The Real ACORN

Anti-Employee, Anti-Union, Big Business

Employment Policies Institute

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"No man, for any considerable period, can wear one face to himself, and another to the multitude, without finally getting bewildered as to which may be the true."
— Nathaniel Hawthorne, *The Scarlet Letter*

On March 27, 2003 the Association of Community Organizations for Reform Now (ACORN) lost its final appeal of a National Labor Relations Board (NLRB) ruling, which found that ACORN had violated the rights of its employees to unionize. Those unacquainted with ACORN's history may find this decision simply ironic because of the organization's active public support of increased unionization, particularly among low-skill service sector employees.

Anyone who has witnessed the activities of ACORN in recent decades, however, realizes that this ruling represents a huge embarrassment for an organization that has maintained a consistent practice of hypocrisy and greed. From bringing suit against the state of California to exempt itself from the minimum wage, to using its national campaign for local wage mandates as a front to increase the membership of its union partners, **ACORN consistently campaigns for laws that it refuses to follow in its own workplace**. Much like Dimmesdale, Hawthorne's adulterous priest in *The Scarlet Letter*, ACORN has attempted to present one face to the masses while hiding its unadulterated hypocrisy and greed from public view.

the Dallas office "is under enormous pressure by ACORN national management to engage in illegal union-busting tactics."
John Rees — Former ACORN Organizer

Wade Rathke, a former organizer for the National Welfare Rights Organization and current member of the International Board of the Service Employees International Union (SEIU), founded ACORN in the early 1970's. With 600 neighborhood chapters in 45 cities across the country, ACORN claims to be the largest organization of low and moderate-income Americans. It claims a total membership of 120,000 families, each paying an annual membership fee of $60.

ACORN plays a prominent role in the American labor movement and local activism. In addition to its founder's significant leadership roles in multiple national unions, ACORN helped to establish the United Labor Union (ULU), aiming to organize low-skill service employees who had not previously been organized by established unions. Since then, ULU has affiliated with other national unions; it now represents over 20,000 service employees in Louisiana, Arkansas, Texas, and Illinois. ACORN's close connection with labor drives its use of the living wage movement as a lever to increase overall union participation.

ACORN also represents a critical component of that movement, a coordinated national campaign to force employers to pay above-market wages (so-called "living wages") at the local level. Robert Pollin, an economist and national living-wage proponent, states that "the New Party and ACORN are

the two national organizations outside of the union movement that have been particularly active in promoting the living wage movement."[1] ACORN calls for wages up to 130 percent higher than the minimum wage, and insists that no job demand overtime hours as a condition of employment.

Despite its ardent public support of higher wages and union membership for all workers, ACORN has made repeated attempts to block the unionization of its own workforce while paying below-minimum-wage salaries to its employees. In addition to the extensive union-busting detailed by the NLRB (see Appendix A), ACORN unsuccessfully sued the state of California to be exempted from the minimum wage. In its appeal of that suit, ACORN argued that the reduction in the number of employees resulting from the minimum wage would violate its First Amendment rights. ACORN's claims were labeled "absurd" by the presiding judge (see Appendix B).

ACORN pays a wage of $5.67 per hour, less than half the level demanded by many proposed "living wage" ordinances that ACORN supports.

Tactics such as these should come as no surprise to even a casual observer of ACORN's history. In 1995 the ACORN Housing Corporation (AHC)—a technically separate entity that maintains extremely close ties to ACORN, sharing office space with ACORN in several cities—was stripped of an AmeriCorps grant after it was found to be using the money as part of an illegal fundraising scheme for ACORN (see Appendix C). **Indeed, a thorough reading of ACORN's "people's platform," as it pertains to workers' rights, finds ACORN in violation of more than one in four of its own guiding principles.**

Unionizing ACORN

On March 27, 2003, ACORN lost its final appeal of a NLRB decision. The ruling stated that ACORN had violated several sections of the National Labor Relations Act (NLRA), pertaining to the rights of ACORN employees to organize into a union for the purposes of collective bargaining. While complaints concerning working conditions and anti-union activities varied slightly from state to state, the similarity of a large number of employee complaints shows that **these illegal practices were not the actions of a few "rogue" regional offices.**

John Rees, a former ACORN organizer who resigned due to the organizations' rampant hypocrisy, states that the head of the Dallas office **"is under enormous pressure by ACORN national management to engage in illegal union-busting tactics."**[2]

These anti-worker activities represent a disturbing trend: ACORN consistently violates in private the very same labor standards it campaigns for in public. The state of ACORN's own workplace highlights the duplicity of its campaign to "assist" low and moderate-income families:

ACORN illegally busts unions.

In an effort to increase union membership, ACORN publicly supports the right of all employees to organize. ACORN's "People's Platform" contains at least 15 provisions pertaining to these rights.[3] Even so, ACORN has fired numerous employees—in several regional offices—who attempted to unionize. These included Sara Stephens, Erin Howley, and Gigi Nevils, the three employees whom the NLRB found were illegally terminated.[4] ACORN also illegally interrogated employees about their union activities. The NLRB found that Kimberly Olson, the head of ACORN's Dallas office, called all employees together for a meeting and proceeded to explain the "negative aspects" of unions.[5] Olson believed that the union would "bring ACORN down"[6] and argued that she "shouldn't have to take orders from employees."[7]

Nearly half of the ACORN “People’s Platform,” as it pertains to workers rights, discusses the rights of employees to unionize. In its living-wage activist manual, ACORN states: “in theory, United States labor law protects the right to freely decide to join a union. In reality, union-busting is a multi-billion dollar industry staffed by specialized management consultants.”[8] Despite ACORN’s publicly stated beliefs, the NLRB found that “by interrogating employees about their union activities, by informing employees that other employees have been discharged because of the Union, by threatening employees that selecting the Union to represent them will be futile, and by threatening employees with discharge,”[9] ACORN violated the rights guaranteed to its employees by the NLRA.

ACORN pays low wages to low-skill employees.

ACORN claims that all employees should be guaranteed “a minimum annual family income at a figure equivalent to the most recent Bureau of Labor Statistics ‘medium living standard,’ adjusted for inflation.”[10] In reality, ACORN organizers typically work 54-hour weeks for a salary of $18,000. Accounting for overtime hours, **ACORN pays a wage of $5.67 per hour, less than half the level demanded by many proposed “living wage” ordinances that ACORN supports.** In some states, such as California and Oregon, this level is below the state-mandated minimum wage. ACORN’s leaders do not pay their own employees a “living wage,” because they know that doing so would limit the number of employees they could hire.[11] This is the same economic reality commonly cited by employers subjected to ACORN’s above-market wage mandates.

ACORN is an unsafe workplace.

ACORN claims to work for the “fundamental right” of all workers to a job “which does not endanger health or safety.”[12] But ACORN employees themselves are routinely forced to work alone at night in dangerous neighborhoods. **Female ACORN employees report being sexually assaulted while attempting to work under these conditions.**[13] ACORN has refused requests from nighttime employees in dangerous neighborhoods to work in pairs.

ACORN fails to pay contracted wages.

Employees in several ACORN offices have complained that their paychecks have not been delivered on time and/or have not included the full amount of money owed.[14]

Help Wanted

Immediate Openings. Have you always wanted to be a martyr? ACORN is currently hiring community organizers to dedicate their lives at the expense of everything else for a least a year for a minimum of 54 hours a week. Job duties include door knocking by yourself to sign up members (sometimes at night); developing leadership; planning meetings, protests and rallies; running campaigns and fundraising. Working for ACORN is a position of privilege, so if you are single, young, can go for weeks without a paycheck, and you think you have what it takes, call us at 555-ACORN. Fluency in Spanish and the willingness to neglect your own well-being a plus.

– A Satirical Help-Wanted Ad Written by an ACORN Employee.[15]

ACORN and the Minimum Wage

ACORN is a prominent supporter of locally based increased-wage mandates. These ordinances force businesses (those contracting with or receiving economic assistance from a locality) to pay wages in excess of the federal minimum wage, sometimes in excess of $12.00 per hour. ACORN has also worked to expand the scope of these local minimum wages to include *all* private businesses.

For example, on February 26, 2003, the Santa Fe City Council passed a living wage ordinance for all employers in the city with more than 25 employees. Local wage mandates like this one set the stage for ACORN's ultimate goal: a national "living wage." ACORN's own activist manual makes the bigger picture clear: "Local coalition building, public education and policy-making have laid the foundation for new proposals at the state and federal levels."[16]

Despite its ardent support for excessively high wage mandates for other businesses, ACORN apparently believes that it should not be bound by the same rules. In 1995, ACORN sued the state of California, claiming that it should be exempt from the state minimum wage.

ACORN realized the simple economic fact facing all employers: being forced to pay higher wages means that you must employ fewer workers. A legal brief filed by ACORN during the appeal of its lawsuit admits as much: "As acknowledged both by the trial court and California, the more that ACORN must pay each individual outreach worker—either because of minimum wage or overtime requirements—the fewer outreach workers it will be able to hire."[15]

ACORN also claimed that paying below the minimum wage was part of a strategy to foster empathy among its employees for the low- and moderate-income families ACORN was attempting to organize. "A person paid limited sums of money," the group argued, "will be in a better position to empathize with and relate to the low and moderate [income] membership and constituency of ACORN."[17]

The trial judge found that both of these arguments were totally groundless. The court decided

Would you want ACORN moving into your neighborhood?

While ACORN claims to work with other members of the progressive movement in order to improve the lives of low and moderate income Americans, this is clearly not the case. In May, 2002 ACORN opened a satellite office in San Francisco, California. Low-income residents already had at least one civic organization working on their behalf, the Outer Mission Resident's Association (OMRA). Apparently, ACORN believed that the town simply wasn't big enough for both groups. According to the *San Francisco Examiner*, "ACORN soon began a process of intimidation by busing in activists from Oakland to disrupt OMRA events. ACORN members then began showing up at some neighbors homes, and in one case jabbed a person in the chest."[18]

One of the main points of contention between the two groups was the objection by Steve Currier, the chief executive of OMRA, to the fact that ACORN was charging for community events. It is not clear, however, that Currier's objection to paying would even matter to ACORN. OMRA member Robert Greco paid for one meeting with a check and soon discovered that ACORN had taken the information from his check in order to continue billing him for subsequent meetings he did not attend.

In addition to strong-arming fellow activists and defrauding citizens, ACORN also began to disrupt community meetings with city officials. Fred Hamdun, the executive director of the City's Parking and Traffic Department, said of a meeting that ACORN attended, "I have to tell you, it was the most abusive meeting I've ever subjected myself and my staff to, ever."[19] Hamdun's experience was echoed by Currier who stated "they were spreading terror at community meetings, trying to muscle established neighborhood groups out of the way."[20]

that the compelling interest of the state to provide a minimum wage is significantly more important than ACORN's ability to more efficiently deliver its message—which, ironically, includes the demand for higher wages.

As for ACORN's claim that poverty would make its employees more effective in their work, the presiding judge wrote: "Leaving aside the latter argument's absurdity ... we find ACORN to be laboring under a fundamental misconception of constitutional law."[21] It appears that ACORN's understanding of the Constitution is on par with its grasp of labor laws.

ACORN and AmeriCorps

In addition to its union-busting activities and its attempt to pay wages below the legal minimum, ACORN has also abused rules and regulations pertaining to the use of federal government funds. In 1994 the ACORN Housing Corporation (AHC) was awarded a grant by AmeriCorps, a program of the Corporation for National Service (CNS). The money was intended to fund the training of 42 AmeriCorps members in 13 cities. The workers were expected to identify low-income families hoping to purchase a first home, to assist them in finding suitable housing, and to advise them in securing the necessary financing.

During the grantmaking process, AHC was asked about its relationship to ACORN, because political advocates were ineligible for the grant. At the time, AHC maintained that it was a completely separate entity from ACORN, and CNS awarded the grant based on this understanding. Evidence uncovered by Luise Jordan, the Inspector General for AmeriCorps, suggests that this promised separation was simply not true. In testimony before a house subcommittee, Jordan stated:

> Our preliminary research determined that AHC was part of a number of ACORN-related organizations. ... Not only did we find references to ACORN having "created" AHC to serve purposes common to both organizations, we noted numerous transactions and activities involving AHC and other "fraternal" ACORN-related corporations. These transactions included costs charged to AHC, and thus to the CNS grant, by ACORN or other ACORN-related entities. ... Charges of this nature were made to our grant for the AHC locations where AHC and ACORN (or other ACORN-related activities) were co-located.[22]

AHC's initial subterfuge pales in comparison to the illegal fundraising scheme it subsequently operated, using its AmeriCorps grant to increase ACORN's membership.

According to Inspector General Luise Jordan, one ACORN member in the Dallas regional office stated that "the only reason for having the AmeriCorps program was to gain new ACORN members, and that if AmeriCorps loan counseling clients did not start becoming ACORN members, she could and would halt the AmeriCorps project."[23] Jordan found that this understanding was not limited to the Dallas office. Using government funds to solicit membership in an organization that—like ACORN—participates in direct political advocacy is a violation of federal guidelines.

AHC also utilized its government-funded loan counseling program to steer low-income families toward ACORN memberships. Jordan found that AHC had distributed leaflets stating that low-income, first-time homebuyers were required to join ACORN, at an annual cost of $60, in order to receive the government-subsidized counseling. "An AHC loan counseling client in New Orleans (who is a retired high school business teacher)," she explained, "was escorted by an AmeriCorps member to an ACORN organizer who solicited membership in ACORN. The client felt like she was not going to be allowed to leave until she gave the ACORN organizer a $60 check, or authorized a

$5 per month automatic bank draft for ACORN membership dues."[24] **And as with ACORN's own employees who attempted to unionize, AmeriCorps members who refused to participate in this illegal fundraising scheme faced the threat of immediate termination.**

The Inspector General's office (IG) was lucky to find out as much about the improper relationship between AHC and ACORN as it did. And AHC made every effort to obstruct the investigation. The IG issued subpoenas to AHC and ACORN, whose response "did not include several documents, or parts of documents that we had obtained from our other sources." IG Luise Jordan later wrote, "Our subpoena clearly called for these documents, and they were critical in supporting the conclusions of our investigation."[25]

Withholding required documentation was only the beginning of AHC's attempt to hinder the investigation. AHC also limited the ability of investigators to interview AmeriCorps members in private.[26] This greatly hampered the IG's ability to obtain reliable information regarding the activities of AmeriCorps members. Eventually, in response to a torrent of red flags raised by the IG, the Corporation for National Service terminated AHC's grant.

ACORN's Funding

Considering that ACORN is already one of the best-funded organizations working on either side of the "living wage" debate, it is somewhat surprising that it felt the need to defraud the federal government. Due to the fact that ACORN is not a nonprofit organization, it is impossible to completely uncover the multitude of funding streams coming into the organization.

It is clear, however, that ACORN receives an estimated $7.2 million per year in dues from its 120,000 low-to moderate-income member families. In addition, ACORN has received at least $16 million dollars in grants from deep-pocketed foundations during the last five years.[27] Many of the nation's largest philanthropies give tens of thousands of dollars annually to ACORN and its fraternal organizations.

Such publicly disclosed donations, however, represent only a portion of ACORN's funding stream. The organization also receives significant support from trade unions. While unions are not legally required to disclose their grantmaking activities in the same manner as private foundations, it is clear that they have given millions of dollars to support living wage campaigns. ACORN, a prominent leader of organizations pushing for the living wage, receives at least a portion of these sizable contributions.

It is estimated that ACORN employs an estimated 150 organizers across the country.[28] With each organizer making approximately $20,000, this amounts to a labor cost of only $3 million dollars. With over $10 million a year flowing into ACORN and so little being spent on labor costs or overhead, just what is happening to this mountain of financial support?

ACORN and the Labor Movement

The ironic twist of ACORN's rampant anti-worker activities is that the group is tied quite extensively to labor unions all over America. ACORN founder Wade Rathke sits on the International Board of the Service Employees International Union (SEIU) and serves as president of the SEIU Southern Conference. Previously, Rathke served as Secretary-Treasurer of the Greater New Orleans AFL-CIO; he now chairs that union's Organizers Forum. It is surprising that someone with such deep connections to unions would permit illegal union-busting within his own organizations. **It is not surprising, however, that Rathke has used living wage campaigns, sometimes deceptively, to benefit unions across the nation.**

While ACORN often claims that the living wage campaign is purely an attempt to bring dignity and

fairness to low-wage workers throughout the country, this is plainly not the case. In numerous publications, **ACORN has stated that a major goal of the living wage movement is an increase in union activity** (that is, outside of their offices). In its manual for living wage activists, ACORN states that "one of the most promising uses of Living Wage Campaigns is to foster union organizing among low-wage workers."[29] The manual goes on to cite the work of Janice Fine and Arnie Graf, who describe a multitude of ways that a living wage campaign can be a boon for union organizers.

In addition to increasing the number of employees who join labor unions, ACORN and the labor movement also leverage living-wage ordinances to discourage the privatization of government services. While privatization decreases the government costs, it also decreases the number of jobs covered by the Association of Federal, State, County and Municipal Employees (AFSCME). ACORN's activist manual states that "privatization directly threatens jobs of unionized government workers" and concedes that "AFSCME has been a major player in several living wage campaigns."[30]

Despite the increased savings, decreased local taxes, and vast efficiency increases that result from privatization efforts, ACORN and other pro-union activist groups are using living wage ordinances as a means to discourage all privatization efforts. In this way, they can increase unions' overall power.

ACORN insists publicly that all employees deserve a "living wage"; the group's own perspective, however, is more complex. Judging by its actions, ACORN really believes that all *non-union* employees deserve a living wage, and that union employees can work for less because they enjoy the privileges of union membership. For this reason, ACORN has pushed for collective bargaining agreement exemptions in several living-wage campaigns.

ACORN's activist guide states that its living-wage activists have "sought to provide union organizing greater leverage" by proposing an ordinance that "allows collective bargaining agreements to supersede the law's requirements."[31] **Exempting employers with unionized workforces from living wage ordinances creates an incentive for employers to sign contracts with unions at wage rates that are above the current minimum wage but below the "living wage" established by such an ordinance.**

If ACORN truly believes that *every* worker deserved to earn a "living wage," it would not logically support exemptions for unionized workforces. No motive, other than an attempt to use the living wage solely as a means to increase union participation, can convincingly explain why employees covered by a collective bargaining agreement would be exempt from receiving a "living wage."

ACORN, first to cry foul when any business resists a living-wage ordinance or unionizing incentives, continues its attempts to hide its union-organizing activities under the cloak of the living wage. But the group's unadulterated hypocrisy seeps through when it rigidly opposes these initiatives in its own workplace.

"We Just Made That Number Up"

Setting the federal "poverty level" is among the most difficult challenges faced by social scientists today. The continuing debate over this guideline is made consistently more complicated by the difficulty of determining the income level necessary for workers to sustain themselves. The same can be said for the battles over various "living wage" levels set by local governments.

ACORN suggests in its activist manual that the most common benchmark for a living wage is $18,100—the 2002 "poverty" guideline for a family of four. Yet basing a living-wage argument on this level is disingenuous. ACORN realizes that the majority of employees affected by living-wage ordinances are not supporting a family of four with a

single salary. In an analysis of the effect of Detroit's living wage, David Reynolds (who co-authored ACORN's activist manual) showed that the majority of living wage recipients do not fit into the category used by ACORN to establish wage levels.

Reynolds wrote: ". . . **National figures show slightly over half of very low-wage workers have a second wage earner in their family. And the average size of a low-wage family is between 2 and 2.5.**"[32]

And how to choose that other important benchmark, the living wage itself? "Ultimately," ACORN's activist manual admits, "the living wage amount is a question of politics and organizing strength, not a technical one. **Ideally, campaigns want to push for as high a wage as possible.**"[33] For this reason, the manual explains, living-wage campaigns should "simply choose a dollar amount that they feel is reasonable and winnable."[34]

Jen Kern, who heads up ACORN's living wage resource center, demonstrated this arbitrary approach in testimony before the Sacramento City Council. Referring to the ACORN-initiated living wage amount for Oakland, California, Kern admitted: "We just made that number up."[35]

In presentations before local city councils and the media, ACORN claims that its living-wage ordinances are based on economic science. In truth, these proposals are filled with potentially faulty and misleading numbers, influenced more by politics than economics. For this reason, all "economic realities" claimed by ACORN must be taken with a handful of salt.

Conclusion

Why does ACORN participate in active union-busting, facilitate the misdirection of government funds, and attempt to pay sub-minimum-wage salaries? ACORN realizes that its guiding principles are not economically sustainable. This is why ACORN attempted to exempt itself from the California minimum wage, and why it has attempted to stifle its own workers' efforts to unionize.

ACORN promotes itself as an honest broker of information on "living wage" campaigns in particular, and labor unions in general. But the facts tell a different story. ACORN disseminates misleading and faulty information in order to influence the decision-making processes of local governments. While ACORN purports to work on behalf of low-income Americans, it actually *uses* these workers to advance the agendas of specific union counterparts, and to augment its own financial position. ACORN's actions and behavior over the past several years shows they are in the profitable business of selling a political ideology they don't actually believe in.

Appendix A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Association of Community Organizations for Reform Now (ACORN) ***and*** **Sarah A. Stephens *and* Erin Marie Howley *and* Gigi Nevils.** Cases 16-CA-21007-1, 16-CA-21007-2, and 16-CA-21173

March 27, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND ACOSTA

On June 24, 2002, Administrative Law Judge Jane Vandeventer issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Association of Community Organizations for Reform Now (**ACORN**), Dallas, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except the attached notice is substituted for the administrative law judge.

Dated, Washington, D.C. March 27, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT imply to that selecting a union to represent you would be futile.

WE WILL NOT threaten you with discharge if you try to organize a union.

WE WILL NOT interrogate you about your union activities or your reasons for supporting a union.

WE WILL NOT inform you that employees have been discharged because of their union activities.

WE WILL NOT layoff or discharge employees because they support the union or try to organize a union.

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

WE WILL, within 14 days from the date of the Board's Order, offer Gigi Nevils, Sarah Stephens, and Erin Howley full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, make Gigi Nevils, Sarah Stephens, and Erin Howley whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL,within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Gigi Nevils, Sarah Stephens, and Erin Howley, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (**ACORN**)

Laurie Hines-Ackermann, Esq., for the General Counsel.
Arthur J. Martin, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JANE VANDEVENTER, Administrative Law Judge. This case was tried on December 3 and 4, 2001, in Ft. Worth, Texas. The complaint alleges Respondent violated Section 8(a)(1) of the Act by interrogating employees about a union, threatening employees with the futility of organizing a union, and threatening termination of employees because of the union. The complaint also alleges Respondent violated Section 8(a)(3) of the National Labor Relations Act (the Act) by laying off or discharging three employees, the three individual Charging Parties. The Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the hearing, the parties filed briefs which I have read.[1][1]

Based on the testimony of the witnesses, including particularly my observation of their demeanor while testifying, the documentary evidence, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Arkansas nonprofit corporation with approximately 37 offices in 23 States, including offices in Dallas, Texas, and Portland, Oregon. During a representative 1-year period, Respondent received at its Dallas, Texas location goods and services valued in excess of $50,000 directly from points outside Texas.

Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The International Workers of the World (referred to in the record herein and in this decision as the Union, the IWW, or the Wobblies) is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. The Facts

1. Respondent's operation

Respondent's activities include organizing community groups and individuals, primarily low and moderate income families. Respondent seeks to serve this constituency by organizing around issues of importance to these individuals and groups in efforts to make political and economic changes beneficial to its constituency. Examples of issues it has worked on in the past few years include lobbying banks to lend money in communities it serves, i.e., not to engage in "red-lining" certain areas, and working on behalf of "living wage" city ordinances.

Respondent operates under its bylaws, and has a national head, called the chief organizer. Each local office has a head organizer, who runs the office on a day-to-day basis, including the hiring of employees. Both the national organization and the local organizations are supervised by elected boards of directors. Local offices have employees called field organizers who perform organizing functions and raise money with which to support these functions. The three individuals involved in these proceedings were employees of the Dallas, Texas office. Kimberly Olsen was the head organizer of that office. Some oversight of local offices was provided by Helene O'Brien, Respondent's national field director. During the latter part of 2000 and all of 2001, some financial oversight of local offices was provided by former Texas organizer, Liz Wolff.

At the time of the events herein, field organizers were expected to work long hours each week—54 hours—and were paid at a salary of $16,000 annually until January 2001, when the salary was raised to $18,000 for field organizers nationally. Their work consisted of: (1) recruiting members and collecting membership dues from them; (2) canvassing, which means knocking on doors in more affluent neighborhoods in order to request donations; (3) organizing campaigns and actions around issues; and (4) for some employees, attempting to secure grants from foundations, churches, businesses, and other organizations. The first two tasks are referred to as "internal" fundraising, and the last one is called "external" fundraising." It appears from the record evidence that various Dallas employees could raise as much as half of their own salaries, and possibly more than half. Some employees were more successful than others at recruiting members and securing donations. The employees generally worked in afternoons, evenings, and weekends.

Respondent nationally, and certainly at the Dallas office, had an extremely high turnover rate among employees. In 2000, significantly less than 10 percent of Dallas office employees stayed in the job for as long as 6 months. Most did not even complete their training period, but quit within a few days or weeks of being hired.

Respondent operated its finances centrally, but each office was expected to be self-sustaining. Each office had an account from which its bills were paid. The head organizer was expected to manage the office's finances: to make a budget and keep to it, to make sure that all income was sent to the central finance administration in New Orleans, and that all obligations were submitted for payment to the same place. As will be described below in more detail, the head organizer of the Dallas office was singularly inept at performing this function.

During 2000, the Dallas office staff varied between approximately 5 and 10 employees at any given time. Head Organizer Kimberly Olsen hired several employees each month, and nearly as many quit each month. Two of the employees hired in 2000 were Charging Parties Sarah Stephens and Erin Howley, in August and September, respectively. Both these employees continued their employment until they were laid off by Respondent on March 2, 2001. Stephens worked full time as a field organizer, and gradually increased her effectiveness until she could recruit two or three members each week and raise about $100 each day she canvassed. In 2000, field organizers canvassed about once a week, although there were other offices around the country in which they did so more often. After a few months, Olsen assigned Stephens the additional task of keeping track of the members and fundraising amounts which each employee

secured, and of preparing bank deposits to be sent to the central financial office. During 2000 and the first few months of 2001, Olsen and some of the Dallas office staff were spending a great deal of their time and attention working on behalf of a "living wage" ordinance which was being considered by the Dallas City Council.

Howley began work as a full-time field organizer, but soon requested to change to a part-time employee. Olsen granted her request to work part time, and assigned her to writing applications for grants and other "external" funding. According to Stephens, Howley was the most effective canvasser on the Dallas staff, able to raise more than $100 per night.

In January 2001, Olsen hired Gigi Nevils as a field organizer. Nevils expressed great enthusiasm for the job, and Olsen was eager to add her to the staff, believing that she would be an effective employee. By January 2001, Olsen had begun to realize that her office was in poor financial condition, she made an arrangement for Nevils to train in the Portland, Oregon office. It is undisputed that having new employees train in other offices is not uncommon at Respondent. Olsen bought Nevils a bus ticket from Respondent funds, and Nevils traveled to Portland to begin her training under Portland Head Organizer Kent Smith in early February 2001. Smith had agreed with Olsen that the Portland office would cover Nevils' paycheck.

2. Union activity

At the end of 2000, Respondent convened a national meeting of its field organizers and management staff, along with representatives of the boards of directors. When not in larger meetings, attendees could choose to attend smaller meetings (caucuses), one of which involved discussion among employees about the possibility of having a staff union at Respondent. Stephens attended this caucus. She testified that the employees made no efforts to hide their union interest from the supervisors and managers, but discussed it openly with them.

Within a month of that meeting, an employee newsletter entitled *To Gather* began to appear in the Dallas office. It was published by an employee in the Philadelphia office of Respondent, and sent to other offices. The newsletter reported on union organizing efforts and working conditions which the employees wished to discuss with management through a union, such as lateness of paychecks, safety of employees when walking alone at night, and the lack of any weekends off.

Stephens, Howley, and another employee, John Rees, testified to seeing copies of the newsletter in the Dallas office during early February 2001, and to reading it. They and other employees in the Dallas office discussed the union organizing effort among themselves and with a tenant in a neighboring office, Kenneth Stretcher, who worked for the Service Employees International Union. The employees also discussed the issue of safety when they canvassed alone at night; they wanted to be allowed to canvass in pairs. They also wanted to have 1 weekend off each month, rather than working every Saturday. Employees made no effort to hide these discussions, and believed that some discussions about the Union took place in Olsen's presence.

3. Allegations of 8(a)(1) violations

The first conversation which is in issue took place on the evening of February 26, 2001,[2][2] between Olsen and John Rees.[3][3] On that date, it had become common knowledge that employees in the Seattle, Washington office had gone on strike. Also on that date, Olsen had telephoned Nevils in the Portland office and laid her off. Olsen and Rees agreed to meet after work for a drink and to talk about the IWW drive away from the office. They met at the Lakewood Landing Bar for about half an hour. Rees told Olsen that in his opinion, a democratic organization like Respondent should practice its principles internally. Olsen responded that the IWW was "trying to destroy" Respondent. She said she shouldn't have to take orders from employees. She told Rees that people are getting fired in Seattle for union organizing, that Nevils was fired because of the Union, and that Rees was to blame. Olsen then told Rees that she was assigning him to open a new office for Respondent in Forth Worth the following month. According to Olsen, she also told Rees "this is where the rubber hits the road," and that he had to help her.[4][4] Rees responded by saying that he could not continue to work for such a hypocritical organization, and that he was quitting.

Also on February 26, Stephens and Howley approached Olsen and told her that they wanted to be constructive and to discuss issues of local interest, such as canvassing in pairs and getting their paychecks. Olsen asked them why they needed a union. She agreed to meet with them in a few days' time.

On March 1, Olsen met with Stephens, Howley, and Cledell Kemp, another employee, at the request of Stephens and Howley. Kenneth Stretcher was also present. Howley began by discussing the issue of safety while canvassing alone at night. Olsen defended the safety of the neighborhoods in which they worked and scoffed at the employees' fears. Stephens supported Howley's contention, and opined that canvassing in pairs would also provide moral support for one another, would decrease employee turnover, and would help employees develop a relationship with the community. The subject of employees having 1 weekend a month off was also raised. Olsen said that she might consider the 1 weekend a month off, and allowing trainees to canvass in pairs for the first month. She said she was willing to work with them individually. Olsen then raised the issue of the union drive in other offices, and asked the employees what they thought of the Union, and why they needed it. Stretcher spoke generally about the benefits of having a union. Olsen responded that he had mentioned only positive aspects; there were negative aspects, too. Olsen said that employees did not need a union to accomplish their goals, that a union would just "bring ACORN down." She called the employee who wrote the union newsletter a "poison pill" and told the employees that they were not workers, but were people who believe in "The Movement" and who should make sacrifices for this. Finally, Olsen appeared to lose interest, began to read her mail, and said, "[T]his isn't going anywhere." She ended the meeting.[5][5]

4. Layoff of Gigi Nevils

Nevils was hired at the end of January by Olsen, and for her first week trained by accompanying Dallas employees in fundraising and signing up members. She exceeded her goals

for members and for fundraising. During that time, she recalled that Olsen commented on a letter which had appeared on the IWW website about the union organizing drive at Respondent. She joked about a member of Respondent who had been a "Wobbly" and wondered if he would picket the office. She also stated that if John Rees organized the employees, he was organizing against her.

On about February 7, Nevils went to Portland and began her training there. She kept in touch with Olsen and with Rees by telephone. Rees openly discussed the Union with Nevils and told her that all the Dallas employees were in favor of the Union. During the second week in February, Nevils participated in a training session with the Seattle head organizer and Seattle employees. After the training, she and the other employees discussed the Union and the work issues raised by the Union. During this time, Nevils was unhappy being away from Dallas, and repeatedly asked Olsen if she could return to Dallas. After a couple of weeks, Olsen told her that she would have to finish her training in Portland. During the succeeding week, Nevils and other Portland employees discussed a rumor that an employee in the Philadelphia office was fired for union organizing. Head Organizer Kent Smith denied that this was the reason for her discharge. He commented that the union trouble would now be over because of her discharge. Nevils said that it was not over, because the Dallas employees were organizing.

A few days later, on about February 23, Smith told Nevils that the Dallas office was "out of money," but told Nevils that they would "work it out" so that she could stay employed. On February 26, Olsen called Nevils on the telephone and told her that she had to lay her off because Portland was out of money and they can't have her there without paying her. Nevils asked how could they have money the previous Friday, but not on Monday. Nevils offered to go to another office to continue her training, but Olsen told her that there wasn't an office that she could train in. Nevils said that there must be something more going on that Olsen was not telling her. Olsen agreed that there was.

Nevils learned the following day from John Rees what Olsen had told him about the reason Nevils had been laid off.[6][6]

5. Layoff of Sarah Stephens and Erin Howley

On March 2, Olsen informed Stephens and Howley that they were laid off. She met with each one separately. She told Howley she was laid off because the organization did not have enough funds to keep her, not because of the Union. She told her that she might be called back to work in a month or so, but there was no guarantee. Howley then saw Olsen take a letter supporting the Union which was in the office, crumple it, and throw it in the trash. Olsen told Stephens that the organization was "broke," and told her the same thing about a possible recall.

6. Respondent's economic defense

Respondent's finances, always in somewhat straitened circumstances, became unusually precarious during mid-2000 through mid-2001. As outlined above, Respondent's income comes entirely from dues, fundraising of various kinds, and grants. According to the testimony of Liz Wolff, who was a generally credible witness, the entity which handled the bank accounts, bill paying, and bookkeeping for all the local offices was not doing its job properly and basically collapsed. Wolff was Respondent's Texas coordinator in 2000, but was drafted by the national organization to help straighten out the accounting and bookkeeping shambles which occurred in 2000. While many of Respondent's offices were in poor financial shape, the Dallas office was among the worst off, Wolff testified, because Olsen had failed to submit certain expenses, such as employee health insurance contributions, which were expected to be paid out of the Dallas office's funds. She had also neglected to have her staff do an appropriate amount of fundraising, according to Assistant Director Helene O'Brien, because she was so busy with the Dallas "living wage" campaign. According to Respondent, it was this unusual financial situation which caused Olsen to lay off Nevils, Howley, and Stephens. O'Brien testified that she instructed Olsen to lay off two additional employees after the layoff of Nevils. I do not credit Olsen as to her testimony that she did not inform O'Brien about the prounion sentiments of Howley and Stephens. In any case, Olsen's knowledge of their prounion sentiments is imputed to Respondent.

B. Discussion and Analysis

1. Olsen's meeting with Rees

I find that Olsen's statements to Rees on February 26 to the effect that employees in Seattle were being fired because of the Union, and that Nevils was fired for this reason were coercive and violated the Act. In addition, her remarks to the effect that the Union was "trying to destroy" Respondent and that she should not have to take orders from employees demonstrate her determined animus towards the Union and employee attempts to support the Union.

2. Olsen's meetings with Stephens and Howley

Olsen's questions to Howley and Stephens on February 26 and again on March 1, as to why they needed a union, and what its benefits would be are coercive interrogation and violate the Act. *Rossmore House*, 269 NLRB 1176 (1984); *Twin City Concrete, Inc.*, 317 NLRB 1313, 1317 (1995). Although Howley and Stephens openly supported the Union, supervisory questioning as to the motives or reasoning underlying employees' sentiments about the Union have been held to be coercive. Her statement that the Union would bring Respondent down, joined with her stated willingness to work with the employees as individuals (implying rather than dealing with the Union) was a threat that selecting the Union would be futile. It is well settled that threats of serious harm in text of other unfair labor practices are coercive and violate Section 8(a)(1). *Reno Hilton Resorts Corp.*, 319 NLRB 1154, 1155 (1995). Her reference in the same conversation to the employee who wrote the union newsletter as a "poison pill" is an expression of animus towards the Union and its employee supporters.

The General Counsel introduced evidence of management e-mail communications in March 2001 in which Helene O'Brien, among others, expressed some antipathy to the union organizing effort. While this evidence is from a period after the three layoffs at issue here, it was shortly after the layoffs and I find that it is some evidence of animus on the part of Respondent.

3. Olsen's layoff of Gigi Nevils

During her 3 weeks in Portland, Nevils displayed her support for the Union openly, telling the Portland supervisor, Kent Smith, that the Dallas employees (of whom she was one) all supported the Union. The General Counsel has therefore established the first two prongs of a prima facie case under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1982), cert. denied 455 U.S. 989 (1982). The third element, that of antiunion animus, has been shown by the remarks of Olsen about the Union described above.

Olsen laid off Gigi Nevils after weeks of assuring her that even though the Dallas office was low on funds, that something would be worked out. She was laid off shortly after Kent Smith's assurances to her that she would be kept on, and within a day or two of her remark to Kent Smith that the Dallas employees were supporting the Union. Thus, the timing of her layoff tends to show a connection between her avowed union support and her layoff. Other evidence of such a nexus can be found in the fact that on the same day Olsen informed Nevils of her layoff, Olsen told John Rees that the reason Nevils was fired was the Union. I find that the General Counsel has established a prima facie case that Nevils was discharged because of her announced support for the Union.

4. The layoffs of Howley and Stephens

As with Nevils, it is clear that both Howley and Stephens showed Olsen that they supported the Union, both by talking about their support openly, and by requesting a meeting with Olsen to discuss implementing some of the Union's demands in the Dallas office. Again, Olsen demonstrated her animus towards the Union. The timing of the two layoffs, coming within a day of the meeting concerning the Union and the employees' desires for changes in some of their working conditions, is evidence of a connection between the decision to lay off Howley and Stephens and their union support and activities. I find that the General Counsel has established a prima facie case that Howley and Stephens were laid off because of their support for the Union.

5. Respondent's defenses

Respondent has raised two primary defenses, first, that it could not have been motivated by antiunion animus in its separation of the three employees because of its principles as an organization, and second, that the financial condition of Respondent was the only motivating factor, or was such that the three employees would have been laid off even absent any union activities.

Respondent's defense that it could not possibly have harbored antiunion animus nor acted upon such animus because to do so would have been against its principles is entitled to very little weight. Respondent is presumed to be neither more nor less prone to unfair labor practices than any other respondent. Respondent's status as a nonprofit organization rather than as a for-profit enterprise endows it with no extraordinary presumptions in the eyes of the law. Furthermore, its avowed pursuit of ameliorative works in the community does not insure that every individual in its organization will invariably act in accord with complete moral and legal correctness. Human nature is more complicated than that.

Respondent's economic defense requires careful consideration. It is clear that the Dallas office was in extremely poor financial shape in February 2001. It is not clear, however, that its financial condition at that time was significantly worse that its financial condition during the preceding 12 months. If it was worse, the evidence does not show in what proportion it differed from the financial condition of the recent past, or that layoffs were the only or even the normal response to the situation.

The Dallas office had been operating without sufficient funds for several months at the time of the layoffs. Late paychecks for the employees were relatively commonplace at the Dallas office, and were not unknown at many other offices. Liz Wolff testified that she had informed Olsen of the severity of the financial problem repeatedly from December 2000 through February 2001. Wolff and O'Brien both urged Olsen to come up with a plan to deal with the financial shortfall. Another Respondent supervisor, Beth Butler, suggested increased fundraising strategies to Olsen. Olsen ignored this advice, and in both December 2000 and January 2001 hired additional employees. On cross-examination, she testified that she "didn't realize" the office was $20,000 behind in its accounts, and didn't remember to allocate money for required costs such as health insurance. Neither Wolff nor Helen O'Brien told Olsen that she could not hire employees, nor did either of them give Olsen specific directives about finances.

Both Wolff and O'Brien testified about other offices around the country which had severe financial difficulties at the same time, such as Los Angeles and Denver. In the other offices, the supervisor of the office increased the fundraising duties of the employees, in one or more offices assigning employees to do fundraising 100 percent of the time. Some employees quit under these circumstances, thus reducing the payroll in those offices. O'Brien testified that in March 2001, she instructed Kent Smith to lay off employees in the Portland office. Smith discussed the situation with the employees, two of whom volunteered for layoff, thus essentially quitting. O'Brien testified that she was unaware of any layoffs from any Respondent offices in the 3 years she has held a national management position other than those of Nevils, Howley, and Stephens, and the Portland voluntary layoffs.

O'Brien testified that she finally instructed Olsen on March 1 that she had to lay off two employees, and the two most junior employees, Howley and Stephens, were chosen. There was apparently no discussion of the fact that several employees, including John Rees, had recently quit, nor was there any discussion of alternate strategies for staying afloat, such as the full-time fundraising being undertaken by other offices. For at least 2 months, O'Brien had given Olsen no guidance, training, or directives about how to solve her office's financial problems, but had simply continued to urge her to come up with a plan. Suddenly, she gave Olsen a directive to take specific action—to lay off two employees. O'Brien changed her approach to Olsen from scrupulously nondictatorial to specific and directive. O'Brien gave no explanation for her about face in handling Olsen's financial mismanagement. Furthermore, O'Brien did not explain why Respondent ordered Olsen to lay off employees in Dallas rather than to undertake one of the alternate strategies used in other offices, such as full-time fundraising.

The facts that layoff was an uncharacteristic recourse for Respondent in its relatively commonplace financial crises, that other offices in similar financial condition did not lay off employees, but instead increased fundraising activities, and the abrupt about face of Respondent from a hands off approach to Olsen's office, to a specific directive to lay off two employees, are all facts which tend to show how unusual and unprecedented the layoffs were. Far from proving Respondent's defense that it would have acted the same even in the absence of the employees' union activities, these facts tend to show the opposite. I find that Respondent has not carried its burden of proving its asserted defense. I find that Respondent violated Section 8(a)(3) of the Act when it laid off Nevils, Howley, and Stephens.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, by informing employees that other employees have been discharged because of the Union, by threatening employees that selecting the Union to represent them will be futile, and by threatening employees with discharge, Respondent has violated Section 8(a)(1) of the Act.
2. By laying off Gigi Nevils, Sarah Stephens, and Erin Howley, Respondent has violated Section 8(a)(3) and (1) of the Act.
3. The violations set forth above are unfair labor practices affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act.

I shall also recommend that Respondent be ordered to remove from the employment records of Gigi Nevils, Sarah Stephens, and Erin Howley any notations relating to the unlawful action taken against them and to make them whole for any loss of earnings or benefits they may have suffered due to the unlawful action taken against them, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7][7]

ORDER

The Respondent, Association of Community Organizations for Reform Now (ACORN), Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities, informing employees that other employees have been discharged because of the Union, threatening employees that selecting the Union to represent them will be futile, and threatening employees with discharge.

(b) Laying off employees because of their support for the IWW or any other labor organization, or because of their concerted protected activities.

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

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

(a) Within 14 days from the date of this Order, offer Gigi Nevils, Sarah Stephens, and Erin Howley full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Gigi Nevils, Sarah Stephens, and Erin Howley whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Gigi Nevils, Sarah Stephens, and Erin Howley, within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Dallas, Texas location copies of the attached notice marked "Appendix."[8][8] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 26, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 24, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT imply to that selecting a union to represent you would be futile.

WE WILL NOTthreaten you with discharge if you try to organize a union.

WE WILL NOTinterrogate you about your union activities or your reasons for supporting a union.

WE WILL NOTinform you that employees have been discharged because of their union activities.

WE WILL NOTlayoff or discharge employees because they support the union or try to organize a union.

WE WILL NOTin any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL reinstate Gigi Nevils, Sarah Stephens, and Erin Howley to their former jobs, and we will make them whole for any loss of pay or other benefits they may have suffered because of our unlawful discharge of them.

WE WILL remove from our files any reference to the unlawful layoffs of Gigi Nevils, Sarah Stephens, and Erin Howley, and notify them in writing that this has been done and that the layoffs will not be used against them in any way.

ASSOCIATION OF COMMUNITY
ORGANIZATIONS FOR REFORM NOW

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

In light of our finding that the Respondent, by Kimberly Olsen, violated Sec. 8(a)(1) on March 1, 2001, by interrogating employees Sarah Stephens, Erin Howley, and Cledell Kemp about their union activities, we need not decide whether Olsen unlawfully interrogated Stephens and Howley on February 26, 2001, as any such finding would be cumulative.

Chairman Battista agrees with his colleagues that Olsen's March 1 statements to Stephens, Howley, and Kemp that the Union would bring Respondent down, and that she was willing to work with employees individually, violated Sec. 8(a)(1) of the Act. He notes, however, that Olsen's remarks are more aptly characterized as an implied threat of closure, rather than a threat of futility.

For all the reasons given by the judge, we adopt her finding that the Respondent violated Sec. 8(a)(3) and (1) by laying off Gigi Nevils, Sarah Stephens, and Erin Howley. We find particularly significant the following: the timing of Nevils' layoff shortly after she informed Supervisor Kent Smith that Dallas employees were supporting the Union, notwithstanding assurances of continued employment she had been given by Supervisor Olsen; the timing of the layoffs of Sarah Stephens and Erin Howley shortly after their meetings with Olsen about the Union and employee concerns about working conditions; the lack of urgency with which the Respondent addressed the financial management of the Dallas office, until employees began pressing for union representation; the "uncharacteristic" and unprecedented decision to layoff employees in response to its "relatively commonplace financial crises," as shown by National Field Director Helen O'Brien's testimony that she was unaware of any layoffs from any Respondent offices during her employment at the Respondent; and O'Brien's sudden "specific and directive" instruction to Olsen to lay off two employees, without consideration or discussion of the fact that several employees had recently quit, and without resort to traditional methods used by **ACORN** to improve finances, such as increased fundraising activity and voluntary layoffs. The Respondent has not explained why it did not employ these traditional tools to improve its financial picture. We agree with the judge that, far from proving the Respondent's defense that it would have laid off these employees even in the absence of their union activities, the facts show the opposite.

2 We correct the inadvertent misspelling of employee Gigi Nevils' name in par. 2(b) of the judge's Order. We have conformed the administrative law judge's notice to her Order.

1[1] The General Counsel also filed a reply brief which I have not relied on, as the filing of such additional arguments with the administrative law judge is not provided for in the Board's Rules and Regulations.

2[2] All dates hereafter are in 2001, unless otherwise specified.

3[3] While Respondent introduced some evidence at the hearing with the apparent view to showing that Rees was a supervisor, Respondent did not contend in its brief that he was a supervisor. From all the evidence, it is clear that Rees was, at most, a lead person. He did train new employees, but most field organizers with any experience participated in training to some degree. I find that he was an employee.

4[4] The General Counsel contends that this last statement of Olsen's, although unalleged in the complaint, violates the Act because it was requesting Rees to stop talking about or organizing for the Union. The General Counsel urges that it was fully litigated, and should be found a violation of Sec. 8(a)(1). I disagree. From the context, the remark appears to refer to opening a new office in Forth Worth, rather than to Rees' admitted union support.

5[5] I have credited Erin Howley, a most impressive witness, as to this conversation. Her testimony is corroborated by Sarah Stephens and Cledell Kemp. Wherever the testimony of Olsen differs from the testimony of these witnesses, or of John Rees, it is discredited. Olsen was a casual witness who barely paid attention to the questions asked of her, and who took no trouble to respond either fully or carefully. I do not credit her testimony in any respect where it differs from that of any other witness.

6[6] On cross-examination, Nevils testified about her postlayoff requests to be allowed to continue her training in another office and about Respondent's responses to these requests. I leave this issue to the compliance stage of the proceeding.

7[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

8[8] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix B

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, Plaintiff and Appellant, v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STANDARDS ENFORCEMENT, Defendant and Respondent.

No. A069744.

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

41 Cal. App. 4th 298; 48 Cal. Rptr. 2d 486; 1995 Cal. App. LEXIS 1255; 131 Lab. Cas. (CCH) P58,049; 95 Cal. Daily Op. Service 9792; 95 Daily Journal DAR 17017

December 21, 1995,
Decided

PRIOR HISTORY:
[***1] Superior Court of the City and County of San Francisco, No. 962283, William J. Cahill, Judge.

DISPOSITION:
The judgment is affirmed.

CASE SUMMARY

PROCEDURAL POSTURE:
Appellant advocacy organization sought review of an order of the Superior Court of the City and County of San Francisco (California) sustaining a demurrer filed by respondent, Department of Industrial Relations, Division of Labor Standards Enforcement, and entering judgment for respondent. Appellant had requested a declaration that California's minimum wage laws were unconstitutional as applied.

OVERVIEW:
Appellant advocacy organization, an Arkansas corporation, employed workers in California to recruit members for local community organizations affiliated with the parent organization in order to promote its social agenda, circulate petitions, and solicit financial contributions. Appellant paid workers in varying ways that may not have risen to the level of California's minimum wage as specified in *Cal. Code Regs. tit. 8, § 11000 (2)*. Appellant contended that the minimum wage laws, while facially constitutional, were unconstitutional as applied to it because they restricted its ability to engage in political advocacy. In affirming the trial judge, the court ruled that just as with a facial constitutional challenge, any incidental infringement on appellant's freedoms under U.S. Const. amend. I could be justified by compelling state interests, unrelated to the suppression of ideas, that could not be achieved through means significantly less restrictive of associational freedoms.

OUTCOME:
The court affirmed the judgment entered against appellant advocacy group and held that California's minimum wage laws were not unconstitutional as applied to an organization whose purpose was political advocacy. The compelling state interest in ensuring a minimum wage adequate to maintain a decent standard of living justified any incidental infringement on appellant's First Amendment freedoms.

LexisNexis(TM) HEADNOTES - Core Concepts

Constitutional Law > Fundamental Freedoms > Overbreadth & Vagueness Constitutional Law > Substantive Due Process > Scope of Protection
[HN1] The compelling state interest test is invoked in as-applied challenges as well as facial challenges to incidental limitations on U.S. Const. amend. I freedoms.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings
[HN2] If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings
[HN3] The burden is on the plaintiff to demonstrate the manner in which the complaint might be amended.

COUNSEL:

Brian J. McCaffrey and Steve Bachmann for Plaintiff and Appellant.

H. Thomas Cadell, Jr., for Defendant and Respondent.

JUDGES:
Opinion by King, J., with Peterson, P. J., and Haning, J., concurring.
OPINION:
[*300] [**487] KING, J.

I. INTRODUCTION

In this case we hold that California's minimum wage laws are not unconstitutional as applied to an organization whose purpose is political advocacy, because the compelling state interest in ensuring a minimum wage adequate to maintain a decent standard of living justifies any incidental infringement on the organization's First Amendment freedoms.

II. BACKGROUND

The Association of Community Organizations for Reform Now (ACORN) is an Arkansas corporation whose purpose is to advocate for lowand moderate-income persons. ACORN employs workers in California, who recruit members for local community organizations affiliated with ACORN, promote ACORN's social agenda, circulate petitions, and solicit financial contributions. ACORN pays those workers in varying ways: [***2] some receive a straight salary, some receive a salary plus commission, and some receive a straight commission. Their compensation may not rise to the level of California's minimum wage, which is currently $ 4.25 per hour. (*Cal. Code Regs., tit. 8, § 11000*, subd. 2.)

ACORN filed the present action seeking a declaration that California's minimum wage laws are unconstitutional as applied to ACORN and an injunction against enforcement of those laws against ACORN. n1 The court sustained a demurrer without leave to amend and rendered a defense judgment.

n1 It is not entirely clear from the record that there is an actual, ripe controversy supporting declaratory relief. (See *Code Civ. Proc., § 1060*; *BKHN, Inc. v. Department of Health Services (1992) 3 Cal. App. 4th 301, 308 [4 Cal. Rptr. 2d 188].)* The complaint alleges that the state has forced ACORN to disclose information regarding compensation of its employees and to appear at hearings, and that the state "by its actions and statements has indicated ... its view that California's labor laws are applicable to Plaintiff," but the complaint does not expressly allege any attempt by the state actually to compel ACORN to pay the minimum wage. In points and authorities supporting the demurrer, however, as well as in the respondent's brief on appeal, the state characterizes the complaint as alleging that the state has enforced the minimum wage laws against ACORN. This amounts to a waiver of any claim that the controversy is unripe.

[***3]

III. DISCUSSION

ACORN contends that California's minimum wage laws, while facially constitutional as supported by the compelling state interest of ensuring [*301] wages adequate to maintain a decent standard of living (see *Industrial Welfare Com. v. Superior Court (1980) 27 Cal. 3d 690, 701 [166 Cal. Rptr. 331, 613 P.2d 579]),* are unconstitutional as applied [**488] to ACORN because they restrict ACORN's ability to engage in political advocacy. According to ACORN, this adverse impact will be manifested in two ways: first, ACORN will be forced to hire fewer workers; second, its workers, if paid the minimum wage, will be less empathetic with ACORN's low and moderate income constituency and will therefore be less effective advocates.

Leaving aside the latter argument's absurdity (minimum wage workers are ipso facto low-income workers) as well as irony (an advocate for the poor seeking to justify starvation wages), we find ACORN to be laboring under a fundamental misconception of the constitutional law. ACORN evidently believes that a compelling state interest justifying an incidental infringement on First Amendment freedoms, while supporting the facial validity of [***4] a government regulation, cannot support the regulation *as applied*. Not so. [HN1] The compelling state interest test is invoked in as-applied challenges as well as facial challenges to incidental limitations on First Amendment freedoms. (*Roberts v. United States Jaycees (1984) 468 U.S. 609, 623 [82 L. Ed. 2d 462, 474-475, 104 S. Ct. 3244]* [compelling interest in eradicating discrimination against women justified application of antidiscrimination statute to United States Jaycees]; *United States v. O'Brien (1968) 391 U.S. 367, 376-377 [20 L. Ed. 2d 672, 679-680, 88 S. Ct. 1673]* [compelling interest in ensuring functioning of military draft system justified application of anti-draft-cardburning law to O'Brien]; cf. *Hurley v. Irish-American Gay Group* (1995) 515 U.S. [*132 L. Ed. 2d 487, 506, 115 S. Ct. 2338]* [no showing of legitimate interest in applying antidiscrimination statute to require organizers of parade to include members of homosexual group among marchers].) Here, just as with a facial constitutional

challenge, any incidental infringement on ACORN's First Amendment freedoms may be justified by "compelling state interests, unrelated to the suppression of ideas, [***5] that cannot be achieved through means significantly less restrictive of associational freedoms." (*Roberts v. United States Jaycees, supra, 468 U.S. at p. 623 [82 L. Ed. 2d at p. 475].)*

In its reply brief ACORN concedes, as it must, that "California's wage and hours law promotes important societal interests." Those interests include the assurance of " 'a wage adequate to supply ... the necessary cost of proper living and to maintain the health and welfare' " of employees. (*Industrial Welfare Com. v. Superior Court, supra, 27 Cal. 3d at p. 701,* quoting former Lab. Code, § 1182, enacted Stats. 1913, ch. 324, § 6, pp. 634-635; see also *West Coast Hotel Co. v. Parrish (1937) 300 U.S. 379, 393* [*302] *[81 L. Ed. 703, 709-710, 57 S. Ct. 578, 108 A.L.R. 1330]* [in employer-employee relations, Legislature has broad discretion to enact regulations "designed to insure wholesome conditions of work and freedom from oppression"].) Those interests support application of the minimum wage laws to ACORN, despite any incidental adverse impact on ACORN's political advocacy, no less than they support the laws' facial validity.

ACORN also contends the court should have [***6] granted leave to amend the complaint. The law on this point is well settled. **(2) (See fn. 2.)** "[HN2] If there is a reasonable possibility that the defect in a complaint can be cured by amendment, it is an abuse of discretion to sustain a demurrer without leave to amend. [Citation.] [HN3] The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended. [Citation.]" (*Hendy v. Losse (1991) 54 Cal. 3d 723, 742 [1 Cal. Rptr. 2d 543, 819 P.2d 1];* accord, *Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636 [75 Cal. Rptr. 766, 451 P.2d 406]* [appellant "must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"]; *Martin v. Thompson (1882) 62 Cal. 618, 622.)* n2 ACORN has not met this burden, [**489] saying nothing about how it would propose to amend the complaint to state a cause of action. No error is demonstrated.

n2 A recent decision states that where "a demurrer is sustained to the *original* complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment." (*California Federal Bank v. Matreyek (1992) 8 Cal. App. 4th 125, 130-131 [10 Cal. Rptr. 2d 58],* original italics, citing *King v. Mortimer (1948) 83 Cal. App. 2d 153, 158 [188 P.2d 502].)* This rule, however, is peculiar to cases where a complaint is good as against a general demurrer for failure to state a cause of action but is subject to a special demurrer for uncertainty or ambiguity in the pleading; in such cases the plaintiff must be given an opportunity to clarify the uncertainty or ambiguity unless the pleading shows on its face that the defect cannot be cured. (E.g., *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 758, 762 [161 P.2d 217, 162 A.L.R. 747]; Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 718-719 [128 P.2d 522, 141 A.L.R. 1358]; King v. Mortimer, supra, 83 Cal. App. 2d at pp. 158, 163.)* Where, as here, the complaint falls to a general demurrer, this special rule does not apply, and the burden remains on the appellant to demonstrate how the complaint might be amended.

[***7]

DISPOSITION

The judgment is affirmed.

Peterson, P. J., and Haning, J., concurred.

Appendix C

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October 17, 1995, Tuesday

CAPITOL HILL HEARING TESTIMONY

TESTIMONY October 17, 1995 LUISE JORDAN INSPECTOR GENERAL CORPORATION FOR NATIONAL AND COMMUNITY SERVICE HOUSE ECONOMIC OVERSIGHT AND INVESTIGATIONS NATIONAL SERVICE OVERSIGHT

TESTIMONY OF LUISE S. JORDAN, INSPECTOR GENERAL OF THE CORPORATION FOR NATIONAL AND COMMUNITY SERVICE BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS COMMITTEE ON ECONOMIC AND EDUCATIONAL OPPORTUNITIES

OCTOBER 17, 1995

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss the results of our work concerning ACORN Housing Corporation (AHC). Our testimony today is based on an audit requested by Corporation for National Service (CNS) management, and an investigation we opened after we received a Hotline complaint from a former AmeriCorps Member.

CNS awarded ACORN Housing Corporation an $822 thousand grant 1 to expand AHC's existing loan counseling efforts. Under the grant AHC was to train 42 AmeriCorps Members in thirteen cities to identify low- income families interested in purchasing homes, assist these families in identifying suitable properties for purchase, and advising these families in securing financing for these homes. 1 The Corporation For National and Community Service (CNS), pursuant to the authority of the National and Community Service Act of 1990 (NCSA), as amended, awarded AmeriCorps Grant Agreement Number 94ADNIL001 to the ACORN Housing Corporation (AHC). The grant budget provided for Federal funding of $822,596 to support the program directly; $198,450 for post service educational benefits; and $122,500 for child care services available to AmeriCorps Members who meet eligibility requirements established by the NCSA. The budget anticipated $605,817 in non-Federal matching funds.

The grant was awarded for the period June 24, 1994 through September 30, 1995. However, CNS records indicate that the program's start up was delayed, and that most of the AmeriCorps Members began their service after January 1, 1995. By March, AHC had 38 AmeriCorps Members located in nine work-sites: Philadelphia, Denver, Houston, Dallas, New Orleans, Chicago, Brooklyn, Phoenix, and Washington DC.

At that time, CNS requested the Office Inspector General (OIG) to conduct an audit to determine whether

-any of AHC's AmeriCorps Members had participated in the demonstration in Washington, D.C. sponsored by the Association of Community Organizations for Reform Now (ACORN) on March 6, 1995 2 . 2 On March 6, 1995, the Association of Community Organizations for Reform Now (ACORN) sponsored a demonstration at the Washington Hilton Hotel that disrupted the National Association of Counties conference. Questions arose regarding participation in, and support for, the demonstration by AHC because it receives, through its grants from CNS and the Department of Housing and Urban Development (HUD), Federal funding. At the request of CNS management, AHC provided written assurance that none of its AmeriCorps Members had participated in the demonstration. (Exhibit A.) However, at least one member of CNS' Board of Directors, the press and other interested individuals continued to question whether CNS should continue its funding of AHC loan counseling activities.

AHC and ACORN are separate entities.

AHC used AmeriCorps grant funds to benefit ACORN either directly or indirectly.

-AHC has an accounting system that supports Federal reporting requirements and properly records expenditures that are charged to the grant.

CNS requested that we complete our audit in time for CNS to consider the results while reviewing AHC's application for renewal of its AmeriCorps grant. Regrettably, AHC's actions resulted in considerable delay in the completion of the audit. CNS management informed AHC that it would not proceed in its evaluation of the proposal until the audit was completed.

In May, we received a Hotline complaint from a former AmeriCorps Member who alleged that AHC was

requiring its AmeriCorps Members to help the Association of Community Organizations for Reform Now (ACORN) recruit new ACORN members. Because the investigation resulted in evidence that caused CNS to terminate the grant, we will discuss the investigation first.

BASED ON THE FINDINGS OF OUR INVESTIGATION, CNS SUSPENDED, AND LATER TERMINATED, ITS AMERICORPS GRANT TO ACORN HOUSING CORPORATION.

On May 24, 1995, the OIG received a Hotline complaint in which a former AmeriCorps member alleged that AHC was directing AmeriCorps Members to solicit loan counseling clients to become members of ACORN. We opened an investigation into this matter, keeping the investigation separate from the audit.

On July 7th, we informed CNS that our investigation had resulted in evidence that AHC had violated the provisions of the National and Community Service Act, as amended, CNS regulations, and the AmeriCorps grant agreement. CNS management acted immediately to begin termination proceedings. In addition, CNS grants management put a hold on withdrawals of CNS funds 3 by AHC. 3 CNS AmeriCorps grant funds are disbursed to grantees through the Department of Health and Human Service's payment management system. After the grant is awarded, grantees are permitted to request electronic funds transfers in payment of expenditures they have incurred.

The evidence clearly indicates that AHC directed, condoned and allowed the use of some of its AmeriCorps Members as conduits for recruiting new ACORN members; thereby providing a direct benefit to ACORN, an organization that engages in substantial advocacy activities. This practice was not limited to just one AHC office. For example, in two cities where AHC had AmeriCorps loan counselors co-located with ACORN recruiters, we found evidence that specific pressure was placed on AmeriCorps Members to assist in recruiting new ACORN members. Further, AmeriCorps Members in a third city (where there were no ACORN recruiters) specifically recalled being told in AHC training sessions that they should tell prospective clients about ACORN's goals and activities. These practices clearly violate the National and Community Service Act, as amended, CNS' regulations and policies, as well as the terms of the grant agreement.

Among the evidence cited in our report 4 are sworn statements and other documentary evidence 5 that 4 CNS Office of Inspector General, Report of Investigation, OIG File Number 95-05-I 5 During our investigation, we issued subpoenas for documents to both AHC and ACORN. The documents provided by AHC pursuant to the subpoena were not important to the results of our investigation. However, what was notable about AHC's response to our subpoena was what they did not give us. AHC sent us more than 700 pages of material, but did not include several documents, or parts of documents, that we had obtained from our other sources. Our subpoena clearly called for these documents, and they were critical in supporting the conclusions of our investigation.

ACORN refused to give us any documents except its public newsletters–which we had already. We later decided that we had enough evidence without the ACORN documents, and withdrew that subpoena.

-An "ACORN Housing Corporation - Loan Counselors Training Manual" made available to AmeriCorps Members from various cities provides a detailed description of ACORN's goals and activities, and encourages loan counselors to advocate membership in ACORN to loan counseling clients. The manual contains detailed descriptions of how to conduct intake sessions and informational seminars, including providing specific opportunities for people interested in obtaining loan counseling to be recruited by ACORN representatives. A sample handout included in the manual to be given to prospective loan counseling clients describes the information and documentation needed at "an intake session," and states that clients "must" bring a $60 check or money order for ACORN membership dues.

-An AHC supervisor in New Orleans threatened two AmeriCorps Members with "immediate termination" if they failed to follow the "national loan counseling policy" of bringing loan counseling clients to ACORN organizers to be solicited for membership in ACORN. Bruce Dorpalen, AHC's AmeriCorps Program Director, was noted as receiving a copy of memoranda concerning this matter.

-A local ACORN official in Dallas stated that the only reason for having the AmeriCorps program was to gain new ACORN members, and that if AmeriCorps loan counseling clients did not start becoming ACORN members, she could and would halt the AmeriCorps project. This ACORN official specifically directed AmeriCorps Members to solicit membership in ACORN.

-AHC officials in Dallas told AmeriCorps Members to give loan counseling clients who became ACORN members priority scheduling and access to assistance (including some financial assistance) over the clients that did not join ACORN.

An AHC loan counseling client in New Orleans (who is a retired high school business teacher) was escorted by an AmeriCorps Member to an ACORN Organizer who solicited membership in ACORN. The client felt like she was not going to be allowed to leave

until she gave the ACORN Organizer a $60 check, or authorized a $5 per month automatic bank draft for ACORN membership dues. The client gave the Organizer a postdated check for $60 and received an ACORN membership card. The client later asked for her check to be returned. After telling her it could not be returned, and again soliciting membership in ACORN, the Organizer returned the check.

AHC officials in Phoenix required an AmeriCorps Member, in addition to her loan counseling duties, to conduct housing committee meetings of all area ACORN members. She was also told to contact the area ACORN members about an anniversary picnic for ACORN, which she refused to do.

Based on the findings of our investigation, CNS suspended the grant to AHC. After review of AHC's response to the suspension, CNS and AHC agreed to end the project as of September 1, 1995, and to sever their relationship. The termination agreement requires a close- out audit of all costs charges to the grant 6 . With respect to the audit 7 of certain activities and financial records relating to CNS's $822 thousand grant to AHC, 6 Under the termination agreement, the mutual decision to terminate the grant is not an admission by AHC that it violated the terms of the NCSA, CNS regulations, or the grant agreement, and CNS does not make a final determination about whether or not AHC violated these provisions. 7 CNS Office of the Inspector General Audit Report No. 95-17; August 1, 1995.

AHC'S ACTIONS RESTRICTED OUR ABILITY TO INTERVIEW AMERICORPS MEMBERS.

As a result of our audit, we found no evidence that AmeriCorps Members participated in the March 6 demonstration sponsored by ACORN; however, the scope of our work in this area was impeded, because AHC placed conditions on our interviews that limited our ability to develop reliable information.

When we informed AHC that we would interview AmeriCorps Members to determine the extent, if any, of their participation in the March 6th demonstration, AHC expressed its reluctance to allow us to interview the members in private. We discussed the matter further in a conference call in which CNS management and AHC officials participated, and AHC agreed that the interviews could be conducted in private. Therefore, our audit notification letter issued on April 26, 1995, advised AHC that our procedures would include interviewing AmeriCorps Members and AmeriCorps grant-funded AHC staff at each AHC location participating in the AmeriCorps program.

During the first weeks of our audit, we conducted 12 interviews in private. However, on May 10, 1995, we were contacted by AHC's outside counsel, who stated that we must make all further requests for information regarding AHC through him.

At first I was reluctant to believe that such restrictions could be imposed upon an OIG's access to AmeriCorps Members whose activities were funded by the Federal government. However, much to my chagrin as a new Inspector General, I learned that an IG does not have the right to control the conditions of interviews. While Inspectors General do have subpoena authority, the IG Act limits its use to obtaining documents. We cannot use our subpoenas to obtain testimony or statements from individuals. Thus, while we do everything we can to conduct our interviews in private, we have no legal recourse if the person we want to talk with insists on having someone else present during our interview. In this case, when AHC's outside counsel insisted on being present at our interviews, it was really up to the AmeriCorps Members and AHC staff to decide who was going to be present. We don't know what AHC told the people that we wanted to talk to, but it was clear that AHC was going to do everything it could to prevent us from interviewing these people in private. In the end, we concluded that we simply could never have outweighed the influence that AHC had over the AmeriCorps Members and AHC staff in deciding how the interviews would be conducted.

We advised CNS as well as AHC's counsel that, under our governing auditing standards, interviews conducted in the presence of third parties are not considered as reliable as private interviews. After discussions with AHC's counsel, we conducted an additional six interviews in the presence of AHC's counsel. We wanted to interview these individuals primarily because they were assigned to AHC offices in Washington, DC, Philadelphia, and New York and would have been the participants most easily involved in the March 6 demonstration. During the interviews, a grant-funded AHC supervisor in AHC's Washington, D.C. office stated that she took an unpaid 46 personal day' to participate in the demonstration. This employee's time sheet for the month of March reflects that the employee did not record any time worked on March 6, 1995.

Given the lower level of reliability we could place on evidence gathered in the presence of AHC management and legal counsel, we subsequently decided that the expense of conducting further interviews in AHC's offices in Dallas, Houston, Phoenix, Denver, and Chicago was not warranted and agreed to accept affidavits from the AHC AmeriCorps Members and staff in those cities. We received declarations signed under penalty of perjury from 17 current AmeriCorps Members and AHC staff in those cities, all of whom state that they did not participate in the March 6 demonstration. We were unable to locate three individuals who are no longer working for AHC: one AmeriCorps Member (in Philadelphia) and two AHC

supervisors (one in New York and one in Denver).

However, because we relied primarily on interviews with AmeriCorps Members and AHC staff assigned to the program and reviews of travel expenditures to address the issues of participation in the March 6th demonstration, OIG can only report that we found no evidence, other than that disclosed above, of participation in the demonstration. Therefore, because our ability to gather evidence was impeded by AHC, 8 we cannot conclude with certainty that there was no participation. 8 Other actions by ACORN Housing Corporation affected the scope of our audit, and thus, the information we gave to management in our report. We considered the impact of these restrictions on the scope of our audit in the findings we reported. First, although AHC provided "management representation" letters in response to OIG's request, the letters received from AHC and Citizens Consulting, Inc. (CCI, an ACORN-related corporation that provides accounting and legal services to AHC) omit confirmation of certain information the OIG requested. The requested confirmations were related to AHC's announced basis for the restrictions imposed on our interviews of AHC staff and AmeriCorps Members, irregularities involving management or employees, and compliance, or disclosure of noncompliance, with laws and regulations.

In addition, although AHC provided copies of the by-laws and minutes of AHC Board of Directors meetings, we were not allowed to review the original documents, and AHC failed to provide the separate certification by the Corporate Secretary of AHC, which we requested: that the copies provided to us were true and correct copies.

WHILE ACORN AND ARC ARE SEPARATELY INCORPORATED ENTITIES, THEY DO NOT ALWAYS OPERATE AT "ARMS LENGTH" FROM ONE ANOTHER.

CNS management emphasized to us that, during the grant application process, ACORN Housing Corporation represented itself as an entity that is totally separate from ACORN. CNS officials told us that they relied on this representation in making the grant to AHC. However, we have determined that while AHC and ACORN are separate corporate entities, they do not always operate at "arms length."

Our preliminary research determined that AHC was part of a number of ACORN-related organizations. We did not attempt to completely investigate nor audit all of these organizations because our primary focus was on CNS' grant to AHC. 9 9 We were only allowed access to financial records specifically related to the grant; however, there was one exception: we were allowed access to AHC-wide travel expenditures for the purpose of assessing whether those records indicated payment for travel in support of the ACORN demonstration.

We established that ACORN and ACORN Housing Corporation are separately incorporated. ACORN is an Arkansas nonprofit corporation chartered on January 5, 1977. AHC is a Louisiana nonprofit corporation incorporated on March 13, 1985.

However, not only did we find references to ACORN having "created" AHC to serve purposes common to both organizations, we noted numerous transactions and activities involving AHC and other "fraternal" ACORN-related corporations. These transactions include costs charged to AHC, and, thus to the CNS grant, by ACORN or other ACORN-related entities. These transactions included rents, telephone and other usage charges. Charges of this nature were made to our grant for AHC locations where AHC and ACORN (or other ACORN-related activities) were co-located. They are included in the costs we questioned 10 in our audit report. 10 Questioned costs are described in general in the following section and described in detail in Exhibit 1.

ALTHOUGH THE RECORDS WE AUDITED COVERED ONLY THE PERIOD FROM OCTOBER 1, 1994 THROUGH APRIL 28,1995, WE QUESTIONED 11 MORE THAN $95 THOUSAND DOLLARS IN COSTS CHARGED TO THE CNS GRANT.

We found that of the approximately $460 thousand in AmeriCorps program costs that AHC recorded from October 1, 1994 to April 28, 1995 (Exhibit 1), approximately $95 thousand is not properly supported. Information provided to us by AHC from its accounting records and other sources has not established that these costs are allowable under the grant agreement and applicable regulations. Exhibit I provides a more detailed description of the underlying reasons for our questioning the costs. And, as explained in the Exhibit, certain of these costs appear to have been paid to AHC or ACORN-related parties.

We recommended that the costs be disallowed because

-AHC failed to provide sufficient evidence that, as required by OMB Circular A-122, Cost Principles for Nonprofit Organizations, these costs are allowable, reasonable in nature and amount, allocable to the grant-funded activity, adequately documented, and consistent with policies that apply uniformly to both Federally funded and other activities. 11 Auditors question costs when items charged against Federal grants or other contracts fail to meet criteria for their allowability that are established by Congress at the time programs are authorized and funds are provided, the Federal Acquisition Regulations, Office of Management and Budget requirements, the grant-making agency's regulations, or the grant agreement. Allowability is normally based upon the logic that the costs are fair and rea-

sonable. Allowability may also be impacted by the policy that the government, as a sovereign, does not desire to condone or encourage certain activities; when this is the case, these costs, for example, fund-raising or costs related to political activities, are specifically excluded.

Auditors bring these costs to the attention of Federal agency management by "questioning" them in their reports.. Management makes the final decisions through a resolution process on their allowability.

According to the American Institute of Certified Public Accountants, Statement of Position, 92-9, Audits of-not-for-Profit Organizations Receiving Federal Awards, paragraph 6.83, the criteria for reporting questioned costs generally relate to the following:

Unallowable costs. Certain costs specifically unallowable under the general and special award conditions or agency instructions, including, but not limited to, pre-grant and post grant costs, and cost in excess of the approved grant budget, either by category or in total.

Undocumented costs. Costs charged to the grant for which adequate detailed documentation does not exist (for example, documentation demonstrating their relationship to the grant or the amounts involved).

Unapproved costs. Costs that are not provided for in the approved grant budget, or for which the grant or contract provisions or applicable cost principles, require the awarding agency's approval, but for which the auditor finds no evidence of approval.

Unreasonable costs. Costs incurred that may not reflect actions that a prudent person would take in the circumstances, or costs resulting from in-kind contributions to which unreasonably high valuations have been assigned.

-The grant agreement and CNS regulations require AHC to have financial management systems that provide written procedures for determining the allowability of costs under Circular A- 122. Our audit found no evidence of such written procedures.

AHC's general record keeping and file maintenance is less than adequate. Although invoices and required documents were produced for our review, retrieval was an arduous process. CCI staff and AHC's auditors stated that AHC did not file many of its financial documents during calendar year 1994. Personnel files were incomplete. Several lease agreements and contracts were undated, missing or unsigned. Not all records were supplied to OIG auditors on a timely basis; in some cases we waited for weeks for CCI or AHC staff to produce supporting documentation for charges to the grant. Even documentation supplied by AHC's attorneys on July 28th included a contract (purported to support charges for CCI's services) that was signed, but not dated.

OMB Circular A- 110, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations, incorporated in CNS' regulations as 45 CFR Part 2543, requires each recipient of a Federal award to maintain a system that provides for (1) the accurate, current and complete disclosure of financial results for each Federally- sponsored program, (2) records that adequately identify the source and application of funds, (3) effective controls for accountability to safeguard all related assets, (3) comparisons of outlays with budget amounts for each award, (4) written procedures, and (5) records that are supported by source documentation.

Further, our review of charges to the grant covered only the period from start-up through April 28th. During that period AHC submitted two financial status reports. Those reports which we reviewed during our audit, reported costs only through March 31, 1995. Because of our concerns related to the propriety of charges to the grant, and because our audit did not cover the entire grant period, we recommended an audit of all charges to the grant.

The termination agreement between CNS and AHC requires a close- out audit. We have hired an independent accounting firm expert in grant audits and related cost issues to perform the audit. We expect the audit to begin within the next six weeks.

Mr. Chairman, that concludes my prepared statement. At this time, I will be happy to answer any questions you or other members of the Subcommittee may have.

Exhibit 1
ACORN Housing Corporation
Schedule of Budgeted, Incurred, Questioned, and Accepted Costs
For the Period October 1, 1994 through April 28, 1995

Cost Category	Budgeted	Incurred	Questioned	Accepted	Notes
Stipends	$660,500	$131,259	$	$131,259	
Payroll & Taxes	318,770	142,58	142,586		
Travel	84,724	48,648	48,648		
Rent	75,600	36,425	36,425		(1)
Member Health Care	50,400	6,001		6,001	
Administrative Support	40,024	23,745	23,745		(2)
Phone	38,400	15,372	14,325	1,047	(3)
Audit	27,989	16,327	16,327		(4)
Performance Bonus	24,000				
Equipment	20,000	19,521	1,500	18,021	(5)
Supplies	8,100	6,103	6,103		
Copier/Phone leases	6,000	4,522	3,022	1,500	(6)
Other Misc & Overnight					
Mail	73,771	9,386	9,396		
Subtotal	1,428,278	459,895	95,344	364,551	
Child Care	122,500				
Education Awards –	198,450..				
Total Budget	$1,749,228	$459,895	$95,344	$364,551	(7)
Federal Share	1,143,411				
Non-Federal Share	605,817				

Total Budget $1,749,228

Notes to Exhibit 1:

(1) Rents: $36,425

AHC claimed rental costs for its purported share of the various facilities in which the AmeriCorps program requires space. Generally, these charges resulted from shared space with other ACORN and/or other AHC projects. Except for one location occupied by AHC in Denver during the period September through October 1994, lease agreements were provided for AHC's AmeriCorps work sites; however, the leases were often incomplete and did not fully explain the basis for determining the rents that were charged. In addition, it appeared that most, if not all, of the lessors are ACORN affiliated organizations. Because charges for space usually resulted from estimated allocations having a cost basis for which AHC did not provide adequate support, and we could not effectively determine that a fair basis for allocation was used, we questioned these costs in total.

(2) Administrative Support: $23,745

AHC obtains its financial, legal, and management support services from Citizens Consulting Inc. (CCI), an organization that essentially provides the same services to ACORN and all of its affiliates, and appears to be a related party of ACORN. Invoices billed to AHC provide no detail for the specific services rendered and/or hours incurred and appear to be billed based solely on the grant's budget. On July 28th, AHC sent us a copy of a contract between CCI and AHC as support for the amounts charged. The contract, which is undated, provides no information as to the basis for the "flat fee" charges. Because we are unable to assess the reasonableness or accuracy of these charges, we have questioned them in total.

(3) Phone: $14,325

AHC allocated organizational phone costs based on estimated use by both AmeriCorps staff and members. Although costs are supported by invoices and it is clear that phone charges are incurred as part of the grant, we were unable to assess the accuracy or reasonableness of the allocations. Phones are found in common areas with little control to access and these same sites support other AHC and/or ACORN projects. Because we could not determine that AmeriCorps was absorbing its fair share of these costs, we have questioned all allocated phone charges.

(4) Audit: $16,327

AHC budgeted $27,989 for anticipated audit charges for a future A-133 audit of its fiscal year 1995 financial reports. Charges to date represent funds moved into a reserve by writing a monthly check to cover the estimated expenses. Although the AHC is required to obtain an audit, the audit would cover all Federal funding, including grants from the Department of Housing and Urban Development. Therefore, logically only some part of the audit expense would be an allowable charge to the grant (subject to the five percent cap on administrative expenses). After repeated requests, on July 28, 1995, AHC sent us an estimate for audit services that it had requested from its present independent accounting firm. The estimated amount, $15,000, was not supported by an engagement letter or other contract, and there was no information as to whether the estimated amount was an estimate of the entire audit fee or an allocation. Moreover, because its original estimate for these charges was considerably higher, as of April 28, 1995, AHC had already charged the grant $16,327 for estimated audit costs. Consequently, because AHC has not incurred these costs, and has failed to properly support its estimates and the related charges, we have questioned all audit costs.

(5) Equipment: $1,500

AHC claimed $1,500 for leases related to telephone equipment purportedly used by AmeriCorps in AHC's Denver office. Adequate documentation was not provided to support these costs; therefore, we have questioned them in total.

(6) Copier Leases $3,022

AHC claimed lease expenses for copiers in Philadelphia, Denver, Chicago, and Dallas. The lease in Chicago ($1,23 1) was not properly documented. Audit issues related to usage and cost allocations for the lease arrangements in Philadelphia, Denver, and Dallas ($1,791) could not be resolved prior to the completion of the audit; for example, although only one copier was available to provide service to all tenants, the entire cost was to be charged to the grant. Consequently, because we have not received basic information from which to determine if there is a equitable and consistent basis for allocating these costs, we have questioned all copier lease costs.

(7) Total Costs Incurred, Questioned and Accepted

The grant budget provides for a splitting of costs for each budget category between CNS and AHC, and allocation percentages vary. For example, the grant agreement and the budget indicate that AHC will match (or bear) 54 percent of the cost of stipends paid to AHC AmeriCorps Members. According to the grant budget, stipends were expected to account for about 46 percent of program costs. Furthermore, administrative costs borne by the grant are subject to a five percent cap. Because of the complexities of these matters and the significant amount of administrative costs included in costs charged to the grant through April 28, 1995, that we have questioned, OIG has recommended that allocation of costs between CNS and AHC should be resolved by a close-out audit.

Endnotes

1 Robert Pollin and Stephanie Luce, *The Living Wage: Building a Fair Economy* (New York: The New Press, 1998a), 167.

2 "To-Gather: A Newsletter for ACORN Workers," March 28, 2001: 4.

3 The platform can be found at: http://acorn.org/whoisacorn/platform.html.

4 Pollin 1998a, 6.

5 National Labor Relations Board, [338 NLRB No. 129] Association of Community Organizations for Reform Now, March 27, 2003. Available at www.nlrb.gov.

6 *Ibid.*

7 *Ibid.*

8 David Reynolds, *Living Wage Campaigns: An Activist's Guide to Building to Movement for Economic Justice*, ACORN and Wayne State University, January 2003: 41

9 National Labor Relations Board, [338 NLRB No. 129] Association of Community Organizations for Reform Now, March 27, 2003. Available at www.nlrb.gov.

10 Available at http://acorn.org/whoisacorn/platform.html.

11 In a legal brief appealing its lawsuit against the California Department of Industrial Relations, ACORN states that being forced to pay the minimum wage will decrease the number of employees it hires.

12 People's Platform available at: http://acorn.org/whoisacorn/platform.html.

13 "To-Gather: A Newsletter for ACORN Workers," January 30, 2001, 1.

14 "To-Gather: A Newsletter for ACORN Workers," February 19, 2001: 4.

15 "To-Gather: A Newsletter for ACORN Workers," March 28, 2001: 4.

16 *Reynolds* 2003: 118;

17 Appellants Opening Brief, *ACORN v. State of California*, 1996: 10-11.

18 Richard Byrne Reilly, "Civic group showdown," *San Francisco Examiner,* 11/14/2002.

19 *Ibid*

20 *Ibid.*

21 17 Appelants Opening Brief, *ACORN v. State of California*, 1996: 11.

22 *ACORN v. State of California*, December 21, 1995: 2.

23 Testimony of Luise S. Jordan before the Subcommittee on Oversight and Investigations, Committee on Economic and Educational Opportunities, October 17, 1995.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.*

27 *Ibid.*

28 Information obtained from public documents detailing foundation grantmaking. Grants awarded in late 2002 and early 2003 may not be fully accounted for.

29 Giazzoni, Gina, "IWW Responds to 20 ACORN Claims," April 18, 2001. Available at: http://www.iww.org/organize/news/acorn/acorn30.shtml.

30 Reynolds 2003, 24.

31 *Ibid,* 48.

32 *Ibid,* 42.

33 David Reynolds, "The Impact of the Detroit Living Wage Ordinance," Wayne State University, September 21, 1999.

34 Reynolds 2003, 39.

35 *Ibid,* 38.

36 R.E. Graswich, "Fun with Numbers," *The Sacramento Bee,* March 14, 2003, B1.

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