

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.

MICHIGAN STATE EMPLOYEES  
ASSOCIATION d/b/a AMERICAN  
FEDERATION OF STATE COUNTY 5 MI LOC  
MICHIGAN STATE EMPS ASSOC, AFL-CIO,

*Respondent*

and

Cases 07-CA-053541  
07-CA-060319  
07-CA-060320  
07-CA-065560  
07-CA-065681  
07-CA-069475  
07-CA-079382  
07-CA-081500

CENTRAL OFFICE STAFF ASSOCIATION,

*Charging Union*

**BRIEF IN SUPPORT OF EXCEPTIONS OF COUNSEL FOR THE ACTING  
GENERAL COUNSEL TO THE ADMINISTRATIVE LAW JUDGE'S  
DECISION**

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## I. SUMMARY OF ARGUMENT

The ALJ erred by failing to find that Respondent maintained an overly broad work rule, in violation of Section 8(a)(1), which stated that “all employee concerns regarding any MSEA issues are to be presented, and addressed, directly by the President.”

Although this work rule is not unlawful on its face, it is unlawful under well-established case law which provides that a work rule is unlawful if it may reasonably be construed by employees to include union or protected concerted activity, and/or if it has been applied to union or protected concerted activity. Both of the aforementioned elements are present here.

The ALJ further erred by failing to find that Respondent discharged Nancy Durner in partial reliance on the above-described overly-broad work rule. The ALJ failed to address substantial evidence in the record, including admissions by Respondent and uncontradicted testimony by Counsel for the Acting General Counsel’s witnesses, establishing that Respondent’s claim of “insubordination” by Durner was based on her alleged violation of the above rule.

The ALJ further erred in finding that Rhonda Westphal’s discipline, though motivated by her union activity and by anti-union animus, was nonetheless based on legitimate business reasons, pursuant to *Wright Line*, 251 NLRB 1083 (190), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982). The ALJ acknowledged that Respondent had not previously disciplined any employees for travel, including Westphal, but stated that Respondent “had to start somewhere.” The ALJ’s reasoning is flawed in

that the timing of the discipline is suspicious and Respondent offered no explanation for its' sudden decision to discipline Westphal for conduct regularly engaged in by Westphal and other unit employees in the past. Further, in so finding, the ALJ ignored uncontradicted testimony by Westphal regarding statements made by Respondent's agents explaining the true reason that the discipline issued, which clearly established a pretext.

The ALJ further erred by stating the wrong date for the unilateral implementation of employee work rules in his recommended order, and explicitly concluding, based on this incorrect date, that Rhonda Westphal's June 14, 2012 discipline occurred prior to the implementation of employee work rules and thus did not fall within the ordered remedy. The work rules were implemented on **July 12, 2011**, the date of Durner's discharge. The ALJ includes this correct date under the discussion of the work rules and of Durner's discharge. However, at subsequent points in the decision, and in the order, the ALJ states that the work rules were implemented on July 11, **2012**, which follows Westphal's June 14, 2012 discipline. In addition to Westphal's discipline, there may be other employee discipline that issued pursuant to the unlawful work rules between July 2011 and July 2012. These disciplines are currently excluded from the order based on a clear mistake, and this error should be corrected.

Finally, the ALJ failed to rule on the complaint allegations that Respondent failed and refused to provide relevant information to the Charging Union, in response to requests made on October 25, 2011 and November 4, 2011. Respondent failed to provide a legitimate defense for refusing to provide the information.

## **II. BACKGROUND**

Respondent is a labor organization which represents the labor and trades unit and the safety and regulatory unit of government for the State of Michigan. (Tr 592). The largest base of Respondent's members is in Lansing, Michigan, but there are members throughout the State. (Tr 1699) The State is divided up into ten regions. (TR 1699-1700). At its' formerly bi-annual general assembly (tri-annual as of July 2012), delegates are elected from among Respondent's members in the various regions, and the president of Respondent is elected by the delegates. (Tr 1584).

Respondent and the Charging Union have had a bargaining relationship for many years. (Tr 41). The Charging Union represents the staff employees working at Respondent's office in various positions. (Tr 41). The most recent contract prior to these charges became effective in 2008, and was set to expire on September 30, 2011. (GC Ex. 4). There are currently about seven employees in the unit represented by the Charging Union. (Tr 41). The unit positions include: labor relations specialists (hereafter referred to as LRS or specialist), a labor relations coordinator (the coordinator), a communications director, an administrative assistant, an accounting assistant, and a computer operator accounting assistant. (Tr 41). There is also a membership service representative (MSR) position which is currently vacant. (Tr 41-42). Respondent's president directly supervises the unit. (Tr 38, 286, 402). The Respondent's treasurer also supervises the accounting employees. (Tr 631, 1025).

In July 2010, Ken Moore became Respondent's new president. t. (Tr 38). From time to time in the past, Respondent had members perform volunteer work in the office. The frequency and number of members performing volunteer work increased after Moore became president in July 2010. (Tr 46, 204). The Charging Union was concerned about the amount of volunteer work being performed because it was losing bargaining unit work, and had an open bargaining unit position. (Tr 46-48, 51). Moore also instituted other changes such as removing mail duties from unit employee Nancy Durner and placing a locked box outside of the office for the delivery of mail. (Tr 51-55, 288-289; GC Ex 8). From about October 1, 2010 through April 2011, the Charging Union filed several grievances over these and other related issues. (GC Ex. 6, 9 – 11, 72).

The Charging Union requested information related to the above grievances and/or related to upcoming negotiations for a successor collective bargaining agreement, on the following dates: October 11, 2010; December 10, 2010 (follow-up request made on February 10, 2011); February 9, 2011; February 10, 2011; and February 16, 2011 (two separate requests made on this date). (GC Ex. 1 fff Att. A-C, E-H). As concluded by the ALJ, with respect to all of the above-dated information requests, Respondent either failed to provide the information or to adequately respond to the information request. (ALJD 40/35-45; 42/9-12; 45/18-22; 45/39-44; 46/13-15; 47/10-12)

Respondent and the Charging Union operated under a collective bargaining agreement that expired on September 30, 2011. (Tr 40; GC Ex. 4). In preparation for upcoming negotiations, the Charging Union also requested information related to health insurance on February 3, 2011. (Tr 61, 406-407; GC Ex. 1 fff, Att. D). As properly

concluded by the ALJ, Respondent delayed in providing the information until April 1, 2011, the first day of bargaining. (Tr 64, 411; 44/32-35). Further, as properly concluded by the ALJ, Respondent failed to provide all of the requested relevant information. (Tr 412; GC Ex. 84; 43/23-31). The Charging Union also requested information on October 25, 2011, and again on November 4, 2011, related to negotiations and a unilateral change (discussed in further detail below). (Tr 130, 133; GC Ex. 46, 47).

As noted above, the parties began negotiations for a successor agreement on April 1, 2011. (Tr 64). The ALJ properly concluded that throughout negotiations, Respondent engaged in a pattern of bad-faith bargaining, as alleged in the complaint, and thereby violated Section 8(a)(5) and (1) of the Act. (ALJD 57, 36-37). In so finding, the ALJ considered the totality of the circumstances, including the following: Respondent's failure to return to the bargaining table after a caucus without notifying the Charging Union of its intentions, on at least three occasions (ALJD 55/ 30-33); Respondent's bad faith proposal to completely eliminate unit position descriptions from the contract at a time when the Charging Union had expressed concern about losing bargaining unit work (ALJD 54/45-47); Respondent's unilateral implementation of work rules and refusal to bargain over same (ALJD 56/12-15); Respondent's unlawful discharge of a member of the bargaining committee during the course of bargaining (discussed below)(ALJD 56/23-25); its failure to provide information and/or respond to numerous requests by the Charging Union (ALJD 56/27-29); and its' refusal to bargain over the status of a temporary employee (ALJD 56/17-20). The ALJ properly concluded that "[f]rom the totality of Respondent's

conduct, both at the negotiating table and away from it, a consistent picture emerges of a party not interested in reaching an agreement.” (ALJD 56, 29-31).

On June 2, 2011, Respondent suspended Charging Union bargaining committee member/secretary Nancy Durner. (Tr 96-99). Durner was placed on administrative leave until July 12, 2011, when she was discharged. (Tr 97-99, 302). Respondent characterized Durner’s protected union activity as “political activity,” and also accused her of “insubordination” and “conduct unbecoming,” in violation of alleged work rules. (GC Ex. 27; Tr 100, 303-304). The ALJ properly concluded that Durner was unlawfully discharged for engaging in union and protected concerted activity, in violation of Section 8(a)(3) of the Act and that Respondent unlawfully implemented the “work rules” on July 12, 2011(the date the Charging Union learned of their implementation). (ALJD 19/10-12; 50/12-13). As discussed further below, Counsel for the General Counsel asserts that Durner was also discharged in violation of Section 8(a)(1), pursuant to an overly-broad directive interfering with Section 7 rights.

In November 2011, as concluded by the ALJ, Respondent unilaterally implemented an employee cell phone benefit. (ALJ 51/8-11). In January 2012, as concluded by the ALJ, Respondent unilaterally removed pre-arbitration settlement work from the unit. (ALJD 54/11-14). Respondent later announced that this work was being done by its members. The removal of this work resulted in a significant decrease in assignments for bargaining unit employees. (ALJD 52/42-43).

As properly concluded by the ALJ based on credibility resolutions, Respondent harbored animosity towards the Charging Union. (ALJD 7/4-7). Based on this

animosity, the ALJ properly concluded that Respondent: (1) suspended the Charging Union's secretary/treasurer, Audrey Johnson, and in the course of an investigation, issued her a questionnaire containing an overly-broad, coercive and threatening statement; (2) terminated Johnson; (3) terminated the recall rights of Charging Union bargaining unit member Mary Groves, who Respondent laid off during contract negotiations; and (4) refused to allow Charging Union president Clyde Manning to return from work after a sick leave. Respondent engaged in all of these actions in retaliation against Charging Union-represented employees for their union activities, in violation of Section 8(a)(3) of the Act. Counsel for the General Counsel further asserts that the June 14, 2012 discipline of Charging Union vice president Rhonda Westphal was also in violation of Section 8(a)(3) of the Act.

### **III. ARGUMENT**

#### **A. Respondent Unlawfully Implemented, and Subsequently Maintained an Overly Broad Work Rule Which Could Reasonably be Construed to Interfere with Protected Concerted or Union Activity. (Exception No. 1)**

After Moore became president of Respondent in July 2010, he began to regularly issue presidential "directives" for the COSA staff to follow. On October 8, 2010, Moore issued the following directive to the staff by email (Tr 59, 288):

"Effective immediately, all employee concerns regarding any [Respondent] issues are to be presented, and addressed, directly by the President." (GC Ex. 13).

The Board has held that an employer violates §8(a)(1) through the maintenance of a work rule if that rule "would reasonably tend to chill employees in the exercise of their

Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C.Cir. 1999). The Board uses a two step inquiry to determine if a work rule would have such an effect. *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004). First, a rule is clearly unlawful if it explicitly restricts §7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate §8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit §7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of §7 rights. *Lutheran Heritage*, *supra*. The second-stage inquiries are listed in the disjunctive, and are separable and independent. As the Board stated in *Lutheran Heritage*, a violation is found on a showing of only one of the three. *Lutheran Heritage*, *supra*.

The ALJ concluded that the above language did not explicitly restrict activity protected by Section 7 of the Act. (ALJD 6/23-24). The ALJ further concluded that the rule: (1) would not reasonably be construed by employees to include activity protected by Section 7 of the Act; (2) was not promulgated in response to union activity, and (3) had not been applied to restrict the exercise of Section 7 rights. (ALJD 6/42; 7/26; and 9/29). The ALJ erred in concluding that employees would not reasonably construe the rule to include Section 7 activity, and further erred in concluding that the rule had not been applied to restrict the exercise of Section 7 rights.

First, for a rule to be unlawful, it is sufficient to show only that there exists a reasonable interpretation that the rule infringes §7. It is not necessary to show that the overly broad interpretation is the only reasonable interpretation. *Double D Construction*

*Group, Inc.*, 339 NLRB 303, 303-304 (2003); see *Jordan Marsh Stores Corp.*, 317 NLRB 460, 463 (1995) (“Employees need not be lawyers, parsing every phrase to seek out permissible constructions.”)

In determining how an employee would reasonably construe a rule, the Board urges that the rule be given a “reasonable reading,” and that particular phrases not be read in isolation. *Lutheran Heritage*, supra at 646. As always, however, ambiguity cuts against the drafter. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012); *Norris / O’Bannon*, 307 NLRB 1236, 1245 (1992). Where a rule may be subject to competing interpretations, lawful and unlawful, the Board looks to whether the employer has communicated limiting language, a clarification, or a refining context to employees, so as to dispel any conclusion that the rule may invade §7 rights. *W. D. Manor Mechanical Contractors, Inc.*, 357 NLRB No. 128 (2011); *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001); *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994).

The ALJ concluded that the rule at issue was “vague,” and could reasonably be construed to include wages, hours and other terms and conditions of employment. (ALJD 6/26-29). With respect to this point, the ALJ is correct. Employee “concerns” and MSEA “issues” are not defined. A reasonable person would interpret employee concerns or MSEA issues to include a variety of topics, including working conditions and terms of employment.

The ALJ found that despite the vagueness of the rule, it was not unlawful since it fell short of specifically prohibiting discussions among employees. (ALJD 6/29-30). The ALJ concluded that the rule did not specifically prohibit any conduct, and did not

threaten, or even mention, the possibility of disciplinary action for violating the rule. (ALJD 6/ 40-43). The ALJ's reasoning fails to consider the chilling effect that the rule reasonably may have on the exercise of employee Section 7 rights, as described in *Lafayette Park Hotel*, supra. Although the rule does not specifically state that employees who violate the rule may be disciplined, it also provided no assurances that discipline will not result. If a potentially overly-broad rule has not been clarified effectively or adequately, any remaining ambiguity is construed against the promulgator. *Ark Las Vegas Restaurant*, 343 NLRB 1281, 1282-1284 (2004); *Lafayette Park Hotel*, 326 NLRB at 828; *Norris / O'Bannon*, 307 NLRB at 1245. A narrowing interpretation of an overly-broad rule must be communicated to the entire workforce covered by the rule. *Bigg's Foods*, 347 NLRB 425, 425 fn. 7 (2006), and cases cited therein. Although discipline is not specifically threatened, the memo was a clear directive from the President, and a reasonable employee would infer that there likely would be negative consequences if the directive was not complied with.

An employee may not wish to share their workplace concerns directly with their supervisor or the MSEA president. In fact, an employee may have a complaint about the president himself, and according to this directive, they must advise the president of their complaint, even if they do not wish to do so. Further, the statement in the rule that the president will "address" any such concerns suggests that only the president can and will do so. Thus, an employee may feel inhibited from seeking redress from the Charging Union, co-workers, or outside entities. While the rule may include legitimate concerns

and issues about MSEA business, this is not clear from the language used in the rule and thus, it is overly broad.

The Board noted this very problem with a similar rule in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). In *Kinder-Care*, the employer maintained a rule that stated: “If you have a work related complaint, concern, or problem of any kind, it is essential that you bring it to the attention of the Center Director immediately or use the company problem solving procedure set forth in this handbook. Failure to abide by this policy statement may constitute grounds for disciplinary action up to and including termination.” *Id* at 1171, fn. 1. The Board noted that a rule such as this inhibits protected concerted activity. Some employees may perceive themselves powerless with respect to their employers, and therefore may fear to approach their employers with work related issues. *Id* at 1172. The Board noted “[t]he same employees, however, may take courage from associating with other employees with similar problems, and may be willing to present those problems to employers collectively or through a union.” *Id* at 1172. Indeed, that is the very essence of concerted activity.

The ALJ distinguished the work rule in *Kinder-Care*, supra, on the basis that, unlike the rule in the instant matter, it specifically stated that employees could not discuss work place concerns with third parties, and further specifically stated that disciplinary action could result if the rule were not complied with. Admittedly, the rule at issue in *Kinder-Care* was more detailed and more specific. However, the impact of the rule is similar. Employees may reasonably fear approaching their employer and feel powerless, and thus their protected activity may be inhibited. Further, the standard under *Lutheran*

*Heritage* is whether a reasonable employee would interpret the rule to restrict Section 7 rights, as described above. To the extent the rule is less specific than the rule at issue in *Kinder-Care*, as noted above; any ambiguity should be resolved against Respondent.

An employee may wish to bring a concern or issue to the Charging Union, a co-worker, another MSEA agent, or even an outside entity, and may feel prevented from doing so by the directive. Although the rule does not on its face state that employees may not *also* discuss their concerns with others in *addition* to the president, it never communicated this right to employees. An employee may wish to discuss an issue with the Charging Union or others that it may or may not ever wish to bring to the president's attention; however, once such an issue is disclosed to someone other than the president, an employee may reasonably be in fear that if they do not also bring it to the president, they will be in violation of the directive should Respondent ever learn about such.

Even if the October 8 directive was not overly broad and did not encompass activity protected by § 7 of the Act, the third prong of the *Lutheran Heritage* test is met in this case. Respondent applied this rule in an overbroad manner when it discharged Durner pursuant to this rule because she had a discussion with an MSEA board member regarding a COSA issue.<sup>1</sup> Moore and MSEA board member Little each testified that they thought it was inappropriate for Durner to bring her concerns to someone other than Moore. Moore testified as follows:

Q. Okay, now you talked -- you actually have a policy that you actually discussed earlier today. I'm not sure what the number was, but you have a

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<sup>1</sup> Durner's discharge is discussed in further detail below. It should be noted that the discharge underscores Counsel for the General Counsel's aforementioned argument.

directive that all concerns should be addressed to you, correct? All employees' staff concerns should be addressed to you and only to you?

A. To me directly, yes.

Q. Does it say "only to you"?

A. I believe it does.

Q. Okay, and so you have a problem then if people complained about their working conditions to other individuals?

A. Depending on what they're complaining of. If you have an issue with your employer, your first line in the chain of command is to take it to your supervisor. I'm the direct supervisor of all staff. (Tr 1836).

Thus, Respondent's intent of this rule, as established by the above and by its application to Durner, is to prevent employees from engaging in union and other protected concerted activities. The effect of Respondent's treatment of Durner on other employees likely chilled protected concerted activity with respect to raising concerns with MSEA board members or others, because of potential retaliation.

Based on the above, Respondent unlawfully maintained and enforced an overly-broad work rule which reasonably could be construed to interfere with Section 7 activity.

**B. Respondent Unlawfully Discharged Nancy Durner in Reliance on the Overly-Broad Unlawful Work Rule Described Above in Exception No. 1, in Violation of Section 8(a)(1) of the Act. (Exception No. 2)**

The Board has long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful (the "*Double Eagle* rule"). *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enf'd. 414 F.3d 1249 (10<sup>th</sup> Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001);

*Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), *enfd.* 496 F.2d 484 (6th Cir. 1974). The Board recently clarified its position regarding the application of *Double Eagle*, and noted that the analysis may be different based on the type of work rule involved. *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 3, 4 (2011). However, the Board noted that in situations where the conduct for which an employee is disciplined under an overbroad rule clearly falls within the protection of §7 of the Act, including discussions related to terms and conditions of employment, the Board will continue to apply the *Double Eagle* Rule. *Continental Group*, *supra*.

As described above, on October 8, 2010, Respondent began maintaining a directive requiring employees to bring all concerns regarding MSEA issues directly to the President. In April 2011, Durner engaged in a conversation with a board member in which she complained about union issues, and in particular, the removal of bargaining unit work. Respondent determined, among other things, that by raising a work-related concern with Little, she was insubordinate to Moore by failing to comply with his October 8 directive.

The ALJ properly concluded that Durner was engaged in union and protected concerted activity, and that Respondent discharged her in violation of Section 8(a)(3); however, the ALJ improperly concluded that Respondent did not rely on the overly broad October 8, 2010 directive in finding her to be “insubordinate.” (ALJD 9/26-28) By concluding that the evidence failed to establish that Moore relied on the October 8 directive to discharge Durner, the ALJ, at least in part, appears to rely on his

interpretation of an arbitrator's decision. The ALJ concluded, based on his reading of the arbitrator's decision, that Respondent did not argue at the arbitration hearing that Durner violated the October 8, 2010 directive. (ALJD 8/27-32). It should be noted that there was no transcript from the arbitration, and the evidence and arguments actually presented to the arbitrator are not included in the record of the instant matter. Thus, it was improper for the ALJ to conclude that Respondent did not present this argument to the arbitrator. Moreover, the ALJ's analysis fails to consider that Respondent may have engaged in shifting defenses. "Shifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation." *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7<sup>th</sup> Cir. 1990).

Regardless, the ALJ failed to consider uncontradicted record evidence establishing that Respondent discharged Durner, in part, based on the directive. Both Clyde Manning and Nancy Durner testified that Moore stated at her discharge meeting that the "insubordination" pertained to the directive. (Tr 101, 304). Durner also testified that either at her discharge meeting or subsequently by mail, she received a packet of information including her July 12, 2011 discharge letter, a copy of the board member's complaint against her, and the October 8, 2010 directive. (Tr 309; GC Ex 13, 79, 80). The ALJ concluded that Moore fell short of admitting that he relied on the October 8 directive. (ALJD 8/42-43). However, the following admission by Moore appears in the transcript, immediately before the quote included by the ALJ on page 8 (lines 37-40) of his decision:

Q. And that's what you were saying yesterday. Now, today you actually made reference once again to a directive that all complaints must be made to the president. And actually, I don't have a copy of that. I don't know, actually you might have that in front of you. I think it's 13, GC-13. That was also relied upon in discharging Ms. Durner, correct? That work rule, that violation of your -- I'm sorry, of your directive?

A. GC-13?

Q. Yes. (Tr 1848).

Further, later on in Moore's cross-examination testimony , he stated as follows, regarding Nancy Durner:

Q. What did you fire her for?

A. Insubordination to the directive October 8th, 2010 that any concerns she has with the employer should be addressed with the president. (Tr 1862).

The above is a clear admission that Moore relied, at least in part, on his unlawful October 8, 2010 directive to discharge Durner. Regardless, Moore also did not dispute the testimony of Durner and Manning regarding what was said about the directive at Durner's discharge meeting, nor did he deny including a copy of the directive with Durner's disciplinary papers.

Moore also admitted that at least in part, he was upset that Durner did not bring the issue directly to him, as President:

Q. Well, I don't believe the problem here -- actually, let's go to Nancy Durner. Was your concern as to Nancy Durner, then, that she was being paid at the time that she made this complaint to Chris Little?

A. The concern with Nancy Durner is that she's demoralized the board member on a position he took on a particular bill.

Q. Okay, did you have a concern that she was doing it on the company's dime?

A. The issue with Nancy Durner is she never brought it to the president to address the issue. (Tr 1842).

Accordingly, Respondent, by applying an overly-broad work rule to Durner's protected union activity, violated §8(a)(1) of the Act when it suspended and then discharged her.<sup>2</sup>

**C. Respondent Unlawfully Disciplined Rhonda Westphal on About June 14, 2012, in Violation of Section 8(a)(3) of the Act (Exception No. 3).**

Labor relations specialists are required to travel in order to represent members and perform their jobs. (Tr 465-466). Prior to Moore's presidency, there were no strict travel rules for specialists, and there were no travel forms. (Tr 466). If employees needed to travel, they did, and they let the secretary know where they were. (Tr 466). After Moore became President, he began requiring certain forms as described above: Staff activity forms, which employees used to advise the Respondent of their expected travel and other activities for the following week (Tr 466); and a daily log, which employees used to identify the amount and type of work performed each day. (Tr 169, 467)(See GC Ex 60 and 61).

Rhonda Westphal has been employed by Respondent since about 2004 as a specialist. (Tr 401-403). Westphal has been the Charging Union's Vice President since about 2005. (Tr 403). Westphal regularly completed the required travel forms based on

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<sup>2</sup> As correctly found by the ALJ, Respondent also discharged Durner for her union and protected concerted activity in violation of Section 8(a)(3), by accusing her of engaging in "political activity" when she brought a union issue to a board member.

Moore's directives. (Tr 468). With respect to staff activity forms, Westphal's normal practice was to fill out the form, make a copy for herself, and put the original in Voight's mailbox. (Tr 471). On her copy, she writes "submitted," and the date, and then files her copy for herself. (Tr 471). Neither she nor the other specialists understood "prior approval," as used in Moore's directive, to mean that they could not travel unless Moore specifically advised them in advance that their travel was approved. (Tr 171, 472). In fact, Moore never came back to an employee about a form, to either tell them their request was approved or denied. (Tr 171, 468). If employees turned in the form, and heard nothing from Moore, they assumed it was approved. (Tr 171, 472). To that end, Westphal and the other specialists had completed the forms and traveled in this matter repeatedly, without incident. (Tr 171-172, 472). At the hearing, Westphal described staff activity forms that she completed for work during various weeks from February 13, 2011 through April 20, 2012. (Tr 472, GC Ex. 96). The forms indicate travel planned and taken by Westphal, for which she was not told specifically that she was "approved" or "denied," and was not disciplined. (Tr 472, GC Ex. 96).

On May 18, 2012, Westphal traveled to Coldwater, Michigan to meet with a member to prepare for a case. (Tr 474). Westphal completed a travel form for travel the week of May 14-18 in advance, and put it in Voight's mailbox on May 11, 2012. (Tr 473). Westphal wrote the date she submitted the form, "May 11," at "5:00 p.m.," in the upper corner. (Tr 473, GC Ex. 97). Westphal specifically recalled turning this form in, because due to steward training, she forgot to submit the form on Thursday, when it was actually due. She submitted it in on Friday instead. (Tr 473-474).

After Westphal returned from her travel, she turned her voucher in to Respondent's Treasurer Tim Schutt. (Tr 475, GC Ex. 98). Westphal's usual practice was to submit the form to accounting assistant/unit member Katherine Washburn. (Tr 475). However, Washburn was off work that week. (Tr 475). Instead, Westphal submitted the form directly to Schutt. (Tr 475). Westphal had never been told of any required procedure for submitting travel voucher forms. (Tr 475).

On June 6, Westphal received an email from Voight asking her for an authorization or approval for out-of-office work on May 18th. (Tr 477, GC Ex. 99). Westphal replied the same day, stating: "I assume you're referring to my travel to Coldwater. This was noted on my staff activity form as required and submitted to your office, and if you require anything further, please let me know." (Tr 477-478, GC Ex. 99). About a week later, Voight came to Westphal's office and asked if she could have a copy of the staff activity form that Westphal had previously submitted. (Tr 478). Westphal told Voight she would find it and bring it do her. (Tr 478). A few minutes later, Westphal gave Voight the form for the week including May 18, which had Westphal's notes in the corner indicating the time and date it was previously submitted. (Tr 478).

On June 13, 2012, Westphal attended Audrey Johnson's disciplinary conference as Johnson's union representative. (Tr 463). At the conclusion of this meeting, Moore handed Westphal her own packet and said her disciplinary conference would be the next day. (Tr 463, GC Ex. 95). Prior to Johnson's meeting, Westphal had no idea that she was going to be disciplined. According to the disciplinary packet, Westphal was being disciplined for handing a completed travel voucher to the Respondent's Treasurer, Tim

Schutt, as opposed to “someone else.” (Tr 464-465). Further, she was accused of traveling out of office on May 18, 2012 without approval. (Tr 465). The disciplinary packet included her staff activity form for the week including May 18 (i.e., the one she submitted to Voight with her notes in the corner), and her expense voucher for her May 18 travel. (Tr 476, 478). Although the voucher was originally approved by Schutt, Moore had crossed the approval out and wrote “Not approved out of office travel.” (Tr. 476; GC Ex. 98). Westphal was never paid for this travel. (Tr 476). Prior to this incident, Respondent had never denied any of Westphal’s travel vouchers. (Tr 468, 472).

The following day, June 14, 2012, Westphal attended her own disciplinary conference. Moore and Voight were present for Respondent. (Tr 463). At the start of the meeting, Moore asked Westphal if she had a union representative. (Tr 464). Westphal told him she was the only union representative left. (Tr 464).<sup>3</sup> Moore told Westphal that she was being disciplined, up to and including discharge for the infractions in her disciplinary packet. (Tr 479). Moore asked Westphal what her procedure was for turning in her travel forms, and Westphal explained. (Tr 480). Westphal asked Moore if there was something she should be doing differently, but Moore offered no explanation. (Tr 480).

Moore went on to tell Westphal that she had violated Respondent’s work rules and its October 8, 2010 directive that all workplace concerns should be addressed directly to the President. (Tr 481, GC Ex 13). The work rules and the October 8 directive

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<sup>3</sup>Audrey Johnson was unlawfully discharged that same day, before this meeting; President Clyde Manning was still on administrative leave, unlawfully against his will and Groves’ recall rights had been unlawfully terminated. Although Durner returned to work in April 2012, she had not resumed her former union position.(Tr 464).

(described in Exceptions Nos. 1 and 2) were in Westphal's disciplinary packet. (Tr 480-481). Westphal told Moore that she was never given a copy of the implemented work rules before. (Tr 481). Westphal also told Moore that the work rules were currently the subject of NLRB complaints. (Tr 482). Moore did not respond to this statement. (Tr 482). At the close of the meeting, Moore told Westphal he would get back to her by the end of the day or the next day. (Tr 479).

Westphal heard nothing further regarding her discipline until the following Monday, June 18, 2012. (Tr 479). That morning, Voight sent an email to Westphal asking her to come to Voight's office to receive her discipline. (Tr 479). Westphal went to Voight's office, and Voight handed her a written reprimand and told her she needed to sign it. (Tr 479, GC Ex. 100). Westphal signed it, and asked if there was something different she needed to be doing for out of office travel, and Voight said "I don't know." (Tr 479). Voight told Westphal that she told Moore that Westphal had consistently turned in Respondent's required forms. (Tr 479).

Respondent produced no evidence at the hearing to establish that it followed up with employees to let them know, after they submitted a form, whether their travel was approved or denied. If Moore did so, there would likely be some documentary evidence in support of such. Board law clearly states that a party's failure to offer documentation in support of witness testimony warrants an inference that the documentation would not support the party's position. *Bay Metal Cabinets*, 302 NLRB 152, 178-79 (1991).

The ALJ concluded that the Acting General Counsel established a prima facie case. The ALJ stated, "Without doubt, the General Counsel has established the first

three of the initial *Wright Line* elements. Westphal was COSA's vice president and dealt with Moore on union-related matters. Moreover, a written reprimand certainly constitutes an adverse employment action." (ALJD 37/8-10). The ALJ further concluded that credited evidence established that Moore intended to eliminate the need to deal with the Charging Union by discharging bargaining unit employees and replacing them with volunteers. (ALJD 37/11-15 ). The ALJ noted that not merely Moore's statements but his actions "reek" of such animus. (ALJD 37/ 15-16). The ALJ concluded that Westphal's union activity was a substantial motivating factor in her discipline, and thus the fourth element of the General Counsel's prima facie case had also been met. (ALJD 37/35-40).

Despite such evidence, the ALJ incorrectly concluded that Respondent had a legitimate reason for the discipline. The ALJ stated, "[p]articularly considering the decline in MSEA membership and consequent reduction in revenue, the Respondent had legitimate reasons to reduce unnecessary travel and travel expenses. Tightening its belt involved tightening its procedures." (ALJD 37/42-45). The ALJ stated that Westphal appeared to be the first person disciplined for out of office work but stated that Respondent "had to start somewhere." (ALJD 38/16-18).

In reaching his conclusion, the ALJ apparently overlooked testimony by Westphal that after she received the above-described discipline, she had a conversation with Respondent's treasurer Tim Schutt about it. (Tr 482). Schutt told Westphal that she was responsible and a good advocate. (Tr 482). He told her she never abused travel and had only traveled as necessary to represent members. (Tr 482). Schutt said he did not agree

with the discipline, and that Moore had told him he had to take this action against her so that he would not have problems with the action he was taking against Audrey Johnson. (Tr 482). Although Schutt testified, he did not deny making this statement. See *International Automated Machines*, 285 NLRB 1122, 1122-23 (1987). See also *Flexsteel Industries*, 316 NLRB 745, 758 (1995)(failure to examine a favorable witness regarding any factual issue upon which that witness would likely have knowledge gives rise to the “strongest possible adverse inference against [a respondent]” regarding any such fact). As concluded by the ALJ, one of Respondent’s pretextual reasons for discharging Johnson was her “insubordination,” by working out of the office without getting approved in advance, in accordance with a directive he had issued. (ALJD 28/11-13).

It should be noted that in the ALJ’s decision, Westphal is generally credited while Schutt is discredited at parts. Accordingly, the omission of the above conversation between Westphal and Schutt does not appear to be an implicit credibility resolution against Westphal, but rather, a piece of evidence that was overlooked. This piece of evidence completely undercuts Respondent’s *Wright Line* defense, and shows it to be a pretext. Although the ALJ suggested that Respondent may have wanted to begin stricter enforcement of its travel policies based on decreasing membership, there is no explanation in the record for why Respondent might choose this particular time, and this particular employee, to begin enforcing its rule. The timing can only be explained by Audrey Johnson’s unlawful discharge the day before, in which she was accused, among other things, of traveling without prior approval. The statement by Schutt is consistent

with the surrounding facts, and shows that Respondent was seeking to bolster its termination of Johnson by disciplining Westphal.

Accordingly, the evidence establishes that Westphal's discipline was retaliatory in nature, in violation of Section 8(a)(3) of the Act.

**D. The ALJ's Proposed Order Incorrectly List the Date that the Work Rules Were Implemented as July 12, 2012, Instead of July 11, 2011. (Exception No. 4).**

As described above, at Durner's discharge meeting on July 12, 2011, Moore advised Manning and Durner that she was discharged pursuant to Respondent "work rules." (Tr 97-98, 302). Thus, the first time Durner and/or the Charging Union had knowledge that work rules were allegedly in effect was at her July 12, 2011 discharge meeting. (Tr 102, 306). No employee had ever been disciplined pursuant to the work rules prior to Durner. (Tr 102). The ALJ concluded that Respondent's announcement and application of the rule on July 12, 2011, violated Section 8(a)(5) and (1) of the Act. (ALJD 50/12-13).

As a remedy for this violation, the ALJ states the following: "...in addition to rescinding its' unilaterally imposed work rules, Respondent must rescind any discipline issued under those rules, and make all such disciplined employees whole, with interest, for all losses they suffered because of the discipline." (ALJD 58/10-12). In the Order, the ALJ provides: "Rescind and cease giving effect to the work rules unilaterally implemented on about **July 12, 2012**, and notify all bargaining unit employees in writing of the rescission; rescind any disciplinary actions taken against bargaining unit

employees for violations of such rules, reinstating any employees discharged pursuant to the work rules, notifying affected employees individually in writing that it has taken these actions and that any discipline or discharge issued to them in reliance in the work rules will not be used against them in the future in any manner, and make whole unit employees for any loss of earnings or benefits they may have suffered as a result of the implementation and/or application of such rules, with interest computed in accordance with Board policy.” (emphasis added). (ALJD 60/27-35).

All facts and evidence in the record establish that the work rules were implemented on July 12, **2011**, as alleged in the complaint, rather than 2012. The work rules were implemented simultaneously with the discharge of Durner, which occurred on July 12, 2011. The first charge alleging that the work rules were unilaterally implemented was filed on September 28, 2011, and the first complaint including this allegation issued on December 30, 2011. Since the date is correct at earlier parts in the decision, it appears the ALJ correctly concluded that the violation occurred in 2011, but subsequently listed the date as 2012 in error. The Order should reflect the conclusions of law reached by the ALJ.

**E. The ALJ Improperly Excluded Rhonda Westphal’s Discipline From the Proposed Order With Respect to the Unilateral Implementation of Work Rule Violation, Based on an Incorrect Date. (Exception No. 5).**

As noted above, in the ALJ’s Proposed Order, he incorrectly states that work rules were implemented in July 2012, instead of July 2011. Moreover, the ALJ’s analysis of Westphal’s discipline is off base as it hinges on the incorrect date. The ALJ states:

“... no valid work rules were in effect when Respondent announced such a rule on about July 12, 2012. That clearly implies, and I would conclude, that no work rules were in effect on June 14, 2012, when Respondent disciplined Westphal for violating one.” (ALJD 38/1-5). The ALJ later states: “[t]he complaint includes an allegation that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing work rules on about July 12, 2011. As discussed above, Moore based his reprimand on the honestly mistaken belief that work rules were in effect. However, the General Counsel has not alleged that Respondent unlawfully discharged Westphal for violating a work rule which was invalid because unilaterally imposed. Moreover, the complaint has not alleged a unilateral implementation of a work rule in connection with the Westphal reprimand, but rather alleges a unilateral implementation of work rules about a month later.” (ALJD 38/27-37).

The ALJ mistakenly excluded Westphal’s discipline from the remedy to the unilaterally implemented work rules based on an incorrect date. The decision correctly notes, in an earlier part, that the work rules were implemented on July 12, 2011 (prior to Westphal’s June 14, 2012 discipline. Under the analysis of Westphal’s discipline, the ALJ states there were no work rules in effect at the time of Westphal’s discipline on June 14, 2012, and he further states that the rules were implemented on July 12, **2012**. It is clear that if not for this error, Westphal’s discipline would clearly fall within the remedy to the work rule violation described above. Respondent clearly relied on the work rules to discipline Westphal, since she was provided a copy of the work rules in her disciplinary packet, and the work rules she is accused of violating are cited in her

disciplinary notice. In addition to Westphal, there may be other employee disciplines which issued pursuant to the unlawful work rules between July 12, 2011 and July 12, 2012. These disciplines are currently excluded from the order based on a clear mistake, and this error should be corrected.

**F. Respondent Failed and Refused to Provide Information in Response to Requests Made by the Charging Union on October 25, 2011 and November 4, 2011. (Exception No. 6).**

The ALJ failed to rule on two information request allegations that were pled in the complaint, litigated at the hearing, and argued in brief. Complaint paragraph 17 alleged that Respondent failed and refused to provide information in response to a request by the Union on October 25, 2011. Complaint paragraph 18 alleged that Respondent failed and refused to provide information in response to the Union's November 4, 2011 request.

An employer's duty to bargain collectively under the Act includes the duty to furnish information, on request, which is relevant to and necessary for a union's performance of its duties as the employees' collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). It is well established that this duty is not limited to contract negotiations but extends to requests made during the term of the contract, for information relevant to and necessary for contract administration and grievance processing. *Id.* This includes any information relevant and reasonably necessary for negotiating or administering and policing a collective-bargaining agreement, including determining whether to file a grievance or proceed to arbitration,

or deciding what position to take with respect to a pending grievance. *Service Employees Local 144 (Jamaica Hospital)*, 297 NLRB 1001, 1002-03 (1990).

While information pertaining directly to employees within the bargaining unit is presumptively relevant, information not on its face directly related to unit employees must be produced only if the union can show its relevance to the collective-bargaining process. *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867-868 (9<sup>th</sup> Cir. 1977). The burden of showing relevancy is not exceptionally heavy and, the information requested need not necessarily be dispositive of the issue between the parties, it must only have some bearing on it. *Pfizer, Inc.*, 268 NLRB 916 (1984); *Ohio Power*, 216 NLRB 987 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976).

1. October 25, 2011 request

On October 13, 2011, Manning requested, by email, that Respondent provide the Charging Union access to review the personnel files of all current and past employees. (Tr 130; GC Ex. 46). The Charging Union needed this information for various reasons – to check on the employment status of Gonzales, and to see what was in employee files regarding work rules and position descriptions, and to prepare for interest arbitration. (Tr 130). In his response, Moore advised the Charging Union that it was not entitled to review personnel files, particularly for past employees.<sup>4</sup> (Tr 130).

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<sup>4</sup> Manning testified to Moore's original response, but it is not contained in GC Ex. 46. However, GC Ex. 46 contains further discussion between Moore and Manning on the issue, and appears to fully explain Moore's position.

In response, on October 25, 2011, Manning amended the original request to limit it to the personnel files of all *current* employees. (Tr 130; GC Ex. 46). Since this request directly pertained to unit employees, it was presumptively relevant. In addition, the Charging Union had valid reasons for its request, including: (1) to see what was in employee files related to work rules; (2) to see if there was any further information regarding unit position descriptions (a major issue during negotiations); and (3) to check on the employment status of Frank Gonzales (an individual of unknown status, suspected of performing bargaining unit work).

Moore replied that despite the Charging Union's amended request, he still would not provide it access to employee personnel files without a waiver from the employee. (Tr 130-131; GC Ex. 46). Manning told Moore that Article 33(B) of the contract specifically provided the Charging Union with the right to review personnel files. (Tr 131; GC Ex. 4, Art. 33). Manning renewed his request to review the employee personnel files. (Tr 131, GC Ex. 46). Moore did not respond further, and Respondent never allowed the Charging Union access to review the files. (Tr 131).

As stated above, it is well established that in certain circumstances, confidentiality concerns can be a valid defense to a request for information. *Detroit Edison Co. v. NLRB*, supra. In this situation, MSEA has failed to identify any valid, specific privacy concern. Instead, MSEA issued a blanket denial to the Charging Union's request to review employee files, which contain presumptively relevant information. Because a specific privacy concern has not been identified, it is impossible to weigh the Charging Union's need for the information against any purported privacy concern. Further, to the

extent there is confidential information in the files, the burden is on Respondent to offer an accommodation to the Charging Union. *Tritac Corp.*, 286 NLRB 522 (1987).

Respondent has not done that. Instead, it has put the burden on Charging Union to obtain waivers from employee. This is not a reasonable accommodation because it shifts the burden onto Charging Union and puts employees in the position of having the power to deny or grant Charging Union access to presumptively relevant, potentially non-confidential information to which it is entitled as the exclusive collective-bargaining representative.

## 2. November 4, 2011 Request

For years, Respondent provided unit employees with either a cell phone, or at the employee's option, a subsidy of \$50 per month. (Tr 136, 503). At the October 29, 2011, Board of Directors' meeting, Respondent's board voted on motions to end all phone subsidies and to no longer provide cell phones to anyone but its president, vice-president, and assistant to the president. (Tr 1032, 1648; GC Ex 158, p. 4). In November 2011, Respondent discontinued the cell phone benefit. (Tr 136). Respondent notified the Charging Union of its decision in a memo dated November 4, 2011. (Tr 137, 504, 1033-34, 1648; GC Ex 49). The ALJD properly concluded the in doing so, Respondent violated Section 8(a)(5) by making a unilateral change without affording the Charging Union with notice and an opportunity to bargain.

In an email to Moore dated November 4, 2011, the Charging Union requested information related to the cell phone change. (Tr 137-138; GC 50). More specifically, the Charging Union requested information such as the number of employees who had cell

phones, who they were, how long they had them, whether they were subsidized or provided, the costs associated with the plans, and the rationale for ceasing to provide the cell phones. (Tr 138). Moore responded to the Charging Union in a memo dated November 7, 2011, wherein he stated that the cell phones were considered a “tool of the trade,” and were removed at the recommendation of Respondent’s Board of Directors. (Tr 138-139; GC 51). Moore stated that the Charging Union’s information request “seems to be out of order and this request for information will not be addressed.” (Tr 139; GC 51). To date, Respondent has failed to provide the Charging Union this information. The requested information was presumptively relevant because it pertained directly to a benefit received by unit employees. Further, it was relevant to the Charging Union’s investigation of the unilateral change.

For the reasons stated above, Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the relevant information requested by the Charging Union on October 25, 2011 and November 5, 2011, as described above.

#### **IV. CONCLUSION**

For the reasons stated above, we ask that the Board find merit in the Acting General Counsel's exceptions to the ALJ's dismissal of certain violations as noted above, and affirm all other rulings, findings, and conclusions reached by the ALJ that are not excepted to by the Acting General Counsel. The Acting General Counsel further requests that the ALJ’s Recommended Order and Notice to Employees be corrected to reflect the

Acting General Counsel's exceptions, and further, that the Recommended Remedy and Notice be corrected to reflect the correct name of the Charging Union's President, as Clyde Manning (instead of Ralph Manning).

Dated at Detroit, Michigan this 22nd day of May, 2013.

(Seal)

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