

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

**SALEM HOSPITAL CORPORATION** )  
                  *a/k/a* )  
**THE MEMORIAL HOSPITAL** )  
**OF SALEM COUNTY** )  
                                  ) **Respondent** )  
                                  ) *and* )  
                                  ) )  
**HEALTH PROFESSIONALS AND ALLIED** )  
**EMPLOYEES (HPAE)** )  
                                  ) **Charging Party** )

**CASE NO. 04-CA-073474**

**RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS**

COMES NOW the undersigned Counsel for Respondent and, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, hereby files its Brief in Support of Exceptions to the September 14, 2012 Decision of Administrative Law Judge Arthur J. Amchan<sup>1</sup>.

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<sup>1</sup> References herein to the Administrative Law Judge will be designated as “ALJ,” and references to his Decision will be designated as ALJD, preceded by the page number and followed by the line numbers. References to the transcript will be designated “Tr.,” to the Acting General Counsel’s exhibits as “GC,” and Respondent’s exhibits as “R,” followed in each instance by the page or exhibit number. Respondent will also be referred to variously herein as, “the Hospital” or “Employer.” Footnotes in the ALJD will be designated as “Fn.”

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## INTRODUCTION (All Exceptions)

The case *sub judice* is the last in a series of eight charges filed by HPAE (“the Union”) against the Hospital. It is the third case upon which Region 4 has issued complaint. The outcome in all active cases is dependent upon final resolution of a pending challenge to the validity of the underlying certification of a unit of registered nurses (“RNs”) in Case No. 4-RC-21697.

The case primarily involves the producibility of information in response to a broad, unfocused and unlimited request for entire contents of personnel files, names of all witnesses, and summaries of all witness statements, where each request presents issues of privacy, sensitivity, and confidentiality, for all employees disciplined since the Union’s August 3, 2011 certification as well as all future yet-to-occur discipline to unknown employees. A seemingly simple set of facts here nonetheless poses numerous and varied legal issues many of which were not considered by the ALJ including but not limited to, the following: the nature of “necessary” and “relevant” information; presumptive relevance and its rebuttal; premature requests; various legitimate confidentiality concerns, including disclosure of patient identity and/or medical data under statutes and the Family and Medical Leave Act of 1993, as amended (“FMLA”)<sup>2</sup>; release of private and sensitive employee information; relevance of information concerning non-unit employees and third parties; lists disclosing witness names alone, and in conjunction with requests for summaries of witness statements; burdensome and costly efforts to provide information; and adequacy of attempts to accommodate information requests seeking confidential information.

The ALJ, in post-trial rulings, set in motion a sequence of events which resulted in his failure to address evidence and arguments presented in the Hospital’s Brief. In so doing, the ALJ failed to come to grips with Respondent’s showing that the Union’s *carte blanche* open-ended and prospective requests for entire contents of personnel files, witness statement summaries and lists of witnesses

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<sup>2</sup> 29 U.S.C. §2611-2619.

rendered the requests neither presumptively relevant nor producible. The ALJ's failure and refusal to address and confront the nature and effect of production of these materials, in the circumstances here, poses the prospect that, in the event the underlying certification were upheld, his recommended Order would allow the Union virtual unrestricted access to personnel files containing highly-sensitive and confidential information, including, *inter alia*, the numerous items listed in Exception 16. Further, his recommended Order would require and permit the Union unrestricted access to witness statement summaries (to be prepared by the Hospital) plus lists of names of witnesses which would, when examined together, potentially reveal the identity of persons including employees, patients and third parties. Moreover, the ALJ's recommended Order would deprive Respondent of its opportunity and ability to challenge relevance, presumptive or otherwise, for all future requests for entire contents of personnel files, witness lists, and summaries or witness statements. The ALJ, by simply presuming relevance, and focusing only on the absence of Respondent's timely response, gave no consideration to an evaluation or assessment of the scope and nature of the requests, nor any analysis or consideration of the impact of his Order requiring production of the required information in the circumstances posed here.

The Hospital denies that it has violated the Act by refusal to provide entire contents of personnel files, witness statement summaries, or lists of witnesses. A summary of the Hospital's position includes, *inter alia*, the following:

- As to unit employees, any presumptive relevance of the requested information has been rebutted by Respondent's evidence of legitimate concerns regarding confidentiality, privacy, disclosure of sensitive information, plus other factors, including the unduly burdensome efforts, time and costs associated with production of such information.
- The request seeks information which is not presumptively relevant as it seeks confidential medical and/or private and sensitive information, as well as information related to non-unit

employees and third parties.

- The request inappropriately seeks information which, if disclosed, would pose very real risks of disclosing confidential information, including release of HIPAA<sup>3</sup>-sensitive information, breach requirements of the FMLA, and betraying employees' expectation of privacy.
- The request is overly-broad and unnecessary inasmuch as the requesting union is aware of specific unit employees who have been disciplined, yet seeks information concerning all disciplined employees, not only from August 3, 2011, but also for yet-to-occur disciplinary actions to be issued to yet-unknown employees for yet-unknown reasons.
- The request is vague and overbroad as information concerning witness statements "considered" could be interpreted to include statements based on hearsay or rumor, written or verbal assertions, and statements that were made in any form and rejected by the Hospital.
- The request is overly-broad as it seeks summaries of witness statements "considered" from August 3, 2011 to present and, thereafter, witness statements considered for future unknown disciplinary actions issued to yet-unknown employees.
- The request seeks information as to future disciplinary actions which logically cannot be concluded to be necessary and relevant at this time inasmuch as the nature of the infraction, the type of discipline, as well as the employee involved cannot be ascertained; and any requirement that the Hospital be automatically required to provide future disciplinary information would preclude Respondent from contesting presumed relevance.
- Respondent has attempted, by its Contingent Accommodation Proposal, under the circumstances presented, to resolve issues between Union's claimed need for requested information and the Hospital's concerns over confidentiality, privacy, sensitivity, vagueness, over-breadth, and unduly burdensome efforts required; and despite the foreseeable lengthy

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<sup>3</sup> Health Insurance Portability and Accountability Act of 1996, Public Law 104-191; 110 Stat 1936; 29 USC §§2611-2619. This enactment is referred to herein as, "HIPAA."

time period before the validity of the underlying certification is finally legally resolved, Respondent's Contingent Accommodation Proposal has been improperly and summarily rejected by the Union (and the Acting General Counsel) and not subject to comment by the ALJ.

## **I. FACTS**

### **A. Procedural**

#### **1. Background**

Following the filing of a petition in Case No. 4-RC-21697 in March 2010, a pre-election hearing took place involving a number of issues relating to the unit of RNs being sought by the Union. Further legal proceedings thereafter transpired before both Region 4 and the Board. In early September 2010, the Union prevailed in an election that took place in a unit of RNs. Objections were filed. A certification was issued by the Board on August 3, 2011. This has been challenged by the Hospital on various grounds.

Following unfair labor practice proceedings in Case No. 4-CA-64455 (testing certification), the matter has come, and is pending, before the U.S. Circuit Court of Appeals for the District of Columbia Circuit on the Hospital's Petition for Review and the Board's Cross-Application for Enforcement. (Court Dockets 11-1461 and 12-1009). Final briefs are due on November 15, 2011, and oral argument has not yet been scheduled.

Following its certification, the Union requested negotiations by letter of August 8, 2011. (GC 4) On August 15, 2011, the Union sought extensive amounts of information directed to bargaining. (GC 5) On August 17, 2011, the Hospital sent written notification to the Union that it would challenge the certification based on objections to the election and, therefore, declined to meet and bargain. (GC 6) The information was not provided. This resulted in charges being filed in both Case No. 4-CA-64455 (test of certification) and Case No. 4-CA-64458 (refusal to provide bargaining-related information). Separate Complaints issued in both matters.

Case No. 4-CA-64458, alleging a refusal to provide bargaining information, was heard before Chief ALJ Giannasi on March 5, 2011. The Board adopted his decision in its order of July 31, 2012. 358 NLRB No. 95 (2012).

## **2. Facts Directly Pertinent to the Case at Bar**

Unlike its prior requests to bargain and provide bargaining-related information, the Union, by letter of October 20, 2011<sup>4</sup>, submitted a request to the Hospital seeking information on any and all disciplinary actions taken with respect to the Hospital's RNs since August 3, 2011. This request not only presumed that the certification was not being challenged, but sought information for which it likewise sought future production, even in the absence of a collective bargaining agreement. The asserted purpose was "to fully represent our members." From the letter itself, it is apparent that the Union sought that all information be provided simultaneously. The items specifically requested by the Union were set forth as follows:

1. Please provide the name (first, last), department, and hire date of all employees who were disciplined since the Union's Certification of August 3, 2011 to date.
2. For each employee disciplined or terminated, please provide the following:
  - a. Copy of Disciplinary Form given to employee.
  - b. Personnel file of employee to include evaluations for the previous 3 years.
  - c. Summary of any witness statements considered.
  - d. Copies of all documents, policies and procedures used in order to base the discipline.
  - e. List of witnesses.

Further, the Union's October 20<sup>th</sup> letter made clear that the sought-after information was to be provided not only for discipline issued since August 3, 2011. It also sought the same information for future, yet-to-occur, disciplinary actions to yet-unknown employees. Thus, the letter asserted that "this is an ongoing request... please provide the above information for all employees disciplined going forward."

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<sup>4</sup> This will be referred to herein as the "October 20<sup>th</sup>" demand or request.

The Union had previously been advised on August 17, 2011, that the Hospital was challenging the August 3, 2011 certification, and that the Hospital would neither meet nor provide information to the Union. Accordingly, as the Hospital's position had been made clear, and as the certification issue was still pending, it did not respond to the Union's October 20<sup>th</sup> request or provide the information requested. Doing so would not only have been repetitive, but any different message would have been inconsistent with the Hospital's challenge to the certification.

Failure to provide the information requested on October 20<sup>th</sup> ripened into the charge in the subject case being filed on January 30, 2012. A Complaint and Notice of Hearing issued on April 26, 2012. On June 8, 2012, the Hospital filed its Answer which included numerous Affirmative Defenses (Nos. 15-22), pertinent to the issues raised herein.

### **3. Pre-Trial and Trial Matters**

#### **a. Preservation of Unit Appropriateness Issue (Exception No. 51)**

As set forth above, the certification of August 3, 2011, has been challenged by the Hospital in prior cases. These include the objections in Case No. 4-RC-21967, as well as the test certification case (Case No. 4-CA-64455) and more recently Case No. 4-CA-64458.

As noted, the test of certification matter, Case No. 4-CA-64455, is currently pending before the U.S. Circuit Court of Appeals for the District of Columbia Circuit upon the Hospital's Petition for Review and the Board's Subsequent Cross-Application for Enforcement. The briefing schedule reflects that final reply briefs are due to the Court on or before November 15, 2012. Oral argument will likely be scheduled on a later date. Accordingly, a disposition of the certification issue before the Court will likely not issue until sometime in 2013. Thus, there has been ample time (since Respondent's June 8, 2012 Answer), until the Court rules, for the Union to have evaluated the Respondent's contentions as to privacy, confidentiality and undue burden.

An additional challenge to the underlying certification was made by the Hospital during the

proceedings March 5, 2012 before Chief ALJ Giannasi in Case No. 4-CA-64458. As recounted in his decision, the Hospital, as part of its denial of the appropriate unit allegations, made an offer of proof. This basically set forth that Respondent would elicit information regarding the eroding effect of the Board's Decision in *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), upon the continued validity of the Board's Healthcare Rule, which had been applied in the underlying representation matter, Case No. 4-RC-21697. Judge Giannasi rejected the Offer of Proof as well as the Hospital's other contentions in his April 17, 2012 Decision. Following the Hospital's filing of exceptions, the Board, on July 31, 2012, issued its Decision and Order in Case No. 4-CA-64458, upholding his decision. See 358 NLRB No. 95 (2012).

In these proceedings, the Hospital sought to preserve for the record the position it had taken in the prior cases as to why the certification is invalid. Rather than totally reiterate the arguments expressed in the rejected offer of proof in Case No. 4-CA-64458, and rather than recounting all arguments as to the certification's validity being raised by the Hospital before the D.C. Circuit Court of Appeals in Case No. 4-CA-64455, the Hospital moved to incorporate those contentions into the record herein. Respondent again urges, on the various grounds previously advanced in those cases, that the certification herein is invalid<sup>5</sup>.

**b. The Contingent Accommodation Proposal**  
(Exception Nos. 52, 53 and 54)

On July 25, 2012<sup>6</sup>, one week before the scheduled hearing in this matter, a conference call was conducted by Presiding Administrative Law Judge Amchan with attorneys for the Acting General Counsel, the Union and the Hospital. Discussions at that time centered upon possibilities of

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<sup>5</sup> The ALJ's decision reflected no comment on this matter.

<sup>6</sup> It is acknowledged that the conference call is not part of the record herein, though it is well-known that the Board countenances the established practice of ALJs conducting pre-trial conferences. It is referred to here only for reference to the timing of Respondent's submission of its Contingent Accommodation Proposal.

settlement or reaching an accommodation between parties to resolve the matter. No accommodation or settlement was achieved.

On July 30, 2012, Respondent submitted to Counsel for the Acting General Counsel a “Contingent Accommodation Proposal” (herein “CAP”) (R 1). The following day, July 31, 2012, the CAP was also presented to the Union. It was rejected by both recipients. It was again rejected by them at trial. Among grounds cited for the rejection was the short time between the CAP’s submission and the trial<sup>7</sup>.

At the August 1, 2012 hearing before ALJ Amchan, Respondent again urged consideration of the CAP as a means of resolution of the complaint’s allegations. Though the Acting General Counsel and Union again expressed their conceptual disagreement with the CAP, the ALJ received the CAP into evidence to insure development of a complete record on this issue. (Tr. 10-15).

#### **4. Post-Trial Matters**

At the conclusion of the August 1, 2012, proceedings, briefs to the ALJ were scheduled for submission on September 5, 2012. Prior to that date, Counsel for the Acting General Counsel submitted an unopposed request for an extension to September 12, 2012 for the stated purpose of taking a vacation. On September 5, 2012, Respondent’s Counsel submitted an eight working day suspension, to September 24, 2012, to file his brief. This request was based upon, *inter alia*, a death in Counsel’s immediate family in mid-August, followed by a two-week incapacitating illness. This request was denied on September 6 without comment. As Respondent has the burden in cases such as this, exhaustive additional research, drafting, clerical and typing work, extensive revision and editing was required.<sup>8</sup> This also resulted in a rushed e-filing by an associate which, unfortunately, was e-filed to Region 4 on September 13, 2012. As noted by the ALJ in his decision, the Brief had

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<sup>7</sup> Drafting the CAP required time and clerical preparation. Respondent was unable to submit it to the AGC and Union until early the following week.

<sup>8</sup> As Counsel does not type or use computers, he retained a typist who is not a legal secretary. The ALJ’s decisional expedience, while statistically exemplary, was pragmatically unnecessary inasmuch as the underlying certification issue currently before the Circuit Court of the District of Columbia Circuit will likely not issue until sometime in 2013.

not reached him by 9:25 a.m. on September 14, 2012, the same day on which the decision issued. Accordingly, the ALJ most expeditiously issued his decision without his having the benefit of reviewing Respondent's Brief. Accordingly, the Board and its staff will be considering Respondent's position *ab initio*.

## **B. Facts and Factors Surrounding the Union's Information Request**

### **1. Scrutiny of the Union's October 20<sup>th</sup> Request Exposes Inherent Deficiencies** (Exception Nos. 11, 21, 25-28, 33, 36, 44, and 49)

As of the August 17, 2011 response of the Hospital's CEO to the Union's August 15 request for information and bargaining, the Union was on notice that the Hospital was challenging the validity of the Union's certification. Further, it would not meet, provide information or bargain until the challenge would be resolved. (Tr.30; GC 4,5,6) Accordingly, since that date, the Union has been on notice that while the certification's validity was pending, Respondent would take no action inconsistent with its position. That the Union thereafter received no reply to its later October 20<sup>th</sup> demand for information would have come as no surprise. The challenge remains pending and, therefore, bargaining with the Union and providing information concerning discipline would be inconsistent with its August 17, 2011 position. While a response may have been courteous, in reality and pragmatically, it would have been repetitive. Further, it is noted that it referenced information as to "members," whom the Hospital obviously could not identify.

The Union admits that it was aware of specific individuals who complained to it concerning discipline issued to them. (Tr. 44) According to Union Representative Lane, specific complaints prompted her October 20, 2011 demand (Tr. 44). Yet information as to specific discipline directed to specific employees posing specific issues was not requested. Rather, the Union submitted an open-ended, unlimited and unfocused demand for all discipline issued to all unit employees despite there being no indications that all disciplined employees supported the Union, or had gone to the Union, or had disputed their discipline. The foreseeable result of responding to the Union's request would be

an ongoing need for the Hospital to engage in perpetual, highly-burdensome tasks of retrieval, copying of entire contents of all disciplined employees' personnel files, preparation of witness summaries, and drafting lists of named witnesses.

The Union's overreaching is further evinced by the absence of any temporal restraints on the information demanded. The testimony of Union Staff Representative Lane, as well as the verbiage of the October 20<sup>th</sup> request itself, establishes that the Union seeks provision of the same information, which, in its view, is presumably relevant to past discipline, to all future discipline. Logically, however, the Hospital could make no challenge to presumptive relevance of future discipline since the disciplinary events have yet to occur. By its request, and now by the ALJ's Order, Respondent would be required, without challenge, to produce all documentation within personnel files, where obviously no current disciplinary action exists. The Union unequivocally seeks unlimited provision of entire contents of personnel files, summaries of witness statements and lists of witnesses, instantly and automatically, for all future disciplinary actions without challenge to presumed relevance (Tr. 38-41). The ALJ's Order precludes any challenge to presumed relevance of that information in future cases of discipline.

The perpetual nature of the Union's requests assumes that all personnel file documentation will be presumptively relevant to all future discipline. The request, especially as to entire contents of personnel files, overlooks the reality that only information arguably relevant to discipline is to be provided. As will be shown, confidential, sensitive information does not become presumptively relevant simply because the employee has been disciplined and that information is in their file.

**2. Unit Employees Have Expectations of Privacy as to Their Files' Personal Information**  
(Exception Nos. 11, 12, 15-18, 30-32, and 44)

The ALJ failed to address or evaluate the factor of the Hospital's employees' expectations of privacy. Not only do unit employees work in an environment where the privacy concerns of patients are of utmost daily concern, they themselves, from commencement of their employment, are given and

receive expectations of privacy that information they have provided to the Hospital will be sheltered from disclosure. The Hospital's training, stress, and emphasis upon privacy contributes to the employees' expectation that personal Patient Health Information (PHI) can only be accessed and only disclosed under very restricted circumstances. Employees cannot even access their own information unless the reason or purpose is one specified within HIPAA.<sup>9</sup> (R 2; Tr. 47-54)

R 6, "Employer Authorization to Release Personal Information," is presented to each new hire as well as to employees being laid off concerning information that the employee authorizes the Hospital to release. Unless specifically authorized by the employee on the form, the following information is not be provided by the Hospital to anyone including creditors and employers: employee's position; home address; Social Security number; employment status with the Hospital; length of employment; dates of employment; date of termination; reason for termination; plus any other information the employee would not want to be disclosed. Unit employees thereby develop an expectation that the Hospital will not disclose the information without their express authorization.

Moreover, citizens throughout the United States in this day and age have legitimate concerns that information possessed by institutions, if released without authorization, could result in identify theft or other misuse, cyber or otherwise. Provisions of the FMLA likewise create an expectation of privacy as to release of medical information. Provisions in the statute and documents used in connection with its provisions clearly specify that the employee's medical provider's assessments of medical conditions are, and must remain, confidential by the Hospital. Respondent would respectfully request that the Board to take judicial notice of § I, II and III of the "Certification of Healthcare Provider – Employee's Serious Health Condition (FMLA) OMB Control No. 1215-0181." Inasmuch as unit employees themselves take this document to their medical care provider,

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<sup>9</sup> "Privacy Rule" and its "Minimum Necessary Rule." 45 CFR §165.502 *et seq.*; 45 CFR 164.502(b); 164.514 (d)

there can be no question that the employees requesting and/or granted such leave would expect that information to remain confidential.

Finally, as Union Representative Lane testified, all unit employees are not “members” of the Union, a fact confirmed by the results of the underlying election. Accordingly, it is clear that an unknown number of unit employees do not support the Union. To provide personnel file information to the Union concerning these employees would serve no purpose other than create foreseeable unnecessary divisiveness among the unit’s employees. Finally, the Union, even at trial, failed to present evidence as to any specific employee who disputed the discipline they received, or the nature of the supposed complaint or issue presented. This failure to present specifics either at the trial or to include a specific individual’s information in its October 20<sup>th</sup> request then mushroomed into ongoing, unlimited, unfocused, broad requests for personnel files, witness statement summaries and names of witnesses for all those disciplined since August 3, 2011.

### **3. Types of Disciplinary Actions Directed to Unit Employees**

The ALJ made no reference to the type and levels of disciplinary actions issued to employees. Had he done so, this would have revealed that (as more specifically set forth in the next section) most discipline which issued since August 3, 2011 has involved matters where no reference to personnel files would even be needed.

R 8, “The Employee Counseling / Disciplinary Action Notice” form is used by the Hospital for the title’s stated purposes. (Tr.62) The top section identifies the employee, the employee’s department and date. This is followed by a “Violation” section with checkboxes next to 16 types of listed violations plus one referred to as “other.” Included, *inter alia*, are violations titled “Excessive Absences,” “Tardiness,” “Failure to Comply With Hospital Policy,” and “Violations of Confidentiality.” That is followed by an “Action Taken” section which provides checkboxes for documented verbal counseling followed by first, second and third written warnings; terminations; investigative suspensions; and disciplinary suspensions. Thereafter, the person issuing the discipline

is to record on the form and discuss the pertinent facts behind the discipline and fill in “Corrective Action Required.” This is followed by “Employee Remarks,” and thereafter by a one-sentence notification of the documents being part of their file and that further disciplinary action could result in termination. Spaces are provided at the bottom of the form for signatures of the employee, the supervisor, and date.

**4. Discipline Since August 3, 2011<sup>10</sup>**  
(Exception Nos. 3, 17, 19, 20, 23, 24, and 46)

In cherry-picking Respondent’s evidence as to discipline, without further explanation, the ALJ gratuitously commented that there was “a marked increase” in discipline in the first seven months of 2012. This unnecessary remark subtly creates the unsupported impression that the Hospital’s discipline of employees during that period was improper. This becomes even more offensive and erroneous when the ALJ refers to the disciplined employees as “discriminatees.” There is no allegation or any evidence to evoke such remarks. The disciplined employees are not discriminatees, nor are they greivants. Such commentary is should not be countenanced by the Board. Similarly, the ALJ’s comment in his Footnote 2, implying that the case is simplistic or non-complex, reflects a skewed and apparent closed view as to the issues posed as a and suggests a predisposition to give little consideration to the Hospital’s evidence advanced to meet its burden. Additionally, the ALJ’s reliance on opinion evidence from Human Resource Manager Linda Tuting, rather than the obviously more meaningful admissions of Union Representative Lane as to the Union’s desire for the contents of personnel files, would appear, at minimum, to reflect a lack of appreciation for needed considerations of weight, relevance and materiality of evidence.

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<sup>10</sup> The Union’s request and the allegations of the Complaint specifically reference that the request encompasses all disciplinary information from August 3, 2011. The ALJ’s reference to *Mike O’Connor Chevrolet*, 209 NLRB 701 (1974) alters both the Complaint’s allegations as well as the precise language of the request upon which this litigation was based. It is submitted that the ALJ’s application of this case here improperly alters that specific request. While *Mike O’Connor Chevrolet* would go to remedy, it is submitted that it should not be used as a means to unilaterally alter the Union’s specific request and Complaint’s allegations.

Respondent stipulated that it has disciplined unit employees since August 3, 2011, and also presented data on the number and types of disciplinary actions issued from that date to the date of hearing. A total of 99 disciplinary actions were issued during that period. 53 of the 99 actions were documented verbal warnings, the least severe form of discipline issued by the Hospital. (R 10) Over 40 percent of the 99 disciplinary actions dealt with absences and tardiness issues stemming from violations of the Hospital's attendance policies (R 4-5). As explained by Linda Tuting, Respondent's Director of Human Resources, disciplinary issues related to absences and tardiness, would be resolved by reference to the policies (R 4,5) plus resort to the mechanics of the Hospital's CHRONOS time-keeping system. Resolution of factual issues relating to such discipline require no resort to the employees' personnel files (Tr.68-72; R 4,5,10).

R 10 also shows one disciplinary action issued for a clock-in/clock-out violation. Also, the exhibit shows a third written warning for leaving work without permission. Any issues as to those absence and time-keeping issues would be resolvable by reference to the CHRONOS system. R 10 further shows that 28 of 99 pieces of discipline involved failure to comply with Hospital policy. The potentially relevant documentation in such discipline would be policies, rather than personnel files. The remaining actions included discipline for substandard work (13), unprofessional conduct (13), and attitude (2). Ostensibly, the factual bases for these 28 actions would require no reference to personnel files of the disciplined employees.

Accordingly, reference to any of the contents of personnel files would be totally unnecessary as to:

1. 42 of the 99 actions involved discipline for time and attendance-related matters;
2. Of the 99 incidents, the Union seeks contents of entire personnel files for 53 first-warning situations thereby involving the least severe level of discipline;
3. 28 of 99 pieces of discipline relate to policy infractions in which the policies, rather than personnel files and would ostensibly provide the most potential relevance for purposes of examining the discipline. 28 of the 99 disciplinary actions relate to substandard work, (13), unprofessional conduct (13), and attitude (2) which would appear to provide little basis for reference to the entire contents of the employees' personnel files.

**5. Personnel Files: Maintenance and Contents**  
(Exception Nos. 24, 29, 30-32, 34, 44, and 45)

The ALJ failed to address Respondent's evidence and contentions as to the contents of the Employer's three-part personnel files. Had he done so, it would be observed that his order would, by edict, require improper disclosure of private, personal, confidential, and sensitive information. This is shown by the following.

The Hospital's Personnel Department is comprised of the Human Resources (HR) Director Linda Tuting; Susan Hearn, Recruiter of Professional and Non-Professional Personnel; Margo Woodward, responsible for compensation and benefit programs; and HR Coordinator, Amanda Lotito. While Linda Tuting is the designated custodian of the Hospital's records, she has delegated part of that responsibility to Ms. Lotito who maintains files for all 450 Hospital employees, including those for all unit RNs.

The "personnel files" for each unit employee are in reality comprised of three differing types of files (Tr. 60). Neither the Union's requests nor the ALJ's decision differentiate between the various types of personnel files. (Tr. 34-40) The "main" file is retained in the first floor area overseen by HR Coordinator Amanda Lotito. The combined "background check" and "FMLA-related" files for each employee are retained in the offices of Margo Woodward. The third set of files are referred to as the "employee health files" and primarily contain workers compensation and ADA-related information. They are maintained by Ms. Lotito and are housed on the Hospital's third floor. (Tr.60-61) All files are locked and secured as are the HR Offices because of the need to protect all employees' sensitive information. (Tr.88-89)

"The main" file folder is comprised of cardboard, expandable, and has five divisions or tabs: "new hire;" "license/certification;" "training/education;" "evaluations;" and "miscellaneous." (Tr.90; R 11) Disciplinary information is placed in the main HR folder behind the "miscellaneous" tab. (Tr.91) Ms. Tuting testified that the main HR file also contains documents from State licensing

authorities that contain, *inter alia*, disciplinary actions imposed by the State. 401(k) information is also contained in that segment of the personnel files. (Tr. 75)

As observed and recorded by Amanda Lotito during her (below-described) review of 12 randomly-selected files:

1. The “main” files include some or all of the following:
  - Social Security numbers; birthdates; phone numbers; addresses; rates of pay; drivers license numbers; W-4 information; educational test scores; performance evaluations; college transcripts; wage garnishment information; family court issues; bankruptcy papers; marriage certificates; mortgage loan information; records of disputes with other RNs; plus disciplinary actions including, *inter alia*, unprofessional conduct; and tardiness issues.
  - From the employee health files, Lotito noted sensitive information including lab work, drug screens, physical examinations, vaccination information, prescription information, post-exposure blood work, and positive or negative results of “TBD” (Tuberculosis) tests.
  - The third set of files contain confidential background check and FMLA-related information including the providers’ statements of medical conditions which form the basis for the FMLA leave request.

**6. Efforts Required to Respond to the October 20<sup>th</sup> Demand**  
(Exception Nos. 26, 34, and 45)

Provision of copies of requested personnel files, witness statement summaries, and lists of witnesses to the Union would foreseeably require at least hundreds of hours of time to retrieve copies by the Hospital’s HR Coordinator.

For purposes of the August 1 trial, Counsel for the Hospital requested that Lotito randomly pull a dozen unit employee files. The files were selected by a random search computer program. (R

12; Tr.92-93) Lotito then, at Counsel's request, counted the number of pages to be copied from each of the three files maintained on each employee. Further, for each one of the employee's files, she noted information which she would consider sensitive. She recorded all this information for the 12 randomly selected RNs in R 13. This shows:

- The number of pages to be copied in the 12 main HR files ranged from 58 to 737;
- The number of such pages in the employee health files ranged from 20 to 117;
- The number of such pages in the background check / FMLA-related files ranged from 19 to 143.

Lotito further testified that the average number of pages for the randomly-selected RN files exceeded 400 pages. (Tr.95) Linda Tuting further testified that she had seen unit employee files up to 6-7 inches thick. (Tr.73)

Lotito explained that to provide copies of the requested information in response to the Union's request she would:

- need to examine each page or sheet in the file to see if it contained sensitive and/or confidential information;
- need to go through all pages in all five sections of the main HR file;
- need to pull out staples when required, for copying;
- need to separate pages when needed;
- examine each page for writing or information on the reverse side of each sheet;
- pull out and segregate different sized sheets for purposes of copying;
- Lotito would not be able to simply deposit a stack of paper in the entry tray of the copy machine, push a button, and have the copying all completed; and
- following the separation, evaluation and copying processes, she would need to re-staple materials and reinsert all documents properly back into the files.

Lotito estimated that simply to copy a 400-page file would take 1½ hours without the processes of searching for sensitive materials and putting the files back together again following their being copied. (Tr.100) She further testified on cross-examination that there was no means by which to electronically pull up or retrieve personnel file information electronically, since the system only allows retrieval of dates for licenses and tuberculosis tests. (Tr.100-101)

Accordingly, the process to fulfill the Union's request for all personnel files involving up to 99 different situations (and likely more since the hearing) could involve at least hundreds of hours of Lotito being engaged in the above-described process. Further, the HR department's copy machine is not suited for such purposes as it not intended for high velocity / high volume projects. (Tr.78-79) Additionally, to fulfill the Union's request for witness summaries and statements, Lotito or someone in personnel would need to review all evidence concerning each discipline, determine the existence of statements, and then prepare summaries of each witness's information as well as a list of witnesses. Obviously, questions would likely arise as to whether a document is a "statement" or should be "considered."

Finally, providing the Union with a list of witnesses would, *inter alia*, require the Hospital's HR Coordinator to review all information related to the disciplinary action, screen the information for confidential or sensitive materials, discuss issues of confidentiality, sensitivity and privacy with others in the event that she could not discern this herself, make judgments as to the propriety of disclosure of materials, and then prepare and submit a list to the Union. In essence, the Union's unduly burdensome request would be extremely costly to the Hospital in terms of personnel and copying costs. When 40 percent of the issues thus far are resolvable without reference to personnel files and 53 of 99 actions involve mere verbal counselings, the Union's requests would require unduly burdensome and costly efforts by the Hospital. The ALJ failed to consider any of the above evidence, for the practical implications of the October 20<sup>th</sup> demand.

## II. ISSUES PRESENTED

(Exception Nos. 4-18, 21-23, 26, 30-43, 47-55)

1. Whether the Union's unlimited request for copies of complete personnel files of all employees' disciplined from August 3, 2011 seeks relevant and necessary information in circumstances where at least forty percent of those disciplinary actions cannot be resolved by resort to information in those files?
2. Whether the Union's unlimited requests for copies of personnel files for all employees disciplined for unknown reasons at presently unknown future times seeks information that can logically be relevant and necessary for bargaining?
3. Assuming, *arguendo*, that the Union's request for complete contents of personnel files of employee/RNs actually disciplined from August 3, 2011 to present, as well as for those to be disciplined for unknown acts at unknown times in the future, were to be deemed presumptively relevant, has Respondent rebutted that presumption by its showing that interspersed throughout the personnel files are numerous non-disclosable items including, but not limited to, items that are confidential, private to employees and/or sensitive to employees, and/or seek medical information potentially violative of HIPPA, FMLA, and/or otherwise privileged from disclosure?
4. Whether the Union and/or the Acting General Counsel, in the circumstances set forth above, have presented sufficient reasons to overcome Respondent's rebuttal of presumptive relevance by Respondent's evidence raising legitimate concerns as to confidentiality, privacy, and sensitivity of information?
5. Whether Respondent has established that production of personnel files would be unduly burdensome and, if so, whether the Respondent's CAP sufficiently addresses that issue?

6. Whether the Respondent's attempted accommodation, the CAP, rejected by the Union and the Acting General Counsel, meet its obligations in the contingent circumstances posed by this case inasmuch as the underlying certification is being challenged?
7. Whether the Respondent's attempted accommodation can be considered timely in the circumstances presented here?
8. Whether the Union's requests for summaries of witness statements "considered" seeks information necessary and relevant to discipline meted out a) from August 3, 2011 to present, and/or b) for discipline occurring in the future; or whether the request is vague and overbroad inasmuch as "considered" could be interpreted to include written and/or verbal statements based on hearsay or rumor as well as fact, and "considered" statements could include any statements rejected by Respondent for numerous reasons?
9. Whether the request for summaries of witness statements, in conjunction with lists of witnesses, would operate to permit disclosure of confidential medical information that could identify patients and indicate patients' medical conditions in conflict with HIPPA; and/or disclose medical conditions in violation of FMLA?
10. Whether the Union's request for summaries of witness statements concerning past and future disciplinary action would disclose information involving third parties whose identity and relevance has not been determined, and could not be evaluated as incidents have yet to occur?
11. Whether the Union's request for a list of witnesses involving employees disciplined from August 3, 2011 as well as for future disciplinary actions seeks 1) necessary and relevant information, 2) seeks material which would conflict with HIPAA and violate FMLA; 3) seeks information as to third parties where relevance, for past discipline, has not been shown; 4) seeks information as to the involvement of third parties, in future unknown acts resulting in employee discipline, and 5) whether the Respondent's CAP has addressed and sought solutions to resolve these issues.

12. Whether the Hospital's Contingent Accommodation Proposal (CAP), as an attempt to resolve the issues, meets its obligations with respect to provision of information and bargaining in these unique circumstances whereby the underlying certification is being challenged, and other information as to disciplinary action is sought not only for the period from August 3, 2011 to present, but also for disciplinary actions which have yet to occur.

### **III. LEGAL PRINCIPLES APPLICABLE TO INFORMATION REQUESTS**

#### **A. General**

- The duty to supply information turns on “the circumstances of the particular case.” *NLRB vs. Truitt Mfg. Co.*, 351 U.S. 3, “and much the same can be said for the type of disclosures that will satisfy that duty.” *Detroit Edison Co. v. NLRB*, 440 U.S. 301, (1979) at 314-315.
- As part of its bargaining obligation with a union duly authorized to represent its employees, an employer, upon that union's request is required to furnish it with information that is “necessary” and “relevant” for the union to perform its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967).
- The Board uses a broad discovery-type standard in determining relevance in information request matters. While the information sought need not be dispositive of the issue, it must have some bearing on it. *Pennsylvania Power and Light Co.*, 301 NLRB 1104, 1105 (1991).
- Under certain circumstances, established claims of confidentiality may justify a refusal to provide information. *Bacardi Corp.*, 296 NLRB 1220, 1223 (1989); *Johns Manville Sales Corp.*, 252 NLRB 268 (1980). When a confidentiality claim is timely raised, the trier of fact is to balance the need for information sought against the legitimate confidentiality interests of the employer.

- A request for information can be deemed premature where the facts have not sufficiently ripened to provide relevance. *Tri-State Generation and Transmission Association*, 332 NLRB 910 (2000).
- No showing of relevance by the requesting union is required for presumptively relevant information unless the employer rebuts the presumption.
- Information concerning non-unit employees is not deemed presumptively relevant. *Bryant Stratton Business Institute*, 321 NLRB 107, 113 (1996).
- The issue of whether an employer unlawfully refused to provide information is to be determined by the facts as they existed at the time of the request with subsequent events having no impact upon a finding of a violation. *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1985).
- The employer bears the burden of rebutting the presumption of the requested information's relevance by showing that the information is not relevant or there is some other reason why it cannot, in good faith, be supplied. *Midwest Communications*, 282 NLRB 1199 (1987); *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006); *Soule Glass & Glazing Co.*, 652 F.2<sup>nd</sup> 1055 (1981). Such reasons include, *inter alia*, a good faith claim of undue burden in providing the information. *Safeway Stores v. NLRB*, 691 F. 2d 953 (10<sup>th</sup> Cir., 1982) These also include legitimate business needs for confidentiality, justifiable fear of violence or harassment, sensitivity of private information, including medical conditions of the employee or individuals for whom the information is sought.
- As to claims of confidentiality, a union's entitlement to information is not absolute and is subject to various limitations. As the Supreme Court noted in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), a union's interests in information arguably relevant does not always predominate over all other interests however legitimate, and no such absolute rule has ever

been established. *Id.* at 318. The Court therein noted the reasonableness of the company's concern for test secrecy and the legitimate and substantial nature of those concerns. The Court took note of the employer's concerns based on sensitivity of the information as to employees' aptitude test scores, noting that the employees tested had been offered assurances of confidentiality. In refusing to enforce the Board's order, the Court observed that **there may be circumstances where an employer's conditional offer to disclose may be warranted.** In this regard, the Court found that the employer's conditioning the release of the employees' test scores upon receipt of employee consent forms constituted such a conditional and appropriate offer. See also, *Minnesota Mining & Manufacturing Co.*, 261 NLRB 27 (1982).

- When an employer adduces evidence to rebut the presumption of relevance (such as a good faith claim of undue burden and/or confidentiality concerns), the union is required to provide specific relevance for the information requested to demonstrate that the need for material outweighs the employer's interests. This involves the showing, supported by evidence, that the requested evidence is relevant. *Atlas Metals Parts Co. v. NLRB*, 660 F.2d 304 (1981); *Disneyland Park*, 350 NLRB 88 (2007). In this connection, it must state the use to which the information is to be put. *Soule Glass & Glazing Co. v. NLRB*, *supra*. Failure to do so relieves the employer of the obligation to provide the information. *Tyson Foods*, 311 NLRB 552 (1993) (Adopting the JD at 569).
- In some circumstances involving balancing, the trier fact will determine that an employer is neither required to provide the requested confidential information nor seek an accommodation with the Union. In such cases, the Board may dismiss the allegations or fashion its own remedy. *Pennsylvania Power and Light Co.*, *supra*.
- In some circumstances, where the employer raises and establishes legitimate concerns as to

the confidential nature of information sought, the employer may be required to pose an offer to accommodate both its concerns and its bargaining obligations. This can include the employer's offering to provide the information conditionally or with restrictions on its use. *Tri-Tac Corp.*, 286 NLRB 522 (1987); *Borgess Medical Center*, 342 NLRB 1105 (2004); *U.S. Testing Co., Inc. v. NLRB*, 160 F.3<sup>rd</sup> 14, 20 (D.C. Cir. 1998); *Detroit Edison, supra*. In several cases, when there has been an attempt to accommodate, the remedy has been to have the parties bargain for an accommodation that would satisfy the union's needs and the employer's protective concerns. *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) and cases cited therein. Where this remedy is ordered, and the parties thereafter cannot resolve their differences, the Board will await a new charge and then determine 1) if the parties bargained in good faith, and 2) engage in a balancing of interest analysis weighing the union's needs and the employer's confidentiality concerns. *Detroit Edison, supra*; *Minnesota Mining & Manufacturing Co., supra*; *Metropolitan Edison, supra*.

- In the process of balancing interests in confidentiality against the requester's need for information, **the balance must favor the party seeking confidentiality**. *Pennsylvania Power and Light Co., supra*; *Northern Indiana Public Service Co., supra*.
- While claims of confidentiality are to be timely raised, it should be noted that an accommodation posed by the employer on the date of hearing before an ALJ was not posed as an issue in *Detroit Edison*, 440 U.S. at 309, 312.
- The Board has also concluded that an employer's efforts to accommodate and reconcile a union's request with the employer's own legitimate confidentiality concerns, has been deemed sufficient to warrant dismissal of the union's allegations as to unlawful refusal to provide information, particularly where the requesting union did not provide a counterproposal. *Northern Indiana Public Service, supra*.

## **B. Other Information Held Either Not Producible or Not Presumptively Relevant**

- Witness statements have been deemed by the Board not subject to disclosure. *Anheuser Busch*, 237 NLRB 982 (1978).
- Information requested to support an unfair labor practice charge is not subject to disclosure. *Union-Tribune Publishing Co.*, 307 NLRB 25 (1992).
- Medical records and medical information have been subject to various commentary by the Board. *Johns-Manville Sales Corp.*, 252 NLRB 368 (1980).
- The identification of employees with medical conditions was held to be confidential. Employers have been successful in advancing legitimate confidentiality concerns as to medical related information, but the employer must offer an accommodation. *Borgess Hospital, supra*.
- Documents subject to the attorney work product privilege are exempt from disclosure. *Sprint Communications d/b/a Central Telephone Co. of Texas*, 343 NLRB No. 987 (2004).
- Information held by a party to an arbitration proceeding which the party contends is conclusive and dispositive of the issues in the arbitration, is not subject to provision to the other party upon its request. *Square D Co.*, 224 NLRB No. 111 (1976).

## **IV. ARGUMENT**

(Exception Nos. 4-18, 22, 27-29, 30-45, 47-48)

### **A. The Presumptions of Relevance Here Have Been Rebutted**

#### **1. Provision of the Information Demanded by the Union in Paragraphs Nos. 2(b), 2(c) and 2(e) of the October 20<sup>th</sup> Demand Would Conflict With HIPAA, and also Improperly Permit Disclosure of Medical Information, plus Sensitive Private Data in the Circumstances Here**

The ALJ's analysis of permitted disclosures under HIPAA is flawed. Since enactment of the Health Insurance Portability and Accountability Act of 1996 the Department of Health and Human Resources has closely regulated the use and disclosure of protected health information (PHI) by

entities including hospitals and healthcare facilities. See Title II “Administrative Simplification” provision, and Privacy Rule set forth therein.

The Hospital’s Chief Nursing Officer (CNO) and Facility Privacy Officer (FPO), Patricia Scherle discussed how and why the statute itself, the regulations of the U.S. Department of Health and Human Services, and the Hospital’s own policies all address the strictures of HIPAA. New employees of the Hospital are given in-depth training concerning HIPAA’s privacy provisions, the appropriate policies, and disciplinary measures for breaches of the statute. (Tr.47-50; R 2&3) Various slides within R 2 describe PHI as:

- 1) Any information that can be used to identify the patient, for example, name and address, Social Security number, medical record number, telephone number, and patient account number.
- 2) Anything about the patient’s medical condition and treatment, past, present, or possible;
- 3) Billing and payment records. See also 45 C.F.R. § 164.501.

The penalties for breaches of HIPAA are severe and can be levied against both the breaching employee and the Hospital. Improper disclosure without authorization can result in a \$50,000 fine and one year’s jail time; malicious use or obtaining information with the intent to sell it could result in a \$250,000 and up to 10 years in jail. (Tr.50-52; R 3) Further, a breach can result in termination. (See R 2, p.12 and p.18 top slide; R 7.) It would appear that if HIPAA precludes a Hospital employee from accessing his/her own health information, a union should have no greater right to that same information.

The emphasis which the Hospital places upon confidentiality of medical information is further demonstrated by its requirement that employees sign R 7, “Employee Confidentiality Agreement.” (See Pars.3&7)

As Ms. Scherle further testified, HIPAA violation complaints can be lodged by patients as well as by employees who witness a breach. (Tr.50) Ms. Scherle investigates all. (Tr.48-50) She further testified about the discipline of a unit RN based upon a patient's HIPAA complaint. Scherle indicated that disclosure of such information could risk a HIPAA violation if information related to the discipline were required to be provided to the Union via an information request. (Tr.52-54) HR Director Tuting further elaborated on a specific case which she investigated involving the termination of an RN. This disciplinary action was taken on the basis of a patient's complaint as to the RN's treatment. The names of the RN, witnesses, and patient, for purposes of the trial, were redacted from the documents presented. This revealed that compliance with the Union's request for personnel file data, including discipline, names of witnesses, and summaries of witness statements would readily violate the strictures of HIPAA. Thus, disclosure of a terminated employee's Employee Counseling and Disciplinary Action Notice, and its four more detailed attachments:

1. Would, if a list of witnesses were to be provided herein, expose witness names for disclosed witness lists, including the daughter of the patient on which the name of the patient could be identified (as well as doctors, nurse directors, and a student);
2. Would, if a list of witnesses were to be produced, expose the condition of the patient from the form itself and from the written summaries which the Union wants produced, as well as the doctor, who could be a specialist and point to the patient's condition.
3. As can readily be deduced, a summary of witness statements in conjunction with a list of witnesses would identify the patient and reveal the medical condition.

(Tr. 79-83; R 9)

The ALJ's analytical effort to dispense with Respondent's legitimate concerns is flawed under the circumstances posed here, and raises an ominous spectre:

- 1) The analysis would require production of entire contents of personnel files of disciplined employees plus witness statements and names of issues encompassing HIPAA-sensitive information here and in similar requests involving other healthcare facilities, in the absence of any specific disputes or grievances;
- 2) The ALJ's analysis would, ironically, allow the Union to have greater access to employees' HIPAA-sensitive materials in their personnel files than the employees themselves. Pursuant to HIPAA's "Minimum Necessary Rule," the employees are not permitted to access their medical information under most conditions while the Union, supposedly pursuing a grievance, would have that access capability per the Judge's analysis. 45 CFR 164.502(b); 164.514(d).
- 3) HIPAA-sensitive information would become required disclosures in the event an accommodation or modification of the Union's request could not be reached.
- 4) It is also submitted that pursuant to 45 CFR 164.530(a)(1)(i), Congress has explicitly provided that it is the facility's designated Privacy Officer, and no other individual or legal body, who must make the final decision regarding whether the facility is in compliance with HIPAA. There is no ground upon which any other body's judgment can be substituted for that of the Privacy Officer.
- 5) Potentially change precedent as the Board has yet to hold that HIPAA-sensitive information must be provided upon request by a union, particularly a request without a reference to a dispute or grievance. Further, the Board has yet to confront and address HIPAA's Privacy Rule (nor has it yet required an employer to obtain a patient's authorization to disclose PHI) here, in the absence of any disputed discipline and where Board law does not, *ipso facto*, require unlimited production of HIPAA-related materials, the ALJ's analysis and its adoption would create precedent far beyond what the Board currently requires. Thus, in this case, his analysis is flawed

as Board law does not require HIPAA-sensitive disclosures in circumstances here, where there is no specific grievance or dispute and Board law would not so require.

- 6) Respondent here would be put to the task of combing through each personnel file for any and all HIPAA-sensitive information and, where required, prepare witness statement summaries, as well as preparation of a list of witnesses' names, for every disciplinary action taken since August 3, 2011 and for unknown future disciplinary acts.

As set forth earlier, in information request cases involving medical information, the Board upon a finding of sincere and actual confidentiality concerns has in some cases required the employer to notify the union of those concerns and offer to both accommodate those concerns and its bargaining obligation by, *inter alia*, seeking modification of the union's request. *Borgess Medical Center*, 342 NLRB 1005 (2004). The circumstances here and the pendency of the certification issue make all actions contingent for the next several months. The Hospital urges that, under these circumstances, the CAP is one workable method to address the Union's needs, the Hospital's legitimate concerns, consonant with Section 8(a)(5) of the Act.

The Union's request would also have the effect of the Employer providing the Union with information from personnel files which would disclose sensitive information. As testified to by Amanda Lotito, and as seen in her formulation of R 13, some, if not all, of the following obviously sensitive information from these files, would need to be disclosed to the Union pursuant to the ALJ's Order:

- Social Security Numbers
- Phone Numbers
- Rates of Pay
- W-4s
- Performance Evaluations
- Records of Disputes With Other Unit Employees
- Marriage Certificates
- Background Check Information
- FMLA-Related Medical Conditions
- Discipline Imposed by State Licensing Authority
- Discipline for Unprofessional Conduct
- Physical Exams
- Vaccine Information
- Results of Tuberculosis Tests
- Birthdates
- Addresses
- Drivers License Numbers
- Education Test Scores
- Mortgage Loan Information
- College Transcripts
- Wages Garnishment
- Family Court Issues
- Bankruptcy Papers
- Lab Work
- Drug Screens
- Prescription Information
- Post-Exposure Blood Work

(Tr. 92-94)

## **2. Other Concerns Involving Witness Statement Summaries and Lists of Witnesses**

The Hospital has other concerns involving provision of witness lists and witness statement summaries that would be derived from personnel files. These include:

- The circumstances of each disciplinary action would need to be evaluated before determining if the lists or summaries are needed or relevant.
- As set forth previously, in connection with employee expectations of privacy, FMLA requires that medical provider's assessment of medical conditions are and must remain confidential in the hospital.
- Assurances of confidentiality and/or maintenance of privacy concerns may arise in unit disciplinary cases involving such unit employees, third parties, non-unit employees and/or their information.
- As to HIPAA violations reported by other unit RNs, all RNs have been informed of the Hospital's Confidential Disclosure Program (R 2, p.11 top slide) Similarly, when such RNs come forward and voluntarily disclose HIPAA violations as to others, the Hospital has assured the reporting employee that there would be no retaliation. Disclosure of that RN's name could provide fertile ground for

harassment, retaliation, and divisive relations between the reporting and the reported RN.

**B. Precedent in the Circumstances Herein, Permits Withholding of Requested Information**  
(Exception Nos. 36-45, 47-49)

**1. The Entire Contents of the Personnel Files Requested Under the Circumstances Herein, are not to be Provided**

The ALJ declared that the requested personnel files are presumptively relevant and, relying on the absence of Respondent's timely response, simply refused to engage in a close examination of the nature and scope of the information requested in the circumstances of this case. In so doing, he failed to consider, evaluate or assess whether presumptive relevance had been rebutted. This is a crucial oversight since, assuming, *arguendo*, that the certification were to be upheld, his Order would require disclosure, even if the Employer had rebutted the presumption of relevance. By failing to dissect the requests for entire contents of personnel files, witness statement summaries, and witness lists, the ALJ's Order could result in the Hospital being required to copy and provide the Union unlimited amounts of confidential, private, and sensitive information and documentation.

Personnel files and their contents are not *per se* confidential. *Midwest Communications, supra, (adopting ALJ); Washington Gas and Light Co., 273 NLRB 116 (1984)*. Nor are personnel files *per se* disclosable. Requests for such information must be evaluated on a case-by-case basis.

In *Detroit Edison*, a case arising from the private sector, the Supreme Court emphasized the sanctity of personnel files. In so doing, it devoted a lengthy discussion to personnel files in the public sector. In its Footnote 16, personnel files and the contents therein were given extensive attention by the Court in making its point as to identical concerns in the private sector. Among many other observations, and in summary, the Court noted:

A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the record-keeping activities of public employers and agencies.

An employer, when confronted with requests for personnel files, is required to show the harm that will result from disclosure of the contents. *Midwest Communications, supra*. The rare case where production of entire personnel files has been required, hardly establishes an unwaiverable commandment that personnel files must be provided in every case. *Fleming Co. 332 NLRB 1086 (2000)*, involved one specific grievance on its way to arbitration. The Board therein noted that the file's relevance to a specific grievance was obvious. Further, the Board noted that the employer therein submitted no evidence to rebut the presumption that information sought by the union was relevant. *Fleming* serves only to confirm that a presumption that personnel files are relevant is subject to rebuttal. Unlike *Fleming*, the Hospital here has presented cogent evidence as to why contents of personnel files of employees, including materials relating to discipline, are not producible in the circumstances posed. Interspersed throughout the files here are materials, including highly-sensitive FMLA material plus other medical information such as prescriptions, physical examination information, vaccination information, results of tuberculosis tests, lab work, drug screens, prescription information and post-exposure lab work.

As made abundantly clear at the trial, each file may have numerous and varied personnel-sensitive issues. Further, the Hospital here produced evidence of the extensive efforts which would be required to provide entire or even parts of employee personnel file contents. The Union's *carte blanche* request for unlimited provision of personnel files must be denied.

**2. The Union's Requests for Names (Listings) of Witnesses, in the Circumstances Herein, are not Presumptively Relevant**

**a. Legal Precedent**

The ALJ again skirted the task of examining the circumstances which reflect that the request for listings of names of witnesses was not here presumptively relevant. Declaring that the request sought presumptively relevant information, and relying on the premise that a defense must be timely raised, and an accommodation sought, he failed to acknowledge that the precedent on this issue

resulted from discernible, discrete disputes rather than, in the context here, where the request is non-specific, open-ended, unlimited, and arising in the absence of a specifically-identified dispute.

There is no *per se* rule commanding that an employer must automatically provide a list of names of witnesses to a requesting union. All cases on this issue have arisen, however, in the context of a discernible, finite, discrete and tangible issue. None take place in circumstances as here where a union seeks unlimited provision of names, on a perpetual basis, in the absence of any cognizable dispute or specific issue over discipline. Though some cases are based on considerations of policy or apparent irrelevancy of the information, most cases center upon issues of confidentiality. Some are based on considerations of whether specific assurances of confidentiality were made or received. Other cases involve considerations of confidentiality in a context of the legitimacy of the employer's confidentiality concerns, apart from assurances. Thus, in informant cases, confidentiality issues frequently make reference to issues of retaliation or harassment toward the informants upon disclosure of their names, plus recognition that informants' future willingness to cooperate would be chilled and/or on the basis of national policy such as a drug free workplace.

As the following shows, a case-by-case analytical approach has been utilized. Several hold that where the presumption of relevance to witness names have been rebutted, the complaint allegations have been dismissed and the information was held not producible.

- ***GTE California, Inc., 324 NLRB 424 (1997)*** The complaint was dismissed where the union requested the name, address and phone number of a customer who complained about the release of her unpublished/unlisted phone number. The customer's report led to an employee's discharge which was later grieved. While concluding that the information was relevant, the Board found the employer to have rebutted this due to its "pre-existing obligation" to keep the complainant's information confidential. Further, the filing of the complaint did not alter its confidential character. The allegations were dismissed.

- The prominent elements of this case include: a finite dispute in the grievance process; a “pre-existing” confidential concern (based on the complainant’s unlisted number); a non-employee witness identity at issue; resulting in the dismissal of complaint.
- ***Pennsylvania Power and Light Co., 301 NLRB 1104 (1991)*** The case arose in an informant-related context. Though the Board directed that summaries of the informants’ statements were to be produced, the union’s request for names and addresses of the employees who informed the employer of other employees’ drug use was denied. The Board therein engaged in balancing the employer’s confidentiality interests *vis-a-vis* the union’s need to obtain at least the essentials of the informants’ information. **The Board noted that any doubts concerning disclosure should be resolved in favor of non-production.** The employer’s concerns regarding harassment of and retaliation against the informants and the chilling effect on cooperation and participation of future potential informants was held to be substantial.
  - The salient elements of the case include: a finite dispute existing in the grievance procedure; concerns based on the implicit need for confidentiality of the informants’ identity; a balancing approach; a unique remedy fashioned by the Board; and accommodation bargaining not being required.
- ***California Nurses Association, 326 NLRB 1362 (1998)*** The employer therein sought the names of witnesses that the union intended to call at an arbitration proceeding. The Board, reversing the ALJ, held witnesses’ names need not be provided. The Board, citing *Square D, supra*, reaffirmed that there is no right to pre-trial discovery in arbitration cases.

- Salient aspects of this case include: a discernible grievance pending arbitration; the Board’s recognition of the need to limit discovery; and dismissal of the allegation.
- ***Columbus Products Co., 259 NLRB 220 (1981)*** A union’s request, during the grievance procedure, for names of employee witnesses who volunteered information to the employer was properly withheld. The employer assured the union that it would not call employee witnesses who gave statements during future proceedings. The Board adopted the ALJ’s conclusion that since the union had already interviewed all involved employees, the names were “not of such significance or necessity” to warrant a violation of the Act. The Board commented that it failed to see how providing this information would enable the union to represent employees more effectively.
  - Prominent elements of this case include: a discernible dispute and issue; employees as the witnesses; considerations of the necessity of the requested material; and dismissal of the complaint.
- ***Minnesota Mining & Mfg. Co., 261 NLRB 27 (1982)*** The Board directed that information identifying employees, including names, addresses and Social Security numbers, were to be excluded from employees’ health and medical information to be provided to the union.
  - This case presents: a ripened issue within the context of bargaining; protection of employee identification documents; substantial privacy concerns.
- ***U.S. Postal Service, 306 NLRB 474 (1992)*** The Board adopted the ALJ’s conclusion that the employer lawfully withheld the names of confidential informants as well as audio and videotapes of the employees who were suspended because of alleged drug transactions. Though the information was deemed relevant to the union’s decision to process the case to

arbitration, the employer's interests in maintaining the confidentiality of the informants' identity, maintaining trust in its inspection division and guarding the integrity of future investigations, outweighed the union's needs. The complaint was dismissed.

- Prominent aspects of this case include: a tangible dispute and grievance; employees as informants; substantial confidentiality concerns; and dismissal of the allegations.

**b. Precedent Holding Names of Witnesses to be Provided are Materially Distinguishable**

Cases which have permitted disclosure of witness names hinge on whether or not the witness was promised anonymity, or had requested or received a reasonable expectation of privacy and confidentiality. The absence of such assurances in these cases increased the probability that witness names would be subject to disclosure.

- *Transport of New Jersey, 233 NLRB 694 (1977)* The names and addresses of non-employee passengers were deemed producible. A bus accident had occurred which led to discipline of the driver. The discipline was grieved. The union's need for the information to determine whether to take the matter to arbitration trumped the employer's "speculative" assertions that the witnesses would be exposed to harassment and "improper contact." This case serves to further establish that presumption of relevance can be (but not in that case) rebutted in a matter involving non-employee witnesses, and that there is no absolute or *per se* rule that witness names must be produced.
  - The basic elements of the case include: the existence of a discernible issue and dispute; non-employee witnesses; and failure of the employer to rebut a presumption of relevance by merely claiming, rather than establishing, its concerns.

- *New Jersey Bell Telephone Co., 300 NLRB 42 (1998)* The employer was required to produce a document showing the name, unlisted number, plus other information concerning a customer. The customer had complained that calls were being made to her unlisted number. The investigation of the complaint resulted in an employee being suspended. The matter was grieved. In ordering production of the document, the Board stressed the fact that the customer neither asked for nor received any assurances of confidentiality.
  - The basic elements of this case include: existence of a discernible dispute; a grievance processing context; a non-employee witness.
- *Fairmont Hotel, 304 NLRB 746 (1991)* The employer was required to provide the name of a customer who complained about an employee who was suspended on the basis of the complaint. The Board therein noted that the employer had failed to establish that the complaining guest was granted any assurances of anonymity or had any expectation of privacy.
  - The basic elements of the case include: existence of a discernible dispute; a witness having no expectation of privacy; arising in grievance-arbitration context.

**c. In the Circumstances Posed Here, Witness Names Can Lawfully be Withheld**

Unlike requests for names of witnesses discussed in the precedent above, the Union here made a blanket request for lists of named witnesses, for all past and future disciplinary actions. Unlike the cases set forth above, the facts here:

- Neither present nor allude to any specific discernible issue or dispute. Here, the ALJ's recommended order, requiring provision of names of witnesses to past and future discipline, would deny the Hospital of its opportunity to rebut any presumptions of relevance as to any and all specific disciplinary matters.

- Presents no justifiable purpose for production of names involved in any present or future case.
- Reflect no input from disciplined Hospital employees as to their disputing the discipline, their willingness to pursue the issue, or even raise the issue of a need for witnesses.
- Reveal that the Hospital has established that the names of witnesses would be contained in the employees' personnel files. The personnel files, based on confidentiality and other concerns expressed above, are themselves not disclosable.
- Precedent set forth above holds that names of witnesses are not to be produced prior to and/or during arbitration proceedings. In such proceedings, issues are clearly defined and crystallized. Here, witness names are sought in the absence of any issue. No issues are posed in either the Union's prospective or retrospective requests. As to future disciplinary acts, there are obviously no circumstances which even raise the issue. Accordingly, it is submitted that the complaint allegations as to witness names must be dismissed and production not required.

### **3. Summaries of Witness Statements, Under the Circumstances Herein, are not to be Provided**

The ALJ again, resting on contentions as to timeliness, and simply concluding that summaries of witness statements are relevant and must be produced, while engaging in no analysis of the nature and scope of the requested summaries, the absence of presumptive relevance, nor any consideration of the requested information under the circumstances and context of this case.

As in earlier discussions herein concerning personnel files and witness names, there is no absolute rule that summaries of witness statements must be provided in every case.

While the Board in *Pennsylvania Power and Light* directed the production of witness summaries, the following must be considered.

1. The Board ordered a remedy specifically tailored to the facts of the case, and even detailed how the summaries were to be drafted.
2. The Board noted that this was a departure from its typical remedies in such cases. Significantly, the Board observed a strong nexus between the witness names and witness summaries to be prepared and therefore specified that the informants' names and other identifying information were to be excluded from the summaries. Unlike the Board's strict prohibition of "witness statements," in *Anheuser Busch, Pennsylvania Power and Light* is a fact-specific case. It sets forth no absolute rules, and further establishes that an employer may rebut a presumption of relevance of witness summaries.

The Union's request for summaries of witness statements in the factual circumstances posed here is flawed. Like *Pennsylvania Power and Light*, there are two concerns existing here: identification of witness names coupled with contents of their statements. It takes no leap of logic to deduce that witness names can easily be associated with witness summaries. In effect, this two-pronged request would result in identification of the employee and the employee's information. In substance, the result would be much the same as producing witness statements which are precluded under *Anheuser Busch*, 237 NLRB 982 (1978).

For reasons expressed previously as to the confidentiality and other issues presented as to personnel files and lists of witness names, the requested summaries are not to be provided in the circumstances here. Unlike the circumstances in *Pennsylvania Power and Light*, the request in the case *sub judice* is made in a context with no specific, finite, tangible or discernible dispute. In turn, the ALJ's Order here obviously precludes the Hospital from any opportunity to rebut claims of presumptive relevance in any individual case of discipline.

This unfocused request and the ALJ's Order are then projected onto future, yet-to-occur disciplinary actions where, again, no opportunity could arise under the ALJ's Order to rebut presumptions of relevance in those presently unknown situations.

**C. Other Legal Deficiencies in the Union's Request for all Information Sought by its October 20<sup>th</sup> Demand**

There has been no unlawful refusal to provide any specific information requested at the time of the Union's request.

Precedent is clear that a refusal to provide information allegation must be evaluated as of the time of the request. *Mary Thompson Hospital*, 296 NLRB 1245 (1989); *Lansing Automakers Federal Credit Union*, 355 NLRB No. 221 (2010). The Complaint in this case alleges failure to provide information concerning discipline only. The Complaint does not allege these violations in conjunction with the prior refusal to provide information case nor with the test of certification case. The considerations as to information sought in this case differ from those in previous cases. The allegations and considerations in this case as to information requested, stand apart from that in the prior two cases.

When viewed at the time of the request, the following is observed:

- The Hospital did not respond to an unfocused and unlimited request for all personnel files, witness statement summaries and witness names concerning unspecified disciplinary actions.
- The Hospital did not provide personnel file containing personal, private, confidential, HIPAA-sensitive, or FMLA-protected information to the Union or any other medical-related sensitive information, as well as other non-medical sensitive information as the Hospital's concerns outweigh the Union's need for unrestricted access and possession of the entire contents of personnel files, witness lists and witness statement summaries, where the Hospital was not made aware of any specific dispute.

- The Hospital did not spend hundreds (if not thousands) of hours copying reams of documents which have no bearing on unspecified instances of discipline.
- The Hospital was not in a position to attack presumptive relevance of future unknown disciplinary actions.
- The Hospital has not engaged in any other independent violations of Section 8(a)(1) or (3) of the Act during the pendency of this charge.

It is submitted that the Hospital therefore engaged in no unlawful conduct with respect to the information sought on October 20<sup>th</sup>, which formed the basis for the allegations in the instant complaint.

The vices common to all items requested in the Union's October 20 letter include:

- The absence of anything to show or establish any nexus between the request and any past, present or future dispute.
- The forward-looking, ongoing request is, at best, premature. Nothing has ripened into a dispute. Nothing has been established by the Union to outweigh the Hospital's real concerns over the disclosure of any and all of the requests.
- The wide open, unlimited, and urgent (sounding) nature of these requests, would preclude the Hospital from advancing argument and evidence that rebut presumptive relevance.

While the Union's requests could be viewed as having all attributes of an unwarranted "fishing expedition," the Hospital's legitimate and established concerns expressed above as to all requests, far outweigh the Union's expressed need for the requested material.

**D. The ALJ Failed to Address, Find and Conclude That Neither the Acting General Counsel Nor the Union Have Provided Reasons or Considerations Which Would Overcome the Hospital's Established Concerns**

The Union's October 20<sup>th</sup> demand asserts that its purpose is to "fully represent its members." At the hearing, the Union's representative asserted that its purpose in seeking the information was to investigate and assess whether there was "just cause" to discipline employees and to engage in "effects bargaining" over their discipline. Had the Union requested information as to the names of specific disciplined employees' complaints and the nature thereof, it is submitted that there would have been someone for the Union to represent and some issue to address. Yet neither exists, even now.

Where, as here, the Hospital raises *bona fide* objections based upon confidentiality and undue burden, the Union must do more than simply rely on general avowals of relevance to establish a right to the information. The Union's bare assertion that it needs the information does not automatically oblige the Hospital to supply all of the information in the manner requested. *Detroit Edison*, 440 US at 314. That premise must certainly hold true where, as here, the Union's highly-generalized and inconsistent justifications are made in the absence of any defined disputes.

There has been no showing by the Union that any group or individual employee situations would overcome Respondent's concerns as to confidentiality, privacy, statutory compliance, or to the sensitive nature of information regarding the employees. Neither the Acting General Counsel nor the Union presented sufficient reason to warrant the exhaustive efforts that would be entailed in providing that information.

**E. The Hospital's Contingent Accommodation Proposal Addresses Union Needs, The Hospital's Confidentiality and Other Concerns and Meets its Bargaining Obligations**  
(Exception Nos. 52-55)

**1. Precedent**

One of the Hospital's defenses to providing the requested information is the request's implicating various pressing privacy and confidentiality interests. As set forth earlier, when an

employer submits evidence to support such concerns it, in various circumstances, must not simply refuse to provide the union with information. Precedent cited above, however, indicates that legitimate confidentiality concerns can result in dismissal of allegations outright and without more. Other precedent cited above holds that in circumstances where legitimate confidentiality concerns exist, the employer must notify the union of its concerns and offer to accommodate both the union's needs and the employer's confidentiality concerns consistent with the employer's bargaining obligations. *Detroit Edison* makes clear that conditional methods for disclosure of information can be appropriate in some circumstances. Such conditional methods have been advanced by the Hospital. It is submitted that these could be appropriate herein, if it were concluded that presumptive relevance had been rebutted.

In the facts of this case, Respondent, in its June 8, 2012 Answer to the Complaint, made those concerns apparent through its Affirmative Defenses (Paras. 18-22). On July 25, 2012, in a conference call with the ALJ, an effort was made to reach an accommodation or settlement but with no success. Thereafter, the Hospital prepared its Contingent Accommodation Proposal which was submitted to the Acting General Counsel and Union on July 31<sup>11</sup>. Respondent submits that the concept and features of the CAP address Respondent's confidentiality and privacy concerns, and the Union's needs, consistent with the Hospital's bargaining obligations. The Respondent is not seeking to have the Board to pass on or approve the CAP's contents and provisions, as Board precedent is clear that such would be inappropriate. Rather, the Hospital submits that the CAP is one step forward in resolving this dispute under the current circumstances.

## **2. Features and Components of the CAP**

The first two and one-half pages of the CAP set forth: the purpose and circumstances in which it is presented; a recitation of facts pertinent to this case; a definition of "contingent; and an

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<sup>11</sup> The CAP was drafted in the two days following the call. Counsel, who does not type, needed to retain clerical help in preparing the document which was another time-consuming process.

acknowledgement that the CAP is to be deemed a legally cognizable offered accommodation as opposed to a settlement.

The specific terms of the CAP of the proposal are set forth on the next three and one-half pages. Among other things, the CAP sets forth that the Hospital would provide the Union with information set forth in paragraphs numbered 1, 2(a) and 2(b) of the Union's October 20<sup>th</sup> letter, and that it would apply to all RNs disciplined since August 3, 2011. Additionally, it contains:

- A provision that the Union can make additional specific and relevant requests for relevant information to further evaluate and consider disciplinary action taken with respect to a specific RN.
- An understanding that, as extensive efforts would be needed to provide the initial information, the Union would initially refrain from filing class-type requests for volumes of information.
- Upon request, the Hospital would continue to supply the Union with the information set forth in paragraphs 1, 2(a) and 2(b) of the October 20 letter, as well as any additional and relevant information as described in the preceding paragraph.
- Section D addresses the Hospital's concerns by proposing that various types and pieces of information would not be provided to the Union from the personnel files of disciplined unit employees. Even a casual perusal of the listed types of documents reveals the sensitive nature of that information.
- The CAP thereafter sets forth non-job-related information in the personnel files which would not be released to the Union. Those relate to information likely to be highly sensitive to the disciplined employee.

- Section E addresses the concerns of the Hospital as to medical-related information, apart from that related to HIPAA and FMLA. Provision of such information would require a release from the disciplined employee.
- Section G anticipates unforeseen circumstances involving documents which the Hospital could claim that a certain document should not be producible for various reasons, and sets forth a procedure to allow both parties an opportunity to reach an accord.
- Section H addresses issues of burdensomeness and cost.

The Union and Acting General Counsel made much of the CAP's not reaching them until shortly before trial. They urge that the Board should look backward, to the time duration between their October 20<sup>th</sup> request and the July 31, 2012 receipt of the CAP.

Respondent submits, that under the circumstances here, consideration of the issue of timeliness of the CAP's submission must necessarily take cognizance of the reality that the underlying certification issues will likely not be resolved for several, if not many, months. The relevant time period here should extend from the July 31, 2012 receipt of the CAP through the date that the certification issued is ultimately resolved. The CAP remains intact, viable and pending until that time is reached. Accordingly, ample time remains for the Union to consider and review the CAP and its provisions.

The CAP confronts the reality that any previous attempt to bargain with the Union over these matters would have been totally inconsistent with the position the Hospital is taking on the certification issue. That Respondent has exercised its legal right to appeal the certification should not be viewed as any indication of bad faith being exhibited by the Hospital in these matters. Accordingly, Respondent submits that the CAP is not untimely submitted.

While the Acting General Counsel and the Union would undoubtedly assert their views that the CAP has numerous flaws, insufficiencies and shortcomings, Respondent views the CAP as a

reasonable mechanism for handling its concerns, and the Union's needs, consistent with its bargaining obligations under current circumstances. Respondent can do no more than propose an accommodation which addresses these concerns and provide a method for resolving them. It would now appear to be incumbent upon the Union, having heard all of the Hospital's concerns, to take the next step.

**V. CONCLUSION**  
(Exception Nos. 4-10)

Information requested by the Union in its October 20<sup>th</sup> letter is irrelevant in the circumstances posed herein. To the extent the information sought would be deemed to be presumptively relevant, the presumption has been cogently rebutted by the Hospital. The substantial, serious and very real concerns established by the Hospital far outweigh the pronounced amorphous and inconsistent generalized needs of the Union. Additionally, the Hospital's submission of its Contingent Accommodation Proposal, which addresses legitimate concerns of the Hospital, and the Union's needs, meets its bargaining obligations. As noted in *Shell Oil Co. v. NLRB*, 457 F. 2d 615, 620 (9<sup>th</sup> Cir., (1972), and cited in *East Tennessee Baptist Hospital v. NLRB*, 6 F. 3d 1139 (1993):

Presentation of *bona fide* concerns by the company, coupled with reasonable proposals designed to satisfy the needs of the union and to achieve a neutrally satisfactory resolution of the union request, is simply not a refusal to bargain.

Accordingly, the ALJ's ruling must be reversed, all complaint allegations dismissed, and the ALJ's Order, Remedy, and Notice, are to be reversed and rendered a nullity. Accordingly, all allegations regarding the requested information must be dismissed.



