

Long Island Day Care Services, Inc. and District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO. Cases 29-CA-13305, 29-CA-13433, 29-CA-13767, and 29-CA-13901

May 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On January 17, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. Counsel for the Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions, as modified, and to modify the remedy,³ only to the extent consistent with this Decision and Order.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) by delaying the submission of a conditionally approved collective-bargaining agreement to its board of directors for a ratification vote until May 5, 1988. We also agree with his finding that the Respondent violated Section 8(a)(5), (3), and (1) by paying cash bonuses only to non-strikers, and that it violated Section 8(a)(3) and (1) by giving a disciplinary warning letter to former striker Linda Morning. However, as explained below, we find merit in certain of the General Counsel's exceptions to the judge's dismissal of other complaint allegations and, consequently, we find that the Respondent violated Section 8(a)(5) and (1) by making unilateral changes regarding employee furloughs and a 4.75-percent cost-of-living adjustment and that it violated Section 8(a)(3) and (1) by disciplining employees Ramsey and Garcia.

¹No exceptions have been filed to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide information on employees that had been requested by the Union and that it violated Sec. 8(a)(3) and (1) by disciplining employee Cook. We also note that no exceptions were filed to the judge's dismissal of the 8(a)(1) interrogation allegation.

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

³*New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Alleged Unilateral Changes: Procedural and Impasse Defenses

1. The judge recommended dismissal of the General Counsel's complaint allegations regarding unilateral changes in terms and conditions of employment because he found that these allegations, offered at the hearing by amendment to the complaint, were not closely related to the allegations in the underlying charge and, therefore, were time-barred by Section 10(b) of the Act. We find merit in the General Counsel's exceptions regarding the 10(b) ruling and for the following reasons we shall consider the complaint amendments on the merits.

As the judge found, the charge in Case 29-CA-13305, filed December 3, 1987, alleges that the Respondent violated Section 8(a)(1) and (5) by refusing to execute an agreed-upon contract. Paragraph 12(e) of the complaint in that case, which issued January 13, 1988, alleges that since October 23, 1987, the Respondent has violated Section 8(a)(5) and (1) by making certain unilateral changes without notice to the Union or its consent. At the hearing on April 26, 1989, the judge requested that the General Counsel "indicate exactly what it is she's alleging with respect to paragraph 12(e) of Complaint 29-CA-13305." At the next hearing date, May 23, 1989, the General Counsel moved to amend paragraph 12(e) as follows:

(e) At all times material herein, since on or about October 23, 1987, Respondent has unilaterally implemented certain terms of the agreement described above in paragraph 11 without prior notice to, or consent of, the Union, as follows:

(i) In or about January 1988, Respondent granted employees Martin Luther King's Birthday as a paid holiday and in about October, 1988, withdrew Columbus day as a paid holiday.

(ii) In or about February, 1988, Respondent withdrew a February furlough program and in or about July, 1988 instituted a July-only furlough program.

(iii) On or about September 15, 1988, Respondent granted a 2% additional cost-of-living adjustment to employees.

The General Counsel also moved to add as renumbered paragraph 13, the following:

13. On or about August 10, 1988, Respondent granted a 4.75% cost-of-living increase to its employees without notice to, or bargaining with, the Union.

The judge found that those charge and complaint allegations do not meet the "closely related" test set forth in the Board's decision in *Nickles Bakery of Indi-*

ana, 296 NLRB 927 (1989). He noted that although certain complaint allegations relating to the process of creating a collective-bargaining agreement were closely related to the charge, unilateral changes were of a different character because the referenced changes were made well after contract negotiations had ended. He recommended dismissal of the complaint amendments because they were not based on the same legal theory as the underlying charge, did not arise from the same factual circumstance or sequence of events, and would require the Respondent to raise a completely different legal defense.

Contrary to the judge, we find merit in the General Counsel's contention that this case is controlled by the Board's holding in *Roslyn Gardens Tenants Corp*⁴. In that case, the Board held that a charge alleging a "refusal to execute an agreement" was "closely related" to original and amended complaint allegations of unilateral changes because both were similarly directed at circumvention of the collective-bargaining process. The Board cited *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959), in which the Supreme Court held that a charge alleging a general refusal to bargain encompassed a later unilateral wage increase because that increase is "within the same class of violations as those set up in the charge." Clearly that holding applies here. We therefore find, in accord with *Roslyn Gardens*, supra, that the allegations of unilateral changes in the subject complaint are closely related to the underlying charge and therefore not barred by Section 10(b).⁵

2. We likewise find no merit in the Respondent's contention that the General Counsel's complaint amendment deprived the Respondent of its right to due process. When the General Counsel moved to amend the complaint on May 23, 1989, in order to particularize what previously had been generally alleged as unlawful unilateral changes in the January 13, 1988 complaint, the Respondent objected vehemently on the grounds of surprise and Section 10(b). The judge deferred action and further argument on the motion to amend until May 31, 1989. On that date, the parties, after brief argument on the motion, entered into some factual stipulations relating to the proposed amendments,⁶ and the Respondent subsequently adduced evidence bearing on them in its case-in-chief. The Respondent made no effort to gain a continuance prior to submitting evidence on these allegations. Accordingly, we are satisfied that the amended complaint allegations were fully and fairly litigated without prejudice to the

Respondent, and we shall proceed to consider them on the merits.

3. On the merits, the Respondent argues that implementation of the previously agreed-to contract terms was lawful because a bargaining impasse occurred in December when Negotiator Mayne told Respondent President Simmons "we seem to be at an impasse," and the Union subsequently canceled further negotiations. We arguably need not consider this defense;⁷ in any event, on consideration of it we find that these events did not give rise to an impasse in bargaining.

Based on the judge's findings, which we have adopted, the Respondent's negotiator, Ann Coates, had the authority to enter into an agreement subject only to approval by the Respondent's board of directors. Pursuant to that authority, Coates reached an accord with Mayne, her counterpart union negotiator, and on October 20, 1987, the two representatives executed a fully negotiated memorandum of agreement that was conditioned only on ratification by the Union's membership and the Respondent's board of directors. Within a few days after execution, the Union's membership ratified the agreement; however, Simmons declined to submit the agreement to her board of directors for approval because of her position that Coates exceeded her authority by agreeing to binding arbitration and superseniority for shop stewards.

As a consequence of Simmons' conduct, Coates resigned her position during the first week in December and the Union, on December 3, filed a charge alleging that the Respondent refused to execute the agreement it had reached with the Union. Mayne received a letter from Coates announcing Coates' resignation as the Respondent's attorney, and on December 7 Mayne called Simmons to arrange a meeting for December 11.

According to Mayne's testimony, on December 11 Simmons expressed her objection to top seniority for shop stewards and also showed Mayne a letter from the regional Head Start office that she said proved that Head Start workers were not entitled to binding arbitration as the final step in their grievance procedure. Mayne said she refuted Simmons' position with a 1977 letter showing that the issue of binding arbitration for Head Start workers in New York City had already been worked out years ago. Simmons mentioned without elaboration that the board of directors had met and "they went crazy," and that they were going to meet again to discuss any other objection they may have. Mayne testified that she set another date to meet with Simmons because she was hoping to get this straightened out.

⁴ 294 NLRB 506 (1989). See also *Brownsville Garment Co.*, 298 NLRB 507 (1990).

⁵ We also note that the complained-of unilateral changes correspond with certain provisions in the unratified collective-bargaining agreement.

⁶ The General Counsel and the Respondent stipulated that the Respondent unilaterally implemented the 2-percent and 4.75-percent cost-of-living adjustments (COLAs) without prior notice to or the consent of the Union.

⁷ The fact that the Respondent was aware of the allegations of unilateral changes before the hearing and participated fully in the litigation of those allegations, but did not interpose its bargaining impasse defense until after issuance of the judge's decision, raises questions about whether the defense is timely raised.

Simmons testified that Mayne telephoned in early December saying, “[W]e seem to be at an impasse,” and asking for a meeting. On December 11, Mayne and Simmons met. Mayne asked how Simmons “would feel about discussing our whole situation that we have.” Simmons stated she replied that she did not feel comfortable discussing anything because of the memorandum of agreement, but that it had to be clarified and put to bed. Thereafter, she and Mayne proceeded to discuss the memorandum at length. According to Simmons, the meeting ended with Mayne suggesting that they have one-on-one discussions to come to conclusions on outstanding items that had not been resolved, like dates of the contract and “stuff like that.” Before any further meeting was held, Union Director of Organizing Stevenson informed Simmons that Mayne did not have the authority to meet with her and said, “Until you agree to sign the memorandum of agreement there is nothing to talk about.”

It is clear from the foregoing that Mayne’s alleged impasse statement, even if made,⁸ was not offered as an admission that the parties had reached an impasse in bargaining. Rather, it was simply her way of depicting, perhaps inartfully, the effect of Simmons’ rejection of the parties’ memorandum agreement and her failure to have submitted it to the board of directors for their consideration. No other conclusion is plausible where, as here, Mayne made the alleged statement after an accord between the parties had been reached. Further, no meeting between Simmons and Mayne had as yet occurred that might serve as a predicate for finding a bargaining impasse. Consequently, no basis exists for finding that Mayne was signaling the existence of a formal impasse in bargaining by her alleged statement.

Similarly, we find no impasse occurred because of their December 11 meeting. The meeting took place after bargaining had been concluded and an agreement had been executed. Thus, when they met there was nothing further for them to bargain about concerning the employees’ terms and conditions of employment. In addition, both were aware that the Union’s membership had ratified the agreement, and that the Union believed the agreement was binding because of the refusal-to-execute charge it had just filed against the Respondent. The meeting, therefore, could not reasonably be considered by either of them as a reopening of contract negotiations. Nor could Simmons reasonably construe Mayne’s participation in the meeting as indicating that the Union was retreating from its position that an agreement existed.

Moreover, both Mayne’s and Simmons’ versions of the meeting demonstrate that it was held to explore the possibility of resolving the dispute over the agreement.

⁸ The judge does not mention the statement in his decision and thus did not resolve whether it was uttered.

Mayne’s testimony establishes that Simmons identified two objections to the agreement—the provisions for binding arbitration and superseniority for stewards—and that Mayne’s efforts to allay Simmons’ fears with respect to those provisions were to no avail. Similarly, Simmons testified that they reviewed the memorandum agreement in an attempt to clarify certain of its terms. Although she also averred that Mayne suggested future discussions to resolve such matters as contract duration and “stuff like that,” she does not claim that Mayne indicated that the Union would agree to any changes in the agreement’s terms and conditions of employment. In any event, any notion of Simmons that her meeting with Mayne may have represented a return by the Union to the bargaining table was quickly dispelled when Stevenson informed Simmons that Mayne had no authority to meet with her and that no further talks would take place until the Respondent agreed “to sign the agreement.”

Accordingly, we discern no grounds for finding that the parties were at impasse after the December 11 meeting, and we shall thus proceed to examine the specific circumstances surrounding each of the Respondent’s alleged unilateral changes.

Holidays

Uncontradicted testimony by President Simmons shows that in a January 1986 employee meeting the employees demanded a holiday on Martin Luther King’s birthday either in addition to, or in place of, Columbus Day. She testified that she made no commitment in 1986 because Martin Luther King’s birthday was not then recognized as a national holiday, but that when the employees repeated that demand in January 1987 at a staff meeting she said she could agree on the spot to an exchange of these two holidays but that she would have to clear it with the Head Start regional office.⁹ Simmons explained that the Federal officials would not allow an additional holiday but that she received immediate telephone approval from her program specialist for the exchange of holidays.¹⁰ This substitution of holidays appears in the Union’s proposed list of paid holidays and the parties’ October 20 written agreement.

The General Counsel asserts that Simmons’ testimony about the Respondent’s having made the decision in January 1987 to change holidays is belied by its inclusion as a bargaining subject in the contract negotiations later that year, and by the Respondent’s failure to produce any documentary evidence to corroborate her testimony about the holiday exchange, such as the calendar reflecting that change that had to be sub-

⁹ Simmons testified that she was unable to implement the holiday exchange in 1987 because Martin Luther King’s birthday had already passed by the time of her commitment.

¹⁰ Simmons also testified that she was required to submit a calendar reflecting the holiday exchange to the Head Start regional office in September 1987.

mitted to the Head Start regional office. We reject this argument.

The undisputed evidence of the Respondent's announcement of the exchange of holidays in January 1987 shows that the Martin Luther King observance became a term of employment prior to the certification of the Union and the onset of contract negotiations. We therefore attach no significance to inclusion of that holiday in the negotiated agreement, and we further find that the lack of corroborative documentary evidence does not constitute adequate refutation of Simmons' uncontradicted testimony. Because we find that the General Counsel has failed to disprove the Respondent's evidence that its decision to exchange holidays was made and announced to employees in January 1987, we shall dismiss that 8(a)(5) and (1) unilateral change allegation.¹¹

Simmons described the Respondent's change in furlough scheduling by saying, "It's the same circumstances as the Martin Luther King day," in response to questioning on direct examination about the amended complaint allegations that the February furlough was withdrawn in February 1988 and a July-only furlough was instituted in July 1988.

The evidence pertaining to this issue is based primarily on Simmons' testimony on direct. Simmons explained that when the Respondent took over management of the day care centers in January 1986 the predecessor agency had a 2-month furlough program, consisting of unpaid leave for July and August. Simmons testified that she announced at a staff meeting at the time of the Respondent's takeover, in January 1986, that "the Feds had agreed that instead of being off for the whole summer . . . that staff could come back in August." Simmons testified, "at that staff meeting, staff complained that they would prefer the four weeks of furlough left in July." Simmons further stated, "[The employees] were happy about that [but] they asked that the furlough four weeks be divided into four other weeks throughout the year, rather than all in one lump in July. I agreed reluctantly."

The Respondent's counsel then asked, "Was this commitment at the same staff meeting that the . . . Martin Luther King's holiday was substituted for the Columbus day holiday?" and Simmons responded:

Yes. But I think the Martin Luther King holiday, they asked for it then in 1986, but it didn't come up until, again, until the 1987. I think it was 1987 that, at that point when it was made a national holiday, which I believe was 1987.

In addition to Simmons' testimony, the Respondent's Personnel Policies and Procedures Manual states:

. . . it is Agency policy to furlough all appropriate staff for periods when the Head Start Program is closed to children as scheduled each year. The furlough will occur during four specified weeks, in accordance with the annual school calendars.¹²

The Respondent argues that the testimony of Simmons substantiates its contention that she made a commitment in January 1987 to change the furlough period to July only.¹³ The Respondent further asserts that the July-only furloughs were motivated by sound business reasons rather than antiunion animus, and did not constitute a material or significant change and so had no real impact on the employees or their working conditions. We make no finding as to animus, but we disagree that this was not a material change.

At the outset, we find Simmons' testimony on this issue too confusing and unreliable to establish that the Respondent made a commitment for July-only furloughs prior to the Union's certification on April 1, 1987. For example, in testifying to the events of the staff meeting in which the subject of furloughs was discussed, she had the employees indicating both that they wanted the furlough "left in July" and that it "be divided into four other weeks . . . rather than all . . . in July." Consequently, it cannot be ascertained what, if anything, she "agreed reluctantly" to at this meeting. Nor does counsel's eliciting a "yes" from her to his question suggesting that the commitment was made at the same meeting in which she agreed to switch holidays clear up the confusion in her testimony. To the contrary, it only compounds it, given the uncertainty regarding the nature of any commitment that might have been made.

Assuming arguendo, however, that Simmons' testimony supports the interpretation urged by the Respondent, it is clear that it was not implemented prior to the 1987 negotiations. Employee Ramsey testified that the Respondent's practice prior to 1988 was to furlough employees in December and February, as well as in July, and that a furlough was taken by employees in February 1987.¹⁴ The Respondent has presented no

¹² According to undisputed testimony by teacher Janie Ramsey, the 4 furlough weeks on the annual calendar refer to Christmas Week, a week in February for winter recess, and 2 weeks in July. She also testified that there was a furlough in February 1987 but not in February 1988. It is implied elsewhere that the February furlough was 2 weeks, but that is unclear on the record.

¹³ The Respondent asserts that its commitment is further substantiated by minutes of a bargaining session in evidence showing that Goode, who assisted the Respondent at the bargaining table, after speaking with Simmons by telephone, stated that July was to be the furlough month; and by inclusion of the following on the final negotiating list of approved items: "3. Furloughs—Beginning Dec. 1, 1987 furloughs in existence to be in month of July." The evidence the Respondent relies on in support of this assertion, however, proves only that the parties agreed to July as the furlough month during their contract negotiations.

¹⁴ The personnel manual's language that "[t]he furlough will occur during four specified weeks" seems to accord with Ramsey's testimony in that, at least by implication, it appears to mirror the pre-1988 practice.

¹¹ In light of this finding, we find no significance in the fact that the page containing holidays in the Respondent's Personnel and Procedures Manual is missing from the exhibit in evidence. Furloughs

evidence to the contrary. Indeed, it has failed to explain why, having allegedly made and announced its commitment to a July furlough in January 1987, the employees were furloughed in February. Unlike the holiday exchange commitment, which could not be implemented in 1987 because the Martin Luther King holiday had already passed, there was no such time impediment to canceling the scheduled 1987 February furlough and including it in July of that year.

In light of the foregoing, we find that the evidence does not demonstrate that July-only furloughs had become a term of employment prior to the Union's certification in 1987. Accordingly, because furloughs are terms and conditions of employment and therefore a mandatory subject of bargaining, we find that the Respondent's withdrawal of them in February 1988 without prior notice to or the consent of the Union, irrespective of the Respondent's motivation, violated Section 8(a)(5) and (1) of the Act.¹⁵

The COLAs

The amended complaint alleges that the Respondent violated Section 8(a)(5) and (1) by distributing 4.75-percent and 2-percent COLAs to employees without prior notice to, or bargaining with, the Union. Because, as set forth *infra*, the record shows that the two grants were markedly different from each other, we shall discuss them separately below.

1. *The 4.75-percent COLA.* It is undisputed that the Federal Government is the Respondent's primary source of funding. On March 14, 1988, the Respondent received a letter from the Department of Health and Human Services (HHS) informing it, *inter alia*, that funds for a COLA were available upon application for the grant year beginning December 1, 1987, in the amount of \$116,978, and that 65 percent of that sum would have to be applied to salary and or fringe benefits. On April 7, 1988, the Respondent forwarded a copy of the HHS letter to the Union with a covering letter stating, in relevant part, "this is for your information and sharing with your union members." The Respondent also informed the Union that it would file a timely application for the \$116,978.¹⁶ On July 6,

1988, the Respondent received a letter from HHS approving its application for a COLA in the amount of \$116,978, and on August 10, 1988, the Respondent sent letters to striking and nonstriking employees—but not the Union—announcing the board of directors' vote to distribute 100 percent of this COLA in the form of salary increases.¹⁷

The Respondent contends that it acted lawfully in granting the 4.75-percent COLA because it was not acting out of antiunion motives but was simply acting in conformance with the status quo as required by the Federal Government. The Respondent further contends that it fulfilled any bargaining obligation by communicating to the Union what it knew about the COLA and its intent to apply for it, and that the Union at no time requested bargaining or even protested distribution of the COLA. None of these contentions has merit.

The Respondent's distribution of the 4.75-percent COLA constituted a change in the terms and conditions of employment of the unit employees, and was, therefore, subject to the obligation of prior notification to and bargaining with the Union, the certified bargaining representative. *NLRB v. Katz*, *supra*. In so finding, we acknowledge the Respondent's dependence on the Federal Government for funds from which to grant increases in wages and fringes in the form of COLAs or otherwise, and that its filing of an application for the \$116,978, i.e., 4.75-percent COLA, for increased wages and fringes was in accordance with its commitment to the Union in its April 7 letter. However, these factors do not excuse the Respondent's failure to recognize the Union's legitimate role as bargaining representative by notifying and affording the Union an opportunity to bargain or to give its consent prior to implementing this COLA. We emphasize that there were decisions within the Respondent's discretion on which bargaining could focus. Although 65 percent of the Federal Government's grant of the \$116,978 COLA had to be applied to salary and/or fringe benefits, there remained, *inter alia*, questions as to the allocation of the grant. How much of the 65 percent would be allotted to salary and how much to fringe benefits? What use should be made of the remaining 35 percent? The Respondent was obligated to bargain with the Union over these decisions.

Nor do we find that the Respondent fulfilled its bargaining obligation to the Union by virtue of its sending a letter to the Union on April 7, 1988, advising it of the Respondent's intent to apply for the available

¹⁵ *NLRB v. Katz*, 369 U.S. 736 (1962). Although it is true that the parties reached a tentative agreement with respect to furloughs and other bargaining subjects, the Respondent was not thereby privileged unilaterally to implement such agreed-upon issues on a piecemeal basis. Here, until that agreement was ratified and became effective as the final agreement of the parties, or failing that, subsequent bargaining ended in an impasse, the Respondent was obligated to give notice to the Union of its intent to implement the terms and conditions of employment that tentatively had been agreed on and to obtain its consent either by agreement or acquiescence before putting such terms and conditions into effect.

¹⁶ There is no evidence of bargaining about the 4.75-percent COLA in the 1987 contract negotiations; however, Simmons testified that it was discussed with the Union in a mediation session in April 1988 when she offered to use the entire COLA award for salaries but the Union's negotiating committee rejected the offer, stating that it was not enough money. We do not find that this informal discussion with the committee constituted negotiations sufficient to satisfy the Respondent's bargaining obligation.

¹⁷ In accord with the allegations of the charge and complaint in Case 29-CA-13767, the judge found, and we have adopted, 8(a)(1), (3), and (5) violations based on the Respondent's payment of cash bonuses, with a portion of the \$116,978 COLA, only to employees who did not strike or who abandoned the strike. Member Cracraft finds it unnecessary to address the finding that the cash bonuses violated Sec. 8(a)(3) as such a finding would not affect the remedy.

\$116,978 COLA. The Respondent appears to contend that the Union's failure to respond to that letter after its receipt constituted a waiver of its bargaining rights rendering further notification unnecessary. The Union, however, had no obligation to request bargaining about the COLA until it had notice that the Respondent's application had been approved. Only upon such notice would it have become incumbent on the Union to pursue bargaining on the 4.75-percent COLA, because only then could the Union be sure that there was something concrete and definite about which to bargain.¹⁸ In this regard, the Respondent neither notified the Union of the July 6, 1988 approval of its application nor of its decision, as announced in its August 10, 1988 letter sent only to the employees, to apply all of that COLA to salary increases. Moreover, even had the Union received the letter, any bargaining request would have been futile because that letter presented the distribution of the COLA as a fait accompli.

Accordingly, we find that the Respondent unilaterally granted the 4.75-percent COLA in violation of Section 8(a)(5) and (1).

2. *The 2-percent COLA.* Simmons testified that she had sought a salary adjustment from HHS for certain staff members who for years had been receiving less than similarly situated employees in the local school districts or at other Head Start agencies.¹⁹ According to Simmons, the March 14, 1988 letter from HHS,²⁰ was responsive to that effort. That letter informed her that if additional funds were available at the end of the Federal Government's year in September they might be used for differential salary increases, the amount of which would be based on the Respondent's answers to a questionnaire designed to reflect whether it was truly unable to compete with the 13 local school districts regarding wage comparability.²¹ Thus, Simmons advised the Union of her intention to participate in the wage comparability study, in her April 7, 1988 letter to the Union in which she also stated she would apply for the 4.75-percent COLA.

Undisputed testimony reveals that, unlike the 4.75-percent COLA, HHS' ultimate offer of additional moneys was accompanied by a directive that the moneys must be added as a 2-percent permanent addition to the

salaries of all its employees, in the form of a salary differential or enhancement. And, unlike the case of that COLA, the Respondent had no say over how much money would be awarded or how the funds would be allocated, i.e., as between salary and fringe benefits. Simmons' uncontroverted testimony reveals that the Respondent's sole discretion was the "choice of taking what they offer or sending it back." The Respondent's decision to accept the 2-percent offer was announced in its September 13, 1988 letter to the employees and the Union, i.e., that the employees would be receiving a 2-percent permanent salary differential beginning with their September 15 paychecks.

We find from the foregoing that the Respondent's total lack of discretion over implementation of the so-called 2-percent COLA (really a salary enhancement) clearly demonstrates that there was nothing of substance to bargain about concerning it. Accordingly, we find that the Respondent's failure to notify or bargain with the Union concerning implementation of the 2-percent "COLA" was not unlawful, and we shall therefore dismiss this allegation of the complaint.

Disciplinary Warnings

As the judge found, the Respondent's employees engaged in a strike from April 11 to August 22, 1988, and some members of the Respondent's board of directors expressed strong negative reactions to the employees' strike action.²² One of the highest percentages of striker participation occurred at the Central Brookhaven facility where the alleged discriminatees Cook, Morning, Ramsey, and Garcia all worked under the supervision of Program Manager Angus.

On or about September 26–28, 1988, Federal officials conducted an audit of the Respondent, which included visits to classrooms in the centers and inspection of files and records. An audit report placed in evidence discloses incidents involving health and safety of the children and administrative matters. The Respondent's usual practice following similar prior audits was to pass out copies of the audit to employees in an informal group setting, and to suggest appropriate corrective measures rather than to apply the following disciplinary procedure set forth in the company manual:

G. Procedures for Administering Discipline²³

1. The supervisor must first ensure that discipline is both necessary and appropriate.

¹⁸ Thus, it is irrelevant in our consideration of the Respondent's bargaining obligations concerning this COLA that the Union could have requested bargaining earlier on its receipt of the Respondent's April 7 letter.

¹⁹ Simmons testified that the Respondent could not retain staff in Suffolk County in Head Start because "as soon as we trained them . . . to do the work well, they were enticed away by dollars."

²⁰ This is also the letter in which HHS advised the Respondent of the availability of the 4.75-percent COLA, discussed *supra*.

²¹ Simmons testified that:

Our part of it was to survey all [13] of the school districts that interacted with our 12 centers. And we surveyed, obtained detailed information on classroom personnel. . . . We verified what we've been saying all along, that our certified and noncertified teachers were earning less than the going rate in the school districts in which we operate. . . . We also discovered what I had been saying all along that teacher assistants compared favorably to the [other] school districts.

²² The documentary evidence contains various expressions of management's concerns about the employees' strike activities, particularly at Central Brookhaven, as well as statements attributing a number of the Respondent's problems involving funding, enrollment, and reputation, to the strike. For example, the minutes of the board of director's May 5, 1988 meeting contains a heated discussion about whether the Respondent's existing personnel policies and procedures could be used to terminate strikers.

²³ Under the separate heading, "Available Forms of Discipline," is listed: "1. Verbal warning. 2. Written warning using Agency Counseling Form."

2. The supervisor should counsel with the employee to get his/her side of the story, if possible. . . .

3. The supervisor should consider the past record of the employee. . . .

4. An employee whose performance is deemed unsatisfactory shall receive a warning, in writing, at least one month prior to a termination. During such period an employee shall be on disciplinary probation. . . . All written warnings shall be signed by both employee and supervisor . . . one copy should be sent to the Personnel Department. . . . The employee may respond, in writing, to the initial warning.

Following the visitation and written report by Federal officials, Program Manager Angus issued written notices of work deficiencies on September 29–30, 1988, to Family Counselors Cook and Morning and to teacher Janie Ramsey and teacher assistant Carmen Garcia.

As to Cook and Morning, the judge found, and we agree, that their disciplinary warnings violated Section 8(a)(3) and (1).²⁴ He based his findings on the overall circumstances, including the Respondent's animus towards employee strike and picketing activity; the timing of its notices to otherwise satisfactory employees shortly after their return from striking; the language of the notices, which threatened further disciplinary actions unless the stated deficiencies were corrected within a specified timeframe; and that the Respondent's resort to written warning letters was a marked departure from both its established practice of holding informal group discussions with employees and its own published disciplinary procedures.²⁵ The judge concluded that the General Counsel established a prima facie violation, and the Respondent failed to meet its burden of establishing that it would have imposed those disciplinary actions even in the absence of their protected concerted activity.²⁶

As to teacher Janie Ramsey and teacher assistant Carmen Garcia, however, the judge dismissed similar allegations arising from Angus' September 29, 1988 written notices of their work deficiencies because he found that they were not warnings of disciplinary action. We find merit in the General Counsel's excep-

tions and find the notices to Ramsey and Garcia unlawful for the following reasons.

The record shows that Ramsey and Garcia, like Cook and Morning, were known picketers of the Central Brookhaven facility²⁷ who had clean employment records prior to the subject letters of deficiencies. Accordingly, the prima facie showing found by the judge of the Respondent's animus toward Cook and Morning for their strike and picketing activity and the timing of its notices to them as otherwise satisfactory employees applies with equal force to Ramsey and Garcia. The judge's dismissal as to Ramsey and Garcia focuses on his finding that the Respondent took dissimilar action against them. Thus, he found that the language in the letters to Ramsey and Garcia could not be construed as a warning but rather "essentially reiterated the Federal Evaluator's comments [and therefore] is little different from [the Respondent's] past practice" (of discussing the report and correcting individual deficiencies in a group meeting).

Contrary to the judge, we find that the Respondent's action towards Ramsey and Garcia was similar to that taken against Cook and Morning, notwithstanding the differences in the language of the respective letters. Thus, all the letters amounted to formal written notification and were inserted in the employees' personnel records. This latter act reveals the true disciplinary nature of the Respondent's action, i.e., management's intent that these notices fulfill the first step of its disciplinary process. All four letters, therefore, served the identical purpose of establishing a predicate for subsequent disciplinary action and thereby constituted a marked departure from the Respondent's past practice. From the foregoing, we find that the Respondent's imposition of written notices of deficiencies to Garcia and Ramsey constitute disciplinary warnings in retaliation for their protected concerted activity, in violation of Section 8(a)(1) and (3) of the Act. We shall therefore amend the Order by directing the Respondent to remove the written notices from the personnel files of Garcia and Ramsey and to notify them that this has been done and will not be used as the basis for future personnel action against them.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 6.

"6. By issuing disciplinary warnings to Linda Morning, Janie Ramsey, and Carmen Garcia on September 29 and 30, 1988, the Respondent violated Section 8(a)(1) and (3) of the Act."

2. Insert the following as Conclusion of Law 7, renumbering the subsequent conclusions of law accordingly.

"7. By unilaterally implementing a July-only furlough program and a 4.75-percent cost-of-living adjust-

²⁴ As noted supra at fn. 1, the Respondent has not excepted to the judge's findings regarding Cook.

²⁵ We note the lack of counseling preceding the warning or use of counseling forms, and that copies of all four letters were sent to the personnel department for inclusion in the employee personnel files and also to all or some of the following: Board of Directors, Parent Policy Council, President Simmons, Deputy Director for Program Goode, and Deputy Director for Administration Baer. The published disciplinary procedure refers to informing higher levels of management (and in some cases the Parent Policy Council) "before a second warning is issued to an employee . . . before an employee is put on disciplinary probation or is terminated."

²⁶ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

²⁷ Indeed, Ramsey's photograph appeared in the Union's newspaper.

ment award, the Respondent violated Section 8(a)(1) and (5) of the Act.”

ORDER

The National Labor Relations Board orders that the Respondent, Long Island Day Care Services, Inc., Patchogue, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unduly delaying the submission of a collective-bargaining agreement negotiated by its agent to the board of directors for a ratification vote.

(b) Unduly delaying the voting by the board of directors on the aforementioned agreement.

(c) Failing to furnish the Union an updated list of its employees with their addresses, job classifications, wage rates and dates of hire.

(d) Paying cash bonuses to nonstrikers while withholding such bonuses from employees who engaged in a strike.

(e) Issuing disciplinary warnings to employees, threatening employees with discharge, and placing employees on probation because they supported District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO, or engaged in other concerted activities for mutual aid or protection.

(f) Unilaterally, without giving the Union timely notice or opportunity to bargain, changing employee furloughs, and granting them a cost-of-living adjustment.

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

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

(a) On request of the Union, submit to the board of directors for a ratification vote, the agreement dated October 20, 1987.

(b) Alternatively, on request, bargain with the Union for 6 months thereafter, as if the initial year of certification had not expired, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time certified teachers, educational specialists, nutrition coordinators, social services coordinators, mental health coordinators, non-certified teachers, parent coordinators, training and development coordinators, educational coordinators, handicapped services coordinators, health coordinators, accountants, family counselors, teacher assistants, cooks, cook assistants, health specialists, custodians, bus drivers, administrative assistants, senior secretaries, secretaries, secretaries/central administrators, clerk typ-

ists, and clerk/bookkeepers, employed by the employer at its Suffolk County, New York facilities, exclusive of all confidential employees, guards, managerial employees, deputy directors, controllers, program managers, acting program managers, and all other supervisors as defined in Section 2(11) of the Act.

(c) Furnish to the Union an updated list of all bargaining unit employees, their addresses, job classifications, dates of hire, and rates of pay. Additionally, on request, furnish to the Union any other information relevant for bargaining.

(d) Pay to each of the full-time unit employees who engaged in the 1988 strike \$80 plus interest, and pay to each of the part-time unit employees who engaged in the strike \$40 plus interest.

(e) Rescind the unilateral changes it made in employee furloughs and cost-of-living award in 1988, if the Union requests such rescission.

(f) Remove from its files any reference to the unlawful disciplinary actions taken against Ernestine Cook, Linda Morning, Janie Ramsey, and Carmen Garcia, and notify them in writing that this has been done and that the disciplinary actions will not be used against them in any way.

(g) Post at its facilities in Patchogue, New York, copies of the attached notice marked “Appendix.”²⁸ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unduly delay the submission of an agreement negotiated by our agent to the board of directors.

WE WILL NOT unduly delay the voting by the board of directors on an agreement negotiated by our agent.

WE WILL NOT fail to furnish to the Union an updated list of our employees with their addresses, job classifications, wage rates, and dates of hire.

WE WILL NOT pay cash bonuses to nonstrikers while withholding such bonuses from employees who engage in a strike.

WE WILL NOT issue disciplinary warnings to our employees, threaten our employees with discharge, or place our employees on probation because they support District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO, or because they engage in concerted activities for mutual aid and protection.

WE WILL NOT change employee furloughs or grant a cost-of-living adjustment without giving the Union timely notice and opportunity to bargain.

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

WE WILL, on request of the Union, submit to the board of directors for a ratification vote the agreement dated October 20, 1987.

WE WILL alternatively, on request, bargain with the Union for 6 months thereafter, as if the initial year of certification had not expired, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time certified teachers, educational specialists, nutrition coordinators, social services coordinators, mental health coordinators, non-certified teachers, parent coordinators, training and development coordinators, educational coordinators, handicapped services coordinators, health coordinators, accountants, family counselors, teacher assistants, cooks, cook assistants, health specialists, custodians, bus drivers, administrative assistants, senior secretaries, secretaries, secretaries/central administrators, clerk typists, and clerk/bookkeepers, employed by the employer at its Suffolk County, New York facilities,

exclusive of all confidential employees, guards, managerial employees, deputy directors, controllers, program managers, acting program managers, and all other supervisors as defined in Section 2(11) of the Act.

WE WILL furnish to the Union an updated list of all bargaining unit employees, their addresses, job classifications, dates of hire, and rates of pay. Additionally, on request, WE WILL furnish to the Union any other information relevant for bargaining.

WE WILL pay to each of our full-time unit employees who engaged in the 1988 strike \$80 plus interest, and pay to each of our part-time unit employees who engaged in the strike \$40 plus interest.

WE WILL rescind the 1988 unilateral changes in employee furloughs and cost-of-living adjustment, if the Union requests such rescission.

WE WILL remove from our files any references to the unlawful disciplinary actions taken against Ernestine Cook, Linda Morning, Janie Ramsey, and Carmen Garcia, and notify them in writing that this has been done and that the disciplinary actions will not be used against them in any way.

LONG ISLAND DAY CARE SERVICES, INC.

Elizabeth Orfan, Esq., for the General Counsel.

Alexander A. Miuccio, Esq. (Altieri, Kushner, Miuccio & Frind, P.C.), for the Respondent.

Vicki Erenstein, Esq. (Sipser, Weinstock, Harper and Dorn), for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Brooklyn, New York, on various dates from April to June 1989.

The charge in Case 29-CA-13305 was filed on December 3, 1987. Based on that charge,¹ the Regional Director issued a complaint on January 13, 1988, which alleged in substance:

1. The refusal by the Respondent to submit for ratification to its board of directors, an agreement made by the Respondent's chief negotiator on October 8 and 20, 1987. It also is alleged that Respondent violated the Act by refusing to recommend the agreement to its board of directors.

2. That the Respondent bargained in bad faith by withdrawing the authority of its negotiator, Ann Coates, on October 23, 1987.

3. That the Respondent bargained in bad faith by reneging on the agreement made on October 8 and 20 insofar as binding arbitration, superseniority for shop stewards and union visitation rights.

4. That since October 23, the Respondent has unilaterally implemented certain terms of the agreement made on Octo-

¹ The charge in Case 29-CA-13305 alleged that in November 1987 the Respondent violated Sec. 8(a)(1) and (5) of the Act by refusing to execute an agreed-upon contract.

ber 20, 1987, without notice to or consent of the Union. It is alleged specifically that:

(a) Respondent in January 1988 granted employees Martin Luther King's Birthday as a paid holiday, while withdrawing Columbus Day as a paid holiday.

(b) Respondent in February 1988 changed its furlough program from having furloughs in February and July to one with furloughs only in July.

(c) Respondent in August 1988 granted a 4.75 percent cost-of-living increase to its employees.

(d) Respondent in September 1988 granted to its employees an additional 2-percent cost-of-living adjustment.

The charge in Case 29-CA-13433 was filed on March 8, 1988, and resulted in the issuance of a complaint on April 19, 1988. The complaint, in conformity with the charge, alleged in substance that in February and March 1988, the Respondent failed and refused to comply with the Union's request for relevant information, to wit: "an updated list of all employees, including their names, addresses, classifications, dates of hire and wage rates. The charge in Case 29-CA-13767 was filed on October 26, 1988.² A complaint was issued in that case on January 31, 1989, and alleged, in substance:

1. That a strike which commenced on April 11, 1988, was an unfair labor practice strike.

2. That on or about August 10, 1988, the Respondent violated Section 8(a)(1)(3)&(5) of the Act by paying cash bonuses to employees who did not strike or who abandoned the strike, while denying such payments to strikers. It is alleged that the bonuses consisted of \$80.00 to full time employees and \$40.00 to part time employees.

3. That in October 1988 the Respondent by Mattie Angus unlawfully interrogated an employee concerning her union sympathies.

On February 10, 1989, the Regional Director issued an order consolidating cases in Cases 29-CA-13305, 29-CA-13433, and 29-CA-13767.

On February 1, 1989, the Union filed another charge in Case 29-CA-13901.³ Based on this charge⁴ the Regional Di-

²The charge in Case 29-CA-13767 alleged, in substance, that the Respondent violated Sec. 8(a)(1), (3), and (5) of the Act in the following manner:

1. That the Respondent paid an \$80.00 bonus to non strikers while withholding such payments to those employees who engaged in a strike.

2. That the Respondent since September 1, 1988, discriminated as to the working conditions of LaVerne James, Dora Callier, and Doris Sands.

3. That the Respondent on or about September 29, 1988, discriminatorily imposed discipline on Ernestine Cook, Carmen Garcia, Linda Morning, Jane Ramsey and LaVerne James.

4. That the Respondent since on or about October 12, 1988, discriminated against Ida Lenton.

5. That the Respondent since on or about October 3, 1988, was involved in a campaign to decertify the Union.

On April 19, 1989, the Regional Director approved the Union's request to withdraw pars. 2 through 5 of this charge.

³It appears that the Union also filed a charge on December 29, 1988, in Case 29-CA-13856 alleging certain violations against the Employer. That charge is not part of this case.

⁴The charge in Case 29-CA-13901 alleged that the Respondent violated Sec. 8(a)(1) and (3) of the Act in the following manner:

1. That the Respondent in October 1988 interrogated, interfered with, coerced and intimidated its employees.

rector issued a complaint on March 30, 1989. In substance, this complaint as amended at the hearing,⁵ alleged:

1. That the Respondent, by Mattie Angus, for discriminatory reasons;

(a) On or about September 29, 1988 issued a warning letter to Ernestine Cook, placed her on probation and threatened her with discharge.

(b) On or about September 26, 1988 issued an oral warning to Carmen Garcia.

(c) On or about September 29, 1988 issued a written warning to Carmen Garcia.

(d) On or about September 29, 1988 issued a warning letter to Janie Ramsey.

(e) On or about September 29, 1988 issued a written warning letter to Linda Morning.

On April 21, 1989, all the complaints were consolidated for one hearing.

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

FINDINGS OF FACT

I. JURISDICTION

Each of the complaints allege, and the respective answers admit, that the Respondent annually provides services valued in excess of \$500,000 and that it annually purchases and receives at its New York facilities heating fuel, food, educational program supplies, and other products valued in excess of \$50,000 directly from points located outside the State of New York.

The Respondent contends, however, that the Board does not have jurisdiction over its operations. In this regard, the Respondent asserts that it is not an employer within the meaning of Section 2(2) of the National Labor Relations Act because the Federal Government provides virtually all of its income and because the Government controls its labor relations policies.⁶

Section 2(2) of the Act exempts from the definition of an employer, "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . ." Further, pursuant to the decision in *National Transportation Service*, 240 NLRB 565 (1979), the Board has declined to assert jurisdiction in those circumstances where a private employer's labor relations policy is so controlled by an exempt institution that effective collective bargaining has been precluded. In such cir-

2. That the Respondent in September 1988 discriminatorily imposed discipline on and retaliated against Ernestine Cook, Carmen Garcia, Linda Morning, Jane Ramsey, LaVerne James and Ida Lenton.

⁵On May 23, 1989, the General Counsel filed a motion to amend certain aspects of the complaints included therewith was a motion to delete pars. 12 and 13 of the complaint in Case 29-CA-13901 which alleged certain discriminatory conduct against employees LaVerne James and Ida Lenton.

⁶On January 5, 1989, the Board denied a Motion For Summary Judgment filed by the Respondent. In the motion, the Respondent argued that it was not an employer within the meaning of the Act, or alternatively, that it was a joint employer with an exempt entity. These are the same contentions made in the present case. Although Chairman Stephens stated that the Respondent would not be precluded from raising an issue of statutory jurisdiction, the Board stated that the contentions made by the Respondent in its motion involved matters of discretionary jurisdiction. The Board held that because the Employer had stipulated that it was an Employer within the meaning of the Act in the representation case, it could not raise, in the unfair labor practice proceeding, an issue of discretionary jurisdiction which it could have raised and litigated in the related representation case.

cumstances, however, the Board has held that where a private employer shares the exemption of a governmental body, the Board's lack of jurisdiction is a matter of discretion and not statutorily required. *Res-Care, Inc.*, 280 NLRB 670 fn 1. (1986).

In the present case, the Union filed a petition for an election in Case 29-RC-6748 on December 22, 1986. In connection with that petition, the parties signed and the Regional Director approved a Stipulated Election Agreement. As part of that agreement, pursuant to which an election was held on March 5, 1987, the employer stipulated that it was an New York corporation with gross revenues in excess of \$500,000 and that it was an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Having stipulated to being within the Board's jurisdiction in the earlier representation case, the Respondent may not now put jurisdiction in issue as there is no genuine issue regarding the Board's statutory jurisdiction. Thus, in *Pollack Electric Co.*, 214 NLRB 970 fn. 4 (1974), the Board, although noting that legal or statutory jurisdiction may be raised at any time, stated that an issue involving the Board's discretionary standards for asserting jurisdiction must be timely raised. Accordingly, where discretionary jurisdiction is at issue, an employer who stipulates to the Board's jurisdiction in a representation case may not in a subsequent unfair labor practice case withdraw from its stipulation and contest jurisdiction at the later stage. *Gateway Motor Lodge*, 222 NLRB 851 (1976).

Based on the above, it is my opinion that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Also as there is no dispute as to the status of the Charging Party, I conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE 10(B) ISSUE

The Respondent argues that certain of the allegations in the complaint in Case 2-CA-13305 are barred by Section 10(b) of the statute. Specifically it contends that those portions of that complaint alleging unilateral changes should be dismissed because there is no unfair labor practice charge filed which would support those allegations.

As noted above, the charge in Case 29-CA-13305 was filed on December 3, 1987, and alleged that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to execute an agreed-upon contract. (The charge also contained the boilerplate "by these and other acts" clause.)

The complaint which issued on January 13, 1988, alleged at paragraph 12(e), that since October 23, 1987, the Respondent had made certain unilateral changes without notice to or consent of the Union.

At the opening of the hearing, I agreed with the Respondent that paragraph 12(e) was imprecise and did not put the Respondent on notice as to what the General Counsel was specifically contending. I therefore gave the General Counsel the opportunity to explicate the meaning of her allegation.

Thereafter, on May 23, 1989, the General Counsel moved to amend paragraph 12(e) of the complaint in Case 29-CA-13305 to allege that the Respondent in January 1988 unilaterally changed holidays; that in February 1988 it unilaterally changed the furlough system; that in September 1988 it unilaterally granted a 2-percent cost-of-living increase; and in

August 1988 it unilaterally granted a 4.75-percent cost-of-living increase.

In *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989), the Board adopted the rule that in all 8(a) cases the allegations of a complaint must be "closely related" to the allegations of the underlying unfair labor practice charge. Thus, an allegation in a complaint or an amendment to a complaint which is not closely related to the charge, cannot be sustained because the Act prohibits the Board from originating complaints on its own initiative. The Board also noted:

Finally, we recognize that matters raising unfair labor practice issues often are discovered or occur after the original charge is filed. In those circumstances, it is customary for a charging party to file an amended charge or an entirely new charge. Obviously, nothing in our decision today limits in any way a charging party's ability to file a timely new or amended charge. Therefore, our holding will impose no significant hardship on a charging party, who continues to remain free to raise additional timely allegations for Board consideration.

In *Redd-I, Inc.*, 290 NLRB 1115 (1988), which was cited with approval by the Board in *Nickles*, the Board defined what it meant by the term closely related. Essentially, the Board held that it would seek to ascertain whether a complaint allegation was closely related to the charge by looking at the following factors: 1. Whether the allegation involves the same legal theory as the allegation of the charge. 2. Whether the complaint allegation arises from the same factual circumstances or sequence of events as the pending charge. 3. Whether a respondent would raise similar defenses to both allegations.

In *Red Food Store*, 252 NLRB 116, 117-124 (1980), which also was cited favorably in *Nickles*, Administrative Law Judge Bernard Reis held that certain allegations of a complaint were not closely related to the underlying charge. Judge Reis after a comprehensive exploration of the cage law (not repeated here) led him to the conclusion that there was a high degree of ambiguity in determining whether a complaint allegation was closely related to the charge. Nevertheless, my sense is that he determined that more recent cases were construing the closely related test in a more strict and less liberal fashion. See *Asko, Inc.*, 202 NLRB 330 (1973), and *Allied Industrial Workers (Warren Molded Plastics)*, 227 NLRB 1541 (1977).

It is of course true that the unilateral change allegations are founded in Section 8(a)(5) of the Act which is the same Section of the Act on which the initial charge is based. On the other hand, the initial charge alleged a single 8(a)(5) allegation that was based on essentially a single transaction; namely, the contention that the Respondent had refused to execute a contract that had been agreed to by the parties during negotiations.

The allegations of the complaint which allege that the Respondent withdrew the authority of its negotiator, refused to submit the contract for approval to its board of directors and reneged on certain portions of that agreement are closely related to the allegations of the initial charge even though inconsistent with it. The relationship arises from the fact that both the charge and the complaint put in issue the contract negotiations between the Union and the Company and raised

issues concerning the process of creating a collective-bargaining agreement.

The allegations relating to unilateral changes do not, however, relate to the process of making a contract and allege violations, which, although under Section 8(a)(5) of the Act, are of a different character altogether. In effect, these allegations concern changes which the Company is accused of making well after negotiations had ended. Moreover, the validity of the allegations does not really depend on the contract negotiations which would, in this case, be legally irrelevant to a determination of the legality of the Company's alleged unilateral changes.

In my opinion, the allegations involving unilateral changes are not closely related to the allegation of the unfair labor practice charge which asserted that the Respondent refused to execute a collective bargaining agreement. The unilateral change allegations are not, in my opinion, based on the game legal theory, they are do not arise from the same factual circumstance or sequence of events and would require Respondent to raise a completely different legal defense. Accordingly, I shall recommend that paragraph 12(e) of the complaint in Case 29-CA-13305 be dismissed.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Contract Negotiations

Pursuant to a Stipulation for Certification on Consent Election, an election was held on March 5, 1987, which the Union won. Consequently, the Union was certified as the collective-bargaining representative on April 1, 1987, in the following unit of employees:

All full-time and regular part-time certified teachers, educational specialists, nutrition coordinators, social services coordinators, mental health coordinators, non-certified teachers, parent coordinators, training and development coordinators, educational coordinators, handicapped services coordinators, health coordinators, accountants, family counselors, teacher assistants, cooks, cook assistants, health specialists, custodians, bus drivers, administrative assistants, senior secretaries, secretaries, secretaries/central administrators, clerk typists, and clerk/bookkeepers, employed by the employer at its Suffolk County, New York facilities, exclusive of all confidential employees, guards, managerial employees, deputy directors, controllers, program managers, acting program managers, and all other supervisors as defined in Section 2(11) of the Act.

In mid-April the Respondent hired attorney Ann Coates to be its negotiator. In the early part of May a meeting was held between Coates, Respondent's president Simmons and Respondent's board of directors to discuss the upcoming negotiations and to define Coates' role. In the retainer agreement dated May 7, 1987, it defines Coates as the "chief negotiator." Also, it was established that Coates would represent the Company at the bargaining table and that Simmons would not directly participate at the negotiations. In a memorandum given to Simmons by Coates entitled "Negotiating A Labor Agreement" Coates stated:

One person speaks for each side; also need a management person familiar with the operation but not the

chief executive officer unless it is a very small operation and there is no one else; also need on the team one person to take notes.

Role of CEO—Aside from continuing daily management of program, must constantly remain in touch with the negotiating team to assess progress, the need to change positions, inform Board as to status, provide information to team as required.

Role of Board of Directors—establish in general the parameters within which the negotiator may bargain with reference to wages, hours and terms and conditions of employment; determine in advance whether willing to take a strike and if so over what matters; recognize the duty imposed by law to bargain in good faith; recognize the added strain in working relations and tensions caused by the stress of negotiations.

It must be agreed in advance that NO information as to bargaining positions or progress is to be given to anyone. Only the chief negotiator is permitted to discuss the negotiations with the public, press or staff. Confidentiality is crucial!

Immediately prior to the commencement of the negotiations the Respondent appointed the other members of its management team to participate in the negotiations with the Union. These persons were Annie Goode who was designated to assist Coates and Leslie Walker who was designated to take notes.

May 15, 1987, marked the outset of negotiations. At this initial session, it was agreed that Renee Mayne would be the person who spoke for the Union. Also at this meeting, the Union presented a document containing their contract demands which numbered about 54 proposal. Phylliss Simmons, the Respondent's president, did not attend this meeting nor did she attend any other negotiation sessions. She was however active behind the scenes insofar as the Company was concerned.

The testimony of Renee Mayne and Ann Coates (who was a witness called by the General Counsel) established that it was understood by both that any agreement they reached at the bargaining table would be subject to ratification by their respective principals. In the case of the Union, this meant that any agreement would have to be ratified by the employees. In the case of the Respondent, the evidence shows that it was stated and understood at the bargaining table that any agreement reached would be subject to approval by the Employer's board of directors. In this regard, although the Respondent asserts that any agreement would have to be approved by Simmons, the Parent Policy Council (a body consisting of parents who have children enrolled in the program) and the board of trustees, there was no evidence to contradict the testimony of the two chief negotiators, Coates and Mayne, that the expressed ground rules for the negotiations required only the approval of the board of directors.

In relation to the authority of Coates, the evidence also shows that at various times during the negotiations, the Union asked Coates to produce Simmons at the bargaining table whereupon Coates, in the presence of the other company representatives, assured the Union that she (Coates), had the authority to speak for the Company and make agreements subject only to ultimate ratification by the board of directors.

It further was established that although Simmons played a significant role behind the scenes on behalf of the Company, it was stated and agreed between Coates and Mayne that Coates was the Employer's chief spokesman, that Simmons would not be at the negotiations, and that Coates had authority to make agreements, subject of course to ultimate approval by the board of trustees. There was in fact no one presented by the Respondent who denied that such representations were made at the bargaining table and the Respondent produced no documentary evidence, such as letters to the Union, which purported to qualify Coates' authority in any other manner.

The Union, as part of its contract demands, included provisions for binding arbitration and superseniority for shop stewards. The Company's position from the outset of negotiations was that it would not agree to these specific demands. As to superseniority, Simmons position as expressed by Coates at the negotiation table was that the Company felt that this was discriminatory, unfair and might have an adverse impact on operations in the event that there was a cut-back in the work force. As to arbitration, the Company took the position that binding arbitration was inconsistent with certain regulations of the United States Government which funded the Employer. Specifically, the Employer took the position that binding arbitration was inconsistent with Section 70.2 of the relevant Federal regulations which, according to the Company, required that the Parent Policy Council have the final say as to hiring and firing.

Regarding section 70.2 the Union's position was that it was not inconsistent with binding arbitration and maintained to the Company that it had contracts with other agencies which had arbitration clauses. Although moving ahead of ourselves, I note that in response to a request by Simmons for an interpretation of this regulation, a Mr. Phipps from the Department of Health and Human Services wrote a letter on November 20, 1987, which stated in pertinent part:

We have received your letter of November 5, 1987 and given serious consideration to your questions regarding Transmittal Notice 70.2, "The Parents." As you can understand, we make no recommendations regarding the negotiation of the contract with District Council 1707 of AFSCME except that you may not arrogate the rights of the Policy Council and, by doing so, limit the scope of 70.2.

....

Any contract which is negotiated must recognize the responsibilities of the Policy Council. Binding arbitration, even if approved by the Policy Council, could cause a situation where the outcome is not consistent with the immediate decision making of the Policy Council on a specific issue.

...

We therefore conclude that a binding arbitration policy could be in violation of 70.2, in that the Policy Council must approve or disapprove of the hiring and firing of staff.

Regarding our position in administering 70.2, you should expect us to fully implement the policy and requirements established in that document. Failure of a grantee to administer those requirements would result in a finding of noncompliance to a performance standard

and, if remaining uncorrected, could be a basis for defunding of a Head Start program.

It is our hope that Long Island Day Care Services, Inc. and District Council 1707 can negotiate a contract that fully recognizes the intent of the Department of Health and Human Services to facilitate the involvement of the parents of Head Start children in the development, conduct and overall program direction at the local level.

According to Mayne, at the bargaining session of August 31, 1987, Coates agreed in principle to binding arbitration, albeit there was no agreement as to whether to use the American Arbitration Association or some other method of selecting an arbitrator.

Coates testified that in August, Simmons agreed to go along with an arbitration clause provided it was qualified with the understanding that the arbitrator would be restricted by the rules and regulations of the granting agency. Coates explains that this was intended to deal with Section 70.2 in that if the Department of Health and Human Services (HHS) determined that a binding arbitration clause, or part thereof, was inconsistent with the Rule (and thereby jeopardized the grant), the arbitration clause, to the extent inconsistent with the Rule would automatically be revoked. (As far as I can see, a binding arbitration provision would only be arguably inconsistent with 70.2 as to grievances involving discharges or hires. The Rule, as far as I am aware, would not affect the arbitration of any other subjects under a collective-bargaining agreement).

In any event, Simmons never denied Coates' testimony that in August she had authorized Coates to agree in principle to binding arbitration with the qualification noted above.

In support of the contention that agreement in principle had been reached regarding arbitration, the General Counsel notes the Company's minutes regarding the negotiation session of September 28. Those minutes state:

Grievance Procedure: Union wants elimination of Step 5 as presently stated; after Step 4, wants Step 5 at arbitration. Union understands that in case of abuse or drinking, employee would be immediately dismissed, with grievance procedure to bypass first three steps and go directly to Parent Policy Council and arbitration. In addition, union does not now want named arbitrator, wants to use AAA.

....

At this point, Mrs. Goode speaks to Mrs Simmons, via telephone, and after concluding conversation states that July is to be furlough month. Mediator returns to room and Coates states that regarding the Grievance procedure, we agree that in cases of drug abuse, child abuse, etc., management bypasses first three steps and goes directly to Step 4, Parent Policy Council. Coates adds that we assume that if union per se or Agency per se were filing a grievance on its own behalf, that it would go to Step 4 and then arbitration, on a normal grievance.

....

Regarding Arbitrator, Coates states management had initially chosen AAA for the mediator because it is less costly; we don't have definitive answer on this as yet.

Mediator cautions that management would have to name Suffolk county labor Department or his designee for free arbitration.

A final bargaining session was held on October 8, 1987, at the offices of the Suffolk County Department of Labor. According to Mayne, at some point later in the evening and after Coates had spoken to Simmons on the phone, both sides made an agreement and each signed the others notes of the agreement. In essence Coates and Mayne agreed to a group of items which in their opinion constituted a contract which on the Union's side was subject to employee vote and on the employer's side was subject to ratification by the board of directors. The agreement which was set forth in General Counsel's Exhibits 6 and 7 was as follows:

1. Health plan—reopen 2nd year.
2. Wages. Cola 3.9% plus 2% on petition to be instituted on December 1987. Second year 2% on petition or elimination or furloughs.
3. Furloughs—Beginning Dec. 1, 1987 furloughs in existence to be in month of July.
4. Agency shop.
5. Dues and initiation fee check off.
6. Grievance. Eliminate step 5 in current procedure and substitute binding arbitration using AAA.
7. Pension study. It committee to study and recommend plan no later than 12/1/88. Agency to implement as soon as funds can be obtained .
8. Vacations. Professionals remain the same at 15 days during each of 1st 3 years, and 20 years after 3 yrs. Non professionals 10 days during first 3 years and 17 days thereafter.
9. Superseniority. Preference on layoff and recall.

With respect to the "agreement" made on October 8, 1987, Coates testified that although there was agreement to use the AAA for arbitration, it also was agreed that arbitration would be qualified as noted above. Coates further testified that as to superseniority, she made this agreement with the Union notwithstanding that Simmons did not give her approval on this item. That is, insofar as superseniority, Coates, on October 8, agreed to the Union's proposal without telling Mayne that Simmons would not agree to a superseniority clause.

Simmons testified that she received a phone call from Coates during the evening of October 8. She states that Coates said that they were coming down to the wire and had to resolve this thing. According to Simmons, Coates told her that she (Simmons) had to make up my mind on binding arbitration and superseniority . Simmons testified that she told Coates that her position hadn't changed on either issue. Simmons also testified that she and Coates talked again about the Federal regulations with Coates claiming that Simmons misunderstood the regulations. According to Simmons, she told Coates that if HHS said it was okay for the contract to have binding arbitration then we'd have to live with it, if the parents wanted it; but that if HHS said it wasn't okay, then we were not obligated. Thus, Simmons in effect agreed with Coates testimony to the effect that in August, Simmons agreed to have arbitration with the qualification that it would be subject to the Federal regulations.

Regarding superseniority, Simmons testified that Coates said that superseniority didn't cost anything, that it was a noneconomic issue and that it didn't place the grant in jeopardy. According to Simmons, she told Coates that she had to live with her staff and the fact that it was a noneconomic issue had nothing to do with anything.

Coates testified that she spoke to Simmons on October 10. She states that Simmons said that she was unhappy about binding arbitration and superseniority. According to Coates, she said that Simmons had agreed to arbitration earlier with the qualification regarding legality whereupon Simmons said that she had changed her mind. Coates testified that she told Simmons that she couldn't change her mind at that point, an assertion with which Simmons vehemently disagreed. As to superseniority, Coates testified that she told Simmons that it was a no cost item, would buy some good will and would help to get the contract off to a good start.

In mid-October, Coates made an arrangement with Simmons to present the "agreement" to the board of directors. The date October 20 was set, but because Simmons's husband went into the hospital, that date was canceled. On October 20 Coates and Mayne met in the former's office. On this occasion, the two negotiators, using Coates' word processor, typed out the text of a complete contract. In pertinent part the agreement provided for:

1. Binding arbitration at the fifth step of a grievance procedure. As to arbitration, the agreement provided that "The arbitrator shall consider the performance standards and regulations of any funding agency where pertinent."
2. An expedited grievance procedure where discharges were effected without 2 weeks' notice. (This is a new provision that had not been part of the previous agreement made on October 8). It provides that in such discharges, the grievance can be commenced at step 4 of the procedure.
3. Superseniority for shop stewards.
4. Visitation rights for union officials.
5. Term from October 20, 1987, to October 19, 1989
6. A savings clause which states: "In the event that any federal, state or local legislation, governmental regulation or court decision shall invalidate any Article or Section of this Agreement, all other Articles and Sections not do invalidated shall remain in full force and effect."

7. An "Agreement to Recommend" which read: "both parties having negotiated in good faith, agreeing on the following issues and will recommend ratification to their respective parties." Like the expedited grievance procedure, this was something new and had not previously been part of the ground rules for negotiations. I also note that Coates testified that during the October 20 meeting, she told Mayne that she (Coates) would recommend the agreement but did not say that Simmons would recommend or ratify it.

On October 21, Coates sent copies of the aforementioned memorandum of agreement to Simmons with a covering letter asking that it be submitted to the board of directors. She suggested that approval of the agreement should be sought in the immediate future, "certainly no later than October 28th."

On October 22, the Union's membership ratified the memorandum of agreement, and Coates received notification of the vote on October 23.

Simmons testified that on or about October 22 she first became aware that Coates had signed a memorandum of agree-

ment. She states that she called Coates and told her that she had no authority to sign anything for the agency; that she had no right to bypass Simmons and that she didn't think that she could work with Coates any longer.

On October 30 Mayne spoke with Coates to complain that she had been denied access to company premises. Coates told her that there was a problem in that Simmons would not go along with certain parts of the agreement. Coates specifically told Mayne that Simmons objected to the arbitration and superseniority provisions and that she was going to recommend that the agreement not be ratified by the board. According to Mayne, Coates said that she (Coates) had exceeded her authority.

On November 5, Simmons wrote to Wilfred R. Phipps, a supervisor at HHS asking for an opinion regarding the compatibility of Section 70.2 with binding arbitration.

On November 6, 1987, Coates sent a letter to Simmons which read:

This just a reminder that we agreed to get back to DC 1707 regarding binding arbitration no later than November 15th. You had assured me last week that that would be the very outside date for determining whether or not binding arbitration fits within the confines of Sec. 70.2 of the regulations. . . .

On November 17, Simmons reported to the Parent Policy Council the status of the contract negotiations. The minutes of that meeting indicate that everything in the memorandum of agreement was agreeable except for the provisions relating to binding arbitration and superseniority.

On November 20, Phipps wrote to Simmons, answering her November 5 letter. (This was quoted above.)

At the end of November 1987, Simmons made a report to the Parent Policy Council which stated, *inter alia*:

Just prior to the Thanksgiving holidays the response was received from Mr. Phipps of Region 11 regarding our letter earlier this month requesting clarification regarding binding arbitration and 70.2. Final negotiations of contract are suspended pending the required clarification. A great deal of confusion ensued for the past several weeks because of misunderstandings and circulation by the union of the "unauthorized agreement." Now that the required clarification from Region 11 has been obtained, President will move forward in obtaining bonafide draft of contractual document as otherwise negotiated. Subsequent review and approval by LIDCS Parent Policy Council and by Board of Directors will follow. A vote for or against ratification by staff in titles covered by the contract will then be necessary.

On December 2, Coates resigned as negotiator for the Employer.

On December 3, the Union filed the charge in Case 29-CA-13305 alleging that the Employer refused to execute the agreement allegedly made with the Union.

On December 4, Coates sent a letter to Jean Dember, then the chairperson of the board of directors. This read as follows:

I find it necessary to resign as labor negotiator for your agency. I regret having to do this as I expended

a great deal of my time and expertise in an effort to gain for you a most advantageous contract with the union representing the vast majority of your employees.

. . . .

I asked Ms Simmons many times for an opportunity to meet with the Board of Directors but she has adamantly and consistently refused my request. I would have appreciated some time to discuss the negotiations, both as they proceeded as well as after the signing of the memorandum of agreement, which I presume has been presented to you!

Between October 8 and December 4, Coates never met with the Respondent's board of directors to explain the agreement or to recommend its approval as she had agreed to do. The closest she came was on October 20, but that meeting was canceled due to the illness of Simmons. After her resignation, she was not invited to the board of directors to state her opinion regarding the contract.

On December 11, 1987, Mayne met with Simmons in the latter's office. At this meeting, Simmons stated her objections to certain portions of the memorandum of agreement and asserted that she would not recommend it to the board of directors. At some point during the meeting, Mayne suggested that she and Simmons sit down and try to work out a resolution on the issues in dispute. As a result a meeting was scheduled for January 1988.

On December 15, there was a meeting of the Respondent's board of directors. In part, the minutes of this meeting are as follows:

Policy Council voted favorably on Board suggestion to hold single-item agenda meeting to review draft of union contract. . . . President states that after review, clause by clause, of draft contract, ratification process would be set up in each center where staff covered by contract would have opportunity to vote. Implementation procedures and schedule dates will have to be set.

President advises board that labor attorney has resigned; response regarding impact of binding arbitration on 70.2 received from Phipps; meeting with President and union staff representative last Friday, where President outlined controversy. President states she will work on draft of contract while away on vacation.

Perpetual Martinez, chairman of the board of directors, testified that at the meeting of December 15, no formal vote was taken with respect to the memorandum of agreement. In this regard, she testified that the first time that the board of directors actually voted on the agreement was on May 5, 1988.

Simmons in her president's report given in December 1987, stated, *inter alia*:

Labor Relations

A meeting was held with Mrs. Renee Nayne as planned and it was agreed to complete the final negotiations of the contract on a one-to-one basis, in view of the resignation of Mrs. Coates. President shared concerns and required process with Mrs. Mayne and was surprised to learn that she was unaware of the required process involving Parent Policy Council and board. The

clarification from R. Phipps of Region 11 regarding binding arbitration and 70.2 were shared with her. Mrs. Mayne agreed to enter in to the process, as suggested, without further benefit of additional counsel.

The joint meeting of parent Policy Council and Board of Directors will be scheduled as quickly as possible in January. This will be an evening meeting with a single agenda, which is review of the draft of the contract.

Simmons testified that after she met with Mayne in December, she received a phone call from union agent Gary Stevenson who stated that Mayne had no authority to hold any further negotiations. She states that he said that as far as the Union was concerned, the contract that was signed on October 20 by Coates and Mayne was binding on the Respondent.

On January 13, 1988, the complaint was issued in Case 29-CA-13305.

According to Mayne, she spoke with Simmons on January 14, 1988, who said that the Employer was not budging and there was nothing more to discuss. According to Mayne, Simmons said that she was not going allow the employees to have binding arbitration.

On January 28, the Employer held a special meeting of its board of directors. In pertinent part, the minutes of that meeting state:

Special meeting began at 7:27 p.m. President discusses motions made at the labor relations meeting of January 19. President advised that she and Judith McPhie met on Sunday and went over NLRB complaint

.....

Renee Mayne has brought letter from Elizabeth Ussery and DC 1707 memo around to the centers. Mayne is stating that staff should convince parents to vote for binding arbitration. . . . President feels that once parents have understanding of the entire situation and the meaning of binding arbitration, they would be able to vote in an informed fashion. Mayne is interpreting the Ussery letter as go ahead for binding arbitration.

.....

Frail questions how binding arbitration would be totally contrary to 70.2. Discussion ensues on this. Frail asked under what circumstances would binding arbitration be acceptable. Grievance procedures were detailed.

Board agrees that document has no validity because it was not negotiated properly and due to the uninvolvement of the Policy Council and Board. Elizabeth Frail moves no action be taken on the union contract until Policy Council is fully informed and counseled on 70.2 and the negotiated draft; Board will not subvert Policy Council role by approving the negotiated draft until the policy Council has been informed, deliberated and comes back with any recommendations. Turpin seconds; eight members in favor, one abstention.

Discussion ensued on administrative costs for dues check off. McPhie states that this is one of the good faith efforts shown by management in negotiating.

The February 9, 1988 minutes of the Parent Policy Council (not the board of directors) states, inter alia:

The meeting will be an exceptional Policy Council Meeting for the purpose of reviewing the Labor Relations situations as it is pertinent to the problems we are having with the Union. . . .

.....

Ruth Richardson makes a motion and it is seconded by Thelma Legette to declare the document being circulated by the Union as referred to as the "Memorandum of Agreement" as invalid and not accepted by the Policy Council. The document does not reflect what was negotiated and was not authorized for signature by Ann Coates on 10/20/87. The Motion was passed and approved unanimously.

On April 11, 1988, the Union commenced a strike at all the Employer's facilities.

In late April or early May a mediation panel made certain recommendations regarding the possible settlement of the outstanding issues between the Union and the Employer.

According to Perpetual Martinez, on May 5, 1988, the board of directors for the first time actually voted as to whether to accept or reject the October 20, 1987 memorandum of agreement. In relevant part, the minutes of this meeting are as follows:

Regarding tonight's business, President advises that two major things must occur: attorney suggests that Board vote on each of the items of the mediation panel's recommendations and then vote on the total recommendation package, accepting or rejecting whether there should be binding arbitration.

.....

Turpin questions whether as employers, Board can move to terminate striking staff if they do not return to work, utilizing passages of the Personnel Policies and Procedures. Turpin's position is that some striking staff have been out for almost four weeks and they should be terminated if they do not return to work after a specified number of days. Heated discussion ensued; Farrar and Nocsia explained this constituted a "lock out." Turpin then asked what would happen if Board does not agree with panel's recommendations. President stated that technically, workers are still on strike but she feels staff will continue to trickle in and added that the children are also continuing to come back into the Program. Turpin expressed her concern about a possible "about face" by the Regional Office regarding their position on the issues. Dollman explained his concept of mixed feelings of workers during a strike situation

.....

Farrar motions to reject super seniority; Abazis seconds; 12 in favor, 2 abstentions; motion carried. Dollman wishes to amend Farrar's motion by adding super seniority will be rejected unless shop stewards are elected by the bargaining union members the shop stewards represent. After discussion on amendment, Martinez asked for a second on the amendment; no response from group.

Turpin motions that Board reject grievance procedure including binding arbitration, due to the fact that LIDCS (ie. Respondent), has approved policies and pro-

cedures which include detailed steps for grievance; Seconded by Carrion; 12 in favor, 2 abstention; motion carried.

B. Conclusions Regarding the Negotiations

The evidence establishes that each of the parties chief negotiators had the authority to make an agreement that would be subject to ratification by their respective principals. Thus, in the case of the Union, it is clear that Rene Mayne had the authority to enter into an agreement subject to ratification by the employees represented by the Union. Similarly, I conclude that Ann Coates was vested with authority to enter into an agreement subject only to approval by the Respondent's board of directors.

The Respondent contends that Coates only had authority to negotiate with the Union, but had no authority to enter into an agreement unless specifically approved by Respondent's president (Simmons) and both the Parent Policy Council and the board of directors. The evidence shows, however, that Coates was designated by the Respondent as its chief spokesman and that on several occasions, in the presence of the managerial employees assigned to assist her, she told the Union that she had authority to make an agreement subject only to ratification by the board of directors. As Coates was placed at the head of the bargaining table by the Respondent she was vested with apparent authority subject to whatever limitations she disclosed to the other side in the absence of express limitations expressed to the Union before or during the negotiations.

On the question of Coates' authority, the Respondent relies, inter alia, on *NLRB v. Coletti Color Prints*, 387 F.2d 298 (2d Cir. 1967). In that case, although sustaining the Board's conclusion that the employer was bound to execute an agreement negotiated by its attorney, the court relied on its conclusion that the company had actually ratified the contract. On the issue of authority the court stated:

It does not necessarily follow that one hired by a company "to negotiate" a collective bargaining agreement with a union has authority to bind the company to the terms he negotiates without receiving subsequent approval of those terms by the company. Under our present labor law, there certainly is no duty on the part of an employer to be represented at the bargaining table by a person with competent authority to enter into a binding agreement with the employees, although the bargainer's lack of such authority is a factor to be considered in evaluating the employer's good faith. There being no evidence in the record that either Arvan or Rains was specifically told by Coletti that he had power to bind the Company, there is no substantial evidence on the record as a whole to support a conclusion that either of them possessed that power. What evidence there is on the record only shows that Arvan reported back to Coletti after the bargaining sessions and discussed the terms which were the subjects of bargaining. This evidence clearly militates against the negotiators having any power to bind. [Citations omitted.]

It seems to me that the court in *NLRB v. Coletti Color Prints* was asked to deal with the issue of actual as opposed to apparent authority. Moreover, I think that more recent

cases in this area are persuasive concerning the issue of agency where a company designates an attorney or some other person as its chief negotiating spokesperson. Thus, in *Metco Products v. NLRB*, 884 F.2d 156 (4th Cir. 1989), the company hired an attorney to conduct its labor negotiations. The company's president did not participate in the negotiations and the union was not told that the attorney's authority to sign an agreement was subject to subsequent approval by the company's president. Thereafter, an agreement was reached between the union negotiators and the attorney, but the company refused to execute the agreement contending that the attorney was not authorized to enter into an agreement. The court stated:

In the context of collective bargaining, the NLRB has adopted a clear and simple rule regarding the creation of apparent authority on the part of a labor negotiator. The NLRB has long held that "when an agent is appointed to negotiate a collective-bargaining agreement that agent is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." *University of Bridgeport*, 229 NLRB 1074. See also *Aptos Seascope Corporation*, 194 NLRB 540 (1971), *Medical Towers Limited*, 289 NLRB No. 123 (1987), enf. granted without opinion, *Medical Towers Ltd. v. NLRB*, 862 F.2d 309 (3rd Cir. 1988). The laudable purpose of this rule is to lessen the opportunities for ambiguity and confusion by requiring a party who chooses to negotiate through an agent to disclose any limitations on the agent's authority. Here Metco does not dispute the fact that neither Saperstein nor any other company official ever stated to the union the alleged limitations on Pearlman's authority. Metco's omission thus raises a rebuttable presumption in favor of the reasonableness of the Union's perception that Pearlman had full authority to enter into an agreement on Metco's behalf.

Metco nonetheless argues that the evidence does not support the ALJ's finding that Pearlman had apparent authority. Gordon, Carroll, and Clark each testified that on a few occasions, Pearlman stated that he needed to discuss specific proposals with Saperstein before agreeing to them. Metco contends that this testimony reveals that the Union negotiators were aware of the fact that Saperstein's approval was required for all new proposals. . . .

The testimony upon which Metco relies, however, does not compel the conclusion that the Union negotiators were aware of any such limitations. From the testimony regarding Pearlman's actions one could reasonably infer that Pearlman, like any conscientious agent, felt an occasional need to confer with his principal before exercising his authority. . . .

Similarly in *Ben Franklin National Bank*, 278 NLRB 986 fn. 2 (1986), the Board stated:

We agree with the judge's conclusion that under the circumstances of this case, William Hart, the Respondent's president and a member of its board of directors, obligated the Respondent to execute a collective bargaining agreement upon the Union's acceptance of the complete contract offer communicated by Hart on 19

June 1981, notwithstanding prior reservations of the right of the Respondent's president and board of directors to approve and ratify "any tentative agreement reached and approved by the Bank's negotiating committee." It is well established that a principal may limit its agent's negotiating authority by affirmative, clear and timely notice to the other party that any tentative agreement is contingent upon subsequent ratification. . . . An agent whose authority depends upon such a contingency may have the apparent authority, however, to convey its satisfaction. . . . Hart's status as the Bank's president would not per se bind the Respondent, but for reasons fully set forth in the judge's decision, we find that Hart had the apparent authority to convey the Respondent's final and binding approval of the 19 June contract offer which the Union subsequently accepted. . . . To conclude otherwise would effectively mean that an undisputed negotiator for the Respondent had made a comprehensive, unconditional final contract offer in bad faith, without any intention to be bound thereby. [Citations omitted.]

In the present case, the record shows that Respondent's agent Coates entered into an agreement with the Union on October 8, 1987, which was modified at a meeting between herself and Mayne on October 20.

Inasmuch as Coates fulfilled her function on October 20 concerning the negotiation of a contract, the only impediment to a binding agreement was ratification of the agreement respectively by the employees (on the Union's side) and by the Respondent by its board of directors. In this respect, it is my conclusion that the October 20 agreement was subject neither to approval by Simmons nor by the Parent Policy Council. In my opinion, it was therefore incumbent on Simmons to promptly submit the agreement to the board of directors for approval or rejection.

In my opinion, the Respondent violated Section 8(a)(5) of the Act simply by not having a vote on the agreement by its board of directors until May 5, 1988. Thus, instead of submitting the agreement to the board of directors within a reasonable period of time, a vote on this agreement was not taken until more than 6 months after it had been negotiated.

Section 8(d) of the Act requires both parties to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms of employment. Thus, under Section 8(d) of the Act, it would be unlawful for an employer or a union to meet infrequently or to unreasonably delay negotiations. *Southside Electric Cooperative*, 243 NLRB 390 (1979); *Rhodes St. Clair Buick*, 242 NLRB 1320, 1323 (1979). Analogously, it is my opinion that by unreasonably delaying the submission of the agreement for ratification, this constituted an unwarranted and unjustified delay by the Respondent in a crucial aspect of the bargaining process.

I do not however agree with the General Counsel's contention that the Respondent violated Section 8(a)(5) by withdrawing the authority of Ann Coates to negotiate a contract. In fact, it is my opinion that Coates did negotiate a contract (subject to Board ratification), and that she voluntarily resigned her retainer after it became apparent that she no longer could work with Simmons.

I also do not find that the Respondent violated the Act by "reneging" on the October 8 and 20 agreements insofar as

arbitration, superseniority for shop stewards and union visitation rights. As described above, these agreements, to the extent that they were included in the October 20 memorandum, were only to be effective if and when they were approved by the employees and by the Respondent's board of directors. As already indicated, it is my opinion that it was the responsibility of Simmons to submit the October 20 agreement (as is) to the board of directors within a reasonable period of time and for that body to vote one way or the other regarding the agreement's ratification. As this was not done in a timely fashion, I shall order that if requested by the Union, the October 20 agreement as signed by Coates and Mayne be promptly submitted to Respondent's board of directors and that a vote be taken on it.

The General Counsel also contends that Respondent violated Section 8(a)(5) of the Act, because contrary to the terms of the October 20 memorandum of understanding, Simmons did not recommend that the board of directors approve the contract. Notwithstanding the rather ambiguous language of the memorandum of understanding, it seems quite clear to me that at the October 20 meeting, Coates only agreed that she personally would recommend the proposed contract to the Respondent as both Mayne and Coates were aware at the time that Simmons was not happy with certain terms of the proposed agreement and had upbraided Coates for agreeing to a superseniority clause which Simmons had opposed from the outset of negotiations. I do not read into the memorandum an intention by Coates to bind Simmons to make a positive recommendation on the proposed contract to the board of directors. For one thing, such a commitment was clearly not part of the ground rules of the negotiations. For another thing, I cannot imagine how such an alleged commitment could be enforced. Finally, I note that Coates did in effect recommend that the proposed contract be ratified when she wrote to Jean Dember (chairperson of the board), stating her reasons for resigning.

C. Alleged Refusal to Furnish Information

The charge in Case 29-CA-13433 alleges that since February 5, 1988, the Respondent has refused to furnish relevant information to the Union.

Before the commencement of negotiations, the Union asked for and received certain information regarding the unit employees. This included information as to their names, addresses, job titles, and dates of hire, plus information relating to their wage and benefits. This information was furnished in May 1987.

On February 4, 1988, the Union sent a letter to Simmons requesting an updated list of the employees with their names, addresses, classifications, wage rates, and dates of hire.

On March 4, Simmons replied by letter and enclosed a list containing information. The problem is that the list, on its face, contains information which is almost a year old as it is for the period as of May 4, 1987.

On March 11, Mayne wrote to Simmons:

In reference to the union's request of February 4 for an updated employee list, we received an incomplete list from your office today, March 11, 1988. There are numerous names missing from each location, such as Terry Woford in Amityville, Nora Callier in Huntington, and Wendy Carpenter in Central Brookhaven. The

list appears to be missing at least 25% of the current employees at LIDCS. Please forward a corrected employee list.

Simmons testified that when she received the Union's March 11 letter she instructed the clerks to check and correct the list. According to Simmons, she was told that there were three employees left off the list. It does not appear, however, that a corrected list was sent by the Respondent sent to the Union.⁷ Indeed the evidence indicates that the Respondent simply ignored the Union's March 11 letter.

Information regarding the names, addresses, job classifications, dates of hire, and wage rates are presumptively relevant to the Union's role as bargaining representative and as such no showing of particularized need is necessary. *Safelite Glass*, 283 NLRB 929, 948 (1987). Further, it seems to me that it is not unreasonable for a union to request updated information from time to time. Thus, although the Company did furnish much of this information at the commencement of negotiations in May 1987, this does not obviate its obligation to furnish the Union with more current information when it was requested in February 1988.⁸

In the present case, the Company in response to the Union's request for updated information simply transmitted information that it had previously turned over the year before. When it was notified by the Union that it had not complied with the request, the Respondent in effect, ignored the Union. Accordingly I conclude that in this respect the Respondent violated Section 8(a)(5) of the Act. *15th Avenue Iron Works*, 279 NLRB 643, 657 (1986).

D. Bonuses

The charge in Case 29-CA-13767 alleged, inter alia, that the Respondent violated the Act when in July 1988 it granted bonuses to those of its employees who did not engage in a strike. (The Union commenced a strike against the Respondent on April 11, 1988.)

Pursuant to a grant from the Federal Government, the Respondent was given money and authorized to give a 4.75-percent cost-of-living adjustment.

Pursuant to the grant, the Respondent had to allocate 65 percent of the money for pay increases but was given the option of applying the remainder for other purposes.

According to Simmons, despite the fact that the board of directors voted to allocate 100 percent of the grant for pay increases, the controller, for reasons of his own, held back a certain amount of the money for other expenses. She testified that when it was discovered that he did this, there was a sum of money that was left over and which was then divided among the employees who had worked during the year. According to Simmons, the strikers did not share in this money because they did not work during the relevant period of time.

In response to a Freedom of Information Act request, the Union was provided with an audit report from the Depart-

ment of Health and Human Services. This report,⁹ based on an audit conducted from September 26 to 28, 1988, stated:

Based on a review of personnel costs, a 4.75 COLA adjustment was distributed across the board (filled and unfilled positions). In addition, salary enhancement was distributed in the same manner. Although the grantee had the option of distributing 35% of the COLA to "other than personnel" costs . . . it was decided by the grantee to distribute the entire amount awarded for COLA to personnel . . .

It was discovered, that after the COLA funds have been disbursed . . . \$9,920 was left because the positions were unfilled at the time the benefits were earned. In order to disburse the remaining COLA funds, the grantee redistributed these funds to those employees that were working during the period of the strike (\$80 to full time and \$40 to part time). The grantee felt this was an incentive award for the hard efforts and work performed by those employees who did not strike . . .

Notwithstanding the contention that the bonuses were paid only to people who performed work during the relevant period, the evidence establishes that this was not so. Thus, the record shows that an employee Nancy Cerna, a nonstriker received the \$80 bonus even though she had been out from work due to illness since before the strike commenced.

In *Rubatex Corp.*, 235 NLRB 833, 834 (1978), the Board, relying on *Aero-Motive Mfg. Co.*, 195 NLRB 790 (1972), enf. 475 F.2d 27 (6th Cir. 1973), concluded that the respondent had violated Section 8(a)(1) and (5) of the Act by making bonus payments to employees who crossed picket lines and worked during a strike. In pertinent part the Board stated:

We considered the lawfulness of bonus payments to employees who cross picket lines and work during a strike in *Aero-Motive Manufacturing Company*, supra . . .

[W]e found that the company violated Section 8(a)(1) of the Act by granting the bonuses, reasoning that they were grants of special benefits to employees who refrained from engaging in concerted activity and a denial of such benefits to employees who chose to engage in such protected activity. While not granted until after the strike ended, the Board found that the bonuses disadvantaged the striking employees vis a vis the non strikers and that this would have the impact of discouraging employees from engaging in protected activities in the future.

In *Aero-Motive* we found, additionally, that the company violated Section 8(a)(5) and (1) of the Act by granting the bonuses unilaterally without prior negotiations with the union . . . Clearly, the payments were additional compensation for services and therefore,

⁷The Respondent placed into evidence as R. Exh. 29 another list which indicates that it contains information as revised on March 3, 1988. This list, however, does not contain the employees' addresses, and it does not appear that the Respondent is claiming that this list was furnished to the Union.

⁸During the course of 8 months, it would be reasonable to expect not only employee turnover, but also some changes in addresses and job classifications.

⁹Pursuant to Sec. 803(8) of the Federal Rules of Evidence, the HHS audit report is receivable in evidence as an exception to the rules barring hearsay. That portion of the rules provides that public records and reports are not excludable by the hearsay rule even where the declarant is available.

were terms and conditions of employment about which Respondent is obliged to bargain

In my opinion this case, insofar as the bonuses, is governed by *Rubatex Corp.*, supra. Moreover, I note that as a remedy, the Board in that case ordered the employer to pay with interest, the same amounts of money to the strikers as were paid to the employees who received the bonuses.

E. The Strike

The General Counsel contends that the strike was an unfair labor practice strike. However, as all the strikers were reinstated to their former jobs on their requests for reinstatement, a characterization of the strike as an economic or unfair labor practice strike is essentially meaningless. As a determination of this question has no practical meaning, I see no reason to decide it.

F. Ernestine Cook

During the strike which lasted from April 11 to August 2, 1988, certain of the Respondent's centers had more employees who participated in the strike than others. Among the centers with the highest percentage of striker participation was Central Brookhaven where Ernestine Cook, Linda Morning, Janie Ramsey, and Carmen Garcia were employed.

There is evidence that at least some of the board members reacted very strongly to the strike. Thus, in the minutes of the board of directors meeting of May 5, 1988, it is indicated that Carolyn Woodard's "initial reaction was to order staff back to work or fire them." Also the minutes state:

Turpin questions whether as employers, Board can move to terminate striking staff if they do not return to work, utilizing passages of the Personnel Policies and Procedures. Turpin's position is that some striking staff have been out for almost four weeks and they should be terminated if they do not return to work after a specified number of days. Heated discussion ensued; Farrar and Nocisia explained this constituted a "lock out." Turpin then asked what would happen if Board does not agree with panel's recommendations. President stated that technically, workers are still on strike but she feels staff will continue to trickle in and added that the children are also continuing to come back into the Program. Turpin expressed her concern about a possible "about face" by the Regional Office regarding their position on the issues. Dollman explained his concept of mixed feelings of workers during a strike situation

The strike ended on August 22, 1988, and the strikers, instead of returning immediately to work, went for a 2-week training program at Suffolk Community College. Thus, Cook, along with all the other strikers did not actually resume her duties until after Labor Day.

Ernestine Cook was employed as a family counselor. Among her responsibilities was recruitment and the paperwork attendant to that function. Ordinarily, intense recruitment of children to participate in the Head Start program takes place in the spring months. As the strike coincided with this time of recruitment and as the people who replaced the family counselors did not have the same degree of train-

ing as those who engaged in the strike, a good deal of recruitment remained to be done when the strike was over. Further, the evidence shows that much of the paperwork and other work that the family counselors would ordinarily have concluded by September had not yet been done.

Cook testified that when she returned to work on September 6, the office was in disarray. She testified that less than a third of the children had been recruited, and that many of the files for these children had not been completed. Thus, according to Cook, many files showed that the initial home visit had not taken place. Moreover Cook testified that many of the files showed that the children recruited had not had their required immunizations yet. (The job of the family counselor is to remind parents to have their children immunized as they are not allowed into the program until they have the necessary shots. Although the family counselor can and does nag a parent, he or she obviously can't compel the parent to take the child to a doctor.) Cook states that from September 6, 1988, she spent her time, recruiting new children for the program, conducting visits with parents in the office as an alternative to home visits, reviewing, updating and completing the files left to her by the replacements and performing the paperwork on new files as new children were recruited.

According to Cook, on September 19, 1988, she received a phone call from Ava Torres, the social services coordinator, who asked for the case number for a particular child. Cook testified that after she told Torres that she had not numbered the files yet, she got a call from Stone, the health coordinator, who demanded to know when she (Cook) was going to number the cases. Cook states that she told Stone that she would do this as soon as possible and would give this priority if there was a deadline on it. According to Cook, the conversation got a bit testy whereupon she told Stone that she did not appreciate being spoken to like a child. Cook states that she told Stone that she would try to have the cases numbered by Friday which was when Stone said she wanted them done. With respect to this incident, neither Torres nor Stone testified and Mattie Angus, program manager for the Central Brookhaven Center, acknowledged that Cook complained to her about the way Stone had spoken to Cook.

On September 25 and 26, 1988, the Federal Government did an audit of the Respondent. In this regard, people from HHS visited the centers, inspected files and records, and visited the classrooms. Included in this audit was an examination of the files worked on and maintained by Ernestine Cook. There is no dispute that a review of the files showed that many were incomplete and that some of the children registered for the program had not yet received their required immunizations. As noted above, Cook explained that the reason the files weren't complete was because of the extensive backlog left by the replacements and the necessity to recruit new children. Also, she had been back to work for only 3 weeks and the immunization problem is ultimately attributable to the parents who must make take their children to a doctor.

On September 29, 1988, Mattie Angus placed Cook on 30 days' probation. The memorandum addressed to Cook stated in pertinent part:

You demonstrated a blatant disregard for the health of the children at the Center by failing to maintain im-

munization records in each child's folder. In addition, you endangered the integrity of this Center, since you knew that these records are mandated by New York State law and must be on file. Therefore a completed immunization record . . . signed by a physician, must be in each child's folder for which you are responsible by Wednesday, October 5, 1988, at 10:00 am. At this time, you will also have documentation that each of your children attending this Program has the minimum requirement of one DPT one Polio and a MMR . . . with an appointment for the next shots needed.

Also missing from your files, or incomplete, are enrollment, first home visit and income verification forms for each child's entrance Therefore, this completed, signed and documented information must be in each child's folder by Friday, October 7, 1988 at 10:00 am as you jeopardized the continued participation of these children in the Head Start Program by not having this in place. If this documentation is not in place by October 7, I will be forced to terminate your employment.

On numerous occasions, you have been observed being disrespectful and uncooperative while on the job.

On September 19, 1988 when the Agency's Social Services Coordinator called you to ask if you had assigned case numbers, you told her they were not done. When she asked you when it would be completed, you responded, "when you got around to it." When she directed you to have them completed by the next day, you became hostile and argumentative.

On September 19, 1988, the Agency's Health Coordinator also called you to get your case numbers. You said you were not doing it. You were told . . . it was to be done before the child entered the Program. You stated you would not do it.

Finally, on September 26, 1988, when Mr. Barry Gordon was a guest at the Center to review Agency documentation, your files were in disarray, required information was missing and you were arrogant and uncooperative. Specifically, when asked to get files of the validator, you responded, "If you want it, get it yourself." In addition, you were observed preparing required documentation and altering records during validation, in total disregard of Agency policy and procedure.

During your period of probation, you will be expected to bring all required documentation up to date, including parent contacts and needed health, social services and handicapped services follow-up

At the end of your probationary period, on October 31, 1988 you will be evaluated. Should these deficiencies not improve, I will have no choice but to terminate your employment

As noted above Cook credibly explained the September 19 incident and adequately explained why her files were not up to date. She also denied the other specific allegations of the memorandum. Cook made a detailed reply to the probation memorandum by letter to Angus dated October 5. Thereafter, Cook resigned her employment at the Respondent.

With respect to Cook I note that she had never received any prior warnings or discipline. I also note that the Respondent operates under a personnel policies manual which provides for a progressive disciplinary procedure which was not followed in the case of Cook.

In my opinion, the General Counsel has met her burden of establishing, *prima facie*, that the Respondent took disciplinary action against Ernestine Cook because she participated in the strike and supported the Union. I note in this regard, the evidence of animus shown by certain of Respondent's board of directors and the timing of the action which took place soon after the strike ended. I am skeptical of the reasons given by the Respondent for placing Cook on a 30-day probation, which reasons I feel Cook has credibly challenged. Moreover, in view of the fact that the Respondent had never previously disciplined or warned Cook and the fact that the Respondent did not follow its own progressive disciplinary procedure I do not think that the Respondent has met its burden of establishing that it would have imposed the disciplinary action on Cook in the absence of her protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980).

G. Linda Morning

Linda Morning also was employed at the Central Brookhaven Center as a family counselor. She therefore had the same duties as Ernestine Cook. Morning had been employed for 5 years and had never received any previous warnings or discipline.

Morning joined the Union in November or December 1987 and was an observer for the Union at the NLRB-conducted election which the Union won. She participated in the strike and engaged in picketing activities. (She also was interviewed by *Newsday* during the second week of the strike.) Like the other strikers she went for a 2-week training program before returning to work after Labor Day. As she describes the situation on her return to work, the office was a mess, there were files all over the place, and there was great deal of missing information from the files. Also, according to Morning, a number of the children recruited for the school year had not yet had their physical examinations or immunizations. Morning states that in addition to getting the existing files up to date, she also had to engage in intensive recruitment so as to get the desired number of children enrolled in the program.

On September 30, 1988, after the Federal review, Mattie Angus issued a warning to Morning as follows:

During the Federal Review the Validator said that there are missing Immunization, Physical, Family needs assessments and documentations on your case work log. It has been documented that several trainings and technical assistance has been provided. Therefore, if you need further assistance please inform me.

You have ten days to update your files, complete with all the above. should this not be done within this time frame further action will be taken.

According to Morning, she had worked on the files but there was a great deal of work still to be done on them at the time the Federal audit was conducted. She states that insofar as immunizations and physicals, there is simply no way for her to insure that these would be documented within 10 days, because although she could remind the parents to take

their children to the doctor, it was up to the parents to do so.

As in the case of Cook and for the same reasons, I am of the opinion that that General Counsel has made a prima facie showing of unlawful discrimination in the case of Linda Morning. I am also convinced that the Respondent has not satisfied its burden in this matter. Accordingly, I shall conclude that the Respondent violated Section 8(a)(1) and (3) of the Act by giving a disciplinary warning to Morning.

H. Janie Ramsey

Ramsey is employed at the Central Brookhaven Center as a teacher. She voted in the election, participated in the strike, and had her picture in the union newspaper.

During the Federal audit, her classroom was visited and the auditor pointed out two items. One was that there was a pair of scissors within reach of the children. The other was about children coming out of the bathroom without having wiped their hands.

In late September, there was another occasion when Angus complained to Ramsey about the toothbrushes not being hung up and labeled properly. On September 29, 1988, Angus wrote a letter to Ramsey with a copy sent to the personnel office. This letter, which the General Counsel asserts was a discriminatorily motivated warning, reads as follows:

On September 26, 1988, during the Validation, I observed a neglecting of performance. Are you instructing your children to brush their teeth after meals?

School has been in operation for three weeks now, and the tooth brushes remain unused in their cases. This is a violation of Performance standards.

Mrs. Ava L. Torres . . . made name tags for each child. There is no reason those brushes should not have been in their appropriate places.

As a Teacher, you are responsible of the supervision of that classroom. . . . All sharp or pointed objects should be kept out of reach of children and not laid on the table for easy access for children.

Please review your Job Description and Performance Standards, especially those applying for Health and Safety. In addition, when I am addressing another staff member, please refrain from interfering.

Thank you for your cooperation. Any assistance you need in respect to this training supplies, let me now immediately.

The Respondent argues and I agree that the above letter is not and should not be construed as a warning of any kind. In this respect, I note that it is conceded by Ramsey that in the past when an evaluation was conducted, a report was written up and the staff was told of the audit including any individual deficiencies. As such, the September 26 letter, which essentially reiterated the Federal evaluator's comments, is little different from past practice. Moreover, there is nothing in the letter itself which in my opinion can reasonably be construed as a warning of any present or future disciplinary action.

I. Carmen Garcia

Carmen Garcia also was employed at the Central Brookhaven Center as a teacher's assistant. She voted in the election, went on strike and engaged in picketing.

During the inspection of September 26, 1988, the Federal auditor mentioned that two of the children had gone to the bathroom without being accompanied by an adult.

On September 29 Angus sent a letter to Garcia which the General Counsel construes as a warning. This read:

On September 26, 1988, I observed you on your performance as Teacher Assistant in the classroom number 4

No Child are to go to the bathroom alone. It must be accompanied by you or Mrs. Ramsey the Teacher. When the child has finished using the bathroom give them a paper towel to dry their hands at the door.

As your Supervisor I am sure you will review and observe the Safety Rules as it appears in the Performance Standards which governs the Program. Should you have any questions, feel free to see me.

On October 5, Garcia sent a letter to Angus responding to the above-noted letter. On October 13, Angus replied as follows:

Carmen, I am aware of your dedication to the Head Start Program and to the development of children. However, there are times when we need to review our rules and regulation to update our knowledge and past trainings. Each experience is part of the learning process, and we want to keep open minds to learn, review, and to obtain new and innovative ideas, which will enhance our job performance. If you have any further questions or additional information, feel free to contact me again.

As in the case of Janie Ramsey, I do not think that the letters to Garcia amounted to a disciplinary warning. I therefore shall recommend that this allegation of the complaint be dismissed.

J. Interrogation

Sometime in September 1988, an employee posted a petition on a bulletin board. This was in essence a petition seeking signatures for a decertification petition (i.e., a petition to get rid of the Union).

Carmen Garcia testified that on one occasion during the lunch hour Angus asked her in passing if she had seen the petition. Garcia said Yes. According to Garcia, Angus said something to the effect of did anyone sign it or did you sign it. According to Garcia she said no and that was it.

Based on the testimony of Garcia, I do not think that the General Counsel has made out a case that the Respondent engaged in coercive interrogation by the minimal transaction described above. *Rossmore House*, 269 NLRB 1176 (1984).

CONCLUSIONS OF LAW

1. By unduly delaying the submission of an agreement negotiated by its agent on October 20, 1987, to the board of

trustees, the Respondent violated Section 8(a)(1) and (5) of the Act.

2. By unduly delaying the voting by the board of trustees on the aforementioned agreement, the Respondent violated Section 8(a)(1) and (5) of the Act.

3. By failing to furnish to the Union an updated list of its employees with their addresses, job classifications, wage rates, and dates of hire, the Respondent violated Section 8(a)(1) and (5) of the Act.

4. By paying cash bonuses to nonstrikers while withholding such bonuses to employees who engaged in a strike, the Respondent violated Section 8(a)(1), (3), and (5) of the Act.

5. By issuing a disciplinary warning to Ernestine Cook and placing her on probation with a threat of discharge on September 29, 1988, the Respondent violated Section 8(a)(1) and (3) of the Act.

6. By issuing a disciplinary warning to Linda Morning on September 30, 1988, the Respondent violated Section 8(a)(1) and (3) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

8. Except to the extent found above, the Respondent has not violated the Act in any other manner as alleged in the amended complaint.

REMEDY

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

In accordance with *Sterling Sugars*, 261 NLRB 651 (1977), it is recommended that the Respondent remove from

its files any references to the warnings to Cook and Morning and that it rescind the probation of Cook. It further is recommended that Respondent notify each of these persons that it has removed references to these actions from its files and that evidence of these disciplinary actions will not be used as a basis for future personnel action against Morning or Cook in the event that she is ever reemployed by the Respondent.

In relation to the bonuses, it is recommended that the Respondent pay to the strikers the equivalent amount of money as was paid to nonstrikers or those who abandoned the strike. See *Rubatex Corp.*, 235 NLRB 833, 836 (1978). This would amount to \$80 per person for full-time employees and \$40 per person for part-time employees. Such payments shall also include interest computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

I shall also recommend that the Respondent furnish to the Union, on request, an updated list of the bargaining unit employees, their addresses, job classifications, wage rates, dates of hire, and any other information which may be relevant to the bargaining process.

Regarding the Respondent's failure to timely present the October 20 agreement for a ratification vote by its board of directors, I shall recommend that it do so immediately if requested by the Union. Additionally, because of the undue delay caused by the Employer, I shall recommend that the certification year be extended for 6 months so as to allow for a reasonable time to bargain in the event the aforesaid agreement is not ratified by Respondent's board of directors. See *Colfor, Inc.*, 282 NLRB 1173 (1987).

[Recommended Order omitted from publication.]