

**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-103202
07-CA-089960

BENNY POOLE, An individual
Charging Party

and

CASES 07-CA-101623
07-CA-101629

CENTRAL OFFICE STAFF ASSOCIATION,
Charging Union

**OPPOSITION OF COUNSEL FOR THE ACTING GENERAL COUNSEL
TO RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Now comes Scott Preston, Counsel for the Acting General Counsel in this matter, and opposes Respondent's motion for partial summary judgment, and states the following:

1. On June 28, 2013, Counsel for the Acting General Counsel issued a Second Consolidated Amended Complaint (Complaint), alleging violations by Respondent including violations of Sections 8(a)(1) and (4), and 8(b)(1)(A),

involving Charging Party Benny Poole, as described in paragraphs 16, 21, 23, and 24 of the Complaint. On September 9, 2013, Respondent filed the Motion described above. Respondent argues in its Motion that Poole is not an employee within the meaning of the Act, and that the Complaint underlying this matter does not plead that he is an employee. Respondent further asserts that it is not a labor organization within the meaning of the Act, as it only represents public sector employees. Respondent further contends that as a result, as a matter of law, it cannot have discriminated against Poole in violation of Section 8(a)(1) or (4) of the Act, nor could it have violated Section 8(b)(1)(A) of the Act.

2. As an initial matter, Respondent did not properly serve Counsel for the Acting General Counsel with its Motion for Summary Judgment. Under the Board's Rules and Regulations, Section 102.114 (a): "...service on all parties shall be made in the same manner as that utilized in filing the paper with the Board, or in a more expeditious manner ..." Further, pursuant to Section 102.114 (c), "[f]ailure to comply with the requirements of this section relating to timeliness of service on other parties shall be a basis for either: (1) A rejection of the document; or (2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond." As noted in Respondent's Proof of Service, it served a copy of its Motion for Partial Summary Judgment on all parties, including the Regional Director of Region 7, and Region 7 attorney Scott

Preston, on September 9, 2013, by regular mail. Region 7 did not receive service of the Motion from Respondent until it arrived on September 11, 2013 via regular mail. (Exhibit 1). Respondent's Motion indicates that it served the "NLRB office" electronically on September 9. While it is unclear whether Respondent is referring to the office of the NLRB's Executive Secretary, or the office of NLRB Region 7, NLRB Region 7 did not receive, from Respondent, a copy of Respondent's motion electronically. Respondent thus did not comply with Section 102.114(a) of the NLRB's Rules and Regulations by not serving all parties in the same manner that it served its Motion on the Board. Accordingly, pursuant to Section 102.114(c)(1) of the Rules and Regulations, Counsel for the General Counsel requests that Respondent's Motion be rejected.

3. Respondent attached to its motion a self-serving, Respondent prepared affidavit of its chief agent, Ken Moore. Counsel for the General Counsel requests that in the event Respondent's Motion is not rejected in its entirety as requested above in Item 1 of this Response, that Moore's affidavit be stricken. Moore's affidavit, as well as various assertions in Respondent's Motion, raise factual issues which are best left to hearing before an Administrative Law Judge. Moore's testimony should not be considered unless and until he has testified in this proceeding before an Administrative Law Judge and after all parties have had the opportunity for cross examination.

4. This matter arises out of an earlier NLRB case involving Respondent: *Michigan State Employees Association*, JD (ATL) 07-13 (March 27, 2013), at which Poole, a chief steward for Respondent testified as a witness in support of the Charging Party, Central Office Staff Association (COSA). In that matter, jurisdiction was not disputed, as Respondent is a private employer of the unit of staff employees represented by COSA. Shortly after Poole’s testimony, which was heavily relied on by the Administrative Law Judge in concluding Respondent violated the Act, Respondent suspended Poole’s union membership for two years.

5. The Board has jurisdiction over MSEA as an employer, regardless of Poole’s status as an employee of MSEA, due to the broad protection afforded under Section 8(a)(4) of the Act. As noted by the Supreme Court, Congress adopted 8(a)(4) to ensure that “all persons with information about [unfair labor practices] be completely free from coercion against reporting them to the Board.” *Nash v. Florida Industrial Commission*, 389 US 235, 238 (1967) (emphasis added). “This complete freedom is necessary ... to prevent the Board’s channels of information from being dried up by employer intimidation of prospective complainants and witnesses. *NLRB v. AA Electric Co.*, 405 U.S. 117, 122 (1972). The Board and the courts have generously construed the provisions of Section 8(a)(4) , recognizing that “if the Board is to perform its statutory function ... its procedures must be kept open to individuals who wish to initiate unfair labor

practice proceedings, and protection must be accorded to individuals who participate in such proceedings. *General Services*, 229 NLRB 940, 941 (1977), enf. Denied mem. 575 F.2d 298 (5th Cir. 1978).

6. Consistent with the broad interpretation of Section 8(a)(4), an employer has been found to violate the Act by retaliating against non-statutory employees, such as supervisors, who testify during a Board proceeding. See *SNE Enterprises, Inc.*, 347 NLRB 472, 497 (2006), enforced 257 Fed Appx 642 (4th Cir. 2007). The Board has further found job applicants and employees of other employers to be within the protections of Section 8(a)(4). See e.g. *Briggs Manufacturing Company*, 75 NLRB 569, 571 (1947) (job applicants); *Lamar Creamery Company*, 115 NLRB 1113 (1056, enforced 246 F.2d 8 (5th Cir. 1957) (employees of another employer). Any protection afforded a non-statutory employee flows from the need to vindicate statutory employees' exercise of their Section 7 rights, rather than from any statutory rights of the non-statutory employees. See *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 403 (1982), review denied sub nom., *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983).

7. With respect to the allegations that Respondent violated Section 8(b)(1)(A), Counsel for the Acting General Counsel has a reasonable basis for pleading this theory in conjunction with the 8(a)(1) and (4) theory. Although the alleged retaliation of Poole arose out of his testimony against Respondent as a

private employer of COSA staff employees, Respondent also served as the Union representing Poole, albeit in the public sector. Although under different circumstances, the NLRB would likely not have jurisdiction over MSEA as a labor organization if it only serves the public sector, this case is directly related to Poole's NLRB testimony. Counsel for the Acting General Counsel intends to present a case before the Administrative Law Judge establishing that due to the overlapping issues and public policy matters involved, the NLRB has exclusive jurisdiction over MSEA for all matters alleging discrimination arising out of its own proceedings.

8. The issues involving Poole are not solely legal in nature, despite Respondent's assertions. There are underlying factual disputes in this matter: i.e., Poole's actual status with Respondent, and whether Respondent's motives toward Poole resulted from his testimony at an NLRB proceeding. If the latter is concluded based on the evidence presented at hearing, the NLRB would have jurisdiction over MSEA as a matter of policy. A determination on these issues can best be made by the trier of fact, after Counsel for the General Counsel has presented the proofs. Accordingly, summary judgment in this matter is inappropriate.

WHEREFORE, the undersigned respectfully requests that Respondent's motion for partial summary judgment be denied.

Dated at Detroit, Michigan, this 16th day of September 2013.

/s/ Scott Preston

Scott Preston

Counsel for the General Counsel

National Labor Relations Board

Seventh Region

Patrick V. McNamara Federal Building

477 Michigan Avenue - Room 300

Detroit, Michigan 48226

I certify that on the 16th day of September, 2013, I electronically filed a copy of Counsel for the Acting General Counsel's Opposition to Respondent's Motion for Summary Judgment with the Office of the Executive Secretary of the NLRB, and served a copy of this document on each of the following parties by electronic mail:

Brandon Zuk, Esq.
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A copy was also served by regular U.S. mail on the following party:

Benny Poole*
P.O. Box 324
Jackson, MI 49204-0324

/s/ Judith A. Champa
Judith A. Champa
Region 7 Attorney

*The Region does not have an email address on file for Benny Poole.