JD-28-11
Pittsburgh, PA

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

NHS HUMAN SERVICES INC. OF ALLEGHENY AND WESTMORELAND,

and **Case No. 6–CA–37002**

PA SOCIAL SERVICES UNION, SEIU LOCAL 668 a/w SEIU.

Julie R. Stern, Esq. (NLRB Region 6)
for the General Counsel

Patrick G. Murphy, Esq. (Kelley & Murphy, LLP)
of Blue Bell, Pennsylvania, for the Respondent

DECISION

Introduction

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This case involves a union's request for information to use in evaluating and handling a discharged employee's grievance case. The employee was discharged from a human services organization that provides mental health and intellectual disability services to children and adult clients after allegations of abuse stemming from her response when a client in her care became agitated and attempted to bite her. The union filed a grievance over the discharge and requested, among other items, the client's "behavioral support plan," an individualized treatment document prepared for each client. The behavioral support plan includes personal and medical information relied upon by employees to assist in providing appropriate care for clients. Citing the confidentiality of the document, the employer refused to provide the union with the support plan.

The government alleges that the behavioral support plan is necessary and relevant to the union's performance of its representational duties and that the employer's refusal to furnish the union with the requested document is violative of the National Labor Relations Act. The employer rejects the government's interpretation of its responsibilities under the Act, asserting that the document is irrelevant and that its confidential nature prohibits it from being required to provide it to the union.

As discussed herein, I find that the employer violated the Act by failing to seek an accommodation of its confidentiality concerns with the union's need for the plan. However, at this point in time, given that the parties have resolved the underlying grievance that prompted the union's request for the plan, I conclude that the confidentiality interests at stake outweigh the union's current need for the document, and, therefore, the recommended remedy for the violation does not include an order to furnish the plan or an order to bargain an accommodation that would permit the furnishing of the plan to the union.

Statement of the Case

On June 25, 2010, the PA Social Services Union, SEIU Local 668 (Union) filed an unfair labor practice charge against NHS Human Services Inc. of Allegheny and Westmoreland (NHS or Employer), docketed by Region 6 of the National Labor Relations Board (Board) as Case 6–CA–37002.

On September 30, 2010, based on an investigation into the charge filed by the Union, the Regional Director for Region 6, acting on behalf of the Board's General Counsel, issued a complaint and notice of hearing against NHS alleging violations of the Act. The complaint alleged that NHS's refusal to provide the Union with certain requested information violated Section 8(a)(1) and (5) of the Act. NHS filed an answer, and an amended answer, denying all violations of the Act.

A trial in this case was conducted February 3, 2011, in Pittsburgh, Pennsylvania.[1]

Counsel for the General Counsel and the Respondent filed briefs in support of their positions by March 10, 2011. On the entire record, I make the following findings, conclusions of law, and recommendations.

JURISDICTION

The complaint alleges, the Respondent admits, and I find that the Respondent is a non-profit organization, with an office and place of business in Pittsburgh Pennsylvania, engaged in the operation of a human services organization providing community based mental health and intellectual developmental disability services to adults and children in Pennsylvania. The complaint further alleges, the Respondent admits, and I find that during the 12-month period ending May 31, 2010, the Respondent, in conducting its operations, derived gross revenues in excess of $250,000, and performed services valued in excess of $50,000 in States other than the Commonwealth of Pennsylvania. The complaint further alleges, the Respondent admits, and I find, that at all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. It is also alleged, admitted, and found that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Factual Background

NHS provides residential, home, and outpatient behavioral health services for developmentally disabled adult and children clients (denoted by NHS as "consumers") through a variety of social service programs. Since 1999, the nonprofessional employees employed by

[1]At the trial, counsel for the General Counsel moved to amend the complaint to delete two of the three items that the Respondent allegedly unlawfully failed to provide to the Union. This left as the only substantive factual allegation the failure to provide the behavioral support plan to the Union.

NHS in programs operated in Allegheny and Westmoreland Counties of Pennsylvania, have been represented by the Union for purposes of collective bargaining.[2]

NHS and the Union have been parties to a succession of labor agreements. The one in effect during the events at issue here was effective from July 1, 2006 to December 31, 2010, after which a new agreement was reached.

Effective April 30, 2010, NHS terminated a bargaining unit employee after she allegedly verbally abused a consumer in her care who had allegedly attempted to bite her.[3] The Union grieved the discharge the same day, pursuant to the grievance-arbitration procedures in the parties' collective-bargaining agreement. Ultimately, an investigation by NHS and witness statements raised the possibility that the employee had also struck the client during the incident.

In conjunction with the grievance, the Union requested a number of documents from NHS, including witness statements, an HCISIS report (an investigative report prepared about the incident), and, most pertinently for the dispute here, a copy of the behavioral support plan for the consumer involved in the incident with the discharged employee.

According to the credible testimony at the hearing of Kim Sonnafelt, the county director for NHS in Allegheny and Butler Counties, a behavioral support plan is a plan of support for an individual client that is generated by a team from NHS (or another agency) for each individual for whom NHS provides care. The team typically involves providers, and could include a family member, pastor, or other individuals selected by the client. The support plan would typically include medical information and diagnoses, a description of the individual's needs and required support, and the plan for treatment or support of the individual. The plans are kept "double locked" and Sonnafelt testified that NHS considers the plans confidential. Employees working with the client are "trained" in the plan, which means they would have access to the support plan (sometimes accompanied by a supervisor) and to daily notes of treatment. The staff document daily how the individual did and those notes might be added to the plan. According to Sonnafelt, employees trained on the plan would essentially have access to, or know everything in the plan, with the exception of the HIV status of the individual which, according to Sonnafelt, Federal rules prohibit from being shared even with employees working with the individual. According to Sonnafelt, NHS would be liable for State sanctions and penalties, and even risk losing its license to operate, if it did not treat client information as confidential. NHS's general practice is that no client information that contained any kind of medical information would be provided without written consent of the client.

---

[2] The represented bargaining unit is composed of the following:

> All full-time and regular part-time non-professional employees, including team associates, lead staff, social role valorization counselors, receptionists, maintenance person and job coach, employed by the Employer in its programs operated in Allegheny and Westmoreland Counties, excluding temporary employees, nurses, confidential and management employees, maintenance coordinator, office clerical employees and guards, causal employees, confidential employees, and guards, professional employees and supervisors as defined in the Act.

[3] The exact nature of the altercation and the alleged conduct of the employee or consumer is relevant only as background to the narrow "information" dispute at issue here. I make no findings as to what occurred, the appropriateness of the discharge, etc.

The Union's business agent Karen Klimazewski was responsible for filing and processing the discharge grievance in this matter. Klimazewski requested the behavioral support plan by letter, dated May 20, 2010, to NHS Human Resources Official Kathy Hall. Klimazewski testified credibly that she wanted the information to help her assess whether to move forward with the grievance process. She believed that the plan might have information explaining steps necessary to "de-escalate" the client, and in conversations with the grievant, Klimazewski came to believe that it was possible that the claim of abuse might have been based on observers misconstruing actions the grievant was taking in compliance with the de-escalation guidelines, specifically reaching into her pocket to get candy for the consumer, a tactic, allegedly in the plan for "de-escalating" the consumer. More generally, she wanted the plan because it would shed light on "how [the employee] was supposed to take care of the consumer."

By email dated May 25, 2010, Hall wrote to Klimazewski and stated that "[w]e will not be releasing a copy of the . . . Behavioral Support Plan as you have requested in your correspondence dated 5/20/10."

In discussions regarding other information (i.e., witness statements) requested by the Union, Hall and Klimazewski had gone back and forth, with Hall suggesting that "[w]e are not able to provide any information in relationship to the investigation or related information due to our responsibility to maintain consumer confidentiality."

On June 4, by email, Hall told Klimazewski that "I will take a look at the behavioral plan for you," presumably to consider whether NHS would release it to the Union. On June 14, Hall wrote Klimazewski and stated "[w]e are not able to release the Behavioral Support Plan due to consumer information and HIPPA." Subsequently, during collective-bargaining negotiations that began in July, Klimazewski and Hall would "speak a little bit in negotiations of other matters before we would start the formal negotiations" and in those discussions Hall told Klimazewski that "they can't release" the behavioral support plan due to "confidentiality."

Klimazewski's credited and uncontradicted testimony (Hall did not testify) was that the Union asked for the plan (and other similar documents) with "the names blackened out" as a way to avoid confidentiality problems. NHS was not amenable to this. Klimazewski admitted that even with a plan redacted in this way, she believed that she would have known who the consumer was based on reading the plan.

There was no further correspondence or negotiations about receipt of the behavioral support plan.

Klimazewski did not recall if she ever explained to NHS why she believed the plan was relevant to the grievance inquiry. On the other hand, there is also no evidence that, prior to the hearing in this matter, NHS ever questioned the plan's relevance. Rather, its refusal to provide the plan to the Union was based solely on its concerns about confidentiality.

Ultimately, the Union and the Employer settled this discharge grievance, sometime prior to November 2010. The nature of the grievance resolution is not set forth in the record.

Analysis

I. Background Precedent

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). "An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration." *A–1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 2 (2011). See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956).

> Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). By contrast, [non-unit information] is not presumptively relevant; rather, relevance must be shown. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). The burden to show relevance, however, is "not exceptionally heavy," *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983); "[t]he Board uses a broad, discovery-type standard in determining relevance in information requests." *Shoppers Food Warehouse*, supra at 259.

A–1 Door & Building Solutions, supra.

Where, as here, the information is requested in connection with a grievance, the Board's test for relevance remains a liberal one. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Supreme Court endorsed the Board's view that a "liberal" broad "discovery type" standard must apply to union information requests related to the evaluation of grievances. Analogizing the grievance procedure to the pretrial discovery phase of litigation, the Court quoted approvingly from the recognition in *Moore's Federal Practice* that "it must be borne in mind that the standard for determining relevancy at a discovery examination is not as well defined as at the trial. . . . Since the matters in dispute between the parties are not as well determined at discovery examinations as at the trial, courts of necessity must follow a more liberal standard as to relevancy." 385 U.S. at 437 fn. 6, quoting 4 Moore, *Federal Practice* P26.16[1], 1175–1176 (2d ed.).

Board precedent has continued to abide by this standard. As the Board explained in *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991): "the information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board and the courts have held that information that aids the arbitral process is relevant and should be provided." And "the fact that the information, if produced at the early stages of grievance discussions would tend to establish that a grievance is without merit, equally serves a legitimate function of collective bargaining as such disclosure would thereby enable a union to determine which grievances should be pursued to arbitration and which should be dropped." *LaGuardia Hospital*, 260 NLRB 1455, 1461 (1982). As the Board affirmed in *W–L Moulding Co.*, 272 NLRB 1239, 1240 (1984), quoting *NLRB v. Rockwell–Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) and *Acme Industrial Co.*, supra at 437, in considering an information request, it is not the Board's role to pass on the merits of the Union's claim, "[t]he Board's only function in such situation is in 'acting upon the possibility that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" Accord, *Howard University*, 290 NLRB 1006, 1007 (1988).

Once the burden of showing the relevance of nonunit information is satisfied, the duty to provide the information is the same as it is with presumptively relevant unit information. Depending on the circumstances and reasons for the union's interest, information that is not presumptively relevant may have "an even more fundamental relevance than that considered presumptively relevant." *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969).

The failure to provide requested relevant information is a violation of Section 8(a)(5) of the Act.[4] Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

Even if requested information is relevant, in certain instances a party may assert a confidentiality defense to the demand for information. In two recent cases the Board has summarized the requirements of this defense. In *U.S. Postal Service*, 356 NLRB No. 75, slip op. at 4 (2011), the Board explained:

> A party asserting a confidentiality defense must prove a legitimate and substantial confidentiality interest in the information withheld. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). Confidential information is limited to a few general categories that would reveal, contrary to promises or reasonable expectations, highly personal information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Such confidential information may include "individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits." Id. Additionally, the party asserting the confidentiality defense may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Id.* at 1072.

In *A–1 Door & Building Solutions*, 356 NLRB No. 76, slip op. at 3 (2011), the Board stated:

> In considering union requests for relevant but assertedly confidential information, the Board balances the union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) [parallel citations omitted]. The party asserting confidentiality has the burden of proving that such interests exist and that they outweigh its bargaining partner's need for the information. See *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991) (footnotes omitted).

---

[4]In addition, an employer's violation of Sec. 8(a)(5) of the Act is a derivative violation of Sec. 8(a)(1) of the Act. *Tennessee Coach Co.*, 115 NLRB 677, 679, enfd. 237 F.2d 907 (6th Cir. 1956). See *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

II. Relevance

I think that under the circumstances presented in this case it is clear that the behavioral support plan is relevant to the Union's representational duties. Indeed, the relevance "should have been apparent to the Respondent under the circumstances." *Disneyland Park*, 350 NLRB 1256, 1258 (2007). It probably was.[5] Here we have a union representative evaluating a grievance filed on behalf of an employee discharged after an altercation with a developmentally disabled individual who was in her care.[6] The behavioral support plan is the document that will give the Union the best idea of the strengths, weaknesses, behavioral propensities, behavioral history, and needs of the individual for whom the employee is alleged to have treated inappropriately. It may also (and the Union specifically advanced this claim at the hearing) provide a basis for the employee's actions during the incident.

To say that the behavioral support plan is not relevant to the Union's investigation is to say that the individual's behavior and needs are not relevant to the Union's investigation. I think that is obviously untrue. But this is—in more provocative terms—exactly what the Respondent's counsel argues when he asserts that the behavioral support plan is not relevant because nothing in it could justify abuse. So tendentiously stated, he is obviously correct. But the premise is overstated and inapposite. Proving abuse will be the Employer's burden in the grievance and arbitration procedure. Demonstrating an explanation and justification for the employee's conduct in the circumstances—which may well include evidence of the individual client's behavior and needs—will be the focus of the Union's efforts. In determining, evaluating, and interpreting the actions of the individual and the employee during this altercation, the behavioral support plan will "be of use" to the Union. It is relevant to the Union's investigation and evaluation of the grievance.

The Respondent contends, in part, that the plan is irrelevant because the employee already knew what was in it, told her union representative about it, and suggested that information in the plan about what would "de-escalate" the individual supported the employee's actions. To the extent the Respondent is contending that the employee's prior knowledge about pertinent information in the plan renders the plan irrelevant, the Respondent has it backwards. It proves its relevance. The Union has every reason to want to confirm the employee's claim to itself, the Employer, and ultimately, to an arbitrator. To the extent the Respondent is contending that the employee and the Union's claim about what is in the plan is not a compelling defense, even if true, the Respondent has moved far outside the realm of the discovery standard applicable to information requests. "[I]t is not the Board's function in this type case to pass on the merits of the Union's claim." *NLRB v. Rockwell–Standard Corp.*, 410 F.2d at 957. "[A]nd the union is not required to demonstrate that the information sought is accurate, nonhearsay, or even ultimately reliable." *U.S. Postal Service*, 337 NLRB 820, 822 (2002), quoting *Asarco, Inc.*, 316 NLRB 636, 643 (1995), enfd. in relevant part 86 F.3d 1401 (5th Cir. 1996); *W–L Molding Co.*, 272 NLRB 1239 (1984).

---

[5]I note that the Respondent did not question or object to the relevance of the Union's request at any time prior to the hearing in this matter. Rather, its refusal to provide the behavioral support plan was based solely on claims of the confidentiality of the document.

[6]On brief the Respondent refers to the individual as a "mental health" and "intellectually development disability" consumer.

III. Confidentiality

The more significant defense to providing the information offered by the Respondent is the assertion that the behavioral support plan is a confidential document that State law and the Respondent's obligations to its consumers preclude it from providing to the Union.

I do agree that this document, which is created by a team of providers, staff, family members, and others, regarding a specific individual being cared for by NHS, contains information of the most personal, private, and confidential nature. There is medical information, information about the individual's medical diagnosis, prescribed medications, and information about the support required for the individual. There are accounts of the individual's daily status, developments, and functioning included in the plan. If this is not information in which a profound confidentiality interest exists, then the concept of confidentiality has ceased to exist. I note that the General Counsel does not directly take issue with existence of a confidentiality interest in the plan. I find that it is a profoundly confidential document, bearing a weighty confidentiality interest.

I would add, as the Respondent stresses, that consideration of both Pennsylvania State law and Federal laws relating to the confidentiality of personal health information support the conclusion that there is a legitimate confidentiality interest in the behavior support plan. "The Board has recognized that State law deeming certain information confidential may be considered in assessing whether there is a legitimate confidentiality interest in that information." *Borges Medical Center*, 342 NLRB 1105 (2004); *GTE California, Inc.*, 324 NLRB 424 (1997).[7]

---

[7]Title 55, Chapter 5100 of the Pennsylvania Code "establishes procedures for the treatment of mentally ill persons" (§ 5100.3) and includes several sections (§§5100.31–39) devoted to the "confidentiality of mental health records," including a prohibition against nonconsensual disclosure (§ 5100.32 with limited exceptions) and a statement of "scope and policy" (§ 5100.31) that highlights the "expectation" that client information "will be treated with respect and confidentiality." Notably, while the State law clearly denotes a policy of confidentiality, it recognizes that the promise of confidentiality cannot be absolute, and it states this in particular regard to conflicting federal statutes:

> While full confidentiality cannot be guaranteed to everyone as a result of Federal and State statutes which require disclosure of information for specific purposes, it remains incumbent upon service providers to inform each current client/patient of the specific limits upon confidentiality which affect his treatment when these limits become applicable.

In addition, Title 55, § 6400.217, provides that a client's written consent is required for the release of information "to persons not otherwise authorized to receive it." Of course, this begs the question of whether an intervening federal statute, such as the Act, might authorize or require disclosure in certain circumstances.

The Respondent also points out that, as a general proposition, the Federal Health Insurance Portability and Accountability Act (HIPAA), limits the disclosure of protected individually identifiable health information, although, as the Respondent recognizes, the implementing regulations contain exceptions that permit a covered entity disclose protected health information without an authorization or consent for purposes of carrying out its own "health care operations," which includes the "resolution of internal grievances." 45 CFR § 164.501(6)(iii). In addition, 45 CFR § 164.512 provides that:

Continued

This review (in the preceding footnote) of State and Federal statutory and regulatory authority adds to the conclusion that there is a legitimate and substantial confidentiality interest in documents such as the behavior support plan. The point is not that either State or Federal guidelines preclude on their own terms—or would necessarily be violated by—an employer's furnishing of the plan to the union pursuant to the Act. I do not make such finding, and clearly, based on the sections I have cited in the footnote, the relevant statutes and regulations anticipate exceptions that would apply to disclosures required by the Act. But legitimate claims of confidentiality do not require a showing that State (or Federal) law would be violated by the disclosure. The existence of the schema designating such information as confidential supports the Board's independent determination that there is a legitimate confidentiality interest in the information, even if the State (and Federal) law does not, in all cases, preclude disclosure of the information, and even if the State law is likely preempted by the Act. *GTE*, supra, at 426-427. *San Diego Building Trades Council v. Garmon*, 359 U.S. 234 (1959) (NLRA preempts State law concerning conduct that is arguably protected by Sec. 7 or prohibited by Sec. 8 of the Act).

The recognition of the legitimacy and significance of the confidentiality interest attaching to the behavior support plan does not, however, end the statutory inquiry under the Act.

> When an employer demonstrates a substantial confidentiality interest, it cannot simply ignore the Union's request for information. It must still seek an accommodation of its concerns and the Union's need for the requested

---

> [a] covered entity may use or disclose protected health information without the written authorization of the individual . . . or the opportunity for the individual to agree or object . . . (a) . . . to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law.

Notably, the U.S. Department of Health and Human Services (HHS)—the Federal agency promulgating the HIPAA Regulations—is of the view that the foregoing exempts from the restrictions of the HIPAA Regulations information otherwise to be supplied under the Act in collective bargaining, and in the grievance procedure. In interpretative guidance on the HIPAA Regulations published by HHS, the agency explained, in specific reference to the Act, that

> [t]o the extent a covered entity is required by law to disclose protected health information to collective bargaining representatives under the NLRA, it may to so without an authorization. Also, the definition of "health care operations" at Sec. 164.501 permits disclosures to employee representatives for purposes of grievance resolution.

Federal Register, vol. 65, No. 250, 65 FR 82462, 82598 (Dec. 28, 2000). See also, Id. at 82485 (referencing "Other "Mandatory Federal or State Laws" with specific mention of the Act, and stating: "If a federal law requires a covered entity to disclose a specific type of information, the covered entity would not need an authorization . . . to make the disclosure."

Thus, in the view of HHS, the HIPAA Regulations do not require employee authorization when a union is otherwise entitled to protected health information under the Act. The agency's view—especially given that the agency is interpreting its own regulation—is entitled to substantial deference. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

> information. The burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited. *United States Testing Co. v NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998) (citing *Tritac Corp.*, 286 NLRB 522, 522 (1987)).

Borgess Medical Center, 342 NLRB 1105, 1106 (2004); *U.S. Testing Co., Inc. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998) ("an employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information").

In this case, no accommodation of the competing needs was proposed by NSH. Indeed, it was the Union that—quite beyond its obligation under longstanding Board precedent—formulated an accommodation, and offered to receive the plan with the name of the individual redacted. NHS did not accept this, and at trial suggested this was inadequate because (as Union Representative Klimazewski admitted) the Union would still be able to identify the individual based on the plan, even without the name. NHS may well be right that mere redaction of the client's name is an inadequate accommodation. But just saying no to a union's proposal manifestly does not satisfy the employer's duty to seek an accommodation.

Under settled precedent the Employer violated the Act by refusing to provide the requested information on grounds of confidentiality, while failing to make an effort to bargain to accommodate the Union's concerns with its own.

As discussed, above, I recognize the legitimacy of the confidentiality concern established by the Employer. Accordingly, "the violation found is the *failure to bargain* over an accommodation (i.e., an alternative means of satisfying the Union's needs), not the failure to provide the [Behavior Support Plan itself]." *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) (original emphasis); *Borgess Medical Center*, 342 NLRB at 1106 fn. 6 ("we have made no finding that the Respondent violated Sec. 8(a)(5) by failing to turn over the incident reports. The violation was the failure to bargain about a possible accommodation").

CONCLUSIONS OF LAW

1. The Respondent NHS Human Services Inc. of Allegheny and Westmoreland, is an employer within the meaning of Section 2(2), (6), (7), and (14) of the Act.

2. The Charging Party PA Social Services Union, SEIU Local 668 (Union) is a labor organization with the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated exclusive collective-bargaining representative of the following bargaining unit of the Respondent's employees:

> All full-time and regular part-time non-professional employees, including team associates, lead staff, social role valorization counselors, receptionists, maintenance person and job coach, employed by the Employer in its programs operated in Allegheny and Westmoreland Counties, excluding temporary employees, nurses, confidential and management employees, maintenance coordinator, office clerical employees and guards, causal employees, confidential employees, and guards, professional employees and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to offer a reasonable accommodation to the Union concerning the Union's request for a client's behavioral support plan that was relevant and necessary to the Union's representational duties.

5. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Generally, where an employer fails to provide relevant requested information, the appropriate affirmative remedy includes an order that the employer provide the information. This is not the appropriate remedy here, where, as I have found, the employer has established that there is a legitimate, indeed, profound, confidentiality interest in the document at issue. It is to be remembered that the violation found here is not the failure to provide the information, but the failure to attempt to bargain an accommodation. The inappropriateness of compelling unfettered disclosure as a remedy is only heightened by the fact that the confidentiality interest asserted by the employer is not its own, but the privacy and confidentiality of a third party: the disabled client.[8]

Under most circumstances involving information that impinges upon a third party's confidential interest, the ultimate appropriate outcome would be for there to be an accommodation of the confidentiality interest with the union's need for the information. I believe it a virtue of Board precedent that the union and employer are required to work through this issue: they, more than the Board, know how to best accommodate the interests at stake.[9]

However, in this case, ordering the parties to bargain an accommodation seems a hollow remedy that avoids resolution of this case. Because so much time has passed, because the grievance has settled, because the employer did not undertake to bargain an

---

[8]I note that in a case where the confidentiality interest asserted by the employer is the employer's own—for example, a request for confidential proprietary data—the failure to attempt to bargain an accommodation might reasonably be treated as a waiver of the confidentiality defense, resulting in a remedy for the violation that includes furnishing of the information. But that seems a markedly inappropriate remedy for the violation where the confidentiality interest at stake is for the benefit of, indeed, belongs to, a third party.

[9]I note that while the confidentiality interest in this case is weighty, it would not be insuperable in the face of a similarly weighty need by the Union for the document. To meet the Union's need for the document in the grievance procedure the parties could have bargained restrictions on the Union's use of the document: who could see it, what would be done with it after the need for it had passed. Such clauses are often included in private parties' confidentiality agreements and could have been crafted here to provide for enforceable restrictions on the Union's use of the document. These restrictions could provide assurances of confidentiality not appreciably more risky for the employer or the client than that posed by the routine use and knowledge of the behavioral support plan by employees working with the client.

accommodation when it should have, it seems a particularly unhelpful and unrealistic remedy to order the parties at this time to bargain an accommodation.

In this case, it is more appropriate for the Board to balance the interests. This is, in fact, what the Board would be required to do if bargaining did not resolve the matter, *Borgess*, supra at 1107, and the Board regularly takes into its own hands the balancing of interests when the parties have failed to do so, and the circumstances dictate that the Board should resolve the matter. See *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1108 fn. 18 (1991) ("We recognize that the remedy ordered here deviates in some respects from the Board's usual view that parties should bargain over the disclosure of partially confidential information. However, we view this departure as necessitated by the peculiar circumstances of this case and the strong interest in fostering efforts to create safe and drug-free workplaces"); *Washington Gas Light Co.*, 273 NLRB 116, 116–117 (1984) (ordering the employer to produce employee disciplinary records to the extent the records do not include individual medical information); *LaGuardia Hospital*, 260 NLRB 1455, 1455, 1464 (1982) (ordering disclosure of relevant portions of patient medical charts with identities of patients revealed only to nurses already in confidential relationship with patients and with understanding that union agents "are not to divulge this information to any other persons who are not involved in or necessary to the resolution of the grievance in question"); *Howard University*, 290 NLRB 1006, 1007 (1988) (ordering disclosure but, in light of confidentiality interest in autopsy records, "our remedy shall direct that the union refrain from any disclosure of the information to unnecessary persons").

In balancing the interests at stake, I find that on the employer's side, the weight of the confidentiality of the document in question remains the same as it did when this dispute began.

At the same time, it is undeniable that the Union's initial need for this document has diminished with the settlement of the grievance that was the impetus for the request.

In making this observation, I do not suggest that the Respondent has met its burden—indeed, it has not even argued—that the request for the behavioral support plan has been rendered moot by the resolution of the grievance prompting the information request. See *Borgess Medical Center*, 342 NLRB at 1106–1107 (where the Board reached just this result, concluding that the employer had met its burden of showing that the union's request for the information was moot).[10] Indeed, the Board's "normal practice" is to require the party that has unlawfully refused to provide requested information to furnish it "despite and conclusion of the grievance procedure for which the Union originally requested it." *Bloomsburg Craftsmen*, 276 NLRB 400, 400 fn. 2 (1985). As the dissent in *Borgess* pointed out, the resolution of the grievance does not necessarily moot a union's use for the requested information. 342 NLRB at 1108 ("The parties' relationship is not limited to the confines of a particular grievance procedure. . . . There is an "on-going relationship between the parties of which the grievance process is only a part. That relationship benefits from a free flow of information").

Yet, it is also undeniable, at least on the basis of the record here, that the Union's need for the document has been substantially reduced in light of the grievance settlement. When the

---

[10]*Borgess* is distinguishable, among other reasons, because in this case there is no claim of mootness by the Respondent, the presence of which the Board majority in *Borgess* stressed as a basis for the outcome. 342 NLRB at 1107. See also *Lansing Automakers Federal Credit Union*, 355 NLRB No. 221, slip op at 1 & fn. 3 (2010) (agreeing that mootness warranted no affirmative remedy only because respondent and charging party union had filed joint notification of mootness with Board).

profound third-party interest in the confidentiality of this document is balanced against the substantially reduced union need for the document in light of the grievance settlement, I do not find that the balance weighs in favor of disclosure as a remedy for the violation found. The recommended remedy in this case will not include an order to disclose the document—even with safeguards and accommodations.

The Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 6 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, NHS Human Services Inc. of Allegheny and Westmoreland, Pittsburgh Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the representative of its employees in an appropriate bargaining unit by failing and refusing to offer a reasonable accommodation to the Union concerning the Union's request to view a client's behavioral support plan that was relevant and necessary to the Union's representational duties.

(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.

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

(a) Within 14 days after service by the Region, post at its union-represented facilities the attached notice marked "Appendix."[12] Copies of the notice, on forms

---

[11]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.

[12]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."

provided by the Regional Director for Region 6, 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. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any 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 May 20, 2010.

(b) 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 Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 12, 2011

_____
David I. Goldman
U.S. Administrative Law Judge

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 refuse to bargain with the PA Social Services Union, SEIU Local 668, as the exclusive bargaining representative of the employees in the following bargaining unit, concerning the Union's request to view a client's Behavioral Support Plan, when such requested information is relevant and reasonably necessary for administering the labor agreement and for the processing of grievances:

All full-time and regular part-time non-professional employees, including team associates, lead staff, social role valorization counselors, receptionists, maintenance person and job coach, employed by the Employer in its programs operated in Allegheny and Westmoreland Counties, excluding temporary employees, nurses, confidential and management employees, maintenance coordinator, office clerical employees and guards, causal employees, confidential employees, and guards, professional employees and supervisors as defined in the Act.

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

NHS HUMAN SERVICES INC. OF ALLEGHENY AND WESTMORELAND

(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.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111

(412) 395-4400, 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, (412) 395-6899.