

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

PROGRAMA AVANCE EN PUERTO
RICO, INC.

and

CASES 24–CA–10947
24–CA–10979
24–CA–11008

OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL
UNION, AFL-CIO, CLC

Maria M. Fernandez, Esq., for the Government.¹
Anibal Escanellas, Esq., Rebecca Santos, Esq.,
and Janice V. Colon Velez, Human Resources
Director, for the Company.²
Josue Montijo, Organizer, for the Union.³

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge. This is an alleged failure by Programa Avance En Puerto Rico, Inc. (Company) to provide information requested by Office and Professional Employees International Union, AFL-CIO, CLC (Union). I heard this case in trial in San Juan, Puerto Rico, on April 2, 2009. These cases originate from charges filed by the Union on June 23, 2008, in Case 24-CA-10947; on September 3, 2008 in Case 24-CA-10979; and on October 9, 2008 in Case 24-CA-11008 against the Company. The prosecution of this case was formalized on January 30, 2009, when the Regional Director for Region 24 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued a Order Consolidating Cases Consolidated Complaint and Notice of Hearing (Complaint) against the Company.

¹ I shall refer to Counsel for General Counsel as Counsel for the Government or Government.
² I shall refer to Counsel for the Company as Counsel for the Company or Company.
³ I shall refer to the Union Organizer as Union Organizer or Union.

5 The Complaint specifically alleges⁴ the Company, since on or about June 2008, has failed and refused to furnish the Union with certain information necessary for and relevant to the Union’s performance of its duties as the exclusive collective-bargaining representative of employees in two appropriate bargaining units (collectively the Unit) at the Company. It is alleged the actions of the Company violate Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (Act).

10 The Company, in a timely filed answer to the Complaint, denies having violated the Act in any manner alleged in the Complaint. At trial the parties entered into a number of stipulations (written and oral) which resulted, among other things, in the Company admitting certain allegations it had previously denied in its Answer.

15 The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine the one witness, and to file briefs. I carefully observed the demeanor of the one witness as he testified. I have studied the whole record and based on more detailed findings and analysis below, I conclude and find the Company violated the Act substantially as alleged in the complaint.

20 **Findings of Fact**

I. Jurisdiction, Labor Organization Status, and Supervisor/Agency Status

25 The Company is a Puerto Rico corporation with an office and place of business in Caguas, Puerto Rico, where it is, and has been, engaged in the operation of child care centers in the municipalities of Luquillo, Rio Grande, Loiza and Canovanas, receiving federal funds through the Head Start Program. During the past twelve months ending January 30, 2009, a representative period, the Company purchased and received at its facilities within the Commonwealth of Puerto Rico goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Puerto Rico. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

35 The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

40 It is admitted that President Elba Bonilla, Head Start Program Director Gloria I Soto, Human Resources Director Janice V. Colon, Education Coordinator Mercedes Rivera and Supervisor Idabelle Ortiz are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

45 ⁴ All allegations of the Complaint were settled by the parties except the allegations related to the refusal to provide information

II. The Facts

A. Background

5 The Company operates child care centers where it provides educational services to
preschool-age children as well as social workers and medical assistance. The Company
receives its funds from the Federal Government’s Head Start Program. The Federal
government provides these funds through the Administration for the Integral Development of
10 Childhood (ACUDEN). ACUDEN releases the funds to the Treasury Department, which in
turn releases the funds to the Company.

 At certain times material herein and until January/February 2009, Ever Padilla-Ruiz
served as legal counsel for the Company.

15 It is admitted that during the past four years, and at all times material herein, the
Union has been the designated exclusive collective bargaining representative of the Unit
employees and has been recognized as the representative by the Company. This recognition
has been embodied in successive collective-bargaining agreements, the most recent of which
is effective November 1, 2008, to October 31, 2011. It is admitted that at all material times
20 herein, the Union, based on Section 9(a) of the Act, has been the exclusive collective-
bargaining representative of the Unit employees. There are approximately 100 Unit
employees at 18 to 20 locations in certain of the municipalities noted elsewhere herein.

B. The Collective Bargaining Unit

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 It is admitted the following Unit (A-1 and A-2) is appropriate for the purpose of
collective bargaining within the meaning of Section 9(b) of the Act:

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A-1: All the professional employees who work full time and regular part time,
including the social workers, teachers, special needs coordinators, activity
coordinator for parents that are employed by the Company. All the rest of the
employees are excluded from the appropriate unit, including the non-
professional employees, home economists, nutritionists, accountants,
education supervisors, education coordinators, nutrition coordinators, health
35 coordinators, family and community coordinators, transition coordinators,
general coordinators of children with special needs, coordinators of food
programs of child and adult care, confidential employees, security guards and
supervisors as defined in the Act.

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A-2: All the non professional employees who work full time and regular part
time, including those in charge of food services, food service assistant, teacher
assistants, secretaries, maintenance employees, and drivers that are employed
by the Company. All of the rest of the employees are excluded from the
appropriate unit including the professional employees, warehouse supervisor,
45 sales agents, secretaries of the account, personnel offices, administrative
assistants, administrative manager, development and health managers,

managers of family and community alliance, program director, security guards and supervisors as defined in the Act.

C. The Request for Information

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It is alleged at paragraph 10 of the complaint that since about June 2008, the Union has requested the Company furnish the Union with certain specifically identified information namely: 1) attendance records of unit employees for the past three years; 2) payroll records of unit employees for the past three years; and, 3) the financial statements of the corporation. The Company admits requests were made starting at the date indicated above. The parties stipulated at trial the Company, as of the trial herein, had not provided the requested information.

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Union Organizer Montijo⁵ testified the parties met on June 17, 2008, at the Puerto Rico Department of Labor’s Conciliation and Arbitration Bureau, to address “several specific matters” related to the Unit employees. Montijo attended for the Union and Attorney Ever Padilla-Ruiz, HR Director Colon, Nutrition Supervisor Idabell Ortiz, and Education Supervisor Minerva Quianes attended for the Company. The first of the specific items discussed, according to Montijo, was “the matter of the delays in payroll payments that the employees were going through at that time ... it was a matter of great concern ... [because] at that point, the employees were owed two pay periods.” Montijo explained the parties’ collective-bargaining agreement calls for the Unit employees to be paid on the 15th and 30th of the month and if the Company does not do so it is obligated to do everything possible to timely effect the payments and notify the Unit employees and Union of the situation. Montijo testified the Company often failed to timely make payroll and estimated the Company had failed approximately 12 times in 2008. Montijo asked Attorney Padilla-Ruiz at the June meeting why the delay on that occasion and when the Unit employees could expect payment. Padilla-Ruiz had no idea why nor could he say when the payroll would be made and said ACUDEN had not released payment funds to the Company. Montijo then asked how much money the Company had available in order to see if the Company could make other arrangements to timely pay the Unit employees. Attorney Padilla-Ruiz had no knowledge about what funds or finances the Company otherwise had available. Montijo at that point made a “a formal request [of the Company] for the financial statements, for the bank statements ... in order to verify whether or not the money was available and what the financial solvency of the corporation was, in order to make payroll payments.” Attorney Padilla-Ruiz said it would take a while to get the information together but he would make it available however he never did.

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Montijo testified the Company in 2008 “developed a fairly consistent pattern of delaying payment to [Unit] employees.” Montijo added “[i]t was so persistent that it reached a point where employees were owed three successive pay periods.” Montijo explained that in addition to the employees not receiving their pay on time it was “additionally complicated by

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⁵ Montijo was the only witness in this proceeding. He appeared to testify truthfully. I detected no reason to reject his testimony which was supported by documentation. I credit his uncontradicted testimony.

the fact that what [the Company] would do was that if it owed three pay periods, it would pay two, not the three. Or if it owed three and then the fourth came due, it would pay off three. So it never paid up, it never caught up with all the money.” Montijo testified the Union needed the Company’s financial statements not only to see if the Company had assets to pay
 5 the Unit employees but also grievances had been filed about the late payroll payments.

Montijo testified the Union requested Unit employee payroll records for the past three years in order to verify or corroborate when delayed or late payroll payments were actually made and the accuracy of such payments. According to Montijo the information was also
 10 needed “to oversee the collective bargaining agreement, specifically in terms of payments, salaries, and ... because there are several complaints [grievances] that have been filed and which are, in fact, still pending and for which the union needs to verify when those payments were made, in order to weigh the validity or the weight of the complaints and proceed accordingly.”
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Additionally, Montijo explained the payroll information was, and is, needed to see if the Company made correct calculations regarding lunch and rest breaks. Montijo stated the parties’ collective-bargaining agreement calls for Unit employees to have one hour for lunch
 20 “and if for reasons related to service needs employees cannot take that one-hour lunch break, then they can use one-half of that hour for lunch and have the other half ... added to their compensatory time.” Montijo said Unit employees are allowed morning and afternoon breaks.

Montijo testified the Union needed attendance records for the Unit employees for the
 25 past three years because the collective-bargaining agreement provided for the breaks and the Union needed to “be able to sit down and look at ... everybody’s schedule and start times ... to determine how the lunch periods could be set up for these employees and bring a better proposal to the negotiating table, regarding the lunch breaks.”

The parties stipulated: 1) Montijo wrote then Company Attorney Ever Padilla-Ruiz
 30 on July 11 and August 6, 2008 requesting copies of the Company’s banking financial statements, payroll records and attendance records for the past three years; 2) Montijo wrote HR Director Colon on June 27, 2008 regarding late payroll payments and requested the Unit employees be paid for their non-enjoyed hourly lunch breaks; 3) Attorney Ever Padilla-Ruiz
 35 wrote Union Representative Iram Ramirez on July 18, 2008 stating copies of the payroll records that had been requested would be provided once the information was located in the inactive files; 4) Attorney Ever Padilla-Ruiz wrote Union Representative Iram Ramirez on August 13, 2008 stating the payroll records would be provided, but Company personnel were engaged in the implementation of a specifically described system and was busy with training
 40 and meetings; 5) Union Organizer Montijo wrote Attorney Ever Padilla-Ruiz on August 27, 2008 reminding him the requested information had not been provided and established a deadline of August 29, 2008 for the production of the information; and, 6) Attorney Ever Padilla-Ruiz wrote Union Representative Iram Ramirez on September 19, 2008 stating the payroll records contained confidential information and the bargaining process had concluded.
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Montijo testified grievances were filed regarding late payroll payments for Unit employees. For example, a grievance was filed on July 4, 2008 by Union Delegate Noemi Del Carmen asserting “We have not received the pay for March 30. Our credit has been affected due to the lack of payments and our families have been affected due to lack of money.” This grievance was filed on behalf of all employees and pursuant to Article XXII of the parties’ collective-bargaining agreement. The evidence indicates the grievance is still pending, but held in abeyance, before an arbitrator. Montijo testified Unit employee, Mildred Castro, filed a grievance regarding not being allowed to take her lunch break and that the requested information is needed in regard to Castro’s and other’s pending grievances. According to Montijo the arbitration of these and other cases has been canceled by the Union because it lacks the requested information to move forward on these and other related grievances. Montijo testified Unit employee Ana Quinones Fuentes also filed a grievance regarding her lunch hour and her grievance is also in a canceled status, awaiting arbitration, as a result of not having the requested information at issue herein. All of the pending grievances held in abeyance are before the Commonwealth of Puerto Rico Department of Labor Conciliation and Arbitration Bureau.

III. Analysis, Discussion and Conclusions

The principle has long been established that an employer is under a duty to provide a union which represents the employer’s employees with information requested by the union which is relevant and necessary for the proper performance of the union’s duties in representing the unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Manufacturing, Co.*, 351 U.S. 149 (1956). A failure to fulfill the obligation to furnish relevant information upon request conflicts with the statutory policy to facilitate effective collective bargaining *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310 at 1315 (8th Cir. 1980). The duty to furnish information turns on the circumstance of the particular case. *Emeryville Research Center v. NLRB*, 441 F.2d 880 at 883 (9th Cir. 1971) This duty extends not just to information which is useful and relevant for the purposes of contract negotiations but also to that which is necessary to informed administration of a collective-bargaining agreement, including information required by a labor organization to process a grievance, and for effects bargaining. *Safeway Stores*, 252 NLRB 1323 (1980), *Bacardi Corp.*, 296 NLRB 1220 (1989). The key question in determining whether information must be produced is one of relevance. The standard for relevancy is a liberal discovery-type standard and the sought after information need not necessarily be dispositive of the issue between the parties but rather only of some bearing upon it and of probable use to the labor organization in carrying out its statutory responsibilities. *Bacardi Corp.*, *supra*. It is well established, however, that information concerning the terms and conditions of employment of unit employees is deemed “so intrinsic to the core of the employer-employee relationship” that such is held to be presumptively relevant and must be furnished. *Troy Hills Nursing Home*, 326 NLRB 1465, 1466 (1998) and *Madison Center*, 330 NLRB 1 (2000).

I now address the instant case in light of the established facts and the foregoing principles.

The Union’s request for three types of information was specific and understandable.

5 The Union made clear what types of information it was requesting and the reasons for its
relevance and needed production. In that regard the parties met in June 2008 to discuss
various issues related to working conditions of the Unit employees and to administer the
parties' collective-bargaining agreement. One of the key issues discussed on that occasion
10 was that the Unit employees had not been timely paid for their services. The failure of the
Company to timely make payroll had been an ongoing problem. The Company indicated it
could not timely make payroll because it had not received Federal funds from the Head Start
Program from which it normally made payroll. The Union clearly indicated to the Company
that its purpose, in part, in requesting financial statements of the Company was for it to be
15 able to ascertain if the Company had other monies available from which it could meet payroll.
Stated differently the Union's request for the financial statements was in part an effort by the
Union to make an informed and intelligent determination regarding whether any other funds
of the Company might be available from which payroll could timely be made. Obtaining the
timely payment of wages for unit employees by their collective bargaining representative is
one, if not the most, fundamental responsibilities performed by a collective bargaining
representative. Information related to the timely payment of wages to unit employees is
presumptively relevant.

20 The need for and relevance of the financial statements was also established in that the
Union needed the information to evaluate grievances filed by Unit employees and Union
representatives related specifically to the Company's failure to timely make payroll for the
Unit employees.

25 The Union's asking for three years of financial statements of the Company is justified
because it provides the Union with a good long term overview regarding whether the
Company consistently had monies from which it could have and currently could make timely
payroll.

30 I find the Union's request for financial statements was for relevant and necessary
information and the Company's refusal to provide it constituted a breach of its bargaining
obligations under Section 8(a)(5) of the Act.

35 I reach a like result with respect to the Union's request for payroll records for the Unit
employees for the past three years. First, wage and related data is presumptively relevant and
requires no showing of precise relevance. Second, the Union explained to the Company the
purpose for which it needed the information, namely, to verify if, and when, delayed payroll
payments were actually made and to establish the accuracy of such payments. Third, the
Union has pending grievances addressing late or delayed payroll payments which grievances
are being held in abeyance for lack of the requested information. As Union Organizer
40 Montijo testified the payroll information is needed to weigh the validity of the grievances and
to shed light on how the Union will proceed with the grievances.

45 The Union's request for three years of payroll records for Unit employees is justified
because late payroll payments had been on going for an extended time.

I find the Union's request for payroll records was for relevant and necessary

information and the Company's refusal to provide it constituted a breach of its bargaining obligations under Section 8(a)(5) of the Act.

5 I again reach a like result regarding the Union's request for attendance records of the
Unit employees for the past three years. The parties' collective-bargaining agreement
provides for lunch and rest breaks daily for the Unit employees. First, information related to
unit employees working conditions, such as lunch and break times, are presumptively
relevant. Second, the Union informed the Company it needed the attendance records to
10 determine when each Unit employee was scheduled to work to ascertain when and how lunch
periods and other breaks could be arranged for each Unit employee. Third, the Union needed
the information because it had pending grievances addressing lunch and other breaks which
grievances were held in abeyance because the Company failed to furnish the requested
information.

15 The Union established it needed, in addition to the attendance records, the payroll
records [addressed earlier] to determine if the Company had made correct calculations
regarding lunch and break times. For example if a Unit employee was unable, because of job
related commitments, to take a full one hour lunch break the employee was allowed to take
one half hour with the remaining time credited to the employees' compensatory time. The
20 Union's request for three years of attendance records for Unit employees is justified for the
reasons set forth earlier herein.

I find the Union's request for attendance records of Unit employees was for relevant
information and the Company's refusal to provide it constituted a breach if its bargaining
25 obligations under Section 8(a)(5) of the Act.

Remedy

30 Having found that the Company has engaged in certain unfair labor practices, I find it
necessary to order the Company to cease and desist there from and to take certain affirmative
action designed to effectuate the policies of the Act as set forth in the recommended Order
below.

35 On these findings of fact and conclusions of law and on the entire record, I issue the
following recommended:⁶

ORDER

40 The Company, Programa Avance En Puerto Rico, Inc., Caguas, Puerto Rico, its
officers, agents, successors, and assigns, shall:

1. Cease and desist from:

45 ⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the
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.

5 (a) Refusing to furnish the Union the attendance and payroll records for the Unit employees (A-1 and A-2) for the previous three years and financial statements of the Company for the previous three years.

(b) 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.

10 2. Take the following affirmative action:

(a) Furnish the Union copies of the attendance and payroll records of the Unit employees (A-1 and A-2) for the previous three years and financial statements of the Company for the previous three years.

15 (b) Post at its Caguas, Luquillo, Rio Grande, Loiza and Canovanas facilities copies of the attached notice in English and Spanish marked "Appendix."⁷ Copies of said notice, on forms provided by the Regional Director for Region 24, after being duly signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, 20 in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facilities involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the 25 notice to all current and former employees employed by the Company at any time since June 17, 2008.

(c) Notify the Regional Director for Region 24, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply herewith.

30 Dated, Washington, D.C., June 2, 2009.

35 _____
William N. Cates
Associate Chief Judge

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45 ⁷ If this Order is enforced by a Judgment of the 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."

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 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 refuse to furnish Office and Professional Employees International Union, AFL-CIO, CLC, the information it requested; namely, copies of the attendance and payroll records for the Unit employees (A-1 and A-2) for the previous three years and financial statements of the Company for the previous three years.

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 furnish the Union with a copies of the attendance and payroll records for the Unit employees (A-1 and A-2) for the previous three years and financial statements of the Company for the previous three years.

**PROGRAMA AVANCE EN PUERTO RICO,
INC.**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

525 F.D. Roosevelt Avenue, La Torre de Plaza, Suite 1002, San Juan, PR 00918-1002
(787) 766-547, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (787) 766-5377.