UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR REVIEW

MICHIGAN STATE EMPLOYEES ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Agency Nos:
NLRB Case Nos. **07-CA-053541**
07-CA-060319
07-CA-060320
07-CA-065560
07-CA-065681
07-CA-069475
07-CA-079382
07-CA-081500

Petitioner, MICHIGAN STATE EMPLOYEES ASSOCIATION, hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board in the above NLRB case numbers, entered on August 4, 2016, which is attached hereto and made a part of this Petition for Review.

Respectfully submitted,
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Dated: August 18, 2016

Fraser Trebilcock LAWYERS

(Proof of Service continued on next page)

PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT ON **AUGUST 18, 2016,** THE FOREGOING INSTRUMENT (WITH ATTACHMENT), APPEARANCE; AND DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST SIMULTANEOUSLY E-FILED WITH FOREGOING PETITION WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE IN THE NLRB PROCEEDING AT THEIR RESPECTIVE ADDRESSES DISCLOSED IN THE NLRB PLEADINGS (AND STATED BELOW), BY:

xx	U.S. MAIL	_____	FAX
_____	HAND DELIVERY	_____	U.S. EXPRESS MAIL
_____	FEDERAL EXPRESS	_____	OTHER

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Michigan State Employees Association d/b/a American Federation of State County 5 MI Loc Michigan State Employees Association, AFL–CIO *and* Central Office Staff Association. Cases 07–CA–053541, 07–CA–060319, 07–CA–060320, 07–CA–065560, 07–CA–065681, 07–CA–069475, 07–CA–079382, and 07–CA–081500

August 4, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On March 27, 2013, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs,[1] and answering briefs; the General Counsel also filed a reply brief.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[1] On June 7, 2013, the Board granted the General Counsel's motion to strike an attachment to the Respondent's brief.

[2] On April 3, 2014, the Respondent filed a motion to reopen the record and a supporting brief, with several attachments, including an attachment that the Board had previously struck. In the motion, the Respondent requests that the Board vacate the judge's decision and reopen the record to afford it an opportunity to submit further evidence relating to the credibility of witness Benny Poole, who testified at the hearing in the instant matter on August 31, 2012. The General Counsel filed an opposition. We deny the motion for the following reasons. First, the Board's long-established policy is that it "will not reopen a record so that a party may attack a judge's credibility resolutions." See *Alta Bates Summit Medical Center*, 357 NLRB 259, 260 (2011), and cases cited therein, enf. denied on other grounds 687 F.3d 424 (D.C. Cir. 2012). See also *Labor Ready, Inc.*, 330 NLRB 1024, 1025 (2000) (motion for reconsideration denied to the extent it was an attack on credibility determinations where party sought to introduce new evidence that a key witness lied at the hearing). Unlike the present case, in each of the cases cited by the dissent, the Board was faced with evidence that a witness lied about a *material fact*, i.e., a fact that establishes or refutes an essential element of an unfair labor practice or a defense. Thus, in *Southdown Care Center*, 308 NLRB 225, 225–226 (1992), a witness provided the General Counsel with an affidavit recanting her testimony in the unfair labor practice hearing that characterized a group of employees (who were later disciplined for their conduct) as engaging in loud, disruptive, and frightening conduct and blocking her wheelchair. In *Inland Container Corp.*, 273 NLRB 1856, 1857 (1985), the witness testified at the unfair labor practice hearing that the successor employer, which allegedly refused to hire union applicants, used three innocuous criteria in hiring; in answering interrogatories in a federal proceeding, however, it added a fourth criterion: that applicants be willing to work in nonunion workplace. In *Lincoln Center for the Performing Arts, Inc.*, 340 NLRB 1100, 1118 (2003), calendars and weekly reports obtained through discovery in a separate proceeding could have belied a witness' testimony at the unfair labor practice hearing that the employer called police to have union leafletters arrested. Here, by contrast, the Respondent seeks to introduce evidence of perjury that does not refute a material fact, but rather goes to possible bias, and therefore, to the judge's credibility determinations. Second, the new evidence does not compel a different result. The judge's finding of unlawful motive does not rely solely on Poole's testimony; he cited ample additional evidence. Third and finally, the motion was untimely. Sec. 102.48(d)(2) of the Board's Rules and Regulations states that a motion to reopen must be filed "promptly on discovery of such evidence." The Respondent asserts that it discovered the new evidence on January 20, 2014, while taking depositions in a state court proceeding concerning employee Audrey Johnson's discharge. The Respondent obtained related documents on January 29 and on March 14, 2014. Yet, it waited until April 3 to file the motion. The Respondent did not promptly file the motion upon discovery of the new evidence, and it proffers no explanation for its failure to do so. See *Precoat Metals*, 341 NLRB 1137, 1137 fn. 1 (2004).

Member Miscimarra would grant the Respondent's motion to reopen the record to permit the Respondent to introduce evidence bearing on the credibility and potential bias of witness Benny Poole, and he would remand the case to the judge to reevaluate Poole's credibility and neutrality in light of this new evidence and to reconsider all unfair labor practice findings the judge reached in reliance on Poole's testimony. Attached as an exhibit to the Respondent's brief in support of its motion is a transcript of Poole's deposition testimony in a state court action brought by Audrey Johnson, formerly an officer of the Charging Party Union and an alleged discriminatee in this case. The proffered deposition testimony postdates Poole's testimony in the instant unfair labor practice proceeding. If received and credited, Poole's deposition testimony would establish that Poole testified falsely in the unfair labor practice hearing. Specifically, Poole's deposition testimony, if received and credited, would show that Poole testified falsely concerning his residential address. In addition, Poole's deposition testimony together with other exhibits attached to the Respondent's brief (but not the exhibit the Board previously struck) would establish that Poole and Johnson were living at the same address at the time of the unfair labor practice hearing. The Board has reopened the record and remanded to the administrative law judge where it appears that a witness may have perjured him- or herself. See *Lincoln Center for the Performing Arts*, 340 NLRB 1100, 1118 (2003); *Southdown Care Center*, 308 NLRB 225, 225–226 (1992); *Inland Container Corp.*, 273 NLRB 1856, 1857 (1985) (Although "newly discovered evidence, the effect of which is merely to discredit, contradict or impeach a witness" does not warrant reopening the record, "[n]o tribunal can disregard allegations" of perjury.). Consistent with these precedents, Member Miscimarra believes the record should be reopened to receive this evidence and the judge should reconsider any of his findings that relied on Poole's testimony. He also believes the majority understates the significance of Poole's testimony. Poole testified that the Respondent's president, Kenneth Moore, said to Poole, "You have to help me get COSA"—i.e., the Charging Party Union. The judge credited Poole's testimony, and this testimony was the basis of the judge's finding that animus against the Charging Party Union was a motivating factor in several adverse employment actions found by the judge to have violated Sec. 8(a)(3). Unless the judge credited Poole's testimony, those findings could not be supported. Moreover, unlike his colleagues, Member Miscimarra would find the Respondent's April 3, 2014 motion to reopen timely. He believes the Respondent reasonably waited to submit its motion until it had obtained everything it wishes to introduce into the reopened record, and the documents the Respondent seeks to introduce include an official record of the State of Michigan dated March 21, 2014—just 2 weeks before the date the motion to reopen was filed.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified and supplemented below and to adopt the recommended Order as modified and set forth in full below.[4]

We affirm the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by placing employee Audrey Johnson on administrative leave and discharging her[5] and violated Section 8(a)(1) of the Act by requiring her to complete an investigatory questionnaire that prohibited her from discussing its contents under threat of discharge.[6] We also affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging employee Nancy Durner, terminating the recall rights of employee Mary Groves, and delaying employee Clyde Manning's return to work.[7] In addition, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by repeatedly refusing to provide relevant information that the Union requested and unreasonably delaying in providing other requested information, unilaterally implementing work rules, unilaterally ceasing to provide cell phones and cell phone subsidies to unit employees, unilaterally removing

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(3) and (4) by isolating COSA officers or to the judge's findings that MSEA violated Sec. 8(a)(5) by failing to provide information that COSA requested regarding Fidencio Gonzales' work and his temporary hire, incoming mail, and the duties of MSEA's officers.

[4] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change. We shall modify the recommended Order and notice to conform to our decision in *Durham School Services*, 360 NLRB No. 85 (2014), and to the Board's customary language. Make-whole relief for employees who suffered cessation of employment (or, in the case of employees Mary Groves and Clyde Manning, inability to resume employment) as a result of the Respondent's unfair labor practices shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Backpay for employees who suffered economic loss but no cessation of employment as a result of the Respondent's unfair labor practices shall be computed in accordance with *Ogle Protection Service, Inc.*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

In the complaint, the General Counsel requests, and the judge's recommended Order directs, that Johnson and Nancy Durner be reimbursed for any out-of-pocket expenses incurred while searching for interim employment. Because the relief sought would involve a change in Board law, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

[5] Member Miscimarra does not pass on the 8(a)(3) suspension and discharge allegations regarding Johnson. In finding that animus against the Charging Party Union was a motivating factor in Johnson's suspension and discharge, the judge squarely relied on the testimony of Benny Poole. In light of proffered evidence calling Poole's credibility into question, Member Miscimarra would grant the Respondent's motion to reopen the record and would remand the instant case to the judge. See supra fn. 2. Accordingly, he would leave the legality of Johnson's suspension and termination for the judge to address on remand.

[6] In finding that the Respondent required Johnson to complete a questionnaire that unlawfully prohibited disclosure of its contents to other employees, we do not rely on *Banner Estrella Medical Center*, 358 NLRB 809 (2012), cited by the judge, which was issued when the Board lacked a quorum. Instead, we rely on the Board's subsequent decision in *Banner Estrella*, reported at 362 NLRB No. 137 (2015). For the following reasons, Member Miscimarra concurs in finding that the Respondent violated Sec. 8(a)(1) when it required Johnson to complete the investigatory questionnaire. On the one hand, the questionnaire, which concerned Johnson's use of an MSEA credit card, required Johnson, on pain of discharge, to keep the contents of the questionnaire confidential, a requirement that had a substantial impact on the exercise of Sec. 7 rights. On the other hand, testimony regarding the business ends served by the confidentiality requirement—MSEA President Moore's testimony that it was necessary "to protect the integrity of the investigation"—lacked particularity and was unsupported by other evidence. Balancing the respective rights and interests, Member Miscimarra finds that the Respondent has not established an interest justifying its nondisclosure requirement that outweighs the impact of that requirement on the exercise of Sec. 7 rights. See *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 7–21 (2015) (Member Miscimarra, dissenting in part).

[7] We reject the Respondent's argument that because Groves put her house up for sale and was contemplating moving to Arizona, she was not genuinely interested in the Respondent's recall offer. At the time Groves responded affirmatively to the recall offer, those were contingency plans, not irreversible decisions. She had been laid off for 16 months and turned down another offer of employment on the same day she responded to the recall offer. Member Miscimarra does not pass on the allegations regarding Groves and Manning. Again, in finding that the Respondent unlawfully terminated Groves' recall rights and unlawfully delayed Manning's return to work, the judge squarely relied on Poole's testimony to link the employees' protected activities to the Respondent's adverse actions. In light of proffered evidence calling Poole's credibility into question, Member Miscimarra would grant the Respondent's motion to reopen the record and would remand the instant case to the judge. See supra fn. 2. Accordingly, he would leave the Sec. 8(a)(3) allegations regarding Respondent's treatment of Groves and Manning for the judge to address on remand.

The judge dismissed allegations that the suspension and discharge of Durner and Johnson, the termination of Groves's recall rights, and the delayed return of Manning also violated Sec. 8(a)(4). There are no exceptions to those dismissals.

prearbitration settlement work,[8] and failing to bargain in good faith with the Union over the removal of this bargaining unit work. As explained below, however, we disagree with certain of the judge's additional findings and we supplement other findings.

Introduction

Michigan State Employees Association (the Respondent or MSEA) is a labor organization that does business as Local 5 of the American Federation of State, County and Municipal Employees, AFL–CIO. MSEA represents employees of the State of Michigan and maintains an office in Lansing. Elected officers and a board of directors manage the Respondent, which employs a small staff of paid representatives and office workers to run its day-to-day operations. These staff employees are represented for purposes of collective bargaining by the Charging Party, Central Office Staff Association (COSA). This case arose in the context of the Respondent's role as an employer.

I. THE OVERBROAD RULE

On October 8, 2010, the Respondent's President, Kenneth Moore, issued a memorandum to all employees entitled "**DIRECTIVE FROM THE PRESIDENT**" with the subject line "MSEA Employees Concerns." The directive stated, "Effective immediately, all employee concerns regarding any MSEA issues are to be presented, and addressed, directly by the President." The judge found that the Respondent's maintenance of the rule was lawful. We reverse.

An employer's maintenance of a work rule violates the Act when the rule reasonably tends to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–645 (2004). If the rule explicitly restricts Section 7 activity, it is unlawful. Id. Absent an explicit restriction, "the violation is dependent upon a showing of one of the following: (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.

Because MSEA's directive does not explicitly prohibit Section 7 activity, we undertake the second part of the *Lutheran Heritage Village* analysis. Contrary to the judge, we find that the rule runs afoul of the first and third prongs of the test. First, because the directive does not define "employee concerns," employees would reasonably construe the rule to prohibit their discussion of terms and conditions of employment. Second, the directive categorically states that employees must present "all employee concerns regarding any MSEA issues" directly to Moore. The directive thereby plainly conveyed the message that employee concerns were to be discussed with no one other than Moore. See *Hyundai America Shipping Agency*, 357 NLRB 860, 860, 871 (2011) (handbook rule requiring employees to "[v]oice your complaints directly to your immediate superior or to Human Resources…" was unlawful), enf. denied 805 F.3d 309 (D.C. Cir. 2015). It is immaterial that the directive does not expressly threaten adverse consequences for employees' failure to adhere to it. Moore's use of bold type capitalization made it abundantly clear that employees would disregard the directive at their own risk.

Although Moore testified that the directive was intended to keep employees from interfering with the business of the Respondent's Executive Board, the directive itself includes no such indication and there is no evidence that Moore communicated that purpose to employees. But even if he had, protected concerted activity encompasses "political activity" when it relates to employees' terms and conditions of employment, and an employer's blanket prohibition of such activity violates the Act. See *American Federation of Teachers, New Mexico*, 360 NLRB No. 59 (2014) (unlawful rule prohibited "AFT-NM employees from engaging in internal politics of AFT-NM, its locals, or AFT, including lobbying executive council members on items likely to come before them, including personnel matters"). See also *Senior Citizens Coordinating Council of Riverbay Community,*

[8] Member Miscimarra joins his colleagues in affirming the judge's finding that the Respondent violated Sec. 8(a)(5) when it unilaterally removed prearbitration settlement work from the bargaining unit. In doing so, he relies on the judge's finding and record evidence that the decline in prearbitration settlement work assigned to unit employees was not accounted for by the terms of the Respondent's 2011 collective-bargaining agreement with the State of Michigan. Member Miscimarra does not rely on the judge's finding that the removal of this work from the unit was motivated by a desire to "get rid of" the Charging Party Union. In determining whether an employer has unilaterally changed a term or condition of employment in violation of Sec. 8(a)(5), motive is irrelevant. See *Consolidation Coal Co.*, 253 NLRB 789, 792 (1980), enf. denied on other grounds 669 F.2d 482 (7th Cir. 1982). In addition, Member Miscimarra disagrees with the judge's categorical statement that "an employer violates Section 8(a)(5) when it diverts bargaining unit work without bargaining with the union" because many decisions that have the effect of reducing work performed by unit employees are not mandatory subjects of bargaining. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674–688 (1981); *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209–215 (1964); *Dubuque Packing Co.*, 303 NLRB 386, 390–392 (1991), enfd. in relevant part sub nom. *UFCW Local No. 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), cert. dismissed 511 U.S. 1138 (1994). Member Miscimarra agrees, of course, that where an employer has no duty to bargain concerning a particular decision, it still has a potential duty to bargain with the union concerning the effects of the decision "in a meaningful manner and at a meaningful time." *First National Maintenance*, supra, 452 U.S. at 682.

Inc., 330 NLRB 1100, 1103 (2000) (employees' concerted attempts to influence selection of supervisors and managers are protected where the employees' terms and conditions of employment are directly affected).

In addition, the rule at issue is unlawful under prong 3 of *Lutheran Heritage Village* because the Respondent applied the directive to restrict Section 7 activity when it suspended and discharged MSEA administrative assistant Nancy Durner. In finding that the Respondent unlawfully discharged Durner, the judge found that the Respondent relied on unilaterally implemented work rules, not Moore's October 8 directive. As explained below, we find that the record shows that the Respondent also relied on the October 8 directive.

Durner, who served as COSA's secretary-treasurer, complained to MSEA's Board Member Christopher Little that President Moore was taking bargaining unit work from employees, that MSEA's board members blindly followed Moore's recommendations, and that callers and employees were experiencing frustration with the Respondent's newly installed automated telephone system.[9] Little reported Durner's complaint to Moore.[10] On May 27, at Moore's request, Little submitted a written report of Durner's complaint. On June 2, Moore suspended Durner pending an investigation. On July 5, Moore summoned Durner to his office, questioned her about her conversation with Little, and recommended that she resign. Durner refused. On July 12, Moore summoned Durner back to the office and handed her a discharge notice, enumerating "Political Activity..., Conduct Unbecoming; [and] Insubordination or Disregard for Authority" as grounds for her discharge.

We agree with the judge that Durner was engaged in protected concerted activity when she complained to Little and that the Respondent unlawfully unilaterally implemented the work rules it cited when it discharged her. However, the record demonstrates that Moore relied on both the work rules and his October 8 directive when he discharged Durner. Moore testified that when Little first told him about Durner's complaint, Moore emailed former MSEA officers to find out whether the Respondent had implemented its 2007 Staff Work Rules prohibiting political activity, conduct unbecoming, and insubordination, and that MSEA's past president Roberto Mosqueda replied—incorrectly—that the rules were in effect; indeed, they had not been implemented. Significantly, Moore testified that "[t]he issue with Nancy Durner is she never brought it to the president to address the issue." When counsel for the General Counsel asked Moore why he fired Durner, Moore responded, "Insubordination to the directive October 8, 2010, that any concerns she has with the employer should be addressed with the president." Moore's admissions establish that MSEA relied on the directive as well as staff work rules when it discharged Durner. Because employees would reasonably construe the directive to restrict Section 7 activity and because the Respondent relied on the directive to discipline Durner for her protected, concerted activity, we find that maintenance of the directive violates Section 8(a)(1) of the Act.[11]

II. THE DISCIPLINE OF RHONDA WESTPHAL

In 2004, the Respondent employed Rhonda Westphal as a labor relations specialist. In 2005, she became COSA's vice president. As a labor relations specialist, Westphal helped resolve MSEA members' employment grievances, and she helped prepare for and participate in the mediation and arbitration of those grievances. To perform those responsibilities, Westphal and other labor relations specialists occasionally traveled to meet with the Respondent's members and employer representatives at their worksites. The Respondent reimbursed them for approved travel costs.

On December 15, 2010, Moore issued a directive that required all employees to submit a weekly schedule in advance and a daily activity log the following week. Employees were to document their anticipated activities on the weekly schedule, including any out-of-office work, and submit it every Thursday. They were to document the type and amount of work they performed each day on the daily activity log and submit it every Monday. Copies of the forms were attached to the directive. In November 2011, Moore reaffirmed those requirements, adding that notations on the staff activity form should be

[9] COSA had filed a grievance over Moore's reassignment of some of Durner's work to volunteers.

[10] Little also told Moore that Durner said the board members "had no balls." The judge credited Durner's denial that she made that statement.

[11] Member Miscimarra concurs in his colleagues' finding that Moore's directive violated Sec. 8(a)(1) of the Act under the third prong of the standard set forth in *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 646–647 (2004), because the Respondent applied the October 8 directive to restrict the exercise of Sec. 7 rights. He does not reach or pass on whether the directive also violated the Act on the basis that employees would reasonably construe the directive to prohibit Sec. 7 activity. However, Member Miscimarra disagrees with the *Lutheran Heritage* "reasonably construe" standard for the reasons explained in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part). Accordingly, Member Miscimarra believes that the Board can find it is unlawful for an employer to maintain a facially neutral rule that does not expressly prohibit protected activity, was not promulgated in response to such activity and has not been applied to restrict the exercise of Sec. 7 rights only if legitimate justifications associated with the rule are outweighed by its adverse impact on Sec. 7 conduct. Id., slip op. at 9.

specific rather than vague. The November 2011 directive also stated, "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."[12]

Westphal regularly submitted her forms to Tamara Voight, Moore's administrative assistant. On Friday, May 11, 2012, Westphal submitted her weekly schedule for the week of May 14 through 18.[13] The form indicated that she planned to travel to Coldwater, Michigan, on May 18, to meet with one of the Respondent's members to prepare for an arbitration hearing. As planned, Westphal drove to Coldwater and back and, when she returned, submitted a travel voucher for reimbursement in the amount of $74.26 to the Respondent's treasurer, Timothy Schutt.[14] Schutt approved the voucher the same day. Subsequently, however, Moore disapproved the voucher and wrote across it in large print, "NOT APPROVED OUT OF OFFICE WORK." Moore also chided Schutt in an email for approving the voucher. On June 6, 2012, Voight emailed Westphal asking who had authorized or approved her out-of-office work on May 18. Westphal responded that she had entered her trip to Coldwater on her weekly schedule.

On June 13, 2012, Westphal represented fellow employee (and former COSA officer) Audrey Johnson in a disciplinary conference conducted by Moore.[15] At the end of the conference, Moore handed Westphal a packet and informed her that her own disciplinary conference would be held the next day. The packet included a memo from Moore that stated:

> The purpose of this conference is to discuss your actions in relation[] to the Employer. The work rules, considered to have been violated are Insubordination or Disregard for Authority, Conduct Unbecoming and Personal Gain. The contemplated discipline is a suspension up to and including dismissal.[16]

On June 14, 2012, Moore conducted Westphal's disciplinary conference as scheduled. He informed Westphal that he had not preapproved her May 18 out-of-the-office work. Westphal explained that she had entered the travel on the weekly schedule that she submitted in advance to Voight, and asked what she should have done differently. Moore did not answer. Instead, he issued her a written reprimand stating that all "employee vouchers are to be turned in to the President and/or Assistant to the President and *any/all* out-of-office work *must* be pre-approved prior to the event as well as placed on your Staff Schedule/Activity forms." (Emphasis in original.) Westphal was the first employee ever disciplined by the Respondent for failure to obtain express preapproval for out-of-office work.

The judge concluded that the Respondent lawfully disciplined Westphal. He found that the General Counsel met his initial *Wright Line* burden, but that the Respondent met its rebuttal burden.[17] The judge reasoned that Westphal "understandably assumed" that submitting the

[12] Neither the December 2010 nor the November 2011 directive included a separate form for preapproval of out-of-office work. However, Moore observed in the earlier directive, "I am expanding my directive sooner than later that all staff will be filling out these forms as instructed," making it clear that he had discussed the new requirements beforehand and that the weekly schedule served the function of a request or notice of intent to perform out-of-office work.

[13] The Respondent makes no argument that Westphal's submission of her weekly schedule on Friday instead of Thursday had any bearing on its decision to discipline her.

[14] Westphal testified without contradiction that she usually submitted her travel vouchers to accounting assistant Katherine Washburn, who worked with Schutt, but that Washburn was out sick the day she returned from Coldwater.

[15] The Respondent terminated Johnson the next day. As stated above, Chairman Pearce and Member Hirozawa affirm the judge's finding that the termination violated Sec. 8(a)(3) and (1). Member Miscimarra would leave the legality of Johnson's discharge for the judge to reevaluate on remand. See supra fn. 5.

[16] The "work rules" are the staff work rules that Moore cited, and thereby unilaterally implemented, when he discharged employee Durner in July 2011.

[17] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management, Inc. v. NLRB*, 462 U.S. 393 (1983). The judge misstated the General Counsel's initial *Wright Line* burden as a 4-element test in which the General Counsel must show that the employee was engaged in protected activity, the employer was aware of the protected activity, the employer took an adverse employment action against the employee, and there was a nexus between the protected activity and the adverse employment action. We reiterate that the General Counsel's initial burden is to establish protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. The *Wright Line* standard does not require the General Counsel to show "particularized motivating animus toward the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." See *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43, slip op. at 1, fn. 1 (2015), citing *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4, fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). If the General Counsel meets that burden, the Respondent must then demonstrate that it would have taken the same action even in the absence of the employee's protected activity. Id. Member Miscimarra agrees with the judge that the General Counsel, as part of his initial burden under *Wright Line*, supra, must prove the existence of a link or nexus between protected activity and the particular decision alleged to be unlawful—here, the Respondent's decision to discipline Westphal. Regardless of whether one characterizes this burden as involving three or four elements, *Wright Line* itself requires the General Counsel to prove that the challenged adverse action was motivated by animus against protected activity, and this burden is not satisfied by evidence of generalized antiunion animus unconnected from the adverse action at issue. See, e.g., *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 9 fn. 5 (2014) (Member Miscimarra, concurring in part and dissenting in part).

weekly report complied with Moore's instruction to obtain advance approval for out-of-office work, but that Moore "had to start someplace" in enforcing his preapproval requirement and that Moore genuinely believed the work rules cited in the reprimand were in effect.

We disagree with the judge and find that the Respondent unlawfully reprimanded Westphal. As the judge found, the General Counsel easily established the elements of the initial *Wright Line* burden. Specifically, Westphal served as COSA's vice president, and she had just represented employee (and former COSA officer) Johnson at a disciplinary conference with Moore. Further, the record is replete with instances of Moore's animus toward COSA: Moore unlawfully discharged Durner on July 12, 2011, unlawfully terminated Mary Groves' recall rights on April 2, 2012, and unlawfully suspended Johnson and terminated her effective June 13, 2012; all three employees were present or former COSA officers. Moore also unlawfully delayed COSA President Clyde Manning's return to work from April 30 to June 25, 2012.[18] In addition, Moore failed to respond to numerous COSA information requests and delayed responding to others, unilaterally eliminated unit work and benefits, and engaged in overall bad-faith bargaining for a new contract, all in violation of Section 8(a)(5) and (1).[19] All of that conduct predated Moore's decision to reprimand Westphal. Thus, the General Counsel established Westphal's union activity, the Respondent's knowledge of that activity, and the Respondent's animus toward her and other employees' union activity.

Contrary to the judge, we find that the Respondent failed to show that it would have disciplined Westphal even in the absence of her union activity. As to the Respondent's contention that it disciplined Westphal because she failed to obtain Moore's preapproval for offsite work, Westphal credibly testified that at the end of each week she put a copy of her weekly schedule in Voight's mailbox. Counsel for the General Counsel submitted copies of 12 weekly schedules that Westphal submitted at various times between February 2011 and April 2012. Of those forms, nine show that Westphal performed out-of-office prearbitration preparation, arbitrations, mediations, and meetings in such places as downtown Lansing, Detroit, Livonia, and Mt. Pleasant, Michigan. In none of those instances did Moore counsel or reprimand Westphal for failing to take additional steps to obtain his preapproval. And Moore's November 2011 directive requiring specificity in the description of the work indicates that he reviewed weekly schedules. In other words, Moore tacitly approved Westphal's out-of-office work for a period of 14 months until June 2012, the day after she represented Johnson at a disciplinary meeting, and when Moore was preparing to terminate Johnson for Johnson's own union activity.

Finally, the evidence shows that Moore charged Westphal with this offense even though he had already questioned Schutt, the Respondent's treasurer (and a supervisor) about Westphal's travel reimbursement, and Schutt had told Moore that he had authorized the reimbursement in accord with past practice based on Westphal's having listed the travel on her weekly schedule, which she had submitted in advance of the travel week. Schutt later told Westphal that Moore disciplined Westphal in order to bolster the termination of Johnson, who, like Westphal, Moore had accused of "insubordination."[20]

Considering all the circumstances, we find that Moore's citation of Westphal was a pretext for disciplining her. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by disciplining Westphal for allegedly failing to obtain preapproval to engage in work-related travel.[21]

III. THE FAILURE TO PROVIDE INFORMATION

We agree with the judge's findings, for the reasons he stated, that the Respondent violated Section 8(a)(5) by failing to respond or inadequately responding to COSA's information requests concerning insurance and retiree benefits, the use volunteer workers, and the monitoring of telephones and emails. However, the judge inadvertently failed to make findings about two other information requests that were fully litigated.

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[18] Indeed, Westphal was unable to bring a COSA representative to her disciplinary meeting with Moore because he had terminated the other officers or otherwise prevented them from returning to work.

[19] Member Miscimarra agrees with his colleagues' affirmance of the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing to bargain in good faith with COSA over a successor collective-bargaining agreement. In doing so, however, he relies on the Respondent's cumulative bad-faith bargaining conduct, not on the judge's comments regarding the Respondent's motives in failing to bargain in good faith.

[20] Disciplining one employee to justify or buttress the unlawful discipline of another employee is itself unlawful. See *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988), *Northern Telecom, Inc.*, 233 NLRB 1374, 1374 (1977), enfd. 618 F.2d 421 (6th Cir. 1980).

[21] Member Miscimarra finds it unnecessary to reach or pass on whether the Respondent's reprimand of Westphal violated Sec. 8(a)(3) of the Act because finding this violation does not materially affect the remedy. When it reprimanded Westphal, the Respondent applied work rules it had implemented without giving the Union prior notice and an opportunity to request bargaining in violation of Sec. 8(a)(5). As a remedy for that violation, we are ordering the Respondent, among other things, to rescind any disciplinary actions taken against unit employees for violations of the unilaterally implemented work rules. Thus, the Respondent must rescind Westphal's reprimand regardless of whether the reprimand violated Sec. 8(a)(3).

A. Personnel Files

The record shows that on October 13, 2011, COSA President Manning emailed Moore with a request to review past and current employees' personnel files. In the email, Manning informed Moore that he needed access to the files to prepare for interest arbitration between the Respondent and COSA, to determine whether the Respondent had changed position descriptions or added signed copies of work rules to the files, and to check on the employment status of Fidencio Gonzalez, a MSEA member who had previously volunteered his services. On October 25, Moore denied Manning's request, citing privacy concerns, particularly with respect to former employees. Manning responded by limiting the request to current employees' personnel files; he clarified the request by stating that he wanted only to review the files, not to copy them. Moore again denied the request, but asked if Manning could provide contractual authorization and indicated that if Manning obtained individual employees' written authorizations to allow him to access their personnel folders, Moore would honor those authorizations. Manning responded by citing article 33(B) of the collective-bargaining agreement, which authorizes COSA's president and the employees themselves to review personnel files. The Respondent never gave Manning access to the files.

An employer's duty to bargain collectively and in good-faith encompasses the duty to furnish, on request, information relevant to and necessary for its employees' exclusive representative to perform its representational functions. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151–153 (1956). In *Grand Rapids Press*, 331 NLRB 296, 298 (2000), the Board found that a union has a right to examine personnel files in connection with its representational duties even absent a collective-bargaining agreement provision permitting access to personnel files. Additionally, a party asserting that its failure to provide information was based on privacy concerns must show "legitimate and substantial" privacy interests and that it sought to accommodate those interests. *River Oak Center for Children*, 345 NLRB 1335, 1336 (2005), enfd. 273 Fed.Appx. 677 (9th Cir. 2008).

Here, the Respondent unlawfully precluded COSA from reviewing employees' personnel files to obtain relevant information that it needed to prepare for interest arbitration, plainly a representational function. In addition, the Respondent has failed to show that it was protecting a legitimate and substantial privacy request and it sought to accommodate that request while safeguarding employee privacy. Therefore, the Respondent violated Section 8(a)(5) and (1) of the Act.[22]

B. Cell Phone Policy

At all relevant times, the Respondent provided unit employees with cell phones or a $50 monthly subsidy for personal cell phones used for work. On November 4, 2011, Respondent's Treasurer Schutt announced that, pursuant to a decision by the Respondent's Board of Directors, effective November 8, the Respondent would no longer provide cell phones to employees and would end the monthly subsidy for personal cell phone usage. The same day, COSA requested bargaining over the decision and requested information related to the decision, including the number and identities of the Respondent's members and employees currently receiving the cell phone benefits and documentation supporting its decision to eliminate the benefit. The Respondent did not provide the requested information. Rather, on November 7, 2011, Moore responded:

> The tools of the trade, or as you refer in this instance as the cell phone benefit, have never been part of the Collective Bargaining Agreement nor is the [Respondent's] belief that it was ever intended to be a benefit. It is the [Respondent's] discretion to install, and/or remove, tools as it sees necessary.... [T]his decision (motion) was carried by the MSEA Board of Directors and, as Management has the right to install, or remove tools of the trade as it is compatible with the needs of the operation the aforementioned request seems to be out of order and this request for information will not be addressed.

Although the judge considered the Respondent's unilateral elimination of the cell phone benefit and found that it was unlawful, he failed to address the Respondent's refusal to respond to COSA's request for information regarding the elimination of the benefit. That information was relevant to COSA's representational duties, and the Respondent was therefore obliged to provide it. The Respondent's failure to do so violated Section 8(a)(5) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, Michigan State Employees Association,

[22] Member Miscimarra agrees that the Respondent violated Sec. 8(a)(5) when it refused Manning's request to review personnel files, but only to the extent that it refused to permit the Union to review the personnel files of employees in the COSA-represented bargaining unit.

Lansing, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing the overly broad October 8, 2010 directive that prohibits employees from discussing work-related issues and concerns with anyone other than their manager.

(b) Prohibiting employees from disclosing the contents of disciplinary documents, including investigative questionnaires.

(c) Placing employees on administrative leave or suspending, discharging, or otherwise disciplining employees because they engaged in union activities or other concerted activities protected by the Act.

(d) Revoking employees' recall rights and refusing to allow employees to return to work because they are union officers or engaged in union activities or in other concerted activities protected by the Act.

(e) Failing and refusing to bargain collectively with Central Office Staff Association (the COSA) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of unit employees. The unit is:

> All full-time, part-time and temporary employees employed for more than 30 calendar days, excluding the assistant to the president, guards, and supervisors as defined by the Act.

(f) Unilaterally implementing staff work rules, eliminating the practice of providing cell phones or subsidies to unit employees, removing bargaining unit work performed by employees in the above-described unit, or otherwise making any material, significant, and substantial change in a term or condition of employment that is a mandatory subject of collective bargaining without first giving the COSA notice of the contemplated change and a reasonable opportunity to bargain about the change and its effects.

(g) Engaging in bad-faith bargaining with the COSA in the conduct of negotiations for a collective-bargaining agreement or other agreement affecting the wages, hours, and working conditions of bargaining unit employees.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind and cease giving effect to the October 8, 2010 directive, and advise the employees in writing that it is rescinded and will no longer be enforced.

(b) Within 14 days from the date of this Order, rescind the suspension and discharge of Nancy Durner pursuant to the October 8, 2010 directive and remove any reference to her suspension and discharge from its records and files, and within 3 days thereafter, notify her in writing that it has taken this action and that her suspension and discharge will not be used against her in the future in any manner.

(c) Within 14 days from the date of this Order, rescind and cease giving effect to prohibitions against disclosure contained in "investigatory questionnaires" and remove any reference to any breach of such prohibition or breach of confidentiality from the records and files of any and all affected employees.

(d) Make Nancy Durner (who has already been reinstated) whole for any loss of wages or benefits suffered as a result of the discrimination against her in the manner set forth in this decision.

(e) Within 14 days from the date of this Order, offer Audrey Johnson immediate and full reinstatement to her former position of employment or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed.

(f) Make Johnson whole for any loss of wages or benefits suffered as a result of the discrimination against her in the manner set forth in this decision.

(g) Within 14 days from the date of this Order, remove from its files and records any reference to the suspension and discharge of Audrey Johnson and, within 3 days thereafter, advise her in writing that it has done so and will not use these disciplinary actions against her in the future.

(h) Within 14 days from the date of this Order, restore the recall rights of employee Mary Groves.

(i) Make Groves whole for any loss of wages or benefits suffered as a result of the unlawful termination of those rights in the manner set forth in this decision.

(j) Within 14 days from the date of this Order, remove from its records and files any reference to the unlawful revocation of Mary Groves' recall rights and, within 3 days thereafter, advise her in writing that it has done so and that the revocation of recall rights will not be used against her in the future.

(k) Make employee Clyde Manning whole for all losses he may have suffered as a result of the refusal to allow him to return to work on April 30, 2012, in the manner set forth in this decision.

(l) Within 14 days from the date of this Order, remove from its records and files any reference to the unlawful refusal to allow Clyde Manning to return to work from medical leave on April 30, 2012, and, within 3 days

thereafter, advise him in writing that it has done so and that the unlawful refusal to allow his return will not be used against him in the future.

(m) Compensate Nancy Durner, Mary Groves, Audrey Johnson, and Clyde Manning for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(n) Within 14 days from the date of this Order, rescind the disciplinary action taken against Rhonda Westphal, remove any reference to the disciplinary action from her files, and within 3 days thereafter, notify her in writing that it has taken this action and that the discipline will not be used against her in any way in the future.

(o) Within 14 days from the date of this Order, rescind and cease giving effect to the staff work rules unilaterally implemented on about July 12, 2011, and notify all bargaining unit employees in writing that the rules are rescinded and will no longer be enforced.

(p) Within 14 days from the date of this Order, rescind any disciplinary actions taken against bargaining unit employees for violations of the staff work rules, reinstate any employees discharged pursuant to the staff work rules, remove any reference to discipline and discharge for violations of the staff work rules from their records, and, within 3 days thereafter, notify affected employees individually in writing that it has taken these actions and that any discipline or discharge issued to them in reliance on the work rules will not be used against them in the future in any manner.

(q) Make whole unit employees for any loss of earnings or benefits they may have suffered as a result of the implementation and application of the staff work rules in the manner set forth in this decision.

(r) Within 14 days from the date of this Order, furnish to the COSA the necessary, relevant information it requested, as described in this decision that has not yet been provided.

(s) Within 14 days from the date of this Order, restore the practice of providing cell phones or cell phone subsidies to bargaining unit employees as it existed before Respondent's unlawful unilateral change.

(t) Make affected employees whole for all losses they suffered because of Respondent's unlawful discontinuation of its practice of providing cell phones or cell phone subsidies to bargaining unit employees in the manner set forth in this decision.

(u) Within 14 days from the date of this Order, restore to bargaining unit employees the prearbitration settlement work that the Respondent unlawfully removed from the bargaining unit.

(v) Make affected employees whole for all losses they may have suffered because of the unlawful removal of prearbitration settlement work from the bargaining unit in the manner set forth in this decision.

(w) On request, bargain collectively and in good faith with the COSA as the exclusive collective-bargaining representative of unit employees.

(x) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(y) Within 14 days after service by the Region, post at its facilities in Lansing, Michigan, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 11, 2010.

(z) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

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[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 4, 2016

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the overly broad October 8, 2010 directive that prohibits employees from discussing work-related issues and concerns with anyone other than their manager.

WE WILL NOT prohibit you from disclosing the contents of disciplinary documents, including investigative questionnaires.

WE WILL NOT place you on administrative leave or suspend, discharge, or otherwise discipline you because you engage in union activities or other concerted activities protected by the Act.

WE WILL NOT revoke your recall rights or refuse to allow you to return to work because you are union officers or engage in union activities or in other concerted activities protected by the Act.

WE WILL NOT refuse to furnish, or unreasonably delay furnishing, information requested by Central Office Staff Association (COSA) that is necessary for and relevant to the performance of its representational duties.

WE WILL NOT unilaterally implement staff work rules, eliminate the practice of providing cell phones or cell phone subsidies to employees in the following unit, remove from the bargaining unit work performed by bargaining unit employees, or otherwise make any material, significant, and substantial change in a term or condition of employment that is a mandatory subject of collective bargaining without first giving COSA notice of the contemplated change and a reasonable opportunity to bargain about the change and its effects.

> All full-time, part-time and temporary employees employed for more than 30 calendar days, excluding the assistant to the president, guards, and supervisors as defined by the Act.

WE WILL NOT engage in bad-faith bargaining with COSA in the conduct of negotiations for a collective-bargaining agreement or other agreement affecting the wages, hours, and working conditions of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's order, rescind and cease giving effect to the October 8, 2010 directive and advise you in writing that it is rescinded and will no longer be enforced.

WE WILL, within 14 days from the date of the Board's order, rescind the suspension and discharge of Nancy Durner pursuant the October 8, 2010 directive and remove any reference to her suspension and discharge from her records, and WE WILL, within 3 days thereafter, notify her in writing that we have taken this action and that her suspension and discharge will not be used against her in the future in any manner.

WE WILL, within 14 days from the date of the Board's order, rescind and cease giving effect to prohibitions against disclosure contained in investigatory questionnaires or other documents issued to you and remove any reference to any breach of such prohibition from the records and files of all affected employees.

WE WILL make Nancy Durner (who has already been reinstated) whole for any loss of wages and benefits she suffered as a result of the discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's order, offer Audrey Johnson immediate and full reinstatement to her former job or, if that position is no longer available, to a substantially equivalent position, with-

out prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Johnson whole for any loss of wages and benefits she suffered as a result of our discrimination against her, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's order, remove from our files and records any reference to the suspensions and discharges of Audrey Johnson and Nancy Durner, and WE WILL, within 3 days thereafter, advise them in writing that we have done so and that we will not use these disciplinary actions against them in any way.

WE WILL, within 14 days from the date of the Board's order, restore the recall rights of employee Mary Groves.

WE WILL make Groves whole for any loss of wages and benefits she suffered as a result of our unlawful termination of her recall rights, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's order, remove from our records and files any reference to our unlawful revocation of Mary Groves' recall rights, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that we will not use the revocation of her recall rights against her in any way.

WE WILL make Clyde Manning whole for any loss of wages and benefits he suffered as a result of our unlawful refusal to allow him to return to work, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's order, remove from our records and files any reference to our unlawful refusal to allow Clyde Manning to return to work from medical leave on April 30, 2012, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that our unlawful refusal to allow him to return to work from medical leave will not be used against him in any way.

WE WILL compensate Nancy Durner, Mary Groves, Audrey Johnson, and Clyde Manning for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 07, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, within 14 days from the date of the Board's order, rescind the disciplinary action taken against Rhonda Westphal and remove any reference to the disciplinary action from her files, and WE WILL, within 3 days thereafter, notify her in writing that we have taken this action and that the discipline will not be used against her in any way in the future.

WE WILL, within 14 days from the date of the Board's order, rescind and cease giving effect to the staff work rules unilaterally implemented on about July 12, 2011, and notify all bargaining unit employees in writing that the rules are rescinded and will no longer be enforced.

WE WILL, within 14 days from the date of the Board's order, rescind any disciplinary actions taken against bargaining unit employees for violations of the staff work rules, reinstate any employees discharged pursuant to the work rules, and remove any reference to discipline and discharge for violations of the staff work rules from their records, and WE WILL, within 3 days thereafter, notify affected employees individually in writing that we have taken these actions and that any discipline or discharge issued to them in reliance on the work rules will not be used against them in the future in any manner.

WE WILL make unit employees whole for any loss of earnings or benefits they may have suffered as a result of the implementation and application of the staff work rules, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's order, furnish to the COSA the necessary, relevant information it requested to the extent it has not yet been provided.

WE WILL, within 14 days from the date of the Board's order, restore the practice of providing cell phones or cell phone subsidies to bargaining unit employees as it existed before our unlawful unilateral change.

WE WILL make affected employees whole, with interest, for all losses they suffered because of our unlawful discontinuation of the practice of providing cell phones or cell phone subsidies to bargaining unit employees.

WE WILL, within 14 days from the date of the Board's order, restore to bargaining unit employees the prearbitration settlement work unlawfully removed from the bargaining unit.

WE WILL make affected employees whole, with interest, for all losses they may have suffered because of our unlawful removal of prearbitration settlement work from the bargaining unit.

WE WILL bargain collectively and in good faith with the COSA as the exclusive collective-bargaining representative of unit employees.

MICHIGAN STATE EMPLOYEES ASSOCIATION

The Board's decision can be found at www.nlrb.gov/case/07–CA–053541 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Judith A. Champa and *Scott R. Preston, Esqs.*, for the General Counsel.

Brandon W. Zuk, Esq. (Fraser, Trebilcock, Davis & Dunlap, P.C.), of Lansing, Michigan, for the Respondent

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent, itself a labor union, engaged in conduct aimed at eliminating the Union which represented its own employees, in violation of Section 8(a)(1), (3), and (5) of the Act.

Procedural History

This case began on March 10, 2011, when the Central Office Staff Association (the Charging Party or COSA) filed the initial charge against Michigan State Employees Association, doing business as American Federation of State, County and Municipal Employees, Local 5, AFL–CIO (the Respondent or MSEA) with Region 7 of the National Labor Relations Board, which docketed the charge as Case 07–CA–053541. The Respondent admits receiving service of this charge on or about the same date. On May 6, 2011, the Charging Party amended this charge, and served the amended charge on the Respondent on or about the same date.

On June 7, 2011, the Regional Director for Region 7, acting for and pursuant to authority delegated by the 'Board's Acting General Counsel, issued a complaint against the Respondent in Case 07–CA–053541. The Respondent filed a timely answer.

On June 14, 2011, the Charging Party filed two charges against the Respondent. They were docketed as Cases 07–CA–060319 and 07–CA–060320, and served on the Respondent on about June 16, 2011. The Charging Party amended the charge in Case 07–CA–060319 on July 22, and served a copy of the amended charge on Respondent on or about July 26, 2011. The Charging Party again amended the charge in Case 07–CA–060319 on October 25, and served Respondent with a copy of the amended charge on about October 26, 2011.

On August 31, 2011, the Regional Director for Region 7, on behalf of the Board's Acting General Counsel, issued an order consolidating cases, consolidated amended complaint and notice of hearing, in Cases 07–CA–053541, 07–CA–060319, and 07–CA–060320. The Respondent filed a timely answer.

On September 28, 2011, the Charging Party filed charges against the Respondent in Cases 07–CA–065560 and 07–CA–065681 and served copies on the Respondent on about September 28 and 29, 2011, respectively. The Charging Party amended both charges on December 27, 2011, and served copies of the amended charges on the Respondent on about December 28, 2011.

On November 22, 2011, the Charging Party filed a charge against the Respondent in Case 07–CA–069475, and served a copy of it on the Respondent on about November 23, 2011. The Charging Party amended this charge on January 31, 2012, and served a copy of the amended charge on the Respondent on about the same date.

On December 30, 2011, the Regional Director for Region 7, on behalf of the Board's Acting General Counsel, issued an order consolidating cases, third consolidated amended complaint and notice of hearing, in Cases 07–CA–053541, 07–CA–060319, 07–CA–060320, 07–CA–065560, and 07–CA–065681. The Respondent filed a timely answer.

On January 31, 2012, the Regional Director for Region 7, on behalf of the Board's Acting General Counsel, issued an order consolidating cases, fourth consolidated amended complaint, and notice of hearing, in Cases 07–CA–053541, 07–CA–060319, 07–CA–060320, 07–CA–065560, 07–CA–065681, and 07–CA–069475. The Respondent filed a timely answer.

On April 23, 2012, the Charging Party filed a charge against the Respondent in Case 07–CA–079382 and served the Respondent with a copy of this charge on April 24, 2012.

On May 21, 2012, the Charging Party filed a charge against Respondent in Case 07–CA–081500 and served Respondent with a copy of it on May 22, 2012. The Charging Party amended this charge on June 20, 2012, and served the Respondent with a copy of the amended charge on the same date. The Charging Party amended this charge again on July 26, 2012, and served Respondent with a copy of this second amended charge on the same date.

On August 10, 2012, the Regional Director for Region 7, on behalf of the Board's Acting General Counsel, issued an order consolidating cases, fifth consolidated amended complaint and notice of hearing, in Cases 07–CA–053541, 07–CA–060319, 07–CA–060320, 07–CA–065560, 07–CA–065681, 07–CA–069475, 07–CA–079382, and 07–CA–081500. The Respondent filed a timely answer.

On August 27, 2012, a hearing opened before me in Lansing, Michigan. On this date and on August 28–31, September 24–28, October 29–31, and November 8, 2012, the parties presented testimony and other evidence. After the hearing closed, counsel submitted briefs, which I have carefully considered.

Background

Employees of the State of Michigan have the right to be represented by a labor organization and engage in collective bargaining in accordance with rules of that State's Civil Service Commission. The Respondent is a union primarily representing such employees. COSA is a much smaller labor organization which represents the Respondent's own employees.

In recent years, the State of Michigan has employed fewer people and, consequently, Respondent's membership has declined. With fewer members paying dues, Respondent has felt the need to tighten its own budgetary belt. Obviously, the un-

ion representing its own employees seeks to minimize the impact on those it represents.

Because the Respondent is a membership organization, its management may change as a result of elections, and precisely such a change occurred in July 2010, when the MSEA general assembly selected Kenneth Moore as the new president. Moore's election brought a different management approach. He came into office determined to eliminate the laxity which he perceived in the Respondent's operations. In doing so, Moore had to deal with the board of directors and with other officers, independently elected, who did not always agree with him. Therefore, management of the organization had a more "political" flavor than might be apparent in a typical corporation.

In essence, this case concerns whether Moore's efforts to change Respondent entailed the commission of unfair labor practices, and whether they included elimination of COSA and the bargaining unit it represented.

Admitted Allegations

In its answers, the Respondent admitted a number of allegations. Based on those admissions, I make the following findings:

The charges and amended charges were filed and served as alleged in subparagraphs 1(a) through 1(p) of the order consolidating cases, Fifth consolidated amended complaint and notice of hearing (the complaint) dated August 10, 2012. The Respondent did not admit that the various charges and amended charges had been filed on the dates alleged but denied these allegations "for lack of knowledge." However, it did admit receiving service of the charges and amended charges on or about the dates alleged.

Moreover, it did not present evidence challenging any of the alleged filing dates or otherwise disputing the dates shown on the charges themselves. Under these circumstances, and considering the presumption of administrative regularity, I find that the government has proven the allegations in complaint subparagraphs 1(a)–(p).

Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as alleged in complaint paragraph 4, and that it meets the Board's standards for the assertion of jurisdiction, as alleged in complaint paragraph 3. Based on these findings, I conclude that jurisdiction properly has been asserted in this case.

Because Respondent has admitted the allegations raised in complaint paragraph 2, I find that its business is that of a labor organization. However, the complaint does not allege that it committed violations of Section 8(b) of the Act in its capacity as a labor organization but rather that it has committed unfair labor practices in its capacity as an employer, and thereby has violated certain provisions of Section 8(a) of the Act.

Based on Respondent's admissions, I find that its president, Kenneth Moore, is its supervisor within the meaning of Section 2(11) of the Act and its agent within the meaning of Section 2(13) of the Act. Further, based on Respondent's admissions, I find that Donna Spenner occupied the position of Respondent's vice president until sometime in July 2012. Respondent has not admitted that Spenner was its agent at any time.

Respondent has admitted that Tim Schutt was its treasurer and its agent until July 2011. I so find. Respondent also admits that Chris Little was its region 2 director and agent until May 2011. I so find.

Respondent also has admitted that, at all material times, Ron Damuth and Frank Gonzales were bargaining committee members and Respondent's agents. I so find.

Respondent has admitted, and I find, that the following employees of Respondent constitute a unit appropriate for collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time, part-time and temporary employees who are employed by Respondent for more than 30 calendar days, excluding the assistant to the president, guards, and supervisors as defined by the Act.

Respondent has admitted that the Charging Party in this case, COSA, is a labor organization within the meaning of Section 2(5) of the Act and is the designated exclusive bargaining representative of the employees in the unit described above, within the meaning of Section 9(a) of the Act. I so find. Further, based on the Respondent's admissions, I find that this recognition has been embodied in successive collective-bargaining agreements between Respondent and COSA, including an agreement effective from October 1, 2008, through September 30, 2011.

The Respondent has admitted certain other allegations which will be addressed below as they pertain to specific unfair labor practice allegations.

The Alleged Violations

Independent 8(a)(1) Allegations

Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. § 158(a)(1). Other subparagraphs of Section 8(a) describe particular types of employer conduct which violate the Act. Because all such employer unfair labor practices inherently interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, such conduct also violates Section 8(a)(1).

When an employer's unfair labor practice interferes with, restrains, or coerces employees in the exercise of Section 7 rights but is not alleged also to violate another provision of the Act, it often is described as an "independent" 8(a)(1) violation. Complaint paragraphs 8 and 9 allege two such violations.

Complaint paragraph 8 alleges that since about October 8, 2010, the Respondent has maintained an overly broad directive to employees that "all employee concerns regarding any MSEA issues are to be presented, and addressed, directly by the President." The Respondent denies this allegation.

Complaint paragraph 9 alleges that on about February 9, 2012, the Respondent required an employee to complete a questionnaire that contained language prohibiting the employee from disclosing the contents of this questionnaire to other employees, and threatened her with immediate discharge for any breach of confidentiality regarding the questionnaire. Respondent has admitted this allegation but further stated that the

confidentiality language also informed the employee she could discuss the questionnaire in union representation.

Complaint paragraph 43 alleges that the conduct described in complaint paragraphs 8 and 9 violates Section 8(a)(1) of the Act, which Respondent denies.

Complaint Paragraph 8

On October 8, 2010, Respondent's president, Kenneth Moore, issued a one-sentence memo to all staff, including members of the bargaining unit. It stated:

> Effective immediately, all employee concerns regarding any MSEA issues are to be presented, and addressed, directly by the President.

The General Counsel argues that this limitation extends to—or reasonably might be understood to include—activities protected by Section 7 of the Act. Thus, the General Counsel considers the words "regarding any MSEA issues" broad enough to encompass wages, hours, and other working conditions. In general, an employer lawfully may not prohibit employees from discussing such matters among themselves and, with certain exceptions, may not restrict employees from seeking the support of others. (Indeed, the iconic example of protected activity, a picket line, involves employees' concerted efforts to make the public aware of their work-related concerns.)

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Therefore, it has developed a multistep inquiry to determine the lawfulness of the language in question. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

First, the Board examines whether the rule explicitly restricts activities protected by Section 7 of the Act. If so, the rule is unlawful.

If the rule does not explicitly restrict activities protected by Section 7, the Board then examines the evidence to answer three questions: (1) Would employees reasonably construe the rule's language to prohibit activities protected by Section 7? (2) Was the rule promulgated in response to union activity? (3) Has the rule been applied to restrict the exercise of Section 7 rights? If the answer to any question is yes, then the rule is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647.

In the present case, the October 8, 2010 memo did not explicitly restrict activity protected by Section 7 of the Act. Therefore, I must test it with the three questions.

Examining the rule's language, I must answer the first question in the negative. Although the phrase "employee concerns regarding any MSEA issues" is rather vague, I will assume that it reasonably would be read to include wages, hours, and other terms and conditions 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." It was necessary to infer that the drafter intended to include the word "to" which appears above in brackets, because without that preposition, the rule would suggest that only the Respondent's president could present employee concerns, which clearly would be nonsensical. Even with that added word, the intended meaning 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.

The second question asks whether the rule was promulgated in response to union activity. The record includes evidence that Respondent's president, Moore bore animus towards COSA, the union representing Respondent's employees. Specifically, Benny Poole Jr., who continued to serve as one of Respondent's stewards at the time of the hearing, testified that on one occasion Moore repeatedly said, "[Y]ou have to help me get COSA."

Poole's testimony indicates that he understood "get COSA" to mean "get rid of COSA," and that he believed Moore made this request because the Respondent's collective-bargaining agreement with COSA cost a substantial amount in pay and benefits. Based on my observations of the witnesses, I credit Poole's testimony rather than Moore's denial. However, the testimony falls short of establishing that Respondent promulgated the rule in question in response to union activity.

Based on Poole's credited testimony, I find that Moore made the "get COSA" statement in April 2011, about 6 months after issuance of the rule. Because Moore made the statement so long after the promulgation of the rule, it does not shed light on the motivation for the rule.

Moore's explanation as to why he issued the October 8, 2010 memo suggests he was concerned that employees were not coming to him to request vacation time but instead were going to others, such as the Respondent's vice president. At that point, Moore had only been Respondent's president for about 3 months. Certain other union officers, such as the vice president, were elected by the MSEA general assembly rather than appointed by Moore, so they did not necessarily share his management philosophy and potentially could undermine his wishes; for example, by allowing employees to take leave when Moore believed they were needed at work. It seems both plausible and in character that Moore would want a single manager, himself, to make all decisions.

In these circumstances, I cannot conclude that Moore issued the October 8, 2010 memo in response to union activity. Therefore, I must answer the second question in the negative.

The General Counsel argues that even if the answer to the first two questions is "no," the answer to the third is "yes." Thus, the General Counsel's brief states that "Respondent applied this rule in an overbroad manner when it discharged [employee Nancy] Durner pursuant to this rule because she had a discussion with an MSEA board member regarding a COSA issue."

The complaint alleges that Respondent's termination of Durner's employment was an unfair labor practice, and the lawfulness of that discharge will be addressed below. At this point, I examine the evidence simply to determine whether Respondent discharged Durner for violation of the October 8, 2010 instruction and, if so, whether this application of the rule restricted the exercise of Section 7 rights.

Respondent admits that it discharged employee Nancy Durner on about July 12, 2011. On that date, Respondent's president, Moore, issued a letter effecting the discharge and giving reasons for it. The letter stated, in part, as follows:

> The investigation brought to light several issues that have resulted in this determination for dismissal.
>
> These issues include, but are not limited to:
>
> – Political activities (2)
> – Conduct unbecoming
> – Insubordination or Disregard for Authority

On its face, this discharge letter does not refer to Moore's October 8, 2010 memo. However, it is possible that the references to "conduct unbecoming" and to "insubordination or disregard for authority" might refer to a failure to follow the instruction in the memorandum.

Durner filed a grievance to contest her discharge and COSA took it to arbitration. Although the arbitral award could be clearer, it does not appear that Respondent disciplined Durner specifically for violating the October 8, 2010 memo.

The arbitrator found that the Respondent had promulgated work rules which prohibited its employees from engaging in internal MSEA politics. These work rules were separate from the October 8, 2010 memorandum. The arbitrator concluded that Respondent had failed to prove that Durner had violated the prohibition on such "political activity."

On the other hand, the arbitrator found that Durner had told a member of Respondent's board of directors that the board members "lacked balls" to oppose President Moore's decision to install a new telephone system. The arbitrator considered this statement to be disrespectful and therefore to constitute insubordination and, derivatively, "conduct unbecoming."

Although the arbitrator's award includes a reference to the October 8, 2010 memo, I cannot conclude that the Respondent argued to the arbitrator that it had discharged Durner for violation of the instruction in this memo. Likewise, it does not appear that the arbitrator sustained the discipline based on a violation of the October 8, 2010 memo. Rather, the arbitrator considered the "lack balls" statement attributed to Durner (and which Durner denied) sufficiently vulgar and disrespectful to justify a suspension, although not a discharge.

Moore's testimony during the unfair labor practice hearing does not resolve the question of whether Respondent discharged Durner for violating the October 8, 2010 directive. The following exchange occurred during Moore's cross-examination by the General Counsel:

> Q. Okay, my question is was one of the bases for discharging Nancy Durner that she violated your directive?
>
> A. She was insubordinate to this directive, correct?

The General Counsel did not pursue the matter further. Because Moore's answer was itself a question, I do not find it to be an admission. Moreover, it appears clear from other parts of Moore's testimony that he based his decision to discharge Durner not on a violation of his October 8, 2010, but rather on a violation of general work rules applicable to bargaining unit employees. (Whether such work rules had been implemented validly is an issue to be discussed further below, but the evidence suggests that Moore sincerely believed that they were.)

Before imposing discipline, Moore made an effort to determine whether the work rules actually had been implemented by one of his predecessors, and received information that they had been. If he had based the disciplinary action on a breach of his October 8, 2010 memo, then it would not have been necessary for him to ascertain whether the work rules were in force. After being satisfied that the work rules were in effect and that Durner had signed a receipt for a copy of them, he decided to discharge her. Moore testified, in part, as follows:

> Q. Thank you. And based on your investigation, Mr. Moore, what did you conclude?
>
> A. That she was in violation of the existing work rule, that her direct activity with Mr. Little was an attempt to make a direct influence on the board and/or decisions as there was still the controversy over the phone systems that I reinstalled. So I found her in violation of the work rules.
>
> Q. And what did you do in terms of—
>
> A. Forgive me for that. What I—I found her in violation of conduct unbecoming, political activity, and it's not coming to me what the third rule was because I don't have nothing to refer to.
>
> Q. Yeah. That's fine. What sanction did you impose? What disciplinary—
>
> A. I dismissed her.
>
> Q. All right. Why did you decide to dismiss her?
>
> A. Because the elements that affecting the board of directors concerning an issue without coming to the president and/or the administration to address the issue I felt was egregious.

Based on this testimony, I conclude that the evidence falls short of establishing that Respondent disciplined Durner for violating the October 8, 2010 memo rather than for violating Respondent's separate rule prohibiting staff from engaging in internal union politics. Therefore, I must reject the General Counsel's argument that the facts fall within the third part of the *Lutheran Heritage Village-Livonia* test.

In arguing that the October 8, 2010 memorandum is unlawful, the General Counsel also cites *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 fn. 1 (1990). In that case, the Board found violative a rule which stated as follows:

> Subjects such as local government regulations, the condition of center facilities, and the terms and conditions of employment are not to be discussed by you with parents and should always remain the responsibility of the Center Director.
>
> . . . .
>
> 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.

The Board found this rule unlawful not only because it interfered with the employees' right to discuss working conditions with each other, but also because it prohibited them from communicating their work-related concerns to third parties. Thus, the Board stated:

> Under Section 7 of the Act, employees have the right to engage in activity for their "mutual aid or protection," including communicating regarding their terms and conditions of employment. It is well established that employees do not lose the protection of the Act if their communications are related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue as to constitute, for example, "a disparagement or vilification of the employer's product or reputation." For example, the Board has found employees' communications about their working conditions to be protected when directed to other employees, an employer's customers, its advertisers, its parent company, a news reporter, and the public in general.

299 NLRB at 1171 (footnotes omitted).

Significantly, the Board found that the rule interfered with employees' right to communicate their work-related concerns to third parties not through an explicit prohibition of such communication but by imposing on employees the requirement that they bring such concerns to management. Thus, the Board stated:

> Although the rule does not on its face prohibit employees from approaching someone other than the Respondent concerning work-related complaints, it provides that employees first report such complaints to the Respondent "immediately or use the company problem solving procedure" and that it is "essential" for the employees to do so. Furthermore, the rule provides that the failure of employees to abide by this policy may result in discipline, including discharge. In these circumstances, we find that the Respondent's rule does not merely state a preference that the employees follow its policy, but rather that compliance with the policy is required. We further find that this requirement -which has no basis in either the language or the policy of the Act-reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for collective bargaining or other mutual aid or protection.

Id. at 1172 (footnote omitted).

However, I believe the present facts are sufficiently different that *Kinder-Care Learning Centers* can be, and should be, distinguished. Unlike the rule in *Kinder-Care*, the one-sentence statement in the October 8, 2010 memo does not compel compliance by threatening disciplinary action for its breach.

Additionally, employees reading the *Kinder-Care* rule reasonably would understand it to bar communications with third parties because it specifically mentions such third parties. However, the October 8, 2010 memo includes no such explicit reference.

Moreover, the wording of the October 8, 2010—that employee concerns "are to be presented"—leaves some doubt as to whether the memo simply is setting forth what is good practice-the way things ought to be done—or setting forth a rule enforceable by discipline. Another document, a February 9, 2012 questionnaire discussed below, illustrates that Respondent could issue an order in no uncertain terms. That document includes phrases such as "you are hereby mandated" and "shall remain confidential" and "will result in immediate termination of employment." Respondent clearly uses strong, unequivocal language when it intends to shout "thou shalt." The much milder tone of the October 8, 2010 memo, and the absence of any threat of disciplinary action, indicates that it was setting a standard rather than demanding absolute, unwavering obedience.

One other point may bear mention. In general, whether or not a particular statement violates Section 8(a)(1) of the Act does not depend on the intent of the person who made the statement. Rather, the Board considers how employees reasonably would understand the statement. I have applied such an objective standard here and have not taken into account Moore's motivation in issuing the October 8, 2010 memo.

On the other hand, it is relevant, indeed necessary, to consider the totality of circumstances because those circumstances will affect how employees will understand the words. Those circumstances include the difference between Respondent, which is a membership association, and the typical corporate employer. Moore held his position because he was elected by the MSEA general assembly, which also elected the vice president. Thus, the vice president did not depend on the president for his job, and, as Moore testified, the president could not discharge the vice president.

This situation created the possibility that the vice president would give staff members instructions which conflicted with those of the president. The record leaves little doubt that when Moore took office he took steps to make sure that he was in charge and that others, such as the vice president, did not undermine his authority. Issuing the October 8, 2010 memo was one such step. Respondent's employees in the COSA-represented bargaining unit would be well aware of this situation and reasonably would understand the memo in this light.

For all the reasons stated above, I conclude that the October 8, 2010 memo did not violate the Act.

Complaint Paragraph 9

Complaint paragraph 9 alleges that on about February 9, 2012, Respondent required an employee to complete a questionnaire that contained language prohibiting disclosing the questionnaire's contents to other employees, and threatened her with immediate discharge for any breach of confidentiality regarding the questionnaire. Respondent's answer admitted this allegation but further stated that the prohibition also included language informing the employee that she could discuss the questionnaire "in union representation."

On January 27, 2012, Respondent's president, Moore, issued a memorandum placing employee Audrey Johnson on adminis-

trative leave, ostensibly "pending further investigation of incidents brought to my attention." As part of this investigation, Respondent required Johnson to complete a series of questionnaires, including one dated February 9, 2012, which included the following language, set forth below verbatim and without grammatical corrections:

> **DISCLOSURE:**
>
> This investigatory questionnaire is in response to an open investigation of alleged misconduct and the results may result in discipline, up to and including discharge. You are hereby mandated to answer all of the questions within this investigatory questionnaire; its contents shall remain confidential and is not to be discussed outside union representation. All answers/responses are to be submitted truthfully, openly and acutely. A proven dishonest response, malice intent or breach of confidentiality will result in immediate termination of employment.

This prohibition on discussing the contents of the questionnaire, which Respondent admits, clearly is overbroad and violates the Act. The qualifying words "outside union representation" fall short of redeeming the rule, which still prohibits a wide range of communication protected by the Act.

The Board has made clear that employees have the statutory right to discuss their work-related concerns with each other and to voice them to third parties. See *Kinder-Care Learning Centers*, above. Here, the prohibition prevents the exercise of this right.

It is true that in rare circumstance, the Board has found lawful a rule enforcing confidentiality during an investigation. See *Caesar's Palace*, 336 NLRB 271 (2001) (employer did not violate Section 8(a)(1) by maintaining and enforcing confidentiality rule during ongoing investigation of alleged illegal drug activity, where confidentiality directive was given to each employee who was separately interviewed, the investigation involved allegations of a management coverup and possible management retaliation, as well as threats of violence, and the confidentiality rule was intended to ensure that witnesses were not put in danger, evidence was not destroyed, and testimony was not fabricated.) However, such circumstances are not present here. *Phoenix Transit System*, 337 NLRB 510 (2002).

In *Banner Estrella Medical Center*, 358 NLRB 809 (2012), the Board left no doubt that an employer bears the burden of establishing that the particular circumstances have created legitimate reasons for a rule prohibiting disclosure. The Board stated, in part:

> To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (no legitimate and substantial justification where employer routinely prohibited employees from discussing matters under investigation). In this case, the judge found that the Respondent's prohibition was justified by its concern with protecting the integrity of its investigations. Contrary to the judge, we find that the Respondent's generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights. Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." Id. The Respondent's blanket approach clearly failed to meet those requirements.

358 NLRB 809, 810.

In its brief, Respondent notes that the Board, in *Banner Estrella Medical Center*, had found unlawful *blanket* rules prohibiting disclosure in a wide range of circumstances and then points out that the prohibition at issue here was not such a blanket prohibition. Instead, it was directed at a specific employee who was under investigation.

Although the Board did distinguish, in *Banner Estrella Medical Center*, between blanket and individualized prohibitions, that distinction is not the central point, which concerns an employer's duty to justify its effort to prohibit communication which otherwise would be protected. In other words, such an infringement on employees' Section 7 rights is extraordinary, and there must be extraordinary circumstances to justify it. As a result of this reasoning, blanket prohibitions necessarily must be unlawful, because they apply to all situations, the ordinary as well as the extraordinary.

Thus, showing that a particular prohibition is not a blanket rule does not carry an employer's burden of establishing extraordinary circumstances. Here, credible evidence has not demonstrated that witnesses needed protection, evidence was in danger of being destroyed, testimony was being fabricated, or that there was a need to prevent a coverup.

Respondent's brief, after quoting the portion of the *Banner Estrella Medical Center* opinion listing these factors, argued that MSEA did have such business justifications. However, Respondent did not point to any evidence giving it cause to believe that witnesses needed protection, that evidence risked destruction, that testimony was being fabricated, or that there was a need to prevent a coverup. Instead, Respondent's brief stated as follows:

> First, as noted previously with regard to this very small unit, employees have exploited the frequent changes in leadership to their advantage, even to the point of denying that the Work Rules have been promulgated, despite the strong evidence to the contrary. The investigation involved matters that potentially were within the knowledge of other members of the bargaining unit; to protect integrity of the investigation, the confidentiality directive was proper under the circumstances.

Respondent's argument begins by assuming a fact not in evidence that employees had "exploited frequent changes in leadership to their advantage." Although the record does reflect a dispute as to whether Respondent actually had promulgated work rules or only drafted them, such a disagreement certainly does not constitute evidence that employees were seeking to take advantage of changes in union leadership.

Moreover, the fact that "the investigation involved matters within the knowledge of other members of the bargaining unit" does not suggest that employees would destroy evidence or fabricate testimony. After observing the employee witnesses and listening to their testimony, I find no reason to believe they would do such things. Respondent certainly has not presented evidence to establish either such an inclination or sufficient grounds for Respondent reasonably to believe that it existed.

Respondent's brief includes a transcript citation to certain parts of MSEA President Moore's testimony, but this testimony is conclusory and without specifics. Thus, Moore testified, in part, as follows:

> Q. All right. Can you explain the purpose of those statements?
>
> A. The purpose was to assure that there was an open dialogue to protect the integrity of the investigation. There is a-it is a small group that works at MSEA central, not to mention the volunteers that come and go with MSEA so it was a mere attempt to keep the confidentiality and protect the integrity of the investigation.

Neither this testimony nor other evidence establishes facts which would support a finding that extraordinary circumstances were present which would justify a curtailment of employees' Section 7 rights. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 9.

Allegations of Unlawful Discrimination

Section 8(a)(3) of the Act prohibits an employer from encouraging or discouraging membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment. See 29 U.S.C. § 158(a)(3). Section 8(a)(4) makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4).

Paragraphs 27–35 of the complaint describe alleged conduct which, the General Counsel asserts, violates both Sections 8(a)(3) and 8(a)(4) of the Act, as well as Section 8(a)(1).

Suspension and Discharge of Nancy Durner

Complaint paragraphs 27 and 28 allege, respectively, that Respondent suspended its employee Nancy Durner on about June 2, 2011, and discharged her on about July 12, 2011. Complaint paragraphs 43 and 44 allege that by these actions, Respondent violated Section 8(a)(3) and (4). Respondent has admitted that it suspended Durner and later discharged her, as alleged, and I so find. However, Respondent denies that it did so for unlawful reasons. It also denies that the suspension and discharge violated the Act.

Nancy Durner began work as a part-time employee of Respondent in June 2008 and became a full-time employee about 2 months later. At all times she has performed clerical duties and her job title is administrative assistant. Her immediate supervisor is Respondent's president, Kenneth Moore.

Durner is active in COSA and was elected secretary/treasurer of that union in February 2011. She has also been a member of the Union's bargaining committee which negotiated with Respondent for a collective-bargaining agreement to succeed the contract expiring September 30, 2011.

Durner also has filed a number of grievances. Many complained that Respondent had transferred bargaining work out of the bargaining unit. These include a grievance dated November 15, 2010, concerning the sorting of incoming mail; a grievance dated March 11, 2011, concerning the copying and mailing of documents to members of Respondent's board of directors; an April 18, 2011 grievance alleging a similar violation; and an April 26, 2011 grievance alleging a similar violation.

In addition to the grievances which Durner signed, COSA filed another grievance which pertained directly to her. This January 2011 grievance concerned Durner no longer answering the telephone and routing calls, duties which, COSA asserted, were bargaining unit work.

Durner also provided affidavits to the Board in connection with its investigation of unfair labor practice charges. To take one of these affidavits, the Board agent came to Respondent's offices and interviewed Durner there.

On April 28, 2011, Respondent's board of directors met at its offices in Lansing. One of the directors attending this meeting was Christopher Little. Respondent has admitted that Little was its agent until May 2011, when he resigned. (Little, a Michigan State employee had accepted a promotion and would no longer be in the bargaining unit of State employees which Respondent represents.)

After the board of directors meeting, but before leaving Respondent's offices, Little had a conversation with Durner, who congratulated him on his promotion. According to Little, she then told him that things were "getting really bad" around the office and attributed the problems to Respondent's president, Moore. Little further testified as follows:

> Q. All right. What else do you recall about that conversation?
>
> A. It was following the board meeting. It might have been why we were down there too, I don't think it was, but it was—she had mentioned the fact that working around Ken in the office was really hard and then he was making things difficult *for them*. He was taking away *their* jobs and giving them to non-union workers and kind of removing duties *from them*. One of the things that she had commented—and she had told me that she said, well, I know it was you that voted to take the phones—to make the phone service automated. And I told her I said it wasn't me that voted to take the— you know, to enable the phone service. I said I'm the one that called the question which ended debate on the subject during the board meeting, so then it was voted on, and then it was approved. [Emphasis added.]

Little gave this testimony on direct examination for the Respondent. His spontaneous use of the words "for them" and "their" and "from them," which I have italicized above, indicates that he understood Durner to be expressing the work-related concerns not only of herself but also of other bargaining unit members. That conclusion is consistent with Durner's status as COSA's secretary-treasurer. Moreover, Durner's complaint that Respondent's president was taking bargaining

unit jobs and "giving them to non-union workers" clearly is a concern which a union would raise to protect the work of the employees it represented.

Other parts of the record make clear that Durner was not just speaking for herself when she complained to Little about the telephone system. Answering the telephone and routing calls had been bargaining unit work before Respondent installed a "voicemail" system in late 2010. In January 2011, COSA had filed a grievance concerning bargaining unit employees no longer performing telephone answering duties, but the diminution of bargaining unit work was not the only reason the new system had become a bone of contention. Difficulties in the system caused frustration both for those who called Respondent's offices seeking to speak with a staff member and for the staff members who could not be reached. Thus, the voicemail system had affected the working conditions of the staff members, who were employees in the COSA-represented bargaining unit.

Additionally, a recorded greeting on the new telephone system stated that calls might be recorded and employees were concerned about that possibility. On February 16, 2011, about 2 months before Durner's conversation with Little, COSA had sent the Respondent a request for information about the monitoring of telephone calls. Ten days later, Respondent had replied. At one point in this February 26, 2011 response Moore had stated: "To the best of my knowledge, no employee(s) have had their phone communications monitored and/or recorded." However, Moore's letter stopped short of disavowing any intent to monitor and record in the future, stating only that "no notice has been sent to employees that the Employer intends to monitor and/or record phone conversations."

Thus, for a number of reasons, bargaining unit employees were quite concerned about the new telephone system and, I conclude, Durner was voicing those concerns when she raised the subject with Little. According to Little, Durner also said that he and "the rest of the board had no balls because we were following Ken [Moore] blindly." Durner denied making this "no balls" statement and, based on my observations of the witnesses, I credit Durner's denial.

Little considered Durner's comments improper and complained to Moore, who conducted an investigation and then discharged Durner. Moore's testimony concerning the reason for terminating Durner's employment is set forth above in the section of this decision concerning complaint paragraph 8.

Moore's testimony establishes that he sought to justify the decision to discharge Durner by asserting that she had violated a rule prohibiting Respondent's staff from engaging in Respondent's internal political activities. However, Moore's testimony also shows that his claimed justification for discharging Durner was not quite the same as his motivation for doing so.

When Respondent's counsel asked Moore why he had decided to dismiss Durner, Moore answered, "Because the elements that affecting the board of directors concerning an issue without coming to the president and/or the administration to address the issue I felt was egregious." That style of speaking typified Moore's testimony, which at times could be hard to follow. In essence, Moore felt it was "egregious" for Durner to go over his head to the board of directors.

Moore rested his decision to discharge Durner on her supposed violation of a "no political activity" rule. Whether such a rule actually was in effect, and whether Respondent had implemented it unilaterally, are separate issues which will be discussed later in this decision. However the 8(a)(3) and (4) discrimination allegations now under consideration may be resolved without deciding the validity of the rule itself. The rule stated as follows:

POLITICAL ACTIVITIES

> Internal MSEA Political Activity is prohibited. No MSEA employee except elected officers of MSEA shall engage directly or indirectly in internal MSEA political matters.
>
> As used in this rule, "internal MSEA political matters" shall include:
>
> 1. The election of MSEA officers, members of the Board of Directors (including both Regional Directors and Alternate Regional Directors), Delegates and Alternate Delegates to the General Assembly, Department Spokespersons, Alternate and/or Co Department Spokespersons and Chief Stewards.
> 2. The formulation, lobbying for or voting on any amendment to the MSEA Constitution or any other matter properly before the General Assembly, the State Board of Directors, the Executive Council or the officers of MSEA.
>
> This rule is intended to prohibit all activities which are political in nature, including, nomination of candidates for MSEA elected office ("Candidates"), lobbying or seeking support for Candidates or potential Candidates; preparing campaign materials for Candidates; or any other activity intended to, or resulting in, influencing any internal MSEA political matter.
>
> Violation of this rule shall be considered a serious matter and shall result in disciplinary action up to and including termination.

The Respondent has not claimed that Durner campaigned for or assisted any candidate for MSEA office and the record would not support such an assertion. Rather, if her conduct violated any portion of the rule, it would have to be the prohibition on "influencing any internal MSEA political matter."

Were I analyzing the facts using the framework which the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), it might become necessary to consider whether assertion of the rule against political activities constituted a pretext. However, I conclude that it is not appropriate to apply a *Wright Line* analysis because Respondent discharged Durner for engaging in conduct which the Act clearly protects. *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006). If an employer's rule prohibits conduct which the Act protects, the rule must yield to the law.

Here, the Act protected Durner's complaint to Little that the Respondent was diminishing the bargaining unit's work, and her voicing the concerns of bargaining unit members about working conditions, including the automated telephone system, every bit as much as it protected the grievance discussion in *Beverly Health & Rehabilitation Services*. Accordingly, as the

Board stated therein, the appropriate inquiry is whether, during the course of her protected activity, Durner engaged in any conduct which removed her from the protection of the Act.

Based on Durner's testimony, which I have credited, I find that she did not tell Little that he and the other board members had "no balls" or lacked the "balls" to go against the MSEA president. However, even if Durner had made this statement, it was not so egregious that it deprived her of the Act's protection. See, e.g., *Phoenix Transit System*, 337 NLRB 510 (2002).

Moreover, the testimony of Respondent's official who made the discharge decision, President Moore, leaves no doubt that he decided to terminate Durner's employment because she had failed to bring her complaints directly to him and instead had gone over his head to the board of directors. Although the arbitrator focused on the purported "no balls" statement in deciding that Durner deserved some discipline short of discharge, the record here establishes that Moore terminated Durner's employment not for vulgar or insulting speech but rather for going over his head to a member of the board of directors.

However, an employer lawfully may not limit employees' Section 7 rights in this manner. Just as employees may take their complaints about working conditions to the public, so they may raise them at higher levels of management.

Durner's discussion with Little was not heated. Tempers did not flare. The only possibly offensive language was the "no balls" remark which, I have found, Durner did not make. Accordingly, I find that Durner did not lose the protection of the Act.

Durner performed clerical functions and did not fall within the meaning of "key paid employee," so I need not perform the sort of analysis applied in *Service Employees Local 1*, 344 NLRB 1104 (2005), and *Operating Engineers Local 370*, 341 NLRB 822 (2004).

Respondent's brief stresses that it discharged Durner because she violated a work rule, namely, the rule against political activities discussed above. A later section of this decision will focus on whether the rule in question had validly been implemented, but even if it had been, an employer's work rule cannot repeal the protection of Federal law.

If the work rule had plainly and specifically prohibited the conduct for which Respondent punished Durner—raising employee complaints about working conditions with a management official other than the president—it would have violated Section 8(a)(1) on its face. In any event, whether or not the rule's language, considered by itself, interfered with, restrained, or coerced employees in the exercise of Section 7 rights, the rule *as applied to Durner* certainly did.

In sum, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by suspending and then discharging Durner for union and concerted activities which plainly fall within the Act's protection. Because the evidence so clearly ties the discharge decision to Durner's protected activity on April 28, 2011, I do not conclude that Respondent also discriminated against her because she gave affidavits to the Board, in violation of Section 8(a)(4).

In this instance, the arbitral award finding Durner insubordinate, and therefore not entitled to backpay, is not entitled to deference. The arbitrator neither considered the unfair labor practice issue nor discussed it in the arbitral award. *Motor Convoy, Inc.*, 303 NLRB 135 (1981). Moreover, even had the arbitral award addressed the unfair labor practice issue, I would conclude that the result was palpably wrong, as the Board used that term in *Kvaerner Philadelphia Shipyard*, 346 NLRB 390 (2006).

The General Counsel argues that the Board should adopt a new deferral standard. However, changing the standard is not within my authority. In this instance, it also would not alter my determination that deferral to the arbitral award is not appropriate.

Investigation and Discharge of Employee Audrey Johnson

Complaint paragraphs 29 and 30 allege, respectively, that the Respondent placed employee Audrey Johnson on administrative leave on about January 27, 2012, and discharged her on about June 14, 2012. Respondent has admitted taking these actions and, based on those admissions, I so find.

Complaint paragraphs 43 and 44 allege that this conduct violated Sections 8(a)(3) and 8(a)(4), respectively, as well as Section 8(a)(1) of the Act. Respondent denies these allegations.

Audrey Johnson began work for Respondent in June 2006 as a membership services representative, a position in the bargaining unit represented by COSA. In about April 2008, she became a labor relations specialist, which gave her the added responsibility of representing MSEA grievances in arbitrations.

In 2007, Johnson became secretary/treasurer of COSA and served in that union office until replaced by Durner in 2011. After Respondent suspended and discharged Durner in the summer of 2011, Johnson resumed the duties of secretary/treasurer on an interim basis. She was also a member of the bargaining team which negotiated COSA's 2008–2011 contract with Respondent.

Johnson furnished four affidavits in Board investigations. For one of them, the Board agent interviewed Johnson in a conference room at the MSEA offices.

On December 15, 2011, Johnson's job duties involved representing a State employee in an arbitration in Detroit. This arbitration did not take place at a single location but involved travel to different physicians' offices to receive testimony. She had forgotten to take her wallet which contained her personal credit cards, but she did have the MSEA credit card, which she kept separately in her work bag. Although she had been issued the credit card when she began work for the Respondent 5 years earlier, she had never used it to purchase gasoline.

Also in December 2011, she charged on the MSEA credit card the purchase of a Franklin Planner to use in her work.

Johnson testified that when she received the credit card the person who was then Respondent's president, Jack Yoak, told her that it was to be used to buy office supplies. She further testified that MSEA Vice President Craig Tuck told her that for any charge more than $100 she should fill out a requisition form and get approval in advance.

A month later, Respondent's treasurer, Timothy Schutt, asked Johnson to surrender her MSEA credit card to him. He also gave her a memo dated January 18, 2012, which stated as follows:

> In review of the current credit card billing statement dated 01/10/12 it appears that there are inappropriate credit card purchases on the credit card with the account ending in 1718, which is prohibited by Policy and/or IRS Regulations. The use of the MSEA credit card to purchase fuel for a personal is not allowed in any circumstances. The use of a MSEA credit card to purchase office supplies is subject to prior approval from the President or Treasurer of MSEA, however, these items can be purchased upon request on a office holder's credit card other than your individual card. With this in mind, at receipt of this letter I am suspending use of your credit card and am requesting the card be surrendered, pending further investigation.

There is no dispute that Johnson gave Schutt the credit card, as he had requested. However, the testimony of Schutt and Johnson conflict concerning another part of this encounter. This conflict concerns whether Johnson gave Schutt an explanation for why she used the credit card to purchase gasoline. According to Schutt, Johnson said that she had charged gasoline to the MSEA credit card because when she had submitted a voucher for reimbursement of expenses for previous travel, Moore had denied it. Specifically, Schutt testified:

> [S]he brought up the fact that she used the credit card. I told [her] we couldn't allow it because of those IRS regulations that I learned about over in Maryland and then she proceeded to tell me that she did it—when I asked about it, she did it because the last voucher was denied, and she wasn't about to ask about mileage reimbursement again, so she just used the credit card, she needed gas, and so she filled it up, and she also said it was allowed in the past.
>
> Q. All right. Did she say anything about having lost her purse or her wallet or misplaced her purse or her wallet on the day she used the MSEA credit card for fuel?
>
> A. No.

Johnson unequivocally denied making the statement which Schutt attributed to her. On cross-examination by Respondent, she testified, in part, as follows:

> Mr. Schutt refused to hear any explanation regarding my credit card charge because he said—he threw his hands up and said it was coming from the back. He didn't allow me the opportunity to explain anything.
>
> Q. All right. And isn't it true that you told Mr. Schutt that you made the fuel purchase because you had mileage reimbursement that was due from a previous travel voucher that the president had denied?
>
> A. No, I didn't.

In resolving this credibility conflict, I consider two competing factors. On the one hand, Johnson's demeanor as a witness particularly impressed me. On the other hand, a nearly contemporaneous document is consistent with Schutt's version of his January 18, 2012 meeting with Johnson. Shortly after his exchange, Schutt sent Moore an email describing it. In this email, Schutt stated: "I specifically ask[ed] about the fuel purchase and she stated 'it was for mileage reimbursement because Ken denied a previous voucher['] and also she wasn't about to ask to get permission to represent members."

Absent other factors, I would be inclined to credit Schutt because of the corroborating email. It would seem unlikely that Schutt would knowingly make an untrue statement in this nearly contemporaneous email unless Respondent was intent upon discharging Johnson and grasping for evidence to make a case. Such a motive should not be ascribed to anyone absent evidence. Here, the record does include evidence suggesting the existence of such a motive.

One of Respondent's members, Benny R. Poole Jr., attributed statements to Respondent's president, Moore, which, if true, indicate an intention to destroy COSA by discharging its members. Poole has been a member of MSEA for two decades or more and continues to serve as a chief shop steward. He testified that in April 2011 he and Moore were alone in Moore's office:

> Q. And what was the purpose for being there?
>
> A. To check on I had [sic] a grievance that was going to go to arbitration, and I wanted to find out the date of that.
>
> Q. Okay, and what was your conversation at that time?
>
> A. Well, at that time Mr. Moore told me—he picked up a big old binder and threw it and said that you've got to help me get COSA.
>
> . . . .
>
> Q. By Mr. Preston: Did he say anything to help your understanding that he wanted to get rid of COSA?
>
> A. As far as the amount of money in their contract and benefits, that's what it was.
>
> Q. One second. Okay, and what was your response to what he said?
>
> A. I didn't say anything. I just wanted my date of my arbitration. The secretary came in at one point. On his computer, she punched it up. They gave me a copy of it, and I proceeded to leave the office. But before I left, he pointed at the wall and stated once again, "You've got to help get COSA," and he pointed across to the wall.
>
> Q. And what wall are we talking about? What did that separate?
>
> A. It separated from his office to Mr. Manning's office on the other side.

At that time, Clyde Manning was COSA's president and worked for the Respondent in the COSA-represented bargaining unit.

Poole also testified that Moore voiced his intention to get rid of COSA during meetings of Respondent's board of directors:

> Q. By Mr. Preston: But did he give, during these conversations, did he express anything as to what would happen with COSA?
>
> A. Yes, he stated that he was going to get rid of them. And as far as on some occasion, he spoke and he gave the names of a couple that he's going to fire and get rid of COSA.
>
> Q. Okay, and who are these individuals he mentioned?
>
> A. One was Audrey Johnson.

Q. And who else?

A. And one was Nancy and Mary.

Q. Okay, do you know when he made those statements as to each individual?

A. Roughly it was at this year's board meetings. I think one was in April of this year, and some was last year.

Q. Okay, the one as to April, which person did he mention?

A. That was Audrey Johnson.

Q. And you said last year. Who did he mention last year?

A. Last year it was Nancy.

Q. Okay, and what about— you did mention, you mentioned Mary. When did he mention Mary?

A. That was, I believe, in one of the earlier board meetings either the last part of last year or the beginning of this year when they were talking about cutting back and laying off people and getting rid of COSA members.

Poole testified on August 31, 2012, so his reference to April "of this year" means April 2012. His references to "Nancy" and "Mary" are to Nancy Durner and Mary Groves, both of whom are alleged in the complaint to be victims of Respondent's unlawful discrimination, matters which will be addressed later in this decision. My observations of the witnesses lead me to conclude that Poole's testimony is more reliable than that of Moore, who denied making the "get COSA" statement. Crediting Poole, I find both that Moore made the statements Poole attributed to him and that he also threw the binder, as Poole described.

In addition to his testimony about statements attributed to Moore, Poole also described a conversation he had with a volunteer working in Respondent's offices. At some point, Respondent had begun using unpaid volunteers to perform some of the work done by Respondent's employees in the COSA-represented bargaining unit. One of these volunteers was Fidencio (Frank) Gonzales, who had retired from his job with the State of Michigan at the end of 2010, freeing him to contribute much of his time to Respondent.

During his 35 years as a member of MSEA, Gonzales had held a number of offices in that union, including shop steward, chief steward, local president, and the chair of various committees. Additionally, while on a leave of absence from his job with the State of Michigan, Gonzales had worked as a paid employee of Respondent in the COSA-represented bargaining unit. The complaint alleges, and Respondent's answer admits, that Gonzales is Respondent's agent within the meaning of Section 2(13) of the Act. Accordingly, Poole's testimony quoting Gonzales is not hearsay and Gonzales' statements are imputable to Respondent.

According to Poole, in April 2012, during a break in one of Respondent's board meetings, he spoke with Gonzales. Poole testified as follows:

Q. Okay. And what was this conversation, or what was his statement?

A. Well, there was talk about firing all COSA in that meeting.

Q. Right.

A. People were talking, and all of a sudden when I talked to Frank Gonzales, he said they're going to fire them all. And he stated that the ones to take over would be him, Ron, I think Schneider, Russ—

Q. Russ who?

A. Waters. These are probably the ones taking over COSA duties.

Q. Okay. Yesterday there was some mention by Respondent as to meetings going long. Do you know what he could be referring to?

A. The board meeting, starting since Ken Moore was president, they started lasting until 10:00, 11:00—too long, 10 hours or more. And sometimes he'd postpone at a given time until the next day on Sunday, which is unusual through the past years. It did not last that long. And the reason for it is because the whole board meeting was talked about COSA, all of COSA, and they couldn't get the other business of the Union done in time because they talked about COSA.

Poole testified emphatically and, based on my observations, I believe he was a reliable witness. Additionally, when Gonzales testified, some 4 weeks after Poole, he did not deny the statements attributed to him by Poole. Therefore, I find that Gonzales did make the "going to fire them all" statement, as Poole testified.

Additionally, in the rather unusual circumstances of this case, Respondent stood to gain by eliminating the jobs in the COSA-represented bargaining unit. Its 2008-2011 collective-bargaining agreement with COSA included an article setting ground rules and deadlines for bargaining together with the following "interest arbitration" language:

> Therefore, all Articles may be pursued to arbitration in such manner to assure an award by AUGUST 1, the decision of the arbitrator will be final and binding on both parties.

Thus, the 2008–2011 contract provided that if the Respondent and COSA could not agree on a particular contract term for the next contract, a neutral arbitrator would have the authority to make a binding decision.

Such interest arbitration clauses, seldom seen in private sector collective-bargaining agreements, are more common in contracts between public employees and their government employers. A strike by civil servants harms the public and is, in many jurisdictions, unlawful. Interest arbitration serves as a substitute.

In the private sector, if an employer's management concludes that it is in a good economic position to weather a strike, it may take a tough stance at the bargaining table. Similarly, if a private sector employer believes that a union will not strike, it may decide not to make certain concessions, increasing the possibility of a deadlock. If a lawful impasse does occur, the employer then may implement its final offer.

However, a binding interest arbitration clause takes these options away from the employer. If the parties do reach impasse, the employer cannot unilaterally implement the terms it prefers. Instead, an arbitrator decides.

For this reason, private sector employees usually do not agree to interest arbitration provisions. But here, the Respondent, although itself an employer in the private sector, represents State workers and enters into collective-bargaining agreements with State government. Such contracts include interest arbitration clauses more often than do private sector collective-bargaining agreements. At some point, the practice of including such clauses migrated from Respondent's negotiations with government to its bargaining with its own employees.

The Respondent's previous leadership, whom Moore replaced when he took office in 2010, had agreed to the interest arbitration clause, but Moore was stuck with it. Meanwhile, the Respondent's membership was declining, resulting in less dues revenue and a perceived need for belt tightening. However, Moore could not insist on concessions to impasse because a deadlock would result in the arbitrator making the decision

As noted above, Moore had come to office determined to run things differently and had taken steps to assure that he, not other elected officers, held the reins. Yet the interest arbitration clause prevented him from bargaining to impasse and unilaterally implementing the terms he desired.

Someone with Moore's "take charge" personality would not find this situation easy to accept and might decide that the only remaining way to regain control was to eliminate COSA. Based on Poole's credited testimony, I find that Moore did make the "get COSA" statements which Poole attributed to him.

Additionally, based on Poole's uncontradicted testimony, I have found that Gonzales, an admitted agent of Respondent, did state that the employees in the COSA unit would be fired and that he, Gonzales, and some others would be taking over their duties.

Such animus against the COSA unit employees increases the likelihood that the statement attributed to her by Schutt—that she had charged gasoline on the MSEA credit card because a previous travel voucher had been rejected—is a fabrication to support her discharge.

Moreover, the manner in which Respondent investigated the credit card charge leads me to believe that Respondent was fishing, with a large net, for anything it could use against Johnson. On January 20, 2012, President Moore's administrative assistant gave Johnson an "investigative questionnaire" to complete and return, which she did. Three days later, the administrative assistant gave Johnson another questionnaire, which Johnson also completed and returned.

Respondent's president, Moore, also asked Respondent's audit committee, chaired by Kay Ryzenga, to investigate. Ryzenga sent Moore a January 25, 2012 report which concluded that it appeared "Ms. Johnson has violated several memorandums, COSA contract articles and a work rule by purchasing fuel for her personal car by using the MSEA credit card and for working at home without prior authorization—then billing MSEA for reimbursement for mileage via voucher for such unapproved travel."

By memo dated January 27, 2012, Respondent's president, Moore, placed Johnson on administrative leave "pending further investigation of incidents that were brought to my attention." Moore's memo notifying Johnson of that decision gave no reason other than "pending further investigation of incidents that were brought to my attention." Johnson credibly testified that when she asked Moore for the reason he "informed me that I was being investigated for misconduct, but he didn't go into any details."

On February 9, 2012, Johnson attended an investigatory conference at Respondent's offices. Moore gave Johnson another questionnaire to complete. The questions ranged well beyond the credit card charge. For example, questions 9 and 10 on the questionnaire stated as follows:

> 9. Did you on September 8, 2011 forward an e-mail to staff members with the subject line "Missing Keys"?
>
> 10. Within your e-mail dated September 8, 2011 did you stated [sic] *"My office keys are missing"*. . . . *"Please advise if you have seen a set of keys with a blue wrist bungee card and a red flash drive attached."*

(Emphasis in original.) Moore admitted on cross-examination that Johnson had sent the September 8, 2011 email about the missing keys to all staff members, including Moore, and that another email 16 minutes later announced that the keys had been located. It seems odd that Moore would bring up this trivial incident in a questionnaire 5 months later. When asked about it on cross-examination, Moore had no ready answer:

> The loss of the keys and the recovery I believe is what I was attempting to document. I'm trying to put the thought process back when this questionnaire was created. I'm having some difficulty doing that.

Another questionnaire which Moore had Johnson complete asked her, among other things, if she had worn track suits to the office. However, Moore admitted that he had never issued a directive concerning the wearing of such apparel and the record otherwise does not establish that there was a prohibition on any such attire.

These "investigatory questionnaires" supposedly were to gather information concerning suspected wrongdoing. The inclusion of questions unrelated to such possible wrongdoing is particularly difficult to understand because Moore already had the information the questionnaires sought. He had received the emails concerning when the keys were lost and found and he obviously would have known that Johnson sometimes wore a tracksuit to work because he and she worked at the same location.

The tenor of the questionnaires, considered together with Moore's failure to explain to Johnson why she was being placed on administrative leave, suggests that Moore was intent on firing Johnson but was looking for a reason to justify that decision. Such a conclusion also would be consistent with Moore's "get COSA" statements to Poole.

The conclusion that Moore was trying to scavenge some reason to discharge Johnson also draws support from the fact that, as Moore himself essentially admitted on cross-examination, he never told Johnson the nature of the allegations being investigated until the day he discharged her. His failure to inform her of the allegations makes no sense if his true motive were to find out the facts. Rather, it suggests that Moore was still looking for some allegations he could use.

This conclusion—that Moore was looking for a reason to justify Johnson's discharge but having trouble finding one—also would be consistent with the long period of time Johnson remained on administrative leave, which did not end June 12, 2012. It would appear that Moore needed the time to drum up support for a discharge decision.

Moore explained that Respondent had "three bodies that address charges in our organization. It'd be the executive council if there's a complaint or charge on staff. It's the steward and training [committee] if it's a complaint or a charge on a steward or chief steward. And then if you're a region director . . . president, vice president, state secretary, treasurer, then those forums would be addressed in our constitutional elections committee." Moore further testified:

> [A]ctually I had put charges in front of the constitutional elections committee, and they sent them back without sufficient merit. That's when I put it in front of the audit committee to compile the documents because I merely pointed at a specific date that I was aware of on a fuel usage versus a voucher usage which would simply indicate double-dipping which is a violation of the law simply. And I had addressed that. Well, unfortunately I didn't have a copy of the voucher, and I didn't have a copy of the credit card log. So when I got that back, I sent it back to audit, and I asked for a full-blown investigation. The acting chair of that committee chose not to put it in front of the audit committee, which I didn't find out about for another 60 days.

Thus, Moore's effort to discharge Johnson, based on Johnson's onetime use of the credit card for gasoline, met with opposition from others in Respondent's organization. However, Moore persisted.

On June 13, 2012, the day after Johnson returned to duty, she attended another disciplinary conference. When she came to work on June 14, 2012, Moore gave her the choice of resigning or being discharged. She chose the latter and Moore gave her a termination letter dated June 13, 2012. The letter gave the following reasons:

- Use of position for personal gain (theft);
- Conduct Unbecoming; and,
- Insubordination or Disregard for Authority

The letter gave these claimed reasons without any elaboration or explanation of their factual basis. On cross-examination, Moore asserted that he had explained these reasons to Johnson when he gave her the letter. On cross-examination, the General Counsel asked Moore about the reasons for Johnson's discharge:

> Q. Okay, can you explain to me right now what were the actions that
>
> A. The use of personal gain, the investigation revealed a denial of a travel voucher. Insubordination in the mindset of the, "I'm going to use the credit card even though you denied the voucher," is insubordination; it's actually theft because it's not an approved process that's ever been participated in MSEA with her, and it's an unacceptable practice. It's compensation versus reimbursement, justifies theft. Insubordination and disregard for authority, the directives were put out there, the manipulation of the calendar, and all the elements that were part of the investigation revealed the complete disregard for authority.
>
> Q. Okay, I'm sorry. Manipulation of calendar, I don't believe there's any evidence that's been shown anywhere about manipulation of a calendar. What are you referring to?
>
> A. I believe the report reflects that her calendar, her Microsoft calendar was checked on the Tuesday of that week, so it must have been when, November 14th, and when it was checked in, the 19th, which was a Friday, it showed there'd been a change; that's manipulation of the calendar from my perspective.

The "manipulation of calendar" allegation concerned the electronic calendar Johnson kept on her computer for her personal use. Moore admitted that it was not used for timekeeping purposes and the record does not show that Respondent used it to track or assign employees' work. Although Moore testified that he also checked it, he did not point to any specific instance of doing so and did not make any claim that he had been misled by any entry in it.

As to Johnson's use of the credit card on a single occasion to purchase gasoline, "There is no procedure, there's no acceptable application of credit card use for personal fuel; that's theft."

It would have been understandable for Moore to characterize this purchase as "theft" if Johnson also had submitted a voucher claiming the mileage expense for reimbursement. Had she done so, she would have been seeking a duplicate payment for the same mileage. However, she did not seek such reimbursement. In these circumstances, Moore's calling the charge for gasoline "theft" is inexplicable.

As to the discharge letter's reference to "insubordination," Moore pointed to an instance when Johnson had worked out of the office without getting approved in advance, in accordance with a directive he had issued.

In determining whether Johnson's discharge violated the Act, I will follow the framework the Board set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employees' protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services, Inc.*, 346 NLRB 1099 (2006).

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright*

Line, 251 NLRB 1083, 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). However, if Respondent's asserted reasons for its action are pretextual, it cannot carry the rebuttal burden. A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. *Rood Trucking Co.*, 342 NLRB 895 (2004); *Austal USA, LLC*, 356 NLRB 363 (2010).

The evidence clearly establishes all four elements which the General Counsel must prove. Johnson was not only a union member, she was COSA's secretary/treasurer and a member of COSA's 2008 negotiating team. In a small bargaining unit of half a dozen employees, who made up most of the employee complement at Respondent's offices, Johnson's union activity would be well known to management. Respondent discharged Johnson, and that certainly constitutes an adverse employment action.

The credited testimony of Benny Poole establishes the fourth element, the link connecting the protected activity with the adverse action. Based on Poole's testimony, I find that Moore was so upset with COSA that he threw a heavy binder as well as voicing his intent to eliminate the bargaining unit. Additionally, based on the statements made to Poole by Gonzales, an admitted agent of MSEA, I find that Respondent intended to discharge the bargaining unit employees and replace them with volunteers.

Because the General Counsel has established all four of the initial *Wright Line* elements, the burden shifts to Respondent to show that it would have discharged Johnson in any event, regardless of protected activity. However, Respondent cannot meet this burden because the reasons it gave for the discharge were pretextual. *Rood Trucking Co.*, above; *Austal USA, LLC*, above. Based on the evidence discussed above, I conclude that Respondent's President, Moore, intended to fire Johnson because she was a COSA member and set about to find reasons which would justify such a discharge. These reasons were not the real reason, which was the desire to eliminate COSA by discharging the bargaining unit employees.

Accordingly, I conclude that Respondent, by placing Audrey Johnson on administrative leave and then discharging her, violated Section 8(a)(3) and (1) of the Act. The General Counsel has also alleged that Respondent took these actions because she gave affidavits during the Board's investigation of unfair labor practice charges. Although it is true that Johnson did give such affidavits, the evidence does not establish that her cooperation with the Board was a motivating factor. Therefore, I do not recommend that the Board find that Respondent also violated Section 8(a)(4) of the Act.

Alleged Isolation of Employees

Complaint paragraph 31 alleges that since about March 2012, Respondent isolated COSA officers from bargaining unit employees by failing to move their office spaces when Respondent moved its employees to another floor in Respondent's building. Complaint paragraph 32 alleges that since about March until June 12, 2012, and then from about June 14 until about July 9, 2012, Respondent physically isolated Rhonda Westphal away from her coworkers by failing to move her office to another floor in Respondent's building. The Complaint further alleges that these actions violated Section 8(a)(3), (4), and (1) of the Act. Respondent denies these allegations.

Respondent owns a building with more than one story and the first floor is partially underground. Respondent's board of directors decided to move all of its operations to the first floor, which is less desirable as rental space, so that the upper floor could be leased out.

On the weekend of March 17–18, 2012, Respondent moved the offices of most of the employees who worked on the second floor but Respondent's president had told two full-time employees, Clyde Manning and Rhonda Westphal, that they would have to wait because of a problem with the furniture. Manning and Westphal were, respectively, COSA's president and vice president.

The desk of Audrey Johnson remained on the second floor but, as noted above, she was on administrative leave. The desk of Respondent's treasurer, Timothy Schutt, also remained on the second floor. However, he was not in the COSA-represented bargaining unit and only worked one day a week.

Several days later, Manning injured his back and took medical leave. Although Westphal requested that her desk and computer be taken downstairs, Moore refused. Westphal continued to work on the second floor until July 2012, when Respondent moved her and Manning (now returned from medical leave) to the first floor. In the meantime, while the desks of Westphal and Manning remained on the second floor, Respondent hired two new employees and assigned them to work on the first floor.

Moore testified that Respondent had intended to buy office furniture manufactured by inmates in prison industries. Such furniture only can be sold to governments and to nonprofit organizations which qualify. According to Moore, the Respondent discovered belatedly that it did not qualify and could not purchase the prison-made furniture.

Moore is an experienced cabinetmaker and decided to build some of the furniture himself. However, doing so took time.

The General Counsel argues that during this period of time the second floor had the appearance of a construction site and that it constituted unlawful discrimination to leave the desks of COSA's two top officers there while moving others downstairs. In examining the evidence, I will again apply the *Wright Line* framework.

Clearly, both the president and vice president of COSA had engaged in union activities and Respondent was aware of those activities. Thus, the General Counsel has satisfied the first two *Wright Line* requirements.

Third, the General Counsel must prove that the alleged discriminatees suffered some adverse employment actions. Certainly, in certain instances, subjecting particular employees to working conditions not shared by other workers can constitute an adverse employment action. However, I conclude that the relatively minor inconvenience experienced by Westphal for a period of about 4 months does not rise to that level. Because Manning was on medical leave for most of this period, he had to work in this less-than-ideal environment only for a short time.

The record does not establish that this environment exposed either Westphal or Manning to any hazards such as coal dust or increased the risk of accidental injury. It also does not establish that either Westphal or Manning, as a result of remaining on the second floor during this period, suffered any diminution in wages, benefits, or other compensation. Accordingly, I conclude that the General Counsel has failed to prove the third *Wright Line* element, an adverse employment action.

Because the General Counsel must prove all four elements, its failure to prove that an adverse employment action occurred ends the analysis. The General Counsel has not proven that the alleged conduct violated either Section 8(a)(3) or (4) of the Act.

However, I must also consider whether the Respondent independently violated Section 8(a)(1) by interfering with, restraining, or coercing employees in the exercise of their Section 7 rights. Clearly, separating union officers from the other bargaining unit employees with whom they usually worked could constitute such interference if it made the employees' access to their union officers unduly difficult or impossible. However, the present record does not establish that maintaining their working space on the second floor significantly impaired the ability of these two union officers to communicate with other members of the COSA bargaining unit or significantly interfered with the performance of union duties. Accordingly, I conclude that the Respondent did not violate Section 8(a)(1).

Therefore, I recommend that the Board dismiss the allegations raised by complaint paragraphs 31 and 32.

Termination of Mary Groves' Recall Rights

Complaint paragraph 33 alleges that on about April 2, 2012, Respondent terminated Mary Groves' recall rights, effectively discharging her. Respondent's answer admits this allegation. However, Respondent denies the further complaint allegations that the termination of Groves' recall rights violated Section 8(a)(1), (3), and (4) of the Act.

Groves began working for Respondent as a temporary employee in May 2009 and became a full-time employee about 2 months later. She worked in the bargaining unit represented by COSA, to which she belonged.

In March 2011 she became a member of COSA's bargaining committee, along with COSA President Manning and Vice President Westphal. The committee negotiated with Respondent for a new collective-bargaining agreement to succeed the one expiring September 30, 2011.

In early November 2011, the Respondent notified COSA that it intended to lay off employees "due to lack of funds, operating revenues and administrative efficiency." Respondent laid off Groves effective December 5, 2011. The General Counsel does not allege that this layoff violated the Act, but only that Respondent later committed an unfair labor practice when it terminated Groves' recall rights.

Respondent's president, Moore, sent Groves a March 22, 2012 notice of recall. It stated:

> Pursuant to the provisions of Article 13, Section F of the COSA Contract, this is to offer recall to you in the classification of Accounting Assistant at MSEA Central Office, performing duties similar to those you did prior to your layoff. Your rate of pay will be the same rate you received prior to your layoff. The hours of work will be 1:00 p.m. to 5:00 p.m, Monday through Friday.
>
> You must respond whether you accept or decline recall of this position prior to April 2, 2012. You may respond in writing by either email (kmoore@msea.org/troberts@msea.org) or fax to 517/3947376. Failure to respond within this time frame will result in your recall rights being terminated.

When Groves received this letter, she was considering another possible job, but one which would have been temporary and would not have offered the extensive benefits she had received while working for Respondent. Moore's recall letter had not indicated a starting date or what benefits she would receive. Since the work would be part time—only 4 hours a day— Groves was concerned that it might not include her previous benefits.

Groves contacted Respondent's treasurer, Timothy Schutt, but Schutt was unaware that Moore had sent Groves a recall letter and could not provide any information. At this point, COSA President Manning was still on medical leave, so Groves contacted COSA Vice President Westphal, who provided some information about language in the collective-bargaining agreement but could not answer all of Groves' questions.

On March 29, 2012, Groves sent Moore a letter (incorrectly dated March 30, 2012), stating that it was impossible for her to make an informed decision based on the information in the March 22, 2012 notification. It further stated:

> The [recall] notification did not include a starting date. Also, I would like a little clarification as to whether this is a permanent recall or just temporary. I am assuming, because the notice did not state otherwise, that it is to be permanent but I would like it clarified as my layoff notice also stated that my employment was terminated and my position within MSEA would be vacated.
>
> Please provide answers and clarification in writing and I will be glad to respond, once I have received them, within the time frame set forth within Article 13, Section F of the COSA contract.

On April 2, 2012, Groves followed up by sending Moore an email which attached her letter, quoted above. The email stated, in part, "I would also like to reiterate that I am considering returning return [sic] to MSEA but am unable to make an informed decision as there was not a start date is [sic] identified and I would also like to know whether the position is permanent or temporary." The email then asked Moore to clarify these issues as soon as possible.

Moore sent Groves an April 2, 2012 letter informing her that her recall rights had been terminated. The letter stated as follows:

> I am in receipt of your correspondence dated March 30, 2012. I would like to refer you back to the language of the COSA Contract:
>
> *"171.e employee shall have ten (10) calendar days from the date [of the] mailing to respond to his/her intentions to accept or refuse recall to the proposed position".*

> As well as refer you to the recent receipt of Arbitrator Van Degens' Interest Arbitration decision adopting the following change to Article 13, Section G:
>
> *The employee shall have Five (5) calendar days from the receipt of certified mailing to respond to his/her intentions to accept or refuse recall to the proposed position.*
>
> As you are well aware, as you were part of the COSA Bargaining team, the Union was adopting said language and the arbitrators decision is retroactive back to the successor agreement. Even though the arbitrator adopted the following change as listed above, I gave you ten (10) days to respond to the Recall notice. Furthermore, the correspondence you were forwarded on March 22, 2012, clearly outlined the classification, duties to be performed, work hours and rate of pay. Prior to the correspondence received from you today we have received no other communications either by email, facsimile, or USPS first class mail; therefore, by your application, your recall rights are hereby terminated. We have marked our files as such and wish you well in the future.

(Emphasis in original.)

Moore's testimony about this matter does not fit well with other evidence. He explained that he decided to recall Groves after making a decision to buy and use a software program called "QuickBooks Premium" which other local unions were using. Moore testified that he and Respondent's treasurer bought the program online:

> It was that evening that we got online and purchased that, and then from that point we started strategizing how to implement, and the intent was to bring Mary Groves back, implement, and run it parallel with the KI system so there was there would be no hiccup in operations.
>
> Q. Okay. And how important was it that this be done quickly?
>
> A. It was very important.

Moore gave this testimony well after Schutt had taken and left the witness stand. Although Schutt, in describing his qualifications, had testified that he used the QuickBooks program, he did not mention that he and Moore ordered it online or had a plan which involved recalling Groves to run it. Moreover, according to Groves, Schutt told her that he knew nothing of the decision to recall her.

Certainly, if the plan Moore described had existed, Schutt would have told Groves when she called him to inquire about the terms of recall. After all, according to Moore, he and Schutt wanted to implement the new program quickly and contemplated using Groves to do it. Therefore, Schutt would have had every reason to tell Groves "we need you right away" when she asked about the starting date. He would have had no reason to deny knowledge of the recall notice which Groves had received.

Because Moore's testimony is inconsistent with this other evidence, I do not credit it. Further, I conclude that Groves' supposed failure to respond by the deadline is merely a pretext. She did, in fact, respond by contacting the treasurer, who had been her supervisor before the layoff and who would supervise her again if she accepted the recall.

Following the *Wright Line* framework, I find that the General Counsel has established all four of the initial elements. Groves' service on COSA's bargaining team involved face-to-face dealings with Respondent's management; clearly, Respondent knew about Groves' union activities. Indeed, Moore's April 2, 2012 letter to Groves mentions her service on the COSA negotiating team. Termination of recall rights certainly is an adverse employment action.

Moreover, based on Poole's testimony concerning Moore's "get COSA" statements, I find a link between the protected activity and the adverse employment action. Respondent therefore bears the burden of showing that it would have canceled Groves' recall rights in any event, even absent protected activity. It cannot meet this burden because its proffered explanation is pretextual.

In sum, I find that Respondent's termination of Groves' recall rights violates Section 8(a)(3) and (1) of the Act.

Alleged Refusal to Allow Clyde Manning to Return to Work

Clyde Manning has worked for Respondent since 1999 and has been president of COSA for about a decade. On March 21, 2012, he had to be taken to the hospital for back pain. In a March 29, 2012 email to Respondent's president, Moore, Manning reported on his condition and noted that he hesitated to return to work while still taking "thought blurring" pain medication.

Manning kept Respondent advised of his progress and, on April 26, 2012, sent the following email to Moore's assistant:

> My physician has released me to return to work, without restrictions, effective Monday, April 30, 2012. I will bring a copy of the release when I return.
>
> Look forward to returning.

However, when Manning reported for work on April 30, Moore's assistant gave him a notice that he was being placed on administrative leave. That same day, Manning sent Moore an email asking for an explanation. More than 3 weeks later, Moore replied. This May 25, 2012 letter stated, gave the following explanation:

> As you are aware, per Article 17, Section D
>
> *"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 refusal by Association."*
>
> Under the provisions of the contract, cited in part above, the Employer is exercising its right to obtain a second opinion.

(Emphasis in original.) However, it should be noted that, in quoting this particular provision of the collective-bargaining agreement, Moore's letter omitted the first sentence, which stated "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." The language quoted by Moore thus did not pertain to Manning's situation. Moore's May 25, 2012 letter did not offer a reason for his decision to have Manning undergo an evaluation.

Manning also received a notice, signed by Moore, informing him that he was being sent for an examination in the occupational health services department of a Lansing hospital. It also instructed him to complete forms authorizing the release of medical information.

When Manning arrived at the hospital on June 7, 2012, he discovered that the examination which Moore had requested was a psychological examination. Finally, on June 23, 2012, Respondent notified Manning that he could return to work on June 25, 2012.

To explain its action, Respondent argues that Manning's reference to "thought blurring" pain medication raised concerns about his mental functioning. Additionally, Moore testified that he did not learn about Manning being sent for a psychological evaluation until after the fact:

> I found out in a later date that there was another evaluation that was done. I happened to be in Los Angeles at the time for a national convention when I was told that Mr. Manning had endured an evaluation, a psychological evaluation. That had been raised to me prior to me departing to L.A., and I indicated to Sparrow Health Services that I had no intent of taking it to that level. I simply wanted to make sure that Mr. Manning had no impairments whether being on medication and is able to perform the duties of this job.

To believe Moore's testimony would require superhuman credulity and a disregard of his modus operandi. Moore's actions, such as his October 8, 2010 memo that employees should bring all concerns directly to him, consistently reveal Moore to be someone with a strong compulsion to be in control of all aspects of Respondent's operations. This compulsion manifested itself both in the changes Moore made in Respondent's operations, such as having all incoming mail delivered to a locked box, and also in his refusal to provide information about those changes, a matter which will be discussed further below. Additionally, both Moore's testimony and his actions, such as drafting extensive "investigative questionnaires," create the impression of someone who pays exceedingly close attention to detail. It would have been out of character for Moore to have taken a "hands off" approach when it came to referring Manning for evaluation.

Moreover, in this instance as in others, Moore appeared uninterested in actually obtaining information from the employee. Instead, he used correspondence in an almost ritualistic way. It would have been quite easy, and much simpler, to ask Manning, when he returned to work, if he were still taking pain medication. (Likewise, when Moore learned that Mary Groves was interested in accepting the recall but had some questions, it would have been easy to contact her and ask when she could report for duty.) Moore's lack of interest in obtaining information needed to achieve his ostensible objective demonstrates that his actual goal differed from the asserted one.

In sum, I do not credit Moore's denial of knowledge that his office had arranged for Manning to undergo a psychological examination. Instead, I conclude that Moore's asserted concern about Manning's medication was a pretext used to delay his timely return to work.

The General Counsel has proven all four of the initial *Wright Line* elements. Respondent obviously knew Manning was the union president. A delay in allowing an employee to return to work clearly constitutes an adverse employment action. Moore's "get COSA" statements, proven by Poole's credited testimony, establishes the link between the protected activities and the adverse employment action.

Because Respondent's asserted reason for the delay in restoring Manning to duty is pretextual, it cannot rebut the General Counsel's case. Therefore, I conclude that Respondent unlawfully refused to allow its employee, Clyde Manning, to return to work between April 30 and June 25, 2012. Further, I recommend that the Board find that Respondent thereby violated Section 8(a)(3) and (1) of the Act.

Discipline of Employee Rhonda Westphal

On June 18, 2012, after a disciplinary conference, Respondent issued a written reprimand to Rhonda Westphal, an employee in the COSA-represented bargaining unit and also vice president of COSA. The reprimand, in the form of a memo from Moore, stated in part as follows:

> This is an official written reprimand due to your failure to seek *pre-approval* prior to performing out-of-office work on May 18, 2012. Consequently, a Disciplinary Conference was held on today's today (June 14, 2012) and after re-consideration, I have elected to issue this written reprimand due to your failure, after numerous President's Directives, to seek pre-approval for any/all out-of-office work performed.
>
> Your actions are a direct violation of MSEA work rules (dated February 26, 2007), specifically Insubordination or Disregard for Authority when you failed to seek prior approval prior to performing out of office work on the above-captioned date.

(Emphasis in original.) The reprimand concluded by stating that "further inappropriate conduct may result in further disciplinary action up to and/or including discharge."

Westphal had not previously received discipline for performing out-of-office work without first getting approval and the credited evidence does not establish that Respondent had disciplined any other employee for such conduct. Additionally, Westphal had assumed, with some reason, that she had Moore's tacit approval. Moore had issued a directive requiring employees to submit reports each week detailing their work schedule for the week to come. Westphal had submitted such a report, which indicated that she planned out-of-office travel in connection with an MSEA member's grievance. When she received no response, she had assumed that Moore did not object.

The record suggests that Westphal had followed the usual practice. In the absence of some specific instruction to the contrary, Westphal understandably might assume that filing the weekly report describing contemplated activity the following

week— itself a new requirement under Moore— would comply with the instruction to obtain approval in advance for out-of-office work. The fact that other employees had not been disciplined gave Westphal additional reason to believe she was following acceptable procedure.

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.

Whether the General Counsel has satisfied the fourth requirement, proving a link between the protected activity and the adverse employment action, is a more difficult issue. Certainly, credited evidence establishes that Moore intended to eliminate the need to deal with COSA by discharging bargaining unit employees and replacing them with volunteers. Not merely Moore's statements but his actions reek of such animus.

However, the fact that Moore was bent on diminishing COSA's presence to the vanishing point does not mean that every single thing he did was in furtherance of this goal. For whatever psychological reason, Moore demonstrated a compulsion to control his environment and, particularly, to be in total charge of MSEA's daily work. Whatever the healthiness or unhealthiness of this compulsion, it is not, by itself, antiunion animus.

An action Moore took in connection with Westphal's out-of-office work is telling. Moore had learned about this work after the MSEA treasurer, Schutt, had approved her travel voucher. Although Moore could discipline staff members, he had no authority to impose sanctions on the treasurer, who, like Moore, was an elected MSEA officer. Nonetheless, Moore sent the treasurer a memo directing that he explain why he had approved Westphal's voucher when she had not obtained preapproval for the travel.

Moore's impulse to control thus exists apart from his antiunion animus and extends beyond the COSA-represented bargaining unit. This compulsion, rather than antiunion animus, appears to be the motivation for reprimanding Westphal.

However, the fourth element of the *Wright Line* framework does not require the government to show that antiunion animus was the sole or even the dominant motivation, but only that it was a "substantial or motivating factor" in the decision to discipline. *Desert Toyota*, 346 NLRB 132 (2005). Therefore, I conclude that the General Counsel has proven the fourth element, shifting the burden to Respondent to show that it would have taken the same action in any event, regardless of protected activity.

In this instance, Respondent has not offered a pretext. Particularly 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.

In reaching the conclusion that the reason for the discipline was not pretextual, I also take into account my finding, discussed later in this decision, that 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.

Ordinarily, it would sound pretextual to assert that an employee was disciplined for violating a work rule at a time when no work rules were in effect. However, in this instance, I conclude that Respondent's president, Moore, genuinely believed that work rules were in effect. He held this mistaken belief based on incorrect information given to him by former MSEA President Roberto Mosqueda, as will be discussed further below. In these unusual circumstances, I conclude that Respondent's assertion that Westphal was disciplined for violating a work rule is not pretextual.

If Moore could not discipline employees who failed to follow his instructions, he would lack the authority needed to make Respondent's operations more efficient. Although Westphal appears to have been the first person disciplined for failing to seek advanced approval for out-of-office work, Moore obviously had to start somewhere. In a bargaining unit as small as COSA's, the fact that Moore chose to discipline a COSA officer does not compel the conclusion that he singled her out because of her association with the Union.

Accordingly, I conclude that Respondent would have taken the same action even if Westphal had not been a union official. Because Respondent has carried its rebuttal burden, I further conclude that the written reprimand issued to Westphal did not violate Section 8(a)(3) of the Act.

One other matter related to Westphal's discipline should be addressed. The reprimand specifically cited Westphal for violation of work rules. The 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.

Therefore, I conclude that there is no allegation before me that Respondent's reprimand of Westphal was unlawful because pursuant to an invalid work rule, and such an issue was not litigated. Accordingly, I do not reach it.

Summary of 8(a)(3) and (4) findings

For the reasons discussed above, I have found that Respondent violated Section 8(a)(3) and (1) of the Act by the following actions: Suspending Nancy Durner on June 2 and discharging her on July 12, 2011, as alleged in complaint paragraphs 27 and 28, respectively; placing Audrey Johnson on administrative leave on January 27 and discharging her on June 14, 2012, as alleged in complaint paragraphs 29 and 30, respectively; terminating Mary Groves' recall rights on April 2, 2012, as alleged in complaint paragraph 33; and refusing to allow Clyde Manning to return to work during the period April 30 to June 25, 2012, as alleged in complaint paragraph 34.

However, I do not conclude that these actions also violated Section 8(a)(4) of the Act. To support an 8(a)(4) theory of violation, the General Counsel points in particular to a transcript of an April 28, 2012 meeting of Respondent's board of directors. However, I believe Moore's comments recorded in this transcript are too vague to demonstrate an intent to retaliate against employees because they gave affidavits or otherwise cooperated in the Board's investigation of unfair labor practice charges.

The General Counsel's brief also points to Moore's testimony at the hearing: "Moore admitted that he didn't like that COSA sought protection from the NLRB. He believes that it should have used the contractual grievance process instead. (Tr 2037.) " However, voicing a preference for the negotiated dispute resolution process or even saying that he "didn't like" COSA going to the Board does not compel a finding that he would engage in unlawful retaliation. In general, people obey even those laws they don't like.

From the record, a clear picture emerges of Respondent acting with one predominant, indeed single-minded purpose: Ridding itself of the Union. Because I do not believe that retaliation for assisting the Board was a substantial motivating factor, I do not recommend that the Board find 8(a)(4) violations.

Additionally, I conclude that the General Counsel has not proven that Respondent violated any section of the Act by the following conduct: Isolating COSA officers from unit employees, since about March 2012, by failing to move the office spaces of the COSA officers while moving other unit employees, as alleged in complaint paragraph 31; from about March until June 12, 2012, and then from about June 14 until July 9, 2012, isolating Rhonda Westphal from her coworkers, as alleged in complaint paragraph 32; and issuing Rhonda Westphal a disciplinary warning on about June 14, 2012, as alleged in complaint paragraph 35. Therefore, I recommend that the Board dismiss these allegations.

Allegations Concerning Requests for Information

An employer's duty to bargain collectively and in good faith with the exclusive representative of its employees includes the duty to furnish, on request, information relevant to and necessary for the union to perform its representation functions. *Postal Service*, 337 NLRB 820 (2002), citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Complaint paragraphs 10—18 describe specific information requests made by COSA, beginning about October 11, 2010. In its answer, Respondent admits that the union did make these requests, as alleged.

However, Respondent has denied that the requested information is relevant for and necessary to COSA's performance of its duties as exclusive bargaining representative. It also denies the allegation, in complaint paragraphs 21, that it has failed and refused to provide all of the requested information except that described in complaint subparagraph 12(b). It also has denied the allegation, in complaint paragraph 21, that it unreasonably delayed in providing the requested information described in complaint paragraph 12(b).

October 11, 2010 Information Request

COSA's information requests reflect the Union's particular concerns at various points in time. After Moore became president in July 2010, the number of volunteers doing work at the MSEA offices increased. Foremost among these volunteers was Fidencio Gonzales, who had held various offices in MSEA over a span of more than three decades. As discussed above, Gonzales had stated that MSEA was going to fire the COSA-represented employees and that he and other volunteers would be doing the work.

Whether or not this particular statement by Gonzales got back to COSA-represented employees at the time, they clearly had reason to be concerned about the impact of volunteers on the bargaining unit because one position within the unit—for a membership service representative—remained unfilled even though Respondent had promised, in a settlement agreement, to do so.

On October 11, 2010, COSA filed a grievance concerning the matter and also an information request seeking information about the kind and amount of work Gonzales was doing. Moore's October 26, 2010 response stated (with grammar and capitalization as in the original) as follows:

> There is not an entitlement of information request concerning from Central Office Staff Association request on October 11, 2010. Once again, I assure you that I am and will continue to uphold the collective agreement of Central Office staff Association, and the Employer, Michigan State Employee Association.
>
> In Unity

Respondent still has not furnished the requested information.

Generally, information pertaining to employees within the bargaining unit is presumptively relevant. *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006); *CalMat Co.*, 331 NLRB 1084, 1095 (2000). COSA had a clear interest in making sure that Respondent assigned bargaining unit work to employees in the bargaining unit, and its request sought information needed to determine whether and to what extent someone outside the bargaining unit was doing it. Moreover, the request sought information in connection with a grievance concerning the matter. There can be no doubt that the information request was necessary for and relevant to the Union's performance of its representation function.

Accordingly, I conclude that Respondent violated Section 8(a)(5) of the Act by failing and refusing to provide the requested information.

Information Requests about Incoming Mail

Respondent's president issued an October 1, 2010 directive that all incoming mail be delivered to his assistant, who would sort and forward it to the correct recipients. Sometime later, Respondent instructed the Postal Service to deliver its mail to a locked box, thus assuring that only the MSEA president or his assistant had access to the incoming mail. These changes removed the work of processing mail from the bargaining unit.

The October 1, 2010 directive also stated that MSEA President Moore would review all outgoing mail and approve it before it left the office. On October 11, 2010, COSA filed two

grievances concerning the changes. Additionally, the bargaining unit member who had performed the mail sorting filed a grievance about a month later.

On December 22, 2010, COSA submitted a written request seeking information related to the pending grievances. Respondent did not reply to this request. On February 10, 2011, COSA filed a second information request seeking the same information:

> 1) Any/all documents, records, notes, memoranda, policies, procedures, etc. which the Employer relied in making its determination to remove the duty of receiving, reviewing, recording and/or distributing all incoming mail from the bargaining unit employee ,who has normally performed the work.
>
> 2) The Employer's written rationale for disallowing receipt. recording, distribution of incoming mail by the Administrative Assistant
>
> 3) Who specifically, is currently retrieving, reviewing, sorting and/or distributing incoming mail? The Employer's written rationale for this assignment. A (written) description of the specific steps, tasks, duties. procedures taken and/or followed by this person in receiving, reviewing, determining which pieces of mail warrant distribution and which do not. recording, and/or distributing incoming mail
>
> 4) Confirmation that the Employer advised the U.S. Postal Service to NO LONGER deliver mail to the Administrative Assistant but instead to ONLY use recently installed "drop box." How was this request made? In writing? If so, please provide a copy of that communication. If verbally . . . to whom was request made? Why was the request made? Who, specifically, has access to the contents of the "drop box?"
>
> 5) Why does the Administrative Assistant not have access to all incoming mail/the contents of the drop box?
>
> 6) Is the Employer claiming that incoming mail contains "confidential" communications and thus the Administrative Assistant should no longer have access to such? If so, what constitutes "confidential" mail? Have these "confidential" mailing only recently been received in the office? What specifically are these "confidential" mailings? What criteria/factors were/are used to determine what mail is "confidential?"
>
> 7) Any/all documents, including supervisory files, counseling memorandums, performance evaluations, disciplinary actions, etc. concerning the work performance of the Administrative Assistance, viz., Ms. Nancy Durner.
>
> 8) The Employer's argument(s) and justifications(s) in support of its decision to remove the complained of work from the bargaining unit.

Respondent did not reply to this information request and has not furnished the requested information.

The requested information relates directly to the grievances which had been filed and to the preservation of work within the bargaining unit. I conclude that it was necessary for COSA to perform its representation function. Accordingly, Respondent's failure and refusal to furnish the information violated Section 8(a)(5) and (1) of the Act.

Information Related to Insurance Policies

By January 31, 2011 letter, COSA notified Respondent it wished to negotiate a collective-bargaining agreement to succeed the one expiring September 30, 2011. By February 3, 2011 letter, COSA requested information about insurance programs under the expiring collective-bargaining agreement. The request included the following:

> (a) A listing of employees currently receiving retiree benefits.
>
> (b) A listing of employees eligible to receive a retirement benefit, summary plan descriptions, certificates, notes, invoice and bills, for current health care, dental and optical plans.

Respondent's answer admits these allegations. However, its answer denies that it failed and refused to provide the information listed in complaint paragraph 12(a) and also denies that it delayed unreasonably in furnishing the information requested in complaint paragraph 12(b), as alleged in complaint paragraphs 20 and 21, respectively.

Complaint paragraphs 12(a) and 20, on the one hand, and 12(b) and 21 on the other, raise different issues which need to be addressed separately. Therefore, I will begin with the issues associated with the information described in complaint paragraph 12(a), a "listing of employees currently receiving retiree benefits."

In a February 14, 2011 reply, Respondent acknowledged the February 3, 2011 information request and promised a "response and/or the requested documents" in the "near future." However, it did not communicate further about the matter until bargaining began on April 1, 2011. At that time, Respondent delivered to COSA a letter dated March 30, 2011, and signed by Moore, which attached much of the information requested except for the documentation related to retirees, that is, the information described in complaint paragraph 12(a).

The Respondent's posthearing brief states, "MSEA responded to this request on the first day of bargaining, April 1, 2011, by providing the large packet regarding employee *and retiree* benefit information; all of the information requested. GC Ex 84." (Emphasis added.) That might suggest that Respondent indeed had furnished COSA with the information described in complaint paragraph 12(a), but I do not find support in the record for such an assertion.

Although Respondent cites General Counsel's Exhibit 84 to support its statement that all of the requested information had been provided, this exhibit does not itself include such information. To the contrary, it indicates that Respondent was denying the portion of COSA's request which sought information about retiree benefits.

Thus, Moore's March 30, 2011 letter stated, "I do not believe that your request for any retiree information is relevant to bargaining and also believe that it is of a confidential nature. Please state the relevance of this request with greater specificity."

COSA replied that the information regarding retiree benefits was relevant because the collective-bargaining agreement covered retirees. When Respondent explained that its confidentiality concerns pertained to the disclosure of Social Security or other identifying number, COSA said it would accept the information with such numbers redacted. Respondent has not provided this information.

In *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), the Supreme Court held that retiree benefits were not a mandatory subject of collective bargaining. However, the requested information remains relevant because the cost of retiree benefits affects the amount of money available to fund wages and benefits for bargaining unit employees.

Moreover, Respondent's revenue does not come from profit but from dues, and its membership base has been shrinking. Thus, COSA has an interest in assuring that benefits funded through its collective-bargaining agreement are used efficiently and by the intended beneficiaries. Therefore, I conclude that the requested information, as described in complaint paragraph 12(a) was both necessary and relevant and that Respondent had a duty to provide it notwithstanding that it pertained to retirees rather than current employees.

Further, I find that Respondent never provided this information, as alleged in complaint paragraph 20. Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by the conduct alleged in complaint paragraphs 12(a) and 20.

Now, I turn to the separate issues raised by complaint paragraphs 12(b) and 21. As noted above, complaint paragraph 12(b) sought information which pertained not to retirees but to current bargaining unit employees. The record establishes that Respondent did provide this information, but not until April 1, 2011.

Complaint paragraph 21 alleges that from about February 3 to about March 30, 2011, Respondent unreasonably delayed in providing the information. The General Counsel's brief states, in part, as follows: "Whether information is provided in a timely fashion depends on the existing circumstances in each case, but the Board has held that a delay as short as four weeks can be unlawful. *U.S. Postal Service*, 308 NLRB 547, 550 (1992)."

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993).

Further, in evaluating the promptness of the response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995); *West Penn Power Co.*, 339 NLRB 585 (2003).

In principle, reasons might exist which would make the 7-week delay here reasonable. However, the record does not establish any. Moreover, if Respondent had indeed been experiencing difficulties gathering the requested information, it could have explained the problem to COSA and requested more time. It did not.

The Act, not the parties' contract, imposes on an employer the duty to provide relevant and necessary information requested by its employees' exclusive representative. However, it may be noted in passing that in article 4, section G of its collective-bargaining agreement with COSA, Respondent "agrees to furnish, in response to reasonable requests, information which is necessary for [COSA] to develop negotiations proposals."

The collective-bargaining agreement also sets out a specific framework and timetable for negotiating. Thus, the parties manifested a fine sensitivity to the bargaining process, as might be expected when the employer itself is a labor organization. In view of this sensitivity, it does seem more likely that had Respondent encountered a problem which delayed its assembling the requested information, it would have told COSA about the difficulty.

Based on Respondent's failure to inform COSA, before the first day of bargaining, that some problem existed which made compliance with the information request difficult, and based on the absence of evidence indicating the existence of such a problem, I conclude there was no such problem. Moreover, the complexity and extent of the information requested does not appear to be so great or burdensome that it would take 7 weeks to comply.

Accordingly, I cannot conclude that Respondent made a reasonable, good-faith effort to respond to the request as promptly as circumstances allowed. Therefore, I further conclude that Respondent delayed unreasonably in furnishing the requested information and thereby violated Section 8(a)(5) and (1) of the Act.

February 9, 2011 Request Regarding Job Duties

On February 9, 2011, COSA requested detailed descriptions of the job duties of the MSEA president, assistant to the president, vice president, and of those job duties and activities of the communication director which were not associated with the publication of a newsletter. Of these four positions, only that of communications director was within the bargaining unit. Information about that latter position is presumptively relevant and that presumption has not been rebutted. However, no presumption of relevance attaches to the request for information about the duties of the MSEA president, assistant to the president, and vice president.

Under the rather unusual circumstances of this case, I conclude that the requested information was relevant. In a typical corporation, the respective duties of the chief executive and the members of the bargaining unit would be rather obvious and not easily confused. However, in the present case, the bargaining unit employees represented State workers in grievance proceedings and arbitrations, and the line between their duties and those of MSEA elected officers easily became blurred.

Moreover, at this particular time, MSEA was using volunteers more than previously, further blurring the contours of bargaining unit work. Also at this time, MSEA and COSA were starting the process of negotiating a new collective-bargaining agreement, which afforded an opportunity for the parties to resolve any ambiguities in what was and what was

not bargaining unit work. Certainly COSA, which suspected that bargaining unit work was being transferred out of the unit, intended to raise the matter during negotiations.

Clarifying what was and what was not bargaining unit work entailed the equivalent of drawing a Venn diagram which showed the duties of unit employees, those of nonunit personnel, and the area of overlap. Such a diagram necessarily would require information about the duties of individuals outside the bargaining unit. Therefore, I conclude that the requested information was both relevant to COSA's representation function and necessary for that purpose.

Although Respondent acknowledged the information request, it has never complied with it. I conclude that its failure to do so violated Section 8(a)(5) and (1) of the Act.

February 10, 2011 Request about MSEA Volunteers

As mentioned above, COSA was concerned about the influx of volunteers and the extent to which they were doing bargaining unit work. It appears that some of these volunteers had retired from their jobs with the State of Michigan, but others were able to take extended leaves from their government jobs and use that time as MSEA volunteers. Obviously, members of the COSA-represented bargaining unit would be concerned that use of such volunteers would result in layoffs.

On February 10, 2011, it requested information regarding whether certain named volunteers worked on matters concerning representation and, if so, sought details about that work. It also asked for the names of other MSEA members released from their State employment to do volunteer work for MSEA, details about the work they did, and documents regarding MSEA meetings that had an impact on the terms of conditions of employment of any bargaining unit employees. COSA requested this information both to police the collective-bargaining agreement and to prepare for negotiations with the Respondent. Under the circumstances, I conclude that the requested information was both relevant to and necessary for COSA to perform its representation function. However, the Respondent has not provided any of the requested information.

Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act.

February 16, 2011 Request Regarding Hiring of Gonzales

In mid-February 2011, COSA received word that Respondent had hired Fidencio Gonzales, who had been working as a volunteer in the MSEA offices. Gonzales, in fact, had been hired to file a vacant position in the bargaining unit, but worked for less than 30 days.

On February 16, 2011, COSA submitted a request for information about the details of Gonzales' employment, the manner of his hire, and related matters. I conclude that this requested information, about an employee in the bargaining unit, was presumptively relevant.

Although Respondent acknowledged receiving the information request, it never provided the information. I conclude that Respondent's failure to do so violated Section 8(a)(5) and (1) of the Act.

Information Request about Phone and Email Monitoring

After Respondent installed a new voice mail system, COSA learned that it was telling callers that their telephone conversations might be recorded. Because the collective-bargaining agreement allows COSA to use Respondent's telephones and email for union business, COSA submitted a February 16, 2011 information request to find out when Respondent began using this recorded telephone greeting, whether Respondent monitored email communications and, if so, the dates when Respondent began doing so and the names of employees whose email had been monitored, the Respondent's rationale or business necessity for monitoring emails, and any written communications sent to employees advising them that their email might be monitored.

Respondent's president, Moore, replied by February 26, 2011 letter, but it failed to provide the date when the phone system began advising callers that their conversations could be monitored. Moreover, Respondent refused to provide information about whether it monitored email. Instead, Moore's letter stated that "The computers and MSEA.org email domains are the property of MSEA and the Employer is well within its Managements." As of the date of the unfair labor practice hearing, Respondent hadn't provided the information.

Even if, as Moore's letter stated, Respondent owned the computers which the employees used and the MSEA.org domain, such ownership does not affect Respondent's duty to provide the requested information concerning the monitoring of email communications. Presumably, any employer owns much of the equipment used by its employees, but such ownership does not allow it to refuse to provide relevant and necessary information about working conditions involving its use.

Additionally, Respondent's February 26, 2011 letter confuses the legal principles concerning when an employer may act unilaterally with the principles about the duty to provide information. Even assuming for the sake of analysis that COSA had waived its right to bargain about this condition of employment, and that Respondent was "within its Managements" when it installed the electronic equipment, a right to make a unilateral change in a condition of employment doesn't affect either the union's entitlement to information about the change or the employer's duty to provide that information.

Nor does a management right to act unilaterally affect the relevance or necessity of the requested information. Even if a union had waived the right to bargain about such a change during the term of a contract, it might still wish to reopen the subject during negotiations for the next agreement. Moreover, a union might well need the information to decide whether to file a grievance.

The requested information concerned working conditions of bargaining unit employees and Respondent has not rebutted the presumption of relevance. Therefore, I find that Respondent's refusal to provide the information violated Section 8(a)(5) and (1) of the Act.

Unilateral Change Allegations

Complaint paragraph 22 alleges that on about July 12, 2011, Respondent unilaterally implemented certain work rules described by Respondent as "Employee Work Rules." Complaint paragraph 23 alleges that on about November 7, 2011, Respondent unilaterally eliminated its practice of providing cell

phones or cell phone subsidies to bargaining unit employees. Respondent's answer admits both allegations. However, later in its answer, Respondent denied that it took the actions alleged in complaint paragraphs 22 and 23 "without providing prior notice" to COSA. It also denied that it failed to afford an opportunity to bargain over the effects of these actions.

If a contemplated change makes a material, substantial, and significant change in employees' terms and conditions of employment and concerns a mandatory subject of bargaining, an employer has a duty both to notify the exclusive representative of its employees of the contemplated change and to bargain with this representative, on request, concerning the change and its effects. Thus, the term "unilateral change" may refer either to a change made without prior notice or to a change made without affording an opportunity to bargain on request, as well as to a change made without both.

Complaint paragraph 22 specifically alleges that Respondent "unilaterally implemented" certain work rules and complaint paragraph 23 specifically alleges that Respondent "unilaterally eliminated" its practice of providing cell phones. For the reasons stated in the paragraph above, I conclude that the word "unilaterally" conveys the meaning that Respondent acted either without giving prior notice or without affording an opportunity to bargain, or both. Because Respondent's answer states that it gave prior notice, and also asserts that it afforded an opportunity to bargain about the effects, but does not state that it afforded an opportunity to bargain about the changes themselves, I conclude that Respondent has admitted that it made the changes without providing an opportunity to bargain.

Alleged Unilateral Implementation of Work Rules

To prove that there was a "unilateral change," the General Counsel must first show that something changed. Obviously, if working conditions remained in all ways the same, there would be no change, whether unilateral or not. Respondent vigorously insists that work rules already were in place before July 12, 2011. On the other hand, the General Counsel asserts that no work rules had been implemented before that date.

Immediately before Kenneth Moore became MSEA president in July 2010, Scott Dianda held that office. Dianda testified that the parties had been bargaining about work rules but that he never implemented them:

> Q. Okay. But what was the resolution as to your negotiation on work rules?
>
> A. I did not implement work rules in that contract.
>
> Q. Did you ever tell the union that?
>
> A. Yes, I did. COSA, I told them—
>
> Q. COSA, yes.
>
> A. [W]hen we negotiated that I just felt that myself coming from the State knowing what we have to do showing up—you know, they'd hire us to come in and do a job, you show up at a certain time and you do your job. So I wasn't really looking at going back to trying to micromanage a lot of those things that were discussed before I came in there. That's just the way I felt about it.

When Dianda testified that "I wasn't really looking at going back to trying to micromanage a lot of these things," his words had the ring of truth. His personality differed from that of his successor, Kenneth Moore, who demonstrated quite an inclination towards micromanagement and believed it was needed. Dianda, on the other hand, found the prospect of work rules distasteful. Indeed, it would seem that, in the 2010 MSEA election, the pendulum swung from one extreme to the other.

Before Dianda became MSEA president in 2008, Roberto Mosqueda held that office. His testimony is particularly significant because he originated a February 12, 2007 memo to all members of the COSA-represented bargaining unit, which attached a copy of work rules. The memo stated:

> In accordance with Article 36 of the Collective Bargaining Agreement between the Michigan State Employees Association (MSEA) and the Central Office Staff Association (COSA), attached, please find your copy of MSEA's Employee Work Rules.
>
> At this time, I would like to thank you for your input and let you know that I have taken all input into consideration.
>
> These rules will be implemented beginning Monday, February 26, 2007.

Respondent points to this memo as evidence that work rules already were in effect at the time of the alleged unilateral change on July 12, 2011. However, Mosqueda's testimony indicates that the work rules, although proposed, were not implemented:

> I remember that Mr. Moore had called me and asked me about the work rules, and I think I believe I told him that they were implemented at the time, I then did some soul searching and talked with my vice president and realized that I basically misspoke at the time, that we had presented these work rules to Clyde, who was ahead of the COSA unit at that time, and we were back and forth, and I did, I believe I did send this out to try to implement them, and then they said they needed more time to look at them. I said okay, so I backed up off of it and said, "Well, we'll just talk."
>
> Q. Okay.
>
> A. It wasn't really no—it wasn't nothing really to push it through. And then what happened was is I ended up losing at the next GA, and from there I think they just fell by the wayside.
>
> Q. Okay, so is it your position that those were never implemented?
>
> A. Well, let me put it this way, I know that we had talked about implementing them and that, you know, I had given them indications that I wanted to implement them, but then COSA came to me and said they'd like to look at them more, and I said, "Okay, go ahead." So it wasn't like I was a—
>
> Q. Okay.
>
> A. it's a now or never.
>
> Q. Okay, so after they talked, they asked for more time, did you ever come back and rediscuss the issue before you left office?

A. No, I don't think so—I think we got—I got involved in GA and everything else that was getting prepared for that, and I really never did, no.

Q. And who succeeded you in office?

A. Scott Dianda.

The term "GA" refers to MSEA's General Assembly, at which Dianda was elected to succeed Mosqueda. Thus, it appears that the pendulum swung from an MSEA president who favored work rules, Mosqueda, to one who did not, Dianda, and then back to one who did, Moore.

From the testimony of both Dianda and Mosqueda, which I credit, I find that Mosqueda never implemented the proposed work rules and Dianda did not want to do so. Therefore, I further conclude that no work rules were in effect on July 12, 2011. However, Moore may have believed they were in effect because Mosqueda provided him erroneous information.

On the other hand, COSA learned that Respondent considered the rules to be in effect when Respondent cited them as grounds for discharging Durner. Since the rules previously had not been in force, Respondent's reliance on them to discharge an employee amounted to a unilateral implementation of the rule.

The collective-bargaining agreement then in effect afforded Respondent a limited right to implement some rules unilaterally but required Respondent to present proposed work rules to COSA within 10 days, to allow COSA to review and comment on them. Respondent did not comply with this requirement, perhaps because Moore may have believed that the work rules already had been adopted.

Additionally, another article of the collective-bargaining agreement provided that "if the Employer exercises its right to make changes which, to a substantial degree, adversely impact the bargaining unit and/or its individual members, the modification and remedy of such resulting impact shall be subject to collective bargaining." Therefore, I conclude that COSA did not waive its right to bargain about the rule.

Further, I find that Respondent did not afford COSA notice and an opportunity to bargain about the rule before Respondent applied it to discharge Durner. Moreover, the fact that the rule could result and indeed did result in the discharge of an employee leads me to conclude that it effected a material, substantial, and significant change in working conditions.

For these reasons, I conclude that Respondent's announcement and application of the rule on July 12, 2011, violated Section 8(a)(5) and (1) of the Act.

Change in Providing Cell Phones

Respondent has admitted the allegation, in complaint paragraph 23, that on about November 7, 2011, Respondent unilaterally eliminated its practice of providing cell phones or cell phone subsidies to bargaining unit employees. However, it denies that this practice was a mandatory subject of bargaining, as alleged in complaint paragraph 25.

Respondent's brief acknowledges that "MSEA eliminated the practice [of providing cell phones] as a cost-cutting measure, necessitated by the undisputed decline in dues income." The brief then argues that the collective-bargaining agreement never refers to cell phones as a benefit:

> They were never provided as an employee benefit or term or condition of employment. Instead, they were provided as a tool for conducting MSEA business, same as an office computer or office furniture. MSEA switched to reimbursing employees on a per-call basis. Hence, the change does not affect a term or condition of employment and, therefore, constitutes no violation of the Act. Even assuming, arguendo, that it did, members suffered no damages because reimbursement for their calls continued in a different form.

With respect to Respondent's first argument that the collective-bargaining agreement didn't refer to cell phones, the Board's case law does not limit the unilateral change doctrine only to those instances in which a contractually agreed-upon benefit is changed. Rather, the doctrine applies to any established term of employment. Unilateral elimination of a past practice violates the Act even if the practice has not been embodied in a term of a collective-bargaining agreement. *Arvinmeritor, Inc.*, 340 NLRB 1035, 1039 (2003).

Respondent also argues that cell phones were merely a tool, analogous to a computer or a desk. However, the elimination of either might well constitute a material, substantial and significant change in a term or condition of employment. To take an extreme example, if employees had a practice of doing their work on laptops while seated at their desks, it would be difficult to argue the insignificance of requiring them to use quill pens while standing up.

Moreover, in actual practice, bargaining unit employees had a choice of receiving a cell phone or a $50-monthly stipend. Changing to a system of per-call reimbursement in lieu of the stipend certainly constituted a material, substantial, and significant change. Respondent's brief described the change as a "cost-cutting measure," and presumably Respondent would not have taken this step if the savings were insignificant. However, by eliminating the stipend, Respondent unilaterally diminished the employees' compensation.

In sum, I conclude that elimination of the cell phone past practice constituted a material, substantial, and significant change in a mandatory subject of bargaining. I further conclude that Respondent's doing so unilaterally, without affording COSA notice and an opportunity to bargain, violated Section 8(a)(5) and (1) of the Act.

Alleged Removal of Unit Work

Complaint paragraph 24 alleges that in about January 2012 Respondent unilaterally removed pre-arbitration settlement work from the bargaining unit. Respondent denies this allegation and also denies that such work was a mandatory subject of bargaining, as alleged in complaint paragraph 25.

Complaint paragraph 26 alleges that Respondent engaged in this conduct without providing prior notice to COSA and without affording COSA an opportunity to bargain with Respondent regarding this conduct and the effects of this conduct. Respondent's answer to complaint paragraph 26 states, in pertinent part, as follows:

> Respondent denies that it engaged in the conduct described in Paragraphs 22 through 24 without providing

> prior notice to the Charging Union. It denies the allegation or implication that bargaining was required with regard to the described actions, and denies that it denied an opportunity to Respondent [sic] to bargain over the effects of these actions. Moreover, the allegations in Paragraph 26 are not applicable to the allegations in Paragraph 24, for the reason that Respondent denies that it unilaterally removed prearbitration settlement work from the unit.

Stated another way, Respondent answers that it gave COSA notice and an opportunity to bargain over the effects but not the decision itself and that there was no duty to bargain over this decision; further, because Respondent did not remove prearbitration settlement work from the bargaining unit, it follows that it could not have failed to provide notice before doing so.

Thus, there is a factual dispute regarding what actually happened with respect to the work performed by employees in the COSA-represented bargaining representatives. Did the Respondent remove pre-arbitration settlement work from the bargaining unit or not?

As a union representing employees of the State of Michigan, the Respondent must decide which of these employees' grievances should be taken to arbitration and which seem so unwinnable that it would not be worth the expense. A committee of MSEA members, called the Litigation and Arbitration Committee, performs this function. However, if the committee decides not to take a particular grievance to arbitration, the grievant can appeal that decision to Respondent's president.

In August 2010, a month after Moore took office as Respondent's president, Fidencio Gonzales became chair of the Litigation and Arbitration (or Lit-Arb) Committee. The record suggests that Gonzales is allied with Moore in Respondent's internal politics, and thus shared Moore's desire to make operations most efficient. It concerned Gonzales to hear that staff members no longer were sending out letters to advise each grievant whether the committee had decided to take the grievance to arbitration, so Gonzales began sending out such letters himself.

In 2011, Respondent, in its capacity as the union representing state employees, negotiated a new collective-bargaining agreement with the State of Michigan which changed the arbitration procedure. Previously, Respondent and the State had obtained arbitrators through the American Arbitration Association, which charged fees for its services. The new agreement established a procedure to use arbitrators on a panel maintained by the Office of State Employer.

Respondent had an established practice of using its paid staff, employees in the COSA-represented bargaining unit, to represent the grievants both in arbitration hearings and at earlier stages in the grievance procedure. In the most challenging arbitration hearings, Respondent would retain a lawyer, and COSA had not objected to its doing so. Even then, a labor relations specialist from the COSA-represented bargaining unit might also attend the arbitration to assist the attorney and provide the grievant with "moral support" (the term Moore had used in describing Audrey Johnson's presence at such a hearing).

Labor Relations Specialist Rhonda Westphal credibly testified that in January 2012 she and other labor relations staff members received a memo advising them that the American Arbitration Association would no longer be used and directing them to turn in all the current cases that had not yet been scheduled for arbitration. Westphal estimated that pursuant to this instruction, staff members turned in about 35 cases.

Previously, bargaining unit employees would receive case assignments soon after the Litigation and Arbitration Committee decided that a grievance should go to arbitration. The number of such assignments diminished greatly, starting in January 2012, but this decrease was not proportional to the number of cases being approved for arbitration. Westphal testified that more than 70 cases had been approved for arbitration between January and August 2012, but she had received only four such case assignments in that period.

Respondent's new collective-bargaining agreement with the State of Michigan created a new procedure, called an "Article 8 meeting," in which representatives would meet to work out a settlement, if possible, to eliminate the need for arbitration. Respondent's president, Moore, and/or Gonzales, as chair of the Litigation and Arbitration Committee, usually attended such meetings, but a bargaining unit staff member did not.

Credited evidence establishes that the amount of prearbitration settlement work given to bargaining unit employees decreased dramatically beginning in January 2012. Although elected MSEA officers, such as the president, always could meet with State of Michigan management concerning a grievance, the regular attendance of Moore and Gonzales at the prearbitration meetings constituted a new development.

Respondent's brief discusses the new "Article 8 meeting" process and then argues that to "read these processes as impinging on COSA's exclusive bargaining unit work, or constituting a unilateral change, is grossly inaccurate. It would subordinate MSEA's obligation to bargain with the State of Michigan to an alleged (and nonexistent) obligation to give unnecessary work to COSA."

Notwithstanding this argument, I conclude that Respondent did make a unilateral change and, in fact, did so precisely to remove work from the bargaining unit because Respondent did not believe bargaining unit employees were doing it well. This conclusion is consistent with a statement made by Respondent's counsel during the hearing while arguing for admission of a proffered exhibit:

> [T]here's been a claim in the complaint that the Respondent has eroded the bargaining unit or taken away bargaining unit work by taking away selection of arbitrators and turning them over to an arbitration panel. This document is relevant towards *explaining why that decision was made and why we think it was justified.*
>
> It's also an example of something that's already been touched upon in this hearing, but you're going to hear a lot more testimony about it, and that is the *repeated difficulty that MSEA's membership and leadership has had in getting information out of its paid staff.* Now, that's been an issue so far for instance in the claims that MSEA was very dilatory in making bargaining proposals. We're going to

> be establishing that the reason why there were delay in proposals, especially on financials, was that MSEA was dependent, hostage if you will, to its own staff getting the information it needed to make bargaining proposals at the table with COSA.

(Emphasis added.) Moreover, the record reveals that Respondent's president, Moore, had a nearly visceral hostility to COSA which manifested itself in the unfair labor practices found above and the Respondent's conduct at the negotiating table, addressed below. Based on the credited testimony of Benny Poole Jr., I have found that Moore harbored not merely animus but an abiding intention to get rid of COSA by discharging its members. Eliminating the bargaining unit work, I conclude, was part of that plan.

It is well established that an employer violates Section 8(a)(5) when it diverts bargaining unit work without bargaining with the union, irrespective of whether the diverted work is performed by statutory employees, independent contractors, supervisors, managers, or any other workers. *Quickway Transportation, Inc.*, 354 NLRB 560 (2009); *Naperville Ready Mix, Inc.*, 329 NLRB 174 (1999), enfd. 242 F.3d 744 (7th Cir. 2001); *Torrington Industries*, 307 NLRB 809 (1992). The category of "any other workers" certainly would include volunteers.

Further, the record does not establish that COSA waived its right to bargain over the decision or its effects.

Complaint paragraph 26 alleges that Respondent refused to bargain about both the unilateral change alleged in complaint paragraph 24—the elimination of bargaining unit work—and about the effects of that change. Respondent's answer, quoted above, asserted that complaint paragraph 26 was "inapplicable" because it had not made a unilateral change.

Having found that Respondent did, indeed, make a change without notifying COSA or affording it an opportunity to bargain, I further conclude that it also failed and refused to bargain about the effects. Respondent would hardly bargain about the effects of change which, it maintained, did not occur. Moreover, the record does not establish any such effects bargaining.

In sum, for the reasons stated above, I conclude that Respondent's elimination of bargaining unit work—the representation of grievants before arbitration— without notifying COSA and affording it the opportunity to bargain about the change and its effects, breached the Respondent's duty to bargain in good faith and violated Section 8(a)(5) and (1) of the Act.

Bad-Faith Bargaining Allegations

Complaint paragraphs 40 and 41(a)–(g) allege that Respondent, from about April 1 to December 31, 2011, engaged in various bargaining-related conduct which the General Counsel has characterized as a "pattern of bad faith bargaining." Respondent denies these allegations.

The General Counsel notes that the 2008–2011 collective-bargaining agreement included an article which set out ground rules for negotiating a contract to replace it, and that on April, 1, 2011, the first day of bargaining, Respondent proposed different rules.

The existing 2008–2011 collective-bargaining agreement included, as an appendix, job descriptions for various positions in the bargaining unit. Early in the 2011 negotiations, Respondent proposed eliminating these descriptions from the contract.

COSA President Manning sent Moore a May 17, 2011 memo asking "if it is the Employer's intent to remove yet maintain the existing position descriptions, or, instead, to rewrite the position descriptions." Moore replied 2 days later with a memo stating, in part, "The existing position descriptions in the COSA agreement are recognized by the employer as current." The memo did not answer Manning's question. Moreover, the record does not indicate that Respondent ever gave COSA any reason for its proposal to remove the position description from the contract other than a desire to have more flexibility.

Although the Respondent did not appear to have compelling reasons for wanting to remove the descriptions from the contract, COSA strongly wanted them to remain in the contract because of its belief that Respondent was having volunteers perform bargaining unit work.

As I have found, above, based in part on the "get COSA" remark Moore made in the presence of Benny Poole, Moore was intent upon eliminating COSA by decreasing the size of the bargaining unit to zero. Moore also had embarked upon a plan to use volunteers to perform functions formerly done by bargaining unit members. In these circumstances, I conclude that Respondent's proposal to remove the position descriptions from the collective-bargaining agreement was not bargaining in good faith but rather part of the "get COSA" scheme.

The General Counsel argues that Respondent was slow to make proposals and slow to respond to COSA proposals. The General Counsel notes that although COSA made its initial wage proposal on May 31, 2011, Respondent didn't make a wage proposal until September 28.

Respondent argues that members of the COSA-represented bargaining unit had control over access to computer records it needed to formulate bargaining proposals, thereby causing delay in Respondent's making proposals. However, credible evidence does not establish the existence of any significant tug-of-war between management and employees concerning access to information. Absent more specific, persuasive evidence, I must reject this asserted defense.

The General Counsel argues that Respondent engaged in delaying tactics by taking frequent caucuses and by often arriving late for bargaining sessions. The General Counsel states that 20 bargaining sessions were held between April 1 and May 31 but the longest meeting lasted only about an hour and a half. "Although both parties took caucuses, Respondent's took them more frequently," the General Counsel's brief states, "and their caucuses were significantly longer in length."

Considered by itself, the evidence concerning the length of bargaining sessions and number of caucuses does not seem particularly indicative of bad faith. However, the Board focuses on the totality of conduct rather than bits and pieces in isolation. See, e.g., *Overnight Transportation Co.*, 296 NLRB 669, 671 (1989).

If a piece of the puzzle does not fit with the rest, it may have more evidentiary significance than if it merely is consistent with them. Here, this one factor, the number of meetings and their duration, fits the overall pattern emerging from a totality of the factors— the pattern of an employer bargaining without

intending to reach agreement—but this one factor certainly is not the brightest star in the constellation.

On the other hand, it is telling that on at least three occasions early in the bargaining, Respondent's negotiators called a caucus and then did not return, leaving the members of the COSA bargaining team waiting and wondering. The significance of this conduct does not inhere in its rudeness but in its reflection on the intentions of the management negotiators.

A party who really is trying to reach agreement must either convince the other side to accept an unpalatable proposal or else modify or drop the proposal, and in that respect, bargaining involves salesmanship skills. It is difficult to imagine an automobile salesman telling a prospective customer, "I'll be right back" and then disappear without returning. At the very least, the salesman somehow would get word to the potential buyer that he could not return. He certainly wouldn't leave the potential customer feeling jilted because a potential customer feeling jilted does not remain a potential customer.

Here, Respondent's negotiators left the COSA team with the impression that after a short time they would return to the table, but then failed either to return or notify the COSA bargainers that they would not be coming back. Such conduct communicates contempt. Even if Respondent's negotiators felt personal ill will towards those on the other side, they would try to suppress those feelings in the interest of reaching agreement. More accurately, they would suppress such personal feelings if they really had an intention of reaching a deal.

Respondent's negotiators were not amateurs. After all, Respondent's primary "business," its reason for being, was to engage in labor negotiations and related matters. These experienced professionals knew how to treat the other side if they wanted and expected to reach agreement. Instead, they acted in a rude manner which foreseeably would make the negotiation process more difficult and less likely to succeed. That is not the signature of someone bargaining in good faith.

The General Counsel points to a number of other factors that may have little odor individually but all together create the stench of bad faith. These factors include Respondent's failure to respond to a COSA request to bargain about work rules. The Respondent's unilateral implementation of such rules had made them a significant issue. Respondent's failure to address COSA's request is consistent with a finding that it did not take its bargain obligation seriously.

Likewise, Respondent's refusal to bargain about the status of a temporary employee takes on additional significance considering that COSA feared that the Respondent was transferring work out of the bargaining unit. Again, such a refusal does not suggest a good-faith intention of reaching an agreement.

Additionally, Respondent's other unfair labor practices reflect on Respondent's good faith, or lack of it, at the bargaining table. Respondent unlawfully discharged a member of the COSA bargaining committee, Nancy Durner, for engaging in union and protected concerted activity.

Even more telling, Respondent repeatedly failed and refused to furnish COSA with requested relevant and necessary information, itself a breach of the duty to bargain in good faith and an impediment to reaching agreement. From 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.

However, in one sense, the Respondent's conduct puzzles me because it occurs in an atypical setting. As noted above, although Respondent is a private sector employer here subject to the Board's jurisdiction, its mission is to represent employees in the public sector, mostly employees of the State of Michigan but also employees of some county governments. Were the field of labor relations a garden, public sector bargaining would be a different cultivar, if not an entirely different species. A fundamental distinguishing factor concerns the role of strikes.

The National Labor Relations Act seeks to reduce industrial strife but nonetheless treats the economic strike as a legitimate means of exerting economic pressure and thereby, ultimately, reaching agreement. On the other hand, strikes by *government* employees evoke widespread disapproval and frequently are illegal. Public sector negotiators therefore seek alternatives to the strike, such as allowing an arbitrator to decide the terms of a contract should the parties' deadlock.

Respondent's collective-bargaining agreement with the State of Michigan, on behalf of the public employees which it represents, includes a provision requiring such interest arbitration when the parties cannot reach agreement. Such a provision is not novel in the public sector. However, when Respondent turned from bargaining with the State to negotiations with its own employees, it agreed to a similar interest arbitration provision in that contract. Such an article is rare in private sector agreements.

The presence of this unusual interest arbitration provision in a private sector labor agreement changes the dynamic of bargaining. Under the Act, if the parties reach a good-faith impasse in the absence of unfair labor practices, an employer may implement its final offer unilaterally. A typical motivation, when a private sector employer crosses the line from "hard bargaining" into bad-faith bargaining, is the employer's intention to force an impasse so that it may implement its offer unilaterally.

However, the interest arbitration clause changes the destination: Instead of freeing an employer to implement its offer, with terms it favors and the union does not, the impasse leads to an arbitration in which a third party decides what the contract should contain.

In the present case, therefore, it would seem unlikely that the Respondent was trying to force an impasse because that would result in arbitration and not in freedom to implement terms unilaterally. Indeed, ultimately, an arbitrator did examine each contract term on which the parties could not agree and, in each instance, chose either the management or union proposal.

The General Counsel's brief suggests that the Respondent forced COSA into the interest arbitration because COSA was a small union which could ill afford its share of the expense of the arbitrator. Perhaps that is true.

However, I believe it more likely that Respondent failed to bargain in good faith with COSA because Respondent already had embarked on a plan to eliminate COSA by reducing the bargaining unit to zero employees and transferring the work elsewhere. Since the Respondent believed COSA was "living

on borrowed time," it saw no need to take its bargaining obligation seriously. Likewise, it appears likely that Moore believed that COSA soon would be a thing of the past and therefore saw little need to suppress his contempt.

In sum, I conclude that 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.

REMEDY

To remedy the harm caused by the violations found herein, the Respondent must post the notice to employees attached as appendix and take affirmative actions. These actions include offering immediate and full reinstatement to employee Audrey Johnson and making employees Audrey Johnson and Nancy Durner (who previously was reinstated) whole, with interest, for all losses they suffered because Respondent unlawfully discharged them.

Respondent also must restore the recall rights of Mary Groves and make her whole, with interest, for all losses she suffered because Respondent unlawfully terminated those rights. Similarly, Respondent must make employee Ralph Manning whole, with interest, for all losses he suffered because Respondent refused to permit him to return to work after he became able to do so.

Respondent also must make all affected employees whole, with interest, for all losses they suffered because of Respondent's unlawful unilateral changes: Discontinuing the practice of providing bargaining unit employees with cell phones or cell phone subsidies and transferring pre-arbitration settlement work out of the bargaining unit.

Moreover, in addition to rescinding it's 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.

The "make-whole" remedy described herein should be in accordance with appropriate Board formulae and practice which would, of course, take into account interim earnings and interim expenses.

CONCLUSIONS OF LAW

1. The Respondent, Michigan State Employees Association, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Central Office Staff Association, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, part-time and temporary employees who are employed by Respondent for more than 30 calendar days, excluding the assistant to the president, guards, and supervisors as defined by the Act.

4. At all material times, the Charging Party has been the exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of the appropriate unit described above in paragraph 3.

5. Respondent violated Section 8(a)(1) of the Act by requiring an employee to complete a questionnaire that contained language which prohibited disclosing to other employees the contents therein and which threatened her with immediate discharge for a breach of confidentiality regarding the questionnaire.

6. Respondent violated Section 8(a)(3) and (1) of the Act by the following conduct: Suspending and thereafter discharging employee Nancy Durner; placing on administrative leave and thereafter discharging employee Audrey Johnson; terminating the recall rights of laid-off employee Mary Groves; and refusing to authorize employee Clyde Manning to return to work.

7. Respondent violated Section 8(a)(5) and (1) of the Act by repeated refusals to provide the Charging Party with requested information which was necessary for and relevant to the Charging Party's performance of its functions as exclusive bargaining representative, and by unreasonable delay in the furnishing of such information, as discussed in this decision.

8. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing work rules, by unilaterally eliminating its practice of providing cell phones or cell phone subsidies to employees in the bargaining unit, and by removing pre-arbitration settlement work from the bargaining unit, without affording the Charging Party notice and an opportunity to bargain about the changes and their effects, as discussed in this decision.

9. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively and in good faith with the exclusive representative of its employees by a pattern of conduct described in this decision.

10. Except as set forth above, Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[1]

ORDER

The Respondent, Michigan State Employees Association, Lansing, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights by prohibiting them from disclosing the contents of disciplinary documents including investigative questionnaires.

(b) Suspending, placing on administrative leave, discharging, or otherwise disciplining employees because they engaged in union activities or other concerted activities protected by the Act.

(c) Refusing to allow an employee to return to work because the employee was a union officer, had engaged in union activities or in other concerted activities protected by the Act.

(d) Failing and refusing to furnish, or unreasonably delaying in furnishing, information requested by the exclusive repre-

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

sentative of a unit of its employees and which is necessary for and relevant to the performance of that union's representation duties.

(e) Unilaterally implementing work rules, eliminating the practice of providing cell phones or subsidies to unit employees, removing from the bargaining unit work performed by bargaining unit employees, or otherwise making any material, significant, and substantial change in a term or condition of employment which is a mandatory subject of collective bargaining without first giving the employees' exclusive representative notice of the contemplated change and a reasonable opportunity to bargain about the change and its effects.

(f) Engaging in bad-faith bargaining with the Charging Party in the conduct of negotiations for a collective-bargaining agreement or other agreement affecting the wages, hours, and working conditions of bargaining unit employees.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and cease giving effect to prohibitions against disclosure contained in "investigatory questionnaires" or other documents issued to employees, and remove any reference to any breach of such prohibition or breach of confidentiality from the files of any and all affected employees.

(b) 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.

(c) Restore the practice of providing cell phones or cell phone subsidies to bargaining unit employees as it existed before Respondent's unlawful unilateral change, and make affected employees whole, with interest, for all losses they suffered because of Respondent's unlawful discontinuation of this practice.

(d) Restore to bargaining unit employees the pre-arbitration settlement work unlawfully removed from the bargaining unit, and make all affected employees whole, with interest, for all losses they suffered because of Respondent's unlawful removal of this work.

(e) Offer Audrey Johnson immediate and full reinstatement to her former positions of employment or, if her respective position no longer exist, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed and make employees Audrey Johnson and Nancy Durner (who previously was reinstated) whole for any loss of wages or benefits suffered as a result of the discrimination against them by payment of backpay, and reimburse them for any out-of-pocket expenses they may have incurred while searching for work, with interest calculated in accordance with Board policy, and remove from its files and records any reference to their suspensions and discharges, and advise them, in writing, that it has done so and will not use these disciplinary actions against them in the future.

(f) Restore the recall rights of employee Mary Groves and make her whole for any loss of wages or benefits suffered as a result of the unlawful termination of those rights, with interest calculated in accordance with Board policy, remove from its files any reference to the unlawful termination of recall rights, and advise her, in writing, that it has done so.

(g) Make employee Clyde Manning whole, with interest calculated in accordance with Board policy, for all losses because Respondent failed and refused to allow him to return to work on April 30, 2012.

(h) As part of the remedy for the violations addressed in paragraphs (e), (f), and (g), immediately above, reimburse Nancy Durner, Mary Groves, Audrey Johnson, and Clyde Manning amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination, and submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will allocated to the appropriate periods.

(i) With respect to the make-whole relief ordered in paragraphs (b), (c), (d), (e), (f), (g), and (h) above, backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(j) Furnish to the Charging Party, without further delay, the necessary, relevant information requested by the Charging Party, as described in this decision, which has not yet been provided to the Charging Party.

(k) On request, bargain collectively and in good faith with the Charging Party Union as the exclusive collective-bargaining representative of the unit.

(l) Within 14 days after service by the Region, post at its facilities in Lansing, Michigan, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 11, 2010.

(m) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. March 27, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT prohibit you from discussing with your coworkers the contents of questionnaires we require you to complete or other documents related to disciplinary investigations and WE WILL NOT threaten you with discharge or other disciplinary action for discussing the contents of questionnaires we require you to complete or other documents related to disciplinary investigations.

WE WILL NOT discharge you because of your union membership or activities or because you engaged in other concerted activities protected by the National Labor Relations Act.

WE WILL NOT place you on administrative or other leave because of your union membership or activities.

WE WILL NOT terminate your recall rights because of your union membership or activities.

WE WILL NOT refuse to allow you to return to work because of your union membership or activities.

WE WILL NOT otherwise discipline you because of your union membership or activities or because you engaged in other concerted activities protected by the National Labor Relations Act.

WE WILL NOT refuse to bargain in good faith with the Union, Central Office Staff Association (COSA), as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time, part-time and temporary employees who are employed by Respondent for more than 30 calendar days, excluding the assistant to the president, guards, and supervisors as defined by the Act.

WE WILL NOT fail to furnish or unreasonably delay in furnishing the Union with information it has requested which is necessary for and relevant to its performance of its duties representing bargaining unit employees.

WE WILL NOT unilaterally end our practice of providing bargaining unit employees with cell phones or cell phone subsidies.

WE WILL NOT unilaterally implement work rules and WE WILL NOT discharge or otherwise discipline bargaining unit employees based in whole or part on work rules which we have implemented unilaterally, without having given their exclusive representative notice and an opportunity to bargain about the rules or their effects.

WE WILL NOT unilaterally remove pre-arbitration settlement work from the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to employee Audrey Johnson and make her whole, with interest, for all loses she suffered because of our unlawful discrimination against her.

WE WILL make Nancy Durner, who previously was reinstated, whole, with interest, for all loses she suffered because of our unlawful discrimination against her.

WE WILL immediately restore the recall rights of employee Mary Groves and make her whole, with interest, for all losses she suffered because we unlawfully terminated those rights.

WE WILL make employee Ralph Manning whole, with interest, for all losses he suffered because we unlawfully refused to allow him to return to work.

WE WILL remove from our files all references to the suspension and discharge of employee Nancy Durner, and WE WILL notify her individually in writing that we have taken this action and that the suspension and discharge of her will not be used against her in any way.

WE WILL remove from our files all references to the placement on administrative leave and discharge of employee Audrey Johnson, and WE WILL notify her individually in writing that we have taken this action and that the placement on administrative leave and discharge of her will not be used against her in any way.

WE WILL remove from our files all references to our refusal to allow employee Ralph Manning to return to work, and WE WILL notify him individually in writing that we have taken this action and that the refusal to allow him to return to work will not be used against him in any way.

WE WILL rescind the work rules we unlawfully implemented unilaterally, rescind the discipline of any employee disciplined under those rules, expunge all references to such discipline from our files, and make each such unlawfully disciplined employee whole, with interest, for all losses he or she suffered because of our unlawful action.

WE WILL restore the practice of providing bargaining unit employees with cell phones or cell phone subsidies, at their option, and WE WILL make all affected employees whole, with interest, for all loses they suffered because we unlawfully discontinued this policy unilaterally.

WE WILL restore to bargaining unit employees the pre-arbitration settlement work which we unlawfully transferred out of the bargaining unit and will make all employees whole, with interest, for all losses they suffered because of our unlawful action.

WE WILL furnish to COSA, the exclusive bargaining representative, without delay, all information that union has requested which is necessary for and relevant to the performance of its functions representing bargaining unit employees.

WE WILL bargain collectively and in good faith with COSA, as the exclusive bargain representative of the employees in the appropriate unit described above.

MICHIGAN STATE EMPLOYEES ASSOCIATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-077078 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.