

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

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

Respondent,

and

CENTRAL OFFICE STATE ASSOCIATION,

Charging Party.

Case Nos. **7-CA-053541**
7-CA-060319
7-CA-060320
7-CA-065560
7-CA-065681
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7-CA-079382
7-CA-081500

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**RESPONDENT MICHIGAN STATE EMPLOYEES
ASSOCIATION'S ANSWERING BRIEF TO EXCEPTIONS
OF COUNSEL FOR THE ACTING GENERAL COUNSEL**

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On May 22, 2013, counsel for the Acting General Counsel submitted Exceptions to the March 27, 2013 Decision (JD (ATL)-07-13) of the Administrative Law Judge. Respondent Michigan State Employees Association (herein after “MSEA” or the “Employer”) hereby files this Answering Brief.

I. THE ALJ CORRECTLY FOUND THAT MSEA’S DIRECTIVE STATING “ALL EMPLOYEE CONCERNS REGARDING MSEA CONCERNS SHALL BE PRESENTED, AND ADDRESSED, DIRECTLY BY THE PRESIDENT” WAS NOT UNLAWFULLY OVERLY BROAD.

At issue is the October 8, 2010 memo issued to staff:

“Effective immediately, all employee concerns concerning MSEA issues are to be presented [to], and addressed, directly by the President.” (See ALJ Decision, p. 5; GC Ex. 13.)¹

The ALJ applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) in determining that the memo did not violate the act. See ALJ Decision, pp. 6-11. The ALJ found that the October 8, 2010 memo did not explicitly restrict activity protected by Section 7 of the Act (ALJ Decision, p. 6); therefore, he delved into the three questions set forth in *Lutheran Heritage Village-Livonia* where a rule does not explicitly restrict protected activities. He answered all three questions in the negative: Employees would not reasonably construe the rule’s language to prohibit activities protected by Section 7 (ALJ Decision, p. 6); the memo was not issued in response to union activity (*Id*, p. 7); and the evidence falls short of establishing that MSEA disciplined an employee (Nancy Durner) for violating the October 8, 2010 memo. (*Id*, p. 9.)

¹The ALJ found that it is necessary to infer that the bracketed word “to” was intended to be included in the memo, a finding to which MSEA has not excepted. (See ALJ Decision, p. 6.)

The General Counsel neither excepts to the ALJ's finding that the memo does not explicitly prohibit protected activities, nor to his finding that the memo was not promulgated in response to union activity. See the General Counsel's Brief in Support of its Exceptions, p. 8. Instead, the General Counsel excepts on the grounds that employees would reasonably construe the memo to prohibit protected activities, and/or that the memo has been applied to restrict the exercise of Section 7 rights. *Id.* Those two arguments are addressed next.

The ALJ correctly found that employees would not reasonably construe the memo to prohibit protected activities. The ALJ wrote:

"Examining the rule's language, I must answer the first question in the negative. Although the phrase 'employee concerns regarding MSEA issues' is rather vague, I will assume that it reasonably would be read to include wages, hours, and other terms and condition of employment. However, the rule stops short of prohibiting employees from discussing such matters among themselves.

"Instead, the rule simply says such matters 'are to be presented [to], and addressed, directly by the President.'...[T]he intended meeting is not entirely clear. However, I conclude that employees reasonably would understand the language to mean that they should take their concerns directly to Respondent's President, rather than to someone else.

"The one-sentence memo does not include an express prohibition of any conduct. Moreover, it does not threaten, or even mention the possibility of disciplinary action for a violation of the rule. Accordingly, I must conclude that employees reading the rule would not reasonably construe it to prohibit Section 7 activity." ALJ Decision, p. 6.

The record is utterly devoid of any evidence that any bargaining unit member understood the memo as prohibiting protected activities or refrained from engaging in protected activities as a result of the memo; the General Counsel's Exceptions do not argue otherwise. Instead, the General Counsel argues that the Rule is ambiguous, and that there exists a reasonable interpretation that the Rule infringes Section 7 rights, citing *DD*

Construction Group, Inc., 339 NLRB 303 (2003) and *Jordan Marsh Stores*, 317 NLRB 460 (1995).

Contrasting the statement at issue in *DD Construction Group*, with the memo at issue in the instant case, shows that *DD Construction Group* offers the General Counsel no support. In that case, the employer's president pointed and shook his finger at an employee and repeated three times, "remember your bills," two days before an election. 339 NLRB at 303. The employee testified that he understood this message as intended to scare him into believing that if he voted for the union, he would be fired and unable to pay his bills. *Id.* The Board held the statement illegal, stating "whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Id.*, pp. 303-304. The instant memo rises to nowhere near the level of the president's statement in *DD Construction Group*. Unlike that statement, it cannot reasonably be construed as an implicit threat. Unlike in that case, no employee testified to understanding it as such. As the ALJ noted, employees reasonably would understand the language to mean that they should take their concerns directly to MSEA's President, rather than to someone else. ALJ Decision, p. 6. It contains no express prohibition of any conduct, and does not even mention the possibility of disciplinary action. *Id.* The General Counsel's attempts to posit a coercive interpretation fail the "reasonable" test.

Similarly, *Jordan Marsh Stores* presented an implicit threat under circumstances that have no bearing on the instant memo. In that case, the supervisor approached an employee who had been named in the union's "protection letter" during an organizing campaign. 317 NLRB at 463. The supervisor expressly referred to the protection letter and asked, "what kind of protection do you think you're going to get from that?" *Id.* When the employee replied

that he could not afford to lose his job, the supervisor told him that the letter would give him no protection. *Id.* The ALJ made short shrift of the Respondent's defense that the supervisor had merely stated the obvious, that the protection letter would not insulate an employee from discharge for *lawful* reasons:

“For [the supervisor] to question the efficacy of such a letter is not merely to suggest that it offered no protection against lawful discipline but also to suggest that it offered no protection against union-motivated discrimination. To say that to an employee concerned about discrimination is to suggest that such discrimination is a possibility. That is a veiled threat, violative of Section 8(a)(1). Employees need not be lawyers, parsing every to seek out permissible constructions.” *Id.*

A permissible construction was indeed difficult to parse out in that case. In the instant case, the opposite is true. The coercive construction is the implausible construction.

The General Counsel also argued to the ALJ, as it argues here, that the instant memo is unlawful under *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). In that case, the Board found unlawful a rule which not only deemed it “essential” that employees bring work-related complaints, concerns, or problems to the director, but expressly directed that terms and condition of employment not be discussed with third parties and expressly warranted disciplinary action up to and including termination. *Id.*, 1171, fn. 1.

The ALJ in the instant case carefully distinguished the rule at issue in *Kinder-Care Learning Centers*, from the instant memo. ALJ Decision, pp. 9-11. The ALJ noted that *Kinder-Care Learning Centers* relied on the threat of discipline, to hold that the rule in that case “does not merely state a preference that employees follow its policy, but rather that compliance with the policy is required. 299 NLRB at 1172; ALJ Decision, p.10. Moreover, the ALJ noted that the *Kinder-Care* rule specifically prohibited such communications with third parties, while the instant memo included no such reference. ALJ Decision, p. 11.

The ALJ also distinguished *Kinder-Care* by noting that MSEA is a membership association, not the typical corporate employer, and that employees would reasonably understand the memo in light of the President's need that he, and not other officers who were not subject to his authority, was in charge of staff. ALJ Decision, p. 11.

The General Counsel also challenges the ALJ's negative answer to the third question; *i.e.*, whether MSEA discharged Nancy Durner for violating the October 8, 2010, memo.² The ALJ noted that the Durner discharge letter does not refer to the October 2010 memo. ALJ Decision, pp. 7-8. The ALJ then examined the possibility that two of the issues listed in the discharge letter, "conduct unbecoming," and "insubordination or disregard for authority" might refer to a failure to follow the instruction in the memo. *Id.*, p. 8. The ALJ noted that MSEA President Moore had made an effort to determine whether the separate Work Rules had been implemented prior to imposing discipline on Ms. Durner (ALJ Decision, p. 9), that Moore may have believed they were in effect because his predecessor provided him erroneous information (*Id.*, p. 49)³, and that President Moore relied on the Work Rule, not the October 2010 memorandum in imposing discipline. *Id.*, p. 9. He found that if the disciplinary action had been based on an alleged breach of the October 2010 memo, then it would not have been necessary for President Moore to ascertain whether the Work Rules were in force.

Even assuming, *arguendo*, that the ALJ's finding that Ms. Durner was terminated for violating the separate Work Rules, not the October 2010 memo, is rejected, discipline for violating the memo is not overbroad. It would have been proper for the same reason as

² The ALJ found elsewhere in his Decision that Nancy Durner's discharge for violation of separate Work Rules was improper; that aspect of his Decision is a subject of MSEA's own Exceptions.

³ MSEA argues in its own Exceptions that President Moore had been led by his predecessors to believe the Work Rules had been implemented because, in fact, they had been implemented and remained in effect; MSEA argues in its separate Exceptions that the ALJ should have so found.

discipline for violating the Work Rule was proper, Ms. Durner's attempt to persuade Chris Little and by extension other MSEA Board members to overrule operational decisions by President Moore was something that MSEA could properly prohibit. See Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, pp. 7-8.

II. THE ALJ CORRECTLY FOUND THAT RHONDA WESTPHAL'S JUNE 2012 REPRIMAND WAS LAWFUL.

In late 2010, MSEA began requiring preapproval for out-of-the-office work. See December 15, 2010, memo regarding "staff activity forms" and attached Form 100B.2. (GC Exhibit 60). On November 16, 2011, that directive was reaffirmed. See GC Exhibit 61. In relevant part, GC 61 states:

"Form 100B.2 will be completed and turned in every Thursday for the up-and-coming week schedule. As a reminder, ANY out-of-office work and/or leave *must* be pre-approved prior to the date of leave or out-of-office work as well as noted on your schedule." (Emphasis in original).

GC 61 closes with the following notation:

"From this date onward, resistance and/or failure to correctly submit the forms as Directed, may result in disciplinary action." *Id.* (Emphasis in original)

Ms. Westphal was reprimanded for failing to obtain preapproval for an out-of-the-office trip, as required in these Directives. Despite the plain language, COSA witnesses, including Ms. Westphal, testified they did not understand the memo to say what it clearly does say.

The ALJ correctly held that the General Counsel had not proven a link between protected activity and this reprimand. ALJ Decision, p. 37. The ALJ noted that President Moore wanted to be "in total charge of MSEA's daily work." *Id.*⁴ The ALJ correctly held that MSEA's proven need to reduce unnecessary travel and travel expenses, in light for the decline in its own membership and consequent reduction-in-dues revenue, constituted legitimate reasons for reducing unnecessary travel and travel expenses. He correctly noted that the fact that Westphal was a COSA officer does not compel the conclusion that she was singled out, precisely because the bargaining unit is so small; the majority of the bargaining unit participated in COSA either as an officer or as a member of the Bargaining Committee. *Id.*, p. 38.

In its Exceptions, the General Counsel relies on an alleged statement by MSEA Treasurer Tim Schutt, in which he allegedly stated that President 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. See General Counsel's Brief Supporting Exceptions, pp. 22-23.⁵ Nonetheless, that alleged statement, even if it is found to have been made, does not show anti-union animus. At most, it would go to the issue of just cause for the discipline; *i.e.*, it is at most a contractual discipline issue. Moreover, an attempt to assure similar consequences for similar behavior is not improper by any statutory or contractual standard.

⁴ The ALJ's characterization of President Moore's desire is gratuitous and not supported by the evidence; he is the MSEA President, elected by his membership precisely for the purpose to be in charge of MSEA's daily work. Nonetheless, the ALJ correctly reached the conclusion that his desire to be in charge is not anti-union animus. See *Id.*

⁵ Johnson had been denied travel reimbursement for failing to get preapproval of a trip, and had been terminated for falsely charging a gasoline purchase to MSEA, in an attempt to get "payback" for the denied reimbursement. Ms. Johnson's discharge is a subject of MSEA's Exceptions.

III. THE ALJ'S REFERENCE TO WORK RULES BEING IMPLEMENTED ON JULY 12, 2012, RATHER THAN JULY 12, 2011, IS OF NO IMPORTANCE.

As argued in MSEA's Exceptions, the Work Rules had been properly implemented in 2007. Hence, there was no improper unilateral implementation subsequent to that date, regardless of whether it was 2011 or 2012.

IV. RESPONDENT COMPLIED WITH THE OCTOBER 25 AND NOVEMBER 4, 2011, INFORMATION REQUESTS.

MSEA responded to the October 25, 2011, request in Respondent Exhibits 44 and 45. In Exhibit 44, it engaged COSA in attempt to determine if it had some specific item and need for information; COSA narrowed its request (R Ex 45) to just current employees, and asserted a contractual right as the designated representative. MSEA responded that individual COSA members have the ability to designate a COSA representative to specifically review a personnel file, but that MSEA did not view the contract as authorizing a blanket review of personnel files by COSA. That was reasonable under the circumstances. COSA failed to identify any particular need for information which might be gleaned from the personnel files. An employer has no obligation to simply turn over all employee files to the union, in the absence of a particularized need tied to terms and conditions of employment.

MSEA's full, fair, and complete response to the November 4, 2011, information request is its November 7, 2011, reply. GC Exhibit 51.

V. CONCLUSION AND RELIEF

For the foregoing reasons, MSEA requests that the General Counsel's Exceptions be denied, and those portions of the ALJ Decision which they attack, be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT ON JUNE 18, 2013, THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE, AS FOLLOWS:

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