

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

**BANNER HEALTH SYSTEM d/b/a
BANNER ESTRELLA MEDICAL CENTER**

and

Case 28-CA-023438

JAMES NAVARRO, an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Counsel for the Acting General Counsel (General Counsel) files this Answering Brief in response to Respondent's exceptions to the decision of Administrative Jay R. Pollack, [JD(SF)-43-11] (ALJD), issued on October 31, 2011.¹ (ALJD) The ALJ properly found that Respondent's Confidentiality Agreement violates Section 8(a)(1) of the Act, and Respondent's exceptions provide no basis for overturning this finding. Instead, the General Counsel urges the Board to reject Respondent's invitation to ignore Board law and to adopt the ALJ's findings that Respondent violated the Act, as alleged, and make the additional findings in conformance with the General Counsel's Cross-Exceptions.²

II. BACKGROUND

Respondent operates a hospital facility located in Phoenix, Arizona, that provides inpatient and outpatient medical care. (ALJD) Respondent's Human Resources Consultant is Joann Odell (Odell) who testified about Respondent's Confidentiality Agreement. (Tr.186) Respondent requires every employee to sign a Confidentiality Agreement when they are hired; this requirement has been in effect since at least since 2005. (GCX 14, 17) More

¹ All dates herein are 2011, unless otherwise noted. Banner Estrella Medical Center will be referred to as "Respondent." References to the official transcript will be designated as (Tr.) with appropriate page citations. References to the General Counsel's Exhibits as (GCX) with the appropriate exhibit number.

² The General Counsel filed Cross-Exceptions under separate cover on December 7, 2011.

senior employees physically signed their Confidentiality Agreement. Respondent currently requires employees to complete and confirm the document online. (Tr. 187; GCX 14, 17) In pertinent part the Confidentiality Agreement reads:

I understand that I may hear, see and create information that is private and confidential.

Examples of confidential information are:

- Patient information both medical and financial
- Private employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee.
- Business information that belongs to Banner or those with who we work including:
 - Copyright computer programs
 - Business and strategic plans
 - Contract terms, financial cost data and other internal documents

Keeping this kind of information private and confidential is **so important** that if I fail to do so, I understand that I could be subject to corrective action, including termination and possible legal action. (emphasis in original)

The document further states that, “I understand these promises carry over even if my employment from Banner should end.” (GCX 14, 17) Employees who fail to abide by the terms of the Confidentiality Agreement could be subject to corrective action, including termination, and to possible legal action. (ALJD 6:3-5)

Odell testified that the Confidentiality Agreement applies whenever an employee sees or overhears information about another associate relating to the subject matters covered by the agreement. (Tr. 257) She then testified that workers could discuss another employee’s salary, but only if that employee had originally disclosed the information, as employees could willingly share their own personal information. (Tr. 260-63) While Odell also testified that she believed the purpose of the Confidentiality Agreement was to require employees to keep confidential information concerning patients or other employees to themselves (Tr. 256-57),

other than what the document actually says, there is no evidence that Respondent further explains the meaning of the Confidentiality Agreement to employees.

II. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT

Respondents exceptions erroneously claim that: (1) the ALJ's finding that employees must obtain permission to discuss other employees' confidential information is not supported by the record; (2) there is no violation because no reasonable employee would interpret the prohibitions in the Confidentiality Agreement as a restriction on their Section 7 rights; and (3) Respondent had a legitimate business justification for the Confidentiality Agreement.

A. The ALJ's Findings Are Supported by the Record

The ALJ properly found that Respondent's Confidentiality Agreement violates Section 8(a)(1) of the Act because it prohibits employees from discussing with coworkers salaries or disciplinary actions, unless such information was first disclosed by the original employee; this is tantamount to requiring an employee first get permission from another employee to discuss the latter's wages and discipline. (ALJD 6) While Respondent claims that the Confidentiality Agreement is lawful because it limits an employee from discussing private information of another employee only to the extent that it is learned solely through performing his or her job duties, the agreement contains no such qualification. Moreover, the record and extant Board law demonstrates that Respondent's argument lacks merit.

The Act declares that it is the "policy of the United States to . . . protect[] the exercise by workers of full freedom of association, self organization, and the designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of employment or other mutual aid or protection." 29 U.S.C. § 151. Thus Section 7 ensures that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157. The Supreme Court has noted that “[e]arly in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.” *Central Hardware Co. v. NLRB*, 407 US 539, 542-43 (1972).

Respondent’s Confidentiality Agreement stifles this freedom of communication. If employees are prohibited from discussing the salaries or discipline of coworkers, unless such information is voluntarily shared, the rights of employees to engage in protected activity for mutual aid and protection are severely limited. For example, pursuant the provisions of Respondent’s Confidentiality Agreement, a worker who witnesses another employee being improperly disciplined from afar would be unable to discuss that matter with other employees, or a third party such as a labor union, unless the disciplined employee personally disclosed the matter. Similarly, a female employee who happens to oversee that a male coworker received a bonus check larger than her own would be unable to discuss this matter with her coworkers. The Act does not countenance such restrictions on employee Section 7 rights.

Thus, the Board has found that an employer violates Section 8(a)(1) by telling an employee to “mind his own business” regarding other employees’ salaries. *Continental Chemical Co.*, 232 NLRB 705, 705-06 (1977). In *Continental Chemical*, a manager called an employee into his office to discuss customer complaints and the employee’s conduct and attitude. *Id.* at 705. During this meeting the manager also discussed the fact that the employee had been talking to coworkers about the need for better wages, told him to “keep his own salary problems to himself,” and to “mind your own business” regarding other employees’ salaries. *Id.* Overturning the ALJ, the Board found that the manager’s statement that the employee should “mind your own business” regarding employee salaries constituted restraint and coercion of employee Section 7 rights. *Id.* at 706.

As for Respondent's contention that there is no violation because the Confidentiality Agreement only prohibits employees from discussing salaries or disciplinary actions "that is not shared by the employee," as noted by the ALJ, the Board rejected a similar argument in *Labinal, Inc.*, 340 NLRB 203, 209-210 (2003). In *Labinal*, the employer argued there was no violation because their rule merely prohibited employees from finding out about another employee's personal pay information and precluded disclosure of that information, absent the employee's knowledge or permission. The Board noted that:

"[T]o prohibit one employee from discussing another employee's pay without the knowledge and permission of that other employee muzzles employees who seek to engage in concerted activity for mutual aid or protection. By requiring that one employee get permission of another employee to discuss the latter's wages, would, as a practical matter, deny the former the use of information innocently obtained, which is the very information he or she needs to discuss the wages with fellow workers before taking the matter to management." *Id.*

Such is the case here. Respondent's Confidentiality Agreement prohibits employees from discussing other employees' salaries or disciplinary actions, unless such information was first disclosed by the original employee. As such, it requires an employee to get permission from another employee to discuss the latter's wages and discipline, and could reasonably be construed to prohibit Section 7 activity. *Id.*; *The NLS Group*, 352 NLRB 744, 755 (2008) (two member Board decision), affirmed 355 NLRB No. 169 (2010) *enfd.* 645 F.3d 475 (1st Cir. 2011) (confidentiality provision, labeling as confidential employees' terms of employment, including compensation, was unlawful because employees reasonably would construe it to prohibit activity protected by Section 7).

Respondent's reliance upon *Community Hospital of Central California*, 335 F.3d 1079 (DC Cir. 2003), to avoid a violation is unavailing. In *Community Hospital* the employer maintained a handbook provision prohibiting the "release or disclosure of confidential

information concerning patients or employees,” without defining the specific type of information considered confidential. *Id.* at 1087-88. The Board held the rule unlawfully broad because it could reasonably be construed by employees to prohibit them from discussing their terms and conditions of employment, including wages. *Community Hospitals*, 335 NLRB 1318, 1322 (2001). The DC Circuit disagreed, refusing to enforce that part of the Board’s order, finding that a reasonable employee would not believe the rule would “prevent him from saying anything about himself or his own employment.” *Id.* at 1089.

It is significant that the rule here, unlike the one in *Community Hospital*, defines confidential information as “salaries and disciplinary action . . . that is not shared by the employee.” Because an employer “may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid,” *Mediaone of Greater Fla., Inc.*, 340 NLRB 277, 279 (2003), Respondent’s prohibitions here differ from those in *Community Hospital*, and violate Section 8(a)(1); *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 (1999) (rule prohibiting employees from revealing “confidential information regarding our customers, fellow employees, or Hotel business” unlawful); *Cintas Corp. v. NLRB*, 482 F.3d 463, 465 (DC. Cir. 2007) (Employer’s rule that states, in part, “we recognize and protect the confidentiality of any information concerning the company, its business plans, its partners,” a violation).

B. Respondent’s Confidentiality Agreement is Facially Invalid

Although Respondent claims that no reasonable employee would interpret its Confidentiality Agreement as preventing discussion of their terms and conditions of employment, the evidence shows otherwise.

The Board, in considering similar language in *The NLS Group*, 352 NLRB 744, 745 (2008), applied the *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1). If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights. The Board determined that the *NLS Group* confidentiality provision was unlawful because employees reasonably would construe it to prohibit activity protected by Section 7.

The same result applies here. First, Respondent's rule precludes employees from discussing salaries and discipline, which explicitly restricts Section 7 activity. *Security Walls*, 356 NLRB No. 87 slip op. at 1, 15-17 (2011) (rule prohibiting, among other things, discussion of salaries, wage rates, demotions, and disciplinary actions, a violation). Thus, Respondent's rule prohibiting employees from discussing coworkers' salaries and disciplinary actions with anyone, which would include other employees or union representatives, is overbroad and unlawful. *Double Eagle Hotel & Casino*, 341 NLRB 112, 113-116 (2004), *enfd.* as modified 414 F.3d 1249 (10th Cir. 2005) (rule explicitly restricts discussion of terms and conditions of employment as defined by employer as "confidential information").

The record demonstrates that, other than the terms of the document itself, Respondent does not further explain the restrictions or applicability of the Confidentiality Agreement. The language of the provision unambiguously prohibits employees from discussing pay rates

and disciplinary actions with third parties, upon pain of discipline, including termination or legal action. Employees would reasonably understand the language of the Confidentiality Agreement as prohibiting discussions of compensation, discipline, or evaluations with each other and with union representatives. *NLS Group*, 352 NLRB at 745 (violation where rule states that terms of employment, including compensation, are confidential and disclosure of such terms to other parties may constitute grounds for dismissal); *Cintas Corp.*, 344 NLRB 943 (2005), *enfd.* 482 F.3d 463 (DC Cir. 2007) (rule deeming any information concerning employer's "partners" as confidential a violation); *Flamingo Hilton - Laughlin*, 330 NLRB 287, 288 fn.3 (1999) (prohibition on employees revealing confidential information about "fellow employees" overbroad and unlawful); *IRIS USA Inc.*, 336 NLRB 1013 (2001) (rule in handbook instructing employees to keep information about employees strictly confidential a violation).

While Respondent argues that the Confidentiality Agreement only applies where an employee learns about private information relating to another employee as a result of performing his job duties, Respondent never informs employees of this supposed qualification. Moreover, even if such a qualification existed, that does not change the fact that the Confidentiality Agreement explicitly prohibits employees from discussing the salaries and wages of their coworkers or with a third party, which would include other employees, or even a union, and continues in force and effect even after an employee's period of employment ends.

At best Respondent's argument is disingenuous. If the Confidentiality Agreement was only intended to prohibit discussion of patients' medical and financial information in relation to medical care, Respondent could easily have narrowed the scope of the Confidentiality

Agreement accordingly. Instead, Respondent included a separate paragraph in the agreement precluding, even beyond an employee's employment with Respondent, discussions of topics, including terms and conditions of employment—salaries and disciplinary actions.

The cases cited by Respondent to support its position are either inapplicable to or readily distinguishable from the present case. Contrary to Respondent's argument, *Windstream Corp.*, 352 NLRB 510 (2008) (two member Board decision), affirmed 355 NLRB No. 119 (2010), supports the ALJ's finding of a violation. More specifically, the ALJ in *Windstream* found that the employer's rule prohibiting employees from discussing compensation was a violation. *Id.* at 514. The employer later modified its original rule, informing employees that they were not prohibited from discussing their terms and conditions of employment, but failed to properly disseminate the modified rule. *Id.* In the present case, Respondent has never issued any such modification to its existing rule.

Respondent also relies on *Palms Hotel & Casino*, 344 NLRB 1363 (2005), for the proposition that rules are to be given a reasonable reading when determining if the rule is unlawful. However, this case does not support Respondent's position either. The Board in *Palms Hotel & Casino* reviewed a rule that prohibited "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." The provision in the present case prohibits disclosure of "[p]rivate employee information (such as salaries, disciplinary action, etc.) that is not shared by the employee." Contrary to Respondent's contentions, *Palms Hotel* fails to address what an employee would reasonably believe was being prohibited by Respondent's Confidentiality Agreement. Notably, there is no evidence that Respondent clarified the Confidentiality Agreement and there is no evidence to contradict a reasonable conclusion that employees are

prohibited from discussing salaries and disciplinary actions. Accordingly, the ALJ's finding that Respondent's Confidentiality Agreement violates Section 8(a)(1) should be sustained.

C. Respondent Lacks any Business Justification

Respondent, again citing *Community Hospital*, claims that it had a compelling business interest in protecting private employee information that an employee has chosen not to disclose. However, as discussed above, *Community Hospital* is distinguishable from the present case, and the record evidence, along with outstanding Board law, demonstrates that Respondent's contention is meritless.

While Respondent claims that it narrowly tailored its Confidentiality Agreement to ensure employees do not disclose confidential information, the actual terms of the Confidentiality Agreement itself does not support Respondent's position. It contains no clarification or expression of purpose regarding the prohibition against discussion of salaries and disciplinary actions. In addition, there is no evidence that employees are ever advised about the purpose of the Confidentiality Agreement, other than what is contained in the four corners of the document.

Furthermore, under Board law, Respondent lacks any business justification for the Confidentiality Agreement. *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (rule, originally promulgated during the course of an investigation, prohibiting employees from discussing issues of sexual harassment a violation); *Security Walls*, 356 No. 87 slip op. 1 n. 1, slip op. 16-17 (2011) (rule requiring employees who assist in an investigation to maintain the confidentiality of all information learned or provided during the investigation violates Section 8(a)(1)); *NLS Group*, supra. Finally, unlike *Caesar's Palace, Inc.*, 336 NLRB 271 (2001), where the employer's requested confidentiality during an investigation involving drug use and

a management cover-up, there are no such extenuating circumstances here. Respondent's Confidentiality Agreement applies in all circumstances and extends even beyond an employee's term of employment with Respondent.

Accordingly, Respondent lacks a legitimate business justification, and as the ALJ found, the Confidentiality Agreement violates Section 8(a)(1) of the Act. *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003); *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999); *Koronis Parts*, 324 NLRB 675, 686, 694 (1997); *Vanguard Tours*, 300 NLRB 250, 264 (1990), enfd. in relevant part 981 F.2d 62 (2d Cir. 1992). See also *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624-625 (1966) (wages are a "vital term and condition of employment," "probably the most critical element in employment" and "the grist on which concerted activity feeds"). *Cintas Corporation*, 344 NLRB 943 (2005) (rule prohibiting release of "any information" regarding "its partners" could be reasonably construed by employees to restrict Section 7 activity); *Cellco Partnership*, 349 NLRB 640, 658 (2007), citing *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999) (absent business justification, rules prohibiting employees from discussing disciplinary actions is a clear restraint on employee Section 7 rights).

III. CONCLUSION

Based upon the foregoing, the General Counsel submits that the ALJ correctly found that Respondent violated Section 8(a)(1) of the Act as set forth above. Accordingly, the General Counsel respectfully urges the Board to reject Respondent's Exceptions and to adopt

the ALJ's findings and recommended order, consistent with General Counsel's Cross-Exceptions.

Dated at Phoenix, Arizona, this 12th day of December 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN ANSWERING BRIEF in Case 28-CA-023438, was served by E-Gov, E-Filing, and E-Mail, on this 12th day of December 2011, on the following:

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