UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO

PRIME HEALTHCARE SERVICES–ENCINO, LLC
D/B/A ENCINO HOSPITAL MEDICAL CENTER
Respondent

and Cases 31–CA–066061
31–CA–070323

SEIU LOCAL 121RN
Charging Party Union

and Case 31–CA–080554

SEIU UNITED HEALTHCARE
WORKERS–WEST
Charging Party Union

PRIME HEALTHCARE SERVICES–GARDEN GROVE, LLC
D/B/A GARDEN GROVE HOSPITAL & MEDICAL CENTER
Respondent

and Case 21–CA–080722

SEIU UNITED HEALTHCARE
WORKERS–WEST
Charging Party Union

ORDER

The Respondent Hospitals, the Charging Party Local Unions, and the Service Employees International Union (SEIU) timely petition to revoke 10 subpoenas duces tecum that have been served on them and/or their staff for the hearing currently scheduled to commence on April 30. This order addresses only the Respondents' petitions to revoke the two subpoenas served on them by the General Counsel (GC). The remaining petitions to revoke will be addressed by separate order or at the hearing.

A. The Consolidated Complaint and Answer

Pursuant to charges and amended charges filed by SEIU Local 121RN and SEIU United Healthcare Workers–West (UHW) on various dates in 2011 and 2012, the GC issued a consolidated complaint on January 13, 2013, alleging that Encino Hospital Medical Center (Encino) and Garden Grove Hospital & Medical Center (Garden Grove) have unlawfully failed and refused to bargain in good faith in certain respects since their collective-bargaining agreements with the Charging Party Unions expired in March 2011. Specifically, the complaint alleges that Encino failed and refused to provide relevant and necessary information requested by SEIU-121RN in April 2011 for the RN unit at that facility, and that both Encino and Garden Grove also failed and refused to provide relevant and necessary information requested by SEIU-UHW in January 2012 for the service and technical units at the two facilities. In addition, the complaint alleges that both Encino and Garden Grove unilaterally failed to grant anniversary wage step increases to the employees in the service and technical units at Garden Grove and Encino and the RN unit at Encino since March, October, and December 2011, respectively.

The Respondents' answer denies that the hospitals committed any of the foregoing alleged unfair labor practices. The answer also denies that the Unions' amended charges were properly served (par. 1); that the information requested by the Unions was relevant and necessary (11 b, 12 b, 13 b); that the hospitals failed and refused to furnish the requested information to the Unions (11 c, 12 c, 13 c); and that the hospitals failed to provide the Unions with notice or an opportunity to bargain before failing to grant the unit employees anniversary wage step increases (18 – 20).

In addition, the answer declines to admit or deny numerous complaint allegations on the ground that they "are legal conclusions to which no response is required." These include the allegations that the Unions are labor organizations (6 a, b); that Respondents' Assistant General Counsels are agents (7 a, c); that Encino's HR Manager is a supervisor and/or agent (7 b); that the three subject bargaining units are appropriate (8 a); that the Unions are the designated exclusive bargaining representative of the subject units (9 a – f, 10 a – c); and that anniversary wage step increases relate to wages, hours, and other terms and conditions of employment and are mandatory subjects of bargaining (17 a).

Finally, the answer asserts numerous affirmative defenses, including that the allegations are time barred (7); that the Unions have unclean hands and bargained in bad faith (3 & 4); that the Unions requested the information in bad faith and to

harass (5); that the Unions conduct disqualifies them from representing the employees (6); that the Unions waived the right to bargain over the wage increases (8); and that the wage increases are a matter of contract interpretation (9), over which the NLRB lacks jurisdiction (10).

B. The Petitions to Revoke

1. Encino's Petition to Revoke GC subpoena duces tecum B-705851.

The General Counsel's subpoena requests 73 types of documents from Encino, categorized by the particular complaint allegations to which they pertain. Encino petitions to revoke all but the last 10 requests (64–73) that relate to its affirmative defenses. Encino contends that that the requested documents are or should be already in the GC's possession as a result of the precomplaint investigation, and that, if they are not, the GC is improperly using a "trial" subpoena as an "investigative" subpoena. Encino also objects to a number of the individual requests on one or more other grounds, including that the requests are overbroad and unduly burdensome (requests 6, 11, 26–63); that the requested information is not relevant or needed to prove the denied allegations (requests 2–5, 6–25), and that the requests encompass documents protected by the attorney-client and/or work-product privileges (requests 6–15).

The petition to revoke is denied. "Section 11 of the Act clearly provides that the Board shall have access to employer records 'at all reasonable times,' whether the records belong to one merely 'being investigated' or to one already 'proceeded against.' 29 U.S.C. § 161(1) (1976)." *NLRB v. G.H.R. Energy Corp.* 707 F.2d 110, 115(5th Cir. 1982) (citing *NLRB v. Friedman,* 352 F.2d 545 (3d Cir.1965); and *NLRB v. Lewis,* 310 F.2d 364 (7th Cir.1962) (upholding post-complaint investigatory subpoenas)). Further, in agreement with the General Counsel, I find that the subpoena is sufficiently specific, is properly limited to the relevant time period, and seeks information that is potentially relevant to one or more of the denied or unadmitted allegations and/or asserted defenses.[1] See generally *Perdue*

[1] As indicated above, the Respondents declined to admit or deny several allegations on the ground that they "are legal conclusions to which no response is required." Arguably, such responses are improper under both the Board's rules and the Federal Rules of Civil Procedure, and may be stricken and/or deemed admissions as a matter of law. See Gensler, 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 8 (database updated March 2013); *Lane v. Page*, 272 F.R.D. 581, 602 (D. N.M. 2011); and *State Farm Mutual Auto Ins. v. Riley*, 199

Farms, Inc. 323 NLRB 345, 348 (1997), affd. in relevant part 144 F.3d 830, 833-834 (D.C. Cir. 1998). Although Encino asserts that some of the subpoenaed documents are already in the GC's possession, it has not specifically identified each of the documents or stated whether they constitute all the documents encompassed by the subpoena requests.[2] See, e.g., *Price Rite Supermarket*, 34-CA-092127, unpub. Board order issued April 8, 2013 (2013 WL 1414665); and *Trinity Protection Services*, 32-CA-67676, unpub. Board order issued Feb. 8, 2012 (2012 WL 392603). See also *Fresenius Medical Care v. U.S.*, 526 F.3d 372, 376-77 (8th Cir. 2008).

I also find that Encino has failed to satisfy its burden of showing that compliance with the requests would be unduly burdensome. See *GHR Energy*, above; and *NLRB v. Carolina Food Processors*, 81 F.3d 507, 509 – 514 (4th Cir. 1996). See also *Voith Industrial Services,* Case 9-CA-75496, unpub. Board order issued Aug. 27, 2012 (2012 WL 3679872). The subpoena itself indicates that, to reduce delay and expense, an agent for the GC would be available to meet at a mutually agreed-upon time and place, prior to the return date of the subpoenas, for the purpose of examining and/or copying the documents and/or to enter into stipulations. And the GC's response to the petition to revoke indicates that this has, in fact, occurred, resulting in the GC's withdrawal, in whole or in part, or agreed-upon modification, of 53 of the 63 requests at issue.

Finally, regarding the Respondents' asserted privileges, it appears that the subject subpoena requests have been withdrawn. In any event, to the extent the

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FRD 276 (N.D. Ill. 2001). See also *AutoZone, Inc.*, 315 NLRB 115, 116 (1994), enfd. per curiam 83 F.3d 422 (6th Cir.), cert. denied 117 S.Ct. 359 (1996); and *Superior Technology*, 305 NLRB No. 121 (1991). But, it is reasonably clear from their petitions to revoke that the Respondents did not intend their responses to be admissions; rather, they intended to put the General Counsel to his burden of proof. The General Counsel therefore certainly has the option of presenting evidence to satisfy that burden, i.e. the General Counsel may choose to litigate the facts now rather than rely solely on pleading rules and thereby risk a remand to litigate the facts later. And the Respondents cannot be heard to complain when the General Counsel then properly seeks the production of documents in the Respondents' possession that are potentially relevant to the subject allegations.

[2] The General Counsel has withdrawn request 1, which sought the Respondents' statements of position to the General Counsel during the investigation, as well as most of the other subpoena requests. See below. The General Counsel denies that he already has the information sought in the remaining paragraphs.

remaining requests may encompass documents Encino believes are privileged, as indicated in the subpoena Encino retains the right to withhold such documents. However, in that event, Encino must provide sufficient information to evaluate the asserted privilege, including a privilege log and supporting affidavits, if necessary. See, e.g., *In re Grand Jury Subpoena*, 274 F.3d 563, 576 (1st Cir. 2001); *Holifield v. U.S.*, 901 F.2d 201, 204 (7th Cir. 1990); and *Friends of Hope Valley v. Frederick Co.*, 268 F.R.D. 643, 651-652 (E.D. Cal. 2010). If Encino fails to demonstrate sufficient grounds for protection, the privilege may be found to have been waived. *In re Grand Jury Subpoena*, above.

2. Garden Grove's Petition to Revoke GC subpoena duces tecum B-705850

The GC's subpoena requests 29 types of documents from Garden Grove, likewise categorized by the particular complaint allegations to which they pertain. Garden Grove petitions to revoke all but the last 7 requests (23 – 29) that relate to its affirmative defenses.

As with Encino's petition to revoke, the GC's response indicates that, per agreement, most of the subpoena requests have been withdrawn. Further, as to the remaining requests, Garden Grove asserts the same or similar general and specific objections as Encino, which lack merit for the same or similar reasons. Accordingly, Garden Grove's petition to revoke is likewise denied.

Dated, San Francisco, California, April 26, 2013

Jeffrey D. Wedekind
Administrative Law Judge

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NLRB-SAN FRANCISCO

JOB #527

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	4/26	16:49	913102357420	EC--S	01' 14"	005	OK
002		16:51	912027995000	EC--S	02' 00"	005	OK
003		16:53	918189733201	EC--S	01' 10"	005	OK
004		16:55	916265770124	EC--S	01' 34"	005	OK
005		16:57	912134435098	EC--S	01' 48"	005	OK

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Coleman, Joyce A.

From: Coleman, Joyce A.
Sent: Friday, April 26, 2013 4:53 PM
To: Ochoa Diaz, Juan C.; 'Hanrahan, Colleen'; 'Joseph A. Turzi'; 'Jamie M. Konn'; 'David Adelstein'; 'Jonathan Cohen'; 'Monica Guizar'
Subject: Prime Healthcare Services - Encino, LLC - 31-CA-066061 - Please see attached Judge Wedekind's Order regarding Encino and Garden Grove Petitions to Revoke
Attachments: JDO.31-CA-066061.ALJWedekind.Order denying Encino and Garden Grove petitions to revoke.04.26.13.pdf