

**United States of America  
Before The National Labor Relations Board**

In the Matter of:

United Nurses & Allied Professionals,  
(Kent Hospital),

Respondent,

And

Jeanette Geary, An Individual,

Charging Party.

Case 1-CB-11135

**ANSWERING BRIEF OF THE UNITED NURSES & ALLIED PROFESSIONALS' TO  
THE EXCEPTIONS FILED BY COUNSEL FOR THE ACTING GENERAL COUNSEL  
AND COUNSEL FOR THE CHARGING PARTY TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

The United Nurses & Allied Professionals

By its attorney,



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Pursuant to Rule 102.46 of the Rules and Regulations of the National Labor Relations Board (NLRB), the Respondent, United Nurses & Allied Professionals, hereby files its answering brief to the exceptions filed by Counsel for the Acting General Counsel and Counsel for the Charging Party to the decision (Decision) of the Administrative Law Judge (ALJ).

I. Counsel for the Acting General Counsel's Exceptions

a. **Counsel for the Acting General Counsel: Exception 1**

The Acting General Counsel excepts to the ALJ's failure to find that Respondent breached its duty of fair representation when it failed to provide the Charging Party with a copy of a written verification by an independent auditor of the expenses set forth in its audit for Fiscal Year (FY) 2009. See *Exception 1 of Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge*. The ALJ's Decision in that regard should be affirmed for the reasons set forth below.

There is not a single Board decision that stands for the proposition that a union must provide objectors with a copy of such documentation. Counsel for the Acting General Counsel acknowledges as much. (Tr. 6:22-23). Rather, there is a well settled body of Board law that stands for the proposition that there is no such obligation. See, e.g. California Saw & Knife Works, 320 NLRB 224 (1995). There, the respondent union provided objectors with information detailing the percent reduction based on the previous year's expenses, a summary of the major categories of expense showing how the reduction was calculated, and information regarding the District and Local portion of the dues reduction. *Id.* at 239.<sup>1</sup> The Board held that this disclosure was adequate. *Id.* In so doing, the Board observed that a respondent need only provide the percentage of the reduction, the basis for the calculation and notice of the right to challenge the calculations: "(i)f the employee chooses to object, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures." *Id.* at 233. See

also, Office Employees Local 29 (Dameron Hospital Assn.), 331 NLRB 48, 50 (2000)(“unions are required only to identify their major categories of expenditures, broken down into chargeable and nonchargeable allocations”); Teamsters Local 443 (Connecticut Limousine Service), 324 NLRB 633, 635 (1997)(“a union satisfies its post objection disclosure obligations to objectors when it provides them with information disclosing the union’s major categories of expenditures and designating which expenditures or portions thereof it deems to be representational and therefore chargeable to them”).

In Teamsters Local 75 (Schreiber Foods), 329 NLRB 28 (1999), the Board focused on what is required of a union with respect to the figures a union must provide to objectors. In that regard, the Board held that a union satisfies its duty of fair representation if it provides objectors with its major categories of expense and verified figures. *Id.* at 30. There, the respondent union provided objectors with the percent reduction, an itemized schedule of expense and non-chargeable expenses, informed the objectors of the amount of the reduction, and explained the procedure for challenging the calculations. *Id.* at 28. Citing California Saw & Knife Works approvingly, the Board held that this disclosure was adequate. *Id.* at 30. Nowhere in its decision did the Board require that a respondent union provide a copy of a cover letter from an audit. Rather, the Board observed that the respondent union need only provide verified figures:

**“The union’s duty of fair representation – which requires a union to act in good faith – is met if it supplies its major categories of expenditures and supplies verified figures.”**

*Id.* (emphasis added).<sup>2</sup>

During the investigation stage of this case the Region relied on an unpublished *Significant Appeals Minute* to argue that UNAP violated the Act by not providing the Charging Party with a copy of a cover letter that came with the accountant’s audit of UNAP’s books for FY 2009.

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<sup>1</sup> While the respondent union had its expenses verified by an independent firm of certified public accountants, *Id.* at 240, there is nothing in the Board’s decision that reflects that the union provided a copy of a cover letter to the objectors.

That unpublished minute is Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 464 (Milton Hershey School), Case No. 4-CB-9545 (April 10, 2007).

There, the General Counsel concluded as follows:

“Based on all of the above, the General Counsel concluded that the Union violated Section 8(a)(1)(A) of the Act by failing to provide the *Beck* objectors with a copy of the auditor’s opinion letter or some other statement or form which represents that an audit was done.”

Id. at 3.

In reaching this conclusion, the General Counsel cites two (2) prior Board decisions as controlling authority: California Saw & Knife Works, 320 NLRB 224 (1995) and Television Artists AFTRA (KGW Radio), 327 NLRB 474 (1999). However, neither requires that a union provide an objector with a copy of an auditor’s opinion letter in order to comply with § 8(b)(1)(A) of the Act.

In Television Artists AFTRA (KGW Radio), the Board, citing California Saw & Knife Works, supra, spoke of the imperative that “some type of verification of the information provided to nonmember objectors is necessary for a union to fulfill its obligation under the duty of fair representation to provide sufficient information.” Id. at 476. In so doing, the Board went to great lengths to discuss the significance of the term “audit” and specifically referenced the accountant’s opinion letter certifying the results of such an audit:

“As record evidence described above makes clear, “audit” is a generally accepted term of art in the accounting profession. It describes a service performed by which an accountant undertakes an independent verification of selected transactions within the major categories of financial information presented in the accountant’s report. **The accountant then issues a report accompanied by an opinion letter certifying that, in the accountant’s opinion, the report presents fairly, in all material respects, the financial information which was the subject of the audit.**”

Id. at 476-477 (emphasis added). The Board did not, however, hold that a union must provide a copy of the accountant’s opinion letter in order to comply with the Act. Rather, the Board held that the information provided be verified: “[w]e merely find that expenditure information

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<sup>2</sup> This holding remained undisturbed during the subsequent appellate history.

provided at this stage of the procedure must be verified by a determination that the expenses claimed were in fact made.” Id. at 477.

The Board’s decision in Television Artists AFTRA (KGW Radio) is consistent with its subsequent decision in Teamsters Local 75 (Schreiber Foods), supra, where the Board held that “(t)he union’s duty of fair representation – which requires a union to act in good faith – is met if it supplies its major categories of expenditures and supplies verified figures.” Id. at 30.

Indeed, what this vast body of settled Board law tells us is that a union must provide objectors with verified figures, which the UNAP did,<sup>3</sup> not that a union must provide objectors with a copy of an accountant’s opinion letter stating that such figures have been verified.

In addition to relying on Television Artists AFTRA (KGW Radio) and California Saw & Knife Works, the General Counsel in Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 464 (Milton Hershey School), also relies on Cummings v. Connell, 316 F.3d 886 (9<sup>th</sup> Cir. 2003) to support the conclusion that objectors must be provided with a copy of the auditor’s opinion letter. There, the Court opined: “it should suffice for the notice to include a certification from the independent auditor that the summarized figures have indeed been correctly reproduced from the audited report.” Id. at 892.

Notwithstanding, Board precedent, not the Court’s decision in Cummings v. Connell is controlling here:

**“An administrative law judge is bound to apply established Board precedent which neither the Board nor Supreme Court has reversed, notwithstanding contrary decisions by courts of appeals.”** (emphasis added).

United Food & Commercial Workers International Union, Local 700 (Kroger Limited Partnership), 2008 NLRB LEXIS 69, slip op. at 14-15 (2008)(citing Los Angeles New Hospital, 244 NLRB 960, 962 fn. 4 (1979), enf’d. 640 F.2d 1017 (9<sup>th</sup> Cir. 1981).

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<sup>3</sup> Richard Brooks testified that the figures set forth in J-2c were subject to an independent audit and were verified. (Tr. 119:4-20).

While the General Counsel in Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 464 (Milton Hershey School) appears to have concluded that a union must provide an objector with a copy of an auditor's opinion letter in order to comply with § 8(b)(1)(A) of the Act, the Board has not. Moreover, the Board has not reversed itself in this regard, nor has the United States Supreme Court reversed Board precedent in this regard.<sup>4</sup>

Lastly, while the UNAP did not provide the objector's with a copy of the accountant's letter, it did provide "some other statement which represents that an audit was done" as required by Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 464 (Milton Hershey School), supra. The UNAP provided the objectors with a letter that reads in relevant part: "(t)he major categories of expense have been verified by a certified public accountant." J-2a.

**b. Counsel for the Acting General Counsel: Exception 2**

The Acting General Counsel excepts to the ALJ's failure to either announce or explain the legal standard he employed in reaching his conclusion as to whether Respondent's expenses incurred in connection with its lobbying efforts on behalf of the Rhode Island Hospital Merger Accountability Act, the Rhode Island Hospital Payments Act, and the Vermont bill increasing mental health funding were chargeable to the Charging Party. See *Exception 2 of Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge*.

The ALJ announced and explained that his decision regarding the chargeability of expenses incurred while lobbying in support of these measures was based upon the holdings in Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991), Locke v. Karass, 129 S.Ct. 798 (2009) and Fell v. Independent Ass'n of Continental Pilots, 26 F.Supp.2d 1272 (D.Colo. 1998). Decision at 6.

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<sup>4</sup> There is no allegation here that the UNAP failed to provide the objectors with verified figures. Amended Complaint, Tr. 6:17-25, 7:1-25, 8:1-7.

c. **Counsel for the Acting General Counsel: Exception 3**

The Acting General Counsel excepts to the ALJ's failure to find that lobbying expenses are only chargeable when the legislation lobbied for is directed toward the ratification or implementation of the collective bargaining agreement. See *Exception 3 of Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge*. The legal standard is significantly broader than that. As such, the ALJ's decision should be affirmed in this regard.

It is settled law that lobbying expenditures that are germane to collective bargaining and representational activities are chargeable:

**“the Board has found that certain expenditures that might reasonably be characterized as political action, such as legislative, executive, and administrative agency lobbying, may be chargeable where they concern matters that are germane to collective bargaining and representational activities.”** (emphasis added).

Carpenters Local 751 (Largo Construction, Inc.), Advice Memorandum, Case 32-CB-5560-1 (2003)(citing Transport Workers of America, AFL-CIO, Local 525 (Johnson Controls World Services, Inc.), 329 NLRB 543 (1999)).

In Johnson Controls, the Transport Workers of America, AFL-CIO, Local 525, charged objectors for expenses incurred while lobbying on their behalf with regard to, *inter alia*, payment of wages, overtime hours and employee safety. *Id.* at 549-550. The Administrative Law Judge held that such lobbying expenses were chargeable. *Id.* at 560. In so doing, he reasoned as follows:

**“With respect to lobbying expenses** incurred by Respondents I am persuaded by the ( ) argument that **lobbying is not per se nonchargeable**, and that **the test is whether they are germane to collective bargaining, ( ), or supports activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative.”** (citing Communications Workers v. Beck, 487 U.S. 735, 745 (1988) and Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984), quotations omitted).

*Id.* at 560. The Board affirmed the Judge's ruling in this regard. *Id.* at 543.

It is critical to highlight here that the United States Supreme Court in Ellis v. Railway Clerks made clear long ago that objectors may not only be charged for the direct costs of contract negotiation and administration and grievance adjustment; objectors may also be charged for expenses related to activities normally or reasonably undertaken by a union to effectuate its duties as exclusive bargaining agent:

“the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, **objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.**” (emphasis added).

Id. at 448.

d. **Counsel for the Acting General Counsel: Exception 4**

The Acting General Counsel excepts to the ALJ’s failure to find that the Respondent’s lobbying efforts regarding the Rhode Island Hospital Merger Accountability Act, the Rhode Island Hospital Payments Act, and the Vermont bill increasing mental health funding were not chargeable to the Charging Party. See *Exception 4 of Counsel for the Acting General Counsel’s Exceptions to the Decision of the Administrative Law Judge*. The ALJ’s decision in that regard should be affirmed for the reasons set forth below.

1. The Hospital Merger Accountability Act (J-6)

The UNAP lobbied in support of the Hospital Merger Accountability Act. J-6.<sup>5</sup> At the time the UNAP was lobbying this bill, there were merger talks going on between the two (2) largest hospital systems in Rhode Island, Lifespan Corporation and Care New England. (Tr. 45:8-12). Lifespan is the largest hospital system in Rhode Island (Tr. 45:15-16); Care New England is the second largest. (Tr. 46:1-2). The Lifespan system is comprised of four (4) hospitals, Rhode Island Hospital, Miriam Hospital, Bradley Hospital and Newport Hospital. (Tr.

45:18-19). The Care New England system is comprised of three (3) hospitals, Kent Hospital, Women & Infants Hospital and Butler Hospital. (Tr. 46:4-5).

The bill was designed to regulate hospital mergers that result in an entity obtaining ownership or effective control of more than 50% of all licensed hospital beds in Rhode Island. J-6 at 1. In particular, the bill empowers a health services council “(t)o review and approve or deny any business plan (including relocation, ( ), contraction, ( ) or closure of hospital services) submitted by an entity ( ).”<sup>6</sup> J-6 at 2.

The UNAP represents 2,200 nurses and technical employees at Rhode Island Hospital, which, as noted above, is part of the Lifespan system. (Tr. 45:22-23). Similarly, the UNAP represents 619 nurses at Kent Hospital, which, as noted above, is part of the Care New England system. (Tr. 46:15-16). The UNAP lobbied in support of this bill because of a concern that bargaining unit employees at Kent or Rhode Island Hospitals might lose their jobs as a result of the a merger of the two (2) systems:

“We were very concerned about the potential adverse impact of what would have been an enormous merger and consolidation of hospitals in Rhode Island had Lifespan and Care New England accomplished their merger they would have owned 75% of the hospital business in Rhode Island. And we were very, very concerned that that merger, if successful, would have the potential to severely threaten jobs of members either at Kent or Rhode Island Hospital, as a result of likely consolidation or closure of services at one or more of the facilities.”

(Tr. 47:1-10).

Had the bill passed, it would have enabled the UNAP to appear before the Health Services Council to intervene and advocate to protect the jobs of bargaining employees at Kent and/or Rhode Island Hospital in the event of a proposed consolidation, relocation or closure of services. (Tr. 48:19-25). More specifically, passage of the bill would have enabled the UNAP to appear before the Health Services Council at an evidentiary hearing to oppose business plans that could result in bargaining unit job loss:

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<sup>5</sup> Richard Brooks spent between 25 and 30 hours lobbying in support of this bill. (Tr. 45:1-3).

<sup>6</sup> The Health Services Council is part of the Rhode Island Department of Health. (Tr. 47:24-25, 48:1).

“The union would have the opportunity to appear before the Health Services Council and present evidence and testimony potentially in opposition to proposed transfers of work, consolidation of work or closure of services that would have resulted in job loss of our members.”

(Tr. 50:4-8).

The Board has held that expenses incurred while lobbying on behalf of bargaining unit employees regarding job security are chargeable. Johnson Controls, supra at 546.<sup>7</sup> Moreover, where, as here, a union acts in an effort to protect the terms and conditions of employment of bargaining unit employees in the context of a merger, expenses related thereto are chargeable. See Fell v. Independent Ass’n of Continental Pilots, 26 F.Supp.2d 1272, 1279 (D.Colo. 1998).

In Fell, the union, the Independent Association of Continental Pilots [IACP], was concerned about the possibility that the employer, continental airlines, would merge with another airline, one whose pilots were represented by a different union, the Air Line Pilots Association (ALPA). Id. IACP was concerned that such a merger could result in a loss of seniority for its pilots. Id. As the Court noted, when two (2) airlines merge and the pilots of both are represented by ALPA, those two airlines have a integration procedure when it comes to the seniority of the affected pilots. Id. IACP, therefore, attempted to merge with ALPA so as to protect seniority in the event continental merged with another airline represented by ALPA. Id. The objectors there were charged for the expenses related to that effort. Id. In holding that those expenses were chargeable, the Court observed:

**“A merger of Continental with another airline could have significantly affected the seniority status of the Continental pilots under their current collective bargaining agreement.** However, if IACP merged with ALPA before Continental merged with an ALPA-union airline, the Continental pilots would have been subject to the ALPA seniority integration formula. Without an affiliation between IACP and ALPA, though, the Continental pilots may have had little bargaining power in the event of a merger.” (emphasis added).

Id. The Court went on to hold as follows:

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<sup>7</sup> There, the union, Transport Workers of America, AFL-CIO, Local 525, was found to have appropriately charged objectors for lobbying the United States Air Force regarding a program it implemented which would have resulted in a reduction in bargaining unit work. Id. at 544-545.

**“(c)learly, protecting ( ) seniority ( ) is an undertaking reasonably employed to effectuate the union’s duties as exclusive bargaining representative. Indeed, if IACP did not take measures to protect the pilots’ seniority, its employees may have alleged a breach of the duty of fair representation. ( ). Therefore, the expenditures for the ALPA merger should be considered germane.”** (emphasis added).

Id. (internal quotations, citations omitted).

The Court’s holding in Fell is instructive. There, the IACP charged objectors for expenses related to merger talks with ALPA undertaken to protect against the loss of seniority in the event of a merger of the employer, continental airlines, with another airline. In the instant case, the UNAP charged objectors for expenses related to lobbying in support of the Hospital Merger Accountability Act undertaken to protect against job loss in the event of a merger of Care New England, a system to which employer Kent Hospital belongs, and Lifespan, another hospital system to which Rhode Island Hospital belongs. The similarities are significant. In each instance, the respondent union was attempting to protect terms and conditions of employment in the event of employer mergers with other entities.

## 2. The Hospital Payments Bill (J-12)

The UNAP also lobbied in support of a bill that would have required the State of Rhode Island to make payments to hospitals in response to uncompensated care expenses.<sup>8</sup> J-12. The bill called for the State to make payments in the amount of \$500,000 to any acute care hospital in Washington County and \$800,000 to any acute care hospital in Kent County on May 15, 2009. J-12 at 1. There are two (2) acute care hospitals in Washington County, Westerly Hospital and South County Hospital. (Tr. 52:22-23). The UNAP represents employees at Westerly Hospital. (Tr. 53:1). More specifically, the UNAP represents 256 professional and technical employees in UNAP Local 5075, and another 326 service, skilled maintenance and business office employees in UNAP Local 5104. R-1. There is one hospital in Kent County, Kent Hospital. (Tr. 53:6-7). The UNAP represents 619 nurses at Kent Hospital. R-1.

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<sup>8</sup> Richard Brooks spent approximately 2 or 3 hours lobbying in support of this bill. (Tr. 52:2-4).

The UNAP lobbied this bill because it would have increased funding for both Kent Hospital and Westerly Hospital. (Tr. 53:14-16). At the time UNAP was lobbying this bill, UNAP was actively engaged in negotiations at Kent Hospital for a first contract:

A. While we were bargaining, while this legislation was being lobbied we were bargaining economics at Kent.

Q. I just asked you what relevance if any did Mr. Brooks' lobbying of this bill have to your bargaining at Kent.

A. We were bargaining, more specifically at Kent, we were bargaining the economics in May and June. And the employer made a presentation through their vice president of finance to show, to whine about the hospital's finances. But in particular they were showing what the hospital believed were disproportionate losses because of reimbursements, and dish money and all that jazz. And they were using that as a justification to blunt the proposals that we had to improve wages, time off, and benefits and other stuff. So, you know, if there was an additional \$800,000, that's an awful lot of money. And we certainly intended to help the hospital spend it on our members.

Q. Now how far could \$800,000 have gone, had this bill passed and that money found its way to Kent Hospital?

A. Well, let me say this: there were about 500 full time equivalents. I know there was 619 members, but that's about 500 full time equivalents. So when you divide that in that's well over \$1,200 per full time equivalent.

(Tr. 106:7-25, 107:1-4).

At the time that UNAP was lobbying this bill, it was also preparing for negotiations at Westerly Hospital. (Tr. 107:5-8). This lobbying, therefore, had relevance there:

A. Okay. What relevance if any would his lobbying activity on Joint exhibit 12, what relevance if any did it have on your prep for Westerly?

Q. It had relevance in two areas. First of all, the Westerly Hospital is a fairly small community hospital. So \$500,000 is a lot of money to a hospital of that size. And that hospital was experiencing I'd even say probably seven years of consecutive deficits. And we were preparing to bargain a contract with a hospital that again was losing money. And naturally you'd rather bargain a contract with an employer that has more money rather than less money.

(Tr. 107:9-19).

In addition, however, the lobbying in support of this bill was undertaken to secure funding for wage increases for bargaining unit employees at Westerly Hospital represented by

UNAP Locals 5104 and 5075. The collective bargaining agreement between Local 5104 and Westerly Hospital is in evidence, marked as R-4.<sup>9</sup> There is a provision in that agreement that reads in relevant part:

“If the Hospital’s net operating loss for fiscal year 2007 goes below \$2.5 million (“the 2007 Benchmark”), all scheduled hour employees (excluding senior leadership) will receive a one-time payment equal to 50% of each dollar below the 2007 benchmark divided by the number scheduled hour employees (prorated for those working less than full-time). The 2008 benchmark will be \$1.5 million and **the 2009 benchmark will be \$500,000, and the same formula as above shall apply.**” (emphasis added).

R-4 at 48. The same exact language appears in the collective bargaining agreement between Local 5075 and the Westerly Hospital.<sup>10</sup> R-5 at 53.

As noted above, the Board has held that expenses incurred while lobbying on behalf of bargaining unit employees regarding wages are chargeable.<sup>11</sup> See Johnson Controls, supra at 546. Moreover, it is well settled that a union may charge objectors for expenses incurred for the purpose of implementation of a collective bargaining agreement. This includes expenses related to lobbying to secure funding for an approved collective bargaining agreement, which is precisely what happened here: “union efforts to acquire appropriations for approved collective bargaining agreements often serve as an indispensable prerequisite to their implementation.” See Lehnert v. Ferris Faculty Association, 500 U.S. 507, 522 (1991).

### 3. Mental Health Care Funding

In addition to lobbying in support of the Hospital Merger Accountability Act and the Hospital Payments bill, the UNAP lobbied for mental health care funding in Vermont on behalf of three (3) local affiliates, Retreat Healthcare, Youth Services and Healthcare and Rehab Services of Southeastern Vermont. (Tr. 99:24-25, 100:1-20). The UNAP hired a lobbyist to do

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<sup>9</sup> The term of that agreement is July 13, 2006 – November 5, 2009. R-4.

<sup>10</sup> The term of that agreement is November 5, 2006 – November 5, 2009. R-5.

<sup>11</sup> There, the union, Transport Workers of America, AFL-CIO, Local 525, was found to have appropriately charged objectors for lobbying a United States Congressman to pressure a government contractor who employed bargaining unit employees to make timely wage payments. Id. at 549-550.

that work (Tr. 22:23-25, 23:1-3), and paid that lobbyist approximately \$15,000 for those services. (Tr. 21:19-21).

In the case of Healthcare and Rehab Services of Southeastern Vermont (HCRS), the UNAP undertook this lobbying effort to improve the wages of bargaining unit employees as called for in the collective bargaining agreement between UNAP Local 5051 and HCRS. Indeed, UNAP Local 5051 and HCRS negotiated two (2) provisions into their July 1, 2006 – June 30, 2009 collective bargaining agreement that called for joint labor management lobbying for state funding, and a mechanism to distribute those funds to address pay inequities among bargaining unit employees. One such provision reads in relevant part: “(d)uring this agreement, both parties agree to cooperate with each other in achieving favorable legislation and regulation to enhance the funding available to the Agency which is currently subject to flat funding.” J-15 at 45 and 47.

A companion provision reads as follows:

“(i)n the event, the State provides HCRS with new money earmarked for personnel costs over and above that which is already covered by the current state budget, either party may ask to reopen the agreement solely on the issue of utilizing the portion of such funds apportioned to the bargaining unit to help address internal pay equity issues among and between bargaining unit employees in the same bargaining unit job classification. Upon such limited reopener, both sides agree to meet at least twice a month to discuss whether and to what extent such funds may be used to rectify such issues.”

J-15 at 39.

The Board has held that expenses incurred while lobbying on behalf of bargaining unit employees regarding wages are chargeable. Johnson Controls, supra at 546.<sup>12</sup> Moreover, it is settled law that a union may charge an objector for legislative lobbying and other political activities where, as here, such activity is relevant to contract implementation. See Lehnert v. Ferris Faculty Association, 500 U.S. 507, 520 (1991). This includes lobbying to secure funding for approved collective bargaining agreements: “union efforts to acquire appropriations for approved collective bargaining agreements often serve as an indispensable prerequisite to their

implementation.” *Id.* at 522. Here, the UNAP was lobbying for that very purpose. UNAP was lobbying the state of Vermont for mental health care funding in order to, *inter alia*, acquire appropriations for the approved collective bargaining agreement between UNAP Local 5051 and HCRS.

## II. Charging Party’s Exceptions

### a. **Charging Party: Exception 1**

The Charging Party excepts to the ALJ’s decision to revoke its subpoena duces tecum. See *Charging Party’s Exceptions and Brief in Support of Exceptions* at 11. The ALJ’s decision in that regard should be affirmed for the reasons set forth below.

The documents subpoenaed by the Charging Party, according to Counsel for the Acting General Counsel, Mr. Firenze, had nothing to do with the allegations set forth in the Complaint:

JUDGE BIBLOWITZ: Mr. Firenze, what’s your –

MR. FIRENZE: My take?

JUDGE BIBLOWITZ: Yes.

MR. FIRENZE: I can make it very simple. A lot of this in my view is – only goes to matter beyond the scope of the complaint. He’s trying to find out about whether the information they provided is accurate or not. We don’t have such an allegation in the complaint. And –

JUDGE BIBLOWITZ: That’s fine. Frankly –

MR. FIRENZE: I don’t think – to be honest, I don’t think – if the stuff was surrendered it wouldn’t advance us an inch.

Tr. 69:5-16.

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<sup>12</sup> There, the union, Transport Workers of America, AFL-CIO, Local 525, was found to have appropriately charged objectors for lobbying a United States Congressman to pressure a government contractor who employed bargaining unit employees to make timely wage payments. *Id.* at 549-550.

**b. Charging Party: Exception 2**

The Charging Party excepts to the ALJ's decision not to allow employees who were Beck objectors to testify. See *Charging Party's Exceptions and Brief in Support of Exceptions* at 19. The ALJ's decision in that regard should be affirmed for the reasons set forth below.

The testimony in issue, according to Counsel for the Acting General Counsel, Mr. Firenze, had nothing to do with the allegations set forth in the Complaint:

MR. MUGGERIDGE: So we have there a couple of Beck objectors, including the Charging Party, who can tell their real life experience about how they objected, and what steps they took, what information they were given and how it was insufficient.

JUDGE BIBLOWITZ: Well there's no dispute that they were Beck objectors. The only dispute is, as Mr. Firenze indicated, whether – you know, there were two areas where the GC is alleging the Union did not follow the law. And whether there were Beck objectors or not and the history of that there's no relevance. Mr. Firenze, you – let me know your opinion.

MR. FIRENZE: I agree with you, Your Honor

Tr. 89-90:18-4.

**c. Charging Party: Exception 3**

The Charging Party excepts to the ALJ's decision to not allow expert testimony, which, according to Counsel for the Charging Party, “would have been directly relevant to issues raised in the case, including: general accounting principles, corporate financial audits, Beck financial statements in general, and labor union accounting practices to comply with Beck disclosure obligations.” See *Charging Party's Exceptions and Brief in Support of Exceptions* at 20. The ALJ's decision in this regard should be affirmed for the reasons set forth below.

According to Counsel for the Acting General Counsel, Mr. Firenze, the testimony in issue, which was to focus on the UNAP's disclosure of its major categories of expense (J-2a-d), had nothing to do with the allegations set forth in the Complaint:

JUDGE BIBLOWITZ: So the – tell me if I’m correct. The GC’s sole claims here are one, the fact that the Union never sent the accountant’s letter to the objectors? One?

MR. FIRENZE: Yes.

JUDGE BIBLOWITZ: And whether the lobbying expenses should really be chargeable?

MR. FIRENZE: That’s it.

Tr. 80:16-22.

JUDGE BIBLOWITZ: [ ] the Region has found nothing wrong with the letter, other than the fact that it was not sent to the objectors.

MR. FIRENZE: Well yes. [ ] the General Counsel made a determination that there was an audit made, and that it was verified by the accountant and that that verification is a valid one. We’re not questioning its adequacy.

Tr. 82-83:13-2.

MR. FIRENZE: [ ] the General Counsel is not challenging the validity, or the worthwhile nature so to speak, the helpfulness of that document.

Tr. 84:1-3.

d. **Charging Party: Exception 4**

The Charging Party excepts to the ALJ’s decision to revoke its subpoena duces tecum because the Respondent’s petition to revoke was not timely served on the Charging Party and because the Charging Party was deprived of relevant documents to support her case. See *Charging Party’s Exceptions and Brief in Support of Exceptions* at 24. The ALJ’s decision to revoke the subpoena duces tecum should be affirmed for the reasons set forth below.

To begin with, the record is bare of any evidence that the petition to revoke was either untimely or never served. Moreover, at no time during the hearing did the Charging Party make such a claim. Rather, the Charging party makes these bald assertions now without any evidence whatsoever.

Even if this bald assertion were accurate, it is of no real moment. It is settled law that even where an ALJ errs in quashing a subpoena, it is of no consequence where, as here, no prejudicial harm resulted. NLRB v. Randall P. Kane, Inc., 581 F.2d 215, 220 (9<sup>th</sup> Cir. 1978).

In the instant case, the documents subpoenaed by the Charging Party, according to Counsel for the Acting General Counsel, Mr. Firenze, had nothing to do with the allegations set forth in the Complaint. As such, the Charging Party was in no way prejudiced by the ALJ's decision to revoke:

JUDGE BIBLOWITZ: Mr. Firenze, what's your –

MR. FIRENZE: My take?

JUDGE BIBLOWITZ: Yes.

MR. FIRENZE: I can make it very simple. A lot of this in my view is – only goes to matter beyond the scope of the complaint. He's trying to find out about whether the information they provided is accurate or not. We don't have such an allegation in the complaint. And –

JUDGE BIBLOWITZ: That's fine. Frankly –

MR. FIRENZE: I don't think – to be honest, I don't think – if the stuff was surrendered it wouldn't advance us an inch.

Tr. 69:5-16.<sup>13</sup>

### III. Conclusion

For the reasons set forth above, the exceptions filed by Counsel for the Acting General Counsel and Counsel for the Charging Party should be dismissed.

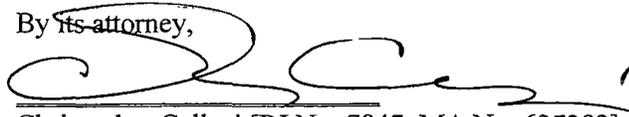
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<sup>13</sup> Charging Party's exceptions 5 and 6 appear to be very similar if not the same. The gravamen of both is that the ALJ erred in his decision with regard to the disclosure of the accountant's cover letter and his conclusions regarding the chargeability of lobbying expenses. Respondent's answer on these two exceptions is set forth herein in sections I a and I d. Similarly, Charging Party's exception 7 speaks to how the ALJ erred in his conclusions regarding the chargeability of lobbying expenses. Again, Respondent's answer to this exception is set forth in section I d herein.

Respectfully submitted,

The United Nurses & Allied Professionals

By its attorney,



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#### **CERTIFICATION OF SERVICE**

I hereby certify that a copy of this brief was sent overnight mail to the Board's Office of the Executive Secretary at 1099 14<sup>th</sup> Street, N.W., Washington, D.C. 20570, by certified mail to Mr. Donald Firenze at Region 1 of the National Labor Relations Board, 10 Causeway Street, 6<sup>th</sup> floor, Boston, MA 02222-1072, and by certified mail to Mr. Mathew Muggeridge of the National Right to Work Defense Foundation at 8001 Braddock Road, Suite 600, Springfield, VA 22160, on May 10, 2011.



Elizabeth Wheeler, UNAP Office Manager

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