United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 20, 2004

TO : Gary T. Kendellen, Regional Director
Region 22

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

530-6067-6067-5700
SUBJECT: Bayonne Medical Center 133-0100
22-CA-26145

This Section 8(a)(5) case was submitted for advice on whether an Employer unlawfully refused to bargain over a mutually acceptable accommodation that would provide a Union with confidential information, medical patient names, that was necessary and relevant to processing a grievance over an employee's discharge. The Employer refused to bargain over how to provide patient names, asserting that HIPAA's Privacy Rule[1] barred release of that information, and claiming that it had met its duty to bargain by providing other disclosable information.

We conclude that the Employer unlawfully refused to bargain over an accommodation sufficient to actually provide the requested information while still protecting the Employer's confidentiality interests. HIPAA's Privacy Rule does not bar disclosure of patient names in this case, and the limited disclosed information did not satisfy the Union's need for actual patient names.

FACTS

Bayonne Medical Center ("the Employer") and Health Professionals Allied Employees Union ("the Union") are parties to a collective-bargaining agreement that applies to the Employer's four recovery room nurses. A recovery room nurse's conduct is the subject of a Union information request.

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[1] Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, Sec. 261-264, 110 Stat. 1936 (Aug. 21, 1996), delegated to the Secretary of Health and Human Services the authority to enact regulations that set forth national standards for protecting the privacy of individuals' health information. The regulations, "Standards for Privacy of Individually Identifiable Health Information," are collectively known as the Privacy Rule. See www.hhs.gov/ocr/hipaa.

Recovery room nurses, who worked two to a shift, were assigned to care for patients as they were released from surgery. In the course of their duties, the nurses accessed patient information computer files to care for patients assigned to them or to respond to requests of physicians who were monitoring their own patients' post-surgery progress.

The Employer discharged a recovery room nurse for alleged improper breach of patient confidentiality by accessing patient computer files at least 37 times. To assess whether to file a grievance regarding the nurse's discharge, the Union requested that the Employer provide the names of those patients whose files allegedly had been viewed improperly. The Employer declined, stating that HIPAA's Privacy Rule barred release of the information. The Employer instead showed the Union a computer printout listing the dates and time periods when someone accessed the patient files, but refused to give the Union a copy of the printout. Before showing the data to the Union, the Employer redacted patients' names. The printout displayed no other patient identifiers.

After the Union filed the instant charge, the Employer stated that it would try to obtain patients' consent to release their names. The Union insisted that, to evaluate the discharge, it would need all patient names for all incidents that triggered the Employer's discharge decision. Later, the Employer reported that it was unable to obtain any patient's consent to release the information. The Union next requested the names of the doctors of the patients involved, but the Employer refused, again asserting that HIPAA barred such disclosure. The Employer has informed the Region that it would not release patient names absent a court order and suggested that the Union should seek a protective order.

ACTION

We conclude that the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement, alleging that the Employer unlawfully refused to bargain over an accommodation on the manner in which it could release patient names to the Union. HIPAA's Privacy Rule does not bar absolutely the release of confidential information about patients absent their consent, but provides a framework that is consistent with existing Board precedent for the actual release of such information.

1. Applicable Principles

A union is generally entitled to information that is necessary and relevant to its collective-bargaining responsibilities.[2] Under Detroit Edison v. NLRB,[3] a union's interest in arguably relevant information does not always predominate when an employer asserts a legitimate and substantial interest in maintaining confidentiality. The party asserting confidentiality has the burden of proving that such interests are present and of such importance that they outweigh the union's need for the information.[4] In determining whether an employer has satisfied its burden of establishing a confidentiality interest, the Board considers such factors as whether the information possesses a "legitimate aura of confidentiality,"[5] and whether another law protects the confidentiality of the information.[6] If an employer shows that it has a legitimate confidentiality interest, it generally has a duty to bargain in good faith over an accommodation of that interest.[7] If the employer fails to bargain over an accommodation of its confidentiality interest, the Board usually will order bargaining as affirmative relief.[8] The order may direct

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[2] See NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[3] 440 U.S. 301, 318 (1979).

[4] Exxon Co. USA, 321 NLRB 896, 898 (1996), enf'd mem., 116 F.3d 1476 (5th Cir. 1997); McDonnell Douglas Corp., 224 NLRB 881, 890 (1976).

[5] See Exxon Co. USA, 321 NLRB at 898-99 (names of persons who had disclosed their drug or alcohol-related arrests, convictions, and rehabilitation); Johns-Manville Sales Corp., 252 NLRB 368, 368 (1980) (names of employees with medical disorder).

[6] See Postal Service, 305 NLRB 997, 998 (1991) (citing Detroit Edison, 440 U.S. 301, 318 n.16 (1979) (employer's Inspection Service Procedures instructions and FOIA's law-enforcement exception); Goodyear Atomic Corp., 266 NLRB 890, 891-92 (1983), enf'd 738 F.2d 155 (6th Cir. 1984) (Privacy Act exception).

[7] See Pennsylvania Power Co., 301 NLRB 1104, 1105-06 (1991)(citing Minnesota Mining & Mfg. Co., 261 NLRB 27 (1982), enf'd sub nom. Oil, Chemical & Atomic Workers Local 6-418 v. NLRB, 711 F.2d 348 (D.C. Cir. 1983)).

[8] See Exxon Co. USA, 321 NLRB at 899 (employer failed to show that it had bargained with the union over accommodation where confidentiality concerns about background checks did not outweigh union's need to know which employees were audited). Cf. GTE California, Inc.,

conditional disclosure of the information through a confidentiality agreement, protective order, or some other appropriate procedure.[9]

2. Necessary and relevant, but confidential information

The Region has determined that the requested information, the patient names, is necessary and relevant to the Union's duty to assess whether to proceed with a grievance over the discharge of a unit employee. Without the patient names, the Union is unable to assess whether the nurse improperly accessed patient files. Merely allowing the Union the chance to review data showing the times patient files had been opened does not provide this information nor enable the Union to assess whether the nurse improperly accessed patient files.

Although the requested information is relevant, the Employer has raised a legitimate and substantial confidentiality interest in the names of the patients. The Board and courts have long recognized that patient identities, and other medical information, are of a sensitive nature.[10] However, that does not end the matter.

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324 NLRB 424, 427-428 (1997) (employer reached accommodation with union that permitted employer to maintain confidentiality while allowing the union to represent employees); Johns Manville Sales, 252 NLRB 368, 368 (1980) (employer reached accommodation with union by submitting consent forms to employees and by supplying the union the names of those who consented).

[9] Exxon Co. USA, 321 NLRB at 899. See United States Testing Co. v. NLRB, 160 F.3d 14, 20-21 (D.C. Cir. 1998) (holding that an employer that invokes confidentiality concerns must offer to accommodate that concern with its bargaining duty, such as by "making an offer to release information conditionally or by placing restrictions on the use of that information"), enf'g 324 NLRB 854 (1997). Cf. Pennsylvania Power Co., 301 NLRB at 1108 n.18 (rather than ordering the parties to bargain over an accommodation, the Board ordered a limited disclosure remedy).

[10] See, for example, New Jersey Bell Telephone Co. v. NLRB, 720 F.2d 789, 791 (3d Cir. 1983); Norris Sucker Rods, 340 NLRB No. 28, slip op. at 1 n.1 (2003); Colgate-Palmolive Co., 261 NLRB 90, 93-94 (1982); Johns-Manville Sales Corp., 252 NLRB at 368. See also LaGuardia Hospital, 260 NLRB 1455, 1455, 1463-1464 (1982) (state law providing for confidentiality did not raise absolute bar where patient chart information, without names, was relevant to

If the Employer believed that it could not disclose the confidential information in the form requested, it had a duty to seek an accommodation with the Union.

3. Employer Defenses Are Rejected

To answer the allegation that it has refused to bargain in good faith, the Employer has raised two defenses. First, the Employer states that it could not give out the information because HIPAA's Privacy Rule forbids any disclosure beyond that which it has provided. Second, the Employer asserts that it has met its duty to bargain because it permitted the Union to review redacted data showing the times of access.[11] Those defenses fail.

First, although the Privacy Rule is designed to protect the confidentiality of protected health information,[12] the Rule does not present an absolute prohibition on disclosure. The Rule is also designed to allow the use of individual health information for certain purposes. Section 164.506(c) of the Privacy Rule provides that "A covered entity may use or disclose protected health information to carry out treatment, payment, or *health care operations*."[13] Health care operations are defined in

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evaluating a grievance over discipline for patient care errors).

[11] There are no restrictions on disclosure of "deidentified" health information. See 45 CFR 164.514(b).

[12] 45 CFR 164.502(a). The patient names constitute protected health information as they are "individually identifiable health information." Section 160.103. The Employer is a covered entity under the Rule; "covered entity" includes health care providers transmitting health information electronically. Id.

[13] 45 CFR 164.506(c)(1) (emphasis added). Section 164.506 reads in part as follows:

> *(a) Standard: Permitted uses and disclosures.* Except with respect to uses or disclosures that require an authorization under Sec. 164.508(a)(2) [relating to psychotherapy notes] and (3) [relating to marketing], a covered entity may use or disclose protected health information for treatment, payment, or health care operations . . . provided that such use or disclosure is consistent with other applicable requirements of this subpart.

Section 164.501(6) to include: "Business management and general administrative activities of the entity, including. . . *resolution of internal grievances*."[14] Therefore, the Rule provides that otherwise nondisclosable information can be produced for certain purposes, specifically including resolution of internal grievances. Thus, the Privacy Rule arguably permits the disclosure in the circumstances of this case, which stems from the need to consider a grievance.

The Employer's reliance on the Privacy Rule also fails because even where an internal grievance is not involved, another section of the Rule discussed above generally contemplates disclosure of confidential information.[15] Section 164.512(e) creates a procedural scheme for disclosure and use of medical records in judicial or administrative proceedings.[16] Disclosure under that scheme is permitted if the party seeking the information follows certain steps, including making a reasonable effort to protect the information through a protective order. A protective order may include a stipulation by the parties

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[14] 45 CFR 164.501(6).

[15] Both sections are part of Subpart E of the HIPAA regulations, which constitutes the Privacy Rule ("Privacy of Individually Identifiable Health Information").

[16] Privacy Rule, 45 CFR 164.512(e) ("Standard: Disclosures for Judicial and Administrative Proceedings"). Under this provision, a covered entity may disclose protected health information:

> in the course of any judicial or administrative proceeding:
> (i) In response to an order of a court or administrative tribunal . . .; or
> (ii) In response to a subpoena, discovery request, or other *lawful process*, that is not accompanied by an order of a court or administrative tribunal, if:
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> (B) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made . . . to secure a qualified protective order . . . .

45 CFR 164.512(e).

to an administrative proceeding that limits the use of confidential information to the particular proceeding and requires the return or destruction of the information when the proceeding ends.[17] Thus, the Rule provides a procedure for disclosing, while at the same time protecting, medical information where necessary.

That procedure for disclosure under the Privacy Rule is consistent with Board precedent in which the remedy has included an order directing an employer to bargain over an accommodation of the use of personal, confidential information. In Exxon,[18] the Board ordered the respondents to disclose requested confidential information to the union conditionally. That disclosure was "subject to the parties' bargaining in good faith to a mutually satisfactory confidentiality agreement, protective order, or other appropriate procedure."[19] Here, the Employer refused to release the relevant and necessary information unless, as it suggested to the Region during the investigation of this charge, the Union obtained a court order. That statement does not satisfy the Employer's duty to bargain in good faith for the required accommodation, since it is clear from Exxon that a protective order is only one accommodation over which the parties can bargain. The Employer could have bargained over an agreement that, as under the Rule and under Exxon, would have protected the

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[17] 45 CFR 164.512(e) defines a qualified protective order for a party seeking information "by subpoena, discovery request, *or other lawful process*," to include:

> an order of a court or of an administrative tribunal or *a stipulation by the parties to the litigation or administrative proceeding* that:
> (A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and
> (B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 CFR 164.512(e)(1)(v) (emphases added).

[18] Exxon Co. USA, 321 NLRB at 899.

[19] Exxon Co. USA, 321 NLRB at 899. See Metropolitan Edison Co., 330 NLRB 107, 109 (1999).

sensitive information and restricted its disclosure only to the extent necessary to represent the discharged employee.[20]

Finally, we reject the Employer's claim that it met its burden by permitting the Union to review, but not copy, redacted computer data. That limited view of the files did not show whether the employee opened files that she was not entitled to access. That information did not enable the Union to assess whether to take a grievance or how to adequately represent the discharged employee.

In view of all of the above, the Employer violated its duty to bargain in good faith over a mutually satisfactory protective arrangement accommodating the Union's need for patient names. A Section 8(a)(5) complaint should issue, absent settlement, seeking a conditional disclosure order similar to that provided in Exxon.

B.J.K.

[20] We have decided in this case not to rely on the "required by law" provision of Sections 164.103 and 164.512(f) of the Privacy Rule. That "required by law" provision was applicable in IBP, Inc., Case 19-CA-28374, Advice Memorandum dated December 30, 2003, where an OSHA regulation required disclosure of portions of injury reports to bargaining representatives. In the instant case, however, the internal grievance clause of the Privacy Rule cited above arguably provides an avenue for disclosure.