

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

<b>SALEM HOSPITAL CORPORATION</b>	)	
<i>a/k/a</i>	)	
<b>THE MEMORIAL HOSPITAL OF SALEM COUNTY</b>	)	
	)	
<b>Respondent</b>	)	
	)	
<i>and</i>	)	<b>CASE NO. 04-CA-073474</b>
	)	
	)	
<b>HEALTH PROFESSIONALS AND ALLIED EMPLOYEES (HPAE)</b>	)	
	)	
<b>Charging Party</b>	)	

**RESPONDENT'S BRIEF IN REPLY TO COUNSEL FOR  
ACTING GENERAL COUNSEL'S ANSWERING BRIEF**

Dated: November 14, 2012  
Brentwood, TN

Respectfully submitted,

/s/ John Jay Matchulat

John Jay Matchulat, Esq.  
Counsel for Memorial Hospital of Salem County  
904 Woodburn Drive  
Brentwood, TN 37027

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BEFORE  
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**RESPONDENT’S BRIEF IN REPLY TO COUNSEL FOR  
ACTING GENERAL COUNSEL’S ANSWERING BRIEF**

COMES NOW the undersigned Counsel for Respondent and, pursuant to § 102.46(h)<sup>1</sup> of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, hereby files Respondent’s Brief in Reply to Counsel for Acting General Counsel’s Answering Brief which was filed in this matter on October 31, 2012<sup>2</sup>.

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<sup>1</sup> Inasmuch as the above-cited rule strictly limits the length of this Brief to ten (10) pages, the absence of a reply by Respondent to every assertion made in the General Counsel’s Answering Brief is not be construed as agreement, acquiescence, or absence of issue being taken by Respondent to such assertions. To the extent that an assertion in the General Counsel’s Answering Brief is not discussed herein, Respondent’s position thereon reverts to its position in its Exceptions and Brief In Support.

<sup>2</sup> Various references will be designated herein as follows: 1) Administrative Law Judge as “ALJ;” 2) Administrative Law Judge’s Decision as “ALJD,” preceded by the page and followed by the line numbers; 3) Footnotes throughout as “Fn.,” followed by the number; 4) Respondent’s Exhibits as “R,” followed by the exhibit number; 5) General Counsel’s Exhibits as “GC,” followed by the exhibit number; 6) transcript references as “Tr.,” followed by the page number; 7) Respondent’s Exceptions to the ALJD as “EXC.,” followed by the number; 8) Respondent’s Brief in Support of Exceptions as “RBISE,” followed, in most instances, by the page number; 9) General Counsel’s Answering Brief as “GCAB,” followed by the page number; 10) Respondent’s Brief in Reply to Answering Brief as “RBIR;” 11) Respondent is also referred to herein as the “Hospital” or “Employer.”

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## I. STATEMENT OF THE CASE

Following an August 1, 2012 hearing, presiding ALJ Arthur J. Amchan issued a Decision on September 14, 2012, without the benefit of Respondent's Brief. The ALJ concluded that Respondent violated §8(a)(5) and, derivatively, §8(a)(1) of the Act by failing to provide the Union entire contents of personnel files, including witness names and (prepared) witness statement summaries, and by refusing to bargain with the Union in circumstances where its certification was, and is, being challenged by Respondent. Thereafter, on October 17, 2012, Respondent filed Exceptions to the ALJD as well as a Brief in Support. On October 31, 2012, Counsel for the Acting General Counsel filed an Answering Brief (GCAB). This Reply Brief addresses certain contentions made in the GCAB

## II. GENERAL OBSERVATIONS

The GCAB reflects a continued disregard for the context, circumstances and realities posed by this matter. Under the guise of a concern in "to fully represent" its "members" as to the existence of "just cause" for all disciplinary actions, the Union unequivocally and unqualifiedly seeks, *inter alia*, complete and unlimited access to the entire contents of employee personnel files, including witness names, and of summaries of witness statements to be prepared by Respondent.<sup>3</sup> (See GC7; Tr.39-41) The disingenuous nature of the Union's request is reinforced by its admission that it had been aware of employees who disputed their discipline prior to the October 20, 2011 demand<sup>4</sup>, yet sought the material for a broad universe of all disciplined employees. (Tr.44) Further, the Union knew, as of the dates of its demands and the filing of the subject charge, that the material could not be provided inasmuch as the Hospital was availing itself of its legal right to test certification. Nevertheless, the Union submitted a blanket, overbroad and unlimited demand for all of the material, i.e., a request having many traits of a fishing expedition. The dubious nature of the Union's demand is further evinced by its intransigent position requiring production of all the material, by its failure to follow up on its request prior to filing the charge, as well as its refusal to even consider an accommodation offered following a pre-trial conference with the presiding ALJ<sup>5</sup>

The Union's unrestricted demand implicates entire contents of personnel files. It thereby poses confidentiality issues: the Hospital's concerns over criminal and civil liability and maintenance of its employees' trust in safeguarding their file information; plus the employees' justifiable concerns over violation of their rights and their expectations that sensitive information in their files will remain private, protected, and safeguarded by the employer. The GCAB (like the ALJD) seeks to dampen and/or minimize these concerns by reference to exceptions to non-disclosure of health information buried in the deep recesses of HIPAA's history and regulations – obviously unknown to unit employees (most of whom are likely not ALJs or labor/employment attorneys). Further, there is no consideration that some, if not most, employees may not dispute their discipline and neither seek nor desire the

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<sup>3</sup> Referred to herein collectively as "the material."

<sup>4</sup> Referred to herein as the "October 20<sup>th</sup> demand" or "demand."

<sup>5</sup> The offered accommodation was not subject to comment by the ALJ.

Union's intervention. The GCAB and ALJ would afford the Union greater rights of access to employees' personnel file health-related information (PHI).<sup>6</sup> The scant regard for sanctity of contents of employees' personnel files shown by the ALJ and within the GCAB is hardly consonant with the Supreme Court's view of personnel file contents as expressed in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). (See Fn. 16 therein.)

Contrary to assertions in the GCAB, the ALJ failed to consider Respondent's evidence. An obvious example is the failure to consider 26 of 27 types of private/sensitive information contained in the personnel files, including FMLA-related information. Nor did the ALJ evaluate evidence of the exhaustive efforts required of Respondent to comply with past and future demands for the material. The ALJ's comments as to the Union's reception to Social Security numbers is no more than pure speculation, particularly under the facts here (4 ALJD 36-38). The GCAB's allusion to the sufficiency and adequacy of the ALJ's addressing the opening statement of Respondent, prior to submission of evidence and ripening of the issues is vacuous, at best.

Further, the GCAB continues to espouse and elevate holdings from fact-specific Board and court decisions to the status of universal legal maxims applicable to all information cases. Also, the GCAB's position, like the ALJ's Order, ignores evidence that rebuts the presumption of relevance of the material demanded. Both participants would require full, continuous, and ongoing production of all the demanded material, though the facts and circumstances here reflect the Union's unwillingness to enter into, or even consider, an offered accommodation, or to limit its demands for the material.

Unlike the two prior and pending cases involving the Hospital and the Union (Case Nos. 4-CA-64455 and 4-CA-64458), which will close, one way or another, in the foreseeable future, the issues herein would continue to fester well into the future in the event the certification is upheld. Under the circumstances posed here, it is essential that the Board itself render a determination as to both the propriety of the demand and the producibility of all the demanded material in these circumstances – lest this be an ongoing source of controversy, and the continuous filing of charges over issues of disclosure, confidentiality and undue burden.

### III. REPLIES TO SPECIFIC SUBJECTS

The following presents summary replies to certain subjects mentioned within the GCAB.<sup>7</sup>

#### **1. Subject: Expectations of Privacy (RBISE 10-11, 26-27, R 6-7; GCAB 4,11)**

**Reply:** GCAB's assertions are erroneous. The evidence, as well as the application of common sense, confirm that unit employees possess expectations that the Hospital will maintain the privacy of their personal file information. The development of these expectations begins with their initial execution of both R 6 and R 7. R 6 advises employees that various types of sensitive file information will be disclosed only with their specific authorization. Apart from creditors and other employers, who else would seek access to their information - other than a union which now demands unrestricted access? R 7, plus the continuous emphasis

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<sup>6</sup> See HIPAA's "Minimum Necessary Rule" 45 CFR 164.502(b); 164.514(d).

<sup>7</sup> Again, due to page restrictions, Respondent's failure to comment on certain subjects and assertions in the GCAB is not to be construed as acquiescence. Further, the order in which the subjects are presented does not reflect their relative significance. All are important.

which the Hospital places on the sanctity of PHI naturally serves to bolster employees' expectations that their own file-contained health-related information will be safeguarded by the Hospital. Further, as explained in RBISE (pp. 10-11), the documentation utilized by the now well-known and widely-used FMLA makes clear to employees that the health-related reasons behind their leave requests are to remain confidential. The Hospital has taken all necessary measures to assure that this information remains confidential. Unless the unit employee is also a labor/employment lawyer, having reason to scour the intricacies of HIPAA and the FMLA, it is probable that he or she would be unaware of the exceptions to their basic understandings of these enactments. Additionally, with the universal fear of identity theft and other misuse of one's personal data, employees must trust their employer to, as here, vigilantly safeguard their personal information. The GCAB's position concerning access flies in the face of the Supreme Court's observations in Fn. 16 of its *Detroit Edison* opinion. Finally, Respondent submits that any reviewer of this Brief would expect the U.S. Government to safeguard and maintain the privacy of any information in their personnel files; and many would likely cringe at the prospect of its unauthorized and unrestricted release to anyone or anything, including a labor organization.

**2. Subject: Personnel Files (RBISE 15, 29-32; GCAB 4-6)**

**Reply:** Contrary to GCAB's assertions, the record evidence cogently establishes that the entire contents of the employees' three-segmented personnel files are to be deemed non-producible based on several considerations, including confidentiality. The record reveals 27 different types of confidential/sensitive/private information appearing in the dozen randomly-selected files. (See RBISE 29-30; R 6, 7, and 13). The ALJ addressed only HIPAA-related concerns and engaged in speculation as to Social Security numbers; the remaining 26 types of private/sensitive information were simply ignored. As set forth in RBISE (pp. 30-32), the producibility and relevance of personnel files must be evaluated on a case-by-case basis and with recognition of the sensitivity of personnel file contents. The ALJ's Order, defended by the GCAB, simply ignores this presumption-rebutting evidence. The Order would result in continuous production of the entire contents of disciplined employees' personnel files, since the Union has shown no willingness to limit its requests and continues to repel efforts to accommodate.

**3. Subject: Witness Names (RBISE 22, 27, 30-31; GCAB 10-11)**

**Reply:** The GCAB's commentary on production of witness names provides further support to Respondent's point that Board precedent on this issue has been developed from specific factual disputes rather than, as here, where there is no identified dispute and the request seeks unrestricted, *carte blanche*, access to contents of employees' personnel files. Further, *Columbus Products Co.*, 259 NLRB 220 (1981), was decided on grounds that the requested information was not necessary, as opposed to GCAB's suggested grounds of the existence or non-existence of an accommodation. Additionally, GCAB mischaracterizes Respondent's purpose in citing *Northern Indiana Public Service Co.*, 347 NLRB 210 (2006). The case was cited as to an employer's burden to rebut presumptive relevance. It was also cited for the propositions that in balancing competing interests, the balance must favor

the party seeking confidentiality, and that the posing of such concerns may result in dismissal of complaint allegations. Finally, Respondent has distinguished *Transport of New Jersey*, 233 NLRB 694 (1977) and *Fairmont Hotel*, 304 NLRB 746 (1991). (See RBISE 36-37.)

**4. Subject: Witness Statement Summaries (RBISE 20, 27, 30-31, 38-39; GCAB 10)**

**Reply:** As with witness names, *Northern Indiana Public Service Co., Id.*, was not cited in support of the purpose asserted in GCAB. Respondent's case support was presented in RBISE (pp. 30-32, 38-39). *GTE California, Inc.*, 324 NLRB 424 (1997), cited in the GCAB, was based on a "preexisting" confidentiality obligation to maintain the customer's identity, and not on the grounds of an accommodation. The only reason the Board did not proceed to weigh the competing interests was a post-request accommodation to allow the requested information to **remain confidential**. The GCAB's assertions further establish that precedent on issues of confidentiality has evolved from fact-specific disputes seeking dispute-specific information.

**5. Subject: Comments on Respondent's Request to Expand Time for the Filing of its Brief to the ALJ (GCAB 8)**

**Reply:** The GCAB's commentary is bothersome inasmuch as the Counsel for AGC's supervisor, on behalf of his subordinate, did not oppose Respondent's request in its entirety.

**6. Subject: "Members" (GCAB 2, Fn. 4; GC 7)**

**Reply:** Unions have "members." The verbiage of GC 7 speaks for itself and "spin" does not modify its plain meaning.

**7. Subject: Discovery (RBISE 25, 34-35, 41; GCAB 7, 14)**

**Reply:** GCAB has repeatedly urged application of a broad discovery standard to the non-specific and unrestricted information requests here. Yet, in response to Respondent's references to *Square D Co.*, 224 NLRB No. 111 (1976), and *California Nurses Association*, 326 NLRB 1362 (1998), which involve specific disputes, GCAB asserts that the case at bar does not implicate the process of discovery.

**8. Subject: Opined Refusal to Except to Conclusion (GCAB 1, Fn. 1)**

**Reply:** The assertion is erroneous. Respondent excepted to the precise area within the ALJD to which the GCAB refers (5 ALJD 41-42; EXC. 6). Further, Respondent excepted not only to the Order, but also to the Remedy and the Notice to Employees, which clearly encompass the conclusion to which Respondent supposedly did not except. (EXCs. 4, 5, 7, 8, and 10) 3 ALJD 25-27 is simply a description of a case citation which does not warrant an exception in the circumstances here. If it were required that such case citations be subject to exceptions, the resulting exceptions and briefs submitted to the Board would be of encyclopedic length.

**9. Subject: Absence of Dispute (RBISE 9, 12, 41; GCAB 14)**

**Reply:** GCAB misses the point. Respondent is not contending that a dispute must exist in all information request cases. Rather, precedent concerning issues of the relevance of confidential and sensitive information has been developed through cases involving discrete factual disputes.

**10. Subject: Remedy and Order (RBISE 2, 10, 13, 15, 28-30; GCAB 16)**

**Reply:** GCAB ignores the Union's intransigent position as to provision of all demanded material and its rejection of a proposed and offered accommodation. Further, the Order fails to provide any incentive for the Union to compromise. To the contrary, it encourages impasse, which would then allow the Union to proclaim that the Order's language specifically requires production of the precise information set forth in the Union's October 20<sup>th</sup> demand. It is further submitted that the ALJ should have found and concluded that 1) Respondent has rebutted presumptions of relevance; 2) Respondent has legitimate concerns over its potential liabilities, and its duty to maintain employees' trust and confidence that their private information will be protected and safeguarded; while its employees have the right to (expect) privacy of personal data in their files; and that these considerations far outweigh the Union's desire for access to entire personnel file information, witness names, and witness statement summaries to, ostensibly, discover disciplinary issues particularly where there is little evidence of employees' disagreement with their discipline, and there is a substantial likelihood that unit employees would not seek or appreciate either the Union's intervention or its access to their personnel file data; 3) that Respondent has offered, and the Union has refused, an accommodation which, under the circumstances herein, addresses the concerns of both parties; and 4) the Complaint's allegations should be dismissed.

**11. Subject: Premature Request (RBISE 3, 22; GCAB 14)**

**Reply:** Respondent disagrees with GCAB's assertion that the decision in *Tri-State Generation and Transmission Association*, 332 NLRB 910 (2000) is distinguishable on grounds of irrelevance to non-unit employees. Rather, the event to establish an accretion (merger) had not yet taken place. Accretion issues naturally affect both unit employees and non-unit employees, but the request was made by a union representing unionized employees. Had the Board sought to rely primarily on a non-unit employee based theory, it would not have viewed the information request as "premature."

**12. Subject: Overbroad and Ambiguous Request (RBISE 3, 9-10, 20; GCAB 4,13)**

**Reply:** The verbiage of the demand itself reflects its over-breadth and ambiguity. The demand unequivocally seeks entire contents of personnel files, absent identification of any employees for whom it knows challenge their discipline, in order "to fully represent" its "members," as well as production of any witness statements "considered." It further encompasses entire personnel file information for a universe of employees many or some of whom 1) would not seek to challenge their discipline, or 2) have provided no authorization to release their entire personnel information, or 3) may not seek the Union's representation, or 4) would have no inclination to allow the Union to view their file contents and information. Additionally, the request encompasses and seeks non-disclosable confidential and sensitive information which, as argued in RBISE, would require unduly burdensome efforts to copy and provide all information contained within entire personnel files of employees disciplined in the past, as well as that for all future disciplined employees.

### **13. Subject: Accommodation**

**Reply:** The GCAB repeatedly asserts that an accommodation must be offered prior to a trier of fact's review, assessment, and determination as to whether an employer has rebutted presumptive relevance as to confidential information. In part, this disregards the U.S. Supreme Court's admonitions in *Detroit Edison, supra*, that a union's interests in arguably relevant information do not always predominate over all other interests; that there are no absolute or *per se* rules; that the duty to supply information must turn on the circumstances of the particular case; and that a union's bare assertion that it needs information (even) to process a grievance does not automatically oblige the employer to supply all of the information in the manner requested (*Id.* at 314, 318). GCAB's assertions further disregard the Court's observation that there may be circumstances where an employer's conditional offer to disclose may be warranted. It is submitted that this is such a case. It is further submitted that should the Board somehow not find the request for entire personnel file contents of witness names and witness statement summaries to be fatally flawed, that the Board should find and conclude that, in the circumstances posed here, Respondent has made an acceptable offer of accommodation. Here, both within the demand document and in testimony at trial, the Union has evinced an intractable stance in its desire for unlimited access to entire contents of personnel files, including witness statement summaries, and witness names. (GC7; Tr.38-41) However, despite a supposed compelling need for this information, there is no evidence that the Union made any attempt to follow up on its request prior to filing its charge. Further, the Union sought no information concerning specific employees who complained about their discipline. (Tr.43-44) Additionally, the Union summarily rejected the Respondent's Contingent Accommodation Proposal (CAP), despite the element of timeliness being minimized by the foreseeable lengthy period spanning from July 31, 2012 to a future date in 2013 when the certification issue will likely be resolved.

### **14. Subject: Blanket Requests and Respondent's Refusals (GCAB 9,11,13-14)**

**Reply:** The Respondent's refusals to provide the information have been based not only on its testing certification, but also on the unlimited breadth of the demands which, foreseeably, would be sources of ongoing conflict and disagreement. The blanket request for entire contents of personnel files, including witness statement summaries and witness names, is inappropriate on grounds including confidentiality, privacy, sensitivity and over-breadth. These concerns will foreseeably continue to generate disagreement in the event that the certification is upheld, unless the Board comes to grips with the defects inherent in the October 20<sup>th</sup> demand in itself. Information does not lose its confidential character due to temporal factors and considerations.

### **15. Subject: ALJ's Consideration of Respondent's Arguments or Absence Thereof (RBISE 15-18; GCAB 8)**

**Reply:** The GCAB's suggestion that the ALJ considered Respondent's arguments is erroneous. An opening statement, made prior to presentation of evidence, ripening of the issues, and full consideration of the record evidence, should hardly be a consideration or basis upon which an astute decision-maker would or should rely. Moreover, the ALJ failed, *inter alia*, to comment upon 26 types of sensitive information found during a computer-generated random search of contents of a dozen personnel files. By

presuming relevance and citing the element of timeliness,<sup>8</sup> the ALJ engaged in virtually no analysis of testimonial and documentary evidence concerning confidentiality and undue burden. The ALJ's consideration of facts bearing upon confidentiality was limited to a discussion of HIPAA.

**16. Subject: HIPAA (RBISE 2, 3, 19, 25-30; GCAB 8,11,14-15)**

**Reply:** The GCAB lauds and exalts the ALJ's HIPAA commentary as to HIPAA. Yet, while HIPAA is a significant factor in the operation of any hospital: 1) It is but one of many types of information implicated by the demands for the requested material; 2) evidence of 26 other types of sensitive information have been disregarded, and one additional (Social Security numbers) was given over to speculation; 3) the observations of Respondent discussed in the RBISE (p. 25) describe flaws in the ALJ's HIPAA analysis; 4) the Board has yet to order an employer to accommodate a request for HIPAA-implicated information by seeking and obtaining a patient's release of their personal health information; 5) the ALJ's analysis, adopted by the GCAB, would accord the Union rights to access unit employees' personnel files and their included HIPAA-related information, far exceeding the rights of unit employees to access their own PHI; 6) the Union has made clear that it seeks and desires the entire contents of these files; 7) given the above, redaction<sup>9</sup> is hardly an acceptable means of accommodating a union which will not entertain an accommodation; and 8) the Union seeks their information despite its failure to identify or specify any dispute which implicates consideration of this information. Finally, Respondent questions whether the Board would willingly intervene or assist Respondent or any other healthcare institution in actions brought against them for wrongful release of PHI, resulting from a Board Order, which can be filed by 1) the U.S. Department of Health and Human Services' Office of Civil Rights (OCR), and/or 2) State's Attorney General, and/or 3) class action lawsuits based on breaches of data allegedly due to the facility's failure to adequately protect individual's PHI, and/or 4) during an OCR HIPAA audit.

**17. Subject: Contingent Accommodation Proposal (CAP) (RBISE 4, 7-8, 9-21, 23, 42-46; GCAB 3,12-13)**

**Reply:** 1) Rather than attacking the CAP offered by Respondent, it is submitted that the AGC should promote its acceptance and/or consideration by the Union. The Union has possessed the offered accommodation for 3½ months, with several more months likely to transpire before the validity of the certification is determined by the courts. This factor has provided, and will

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<sup>8</sup> The Board's recent decision in *IronTiger Logistics*, 359 NLRB No. 13 (2012), is inapposite. 1) Unlike here, *IronTiger* arose from a mature bargaining relationship where the Board's concern was a disruption of that relationship; 2) In the event the certification were ultimately not upheld, the Board, applying *IronTiger*, would have found the Hospital in violation of the Act by failing to timely comply with a request from a Union which did not represent the employees. Had the Respondent complied with that Union request, its actions would then constitute a violation of § 8(a)(2); 3) Unlike here, *IronTiger* did not pose issues of the requested information implicating confidentiality concerns; 4) Here, unlike *IronTiger*, a determination as to whether the presumption of relevance has been rebutted; 5) Here, unlike *IronTiger*, the trier of fact must weigh the legitimate concerns of the Hospital *vis- a-vis* the concerns of the Union; 6) The testimony and documentary evidence here shows that the Union will agree to nothing but complete compliance with its October 20<sup>th</sup> demand for material; 7) The Hospital has offered an accommodation which has been rejected by the Union.

<sup>9</sup> The exercise in redaction at trial illustrated the HIPAA-related issues implicated by unlimited access to personnel file information, and is not a proper accommodation where entire contents of personnel files are sought and each file would require a person versed in HIPAA to identify all HIPAA-sensitive material within the files. (Tr.102-103) Redaction would not constitute an accommodation where, as here, there is no evidence that the Union would accommodate. The Union's vague testimony as to experience at other hospitals, objected by Respondent, does not govern concerns of Respondent.

provide, ample time for the Union's evaluation, assessment, and consideration. 2) The CAP specifically states it is not a settlement proposal. 3) An objective to avoid costly and time-consuming litigation is a goal common both to an accommodation and a settlement agreement. This common objective does not transform a document offered with the purpose of accommodating a request for information, into a settlement agreement proposed for the purpose of compromising or adjusting allegations of violations of the Act. 4) The CAP is "contingent" since, if it is determined that there is no bargaining obligation, it will become a nullity. In the meantime, it constitutes a viable proposal in the event the certification is upheld. As argued in *RBISE* (pp. 22-23), in connection with *Detroit Edison, Id.*, this case poses circumstances where a conditional offer to disclose is warranted. 440 US at 318. 5) Witness statement summaries and names of witnesses are excluded from the CAP for reasons set forth herein and in the *RBISE*. This information is not presumptively relevant in the circumstances posed here.

**18. Subject: Undue Burden (RBISE 9-10, 16-18, 22, 32; GCAB 4-5, 7-8, 13)**

**Reply:** 1) Contrary to the GCAB, Respondent's evidence, summarized in *RBISE* (pp. 16 and 17) sets forth the extensive and exhaustive efforts required to comply with the Union's request for entire contents of personnel files, including witness names, and prepared witness statement summaries. While the Region or Board could, potentially, spend significant resources in terms of funds and personnel to undertake the AGC's suggested counting of all pages of an unknown number of personnel files, the Hospital could not feasibly afford to do so for purposes of this trial. Accordingly, to prove burdensomeness, a computer-generated random sampling of a dozen files was utilized by the Hospital, accompanied by explanatory testimonial evidence and documented summaries of the findings, to establish efforts potentially needed to comply. The Hospital further submits that its methodology is a more efficient and cost-effective process, and provides more probative value as a means to show the extensive efforts required, than the methodology suggested in the GCAB. 2) The GCAB, like the ALJD, views the issue of burdensomeness in isolation from the issue of confidentiality. Both the GCAB and ALJ disregard evidence that the Union seeks all contents of personnel files which encompass and are contained in three separate files for each employee. To honor the Union's demands, the file contents could not simply be copied by setting and loading stacks of documents on or into the copier. Rather, the time-consuming and exhaustive efforts discussed in *RBISE* (pp. 16-18) would be required.

**IV. CONCLUSION**

The GCAB has done nothing to alter the evidence, precedent, and arguments supporting the Respondent's position that the information sought in the Union's October 20<sup>th</sup> letter is not presumptively relevant in the circumstances here. The substantial, serious and very real concerns established by the Hospital far outweigh the disingenuous and amorphous needs of the Union. Respondent's earnest efforts to accommodate the Union and address both parties' concerns have been rebuffed by the Union. Accordingly, the ALJ's Decision must be reversed, all Complaint allegations dismissed, and the ALJ's Order, Remedy and Notice are to be reversed and rendered nullities.

Dated: November 14, 2012  
Brentwood, TN

Respectfully submitted,

/s/ John Jay Matchulat

John Jay Matchulat, Esq.  
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**CERTIFICATE OF SERVICE FOR RESPONDENT’S BRIEF IN REPLY TO COUNSEL FOR  
ACTING GENERAL COUNSEL’S ANSWERING BRIEF**

The undersigned, John Jay Matchulat, Esq., being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. §1746, that the Respondent’s Brief in Reply to Counsel for Acting General Counsel’s Answering Brief in the above-captioned case, was E-filed on Wednesday, November 14, 2012 with the National Labor Relations Board through the website of the National Labor Relations Board ([www.nlr.gov](http://www.nlr.gov)).

The undersigned does hereby certify that, on November 14, 2012, a copy of this document, Respondent’s Brief in Reply to Counsel for Acting General Counsel’s Answering Brief, was served by email upon the following:

Noelle Reese, Esq.  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 4  
615 Chestnut Street, 7<sup>th</sup> Floor  
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The undersigned does hereby certify that, on November 14, 2012, a copy of this document, Respondent’s Brief in Reply to Counsel for Acting General Counsel’s Answering Brief, was served by email upon the following:

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Dated: November 14, 2012  
Brentwood, TN

Respectfully submitted,

/s/ John Jay Matchulat

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