UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 4
615 CHESTNUT ST
STE 710
PHILADELPHIA, PA 19106-4413

Agency Website: www.nlrb.gov
Telephone: (215)597-7601
Fax: (215)597-7658

October 31, 2012

VIA E-FILING

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
1099 Fourteenth Street, N.W.
Washington, D.C. 20570-0001

Re: Memorial Hospital of Salem County
Case 04-CA-073474

Dear Mr. Heltzer:

Accompanying this letter is Counsel for the Acting General Counsel's Answering Brief which is being electronically filed. I certify that copies of the Brief are being sent on this date to the parties listed below by electronic mail.

Very truly yours,

Noelle M. Reese

NOELLE M. REESE
Counsel for the Acting General Counsel

Lisa Leshinski, Esquire, lleshinski@hpae.org
John Jay Matchulate, Esquire, jmatchulat@gmail.com

NMR/tsl

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

SALEM HOSPITAL CORPORATION a/k/a
THE MEMORIAL HOSPITAL OF SALEM
COUNTY

and Case 04-CA-073474

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES (HPAE)

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF

Dated: October 31, 2012

Noelle M. Reese
Counsel for the Acting General Counsel
National Labor Relations Board
Fourth Region
One Independence Mall
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106-4404

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I. STATEMENT OF THE CASE

A hearing was held before Administrative Law Judge Arthur J. Amchan on August 1, 2012. Judge Amchan issued his decision on September 14, 2012 finding that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with requested information and refusing to bargain with the Union concerning discipline taken with regard to bargaining unit employees. Respondent filed Exceptions to the Judge's Decision on October 17, 2012 urging the Board to find that Respondent did not violate the Act by failing to provide the Union with the requested information.[1] This Brief represents the Counsel for the General Counsel's responses to those Exceptions.

II. FACTS

A. The Union Requests Information concerning Disciplinary Actions Taken

The Union was certified as the representative for a unit of Respondent's registered nurses on August 3, 2011 after the Union had won a Board-conducted election held on September 1 and 2, 2010 (GCX-3).[2] On August 15, Union representative Sandra Lane sent Respondent CEO Richard Grogan a letter requesting bargaining and asking for information which Lane indicated the Union needed "to provide adequate representation to our members and prepare for upcoming contract negotiations." (GCX-5). Grogan responded to Lane's bargaining demand and

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[1] Respondent did not except to the Judge's conclusion that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to meet and bargain with the Union concerning the discipline of unit employees; therefore, the Board should adopt this aspect of the Judge's decision. (JD. 3, lines 25-27; 5, lines 41-42).

[2] Throughout this brief, references to the Transcript, Exhibits, and Administrative Law Judge's decision will be as follows:

Transcript.....	T (followed by page number)
General Counsel's Exhibit.....	GCX- (followed by exhibit number)
Respondents' Exhibit.....	RX- (followed by exhibit number)
Administrative Law Judge's Decision.....	JD- (followed by page and line numbers)

information request in an August 17, 2011 letter. (GCX-6). In this letter, Grogan noted that Respondent intended to seek Court of Appeals review of the Board's certification. (GCX-6). As a consequence, Grogan indicated Respondent was declining to meet and bargain with the Union.[3] The Board recently found that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide the information requested in the Union's August 15 letter. 358 NLRB No. 95 (July 31, 2012).

On October 20, 2011, Lane sent Grogan a letter requesting bargaining over all disciplinary actions taken and information related to disciplinary actions. (GCX-7). Specifically, the Union requested:

(1) Please provide the name (first, last), department, and hire date of all employees who were disciplined since the Union's certification on 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 (GCX-7).[4]

The Union requested the information to bargain over disciplinary actions, assess and investigate whether there was just cause to discipline employees, and to bargain over the effects of the discipline. (T. 32, GCX-7).

[3] The Board found that Respondent's refusal to bargain violated Section 8(a)(1) and (5) of the Act. 357 NLRB No. 119 (November 29, 2011).

[4] In Exception 25, Respondent argues that the October 20 request only referenced "members." However, the request clearly refers to employees. The October 20 letter does state that they need the information to "fully represent our members." Members in this context could refer to bargaining unit members as opposed to all employees.

B. Respondent Fails to Respond to the Union's Request for Information and Bargaining

The Union received no response to its October 20 letter requesting information and to bargain over disciplinary actions taken. (T. 31; GCX-7). The Union has never received any of the requested information from Respondent. (T. 31-32, 55).

Respondent issued discipline to employees since the Union was certified on August 3, 2011. (T. 6; RX-10). From August 1, 2010 through July 31, 2012, Respondent has issued approximately 99 disciplinary actions to registered nurses, including three terminations and four suspensions. (RX-10). For each of these disciplinary actions, Respondent completed an Employee Counseling/Disciplinary Action Notice. (T. 62; RX-8). Disciplinary notices are maintained in the personnel file (T. 91-92). Each time an employee is disciplined, Respondent completes a log sheet in an Excel spreadsheet. (T. 67, 94). Some of the reasons for the disciplines were excessive absences/tardies, substandard work, unprofessional conduct, and failure to comply with hospital policies. (RX-10). Respondent never contacted the Union after disciplining these employees and never provided the Union with these forms or any information requested related to these disciplinary actions. (T. 31-32, 55-56; GCX-7).

Respondent's counsel submitted to the Union's attorney a settlement proposal entitled "Contingent Accommodation Proposal" at approximately noon on the day before the hearing as a means to settle this case. (T. 14, RX-1). Counsel for the Acting General Counsel objected to Judge Amchan's receipt of Respondent's Exhibit 1 on the basis that it constituted a settlement proposal. (T. 11-12). The proposal aimed to "avoid costly and time-consuming litigation." (RX-1, p.1). The proposal specifically states that the terms of the proposal will only be activated when the certification of the unit has been upheld. (RX-1). It further specifically excludes summaries of witness statements and lists of witnesses. (RX-1, p. 4).

C. Respondent Presented Little Evidence at the Hearing in its Defense

In support of its argument that the Union requested confidential information, Respondent presented scant evidence buttressing this argument. Respondent presented evidence that some witnesses to the employee discipline were other nurses, doctors, directors and patients, such as when Respondent discharged an employee for substandard work and relied on complaints from patients, a doctor and the Director. (T. 82; RX-9). Chief Nursing Officer Patricia Scherle testified that in the past six months, a patient had made a complaint about proper care and they had to investigate those matters with the patient and their families (T. 53-54). Scherle stated that they would have to ask the patient's permission to disclose his or her identity to anyone and if the patient refused, then she could not disclose the identity to anyone. (T. 53-54). Scherle never asked any patient's permission to disclose his or her identity to the Union. (T. 55). To provide a summary of witness statement, Linda Tuting, Director of Human Resources testified that she would have to allude to a medical condition and patient's identity. (T. 82-83). On the other hand, Sandra Lane testified that other hospitals that they represent typically provide patients' charts and information with names redacted to protect the patient's identity. (T. 102). The record further failed to establish that employees' personnel files are confidential. Respondent introduced into evidence a document entitled "Employer Authorization to Release Personnel Information," which specifically concerns information that Respondent could divulge to "creditors and/or outside employers." (RX-6).

Likewise, Respondent presented very little evidence to support its argument that the request was overly broad and unduly burdensome. Human Resource Coordinator Amanda Lotito testified regarding this point. In preparing for this hearing, she testified that she took 12 random

personnel files of employees who may never have been disciplined and the average number of pages of these 12 random files was 400 pages. (T. 92, 98, 100). She testified that it took about an hour and a half to copy a personnel file of 400 pages. (T. 99). Even though Respondent could have discovered the amount of pages in each personnel file that the Union requested, it instead produced evidence of 12 random personnel files that may not involve anyone who was disciplined. (T. 100).

III. ARGUMENT

A. The Administrative Law Judge Properly Found that Respondent Violated Section 8(a)(1) and (5) of the Act by Failing and Refusing to Provide Relevant Information to the Union

1. The Information Sought by the Union is Presumptively Relevant

An employer's duty to bargain encompasses an obligation to provide, upon request by the Union which represents its employees, information relevant to Union's performance of its representational functions. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435-36 (1967). Information affecting the terms and conditions of employment of unit employees is deemed presumptively relevant and must be provided to the union on request. An employer violates Section 8(a)(1) and (5) of the Act by failing to provide information needed for contract negotiations or administration. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149, 152-153 (1956). The Union is not obliged to make any special showing of need to secure such information, and the Employer can avoid production only if it either proves the information is not relevant or demonstrates some reason why it cannot be provided. *Ormet Aluminum Mill Products Corporation,* 335 NLRB 788, 801 (2001); *A-Plus Roofing,* 295 NLRB 967, 970 (1989), enf'd 39 F.3d 1410 (9th Cir. 1994).

The Judge correctly found that the Union's October 20 request deals with presumptively relevant information concerning information related to disciplining unit employees. The Union

requested the information to bargain over disciplinary actions, assess and investigate whether there was just cause to discipline employees, and to bargain over the effects of the discipline. (T. 32, GCX-7). The Union, for instance, seeks the names of employees who were disciplined and their disciplinary forms which have been deemed presumptively relevant by the Board. *Antioch Rock & Ready Mix,* 328 NLRB No. 116, slip op. at 2 (1999); *Maple View Manor, Inc.,* 320 NLRB 1149, 1150-1151 (1996). Copies of all documents, policies and procedures used in order to base the discipline are similarly held to be presumptively relevant. *Antioch,* supra. Likewise, the personnel files of these disciplined employees are presumptively relevant. See *Grand Rapids Press*, 331 NLRB 296, fn2, 299-300 (2000) ("This is particularly so, in instances where discipline of employees is at issue"). The Board has also found that summaries of witness statements are presumptively relevant and an employer may violate Section 8(a)(5) by refusing to furnish the Union with such data. *Pennsylvania Power and Light,* 301 NLRB 1104, 1106-1108 (1991); *New Jersey Bell Telephone Co.,* 300 NLRB 42, 43 (1990).

A final presumptively relevant piece of information being sought by the Union is a list of witnesses. See *Metropolitan Edison Co.,* 330 NLRB 107, 107-108 (1999)(finding violation for failing to accommodate information request seeking names of informants who witnessed employee theft); *Fairmont Hotel Co.*, 304 NLRB 746 (1991)(Board affirmed ALJ decision finding Respondent violated Section 8(a)(5) and (1) by, among other things, failing to disclose the identities of the employee-witnesses for some 3 months after the union first requested them.); *Boyertown Packaging Corp.,* 303 NLRB 441, fn 4 (1991); *Transport of New Jersey*, 233 NLRB 694 (1977) (an employer has a duty to furnish the union, upon request, the names of witnesses to the events upon which an employee discipline is based). The Board stated in *Anheuser-Busch, Inc.,* 237 NLRB 982 (1978), citing *Transport of New Jersey*, 233 NLRB 694 (1977):

> An employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined. 237 NLRB at 984, fn. 5.

Respondent's Exceptions which rely on *California Nurses Association,* 326 NLRB 1362 (1998), *Frontier Hotel & Casino,* 318 NLRB 857 (1995) and *Tool & Die Maker's Lodge 78 (Square D Co.),* 224 NLRB 111, 112 (1976) lack merit because the information was not requested for discovery purposes. The Board has declined to find a Section 8(a)(5) violation when the party seeks the information as a means of discovery. See e.g., *California Nurses Association,* 326 NLRB 1362 (1998) (finding that the union did not have disclose the names of its witnesses for arbitration under Section 8(b)(3) of the Act because it delved into Respondent's strategy in arbitration and amounted to pretrial discovery); *Frontier Hotel,* 318 NLRB at 877 (finding no violation because the union sought the information to support its Complaint allegations). Although the Union did file other charges alleging a refusal to bargain and provide information, this October 20 information request was not seeking evidence to support these other allegations, but rather sought information about disciplinary actions taken. Here, the parties have not even begun to bargain and so are clearly not requesting the witnesses it will use in arbitration. The Union requested the information to simply bargain over disciplinary actions and determine whether there was just cause to discipline the employees.

In short, the information requested in the Union's October 20 request is all presumptively relevant. The burden is, therefore, on Respondent to show either that the requested information is not relevant or that there is some other excuse for non –production.

2. Respondent's Defenses and Various Exceptions Lack Merit

Each of Respondent's Exceptions lacks merit because the Administrative Law Judge's decision rested on sound legal precedent and accurate facts. Although Respondent deny that the

information requested by the Union is relevant, Respondent made little attempt at the hearing to present evidence supporting this position. Respondent also insists that the Union information request improperly sought confidential data and was overly broad and unduly burdensome. As discussed fully below, each of these defenses fails because Respondent ignored the Union's information request and failed to timely seek any accommodation.

a. The Administrative Law Judge's Decision Considered Respondent's Arguments

In Respondent's Exceptions 1 through 3, Respondent argued that the Judge issued his decision without considering Respondent's arguments as the Judge denied Respondent's request for an extension of time to file a brief. Although the briefs were due on September 12, Respondent failed to submit a brief before the Judge issued the decision on September 14. (JD 1, fn 2). However, the Judge's decision showed that the Judge did consider Respondent's defenses raised in its Answer and Amended Answer. At the hearing, Respondent's counsel delivered a lengthy opening statement addressing many of its arguments. (T. 19-27). Respondent raised various defenses that the decision fully addresses. The Judge properly analyzed Respondent's confidentiality, unduly burdensome, and overbroad arguments and rejected them as lacking merit. (JD 3, lines 39-43 (rejecting confidentiality defenses); JD 4, lines 1-2 (rejecting unduly burdensome argument); JD 4, lines 4-14 (rejecting overbroad defense); JD 5, lines 5-10 (unduly burdensome)). Similarly, the Judge carefully considered Respondent's HIPAA argument and found that it lacked merit. (JD 4, lines 16-30). At the time of Respondent's request for additional time to file briefs, Respondent still had seven additional days to complete the brief which is adequate time considering the facts of this case.

b. The Judge Properly Rejected Respondent's Defenses Concerning Confidentiality Concerns

Although the Board has found that substantial claims of confidentiality may justify a refusal to provide specific information, blanket claims of confidentiality will not be upheld. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991); *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984) (finding violation for an employer's per se refusal based on confidentiality concerns to furnish any information from an employee's personnel file). A party refusing to provide information on confidentiality grounds has a duty to seek an accommodation. Id.; see also *Mission Foods*, 345 NLRB 788, 791-792 (2005); *Tritac Corp.*, 286 NLRB 522, 522 (1987)(employer "cannot simply raise its confidentiality concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation"). These confidentiality claims must be timely raised so that the parties can bargain over an accommodation. *National Broadcasting Co.*, 352 NLRB 90, 101-102 (2008); *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). The Board has found that utilizing the balancing test of weighing the union's need for the information against the legitimate confidentiality interests of the employer will only be triggered when the confidentiality claim has been timely raised. *Mission Foods*, 345 NLRB 788 (2005). The Board has found that raising confidentiality concerns months after the information request and during or shortly before the unfair labor practice hearing is not timely. *Detroit Newspaper*, 317 NLRB at 1072.

The Judge correctly found that Respondent's confidentiality argument lacks merit because Respondent failed to timely raise these concerns at the time of the request and seek an accommodation. (JD 3, lines 39-43). Because Respondent completely ignored the information request because it was testing the Union's certification, Respondent has simply failed to preserve

this confidentiality defense. Respondent never raised these concerns until it filed its Answer to the Consolidated Complaint which the Board has found to be too late. *Detroit Newspaper,* 317 NLRB at 1072.

Because Respondent failed to timely seek an accommodation and simply ignored the information request, Respondent's reliance of various Board cases to support its position that it lawfully refused to provide information is misplaced. Relying on *Northern Indiana Public Service Co.,* 347 NLRB 210 (2006) and *Columbus Products Co.,* 259 NLRB 220 (1981), Respondent argues that summaries of witness statements and the identity of witnesses are confidential and can be withheld from the Union. However, the facts of *Northern Indiana* are clearly distinguishable because the employer there had actually made an accommodation and provided the Union with the names of the witnesses involved. Further, the employer in *Northern Indiana* specifically showed that the investigation notes were kept confidential and pertained to allegations of serious misconduct by a supervisor toward employees, including an alleged threat of violence. Although the Board found no duty to provide the names of witnesses in *Columbus Products*, the ALJ noted that the employer had informed the Union of the substance of the employees' statements. 259 NLRB at 223. In contrast here, Respondent never timely responded to the Union's information request and never sought an accommodation.

In certain limited circumstances depending on *specific* examples of confidentiality concerns and the specific facts of the case, the Board has found legitimate confidentiality claims outweighed the Union's right to the information. For instance, the Board has found that names of witnesses need not be disclosed when it would involve revealing the identity of informants who witness criminal activities. See *Pennsylvania Power and Light,* 301 NLRB 1104, 1104-1107 (1991). The Board has recognized a confidentiality interest in the names and unlisted

phone numbers of customers whose complaints led to an employee's discharge when it had been established that the customer would not consent to release that information and the employer accommodated the Union's request by allowing the Union to interview the complaining customer. *GTE California, Inc.*, 324 NLRB 424 (1997). In contrast, Respondent here failed to accommodate the Union and never asked for any patient's consent to release their identity. (T. 55). Further, unlike in *Pennsylvania Power,* there is no evidence that divulging witnesses' names here would involve revealing the identity of informants who witness criminal activities. Respondent here only offered speculative and generalized evidence of confidentiality concerns despite having issued 99 instances of discipline. If Respondent had a problem with disclosing a patient's name, then it could have asked the Union for an accommodation by redacting the name. The Union had been accustomed with redacting patients' names in previous cases involving other hospitals. (T. 102). If Respondent felt some of the requested information was confidential, it was obliged to seek a timely accommodation with the Union. *Metropolitan Edison Co.*, 330 NLRB 107, 107-108 (1999).

Respondent erroneously argued in its Exceptions 15 and 16 that employees have an "expectation that the Hospital will not disclose the information without their express authorization." (Respondent's Exceptions Brief p. 11). The facts simply do not support this assertion. The only document to remotely support this assertion is Respondent's Exhibit 6, which is entitled "Employer Authorization to Release Personnel Information." However, this document specifically concerns information that Respondent could divulge to "creditors and/or outside employers." (RX-6). The record and this document in no way establishes that employees' personnel files would be kept confidential unless express authorization.

In Exceptions 52 and 53, Respondent argues further that its Contingent Accommodation Proposal satisfied its duty to seek an accommodation. This argument clearly lacks merit for many reasons. First of all, this proposal did not amount to an accommodation, but rather a feeble settlement proposal aimed to "avoid costly and time-consuming litigation." (RX-1, p.1). Counsel for the Acting General Counsel objected to the receipt of this evidence because it constituted a settlement proposal. (T. 14). As such, this proposal should be deemed inadmissible as a settlement offer under Rule 408 of the Federal Rule of Evidence. See *St. George Warehouse, Inc.*, 349 NLRB 870, 872 (2007); *Plough, Inc.*, 262 NLRB 1095, 1103 fn 11 (1982) ("Offers which are part of settlement negotiations are inadmissible"); *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO (Altemost Construction Co.)*, 222 NLRB 1276, fn 1 (1976) (contents of settlement negotiations are inadmissible under Rule 408 of the Federal Rules of Evidence). Even assuming arguendo that the proposal is admissible, the proposal was not timely as it was presented to the Union less than 24 hours before the hearing took place. See *Detroit Newspaper,* above, 317 NLRB at 1072. Thirdly, the proposal specifically excluded information that Respondent is required to provide the Union, such as summaries of witness statements and lists of witnesses. (RX-1, p.4). Finally, it was a contingent proposal and only became activated until the certification was upheld by the court of appeals. (RX-1). However, an employer cannot escape liability and delay providing information by merely announcing that it intends to test the certification in the court of appeals. The Board has repeatedly held that an employer assumes the risk if it refuses to provide relevant information requested by a union in an effort to test the certification. See *Alta Vista Regional Hospital,* 357 NLRB No. 36, slip op. at 2 (2011).

c. The Judge Properly Rejected Respondent's Burdensome and Overbroad Defenses

The Judge properly concluded that Respondent failed to substantiate and timely raise its claims that the Union's request was overly broad and burdensome. See *Honda of Hollywood,* 314 NLRB 443, 450-51 (1994); *Pet Dairy,* 345 NLRB 1222, 1223 (2005). The facts are undisputed that Respondent simply ignored the information request in its entirety because it was contesting certification.

Even if Respondent had legitimate complaints to make about some aspects of the Union request, this would not have entitled the Company to ignore the request in its entirety. If Respondent considered the request was overbroad, Respondent should have supplied whatever information was unquestionably relevant and sought clarification from the Union as to any data which it felt was out-of-bounds. *Watkins Contracting, Inc.,* 335 NLRB 222, 226 (2001); *Keauhou Beach Hotel,* 298 NLRB 702 (1990). Assuming production would have been burdensome, Respondent should have spoken to the Union about possibly narrowing its demands at the time the request was made and was not entitled to wait until unfair labor practice proceedings had been initiated to raise its concerns. *Westside Community Mental Health Center, Inc.,* 327 NLRB 661, 673 (1999); *Anthony Motor Co., Inc.,* 314 NLRB 443, 450 (1994). Respondent should have sought clarification rather than ignore the Union's request. See *Holiday Inn Coliseum,* 303 NLRB 367 fn. 6 (1991) (finding an employer "may not simply refuse to comply with an ambiguous or over broad information request, but must request clarification and/or comply with the request to the extent that it encompasses necessary and relevant information").

d. Respondent's Exceptions Arguing that Union not Entitled to Information Because No Defined Dispute Exists Lack Merit

In its Exceptions 36 through 39, 41, 43 and 45, Respondent argues that because there is no ripened or defined dispute that the Union is not entitled to the information requested. This argument fails for many reasons. First, an actual grievance need not be pending at the time of the information request. *Ohio Power Co.*, 216 NLRB 987, 991 (1975). A liberal discovery type standard is applied, and the Union is not required to prove that the requested data will be dispositive of the issue before the parties. Information must be produced so long as there is "potential or probable relevance" and the data will have some bearing on the Union's representation of employees. *ATC/Vancom of Nevada Ltd.,* 326 NLRB 1432, 1434 (1998); *Ormet Aluminum Mill Products Corp.,* 335 NLRB 788, 801 (2001). Secondly, Respondent's reliance on *Tri-State Generation,* 332 NLRB 910, 910-911 (2000) dealing with premature information requests is distinguishable from the instant case. The Board in *Tri-State Generation* held that an information request about employees of another employer was premature because the possible merger had not yet occurred and it concerned matters *outside* the bargaining unit. Id. Here, the information request clearly concerned bargaining unit members and the Union requested it to engage in bargaining. Finally, Respondent has at its disposal specific facts about each employee disciplined and could have offered specifics about why a certain case was confidential. However, Respondent remained silent on this point and failed to offer specific reasons on why particular information could not be shared with the Union.

e. Judge Properly Rejected Respondent's HIPAA's Defenses

Respondent's Exceptions 12 through 14 further argue that production of this information would violate several federal enactments, including the Health Insurance Portability and

Accountability Act of 1996 (HIPAA).[5] (RX-2; T. 20, 23). The Judge properly analyzed this argument and found that HIPAA does not provide a blanket prohibition to disclosure, but rather Respondent must seek an accommodation with the Union. (JD 4, lines 16-40).

Respondent presented evidence that some witnesses to the disciplinary actions would be patients in addition to others nurses, doctors, directors and patients. (T. 82). HIPAA generally prohibits a "covered entity" from disclosing all "individually identifiable health information" or "patient health information" (PHI).[6] While the Employer may be subject to confidentiality restrictions under HIPAA, HIPAA does not preclude all disclosures or alter the Employer's duty to bargain over some kind of accommodation of the Union's interests. For example, the Privacy Rule permits disclosure upon receiving a patient's consent or even without the patient's consent by redacting information from the PHI that may be used to identify the individual. Under Section 164.512(a)(1) of the Privacy Rule, a covered entity may also use or disclose PHI without an individual's written authorization where the use or disclosure is required by law. Further, HIPAA's Privacy Rule does not bar absolutely the release of confidential information about patients absent their consent. Section 164.506(c) of the Privacy Rule provides that "A covered entity may use or disclose protected health information to carry out treatment, payment, or *health care operations*."[7] Health care operations are defined in Section 164.501(6) to include: "Business management and general administrative activities of the entity, including... *resolution of internal grievances*." 45 CFR 164.501(6). Therefore, the Rule provides that otherwise

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[5] Health Insurance-Portability and Accountability Act of 1996, Pub. L. No. 104-191, Sec. 261-264, 110 Stat. 1936 (1996).

[6] PHI is information that relates to, among other things, "the provision of health care to an individual." PHI is broadly defined to include any individually identifiable health information such as name, address, birth date, or social security number. 45 CFR § 160.103 (2011).

[7] 45 CFR 164.506(c)(1) (emphasis added).

confidential information can be produced for certain purposes, specifically including resolution of internal grievances. See also *LaGuardia Hospital*, 260 NLRB 1455, 1455-56 (Board ordered parties to disclose patient identities only to nurses who already were in a confidential relationship with patients, and only if necessary). The Judge correctly noted how Respondent could make redactions of individually identifiable patient information as it had in introducing its exhibits to reach an accommodation with the Union. (JD 4, lines 31-40). In conclusion, Respondent failed to establish a legitimate confidentiality defense based on HIPAA.

B. The Administrative Law Judge Issued a Proper Remedy and Order

The Board should adopt the Administrative Law Judge's Remedy and Order. The Judge properly ordered Respondent to supply the information requested on October 20, 2011, to cease and desist from refusing to provide information to the Union that is relevant and necessary to its role as the exclusive bargaining representative, and post an appropriate notice. (JD 5, lines 34-42; JD 6, lines 5-26).

In Exceptions 8 through 10, 49 and 50, Respondent contends that the Judge's Order would "preclude Respondent's right, opportunity, and ability to challenge the presumptive relevance of that information in future cases of discipline." These arguments are completely unfounded because the Judge specifically provided in the Order and Remedy an opportunity for Respondent to raise future specific confidentiality concerns by asserting the following:

> Furnish the Union with all the information it requested in its October 20, 2011, unless the Respondent can establish that it has a confidentiality concern that outweighs the Union's interest in obtaining such information -- after the Respondent has offered the Union a reasonable accommodation that meets the Union's needs. (JD 5, lines 6-9).

IV. CONCLUSION

Based on the foregoing, it is respectfully requested that the Board overrule Respondent's Exceptions, affirm the Administrative Law Judge's findings of fact and conclusions of law, and adopt the recommended Order of the Administrative Law Judge. Respondent simply did nothing after receiving the information request. Respondent did not communicate any concerns to the Union about over-breadth, excessive burden or confidentiality. Instead, it simply refused to supply the requested information based on its assertion that the Union had been improperly certified. As the Board has repeatedly held in prior proceedings with this employer, the Union was properly certified. [8] It should, therefore, be found that its refusal to provide the Union with information contained in its October 20 request violated Section 8(a)(1) and (5).

Respectively submitted,

Dated: October 31, 2012

NOELLE M. REESE
Counsel for the Acting General Counsel
National Labor Relations Board
Fourth Region
One Independence Mall
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106-4404

[8] See *Salem Hospital Corp.*, 358 NLRB No. 95 (July 31, 2012) and 357 NLRB No. 119 (November 29, 2011).