State of Maryland
State Higher Education Labor Relations Board

IN THE MATTER OF:	)	
	)	
American Federation of State, County and Municipal Employees,	)	
	)	
and	)	
	)	
Donald Pryor	)	
	)	
Petitioners,	)	
	)	
v.	)	**SHELRB Case Nos. 2001-03, 2002-06, 2002-16 & 2002-23**
	)	
Salisbury University	)	
	)	**Opinion No. 17**
Respondent.	)	
	)	

DECISION AND ORDER

Statement of the Case

In six separate unfair labor practice petitions, the Petitioner, American Federation of State, County and Municipal Employees (AFSCME or Petitioner), charged that a series of actions taken by the Respondent, Salisbury University (SU), against bargaining unit employee Donald Pryor (Pryor or Petitioner), ultimately resulting in Pryor's discharge, constituted unfair labor practice violations. Specifically, AFSCME charged that Respondent SU violated Pryor's rights under Title 3 of the State Personnel and Pensions Article (Collective Bargaining Statute), §3-301 and that by its acts and conduct, SU committed unfair labor practices as defined and proscribed under the State Higher Education Labor Relations Board (Board) Regulations at COMAR §14.30.07.01A and D.

Following investigations of the allegations, the Board found there was sufficient support for the allegations and referred the above-captioned ULP Cases to the Office of Administrative Hearings (OAH) for assignment to an administrative law judge to make proposed findings of fact.[1/] Administrative Law Judge Douglas Koteen (ALJ) issued his report of Proposed Findings of Fact (Report) on September 29, 2003 (attached as appendix to this Decision and Order).

[1/] By Order issued September 26, 2002, and a delegation of hearing authority dated November 14, 2002.

Background

Donald Pryor had been employed by SU in various non-exempt unit positions since 1990. At all times material to the ULP allegations, Pryor was employed in SU's Physical Plant Department as a Senior Maintenance Mechanic. In the early fall of 2001, two unions, AFSCME and the Maryland Classified Employees Association (MCEA), were actively engaged in campaigns to solicit support among SU's non-exempt employees in an effort to become the exclusive collective bargaining representative of SU's non-exempt bargaining unit. The initial election and a subsequent run-off election were held on December 12, 2001 and February 6, 2002, respectively.[2]/ Pryor actively participated on behalf of AFSCME in its union organizing campaign and was one of its most active supporters throughout this period.

The Respondent's actions alleged in the unfair labor practice petitions occurred over a nine-month period between October 16, 2001, and September 26, 2002. From December 18, 2001, through September 26, 2002, AFSCME and Pryor jointly filed six ULP Petitions against SU for these actions.[3]/ Petitioners allege that SU's disciplinary actions—which included counseling, two written reprimands, four suspensions, and a suspension pending Pryor's ultimate discharge—were unlawful interference with Pryor's statutory rights under the Collective Bargaining Statute, and, later, under Board regulations.[4]/ SU's stated reasons for its actions against Pryor range from performance and tardiness problems to issues related to unauthorized absence from his work area.

---

[2]/ The disposition of objections to the election filed by AFSCME delayed certification of MCEA as the winner of the election and exclusive representative until the Board's Decision and Order issued July 7, 2003.

[3]/ Subsequent ULP Petitions, making essentially the same claims, were filed on January 31, March 8, June 12, July 19, and September 26, 2002. The six filings were consolidated and referred to OAH for hearing under the four captioned case numbers.

[4] / The Board's regulations establishing as an unfair labor practice an employer's reprisals against its employee for filing an unfair labor practice petition against it is one of several defined unfair labor practices that became effective on May 28, 2002. Three of the six ULP complaints filed by Petitioners were filed prior to May 28. However, the Collective Bargaining Statute provides for the Board to "take appropriate action in response to complaints of unfair labor practices and lockouts." *See* Title 3 of the State Personnel and Pension Article, Section 3-2A-05. The Board has ruled that rights secured by the Collective Bargaining Statute, as is the right to file unfair labor practice petitions with the Board, are enforceable upon the effective date of the Statute, i.e., July 1, 2001. *See* American Federation of State, County and Municipal Employees and Salisbury University and Donald Pryor, et. al, SHELRB ULP Case. No. 2001-03, Slip Op. No. 7 (2002). In any event, three of the Petitioners' unfair labor practice filings post date May 28, 2002. Any violation occurring prior to May 28, 2002, would turn on a violation of Pryor's statutory employee rights secured under Section 3-301(a) of the Collective Bargaining Statute.

ALJ's Findings of Fact

The consolidated cases presented a total of fourteen separate acts and/or conduct alleged by Petitioner as unfair labor practices.[5]/ The ALJ found that AFSCME had proved, by a preponderance of the evidence, that three of the alleged actions were unfair labor practices. Specifically, the ALJ found that Pryor's circulation of a petition on behalf of a terminated co-worker constituted protected concerted activity; therefore, SU's counseling of Pryor concerning his circulation of it during non-working hours interfered with Pryor's statutory employee rights. The ALJ further found that two adverse actions against Pryor, a one-day suspension for leaving his work area early and Pryor's suspension pending discharge, were motivated by Pryor's participation in protected union activities and his exercise of other rights secured under the Collective Bargaining Statute.

Exceptions

SU filed Exceptions to the ALJ's findings with respect to the three employer actions found to be unfair labor practices. SU also requested oral argument. AFSCME filed an Opposition to SU's exceptions. The Board granted SU's request for oral arguments, and, on November 20, 2003, heard arguments on SU's exceptions. The case is now before the Board to review the ALJ's Report; dispose of SU's exceptions to the ALJ's findings; and make both final findings of fact and final conclusions of law as well as award any remedy appropriate to the Board's final determinations.[6]/

We have reviewed the ALJ's Report and hereby adopt the ALJ's findings of fact and implicit conclusions of law in support of those actions found not to establish the alleged unfair labor practices.[7]/ We deny SU's Exception with respect to Pryor's one-day suspension for his early departure from his work area. However, for the reasons discussed below, we grant SU's Exceptions concerning both (1) Pryor's counseling over his circulation of a petition on behalf of a co-worker and (2) Pryor's suspension pending discharge.

---

[5]/ In his Report, the ALJ organizes his discussion of the alleged acts and conduct under 11 incidents.

[6]/ The ALJ's report on Proposed Findings of Fact goes beyond our limited delegation instructions and implicitly offers conclusions of law. We nevertheless retain the authority to make final findings of fact and final conclusions of law.

[7]/ We note that the ALJ erroneously cites §3-306(a) of the Collective Bargaining Statute as the source of the Board's authority to define unfair labor practices. (Rprt at p. 33) The statutory provision cited is actually administered by another agency, the State Labor Relations Board, in conjunction with the Secretary of the Department of Budget and Management, and does not pertain to the SHELRB. The SHELRB's authority for defining unfair labor practices is provided under §3-2A-06.

A. October 2001 Petition Circulation Incident

The pertinent facts follow. In October 2001, SU's Human Resource (HR) Director counseled Pryor regarding a petition Pryor had agreed to circulate in support and on behalf of a terminated co-worker. The HR Director told Pryor that he could not circulate the petition at any time (working time and non-working time), and that the individual's termination was a private personnel matter. In its Exception, SU argues that the petition Pryor was circulating concerned a sensitive personnel matter about another employee and that such information is ordinarily kept private. SU further contends that there is no evidence that the HR Director continued to maintain that Pryor could not circulate the petition once Pryor informed her that he had the permission of the employee's wife to circulate the petition.

We find no specific evidence in the record establishing that SU's HR Director took any steps to rehabilitate the chilling effect her counseling of Pryor had on the right the ALJ perceived Pryor had to circulate the petition during non-working hours.[8]/ However, our disposition of this exception turns on an overriding issue under these facts.

Critical to the ALJ's finding was the HR Director's unqualified warning to Pryor that he had no authority to take on personnel actions and remedies at any time (including non-working hours) despite being informed by Pryor that he had obtained the consent of the co-worker (Report at 40). Referencing National Labor Relations Board (NLRB) case law, the ALJ found that Pryor's activity (circulating the petition) was protected concerted activity on behalf of another employee in the work place and is therefore protected under established labor law. Therefore, the ALJ found that the HR Director interfered with Pryor's right to engage in such activity.

The ALJ referenced NLRB case law interpreting employee rights as prescribed under Section 7 of the National Labor Relations Act (NLRA). Section 7 of the NLRA is not identical to the Collective Bargaining Statute's employee rights provision prescribed under Section 3-301(a), however.

Section 7 of the NLRA provides as follows:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ... ."

[8] / In disciplining Pryor for his speech standing up for a fellow employee, the university may very well have violated his First Amendment rights, but this is not our province and we express no opinion on it.

By comparison, in pertinent part, Section 3-301(a) provides as follows:

> Employees subject to this title have the right to: (1) take part or refrain from taking part in forming, joining, supporting, or participating in any employee organization or its lawful activities; ... (3) except as provided in §§3-303 and 3-305 of this subtitle, engage in other concerted activities for purpose of collective bargaining. [Emphasis added.]

Section 3-301(a) is not as broad as Section 7 of the NLRA regarding protected concerted activities. Section 3-301(a) limits its coverage of such activities to "other concerted activities for the purpose of collective bargaining." Unlike Section 7 of the NLRA, Section 3-301(a) does not extend its coverage of protected concerted activity beyond collective bargaining to "other mutual aid or protection."[9]/

Regarding Pryor's rights under Section 3-301(a), there was no evidence or finding made that the petition Pryor circulated related to activities concerning the forming, joining, supporting or participation in any employee organization or its lawful activity. The remaining activity protected under Section 3-301(a) is the right to "engage in other concerted activities for the purpose of collective bargaining." [Emphasis added.] Here, again, there is no evidence that Pryor's circulation of the Petition was in any way related to collective bargaining activities or was for the purpose of collective bargaining.[10]/

Although the ALJ's findings concerning Pryor's activity on behalf of a coworker may be correct under the NLRA as it relates to work place issues not linked to collective bargaining, the ALJ has misapplied federal labor law to the rights of employees as delineated at Section 3-301(a) of the CBS. Therefore, while Pryor's conduct would have been protected under the NLRA, it was not protected under our more narrowly written Collective Bargaining Statute. We underscore, however, that even under our more narrow employee right provision, Pryor's petition-circulating activity would have been protected if there was evidence establishing an actual specific link between his actions and either: (1) the union campaign drive for (ultimate) collective bargaining; or (2) existing collective bargaining efforts. There simply was no such evidence which tied Pryor's circulation of the petition with his organizing efforts on behalf of AFSCME or any other employee organization.[11]/

---

[9] / When drafting the Collective Bargaining Statute, the Maryland General Assembly had available to it the NLRA; however, it is clear that it chose not to adopt identical employee rights language in the final legislation.

[10] / "Collective Bargaining" is a term of art under the statute and is defined in § 3-101 as "good faith negotiations by authorized representatives of employees and their employer with the intention of: (1) reaching an agreement about wages, hours, and other terms and conditions of employment; and (2) incorporating the terms of the agreement in a written memorandum of understanding."

[11] / The instant facts are that a former BSU co-worker's wife approached Pryor about her husband's termination. Pryor decided, with her permission, to circulate a petition about BSU's termination of the co-worker. There was no finding of AFSCME's involvement or that Pryor communicated (or that

Therefore, since Pryor's petition circulating activity, identified as "protected concerted activity" by the ALJ, cannot be deemed to have been "for the purpose of collective bargaining" and thereby protected under the CBS, SU's alleged interference with this activity by Pryor is not interference with Pryor's employee rights under the Collective Bargaining Statute.

B. December 5, 2001 Suspension

The facts of this incident were that as a matter of practice employees, at the end of their shifts, decided on their own when they were done working for the day and could leave their work area and return to the Physical Plant where they prepared to leave. Generally, this occurred between 3:00 and 3:30 p.m. However, there was no clearly articulated rule as to when employees were permitted to return. The ALJ found that there was a generally accepted practice of SU's not citing employees for leaving their workstation early and returning to the Physical Plant at the end of their shifts. On the day in question, November 30, 2001, Pryor returned to the Plant at 2:50 p.m. He received a one-day suspension for leaving his work station and returning to the Physical Plant without permission. However, there is no evidence that any other employee but Pryor was ever reprimanded or disciplined for returning earlier than 3:00 p.m.

SU argues that there was no evidence of a "global" enforcement, or lack thereof, concerning employees' return time to the Physical Plant during working hours and notes that there was no finding that employees were not ever disciplined for returning before 3:00 p.m. SU further argues that Pryor's circumstances were different from those of other employees who may have not been disciplined for returning to the Physical Plant early. In support of this contention, SU cites the ALJ's finding that Pryor had been legitimately disciplined by the same supervisor for similar infractions twice before — just two and four weeks earlier — for not being where he should have been during working hours. SU contends that Pryor was not similar to any other employee when SU decided to suspend him for the latest instance of this repeated infraction.

Accepting all of what SU argues as true, we find that SU misplaces the burden it had to rebut the prima facie case of a violation established by the evidence. The ALJ made an undisputed finding that SU tolerated a practice of employees' leaving their work stations at the end of the day and returning to the Physical Plant before the end of their shifts. There is no dispute that Pryor was disciplined for doing just that. Notwithstanding SU's recent suspension of Pryor for similar reasons found to be legitimate by the ALJ, those instances did not have a history of being tolerated by SU Furthermore, a finding was made that Pryor was seen talking to AFSCME representatives during this particular early return and this was reported by one supervisor (a rival union adherent) to the supervisor who actually disciplined Pryor. The ALJ concluded that even though Pryor's returning had stretched ten minutes beyond the normally tolerated return

---

the petition reflected) to employees that its purpose was also related to demonstrating the need for union representation.

time, SU failed to show that it was this additional ten minutes and not his union-related activity that triggered or motivated its discipline of Pryor in this instance. Therefore, the ALJ stated, SU could not overcome the other findings of fact supporting union animus as the substantial motivating factor. We agree.

There is no question that the above findings support a prima facie case that SU's discipline of Pryor was substantially motivated by unlawful discriminatory reasons. If, as SU asserts, no one had ever returned as early as Pryor, SU had the burden to establish that its disciplining of Pryor was legitimate under the particular circumstances. As the employer, SU was in the best position to rebut the evidence of its tolerance for employees' early-return practice and of Pryor's apparent disparate treatment under it, by evidence of employees who were similarly disciplined when returning to the physical plant before 3:00 p.m. Once evidence was presented establishing that SU tolerated a practice of allowing employees to return to the Physical Plant before the end of their shifts, the burden shifted to SU to establish, as an affirmative defense, where it drew the line in the early-return practice of its employees. Only if SU did this, which it did not, would the burden then revert to AFSCME to further demonstrate, by a preponderance of the evidence, that SU would not have disciplined Pryor absent his protected activity. *Wrightline, Inc.*, 250 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981, *cert. denied,* 445 U.S. 989 (1982)(hereinafter, *Wrightline*).

C. Suspension Pending Discharge

The record contains very little evidence with respect to the suspension pending termination. However, from what evidence there is, we can discern only the following facts regarding SU's final adverse action against Pryor: SU provided Pryor with a letter notifying him that he was being suspended pending termination and listed the reasons why; and, SU subsequently terminated him. The letter, however, was not introduced into evidence. There also was no testimony as to why SU chose to take this disciplinary action against him at that time (September, 2002).

In *Alpo Petfoods v. NLRB*, 126 F.3d 246 (4th Cir. 1997), the Fourth Circuit established the test for determining ULP disputes involving allegations of discriminatory discharge based on anti-union animus. The Court explained that to establish a prima facie case, the following must be shown: (1) that the employee was engaged in protected activity; (2) that the employer was aware of the activity; and (3) that the activity was a substantial or motivating reason for the employer's action.

In *Wrightline*, the NLRB addressed the standard for mixed motive cases—where the employer has both legitimate and illegitimate (anti-union) motives for taking the action.[12]/ The Board explained that the General Counsel (who prosecutes the case for the

[12] / Similarly, the Court in *Wrightline*, observed that in order to meet its prima facie burden, the petitioner must establish: (1) that the employee engaged in protected activity; (2) the employer was aware

NLRB) must "make out a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct." *Id.* at 1089.

In this case, AFSCME has alleged that SU's September 2002, suspension of Pryor pending discharge and its subsequent discharge of Pryor was motivated by union animus based on Pryor's active participation in union matters, filing of ULP Petitions against SU, and other concerted activities related to collective bargaining. The ALJ's determination that AFSCME had made a prima facie showing that Pryor's suspension pending discharge was unlawful essentially turned on: (1) the findings he made regarding the two other employer actions against Pryor (discussed above) supporting prima facie cases of violations; and (2) SU's failure to produce any evidence of any legitimate reason(s) for Pryor's suspension and subsequent discharge. In excepting to the ALJ's determination, SU takes the position that AFSCME did not set forth a prima facie showing of the alleged ULP charge. Therefore, SU asserts, it was under no obligation to justify that the disciplinary action was for a legitimate business reason.

The approach taken by SU was very risky. In effect, if AFSCME failed to present a prima facie case then SU is correct. However, if AFSCME did present a prima facie case, then AFSCME prevails, because even if SU had had a legitimate business reason, it failed to present evidence to justify the reason and, thus, rebut the prima facie case as per *Wrightline*. Therefore, the crux of SU's Exception turns on whether the Board agrees with the ALJ's assessment of the evidence to determine that, by a preponderance of the evidence, a violation was established.

The facts of this case clearly show (and it is undisputed) that AFSCME established the first two prongs of the prima facie case — that Pryor had been engaged in protected activity and that SU was aware of his protected activity. The critical question is whether AFSCME satisfied the third and critical prong of the prima facie case — that Pryor's protected concerted activity was a substantial or motivating reason for the employer's action. If this factor has not been established, then, as discussed above, a prima facie case of a violation has not been established and, therefore, the burden never shifted to SU to justify its actions against Pryor.

Appropriately referencing the *Alpo* and *Wrightline* cases, factors the ALJ cited as evidence of anti-union animus included: (1) implied or express threats of termination tied to union activity; (2) surveillance of employees engaged in union activities or creating an impression of such surveillance; (3) notorious union activity just prior to termination; (4) the employer's departure from usual personnel policy and practice in terminating the employee; (5) adverse employment actions against other union activities; (6) disparate treatment; (7) the timing of the employment actions in relation to protected activity; and (8) inconsistent explanations of employment actions.

---

of the activity; (3) that the employee suffered an adverse action; and (4) that there was a nexus between the protected activity and the adverse action.

In support of AFSCME's contention that a motivating factor for Pryor's termination was his union activity, Pryor testified that (1) he believed it to be (this assertion by Pryor is not particularly persuasive, since his support for this was based on the claims that formed the basis of ULP charges that were rejected by the ALJ); and (2) that he never had received any prior notice that he was faulty in his record keeping or about his failure to perform his work properly, apparently two of the reasons (among others) that were cited as the basis for the suspension pending termination in the letter notifying him of this action (but not introduced into evidence) during the two-month period before SU issued the suspension pending termination.[13]/ On cross-examination, however, Pryor admitted that, during this period, his supervisor, Mr. Shenton, did speak with him about his record keeping, but Pryor claimed that his errors were "not purposeful. In other words, I didn't purposely disobey a direct order." Tr. at 56-57. Pryor also admitted that, during this period, Mr. Shenton spoke with him about various things relating to his work. Tr. at 57. The record is also replete with instances up through June 2002 of Pryor's poor performance, failure to follow orders, poor record keeping, etc.

In determining that all the prima facie elements had been met, the ALJ found the following as evidence of anti-union animus: (1) SU's actions in not allowing Pryor to circulate the petition on behalf of a terminated co-worker and SU's confiscation of union material in November 2001; (2) the suspension issued for returning to the physical plant early, also in November 2001; and (3) the fact that Pryor had filed multiple ULP's over time. The underlying incidents for the first and second factors occurred ten months before Pryor's September 2002 suspension pending discharge action. With respect to the third factor, the great majority of the claims made in the multiple ULP filings (with the exception of items one and two) were rejected by the ALJ. Further, for the reasons

---

[13] / The sole questioning and testimony in the transcript on this issue is so sparse that it is difficult to discern what Pryor was saying:

> Q: During the time period from June through the time that you received your suspension pending discharge notice, were you ever brought up on any other disciplinary charges concerning record keeping, failure to perform work or anything of that nature?
>
> A: The question was before this time?
>
> Q: No, between the time period from June until September when you got your letter. Did you receive notice of any of these allegations about you that were made in the termination letter?
>
> A: No.
>
> Q: Did you ever see any of Mr. Shenton's notes and did you have the opportunity to refute those allegations?
>
> A: No, I mean, even a lot of times, just like the light bulb incident when I asked Mr. Maddux to look at it, they would never allow me the time to go back over the allegations and prove otherwise.

Tr. at 50-51. Note, that the light bulb incident that Pryor is referring to occurred in February 2002.

previously discussed, we rejected the ALJ's findings supporting a violation with respect to Item 1. There was nothing else cited by the ALJ or in the record to show that anti-union animus was a motivating reason for the action that SU took against Pryor or that the action SU took was otherwise unlawfully motivated.

With nothing more, we do not find that the evidence establishes a prima facie showing sufficient to support an inference that Pryor's protected activity was the motivating factor for SU's suspension of Pryor pending discharge in September 2002. As noted above, we reject the prohibitions placed on Pryor's circulation of the petition as a ULP because of the language of the Collective Bargaining Statute. Thus, that reduces the evidence in support of the finding to the last two factors. Nevertheless, even assuming *arguendo* that we include the circulation of the petition, we remain unconvinced that AFSCME met the third prong to establish a prima facie showing that Pryor's protected activity was a substantial or motivating reason for SU's action.

We find the only situations where any anti-union animus can be inferred in this case—the two November 2001 incidents regarding confiscation of the AFSCME flyers and Pryor's early return to the Physical Plant at the end of the day—are not sufficient to establish the requisite nexus between Pryor's activity and SU's action (suspension pending discharge) necessary to constitute a violation of Board Regulations or the Collective Bargaining Statute. These incidents happened almost ten months before the suspension pending termination. There is nothing more in the record tying any animus implied by these incidents to SU's suspension of Pryor pending termination ten months later that would establish the requisite substantially motivating reason for disciplinary action that occurred so much later.

Additionally, and more importantly, the record is replete with Pryor's numerous intervening violations of SU policies and procedures, his lying about the facts when questioned, and a serious incident where he completely ignored his supervisor's instructions on how to clean the pizza conveyor belt, which created a potential health hazard.[14]/ This last incident occurred in late June, a little more than two months prior to the suspension pending termination. Even if SU were out to eliminate a known union adherent, it had cause to terminate Pryor for any of these other incidents, but did not do so until September 2002.

---

[14]/ There was another incident that occurred on May 28, 2002, where Pryor was responsible for inspecting and replacing air filters of the variable air volume control units ("VAV"). Findings were made that the proper way to install the filter is to insert the pliable filter into tracks that are located on the top of each VAV. Sometimes the filter has to be bent or flexed. If a filter is placed on top of a VAV instead of being inserted in the tracks, the unit will function with reduced efficiency. Further findings were made that on May 28, 2002, Pryor reported devoting 5.25 hours to this task. He failed properly to record his work (by placing his initials and the date) on four VAVs. With respect to four other units, Pryor merely laid the air filters on tops of the tracks on the VAV rather than inserting them. On one other unit, he jammed the filter into the tracks in such a way that it was twisted and protruding 10-12 inches above the unit, in a position where it could not filter air.

The ALJ noted that he considered the lack of evidence presented to tie SU's decision to discharge Pryor to the fact that no other employees had as many disciplinary problems. (Report at 73.) However, as we stated, the burden of proof does not shift to SU to establish a legitimate justification for its decision if the evidence presented by AFSCME does not make a prima facie showing of the alleged violation. Rather, the significance of these findings of Pryor's intervening performance and disciplinary problems is that they largely vitiate whatever anti-union animus could be inferred from the two incidents that occurred ten months earlier as a basis for establishing a nexus to SU's discharge of Pryor.[15]/ Moreover, we note that with respect to all of these intervening adverse actions/incidents involving Pryor, the ALJ made findings rejecting them as supporting alleged unfair labor practice violations.

We also reject the general statement by the ALJ that anti-union animus against Pryor can be assumed by the mere filing of many ULP charges over time. (Report at 71.) As explained above, all but one of the charges were rejected, including both disciplinary and non-disciplinary charges covering such things as unlawful surveillance of his activities, assigning him trivial work, disconnecting the phone line, limiting access to the office, all allegedly due to his union activity. The one ULP charge we upheld involved disciplinary action that we found was, in part, motivated by the employer's anti-union animus. This ULP occurred more than 9 months before the suspension pending termination. Without more, we will not assume that merely because an employee files ULP charges (that are not upheld) the employer has anti-union animus against the employee as a motivating reason for taking subsequent disciplinary action against the employee.[16]/

We simply do not find that the evidence establishes that anti-union animus was a motivating reason for SU's suspension of Pryor pending discharge. Under established law controlling burdens of proof, the burden first rests with AFSCME to present evidence to establish that Pryor's union activity was a motivating reason in the adverse disciplinary action. Since we find AFSCME did not prove its prima facie case with respect to Pryor's suspension pending discharge, SU had no burden and therefore was under no obligation to present evidence justifying its actions.

In view of the above, we shall order a remedy, as set forth in our Order below (page following) appropriate in this case. We shall also direct that SU communicate to

---

[15]/ We further note that none of the reasons cited by the ALJ as examples of the kinds of evidence that could be used to infer union animus was presented here. Specifically, there was no evidence of: (1) any threats of termination tied to union activity; (2) surveillance of employees engaging in union activities (Pryor's ULP alleging surveillance was rejected); (3) notorious union activity by Pryor just prior to termination; (4) a departure by SU from its usual personnel policy and practice in terminating employees; (5) adverse employment action against other union activities (with the sole exception of the November 30, 2001, return to the physical plant building early); (6) disparate treatment; (7) the timing of the employment action in relation to any protected activity by Pryor; or (8) inconsistent explanation of the employer's actions.

[16]/ As stated earlier, we adopt the rejection of each of these charges by the ALJ and note that the Petitioner did not file Exceptions to the ALJ's rejection of those charges.

The ALJ noted that he considered the lack of evidence presented to tie SU's decision to discharge Pryor to the fact that no other employees had as many disciplinary problems. (Report at 73.) However, as we stated, the burden of proof does not shift to SU to establish a legitimate justification for its decision if the evidence presented by AFSCME does not make a prima facie showing of the alleged violation. Rather, the significance of these findings of Pryor's intervening performance and disciplinary problems is that they largely vitiate whatever anti-union animus could be inferred from the two incidents that occurred ten months earlier as a basis for establishing a nexus to SU's discharge of Pryor.[15]/ Moreover, we note that with respect to all of these intervening adverse actions/incidents involving Pryor, the ALJ made findings rejecting them as supporting alleged unfair labor practice violations.

We also reject the general statement by the ALJ that anti-union animus against Pryor can be assumed by the mere filing of many ULP charges over time. (Report at 71.) As explained above, most of the charges were rejected. We reversed only one of the disciplinary actions taken against Pryor because of the anti-union animus we found as a motivating factor in this mixed motive action. Without more, we will not assume that merely because an employee files ULP charges (that are not upheld), the employer has anti-union animus against the employee as a motivating reason for taking disciplinary action against the employee. Similarly, Pryor filed other (non-disciplinary) ULP charges against SU claiming such things as unlawful surveillance of his activities, assigning him trivial work, disconnecting the phone line, and limiting access to the office, all allegedly due to his union activity.[16]/

We simply do not find that the evidence establishes that anti-union animus was a motivating reason for SU's suspension of Pryor pending discharge. Under established law controlling burdens of proof, the burden first rests with AFSCME to present evidence to establish that Pryor's union activity was a motivating reason in the adverse disciplinary action. Since we find AFSCME did not prove its prima facie case with respect to Pryor's suspension pending discharge, SU had no burden and therefore was under no obligation to present evidence justifying its actions.

In view of the above, we shall order a remedy, as set forth in our Order below (page following) appropriate in this case. We shall also direct that SU communicate to

---

[15]/ We further note that none of the reasons cited by the ALJ as examples of the kinds of evidence that could be used to infer union animus was presented here. Specifically, there was no evidence of: (1) any threats of termination tied to union activity; (2) surveillance of employees engaging in union activities (Pryor's ULP alleging surveillance was rejected); (3) notorious union activity by Pryor just prior to termination; (4) a departure by SU from its usual personnel policy and practice in terminating employees; (5) adverse employment action against other union activities (with the sole exception of the November 30, 2001, return to the physical plant building early); (6) disparate treatment; (7) the timing of the employment action in relation to any protected activity by Pryor; or (8) inconsistent explanation of the employer's actions.

[16]/ As stated earlier, we adopt the rejection of each of these charges by the ALJ and note that the Petitioner did not file Exceptions to the ALJ's rejection of those charges.

employees, by means of a notice posting, their rights under the Collective Bargaining Statute.

ORDER

IT IS HEREBY ORDERED THAT:

1. Salisbury University (SU) and its agents and representatives shall cease and desist from suspending and otherwise disciplining its employees because they exercise their employee rights under Title 3 of the State Personnel and Pensions Article (Collective Bargaining Statute), §3-301(a).

2. SU and its agents and representatives shall cease and desist from interfering, restraining or coercing, in any like or related manner, Donald Pryor and other employees in the exercise of their rights under the Collective Bargaining Statute.

3. SU shall rescind the one-day suspension of Mr. Pryor and pay Mr. Pryor back pay for that day.

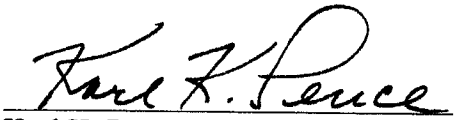
4. SU shall, within fourteen (14) days from the service of this Decision and Order, post the attached Notice, dated and signed, conspicuously on all bulletin boards where notices to these bargaining unit employees are customarily posted, for thirty (30) consecutive days.

5. SU shall notify the State Higher Education Labor Relations Board, in writing, within twenty-one (21) days from the service of this Decision and Order, that: (a) the Notice has been posted accordingly; and (b) what steps BSU has taken to comply with paragraphs 3 and 4 of this Order.

6. In all other respects, the allegations contained in the ULP Petitions filed in Case Nos. 2001-03, 2002-06, 2002-16, and 2002-23 are dismissed.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD

Annapolis, MD
December 11, 2003



Karl K. Pence, Executive Director
State Higher Education Labor Relations Board
On behalf of Jamin B. Raskin, Chair

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,	*	BEFORE DOUGLAS E. KOTEEN,
	*	AN ADMINISTRATIVE LAW JUDGE
On behalf of:	*	OF THE MARYLAND OFFICE
DONALD R. PRYOR, JR.,	*	OF ADMINISTRATIVE HEARINGS
Petitioner	*	OAH Nos. HELRB-LRB-01-200200008 HELRB-LRB-01-200200005
v.	*	HELRB-LRB-01-200200006 HELRB-LRB-01-200200007
SALISBURY UNIVERSITY,	*	
Respondent	*	HELRB Nos. ULP 2001-03; 2002-06; 2002-16; 2002-23

* * * * * * * * * * * * *

PROPOSED FINDINGS OF FACT[1]

RECEIVED
SEP 30 2003
SHELRB

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION

STATEMENT OF THE CASE

On December 18, 2001; January 31, 2002; March 8, 2002 (HELRB-LRB-01-200200008); June 12, 2002 (HELRB-LRB-01-200200005); July 18, 2002 (HELRB-LRB-01-200200006); and September 26, 2002 (HELRB-LRB-01-200200007); the American Federation of State, County and Municipal Employees ("AFSCME" or "Petitioner") filed Unfair Labor Practice petitions ("ULP's"), on behalf of Donald R. Pryor, Jr., ("Pryor") against Salisbury University ("SU" or "the University") with the State Higher Education Labor Relations Board ("HELRB"). In essence, the Petitioner claimed that the University had interfered with Pryor's right to take part in forming, joining,

[1] This Decision includes only proposed findings of fact, and not proposed conclusions of law, in accordance with the HELRB's delegation to the Office of Administrative Hearings, as set forth in its Order dated September 26, 2002. *AFSCME & Pryor v. Salisbury University,* HELRB ULP Case Nos. 2001-03 and 2002-01 (Opinion No. 7, September 26, 2002).

supporting, or participating in any employee organization, to engage in other concerted activities for the purpose of collective bargaining, and had discriminated against him in hiring, tenure or terms or conditions of employment to discourage support or membership in an employee organization, when it issued to him written reprimands, disciplinary suspensions, and a suspension pending discharge during a union organizing campaign at SU.

By Order dated September 26, 2002, the HELRB remanded Case No. HELRB-LRB-01-200200008 to the Office of Administrative Hearings ("OAH") and delegated authority to OAH to conduct a hearing and issue proposed findings of fact regarding the ULP's filed on December 18, 2001; January 31, 2002, and March 8, 2002.[2] By letter dated November 14, 2002, the HELRB delegated authority to OAH to conduct a hearing and issue proposed findings of fact in three additional ULP cases, OAH Case Nos. HELRB-LRB-01-200200005; HELRB-LRB-01-200200006; and HELRB-LRB-01-200200007. By OAH Orders dated February 24, 2003 and March 7, 2003, all four ULP cases were consolidated for hearing and decision.[3]

Following the remand, a prehearing conference ("PHC") was held in OAH Case No. HELRB-LRB-01-200200008 on November 25, 2002, at OAH, 11101 Gilroy Road, Hunt Valley, MD 21031, before Douglas E. Koteen, Administrative Law Judge ("ALJ"). Linda D. McKeegan, Esquire, Kahn, Smith & Collins, P.A., appeared on behalf of the Petitioner. Anne L. Donahue, Assistant Attorney General, appeared on behalf of the University. A Prehearing Conference Report and Order was issued on December 10, 2002. A motions hearing was conducted by telephone conference on March 3, 2003 in the consolidated cases. A final PHC in the consolidated cases was

---

[2] The HELRB's intitial delegation to OAH was issued on April 4, 2002. An Order granting SU's Motion to Dismiss OAH Case No. HELRB-LRB-01-200200008 was issued by OAH on May 31, 2002. As noted above, that decision was reversed and remanded to OAH for an evidentiary hearing by the HELRB, in Opinion No. 7, issued on September 26, 2002. Prior to the remand, OAH Case No. HELRB-LRB-01-200200008 had been designated as OAH Case No. HEC-LRB-02-200200001.

[3] In the February 24, 2003 Order, the Petitioner's Motion to Stay OAH Case No. HELRB-LRB-01-200200007 was denied. Additionally, Petitioner's Motion to Assign OAH Case Nos. HELRB-LRB-01-200200005; 200200006; and 200200008 to ALJ Watson who was presiding over a consolidated personnel case involving some of the same discipline imposed on Mr. Pryor, was also denied. The personnel case was designated as UMS-SSU-02-200200001, et al., which included several consolidated personnel cases.

conducted at OAH in Hunt Valley, Maryland on May 20, 2003. Ms. McKeegan represented the Petitioner and Ms. Donahue represented the University in the motions hearing and prehearing conference.

The hearing on the merits was held on June 2, 2003, at SU, Room 027, Holloway Hall, 1101 Camden Avenue, Salisbury, Maryland, before the undersigned ALJ.[4] Ms. McKeegan represented the Petitioner. Ms. Donahue represented the University. The parties requested the opportunity to file written closing arguments after conclusion of the hearing. Pursuant to a briefing schedule established at the hearing, Petitioner filed its Post-Trial Brief and Proposed Findings of Fact at OAH on July 18, 2003. The University filed a Closing Argument and Proposed Findings of Fact on August 15, 2003. Petitioner filed a Reply Brief on August 28, 2003. Pursuant to agreement of the parties, the record in this matter closed upon receipt of the final brief, and the date for issuance of the decision was designated as September 29, 2003, thirty days after close of the hearing record, and immediately following the intervening weekend.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings and the Procedures for Administrative Hearings concerning matters before the HELRB. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2002); COMAR 28.02.01; and COMAR 14.30.11.

ISSUES

The issues are whether the University engaged in unfair labor practices and was motivated by unlawful reasons, pursuant to Md. Code Ann., State Pers. & Pens. § 3-306 (Supp. 2002), because of Pryor's participation in protected union activities, when it disciplined, discharged, and engaged in other conduct involving Pryor, as follows:

(1) a written reprimand for alleged failure to return from lunch in a timely manner on November 12, 2001;

[4] The PHC was previously scheduled for March 18, 2003 and the hearing scheduled for March 31 through April 4, 2003, and April 7-10, 2003. The University requested a postponement of the PHC and hearing so the parties could consider ALJ Watson's decision in the consolidated personnel case which was not issued until March 24, 2003. The Petitioner did not oppose postponement, and the PHC and hearing were postponed for good cause.

(2) a one day suspension for alleged failure to obtain permission to leave work station on November 30, 2001;
(3) a three day suspension for alleged failure to obtain permission to leave work station on January 22, 2002;
(4) alleged harassment and surveillance of Pryor in January and February 2002;
(5) a five day suspension for failure to obtain permission to leave work station on May 9, 2002
(6) a written reprimand for poor performance of job duties on May 28, 2002;
(7) a five day suspension for poor performance of job duties on June 16, 2002; and
(8) a suspension pending discharge of Pryor on September 11, 2002 for multiple reasons.

SUMMARY OF THE EVIDENCE

Exhibits

AFSCME submitted the following documents into evidence:

AFSCME No. 1 - AFSCME's Transcript Designations, including attached Transcript Pages from OAH Case No. UMS-SSU-02-200200001: Page Nos. 93-104; 115-116; 315-316; 335; 350-351; 379-380; 577-578; 617-618; 628-630; 653-654; 690-691; 693; 706-707; 712-713; 725; 728-733; 736-738; 740; 756; 765-767; 771-774; 820-823; 824-826; 840-843; 844-847; 850; 953-955; 977; 981-982; 1078-1080; 1187-1193; 1199; 1201; 1235-1236; 1238-1245; 1263-1268; 1290-1294; and 1368-1369.

AFSCME No. 2 - Handwritten Note from Pryor to Mike S., dated July 19, 2002 ("7-19-2").

The University submitted the following documents into evidence:

Univ. No. 1 - Memorandum For Record – Meeting With Ray Pryor, dated October 16, 2001.

Univ. No. 2 - University's Transcript Designations, including attached Transcript Pages from OAH Case No. UMS-SSU-02-200200001: Page Nos. 61-70; 74-79; 81-87; 119; 125-126; 129-130; 133-137; 207-208; 248-249; 322-323; 325; 338; 350; 367-368; 377-382; 491-493; 509; 528-530; 533; 623; 978; 1075-1077; 1080; 1212-1213; 1215; 1234; 1370; 1372-1374; 1382-1383; 1385-1395.

The parties submitted the following Joint Exhibit:

Jt. Ex. 1. - Decision issued in *Pryor v. Salisbury University,* OAH Case No. UMS-SSU-02-200200001, et al. (ALJ K. Watson), Issued March 24, 2003 (Stipulated Findings of Fact Nos. 1-74 and 90-129).[5]

Witnesses

The Petitioner presented the testimony of the following witness:

The Respondent presented the testimony of the following witnesses:

1. Donna Keener, Director of Human Resources, SU;
2. Michael Taylor, former Assistant Director of Physical Plant for Building Trades, SU;
3. M. Robert Maddux, Multi-Trades Chief for the Auxiliaries Physical Plant, SU;
4. Michael Shenton, Maintenance Mechanics Lead, SU.

PROPOSED FINDINGS OF FACT

Stipulated Facts

The parties stipulated to Findings of Fact Nos. 1-74 and 90-129 found by ALJ Kenneth Watson by a preponderance of the evidence in JT. Ex. No. 1. Those stipulated Findings of Fact are as follows:

Pryor and the SU Physical Plant Department

1. Pryor has been employed by SU in a number of capacities since 1990. Beginning in March of 2000 and as a member of the Physical Plant Department, Pryor was assigned as a Maintenance Mechanic Senior to the University Center/Commons complex ("UC/C"). (Pryor, T. 1164).[6]

2. The Physical Plant Department has its own main administrative building on the SU Campus. The UC/C building is approximately a four-minute walk from the Physical Plant building. The University Center component of the UC/C complex is an older structure and primarily houses student and university activities. The Commons building is a newer structure that primarily serves as a dining services building, but also contains meeting and seminar rooms. Although the Commons and University Center are separate structures, there is a common loading dock that runs between the back ends of the two buildings in the complex. (Taylor, T. 435-436; Pryor Exhibit 46)

3. Kevin Mann is the Director of Physical Plant at SU. In this position, he has overall responsibility for the maintenance and upkeep of the buildings on the SU campus, together with duties in policy development and compliance regarding employees in his unit. He works through his designated Assistant Directors in such areas as project management, horticulture, housekeeping, and building trades. Mann has served as Director of Physical Plan for more than two

[5] The entire decision in OAH Case No. UMS-SSU-02-200200001 was reviewed by the undersigned ALJ concerning the basis for ALJ Watson's Findings of Fact Nos. 1-74 and 90-129.

[6] References to the transcript in the hearing in this [Watson's] case will be made by identification of the witness, followed by a "T" with the appropriate page(s) on which the testimony appears. For example, (Taylor, T. 435-436). During the last day of the [personnel] hearing on October 4, 2002, a portion of Mr. Pryor's testimony was not properly recorded and not transcribed. This testimony has been reconstructed from my [Watson's] hearing notes and will be referenced as "Pryor testimony."

years, beginning as Interim Director and being promoted to full Director in 2001. Prior to that he served as Assistant Director for Building Trades. (Mann, T. 164-165).

4. Serving immediately under Mann is Mike Taylor, who joined SU as Assistant Director of Physical Plant for Building Trades (the position formerly held by Mann) more than 2 ½ years ago, after a 30 year career in the Army with extensive managerial experience in building trades and equipment maintenance. In this role, he supervises a 40-employee building trades unit, including plumbers, painters, HVAC specialists and maintenance mechanics. Four supervisors report directly to him. (Mann, T. 213-215; Taylor, T. 318-324). Taylor assumed his duties at about the same time that Pryor was assigned to the University Center/Commons Building complex. (Taylor. T. 325).

5. Reporting to Taylor as one of his four supervisors is Robert Maddux. Maddux has served as Multi-Trades Supervisor in the SU Physical Plant Department for some ten years. In this position, he supervises 12 employees who serve the auxiliary or revenue producing buildings on the SU campus, including 10 dormitories and the UC/C. Maddux oversees daily scheduling, logbooks, accountability sheets, and the implementation of work orders in regard to these employees. (Mann, T. 213-215; Maddux, T. 270-271; Taylor, T. 321).

6. Michael Shenton has been employed by SU for approximately ten years. For the last five years, he has served as Lead Maintenance Mechanic assigned to the UC/C, reporting to Maddux. In that position, Shenton immediately supervised the two Maintenance Mechanics assigned to that facility, Pryor and Jerry Classing. Maddux assigns work at UC/C through Shenton, who is responsible for allocating the tasks among himself and the other Maintenance Mechanics and for making sure that the work is completed. (Mann, T. 213-216; Shenton, T. 813).

7. As a Maintenance Mechanic, Pryor was normally assigned to the day shift, with the conventional hours of 7:00 A.M. to 3:30 P.M. Additionally, he was required to work every other weekend on a shift running from 5:00 A.M. to 1:30 P.M., with Jerry Classing, the other Maintenance Mechanic assigned to the UC/C, working on weekends that Pryor did not work. During the week, Classing worked from 2:00 P.M. to 10:30 P.M. (Mann, T. 173-174; Shenton, T. 1061).

Discipline at SU and in the Physical Plant Department

8. At the times germane to the instant case, SU provided an Employee Handbook (the "Employee Handbook" or "Handbook") to newly hired individuals. This booklet described a "progressive corrective discipline" process for various work rule violations. These included failure to inform a supervisor when leaving a work station, failure to report back to a work station at the conclusion of a break or meal period, failure to follow instructions, and poor performance of duties. (Keener, T. 50; SU Exhibit 53, pgs. 22 and 23).

9. After being hired by SU in September of 2001, as the Director of the Department of Human Resources ("HR"), Donna Keener determined to make some revisions to the processes described in the Handbook. This was in response to comments from both employees and supervisors as to confusion over appropriate procedures and matters warranting different levels of discipline. Under instructions from Vice President Richard Pusey and after a process involving consultations with employees, supervisors, legal counsel and colleagues at other UMS institutions, Keener proposed an SU policy of progressive discipline. The policy included a guidelines chart where work rule violations were broken down into categories and correlated with appropriate

sanctions, factoring in factors of frequency and seriousness. It also referenced the existing range of sanctions between verbal reprimand and termination. This policy was adopted by SU, effective February 4, 2002. (Keener, T. 51-55; SU Exhibit 52).

10. The Disciplinary Guidelines Chart (the "Chart") attached to the February 4, 2002 progressive discipline policy described "reporting late...after the lunch period" and "stopping work before...the designated time" as "Group I" offenses. "Failure to inform the supervisor when leaving the work station, or failure to report back to the work station at the scheduled conclusion of a work break or meal period" was characterized as a "Group II" offense. Also in this latter category was "failing to report for part or all of shift for which leave was not approved by the supervisor," together with "poor performance of job duties, including failure to follow instructions or to maintain established standards of workmanship or productivity." (SU Exhibit 52).

11. As part of the adoption of the Policy, Keener devised pre-formatted forms for use by SU supervisors in documenting the counseling and coaching of employees for corrective action. (Keener, T. 53).

12. Both the former SU disciplinary policy and the one that came into effect on February 4, 2002, sought to give supervisors flexibility in correlating an employee's overall performance with the types and frequency of violations committed. Discipline was to be imposed progressively, the severity of sanction increasing with successive offenses. (Keener, T. 72-73; SU Exhibit 52).

13. In the SU Physical Plant Department, Director Mann has the overall responsibility for the consistent application of the disciplinary process, acting through his Assistant Directors and coordinating with HR for guidance. Ms. Keener or her designee must approve also proposed suspensions at SU and in the Physical Plant Department under the February 4, 2002 progressive discipline policy. Under the Handbook, HR was to be "consulted" in the imposition of suspensions. (Keener, T. 76; Mann, T. 165-166; SU Exhibits 52 and 53).

14. As an Assistant Director of Physical Plant for Building Trades, Taylor has the authority to administer counseling or issue reprimands to the employees in his unit. For the more serious sanctions, suspension and termination, he recommends action to Director Mann who has the final authority to enforce and implement these measures. (Taylor, T. 330).

15. In accordance with recommendations by HR and the disciplinary policies in effect, Taylor conducted fact-finding before imposing or proposing disciplinary action against any of his building trades employee. This type of fact finding was part of the SU disciplinary policy under both the former and present policies. (Keener, T. 105, 131, 134; Mann, T. 224-225; Taylor, T. 330-331).

The Work Day at SU's Department of Physical Plant

16. Most employees at the SU Physical Plant Department work a day shift from 7:00 A.M. to 3:30 P.M. There is a skeleton crew that works a night shift. Day employees are allowed a 15-minute break in the morning. These same employees are allowed a 45-minute lunch period that runs from 11:45 A.M. to 12:30 P.M. These practices as to work hours, the morning break, and the lunch period were set out in a September 29, 1993 Memorandum from former Director Jim Brown to Physical Plant employees (the "Brown Memorandum"). Although there has been very limited

distribution or posting of this memorandum in recent times, the policies it sets forth have been applied since its issuance. (Mann, T. 171-172; Maddux, T. 283-285; SU Exhibit 54).

17. Non-exempt Physical Plant employees punch in and out at the beginning and ending of the workday on a time clock that is located in the Physical Plant/Maintenance Building. These clock-punching procedures are not utilized in regard to employees taking their morning breaks or lunch breaks. (Mann, T. 221-224, 260).

18. There have been instances where various Physical Plant employees return to the Maintenance Building before the close of the workday, sometimes as early as 3:00 P.M., in order to straighten and put away their things, and lock up their equipment. There is no governing rule on this point and some employees believe that they have discretion near the end of the day as to when to cease work on a particular task and return to the Maintenance Building. These employees have not been formally disciplined for such early returns, although management representatives have spoken to HVAC Mechanic Davis about the practice. (Brittingham, T. 690-691, 712-713; Baugh, T. 725-728; Davis, T. 751-753).

Records in Use by Physical Plant Department and Maintenance Mechanics

19. As employed in the Physical Plant Department, a work order constitutes a job request from a member of the SU campus community, or the document is generated by the Department itself as part of the preventative maintenance program. The vast majority of work orders are recorded in a computer system. Work orders are broken down and assigned to one of five categories: emergencies, preventative maintenance, routine maintenance, minor repairs and work to be done by a specific date. For auxiliary SU buildings such as the UC/C, Maddux has the responsibility for seeing that the tasks called for at those locations are completed in accordance with pertinent work orders. (Mann, T. 255-259; Maddux, T. 273-274).

20. In the Physical Plant Department, Maintenance Mechanics are required to keep a daily log. This includes an inspection sheet, a record of their rounds, and a time accountability sheet. (Mann, T. 175).

Application of SU Physical Plant Lunch Break Policy

21. In accordance with the Brown Memorandum, Physical Plant management expects that employees will only take their lunch during the authorized break period of 11:45 A.M. to 12:30 P.M. Also consistent with that directive, Physical Plant supervisors expect their employees to obtain their approval when the employees take "early" or "late" lunch by departing before 11:45 A.M. or returning after 12:30 P.M. In such a situation, an employee was expected to take an appropriate form of leave. (Mann, T. 172-173; Maddux, T. 297-298; Taylor, T. 336).

22. Several Physical Plant employees have made standing arrangements with their superiors to deviate form [sic] the standard lunch period set forth in the Brown Memorandum. On various days of the week, Multi-Trades Chief Maddux, with the permission of his supervisor, extends his lunch period by half an hour to work out at the gym. He submits a leave slip and takes compensatory time on each occasion that he does this. In his role as Multi Trade Chief, Maddux has never denied a subordinate permission to adjust his lunch break outside the normal 11:45 A.M. to 12:30 P.M. time frame. (Maddux, T. 298; 305-307).

23. Maintenance Mechanic Lead Shenton also works out at the gym and uses his lunch hour from 11:45 A.M. to 12:30 P.M. for this purpose. He then returns to his office and adds his 15 minute morning break to the end of the lunch period in order to actually eat his lunch. He obtained permission for this adjustment from his supervisor, Chief Maddux. Shenton had been engaging in this practice for some 5 years. Yet he only obtained permission from Maddux sometime in the winter/spring of 2002, despite the fact that his activities were common knowledge in the Physical Plant Department. (Davis, T. 765-767, 771-774; Shenton, T. 824-826, 839-840, 847-848; Fact- Finding 6).

24. In the September/October period of 2000, Physical Plant supervisors observed a tendency for some of their employees to "lean" in or out of their lunch breaks, either by departing early for lunch or coming back late. Some Physical Plant employees were more inclined to "lean" into their lunch hours early, but were most reluctant to return late. These individuals were comfortable leaving for lunch 5 to 10 minutes early, but would feel the need to obtain permission from the appropriate supervisor if departing 15 to 20 minutes early. (Taylor, T. 335-336; Brittingham, T. 694-695, 877; Davis, T. 762-763).

25. Beginning in September/October of 2000, Assistant Director Taylor verbally advised some Physical Plant employees from time to time as to the necessity of adhering to the time period permitted for lunch breaks. Additionally, during staff meetings that he conducted, Chief Maddux made comments to various employees as to the practice of easing in and out of lunch breaks. There have not been many known incidents where an employee has been disciplined for sliding in and out of lunch breaks. (Taylor, T. 335-336; Brittingham, T. 694-695 710; Maddux, T. 307-308; 800-802).

Smoking Policy

26. Physical Plant Department workers and other University employees are not allowed to smoke in SU buildings. Under this policy, Physical Plant workers are not permitted to leave their duty stations to go outside an SU building for the purposes of smoking, unless this is done during lunch or an authorized break period. (Taylor, T. 370; Kenner, T. 1408). As the smoking policy is applied to Physical Plant workers, they are allowed to smoke when they are outside of SU buildings and moving about campus between job sites and assignments. This would include traveling together in University vans. The policy is also not normally applied in a literal sense when Physical Plant workers smoke while actually performing an outside work assignment. (Taylor, T. 369-370; Keener, T. 1408-1410).

27. There have been occasions in the Physical Plant Department where employees have stepped outside of SU buildings to smoke cigarettes during non-break, non-lunch periods, without disciplinary repercussions. (Brittingham, T. 692-694; Baugh, T. 728-729; Davis, T. 757-758).

Union Organizing Activities and Policies

28. As approved by the UMS Board of Regents on February 28, 1992, UMS Rule VII-2.20 prohibits the solicitation of UMS employees for any purpose in order that they shall have "an undisturbed opportunity to perform assigned duties and responsibilities. (SU Exhibit 56).

29. On March 16, 2001, SU's Human Resources Office issued a memorandum on Union Activities to off-campus representatives of the American Federation of State County and Municipal Employees ("AFSCME"), the Maryland Classified Employees Association, and the Teamsters. Among other provisions, this memorandum advised that unions seeking to recruit new members would have to file a reservation request with the Office of Facilities Reservations. They would then be assigned a space in the University Center where they could "display their materials and meet with interested employees." This memorandum reaffirmed the UMS Rule VII-2.20 restriction on the solicitation of UMS employees. (Keener, T. 1386-1387; SU Exhibit 57).

30. With the right of UMS employees to bargain collectively through union representation being officially enacted into law, effective, July 1, 2001, union organizational activities began to increase on the SU campus. HR Director Keener began receiving complaints from supervisory and non-supervisory personnel that SU employees were being bothered at work by various union organizers. (Keener, T. 1406).

31. In response to these complaints, Keener advised the complaining parties that there was no obligation to talk to an organizer and that the organizer should be told to leave them alone to do their work. Additionally, she advised that employees could speak with organizers at SU before work, after work, or during lunch and breaks. HR also distributed copies of the UMS Rule VII-2.20 and its March 16, 2001 memo to those parties who complained. Additionally, the SU Police were also provided with these materials for use when responding to complaints about solicitations by union organizers. (Keener, T. 1388-1391, 1407-1408).

32. With the complaints as to union organizers interfering with work activities and the increase of organizational activities on campus, SU employees were instructed to report suspected violations of the UMS and SU non-solicitation rules to supervisors. Employees in the University Commons area were advised that they could not talk to union organizers while "on the clock," but that such activities were permissible "off the clock" (lunch, breaks). Union organizers were not permitted to enter such non-public locales as the UC/C kitchen and dishwashing areas. (Vandenbergh, T. 652-653, 656-657).

33. On or about October 1, 2001, the Maryland Classified Employees Association ("MCEA") filed a petition with the SHELRB, seeking recognition as the collective bargaining agent for non-exempt employees at SU. (Krawczyk, T. 572). On or about October 15, 2001, and after obtaining the requisite number of authorization cards, AFSCME petitioned the SHELRB to intervene in the representation election. The SHELRB scheduled a representation election for December 12, 2001, in which SU non-exempt employees were to vote on whether to be represented by MCEA or AFSCME, or whether to have no collective bargaining agent at all. (Krawczyk, T. 576-577; Pryor, T. 1214-1215).

34. In the December 12, 2001 election, AFSCME received the highest number of votes cast, with MCEA and no representative options finishing second and third, respectively. Since there was no majority winner, the SHELRB scheduled a run off election between AFSCME and MCEA for February 6, 2002. (Krawczyk, T. 778-779; Pryor, T. 1214-1215).

35. In the February 6, 2002 run-off election, MCEA received a majority of the votes cast. (Pryor, T. 1214).

Incidents Prior to the Formal Imposition of Discipline on Pryor

36. Non-exempt employees elected Pryor to serve as a representative to the SU Staff Senate. The Staff Senate is an advisory body that represents exempt, non-exempt and contingent personnel at the University. It serves in an advisory capacity, consulting with the SU Administration and Human Resources Department on employment practices, policies and issues. (Kenner, T. 57-58; Pryor, T. 1174-1178).

37. Pryor was also a member of AFSCME. He had been identified as a "key employee" by AFSCME, an individual who was committed to bringing collective bargaining to the campus and willing to expend time in organizational efforts. During AFSCME's initial organizing campaign, he was active in obtaining authorization cards to support the union's intervention in the first representation election. (Krawczyk, T. 576-577; Pryor, T. 1189-1190). Pryor's fellow employees and SU management personnel were aware of his support for and participation in AFSCME organizational activities. (Keener, T. 115; Mann, T. 251; Maddux. T. 308-309; Taylor, T. 380, 1384; Pryor, T. 1189).

38. As early as the spring of 2001, and continuing into the fall, there were times during the workday when Pryor engaged in discussions with SU employees at the University Commons. Some of these conversations would last up to 15 minutes. He was observed in these activities by various supervisors, including Jane Fandray, Director of Dining Services, and Tony Cerulli, the Assistant Director of Dining Services. These individuals complained to Director Mann, Assistant Director Taylor, and Keener that Pryor was spending inordinate periods of time away from his duty station and interfering with other SU employees in the performance of their job duties. In her position as HR Director, Keener had not received similar complaints as to other employees during this period. (Keener, T. 62-64, 70; Taylor, T. 338-341).

39. HR Director Keener first met Pryor at a Staff Senate meeting in September of 2001. Keener began seeing and talking to Pryor with some degree of regularity and at times he made almost daily complaints about problems and issues at SU. In light of the complaints that she had received regarding Pryor being away from his duty station, Keener informally counseled Pryor. She advised him that he was spending too much time and energy complaining to supervisors and employees about innumerable matters and that he needed to be aware that his activities were having an adverse impact on SU and himself. Keener also stated that Pryor needed to be "good citizen" by working within guidelines and rules and being at his workstation during duty hours. Keener formed the opinion that Pryor was an "extremely disgruntled employee." (Keener, T. 65-67, 70, 89-90, 136-137).

40. In October of 2001, Pryor prepared a petition seeking the reinstatement of a discharged SU employee. For a number of days, he brought the petition to campus and sought to circulate the document and procure the signatures of other employees on it. Pryor ultimately intended to submit the petition to University administrators. (Pryor, T. 1190-1193, 1197-1198).

41. Keener received a call informing her that Pryor was spending time circulating the petition and was interfering with other employees in the performance of their duties. (Keener, T. 94).

42. Keener met with Mann in the latter's office and Pryor was called over to the meeting. Keener advised Pryor that his circulation of the petition was interfering with other employees and disrupting the workplace. Keener entered into negotiations with Pryor over the

matter. Ultimately, Pryor admitted to initiating the petition and circulating it during work hours. Keener agreed that Pryor would not be reprimanded for the incident and that no entry would be made in his personnel records. She also agreed to look into the matter and to bring the situation of the discharged employee to the attention of SU administrators, as appropriate. (Keener, T. 99-103; Pryor, T. 1200).

43. As Taylor continued to receive complaints about Pryor occupying and bothering SU employees in various discussions during duty hours at the Commons, he called Pryor to his office early on the morning of October 16, 2001 for counseling. Taylor referenced the complaints as to Pryor tying up Commons employees for 10 to 15 minute periods during work hours. He advised Pryor that he could engage in discussions or other activities with other employees during his and their breaks or lunch hours. However, Taylor also told Pryor that there was more than enough work for him and other maintenance mechanics to do, without his convening unofficial discussions during work hours. Pryor responded that Commons employees were asking him questions as a Staff Senator and in regard to the possible union election. Taylor prepared a written memorandum as a record of this meeting with Pryor. (Taylor, T. 339-340, 342-343; Pryor, T. 1201-1202; SU Exhibit 40).

November 12, 2001

44. Brian Polkinghorn is the Director of SU's Conflict Resolution Center. (Maddux, T. 291-292; Pryor, T. 1181). In 2001, Polkinghorn was designated by the SU President to conduct an "appreciative inquiry" of the institution's Physical Plant Department. (Keener T. 107-108, Pryor, T. 1180-1185). This inquiry was prompted by employee complaints regarding pay and personnel matters within that department. (Taylor, T. 389-391).

45. In late October of 2001, Pryor attended a Staff Senate Meeting, at which Polkinghorn was an invited speaker. Polkinghorn made some remarks that Pryor interpreted as being derogatory of an AFSCME official, Kim Keller. (Krawczyk, T. 585-586; Pryor, T. 1204-1206).

46. After Pryor reported Polkinghorn's remarks to his union, AFSCME representative Krawczyk made a number of unsuccessful attempts to contact Polkinghorn. She sought to arrange a meeting between herself, Pryor and Polkinghorn in order to discuss the purported remarks about Keller. (Krawczyk, T. 585-587).

47. Krawczyk was finally able to reach Polkinghorn by telephone late on the morning of November 12, 2001. Polkinghorn advised that he was available for a meeting at that very time and invited Krawczyk to come over to his office. (Krawczyk, T. 587-588).

48. Krawczyk drove to Polkinghorn's office and telephoned Pryor in transit. Pryor and Krawczyk met at Polkinghorn's office. (Krawczyk, T. 591; Pryor, T. 1207-1208). They met with Polkinghorn for a period that began shortly before 11:45 A.M. and extended well past 1:00 P.M. Pryor returned to work at the UC/C complex after the conclusion of the meeting, well past 1:00 P.M.

49. Pryor made an entry on his log sheet for November 12, 2001, that he had participated in a "meeting with Brian P." (Maddux, T. 291; Joint Ex. 2). The next day, Assistant Director Taylor, in reviewing Pryor's log and noting this entry, requested Maddux to see if this

meeting had involved Physical Plant business and/or if Pryor had obtained permission to attend. (Taylor, T. 344-345).

50. Maddux met with Pryor who advised that the meeting with Polkinghorn had been during the lunch period on November 12, 2001. Maddux reported this to Taylor, who at that time determined that Pryor had appropriately used his own time for this session. (Maddux, T. 294; Taylor, T. 346).

51. Several days later, Taylor was at a meeting called by SU's President in connection with Polkinghorn's inquiry. While Taylor was having a discussion with Polkinghorn, Dale Maddux, President of MCEA's local chapter, interrupted and asked why Pryor was being allowed to run around campus on union matters. Polkinghorn advised that Pryor had been in his office for two hours during a meeting earlier in the week. (Taylor, T. 346-348). Shortly thereafter, Taylor pursued the matter further with Polkinghorn, who stated that the meeting had occurred on Monday November 12, 2001. It then occurred to Taylor that Pryor might have misstated the facts surrounding his entry on his log for November 12, 2001. (Taylor, T. 348).

52. Taylor investigated the matter further the following day. He had difficulty reaching Polkinghorn by telephone. Later a student aide called from Polkinghorn's office to advise that he had spoken to Polkinghorn, who confirmed that the meeting on November 12, 2001 with Krawczyk and Pryor had run between 11:30 A.M. and about 1:30 P.M. (Taylor, T. 355-356).

53. Pryor subsequently had discussions with Maddux and Taylor. Maddux asked Pryor why he had stayed at the meeting with Polkinghorn beyond 12:30 P.M. without obtaining permission, and Pryor responded that he could not very well have been expected to stop the meeting in order to make a phone call. (Maddux, T. 295). Pryor told Taylor that he did not believe that the meeting had gone on for as long as stated and that he was being punished merely for being in Polkinghorn's office. (Taylor, T. 357-358).

54. On November 19, 2001, Taylor issued a written reprimand to Pryor, citing the latter's "failure to report back to your workstation at the scheduled conclusion of your lunch break period on November 12, 2001, without permission of your supervisor." The reprimand also noted that Pryor had been at a meeting in the Conflict Resolution Center for two hours between approximately 11:30 A.M. and 1:30 P.M., and referenced Maddux's prior advisories to him regarding the requirement that employees be at their work stations except during the lunch period and morning break. (Taylor, T. 355; Joint Ex. 1).

November 30, 2001

55. In the fall of 2001, Pryor was involved in an ongoing dispute with SU officials about the amount of annual leave that he had accrued. He had engaged in a number of e-mail and telephone communications with Multi Trades Chief Maddux on this question. Maddux informed Pryor that his concerns were an issue between and himself and Human Resources. Before lunch on Friday, November 30, 2001, Maddux had another phone conversation with Pryor on this subject. Maddux stated that no decision had been made on Pryor's claims and reiterated that any determination would have to come from Human Resources. (Maddux, T. 665-667).

56. Later that same day, Friday, November 30, 2001, before 3:00 P.M., Pryor was walking back to the Physical Plant building from the UC/C. As he prepared to enter the Air Conditioning Shop, two AFSCME organizers, Arlene Diaz and Dan Abernathy hailed him. Pryor

stopped and began discussing the distribution of AFSCME fliers with these two individuals. (Pryor, T. 1243-1245).

57. At this time, Pryor was observed by Jerry Adkins, a Multi-Trades Supervisor in Physical Plant, and Robert Meigel, a Paint Supervisor with Physical Plant at that time (since retired), who were standing outside the Carpentry Shop. Meigel advised Adkins that Diaz and Abernathy were union representatives. Adkins looked at his watch and found that it was 2:50 P.M. (Adkins, T. 619-622; Pryor, T. 1244-1246).

58. Adkins was aware of the instruction that supervisors were to report whenever there were instances of union representatives interfering with SU Physical Plant employees in the performance of their duties during working hours. Adkins waited several minutes until 3:00 P.M., then went inside the Physical Plant building and reported to Assistant Director Taylor that Pryor was outside the Air Conditioning Shop with union representatives. (Taylor, T. 395; Adkins, T. 622-623).

59. Upon receiving this report, Taylor went to Maddux's office and asked if the latter had given Pryor permission to be back at the Physical Plant building at that particular time of day. After Taylor received a negative response to this question, he and Maddux went outside where they observed Pryor in conversation with Diaz and Abernathy at approximately 3:05 P.M. Taylor instructed Maddux to bring Pryor to his office. (Taylor, T. 397-398; Maddux, T. 669-670; Pryor, T. 1246-1247; SU Exhibit 4).

60. Maddux escorted Pryor into Taylor's office at approximately 3:10 P.M. Taylor asked what Pryor was doing back at the Physical Plant building at that time. Pryor looked at his watch and stated that he usually returned to the building at that time of day. He did not respond when Taylor pointed out that he had been observed outside with the union representatives at 2:50 P.M. that afternoon. (Taylor, T. 398-399; Pryor 1246-1247).

61. After the conclusion of his meeting with Pryor, Taylor reported the incident to Director Mann. Mann instructed Taylor to get more information and report the matter to Ms. Keener. (Mann, T. 186; Taylor, T. 400). Taylor intended to take these steps after the weekend, on the following Monday, December 3, 2001, but he was sick that day and did not report to work. (Taylor, T. 400-401). Taylor did not consult with Shenton on November 30, 2001, although the latter was present at work that day until 6:00 P.M. (Pryor Exhibit 37).

62. Taylor came to work on Tuesday, December 4, 2001. He contacted Shenton who advised that he had not given Pryor permission to return to the Physical Plant building early on November 30, 2001. (Taylor, T. 401-402). Taylor determined to impose a one-day suspension on Pryor, and began preparation of a disciplinary suspension form and cover letter. With Pryor having been previously reprimanded for being away from his workstation without permission, this was the next step in SU's progressive discipline scheme. Taylor telephoned Ms. Keener who advised that she wished to consult with SU counsel as to the timing of such an action. Later in the day Keener called back. She advised that, according to counsel, notice of suspension would have to be given to Pryor by no later than the close of business on December 5, 2001. Late that same afternoon of December 4, 2001, Maddux advised Taylor that Pryor had called in and stated that he was taking annual leave on December 5, 2001, to go hunting. Taylor relayed this information to Keener and also faxed her a copy of the suspension notice that he had prepared. (Taylor, T. 402-405; SU Exhibits 4 and 53).

63. At approximately 4:30 P.M. on December 5, 2001, Mann telephoned Pryor at his home to inform him of a one day disciplinary suspension without pay. Mann related that this was being imposed because of Pryor leaving his workstation at UC/C and returning to the Physical Plant building without the permission of his supervisors on November 30, 2001. Mann read the suspension notice to Pryor. Pryor responded that he had returned to the Physical Plant building early that day in order to discuss the ongoing question of his leave with Maddux. That same day, Mann had the suspension notice delivered to Pryor by the SU Police. (Mann, T. 188-189; Taylor, T. 404-405, 427; SU Exhibit 4; Joint Exhibits 5 and 6).

64. As neither Mann nor Taylor had previously heard Pryor's claim that he was returning early to the Physical Plant building on November 30, 2001, to discuss his leave issues with Maddux, Mann asked Taylor to look into the contention. Taylor approached Maddux later that same day, December 5, 2001. Maddux advised that he had not given Pryor permission to return to the Physical Plant building on November 30, 2001, so as to further discuss the ongoing question of the latter's annual leave. Taylor reported this back to Mann. (Mann, T. 189-190; Taylor, T. 405-406; SU Exhibit 4).

January 22, 2002

65. Sometime after 2:00 P.M., Pryor went out on the loading dock behind the UC/C. (Pryor, T. 1270). He observed a group standing near a compactor that included SU Physical Plant employees Brittingham and Blum, student helper Ryan Kelly, and AFSCME representatives Krawczyk and Diaz. Pryor descended from the loading dock and walked over and joined the group. (Vandenbergh, T. 644-646; Pryor, T. 1270-1273).

66. Somewhat contemporaneously, George Vandenbergh, the SU System Manager for Dining Services, was called to the loading dock in connection with a delivery being made there. At approximately 2:10 or 2:15 P.M. he arrived at the dock and remained there for ten minutes as he dealt with the delivery. During this period, he observed Pryor speaking with the AFSCME representatives. (Vandenbergh, T. 644-646).

67. Although Vandenbergh did not know whether Pryor was on or off the "clock," he was aware that he was supposed to notify appropriate officials if union representatives were dealing with SU employees during work time. Vandenbergh went directly to his superior, Jane Fandray, SU Director of Dining Services, and advised her as to his observations of Pryor. (Vandenbergh, T.645-646).

68. At 2:30 P.M., Fandray telephoned Assistant Director Taylor. She advised him that her subordinate Vandenbergh had observed Pryor outside the UC/C complex for approximately 10 minutes, speaking with two union representatives in the loading dock area, and that Pryor was still there when Vandenbergh left the scene. Taylor obtained Vandenbergh's number from Fandray and telephoned him. Vandenbergh confirmed his observations of Pryor to Taylor. (Taylor, T. 432-434; Vandenbergh, T. 647).

69. After speaking with Vandenbergh, Taylor accosted Tim Jones, Energy Manager in the Physical Plant Department, and asked Jones to accompany him to the loading dock area. Taylor wished to see if Pryor was still at that location and he wanted to have a witness. (Taylor, T. 434-435).

70. Taylor and Jones made a four-minute walk to the UC/C building. (Taylor, T. 435). They crested a hill overlooking the loading dock area at approximately 2:45 P.M. and saw Pryor speaking with Blum and the two female union representatives. Jones also pointed out Brittingham to Taylor. Jones and Taylor proceeded down the hill to the loading dock. (Taylor, T. 435-438).

71. Pryor observed Taylor and Jones coming down the hill. Krawczyk and Diaz left the area in a northerly direction, while Brittingham and Kelly got in the former's van to return to their job site. Pryor and Blum went back inside the building, through the boiler room to the service elevator. They got in the elevator and were soon joined by Taylor and Jones, but Pryor had no discussions with Taylor at that time. (Taylor, T. 438-439; Brittingham, T. 859; Pryor, T. 1274, 1283-1285).

72. The next day, January 23, 2002, Taylor called Pryor into his office. Pryor explained that at the time he had been seen by Taylor and Jones on January 22, 2002, he was between jobs and was merely at the UC/C loading dock for a quick cigarette break. Pryor stuck to his version of events when Taylor pointed out that he had been seen by Vandenbergh the previous day at the same location for a ten minute period around 2:15 P.M. (Taylor, T. 439-440; SU Exhibit 8). Taylor also called Blum into his office regarding the matter of the previous day. Blum advised that he had left the UC/C for a ten minute period to get a truck at the Physical Plant building and that he had observed Pryor speaking to two union representatives, both when he left and when he returned. (Taylor, T. 442-444; SU Exhibit 7).

73. With Pryor having received an earlier one-day suspension for being away from his workplace without permission, Taylor recommended to Mann that a three-day suspension be imposed upon Pryor for another infraction of this nature. Mann agreed and Keener approved the recommendation after reviewing the background information and facts that had been obtained. (Keener, T. 78; Taylor, T. 445; SU Exhibit 53).

74. Taylor prepared a Notice of three-day suspension for Pryor being away from his workstation without permission on January 22, 2002, together with a cover memorandum. Mann executed the Notice of Suspension as department head, and the notice and memorandum were given to Pryor on January 25, 2002. (Taylor, T. 445-446; Joint Exhibits 8 and 9).

May 9, 2002

90. At approximately 11:50 A.M. on May 9, 2002, Pryor telephoned Krawczyk and asked that she meet him on campus to receive several documents. Krawczyk drove to SU and met Pryor at the loading dock behind the UC/C and parked. Pryor got into her vehicle. (Krawczyk, T. 984-985; Pryor testimony).

91. Pryor then gave Krawczyk two documents: (a) a flyer from MCEA accusing AFSCME of "sour grapes" for challenging the results of the recent election; and (b) a memorandum from Vice President Pusey to SU supervisors as to their conduct during union organizing campaigns. (Krawczyk, T. 985;.Pryor testimony).

92. Pryor was in Krawczyk's vehicle at approximately 12:40 P.M. when Shenton was returning from one of his daily workouts at the gym. Shenton observed Pryor in the vehicle with Krawczyk and looked at his watch to note the time. (Shenton, T. 930).

93. Shenton went inside the Commons building and went to his office. At approximately 12:50 P.M., Shenton left his office to go to the Gull's Nest snack bar in the University Center. Pryor was in still the car with Krawczyk at that time and was observed by Shenton as the latter walked along the loading dock. Shortly thereafter, at approximately 1:00 P.M., Shenton was returning from the Gull's Nest to his office. He noted Pryor and Krawczyk were no longer there. (Shenton, T. 931-932).

94. A few minutes after 1:00 P.M., Pryor came to Shenton's office to discuss some hinges for a refrigerator. Shenton advised Pryor that the hinges were on his cart. There was no discussion at that time as to Shenton having seen Pryor talking with Krawczyk in the latter's vehicle. (Shenton, T. 933-934).

95. Later that afternoon, Shenton reported to Taylor that he had seen Pryor outside in a vehicle with a union representative at 12:40 P.M. and 12:50 P.M. that day. Taylor telephoned Pryor and asked him why he had been in a vehicle outside the UC/C at those times. Pryor responded that he did not remember being outside in a car at those times. Shenton also reported the incident to Maddux. (Taylor, T. 496-498; Shenton, T. 944).

96. Later, Shenton checked the log sheet that Pryor submitted for May 9, 2002. He noted that Pryor had indicated that he started working on a refrigerator door at 12:30 P.M. on May 9, 2002, finishing the task at 2:00 P.M. On May 13, 2002, Shenton prepared a report of the May 9, 2002 incident that went through 3 drafts. In an original version he described his observing Pryor initially and at 12:50 P.M. In the second draft, he added that Pryor had come to his office at 1:00 P.M. to discuss the refrigerator hinges. In the last version, he noted that Pryor had not asked for an extension of his lunch break past 12:30 P.M. The last version he submitted to Taylor, together with Pryor's log for May 9, 2002. (Shenton, T.934-945; SU Exhibits 14, 15, and 16).

97. Later, on May 13, 2002, Taylor prepared a memorandum recording Shenton's observations of Pryor on May 9, 2002, and the review of Pryor's log for that day. He recommended that Pryor be suspended for 5 days for his being away from his workstation, referencing the latter's earlier three-day suspension on January 25, 2002. A five-day suspension was the next step in progressive discipline according to the Chart attached to the February 4, 2002 policy. Taylor also made a handwritten entry as to Pryor's claiming that he did not remember being in the a car at the times in question on May 9, 2002, and attached Shenton's statement and Pryor's log. (Taylor, T. 496-502; SU Exhibits 18 and 52).

98. Mann and Keener concurred with Taylor's recommendation. On May 14, 2002, Mann issued a five-day suspension without pay to Pryor for "leaving your workstation on May 9, 2002, during a time that was not a break or lunch period," and without informing either Maddux or Shenton. (Keener, T. 79; Mann, T.196-198; Joint Exhibit 18).

May 28, 2002

99. A variable air volume control unit ("VAV") is a device that controls air temperature by regulating the air volume in a room. (Taylor, T. 511). There are 65 of these units in the Commons building. (Shenton, T. 995).

100. Preventative maintenance is performed upon the Commons VAVs on a quarterly basis. This includes checking the belts and lubrication. A cycle of such preventative maintenance can require 10 days or more to complete. (Taylor, T. 511-513, 522-523; Shenton, T. 995, 1000).

101. The Maintenance Mechanics assigned to the Commons building, Shenton, Pryor, and Classing, perform this VAV preventative maintenance work. Work orders for this maintenance are generated quarterly, with Shenton attaching a check off sheet of the VAVs, each listed by number. (Taylor, T. 512-513, 521; Shenton, T. 995, 1000).

102. Another important component of the quarterly VAV preventative maintenance is the inspection and replacement of the air filters. The mechanic checking a particular VAV during quarterly maintenance determines whether the unit's filter needs replacement. After checking or replacing a particular unit, the mechanic doing the work is to place his initials and the date on the edge of the VAV itself. He then inserts his initials next to the number of the particular unit on the check off sheet, which is clipped to the work order. The mechanic also records the task on his log sheet. (Taylor, T. 514-515, 521-522; Shenton, T. 995-997; 1010).

103. Because of the architectural design of the Commons building, some of the VAVs are located in the ceilings and are difficult to service. For these units, a mechanic must often obtain an 8 to 10 foot ladder and remove ceiling tiles in order to access the units. Additionally, to properly insert a pliable filter into the tracks that are located on the top of each VAV, the filter must sometimes be flexed or bent. If a filter is placed on top of the tracks of a VAV filter, instead of being inserted into the tracks, the unit will function, but at somewhat reduced efficiency. (Taylor, T. 521-523, 525; Shenton, T. 1031-1032).

104. At least as early as March of 2002, Maddux gave instructions to Shenton to check the work of Maintenance Mechanics under him, Pryor and Classing. It was expected that Shenton would check the work of these subordinates frequently during this period. Accordingly, Shenton was to take Pryor's work log for a particular day and actually inspect the work that had reportedly been done. Additionally, he was to compare Pryor's work log with the daily schedule to ascertain how much Pryor had been able to accomplish in certain areas. (Taylor, T. 528-532).

105. On May 28, 2002, Pryor performed preventative maintenance of various VAVs in the Commons, reporting on his log that he devoted 5.25 hours to this task. He noted the units that he had inspected by placing his initials next to the corresponding units on the check off sheet attached to the work order. Of these units he failed to place his initials and "5/28/02" on the edge of VAVs 4, 6, 7, and 2. As to some four other units that he noted as having inspected that day, he merely laid the air filters on top of the tracks on the VAV, rather than inserting them in the tracks. On VAV 31 in the Caroline Room of the Commons, Pryor jammed the filter into the tracks in such a way that it was twisted and protruding some 10 to 12 inches above the unit, in a position where it could not filter air. Pryor placed his initials and "5/28/02" on the edge of the filter. (Shenton, T. 1010-1013; Joint Exhibit 21; SU Exhibits 20 and 23).

106. Later that day or the next day, Shenton reviewed Pryor's log for May 28, 2002. Knowing that most of the Commons VAVs had already been checked as part of the current quarterly cycle of preventative maintenance, Shenton was suspicious of the "5.5 hours" that Pryor had placed on his log as time spent on this task. Accordingly, Shenton retraced Pryor's steps through the Commons and checked the VAVs that Pryor reported he had worked on. Shenton found the omissions in initialing on the edges of some of the filters and the four that had been merely laid on top of the tracks. (Shenton, T. 1007, 1011-1012; Joint Exhibit 21; SU Exhibit 20).

107. Finally, Shenton entered the Caroline Room and noticed the protruding filter above VAV 31. Shenton reported the condition of VAV 31 to Maddux who came to the Commons and

took a photograph of the unit. The filter was then properly reinstalled. Maddux and Shenton then reported to Taylor, who requested a written statement. Shenton prepared a report that same day. At no time was there an attempt to contact Pryor in order that he could view the objectionable filter installation. (Maddux, T. 914-916, 924-925; Shenton, T. 1016-1018, 1023-1026; SU Exhibits 20 and 23).

108. On May 31, 2002, Taylor met with Pryor and issued a written reprimand for poor performance of job duties and failure to adhere to standards of workmanship. He specifically cited the failure to put initials on filter edges and the improper installation of filters, including the jamming of VAV 31 into the filter rack. When presented with the reprimand, Pryor stated that he would not have done these things and that Shenton was setting him up. (Taylor, T. 516-519; Joint Exhibit 20).

June 16, 2002

109. A number of months after Taylor assumed the position of Assistant Director of Physical Plant, he began attending staff meetings at the University Commons in an effort to address complaints that had been made regarding the maintenance and upkeep of that facility. The purpose was to coordinate maintenance requirements with events that were taking place at the Commons. Normally, Assistant Dining Director Cerulli chaired these meetings. (Taylor, T. 326-328).

110. Contemporaneously, he emphasized to Shenton that he was in charge of maintenance activities in that building. Accordingly it was Shenton's role to keep Commons staff and supervisors informed as to maintenance activities and to report back to Physical Plant as to problems with equipment or other difficulties. Subsequently, Taylor began taking Shenton to the Commons staff meetings. Ultimately, Shenton began attending these meetings alone. (Taylor, T. 328-330).

111. During the week beginning June 10, 2002, Shenton attended the regular meeting of UC/C staff as a representative of the Physical Plant Department. One of the chefs in the Student Cafeteria requested that the pizza oven and other equipment in the kitchen be cleaned. In regard to the pizza oven, and although this had never been done by SU maintenance staff before, the chef requested that the conveyor belt and the shafts' rods and gears at the end of the oven be cleaned so as to remove the crumbs, perhaps utilizing a brush. It was noted that the cafeteria would be shut down on Sunday June 16, 2002, presenting an opportunity for such work. (Shenton, T. 1046, 1097, 1125-1126, 1128-1129

112. On June 13, 2002, Shenton prepared two work orders for clean up activities in the Commons boiler room and the removal and cleaning of exhaust fans in various bathrooms. (Joint Exhibits 25 and 26). On June 14, 2002, he prepared three work orders for work in the kitchen of the student cafeteria. One instructed to "clean inside of wok hood and remove built up grease." (Joint Exhibit 27). A second stated "clean inside of griller's hood." (Joint Exhibit 28). A third instructed to "clean the pizza conveyors on the pizza oven" and "clean up any mess when finished." (Joint Exhibit 29). Shenton gave these work orders to Pryor. (Shenton, T. 1036-1040).

113. In conjunction with these work orders, Shenton also prepared a weekend work list for Pryor, referencing the work orders that he had written. For Saturday, June 15, 2002, Pryor was to perform the cleanup in the boiler room and the work relating to exhaust fans in the bathrooms. For Sunday June 16, 2002, he was to complete three tasks: a) "clean pizza conveyor on pizza oven;"

b) "clean inside wok hood-use oven cleaner and a piece of wood;" and c) "clean inside griller's hood." (Shenton, T. 1041-1044; 1054-1056; Joint Exhibit 30)

114. On the morning of Friday, June 14, 2002, Shenton approached Pryor while the latter was in the kitchen of the Student Cafeteria in the Commons, working on a refrigerator there. Seeking to explain the weekend work assignment, Shenton asked Pryor to join him and they walked to the area of the pizza oven and other cooking equipment. Shenton took his finger and rubbed it across part of the pizza oven's metal conveyor belt and crumbs came off. Shenton stated that this area of the oven needed cleaning and recommended that it be done with an air compressor and vacuum cleaner. Pryor advised that he thought that it would be better to clean the equipment with a power washer. Shenton replied that this would not be a good idea, given that the pizza oven was operated with both gas and electricity. (Shenton, T. 1047-1048; Pryor testimony; Joint Exhibit 23).

115. Pryor and Shenton then walked past the wok, which was being used by kitchen personnel at that time. Next in line was the griller. Shenton advised Pryor that he should clean the hoods over both the wok and the griller. These hoods were utilized to collect grease and smoke generated by these two pieces of equipment as part of the exhaust system. As Shenton had successfully cleaned the wok hood in the past by employing oven cleaner and a piece of wood, such as a paint paddle, and since the two hoods were essentially identical, he told Pryor to utilize this technique. He instructed Pryor to apply the oven cleaner, let it sit for a period and then scrape it off with the piece of wood. Shenton climbed up onto the griller and demonstrated how this was to be done under the hood. (Shenton, T. 1049-1051; Pryor testimony).

116. Later that afternoon, Pryor contacted Mann with questions about the instructions that Shenton had given him regarding his work for the weekend. Pryor specifically wondered why he had been asked to clean the pizza oven and other equipment. Mann advised him to talk to Shenton in order to obtain any clarification as to his instructions. (Mann, T. 201, 232-233).

117. After this conversation, Mann advised Taylor that Pryor had contacted him with complaints about having been assigned certain work over the weekend and with questions about the instructions he (Pryor) had been given for these tasks. Mann asked Taylor to check with Shenton to make sure that Pryor understood what he was supposed to be doing and if there were any problems. (Taylor, T. 535-536).

118. Taylor then met with Shenton and asked what was going on and whether there was any difficulty in regard to Pryor's work for the weekend. Shenton explained the instructions he had given to Pryor and showed Taylor a copy of the work list, with attached work orders, that had been provided to Pryor. Taylor reviewed these and believed that they were adequate to explain the work envisioned, particularly with the demonstration that Shenton had given to Pryor at the work site. (Taylor, T. 536-537).

119. After the meeting with Taylor, Shenton added the following notation to the bottom of the work list that he had prepared for Pryor over the weekend: "If you have any questions concerning any of these work orders see me before you leave on 6/14/02. All equipment is in my office." He left the work list with this addendum on Pryor's cart. (Shenton, T. 1055-1056; Joint Exhibit 31).

120. At the end of the workday, Taylor emphasized to Shenton that Pryor should be talked to once more as to whether he understood his instructions regarding his weekend work. Shenton went and met Pryor at the time clock in the Maintenance Building just after Pryor had checked out.

Shenton asked Pryor if he had any questions about the work he had been assigned over the weekend. Pryor responded that "as a matter of fact I do." Pryor proceeded to walk down the hall toward the building exit. Shenton followed Pryor a short way and asked what the questions were. Pryor responded that he had been given a lot of cleaning for one maintenance man and that it was a can of worms. Pryor then left the building. (Taylor, T. 537, 539; Shenton, T. 1056-1057; Pryor, T. 1338-1339).

121. On Sunday, June 16, 2002, Pryor worked the entire day cleaning the pizza oven, including the conveyor belt and cogs. He utilized materials that were in Shenton's office, including a paint paddle, oven cleaner, rubber gloves, and paper towels. At the end of the workday, he noted on his work log that he had spent the bulk of the workday, 6:15 A.M. to 1:00 P.M., cleaning the pizza oven conveyor, even working through lunch. He attached a note to the log. In this note he expressed his regret that it had taken so long to clean the pizza conveyor belt and explained that using oven cleaner and a broken paint paddle had been "extremely slow." He questioned why he was not allowed use the power washer as he had originally requested. Pryor expressed his concern, since the oven cleaner was toxic and pizzas were cooked directly on the conveyor belt. He explained that he had worked diligently in an effort to get to the other work orders. (Pryor, T. 1340-1341, 1343-1344; Joint Exhibits 23 and 32).

122. Shenton checked in at work on June 17, 2002, and very shortly thereafter reviewed Pryor's work log and the attached note from the weekend. From this review, Shenton determined that Pryor had used oven cleaner and a wooden stick on the pizza conveyer and had not gotten to the wok and griller hoods at all. He then went to the Commons building and looked at the pizza oven. Shenton observed that the top surface of the conveyor had been cleaned, but that it had not been rotated and that the bottom had not been cleaned at all. Maddux also viewed the pizza oven that morning. (Shenton, T. 1058-1069).

123. That same morning, Taylor had also reviewed Pryor's log and attached note and had noticed that Pryor had reportedly used oven cleaner and a piece of wood to clean the pizza oven. He instructed Maddux to get over to the Commons, check the situation out and determine whether the oven cleaner was going to present some kind of a health hazard. Shenton reported his observations to Taylor and subsequently prepared a written statement upon Taylor's instructions. (Taylor, T. 542-543; Shenton, T. 1065-1068; Joint Exhibit 33).

124. As Pryor was off on Monday and Tuesday, June 17, and 18, 2002, after having worked the weekend, Taylor spoke with Pryor on Wednesday, June 19, 2002. Maddux and Shenton were also present. When asked about the pizza oven incident, Pryor denied that Shenton had given him any instructions as to how to clean the pizza oven and insisted that he had used what Shenton had left for him, oven cleaner and a paddle. He did acknowledge that he had access to an air compressor and vacuum cleaner. (Taylor, T. 541-542; SU Exhibit 29).

125. That same day, Taylor prepared a report of the incident for Mann. He recommended that Pryor receive a one day suspension for deliberately violating Shenton's clear oral and written instructions regarding the pizza oven and using a substance he knew was inappropriate. (Taylor, T. 544-546; SU Exhibit 29).

126. Although Mann was out of town at the time, Taylor conferred with him by telephone on the matter and also consulted with Keener. It was determined after these discussions that Pryor should be suspended for five days. (Keener, T. 81; Mann, T. 198-200; Taylor, T. 543-547).

127. On Thursday, June 20, 2002, Taylor, acting as Mann's designee, delivered a notice to Pryor that suspended him for five days without pay. The notice cited Pryor's poor job performance and workmanship in failing to follow Shenton's instructions in cleaning the pizza oven/conveyors on June 16, 2002. (Taylor, T. 547-548; Joint Exhibit 22).

128. In the past, there have been occasions when an outside contractor, Ocean Spray, has cleaned the wok and griller hoods. This company would typically isolate the area with tape and then utilize a power washer. (Shenton, T. 1101-1102; Pryor testimony).

129. An outside contractor, EMR, also periodically cleans the pizza oven. In a maintenance manual provided by the oven's manufacturer, Middleby Marshall, daily maintenance activities are described and recommended, including brushing the conveyors and removing and cleaning the crumb pans. The manual also addresses and details more heavy maintenance operations, involving elaborate disassembly, cleaning and reassembly procedures. (Shenton, T. 1101; Pryor testimony; Pryor Exhibit 20).

Additional Findings of Fact

Based on the evidence presented, I propose that the HELRB find the following additional facts by a preponderance of the evidence:[7]

Preliminary Matters[8]

1. In early October 2001, Pryor prepared and circulated a petition seeking reinstatement of a recently discharged SU employee. Keener advised Pryor that he could not circulate the petition at any time because he was doing it during his work time and interfering with the work of other employees, because it was a confidential employee matter, and because Keener believed that Pryor had no authority to take on personnel actions and remedies himself. (Watson TR 130; Watson FF 40-42).

2. Pryor had permission from the discharged employee and his wife to circulate the petition, and Pryor told Keener that he had this consent. (Watson TR 1192-1193, 1199). Pryor was circulating the petition on another employee's behalf and it involved workplace issues.

3. Keener ordered Pryor to stop circulating the petition.

4. Although Keener had the right to prohibit Pryor from circulating the petition on work time, her order to Pryor to stop circulating the petition at any time on behalf of a discharged coworker was motivated by the University's desire to thwart Pryor's concerted activity.

5. Keener's stated reason for requiring Pryor to stop circulation of the petition among the employees was invalid and pretextual, in part, thereby supporting the inference that the University had an unlawful motive. She had both valid and invalid reasons for objecting to Pryor's

[7] The parties submitted proposed findings of fact. Those findings that appear in this decision were adopted and those that do not appear were rejected. The parties' proposed findings of fact were adopted or rejected, as applicable, for the reasons addressed in the Discussion section of this decision.

[8] Transcript pages from the personnel hearing are identified as "Watson TR". Transcript pages from the ULP hearing are identified as "TR". Stipulated findings of fact from ALJ Watson's decision are identified as "Watson FF".

circulation of the petition. However, her desire to prevent him from circulating the petition at any time was invalid.

6. Michael Taylor, Assistant Director of the Physical Plant Department, and one of Pryor's supervisors, had knowledge that Pryor was supporting AFSCME in September 2001, before Pryor participated in circulating the petition regarding the recently discharged employee. (Watson TR 380, 1384).

7. In September 2001, Keener informally counseled Pryor because of complaints she had received regarding his being away from his work station and interfering with the work of other employees during work time. She told Pryor that he could do what he wanted before and after work and on breaks or at lunch, but that during work time he was required to be working. Keener did not receive similar complaints about other employees being away from their work station or disrupting the work of other employees. (Watson TR 68-70).

8. Keener's additional comments to Pryor in September 2001 that he was spending too much time and energy complaining to supervisors and employees about innumerable matters, together with her opinion that he was an "extremely disgruntled employee," demonstrated an intent to interfere with Pryor's right to engage in concerted activity on behalf of employees regarding workplace issues on his own time. (Watson FF 39).

9. Taylor counseled Pryor on October 16, 2001 regarding complaints about him being away from his duty station and interfering with other employees while both he and they were supposed to be working. (Watson TR 339-340, 342-343, 379-380). Taylor told him that he could engage in discussions or other activities during break and lunch times, but that he had to be working during work time. (Watson TR 381). Pryor understood that the gist of the meeting was that he was supposed to pay attention to University business while he was on the clock and that he had every right to participate in union activities when he was not on the clock. (Watson TR 1234).

November 12, 2001

10. Pryor attended a meeting on November 12, 2001 unrelated to his duties as a maintenance mechanic. Although his regular lunch period ends at 12:30 p.m., he did not return to work from his lunch break until well after 1:00 p.m. He did not have permission from his supervisor to return late from lunch that day.

11. Pryor made an entry on his log for November 12, 2001 about "meeting with Brian P", but listed no time for that entry. Because Taylor had received reports about Pryor being away from his regular work area, he investigated this log entry. (Watson TR 338). When Taylor subsequently received unsolicited information that led him to question whether Pryor's meeting had lasted beyond his lunch period, he looked into it further. (Watson FF 49-53). Taylor's investigation of Pryor's actions on November 12, 2001 was based on legitimate business considerations. It was not undertaken because of improper union conduct and was not motivated by anti-union or anti-AFSCME sentiment.

12. Pryor was issued a written reprimand on November 19, 2001 for returning more than thirty minutes late from lunch on November 12, 2001. Pryor's misconduct violated a work rule in the Employee Handbook that was in effect at the time regarding the failure to report back to a work station at the conclusion of a break or meal period. No similarly situated employee was treated differently than Pryor with regard to this written reprimand. (Watson FF 8, 21-23, 53).

13. The University's issuance of the written reprimand to Pryor for returning late from lunch on November 12, 2001 was not motivated by anti-union or anti-AFSCME sentiment.

November 30, 2001

14. On November 30, 2001, Pryor arrived at work at approximately 6:15 a.m. with about forty pieces of union campaign literature that he intended to pass out to employees before his starting time of 7:00 a.m. He put the union flyers on a desk in the carpentry shop and went down the hall to the bathroom. When he returned from the bathroom, the flyers were no longer there. (Watson TR 1238-1241).

15. Jerry Adkins, Multi-Trades Supervisor, saw the union literature while he was cleaning the shop. He picked up the stack of literature in the carpentry shop and placed it in the office of Paint Supervisor Bob Meigel, who was also a regional president of the rival union, MCEA. Adkins locked Meigel's office because there were personnel files maintained there. Pryor made several requests to Adkins that he return the union materials. Adkins refused Pryor's requests. (Watson TR 628-630, 636-637, 640, 1238-1243).

16. Adkins told Pryor that the literature should be posted on the bulletin boards. He also told Pryor that he would post the materials and pass them out. Adkins distributed the literature to employees in the shop that wanted it. He also posted one piece on the bulletin board in the carpentry shop. Meigel also distributed some materials to employees in the carpentry shop. (Watson TR 628-630, 636-637, 640; 1238-1243).

17. The confiscation and refusal to return Pryor's union literature by the University's supervisory personnel interfered with Pryor's right to engage in protected concerted activity and demonstrates anti-union or anti-AFSCME animus by the University.

18. Later the same day, on November 30, 2001, Adkins and Meigel observed Pryor talking with two union organizers outside the physical plant building at 2:50 p.m. on November 30, 2001. When Meigel told Adkins that Pryor was speaking with union representatives, Adkins reported this to Pryor's supervisor Taylor. After Taylor investigated the report and confirmed that Pryor was speaking with union representatives, he suspended Pryor for leaving his work station and returning to the Physical Plant building without supervisory permission. (Watson FF 56-58).

19. It was customary for Physical Plant employees to self-direct their workday and determine when to return to the Physical Plant where they often mingled with coworkers until clocking out. Physical Plant employees frequently returned to the Physical Plant building before the end of their shift between about 3:00 p.m. and 3:30 p.m. without permission. Employees sometimes returned early for business reasons and sometimes merely congregated with other employees. (Watson FF 18; Watson TR 690-691, 693, 712-713, 725-728, 751-753).

20. The University had no written rule concerning return to the Physical Plant building at the end of the shift. No other University employee had ever been formally disciplined for returning early to the Physical Plant building before the end of their shift. (Watson TR 690-691, 756, 767). Pryor had never been counseled about returning to the Physical plant building before the end of his shift.

21. Anti-union or anti-AFSCME animus was a motivating factor in the University's issuance of a one day suspension to Pryor on December 5, 2001 for the November 30, 2001 incident. This inference is supported by the University's confiscation and refusal to return union

materials to Pryor, the surveillance and reporting of Pryor's conversations with union representatives, the absence of a written rule regarding return to the Physical Plant building at the end of the shift, and the disparate treatment of Pryor for returning there at the end of his shift without permission.

22. The University's decision to suspend Pryor for one day for the November 30, 2001 incident was also motivated by his leaving his work area and returning early to the Physical Plant building without permission. However, the University would not have disciplined Pryor that day if not for its anti-union or anti-AFSCME motivation.

January 22, 2001

23. On January 22, 2002, Pryor was conversing with union organizers and other employees outside near the loading dock for an extended period or periods between about 2:15 p.m. and 2:45 p.m. Pryor was not performing his work duties during this period, even though he was not on an authorized break and was supposed to be working. (Watson FF 66, 70, 72).

24. After investigating the incident, the University suspended Pryor for three days on January 25, 2002 based on his being away from his work area without permission on January 22, 2002 when he was supposed to be working. (Watson TR 509). Pryor had previously been warned and counseled for similar misconduct. (Watson FF 72-74).

25. Pryor's misconduct violated a work rule in the Employee Handbook that was in effect at that time for the failure to inform a supervisor when leaving a work station. (Watson FF 8).

26. This discipline was not motivated by anti-union sentiment or in retaliation for AFSCME support, but rather by the fact that Pryor continued to violate University work rules and policies.

May 9, 2002

27. In early May 2002, Pryor assisted another employee and AFSCME organizer Joyce Krawczyk in circulating a petition on behalf of the Dining Service employees who were addressing the implementation of split shifts. The University did not discipline Pryor or subject him to any adverse action as a result of his involvement with the petition regarding the split shift issue. (Watson TR 981-982).

28. On May 9, 2002, Pryor was observed by Mike Shenton between 12:40 p.m. and 12:50 p.m., after the end of his authorized lunch break, sitting in a car speaking with an AFSCME organizer. Pryor was not engaged in any work duties during this period at a time when he was supposed to be working. (Watson FF 92-93).

29. Pryor noted on his log sheet for May 9, 2002 that he was working on a refrigerator door between 12:30 p.m. and 2:00 p.m. that day, even though he was engaged in nonwork matters during a portion of that time. (Watson FF 96).

30. Pryor's supervisors conducted an investigation of the incident and discussed the matter with Human Resources Director Keener. During the investigation, Pryor told Taylor that he did not remember being outside in a car during the period between 12:40 and 12:50 p.m. (Watson FF 95; Watson TR 496-498, 944).

31. The revised progressive discipline policy that became effective on February 4, 2002 included a work rule violation for failure to inform the supervisor when leaving the work station. Pryor had previously been counseled and disciplined for similar misconduct. (Watson FF 8, 97).

32. After completion of the investigation, Physical Plant Director Mann issued Pryor a five day suspension on May 14, 2002 for leaving his work station during a time that was not a break or lunch period and without informing a supervisor. (Watson TR 97-98).

33. This five day suspension was not motivated by anti-union sentiment or in retaliation for AFSCME support, but rather because Pryor had again violated the University's work rules.

May 28, 2002

34. On or about March 2002, Maddux instructed Shenton to frequently check the work of the maintenance mechanics he supervised, Pryor and Classing. As part of this monitoring of his subordinates, Shenton checked Pryor's work logs and inspected his work. (Watson FF 104; TR 104-106, 120).

35. On May 28, 2002, Pryor was assigned to perform routine maintenance on the VAV air filters. In reviewing Pryor's work for legitimate business reasons, Shenton discovered that Pryor had failed to inspect some of the filters for which he was responsible, and had installed other filters incorrectly. He also discovered that Pryor had installed one filter so poorly that he had seriously damaged it and rendered it useless. (Watson FF 105-107).

36. After investigating this incident, Taylor issued Pryor a written reprimand on May 31, 2002 for the poor performance of job duties. The poor performance of job duties, failure to follow instructions, and the failure to maintain standards of workmanship or productivity are rule violations under the revised progressive discipline policy. (Watson FF 108, 10).

37. This reprimand was not motivated by anti-union sentiment or in retaliation for AFSCME support, but rather because Pryor had violated University work rules regarding job performance. Pryor was not treated differently from similarly situated employees.

June 16, 2002

38. In 2002, Jane Fandray, a supervisor in the Dining Services department, wrote a letter to Pryor's supervisors commending Pryor and the maintenance department for making repairs to kitchen equipment that afforded substantial savings to the University because the repairs were made in-house and did not have to be sent to an outside private contractor. Pryor was able to make such repairs because he had more experience than other maintenance employees in repairing such equipment. (TR 51-53).

39. On or about June 10, 2002, a kitchen chef requested that certain kitchen equipment be cleaned. The cafeteria was scheduled to be closed on Sunday June 16, 2002, providing an opportunity for this work to be done. (Watson FF 111).

40. Pryor was assigned to clean the pizza oven, and the wok and grill hoods, and was scheduled to perform this work on June 16, 2002. On June 14, 2002, Shenton provided Pryor with detailed instructions on how the work was to be performed and the materials to be used, including

direct observation of the kitchen equipment. Mann, Taylor, and Shenton took numerous steps that day to ensure that Pryor understood the assignment. Pryor was provided with sufficient information to enable him to perform the assignment correctly. Shenton had successfully performed some of this kitchen maintenance work himself in the past. (Watson FF 114-120).

41. On June 16, 2002, Pryor failed to follow Shenton's instructions, used the wrong materials, and used a substance in a manner that could have created a health hazard. (Watson FF 121-123).

42. Pryor's supervisors conducted an investigation of the incident and also conferred with Keener. On June 20, 2002, following the investigation, Pryor was suspended for five days for poor job performance and the failure to follow the instructions of his supervisor. Pryor's conduct constituted a rule violation under the revised progressive discipline policy. (Watson FF 10, 122-127).

43. Although Judge Watson subsequently reduced the sanction to a one day suspension based on his evaluation of the progressive discipline policy, the University's issuance of a five day suspension to Pryor for this incident was not motivated by anti-union sentiment or in retaliation for AFSCME support.

July 18, 2002 ULP Charge

A. Change in Work Assignments

44. The University did not change the nature of Pryor's work assignments or provide him with increased "picayune custodial assignments" or "trivial work orders" since May 2002.

B. Access to Maintenance Office

45. After the maintenance office was vandalized in June 2002, the office was locked and both Pryor and Classing were denied access to it. The police conducted an investigation and placed a surveillance camera in the office. The police initially requested that no one be given access to the office, but it was subsequently decided that Shenton needed a key so he could have access to certain work records. A second key was given to the police for use in their investigation. (TR 87-89, 41).

46. The office contained equipment records, emergency telephone numbers, a telephone, first aid kit, and work orders, that were used by the maintenance mechanics. The office also contained a desk that could be used to fill out daily logs and work orders. (TR 39, 41).

47. Pryor and Classing attempted to set up another office with a desk and chair in the elevator service room, and then the fire pump room, to assist them in performing their duties. Maddux asked them to move the desk and chair out of those areas because they did not comply with safety codes. (TR 41-42, 96-98, 101). Maddux suggested that Pryor and Classing use a desk and chair that was already present in the boiler room, or they could use the maintenance building or the food service facility to do their paperwork. (TR 98).

48. The University's action in denying access to the maintenance office was undertaken for legitimate business reasons, affected Pryor and Classing equally, and was not motivated by union animus.

March 8, 2002 ULP Charge

A. Outside Telephone Line

49. At Pryor's request, SU was in the process of installing voice mail on the telephone line in the physical plant office for use by the maintenance mechanics. (TR 22). During this process, it was discovered that the telephone line was an outside line. The phone had originally been installed there about a year or more earlier and had been designated for on-campus use only. Most maintenance mechanics do not have an outside line. When it was discovered that the telephone had an outside line, Robert Maddux changed the phone line in January 2002, on Mann's recommendation, to on-campus use only consistent with the original authorization and the needs of the maintenance mechanics. (TR 22, 92-94; Watson TR 492-493).

50. The change in the telephone from an outside line to one for on-campus use affected Shenton, Pryor and Classing equally. Shenton used to call his wife at lunch time. He was no longer able to do this after the telephone line was limited to on-campus use. (Watson TR 826). Campus police can be contacted through the on-campus telephone line. (TR 93-94).

51. Pryor used the outside telephone line to contact his supervisor on weekends and at other times when his supervisor was not present to obtain information regarding a work order, an emergency, or to advise that he was ready to leave for the day. (TR 23). Pryor did not use the outside telephone line to communicate with AFSCME. (TR 24).

52. The University's action in changing the telephone line affected the three maintenance mechanics equally, was undertaken for legitimate business reasons, and was not motivated by anti-union sentiment.

B. Alleged Harassment and Surveillance in January and February 2002

53. Pryor and Classing required more supervision than Shenton's previous maintenance employees. Several supervisors in Pryor's chain of command were receiving complaints about Pryor not working during work time, and not completing his assigned work, and asked Shenton about Pryor's work activities and whereabouts. Taylor and Maddux gave instructions for Shenton to check on the work of Pryor and Classing, and he was expected to check as often as necessary. As a result, during the period of approximately January through July 2002, Shenton checked Pryor and Classing's work more closely to ensure they were doing their work, and generally supervised them more directly. Shenton was also expected to review Pryor's log on a daily basis during the entire period that he supervised him. (TR 104-107, 120; Watson TR 528-530, 533, 1076-1080).

54. Shenton monitored Pryor and Classing's work by checking to see whether they had completed their work. Shenton contacted Pryor by radio on a seldom basis because he did not like to use the radio. He used the radio if he needed to locate him to assign work or relay a message. (TR 106-108).

55. On February 19, 2002, Pryor's immediate supervisor, Michael Shenton, radioed Pryor about two times to determine his location and inquire as to what he was doing. Shenton was trying to locate Pryor and determine what tasks he was working on that day as part of his regular supervisory duties. He did not follow Pryor to harass him. Maddux investigated Pryor's claim that Shenton was harassing him. He received information from both Shenton and Pryor and determined that Shenton was simply doing his job as a supervisor. (TR 25, 91, 98-99).

56. Shenton called Pryor by radio approximately two times that day about 45 minutes apart. He called when he noticed lights that were out that he thought should have already been replaced during light preventive maintenance ("PM"), and when he also discovered stained tiles that needed cleaning and lights that were out that required use of the lift for their replacement because of the high ceilings. (TR 109-113).

57. Pryor became visibly upset at Shenton and accused him of harassing him. Pryor yelled across the Bistro on one occasion and hollered in front of students in the University Center another time. Shenton told Pryor to shut up only after Pryor hollered in front of students. (TR 91, 113). When Shenton saw Pryor in person, he was upset and told him he was to answer only yes or no on the radio. (Watson TR 1264-1268).

58. Later that day, Taylor, Maddux, Shenton, and Pryor attended a meeting that Maddux called to address the incident involving Shenton and Pryor. During the meeting, Pryor became upset and pointed at Shenton with a pen in his hand. Neither Shenton nor Pryor made a threatening gesture in the meeting. Taylor asked both employees to calm down during the meeting. (TR 81-86). Taylor concluded after hearing from both Pryor and Shenton regarding the day's events that Shenton was properly doing his job as a supervisor, was not at fault, and that Pryor was expected to follow Shenton's instructions. (TR 84-85). Although Shenton supervised Pryor closely, this action was not motivated by anti-union sentiment, but was instead motivated by the University's desire to ensure that the maintenance employees were doing their work.

Suspension Pending Discharge

59. Pryor received a suspension pending discharge notice in September 2002 and was subsequently terminated. (TR 50-51, 89, 108). The letter notifying Pryor that he was suspended pending discharge was never submitted into evidence at the ULP hearing. No witness testified at the ULP hearing regarding the reasons for, and timing of, the University's decision to suspend Pryor pending discharge.

60. During the period between about June and September 2002, Pryor did not see Shenton's notes and did not receive advance notice about any additional allegations during that period that were subsequently included in his termination letter. Pryor was also not afforded an opportunity to refute those additional allegations contemporaneous with the events. (TR 50-51).

Additional Issues

July 16, 2002

61. On July 16, 2002, Pryor experienced a problem with his water pump at home that required him to remain at home to have the problem repaired. He called Maddux and left a message that he would "at least be late getting to work if not requiring the entire day to make this repair." (TR 47).

62. Pryor was able to complete the handling of his water pump problem quite early that day and decided to take off the rest of the day to attend a community social and political event in Crisfield, Maryland. (TR 47-49). Pryor did not call back to notify his supervisor that although his water pump problem had been repaired, he had decided to take the rest of the day off for personal reasons.

63. Several days later it was reported to Maddux that Pryor had been at this community event on the same day that he had called in to report his problem with the water pump. After receiving this information, Maddux questioned Pryor as to why he had not reported to work on July 16, 2002. (TR 48-49).

Profane Language/Insubordination

64. Pryor did not direct profane language at his supervisor Maddux, but did occasionally use foul language in his presence. (TR 50).

65. Pryor was insubordinate to Shenton and Maddux and failed to follow instructions issued by them. He failed to report for a meeting with Taylor and Maddux at the end of the day when requested by Maddux. (TR 99-101).

Union Organizing Activities and Policies

66. The Human Resources Department helped to educate employees and supervisors with regard to collective bargaining and employee rights. The Human Resources Department generally maintained a neutral status with regard to collective bargaining and communicated that position to employees and supervisors. (TR 71).

67. Keener sent regular communications to employees, staff, and faculty, by e-mail to update them on the status of collective bargaining, petitions, and elections at SU and at other campuses. (TR 71-72). SU had an outside consultant come to the campus and help educate employees about collective bargaining and their rights. (TR 72).

68. After the first election and prior to the runoff election, SU sponsored an open forum where both AFSCME and MCEA representatives participated and answered questions posed by employees. The forum was facilitated by HELRB. The University invited employees to attend the forum, allowed them to leave their workplaces, and paid employees for the time in which they attended the forum. (TR 72).

69. Keener communicated to supervisors that after the collective bargaining campaign began, the University's ability to discipline employees based on violations of University or workplace policies and procedures remained unchanged, and would not be based on whether an employee was for or against a union. (TR 73).

70. Pryor was a very active supporter of AFSCME during its organizing campaign at SU, which began in the fall of 2001. (Watson TR 729; Watson FF 37).

71. SU management personnel had direct knowledge of Pryor's support for and activities on behalf of AFSCME. (Watson FF 37).

72. The University had a written rule regarding the solicitation of University employees. The text of that rule was not part of the record in this ULP proceeding. The University communicated to supervisors and employees that employees could talk with union organizers and engage in union activities before and after work and during breaks and lunch, but not during their work time. (Watson FF 28-32).

73. Several supervisors received complaints about employees being away from their workplace when they were supposed to be working. Supervisors were instructed to report if union representatives were interfering with employees doing their jobs during work time. Dining service supervisors instructed supervisors at management meetings in the fall of 2001 to report to their supervisors if employees or union organizers were seen in places they were not supposed to be. (Watson TR 623, 654). Other employees have been disciplined for speaking with union organizers on work time. (Watson TR 690-691).

Work Rules and Assignments

74. In July 2002, Shenton instructed Pryor to sign his full name on his daily logs rather than just placing his initials as he had done throughout his employment at SU. (TR 42-43, 56). That change was made because Pryor was the only employee who used only his initials on the daily logs rather than his full name. (TR 117).

75. Shenton required Pryor and Classing to indicate on work orders what work they had done through completion of the checklist and/or writing on the form. (TR 117-118). Shenton required both Pryor and Classing to complete the forms with more accuracy and detail, so he could hold them accountable for their work. (TR 117-119; 45-46).

76. In January 2002, Robert Maddux instructed Pryor to include on his log sheets the time that a task was performed in addition to the notation that a task was completed. Maddux instituted this change after a problem had arisen so that Pryor could be protected from accusations about his work. (Watson TR 821-822, 1263). Maddux subsequently gave Classing the same instruction. (Watson TR 954, 977). Shenton kept notes to keep track of employee performance and behavior. (Watson TR 822).

Disciplinary Process

77. As HR Director, Keener had to review and approve all disciplinary suspensions. (Watson TR 76, 119). She would talk to the supervisors involved, look at their documentation, and consider prior disciplinary actions. She did not instruct supervisors to engage in any particular recordkeeping or monitoring with regard to Pryor that was different from any disciplinary actions involving other employees. (Watson TR 76, 119, 125-126). The supervisors in the Physical Plant department consulted with the HR department regarding the issuance of disciplinary suspensions, including the substance of the case and the procedures to be followed. (Watson TR 249).

78. Keener supported the recommendation for the disciplinary suspension of Pryor for the November 30, 2001 incident based on prior counseling sessions with Pryor and his recent written reprimand. Keener concurred with the recommendation for the next level of progressive discipline in the form of a three day suspension of Pryor for a January 22, 2002 incident of being away from his work station. Keener also concurred with the recommendation for a five day suspension of Pryor for an incident of May 9, 2002 in which he was again away from his workstation without permission. This discipline was consistent with progressive discipline. Keener had no personnel knowledge of those incidents. (Watson TR 77-79).

79. Keener recommended a written reprimand of Pryor for a performance issue for an incident that occurred on May 28, 2002. Keener recommended a five day suspension for the incident of June 16, 2002, as well as his accumulation of offenses. (Watson TR 79, 81).

80. No employee in the Physical Plant department has been issued eight disciplinary actions within a ten month period. No employee in that department had the number of disciplinary problems that Pryor had during the period that Taylor supervised Pryor, including employee misconduct or not being where he was supposed to be. (Watson TR 207, 1382-1383).

DISCUSSION

The Substantive Matters

1. The Legal Standard

In this case, the University issued Mr. Pryor two written reprimands, four disciplinary suspensions, and subsequently suspended him pending discharge. The University contends that one written reprimand was based on Pryor's failure to return from lunch in a timely manner, and the other based on poor performance of job duties. The University further argues that three of the disciplinary suspensions, of one, three, and five days, respectively, were based on Pryor's failure to obtain permission to leave his work station. The University further contends that the fourth disciplinary suspension, of five days, was also based on poor performance of job duties.[9] The University argues that the suspension pending discharge was based on the disciplinary actions noted above, as well as other matters that were discovered during further investigation of Pryor's employment. The Petitioner maintains that the University disciplined and discharged Pryor based on union animus, relying on several factors to support its claims. It contends further that the University engaged in the harassment and surveillance of Pryor based on union animus.

The HELRB was established in 2001 to enforce the collective bargaining laws, under Md. Code Ann., State Pers. & Pen. tit. 3 (Supp. 2002), as applied to state employees of higher education institutions, including the UMS and SU. Md. Code Ann., State Pers. & Pen. §§ 3-102(a)(5), 3-2A-05(a) (Supp. 2002).[10]

---

[9] The five day suspension for the poor performance of duties on June 16, 2002 was subsequently reduced to a one day suspension as a result of the personnel decision issued by ALJ Watson on March 24, 2003 in the consolidated personnel case. I shall continue to address it as a five day suspension here because that is the disciplinary action that the Petitioner challenged when it filed a ULP in OAH Case No. HELRB-LRB-01-200200006 on July 18, 2002.

[10] Unless otherwise indicated, all statutory references will be to the 2002 Supplement of the State Personnel and Pensions Article of the Annotated Code of Maryland.

Under § 3-301(a), a qualified employee has the right to:

> (1) take part or refrain from taking part in forming, joining, supporting, or participating in an employee organization or its lawful activities;
> (2) be fairly represented by their exclusive collective bargaining representative, if any, in collective bargaining; and
> (3) except as provided in § § 3-303 and 3-305 of this subtitle, engage in other concerted activities for the purpose of collective bargaining.

Under § 3-302, the statute sets forth the rights of the employer, which include, in pertinent part, the following:

> The State, through its appropriate officers and employees, has the right to:
> (1)(i) determine the mission, budget, organization, numbers, types and grades of employees assigned, the work projects, tours of duty, methods, means, and personnel by which its operations are to be conducted, technology needed, internal security practices, ...; and
> (ii) maintain and improve the efficiency and effectiveness of governmental operations;
> (2) determine the:
> (i) services to be rendered, operations to be performed, and technology to be utilized; and
> (ii) overall methods, processes, means, and classes of work or personnel by which governmental operations are to be conducted;
> (3) hire, direct, supervise, and assign employees;
> (4)(i) promote, demote, discipline, discharge, retain, and lay off employees; and
> (ii) terminate employment because of lack of funds, lack of work, under conditions where the employer determines continued work would be inefficient or nonproductive, or for other legitimate reasons;
> (5) ... set standards of conduct;
> * * *
> (8) take actions, not otherwise specified in this section to carry out the mission of the employer.

Pursuant to § 3-306(a), the State and its officers, employee, agents, or representatives are prohibited from engaging in any "unfair labor practice." That statute grants authority to the Secretary of DBM to define this term. Pursuant to § 3-2A-06, the HELRB may adopt and enforce regulations, guidelines, and policies which define unfair labor practices and establish permissible labor-related activities on the work site. The HELRB may investigate possible violations of the statute or regulations, and hold hearings to fairly determine any issue or complaint. § 3-2A-07.

COMAR 14.30.07.01 defines an "unfair labor practice" by an employer, in part, as follows:

> A. Interfering with, restraining, or coercing employees in the exercise of rights under the Collective Bargaining Law;
> D. Discriminating in hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
> E. Discharging or discriminating against an employee because of the signing or filing of an affidavit, petition, or complaint, or giving any information or testimony in connection with matters under this subtitle;
> G. Engaging in the surveillance of union activities[.][11]

This language in COMAR is similar to the National Labor Relations Act ("NLRA") § 8(a), now codified at 29 U.S.C.A. § 158(a) (2002). The NLRA is a federal law that applies only to private employers and their employees. Since the term, "unfair labor practice(s)," is defined almost identically under the NLRA and COMAR 14.30.07.01, the case law in this jurisdiction and others interpreting the NLRA provisions is strongly persuasive.

Both federal and Maryland labor law permit an employer to discharge employees for misconduct and the violation of work rules, but not for unlawful anti-union motives. In *J.P. Stevens v. NLRB,* 638 F.2d 676 (4th Cir. 1980), the employer disciplined two employees and discharged one. The National Labor Relations Board ("NLRB") found that the employer had discriminated against the employees based on their union activity, found evidence of disparate treatment, and ordered reinstatement and other relief. The U.S. Circuit Court for the Fourth Circuit upheld the Board's order, finding that although there was also evidence of legitimate business reasons for the discipline and discharge, it concluded that the discipline would not have occurred except for the employees' union activity. See, *Poly-America, Inc. v. NLRB,* 260 F.3d 465 (5th Cir. 2001); *McLean Trucking v. NLRB,* 719 F.2d 1226 (4th Cir. 1983); *Goldtex, Inc. v. NLRB*, 14 F.3d 1008 (4th Cir. 1994).

[11] The regulations addressing the definition of unfair labor practices in Maryland institutions of higher education did not become effective until on or about May 28, 2002, after most of the disciplinary actions at issue in this proceeding had already been imposed. However, because the State ULP definition is similar to that found in federal law, federal case law addressing ULP issues is considered analogous. Moreover, in accordance with the HELRB's September 26, 2002 Order, the statute addressing employees' collective bargaining rights, as well as that addressing Employer rights, is also relevant and instructive regarding whether the University was motivated by union animus in its employment actions.

In *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246 (4th Cir. 1997), the U.S. Court of Appeals for the Fourth Circuit determined the sufficiency of a ULP concerning the layoff of employees following a union campaign. Although *Alpo* concerned employee layoffs, in quoting *Goldtex,* at 1011, the Court established the test for determining ULP disputes involving allegations of discriminatory discharge based on anti-union motivation:

> The Board ("National Labor Relations Board" or NLRB") has established a formula for determining when an allegedly discriminatory discharge violates the [Act]. First, the General Counsel must make out a prima facie case that the employer's decision to lay off an employee was motivated by anti-union animus. The burden then shifts to the employer to prove affirmatively that the same action would have been taken even in the absence of the employee's union activity. To make out a prima facie case, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

Alpo, at 250 (parenthetical matters added).

In essence, this analysis applies the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 445 U.S. 989 (1982). The *Wright Line* case discussed the history of decisions addressing "mixed motive" controversies; i.e., where the employer is motivated both by anti-union animus and legitimate business purposes in taking an adverse employment action. The NLRB noted that the shifting burden paradigm described above "represents a recognition of the practical reality that the employer is the party with the best access to proof of its own motivation." *Id.*, 251 NLRB at 1087-88.

The *Wright Line* analysis requires: "In 'situations present[ing] a complex of motives' that the decisional body be able to accomplish the 'delicate task' of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *Id.* at 1089

[citations omitted]. The NLRB set forth the following test for determining whether an ULP was committed based on an employer's motive:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Id. at 1089. See, *Alaska Ship and Drydock, Inc.*, 2003 NLRB LEXIS 102 (2003). This is the test to be applied in this case, as the issue here concerns the motive of the University in disciplining and subsequently terminating Pryor's employment with SU.

In order to meet its prima facie burden, the employee must establish: (1) that the employee engaged in protected activity; (2) that the employer was aware of the activity; (3) that the employee suffered an adverse employment action; and (4) that there was a nexus between the protected activity and the adverse action. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002); *American Gardens Management Co.*, 338 NLRB No. 76 (2002).

As the Court in *Alpo* stated, the NLRB's determination of motive will be upheld if it is reasonable, but "mere speculation as to the employer's real motives registers no weight on the substantial evidence scale." *Alpo*, at 250. Some factors that have been regarded as evidence of anti-union animus include: (1) implied or express threats of termination tied to union activity; *id.*, at 253; (2) surveillance of employees engaged in union activities or the creation of the impression of such surveillance; *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 683 (4th Cir. 1980); (3) notorious union activity just prior to termination; *Alpo*, at 253; *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423 (11th Cir. 1985); (4) the employer's departure from usual personnel policy and practice in terminating the employee; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404 (1983); (5) adverse employment actions against other union activists; *Medtech Security, Inc.*, 329 NLRB 926, 929-30 (1999); (6) disparate treatment; *Holiday Inn East*, 281 NLRB 573, 575 (1986); *Montgomery Ward & Co.*, 316 NLRB 1248 (1995); (7) the timing of employment actions in relation

to protected activity; *Taylor & Gaskin, Inc.,* 277 NLRB 563, fn. 2 (1985); (8) and inconsistent explanations of employment actions; Master Security Services, 270 NLRB 543, 552 (1984).

The employer's knowledge can also be imputed by using such factors as the employer's general knowledge of union activity, expressed hostility to the union activity, timing of the discharge, and the pretext given. *Darbar Indian Restaurant*, 288 NLRB 545 (1988); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd.* 97 F.3d 1448 (4th Cir. 1996).

Although an employee has the right to engage in union activity in the workplace, an employer has the right to institute work rules that limit union solicitation and distribution to nonwork time. *Sara Lee Bakery Group v. NLRB,* 61 Fed. Appx. 1, 2003 U.S. App. LEXIS 3218 (4th Cir. 2003). Management officials may observe open and public union activity on company premises without enagaging in unlawful surveillance of union activities. *NLRB v. Southern Maryland Hosp. Ctr.,* 916 F.2d 932 (4th Cir. 1990). Additionally, supervisors may lawfully report a violation of an employer's valid work rule prohibiting the solicitation or distribution of union materials during work time. *Eastern Omni Contractors, Inc. v. NLRB,* 170 F.3d 418 (4th Cir. 1999).

The Petitioner's Prima Facie Case

1. Protected Activity

The evidence was undisputed that Pryor engaged in concerted activity on behalf of AFSCME throughout the union organizing campaign and in advance of the discipline issued in the consolidated cases. Beginning in the fall of 2001, AFSCME was active at SU in its organizing drive. Pryor became a member of AFSCME, and advocated in favor of that union to other employees. Pryor was also identified by AFSCME as a "key employee" who was committed to bringing collective bargaining to the SU campus and was willing to spend time participating in the Union's organizing efforts. He was active in obtaining authorization cards to support the Union's intervention in the representation election, and throughout the campaign and thereafter. HVAC mechanic Baugh testified that Pryor was a very active union AFSCME supporter. (Watson TR 729).

On December 12, 2001, a representation election was held to determine whether the non-exempt employees at SU would be represented by AFSCME, another union, MCEA, or would have no collective bargaining agent at all. AFSCME received the highest number of votes cast in the first election, but with no choice receiving a majority of the votes, a run-off election was scheduled for February 6, 2002. MCEA received a majority of the votes in the run-off election. Mr. Pryor openly discussed union matters with employees and union organizers on the SU campus, and openly possessed union literature for distribution to employees.

The Petitioner also filed multiple ULP charges with the HELRB on behalf of Pryor. (TR 54). Such action is also considered protected concerted activity and is protected from retaliation under federal and State law. Md. Code Ann. State Pers. & Pens. § 3-301(a)(3); COMAR 14.30.07.01E; 29 U.S.C. § 158(a)(4).

2. Employer Knowledge

The evidence established that SU employees and management personnel were well aware of Pryor's participation in and support for AFSCME's organizing activities. Human Resources Director Donna Keener; Director of the Physical Plant Department, Kevin Mann; Multi-Trades Chief for the Physical Plant Department, Robert Maddux; former Assistant Director of the Physical Plant Department, Michael Taylor; and Pryor, all testified regarding management's knowledge of his active involvement in union activities. There was no dispute regarding Pryor's active involvement in union activity and the Employer's knowledge.

The University argued that the Employer was unaware of Pryor's union activity in early October 2001when he disseminated a petition on behalf of a recently discharged SU employee. Accordingly, the University claimed that it had no knowledge that Pryor was engaged in protected union activity at that time.

The evidence established that University management had knowledge of Pryor's union activity on behalf of AFSCME in advance of all of the disciplinary actions imposed upon Pryor by

the University. In fact, some of the disciplinary actions involved the University's contention that Pryor was engaged in union activity at times when he was supposed to be working. Accordingly, his union activity was open and notorious and management was aware. Keener acknowledged that, at the time of imposition of the first disciplinary action on or about November 12, 2001, she knew that Pryor was actively involved in union organizing. She also knew that he had circulated a petition regarding the termination of another employee. (Watson TR 115-116). Taylor had knowledge that Pryor was engaged in union organizing activities with AFSCME, and knew as early as September 2001. (Watson TR 380, 1384). Kevin Mann and Robert Maddux also had knowledge about Pryor's union activity. (Watson TR 251, 308-309).

Based on the testimony of Michael Taylor, one of Pryor's supervisors in the Physical Plant Department, University management had knowledge that Pryor was supporting AFSCME at the time that he was observed circulating the petition regarding a recently discharged SU employee. Keener testified that Pryor was circulating the petition in early October 2001, before AFSCME filed a representation petition on October 15, 2001 seeking to intervene in the representation election. (Watson TR 94, 99-103, 130, 1190-1193, 1199). Taylor testified that he knew that Pryor was supporting AFSCME in September and October 2001. (Watson TR 380, 1384). Accordingly, SU management had knowledge of Pryor's union activity at the time that he circulated the petition regarding a discharged employee in early October 2001.

3. Adverse Action

The parties agreed that Mr. Pryor was disciplined on seven occasions between November 2001 and September 2002. These involved two written reprimands, four disciplinary suspensions, and a subsequent suspension pending discharge. One reprimand was allegedly based on his failure to return from lunch in a timely manner, and the other based on poor performance of job duties. Three disciplinary suspensions, of one, three, and five days, respectively, were allegedly based on his failure to obtain permission to leave his work station. The fourth suspension, for five days, was

allegedly based on poor performance of job duties. The suspension pending discharge was allegedly based on the previous disciplinary actions and other matters discovered during further investigation of Pryor's employment. The Petitioner also alleges that the University harassed Pryor and engaged in surveillance of his union activities based on union animus.

4. Nexus

Evidence of protected activity

The Petitioner established in its prima facie case a nexus between Mr. Pryor's protected activity and his discipline. Before any discipline was imposed on Pryor, he was active in circulating a petition on behalf of a recently discharged SU employee. The University counseled Pryor regarding his activities in circulating the petition which may be considered protected concerted activity on behalf of another employee regarding workplace issues. *Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984); *FiveCap, Inc. v. NLRB,* 294 F.3d 768 (6th Cir. 2002). The University claimed that it objected to Pryor's participation in circulating the petition because it was disruptive to employees' ability to perform their work duties and because it involved confidential personnel matters. Pryor admitted that he was involved in circulating the petition during work time (Watson FF 42). However, the University ignored Pryor's unrebutted claim that he had obtained consent from both the discharged employee and his wife to circulate the petition, and had communicated this consent to Keener . (Watson TR 130, 1192-1193, 1199). Keener also asserted incorrectly that Pryor "had no authority to take on personnel actions and remedies himself." (Watson TR 130). His actions in circulating a petition on behalf of another employee may be considered protected concerted activity under established labor law. The University produced no employees who testified that circulation of the petition interfered with their work.

Although the University had the right to limit Pryor's actions in circulating the petition during his work time, Keener's testimony demonstrated that she objected to Pryor's involvement with the petition *at any time*. She claimed the petition involved sensitive issues with regard to an

employee's termination, and that he had no authority to undertake this action at all. This demonstrated that she had both legitimate and improper motives for objecting to Pryor's involvement with the petition. While she had the right to prohibit Pryor from circulating the petition during work time, she could not restrict his involvement with the petition at other times. Accordingly, she interfered with Pryor's right to engage in protected concerted activity.

Further evidence that Keener objected to Pryor's right to engage in concerted activity was established through her testimony that Pryor was an "extremely disgruntled employee" who complained almost daily about problems and issues at SU, that he spent too much time complaining to supervisors and employees, that his activities were having an adverse impact on SU and himself, and that he needed to be a "good citizen." (Watson FF 39). Although the University had the right to limit Pryor's actions in engaging in nonwork activities on work time, it did not have the right to squelch his actions in identifying and addressing workplace issues, acting on behalf of other employees, and seeking solutions. This evidence suggests that the University was attempting to stifle Pryor's right to engage in concerted activity because his activity was annoying to them. These incidents occurred shortly before Pryor was disciplined.

Further evidence of a nexus between Pryor's protected concerted activity and the discipline is demonstrated through an incident that occurred on November 30, 2001. Pryor brought union flyers to work that day that he intended to distribute to employees before the start of his shift. He placed the literature on a desk in the carpentry shop well before his shift began while he went to the bathroom. While he was gone, Multi-Trades Supervisor Jerry Adkins, removed the union materials and locked them in the office of another supervisor, Robert Meigel, an official in the rival union, MCEA. When Pryor requested the return of the materials, Adkins refused. Adkins claimed that he subsequently distributed the flyers to employees and posted them on a bulletin board. However, he failed to offer a reasonable explanation for his initial confiscation of the materials or his refusal to return them to Pryor. Adkins claimed that leaving materials on equipment or a desk posed a safety

issue. There was no evidence that the flyers were placed on equipment, and no explanation was provided as to how placement of the papers on a desk posed a safety risk; nor did Adkins provide an adequate explanation for why he refused to return the materials when Pryor asked. Even though Adkins distributed and posted some materials himself in the carpentry shop, he still interfered with Pryor's right to distribute the materials and discuss their content with employees before work time.

Pryor had the right to possess, distribute, and discuss the union materials on nonwork time, and Adkins did not justify his refusal to return the materials on demand. No University rule limiting the areas where materials could be distributed was identified. Adkins, a member of SU management, interfered with Pryor's right to engage in union organizing activity on his own time. As addressed below, Adkins subsequently played a key role in an incident later the same day that led to the discipline of Pryor.

The Petitioner also claimed that SU interfered with Pryor's union activities when his supervisor, Michael Taylor, counseled him on October 16, 2001 regarding his nonwork discussions with employees while Pryor and the other employees were supposed to be working. The Petitioner claimed that Pryor was singled out because employees had always been permitted to converse freely with each other during the workday. However, the evidence established that Taylor's counseling of Pryor was justified by legitimate business considerations for several reasons. Taylor explained to Pryor during the October 16, 2001 meeting that Commons management had complained that Pryor was "tying up their employees in discussions not related to work for 10-15 minutes on numerous occasions lately." (Univ. Ex. 1). The meeting was prompted by complaints from other supervisors regarding Pryor's interference with employees' work time. Taylor also told Pryor that he could engage in unofficial discussions with other employees during his and their breaks and lunch periods. This permitted Pryor to engage in union activity and other personal matters at times when he was not working. That is consistent with University policy, does not prohibit him from participation in union activities on his own time, and is lawful.

The Petitioner's contention that "unofficial discussions" are code words for "union discussions" was not supported by the evidence. A more reasonable interpretation of Taylor's memo in its context is that he was referring to any nonwork-related discussions when he used the terms "unofficial discussions." The Petitioner's claim that Pryor was being treated differently than other employees who engaged in personal conversations is not supported by the evidence. The complaints from other supervisors contended that Pryor was tying up other employees in nonwork discussions for 10-15 minutes on numerous occasions. Although there was some evidence that employees are permitted to speak with each other during the work day, there was no evidence presented that management had knowledge that other employees were having lengthy nonwork-related conversations on numerous occasions, as was reported regarding Pryor. Moreover, the evidence did not establish who supervised the employees to whom Pryor was speaking, and whether they were counseled or disciplined. Consequently, the Petitioner failed to establish that similarly situated employees were treated differently than Pryor. Accordingly, the Petitioner has failed to demonstrate that Taylor's counseling of Pryor on October 16, 2001 was unlawful or demonstrated evidence of disparate treatment.

November 12, 2001

The University imposed a written reprimand on Pryor on November 19, 2001 for a November 12, 2001 incident based on his failure to return from lunch in a timely manner. In the ULP charge filed by the Petitioner on December 18, 2001, the Petitioner conceded that Pryor returned late to work, but argued that the discipline was unlawful and motivated by union animus. The Petitioner based this claim on the contention that Pryor was involved in union business during the lunch break and the issuance of a written reprimand to Pryor without having first issued him a verbal warning was in violation of the University's disciplinary policy.

The record in this proceeding did not contain a written policy that was in effect in November 2001 establishing that a verbal reprimand was required before a written reprimand could be issued

to an employee. The stipulated facts established that an Employee Handbook described a "progressive corrective discipline" process for a variety of work rule violations. These rules included the failure to inform a supervisor when leaving a work station, failure to report back to a work station at the conclusion of a break or meal period, failure to follow instructions, and poor performance of duties. (Watson FF 8). The range of sanctions involved in that progressive discipline process were not expressly identified in this record. Subsequently, Keener revised the Handbook and implemented a new policy of progressive discipline that became effective on February 4, 2002, after the incident at issue in the November 19, 2001 written reprimand. The revised policy referenced an existing range of sanctions between verbal reprimand and termination. (Watson FF 9). Neither the complete Handbook nor the complete revised policy were part of this record.

A September 29, 1993 Memorandum ("the Brown Memorandum") established the day shift in the Physical Plant Department of 7:00 a.m. to 3:30 p.m., a fifteen minute morning break for day shift employees, and a lunch break from 11:45 a.m. to 12:30 p.m. (Watson FF 16).

The stipulated facts from ALJ Watson's decision established that Pryor attended a meeting in the office of Brian Polkinghorn, Director of SU's Conflict Resolution Center, from "shortly before 11:45 a.m." to "well past 1:00 p.m." (Watson FF 48). Polkinghorn told Michael Taylor, Pryor's supervisor, that the meeting lasted for two hours, and a student aide called Taylor to advise that Polkinghorn confirmed that the meeting lasted from 11:30 a.m. to 1:30 p.m. (Watson TR 51, 52). The stipulated facts established that Pryor did not return to his work station until more than thirty minutes past the end of his lunch period.

The evidence presented in this record failed to establish that a verbal warning was a condition precedent to the issuance of a written reprimand on November 19, 2001 when the reprimand was imposed. However, even if a verbal warning was required, Pryor received such a verbal warning when Taylor counseled him on October 16, 2001. That warning made it clear to

Pryor that he was not to engage in nonwork business during work time and that he was free to engage in personal matters before and after work and during break and meal times. (Univ. Ex. 1). There was no evidence presented that the meeting in Polkinghorn's office was related to Pryor's assigned duties as a maintenance mechanic, regardless of whether it involved union matters. Accordingly, Pryor failed to return to work in a timely manner after his lunch break and was engaged in nonwork matters during his extended lunch break. Additionally, there was no evidence presented that Pryor had obtained permission to return late from lunch.

Although there was some evidence that employees had left early or returned late from lunch in September or October 2000, ALJ Watson concluded, and the parties stipulated, that employees felt comfortable leaving five to ten minutes early, felt the need to obtain permission if leaving fifteen to twenty minutes early, and were reluctant to return late. (Watson FF 24). As a result of this tendency of employees to stretch the lunch period, Taylor and Maddux both spoke to employees regarding the need to comply with the time period for lunch breaks. (Watson TR 25).

There was no evidence that any other SU employee returned late from lunch by more than thirty minutes without permission. Although Maddux, a Multi-Trades Chief in the Physical Plant Department, extended his lunch period by thirty minutes on various days of the week to work out at the gym, he did this with permission from his supervisor. Moreover, he submitted a leave slip and used compensatory time to cover the additional time on each occasion. (Watson TR 22).

The evidence established that Michael Shenton, Maintenance Mechanic Lead, also worked out at the gym on a daily basis during his entire lunch period from 11:45 a.m. to 12:30 p.m., and then ate lunch for an additional fifteen minutes. However, Shenton did not take his allotted fifteen minute break in the morning, and used this morning break time for the purpose of eating his lunch. Shenton obtained permission from Maddux sometime in the winter or spring of 2002, but had been engaged in this practice for five years. I do not find that Shenton's practice demonstrated evidence of the disparate treatment of Pryor. Although he engaged in this deviation from the normal lunch

period for several years before obtaining permission, Shenton was not stealing time from his employer. He was simply taking his morning break time at the conclusion of his lunch period rather than in the morning. Moreover, the evidence did not establish that Shenton's *supervisor* was aware of this practice and chose to ignore it, even though ALJ Watson found that this practice was common knowledge in the Physical Plant department. (Watson FF 23). Shenton stated that he never told his supervisor, even after receiving permission. For these reasons, I find that neither Shenton nor Maddux was similarly situated, and that Pryor was not subjected to unlawful disparate treatment.

The Petitioner also argues that the written reprimand regarding the November 12, 2001 incident was motivated by union animus because the investigation that uncovered Pryor's misconduct was initiated as a result of Pryor's protected activity.[12] The Petitioner failed to demonstrate that Taylor's investigation was unlawfully motivated. Taylor investigated Pryor's meeting with Polkinghorn because of the notation that Pryor placed on his log sheet regarding a meeting and because Taylor wanted to determine whether the meeting involved Physical Plant business. Initially, Pryor advised Maddux that the meeting occurred during his lunch period. It was only after additional unsolicited information came to Taylor's attention several days later, that he investigated further and discovered that Pryor had not been forthright and had failed to disclose that the meeting lasted until long after the end of his designated lunch period. When Maddux asked Pryor why he stayed in the meeting until after 12:30 p.m. without permission, Pryor did not deny it. He simply stated that "he could not very well have been expected to stop the meeting in order to make a phone call." (Watson FF 53). An employee who had previously been warned about participating in nonwork matters on work time, should have either returned to work on time at the end of the lunch period, or made the phone call requesting permission to extend the meeting. When

[12] This reason was never raised in the ULP charge file in December 2001. However, as it was raised in the Petitioner's brief as a further basis for unlawful motive, it has been addressed.

Pryor failed to do either and returned to work more than thirty minutes after the end of his lunch period, the University was justified in issuing a written reprimand for returning late from lunch.

The evidence failed to demonstrate that the University's investigation was motivated by unlawful reasons. The Petitioner argued that Pryor had been admonished to cease his concerted activity. Pryor had been warned to cease nonwork business during work time. He had also been told that he could engage in nonwork business, including union matters, on his own time. The evidence failed to demonstrate that SU management undertook the investigation to uncover or chill protected activity. The evidence demonstrated that the investigation was undertaken to determine whether Pryor had engaged in a nonwork matters during work time, and subsequently whether he had been forthright about the duration of the meeting and the time of his return. Taylor's knowledge as to whether there were union representatives present at the meeting was merely incidental to the investigation and Pryor's misconduct. When Taylor determined that the meeting did not involve Pryor's assigned duties, had lasted more than thirty minutes past the end of his lunch period, that he had not obtained permission to extend his lunch period, and that Pryor had initially misled his supervisors about the length of the meeting, that prompted the decision to issue a written reprimand. The Petitioner failed to establish that the November 12, 2001 discipline was motivated by unlawful union animus.

November 30, 2001

The University issued a one day suspension of Pryor on December 5, 2001 for an incident on November 30, 2001 based on his leaving his work station and returning to the physical plant without permission. In the ULP charge filed by the Petitioner on December 18, 2001, it was contended that the suspension was motivated by Pryor's union activities because his union materials had been confiscated by a supervisor earlier that day before his shift, and because employees had never needed permission to return to the physical plant building at the end of the day between about 3:00 p.m. and 3:30 p.m.

The record established that employees regularly returned to the physical plant building between about 3:00 p.m. and 3:30 p.m. to straighten and put away their things, lock up equipment, prepare and review paperwork, and discuss the next day's assignments. Although there was a work rule regarding "stopping work before...the designated time",[13] this rule did not become effective until February 4, 2002, and no written rule existed with regard to when employees could return to the physical plant building. (Watson FF 8-10). Additionally, no employee had ever been formally disciplined for returning early to the physical plant building. A supervisor had merely spoken to HVAC Mechanic Davis about the practice of returning early to the physical plant building. (Watson FF 18).

The evidence established that the University's issuance of this discipline was motivated by both union animus and legitimate business considerations. However, for reasons addressed below, the University failed to prove that this suspension would have been imposed even in the absence of anti-union motivation.

The evidence is undisputed that Pryor arrived at work at approximately 6:15 a.m. on November 30, 2001 with about forty union flyers that he intended to distribute to employees that morning before the start of his shift. After leaving the materials on a desk in the carpentry shop, he went down the hall to use the bathroom. While he was away, Multi-Trades Supervisor Adkins confiscated the materials and locked them in the office of Robert Meigel, Paint Supervisor and a regional president of the rival union, MCEA. When Pryor made several requests for return of the materials before the start of his shift, Adkins refused. Although Adkins claimed he would distribute the materials himself, his failure to return the materials to Pryor for his use before the start of his shift clearly interfered with Pryor's rights under the collective bargaining law to "take part ... in forming, joining, supporting, or participating in any employee organization or its lawful activities"

[13] The full text of that rule was not part of this record, so the portion of the quote that was deleted from ALJ Watson's FF 10 is unknown.

and to "engage in other concerted activities for the purpose of collective bargaining." COMAR 14.30.07.01A; Md. Code Ann., State Pers. & Pens. § 3-301(a)(1), (3) (Supp. 2003); *Cooper Tire & Rubber Co. v. NLRB,* 957 F.2d 1245, 1248-1249 (5th Cir. 1992). The Union election was less than two weeks away at this time. (Watson FF 34). Adkins claimed that he confiscated the materials because he did not permit papers to remain on the desk in the carpentry shop for safety reasons. This reason is not logical and raises a strong inference that Adkins was motivated either by union animus or hostility to AFSCME, the union that Pryor was openly supporting. Adkins claimed that he locked the papers in the office because Meigel maintained personnel files there. While Adkins identified a reasonable basis for locking the office, he failed to offer a legitimate justification for his refusal to return the materials to Pryor on demand. Even though Adkins posted a flyer and distributed the materials to some employees, he still deprived Pryor of his statutory right to distribute the materials himself and discuss their contents with fellow employees before the start of his shift, when such actions were permissible in the SU workplace. Moreover, it appears that Adkins distributed the materials to a limited group of employees in the carpentry shop and posted them on a carpentry shop bulletin board. This deprived Pryor of his right to distribute the materials across the campus, if he wished. If Adkins refused to return the materials because he thought they should be posted on a bulletin board rather than distributed directly, the University identified no such internal rule that imposed this limitation. An employee has the right to engage in solicitation and distribution of union materials on nonwork time in appropriate areas. *Poly-America, Inc. v. NLRB,* 260 F.3d 465, 480 (5th Cir. 2001); *NLRB v. Transcon Lines,* 599 F.2d 719, 721 (5th Cir. 1979).

In this context, on the same day, Pryor was disciplined near the end of his shift for returning to the physical plant building without permission after being seen talking to union representatives. The individuals who observed Pryor and then reported it to his supervisor were Adkins, the SU supervisor who had confiscated his materials that morning, and Meigel, an SU supervisor and

officer in the rival union. It was Meigel who noted that Pryor was speaking to union representatives, and Adkins who promptly reported this fact to Pryor's supervisor. In the context of the morning incident, a strong presumption exists that these SU supervisors were actively engaged in surveillance of Pryor and the report of this information to other SU management based on Pryor's earlier and continuing union activity that day.

The University contends that this discipline was warranted because Pryor had left his work station without permission, was engaged in nonwork discussions during work time, and had previously been disciplined for similar misconduct. Unlike the previous incident in which Pryor extended his lunch period well beyond its expiration, however, there was no written rule regarding return to the physical plant building at or near the end of his shift. Although Pryor had been warned about engaging in nonwork matters during work time, there was no evidence that Pryor had been warned, counseled, or otherwise informed about the practice of returning to the physical plant building near the end of the day. Nor was there any evidence that formal discipline had been imposed on any employee for returning to the physical plant building early at the end of the day. There was extensive testimony that employees regularly returned to the physical plant building between around 3:00 p.m. and 3:30 p.m. for a variety of work-related reasons and often congregated outside the building at that time. (Watson TR 690-691, 693, 712-713). ALJ Watson concluded that Pryor was about to enter the Air Conditioning Shop when he was stopped by two union representatives at 2:50 p.m. and began to discuss union matters with them. (Watson FF 56, 57).

Although Pryor was observed near the physical plant building before 3:00 p.m. engaged in nonwork business, the context of the earlier confiscation of union materials and Adkins' subsequent involvement in reporting Pryor's union activity cannot be ignored. In the absence of a written policy about returning to the plant at day's end, the absence of any employee having been formally disciplined for returning early to the plant, the regular early return of employees to the plant building, and there being no evidence that Pryor was ever counseled about the practice of returning

to the plant, I conclude that the University has failed to prove that it would have disciplined Pryor but for his concerted activity on the day of the incident and the University's anti-union motive. The University interfered with Pryor's right to support a union and engaged in surveillance of his union activities that day. Although the University contends that Pryor was not working during work time, the evidence indicates that the discipline was issued solely based on his early return to the physical plant building without permission, a common practice among employees, and not for some other reason. (Watson FF 63). There is no evidence that any other University employee required permission to return to the physical plant building at the end of the workday. Despite the ten minute differential, this distinction alone fails to prove that Pryor would have been disciplined regardless of his union activities and the Employer's anti-union or anti-AFSCME motive. The evidence demonstrates that Pryor was treated disparately from other employees regarding this incident because of the regular practice among employees for the early return to the physical plant building, and the absence of a clear policy. Although there was no other evidence of Adkins' anti-union sentiment, such hostility can be inferred from his improper confiscation of union materials and failure to return them on demand, together with his highly suspect involvement later the same day in the incident that led to Pryor's discipline. Moreover, by placing them in the office of an MCEA official, for his review and consideration, an inference is raised that he was favoring one union over the other.

I conclude that the evidence establishes that the University had a mixed motive regarding this incident. Accordingly, it has the burden to establish that it would have issued the same discipline in the absence of an anti-union motive, and has failed to meet that burden with regard to the November 30, 2001 incident. *NLRB v. Wright Line,* 662 F.2d 899 (1st Cir. 1981); *Alaska Ship and Drydock, Inc.,* 2003 NLRB Lexis 102 (March 14, 2003).

January 22, 2001 Incident

The University issued a three day suspension of Pryor on January 25, 2002 for an incident on January 22, 2002 based on his being away from his work station without permission. In the ULP charge filed by the Petitioner on January 31, 2002, it was contended that the suspension was motivated by Pryor's union activities because he claimed he had no work station per se and denied that he was engaged in nonwork matters during the period alleged in the suspension notice, from about 2:15 to 2:45 p.m.

ALJ Watson concluded that Pryor was engaged in nonwork matters for an extended period or periods between 2:15 p.m. and 2:45 p.m. on January 22, 2002 on the loading dock behind the University Center/Commons complex ("UC/C"). This conclusion is supported by the facts that Watson found, to which the parties stipulated. Pryor was seen speaking with two union representatives on the loading dock beginning at about 2:15 p.m. for ten minutes by a Dining Services manager, George Vandenbergh, and he was still there when Vandenbergh left. The manager reported this to his superior, Jane Fandray, Director of Dining Services, because he knew of his obligation to report to appropriate officials if union representatives were dealing with SU employees during work time. When Taylor arrived at the loading dock at 2:45 p.m. to investigate, after receiving a report from Fandray, he observed Pryor in the same location and speaking with the same union representatives as had been reported that he was doing at 2:15 p.m. (Watson FF 65-71). The conclusion that Pryor was there either for the entire period or had returned for extended periods is amply supported by the record. It is too much of a coincidence that Pryor was observed in the same place and speaking with the same individuals at both ends of a thirty minute period and for at least ten minutes during that same period. Another employee, Blum, who was also present for a portion of the time and left for ten minutes to retrieve a truck, advised Taylor that he saw Pryor there speaking to two union representatives both when he left and when he returned. (Watson FF 72). The significance of Pryor having been observed speaking with union representatives, who

were not shown to be SU employees, is that Pryor was engaged in nonwork matters for an extended period when he was supposed to be working.

In the ULP charge, the Petitioner argued that he was just passing through the area between jobs and was asked by Blum to help him repair a refrigerator in the Commons Building, but no mention was made of a cigarette break. When questioned by Taylor the day after the incident, Pryor claimed he was on a quick cigarette break. However, he failed to explain why he was seen in the same area speaking with the same individuals at 2:15 p.m. for approximately ten minutes, and again at 2:45 p.m. (Watson FF 72). Having been counseled and disciplined previously for participating in nonwork matters during work time, and being away from his work area without permission, SU imposed a three day suspension in accordance with the progressive discipline policy.

Pryor's claim that he was merely on a quick cigarette break is not supported by the stipulated facts which establish that Pryor was on the loading dock and not working for an extended period or periods between 2:15 p.m. and 2:45 p.m., far beyond the time it takes to smoke a cigarette.[14] Accordingly, the contention that Pryor was disciplined for a mere quick cigarette break and was subjected to disparate treatment because other employees were not disciplined for such minimal breaks, is not supported by the evidence. The evidence does support that Pryor was engaged in nonwork matters for an extended period of time between 2:15 and 2:45 p.m. when required to be working. The extended nature of Pryor's unauthorized break establishes that the discipline was based on legitimate business considerations and not motivated by union animus.

The evidence does not establish that Pryor was treated differently than other similarly situated employees. The evidence failed to establish that other employees were present during this incident for extended periods of time while not engaged in work duties. Moreover, even if another

[14] Contrary to the Petitioner's contention, ALJ Watson never concluded that Pryor was smoking a cigarette during that period on January 22, 2002. (Watson FF 65, 66, 70, 71).

employee had been so engaged, there was no evidence presented that any other employees involved had previously been counseled and disciplined for taking unauthorized extended nonwork breaks during work time, as Pryor had. Moreover, although there was some evidence presented at the personnel hearing that other employees have spoken to union representatives during the work day without discipline, the evidence failed to establish that their supervisors had knowledge of this activity, or that it occurred when the employees were not on authorized breaks or other authorized non-working time. (Watson TR 731-733, 736-738, 740). Although Brittingham testified that he had been disciplined for stopping and talking to union representatives, no further information was provided about that claim. (Watson TR 691).

May 9, 2002 Incident

The University imposed a five day suspension on Pryor on May 14, 2002 for a May 9, 2002 incident based on his leaving his work station during a time that was not a break or lunch period and without informing his supervisor. In the ULP charge filed with the HELRB on June 12, 2002, the Petitioner simply argued that the University engaged in surveillance of Pryor during nonwork hours and then disciplined him on trumped up charges. The Union further argued that Pryor was not present with union representative Jane Krawczyk in her vehicle between 12:40 p.m. and 12:50 p.m., as alleged, and claimed that he had returned to work before the end of his lunch period that day.

ALJ Watson concluded that Pryor was in a vehicle with the union representative from at least 12:40 p.m. to 12:50 p.m. when he was observed by Shenton. Although Shenton observed Pryor at both times in the vehicle, but not in between, it was reasonable for Watson to conclude that Pryor had been present during the entire period because Shenton observed him in the same vehicle near the UC/C loading dock and with the same companion on each occasion. (Watson FF 90, 92, 93). When questioned about the incident by Taylor, Pryor merely stated that he did not remember being in a car at those times, which was far less than a denial. (Watson FF 95). Watson concluded that Shenton's testimony regarding his observation of Pryor at those times was credible, and he

found that Pryor's testimony "was not always consistent or in harmony with the historical record." (Watson, p. 55). He thus credited Shenton over Pryor and concluded that Pryor was away from his work station without permission on May 9, 2002.

The parties stipulated to ALJ Watson's Findings of Fact and I shall rely on his credibility findings as he observed the witnesses in the personnel hearing regarding this incident. There is no evidence that Krawczyk was an SU employee and ALJ Watson also concluded that the Pryor and Krawczyk were engaged in union matters while present in her vehicle. Accordingly, I conclude that Pryor was engaged in nonwork matters at a time when he was supposed to be working, after his lunch period had concluded, and without permission. Again, the only significance to the fact that Pryor was engaged in union matters with a union representative who was not shown to be an SU employee, is that Pryor was yet again unmistakably engaged in nonwork matters during work time. It is notable that Pryor indicated on his log sheet that he was working on a refrigerator door from 12:30 until 2:00 p.m. that day, even though he was in a vehicle and not working for part of that time. (Watson FF 96).

The Brown Memorandum clearly defined the parameters of the lunch period which concluded at 12:30 p.m. The Employee Handbook included prohibitions against the failure to inform a supervisor when leaving a work station and the failure to report back to a work station at the conclusion of a break or meal period. (Watson FF 8). Keener revised the progressive disciplinary policy effective February 4, 2002. That revised policy included prohibitions against the failure to inform the supervisor when leaving the work station, and the failure to report back to the work station at the scheduled conclusion of a work break or meal period. (Watson FF 10). The specific language in the University's written progressive disciplinary policy was not part of the record in this proceeding so it cannot be determined whether the University's decision to impose a five day suspension was entirely consistent with that policy. However, issuance of a five day

suspension to Pryor on May 14, 2002 following the earlier three day suspension imposed on him on January 25, 2002 for a similar violation was consistent with the principles of progressive discipline.

The Petitioner argued for the first time in its brief that because Pryor was assisting in circulating a petition regarding the split shift issue among Dining Service employees in May 2002, the five day suspension regarding the May 9, 2002 incident was motivated by the University's desire to squelch Pryor's protected concerted activity. The Petitioner raised no such argument in its June 2002 ULP and there was but a passing reference to the petition in the Watson transcript. Although the testimony from the personnel hearing supports the claim that Pryor was involved with this petition (Watson TR 981-982), unlike his involvement with the earlier petition in October 2001 involving a discharged employee, there was no evidence in this record that the University pressured Pryor or took any adverse action against him regarding his involvement with this second petition. Accordingly, the Petitioner has failed to establish that the University was motivated by union animus in issuing the five day suspension against Pryor for the May 9, 2002 incident.

May 28, 2002 Incident

The University issued a written reprimand to Pryor on May 31, 2002 for the poor performance of job duties involving the replacement of air filters in the volume air control ("VAV") units. In the ULP charge filed with the HELRB on June 12, 2002, the Petitioner argued that Pryor properly performed all of his assigned tasks involving the VAV filters. It noted that when Pryor requested to observe the VAV filters at issue after receiving the reprimand, his supervisors refused. Additionally, the Petitioner claimed that the design and installation of the VAV units in the Commons building required that some replacement filters be bent for proper installation in the VAV's. The Petitioner denied that Pryor destroyed VAV filter No. 31 at issue in the reprimand.

ALJ Watson concluded that maintenance mechanics are required to inspect and replace, where necessary, the air filters for the VAV units. A mechanic is required to place his initials and the date on the edge of the VAV unit itself for all units in which he has either inspected or replaced

the VAV filters. (Watson FF 102). On May 28, 2002, he indicated on the check off sheet those VAV units that he had inspected. However, on four corresponding VAV units, Nos. 2, 4, 6, and 7, he failed to place his initials or the date on the VAV unit itself, even though he had indicated on the check off sheet that he had inspected those units. Additionally, on four other units he merely laid the filters on top of the VAV filter tracks rather than inserting them into the tracks. (Watson FF 105). If a VAV filter is placed on top of the tracks of a filter instead of being inserted into the tracks, the VAV unit will function at reduced efficiency. (Watson FF 103). Finally, on VAV unit No. 31, in the Caroline Room of the Commons, Pryor had "jammed the filter into the tracks in such a way that it was twisted and protruding some 10 to 12 inches above the unit, in a position where it could not filter air." (Watson FF 105). Pryor had placed his initials and the date on the damaged filter, providing the University with a clear signature for his unacceptable work. (Watson FF 105).

The parties stipulated to all these facts demonstrating that Pryor had performed his duties regarding the inspection and replacement of numerous VAV air filters on May 28, 2002 in a poor and unacceptable manner. This poor performance was discovered by Shenton who had previously been instructed by Maddux to check the work of the maintenance mechanics he supervised, including both Pryor and Jerry Classing. In accordance with these instructions, Shenton carefully checked Pryor's performance of the VAV maintenance and filter work. Shenton reported the deficiencies to Maddux. A photograph was taken of the poorly installed and damaged filter and then it was properly reinstalled. Pryor was not given an opportunity to view the defective work. (Watson FF 107).

On May 31, 2002, Pryor was issued a written reprimand for his poor performance of job duties, the failure to adhere to standards of workmanship. The reprimand noted the failure to place his initials on the filter, the poor installation of the filters, and the jamming of VAV No. 31. The Employee Handbook listed a work rule violation as the poor performance of duties. The revised progressive discipline policy included a work rule violation for "poor performance of duties,

including failure to follow instructions or to maintain established standards of workmanship or productivity. (Watson FF 8-10).

Pryor's workmanship was poor with regard to his inspection and replacement of the VAV air filters on May 28, 2002. Although the Petitioner objected to the close supervision of Pryor by Shenton, this was undertaken in response to Maddux's instructions that Shenton check the work of both Pryor and Classing, which included instructions that he monitor his work logs and inspect his actual work. (Watson FF 104). Moreover, Pryor was an employee who had repeatedly been observed engaging in nonwork matters during work time. The desire of SU supervision to ensure that he was actually performing his assigned work was reasonable in light of his demonstrated tendency to take unauthorized breaks. That Pryor was not afforded an opportunity to view the poor work firsthand, did not demonstrate anti-union animus. It was, instead, consistent with the University's reasonable efforts to promptly reinstall the damaged filter. Though Pryor denied any wrongdoing, the stipulated facts established that Pryor did indeed perform his duties with regard to the inspection and replacement of VAV filters in a poor and inadequate manner on May 28, 2002. The Petitioner has failed to establish anti-union motivation in this written reprimand and did not identify any similarly situated employees who were treated differently.[15]

June 16, 2002 Incident

The University issued a five day suspension to Pryor on June 20, 2002 regarding a June 16, 2002 incident for poor job performance in failing to follow instructions regarding the cleaning of a pizza oven and conveyors. In the ULP charge filed with the HELRB on July 18, 2002, the Petitioner argued that Pryor followed the instructions of his supervisor, Shenton, in performing the

[15] In its posthearing brief, the University requested that certain transcript pages included in AFSCME Ex. 1 be redacted because the Petitioner should not be permitted to relitigate certain facts that have already been decided by ALJ Watson in his March 24, 2003 decision. The University's request for redaction of certain transcript pages is denied because those documents are properly a part of this record and have essentially been admitted into evidence over the University's objection as they include relevant information. However, the parties are still bound by the facts decided by ALJ Watson to which they have already stipulated, namely Watson FF 1-74, and 90-129. No additional findings of fact have been made here that directly conflict with those stipulated facts.

work. The Petitioner also claimed that Shenton did not provide him with adequate materials to perform the work and that it was Shenton's instructions, and not Pryor's work, that were flawed. Moreover, the Petitioner claimed that he was unfairly assigned cleaning work that was traditionally performed by an outside commercial contractor and that he was assigned more work than could be completed in a single shift. The Petitioner claimed that this assignment was designed to set Pryor up for failure because he had engaged in concerted union activity.

The evidence established that Shenton met with Pryor in advance of the day when the work was to be performed, toured the kitchen area and equipment where the work was assigned, and provided him with detailed instructions as to how the work was to be completed. Shenton expressly instructed Pryor to clean the pizza oven's metal conveyor belt to remove the crumbs and recommended that he use an air compressor and vacuum cleaner. He specifically rejected Pryor's suggestion that a power washer be used, explaining that this would not be a good idea since the pizza oven was operated with both gas and electricity. (Watson FF 114). Shenton also instructed Pryor to clean the hoods over both the wok and griller using oven cleaner and a stick. He expressly "instructed Pryor to apply the oven cleaner, let it sit for a period and then scrape it off with the piece of wood." Shenton had successfully cleaned the wok hood in the same manner in the past. (Watson FF 115).

After Pryor inquired of Kevin Mann regarding this assignment, Mann instructed Pryor to contact Shenton for any clarification regarding the assignment. Mann also instructed Taylor to check with Shenton to ensure that Pryor understood his assignment. (Watson FF 116, 117). Shenton explained to Taylor the instructions that he had provided to Pryor and also showed him the written work orders. Taylor concluded that the documents and instructions that Shenton had provided to Pryor were adequate to describe the assignment. (Watson FF 118). To be sure, Shenton added a note to Pryor's work orders that stated, "If you have any questions concerning any of these work orders see me before you leave on 6/14/02. All equipment is in my office." (Watson FF 119).

At the end of the workday, Taylor instructed Shenton to meet with Pryor again to ensure that he understood the work assignment. Shenton met Pryor at the time clock just after Pryor had checked out and asked if he had any questions. Pryor said he did and then walked away. Shenton followed him and asked what questions he had. Pryor expressed concern about the assignment but failed to ask any specific questions and then left the building. (Watson FF 120). Shenton left a paint paddle, oven cleaner, rubber gloves, and paper towels in his office for Pryor to use. Pryor also had access to the air compressor and vacuum cleaner. (Watson FF 1121, 124).

On June 16, 2002, a Sunday, Pryor cleaned the pizza oven, using oven cleaner and a wooden stick on the conveyor belt. He failed to rotate the conveyor so that only the top surface had been cleaned. He never cleaned the wok or grill hoods because of the substantial time it took for him to clean the pizza oven. (Watson FF 121, 122). When Taylor, Maddux, and Shenton met with Pryor on his next scheduled work day on June 19, 2002, he denied that Shenton had given him any instructions, and insisted that he had used the materials that Shenton left for him. He also admitted that he had access to the air compressor and vacuum cleaner. (Watson FF 124). On June 20, 2002, Taylor issued Pryor a five day suspension for poor job performance and workmanship in failing to follow Shenton's instructions in cleaning the pizza oven and conveyors. The suspension did not address Pryor's failure to clean the wok or grill hoods. (Watson FF 127). As addressed above, the Employee Handbook and revised progressive discipline policy included rule violations for the poor performance of duties and/or the failure to follow instructions. (Watson FF 8, 10).

The stipulated facts demonstrate that Pryor failed to follow Shenton's instructions and used the wrong materials in cleaning the pizza oven and conveyors. He also created a health hazard when he used oven cleaner on the conveyor belt because that substance is toxic and pizzas are placed directly on the conveyor belt for cooking. (Watson FF 121, 123). Although Pryor denied having received instructions from Shenton on how to clean the oven and conveyors, the stipulated facts demonstrate that Shenton provided Pryor with detailed instructions when he took him through

the kitchen and they viewed the equipment together. While the Petitioner contended that the assignment had been made to set Pryor up for failure due to his union activity, there was no evidence to support this view. The evidence demonstrates that Pryor was afforded detailed in-person instructions regarding the assignment and that both Taylor and Shenton took additional steps to ensure that Pryor understood the assignment. Moreover, when Shenton made a final attempt at the end of the day to confirm with Pryor that he understood the assignment, Pryor voluntarily chose to walk away. Although this last encounter occurred after Pryor had already checked out, it was after Shenton had already given Pryor a hands-on instructional tour at the site of the kitchen equipment, Mann had instructed Pryor to check with Shenton, and Shenton had left Pryor a note to check back with him. Moreover, it was not until the end of the day when Taylor had again instructed Shenton to check back with Pryor. By the time that Shenton reached Pryor at the time clock, he had already checked out. If Pryor had legitimate questions about the assignment, he could have stayed a few extra minutes with Shenton to have those questions answered. He failed to do so. The evidence demonstrates that SU management took more than adequate steps to provide Pryor with detailed instructions of this assignment.

The Union has failed to establish that Pryor was engaged in any specific concerted activities at the time of this assignment that would have established an unlawful motive for this assignment or discipline. Additionally, the Petitioner failed to identify any similarly situated employees who were treated differently after demonstrating poor performance and the failure to follow instructions on a maintenance assignment. Although the evidence established that the University had previously contracted out some of this maintenance work, the assignment arose out of a routine request from a chef in the Student Cafeteria, the assignment was scheduled for a day when the Cafeteria would be closed to students, and had Pryor followed Shenton's instructions, including the use of the air compressor and vacuum cleaner, his work would have been much easier. Additionally, the hood

maintenance work had previously been performed successfully by Shenton, and Pryor also claimed that he was experienced at working with kitchen equipment.

The University suspended Pryor for five days as a result of this misconduct. As addressed above, the complete text of the University's progressive discipline policy is not a part of this record.[16] Therefore, I am unable to review that policy to determine whether the imposition of the five day suspension as opposed to some lesser sanction for this incident complied with the University's disciplinary policy or provided some evidence of anti-union animus.[17] As stated in an earlier footnote, although ALJ Watson subsequently reduced the five day suspension to a one day suspension, the decision that was challenged in the Petitioner's July 18, 2002 ULP charge, and the decision that I am reviewing, was the University's imposition of a five day suspension on Pryor for this incident. Accordingly, I do not find on this record that the imposition of a five day suspension rather than a lesser sanction demonstrated that the University was motivated by anti-union animus in the issuance of the suspension for this incident.

July 18, 2002 ULP Charge – Alleged Discrimination in Terms and Conditions of Employment

In addition to the June 16, 2002 incident, the July 18, 2002 ULP charge that the Petitioner filed with the HELRB also referenced alleged "Discrimination in Terms and Conditions of Employment." In support of that portion of the charge, Petitioner argued that since at least May 2002 Pryor "has been relegated to picayune custodial assignments such as cleaning bugs from outdoor light bulbs, sweeping, and cleaning ice cream freezers rather than performing the semi-skilled tasks called for in the job specification for Maintenance Mechanics." It also argued that no "other Maintenance Mechanic [is] required to serve the University in this manner," and that such

[16] Although referenced in ALJ Watson's decision, none of the exhibits from the personnel hearing were submitted into evidence in this proceeding and, therefore, I was unable to review the text of those exhibits. Those documents were not expressly made a part of this record and no access to those exhibits was provided to me.

[17] Although the University argued, and Keener claimed, that the June 16, 2002 discipline was based on both the June 16, 2002 incident and Pryor's accumulation of disciplinary actions, the text of the June 16, 2002 suspension document was not part of this record. Watson's factual findings concluded that the suspension was based solely on the June 16, 2002 incident. (Watson FF 127).

changes occurred after the University became aware of Pryor's union activity. Additionally, the Petitioner claimed that Pryor was denied access to the Boiler Room office previously used by the Maintenance Mechanics.

The Petitioner presented no evidence at the hearing regarding a change in the nature of Pryor's work assignments or an increase in "picayune custodial assignments" or "trivial work orders." Moreover, the job specification for Maintenance Mechanics was not submitted into evidence as an exhibit in this proceeding. Accordingly, I find no evidence in the record to support the allegation raised in the July 18, 2002 ULP charge that the University instituted a change in the nature of Pryor's work assignments based on his union activity, or for any other reason.

With regard to the allegation that Pryor was denied access to the Boiler Room office, the record established that Pryor was denied access to an office he previously used in the Physical Plant building. This change was made after that office was vandalized in June 2002. Taylor's testimony established that after this vandalism was discovered, the office was locked, and then a key was provided to Shenton, a supervisor, to afford him access to certain work records maintained in that office. (TR 87-89). The testimony of Maddux also established that when the office was locked after discovery of the vandalism, both Pryor and Jerry Classing, the other Maintenance Mechanic, were denied access to that office. (TR 88-89, 96). Shenton retained a key and another key was provided to the campus police for their use in conducting an investigation of the incident. (TR 87-89).[18]

When Pryor and Classing attempted to set up an office in other locations, including the elevator service room and the fire pump room, Maddux asked them to move because placement of a desk and chair in those locations did not comply with safety codes. Maddux suggested that Pryor and Classing use a desk and chair already present in the boiler room, or use a desk in the maintenance building, or use the food service facility. (96-98, 101).

[18] The evidence in this record did not establish who was responsible for the vandalism of the office.

The evidence established that there was a legitimate business reason for the University to lock the office after the discovery of vandalism and during the police investigation. The evidence also established that both Pryor and Classing were denied access to the office after it was locked. Moreover, both Pryor and Classing were treated equally with regard to their attempts to find an alternate location to perform their paperwork. There was no evidence presented to establish that Classing was a union supporter or was engaged in protected concerted activity. Accordingly, because the evidence established that both Pryor and Classing were treated in the same manner with regard to office access and office relocation, the Petitioner has failed to demonstrate that the University was motivated by anti-union animus when it denied Pryor access to the office he had previously used in the Physical Plant building.

Although Pryor claimed in his testimony that Jerry Classing was also given a key to the locked office, I do not find Pryor's testimony on that point to be persuasive or credible because it was inconsistent and speculative. First he stated that he "believed" that other gentlemen were given a key back. Then he stated that Shenton gave Classing a key. Subsequently, however, he indicated that both he and Classing used the area in the elevator room where they set up a desk and chair after the office was locked. (TR 39-41). Obviously, if Classing had been given access to the locked office, he would not have needed to set up a desk and chair with Pryor in the elevator room. In contrast, I found the testimony of Taylor and Maddux on this point to be more convincing because it was clear and detailed with regard to the vandalism, the police investigation, the assignment of keys, and the equal treatment of Classing and Pryor with regard to access to the locked office and the office relocation. (87-89, 96-98, 101). Pryor also claimed that he was inconvenienced in being denied access to the locked office because there were materials there that he needed to perform his job. However, because Classing was denied access to the same office, this inconvenience does not establish evidence of anti-union motivation.

Alleged Harassment and Surveillance in January and February 2002

On March 8, 2002, the Petitioner filed a ULP charge with the HELRB in which it alleged that Pryor had been the subject of harassment and surveillance due to his active support of the union during the period of January and February 2002. The Petitioner also alleged that the harassment and surveillance was in retaliation for Pryor having filed ULP charges with the HELRB on December 18, 2001 and January 31, 2002, and that the University had knowledge of the filing of those charges. The Petitioner notes that the filing of ULP charges is also protected activity under federal and State law. The charge alleged that in mid-January 2002, Shenton increased his supervision of Pryor by following him while he performed his duties and calling him more frequently on the radio. The Petitioner further alleged that in mid-February 2002, the University disconnected the outside telephone line "in Pryor's shop," which severely limited his ability to perform his job duties, and that no other Physical Plant employee had their outside phone line disconnected. The Petitioner further alleged that on February 15, 2002, Pryor's supervisor fabricated a claim that Pryor had failed to complete a work order over several days.

The charge went on to allege that on February 18, 2002, Shenton called Pryor on the radio and watched him perform his duties on several occasions. On February 19, 2002, it was alleged that Shenton again called him on the radio, and watched his job performance on several occasions, gave him additional assignments, and was rude in their encounters. The charge further claimed that meetings were held on February 18, and 19, 2002 to address these matters and, despite Pryor's claim of Shenton's intimidating and coercive behavior, Pryor's supervisors concluded that Shenton had done nothing wrong and that Pryor was to comply with his supervisor's requests. The Petitioner argued that no other Physical Plant employee has been subjected to such increased supervision.

In its brief, the Petitioner claimed that management imposed new terms and conditions on Pryor in January 2002 to record his time on log sheets, but not with regard to other maintenance

mechanics. The testimony established that this requirement was applied to both Pryor and Classing, the other maintenance mechanic who worked the night shift. Although Maddux first spoke to Pryor about this change, Shenton explained logically that Maddux made this change for Pryor's benefit so that he could justify his time. (Watson TR 821-822, 954-955, 977).

The evidence established that Shenton increased his supervision of Pryor during the period of January and February 2002. The University claimed this was in response to Maddux's inquiries to Shenton about Pryor's work performance and whereabouts because of complaints that had been received about Pryor interfering with other employees' work time, and Pryor having been observed, counseled, and disciplined for engaging in nonwork matters during his work time and being away from his assigned work area. As a result of Maddux's inquiries, Shenton determined that he had to supervise Pryor more closely because he was taking "heat" for Pryor's misconduct. Shenton further explained that Maddux's inquiries began around the time that the union activity began, but only because that was what Pryor was off doing when he was supposed to be working. (Watson TR 1078-1080). He also pointed out that regardless of whether it involved the union, Pryor was somewhere else instead of working. (TR 106).

Pryor testified that Shenton radioed him frequently one day in a short span of time asking him repeatedly for his location. When Pryor asked him whether he could meet him somewhere, Shenton appeared, shook his finger at him, and told him to limit his answers on the radio to yes or no. (Watson TR 1264-1267; TR 25-28). Pryor responded to Shenton that he thought he was being set up and that it was harassment. He then called Maddux on the radio and asked him to meet with him. After that, Shenton gave him several new assignments in the link area. Pryor was concerned about his safety in using the lift in that area during lunchtime when several thousand students would be passing through. Shenton also shook his fist at Pryor and told him to "shut up." (TR 26-28). At a meeting among Pryor and his supervisors to discuss the situation, Shenton told Pryor he would supervise him even more. (TR 29). Despite Pryor's complaints regarding Shenton's harassing

behavior, Taylor found no fault with Shenton's supervision of Pryor and told Pryor to comply with Shenton's instructions. (TR 84-86).

Although Pryor claimed that Shenton's increased supervision involved frequent radio calls and frequent visits by Shenton in monitoring his work, the testimony from both hearings and all witnesses involved appeared to describe an incident on one particular day, February 19, 2002. That day, Shenton contacted Pryor on about two occasions by radio, observed his work in person on several occasions, and gave him several new assignments in the area of the link. (TR 24-28, 109-113). Shenton explained that he seldom used the radio because he did not like it. (TR 108). He further explained that he was trying to locate Pryor to ensure that he changed some lights that he noticed were still out. As Pryor was already using the lift, Shenton then gave Pryor some additional assignments that also required use of the lift so that the cumbersome lift would not have to be redeployed. (TR 113). Pryor got upset because he believed that Shenton was harassing him, and Shenton told him to "shut up" because Pryor was yelling in a public area. (TR 109-113). Although both individuals became upset, the credible evidence demonstrated that it was only one incident and did not support Pryor's claim that there was a pattern of harassment and surveillance. Moreover, Shenton's explanation of the incident was detailed and logical and demonstrated a legitimate business reason for his supervision of Pryor that day. While it appeared that Taylor was not very supportive of Pryor during their meeting later that day, his conclusion that Shenton was merely supervising Pryor and that Pryor was expected to follow Shenton's instructions was consistent with the events of the day. As it was just one incident and a pattern of harassment was not shown, this allegation does not support Pryor's claim of anti-union motivation. The evidence did not support other incidents of frequent radio contact, frequent in-person monitoring, or fabricated claims of incomplete work performance, as alleged in the ULP charge.

Finally, the Petitioner alleged that the University disconnected the outside telephone line used by Pryor in the maintenance office. In the March 8, 2002 ULP charge, the Petitioner argued

that "no other employee in the Physical Plant Department has had the outside phone line to which he or she would normally have access disconnected." The evidence established that this claim was incorrect. The phone line that was changed from an outside line to an on-campus line was in an office that was used by Pryor, Classing, and Shenton, all maintenance mechanics. Accordingly, when the phone line was changed in February 2002, it affected Shenton, Classing and Pryor equally. Maddux confirmed that all three employees used this phone line. (TR 92-93). Even Pryor confirmed that installation of voice mail on that telephone line was for all three mechanics in that area. (TR 22). This was also confirmed by Shenton, Pryor's supervisor, who explained that he used to call his wife at lunchtime, but no longer did so because the office no longer had an outside line. (Watson TR 826).

Maddux's testimony also established that the change was made after Pryor requested that telephone voice mail be made available for the three maintenance mechanics who worked in that area. In attempting to comply with Pryor's request, SU management determined that the telephone had to be replaced to support a voice mail system. In the process of replacing the phone, it was also discovered that the phone line was an outside line even though it had originally been designated for on-campus use only. Maddux made the change with Mann's recommendation so that it would be consistent with the original designation and because most maintenance mechanics did not have an outside line. (TR 92-94). Even after that telephone line was changed to on-campus only, mechanics could still make outside calls from the physical plant. (TR 94). Additionally, in an emergency, employees could contact the University Police by using the on-campus telephone line.

The University demonstrated that the change to the phone line was made for legitimate business reasons and affected three maintenance mechanics equally, including Pryor, Classing, and their supervisor, Shenton. Moreover, as outside calls could still be made from other locations on campus, the evidence failed to establish that the change interfered with Pryor's ability to engage in protected union activity. The Petitioner has failed to demonstrate that the University's action in

disconnecting the outside telephone line in February 2002 was unlawfully motivated by union animus.

Suspension Pending Discharge

The University sent Pryor a suspension pending discharge notice in September 2002. (TR 50, 51). The Petitioner filed a ULP charge with the HELRB on September 26, 2002 in which it alleged that Pryor's suspension pending discharge was motivated by union animus based on Pryor's filing of ULP charges, active participation in union matters, and other concerted activities related to collective bargaining. The Petitioner argued that the discharge was unlawful because formal discipline was imposed on Pryor in violation of his statutory right to engage in protected activities. The Petitioner argued further that additional reasons relied upon by the University in discharging Pryor were matters that were not previously brought to Pryor's attention, for which he was never issued any formal discipline, and for which he was never afforded an opportunity to respond prior to the issuance of a suspension pending discharge. Additionally, the Petitioner contends that other reasons were based on mere speculation.

As addressed below, the Petitioner has established a *prima facie* case that union animus was a motivating factor in Pryor's suspension pending discharge.

As discussed above, the record established that Pryor was engaged in union activities in support of AFSCME and was an open and active union supporter. The record also established that University management and supervision had knowledge of Pryor's union activities. The University took an adverse action against Pryor when it sent him a suspension pending discharge notice in September 2002. (TR 50-51, 89, 108).

The record also established that the Petitioner presented evidence of some union animus on the part of the University and some interference with Pryor's right to engage in protected concerted activity. The evidence established that Pryor filed multiple unfair labor practice charges in advance of his discharge and that he believed he was being punished for filing those ULP's, and due to his

open and active support of AFSCME. (TR 54). When Pryor circulated a petition in support of a discharged employee in October 2001, the University's Human Resources Director went beyond merely objecting to Pryor's participation in this activity during working time. She also claimed that his circulation of the petition was impermissible because it involved a confidential personnel matter even though Pryor told Keener that he had permission from the employee and his wife to distribute the petition. (Watson TR 1190-1193). Moreover, Keener claimed that Pryor had no authority to take on personnel actions and remedies himself. In fact, he did because he was engaged in protected concerted activity on behalf of another employee regarding workplace issues. *Meyers Industries, Inc.*, 268 NLRB 493, 494, 497 (1984); *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986); *FiveCap, Inc. v. NLRB*, 294 F.3d 768 (6th Cir. 2002). Pryor was not disciplined for this matter only after he made certain admissions. Keener also labeled Pryor as an "extremely disgruntled employee" because he expressed numerous complaints about workplace issues and was not a "good citizen."

Additionally, an SU supervisor confiscated Pryor's union materials and refused to return them when Pryor requested their return. The supervisor, Adkins', union animus can be inferred from his unreasonable justification for confiscating the materials and his refusal to return them on demand. This interfered with Pryor's right to engage in the protected activity of distributing union materials before his shift. It was then Adkins who reported Pryor to management that same afternoon when he observed him speaking with two union supervisors. Union animus was found to be a motivating factor for Pryor's suspension because of the earlier confiscation incident, Adkins' involvement, the absence of a written rule governing Pryor's behavior in returning to the plant at shift's end, Pryor having never been warned or counseled about returning to the plant at the end of his shift, and the absence of any employee having ever been formally disciplined for similar behavior. It was concluded that the University failed to demonstrate that it would have issued the same discipline in the absence of anti-union motivation.

Although there was no evidence of other union activity having taken place contemporaneous to Pryor's discharge, Pryor filed multiple ULP's over time about which the University had knowledge. The filing of ULP's is protected activity and retaliation for this activity is prohibited by both federal and State law. The above factors, as well as the filing of these ULP charges over time, has established a prima facie case that union animus and retaliation for engaging in protected activity was a motivating factor in Pryor's discharge.

Under the mixed motive analysis, once the Petitioner has established a prima facie case that antiunion sentiment was a motivating factor in the discharge decision, the employer must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 445 U.S. 989 (1982); *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983); *Alaska Ship and Drydock, Inc.,* 2003 NLRB LEXIS 102 (2003).

On the instant record, I conclude that the University has failed to demonstrate that it would have discharged Pryor even in the absence of his union activity and the evidence of the University's union animus. The University has failed to present any evidence on this record of the reasons for Pryor's discharge. The letter on which the University purportedly relied in sending Pryor notice of his suspension pending discharge was never placed into evidence at the ULP hearing. Therefore, the reasons set forth in that letter are not part of the evidentiary record in this case and cannot be relied upon as a basis for discharge or for consideration of whether the University had legitimate business reasons for the decision to discharge.[19] More importantly, the University presented no witness at the ULP hearing to address the reasons for the discharge. The evidence presented at the

[19] At the conclusion of the ULP hearing, a discussion ensued on the record to clarify what documents had been admitted into evidence and to clarify that any other documents not expressly offered and admitted into evidence would not be considered a part of the factual evidentiary record in this case. It was further discussed that the ULP charges would be considered as argument only, and not as evidence. The parties chose not to submit into evidence any additional documents and specifically did not offer into evidence any of the attachments to the ULP charges. (See TR 123-131).

ULP hearing failed to establish who made the decision to discharge Pryor, why that decision was made, and why the decision was made at the time that it was carried out.

At the hearing, Pryor testified that between June and September 2002, he never received notice of any of the allegations that were set forth in the discharge letter. Moreover, he never was afforded an opportunity to see Shenton's notes or to refute any allegations made in the discharge letter. (TR 50-51). Additionally, no witness addressed the issue raised by the Petitioner in its charge and supported by Pryor's testimony here that additional reasons were considered in the decision to discharge Pryor that were never brought to his attention, for which no formal discipline was imposed, and for which he was not even afforded a timely opportunity to respond. While there is not a contention here that this process was itself unlawful, it raises a reasonable suspicion as to why the University issued formal discipline in advance to Pryor with regard to some of his conduct and conducted an apparent clandestine investigation and afforded him no advance notice or opportunity to respond with regard to other conduct purportedly relied upon for the discharge. In the absence of any testimonial or documentary evidence in this record regarding the reasons for the decision to discharge Pryor, I find that the Petitioner has established that union animus and protected activity was a motivating factor in Pryor's discharge. The University has failed to meet its burden to persuade that it would have taken the same action even in the absence of the protected conduct and union animus.

I have considered that there is substantial evidence in the record, including from the ULP hearing and that portion of the personnel case that is also a part of this record, regarding workplace misconduct by Pryor as well as discipline issued regarding some of his misconduct. However, that evidence was insufficient to overcome the Union's prima facie case because no evidence was presented regarding the reasons for the actual decision to discharge, the timing of that decision, the factors considered by the decision maker, or even who the decision maker was. Moreover, no explanation was given for addressing some misconduct in advance through discipline, and

withholding discipline or even notice and an opportunity to respond with regard to other alleged misconduct. I have also considered that testimony was presented that no other employee had as many disciplinary problems as Pryor. However, again, no evidence tied that factor to the decision to discharge. The trier of fact may not assume facts that are not in evidence.

Accordingly, I conclude based on the evidence in this record that the decision to discharge was motivated by union animus and that concerted activity was a motivating factor.

September 29, 2003
Date

Douglas E. Koteen
Administrative Law Judge

DEK/cf
56422

REVIEW RIGHTS

Any party aggrieved by the proposed decision may file written exceptions thereto and request an opportunity to present oral argument. Such exceptions and any request for argument must be made within twenty (20) days from the date of receipt of the proposed decision. A response to the exceptions may be filed within fifteen (15) days from the filing of the exceptions. The written exceptions must contain the legal and factual basis for the exceptions or response, and be accompanied by copies of any portions of the record referred to in the exceptions. COMAR 14.30.11.23. The written exceptions and request for argument, if any, should be directed to Karl K. Pence, Executive Director, Maryland State Higher Education Labor Relations Board, 839 Bestgate Road, Suite 400, Annapolis, MD 21401. The Office of Administrative Hearings is not a party to any exceptions or appeal process.