

**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 BRIEF IN  
REPLY TO RESPONDENT MICHIGAN STATE EMPLOYEES  
ASSOCIATION'S ANSWERING BRIEF**

On June 19, 2013, Respondent Michigan State Employees Association filed its "Answering Brief to Exceptions of Counsel for the Acting General Counsel." (R Ans Br).<sup>1</sup> Pursuant to §102.46(h) of the Board's Rules and Regulations, Scott R. Preston and Judith A. Champa, Counsels for the Acting General Counsel in this matter, respectfully submit this reply brief.

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<sup>1</sup> References to the record are hereinafter abbreviated as follows: Administrative Law Judge Decision – ALJD (follow by page number: and line numbers); Respondent's Answering Brief – R Ans Br (followed by page number); General Counsel Exhibit - GC Ex (followed by exhibit number); and Transcript - Tr (followed by page number).

**I. ALJ Incorrectly Found that October 2010 Directive Was Not in Violation of Section 8(a)(1) of the Act in that It Would Not Be Construed to Prohibit Section 7 Activity or that It Had Been Applied to Restrict Section 7 Rights**

In his March 27, 2013, Decision, Administrative Law Judge (ALJ) Keltner W. Locke relied on *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), in his analysis of the October 8, 2010 directive to unit employees that all employee concerns are to be addressed to the president. (ALJD 5:35 – 11:39). Both Respondent and Counsels for the Acting General Counsel also use this case law to analyze the directive. *Lutheran Heritage* holds that a rule which does not explicitly restrict Section 7 activity, will still violate Section 8(a)(1) of the Act if either: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 646-47.

Counsels for the Acting General Counsels assert that both the first and third prong of this test are met in the instant matter, even though only one of the three needs to be established. As to the first prong involving the employees' reasonable beliefs, it is important to reiterate that the overly broad interpretation of the directive need not be the only reasonable interpretation. *Double D Construction Group, Inc.*, 339 NLRB 303, 303-04 (2003). While Respondent argues that the October 2010 directive could not be reasonably interpreted broadly enough to imply that discipline would be imposed for addressing issues to others than

Respondent's president (R Ans Br 3), it makes a startling admission while addressing the third prong of the *Lutheran Heritage* test:

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 discipline for violating the Work Rule was proper, Ms. Durner's attempt to persuade Chris Little and by extension other MSEA members to overrule operational decisions by President Moore was something that MSEA could properly prohibit. (R Ans Br 6).

Thus, while Respondent initially disingenuously denies the overbroad construction of the directive, it concludes by arguing that discipline is not only permissible for communication to individuals other than the president in violation of the directive; such communication was properly prohibited.<sup>2</sup>

As to the third prong of the *Lutheran Heritage* test, we cited in our brief in support of our exceptions that the ALJ failed to take notice of an admission by Respondent's President Moore that Nancy Durner was discharged, in part, for insubordination by communicating with others in violation of the October 2010 directive. (Tr 1862). The ALJ also ignored testimony by both Clyde Manning and Nancy Durner that they were told by Moore that insubordination cited to in Durner's discharge referred to disregard of the October 2010 directive. (Tr 101,

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<sup>2</sup> As found by the ALJ, the 'operational decision' referred to by Respondent concerned the implementation of a new phone system, which directly affected Nancy Durner and the bargaining unit as a whole. (ALJD 18:14-17). Therefore, while in its own exception 2, Respondent cites to *Riverbay Corporation*, 341 NLRB 255 (2004), in arguing that Durner's discharge was not in violation of Section 8(a)(3) because she was engaged in Respondent's internal politics by trying to undermine the president's position, here Respondent explicitly admits that Ms. Durner was trying to effect change in the bargaining unit's terms and conditions of employment, which is protected activity. Therefore, Respondent's exception 2 should be denied.

304). Respondent does not dispute these facts. Rather, Respondent completely ignores these parts of the record and disingenuously recites the ALJ's incomplete analysis in finding that other parts of the record do not sufficiently support the conclusion that Durner was discharged, in part, due to her violation of the October 2010, although Respondent's president readily admitted that. (Tr 1862).

The ALJ's oversight of this testimony in the record not only shows that his conclusion that the third prong of the Lutheran Heritage test was not fulfilled is incorrect; it also shows that his decision that Durner was not discharged under this unlawful directive is incorrect. Therefore, Counsels for the Acting General Counsel respectfully requests that the Board find merit to our first and second exceptions.

**II. ALJ Incorrectly Found that the June 14, 2012 Discipline of Rhonda Westphal Was Not in Violation of Section 8(a)(3) of the Act**

In his Decision, the ALJ found that Counsels for the Acting General Counsel met our burden to show that Respondent disciplined Rhonda Westphal in substantial part because of her union activity. (ALJD 37:38-40). However, the ALJ also found that Respondent would have taken the same action regardless of her union activity because President Moore had a legitimate reason to reduce unnecessary travel and related expenses. (ALJD 37:42-45). The ALJ made this conclusion even though he acknowledged that Moore had not previously been disciplining employees for allegedly unapproved travel. (ALJD 36:39-41, 37:5-6).

In our brief in support of our exception 3, Counsels for the Acting General Counsel noted the testimony of Westphal that Respondent's Treasurer Tim Schutt told her that Moore had informed him that this discipline was administered to Westphal so that he would not have problems with the discharge of Audrey Johnson, which was, in part, assertedly for the same reason. (Tr 482). While Schutt testified in the hearing, he did not dispute this statement. Respondent argues that this statement, if made, would only go to a contractual issue of just cause. (R Ans Br 7). However, Respondent's assertion has no legal or logical basis.

The ALJ correctly found that Respondent's specified reasons for discharging Audrey Johnson were pretextual and that she was discharged as part of a campaign to crush the collective-bargaining representative of Respondent's employees. (ALJD 29:9-13). Moore's statement to Schutt establishes that the Westphal's discipline was not the legitimate business reason that the ALJ found; rather, it was an attempt to cover up the inconsistent application of one of the pretextual reasons given for Johnson's discharge. As such, Respondent would have not taken the same action if its actions were not motivated by unlawful antiunion animus. Therefore, Counsels for the Acting General Counsel ask the Board that the ALJ's determination of a valid *Wright Line* defense be found to have been in error and that it find merit in our exception 3.

**III. ALJ Incorrectly Found that the Work Rules Were Implemented on July 12, 2011, Rather Than the Actual Date of July 12, 2012, and Incorrectly Excluded Rhonda Westphal's Discipline from Proposed Order Due to that Error**

The record clearly establishes that the work rules were unilaterally implemented on July 12, 2011, at Nancy Durner's discharge meeting. (Tr 102, 306). This was acknowledged by the ALJ in his decision. (ALJD 50:12-13). However, elsewhere in his decision, including his Recommended Order, he mistakenly cites the date as July 12, 2012. (ALJD 60:27-35). Based upon this error, the ALJ found that Westphal's June 18, 2012, discipline occurred before the unlawful implementation of the work rules and should not be addressed under the Recommended Order. (ALJD 38:27-41).

Respondent does not dispute this error, but rather argues that the error is irrelevant in that, as Respondent argues in its brief in support of its exceptions, the work rules were properly implemented in 2007. (R Ans Br 8). As explained in our answering brief to Respondent's exceptions, this argument is without merit. Counsels for the General Counsel respectfully request that the Board correct the ALJ's clear error, find that the work rules were unlawfully implemented on July 12, 2011, and find that Westphal's discipline pursuant to those work rules should be rescinded under the remedy for the unlawful implementation of the work rules on July 12, 2011.

**IV. ALJ Failed to Address and Find Failure and Refusal to Provide Information in Response to October 25, and November 4, 2011, Information Requests**

The ALJ's failed to make findings as to the properly alleged and fully litigated refusals to provide information violations in response to the October 25, and November 4, 2011, information requests. Respondent does not dispute that the ALJ made this omission. Rather, it argues that the allegations themselves have no merit.

As to October 25 information request, Respondent argues that the Charging Union failed to identify any particular need for the information. (R Ans Br 8). However, as the request concerned personnel files of unit employees, the information requested was presumptively relevant. While it is possible that Respondent may have had some concern about possibly providing confidential information, it failed to express any such concerns or to offer a reasonable accommodation as it would have been required to have done if such a claim had been made. *Tritac Corp.*, 286 NLRB 522 (1987).

As to the November 4 information request, Respondent inexplicably claims that all information was provided on November 7, 2011. (R Ans Br 8). However, 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 137-38; GC Ex 50). Respondent provided none of this information. Instead, President Moore responded on November 7 that

the cell phones were considered a tool of the trade, were removed at the recommendation of its Board of Directors, and that the information request “seems to be out of order and this request for information will not be addressed.” (Tr 138-39; GC Ex 51).

Counsels for the Acting General Counsel respectfully request that that Board rectify the ALJ’s omission by finding that Respondent failed and refused to provide information in response to the October 25, and November 4, 2011, information requests, and provide the appropriate remedies.

## **V. Conclusion**

For the reasons stated above in our brief in support of our exceptions, we ask that the Board find merit in Counsels for 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 Counsels for the Acting General Counsel. We further request 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). (ALJD 57:42, 64:33, 65:1).

Respectfully submitted this 3rd day of July 2013.

Respectfully submitted,

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**Certificate of Service**

I certify that on the 3rd day of July, 2013, I e-mailed copies of Counsels for the  
Acting General Counsel's Brief in Reply to Respondent Michigan State Employees

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