

**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 EXCEPTIONS TO DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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, files Exceptions to the September 14, 2012 Decision of Administrative Law Judge Arthur J. Amchan, submitting that he erred as to the following:

1. Issuance of a decision and recommended order on September 14, 2012, without having addressed and/or considered the issues, facts, analyses, and arguments set forth in Respondent's post-trial Brief.
2. The ALJ's denial of Respondent's September 5, 2012 unopposed request for an extension of time to file its post-hearing Brief, in circumstances where an extension had previously been granted to Counsel for the Acting General Counsel and Respondent's request was based, *inter alia*, upon a death in Respondent Counsel's immediate family, in addition to a two-week incapacitating illness, where the ruling deprived the ALJ of the ability to reach a fair and informed decision on the merits.
3. Implication that "the nature of the issues" were simplistic, neither involved nor complex, without his having addressed, considered, or evaluated the evidence-based legal contentions advanced by the Respondent as part of meeting its burden to rebut presumptions of relevance of the information requested. (1 ALJD Fn 2)
4. To the entire Remedy. (5 ALJD 22-27)
5. To the entire Notice to Employees. (8 ALJD)
6. To the ALJ's recommended Order which grants the Union virtually unlimited access to confidential, private and sensitive information which is interspersed within the sought-after entire contents of disciplined employees' personnel files, under circumstances where no specific and identifiable disputes exist, and where numerous disciplined employees do not support the Union (by virtue of election results), and an unknown number of disciplined employees have not disputed or challenged the

discipline issued to them. (Tr. 13; 5 ALJD 30-42; 6 ALJD 1-26; 7 ALJD 1-10)

7. Failure to recognize that under the ALJ's recommended Order, the Union could assume an intransigent position as to accommodations offered by Respondent which, in turn, would then require the Hospital to produce the entire contents of personnel files as well as lists of all witness names, plus summaries of all witness statements, for all disciplined employees, with no regard as to whether any employee's discipline is in dispute.
8. Failure of the ALJ to recognize that his recommended Order, requiring Respondent to produce entire contents of personnel files for **all** past and **all** future disciplined employees, would operate to preclude Respondent's right, opportunity, and ability to challenge the presumptive relevance of the contents of personnel files in all future cases of discipline.
9. Failure of the ALJ to recognize that his recommended Order, requiring Respondent to produce names of witnesses for all past and all future disciplined employees, would preclude Respondent's right, opportunity, and ability to challenge the presumptive relevance of that information in all future cases of discipline.
10. The ALJ's failure to recognize that his recommended Order, requiring the Hospital to produce summaries of witness statements for all past and all future disciplined employees would preclude the Hospital's right, opportunity and ability to challenge the presumptive relevance in all future cases of unit employees' discipline.
11. Finding that information sought by the Union is necessary and relevant, without having addressed record evidence and legal authority establishing that, in the

circumstances presented herein, presumptions of relevance have been rebutted inasmuch as:

- a) the Union's unfocused, generalized requests seek information on all past and all future disciplined employees;
- b) there has been no specified ripened dispute or issue as to any disciplined individual employee or employees (apart from a claimed few employees' complaints which have not been identified or advanced by the Union);
- c) the information sought includes the entire contents of all disciplined employees' personnel files, including witness names and witness summaries;
- d) the information sought includes highly-personal, sensitive, private and confidential material interspersed within the personnel files;
- e) unit employees maintain expectations of privacy as to contents of their personnel files;
- f) the Employer has legitimate concerns over disclosure of the sought-after material which outweigh the interests of the Union; and
- g) the Union's claimed purposes for seeking the information are based entirely on representation of individual employees disciplined, rather than blanket concerns affecting all disciplined employees. (4 ALJD 11-47; Tr. 42-44)

12. Failure to recognize and acknowledge that the Union's request, unlimited in scope, a) seeks not only HIPAA-sensitive materials, but also other highly-sensitive medical information, including, but certainly not limited to, FMLA medical conditions

information; and b) requires production of the personnel files of all past, present and future disciplined employees - without regard to whether any dispute exists; and c) that the recommended Order would foreseeably require measures and accommodations for production of an unknown number of personnel files and their entire contents where there will have been no dispute as to discipline imposed. (4 ALJD 32-40; 5 ALJD 1-3)

13. The flawed analysis of the ALJ which would require production of HIPAA-sensitive information in the current circumstances where there is no specific dispute or grievance and where Board law does not, *ipso facto*, require unrestricted production of such sensitive information without proper authorization. (4 ALJD 17-40; 5 ALJD 1-3)
14. Failure to recognize that 45 CFR 164.530(a)(i) which governs the administration of HIPAA, requires that a covered entity establish a “privacy official who is responsible for the development and implementation of the [privacy] policies and procedures of the entity,” and that, by way of its regulations, Congress has explicitly provided that it is a facility’s Privacy Officer, and no other individual or legal body, which must make the final decision as to whether the facility is in compliance with HIPAA. Accordingly, there is no ground upon which any other body’s judgment can be substituted for that of the Privacy Officer.
15. Failure to address established documentary and testimonial evidence that from commencement of their employment, unit employees are given, receive, acquire and thereafter possess expectations that the information they provide to the Hospital and contents of their personnel files will be sheltered from disclosure and remain confidential. (See R 6 and 13.)

16. Failure to recognize and address the reality that the personnel files of unit employees contain sensitive private information that employees expect to remain confidential

including, but not limited to, the following:

- Social Security Numbers
- Phone numbers
- Rates of pay
- W-4's
- Performance evaluations
- Records of disputes with other unit employees
- Marriage certificates
- Background check information
- FMLA-related medical conditions
- Discipline imposed by State licensing authorities
- Discipline for unprofessional conduct
- Physical exams
- Vaccine information
- Birthdates
- Address
- Driver's license numbers
- Education test scores
- Mortgage loan information
 - College transcripts
- Wage garnishments
- Family court issues
- Bankruptcy papers
- Lab work
 - Drug screens
- Prescription information
 - Post-exposure blood

work

- Results of tuberculosis tests

17. Failure to recognize or consider that interspersed throughout the various three components of the personnel files are at least 27 types of documents that are predictably highly-sensitive, private and confidential to employees. (See Exception No. 16.)

18. Failure to evaluate the confidential nature of entire contents of personnel files as set forth above in Exception No. 16.

19. Gratuitous and erroneous suggestion that discipline issued to unit employees by the Hospital was improperly motivated by his commenting that there was a "marked increase" in discipline issued in the first seven months of 2012, and by his reference to disciplined employees as "discriminatees." (3 ALJD 15-19; 5 ALJD 5-8)

20. Erroneously referring to unit employees as "discriminatees" when, in fact, they are

neither discriminatees nor grievants, nor has it been alleged that any discipline issued by the Hospital was in any way improperly motivated. (5 ALJD 5-8)

21. Finding that Respondent Hospital did not substantiate its defense that production of the demanded information would be burdensome. (4 ALJD 7-14)
22. Assertion that Respondent never sought clarification from the Union in order to narrow its demands. (4 ALJD 10-11)
23. Expansion of the universe of affected unit employees beyond that set forth both in the Complaint herein, and the Union's October 20, 2011 demand for bargaining. (6 ALJD Fn 9)
24. Reliance upon the opinion of Respondent's HR Director, Linda Tuting, that the information in the personnel files would be of no use to the Union, rather than placing reliance upon the more relevant and meaningful testimony of Union Staff Representative Sandra Lane, **that the Union is seeking all requested information, unequivocally and unqualifiedly, and that the Union wants it all.** (5 ALJD 5-10; Tr. 39-40)
25. Failure to recognize that the request referenced "members," whom the Employer could not identify. (Tr. 43)
26. Failure to address detailed evidence concerning the burdensome efforts required to respond to the Union's unlimited, unfocused, request for entire contents of personnel files for all past and future disciplined employees.
27. Failure to recognize and acknowledge that the limited purpose asserted by the Union for its demand for information is supposedly resolution of individual employee

complaints over their specific discipline, though its written demand is inconsistent therewith as it seeks *carte blanche* production of the entire contents of all personnel files, all witness statement summaries, and all names of witnesses for all disciplined employees.

28. Failure to acknowledge and recognize that the Union's information requests are unlimited in substance and time.
29. Failure to recognize that personnel files are comprised of three separate components, 1) main, 2) employee health, and 3) FMLA, disability, and background check materials. Accordingly, provision of "personnel files" would, by the ALJ's edict and Order, require Respondent to disclose highly-confidential, private and/or sensitive information interspersed within all three components of the personnel files of all past and future disciplined unit employees.
30. Failure to evaluate and analyze the confidentiality concerns raised and implicated by the Union's October 20, 2011 demand, particularly as to entire contents of personnel files, which, if produced, would breach and betray employee expectations of privacy and confidentiality as to their personnel file information, as derived in part by forms executed by unit employees at the outset of their employment with the Hospital. (R 6)
31. Failure to find that one of three segments of requested personnel files contain background check, disability, and FMLA-protected medical condition information which is not to be disclosed to third parties, all of which pose sensitive, confidential concerns for both the employees and the Hospital.
32. Failure to recognize that one component of the unit employees' personnel files contains

medical information that must not be disclosed to third parties, including, *inter alia*, prescription information, drug screens, post-exposure blood work, results of tuberculosis tests, physical exam information, and lab work.

33. Failure to address, recognize and acknowledge that despite the Union's asserted awareness of specific employees who supposedly complained to it concerning their discipline, the Union nonetheless submitted to Respondent a broad, unfocused, unlimited, and generalized demand seeking *carte blanche* production of file-related information involving not only past discipline (where none is disputed), as well as the same flawed demand for information involving all future, yet-to-occur, discipline to yet-unknown employees. (Tr. 44)
34. Failure to address and recognize that a showing of burdensome production may pose a complete defense to production of information. (4 ALJD 12-14)
35. Failure to find and conclude as to unit employees, that the presumption of relevance of the requested information has been rebutted by Respondent's evidence as to its legitimate concerns over privacy, confidentiality, sensitive nature of information, and burdensome production.
36. Failure to find and conclude that the Union's October 20, 2011 demands make no reference to a specific issue, grievance or dispute but, rather, seek *carte blanche* production of entire contents of personnel files, witness statement summaries and witness names, where Board precedent as to production of such information arises only in contexts involving specific disputes raising specific issues.
37. Failure to acknowledge, find and conclude that the producibility of summaries of

witness statements and names of witnesses has been determined by the Board in cases which arose in the context of identifiable and discrete disputes rather than, as here, where requests for such information were submitted in circumstances in which no identifiable grievance, dispute, or issue has arisen or exists.

38. Failure to recognize and acknowledge that virtually all Board cases where confidential, sensitive, and private information is sought by a union or an employer, have arisen in the context of a finite, discrete, identifiable and crystalized dispute rather than, as here, where the Union's demand for information is unlimited, unfocused, and seeks not only information concerning disciplinary actions for which there is no apparent dispute, but also for future disciplined employees' information where there is obviously no discernible issue or dispute.
39. Reliance upon precedent, arising from fact patterns involving specific, identifiable and discrete disputes, to support conclusions that the entire contents of all personnel files as well as all witness statement summaries and all names of witnesses are producible, and without recognizing or acknowledging that the Union's demands of October 20, 2011, unlike extant precedent, are temporally and substantively unlimited, and reference no specific issue.
40. Failure to acknowledge precedent holding that where presumptions of relevance are rebutted as to information requested, and the employer's confidentiality concerns are substantial, legitimate and outweigh a union's interests, an accommodation is neither required nor directed but, rather, the information is deemed non-producible and the allegations dismissed.

41. As to producibility of witness statements, the failure to reconcile Board holdings where their producibility arose in factual contexts involving specific, identifiable and discrete disputes rather than, as here, where there are no specific incidents of disputed discipline and the information request is unfocused, generalized, and unlimited in scope.
42. Failure to recognize that requests for entire contents of personnel files, plus witness lists and witness statements, when shown to lack presumptive relevance on the basis of substantial legitimate concerns over confidentiality, privacy, sensitivity and burdensome production, need not be produced and need not be subject to an attempted accommodation.
43. Failure to acknowledge that his reference to *Pennsylvania Power Company*, 301 NLRB 1104 (1991), was a Board holding which arose in a context of a defined and crystallized dispute rather than, as here, where no specific issue or dispute has been pursued by the Union. (4 ALJD Fn 4)
44. Failure of the ALJ to examine record evidence as to contents of personnel files which would establish that a) Respondent rebutted presumptions of the files' relevance based on legitimate concerns over confidentiality, sensitivity, privacy and burdensomeness; b) that the request is inappropriately overbroad; and c) the information is not producible on legal grounds.
45. Failure to address issues raised in this case concerning:
 - the nature and scope of evidence sufficient to rebut presumptions of relevance;

- premature information requests;
- legitimacy of confidentiality concerns including disclosure of patient identity and medical data such as that contained in FMLA-related physician statements of medical conditions
- release of private and sensitive employee information;
- that lists, disclosing witness names alone and in conjunction with summaries of witness statements, will identify witnesses who may have been given and received assurances of confidentiality;
- evidence establishing the burdensome nature of the requests; and
- adequacy of Respondent's attempts to accommodate the Union's information requests.

46. Failure to recognize that most discipline issued since August 3, 2011, has been comprised of a) documented verbal warnings, i.e., the least severe discipline, as well as b) absence and tardiness issues which would be, and are, resolvable without resort to contents of personnel files, witness statement summaries, or names of witnesses. (5 ALJD 5-8)

47. Failure to find and conclude that the Union's information request, seeking entire contents of disciplined employees' personnel files, overlooks the reality that only information arguably relevant to discipline is to be provided.

48. Failure to recognize that in the event the underlying certification is upheld, the ALJ's Order, like the Union's request, would require unlimited disclosure and production of entire contents of personnel files, witness statement summaries, and names of

witnesses, which are not presumptively relevant and are inappropriate since the Hospital has overriding legitimate concerns as to confidentiality, sensitivity of file contents, and privacy; particularly in the circumstances where, as here, there is no identifiable dispute and where the Union's request and ALJ's Order encompass an unknown and unlimited universe of all employees disciplined since August 3, 2011, as well as all presently unknown employees who will be disciplined at unknown future times.

49. Failure to find and conclude that the Union's request improperly seeks to have Respondent provide and reproduce extensive amounts of file documentation for future matters of discipline where obviously no disciplinary action now exists, and further, that Respondent would hereafter be denied any means or opportunity, by his Order, to challenge the presumptive relevance of demands for the same information upon the occurrence of future disciplinary actions.
50. Failure to acknowledge that asserted defenses of confidentiality, sensitivity, privacy and undue burden, even when belatedly raised, remain defenses to producibility where the information requested is not relevant and/or where, as here, the presumption of relevance is rebutted by substantial legitimate confidentiality, privacy and sensitivity concerns which outweigh a union's interests and, accordingly, must consider those defenses to the information demanded.
51. Failure to address or comment upon the Respondent's attempt to preserve in this case the position Respondent had taken as to the invalidity of the underlying certification in Case No. 4-CA-64455, pending before the U.S. Circuit Court of Appeals for the

District of Columbia Circuit and in a rejected offer of proof in Case No. 4-CA-64458.

52. The ALJ, though stressing the need for accommodation, failed to address or consider Respondent's Contingent Accommodation Proposal. (3 ALJD 41-44; 4 ALJD 32-34; 4-5 ALJD Fn 4)
53. Failure to address, find or conclude that Respondent's Contingent Accommodation Proposal, in the circumstances posed in the instant case, constitutes a reasonable means to resolve the Complaint's allegations.
54. Speculative statement that the Union would not want social security numbers, and failure to recognize and acknowledge that the Union unequivocally and without qualification or exception seeks procurement of the entire contents of personnel files as per the testimony of its Union Staff Representative Sandra Lane. (Tr. 39-40)
55. Gratuitous unwarranted reference to an ALJ decision to assert his inclination to find Respondent waived its confidentiality defenses. (6 ALJD Fn 8)

Dated this 17th of October, 2012.

Respectfully submitted,

/s/ _____

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Corporation a/k/a The Memorial
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