UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SRM ALLIANCE HOSPITAL SERVICES d/b/a PETALUMA VALLEY HOSPITAL **And** **CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED**	**CASE: 20-CA-088742**

RESPONDENT PETALUMA VALLEY HOSPITAL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent, PETALUMA VALLEY HOSPITAL ("Hospital" or "Respondent"), files the following exceptions to the March 26, 2013 Decision and Order (JD(SF)-15-13) (the "ALJD") issued by Administrative Law Judge Gerald M. Etchingham (the "ALJ") in the above-referenced unfair labor practice case, pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB" or "Board"), and in support states as follows:[1]

EXCEPTION NO. 1

Respondent excepts to the ALJ's characterization of the California Nurses Association / National Nurses United's ("CNA" or "Union") June 5th explanation of why the information requested was necessary. (ALJD p. 3, lines 37-40). Specifically, the ALJD misquotes Exhibit N, Page 1 of the record. In doing so, the ALJ erroneously summarized the record evidence presented to him.

[1] In light of the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), the NLRB has been acting since August 27, 2011 without a valid quorum under *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010). By submitting these exceptions, Respondent is not waiving, and hereby preserves, its position that all actions taken by the NLRB since August 27, 2011, including, but not limited to, delegations of authority to the Acting General Counsel and regional directors, are invalid.

EXCEPTION NO. 2

Respondent excepts to the ALJ's characterization of Respondent's June 12 letter to the Union, which the ALJ described as indicating that Respondent would "respond . . . only" if the Union established relevance "'for the overbroad, unduly burdensome, or oppressive scope'" of the requests (ALJD p. 3, lines 47-50). The ALJD quotes Respondent's letter out of context, both mischaracterizing and misquoting the letter, which raised objections to certain requests, but noted that Respondent was "prepared to bargain in good faith with CNA about the scope of such request, and will reconsider our objections if provided with a statement establishing the relevance of the request and/or the reason for the seemingly overbroad, unduly burdensome or oppressive scope." (Ex. U, p. 1).

EXCEPTION NO. 3

Respondent excepts to the ALJ's characterization of Respondent's July 11 letter, which the ALJD describes as "reject[ing] the Unions [sic] offers to enter into a confidentiality agreement and redact privileged material." (ALJD p. 4, lines 39-41). The ALJ mischaracterizes Respondent's letter, which never rejected the offer of confidentiality or redaction, but instead noted that the Union needed to carry its initial burden of demonstrating relevance. (Ex. W, p. 2). The ALJD ignores that Respondent explicitly stated that "[o]nce provided with the individualized statements of relevance that the Hospital requested, we will reconsider CNA's request, including whether to enter into an appropriate non-disclosure agreement." (*Id.*). Similarly, Respondent noted that it would consider CNA's requests with respect to privilege upon receiving individualized statements of relevance. (*Id.* pp. 2-3).

EXCEPTION NO. 4

Respondent excepts to the ALJ's conclusion that the Union's request for the temporary staffing contract seeks relevant information. (ALJD p. 6, lines 12-16). Specifically, Respondent excepts to the ALJ's conclusion that the information is relevant to determining whether Respondent was contractually obligated to employ replacement workers for five days. (*Id.*). The ALJ ignored settled Board law holding that unions have no right to bargain over the lawful use of temporary replacements during a strike and for the period constituting the minimum obligation to the temporary replacements. *E.g.*, *Encino-Tarzana Reg'l Med. Ctr.*, 332 N.L.R.B. 914 (2000). Further, the ALJ erroneously concluded that the Union was entitled to information regarding Respondent's agreement with temporary replacement workers, given that the Union had no bargaining obligations or rights regarding the hiring of temporary replacement workers.

EXCEPTION NO. 5

Respondent excepts to the ALJ's interpretation and application of Board precedent regarding the relevance of contracts, specifically, *Wallace Metal Products, Inc.*, 244 N.L.R.B. 41 (1979), and *Finch, Pruyn, & Co., Inc.*, 349 N.L.R.B. 270 (2007). (ALJD p. 6, lines 18-36). In *Wallace*, the union was entitled to see the information in order to "intelligently perform[] its functions of administering the contract, processing grievances, and conducting negotiations" over "the Company's proposed elimination of the 32-hour guaranteed workweek and subcontracting clauses from the contract" long after the strike. 244 N.L.R.B. at 48. In *Finch*, the union was entitled to see the information in order "to assess and enforce the unit employees' recall rights" against ongoing subcontracting, again long after the strike. 349 N.L.R.B. at 275. Here, the ALJ erred by applying this Board precedent, which stands for the unremarkable proposition that unions are entitled to information to formulate bargaining proposals or assess

ongoing subcontracting that has resulted in plant closure, to the instant case, where CNA has no right to formulate bargaining proposals, nor does Respondent have any obligation to bargain with CNA over the work subcontracted during a strike. *See Encino-Tarzana*, 332 N.L.R.B. 914.

EXCEPTION NO. 6

Respondent excepts to the ALJ's conclusion that Respondent violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("NLRA" or "Act") by refusing to provide the requested temporary nurse staffing contract. (ALJD p. 6, lines 41-44). In so concluding, the ALJ ignored Respondent's repeated overtures that it would bargain with the Union regarding production of the information upon a demonstration that the requested information was relevant and misapplied the applicable legal standards under Sections 8(a)(1) and (5) of the Act.

EXCEPTION NO. 7

Respondent excepts to the ALJ's conclusion that *Wallace* and *Finch* make documents relating to the negotiations of contracts relevant because they "would allow the Union to verify whether the 5-day replacement period was required in order to engage the services of the temporary staffing agency." (ALJD p. 6, lines 48-51). As noted, *Wallace* and *Finch* are distinguishable from the facts of this case in that the unions in those cases had a right to bargain over the topic of the information request, while no such right exists here. *See Encino-Tarzana*, 332 N.L.R.B. 914. Accordingly, the ALJ misapplied Board law by concluding that the information sought in Request No. 2 was relevant.

EXCEPTION NO. 8

Respondent excepts to the ALJ's determination that information relating to the negotiation of the temporary staffing contract was relevant "because it would reveal whether the 5-day replacement period was a condition for the Respondent to enter into the temporary staffing

contract" and "would show the circumstances under which the parties negotiated the contract and indicate which party proposed the replacement period and if shorter replacement periods were available." (ALJD p. 6, line 51 – p. 7, line 7). The ALJ ignored settled Board law holding that unions have no right to bargain over the lawful use of temporary replacements during a strike and for the period constituting the minimum obligation to the temporary replacements. *E.g.*, *Encino-Tarzana*, 332 N.L.R.B. 914. Further, the ALJ erroneously concluded that the Union was entitled to information related to Respondent's agreement with temporary replacement workers, given that the Union had no bargaining obligations or rights regarding the hiring of temporary replacement workers. Neither the Union nor the Acting General Counsel have demonstrated any evidence supporting a belief that Respondent proposed the replacement period or that a shorter replacement period was available.

EXCEPTION NO. 9

Respondent excepts to the ALJ's determination that replacement contracts between Respondent and the temporary staffing agency for the past three years were relevant because they "would allow the Union to determine if the Respondent previously entered into similar contracts and always agreed to a 5-day replacement period." (ALJD p. 7, lines 10-14). The ALJ ignored settled Board law holding that unions have no right to bargain over the lawful use of temporary replacements during a strike and for the period constituting the minimum obligation to the temporary replacements. *E.g.*, *Encino-Tarzana*, 332 N.L.R.B. 914. Further, the ALJ erroneously concluded that the Union was entitled to information related to Respondent's agreement with temporary replacement workers, given that the Union had no bargaining obligations or rights regarding the hiring of temporary replacement workers.

EXCEPTION NO. 10

Respondent excepts to the ALJ's characterization that "the Respondent . . . misle[d] the Union into thinking that the information in request no. 5 did exist . . . ." (ALJD p. 7, lines 15-28). In so stating, the ALJ mischaracterizes the record, which is devoid of any suggestion that Respondent intentionally or knowingly misled the Union regarding the existence of prior temporary staffing contracts. Respondent's June 12 letter, referenced by the ALJ, only objects on the grounds of relevance, that the request is overbroad and unduly burdensome, and that it seeks confidential and proprietary business and/or financial information. (Ex. U, p. 3). Likewise, the July 11 letter only reiterated the objections and continually noted that Respondent would reconsider CNA's requests upon the threshold demonstration of relevance. (Ex. W). Finally, on August 10, Respondent again lodged its objections and noted that the requested information was irrelevant. (Ex. Y.) Because the ALJ's assertion that "Respondent . . . misle[d] the Union into thinking that the information in request no. 5 did exist" is unsupported by the record, it is clear error.

EXCEPTION NO. 11

Respondent excepts to the ALJ's reliance on, and misapplication of, *Mary Thompson Hospital v. NLRB*, 943 F.2d 741, 746 (7th Cir. 1991). (ALJD p. 7, lines 21-41). The ALJ's reliance on *Mary Thompson Hospital* is a misapplication of Board law because, in that decision, an employer affirmatively represented that a document existed, represented the nature of the document, and indicated that it was reviewing the document. *See* 943 F.2d at 744. The employer later denied that "affiliation agreement[s]" existed, instead describing the existence of similar, unrequested documents. *Id.* at 746. The U.S. Court of Appeals for the Seventh Circuit noted that the Board's order requiring production of the documents "did not unlawfully expand

the reach of the Union's request; it merely required the Hospital to provide the Union with the information both parties understood the Union to have been requesting all along." *Id.* Because the facts of *Mary Thompson Hospital* are substantially different than the facts in this case as contained in the stipulated record, the ALJ erred in describing "[t]he situation here [a]s analogous to the scenario in *Mary Thompson Hospital*" and concluding that Respondent violated the Act. (ALJD p. 7, line 30).

EXCEPTION NO. 12

Respondent excepts to the ALJ's characterization that Respondent "changed its position" from asserting that the information existed "to assert[ing] in an untimely manner that the information suddenly did not exist." (ALJD p. 7, lines 39-41 – p. 8, lines 1-3). In so stating, the ALJ mischaracterized the record which, as described above, clearly indicates that Respondent never claimed that the information did exist, and thus could not "chang[e] its position" on the matter.

EXCEPTION NO. 13

Respondent excepts to the ALJ's conclusion that the information requested was relevant to the Union's collective bargaining duties based on provisions in the collective bargaining agreement ("CBA") between Respondent and the Union. (ALJD p. 8, lines 5-22). By relying on the CBA as a basis for the information request, the ALJ again ignored the Board's holding in *Encino-Tarzana*, which held that a hospital has no obligation to bargain with a union prior to deviating from its obligation under a CBA, as long as the CBA's procedures are reinstated after the strike and ensuing replacement period. *See* 322 N.L.R.B. at 915.

EXCEPTION NO. 14

Respondent excepts to the ALJ's conclusion that documents relating to the negotiation of the temporary staffing contracts and similar contracts entered during the prior three years were relevant and that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to produce them. (ALJD p. 8, lines 25-32). The ALJ ignored settled Board law holding that unions have no right to bargain over the lawful use of temporary replacements during a strike and for the period constituting the minimum obligation to the temporary replacements. *E.g.*, *Encino-Tarzana*, 332 N.L.R.B. 914. Further, the ALJ erroneously concluded that the Union was entitled to information related to Respondent's agreement with temporary replacement workers and prior contracts, given that the Union had no bargaining obligations or rights regarding the hiring of temporary replacement workers. Finally, in so concluding, the ALJ ignored Respondent's repeated overtures that it would bargain with the Union regarding production of the information upon a demonstration that the requested information was relevant and misapplied the applicable legal standards under Sections 8(a)(1) and (5) of the Act.

EXCEPTION NO. 15

Respondent excepts to the ALJ's conclusion that the information requested in Request No. 8(g), "a unit employee's work schedule, is . . . presumptively relevant." (ALJD p. 8, lines 39-41). Initially, the ALJ mischaracterizes the Union's request, which was not for "a unit employee's work schedule" but requested "[t]he number of RNs who were previously scheduled to work the 13th." (Ex. N, Sec. 8(g)). Additionally, the ALJ's reliance on *Castle Hill Health Care Center*, 355 N.L.R.B. No. 196 (Sept. 28, 2010), is distinguishable. In *Castle Hill*, the union requested employees' schedules to "investigat[e] employee complaints regarding staffing and agency usage" and effectively generate and bargain over proposals relating to such matters. *Id.*

at *28. Board law does not support a finding of presumptive relevance where, as here, the Union requests information over which it has no right to bargain.

EXCEPTION NO. 16

Respondent excepts to the ALJ's conclusion that "even if the work schedule is not presumptively relevant it is relevant for the purposes of determining the impact of Respondent's mandatory call-in guidelines on unit employees." (ALJD p. 8, line 41 – p. 9, line 2). The ALJ ignored settled Board law holding that unions have no right to bargain over the lawful use of temporary replacements during a strike and for the period constituting the minimum obligation to the temporary replacements. *E.g.*, *Encino-Tarzana*, 332 N.L.R.B. 914. Further, the ALJ erroneously concluded that the Union is entitled to information regarding the number of individuals scheduled for June 13, given that the Union had no bargaining obligations or rights regarding the hiring of temporary replacement workers.

EXCEPTION NO. 17

Respondent excepts to the ALJ's misapplication of *Sahara Las Vegas Corp.*, 284 N.L.R.B. 337, 344 (1987), and his conclusion that it was "factually distinguishable" because *Sahara*'s "analysis was largely based on the union previously filing numerous unfair labor practice charges" and "[h]ere, there is nothing in the record to indicate that the Union has previously filed unfair labor practice charges concerning Petaluma's use of temporary replacement nurses." (ALJD p. 9, lines 24-37). Contrary to the ALJ's interpretation of *Sahara*, while the Board noted that the union had filed multiple charges, the touchstone was that it was "reasonable for the Respondent to conclude that charges would likely follow concerning the terminations of those employees for whom information was requested." *See* 284 N.L.R.B. at 344. As a result, the ALJ misapplied Board law by focusing on the existence of prior charges

"concerning Petaluma's use of temporary replacement nurses." Further, the ALJ erred in ignoring clear record evidence that (1) the Union accused Respondent of unlawful conduct regarding the temporary replacement staff, explicitly threatened to file unfair labor practice charges, or couched similar threats in vitriolic terms (Exs. N, pp. 1, 4; P; R; T; V; X); (2) the Union threatened to file "additional" charges with the Board, in addition to the then-pending charge in case 20-CA-080913 (Exs. P; R; X); and, among other evidence, (3) the Union threatened to file charges over the information request 72 hours after issuing the request, prior to any substantive response from Respondent (Ex. R).

EXCEPTION NO. 18

Respondent excepts to the ALJ's conclusion that the Union made a meaningful effort to establish the relevance of its multiple information requests. (ALJD p. 9, lines 39-47). In so concluding, the ALJ ignored settled Board law that information regarding non-unit personnel is not presumptively relevant and that a Union may not rely on "a generalized, conclusory explanation...to trigger an obligation to supply information." *E.g.*, *Disneyland Park*, 350 N.L.R.B. 1256, 1257 (2007).

EXCEPTION NO. 19

Respondent excepts to the ALJ's determination that Respondent unreasonably believed that the information requested was solely for the purpose of supporting an unfair labor practice charge and finding that the Union sought the information exclusively to determine whether Respondent violated the CBA. (ALJD, p. 9, line 50 – p. 10, line 2). In so concluding, the ALJ ignored the stipulated record which clearly established that the Union repeatedly threatened to file unfair labor practice charges regarding Respondent's use of temporary replacements. (Exs.

N, pp. 1, 4; P; R; T; V; X). Further, the ALJ made this determination based on the record alone, without an opportunity to assess witness demeanor or other factors indicative of credibility.

EXCEPTION NO. 20

Respondent excepts to the ALJ's determination that Respondent failed to demonstrate that portions of the information requested by the Union were confidential. (ALJD p. 10, lines 4-12). To the contrary, neither the Union nor the Acting General Counsel contested Respondent's assertions that portions of the requested information were confidential and/or privileged.

EXCEPTION NO. 21

Respondent excepts to the ALJ's conclusion that Respondent has failed to establish any other legal basis for not producing the information requested by CNA. (ALJD p. 10, lines 12-13). To the contrary, Respondent has established that the information was irrelevant and that Respondent was under no obligation to produce the information that would reasonably be used in support of an unfair labor practice charge.

EXCEPTION NO. 22

Respondent excepts to the ALJ's conclusion that Respondent has not offered any evidence in support of its objections. (ALJD p. 10, lines 15-16). To the contrary, Respondent has established that the information was irrelevant and that Respondent was under no obligation to produce the information that would reasonably be used in support of an unfair labor practice charge.

EXCEPTION NO. 23

Respondent excepts to the ALJ's conclusion that Respondent violated Sections 8(a)(1) and (5) of the Act. (ALJD p. 10, lines 28-30). As set forth in Exception Numbers 1 – 22, the ALJ's conclusions regarding the relevancy of the information, the Union's right to the

information, Respondent's efforts to bargain with the Union over the requests, Respondent's confidentiality and privilege concerns regarding the information, and Respondent's reasonable belief that the Union sought the information to support an unfair labor practice charge, are not supported by the record and/or are the result of misapplication of Board law.

EXCEPTION NO. 24

Respondent excepts to the remedy ordered by the ALJ because his conclusion that Respondent violated Sections 8(a)(1) and (5) of the Act is not supported by record evidence and is clearly erroneous. (ALJD p. 10, lines 38-43).

EXCEPTION NO. 25

Respondent excepts to the remedy ordered by the ALJ because it is vague and ambiguous insofar as it does not describe with particularity the information to be produced to the Union and does not provide Respondent with adequate notice of its legal obligations for compliance purposes. (ALJD p. 10, lines 38-43).

EXCEPTION NO. 26

Respondent excepts to the ALJ's recommended remedy requiring Respondent to "furnish the requested information in its possession." (ALJD p. 11, line 15). In doing so, the ALJ fails to account for the confidential and/or privileged nature of portions of the information, which the Union has not contested. Respondent requests that, in the event the Board concludes that a remedy is required, the remedy be amended to allow Respondent and the Union to bargain over the manner of producing documents containing confidential or privileged information.

EXCEPTION NO. 27

Respondent excepts to the ALJ's proposed order because his conclusion that Respondent committed certain unfair labor practices is not supported by record evidence and is clearly

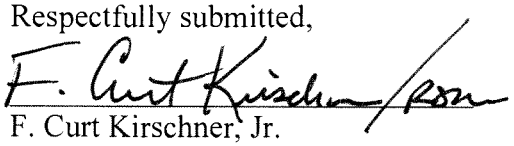
erroneous; because the order is vague and ambiguous insofar as it does not describe with sufficient particularity the information to be produced and because the order does not provide Respondent with adequate notice of its legal obligations for compliance purposes. (ALJD p. 10, line 47 – p. 11, line 45).

EXCEPTION NO. 28

Respondent excepts to the ALJ's proposed notice because his conclusion that Respondent committed certain unfair labor practices is not supported by record evidence and is clearly erroneous and because the notice is vague and ambiguous insofar as it does not describe with sufficient particularity the information to be produced and does not provide Respondent with adequate notice of its legal obligations for compliance purposes. (ALJD Appendix).

Date: April 23, 2013

Respectfully submitted,



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ATTORNEY FOR RESPONDENT
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2013, a true and correct copy of the foregoing Respondent Petaluma Valley Hospital's Exceptions to the Decision of the Administrative Law Judge was served upon the following by email:

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