Accounting Department of the Employer for processing.

Section 3.04. The Employer will provide payroll deduction of voluntary contributions to VOTE/COPE/PEP program on the basis of individually signed payroll deduction forms in accordance with applicable law, as set forth in Exhibit "F" hereof. The proceeds of such VOTE/COPE/PEP deductions will be paid to the Secretary-Treasurer of OPEIU, Local 2 once each month.

ARTICLE 4
Seniority - Layoff- Recall

Section 4.01. In cases of increases or decreases of the working force, the rule of seniority shall prevail that is, the last employee hired shall be the first to be laid off, and vice versa, when recalled for service. The parties to this Agreement realize that it will not be feasible in all instances to layoff and recall on the basis of seniority because of the specific training and experience required in some classifications. The Employer may deviate from strict seniority in some instances, but it is the intention of this clause to provide maximum protection for seniority.

Section 4.02. The Employer shall prepare from existing personnel records a seniority roster of all employees presently covered by this Agreement (on the first working day after January 1 of each calendar year), based on the beginning date of uninterrupted and continuous employment. The Shop Steward will be furnished with a copy of such seniority roster.

Section 4.03. Seniority shall accumulate as a result of time worked or otherwise given credit for by Agreement between the parties, from the date of continuous employment as a regular, mil-time employee with the Employer.

Section 4.04. Recall/Severance Pay Employees laid off shall receive their layoff pay on a normal payroll period (earlier payout if the Employer deems feasible) and payments will stop if recalled prior to all severance payouts having been made. Recall rights terminate eighteen (18) months after the layoff. In the event of recall, employees will be given notice by certified mail sent to their last known address. Employees will be given seven (7) days from their receipt to accept or reject the offer to return to work. Failure to accept an offer of recall terminates an employee's recall rights. Failure to return to work within twenty one (21) calendar days of accepting the offer to return to work terminates an employee's recall rights.

ARTICLE 5

Job Postings - Applications

Section 5.01. When vacancies occur in positions covered by this Agreement, or when new positions are created, notices of such vacancies and/or newly created positions shall be posted on appropriate bulletin boards immediately for a period of three (3) working days, and a copy of such posting shall be supplied to the Shop Steward of the Union. Any deviation from this provision will be discussed with the Union immediately.

Section 5.02. When more than one employee applies for the vacancy, seniority shall be given primary consideration in the selection when qualifications are relatively equal.

Section 5.03. If a test is given to determine the technical qualifications of the bidder, then a uniform and standard score must be mutually agreed upon by the Union and the Employer prior to the testing. The bidders who reach or surpass this agreed upon score will be declared eligible bidders for the job. The eligible bidder having the greater seniority in this group will automatically be declared the successful applicant.

Section 5.04. Applications involving no changes in pay grade (lateral transfer) need not be considered by the Employer unless such a change would provide for the applicant a better opportunity for future advancement.

Section 5.05. Applications for positions shall be made out in duplicate, one copy to be presented to the Shop Steward at the time the original is filed with the Personnel Office.

Section 5.06. Filled positions to be posted indicating the successful candidate. Employees will be allowed a two (2) month probationary period. If said employee, in the opinion of the Employer, fails to perform satisfactorily the duties of the new position, he/she will be permitted to return to his/her original position without loss of seniority. Any deviation from this provision will be made only following consultation between the Union and the Employer. It is the intention of this clause to normally return an unsuccessful bidder to his/her original position and original pay rate.

Section 5.07. In the event a vacancy should occur in the classification of secretary to the Administrator or Director of Apprenticeship, the provisions of Section 5.01 herein shall not be compulsory in the filling of such vacancy.

ARTICLE 6 Employment, Discipline and Discharge

Section 6.01. The Employer reserves the right to employ or dismiss in accordance with the seniority provisions of Article IV, Section 4.01, herein as the conduct of its business requires, and further reserves the right to reassign employees to different job classifications at the rate of pay applicable to such job as specified in Exhibit A. The Employer also reserves the right to make final determination of the qualifications of any applicant for employment prior to such employment or during the probationary period of new employees.

Section 6.02. The probationary period for new permanent employees shall be six (6) months, at the expiration of which the employees shall be placed on the employment rolls on a permanent basis, provided the work of the new employee is satisfactory to the Employer. Seniority shall then date from the original date of employment.

Section 6.03. Two (2) weeks' notice or two (2) weeks' pay in lieu of notice shall be given by the Employer in terminating the employment of a permanent employee. No such notice or pay in lieu thereof shall be payable in the event that an employee has been discharged for cause.

Section 6.04. The Employer shall not discontinue the services of any employee except for just and sufficient cause. In the event of the discharge of an employee covered by this Agreement, the discharged employee shall be given the reasons for his/her discharge and the employer shall notify the employee in the presence of a Shop Steward, or in the presence of a Union Officer, except that when neither is available such notification will be given to the Shop Steward as early as possible. In instances where an Employer finds it necessary to give an employee final warning, the Employer shall render such final warning in the presence of a Shop Steward or Union Officer. If the employee requests that the Shop Steward or Union Officer not be present, the Employer shall apprise the Steward or Union Officer of the nature of such final warning immediately after the employee has been advised.

Section 6.05. In cases of suspension from the workforce, the procedure outlined in section 6.04 shall be followed.

Section 6.06. If an employee is absent for three (3) consecutive days without calling in, it shall be presumed that the employee has resigned.

Section 6.07. Any employee who has been disciplined or discharged, and who is subsequently exonerated, shall be reinstated without prejudice or loss of seniority and shall be compensated for any loss in wages, unless the grievance committee or the arbitrator determines otherwise. Any complaint relative to a discharge must be filed with

the Employer within five (5) working days of the time the Shop Steward is notified of the discharge, or the matter will be considered closed.

ARTICLE 7 Hours of Work - Overtime

Section 7.01.

1) Seven (7) hours of work per day and thirty-five (35) hours of work per week shall constitute the regular hours of work. Employees will be entitled to an unpaid lunch period of thirty (30) or forty-five (45) minutes. The length of the lunch period is at the option of the employee subject to the approval of the Employer.

2) Establishment of employee work schedules shall be within the discretion of the Employer, subject to the restrictions set forth in the remaining sections of this Article.

3) a. The Employer shall establish the work schedule for each new employee upon hiring that employee.

b. The Employer shall establish the work schedule for any current employee moving into a new job category. Notice of the change in hours will be provided in the job posting.

4) a. The Employer shall retain the right to change the work schedule of any current employee even when the employee does not change job classification. However, no decision to make such a change shall be made without prior consultation with the employee and/or the Union representative.

b. The Employer shall provide at least one (1) week's written notice to any employee whose schedule is changed for any reason other than a change in job classification.

c. The Employer recognizes that a decision to change an employee's schedule for reasons other than a change in job classification is subject to the grievance and arbitration procedure set forth in Article 12 of this contract. An arbitrator considering such a grievance shall not disturb the Employer's decision unless it is found to be arbitrary, capricious, or unreasonable.

Section 7.02. Time and one-half (1-1/2) shall be paid for all work in excess of seven (7) hours per day and thirty-five (35) hours per week. Double time (2 times) shall be paid for all work performed after 7:00 p.m., Monday thru Friday and for all hours of work in excess of seven (7) hours on Saturday. Double time will be paid for all work on Sundays. Double time will be paid on holidays, plus holiday pay.

Section 7.03. If an employee is required to work overtime more than two (2) hours beyond his/her regularly scheduled quitting time, he/she shall receive a meal allowance of \$10.00.

ARTICLE 8
Vacations

Section 8.01. Vacations with pay shall be granted employees who have completed periods of continuous service with the Employer as follows: After six (6) months, one (1) week; after one (1) year, two (2) weeks (if an employee elects to take one (1) week of vacation after six (6) months' service, he/she shall be entitled to one (1) additional week upon completion of one (1) years service); after five (5) years, three (3) weeks; after ten (10) years, four (4) weeks; after twenty (20) years, five (5) weeks.

Section 8.02. All accrued pro rata vacation time may be paid to employees taking maternity leave or other leaves of absence up to the time of the granting of the leave of absence or upon termination of employment. At separation, accrued vacation will be paid out at one hundred percent (100%) at the employee's current wage rate.

Section 8.03. The vacation schedule shall be agreed upon by mutual consent but employees shall have preference in accordance with seniority. After an employee's vacation schedule has been approved, it can only be changed with the consent of the Employer. However, at least one (1) week of vacation may be taken in increments of foil hours provided notice of such intention is given to the Employer at least one (1) work day in advance of the time the employee intends to utilize such vacation. In the event of a bona fide emergency where it is impossible to give one (1) day's notice, the employee may utilize portions of the one (1) week vacation, referred to in the previous sentence, in increments of full hours if the Employer is notified promptly of the emergency situation.

ARTICLE 9
Holidays

Section 9.01. The Employer shall allow time off with pay for all legal holidays, namely:

New Year's Day
Martin Luther King Jr.'s Birthday
President's Day
Good Friday
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

and any other holiday which may hereafter be declared a general holiday by an Act of Congress of the United States, this shall not include Inauguration Day. In the event a holiday falls on a Thursday or Saturday, the Friday will also be observed as a holiday. In

the event the holiday falls on a Sunday or Tuesday, the Monday will also be observed as a holiday. Should any Federal Law be enacted which would change the day on which any of the foregoing holidays are now celebrated, the newly-established day shall be considered the holiday.

Section 9.02. In addition to the above holidays, four (4) floating holidays shall be observed.

Each employee who has satisfied the initial probationary period provided under Section 6.02 of this Agreement, shall receive one (1) floating holiday in the quarter in which the probationary period is completed and each quarter thereafter. This will not be tied to anniversary dates of employment but rather to the calendar year. The Employer must receive one (1) week's notice in advance of the date that the employee selects as a floating holiday. Seniority in each department will apply in determining which employees may take the same day as a floating holiday. As least 75% of the employee complement in each department must be present to cover each floating holiday. In the Joint Apprenticeship Fund Office, which is not set up in departments, one-half of the office staff must be present on each floating holiday and, of course, seniority will apply there also.

Employees shall receive one and three quarters (1.75) hours of additional floating holiday time beginning January 1, 2001.

ARTICLE 10

Leave and Time Off

Section 10.01. When leaves of absence are granted to employees by the Employer, such leaves may be granted for a period up to one (1) year, with extensions beyond that period at the discretion of the Employer, except as provided in Section 10.05 of this Article.

Section 10.02. Employees inducted into the Armed Forces shall accumulate seniority, retain all rights and privileges and upon return be reinstated in their former positions, or comparable ones, provided application is made within two (2) months or longer if required by law after discharge.

Section 10.03. Employees shall be provided leave with supplemental pay during periods of required jury service and for service resulting from subpoena from any court of competent jurisdiction, except subpoenas resulting from illegal acts of the employee. During required military service and for those who are members of military units that are reactivated for emergency duty (such as special riot duty), for a period not to exceed two (2) weeks, supplemental pay from the Employer shall be an amount which when combined with the pay received by the employee for such jury duty, subpoena, military service, or emergency military duty, shall equal the total regular salary which would have been received by the employee from the Employer for the same period of time.

Section 10.04. Employees who are eligible voters shall receive sufficient time off without reduction in pay to vote on election days, not to exceed two (2) hours, either in the morning

or in the afternoon, at the option of the Employer. In order to receive such voting time with pay, employees may be required to provide proof of voting to the Employer.

Section 10.05. The Employer agrees to grant a leave of absence, without loss of seniority, but without pay, to any employee who is elected or selected for a union office which would involve full-time employment by the Local or International Union, not to exceed three (3) years.

Section 10.06. Employees shall be allowed three (3) days' compassionate leave without loss of pay in the event of death in the immediate family, which shall be limited to mother, father, mother/father-in-law, grandmother/grandfather, son, daughter, stepchildren, stepmother/stepfather, foster parent, spouse, sister, brother, brother-in-law, sister-in-law, grandchildren, or any other blood relative living under the same roof as the employee. In addition, necessary time off for travel purposes, as measured by the fastest practical mode of transportation, shall be granted upon request of the employee when, in the Employer's judgment, such additional time is warranted.

Section 10.07. Time off with pay will be allowed for union activities to authorized employees servicing this Agreement. The Union will pay for loss time incurred by virtue of its representative negotiating this Agreement and for duties which do not affect the Union representative's own shop.

Section 10.08. Authorized leave up to a maximum of one (1) year with extensions beyond that period at the discretion of the Employer shall not interrupt the seniority of employees.

ARTICLE 11 Leave for Sickness and Disability

Section 11.01. Employees shall be credited with seven and one-half (7-1/2) days of sick leave after completing six (6) months of service; thereafter, sick leave will accrue at the rate of one and one-fourth (1-1/4) days per month and unused sick leave may be accumulated up to one hundred and fifty (150) days. Sick leave will be paid at the current wage rate for the job classification at which the employee earned the leave.

Effective January 1, 1999, each employee will continue to receive fifteen (15) days of sick leave per year. However, an employee will lose one (1) day of sick leave upon the fourth (4th) occurrence of sick leave used in a calendar year. If that same employee has a fifth (5th) occurrence of sick leave during the same calendar year, another day of sick leave would be lost. Upon the sixth (6th) such occurrence of sick leave used during the calendar year, the employee would lose one (1) more day of sick leave, in other words, an employee who has six (6) sick leave occurrences during a calendar year will receive twelve (12) days of sick leave. If an employee has five (5) sick leave occurrences during a calendar year the employee will receive thirteen (13) days of sick leave; and if the employee has four (4) sick leave occurrences during a calendar year the employee will receive fourteen (14) days of sick leave. An occurrence is defined as any use of sick leave in excess of three and one half (3.5) hours in a day.

The Employer, in its sole discretion may waive an occurrence, where an employee presents acceptable evidence that the absence was due to a chronic, ongoing medical condition.

The Employer will notify the employee on their 3rd occurrence and each additional, with copies to the Union. The Employer will provide a record of leave usage to each employee by the end of February each year.

Section 11.02. Physical inability to work caused or contributed to by pregnancy, miscarriage, involuntary abortion, childbirth and recovery therefore, shall be treated, for all job related purposes, the same as inability to work due to sickness or other temporary disability. A doctor's certificate may be required for absences in excess of three (3) days.

Accrued sick leave may be used as necessary for maternity related illness and disability. Unless substantiated by a doctor, the postpartum period of disability is considered to be six (6) weeks during which time sick leave may be used. If a maternity related disability continues beyond accrued sick leave, disability benefits are available under the NASI Welfare Plan.

However, should a maternity related disability continue beyond an employee's accrued sick leave, regardless of any disability benefit entitlement, an employee with one (1) or more years of service may take an additional one hundred eighty (180) days of leave without pay with no loss of seniority or other benefits. No S.I.S. benefits shall be payable during those periods in which an employee is on unpaid maternity related disability leave. Vacation leave may be used at any point during a maternity related illness and/or disability.

Any extension of leave beyond this period shall be subject to the provisions of Section 10.01.

One (1) day of paid Paternity Leave will be granted to employees on the birth of or the adoption of a child.

Section 11.03. An employee with one (1) or more years of service who is physically unable to return to work when all accumulated sick leave has been used may take additional leave not to exceed one hundred eighty (180) days, without pay, but without loss of seniority. An employee requesting such additional leave must so notify the Employer in writing before accumulated sick leave is exhausted. An employee must, on request of the Employer, supply a certificate from a physician that the employee is physically unable to work. The employee may be required to be examined by a doctor chosen by the Employer. If the two doctors are in disagreement, they shall choose a third doctor whose determination shall be binding. Employees who comply with this provision shall be guaranteed the return to the job held at the time of taking leave and shall be guaranteed the same rate of pay received at the time of taking leave, plus any increases given to their job classification during the time of the leave of absence.

Section 11.04. All accrued sick leave up to a maximum of forty five (45) working days will be paid at the time of retirement or death at the current rate of pay.

Section 11.05. An employee who has accrued a minimum of fifteen (15) days of sick leave and does not use any sick leave during any consecutive two-month period may have ten and one-half (10 ½) hours of that time retained as sick leave and the remaining seven (7) hours maybe exchanged for one (1) floating holiday, or one (1) day's wages to be paid at the employee's then current wage rate. Choice of either holiday or wages will be determined by the Employer at the time the employee becomes eligible for such option. If such option is not exercised by March 1 from the time the employee became eligible for such option, the option will no longer be available and the sick leave will be retained as such. The time period for the above shall be from January 1 through December 31 of the previous year.

ARTICLE 12 Grievances

A grievance within the meaning of this Agreement shall be any controversy or dispute arising between the parties hereto relating to any matter of wages, hours, and working conditions, or any dispute between the parties involving the interpretation or application of any provision of this Agreement.

Since grievances vary, it is understood that the nature of each will dictate the most appropriate approach to its resolution. Therefore, either of the first two (2) of the following steps may be bypassed or expanded, by mutual consent. However, a grievance may not progress beyond Step 1 unless a written grievance has been presented to the Employer.

If a grievance is not presented within seven (7) working days of its occurrence, it shall be deemed waived. The steps of the grievance procedure shall be as follows:

Step 1: An aggrieved employee must present the grievance to his/her immediate supervisor. If they are unable to resolve the grievance, the employee shall reduce the grievance to writing and present the same to the Shop Steward within two (2) working days from the time that the employee and the immediate supervisor have met. Thereafter, the Shop Steward, the employee and the immediate supervisor shall attempt to settle the grievance. If the grievance is not satisfactorily resolved at this meeting, it shall be referred to Step 2 of the Grievance Procedure within five (5) working days of the response. Failure to invoke Step 2 of the Grievance Procedure within this five (5) day period will result in the waiving of any grievance.

Step 2: An authorized representative of the Union and the Funds' Administrator or the Apprenticeship Director shall meet within five (5) days of Step 2 being invoked by the Union. In the event that, using the first two (2) steps, the complaint has not been satisfactorily settled, the grievance shall be referred to Step 3 of the Grievance Procedure.

Step 3: Notice of intent to take a grievance to arbitration must be given within five (5) working days of failure to reach a satisfactory adjustment pursuant to Step 2. Failure of the Union to notify the Employer of its intention to arbitrate a dispute within five (5)

days of the Step 2 meeting shall result in waiving of the grievance and will result in an impartial arbitrator having no jurisdiction over the grievance.

An impartial arbitrator shall be selected from a panel supplied by the Federal Mediation and Conciliation Service upon request of either party. The parties shall, within five (5) working days of receipt of such panel, make a selection of an arbitrator. In the event the parties cannot agree, the FMCS shall be petitioned to appoint an arbitrator. The arbitrator shall render a decision within thirty (30) days after the case has been heard. The decision of the arbitrator shall be final and binding on both parties. The arbitrator's fee shall be borne equally by the both parties.

ARTICLE 13 Wages

Section 13.01. (a) The wages of bargaining unit employees covered by this Agreement shall be increased by **three percent (3%) effective January 1, 2010; an additional two and one half percent (2.5%) effective January 1, 2011, and an additional two and one half percent (2.5%) effective January 1, 2012.**

(b) Employees completing five (5) years of continuous service shall be paid a longevity increase of one and one half (1.5%) percent of their current wages; employees completing ten (10) years of continuous service shall be paid an additional longevity increase of one and one-half (1.5%) percent of their current wages; employees completing fifteen (15) years of continuous service shall be paid a further longevity increase of one and one-half (1.5%) percent of their current wages, and employees having completed twenty (20) years of service shall receive another longevity increase of one and one-half (1.5%) percent of their current wages, employees having completed twenty-five (25) years of continuous service shall receive an additional one and one-half (1.5%) percent of their current wages, employees having completed thirty (30) years of continuous service shall receive an additional one and one-half (1.5%) percent of their current wages, employees completing thirty five (35) years of continuous service shall be paid a longevity increase of one and one-half (1.5%) percent of their current wages, and employees completing forty (40) years of continuous service shall be paid a longevity increase of one and one-half (1.5%) percent of their current wages. Such longevity increases shall be in addition to all other increases and adjustments otherwise provided.

Section 13.02. An employee promoted to a higher classification shall receive an increase sufficient to make his/her wages equal to the next higher rate in the new wage schedule. He/she then shall be given credit for the number of months and days accumulated since the last progression increase was granted. After an employee reaches the maximum rate for his/her job classification, wage progression credit shall continue to accumulate for a period not to exceed six (6) months. When an employee is promoted to a higher classification, the employee will be placed at a step level that results in a wage increase that is no less than \$0.35 per hour. Progression through the seniority levels within the new classification will occur every six (6) months until the individual reaches the longevity level commensurate with that individual's employment with the employer.

Section 13.03. Any employee who is temporarily transferred to a higher-paid classification for one workday or more shall be paid for all work performed in such higher classification at the minimum rate step in such classification or at the automatic rate step in such classification next above his/her present rate, whichever is greater.

Section 13.04. The Employer agrees to discuss with the Union any proposal to abolish, create or reclassify jobs which fall within the classification system agreed upon by the Employer and the Union, and which fall within the jurisdiction of the Union as recognized by Article 2.

Section 13.05. It is agreed that where the Union feels that a job is presently improperly slotted under the current classification system, the Union representatives and persons designated by the Employer to represent the Employer will review the request of the Union to insert several other jobs under the classification system.

Section 13.06. Employees shall be paid every other Wednesday by 12 noon.

ARTICLE 14

Pensions, Health, Dental Hospitalization and Life Insurance

Section 14.01. The Employer agrees to maintain the NASI Welfare Plan in force for employees. Disability benefits will become effective upon the expiration of sick leave and will remain in force up to six (6) months, or the start of pension coverage.

Section 14.02. The Employer agrees to provide all employees and their dependents with any improvements that may be made in the NASI Welfare Plan.

Section 14.03. The Employer agrees to maintain in force the existing Pension Plan. Effective January 1, 2006, for employees with at least one (1) hour of service after 2005, the existing pension plan shall be modified to provide that the maximum benefit payable therefore shall be sixty five percent (65%) of an employee's final average salary as determined under the terms of the Plan. The accrual shall be 2.167% per year with a maximum at 30 years of service.

Annual pension statements will be provided to any employee requesting one and all employees over 50.

The employer shall provide pre-retirement surviving spouse pension to vested participants without needing to wait until the participant reaches age 55.

Section 14.04. The Employer agrees to contribute to the Sprinkler Industry Supplemental Defined Contribution Pension Fund ("S.I.S.") on behalf of the employees whose wages are covered by this Agreement. The Employer contribution to the S.I.S. Fund provided for in this Section shall be a pretax deduction. The Employer shall not be responsible for any expense or cost beyond the contribution set forth below.

Effective January 1, 2002, the Employer shall pay to the S.I.S. Fund one dollar and thirty cents (\$ 1.30) per hour for all hours worked. Effective January 1, 2003, the Employer shall pay to the S.I.S. Fund one dollar and forty cents (\$ 1.40) per hour for all hours worked. Effective January 1, 2004, the Employer shall pay to the S.I.S. Fund one dollar and fifty cents (\$ 1.50) per hour for all hours worked. Effective January 1, 2005, the Employer shall pay to the S.I.S. Fund one dollar and sixty cents (\$ 1.00) per hour for all hours worked.

The Employer hereby agrees to be bound by the Agreement and Declaration of Trust of the Sprinkler Industry Supplemental Defined Contribution Pension Fund and any amendments thereto.

Section 14.05. The parties agree to reopen the contract solely for the purposes of discussing the addition of a 401 (k) Plan for the employees. It is expressly understood that the Employer agrees to reopen the agreement only if Local 2 agrees that there will be no request for any Employer match to the 401 (k) contributions.

ARTICLE 15 Severance Pay

Section 15.01. Employees of six (6) months or more shall receive severance pay at the rate of one (1) week's pay for each year or major fraction thereof worked. Such severance shall be based on the highest salary received from the Employer by the employee. Such severance shall be paid only in the event of a layoff. Any contemplated layoffs will be discussed with the Union.

ARTICLE 16 Automation

Section 16.01. It is recognized by the parties that any jobs which may required the use of electronic data processing equipment, computer equipment, or similarly automated office machinery are jobs within the bargaining unit, excepting jobs of a supervisory or managerial nature. In the event the Employer introduces or uses any electronic data processing equipment, computer equipment, or similarly automated office machinery, prompt notice will be given to the Union and the creation of any jobs not presently within the unit will be posted to permit bidding by the employees within the unit, hi the event that training programs are necessary to qualify employees for such jobs, the Employer agrees that employees within the unit will be given first opportunity to qualify for such job training programs before any persons outside of the Union are hired to fill such jobs.

Section 16.02. It is further agreed that the Employer, in cooperation with the Union, will exhaust every means possible to keep layoffs due to the introduction of electronic data processing equipment or outsourcing to a bare minimum.

ARTICLE 17

The Employer agrees to implement an I.R.S. 125 account for child/elder care commencing in March, 1996 if there is sufficient employee interest in such a program.

ARTICLE 18

No Reduction in Benefits

Section 18.01. This Agreement represents the full Agreement between the parties with respect to wages, hours and conditions of employment which shall prevail during the term hereof.

ARTICLE 19

Health Reimbursement Account

Section 19.01. As of January 1, 2011, the Employer will provide a health savings account, to be used for retiree health care premiums, for each employee with yearly Employer contributions, to the extent permitted by law, as follows:

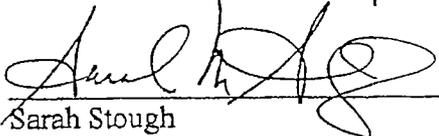
For employees with 1-10 years of service as of January 1 of each year, \$100 is contributed to the HRA for that year.

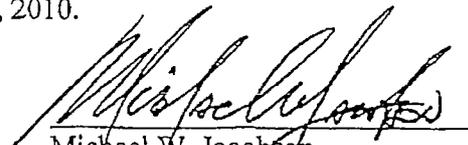
For employees with 11 to 19 years of service as of January 1 of each year, \$500 is contributed to the HRA for that year.

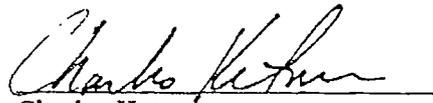
For employees with 20 or more years of service as of January 1 of each year, \$1,000 is contributed to the HRA for that year.

Individuals who leave employment such that they will not be entitled to retiree medical coverage under the NASI Welfare Plan or individuals who choose not to avail themselves of the retiree medical coverage available from NASI Welfare Plan at retirement will forfeit any amounts accrued in the HRA.

Signed this 23rd day of September, 2010.


Sarah Stough
Staff Representative


Michael W. Jacobson
Administrator


Charles Kettner
Director

BEFORE
ANDREW M. STRONGIN
ARBITRATOR

December 10, 2012

In the Matter of the Arbitration between- :
: OFFICE AND PROFESSIONAL EMPLOYEES :
INTERNATIONAL UNION LOCAL 2 :
: -and- :
: AUTOMATIC SPRINKLER INDUSTRY :
WELFARE FUNDS :
: -and- :
: NASI LOCAL 669 JOINT APPRENTICESHIP :
TRAINING COMMITTEE :

Grievance: LaKishia Thomas

APPEARANCES:

For the Union:

David R. Levinson, Esq.
Attorney at Law
PO Box 39286
Washington DC 20016

For the Employer:

Charles W. Gilligan, Esq.
O'Donoghue & O'Donoghue
4748 Wisconsin Avenue, NW
Washington DC 20016

This grievance protests the March 28, 2012, termination of grievant LaKishia Thomas from her position as shared receptionist for the National Automatic Sprinkler Industry Welfare Fund (grievant's direct Employer), together with the Pension Fund and Supplemental Pension Plan that share the Employer's office space and a common telephone switchboard. The Union claims that grievant's termination is without just and sufficient cause, in violation of Section 6.04 of the parties' Agreement, and asks that grievant be reinstated to her former position and made whole for her losses.

The Welfare Fund and Pension Plan and Fund provide medical and pension benefits to thousands of unionized sprinkler fitters throughout the country. These 20,000 or so participants periodically visit the Employer's offices, but regularly call with questions and inquiries. All calls are routed through a common switchboard, initially automated but manned by a live receptionist beginning in October 2011, and it appears to be undisputed that the job is demanding and somewhat hectic, especially so following the October 2011 change. The receptionist is described as the Employer's first point of contact, and it is undisputed that the Employer's trustees place great emphasis and importance on the quality of service provided by the receptionist and other office employees.

Grievant was hired as the receptionist in April 2010, and except for a verbal warning issued on June 9, 2011, for leaving the switchboard uncovered while she took a break—which warning led to the Employer's establishment of a regular process by which grievant could seek and obtain relief to cover her daily breaks—grievant had a clean disciplinary record as of the date of her termination. Grievant initially found the job to be difficult and, particularly after October 2011, too demanding. Meanwhile, several of grievant's non-supervisory coworkers began to criticize grievant's work performance. Grievant characterizes these

complaints as “constant,” “daily,” and very upsetting. Grievant repeatedly shared her concerns about the work and her coworkers’ complaints with her direct supervisor, Barbara Kearse, who testifies that she, too, heard these complaints. In her discussions with grievant, Kearse acknowledged the high volume of calls, but apparently limited her feedback to telling grievant to do her best, without signaling any supervisory dissatisfaction or disapproval. It appears, however, that Kearse believed or at least came to believe that the coworkers’ complaints were legitimate.

The coworkers’ complaints persisted and grievant’s feelings of persecution increased, causing grievant repeatedly to seek assistance from Shop Steward Dianne Jones and Claims Manager Nia Padmore. In the last of three or four meetings on the subject, grievant told Padmore of her concerns and Jones opined that grievant was being bullied. Padmore, who acknowledges grievant’s complaints about harassment and unfair treatment, found grievant to be sincere and agreed to address the issue. Unbeknownst to grievant or Jones, however, Padmore later assessed that grievant was overreacting and let the matter drop without taking any further action.

Against that backdrop, grievant reported for work on March 27, 2012, and quickly was confronted with a coworker’s complaint about a misrouted call. Kearse then visited grievant’s desk, reported that she was fielding complaints, told grievant to be mindful of her work and to do her best, and then walked away without allowing grievant to speak—literally, Kearse held up her hand to silence grievant—despite the fact that grievant was visibly upset and clearly wanted to address the issue. Shortly after this episode with Kearse, grievant’s former supervisor, Mary Taylor, who happened also to be the mother of grievant’s boyfriend and a person with whom she had a personal relationship, passed by grievant’s desk. According to Taylor, grievant profanely exclaimed that she was

going to leave, and asked Taylor—who regularly assisted in providing relief for grievant's breaks—to find someone to cover the switchboard. Taylor left the area in order to find someone to provide coverage, but in the meantime another employee, Connie Blount, arrived to cover the switchboard—it is not clear on the record how Blount knew she was needed—and grievant, believing Taylor had sent Blount and that she had done all that was necessary to gain permission to leave, left the office, got in her car, and drove home.

Meanwhile, Taylor approached Kears in regards to the situation, who was unaware that grievant had left the office. Both Kears and Taylor called grievant on her mobile phone, but grievant did not answer either call. Grievant returned Taylor's call about 20 minutes later, at which point Taylor advised grievant that she was considered to have walked off the job, and had better call Kears. Subsequently, perhaps 40 minutes thereafter, grievant telephoned Kears. There is some dispute as to the substance of their discussion, but it appears that Kears told grievant that she should have returned to work, and that grievant, still obviously upset, cryptically stated that there was "a lot going on," and that she would be back the next day. Grievant did not offer any additional explanation, and Kears requested none.

At some point on March 27, Padmore met with a variety of supervisory employees, including not only Kears and Taylor, but also Fund Administrator Michael Jacobson and Assistant Fund Administrator John Eger, and then decided to terminate grievant. Padmore authored a letter that same day to inform grievant that she was being terminated for job abandonment.

Grievant returned to work as scheduled on March 28, apparently unaware that Padmore already had prepared a termination letter, at which time Padmore summoned her to a meeting attended also by Eger and Shop Steward

Jones. Padmore began by presenting the termination letter, to which grievant responded, "Fine." Jones asked grievant if she had anything to say, and grievant said, "No," and the meeting concluded. At grievant's subsequent request, the meeting reconvened a short time later, with grievant asking for an explanation of the reasons for her termination. Padmore stated that she had walked off the job without telling her supervisor. Grievant stated that she had told Taylor, which had been acceptable in the past, but Padmore stated that Taylor was not her supervisor, Kearse was, and Kearse was available. The instant grievance, and this proceeding, followed.

At hearing, Padmore testifies that although stressful, grievant's job is manageable, and that no combination of stresses justified her action in walking off the job. Fund Administrator Jacobson testifies that he concurred in Padmore's decision to terminate grievant, because he trusted her judgment and agreed that grievant's misconduct was egregious and need not be condoned. Jacobson testifies that Padmore had told him of grievant's history of complaints, indicated that they were a source of frustration for Padmore, and made her more inclined to terminate grievant than to regard them as mitigating factors. Jacobson adds that Padmore at some earlier point wanted to reassign grievant due to the distraction her complaints were causing Padmore, but that he dissuaded Padmore from that course on the theory that it would just make grievant someone else's problem.

Grievant, for her part, testifies that job-related stress caused her to begin ongoing psychological counseling in December 2010—a fact not earlier disclosed to management—explaining that her supervisors were not assisting her with her problems. She testifies that she never intended to abandon her job. Rather, she claims that she needed to leave to get herself together, and that she did

not leave until after she told Taylor and waited for relief to arrive. She admits, however, that she could and should have handled the situation differently.

The Employer contends that grievant walked off the job without defensible provocation, due to what amounts to a fit of pique and frustration over complaints by coworkers about her job performance, which conduct so seriously undermines efficient operation of the workplace and the purpose for which she was employed as to provide just and sufficient cause for her termination. The Employer contends that progressive discipline is not required in this situation, as grievant's conduct was both severe and essentially unprovoked. In this last regard, the Employer emphasizes that grievant walked off the job without discussing the matter with her supervisor, let alone obtaining supervisory permission, and that such egregious conduct cannot be legitimized or reconciled with the Employer's operational needs. The Employer denies the existence of any mitigating factors, as grievant was a short-term employee with a history of discipline for leaving her post without coverage, and who was regarded as a difficult employee. The Employer also rejects grievant's attempt at hearing to excuse her behavior as attributable to psychological issues, arguing that grievant never raised this contention prior to hearing, and that irrespective of any such issues, grievant understood the import of her actions.

The Union contends that just cause does not exist for grievant's termination, as grievant visibly was upset and reasonably concluded that she was not fit to continue working on the day in question; advised a former supervisor that she would be leaving; and then waited for relief to arrive to cover her position before she left. The Union adds that grievant's actions on the day in question are mitigated by all commonly considered factors, including that grievant's supervisor spoke with her by telephone, but failed either to direct her to return to work, or to

warn her that she risked termination if she did not; that the Employer failed to conduct a fair and adequate pre-termination investigation, pointing out that neither grievant nor the Union was asked any questions, and that both of grievant's superiors, Kearsse and Padmore, admittedly ignored grievant's honest complaints about her treatment; and that the Employer failed to apply progressive discipline or consider a lesser penalty. Consequently, the Union asks that grievant be reinstated to her former position and made whole for her losses.

As noted, Article 6.04 of the parties' Agreement requires termination actions to be supported by just and sufficient cause. The Employer is correct that such provision does not strictly require the application of progressive discipline in all cases. Even in the case of egregious misconduct, however, the provision does require the Employer to establish the employee's commission of terminable misconduct, and fairly to consider any relevant mitigating factors prior to effecting an employee's termination on such basis.

Applied to the facts of this case, and recognizing that the Arbitrator's charge is not broadly to substitute his judgment for that of management, but more narrowly to inquire whether management's action is reasonable and taken in good faith, the record demonstrates that although grievant's conduct is subject to discipline, her misconduct nevertheless was less egregious than charged, and that the termination penalty is disproportionate to her offense.

Turning first to the charged misconduct, the act of walking off the job undoubtedly is a serious offense, particularly when the Employer is in a customer service business, and even more particularly when the principal focus of the job at issue is the provision of customer service by a receptionist whose principal job function is personally to answer each and every incoming telephone call. On this record, however, it is an inaccurate oversimplification to characterize grievant's

conduct as walking off the job. True, grievant did, in fact, leave the workplace without express permission from her direct supervisor, for which she is subject to some discipline. Also true, however, grievant did not leave the workplace until after she first informed another supervisory employee, Taylor, that she was leaving, and until after she awaited the arrival of another employee to cover the switchboard in her absence.

As the Employer argues, Taylor was not grievant's direct supervisor, and technically was not in a position to authorize grievant's departure. Nor did grievant ask Taylor for permission to leave early, as normally would be required; rather, grievant abruptly announced to Taylor that she was leaving, at which point Taylor immediately proceeded to summon another employee to cover grievant's impending absence, without expressly authorizing her to leave. Yet, the matter is not so simple as to admit of the conclusion that grievant is subject to termination for having failed to seek permission from Kears, without regard to other considerations.

As is clear from the record, grievant repeatedly sought assistance from Kears in relation to the ongoing problem of coworker complaints about her performance, which is the precise issue that led to grievant's difficulties on the day in question. As Kears admits, she lent grievant an apparently sympathetic ear, but little if anything else. Kears testifies that she believed the coworkers' complaints to be well-founded, yet Kears apparently did not share that view with grievant, and did nothing more than tell grievant to do the best she could, without telling grievant that she believed the complaints, offering her any training or instruction, or issuing any form of discipline, formal or otherwise. And, on the day in question, Kears literally made clear that she was not interested in hearing grievant's response to the latest round of complaints, as it is undisputed that when grievant

tried to speak, Kearsse silenced her. Under the circumstances, although it certainly would have been better for grievant to seek Kearsse's permission to leave work, grievant's failure to follow normal protocol is mitigated by her understandable frustration and/or confusion as to Kearsse's views on the subject of the ongoing complaints.

Although Taylor did not expressly authorize grievant's departure, that shortcoming is mitigated by the fact that Taylor occasionally was responsible for providing grievant's relief, and by the fact that Taylor was a member of supervision. And, even if grievant incorrectly assumed that Blount arrived to provide relief at the behest of Taylor—again, it is unclear who directed Blount to perform that role—the fact remains that grievant did not leave the switchboard unattended. In this regard, it is to be emphasized that grievant's action in waiting for Blount's arrival demonstrates grievant's internalization of and acquiescence to her earlier verbal warning for leaving her post unattended, and therefore her susceptibility to corrective action. On this occasion, grievant did not leave her post unattended, despite her obvious distress.

Moreover, there is considerable cause for concern on this record over Padmore's response to grievant's repeated expressions of complaint and requests for assistance. As is undisputed, Padmore fielded those complaints and requests, telling grievant and her Union representative that she would speak to the coworkers. In actuality, however, Padmore dismissed grievant's concerns, not only without speaking with grievant's coworkers, but also without telling grievant. The explanation for Padmore's approach to grievant's concerns is best evidenced by Fund Administrator Jacobson's testimony, which strongly suggests that Padmore considered grievant to be a difficult employee, more appropriately terminated than foisted off on another department. As the Union acknowledges,

grievant's complaints may have been overstated and unfounded, but Padmore did not investigate and therefore treated her unfairly.

It was not appropriate for grievant to lose her cool, announce that she was leaving, and walk out the door without express supervisory approval, but grievant's conduct on the day in question, understood in context of her ongoing requests for assistance from her first and second-level supervisors, who neither helped her, nor signaled their disapproval of her conduct through the application of discipline, demonstrates an employee who desired to retain, not resign, her employment. Clearly, grievant desired to improve her work situation, and just as clearly, her supervisors were listening largely with deaf ears. Apparently, Kearse and Padmore both concluded that grievant was underperforming, and that her coworkers' complaints were justified, yet neither of them took any action either to shield grievant from what they knew she regarded to be harassing and upsetting complaints, or to discipline her for deficient work performance. Instead of investigating the coworkers' complaints in an effort to verify them, providing grievant with any appropriate training or counseling in the event the complaints were well-founded, or seeking to improve and/or correct grievant's performance through the application of progressive discipline for the relatively less serious offense of misrouting telephone calls, Kearse and Padmore instead allowed the situation to fester, and when the foreseeable occurred—grievant finally snapped due to the stress of the situation—in lieu of directly addressing the underlying and burgeoning work performance problem through the application of progressive discipline, Padmore instead seized on the opportunity to terminate grievant for abandoning her job, a point that seems unnecessarily to have been reached.

In the final analysis, grievant's conduct on the day in question, understood in its proper and obvious context, is that of an employee requiring

supervisory assistance, but receiving none. Grievant's conduct in failing to secure permission to leave work from the proper supervisor is subject to correction, but is not fairly subject to summary termination. In the Arbitrator's judgment, a one-day disciplinary suspension and associated warning as to the importance of obtaining supervisory approval to take leave appropriately balances the Employer's right to maintain order in the workplace, with grievant's right not to be disciplined and/or terminated without just and sufficient cause. Subject to that one-day suspension and associated warning, grievant shall be reinstated to her former position and made whole for her losses.

Finally, in so concluding, the Arbitrator is mindful of the Employer's concern that other employees will be emboldened by this result to walk off the job any time they have a fit of pique, but finds that concern misplaced here. As the record makes clear, grievant did not simply walk off the job due to an isolated fit of pique; grievant walked off the job after enduring constant daily complaints from coworkers, which the Employer knew she found upsetting, and which—despite repeated requests for assistance from grievant—the Employer took virtually no action to check, whether through positive assistance or the application of corrective discipline. In the event some other employee walks off the job under some other set of circumstances, nothing in this Award, other than its fealty to Section 6.04 of the Agreement, should be regarded as precluding the Employer from responding to such situation as it deems appropriate in light of all of the facts and circumstances of such case, subject of course to the Union's contractual grievance rights.

DECISION

The grievance is sustained. Grievant shall be reinstated to her former position and made whole for her losses, subject to a one-day disciplinary suspension and associated warning for taking leave without appropriate supervisory approval. The Arbitrator retains jurisdiction to resolve any questions that may arise over application or interpretation of the remedial provisions of this Award.



Andrew M. Strongin, Arbitrator

Takoma Park, Maryland

-----Original Message-----

From: David Levinson [<mailto:levlaw@gmail.com>]

Sent: Thursday, December 27, 2012 1:18 PM

To: Andrew Strongin

Cc: Chuck Gilligan

Subject: Lakisha Thomas grievance with NASI Funds and OPEIU Local 2

Dear Arbitrator Strongin--Local 2 is asking you to exercise your retained jurisdiction in the above matter. Specifically, while your Award provided for Ms. Thomas to be reinstated to "her former position", upon her return to work yesterday, she has been assigned tasks that involve substantial physical and manual labor.

Presently, Ms. Thomas is assigned to work in the Employer's "archive room", a room filled with boxes of paper records. She does certain clerical work of checking the boxes contents and labels and creating a bar code. However she also has the physical labor of lifting the boxes from their stacks to review the contents, and then to lift them again onto a dolly and transport them into an unheated garage and stack them there for pickup to off-site storage. I do not have a figure for the weight of these boxes, but coincidentally, I am presently moving some boxes of my closed case files to storage. Taking a representative box of standard size, I found it weighs 28 pounds. I have had limited discussion with Employer counsel Gilligan; however I doubt that he and I can resolve this matter without your involvement.

Local 2 is agreeable to placement of Ms. Thomas in a clerical position other than receptionist, but believes that a position with substantial and onerous manual labor is not equivalent to her former clerical position. As such manual labor appears to be an inherent part of her current job assignment, Local 2 believes that this assignment does not conform with the Award in this matter. For this reason Local 2 is requesting that you exercise your retained jurisdiction and that, following Mr. Gilligan's response to this message on behalf of the Employer, you direct the Employer to return Ms. Thomas to work of an exclusively clerical nature rather than her current assignment. Thank you for your attention to this matter.

--

David R. Levinson
Levinson Law Office
P.O. Box 39286
Washington, DC 20016
tel 202 223-3434
fax 202 659-1034
levlaw@gmail.com

BEFORE
ANDREW M. STRONGIN
ARBITRATOR

February 6, 2013

In the Matter of the Arbitration between- :

OFFICE AND PROFESSIONAL EMPLOYEES :
INTERNATIONAL UNION LOCAL 2 :

-and- :

AUTOMATIC SPRINKLER INDUSTRY :
WELFARE FUNDS :

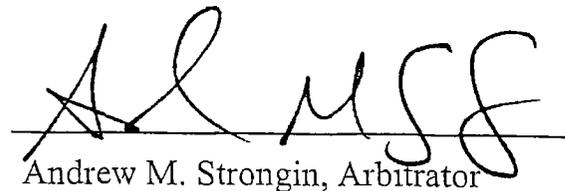
-and- :

NASI LOCAL 669 JOINT APPRENTICESHIP :
TRAINING COMMITTEE :

Grievance: LaKishia Thomas

SUPPLEMENTAL REMEDIAL ORDER

In the underlying Award dated December 10, 2012, the Arbitrator held that, "grievant shall be reinstated to her former position and made whole for her losses." Subject to the Arbitrator's retained jurisdiction, grievant's reinstatement to her position as Receptionist shall be effected immediately, without further delay.


Andrew M. Strongin, Arbitrator

Takoma Park, Maryland

Five Copies
d

**NASI WELFARE
FUND**

Memo

To: Lakishia Thomas
From: Dan Curry
CC: Michael Jacobson, Diane Jones
Date: January 11, 2013
Re: Using cell phone during work hours

On Thursday, December 27, 2012, I told you that it was not acceptable for you to use your cell phone to talk or to text while you were punched in. In that same conversation, I told you that you were not to eat your breakfast after you had punched in. You may eat before you punch in before 9:00 a.m. or after you punch out for lunch.

Since that this morning you have failed to heed my verbal warning and continued to use your cell phone while you were in the archive area. Future acts of inappropriate cell phone use will lead to further disciplinary action. Such disciplinary action could include suspension or termination of your employment.

In the event you get an emergency call from your day-care provider (or other emergency incoming call, you should report it to me promptly. Non-urgent use of your cell phone must stop.

Memo

To: Lakishia Thomas
From: Michael Jacobson
CC: Diane Jones, Dan Curry
Date: February 4, 2013
Re: Using cell phone during work hours; insubordination

On Friday, February 1, 2013, at 4:10 p.m., I directed you to report to your supervisor, Dan Curry. Instead of following my direction, you went into the restroom and began a conversation on your cell phone. You finally emerged at almost 4:30. When you began to approach the time clock, I asked you what Dan had to say. From your response it was clear to me that you had not as of that time, reported to Mr. Curry; a fact I confirmed with Mr. Curry.

On December 27, 2012, Dan Curry told you that it was not acceptable for you to use your cell phone to talk or to text while you were punched in. On January 11, 2013, this verbal warning was reiterated to you in a written warning because you failed to heed the earlier warning and continued to use your cell phone while you were on the clock. You were advised that future acts of inappropriate cell phone use would lead to further disciplinary action and that such disciplinary action could include suspension or termination of your employment.

Your most recent decision, that it was more important for you to make a telephone call than to follow my direction to report to your supervisor, is unacceptable behavior. You are to follow directions from me or other supervisory staff promptly and professionally. Your failure to follow my direction and your decision to, instead, make a telephone call justifies additional disciplinary action. You are hereby advised that you are suspended for the day of Tuesday, February 5, 2013. Please understand that future acts of inappropriate cell phone use or insubordination will lead to further disciplinary action. Such further disciplinary action could include suspension or termination of your employment.

Upon your return to work on Wednesday, February 6th, you are to report to Dan Curry by 9:00 a.m.



8555 16th St Suite 550
Silver Spring, MD. 20910-3320
301-608-8080
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION
LOCAL 2, AFL-CIO
GRIEVANCE REPORT FORM

GRIEVANT Lakisha Thomas DATE 2/5/2013
EMPLOYER NAST
DEPARTMENT Mail Room
CLASSIFICATION Receptionist
NATURE OF GRIEVANCE Harrasment retaliation
against an employee who has been subsequently exonerated

ARTICLE (S) VIOLATED REMEDY SOUGHT 6.07
REMEDY SOUGHT to be made whole and to be treated
fair and just in a safe work environment
since 7 years
(Grievant's Signature)

FIRST DECISION Denial

(Employer Representative) (Union Representative)

SECOND STEP DECISION _____

(Employer Representative) (Union Representative)

THIRD STEP DECISION _____

(Employer Representative) (Union Representative)

ARBITRATOR'S AWARD _____

Note: Union Signature at each step is only indicative that such step is taken and does not reflect concurrence in the decision rendered unless so specified in his/her stated position.



8555 16th St Suite 550
Silver Spring, MD. 20910-3320
301-608-8080

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION
LOCAL 2, AFL-CIO
GRIEVANCE REPORT FORM

GRIEVANT Lakisha Thomas DATE 2/5/2013
EMPLOYER N.A.S.T. welfare fund
DEPARTMENT Mail Room
CLASSIFICATION Receptionist
NATURE OF GRIEVANCE Employee was suspended without sufficient just cause. ~~employee~~ employer enforcing policies that have not been written or agreed upon in contract

ARTICLE(S) VIOLATED 6.07
REMEDY SOUGHT to be made whole

[Signature]
(Grievant's Signature)

FIRST DECISION Denial

[Signature] (Employer Representative) [Signature] (Union Representative)

SECOND STEP DECISION _____

(Employer Representative) (Union Representative)

THIRD STEP DECISION _____

(Employer Representative) (Union Representative)

ARBITRATOR'S AWARD _____

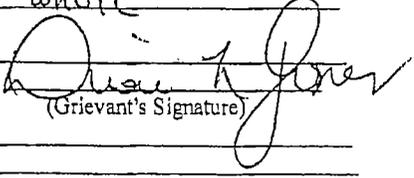
Note: Union Signature at each step is only indicative that such step is taken and does not reflect concurrence in the decision rendered unless so specified in his/her stated position.



8555 16th St Suite 550
Silver Spring, MD. 20910-3320
301-608-8080
OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION
LOCAL 2, AFL-CIO
GRIEVANCE REPORT FORM

GRIEVANT Class Action DATE 2/08/13
EMPLOYER NASE Welfare fund
DEPARTMENT Claims
CLASSIFICATION claims processor
NATURE OF GRIEVANCE Charge in working conditions and benefits without bargaining with Local 2 cell phone usage and internet use

ARTICLE (S) VIOLATED REMEDY SOUGHT Article 18
REMEDY SOUGHT to be made whole

FIRST DECISION Denies

(Grievant's Signature)

(Employer Representative) _____ (Union Representative) _____

SECOND STEP DECISION _____

(Employer Representative) _____ (Union Representative) _____

THIRD STEP DECISION _____

(Employer Representative) _____ (Union Representative) _____

ARBITRATOR'S AWARD _____

Note: Union Signature at each step is only indicative that such step is taken and does not reflect concurrence in the decision rendered unless so specified in his/her stated position.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NATIONAL AUTOMATIC SPRINKLER
INDUSTRY WELFARE FUND,

Respondent,

and

Case No. 05-CA-97998

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 2,

Charging Party.

AFFIDAVIT OF MICHAEL JACOBSON

I, MICHAEL JACOBSON, Fund Administrator of the National Automatic Sprinkler Industry Welfare Fund (hereinafter "Welfare Fund") hereby depose and say as follows:

1. I am authorized to execute this Affidavit on behalf of the Welfare Fund and I make this Affidavit from personal knowledge.

2. A true and accurate copy of the most recent collective bargaining agreement between the Welfare Fund and Office and Professional Employees International Union, Local 2 ("Local 2"), which was effective from January 1, 2010 through December 31, 2012, is provided as Exhibit 3 to the Welfare Fund's Memorandum in Support of its Motion for Summary Judgment.

3. A true and accurate copy of Arbitrator Andrew Strongin's December 10, 2012 arbitration award in the case involving the discharge of Lakishia Thomas is provided as Exhibit 4 to the Welfare Fund's Memorandum in Support of its Motion for Summary Judgment.

4. A true and accurate copy of Arbitrator Strongin's supplemental award dated February 6, 2012 is provided as Exhibit 6 to the Welfare Fund's Memorandum in Support of its Motion for Summary Judgment.

5. A true and accurate copy of the written warning provided to Lakishia Thomas on or about January 11, 2013 is provided as Exhibit 7 to the Welfare Fund's Memorandum in Support of its Motion for Summary Judgment.

6. A true and accurate copy of the memorandum dated February 4, 2013 imposing a one-day suspension upon Lakishia Thomas is provided as Exhibit 8 to the Welfare Fund's Memorandum in Support of its Motion for Summary Judgment.

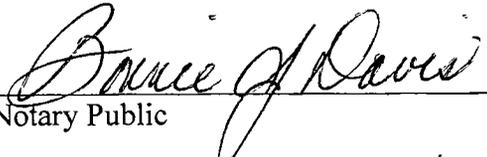
7. A true and accurate copy of three (3) grievances filed by Local 2 is provided as Exhibit 9 to the Welfare Fund's Memorandum in Support of its Motion for Summary Judgment.


MICHAEL JACOBSON

Subscribed and sworn to

before me this 11 day

of June, 2013


Notary Public

My Commission Expires: 6/20/2014