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Public Employee Reporter for Illinois

James J. Mulligan, Charging Party, and City of Chicago, Respondent

CITY OF CHICAGO

Docket No. L-CA-92-124

Illinois Local Labor Relations Board

11 PERI (LRP) P3008; 1995 PERI (LRP) LEXIS 61

January 19, 1995, Decided

HEADNOTES:

Unfair Practice -- Discipline -- Union Activity -- Intent -- 15.62, 43.361, 72.324, 72.331, 72.333, 72.324, 72.3593, 72.363 Where city machinist failed to show, apart from his filings of grievances and his union membership, that he engaged in union activity or that city took discriminatory action to encourage or discourage his union membership, city did not commit violation of Section 10(a)(1) of Act for disciplining him because machinist failed to prove that grievances motivated any particular adverse employment action against him. However, city did violate Section 10(a)(2) of Act with reference to machinist's grievances regarding distribution of overtime, where evidence--such as city's treatment of other employee who performed same misconduct--strongly suggested that reprimand of machinist after he called pipefitters "scabs" was motivated by his exercise of protected right to file grievance. Retaliatory Discipline -- Protected Activity -- Enforcement Of Contractual Safety Provision -- 15.62, 43.361, 72.323 City committed unfair practice by assigning "punishment" jobs and hazardous work to machinist, and suspending and harassing machinist, in retaliation for his numerous contacts with city office of Inspector General (IG), where machine shop supervisors knew of machinist's contact with IG, and where abundant evidence--such as timing of supervisors' adoption of new work rules and suspensions--showed that their actions were motivated by animus. Further, machinist's contacts with IG constituted protected concerted activity within meaning of Act because such contacts were aimed at proving safe work environment, as was guaranteed in collective bargaining agreement between machinist's union and city. Unfair Practice -- Attorney's Fees -- Prevailing Wage Act -- 15.62, 74.352 City machinist who was subject of city's unfair labor practices, such as suspensions and disciplinary action in retaliation for his protected concerted activity, was nevertheless not entitled to attorney's fees under Illinois Prevailing Wage Act, which did not extend to persons directly employed by city of Chicago. Further, despite LLRB's broad remedial powers, it maintained no authority under Section 11(c) of Act to award attorney's fees and costs.

PANEL: Before Hoffman, Chairman; and Simon and Sadlowski, Board Members**OPINION:** Decision and Order of the Illinois Local Labor Relations Board

On July 20, 1994, Administrative Law Judge Sharon B. Wells issued a Recommended Decision and Order in the above-captioned case, finding violations of Section 10(a)(1) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (1992). Thereafter, on October 6, 1994, in accordance with Section 1220.60(a) of the Rules and Regulations of the Illinois Labor Relations Boards (Rules), 80 Ill. Admin. Code 1200-1230, James J. Mulligan (Charging Party) filed timely exceptions, to which the City of Chicago (Respondent) timely replied.¹ After reviewing the record, exceptions, response, and briefs, the Board accepts in part and reverses in part the ALJ's recommended order.

The complaint in this matter involved allegations by Mulligan that Respondent City had violated Section 10(a)(1) and (2) of the Act by harassing and disciplining him, by denying him overtime, and by assigning him "punishment" jobs and hazardous work in retaliation for his filing an overtime grievance and contacting the City's Inspector General (IG).² The City argued that Mulligan's contacts with the Inspector General did not constitute protected concerted activity within the meaning of the Act. Moreover, Respondent contended that the discipline it had imposed on Mulligan was both just and deserved, and was not motivated by animus. The ALJ found that Charging Party had failed to show that he engaged in

union activity and furthermore, had failed to prove that Respondent possessed the necessary intent to constitute a violation of Section 10(a)(2), and accordingly, the ALJ concluded that Mulligan had failed to make a prima facie showing of a violation of that Section. However, the ALJ also determined that although Mulligan had failed to prove, for various reasons, several of his alleged violations of Section 10(a)(1), Charging Party had established by a preponderance of the evidence that Respondent violated Section 10(a)(1) in regard to two incidents and, therefore, the ALJ ordered certain remedial action.

Although Charging Party obtained almost all of the relief he had sought through the ALJ's decision, he nonetheless filed three exceptions. Charging Party's first exception takes issue with the ALJ's refusal to find that Mulligan's numerous contacts with Respondent's Inspector General constituted concerted activity within the meaning of the Act. In his second exception, Charging Party argues that the ALJ should have awarded him the overtime lost due to the suspensions the ALJ found unlawful. In his final exception, Charging Party contends that the ALJ erred by failing to award him attorney's fees and costs in accordance with Illinois law.

We find merit to Charging Party's first exception, that the ALJ erred in finding that Mulligan's numerous contacts with Respondent's Inspector General did not constitute concerted activity within the meaning of the Act. The ALJ found that although Charging Party had established that Respondent retaliated against him because of his contacts with the Inspector General's Office, and that certain of those contacts constituted protected activity,³ none of those contacts were concerted. Thus, the ALJ determined that Charging Party failed to prove that the retaliation constituted a violation of Section 10(a)(1) of the Act. We disagree with the ALJ's determination as to the concertedness of those contacts and correspondingly, reverse the ALJ's finding that Charging Party thereby failed to establish a violation of Section 10(a)(1) of the Act.

The ALJ concluded that Mulligan's contacts with the IG's office were not concerted under the National Labor Relations Board's Meyers standard and that, therefore, Charging Party failed to prove that Respondent's retaliation for those contacts constituted a violation of Section 10(a)(1) of the Act. *Meyers Industries*, 268 NLRB 493 (1984) (Meyers I), rev'd sub nom, *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985) cert. denied, 474 U.S. 971 (1985), decision on remand sub nom. *Meyers Industries*, 281 NLRB 882 (1986) (Meyers II), enf'd, 835 F.2d 1481 (D.C. Cir. 1987). Under Meyers, for a finding of concert, the National Labor Relations Board (NLRB) requires that there be evidence of the formation of, or assistance to, a group, or action as a representative on behalf of a group.

In its exceptions, Charging Party urges that we decide this case using the standard previously adopted by the National Labor Relations Board (NLRB) in *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975), rather than Meyers, and in the alternative, argues that even under Meyers, Mulligan's contacts with the IG's office were concerted. We believe it unnecessary, however, to decide if Mulligan's protected activity was concerted under either Meyers or Alleluia.

This Board has long recognized that individual activity involving attempts to enforce the provisions of an existing collective bargaining agreement is concerted activity, based upon the reasoning that individual action taken to implement a right rooted in a collective bargaining agreement is but an extension of the concerted activity that originally gave rise to the agreement. *City of Chicago, Chicago Police Department* (Karson), 7 PERI 3035 (IL LLRB 1991); *City of Chicago, Chicago Police Department* (Kostro), 3 PERI 3028 (IL LLRB 1987); See also, *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enf'd 388 F.2d 495 (2d Cir. 1967); *El Gran Combo*, 284 NLRB 1115 (1987), enf'd 853 F.2d 996 (1st Cir. 1988); *County of Jersey* (Lewis and McAdams), 7 PERI 2023 (IL SLRB 1991). The Board and the NLRB have further held that such activity is deemed concerted regardless of whether the employee's understanding of the agreement is correct. *Id.*

In this case, the ALJ found that to the extent Mulligan's contacts with the IG's office involved plant safety, they constituted protected activity within the meaning of the Act. The ALJ also found that the collective bargaining agreement between Mulligan's and Respondent obligated the latter to "provide . . . a safe working environment for its employees as is legally required by federal and state laws." Accordingly, since Mulligan's contacts with the IG's office that constituted protected activity were efforts aimed at providing a safe working environment, as was guaranteed in the collective bargaining agreement between Mulligan's union and Respondent, and since attempts to enforce the provisions of an existing collective bargaining agreement constitute concerted activity, Mulligan's protected activity must necessarily be concerted.

As to his second exception, Charging Party argues that he should have been specifically awarded the overtime he lost due to Respondent unlawfully suspending him. Although the ALJ agreed that Mulligan was owed whatever overtime he had lost due to the unlawful suspensions he incurred, as is the Board's usual practice, she did not set forth a specific dollar amount due to Charging Party, nor did she state specifically that he was due such overtime compensation. However, the ALJ clearly awarded Mulligan, among other sums, his unlawfully denied overtime, for she recommended in her order that he be made "whole for the losses incurred as a result of the discipline he incurred as a result of his exercise of rights guaranteed under Section 6 of the Act." Her recommended order therefore contemplates that Respondent will pay to Charging Party whatever sums are necessary to return him to the position he would have been in absent the City's unlawful acts. The exact amount of money due Mulligan as a result of Respondent's unlawful acts, however, is at this point unknown. It was not the purpose of this hearing to set those amounts, but rather to determine whether Respondent violated the Act. If, as in this case, Respondent violated the Act and must therefore pay damages to Charging Party, and the parties are unable to agree on the exact amounts due or what losses are compensable, then Charging Party may invoke the Board's compliance procedures to settle the matter. As it now stands, the ALJ's order awarded Mulligan his unlawfully denied overtime, as will the Board's order.

Charging Party's final exception is that the ALJ erred by failing to award him attorney's fees and costs in accordance with Illinois law, and in support of this claim he cites Section II of the Illinois Prevailing Wage Act, 820 ILCS 130 (1992), which in pertinent part, reads as follows:

Any laborer, worker or mechanic employed by the contractor or by any sub-contractor under him who is paid for his services in a sum less than the stipulated rates for work done under such contract, shall have a right of action for whatever difference there may be between the amount so paid, and the rates provided by the contract together with costs and such reasonable attorney's fees as shall be allowed by the court.

Charging Party claims that since Mulligan "challenged the misapplication of overtime . . . he should be provided the remedy of attorney's fees under the statute." Apart from the fact that the statute on its face does not apply to the situation as argued by Charging Party, the Illinois Prevailing Wage Act does not extend to persons directly employed by the City of Chicago. See 820 ILCS 130/3 (1992); *Bradley v. Casey*, 415 Ill. 576, 114 N.E.2d 681 (1953) (wherein the Illinois Supreme Court held that the Prevailing Wage Act applies only to persons employed under contracts for public works and does not apply to persons directly employed by the state or other public bodies).

Charging Party also argues that under Section II(c) of the Act, the Board has broad remedial powers and that an award of attorney's fees and costs would be appropriate in this case. However, Charging Party failed to note that the Illinois Appellate Court rejected this precise argument in *Burbank v. State Labor Relations Board*, 185 Ill. App. 3d 997, 541 N.E.2d 1259, 5 PERI 4022 (1st Dist. 1989), finding that the Board lacked the authority under Section II(c) to award attorneys' fees.⁴

Consistent with the foregoing, we find meritless Charging Party's exceptions with regard to the ALJ's remedy and her refusal to grant attorney's fees and costs. As above, the ALJ's ruling in each is well supported.

Therefore, based on the foregoing, the Board sustains the ALJ's recommendation in all respects except for her finding that Mulligan's protected contacts with the IG's office were not concerted activity. As to that sole finding, the Board reverses the ALJ's recommendation and finds that Mulligan's protected activity was indeed concerted under the Interboro rule.

Order

Based on the foregoing, we hereby order Respondent, the City of Chicago, its officers and agents to:

1. Cease and desist from:

- a. disciplining James J. Mulligan or any of its other employees for engaging in activity protected by Section 6 of the Act.
- b. in any like or related manner, interfering with, restraining or coercing its employees in the exercise of rights guaranteed them under the Act.

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

- a. make James J. Mulligan whole for the losses he incurred as a result of the discipline he received due to his exercise of rights guaranteed under Section 6 of the Act.

b.expunge from Respondent City's files any reference to the suspensions of Mulligan in January 1992 and March 1993 and notify him in writing both that this has been done and that evidence of the unlawful suspensions will not be used as a basis for future personnel actions against him.

c.preserve, and upon request, make available to the Board or its agents for examination and copying, all records, reports and other documents necessary to analyze the amount of backpay due under the terms of this decision.

d.post, for 60 consecutive days, at all places where notices to employees of the City of Chicago are regularly posted, copies of the attached notice. Respondent shall take reasonable steps to insure that the notices are not altered, defaced, or covered by any other material.

3.Notify the Board, in writing, within 20 days of the date of this order, of the steps that Respondent City has taken to comply herewith.

1We reject Respondent's contention that Charging Party's exceptions were untimely. According to the record herein exceptions to the ALJ's Recommended Decision and Order were originally due on September 7, 1994. On August 30, 1994, Respondent asked for and received an extension of time until September 30, 1994, within which to file its exceptions. On September 29, 1994, Charging Party asked for and received an extension of time until October 7, 1994, within which to file his exceptions. Charging Party filed his exceptions on October 6, 1994, and on October 7, 1994, the City notified us by letter that it would not be filing exceptions. Respondent argues that the extension of time it received due to its August 30 motion applied to it only, and that therefore, when Charging Party requested an extension of time on September 29, his exceptions were at that time already 22 days late. The practice of the Board in granting such continuances has always been to extend them to both parties equally, even if, as is usually the case, only one party made the request. Accordingly, Respondent's argument in this regard is meritless.

2The City's Inspector General's Office investigates employee misconduct and the waste or misappropriation of City funds.

3Neither Party excepted to any of the ALJ's findings of fact or her conclusions regarding protected activity.

4Notably, Charging Party does not seek sanctions against Respondent, nor would the evidence support such a finding. Under Section II(c), the Board's sanction may include an award of attorney's fees.

----- End Footnotes -----

PROPOSED:

Administrative Law Judge's Recommended Decision and Order

On April 22, 1992, Charging Party, James Mulligan, filed an unfair labor practice charge with the Illinois Local Labor Relations Board (Board) against Respondent, City of Chicago (Respondent or City), alleging that Respondent had violated Section 10(a)(1) and (2) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (1992) and the Rules and Regulations of the Illinois Labor Relations Boards, 80 Ill. Adm. Code, Sections 1200 through 1230, by harassing and disciplining him, by denying him overtime and by assigning him punishment jobs and hazardous work in retaliation for his filing an overtime grievance and contacting the City's Inspector General. The charge was investigated in accordance with Section II of the Act and, on November 10, 1992, the Executive Director of the Board issued a Complaint for Hearing.

The hearing was held on May 3, 4, July 7, 8, September 1, 2, October 7, 8, and November 9, 10, 1993. Charging Party testified on his own behalf and called as witnesses Daniel Ahlfeld, Thomas Murray and Dan Clarke, who were formerly employed by the City of Chicago, Roman Tapkowski, a Chicago police detective assigned to the City's Inspector General's Office, Tom O'Neill, a City machinist, and Virgil Sarti, a union business representative. Respondent called as witnesses its employees, James Hoffman, a machinist-foreman, John Madl, plant manager at Northwest Waste To Energy Facility (Northwest incinerator), John Fanning, the former plant manager at Northwest, and Angela Thomas, Chief Assistant Corporation Counsel in the City's Law Department. Both parties orally argued the facts of the case, and were afforded the opportunity to, and did, file post hearing briefs on the legal issues.

I.Preliminary Findings

1.The City of Chicago is a public employer within the meaning of Sections 3(o) and 20(b) of the Act, and is a unit of local government with a population in excess of one million, and under the jurisdiction of the Board under Section 5(b) of the Act.

2. James J. Mulligan is, and has been, employed by the City of Chicago since May 16, 1973, and is a public employee within the meaning of Section 3(n) of the Act. He became a machinist for the City in 1976.

3. The International Association of Machinists and Aerospace Workers, Local 126 (Local 126) is the exclusive representative for a bargaining unit of the City's employees, which includes Mulligan.

4. The City and Local 126 are parties to a collective bargaining agreement currently in effect which covers the bargaining unit and provides a grievance procedure which culminates in final and binding arbitration.

II. Issues and Contentions Charging Party

Charging Party, James Mulligan, contends that he had been regarded as a good employee until he filed a grievance in April 1991, regarding the distribution of overtime. A supervisor threatened him prior to resolution of the grievance and shortly thereafter, he was issued a written reprimand. Subsequently, he contacted the City's Inspector General regarding alleged employee misconduct. Charging Party contends that he has been subjected to discipline, including suspensions, and other harassment in retaliation for his filing of grievances and his contact with the Inspector General's office.

Respondent

Respondent contends that it can justify its conduct toward Charging Party, that there was just cause for his discipline, and that it was not motivated by animus. Respondent also argues that Mulligan's contacts with the Inspector General's Office did not constitute concerted protected activity.

III. Findings of Fact

The parties have stipulated and I find as follows:

1. John J. Fanning is the plant manager of the Northwest incinerator facility and a City employee.
2. John F. Madl is the acting chief operating engineer of the Northwest incinerator facility and a City employee.
3. On April 29, 1991, Local 126, on behalf of Mulligan, filed a grievance involving the unequal distribution of overtime.
4. In May 1991, Local 126, on behalf of Mulligan, advanced the grievance to the Assistant Commissioner of the City's Department of Streets and Sanitation, Becky J. Frederick.
5. The grievance was settled on June 24, 1991, by giving Mulligan eight hours of overtime pay.
6. On or about September 27, 1991, and occurring a number of times thereafter, Mulligan contacted the City's Inspector General's Office (IG), about alleged illegal activities in the Department of Streets and Sanitation.
7. On October 1, 1991, the City issued Mulligan a five-day suspension.
8. On January 3, 1991, the City issued Mulligan a 29-day suspension.
9. On or about February 3, 1993, the City wrote Mulligan a letter concerning his attendance record for the entirety of 1992.
10. On or about February 9, 1993, the City issued Mulligan a nine-day suspension, which was later revoked by a hearing officer.
11. On or about February 23, 1993, Mulligan received a certified letter from William Bresnahan, Assistant Commissioner in the Department of Streets and Sanitation, regarding absenteeism.
12. On or about March 25, 1993, Mulligan was suspended for 29 days by the City.

Based on the testimony of Respondent's and Charging Party's witnesses, my observations of those witnesses' demeanors, and the documentary evidence in the record, I make the following additional findings of fact:

James Mulligan

James Mulligan has worked for the City since May 16, 1973, and has been employed as a machinist since May 1976. He is a member of Local 146. Mulligan worked at the City's Northwest incinerator² from 1976 to 1981 and from March

1990 until May 1993. Between 1981 and March 1990, he was on and off the Northwest payroll. During the latter period, he did not usually work at the incinerator even when he was on its payroll, except when a machinist was needed for overtime assignments on weekends and holidays. During that period, Mulligan worked at other facilities, but would be assigned to the Northwest payroll when his job title did not exist on the payrolls of the facilities where he was assigned. After hearings in this case began, on June 1, 1993, Mulligan was transferred to Respondent's Department of Transportation.

Machinists' duties at the incinerator included the maintenance and repair of cranes, pumps, conveyors, turbines, and gear boxes. Machinists weld on the conveyor, and install wheels and rails. Working on the conveyor was a greasy, dirty job.

At the Northwest incinerator, Mulligan's immediate supervisor was the machinists' foreman, James Hoffman; who, together with all other foreman, reported to John Madl,³ the acting chief operating engineer (ACOE) for maintenance. Madl reported to John Fanning,⁴ the plant manager.

After Mulligan was transferred to the incinerator in March 1990, he tried to find out the reason for his transfer. In February 1990, Mulligan had been sent to the International Amphitheatre to check a gas meter. He called the gas company to determine the location and the problem with the meter. The gas company responded that there was no problem with the meter, and that the gas bill, which averaged \$ 30,000 per month, had been paid by the City. At that time, the space was occupied by a private businessman, but the City had continued to pay the gas bill for the space it had vacated in December 1986. Mulligan told his supervisors about the situation prior to his transfer to the Northwest incinerator, and he told Fanning after his transfer.

In a letter dated October 1, 1990, and sent to Fanning, and his superiors, Mulligan asked whether he was transferred to the incinerator in retaliation for his discovery that the City was paying the gas bill for a facility it no longer rented. Mulligan also complained that he was not detailed to work at facilities outside the incinerator, that he was not compensated for overtime, and that he was being punished and harassed. Fanning forwarded the letter to Assistant Commissioner Doug Zieseimer, with a covering memorandum dated October 2, 1990.⁵

When Mulligan was transferred back to the incinerator, Tom O'Neill⁶ was the machinists' foreman. But O'Neill resigned his position as foreman in October or November of 1990 and Hoffman took over. Before Hoffman⁷ became the machinists' foreman, Mulligan was offered many overtime opportunities, but afterwards, Mulligan received only a small amount of overtime. After Hoffman became foreman, O'Neill also was denied overtime opportunities. Mulligan and O'Neill interpreted their collective bargaining agreement to require that overtime be assigned by seniority and felt that management was not observing that agreement in assigning overtime.

Section 5.3 of the collective bargaining agreement between the City of Chicago and Local 126 provides that overtime . . . shall be offered first to the employee performing the job and thereafter by seniority to the most senior employee in the classification at the work location being given the opportunity to work, provided the employee has the present ability to perform the work to the satisfaction of the Employer without further training.

Apparently Hoffman and his superiors interpreted the contract to allow them to assign overtime to employees they considered the best qualified without regard for seniority. Mulligan and O'Neill both discussed the matter with Fanning, the plant manager, who stated that the matter would be taken care of and that they would not be denied overtime again.⁸ But on a subsequent occasion, when Mulligan and O'Neill believed they were denied overtime, John Madl, the acting chief operating engineer, denied that they were entitled to overtime.⁹ Hoffman, Mulligan's foreman, said he had nothing to do with the denial of overtime, that it was an oversight.¹⁰ After hearing different reasons for the denial of overtime, Mulligan felt it was time to file a grievance. Mulligan had not previously filed any grievances.¹¹ O'Neill did not file a grievance, but called a friend in his ward organization.¹² Subsequently, O'Neill was paid for the time he would have worked had he been assigned the overtime.

Sometime between December 1990 and April 1991, O'Neill showed and discussed with Mulligan an article he had clipped from a newspaper on the City's Inspector General's Office. The article explained that the Inspector General's function was the investigation of employee misconduct or misconduct involving the use of City funds and contained a telephone number to report misconduct. When the article first appeared, O'Neill heard other employees at the incinerator discussing its contents.

Mulligan's first grievance

On April 29, 1991, Mulligan filed a grievance regarding the distribution of overtime.¹³ The step one grievance meeting was held in plant manager Fanning's office. Present at the meeting were Mulligan, Virgil Sarti¹⁴ and Bob Carey, union representatives, Hoffman, Madl¹⁵ and Fanning. Sarti and Fanning did most of talking, discussing problems with overtime and why Mulligan was not offered overtime. At that meeting, Hoffman first told Mulligan that he was not called for overtime because Hoffman felt Mulligan was not qualified to do turbine work.

Fanning stated that he felt management was right in deciding who to call in for overtime according to its perception of employees' abilities. However, Sarti stated that the collective bargaining agreement controlled the distribution of overtime according to seniority. Fanning responded that Mulligan was not a cooperative employee, but Sarti said that was irrelevant because the collective bargaining agreement provided for equal opportunity for overtime by seniority. Fanning then said that Mulligan could not do the work. Sarti told management that it could not presuppose that an employee could not do work. If an employee could not do the work, the employer must document it, then give a reprimand. On the next occasion when overtime was available, then the employer could overlook that employee. Sarti also told Fanning that if Mulligan could have done the work, he should not have been bypassed.

Ultimately, Fanning agreed that Mulligan was denied overtime and promised to treat Mulligan fairly in the future but did not want to compensate him for the overtime opportunities he had missed. Mulligan, however, wanted compensation, which required that the grievance be advanced to the next step and a hearing outside the building. Fanning responded that if the grievance left the building, he (Fanning) would have no choice but to recommend privatizing the machine shop.¹⁶ At that time, approximately half of the machinists employed at the incinerator were City employees, and the other half were contractors, employees of a private contractor. As Fanning became irritated, he said he would throw all machinists out of the incinerator. Sarti responded "you can't do that" and decided to terminate the meeting.¹⁷

At the close of the hearing, Fanning wanted to know immediately whether Mulligan would pursue the grievance to the next step, but Sarti suggested that Mulligan have the weekend to decide. Mulligan commented that it was unfair to put the jobs of other machinists on his "back,"¹⁸ but that he would think the matter over, and decide whether to advance the grievance by the following Monday.

Mulligan decided to advance the grievance to step two. The hearing was held in the office of Becky Frederick, the Assistant Commissioner of the City's Department of Streets and Sanitation, around June 1, 1991. At that hearing, Mulligan informed Frederick of Fanning's remark about privatizing the machine shop. Frederick offered Mulligan eight hours of compensation, which he accepted, but it was six months before Mulligan was paid.¹⁹

The written reprimand

After Mulligan pursued the grievance, his relationship with Hoffman was uneasy but livable. Mulligan had no problems with Hoffman for the first 5 or 6 months after the latter became foreman.²⁰ However, on July 29, 1991, after receiving approval from Madl, Hoffman issued Mulligan a written reprimand. The former cited Mulligan for constantly questioning his decisions and for calling pipe fitters, who had assisted machinists in unloading supplies, scabs.

The name-calling incident had occurred several months before the reprimand when machinists were installing grates, and pipe fitters and other employees were helping by handing the grates to the machinists. Mulligan and coworkers jokingly referred to the pipe fitters as scabs at that time and subsequently because it was a job that only machinists should have done. At some time after the grates were installed, Dan Clarke, a machinist, was with Mulligan, when they both called pipe fitters scabs. Clarke was not disciplined for name-calling.²¹

Hoffman's claim in the reprimand that Mulligan questioned his authority apparently involved Mulligan's assignment to install metal plates on a curb on the tipping floor which was completed around July 1991. The curb stopped trucks from falling into the pit where garbage was dumped. Mulligan, Clarke and two other machinists were assigned the task. At first, the machinists performed the work on the day shift, then the night shift. The work was dangerous as well as dirty. At nights, the machinists might see 20 to 25 rats and had to watch out for wild dogs. After about two months, when the assignment was nearly complete, Mulligan and Hoffman had a difference of opinion as to how to install the plates. Mulligan said that the plates should have been welded rather than tacked on for safety reasons, but Hoffman did not want them installed that way. Welding the plates would have added one or two hours to the assignment. The plates were tacked on the curb as Hoffman directed.

After the assignment was completed, Hoffman gave Clarke and another machinist a letter and said "Read this. I would appreciate it if you would sign." Most of remarks in the letter concerned the job on the tipping floor and there were negative comments about Mulligan. When Clarke and the other machinist refused to sign the letter, Hoffman became "huffy."²²

Mulligan appealed the written reprimand, and it was reduced to an oral reprimand. However, the reprimand was not removed from his personnel file until around September 26, 1991, after Mulligan complained about the matter.

The employee council

In August 1991, Mulligan was elected to the employee council, which was started by plant manager Fanning. The council consisted of five employees, selected by their coworkers. Council members could invite Fanning to their meetings and discuss whatever they wanted.²³ At a meeting, on September 4, 1991, Mulligan asserted that employees were being harassed,²⁴ citing as an example the fact that the labor foreman's desk had been placed at the end of a conveyor in a dusty area with standing water, rather than in the laborers' office. Fanning, who was at that meeting, denied that any harassment had occurred. At the employee council meetings, Mulligan also raised issues regarding safety.²⁵

The truck repair incident

On or about September 23 or 24, 1991, the rear brakes of Hoffman's private vehicle, a pickup truck, failed on his way to work. Hoffman occasionally used the truck for City business.²⁶ With Madl's permission, Hoffman worked on the truck during work hours. After observing Hoffman working on the brakes in the incinerator near the machine shop, Mulligan commented to coworkers that they could get into trouble if it appeared that they were working on the truck. Later Mulligan observed Rudy Rempert, a contract machinist, also working on Hoffman's truck.

Later that day, employees tossed around tomato plants that had been in the back of the truck. The plants had been pulled out of the ground by their roots, and had unripe tomatoes on them. Hoffman placed the tomato plants in a barrel.²⁷ On the next day, Hoffman was on vacation. When Hoffman returned to work on the following day, Mulligan told Hoffman that it was "ignorant" for him to throw the plants in the scrap barrel, and that he should have discarded the plants in a regular garbage can. Hoffman said "that's what I did." Mulligan then told Hoffman he would clean up so as to lessen flies attracted by the plants.

On the next day, Mulligan, who was in Fanning's office to ask about his reprimand being reduced to an oral reprimand, asked Madl if Hoffman had complained about Mulligan's calling him ignorant. Madl ignored Mulligan's query, telephoned the acting foreman and machinists' union steward, Bob Carey, stated that Mulligan was wandering around with nothing to do and asked if Mulligan had any assignments. Mulligan also asked Madl if he knew that Hoffman was working on his truck. Madl said "Yes, I gave him permission. Mind your own business and go back to work." On that evening, September 27, 1991 Mulligan first called the City's Inspector General's office, which investigates corruption and wrong doing involving City workers or City funds, to inquire into its procedures.²⁸ Mulligan spoke to IG employee Cathy Lenz, but did not identify himself.

On the following morning, the last Friday in September 1991, Mulligan told his union steward Carey that he would report to the IG that employees were working on Hoffman's truck. Mulligan said to Carey "I'm tired, I'm going to the IG. Tell Hoffman, Madl and Fanning about it."²⁹ Mulligan then observed Carey go upstairs where the supervisors' offices were located. Within the next half hour, Fanning had reprimanded Hoffman for working on his truck and Madl for giving Hoffman permission to do the work.³⁰ Mulligan never directly told Madl and Hoffman he was going to the IG.³¹ Sometime after the incident, an old City-owned vehicle was assigned to the incinerator for use in lieu of Hoffman's vehicle, and in 1992, a new City-owned vehicle was assigned to the incinerator.

The new work rules

Around the end of September 1991, Hoffman entered the machine shop at 7:15 a.m. on a Monday, stating, in front of all the machinists, that "because Mr. Mulligan, Local 126 member, has turned me in for working on my truck, which I did in an emergency, these are the new rules of the shop."³² The new rules stated the starting time, and the time for coffee and lunch breaks, the area where machinists were to pick up their work orders and what they should do if they finished their jobs early. Hoffman requested that the machinists sign the new rules, but Mulligan refused. The rules were not printed on official City of Chicago stationery and were not distributed to members of other trades.³³ After Hoffman handed out the work rules, he showed them to Fanning, who suggested the addition of the restriction to one's own shop. Around 9:00 a.m., Hoffman gave Mulligan another copy of the work rules on which was handwritten "No machinist is allowed in another trade's room unless work related."

At that time, the work day of machinists at the incinerator was as follows. Employees arrived at 7 a.m., had coffee, read the paper, and waited in the upper level machine shop for Hoffman, who was in a meeting with Fanning and Madl about the work to be done that day. Around 7:25 to 7:30 a.m., Hoffman would hand out assignments. Around 7:40, employees would go to the machine shop downstairs. Until October 1991, it was Mulligan's practice to await his assignment in the electricians' shop with its foreman Norbert Wyderski. The electricians' shop was ten feet from the machinists' shop. No one smoked in the electricians' shop and it was quieter than the machine shop, where the table only accommodated eight of the ten or eleven machinists. An intercom permitted communication between the two shops, and it was generally known that Mulligan was in the electricians' shop.³⁴

On the next day after the work rules were distributed, when Mulligan was in the electrician's shop, Hoffman asked Mulligan whether he had signed the new work rules. Mulligan said "no," that he would have to check with "his people" to see if the rules were valid because he thought the rules were improper and meant only for him. Hoffman then discussed the matter with Madl and Fanning. Subsequently, Hoffman told Mulligan, who at that time was in the electrician's shop, that, on Madl's and Fanning's orders, he had to follow the directive.³⁵ Mulligan still refused to sign the work rules and said "I dare them to suspend me." Ten or fifteen minutes later, on October 1, 1991, Mulligan was served with a five day suspension, signed by Madl and approved by Fanning, for insubordination, that is, failure to carry out a rule, order or directive related to the performance of the employee's duty. Mulligan appealed the suspension, but it was upheld by a hearing officer. Mulligan served the suspension, from October 18, 1991 through October 22, 1991, losing three days of regular pay and between 24 and 32 hours of overtime pay. Mulligan appealed the hearing officer's decision in a letter to Becky Frederick dated October 28, 1991, in which he alleged that the disciplinary action taken against him was due to his "complaint of improper activity by my foreman." Mulligan further stated in the letter that the five day suspension was an extreme penalty for his not signing "an unofficial paper."

Frederick acknowledged receipt of the letter but denied Mulligan's request for further review in a letter dated November 19, 1991.

Mulligan's contact with the IG

On the evening of October 1, 1991, Roman Tapkowski, an IG investigator, visited Mulligan at his home for 2 1/2 hours.³⁶ Mulligan discussed Hoffman's repair of his private vehicle, alleged harassment and retaliation by Hoffman, Madl and Fanning, and other matters.³⁷ Earlier that day, Mulligan had talked to Cathy Lenz at the IG's office to set up the meeting. After interviewing Mulligan, Tapkowski went to the incinerator that night to look for the discarded brake drums from Hoffman's truck.³⁸

Mulligan had numerous contacts with the IG's office between October and December 1991. From October 1991 until the start of the hearing in this case, Mulligan and Tapkowski had at least 100 telephone conversations and 10 face to face meetings.³⁹

On or about November 20, 1991, after being informed by a coworker, Mulligan observed Hoffman working on the manifold of his truck in the pipe fitter's shop.⁴⁰ Mulligan reported the incident to Madl, and commented on the new work rule which barred machinists from visiting in other trades' shops. That evening Mulligan discussed his observations with IG investigator Roman Tapkowski.

On the next day, November 21, 1991, Mulligan arrived at work around 7:01 or 7:02, but signed in at 7:00 a.m. ⁴¹ Later that morning, without explanation, Hoffman changed Mulligan's arrival time to 7:05 and initialed the sheet.⁴² Mulligan was not docked pay for his late arrival. After this incident, machinists were allowed a five minute grace period for late arrivals.

Around December 1991 or January 1992, Hoffman observed a contract employee, John Miller, painting trim work in the storeroom. Miller, who worked seasonally, was a laborer who worked as a carpenter at the incinerator. When Mulligan asked what the trim was for, Miller claimed he was building a bar for Madl's home.⁴³ Mulligan informed Tapkowski, who came to Northwest to observe the bar trim and mirrors. Mulligan and Tapkowski were escorted by a coworker. After this incident, Hoffman⁴⁴ and the storekeeper of the storeroom informed Mulligan that he was not allowed in the storeroom.⁴⁵ Hoffman never told any other machinist not to enter the storeroom.

In November and December 1991, Mulligan was not allowed to use the photocopier⁴⁶ and coworkers gave him the "cold shoulder." Around that time, Dan Clarke, a machinist, noticed that Hoffman seemed displeased when he (Hoffman) observed Clarke having lunch with Mulligan.⁴⁷

At sometime during the winter of 1991, between December 1991 and February 1992, Madl, the acting chief operating engineer, observed an employee, Daniel Ahlfeld,⁴⁸ having a brief conversation with Mulligan. There were no other employees in the area where the conversation occurred. After Mulligan walked away, Madl followed Ahlfeld into the electrical engineers' office, pointed at him and said "You better watch who you talk to or you could lose your job." Ahlfeld did not talk to Mulligan any more often than he talked to other coworkers.

December 1991

Just prior to Christmas, Mulligan reported to the IG, based on a conversation he had with coworkers, that employees, who were painting office and hallway areas of the facility, were marking their time sheets as working on the number three boiler.⁴⁹ The employees were Ken Janisch, an engineer, Sheroz Jimenez, and Al Dorn, laborers. The work was performed after hours and the employees were paid overtime. Fanning, Madl and Janisch provided the paint.⁵⁰

Prior to the plant's Christmas party, around December 20, 1991, Mulligan asked Fanning if he could speak to Commissioners Ziesemer or Schivarelli, high officials in the Department of Streets and Sanitation who were expected to attend. Fanning said "no." Mulligan asked when he could speak to them. Fanning said it was not the time or place and that Mulligan should arrange a meeting himself. Mulligan then accused Fanning of covering up for Hoffman and Madl, and told him he was aware of the false time sheets. Fanning said "give it your best shot."⁵¹ Mulligan responded "we will find out if you are a friend of Billy Daley's or not."

On the same day, Fanning wrote a memorandum to Becky Frederick reporting his conversation with Mulligan and stating that Mulligan had said that the "Daley administration was also a part of this fraud and that he was going to expose this problem." Fanning also stated that, in the past, Mulligan had made allegations against his foreman and an ACOE (presumably Madl) which were "unsubstantiated and indeed, possibly fabricated." Fanning requested that the department conduct an investigation of Mulligan's charges.⁵² Fanning also stated in the memorandum that if Mulligan's charges were found to be unsubstantiated, "the Department take immediate disciplinary action against Mr. Mulligan." Subsequently, a department employee, Vincent Tenudo, was appointed to conduct the investigation, but he did not pursue the investigation after the IG visited the incinerator in February 1992.

A few days later, around December 23, 1991, a coworker told Mulligan of a rumor that Mulligan would be suspended for 29 days, a matter Mulligan reported to IG investigator Tapkowski.⁵³

The vent pipe incident

On the morning of January 3, 1992, Mulligan was working on a furnace with a fellow machinist, Chris Jaekel, when he noticed a pipe venting a considerable amount of steam near a ladder used by trades workers. Mulligan was about 15 feet from the pipe, and the ladder was eight feet away from where the steam pipe was venting. The pipe, which had been recently replaced, was venting straight across. It should have been venting down. Mulligan spoke to Jaekel about the situation, then went to the machine shop, telephoned the pipe fitters' shop, and spoke to the pipe fitter who repaired the pipe. Mulligan learned that repairs on the pipe had been completed. Sometime later, Hoffman telephoned Mulligan to inform him that the pipe fitter's foreman, Eugene Wapniarski, had complained about his (Mulligan's) conversation with the pipe fitter about the pipe. Hoffman told Mulligan that Wapniarski said that Mulligan should have reported the venting problem to a foreman or a supervisor but should not have talked to a pipe fitter. Mulligan responded that he had tried to contact Hoffman. Then Mulligan said "what's the issue? Take care of the vent pipe." Meanwhile, Mulligan had informed his union steward Carey about the situation and the latter had inspected the vent pipe.

When Mulligan returned from lunch, Mulligan and Carey realized that neither had reported the situation. Mulligan reported the matter to the plant safety officer, Ken Janisch, an engineer. Mulligan told Janisch that if the fitters didn't do anything about the pipe, he would cap the pipe himself.⁵⁴ Mulligan also advised coworkers to avoid the pipe.⁵⁵ That afternoon, Mulligan observed two pipe fitters repairing the pipe with a rubber hose. Mulligan commented to the pipe fitter's foreman, Wapniarski, that a steel pipe was more appropriate for the repair. Wapniarski complained about Mulligan's remark and Mulligan responded that the pipe was being repaired negligently. During this conversation, Mulligan touched Wapniarski's arm to get his attention but he did not spin him around. Then Mulligan commented on the repair to a coworker.

Mulligan also called Fanning to report the problem. It was not unusual for employees to call Fanning directly regarding safety concerns. On his way to inspect the area, Fanning met Madl. When Fanning met Mulligan, the latter showed Fanning safety screens made in August 1991 for a crane after a plant accident in which Tom O'Neill, a machinist, was injured. But by January 1992, only one of the three had been installed.⁵⁶ Mulligan explained his concerns about safety

and angrily told Fanning that he was a "nothing." Fanning walked away and Mulligan returned to his duties. When Fanning returned to his office, he decided to issue a suspension to Mulligan.⁵⁷ After talking to Madl and Wapniarski, he decided on a penalty of 29 days, which was approved by Commissioner Zieseemer, who advised an immediate suspension presented in the presence of three witnesses "in case Mulligan got violent." Zieseemer also advised Fanning to call the police if necessary. Fanning gave Madl a radio telling him to call if he thought it desirable to call the office, and the clerk would summon the police. At that time, Madl did not usually carry a radio.

Shortly thereafter, Madl, Fanning, Wapniarski and Carey returned and handed Mulligan notice of a 29-day suspension. The suspension was for abusive behavior toward Madl, Fanning and Wapniarski. The latter had claimed that Mulligan had spun him around in anger. Mulligan threw the suspension on the ground. Madl told Mulligan to leave the building and that if he did not do so immediately, he (Madl) would call the police. Madl radioed the plant's office, requesting police assistance. Mulligan walked back toward the machine shop. Madl again told Mulligan he had to leave.⁵⁸ Mulligan told Madl that he understood and proceeded toward his tool box. Madl then followed Mulligan to the machine shop, informing him that the police were coming.⁵⁹ The union steward Carey said he would call the union. Mulligan put his tools away and was washing his hands when police officers arrived. Mulligan and the officers left the building around 1:30 p.m. The officers searched and questioned Mulligan. Madl told the officers that he wanted to charge Mulligan because he had felt threatened.⁶⁰ The officers told Madl that they could not charge Mulligan in the absence of threatening remarks. Mulligan immediately began serving the 29-day suspension on January 3, 1992.

Mulligan appealed his suspension. The hearing on the matter began in September 1992. On April 19, 1993, the hearing officer rendered a decision, holding that Mulligan's remarks were insubordinate, but reducing the suspension to five days and recommending that Mulligan be transferred to another work site as soon as possible. The City's Personnel Board accepted the decision, with one member dissenting and recommending that no suspension be imposed because of provocation by the supervisor and the dangerous nature of the hazard in the workplace.

When Mulligan returned to work after serving the suspension, he was credited with having worked overtime and was ineligible to be the next one called to work overtime, even though he could not have worked overtime due to his suspension. At that time, the employee with the least overtime accumulated was the first one called for overtime. Mulligan grieved the overtime issue on February 4, 1992, but his grievance was denied. On that same day, Mulligan filed a second grievance alleging he had not been given proper notification regarding his January 1992 suspension.

The IG's visit

On February 19, 1992, four to six IG investigators arrived at the incinerator,⁶¹ interviewed 20 to 22 employees, and ordered certain other employees, including Hoffman and Madl, to go to the IG's office for interviews. IG investigator Tapkowski conducted most of the interviews. Tapkowski and another investigator took notes, from which Tapkowski prepared reports.⁶² After submission to Inspector General Vruostuoris, Tapkowski destroyed the notes on which the reports were based. Vruostuoris then prepared a document for Mulligan's 29-day suspension hearing based on Tapkowski's reports.

Tapkowski interviewed Hoffman on February 19, 1992 for over one hour.⁶³ Tapkowski told Hoffman that unless he signed a paper (apparently a statement of administrative rights), he would be terminated. Tapkowski asked Hoffman between 150 to 200 questions concerning the plant. Some of the questions were the same but asked in different ways. Tapkowski questioned Hoffman about Mulligan's five-day suspension, about Hoffman's truck, overtime, computers and job assignments.⁶⁴

The IG's summary of Hoffman's interview

A summary, composed by the Inspector General based on the notes made during the interviews conducted by Tapkowski, stated that Hoffman remembered that Mulligan mentioned making a complaint to the IG. However, at the hearing in this case, Hoffman denied making that statement. According to the summary, Hoffman said that the work rules were directed specifically at Mulligan because Fanning had received a complaint. In the summary, Hoffman admitted that when introducing the new rules to the machinists, he said that since Mulligan had gone to the IG's office, "I guess I haven't been such a good boss, so here are the new rules." However, at the hearing in this case, Hoffman denied making that statement. With regard to Mulligan's allegations about the manifold, Hoffman told Tapkowski that he had been attempting to repair the manifold by welding it in the pipe fitters' shop, but was unable to do so. The manifold was too hot to handle, so Hoffman left it on the bench. In the statement, Hoffman claimed that Madl suspended Mulligan so as to exclude him from scheduled overtime, a statement Hoffman denied at the hearing in this case.

Other statements Hoffman made to Tapkowski in the interview included the following. Hoffman admitted throwing the tomatoes in the scrap bin. Hoffman said he used his truck for work related purposes and felt he was entitled to use a City facility to repair it. He also said he had permission of his supervisor. Hoffman said Madl intentionally antagonized Mulligan when presenting the 29-day suspension so as to provoke Mulligan so he would be arrested. However, Hoffman denied making the last statement at the hearing in this case.

Madl's interview

Madl was also interviewed at the IG's offices.⁶⁵ After waiting about 2 1/2 hours, he was interviewed for about three hours by Tapkowski and another investigator, beginning around 1:30 p.m. Tapkowski told Madl he would not be charged with criminal acts, but if he did not sign a paper (again, apparently a statement of administrative rights), he would be terminated. During the interview, Tapkowski kept showing his gun. The latter asked most of the 200 questions covering subjects such as cheating on time sheets, personal benefits, reprimands of a crane operator, Madl's use of a personal computer at work, the painting of the plant, remodeling work done on Madl's home,⁶⁶ and overtime. Both investigators wrote down Madl's responses, but they did not ask Madl to sign their notes nor did they show them to him. Madl felt that Mulligan had contacted IG, but had no proof.⁶⁷ He asked the investigators who his accuser was, but they did not say.⁶⁸ During the interview, Madl characterized Mulligan as a trouble maker.⁶⁹ The investigators asked Madl if he thought Mulligan should be terminated. First he said yes, then he said "no, he should shut up and do his job." At the end of the interview, Madl said he was sorry he wasted the investigators' time, they said that he did not waste their time, Madl responded "but you wasted mine."⁷⁰

The IG's summary of Madl's interview

According to the IG's summary,⁷¹ Madl stated that he selected the dates Mulligan would be suspended, but at the hearing in this case, Madl said that the department decided when the suspension began. According to the summary, Madl admitted that he and Hoffman were reprimanded after Mulligan complained about Hoffman repairing his vehicle. At the hearing in this case, Madl admitted that statement was correct. Madl also agreed with the statement in the summary that Mulligan was suspended for verbal abuse of Madl and Fanning and for allegedly spinning Wapniarski around. Madl admitted telling investigators that after Mulligan was handed the suspension, the latter was angry and yelling. He may have said that Mulligan used vulgar names. According to Madl, in his statements to the IG, he said that he asked the police whether he could file charges against Mulligan, not vice versa, and the police responded that unless Mulligan made threats, they could not charge him with a crime.

Fanning's interview

Fanning was interviewed at the plant by two IG investigators, one of whom was Tapkowski.⁷² The interview lasted one to one and half hours. In addition to questioning Fanning, the investigators inspected his computer. The questions asked included questions about Mulligan, private work on City time, and pornography on the computer.

The IG's summary of Fanning's interview

At the hearing in this case, Fanning denied or did not recall numerous statements attributed to him in the Inspector General's summary of his interview. According to the summary, Fanning stated that Mulligan had a problem with his supervisors, a statement Fanning denied at the hearing in this case. According to the summary, Fanning told investigators that he knew Mulligan had made a complaint to the IG, a statement Fanning also denied at the hearing in this case. The summary stated that Fanning told investigators that Madl, Wapniarski, Mulligan and Carey were involved in a loud argument on the day Mulligan received the 29-day suspension, a statement Fanning disavowed at the hearing in this case.

Fanning's documentation of Mulligan's conduct

Sometime after the IG's visit, Commissioner Ziesemer told Fanning not to suspend Mulligan, but to document any problems in memoranda.⁷³ When things happened involving Mulligan, Fanning called Ziesemer or other commissioners.⁷⁴ Any suspension subsequently issued to Mulligan was approved by upper management. Between March 1992 and February 1993, Fanning addressed a series of memoranda to Ziesemer concerning Mulligan. Fanning, in turn, directed Hoffman to document in writing incidents concerning Mulligan. In most instances, Mulligan was not provided copies of the memoranda at the time they were written.

After the IG's "raid," around February 26, 1992, Deputy Commissioner of Streets and Sanitation, Michael Schivarelli, issued a letter stating his support for plant manager Fanning.

The lathe incident

On March 3, 1992, Madl directed Mulligan to mop the floor in the machinists' lunch room/locker area.⁷⁵ Mulligan had never been asked to clean that area before.⁷⁶ Mulligan asked "what about the windows?," Madl said "do that as well." When the proper equipment was brought, Mulligan began work, after which Madl inspected the floor. Later that day, Mulligan noticed that the receiver was missing from the telephone and that Madl had the receiver under his arm. After Mulligan finished mopping, the receiver was put back.

On the same day, around 1:30 p.m., Madl⁷⁷ said to Mulligan "we have an emergency. We need a coupling bored out. You do know how to operate the lathe don't you?" Mulligan, who had never been given a lathing assignment, responded that he was rusty and had not used a lathe in 17 years. When Madl asked "Do you mean you can't do the job?," Mulligan replied that he would do his best to make the part. The part had to be made precisely because an improper size could cause an explosion in the turbine which operated at 4000 revolutions per minutes. After Mulligan entered the machine shop to start the assignment, all the other machinists left. It was unusual for only one machinist to be in the shop. Generally at least two machinists worked together as a team and dangerous conditions in the incinerator made it advisable not to work alone. Madl had told the other machinists to keep away from Mulligan, to stay out of the shop and not to help Mulligan.

During that afternoon, Mulligan asked a coworker for help in finding the cutting bits needed to perform his assignment, but the coworker refused.⁷⁸ Madl visited the machine shop many times during the afternoon to check on Mulligan's progress. At the end of his shift, Mulligan asked if he should stay overtime to complete the task, but Madl said "no."

Mulligan did not return to work until the following Tuesday. At that time, the turbine for which the part was fabricated was in operation. Despite this, Hoffman instructed Mulligan to complete the lathe work, but to cut the part to a larger size. Mulligan told Hoffman that the size was too large, but Hoffman said that was the size he wanted and initialed a paper with the size on it.⁷⁹ Mulligan returned to working on the lathe but could not find all the cutting bits he needed. A coworker, Frank O'Brien, covertly assisted Mulligan in finding the bits. When Mulligan finished, Madl and Hoffman came to the shop to measure the part. It was unusual for Madl to inspect a measurement. Madl said the part was off by a 2000th taper.⁸⁰

After the incident, Madl wrote a memorandum to Fanning stating that it was a "very common occurrence for a city machinist to bore/lathe a coupling alone," that it took Mulligan seven hours to complete the task, which was "five hours longer than an inexperienced machinist should have taken and the final product was unacceptable for use on the assigned piece of equipment."⁸¹ Madl concluded that Mulligan was "not capable of performing routine machinist duties," but suggested no remedial action to improve Mulligan's ability to run the lathe.

Machinists' duties

Local 126 includes 650 unit members, but not all the members are bona fide machinists.⁸² Only 50 to 60 percent of the unit members are journeymen machinists, although all machinists at the incinerator are journeymen. Wage scales reflect the difference in qualifications between journeymen and other unit members. Not all journeymen within the bargaining unit can run a lathe. Further the City does not have an apprenticeship program with Local 126 for further training of machinists after they are hired.

The Northwest incinerator did not initially have a machine shop, but only a drill press which other trades persons used. The City's Department of Public Works performed machine work for that facility. A machine shop was not established until the 1980s. Most of the machinists' work at the facility involved use of a torch and welder to dismantle and repair chains, conveyors and turbines, rather than machining. Further, overtime work seldom involved machining. Most of the lathe work at the incinerator was done by only a few machinists. For example, Tom O'Neill⁸³ and Dan Clarke, who were machinists at the incinerator, were never assigned to bore a coupling.

Documentation of Mulligan's conduct

Beginning on March 4, 1992 and continuing until March 25, 1993, Hoffman wrote a series of 24 memorandums to plant manager, John Fanning, regarding Mulligan. Fanning had told Hoffman that he was not to discipline Mulligan on orders from "downtown," but to document everything.⁸⁴ Hoffman started writing the memoranda to document his complaints against Mulligan.⁸⁵ Prior to that time, Hoffman had not written any memoranda regarding Mulligan. During the period Hoffman has been a foreman, he has written two or three memoranda on only one other employee who filed grievances regarding overtime. Hoffman did not give copies of the memoranda to Mulligan although he discussed the subject matter of some of the memoranda with Mulligan.

The memoranda covered such matters as Mulligan leaving his tools in his personal vehicle rather than having them in the plant,⁸⁶ Mulligan's alleged damage of a boring tool; his alleged incompetence, his alleged use of a telephone in another trades' shop, his presence in the shops of other trades; his attitudes toward work, work procedures and coworkers, Mulligan's statements and other conduct in the machine shop; and grievances filed by Mulligan. Hoffman never approached Mulligan to resolve the problems which were the subjects of the memoranda.⁸⁷

Sometime between February and July 1992, Madl⁸⁸ entered the office of the chief operating engineer, Thomas Murray, and asked if Murray had given time sheets to Mulligan. Murray, who cosigned the time sheets, said "no," and that he did not hand out time sheets, but turned them in to the clerk. Madl responded that Murray would be in trouble if he did hand them out.

On or about March 4, 1992, Mulligan left the incinerator to retrieve a certain type of wrench from his personal vehicle. He did not ordinarily use small hand tools at the incinerator. The type of tasks he performed at the incinerator did not require a complete selection of tools and many of the tools that he needed were supplied by the City. As Mulligan was returning to the incinerator, Hoffman and Madl asked what he had in the bag and whether they could inspect it. Mulligan said "yes" if they inspected the parcels of everyone else who entered the plant. They did not pursue the matter.

On or about March 27, 1992, Mulligan commented, in a joking manner, to Mike Lowe, an incinerator employee who had been walking closely behind Madl and Fanning, that if he did not stop quickly, he would trip and break his neck. In a memorandum dated March 30, 1992, Fanning reported those "intimidating remarks" to Ziesemer as an example of "Mulligan's apparent desire to disrupt and undermine operations."

Around 3:00 p.m. on March 31, 1992,⁸⁹ Hoffman observed Mulligan using the telephone in the laborer's shop. Mulligan had asked the laborers' foreman for permission to use the telephone because he could not make outside calls on the telephone in the machinists' shop. While Mulligan was talking on the phone, Hoffman told Mulligan he was not allowed in the laborers' shop. After Mulligan finished his call, he spoke to Hoffman about the latter's interruption of his (Mulligan's) telephone call. Hoffman reported the incident to Fanning in a memorandum entitled "insubordination of James Mulligan" and commented that Mulligan's conduct was "abusive and intimidating."

April 1992 incidents

On or about April 14, 1992, Mulligan filed two grievances, one involving distribution of overtime and the other involving his request for a copy of his evaluation.

On or about April 16, 1992, Mulligan twice requested additional help in repairing a conveyor. Hoffman reported the incident to Fanning in a memorandum dated April 20, 1992 and entitled "insubordination and shop disruption of James Mulligan." In the memorandum, Hoffman stated that Mulligan "disrupted the machinist crew with outbursts of harassment by being passed over on overtime and not being helped when needed." Hoffman further stated that Mulligan's outbursts were becoming "more frequent and violent."

In April 1992, Mulligan participated in a conversation in which a coworker Chris Jaekel said as a joke "You're not paying the foreman enough if he has to work with Mulligan." Apparently this conversation was reported to John Fanning as indicating that Mulligan was alleging that management was taking money for jobs. Fanning summoned Mulligan to his office to question him about his remarks. Hoffman, Carey and Janisch were also present. Mulligan told Fanning that the remarks were a joke but that he would not comment further without a union representative present.

Around the same time, Mulligan reported to Bob Carey, the union steward, that contract machinists were doing personal work on City time. Mulligan had observed a contract machinist, Rudy Rempert, building a mail box for his residence over several months. Hoffman advised Mulligan to report the matter to the IG. That day the contractor machinists were fired.

In memoranda dated April 23, 1992 and addressed to Ziesemer, Fanning requested a department investigation of Mulligan's charges of "extortion" and that contract machinists were doing personal work on City time. Fanning wrote that "a failure to investigate the charges will result in other accusations being made to the Inspector General's Office." On the next day, April 24, 1992, Madl reported to Fanning in a memorandum that Mulligan's accusations had "no validity."

May to August 1992

On or about May 4, 1992, Mulligan filed a grievance regarding the distribution of overtime. On or about May 11, 1992, Mulligan requested extra copies of grievances that he had filed. Hoffman reported the incident to Fanning in a memorandum dated May 12, 1992 in which he (Hoffman) also alleged that Mulligan was making copies of wagering pools and announcements of picnics on the plant copy machine.⁹⁰ On May 12, 1992, Mulligan filed another grievance involving the distribution of overtime.

In memoranda dated June 11 and June 25, 1992, from Hoffman to Fanning, the former complained of Mulligan's presence in the shops of other tradesmen. In the earlier memorandum, Hoffman stated that Mulligan was in the pipe fitter's shop,⁹¹ in the later memorandum, Hoffman complained of Mulligan's presence in the boilermakers' shop. In the second incident, which occurred around 3:00 p.m., Mulligan had been on his way to the elevator to go upstairs and sign out, when a boilermaker asked Mulligan about his trip to Ireland. When Mulligan went upstairs, Hoffman commented to Mulligan on his presence in the shop and said that Fanning did not want him (Mulligan) there. Mulligan said "tough." Earlier that day, Mulligan had filed a grievance. In a memorandum dated June 26, 1992, from Fanning to Ziesemer citing Mulligan's presence in the other trade shops, the former described Mulligan as a "deviant." In a grievance dated July 8, 1992, Mulligan charged that Fanning was retaliating against him for the June 25, 1992 grievance when Hoffman complained about Mulligan's presence in the boilermakers' shop on that day.

During the summer of 1992, when Mulligan was on vacation, Madl told machinist Dan Clarke, and two other employees, that Mulligan had pictures of them doing work they should not have been doing. When Mulligan returned to work, Clarke asked Mulligan about the photographs. The latter admitted to taking pictures of unsafe conditions in the incinerator, but without employees in them. Mulligan gave the photographs to the IG.

Around July 25 or 26, 1992,⁹² James Walton, a laborer who worked at the plant, asked Mulligan to make burglar bars for his (Walton's) garage, but Mulligan refused. Walton apparently next asked Hoffman⁹³ about making bars, but Hoffman referred Walton to Bob Carey, because Hoffman would be absent for the next few days. Mulligan reported the solicitation to the IG, and also reported that a coworker, Bob Carey, had been fabricating the bars over a two day period. Around 8:30 a.m. on July 27, 1992, Mulligan and IG investigator Tapkowski observed employees doing non-City work at the incinerator. Tapkowski confiscated the items that had been made. Two other employees, Hayes and Rempert, were about to start work on the screens, when Tapkowski arrived.

On the same day, Tapkowski visited Hoffman at his home to question him about the incident. Hoffman was not at work because his wife had just had a baby. After Tapkowski and another investigator arrived around 11 a.m., Hoffman received a telephone call from Madl who advised him not to talk to the investigators. Despite this advice, Hoffman answered questions for one half hour or 45 minutes.⁹⁴ Hoffman told the investigators that Walton had claimed he needed a screen for the basement of the plant, and that he had assigned the job to Bob Carey. Hoffman told the investigators that he had no knowledge that the job was personal and that it frequently happens that machinists are asked to fabricate things.⁹⁵ Hoffman subsequently confronted Walton about the burglar bar incident but did not get a satisfactory response as to why Walton requested bars for his home. Madl also talked to Carey and Walton. Carey admitted that he knew the grates were for Walton's garage. Fanning attempted to suspend Carey and Walton for 10 days, but the Inspector General advised Fanning, and upper management confirmed, that no discipline could be imposed on employees pending the IG's investigation of the matter.

In August 1992, when Mulligan returned to work after attending a funeral, he noticed on the paper holder in the washroom a picture drawn with a felt pen of a hooded skeleton, a "grim reaper," with a pistol in its hand. Also pictured was a tombstone with the words "Jim M. R.I.P."⁹⁶ Mulligan removed the cover, and called an IG investigator, who advised Mulligan to call the police and make a report, which he did. The police arrived around 4:00 p.m. Mulligan also showed the cover to coworkers. When Mulligan told Hoffman about the cover, Hoffman asked where Mulligan was at a certain time and said "How do we know you didn't do it?" Mulligan responded "How do I know you didn't do it." Mulligan also informed Fanning that he had reported the incident to the IG and to the police. When Fanning called downtown, he was told that as long as the IG was involved, he was to stay out of the situation.

On the next day, Hoffman asked for the towel cover, claiming that Fanning wanted to see it. Hoffman also took the police report of the incident. Mulligan said that he wanted to make a telephone call first, because he did not want evidence destroyed. Hoffman told Mulligan that he would be making telephone calls from home if he did not turn over the cover.⁹⁷ Mulligan then complied with Hoffman's request.⁹⁸ Fanning received the holder from Hoffman, photographed it and had a laborer erase the drawing. Twenty minutes later Hoffman returned the cover to Mulligan. Mulligan asked Hoffman who destroyed the marks, but Hoffman would not respond. When Mulligan asked for a copy of the police report, Hoffman said "what police report?" Hoffman directed Mulligan to reinstall the holder immediately, which he did.⁹⁹

In August or September 1992, after Mulligan walked under a crane, a cable dropped directly behind him. Three employees were working on the crane above Mulligan, but none of them warned Mulligan that the cable was falling.

Prior to that time Mulligan had reported to the IG that one of those individuals was doing private work on City time. After the incident, Mulligan remarked that employees needed to be more careful to Carey and Hoffman. In a conversation with Mulligan later that day, Madl¹⁰⁰ said he believed Mulligan's remark about being careful showed an intent to harm fellow machinists and that Mulligan would be held responsible if anyone was injured. In the same conversation, Madl mentioned to Mulligan that the drawing on the paper holder concerned a baseball rivalry. Mulligan completed his shift that day, and then took three days of sick leave.

September to December 1992

On or about September 2, 1992, when Mulligan entered the machine shop, he observed a coworker, Dom Zambuto sitting where he (Mulligan) usually sat. When Mulligan asked Zambuto why he was sitting in his (Mulligan's) chair, Zambuto called Mulligan an "asshole." Later, Zambuto complained to Hoffman, who talked to Mulligan about the incident. In a memorandum written that day to Fanning, Hoffman claimed that Mulligan had been harassing Zambuto and that the incident was "another example of Jim Mulligan not being able to get along with his coworkers."

Sometime between November 1992 and January 1993, machinists, pipe fitters and boilermakers were issued new helmets. Hoffman,¹⁰¹ Mulligan's foreman, handed out new helmets to all employees, including contract employees, except Mulligan. The latter was the only employee at work that day not to receive a helmet. Mulligan had not been asked previously whether he needed a new helmet. When confronted, Hoffman claimed that there were not enough for everyone. However, five minutes after Mulligan called the union to complain, Hoffman appeared with the helmet that had been given to Dan Clarke, and yelled at Mulligan, "Here's your helmet," throwing it on a welding bench where Mulligan was working.

On November 5, 1992, Mulligan filed a grievance regarding overtime.¹⁰² In the grievance, Mulligan alleged that a subcontractor, who had been assigned to work overtime, was allowed to leave early on one day and return to the overtime assignment the next day, despite an agreement among all machinists at the incinerator that when an employee leaves an overtime assignment, he gives up the right to further overtime on that job.¹⁰³ Mulligan's grievance was denied. Apparently, Mulligan was mistaken in believing that the employee who left early returned to the assignment the next day.¹⁰⁴ Fanning and Hoffman commented on Mulligan's grievance that it would have been a waste of City money to call in a City employee, presumably Mulligan.

On or about November 25, 1992, Hoffman directed Mulligan to install a gear reducer. Mulligan noticed that the gear box contained metal chips which could cause premature failure. Mulligan did not want to be blamed for such failure and brought the problem to Fanning's attention. The latter decided that the gear reducer should be installed despite Mulligan's concerns. On that day, Fanning sent a memorandum to Commissioner Ziesemer informing him of the incident.¹⁰⁵

On December 17, 1992 and January 22, 1993, Hoffman observed Mulligan talking to Norbert Wyderski,¹⁰⁶ the electricians' foreman, in the electricians' shop around 7:15 a.m. Hoffman reported these incidents to Fanning in memoranda written on those days.

In December 1992, Mulligan spoke to Commissioner Eileen Carey when she toured the Northwest facility. Carey had introduced herself and shook hands with Mulligan. Mulligan told Conlon, an aide who was with Carey, that he would make people nervous talking to Mulligan. When Conlon asked why, Mulligan explained his situation at the incinerator. Conlon told Mulligan to telephone him, but when Mulligan did, Conlon would not take the call.

January to June 1993

On or about January 31, 1993, Mulligan telephoned Sheroz Jimenez, an acting clerk, to ask the amount of vacation time he was due for 1993. When Jimenez reported that Mulligan had lost two vacation days due to his 29 day suspension, the latter responded "thanks a lot." Jimenez reported the conversation to Fanning and he directed her to tell Mulligan that he considered the remark insubordinate and requested an explanation of what Mulligan meant. Mulligan responded saying, he did not care what Fanning thought, that he was holding him responsible for his lost wages due to his suspension. In a memorandum dated February 1, 1993 and addressed to Ziesemer, Fanning cited the incident as an example of Mulligan's "outrageous contempt" toward management.

On or about the end of January, 1993, Mulligan requested permission to leave the incinerator to come to this Board for a prehearing conference, and he also requested a vacation day for the next work day. In a memorandum dated February 2, 1993 from Fanning to Ziesemer, the former characterized the incident as causing "disruption of the work schedule of the Machinist crew."¹⁰⁷

On February 3, 1993, Fanning sent memoranda to Mulligan and other employees, advising them that their number of absences was unacceptable and that corrective action would be directed. The memorandum constituted a written warning.

In a memorandum addressed to Fanning and dated February 10, 1993, Hoffman recounted a conversation he had with Al Wade, an electrician who was acquainted with Mulligan. According to Hoffman, Wade said that Mulligan was the kind of person who "could easily snap" and who might "come back to work with a gun."

On or about February 11, 1993, Mulligan had a conversation with a coworker, Vito Marchese, in which Mulligan said that he was so stressed he felt he could take someone's head off. Marchese repeated the conversation to Hoffman, who repeated it in a memorandum to Fanning entitled "threat of possible violence by Jim Mulligan."

The time sheet incident

In early February 1993, Fanning instructed Madl, who instructed Hoffman, to bring upstairs the time sheets for all trades after 7:30 a.m. and return them to the lobby at 3:20 p.m. Additionally, employees who left the incinerator to go to lunch were advised to sign out and in when they went to lunch. Employees who remained in the building for lunch did not have to sign in and out for lunch until the end of the day when they also signed out for the day.¹⁰⁸ Previously, the time sheets had remained in the lobby during the day, unless they were sent upstairs for a clerk to work on and then return downstairs. Management's rationale for removing the time sheets from the lobby was so that employees arriving late could be observed signing in and out. Around that time it was discovered that certain contract machinists were signing in and out for the entire day at 7:00 a.m. The rationale for requiring employees who left the incinerator to contemporaneously sign out for lunch, but not those who stayed in the plant was that if checkers came to the plant, the latter individuals could be accounted for and found within the plant.

Mulligan attempted to sign out one day, but could not find the time sheets and commented on his predicament to Hoffman. The latter then went to get the time sheets. Mulligan remarked that the sheets needed to be in the lobby at 11:30 a.m., the time when Mulligan was scheduled for lunch, so that he could sign out at the start of his lunch period.¹⁰⁹ Hoffman responded "is that a complaint?" On the next day, the time sheets were not in the lobby.¹¹⁰ While searching for them on the second floor of the building, Mulligan commented to Fanning that it was not right that other employees had to go to the second floor to sign out because he had commented on the matter. Mulligan also asked Fanning what clock he should refer to in signing out. Fanning yelled at Mulligan, and told him to leave and to see his foreman.

On the next day, Mulligan discussed with Hoffman which clock to use in recording his times on the time sheet and whether he had to be in the building by noon or whether he had to sign in by noon. Hoffman said that he did not think management would mind if Mulligan was a few minutes late in signing in. However, Mulligan reminded Hoffman of an incident which occurred five or six months before, in which Madl wrote up Mulligan for returning from lunch one or two minutes late.¹¹¹ Mulligan then told Hoffman he was not a "strong" foreman. One and a half hours later, Hoffman gave Mulligan a nine day suspension for insubordination on account of the remarks that Mulligan had made.

Mulligan appealed the suspension and a hearing on the matter was held in mid-February 1993 before hearing officer, Lee Krating. It was the union's position at the hearing, that Mulligan should not be suspended for expressing his opinion and giving constructive criticism to Hoffman. In attendance at the hearing were Krating, Virgil Sarti, the union representative, Mulligan, Hoffman, and Dan Clarke, a machinist. After the hearing started, Krating asked Hoffman a number of questions concerning Mulligan's alleged insubordination, to which Hoffman answered "no." At the time of the incident, Mulligan did the work assigned, he did not use vulgar language, nor talk in a loud voice. Krating decided that Mulligan had not been insubordinate and threw out the suspension.

In February 1993, Mulligan called Respondent's Employee Assistance Program (EAP) and, after informing his supervisors, left work to visit that office. Mulligan talked to a counselor, who advised Mulligan to see a physician and a therapist. Mulligan called his health care provider, Anchor, and scheduled an appointment with a psychologist, who advised Mulligan to take a three week leave of absence. The psychologist gave Mulligan a letter which he used in an unsuccessful attempt to obtain worker's compensation. Respondent denied Mulligan's request for disability compensation on a theory that his injury was not covered. Mulligan then took 16 days of leave, and visited his doctor for a series of tests. The doctor found no physiological problems.

Prior to returning from that leave, Mulligan asked for vacation days on March 11, 12, 15 and 16, which was initially approved by Hoffman. However when Mulligan returned to work on March 18, he learned that permission was revoked and that he would not receive vacation pay for March 11, 12 and 15, 1993. Because Mulligan was not allowed vacation leave, he was not eligible to receive overtime for the entire day on Saturday, March 20, 1992. Initially Mulligan told Hoffman, he would not work on that day, but he asked if he would violate any rule if he did not come to work. Hoffman responded "I expect you to come to work." Mulligan worked on that Saturday from 6:00 a.m. to 2:30 p.m. straight time, and then another four hours overtime.

Around March 1993, Mulligan was assigned to clean a conveyor belt, which consisted of chipping off the accumulation of cement-like material. Machinists considered such work a punishment job, because it was one of the worst jobs in the incinerator. It was hard work which involved constant grinding of material which was probably toxic. The conveyor needed to be cleaned so that it could be repaired. Initially, Mulligan cleaned the belt with a drill, but the chisel bit wore out. Mulligan offered to replace it if he were reimbursed, but Hoffman told Mulligan he could not guarantee reimbursement by the City and advised the latter to continue the project by hand with a hammer and chisel. After several days, Mulligan's elbow became sore because of the repetitive motion. When Mulligan so informed Hoffman, the latter told Mulligan to begin repairs on the conveyor. Hoffman also suggested that Mulligan consider seeking an evaluation regarding disability. However, Mulligan continued to work on the project. When Mulligan subsequently reminded Hoffman that he needed a new drill bit, Hoffman told Mulligan not to chip but to repair. At that time, no other employee was exclusively assigned the task of chipping ash from the conveyor. Mulligan worked on job for eight days.¹¹²

A few days later, on March 25, 1993, Hoffman took Vito Marchese with him as a witness when he went to talk to Mulligan. Hoffman commented to Marchese, who was new to the position of union steward, that he had been telling Mulligan for three days how to do the job and was tired of doing so. Mulligan responded that Hoffman kept changing his instructions. Mulligan then removed a tape recorder from his pocket, showed it to Hoffman, turned it on and said "So there would be no misunderstanding." Hoffman said to Marchese "look he's got a tape recorder." Mulligan saw that Hoffman was displeased, and shut off tape recorder.

Later that day, Hoffman returned with investigators from the IG's office, who invited Mulligan to talk with them. They asked if he had a tape recorder, Mulligan showed it to them and explained his attempt to use it. They asked if there was anything on the tape. Mulligan said he did not know, but that there had been a song recorded on it. The investigators took the tape and never returned it to Mulligan.

On March 25, 1993, Hoffman handed Mulligan a suspension notice of 29 days, charging him with insubordination and intimidation by recording a conversation with a tape recorder. Because the notice had no effective date and date of return to work, Mulligan refused to sign the notice. After calling the Personnel Board, Mulligan returned the notice to Hoffman, who inserted the dates and returned it to Mulligan. The latter immediately appealed his suspension, leaving the building to go to the Personnel Board and then returning to work. Mulligan was denied pay for the time spent at the Personnel Board. Fanning did not speak to Mulligan prior to approving the suspension.

In a memorandum on the suspension dated March 25, 1993 from Fanning to Commissioner Ziesemer, Fanning stated that Mulligan had used the City's personnel policy "in a macabre and corrupted manner, so as to continue his outrageous and destructive behavior," that the "monetary cost incurred by the City . . . has reached a wholly disproportionate amount," and that Mulligan's attempt to tape record his conversation with Hoffman was "morally reprehensible." Fanning requested that termination procedures be initiated against Mulligan.¹¹³

Mulligan's attempts at resolution

Mulligan has made efforts to resolve his problems at work. He has talked to union representatives and to Douglas Ziesemer, the Assistant Commissioner who was plant manager Fanning's supervisor. On one occasion, he tried to talk to Fanning about an overtime grievance. Mulligan has written letters to the Commissioner of Streets and Sanitation. When he asked for a meeting with the Commissioner of Streets and Sanitation, his attorney was advised not to contact her. Mulligan asked to be detailed outside the incinerator building, replacing an injured coworker, but his request was denied.¹¹⁴ Mulligan unsuccessfully bid for the position of stationary engineer. His requests for a transfer outside the incinerator were denied until June 1993, after the start of the hearing in this case.¹¹⁵

To avoid losing his temper, Mulligan used his vacation days and took sick days, for which he was not paid. Mulligan used 16 sick days in 1992, and 23 vacation days. In 1993, Mulligan used almost all of his vacation days, and many sick days.

Mulligan had been considered a good employee prior to his problems at the Northwest Incinerator. He was rated an outstanding employee in 1983 and 1985.¹¹⁶

Discipline of employees at Northwest

During the period Mulligan worked at Northwest, Fanning broke up a physical fight¹¹⁷ between two employees, Ken Janisch and Al Wade. After inviting them into his office, they discussed the fight, and Janisch and Wade apologized. Fanning did not discipline either employee. He could not recall when the fight occurred. There were no other incidents of discipline involving fights introduced into evidence at the hearing in this case.

During his tenure as plant manager, Fanning counseled employees who showed evidence of alcoholism, and suspended an alcoholic employee for 10 days, stripping him of supervisory authority. In November 1992, an employee of the incinerator who was caught signing out early on a time sheet was suspended for three days for verbally abusing a supervisor.

The Inspector General's Office

The Inspector General is authorized under City ordinance to receive complaints and information concerning misconduct, inefficiency and waste in City government, programs and operations, and to promote economy, efficiency, effectiveness and integrity of City government. The IG investigates City employees based on complaints by employees and others. At the conclusion of the investigation, the IG prepares a report and makes a recommendation regarding discipline, forwarding it to Angela Thomas, Chief Assistant Corporation Counsel in the Labor Division of Respondent's law department. Thomas reviews cases involving discipline of employees and assigns them to the 10 attorneys who handle disciplinary procedures for the City. Suspensions of 10 days or more must be submitted to Respondent's personnel department. During the course of a year, 200 suspensions or discharges are imposed, with about 100 referred to the law department. About 150 employees appeal their discipline annually.

If the department head decides to discharge or suspend an employee, the employing department serves its employee with disciplinary charges. Career service employees may appeal such discipline. Attorneys supervised by Thomas prosecute the case on behalf of the department at the appeal hearing. Thus it is the employee's department which is Thomas's client in disciplinary cases. In such cases, the IG's office is an investigatory arm of the City. The report, prepared by the IG for such hearings, consists of an investigative summary and sometimes a statement by the employee investigated, police or arrest reports, and a certified statement of conviction. The IG destroys the investigators' notes after he prepares the investigative summaries. Thomas has access to documents for investigations which have concluded but not for ongoing investigations. Thomas reads the report, and decides whether the evidence is sufficient to initiate discipline. She assigns the case to an attorney. She reviews case files, and frequently communicates with the IG regarding the evidence, its sufficiency, strengths, weaknesses, and strategy of the case. Thomas has disagreed with the IG regarding cases. The Inspector General, who is an attorney, also calls and sends notes to Thomas. Thomas may confer with the IG once or twice a week, primarily by telephone. The IG occasionally writes notes and memoranda, but this is infrequent compared to phone calls. The IG or a member of his staff testifies in cases involving the Inspector General.

When Thomas gives a case file to an attorney, she retains her notes from the IG. The notes are not revealed to anyone except the assigned attorney. Thomas may discuss the concerns raised in the IG's notes with department heads.

The IG advises the mayor and department heads. Although the IG can initiate an investigation on his own, he cannot unilaterally discipline employees except in cases involving his own employees.

With respect to Mulligan, the Personnel Board notified Thomas of Mulligan's appeal of his first 29 day suspension. A summary of interviews with witnesses at the Northwest incinerator was prepared by the IG, and attached to it was a memorandum addressed to Thomas.¹¹⁸ In no other case has Thomas received a memorandum written in the manner that the IG wrote for Mulligan's suspension. The only persons who have seen the memorandum are Thomas, Laura Guzik, an attorney who represented the Department of Streets and Sanitation at the appeal hearing, and Steve Bierig, who represented the City in this case. Thomas has not received any other documents regarding complaints made by Mulligan, including those from an ongoing investigation at the Northwest incinerator. A City ordinance precludes

revelation of documents in ongoing investigations. Thomas discussed Mulligan's case with Streets and Sanitation commissioners Bill Bresnahan and Becky Frederick during the course of Mulligan's appeal hearing.

IV. Discussion and Analysis

The issues in this case are whether Respondent retaliated against Charging Party in violation of Sections 10(a)(1) and 10(a)(2) of the Act because he contacted the City's Inspector General's Office and because he filed grievances.

The alleged 10(a)(2) violation

Section 10(a)(2) of the Act provides that it is an unfair labor practice for an employer or its agents "to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization." The Board has ruled that to establish a Section 10(a)(2) violation, a charging party must show that an employer discriminated against him based on his membership in a union or because of his union organizing activities. However, the mere filing of a grievance pursuant to a collective bargaining agreement is not sufficient activity to constitute membership in or support for a labor organization. Chicago Park District (Public Service Employees Union, Local 46, 7 PERI 3021 (IL LLRB 1991). Apart from his filings of grievances and his union membership, Charging Party has made no showing of union activity by him or discriminatory action to encourage or discourage union membership or union support by Respondent. I conclude that Charging Party has failed to state a prima facie violation of Section 10(a)(2).

The alleged 10(a)(1) violation

Section 6(a) of the Act provides in pertinent part that public employees have, and are protected in the exercise of, the right of self-organization, and may form, join or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment . . . and to engage in other concerted activities not otherwise prohibited by law for the purposes of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion.

Section 10(a)(1) of the Act makes it an unfair labor practice for an employer or its agents to interfere with, restrain or coerce public employees in the exercise of their Section 6 rights.

In determining whether a Section 10(a)(1) violation has occurred, the Board has adopted the objective test of employer conduct, i.e., whether the employer engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the free exercise of their rights under the Act. Section 10(a)(1) prohibits employer conduct which, regardless of motivation, has the effect of coercing employees or interfering with their exercise of protected rights. Chicago Housing Authority (Gale), 1 PERI 3010 (IL LLRB 1985). However, in this case the Charging Party claims that the employer was improperly motivated when it took adverse action against him on account of his concerted, protected activities. Thus, it must be determined whether Respondent's actions were, in fact, illegally motivated. Therefore, the analysis of a Section 10(a)(1) violation must follow the criteria arising under Section 10(a)(2) of the Act regarding the right to engage in union activity. Chicago Housing Authority (Kirk), 6 PERI 3013 (IL LLRB 1990).

To establish a prima facie case of employer discrimination based on an employee's protected activities, a charging party must prove by a preponderance of the evidence: (1) that the employee engaged in union or protected concerted activity; (2) that the employer had knowledge of such activity; and (3) that the employee's protected conduct was a motivating factor in the adverse employment action. *City of Burbank v. Illinois State Labor Relations Board*, 128 Ill. 2d 335, 538 N.E. 2d 1146, 5 PERI 4013 (1989).

Mulligan's filing of grievances

It is well settled that the filing of a grievance pursuant to a collective bargaining agreement is protected concerted activity. An employer who retaliates against an employee for filing a grievance violates Section 10(a)(1) of the Act. *City of Chicago, Chicago Police Department (Kostro)*, 3 PERI 3028 (IL LLRB 1987), *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enf'd, 388 F.2d 495 (2nd Cir. 1967).

The record in this case establishes that Charging Party filed between 10 and 15 grievances during the period April 1991 through May 1993. On April 29, 1991, February 4, 1992, May 4 and 12, 1992, and November 5, 1992, Mulligan filed grievances regarding the distribution of overtime. On February 4, 1992, Mulligan filed a grievance regarding the notice of suspension that he received in January 1992; on April 14, 1991, he filed a grievance regarding copies of his evaluation, on June 25, 1992, he filed a grievance; and on July 8, 1992, he filed a grievance alleging that Respondent retaliated against him for filing the June 25, 1992 grievance.

With respect to the grievances he filed, Charging Party has established that he engaged in protected concerted activity and that Respondent had knowledge of his filing of such activity since the grievances were presented to Respondent's

agents. However, except for his first grievance filed April 29, 1991 and the grievance filed on June 25, 1992, Charging Party has not established that the grievances motivated any particular adverse employment action by Respondent.

The April 29, 1991 grievance

The record establishes that at a hearing on Mulligan's first grievance regarding the distribution of overtime, plant manager Fanning told Mulligan that if he advanced the grievance to the next step, he (Fanning) would recommend privatizing the machine shop. Fanning's statement constituted a threat because, under the objective test for a violation of Section 10(a)(1), when viewed objectively from Mulligan's standpoint, it reasonably tended to interfere with, restrain or coerce him in the exercise of rights protected by the Act. *City of Chicago, Chicago Police Department (Kostro)*, 3 PERI 3028 (IL LLRB 1987)(a threat constitutes a Section 10(a)(1) violation). Such a threat of reprisal would tend to discourage an employee from asserting his rights under the collective bargaining agreement to file and pursue grievances. Even though the threat to privatize occurred more than 180 days before the filing of the charge in this case and thus cannot be remedied by the Board,¹¹⁹ it is nonetheless relevant to the issue of whether Respondent was improperly motivated in its conduct towards Mulligan. For that reason it is an appropriate matter for discussion. By threatening to privatize the machine shop if Mulligan decided to advance his grievance, Fanning indicated his hostility to Mulligan's protected concerted activities in the presence of Hoffman and Madl.

Mulligan's grievance was resolved in his favor around the beginning of June 1991, with the Respondent awarding him eight hours pay. Almost two months later, on July 29, 1991, Hoffman issued a written reprimand to Mulligan. Despite the fact that the reprimand was not issued close in time to the grievance proceedings, there is evidence which strongly suggests that the reprimand was motivated by Mulligan's exercise of his protected right to file a grievance.

The bases for the reprimand were Mulligan's calling pipe fitters "scabs" and his questioning of Hoffman's judgment. Mulligan credibly established that, contrary to Hoffman's assertions at the hearing in this case, the reprimand was not based on incidents occurring on the day the reprimand issued. The name calling incident had occurred several months before Hoffman issued the reprimand and another machinist, Dan Clarke, who also called pipe fitters "scabs," was not disciplined. See *Tressler Lutheran Home for Children*, 263 NLRB 651 (1982)(employer committed an unfair labor practice where it terminated a union activist for using obscenity but took no action against another employee who uttered the same obscenity). Thus Mulligan established that he was treated differently from an employee who engaged in the same conduct. Additionally the remarks were made in jest and Mulligan could certainly comment on the fact that employees were at least in technical violation of work rules since that was a matter involving working conditions. Mulligan's scab remark was not so abusive as to cause him to lose the protection of the Act. See *El Gran Combo v. NLRB*, 853 F.2d 996 (1st Cir. 1988)(employees' comments were not so disruptive as to lose protection of National Labor Relations Act).

With respect to Mulligan's questioning of Hoffman's authority, the record reveals that they had a difference of opinion as to how a metal plate should be attached to a curb. There is no evidence that Mulligan refused to perform the task despite his disagreement with Hoffman. The latter's attempt to enlist the support of two machinists in signing a letter containing negative comments about Mulligan and Hoffman's "huffy" reaction to their refusal to do so, his testimony that Mulligan slowed down the work, credibly denied by machinist Dan Clarke, and the fact that Hoffman disciplined Mulligan for incidents occurring sometime before the reprimand was issued all support an inference that Hoffman was reaching for an excuse to discipline Mulligan because he had filed a grievance which challenged Hoffman's assignment of overtime. I conclude that Hoffman's written reprimand of Mulligan was motivated by Mulligan's exercise of his right to file a grievance. Although the reprimand, like Fanning's threat, occurred outside the 180 day period prior to the filing of the charge in this case, it is relevant as indicating Respondent's unlawful motivation in disciplining Charging Party.

The June 25, 1992 grievance

Charging Party alleges that because he filed a grievance on June 25, 1992, Hoffman confronted him about being in the boilermakers' shop later that day. Prior to June 25, 1992, Hoffman had complained to Fanning about Mulligan's presence in the shops of other trades on or about March 31, 1992, and June 11, 1992. Hoffman made similar complaints about Mulligan on or about December 17, 1992 and January 22, 1993. Mulligan did not file grievances in March or December 1992 or in January 1993. Thus it does not appear that Hoffman's complaints about Mulligan's presence in other trades' shops was closely associated with or motivated by Mulligan's filing of grievances. Even a suspicious coincidence between the employer's actions and charging party's protected activity does not by itself establish that the latter was a motivating factor for the former. *Metropolitan Sanitary District of Greater Chicago*, 2 PERI 3012 (IL LLRB 1986)(transfer of union activist was not motivated by anti-union animus merely because it occurred shortly after a union campaign). I conclude that Charging Party has not established that Respondent warned him about being in the

boilermakers' shop because he had filed a grievance earlier that same day. Thus, Charging Party has not proved that Respondent committed an unfair labor practice by retaliating against him for filing grievances.

Mulligan's contact with the Inspector General's Office

The record establishes that after Mulligan announced that he would contact the Inspector General's Office and after he contacted that office, he was subjected to serious discipline, suspensions ranging from 5 to 29 days, and he was subjected to discriminatory treatment and harassment. Mulligan was suspended for five days in October 1991, and 29 days in January 1992 and March 1993, and in February 1993, Hoffman attempted unsuccessfully to suspend Mulligan for nine days.

Incidents of harassment and discriminatory treatment included the following. On November 21, 1991, Hoffman changed Mulligan's time of arrival on a time sheet from 7:00 a.m. to 7:05 a.m. Hoffman had not previously changed a machinist's time of arrival on a time sheet and after that incident he changed times of arrival on only two or three occasions. Around November and December 1991, Mulligan was denied access to a storeroom, he was not allowed to use the photocopier and coworkers gave him the "cold shoulder."

After the Inspector General's visit to the Northwest incinerator, Fanning and Hoffman started writing memoranda which documented incidents involving Mulligan. During Hoffman's tenure as foreman, he had only written two or three memoranda involving another machinist. Some of the incidents described in the memoranda were of a trivial nature and Mulligan was not given an opportunity to explain his side of the story before the memoranda were written. Also shortly after the IG's visit, Madl ordered Mulligan to clean up the machine shop. Previously, no machinist had been ordered to clean the machine shop. Madl also directed Mulligan to bore a coupling as a test of his ability to use the lathe even though Mulligan had never been required to do so during his employment as a machinist. Mulligan's coworkers were advised not to help him in boring the coupling. The assignment was a pretext and resulted in a memorandum written by Madl in which he claimed that Mulligan was not capable of performing routine machinist duties. However, the evidence in the record established that boring a coupling was not a routine machinist duty.

In August 1992, Fanning, Madl and Hoffman treated a picture drawn on a paper holder which stated "JIM M. R.I.P." as if it were a joke and not a threat of violence against Mulligan. However, when Mulligan remarked that employees needed to be more careful after a cable fell behind him, Madl reacted to Mulligan's remark as if it were a threat of violence against the employees who watched the cable fall without warning Mulligan. In late 1992, Hoffman issued new helmets to all machinists at work that day except Mulligan. Until June 1993, Mulligan's requests to be detailed outside the incinerator and for a transfer were denied. I conclude that Mulligan has established that he was subjected to adverse employment action.

Respondent's knowledge of Mulligan's contact with the IG

The testimony of Hoffman, Madl and Fanning clearly established that they believed that Mulligan had contacted the Inspector General after the IG's agents conducted interviews at the incinerator in February 1992. At issue is whether they knew Mulligan had contacted the IG prior to that time. Evidence suggesting that they knew about Mulligan's contact with the IG before February 1992 is as follows. On the last Friday in September 1991, Mulligan told Carey that he would report to the IG that employees were working on Hoffman's truck and advised Carey to so inform Hoffman, Madl and Fanning. Mulligan then observed Carey go upstairs to the area where supervisors' offices were located. Within the next half hour, Fanning had reprimanded Hoffman and Madl. Conveniently, Hoffman could not recall at the hearing in this case, whether he issued the new work rules before or after he was reprimanded by Fanning. When Hoffman issued the new work rules, he stated that because Mulligan had turned him in for working on his truck, he was issuing new rules. Mulligan had reported to Madl but not Fanning that Hoffman was working on his truck during work time. Madl had told Mulligan that he gave Hoffman permission to repair the truck. Thus, "turning him (Hoffman) in" had to relate to Mulligan's contact with the IG.

Around December 1991 or January 1992, after Mulligan had asked a carpenter about work the latter was doing in the storeroom which appeared unrelated to the incinerator, Mulligan was barred from entering the storeroom. An employee of the incinerator escorted Mulligan and Tapkowski to the storeroom so that they could observe the bar trim and mirrors made by the carpenter. This visit could have been reported to Mulligan's superiors as is evidenced by the fact that around that time, coworkers of Mulligan were discouraged from associating with him. See *Rockford Township Highway Department v. State Labor Relations Board*, 153 Ill. App. 3d 863, 506 N.E. 2d 390, 4 PERI 4006 (1987) (where the setting is a "small plant," the employer may be charged with knowledge of union activities without the need of direct proof. On December 20, 1991, Fanning wrote a letter to Becky Frederick in which he stated that Mulligan had made unsubstantiated and possibly fabricated allegations against Madl and Hoffman. Inasmuch as Fanning himself

reprimanded Madl and Hoffman because of the work done on Hoffman's truck, it is reasonable to infer that the "possibly fabricated" charges allegedly made by Mulligan referred to his contacts with the Inspector General.

Also in December 1991, there were rumors that Mulligan would be suspended for 29 days. The severity of the rumored suspension indicates that Respondent's agents knew about Mulligan's contacts. I note that Fanning was aware of the existence of the Inspector General's Office as the agency which received reports of employee misconduct because he had, shortly after his arrival at the incinerator, reported such misconduct to the IG. Also, when the establishment of the Inspector General's Office was announced in the newspapers, it was a subject of conversation among the incinerator's employees. Thus it was generally known at the incinerator that misconduct could be reported to the IG. For all these reasons, I find that Respondent had knowledge that Mulligan had contacted the IG prior to Mulligan's suspension in January 1992 and that Respondent's agents suspected that Mulligan would contact the IG prior to his suspension in October 1991.

Respondent's motivation

Respondent denies that it was motivated in its conduct toward Charging Party by hostility because of his contact with the Inspector General's Office. However, there is abundant evidence in the record that Respondent's actions were motivated by animus.

Hoffman's new work rules were issued because Mulligan "turned him in" for working on his (Hoffman's) truck. The rule that no machinist was allowed in another trade shop targeted Mulligan because he was the only machinist who did not remain in the machine shop for breaks or for lunch. The five day suspension imposed on Mulligan on October 1, 1991 occurred suspiciously close to Mulligan's announcement that he would contact the IG.

In November 1991, Hoffman, for the first time for any subordinate, changed Mulligan's sign-in time on a time sheet. Mulligan was also barred from entering the storeroom where he had observed an employee performing non-City work. Coworkers gave Mulligan the "cold shoulder" around that time. In December 1991, rumors circulated around the incinerator that Mulligan would be suspended for 29 days. Also in December 1991, Fanning wrote that Mulligan had made "unsubstantiated and . . . possibly fabricated allegations" of misconduct, even though Fanning himself had previously reported employee misconduct to the IG, and had disciplined Hoffman and Madl for work done during working hours on Hoffman's truck.

In January 1991, Fanning imposed a 29 day suspension on Mulligan for verbal abuse. A hearing officer's reduction of the penalty to five days supports the proposition that the penalty greatly exceeded the gravity of the offense and suggests that the discipline was motivated in large part by animosity because of Mulligan's contact with the IG. It is interesting to note that during his tenure as plant manager, Fanning found no discipline appropriate for a seemingly more serious incident in which two employees engaged in a physical fight. An employee who was caught signing out early on a time sheet was suspended for only three days for verbally abusing a supervisor. Thus, Mulligan was disciplined much more severely than coworkers who committed more serious offenses than making statements management did not like. Fanning's conduct during the vent pipe incident suggests that he wanted to create an opportunity to have Mulligan arrested by police, additional evidence suggesting animus on account of Mulligan's contact with the IG.

That Fanning, Madl and Hoffman deeply resented the IG's visit to the incinerator on February 19, 1992 is evident from the language they used to describe that visit. At the hearing in this case, they characterized the arrival of the IG's agents as a "raid," and a "terrorist act." They described the IG's agents as a "horde" who pushed employees around. After his interview with the IG, Madl filed a grievance alleging that his rights as a U.S. citizen were violated. Fanning, Madl and Hoffman retaliated against Mulligan because of the IG's visit within two weeks of that visit.

The record establishes that on March 3, 1991, Mulligan was the first employee ever ordered to clean up the machine shop. Also on that day, Madl directed Mulligan to bore a coupling, falsely claiming that an emergency existed. Madl knew that Mulligan had not used a lathe during his employment with the City and warned coworkers not to assist Mulligan. This was a patent attempt to establish that Mulligan was not a competent machinist. However, the evidence in the record showed that not all journeymen machinists were competent to, or required to, run a lathe. The varying explanations from Hoffman, Madl and Fanning as to why Mulligan was directed to lathe the coupling support the proposition that the purpose of the assignment was to discredit Mulligan because of his contacts with the IG's office.

In March 1992, Fanning and Hoffman began to document in memoranda, with no notice to Mulligan, any and apparently all incidents involving him. They accepted as true and accurate statements made by coworkers regarding Mulligan with no attempt to ascertain his version of events. Some of the incidents described in the memoranda were of a trivial and innocuous nature and no other employees were treated similarly to Mulligan. Fanning greatly exaggerated the seriousness of Mulligan's alleged misconduct in those memoranda. For example, when Mulligan made remarks to coworkers in a joking manner, those remarks were characterized by Fanning as intimidating. When Mulligan was observed speaking to another tradesman in the latter's shop at the end of the work day, Mulligan's conduct was described as "deviant." When Mulligan inquired about his vacation days, and was told he lost two days due to his 29 day suspension, he responded "thanks a lot." Fanning characterized this remark as displaying outrageous contempt toward management.

The record reveals that resentment against Mulligan because of his contacts with the IG persisted through the remainder of 1992 and into 1993. In July 1992, machinists were observed doing non-City work during working hours and the IG's agents seized items that had been made. Fanning attempted to discipline the employees involved in the incident. Despite this, Fanning testified, at the hearing in this case, that Mulligan's complaints to the IG about misconduct at the incinerator were frivolous and that Mulligan was the only problem employee at the incinerator. Apparently, Fanning considered making complaints to the IG a more serious offense than performing non-City work on City time.

In late 1992, Hoffman revealed his continuing resentment when he distributed helmets to all machinists present at work except Mulligan. In February 1993, Hoffman attempted to suspend Mulligan for nine days because the latter had said Hoffman was not a "strong" foreman, conduct which the City's own hearing officer found was not insubordinate. In March 1993, Hoffman suspended Mulligan for 29 days for attempting to tape record their conversation. That suspension is puzzling in light of the fact that Hoffman asked the union steward to accompany him as a witness to his (Hoffman's) conversation with Mulligan. Respondent offered no explanation as to why a live witness was appropriate to bring to the conversation with Mulligan but a would be technical witness--the tape--merited a 29 day suspension even though Mulligan immediately ceased tape recording after noticing that Hoffman objected.

To summarize, I find that Respondent was motivated by animus in its conduct toward Mulligan on account of his contact with the Inspector General because of the excessive discipline imposed on Mulligan, the timing of that discipline, its discriminatory treatment of Mulligan, and the exaggerated language used in memoranda describing Mulligan's conduct.

Concerted, protected activity

The next issue to be considered is whether Mulligan's contacts with the Inspector General's Office constituted concerted, protected activity. An appropriate starting point for this discussion is *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975).

In *Alleluia Cushion*, an employee wrote a letter of complaint about safety conditions at his place of employment to the California Occupational Safety and Health Administration (OSHA), which had jurisdiction over safety matters. The employee did not discuss safety problems with other employees, solicit their support in remedying those problems, or request their assistance in preparing the letter. The day after the employee accompanied an OSHA inspector on a tour of the plant, the employee was terminated. The administrative law judge determined that while the employee engaged in protected activity, it was not concerted activity because the employee did not act in conjunction with other employees.

The National Labor Relations Board (NLRB) reversed the administrative law judge, holding that the absence of any outward manifestation of support for the employee's efforts did not establish that his coworkers did not share the employee's interest in safety or that they did not support his complaints regarding safety violations. According to the NLRB:

Safe working conditions are matters of great and continuing concern for all within the work force. . . . The National Labor Relations Act cannot be administered in a vacuum. The Board must recognize the purposes and policies of other employment legislation, and construe the Act in a manner supportive of the overall statutory scheme.

Alleluia Cushion, 221 NLRB at 1000.

The NLRB further stated that the filing of the complaint with the California OSHA was an action taken in furtherance of guaranteeing respondent's employees their rights under the California statute. According to the NLRB, it would be incongruous with the public policy enunciated in occupational safety legislation to presume that, absent an outward

manifestation of support, the employee's coworkers did not agree with his efforts to secure compliance with the statutory obligation imposed on their employer for their benefit. The NLRB held:

Accordingly, where an employee speaks up and seeks to enforce statutory provisions relating to occupational safety designed for the benefit of all employees, in the absence of any evidence that fellow employees disavow such representation, we will find an implied consent thereto and deem such activity to be concerted.

Alleluia Cushion, 221 NLRB at 1000.

Under the rationale of *Alleluia Cushion*, Charging Party's contacts with the Inspector General's Office could be considered concerted, protected activity because Mulligan made complaints to that office in furtherance of a statute, a city ordinance, affecting and benefiting employees. It could be argued that in the absence of evidence showing that his coworkers disavowed Mulligan's actions in contacting the IG, it should be presumed that he was acting on their behalf and with their implied consent. Charging Party argues that among his complaints to the IG were several which affected the terms and conditions of employment such as retaliation for his complaint about safety during the vent pipe incident, time sheet fraud, the performance of personal work on City time and other employee misconduct. Charging Party contends that such misconduct, inefficiency and waste affects the terms and conditions of employment. However, in *Meyers Industries, 268 NLRB 493 (1984)*, (Meyers I) rev'd sub nom, *Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985)* cert. denied, *474 U.S. 971 (1985)* decision on remand sub nom. *Meyers Indus., 281 NLRB 882 (1986)* (Meyers II), enf'd, *835 F.2d 1481 (D.C. Cir. 1987)*, the NLRB repudiated the concept of constructive concerted activity articulated in *Alleluia Cushion*.

Meyers Industries

In *Meyers I* the NLRB found that an employer did not violate Section 8(a)(1)120 of the National Labor Relations Act (NLRA) when it discharged an employee who refused to drive an unsafe truck after reporting its condition to the Tennessee Public Service Commission. The NLRB interpreted Section 7121 of the NLRA as requiring concerted action in terms of collective activity, namely, the formation of, or assistance to, a group, or action as a representative on behalf of a group. Activities must be concerted before they are protected and there must be employee interaction in support of a common goal.

The NLRB distinguished *Alleluia Cushion* from *Interboro Contractors, 157 NLRB 1295 (1966)*, enf'd *388 F.2d 495 (2d Cir. 1967)*, which held that actions an individual takes in attempting to enforce a provision of an existing collective bargaining agreement are, in effect, grievances within the framework of that agreement. To find an employee's activity to be concerted, the NLRB required that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. In *Meyers I*, the employee acted solely on his own behalf. The NLRB held that individual employee concerns, even if openly manifested by several employees, but on an individual basis, were not sufficient evidence to prove concert of action.

The dissent in *Meyers I* argued that Section 7 protects the individual assertion of a work-related statutory right and that the requirement of concert in the NLRA was a check against the use of the criminal conspiracy doctrine and the injunctive power of courts in labor cases. On appeal, the District of Columbia Court of Appeals set aside the NLRB's order holding that its restrictive reading of Section 7 was not compelled by the NLRA. On remand, the NLRB affirmed its initial ruling that employees must act with or on the authority of their fellow workers and not solely on their own behalf to meet the requirement of concerted activity. The Court of Appeals then upheld the NLRB's interpretation as "a reasonable--but by no means the only reasonable--interpretation of Section 7." *Meyers II, 835 F.2d at 1484.*

Post-Meyers II cases

Despite the NLRB's rejection of constructive concerted activity in *Meyers*, it has still found, in certain cases, concerted activity where an employee has acted alone. In *Oakes Machine Corporation, 288 NLRB 456 (1988)*, an employee sent an unsigned letter to the parent company of his employer asking that his employer's president be removed for mismanagement which employees believed had a detrimental effect on their working conditions. The letter consistently used the pronoun "we" and complained of the president's use of employees to work on personal projects, distinct from the employer's business. The NLRB held that a reasonable person would conclude that the letter was the product of more than one person and thus the writing and mailing of the letter was concerted activity because it was engaged in with and on the authority of other employees and not solely by or on behalf of the employee himself.

The NLRB noted that the employee had conferred with his supervisor regarding dangerous working conditions at his place of employment, commented on those conditions to a coworker, and telephoned a county health official who agreed to inspect the premises. After the health official informed the manager of the plant of safety violations, the employee and his supervisor were terminated.

Although the NLRB held that the employee's contact with the county agency about unsafe working conditions was not concerted because it was not done in concert with other employees, it found an unfair practice violation because the supervisor had expressed a willingness to testify on behalf of the employee in court. The NLRB interpreted that expression as implying a willingness to testify at NLRB proceedings. According to the NLRB, the employer committed an unfair labor practice because employees excluded from coverage under the NLRA, may not be discouraged from participating in Board proceedings.

In *Whittaker Corporation*, 289 NLRB 933 (1988), the president of the employer conducted a meeting with employees in which he informed them that they would not receive their regular annual wage increase, and then invited the employees to ask questions. One employee made comments, which several employees agreed with after the meeting concluded. On the next day the employee was discharged for insubordination. In overturning, the administrative law judge's determination that the employee had not engaged in concerted activity because he did not try to enlist group support and because group activity did not occur, the NLRB held that the employee's remarks at the meeting protesting the change in policy was the initiation of group action. According to the NLRB, an employee does not have to engage in further concerted activity to insure that his initial call for group action retains its concertedness, and other employees do not have to accept the individual's invitation to group action before the invitation itself is considered concerted. Holding that the inducement to group action need not be expressed, the NLRB inferred concerted activity from the context of the group meeting.

In contrast to *Whittaker is Salem Tube, Inc.*, 296 NLRB 142 (1989), wherein an employee was terminated after he disrupted a meeting of employees called by management to explain a new insurance policy and to announce a pay raise. During the meeting, the employee made a thumbs down gesture, which was considered derogatory, left the room, walking in front of the speakers and loudly revved up his motorcycle, making it impossible to hear. The NLRB found that the employee's conduct was a personal comment and not concerted activity. The employee did not initiate a protest or call to action and made no attempt to mobilize for group action. The NLRB concluded that the employer did not commit an unfair labor practice when it terminated the employee for his disruptive conduct.

In *Washington Adventist Hospital*, 291 NLRB 95 (1988), the issue was whether an employee's use of a hospital-wide computer system to send a message expressing dissatisfaction with impending layoffs was concerted protected activity. The employee had previously written a letter to the hospital president criticizing a wage freeze, had requested that coworkers complain to their supervisors about the freeze and had distributed handbills regarding the matter. In determining that the use of the computer system to send the message was not concerted protected activity, the NLRB noted that when the employee made the decision to use the computer system, he did not indicate, contemplate or even refer to group action. The employee acted impulsively and on the spur of the moment. The NLRB held that the employer was justified in disciplining the employee for his sudden, unauthorized taking over of the computer system regardless of how worthy his motivation might have been.

In *Elston Electronic Corp.*, 292 NLRB 510 (1989), the NLRB held that the employer violated the NLRA when it told an employee she could not discuss wages with coworkers. The employee had discussed her concerns about whether temporary employees would receive a wage increase with other employees who also voiced their concerns to management officials. The NLRB ruled that the employee's wage discussions were engaged in with the object of initiating or inducing or preparing for group action, thereby constituting concerted activity.

In *Great Dane Trailers Indiana, Inc.*, 293 NLRB 384 (1989), the NLRB ruled that an employee's request that another employee assist in running press machines was protected concerted activity. The employee had requested assistance on three occasions. After the supervisor refused the third request, the employee yelled a profanity and the supervisor responded that he would take care of the employee's problem. Thereafter the supervisor suspended the employee for a day and a half. The employer claimed that the employee was disciplined for using abusive language toward a supervisor. The NLRB held that the employer's discipline was motivated by the employee's entreaties for assistance and that the employee's strong language in the course of making his protest did not remove the protection of the National Labor Relations Act. Because discipline resulting from the supervisor's hostility to the employee's continuing protests would reasonably tend to restrain protected concerted activity, the NLRB determined that the suspension of the employee violated the NLRA.

In *Martin Marietta Corp.*, 293 NLRB 719 (1989), an employee was terminated for posting a sign in a break room which stated "If you don't like being poisoned, be at the lion's den for Channel 9 at 3:45 today." The employee had been dissatisfied with the employer's explanations for episodes of a mysterious illness at the employer's plant even though the employer investigated the matter in cooperation with the Occupational Safety and Health Administration, but failed to identify the cause of the illness. The employee accused his employer of not telling the truth about the illness, and other employees shared his concern and approved of his plan to air his complaints on a television show. The NLRB ruled that posting the notice was concerted protected activity because it was an implicit request of and invitation to other employees to join the employee in group action. The NLRB held that Section 7 of the NLRA protected the efforts of employees to concertedly avoid a reoccurrence of the mysterious illness. Even if the employee had an ulterior motive, his right to protect his and other employees' safety outweighed the possible risk that his communication was the result of malice. The employee's notice was so clearly related to health and safety, that even if he were wrong, he did not have to be correct in order that his conduct be protected.

In *K. Mart Corporation*, 297 NLRB 80 (1989), an employee talked to management about schedules after having talked with his coworkers. However, he had not been authorized to represent his coworkers. When the employee subsequently reported to work, he commented to a coworker that his schedule had not been changed to indicate his days off. Then he got into an argument with a management employee regarding his loud complaints about his schedule. The NLRB held that the employer committed an unfair labor practice when it instructed the employee not to talk to coworkers about scheduling because improved working conditions are a frequent objective of organizational or other protected concerted activity, and discussions about them are necessary to further that goal. See also, *Trayco of S.C., Inc.*, 297 NLRB 630 (1990)(employees' discussion of salaries is concerted protected activity); *Kinder-Care Learning Centers, Inc.*, 299 NLRB 117 (1990)(employees have the right to communicate with third parties regarding their terms and conditions of employment).

In *El Gran Combo v. NLRB*, 853 F.2d 996 (1st Cir. 1988), the court of appeals affirmed the NLRB's determination that two employees who solicited coworkers to demand more proceeds from the sale of a record album had engaged in protected concerted activity. The court held that some activities that seem to concern only individual rights or benefits can properly be considered for mutual aid or protection. For example, where an individual attempts to reap the benefits of a collective bargaining agreement, it matters not that the employee's specific actions may only have been taken with a view for her own regard. The individual, by asserting her own rights, strengthens the mechanisms of protection that benefit the entire group. Restraining the rights of one employee will quite likely chill the exercise of those rights for all. In *El Gran Combo*, the court contrasted talk which looks toward group action from mere griping which looks forward to no action at all.

In *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988), the employer retaliated against an employee because it believed he had filed a complaint with OSHA officials. The court of appeals affirmed the NLRB's determination that the employee's invocation of a statutory employment right did not constitute concerted activity under *Meyers*, even though it noted that the NLRB's view might have a chilling effect and with the passage of time might have unintended, and even unreasonable, results.

In *Burie Industries*, 300 NLRB 498 (1990), an employee stated that he would call outside the plant if a supervisor did not do something about a chemical spill causing noxious fumes in the plant. The employee commented on the situation to coworkers and told another supervisor that she was a poor example of responsible supervision. The employee used profanity in speaking to the latter supervisor. The NLRB held that the employer committed an unfair labor practice when it suspended the employee for his speech which constituted concerted, protected activity. The NLRB excused the employee's verbally abusive language because it was said "in the heat of the moment" and was "animal exuberance." The employee had otherwise been a good employee with a good work record who had never had any similar disciplinary problems. According to the NLRB, the employee's conduct was not so violent or extreme as to render him unfit for further service. There was also evidence that another employee who used profanity had not been similarly disciplined. Similarly, in *Williams Contracting, Inc.*, 309 NLRB 433 (1992), the NLRB held that employees who complained to the U.S. Department of Labor about their employer's failure to pay prevailing wages engaged in protected concerted activities.

In *YMCA of Pikes Peak Region v. NLRB*, 914 F.2d 1442 (10th Cir. 1990), an employee who was a union activist was terminated for "gross interference in a sexual harassment complaint" because she had called another employee who had alleged harassment by a coworker. The union activist was seeking to determine whether there was just cause for the

termination of the coworker who had allegedly been guilty of harassment. The court of appeals upheld the NLRB determination that the disparity and severity of the discipline imposed on the union activist warranted an inference that the employer used the telephone conversation as an excuse to rid itself of its leading union adherent.

In *Alchris Corp.*, 307 NLRB 182 (1991), an employee posted a newspaper article on a new state law raising the minimum wage to notify coworkers of its existence. The administrative law judge ruled that the employer violated the NLRA when it prohibited the employee from posting the article because such conduct had as its object inducing or preparing for group action. However, the administrative law judge ruled that the employee's complaints to a maitre'd, who was not responsible for such matters, that waiters did not make enough money was not concerted activity because the employee was acting on his own behalf when he complained.

In *Express Messenger Service*, 301 NLRB 651 (1991), the NLRB held that an employee who advised a coworker as to what her rights would be under a collective bargaining agreement if she completed her probationary period prior to taking a leave of absence engaged in concerted activity for mutual aid or protection.

In *Circle K Corporation and Charlotte Moneagie*, 305 NLRB 932 (1991), the NLRB held that an employer committed an unfair labor practice when it discharged an employee who stated her intention to organize a union and who distributed a letter regarding wages, hours and working conditions. The NLRB characterized the employee as making an initial call for group action on matters of mutual concern to employees. The coworkers' opinions regarding the employee's attempt or motive was an irrelevant consideration in determining whether the employee's conduct constituted concerted activity. According to the NLRB, employees may act in a concerted fashion for a variety of reasons--some altruistic, some selfish--but the standard is an objective one: whether the employee's conduct on its face solicited group action and invited the backing of the coworkers for efforts to improve their wages, hours and other terms and conditions of employment.

In *Mike Yurosek & Son, Inc.*, 306 NLRB 1037 (1992), four employees were individually approached by a manager and asked to work an extra hour. The employees refused because previously another manager had told them they could only work until 4:30 p.m. The administrative law judge found that the employees' refusal to work the extra hour was not concerted because they did not rely on each other in following the directive to leave at 4:30 p.m. The NLRB reversed the administrative law judge's dismissal of the charge. The NLRB found concertedness in the fact that the employees had been gathered as a group when they were told of the policy of only working until 4:30 p.m., they made a concerted protest of the policy, several employees were asked to work another hour, a manager made remarks to them as a group when they left work, they were jointly asked why they refused to work overtime and were jointly fired, and the concerns expressed by the employees individually were a logical outgrowth of the concerns expressed by the group.

In *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257 (D.C. Cir. 1993), restaurant employees who worked a private party received a smaller gratuity than anticipated. Owners of the restaurant overheard one of the employees complaining about the situation in a telephone conversation with his girlfriend in which he stated he would take his complaint to the NLRB. When the employers confronted the employee, the latter acknowledged that employees were unhappy, although he denied that he was a spokesperson for the disgruntled employees. The court of appeals supported the NLRB's determination that the employee was involved in concerted activity because it was a reasonable inference that the employee had voiced a complaint on behalf of the group and that his subsequent denial that he acted on behalf of the group was prompted by fear of being viewed as the official spokesperson by his employer.

In *Springfield Air Center*, 311 NLRB No. 133 (1993), the NLRB held that an employer committed an unfair labor practice when it fired two employees who refused to install a vital aircraft engine part until they had documentation they believed was required by federal rules and regulations. The NLRB characterized the employees as acting together for a purpose concerning conditions and terms of employment for the protection of the public over a perceived unlawful and unsafe violation of federal regulations.

In *Lancaster Fairfield Community Hospital*, 311 NLRB No.42 (1993), the NLRB found that an employer committed an unfair labor practice when it told an employee who was a union activist to refrain from complaining about working conditions and from making suggestions for improvement. The NLRB stated that an employee has a protected right to criticize management at proper times and places and in an appropriate manner in support of a union organizational drive.

Illinois cases

In Schaumburg Community Consolidated School District No. 54, 7 PERI 1053 (1991), a teacher informed a union representative, Beverly Gorski, that the principal Bernard Lucier had not told her how she could improve her performance when he evaluated her. Other teachers joined in that discussion about the evaluation process. After speaking to the union president, Gorski decided to conduct a survey and, at a union meeting, distributed notices that a survey would be conducted. Subsequently, on May 1, 1989, Gorski and another teacher presented the evaluation questionnaire to the principal and later related the results of that meeting at another union meeting. On May 2, 1989, the principal recommended that Gorski be transferred to another grade. Previously, she had taught second grade for 9 or 10 years with another teacher.

Another teacher who was active in the union, Kay Wojcik asked principal Lucier in an April 13, 1989 letter how she could earn a higher evaluation. The principal felt insulted by the questions asked in Wojcik's letter and initially refused to respond. In a subsequent conversation with coworkers, Wojcik stated jokingly that if she won the lottery she would not quit but would stay to harass Lucier. A coworker reported the incident to him. Wojcik also complained to the union that Lucier had not completed the areas for improvement sections of the evaluation forms. Lucier wrote a memorandum describing the incidents. In his May 2 memorandum, Lucier also recommended the transfer of Wojcik and suggested a write up or transfer of another teacher Beth Roemer. In a May 5 letter, Lucier cited Roemer for her "questioning attitude" which suggested that the parents and administration were adversaries of teachers.

The IELRB, reversing the hearing officer, held that the employer violated Section 14(a)(3)122 and (1)123 of the Illinois Educational Labor Relations Act (IELRA) when it reassigned Gorski. According to the IELRB, the charging party established a prima facie case of a Section 14(a)(3) violation. The respondent reassigned Gorski within two weeks of the union meeting and the day after she presented her principal Lucier with the results of the evaluation questionnaire. The IELRB found improper motivation because the principal chose to reassign Gorski who was active in the union rather than her partner who was not; the principal did not follow his usual practice of discussing the involuntary transfer with the teacher prior to implementation; the principal had a vague explanation--the good of the school--for the transfer; and Gorski was a visible union activist. The IELRB, having determined that the charging party established a prima facie case, then considered whether the respondent would have made the same decision absent the employees protected activity. The IELRB concluded that the transfer would not have been made in the absence of Gorski's protected activity, and found that the employer violated Section 14(a)(3) of the Act.

Similarly the IELRB reversed the hearing officer's determination that the employer did not violate Section 14(a)(1), and found that the transfer of Wojcik was improperly motivated but by her concerted protected activity rather than her union activity. The IELRB, relying on and adopting *Alleluia Cushion Co., 221 NLRB 999 (1975)*, held that Wojcik's attempt to convince Lucier to fill in the areas for improvement sections of her evaluation form was concerted protected activity. The IELRB held that the statutory purpose of protecting employee rights required it to broadly construe concerted activities and that the "narrow and artificial view of concerted activity" in *Meyers I* was contrary to the statutory purpose of protecting employee rights. Schaumburg, at p.IX-225. The IELRB further stated

we shall presume in the absence of contrary evidence, that a "concern, gripe or complaint about wages, hours, terms and conditions of employment" is concerted if it is based on a group concern. We shall view the existence of a statute as evidence of such a group concern.

Schaumburg at p.IX-225. The IELRB characterized the filling in of the areas for improvement section of the evaluation forms as a group concern, and found that there was statutory evidence of such concern since Illinois law provides that teacher evaluations indicate the teacher's strengths and weaknesses, with supporting reasons for the comments made. Also the evaluation plan was incorporated into the collective bargaining agreement. Having decided that charging party established a prima facie case, the IELRB decided that the employer did not establish it acted for a legitimate reason.

The IELRB found that Roemer engaged in protected, concerted activity when she participated in a conversation with two other teachers on the necessity for a third clinical supervision observation, and in her commenting at a meeting of teachers about students approaching the principal because these incidents were evidence of group concerns. Her discussion with her principal, however, was not concerted activity. Again concluding that the employer would not have issued the letter except for Roemer's protected activity, the IELRB held that the employer violated Section 14(a)(1) of the Act.

In a dissent, Chairman Berendt stated that he disagreed that the employer had not rebutted the prima facie case involving Gorski's reassignment. He stated that the principal had legitimate management reasons for separating Gorski from her partner. Thus he would not have found a violation in the reassignment of Gorski.

The appellate court, in *Schaumburg School Dist. v. Illinois Educational Labor Relations Board*, 247 Ill. App. 3d 439, 616 N.E. 2d 1281, (1993) reversed the IELRB, holding that its determination that the employer committed unfair labor practices was against the manifest weight of the evidence. The court held that the board's determination that, in the absence of contrary evidence, a concern, gripe or complaint about wages, hours, terms and conditions of employment is concerted if it is based on a group concern, was contrary to statutory language that the Act's purpose was promoting orderly and constructive relationships between educational employees and their employers. According to the court, the board's interpretation made the exercise of supervisory authority impossible. To conclude that activity is protected whenever it involves a group concern eliminated the requirement that the activity be concerted. In the court's view, the board's overbroad interpretation of Section 3 of the Illinois Educational Labor Relations Act, which guarantees the right to engage in lawful concerted activities for mutual aid and protection, was unnecessary to effectuate the legitimate goals of the act and undermined the policy of promoting harmonious labor relations by quelling legitimate exercises of supervisory authority. *Schaumburg School Dist.*, 616 N.E. 2d at 659, 660.

The court characterized Wojcik's activities with respect to the evaluation issue as personal rather than concerted. Wojcik had sought personal suggestions and responses tailored to her individual situation. She wanted to find out why she had not been given a superior rating. The court quoted the hearing officer's decision which stated:

Since Wojcik pursued her own interests in dealing with Lucier regarding her evaluation, she clearly cannot be said to have acted with or on the authority of other District teachers. Therefore, Wojcik's activity in this regard was not concerted.

Schaumburg School Dist., 616 N.E. 2d at 661. The court then stated that the education board's conclusion that Wojcik's conduct was protected because she was articulating a group concern distorted the Act by protecting purely selfish behavior. *Schaumburg School Dist.*, 616 N.E. 2d at 661.

Next the court noted that the right to challenge the content of evaluations was excluded from the collective bargaining agreement and that individual employees do not have the right to insist on terms and conditions in addition to or different from what has been negotiated by their exclusive representative. According to the court, protecting employees whose demands are different from what their union negotiators agreed to is not a natural extension of concerted action but a repudiation of the union's right to be the exclusive negotiator with the employer and wholly undermines the collective bargaining process. The court describes Wojcik's behavior as nothing more than a personal gripe which neither contemplated nor promoted group action. It also characterized her behavior at the evaluation conference with Lucier as rude and unprofessional and declared that the Board's finding that Wojcik's conduct was protected by the Act was "tantamount to declaring that that Act has liberated teachers from meeting minimal standards of professional conduct with respect to principals." *Schaumburg School Dist.*, 616 N.E. 2d at 661, 662.

The court also disagreed that Roemer engaged in protected concerted activity when she made comments at a meeting of sixth grade teachers. It considered her comments to be merely an expression of a "personal pique." The court held that Roemer's comments to two other teachers was not intended to lead to any group action and that she was acting only on behalf of herself. The court found Roemer's conduct at odds with the education act's goal of promoting orderly and harmonious labor relations and that the IELRB erred in finding her conduct protected. *Schaumburg School Dist.*, 616 N.E. 2d at 662.

Finally, the court found that the IELRB misapplied the burden of proof in holding that the employer reassigned Gorski because she engaged in union activities. The court held that the union failed to establish a causal link between her protected activity and her reassignment. According to the court, there was no evidence of animus towards Gorski's union and other protected activities. For this reason, the court found the IELRB's decision that the employer committed an unfair labor practice in reassigning Gorski contrary to the manifest weight of the evidence.

In *Slechter and Village of Evergreen Park*, Case No. S-CA-92-179, (IL SLRB E.D. dismissal 1992), the charging party alleged that his employer denied him pay for court time in retaliation for his contacting other government agencies regarding his concerns that his employer was not properly handling a case of alleged child abuse. The Executive Director of the Illinois State Labor Relations Board, relying on *Meyers II*, dismissed the charge on a theory that the charging party's actions were undertaken by himself alone, without the involvement or authority of coworkers, and focused on his employer's responsibilities to other agencies and the public rather than any issue concerning employee terms and conditions of employment. Also the charging party's actions did not involve the assertion of any rights under the collective bargaining agreement between his union and employer.

In County of Cook and Cook County Sheriff (Humes), 3 PERI 3019 (IL LLRB 1987), the charging party alleged that his employer retaliated against him for complaining about cold working conditions and filing a charge of discrimination with the Illinois Department of Human Rights. The hearing officer, relying on Alleluia Cushion, held that the filing of a charge with the human rights department was concerted protected activity because it was a right under a statute enacted for the benefit of employees. However, the hearing officer found that the filing of the human rights charge did not motivate the discipline imposed on charging party by his employer and thus recommended dismissal of the charge. Because no exceptions were filed, the Board let the hearing officer's decision stand but stated

Whether the sorts of activities at issue in this case may constitute protected concerted conduct under the Act has not previously been decided by the Board, and involves troubling issues of statutory interpretation upon which tribunals elsewhere have sharply divided as reflected in the hearing officer's analysis.

County of Cook and Cook County Sheriff (Humes), 3 PERI 3019, at IX-87. The Board stated it would not "grapple with those questions until presented with an actual controversy requiring their resolution." County of Cook and Cook County Sheriff (Humes), 3 PERI 3019, at IX-87.

In my opinion, this is a close case as to whether Mulligan's contact with the City's Inspector General constituted concerted activity. Clearly, under Alleluia Cushion, Mulligan's contact with the IG would be concerted activity because of the presumption that coworkers would share his concerns about matters he brought to the attention of the IG such as safety, and the performance of personal work during work hours. However, even under the more rigid standards of Meyers I and II, it can be argued that Mulligan engaged in concerted activity.

In August 1991, Mulligan was elected by coworkers to an employee council. At its meetings, he asserted that employees were being harassed and raised issues about safety. Thus it can be argued, that Mulligan was a spokesperson for other employees on such matters. Around the end of September 1991, Mulligan told his union steward that he would contact the IG, and that the steward should so inform his superiors, Hoffman, Madl and Fanning. In November 1991, a coworker advised Mulligan that Hoffman was working on the manifold of his truck. It could be argued that under the small plant doctrine, the coworker who so advised Mulligan was aware of the latter's contact with the IG, since by that time Tapkowski had visited the plant, and thus the coworker was acting in concert with Mulligan in providing information to the IG. In November and December 1991, coworkers gave Mulligan the "cold shoulder," which suggests they may have known of his contacts with the IG. It might be inferred that employees who provided information to Mulligan at that time did so with a view toward aiding his efforts. In December 1991, a coworker reported to Mulligan that there were rumors that he would be suspended, presumably because of his contacts with the IG.

In January 1992, when Mulligan noticed that a pipe was venting steam, he commented on it to a coworker, discussed it with a pipe fitter, the pipe fitter's foreman, his union steward, and the safety officer, and he advised coworkers to avoid the pipe. When the plant manager arrived to inspect the pipe, Mulligan reminded him that a coworker had been injured in an accident the previous August, and that only one of three grates made to prevent a recurrence of such an accident had been installed.

It could be argued that because Mulligan had been elected to the employee council and spoken out on safety issues, because coworkers had informed him of alleged wrongdoing in the plant, had warned him he might be disciplined, and were probably aware that he had contacted the IG, that when he contacted the IG, he was acting as a spokesman and on the authority of his coworkers. Also Respondent treated Mulligan as if it believed he acted or might act in concert with other employees. For example, employees were warned to stay away and not cooperate with Mulligan and not to assist him in performing work. Coworkers were encouraged to report any incident involving Mulligan to management.

Unlike the situation in Schaumburg, Mulligan did not make complaints which were merely personal in nature. Changes affecting other employees as well as Mulligan occurred as a result of his complaints. A new vehicle was assigned to the incinerator in the aftermath of the controversy involving Hoffman's truck. Employees were allowed a five minute grace period for late arrivals after Hoffman changed Mulligan's time of arrival on a sign in sheet. New overtime procedures were instituted at the incinerator after Mulligan grieved the distribution of overtime. Ultimately, safety screens were installed at the incinerator and a time clock used instead of time sheets after Mulligan made complaints about those matters. After Mulligan was directed to clean the machine shop, there was a new routine for assigning that chore to machinists. Thus, Mulligan's complaints were not mere griping but looked forward to action. See *El Gran Combo v. NLRB*, 853 F.2d 996 (1st Cir. 1988)(mere griping, which is not protected activity, looks forward to no action).

However, it could also be argued that Mulligan was acting on his own. It is clear from the evidence in the record that it was Mulligan's decision to contact the IG, albeit for the good of the plant. It is also clear that Mulligan did not involve other employees in his contacts with the IG. For example, when he photographed alleged unsafe conditions at the plant, he did not photograph coworkers. He generally did not identify at the hearing in this case the employees who gave him information about alleged misconduct.

However, from my review of federal caselaw on *Alleluia Cushion*, *Meyers* and its progeny, it appears that Mulligan's contact with the IG did not constitute concerted protected activity because he acted on his own and the evidence that he may have acted with or on the authority of other employees is at best inferential. See *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988)(no unfair labor practice committee by employer who retaliated against an employee because it believed he had filed an OSHA complaint). Further, the State Board has held that an employee who contacted government agencies regarding his concerns that his employer was not properly handling a child abuse case was not engaged in concerted activities. *Slechter and Village of Evergreen Park*, Case No. S-CA-92-179, (IL SLRB E.D. dismissal 1992). Finally, in *Schaumberg*, the Illinois Appellate Court expressly rejected *Alleluia Cushion*, and appears to have adopted a literal and strict interpretation of the *Meyers* holding that concerted activity must involve more than one employee. For these reasons, I find that Mulligan did not engage in concerted activity when he contacted the Inspector General's Office.

Protected activity

The next issue is whether Mulligan's contacts with the Inspector General's Office constituted protected activity. Activities that seem to concern only individual rights or benefits can properly be considered for mutual aid or protection in cases where an individual employee attempts to reap the benefits of a collective bargaining agreement. By asserting his own rights, the individual strengthens the mechanisms of protection that benefit the entire group. Restraining the rights of one employee will quite likely chill the exercise of those rights for all. *El Gran Combo v. NLRB*, 853 F.2d 996 (1st Cir. 1988).

However, to be protected, the activity must not be improper. Activities that disrupt the employer's operations and production, notwithstanding an intent to bring attention to grievances, may not be improper. *Washington Adventist Hospital*, 291 NLRB 95 (1988). In *Great Dane Trailers Indiana, Inc.*, 293 NLRB 384 (1989), an employee who had made three requests that his supervisor assign a third employee to help him in running two press machines, was reprimanded and suspended when he responded with a profanity after the supervisor denied the third request because the employee had been "bugging" him about help. The NLRB found that the employee's requests for assistance were protected concerted activity. The disciplined employee had discussed the need for additional help with other employees and his use of strong language in protesting his supervisor's decision did not remove him from the protection of the NLRA.

Under federal law, it is well established that the expression of concerns about safety and well being of employees on the job is conduct encompassed within the meaning of mutual aid or protection. An attempt to involve a third party in such a discussion does not remove that protected activity from the protection of the Act. *Martin Marietta Corporation*, 293 NLRB 719 (1989). In *Martin Marietta*, an employee who invited coworkers to participate in a discussion on television of a mysterious illness at the employer's plant did not engage in activities so flagrant, violent or extreme as to render the individual unfit for further service. Even if the individual had an ulterior motive in involving the media, his right to protect his and other employees' safety outweighed the possible risk that his communication was the result of malice. Even if he were wrong, he did not have to be correct in order that his conduct be protected.

Further, the NLRB has held that employees have rights to engage in activity for their mutual aid or protection, including communications regarding their terms and conditions of employment which is directed to other employees, an employer's customers, its advertisers, its parent company, a news reporter and the public in general. Employees do not lose their protection if their communications are related to an ongoing labor dispute and are not so disloyal, reckless or maliciously untrue as to constitute, for example, a disparagement or vilification of the employer's product or reputation. *Kinder-Care Learning Center, Inc.*, 299 NLRB 1117 (1990).

In my opinion, Mulligan's contact's with the Inspector General's Office, to the extent they involved issues of plant safety, concerned issues of mutual aid and protection. The collective bargaining agreement between Mulligan's union and Respondent provided that the latter would "provide for a safe working environment for its employees as is legally required by federal and state laws." Thus, in contacting the Inspector General's office, Mulligan engaged in activities for "mutual aid or protection" which constituted protected activities under the Act. Mulligan's activities were not removed

from the protection of the Act even if he was mistaken in his assessment of the seriousness of the allegedly unsafe conditions. See *Martin Marietta Corporation*, 293 NLRB 719 (1989).

I conclude that Mulligan engaged in protected but not concerted activities when he contacted the Inspector General. Consequently, Respondent did not commit an unfair labor practice when it retaliated against Charging Party on account of those contacts.

Although I have found that Mulligan's contact with the IG's office did not constitute concerted activity, several issues remain.

The vent pipe incident

In January 1992, Mulligan brought to the attention of management that a pipe was venting steam, a situation which he considered a safety hazard. Mulligan commented on the situation to coworkers, and was involved with his union steward in notifying the safety officer, other employees and management. In my opinion his conduct was concerted. Mulligan had been elected by employees to an employee council and had spoken about safety issues at its meetings. Thus he could be considered a spokesman for employees and as one authorized to act on their behalf regarding such matters. There was a delay in reporting the vent pipe situation to the safety officer because Mulligan and his union steward mistakenly thought the other would report the incident. Thereafter, Mulligan reported the incident. To the extent that Respondent disciplined Mulligan for making an issue of the vent pipe, it retaliated against him for engaging in protected concerted activity in violation of Section 10(a)(1) of the Act.

A violation of Section 10(a)(1) may occur, regardless of the employer's motivation, if its action has a tendency to interfere with, restrain or coerce public employees in the exercise of their rights under Section 6 of the Act, which gives employees the right to engage in activities on matters involving conditions of employment, collective bargaining or for other mutual aid or protection. An employee has a right to protest conditions which he believes are a threat to his health and safety. Even if the employee has an ulterior motive, his right to protect his and his coworkers' safety outweighs a possible risk that his communication was the result of malice. An employee does not have to be correct in order that his conduct be protected. *Martin Marietta Corp.*, 293 NLRB 719 (1989). Mulligan's conduct remained protected even though he told Fanning that he was a "nothing." As in *Burie Industries*, 300 NLRB 498 (1990), where an employee commenting on a hazardous condition in the plant told her supervisor she was a poor example of responsible supervision, and, unlike this case, even used profanity, Mulligan's remarks were made "in the heat of the moment." His conduct was not so violent or extreme as to justify the discipline imposed. Also, as in *Burie Industries*, there was evidence that Mulligan was disparately treated. Mulligan was more severely disciplined than employees who committed serious offenses. Two employees at the incinerator who engaged in a physical fight were not disciplined, an employee who engaged in misconduct and verbally abused a supervisor received only a three day suspension, and an employee who showed evidence of intoxication was suspended for 10 days. For all these reasons, I conclude that Respondent violated Section 10(a)(1) of the Act when it disciplined Mulligan for his conduct during the vent-pipe incident. Respondent's conduct would tend to discourage employees from making complaints about hazardous working conditions.

The tape recorder incident

On March 25, 1993, Mulligan's foreman Hoffman brought the union steward Vito Marchese to witness a conversation with Mulligan in which the subject of discussion would be Mulligan's job assignment. After Hoffman commented to Marchese that he was tired of telling Mulligan how to do the job, Mulligan said that Hoffman kept changing instructions. Mulligan then removed a tape recorder from his pocket stating "So there would be no misunderstanding." Hoffman commented to Marchese that Mulligan had a tape recorder. When Mulligan observed that Hoffman was displeased, he shut off the tape recorder. Later that day Hoffman handed Mulligan a 29 day suspension notice for attempting to record a conversation. The first issue to be addressed regarding this incident is whether Mulligan engaged in protected and/or concerted activity during the above-described conversation.

The Board has held that an employee has a "Weingarten"¹²⁴ right to union representation when the following three circumstances are present at once:

1. the meeting between the employee and his superiors is investigatory;
2. the employee reasonably believes that disciplinary action may result; and
3. the employee requests union representation.

City of Chicago (Police Department), 5 PERI 3025 (1989). The rationale for a "Weingarten" right is that an employee has a right to union representation in furtherance of the right of employees to act in concert for mutual aid and

protection. An employer who violates an employee's "Weingarten" right violates Section 10(a)(1) of the Act. As the Supreme Court stated in *NLRB v. Weingarten*, 420 U.S. at 257, quoting from *Mobil Oil Corp.*, 196 NLRB 1052 (1972): Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is . . .unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

This case is indistinguishable from the usual "Weingarten" case with one exception: Respondent's agent Hoffman brought the union representative to the interview, obviating the need for Mulligan to request representation. Had Mulligan requested that a union steward accompany him to the meeting, listen to the discussion and represent him, the discussion would be union activity. As the Supreme Court stated in *Weingarten*, an employee has the right to insist on concerted protection against possible adverse employer action. An employer cannot discipline an employee for insisting upon such representation in the proper circumstances, or for utilizing it. Clearly Respondent's agent recognized the discussion as a matter for union representation since it took the initiative to bring the steward to the meeting. I conclude that Mulligan was engaged in union activity when he spoke to Hoffman with his union steward present.

Since Mulligan was engaged in union activity during the incident, his attempt to tape the discussion did not remove him from the protections of the Act. Although a union may not insist to impasse that discussions with employers be taped, it may make such a request as a permissive subject of bargaining. County of Cook (Illinois Nurses Association), 6 PERI 3003 (IL LLRB 1989) (tape recording grievance sessions is a nonmandatory subject of bargaining that may not be implemented absent mutual agreement of the parties). In this case Mulligan attempted to tape the conversation, but immediately ceased doing so upon observing Hoffman's negative reaction. I conclude that Respondent violated the Section 10(a)(1) when it disciplined Charging Party for attempting to use a tape recorder during a conversation involving Hoffman, Mulligan and the union steward Marchese.

V. Conclusions of Law

1. Charging Party failed to prove that Respondent retaliated against him for filing grievances within the jurisdictional period.

2. Although Charging Party established that Respondent retaliated against him because of his contacts with the Inspector General's Office, such contacts constituted protected but not concerted activities. Thus Charging Party failed to prove that such retaliation constituted a violation of Section 10(a)(1) of the Act.

3. Charging Party proved that Respondent's 29 day suspension because of his complaints in January 1992 about a safety hazard at the plant constituted concerted, protected activity. Thus Respondent's retaliation constituted a violation of Section 10(a)(1), regardless of Respondent's motivation.

4. Charging Party proved that Respondent violated Section 10(a)(1) of the Act when it disciplined Mulligan because he attempted to tape record comments made at a "Weingarten" type interview.

VI. Recommended Order

In light of the above findings and conclusions, I recommend the following:

1. That Respondent, City of Chicago, having violated Section 10(a)(1) of the Act, be ordered to cease and desist from:

A. Disciplining any employee for activity protected by Section 6 of the Act.

B. In any like manner interfering with, restraining or coercing its employees in the exercise of rights guaranteed them by Section 6 of the Act.

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

A. Make James Mulligan whole for the losses incurred as a result of the discipline he incurred as a result of his exercise of rights guaranteed under Section 6 of the Act.

B. Expunge from its files any reference to the suspensions of Mulligan in January 1992 and March 1993 and notify him in writing that this has been done and that evidence of the unlawful suspensions will not be used as a basis for future personnel actions against him.

C. Preserve and, upon request, make available to the Board or its agents for examination and copying, all records, reports and other documents necessary to analyze the amount of backpay due under the terms of this Decision.

D. Post at all places where notices to employees are ordinarily posted, copies of the Notice attached hereto. Copies of this Notice shall be posted, after being duly signed by the Respondent, in conspicuous places for a period of 60 consecutive days. The Respondent will take reasonable efforts to ensure that the Notices are not altered, defaced or covered by any other material.

E. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondent has taken to comply herewith.

VI. Exceptions

In accordance with Section 1220.60(a) of the Rules and Regulations of the Board, *80 Ill. Adm. Code 1220.60(a)*, parties may file written exceptions to the Hearing Officer's Recommendation and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to the exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. Exceptions and responses shall be filed with the Board's General Counsel, Jacalyn J. Zimmerman, 160 North LaSalle Street, Suite C-400, Chicago, Illinois 60601-3103. If no exceptions have been filed within the 30 day period, the parties will be deemed to have waived their exceptions.

1 After the hearing in this case began, Madl replaced Fanning as the plant manager of the incinerator.

2 The incinerator is located at 700 North Kilbourn in Chicago, Illinois. It was opened in 1971 and is the City's only operational incinerator. It has two levels. On the ground level, trucks dump garbage into a pit. A crane picks up the garbage and drops it into a hopper, which feeds into a furnace. The residue from the furnace is eventually hauled away to a landfill. On the lower level are shops for the various trades. Machinists have shops on both levels. The shop on the upper level serves as a lunch and locker room. The shop on the lower level is where work is performed.

3 Madl has worked for the City and at the incinerator since March 1971. On July 1, 1993, he became the plant manager.

4 Fanning was plant manager at the incinerator from June 1990 until June 1993. Currently, Fanning manages the Bureau of Facilities Management in Respondent's Department of General Services where he is responsible for repairs and maintenance of all City-owned buildings and supervises all trades persons.

5 In the memorandum, Fanning denied knowledge that Mulligan was being punished or harassed and denied knowing about the gas bill incident. However, at the hearing in this case, Fanning admitted that, shortly after he started working at the incinerator, Commissioner Schivarelli directed him not to detail Mulligan outside the incinerator.

6 Tom O'Neill has worked for the City for over 20 years and has been employed as a machinist for 12 to 13 years. He has been on duty disability since July 31, 1991, when he was injured on the job. Employed at the incinerator since 1981, O'Neill was an acting foreman, then a foreman from 1986 or 1987 until 1990. He gave up the position after Fanning took over because of safety considerations. Machinery had been continuously breaking down because of a lack of maintenance and conditions did not improve when Fanning became plant manager, despite the fact that O'Neill brought such concerns to Fanning's attention.

7 Hoffman has been employed as a machinist in the City's Department of Streets and Sanitation for nine years and is a member of Local 126. As machinists' foreman, he has responsibility for a crew of six City employees and five subcontractors, coordinating job assignments and ordering parts.

8 Fanning did not recall having discussions with O'Neill and Mulligan about overtime. However, O'Neill, who was a credible witness, corroborated Mulligan's testimony that they discussed the assignment of overtime with Fanning.

9 At the hearing in this case, O'Neill characterized Madl's attitude toward their complaints about the distribution of overtime as "snotty." In a handwritten note dated February 1, 1991 and given to O'Neill, Madl denied saving that Mulligan and O'Neill were excluded from overtime. This note corroborates the testimony of Mulligan and O'Neill that they brought the issue of overtime to the attention of management prior to the time Mulligan filed his first grievance.

10 At the hearing in this case, Hoffman admitted that he did not follow seniority in assigning overtime at that time, but based such assignments on his judgment as to which machinist was best qualified to perform the job.

11 Between April 1991 and May 1993, Mulligan filed between 10 and 15 grievances.

12 O'Neill testified that around January 1991, he had a confrontation with Fanning. After initially denying to O'Neill that he (Fanning) had complained to Madl and Hoffman that O'Neill was not working, Fanning admitted, at a meeting with Fanning, Madl, Hoffman and O'Neill, that he had made that statement. During the meeting, Madl yelled at O'Neill, calling him "a nobody, a nothing." After O'Neill started to leave, Fanning swore at

O'Neill several times. When O'Neill said "have a nice holiday," Fanning swore at him again. At the hearing in this case, Fanning denied, in an offer of proof, that the incident occurred.

13Mulligan has filed more grievances than other individual machinists. Virgil Sarti, the business representative of Local 126, estimated that there are 650 City employees in the bargaining unit and that 99 percent of the grievances filed involved overtime. Thus if a department does not offer overtime, there are no grievances filed.

14Virgil Sarti, the business representative, has been employed by Local 126 for 14 years and has represented machinists at Northwest since 1980. The duties of his position include the negotiation of agreements, representation of members in disciplinary and grievance hearings, and administrative duties. Prior to his employment with the union, Sarti was an active machinist, employed in the private and public sector. He worked at the Northwest incinerator from 1972 to 1977. Local 126 represents machinists working in the public sector in the Chicago area and in the private sector with contractors and printing and publishing houses.

15Madl's involvement in the grievance was to check time sheets. According to Madi, Mulligan had only two hours less overtime than Tom O'Neill. He also claimed that prior to Mulligan's grievance, there had not been many opportunities for machinists to work overtime, but that the chief engineer insured that such work was equitably apportioned.

16Fanning denied making a threat to privatize, but recalled saying that it was important that the private contractors and City employees get along in view of threats to privatize. However, Mulligan's version of events was confirmed by Virgil Sarti who testified that Fanning's voice got higher as he talked and he waved his hands. According to Sarti, Fanning's statement was said in a threatening tone of voice. In Sarti's opinion, Fanning became upset because he had a "short fuse." If things did not go his (Fanning's) way, he would take it personally. Fanning was not happy with the way the grievance meeting was going because Sarti was giving him a hard time.

17Sani was not concerned about Fanning's threat because, under its collective bargaining agreements, Local 126 had jurisdiction over machinists whether they worked for a private contractor or were employed by the City.

18Mulligan perceived Fanning's comment as a threat.

19At the hearing in this case, Hoffman testified that he disagreed with Frederick's resolution of the grievance.

20Hoffman agreed that initially his relationship with Mulligan was good, but claimed it deteriorated when Mulligan realized he was not going to be transferred from the incinerator.

21Because of Clarke's testimony, I did not credit Hoffman's testimony that the name calling incident occurred on the day the reprimand was issued, that Mulligan was the only one who engaged in name calling, and that he had never heard the term "scab" used, even in jest, at the incinerator. Work logs for the date of the reprimand, July 29, 1991, also reflect, contrary to Hoffman's assertions, that Mulligan was not working on the tipping floor and thus did not question Hoffman's decision to tack down metal plates on the tipping floor on that date.

22Because of Clarke's testimony, I did not credit Hoffman's claim that fellow machinists accused Mulligan of slowing the work and not working properly. I did credit Hoffman's testimony that Mulligan disagreed with how the work should be done since that was corroborated by Clarke.

23Madl testified that he regarded the council as a "nuisance" because he might be required to implement council recommendations.

24Mulligan considered the denial of overtime and the denial of outside job assignments to also constitute harassment.

25Fanning admitted at the hearing in this case that Mulligan raised "good" issues at the meetings.

26At the hearing in the case, there was a dispute as to how frequently Hoffman used his truck for City business. According to Mulligan, Hoffman used the truck once every six months to drop parts off at a welding supplier or for deliveries. However, Hoffman testified that he used the truck six or seven times a year for City purposes and that he had used the truck for City business the day before he repaired it at the incinerator.

27There was a dispute as to whether Hoffman threw the plants in a scrap metal barrel or in the regular trash. Hoffman testified that he threw the plants into the regular trash and not a scrap barrel bin. Mulligan testified that Hoffman put the plants in a scrap barrel which was not emptied for long periods of time. Scrap metal was discarded into barrels for recycling. When the barrels were filled, they were placed outside for pickup by trucks. However, employees have put other trash in those barrels.

28Hoffman's working on his truck was the impetus for Mulligan to go to the IG, but there were other matters that motivated his contact with the IG such as alleged mismanagement at the plant. Tom O'Neill corroborated Mulligan's testimony in that he (O'Neill) observed misconduct at the incinerator that could have been reported to the IG. After his first contact with the IG's office, Mulligan contacted that office between 50 and 100 times, speaking most often with investigator Roman Tapkoski. His last contact with the IG's office was in March 1993.

29Hoffman, Madl and Fanning testified that they did not know that Mulligan contacted the IG around October 1, 1991.

31 According to Fanning, Madl volunteered the information that he had done something "stupid," namely, allowing Hoffman to repair brakes on his vehicle during the lunch hour. Fanning testified that he did not know what prompted Madl to make the admission. Fanning claimed he told Madl and Hoffman that they must avoid the appearance of impropriety and that if they had asked his permission to repair the vehicle, he would have said "no." Madl and Hoffman appealed, and their reprimands were rescinded because the City had benefited from the use of Hoffman's vehicle. According to Madl, that incident was the only time Hoffman worked on his vehicle.

31 Beginning in early 1992, Madl and Hoffman told Mulligan to go to the IG whenever he made complaints.

32 At the hearing in this case, Hoffman denied making the statement and claimed that what he said was that because Mulligan had been complaining about coworkers taking long lunches and breaks and not being available to perform assignments, he (Hoffman) was issuing new work rules. Hoffman claimed that around that time, employees were taking too long for lunch and breaks. Hoffman could not recall exactly when he issued the work rules and whether or not it was before or after he was reprimanded by Fanning. He also denied that work rules were triggered by that reprimand. However, Dan Clarke, a contract machinist, corroborated Mulligan's version of the incident. According to Clarke, in presenting the work rules, Hoffman stated that according to Mulligan, he (Hoffman) was not a good foreman.

Fanning and Madl's explanation of the new work rules differed from Hoffman's. According to them, management was concerned about keeping track of inventory. According to Fanning, foremen explained to him that they could not keep track of inventory in their shops unless they restricted access. According to Fanning, foremen in other trades verbally informed their subordinates of the restriction to their own shops, but Hoffman decided to type up the rules. Fanning did not recall when the issue of restricting employees to their own shops because of inventory considerations arose.

33 Prior to Hoffman's announcement of the new rules, Mulligan had never discussed the rationale for the rules with either Hoffman or Fanning. Mulligan believed that the restriction of machinists to their own work areas was intended for him because he was the only machinist who did not remain in his own shop for breaks and lunches. After the work rule restriction was imposed, employees from other trades continued to enter the machine shop for non-work related reasons. Also, every other communication Mulligan received as an employee had been on official City of Chicago stationary, and he had never been required to sign a document that did not also apply to the other trades.

34 Tom O'Neill, who worked at the incinerator until July 1991, corroborated Mulligan's testimony that there had been no requirement to meet in the machine shop to receive assignments and that it had been his and Mulligan's practice to have coffee in the electricians' shop prior to receiving their assignments. According to O'Neill, Hoffman would give O'Neill his assignment for the day when the former saw O'Neill in the electricians' shop.

35 There is a dispute as to what the directive was. Mulligan's testimony was that Hoffman said that Madl had told him, that Mulligan would be suspended if he did not sign the work rules. Hoffman testified that the directive was for Mulligan to leave the electricians' shop. Madl testified that Mulligan was suspended for saying he would not abide by the work rules. Fanning testified that Mulligan was suspended for refusing to obey the rule restricting him to his own shop.

36 Tapkowski is currently employed by the City as a Chicago Police detective assigned to the Inspector General's Office. He has been a police officer since 1968, and has worked for the IG for 21/2 years. Prior to his current position, he was a violent crimes detective for 5 years, performing follow-up investigations in cases involving violence against individuals. As an investigator with the IG, he performs duties similar to that of a detective, such as gathering documents, conducting interviews, and concluding investigations.

37 One of the matters Mulligan discussed with Tapkowski concerned the City's payment of the gas bill for space it formerly rented at the International Amphitheatre.

38 Tapkowski investigated Mulligan's allegations by conducting interviews, gathering documents, visiting the incinerator three or four times, and making observations. In Tapkowski's opinion, his investigation of Mulligan's allegations revealed wrongdoing.

39 At the time of the hearing in this case, the IG's office was still investigating some of Mulligan's complaints.

40 At the hearing in this case, Hoffman claimed that he was using the manifold to test a welding rod that could be used in the plant. The manifold was made of cast iron, the same type of material as the turbines in the incinerator. Hoffman also explained that he used the pipe fitters' welding bench because the machinists' welding bench was in use.

41 According to Mulligan, at that time, employees who arrived a few minutes late were allowed to sign it at 7:00 a.m. However, Hoffman testified that employees were allowed only a one minute grace period.

42Prior to that time, Hoffman had not changed any machinist's time sheet. However, since then, Hoffman has changed an employee's entry on a time sheet on two or three occasions.

43Madl admitted that Miller had done remodeling work for him but could not recall when the work was done. Madl also testified that he had not heard that Miller claimed to be making parts for Madl's home while at work. Madl did not think Miller had a key to the storeroom in which Mulligan observed him but admitted that at that time the storeroom lock was not secure.

44Hoffman testified that Madl had received a complaint from the storekeeper about Mulligan using the storeroom's telephone.

45According to Mulligan, at that time all employees walked into storeroom when they needed something, and after Mulligan was told not to enter, other employees were allowed to enter the storeroom. According to Madl, the temporary storekeeper complained about Mulligan using the telephone in the storeroom, but Madl could not recall when the complaint was made. Thereafter, Madl told the storekeeper to tell Mulligan to stay out of the storeroom. According to Madl, an employee would be allowed into the storeroom to look for a part.

46Hoffman could not recall if he told Mulligan not to use the photocopier, but he may have told Mulligan to request copies through a clerk. According to Hoffman, Mulligan was constantly making copies and employees did not ordinarily have the right to use the photocopier.

47Clarke described Hoffman's look as one of betrayal. Clarke generally got along with Hoffman and had only one argument with him during the period Clarke worked at the incinerator.

48Ahlfeld, a probationary electrical engineer, met Mulligan on his (Ahlfeld's) first day of work, September 18, 1991. At that time Mulligan warned Ahlfeld to stay away from him, but Ahlfeld did not take the warning seriously. On July 17, 1992, Madl and Fanning terminated Ahlfeld, allegedly for damaging City property.

49According to Madl and Fanning, time sheets would not indicate that the employees were painting during off hours, although paperwork relating to overtime requests might indicate maintenance duties. Fanning explained the painting as having been done by "paint fairies." Painting was outside the job descriptions of the employees who did the job, but their unions did not object.

50Fanning and Madl claimed they were not reimbursed by the City for the paint they bought.

51Fanning did not recall making that remark, but recalled that Mulligan was confrontational at the start of the conversation.

52At the hearing in this case, Fanning testified that he had no knowledge that Mulligan ever contacted the IG, and that to date no one had ever told him that Mulligan had contacted the IG.

53Every time an incident occurred, Mulligan reported it to the IG. Mulligan's most recent contact with the IG occurred about a month prior to the start of the hearing in this case.

54Mulligan testified that he made that statement to provoke the fitters into taking action. He did not think he would have to repair the pipe himself, but believed emphasis was necessary to insure that action would be taken.

55Mulligan believed that employees could be severely injured by the steam from the pipe.

56All the screens were installed just prior to Mulligan's transfer from the incinerator.

57Fanning claimed that prior to that time, he had shredded suspension notices from Hoffman and Madl, and that he believed that Mulligan was making up stories about fraud. Fanning also testified that he had no knowledge that Mulligan had contacted the IG.

58Madl told Mulligan to leave five or six times.

59At the time of the incident, Madl told Hoffman that Mulligan had become violent and that was why the police were called. Madl also asked Hoffman to watch for the arrival of the police.

60Madl testified that Fanning had said that "downtown" wanted a police report number.

61Fanning described the visit as a "raid," said it was a rough experience and stated that an employee compared the event to a "terrorist act." According to Fanning, employees were very upset about the visit.

62Reports are prepared as soon as possible after an event. Witnesses do not sign or see the notes made by the investigators, except for formal statements. Investigators' reports are descriptive and do not contain recommendations. It is the Inspector General who makes the decision to take action, although he may confer with an investigator to clarify matters revealed in the reports.

63In his testimony at the hearing in this case, Hoffman described the IG's agents as "pushing" employees around after their arrival. Hoffman testified that Tapkowski interviewed him in a room that looked like a "broom closet" and told him "he had no rights."

64Hoffman claimed that he did not become aware that Mulligan had contacted the IG until the February 1992 visit to the incinerator and that he was aware of Mulligan's involvement because of the questions asked during the interview. Hoffman admitted that at some indefinite time, Bob Carey, a machinist, told him that Mulligan

bragged that he had contacted the IG's office, but Hoffman denied that he retaliated against Mulligan because of the latter's contact with the IG.

65Madl described the IG investigators who visited the incinerator as a "horde."

66Madl claimed that a laborer he hired to remodel his house was using, unknown to Madl, leftover materials to make a coat-rack and computer stand at the plant.

67Madl did not recall exactly when he became aware that Mulligan had contacted the IG, but claimed he was not certain until the Personnel Board hearing on Mulligan's suspension in September 1992. Madl denied that he took actions against Mulligan because he contacted the IG's office.

68The only subsequent contact Madl has had with the IG was when he and Fanning escorted investigators to confiscate caging materials.

69Hoffman and Fanning also characterized Mulligan as such during interviews with Tapkowski.

71OAfter the incident, on March 4, 1992, Madl filed a grievance claiming that the interview violated his rights as a U.S. citizen to know his accuser(s) and to a "complete, thorough investigation." The department responded that it had no information on the IG investigation and nothing further happened concerning Madl's grievance.

71According to Madl, the summary represented only about five minutes out of the three hour interview.

72Fanning's first contact with the IG occurred shortly after he became plant manager. He observed two employees engaged in an impropriety involving a private contractor and reported the matter to the IG.

73Fanning did not recall exactly when this conversation occurred.

74Fanning testified at the hearing in this case that he thought Mulligan had contacted the IG after the latter's visit to the incinerator, but claimed that he did not retaliate against Mulligan for such contact. He characterized the plant as having one hundred employees and one problem employee. He claimed he gave Mulligan preferential treatment because Mulligan was not disciplined and for every time Mulligan was disciplined, there were five times when he was not. According to Fanning, Mulligan was allowed to disobey rules.

75Madl testified that he directed Mulligan to clean the shop because Fanning had complained about the condition of the shops.

76Hoffman testified that, prior to that time, other machinists had volunteered to mop the floor. but Mulligan had never volunteered. According to Hoffman, Mulligan was assigned the task because he was first on the overtime list and thereafter, machinists were assigned the task based on that list.

77Hoffman was at a class outside the incinerator on the day Mulligan was assigned the lathe work. At the hearing in this case, Hoffman testified that he did not know why Mulligan was asked to perform the assignment and that he did not discuss the assignment with Madl until after Mulligan finished. However, Madl testified that he discussed the assignment with Hoffman a few days before. Madl and Fanning testified that Mulligan was asked to bore the coupling to see if he could run a lathe in accordance with the job description of a machinist and to determine whether he would be qualified to perform overtime assignments involving the lathe. However, they did not tell Mulligan that he was assigned the task as a test of his abilities.

78Madl denied that he told machinists not to assist Mulligan. but claimed he told them not to lathe the coupling for Mulligan.

79Hoffman testified that he made the decision to change the size. Hoffman claimed he instructed Mulligan to make the coupling a different size because he had a "feeling" that Mulligan was incapable of machining the part, and he did not want the part made too close to the original size so that if it were made to a larger size, it could be used for another part. Hoffman also testified that once learned, a machinist never forgets how to use a lathe. Hoffman made no attempt to show Mulligan how to correctly machine the part and the City does not offer refresher classes for machinists.

80The part, was too large to be used on the turbine because the measurement given to Mulligan was incorrect. Hoffman told Mulligan and Madl that the part was no good and that Mulligan had used the boring bar improperly in making the coupling, damaging the boring bar. Since that incident, the City has not replaced the boring bar and it has not been used in the machine shop. Hoffman also testified that it took Mulligan about 10 hours to machine the part when it should only have taken three to four hours.

81At the hearing in this case, Madl testified that it took Mulligan 12 hours to complete the coupling.

82During the 1970s, the City hired individuals based on their political connections who were not qualified as either apprentices or journeymen apprentices.

830'Neill testified that when he was foreman, he assigned only three machinists to run the lathe. He also testified that every machinist did not have the proper tools for boring a coupling.

84At the time Hoffman wrote the last memorandum, the Department had lifted its ban against disciplining Mulligan. Madl, however, testified that he was unaware of a directive not to discipline Mulligan.

85Hoffman testified at the hearing in this case that he was not motivated to write the memoranda by the IG's visit.

86Machinists are required to have tools but not necessarily at the incinerator, and there is no list of required tools. The City does not reimburse employees for broken tools. Tool carts, which are used to store tools, can be locked.

87Hoffman claimed that he did not feel safe discussing such matters with Mulligan, fearing the latter would become violent and claimed the discussions he had with Mulligan had not been productive.

88Although Madl was subordinate to Murray, Madl reported directly to Fanning, the plant manager.

89According to Mulligan, although the work day officially ended at 3:30 p.m., employees generally stopped working around 2:20 p.m. and prepared to leave. Around 2:40 p.m., employees would go upstairs and wait to sign out. Thus, when Hoffman observed Mulligan around 3:00 p.m., employees had stopped working for the day.

90Mulligan denied, at the hearing in this case, that he made copies of wagering pools and picnic announcements.

91At the hearing in this case, Mulligan explained that the pipe fitters' shop adjoined the drinking fountain. On the lower level of the incinerator, after an employee leaves the machinists' shop, he passes the boilermakers' shop, then the general storeroom where pipe fitters and laborers are located, the electricians' shop, and two storerooms on the way to the elevator.

92Mulligan recollected that the incident occurred around the end of August 1992. However, I credited Hoffman's testimony that it occurred in July since the latter associated it with the birth of his child.

93According to Hoffman, it was not unusual for an employee, rather than a foreman, to ask that a part be made. However, Hoffman denied knowing that the part was to be fabricated for Walton's home rather than for the plant. Hoffman admitted that after the incident, Walton acted as if Hoffman knew the grates were for Walton personally, rather than for the plant. Madl testified that he was not aware that Walton had asked Mulligan to make the bars.

94Fanning testified in this case that he was "appalled" that IG investigators interviewed Hoffman at his home, that their action was "totally uncalled for." Fanning was not forewarned about the visit to Hoffman's home.

95Hoffman has had no contact with IG investigators since this incident.

96Mulligan presumed the inscription meant "Jim Mulligan, rest in peace," although he found out subsequently that there were other "Jim M's" who worked at the incinerator.

97Fanning testified that he told Mulligan to turn in the paper holder a long time after Mulligan removed the holder and that he never said Mulligan would be suspended if he did not return the holder.

98Mulligan interpreted Hoffman's remark as a threat of suspension.

99Management's explanation to Mulligan for the writing on the paper holder was that it referred to the rivalry between two baseball teams of boilermakers and pipe fitters. Apparently, there was joking, rowdiness and name calling associated with the games, which was not considered serious. The captain or a member of one of the teams was Jim McDonald. However, the latter Jim was popularly called "Lefty." According to Hoffman, the drawing was on the cover for two or three days before Mulligan discovered it and employees considered the drawing a joke. It was never discovered who made the drawing.

100Madl testified that he interpreted Mulligan's remark as a threat.

101Hoffman testified at the hearing in this case, that he had asked the machinists if they wanted new helmets, but Mulligan was not present at that time, and that was why no helmet was ordered for Mulligan. However, Dan Clarke, a machinist, denied that Hoffman had ever asked machinists whether they needed new helmets. Initially, Clarke received a new helmet even though he had not requested one and did not know they had been ordered.

102On June 26, 1992, machinists employed at the Northwest incinerator agreed to abide by work rules providing that machinists employed by the City and by a contractor would be listed on one overtime sheet in the order of hiring date for City employees, and in order of plant seniority for contract employees, with City machinists listed first. Overtime hours would be listed per occurrence and would run from year to year. Previously, overtime was assigned based on the number of hours worked, and prior to that no overtime list was kept. A machinist refusing overtime, would be charged for those hours, but not if he could not be reached. If the first machinist declined overtime, then the machinist with the next lowest year to date total would be the called. Machinists on vacation would not be charged or called for overtime. This agreement was formulated after discussion among the machinists, and was relied on by management to explain the denial of overtime to Mulligan.

103It was Mulligan's contention that he should have been offered overtime when the other employee left early.

104Madl testified that Mulligan was not next on the list for overtime.

105In the memorandum Fanning wrote that Mulligan had refused Hoffman's orders to install the gear reducer six times. Mulligan denied the allegation at the hearing in this case, explaining that he had not been ready to install the gear reducer until the time he brought his concerns to Fanning's attention.

106Mulligan testified that he was in the electricians' shop at the incitation of the Foreman, that generally only he and Wyderski were in the room, and that he informed his coworkers where he was going when he left the machine shop.

107In the memorandum, Fanning claimed that Mulligan did not timely notify Hoffman of his request for leave and left the job site without signing out on his time sheet. At the hearing in this case, Mulligan denied both charges, explaining that he followed the practice of giving one hours notice before requesting leave, and signed out on the time sheet when he left early.

108Official policy was for employees to sign in and out at the beginning and end of the day and for lunch.

109According to Hoffman, 50 to 75 percent of machinists ate their lunch in the plant.

110At the hearing in this case, Mulligan testified that Hoffman never explained why the time sheets were moved from the lobby. Mulligan also commented that the time sheets were left in the lobby between 3:30 p.m. and 7:00 a.m., on weekends and holidays with no one observing them. After Mulligan was transferred, a time clock was installed in the incinerator.

111Fanning did not allow the discipline to be imposed. Madl testified that he did not receive directives from Fanning not to suspend Mulligan, but that eventually he gave up trying to suspend Mulligan because discipline did not modify the latter's behavior.

102Hoffman testified that it took Mulligan five times too long to chip the pans. He also claimed that he chipped some pans himself.

113Fanning did not recall writing memoranda regarding other employees and he did not give Mulligan copies of the memoranda. He also testified that he approved all suspensions of other employees.

114Machinists may be detailed to work at facilities outside the incinerator which do not have machinists on their staffs. The machinists' foreman decides who to detail to outside facilities based on their proximity to the outside facility and their work experience. Fanning told Hoffman not to assign Mulligan to details.

115Hoffman testified that on a few occasions, he told Mulligan that he understood that the latter did not want to be at the incinerator, and that if he (Hoffman) could arrange a transfer, he would. He also asked his supervisors to transfer Mulligan.

116Thomas Murray, the chief operating engineer at the Northwest incinerator from November 1990 to July 1992 considered Mulligan a hard worker who performed all assignments, even the worst. Tom O'Neill, who had been the machinists' foreman and acting foreman, considered Mulligan the best worker he had. He described Mulligan as a workaholic who performed all assignments and never complained. According to O'Neill other machinists complained because Mulligan was a workaholic, and liked to work. Dan Clarke testified, contrary to Hoffman's and Fanning's assertions, that Mulligan did not turn machinists against each other. Fanning claimed that at some indefinite time a committee of machinists came to his office and requested that he do something about Mulligan.

117Fanning characterized the fight as one over silliness caused when two people in bad moods carried those bad feelings on to the job.

118According to Thomas, the summary contained the IG's mental impressions of the strength of the City's case against Mulligan, and his analysis of the matter. Thomas did not turn over the memorandum pursuant to Charging Party's subpoena under a theory of attorney-client privilege. According to Thomas, there was no evidence in the memorandum, but merely statements of the IG's mental impressions. Thomas's relationship with the IG is based on an ongoing need for confidentiality. The IG's notes are comparable to work product which would reveal the City's strategy in disciplinary cases. The City also declined, despite an order of the Administrative Law Judge, to provide information to the Charging Party regarding other investigations, initiated by Mulligan, which were ongoing at the time of the hearing in this case. The Attorney General of Illinois declined to seek enforcement of the subpoena with respect to that information.

119Respondent, during the course of the hearing in this case, objected that the threat to privatize incident occurred outside the 180 day jurisdictional period.

120Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the NLRA. 29 U.S.C. 158(a)(1) (1989).

121Section 7 provides in pertinent part 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 the other concerned activities for the

purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

29 *U.S.C.* 157 (1989).

122Section 14(a)(3) of the IELRA provides that an educational employer is prohibited from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.

123Section 14(a)(1) of the IELRA provides that an educational employer is prohibited from interfering, restraining or coercing employees in the exercise of the rights guaranteed under that act.

124*NLRB v. Weingarten, Inc.*, 420 *U.S.* 251 (1975).

125Hoffman may have recalled that in April 1992, Mulligan insisted on having union representation when Fanning questioned Mulligan about remarks the latter had made.

----- End Footnotes -----