

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

GLADES ELECTRIC COOPERATIVE, INC.

and

Cases    12-CA-168580  
          12-CA-175794  
          12-CA-180034

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 1933,  
AFL-CIO

/

**RESPONDENT’S RESPONSE TO GENERAL COUNSEL’S PETITION TO REVOKE**

The Respondent, Glades Electric Cooperative, Inc., by and through undersigned counsel, hereby responds to the General Counsel’s Petition to Revoke (“Petition”) as follows:

**BACKGROUND**

Generally, a subpoena is proper if it seeks information related to material issues or if the subpoena can provide background information or lead to other evidence potentially relevant to the proceeding. § 8-310 NLRB ALJ Bench Book 2020. This Compliance proceeding concerns the issue of proper remedy for two of Respondent’s former meter readers (Emily Randolph and Chad Sevigny) who were found to have been unlawfully laid off. Because it is undisputed that their former positions no longer exist, the Parties dispute the amount of back pay, if any, is owed and whether reinstatement is appropriate. In advance of the upcoming hearing, Respondent has issued multiple subpoenas to various third party witnesses in order to obtain records relevant to Respondent’s alleged back pay liability, including records pertaining to the discriminatees’ interim earnings, mitigation efforts, and eligibility for employment post-layoff. With limited exceptions addressed in further detail below, Respondent opposes the General Counsel’s Petition and requests that it be denied or, alternatively, granted only in part.

## MEMORANDUM OF LAW

### I. STANDING

The Board follows the federal rule that a party lacks standing to object to a third-party subpoena unless the objecting party claims some personal right or privilege with regard to the documents sought. § 8-205 NLRB ALJ Bench Book 2020; *see e.g., Grief Packaging, LLC*, 2012 WL 3184971 n. 2 (2012) (“Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the party claims some personal right or privilege with regard to the documents sought.” (quoting *In re Grand Jury Subpoena John Doe*, No. 05GJ1318, 584 F.3d 175, 184 n. 14 (2009))). While this rule is applicable to the General Counsel (to the extent a subpoena calls for the production of confidential NLRB affidavits or statements), Respondent also acknowledges that the General Counsel may petition to revoke third-party subpoenas which seek “irrelevant information or would otherwise undermine the efficacy of agency proceedings.” § 8-205 NLRB ALJ Bench Book 2020

The General Counsel’s Petition, however, raises arguments beyond the scope of its standing, including the assertion of privileges on behalf of third parties, claims of confidentiality of records that are non-*Jencks* material, as well as over breadth and undue burden. The General Counsel has no standing to assert these arguments on behalf of third-party witnesses. As specified more fully below and insofar as the General Counsel’s Petition is premised on objections it lacks standing to assert, the General Counsel’s Petition should be denied.

### II. OVERBREADTH/*JENCKS* MATERIAL (SUBSECTION II)

Respondent acknowledges that its Subpoena to Megan Randolph and Chad Sevigny could be read to contemplate the production of Board affidavits that may have been obtained by the General Counsel’s office in preparation for the upcoming Compliance Hearing. Respondent

has no intention to seek production of such *Jencks* statements prior to those individuals offering testimony.

Respondent, however, notes that not all communications between third-party witnesses and General Counsel/the Board is considered *Jencks* material. *See* 29 C.F.R. § 102.118(g) (defining a *Jencks* statement to mean “a written statement made by a witness and signed or otherwise adopted/approved by the witness or a recording which is a substantially verbatim recital of an oral statement from the witness). Communications between the witnesses and/or discriminatees and the General Counsel’s Office or Board’s Compliance Office outside of *Jencks* material does not fall within the scope of the privilege and should be produced. Moreover, even *Jencks* material, to the extent a witness such as Megan Randolph and/or Chad Sevigny may have shared such documentation with other third parties (other than the Union), is subject to production.

Accordingly, Respondent agrees to limit its subpoenas for Megan Randolph and Chad Sevigny to clarify that it is not seeking production of any written or recorded statements provided to the General Counsel’s Office in advance of testimony from those individuals in the upcoming proceeding. Respondent, however, contends documentation related to any other communications, such as non-*Jencks* material related to the calculation of Respondent’s alleged back pay liability, should be produced.

### **III. MEGAN RANDOLPH**

#### **A. Marital Privilege (Subsection I)**

The General Counsel does not have standing to object to a third-party subpoena on marital privilege grounds. To the extent there are documents responsive to the subpoena which

Ms. Randolph believes are protected by privilege, she can assert a timely objection through the process outlined on the face of the subpoena itself.

Moreover, marital privilege, like the attorney-client privilege and the other privileges referenced in the Petition, may be waived. Communications which were not intended to be private/shared with others or which pre-date the marriage are not protected. *See e.g., Pereira v. United States*, 347 U.S. 1, 6 (1954) (noting communications between spouses may fall outside the scope of marital privilege if not intended to be private such as if made in the presence of a third party). These issues, however, need not be reached<sup>1</sup> due to the General Counsel's lack of standing and thus subsection "I" of its Petition should be denied.

**B. Paragraphs 1, 4-8 (Subsection III)**

Subsection III of the General Counsel's Petition objects to Paragraph 1, 4, 5, 6, 7, and 8 of Randolph's subpoena on relevancy grounds. With respect to Paragraphs 4, 6, and 7, Respondent's requests are narrowly tailored to subject matters described with sufficient particularity and pertain to issues material to this Compliance proceeding (i.e. communications with Emily Randolph regarding any employment Emily Randolph has held *other than at Glades Electric* post July 11, 2016; communications with Sevigny regarding his claim for back pay/reinstatement or efforts to find reemployment). Megan Randolph, therefore, can certainly ascertain whether she has documents responsive to these requests and the General Counsel's Petition does not offer any suggestion to the contrary.

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<sup>1</sup> To the extent the Judge entertains the merits of the General Counsel's marital privilege argument, Respondent submits documents alleged to be protected under marital privileges grounds be identified in a privilege log and/or produced for *in camera* inspection before a final ruling is made on their discoverability. *See e.g.,* § 8-510 NLRB ALJ Bench Book 2020 (noting that a privilege log is appropriate when an objection to subpoenaed documents is made on privilege grounds).

With respect to Paragraphs 1, 5, and 8, the Petition remains speculative in nature insofar as it offers only hypotheticals regarding the nature and volume of responsive documentation potentially in Megan Randolph's possession. However, to facilitate production, Respondent agrees to limit the temporal scope of its requests to the period from November 30, 2015 to present.

**C. Paragraphs 1, 2, 5, 6, 8, and 9 (Section IV)**

Subsection IV of the Petition objects to Paragraph 1, 2, 5, 6, 8, and 9 of Randolph's subpoena on the grounds that it is overly broad in temporal scope and therefore unduly burdensome. The General Counsel lacks standing to object on behalf of Ms. Randolph on grounds of over breadth or undue burden and thus its objection should be denied.

Notwithstanding, "[t]he party asserting burdensomeness . . . must meet a high standard or burden of proof" and demonstrate how the requested production would pose an undue burden. *See* § 8-330 NLRB ALJ Bench Book 2020. Here, the Petition offers nothing more than bare assertions that production would be burdensome. *See* Petition at p. 6. Moreover, the Petition objects to certain requests which are narrowly tailored to subject matters that are confined to certain time periods even if the date is not specifically reference therein. For example, Paragraph 2 seeks communications regarding Emily Randolph's claim for back pay and/or reinstatement with Glades Electric. Emily Randolph was not laid off until July 11, 2016 before she was reinstated in August of 2016. As a result, General Counsel's objection to overbreadth on temporal grounds should be denied.

**IV. CHAD SEVIGNY**

The General Counsel broadly objects to Sevigny's entire subpoena insofar as the General Counsel claims it is "overly broad, unduly burdensome, duplicative, repetitive, and

unnecessary.” The General Counsel then more specifically objects to Paragraphs 5 and 7 on the grounds of confidentiality associated with Sevigny’s medical records. Again, the General Counsel lacks standing to assert these objections on behalf of Sevigny and this its objections should be denied.

Alternatively, the General Counsel’s objection should be denied on the merits. With regard to the General Counsel’s objections to the subpoena in its entirety, General Counsel fails to specify how production of the responsive records is “voluminous and overly burdensome” beyond its vague and unsupported assertion. *See* Petition at p. 6. It appears the General Counsel’s primary basis for its objection is Respondent’s use of the phrase “any and all” as a predicate to certain requests for records. There is nothing objectionable about the phrase “any and all” as each request seeks documentation limited to a particular subject. *See e.g.* Sevigny Subpoena #1 (seeking “any and all” documentation reflecting his efforts to find employment from the date of his layoff through present).

The General Counsel also objects to Respondent’s requests for Mr. Sevigny’s monthly bank statements. Sevigny has apparently been self-employed for the past four years while only earning minimal income. In light of the General Counsel’s most recently filed Second Amended Compliance Specification, it also appears Sevigny has derived income from multiple rental properties and previously-undisclosed employment with the Union. Furthermore, and as outlined below, Respondent understands Sevigny has been unavailable to work for certain portions of the relevant alleged back pay period due to medical reasons. Indeed, Sevigny was unavailable for work on the date of his layoff due to a medical issue. Sevigny’s monthly bank statements are relevant to Respondent’s alleged back pay liability and should be produced. To the extent there are items within Sevigny’s monthly bank statements over which Sevigny claims some type of

privilege, Respondent submits he can submit a privilege log in accordance with Board procedures.

The General Counsel's objection to Respondent's requests concerning Sevigny's medical records on relevancy grounds is equally without merit. During the later stages of Mr. Sevigny's employment, Sevigny took a leave of absence due to, what Respondent understands was to be, a need to undergo in-patient treatment at an out-of-state facility. Since time periods during which Sevigny was unable to work must be factored into any backpay calculation, such documentation is highly relevant and material to the instant proceeding. *See* § 14-140 NLRB ALJ Bench Book 2020, p. 150. (noting it is Respondent's burden of whether backpay should be tolled because of discriminatee's unavailability or abandonment from the workforce). It is equally relevant and material to the instant proceeding insofar as Sevigny's treatment and/or underlying health effects may affect his qualifications for employment and ability to safely perform the essential functions of the positions to which the Board claims he should be reinstated.

Respectfully submitted,

***Brian Koji***

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*On behalf of Respondent*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 19th day of October, 2020, a true and correct copy of the foregoing has been furnished via e-filing and via email to:

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