

**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

**COUNSELS FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT MICHIGAN STATE EMPLOYEES
ASSOCIATION'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Scott R. Preston
Judith A. Champa
Counsels for the Acting General Counsel
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226-2569

TABLE OF CONTENTS

I. INTRODUCTION..... 2

II. RESPONDENT’S EXCEPTIONS HAVE NO MERIT AND SHOULD BE DENIED..... 3

 A. ALJ’s Credibility Determinations Were Proper and Respondent Offered No Evidence to the Contrary (Exceptions 2 and 4)..... 3

 B. ALJ’s Determinations That Respondent Did Not Have Justification for Its Actions Were Correct (Exceptions 1, 2, 10, 11, and 12)..... 5

 C. ALJ Was Correct in Finding That Respondent President Moore Had a Plan to Get Rid of COSA and Took Retaliatory Actions Against COSA Members in Carrying Out His Plan. (Exceptions 2, 3, 4, 5, and 6)..... 11

 1. Suspension and Discharge of Nancy Durner..... 12

 2. Administrative Leave and Discharge of Audrey Johnson.. 14

 3. Termination of the Recall Rights of Mary Groves..... 16

 4. Refusal to Allow Clyde Manning to Return to Work..... 17

 D. ALJ’s Determinations That Respondent Did Not Properly Respond to COSA’s Requests for Information Were Correct (Exceptions 7, 8, and 9)..... 19

 E. ALJ’s Determination That Respondent Did Not Bargain in Good Faith with COSA Was Correct (Exception 13)..... 21

III. CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases:

<i>Banner Estrella Medical Center</i> , 358 NLRB No. 93 (2012).....	5
<i>Daikichi Corporation</i> , 335 NLRB 622 (2001).....	4
<i>Fresno Bee</i> , 339 NLRB 1214, 1214 (2003).....	7
<i>Light Electrical Construction Company</i> , 345 NLRB 1095 (2005).....	13, 14
<i>NLRB v. Acme Industrial Company</i> , 385 U.S. 433, 437-38 (1967).....	21
<i>Overnight Transportation Company</i> , 296 NLRB 669, 671 (1989).....	23
<i>Phoenix Transit System</i> , 337 NLRB 510 (2002).....	13
<i>Quickway Transportation, Inc.</i> , 354 NLRB 560 (2009).....	9
<i>Riverbay Corporation</i> , 341 NLRB 255 (2004).....	12, 13
<i>Shen Automotive Dealership Group</i> , 321 NLRB 586 (1996).....	4
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950).....	3, 4
<i>Wright Line</i> , 251 NLRB 1083 (1980), <i>enfd.</i> 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).....	14, 15, 18

**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

**COUNSELS FOR THE ACTING GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT MICHIGAN STATE EMPLOYEES
ASSOCIATION'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Scott R. Preston and Judith A. Champa, Counsels for the Acting General Counsel in this matter, pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, respectfully submit this answering brief to the exceptions of Respondent Michigan State Employees Association (Respondent) to Administrative Law Judge (ALJ) Keltner W. Locke's decision.

I. INTRODUCTION

On March 27, 2013, ALJ Keltner W. Locke issued a decision finding Respondent to have issued a questionnaire containing unlawful language to an employee in violation of Section 8(a)(1), took retaliatory actions against employees Nancy Durner, Audrey Johnson, Mary Groves, and Clyde Manning, in violation of Sections 8(a)(1) and (3), and failed to provide or unreasonably delayed in providing requested information, unilaterally changed terms and conditions of employment, removed bargaining unit work without notice and an opportunity to bargain over the decision and effects, and failed and refused to bargain in good faith with Central Office Staff Association (COSA), the collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act. On May 22, Respondent filed 13 exceptions to that decision.

Respondent's brief in support of its exceptions contains many arguments, but it repeatedly mischaracterizes the record¹ and, in citing just seven legal cases to support its arguments, it repeatedly misapplies the case law to the facts in the instant case.

Counsels for the Acting General Counsel ask that Respondent's exceptions to the ALJ's decision be denied.

¹ On June 7, 2013, the Board granted GC's May 29 Motion to Strike Attachment to Respondent's Brief in Support of Exceptions to Decision of the ALJ.

II. RESPONDENT’S EXCEPTIONS HAVE NO MERIT AND SHOULD BE DENIED.

A. ALJ’s Credibility Determinations Were Proper and Respondent Offered No Evidence to the Contrary (Exceptions 2 and 4)

In finding multiple unfair labor practices, the ALJ relied, in part, on the testimony of Respondent’s Chief Steward Benny Poole, who recounted that Respondent’s President Ken Moore told him that he wanted to get rid of COSA and asked for his assistance in doing so. The ALJ credited Poole’s accounts and discounted the explanations of Respondent’s President Ken Moore. (ALJD 22:43-45).² The ALJ found Poole to be a reliable witness (ALJD 23:37-38) and that “[t]o believe Moore’s testimony [as to his reason for not letting Clyde Manning return to work] would require superhuman credulity and a disregard of his modus operandi.” (ALJD 25:37-38).

Respondent argues that the ALJ’s credibility determinations are incorrect and that Poole’s testimony should not be found credible. (R Br 14). It cites to *Standard Dry Wall Products*, 91 NLRB 544 (1950), and states that findings of fact are to be reviewed *de novo*. (R Br 14). However, Respondent fails to point out that determinations of credibility are not subject to the same standard of review.

² References to the record are hereinafter abbreviated as follows: Administrative Law Judge Decision – ALJD (follow by page number: and line numbers); Supporting Brief of Respondent’s Exceptions – R Br (followed by page number); General Counsel Exhibit - GC Ex (followed by exhibit number); Respondent Exhibit - R Ex (followed by exhibit number); and Transcript - Tr (followed by page number).

The Board has long held that it will not overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence establishes it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB at 545. The ALJ may base credibility determinations on the demeanor of the witnesses, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Daikichi Corp.*, 335 NLRB 622, 623 (2001), citing to *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996).

In its effort to discredit Benny Poole, Respondent refers to him as a disaffected member of Respondent who was facing internal Union charges at the time of his testimony. However, the record clearly establishes that Poole had no knowledge of any such charges at the time of his testimony. (Tr 782). It was not until late the following month that he was served with notice of the charges. (Tr 885-87, 901-03).

Respondent further argues that Poole's testimony of statements by Moore showing animus towards COSA should be discounted since the Board was not able to play any subpoenaed recording of the Respondent's Board of Directors meetings that show "Moore or anyone else talking about their intention of getting rid of COSA." (R Br 13). However, such an assertion is disingenuous in light of Moore's own admission that anytime the Board of Directors discussed staff issues, they went into executive session and turned off the tape recorder. (Tr 1945, 1950).

Respondent provides little to support its assertion that the ALJ erred in his repeated discrediting of Moore's testimony or crediting of Poole's account. Its failure to establish such error by a clear preponderance of the evidence call for the ALJ's determinations regarding credibility to remain intact, and for all exceptions relating to the ALJ's credibility determinations be denied.

B. ALJ's Determinations That Respondent Did Not Have Justification for Its Actions Were Correct (Exceptions 1, 2, 10, 11, and 12).

In Respondent's brief in support of its exceptions, it tries to excuse many of its actions based on office conditions, economic conditions, and alleged difficulties with getting accurate information from its workers. However, while Respondent has shown that it had reasons that it desired to entail the union activities of its employees, rescind benefits, and remove bargaining unit work, Respondent has failed to establish that it had the legal right to take any of these actions.

As to its exception 1, Respondent argues that the ALJ erred in not excusing language in the February 9, 2012, questionnaire given to Audrey Johnson, which stated, in part, that "[i]ts contents shall remain confidential and is not to be discussed outside union representation," and that a "breach of confidentiality will result in immediate termination of employment." (GC Ex 129). Respondent acknowledges that under *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), an employer must establish that a legitimate business justification

outweighs the Section 7 rights of its employees for it to lawfully prohibit discussion of an ongoing investigation. (R Br 6).

Respondent provides a cursory argument that the unit is small, that matters under investigation were potentially within the knowledge of other unit employees, and an assertion that COSA members had withheld information from management in the past. However, the only basis cited for these claims is self-serving testimony from Respondent's President Moore, who the ALJ thoroughly discredited in his decision. Respondent fails to present any case law to support a belief that Section 7 rights can be more easily infringed upon in a smaller bargaining unit than in a larger unit. Furthermore, while Moore repeatedly investigated his employees to find any infractions for which he could discharge unit employees, Respondent has provided no claim that any employee was ever accused of withholding information or misrepresenting facts, other than a claim that Johnson had altered an electronic calendar, which was never used in reporting activities to management and was not required to be used by employees.³ (Tr 2029-30, 2125-26).

As to exception 11, Respondent makes a one paragraph argument that cell phones and cell phone subsidies were provided to its employees as business tools,

³ While Respondent complains in its exceptions brief as to its difficulty in getting accurate membership headcounts from COSA members, as stated below, the ALJ discredited this testimony based on the lack of support in the record (ALJD 55:6-10) and assuming, *arguendo*, that Respondent had been able to establish such problems, Respondent has not provided any evidence that would tend to show that these difficulties were the result of any intentional actions or omissions on the part of any COSA representative or member. (Tr 1518-19).

the elimination of this practice was necessitated by reduced revenue, and employees are now being reimbursed for calls made. Again it provides no legal basis for these arguments.

It is well settled that an employer violates Section 8(a)(5) of the Act when it unilaterally makes a material and substantial change in wages, hours, or any other term of employment that is a mandatory subject of bargaining, at a time when the employees are represented by a union. *Fresno Bee*, 339 NLRB 1214, 1214 (2003). Respondent ceased providing each employee a cell phone or, at the employee' option, \$50 per month, without bargaining, pursuant to a decision of its Board of Directors. (Tr 1032, 1648, GC Ex 158, p. 4).

While Respondent states that it does not intend this practice to be a benefit for its employees, it cannot reasonably argue that the use of a cell phone, let alone a payment of \$50 per month, is not, in practice, a benefit to employees. The free availability of cell phones empowered and advantaged Unit employees; the \$50 subsidies directly enriched them. The practice's value is confirmed by the fact that Respondent's Board of Directors made this change specifically in an effort to save money for itself with the corresponding monetary loss of its employees.

While Respondent may have provided a new method for employees to recover some of their phone expenses, the unilateral change still resulted in less favorable conditions of employment, and regardless of the net effect, Respondent has not and cannot cite any case law stating that it has a right to make such a material

change to a substantial term and condition of employment without notice and an opportunity to bargain.

Elsewhere in his decision, the ALJ correctly found that Respondent removed the pre-arbitration bargaining unit work from its employees. He based this decision in part on evidence that following an agreement with the State of Michigan, Respondent's grievances were no longer being handled by COSA members prior to arbitration, but rather by President Moore or volunteer Frank Gonzales. (ALJD 52:36-46). The ALJ also noted that during the trial, Respondent's attorney made a statement admitting that Respondent had removed the work, but asking for the opportunity to offer evidence as to why it believed it had the right to do so. (ALJD 53:9-17, Tr 996).

Respondent's exception 12 states that the ALJ erred in finding that the removal of pre-arbitration work was unlawful. It argues that since under its collective-bargaining agreement with COSA, there was nothing to prohibit management from settling cases prior to arbitration, it could cease its then-current practice of providing the case files to its labor relations specialists for processing immediately after Respondent's Litigation and Arbitration Committee decided that a grievance should go to arbitration. (R Br 26-27). However, just because management had the power to settle a case if the opportunity presented itself, it does not give management the right to totally remove the pre-arbitration processing from the bargaining unit employees and reassign it to others.

Respondent argues that even if it give this work over to Frank Gonzales, this reassignment of work could not constitute a violation as Gonzales was a volunteer and could not be considered a non-bargaining unit worker under *Quickway Transportation, Inc.*, 354 NLRB 560 (2009). (R Br 27-28). Yet again, instead of making an attempt at establishing a legal basis for its claim, it just offers a bold unsupported assertion. The ALJ was correct that regardless of whether the work was taken to be performed by management or a volunteer, removal of the work from the bargaining unit and assigning it to others constitutes a violation of Section 8(a)(5) of the Act. (ALJD 53:36-41).

The ALJ also correctly found that Respondent unlawfully implemented work rules on July 12, 2011. (ALJD 14:28-29). In its exception 10, Respondent argues that this conclusion was made in error as it claims the rules were promulgated in 2007. However, its supporting brief only addresses the issue in its section concerning exception 2, which addresses, in part, the unlawful use of the work rule in discharging Nancy Durner. (R Br 10-11).

Respondent has little to point to in claiming a prior implementation other than the testimony of a former assistant testifying that she remembering distributing them (Tr 1217, 1221), and a February 12, 2007, letter from Respondent President Bob Mosqueda stating that the work rules would go into effect on the following February 26. (GC Ex 17). Yet, in addition to the COSA representatives testifying that the work rules never went into effect, Bob Mosqueda, himself, testified that after discussions with COSA, he did not put the

rules into effect. (TR 2151) Furthermore, Scott Dianda, who served as Respondent's president directly between Mosqueda and Moore, confirmed that there were no work rules in effect while he was in office. (Tr 802-04).

Respondent's attempt to dispute the accounts of those in the best position to know deserves little consideration.

In defense of Moore's unlawful promulgation of the work rules, Respondent tried to establish an urgent need for the rules by presenting multiple witnesses who attempted to sully the reputation of COSA President Clyde Manning. The ALJ gave Respondent wide latitude to present witnesses who testified that many years ago, Manning liked to recount old stories he heard of union representatives who would resort to unscrupulous ways of dealing with their enemies, such as by putting cocaine in the person's car and calling the police to make a report (Tr 1152, 1407-08, 2171-72), and a witness who recounted losing a set of keys in 2007 and speculating that Manning may have had something to do with it. (Tr 1206, 1213).

While the ALJ inexplicably allowed such testimony to be presented over General Counsel's continuing objections, he correctly made no mention of this line of testimony in his decision. However, Respondent again raises this irrelevant and slanderous testimony in an attempt to excuse its unilateral action. (R Br 23-25). Respondent does not explain however, how a desire to change terms and conditions of employment, no matter how sincere, can be brought to fruition without notice to the employees' collective-bargaining representative and an

opportunity to bargain, or, as provided by Article 36 of the parties' collective-bargaining agreement (GC Ex 4), the presentation of proposed rules, and 10 days for COSA to comment and/or, upon request, meet for discussion with Respondent, prior to implementation. (GC Ex 4). Respondent does not claim, and the record does not reflect, that any notice or opportunity for discussions took place prior to the implementation of the work rules. Rather, unrebutted testimony of Manning establishes that Moore refused to meet to discuss the work rules. (Tr 103-04; GC Ex 29).

C. ALJ Was Correct in Finding that Respondent President Moore Had a Plan to Get Rid of COSA and Took Retaliatory Actions Against COSA Members in Carrying Out His Plan. (Exceptions 2, 3, 4, 5, and 6)

Based, in part, upon Respondent's Chief Steward Benny Poole's testimony, Respondent's President Ken Moore's demeanor during his testimony, and the actions Moore had taken on behalf of Respondent, the ALJ concluded that, in an effort to obtain full control of his offices, Moore embarked on a mission to crush COSA, the employees' collective-bargaining representative. (ALJD 24). In pursuit of his goal, Moore took actions against several of COSA's representatives. The ALJ found each of these actions to be violations of Section 8(a)(1) and (3) of the Act. Respondent objects to the ALJ's characterization of Moore's motives and takes exception to his finding of unfair labor practices as to Moore's actions.

1. Suspension and Discharge of Nancy Durner

The ALJ found that Respondent unlawfully suspended and discharged Nancy Durner in retaliation for her union activities and pursuant to an unlawfully implemented work rule. In support of its exception 2, Respondent argues that the ALJ's determination of the Section 8(a)(3) violation is in error since Durner's complaints to a member of Respondent's Board of Directors were unprotected. (R Br 7-9). However, as the ALJ determined, and both Durner and Chris Little, the Board member involved, testified, Durner was complaining about the implementation of the new phone system, which directly affected her job and the bargaining unit as a whole. (ALJD 18:14-17).

Respondent argues that as Durner was criticizing the Board members for allowing President Moore to take these actions, she was engaged in internal Respondent politics. Yet, Respondent misunderstands Durner's motivation and intention. She was voicing her complaint to a person who, through his position, had power in making these decisions that directly affect her work. She was seeking for actions improving employees' conditions of employment and stopping the diminishment of unit work. As such, this was protected activity.

Respondent cites to *Riverbay Corporation*, 341 NLRB 255 (2004), in support of its position. In that case, the Board found that the employee's activities in trying to defeat a candidate's bid for a position on the Employer's Board of Directors was unprotected. However, Respondent misapplies that case to the instant matter. Again, Durner's complaint was about Employer's actions which

affected her job. Durner did not in any way attempt to change Respondent's management; rather, she implored Little to stand up against actions by Moore that negatively affected the terms and condition of employment for employees. Therefore, *Riverbay Corporation* has no relevance to the current situation and its attempted application to the instant facts is misguided.

While there is a disagreement between Little and Durner as to whether Durner accused Board of Directors members of having "no balls," as the ALJ correctly noted, such a statement would not remove Durner from the protection of the Act. (ALJD 18:23-24, citing *Phoenix Transit System*, 337 NLRB 510 (2002)). Respondent further argues that even if Durner testified truthfully and Little didn't, Respondent had the right to act in good faith reliance on Little's account of the conversation. (R Br 9). It cites to *Light Electrical Construction Company*, 345 NLRB 1095, 1096 (2005), for the case law that "an employer does not violate the Act by terminating employees based on a mistaken belief that they were engaged in misconduct if their actions did not arise out of any protected concerted activity." However, again, Respondent misapplies case law to the instant matter. There was no misunderstanding as to the fact that Durner's statements were made concerning the phone system and would normally be protected. The misunderstanding, if any, actually involved whether Durner stated that the Board of Directors members had "no balls," and further, whether that statement would remove Durner from the protection of the Act. Again, regardless of whether the "no balls" statement was made, which the ALJ justly decided it

wasn't, that statement would not have removed Durner from the Act's protection. As there was no misunderstanding as to the subject and nature of the activity, but only a mistake in an analysis as to the legal affect of the alleged "no balls" comment, *Light Electrical Construction Company* is not relevant to this matter. An Employer's actions against employees in retaliation for protected concerted activity are not excused just because the Employer has a mistaken belief that conduct that occurred within that normally protected concerted activity was so egregious as to remove the employees from the protection of the Act.

2. Administrative Leave and Discharge of Audrey Johnson

After an exhaustive *Wright Line* analysis, the ALJ found that Audrey Johnson's discharge was a Section 8(a)(3) violation since it was motivated by Moore's "desire to eliminate COSA by discharging the bargaining unit employees." (ALJD 29:9-12). As some of the ALJ's conclusion is based on Benny Poole's account of Moore telling him of his desire to get rid of COSA, in its exception 4, Respondent argues extensively as to Poole's credibility. This subject is addressed above. Otherwise, Respondent makes only a few arguments as to the facts surrounding Johnson's discharge.

First, Respondent argues that Johnson was guilty of theft by putting the gas purchase on her Respondent credit card as it claims that she did not drive on December 15, 2011, the day she bought the gasoline. (R Br 15). However, testimony actually established that Johnson drove on both December 15 for the arbitration, and on December 12 in preparation for the arbitration. She drove in

total about 140 miles. (Tr 920-23; GC Ex 133, 134). While under the collective-bargaining agreement, she could have been sought reimbursement at 40 cents per mile, for a total of \$64, Johnson decided to keep the status quo of having charged the \$40 for gas actually purchased on her Respondent-provided credit card and she did not submit a claim for reimbursement of her mileage. (Tr 877-78).

Second, Respondent points out that Johnson had not submitted travel documentation by the time the credit card statement was received and the subject of the gas purchase was raised. (R Br 14). However, as Accounting Assistant Mary Groves testified, it was common practice for many Respondent employees, including Moore himself, to wait until being reminded following receipt of the credit card statement before submitting this documentation. (Tr 635-37).

Lastly, Respondent correctly states that when asked by Respondent Treasurer Tim Schutt about the gasoline purchase, Johnson did not tell him about her reason for needing to use Respondent's credit card. (R Br 15). Yet, Respondent fails to note that Johnson testified that when she tried to explain what happened, Schutt did not give her an opportunity, but rather threw up his hands and insinuated that the matter was out of his hands. (Tr 864, 915).

While Respondent has tried to establish a valid *Wright Line* defense, the ALJ is correct that all given reasons are merely pretextual to hide the real reason - its desire to get rid of COSA and its representatives.

3. Termination of the Recall Rights of Mary Groves

The ALJ found that Respondent terminated Mary Groves' recall rights as part of its campaign to crush COSA. (ALJD 34:3-11). While Respondent President Moore claimed that it took this action because Groves did not respond in time and it was very important to utilize its Quickbooks Premium computer program, the ALJ correctly determined that the proffered explanation was pretextual as Schutt never testified about such a need and, in fact, he did not even know that Groves had been offered recall. (ALJD 33:14-41). While Respondent does not dispute this fact, in support of exception 5, Respondent argues that Moore did not require Treasurer Schutt's approval to recall the accounting assistant. (R Br 18). However, this argument misses the point. As the ALJ stated, the failure of Respondent's Treasurer to testify as to this urgent need or to be aware of Moore's efforts in moving forward on these plans, undermines the credibility of Moore's story. Respondent tries to undercut the ALJ's finding of an unlawful motivation by claiming that Moore's March 22, 2012, offer of recall "was more generous than necessary" since the time for a response had been reduced to five days in the recent interest arbitration. (R Br 16). Yet, any claim of generosity by Moore is unfounded, as the interest arbitration decision issued March 26, four days after Moore sent the recall notice and therefore received on that day, at the earliest.

Respondent goes on to argue that regardless of Moore's motivation, the determinative factor is that Groves' did not respond within the 10 days provided. (R Br 18). Yet, the record established that Groves did mail her response before

the end of the 10 days and it was not received because Moore scheduled the 9th and 10th days to fall on the weekend, when no mail was received. Respondent also argues that Groves' April 2, 2012, correspondences did not constitute an unequivocal acceptance of the recall. (R Br 17). Yet, Groves had the right to ask for clarification of the job offer, and if Moore wanted to fill the position quickly as he had testified, he could have called Groves to discuss the offer and get Groves' decision, rather to terminate her recall rights and start a search for someone else to fill the position. The ALJ noted that while Moore claimed this ambiguity was a genuine issue, as he acted in dealing with Manning's medical status, Moore showed no interest in contacting the employee to resolve this uncertainty, and this belies his true intentions. (ALJD 35:39-46).

4. Refusal to Allow Clyde Manning to Return to Work

On March 21, 2012, Manning left work due to major back pain. (Tr 183-84; R Ex 29). On March 29, Manning informed Moore that his doctor put him on several pain medications and muscle relaxants, and that he was hesitant to return to work until he could do so without the use of the "thought blurring" medication he was currently using. (Tr 1685-86; R Ex 28). Then, on April 10, Manning advised Respondent that his doctor had decided that the mix of medications he had been received was ill-advised and had been causing his inability to focus. (Tr 1686; R Ex 30). By April 30, Manning was cleared to return to work without restrictions, but Moore refused to allow him. (Tr 185; GC Ex 63). The ALJ

rightly found that this refusal was unlawfully motivated and violated Section 8(a)(3) of the Act.

Respondent argues that the ALJ's conclusion was error as Moore's asserted reliance on the "thought blurring" comment was reasonable and his decision was not unlawfully motivated. (R Br 20). The ALJ pointed out that if Moore had genuine concerns about Manning's use of these medications, he could have easily asked Manning to confirm whether he was still taking these or any medications. (ALJD 35:39-46). Respondent states in its supporting brief that this isn't the issue; rather the issue is whether it has been proven that Respondent acted as it did to Manning due to an unlawful motivation. (R Br 21). Respondent's argument though is illogical as Moore's disinterest in Manning's mental state illustrates that Moore's given reason is pretextual and Respondent therefore does not have a valid *Wright Line* defense.

Rather than letting Manning return to work, Moore exhausted considerable time by insisting that Manning go through additional medical evaluations. He claimed that he had the right to do so under Article 17, Section D, of the collective-bargaining agreement. (Tr 189, 1892-93; GC Ex 67, R Ex 32). This section states:

An employee receiving worker's compensation or Long Term Disability (LTD) benefits may elect to supplement such benefits with the use of sick leave and annual leave credits to the extent of the difference between the benefits and the employee's regular salary or wage. Nothing herein shall prevent the Employer from referring the employee to another physician or practitioner for a second opinion in the same field (doctor equal to or greater than) for a

second opinion, provided however, the Employer and the Association mutually agree upon the selection of such physician or practitioner, not to exceed two refusals by Association.

The ALJ correctly found that, since Manning was not and had not received worker's compensation or long term disability, the provisions of this section did not rightfully apply to him. (ALJD 35:3-4). Respondent makes a baseless claim that the second sentence of Section D does not relate to the subject matter of the first and only other sentence of that section. The same argument was made by Moore during his testimony and further demonstrates why he lacks all credibility.

D. ALJ's Determinations that Respondent Did Not Properly Respond to COSA's Requests for Information Were Correct (Exceptions 7, 8, and 9)

The ALJ found multiple and repeated refusals and delays in producing information which was requested by COSA. (ALJD 59:1-4). Yet, Respondent only files exceptions to his determinations as to three of these requests.

In exception 7, Respondent claims that the ALJ erred in finding that it did not sufficiently respond to the February 3, 2011, information request. In its supporting brief, it provides just one sentence on the matter, claiming that all information was provided on April 1, 2011. (R Br 21). Even if that were true, Respondent does not offer an explanation on why this delay was reasonable. Furthermore, it was established that all information was not produced on April 1. Rather than providing "a listing of employees currently receiving retiree benefits," Respondent presented COSA with a letter, stating that it refused to provide this

requested information and asked for COSA to state the relevance of this request. (Tr 67, 412; GC Ex. 84). At the contract bargaining meeting that day, COSA explained its right to the information, and even offered to make an accommodation in response to Respondent's concern of providing identifying employee numbers, by allowing Respondent to redact that information before turning the documents over. (Tr 67, 413). However, Respondent did not respond to COSA's offer and never provided the information. (Tr 67, 413). Thus, the ALJ's determination that Respondent did not provide this requested information was not made in error.

Respondent also alleges that the ALJ erred in finding a violation as to it not fulfilling the February 10, 2011, request for information concerning Respondent's members performing volunteer work, as Respondent claims that the request was overbroad and irrelevant. Yet, as the ALJ pointed out, COSA was concerned about volunteers performing bargaining unit work (Tr 45:26-31), and, as stated above, pre-arbitration work was actually taken from the labor relation specialists and given, in part, to volunteer Gonzales. Accordingly, the requested information is exceedingly relevant.

Respondent's argument that the request is overbroad is also unconvincing. It provides no legal basis for its argument, assumedly because existing case law does not support Respondent's position. (R Br 21). Rather, it is well established that the duty of an employer to bargain in good faith includes the obligation to disclose to its employees' collective bargaining representative information relevant and necessary to its role as bargaining agent. The Supreme Court has

enunciated a liberal discovery type standard, which mandates furnishing information if there is a probability that it will be relevant. *NLRB v. Acme Industrial Co.*, 385 U.S. 433, 437-38 (1967). As the requested information is plainly relevant, COSA had an unquestionable right to it.

Respondent's last exception as to information requests concerns the February 16, 2011, request about telephone and e-mail communications. Respondent points to a February 26 letter from Moore (GC Ex 86) in support of its claim that it sufficiently responded to this request. (MSEA Exceptions Brief 22). Yet, in that letter, Moore not only fails to provide the date that the phone system began advising callers that their call may be recorded (Tr 415), he outright refused to provide the requested information relating to email monitoring. (Tr 416; GC Ex. 86). Thus, while it is technically true that Respondent responded on February 26, the ALJ was correct in finding that it violated Section 8(a)(5) of the Act by failing and refusing to provide the requested information. (ALJD 47:11-12).

E. ALJ's Determination that Respondent Did Not Bargain in Good Faith with COSA Was Correct (Exception 13)

The ALJ found that Respondent bargained in bad faith with COSA. In arguing that this determination was incorrect, Respondent offers just three arguments as to why the ALJ's conclusion should be found to be in error.

First, Respondent argues that its bargaining committee consisted of a full-time State of Michigan employee, a retiree, and Respondent President Moore, who was also involved in negotiations with the State of Michigan at the time. (R Br 28). The unstated argument would presumably be that such delays were unavoidable. However, Respondent fails to mention the fact that Article 38 of the collective-bargaining agreement provided bargaining ground rules stating that while each party could only have three representatives at the bargaining table at one time, each party was entitled to a fourth representative as an alternate. (GC 4) Donna Spenner, Respondent's Vice President was that alternate and worked full-time for Respondent. (Tr 1726, 2045). Respondent does not explain why she wasn't more fully utilized in bargaining and it did not present her at the trial to testify as to these matters.

Respondent's second argument concerning bargaining is that it relied on COSA members for gathering required information and it had difficulty in obtaining an accurate membership count. (R Br 28). While Respondent strains credulity in claiming that only unit employees have access to such information, even if true, Respondent presented insufficient evidence at trial to establish that it requested any information from COSA or that information was not provided. Furthermore, Manning and Westphal each denied that Respondent ever stated during negotiations that its members were not supplying information, or furthermore, that Respondent was unable to make proposal because of this. (Tr 2115-16, 2167). The ALJ correctly rejected this defense in that the record does

not contain sufficient evidence to support Respondent's assertion that it was having problems in getting the information. (ALJD 55:6-10).

Lastly, Respondent argues that it should not have been found to have engaged in delaying tactics because it did meet for bargaining numerous times and it was able to reach agreement on the majority of issues. (R Br 29). However, the ALJ correctly noted that in judging the good faith or lack of good faith in bargaining, the Board focuses on the totality of the conduct, rather than viewing each factor separately. (ALJD 55:20-22, citing *Overnight Transportation Co.*, 296 NLRB 669, 671 (1989)). In reaching his decision, the ALJ recounted many pieces of evidence that not only demonstrates that Respondent had no desire to reach an agreement (ALJD 56:11-31), but also show that it had ill-disguised contempt towards COSA. (ALJD 55:43-46). As such, the ALJ's conclusion is well founded and this exception should be rejected.

III. CONCLUSION

For all of the above reasons, Counsels for the Acting General Counsel request that the National Labor Relations Board reject Respondent's exceptions and affirm the Decision and Order of the Administrative Law Judge finding's with modifications as requested in the Counsel's for the Acting General Counsel's own exceptions to the ALJ's Decision, and that it grant all of the recommended and requested relief.

Respectfully submitted this 19th day of June 2013.

Respectfully submitted,

/s/Scott R. Preston

Scott R. Preston
Counsel for the Acting General Counsel
National Labor Relations Board
477 Michigan Avenue, Room 300
Detroit, MI 48226
(313) 226-3346

/s/Judith A. Champa

Judith A. Champa
Counsel for the Acting General Counsel
National Labor Relations Board
477 Michigan Avenue, Room 300
Detroit, MI 48226
(313) 226-3207

Certificate of Service

I certify that on the 19th day of June, 2013, I e-mailed copies of Counsels for the Acting General Counsel's Answering Brief to Respondent Michigan State Employees Association's Exceptions to Decision of the Administrative Law Judge to the following parties of record:

Brandon W. Zuk, Esq.
Fraser Trebilcock Davis & Dunlap, PC
124 West Allegan Street
Suite 1000
Lansing, MI 48933

bzuk@fraserlawfirm.com

Ken Moore, President
Michigan State Employees
Association (MSEA), AFSCME
6035 Executive Drive, Suite 204
Lansing, MI 48911-5338

kmoore@msea.org

Clyde Manning
Central Office Staff Association
2705 E. Mount Hope Avenue
Lansing, MI 48910-1914

ckellymanning@hotmail.com

Rhonda Westphal
Central Office Staff Association

coinorbust1@aol.com

/s/Scott R. Preston
Scott R. Preston
Counsel for the Acting General Counsel

Date: June 19, 2013