

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

CATHOLIC HEALTH INITIATIVES
COLORADO d/b/a CENTURA HEALTH
ST. MARY-CORWIN MEDICAL CENTER

and

Cases 27-CA-092767
27-CA-097152

COMMUNICATION WORKERS OF
AMERICA, LOCAL 7774

Julia Durkin and Leticia Pena
for the General Counsel.

Melvin B. Sabey (Kutar, Rock LLP),
Denver, Colorado, for the Respondent.

Larry Ellingson, of Greenwood Village, Colorado,
for the Union.

DECISION

Statement of the Case

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Denver, Colorado, on April 16, 2013. On November 7, 2012, Communication Workers of America, Local 7774 (the Union) filed the charge in Case 27—CA—092767 alleging that Catholic Health Initiatives Colorado d/b/a Centura Health St. Mary-Corwin Medical Center (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. § 151 et seq. (the Act)). The Charge was amended on January 24, 2013. On January 28, 2013, the Union filed the charge in Case 27—CA—0973152. On February 27, 2013, the Regional Director for Region 27 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (5) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my

observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the parties, I make the following.¹

Findings of Fact

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I. Jurisdiction

Respondent is a Colorado non-profit corporation with an office and place of business in Pueblo, Colorado, where it is engaged in the business of operating a hospital providing both inpatient and outpatient medical care. During the 12 months prior to issuance of the complaint, Respondent received gross revenues in excess of \$250,000. During that same time period, Respondent purchased and received shipped goods valued in excess of \$50, 000 from outside the State of Colorado. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. The Alleged Unfair Labor Practices

A. Facts

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Respondent is a non-profit organization that operates a hospital in Pueblo, Colorado. The Union represents approximately 300 of Respondent’s nonprofessional employees who work throughout different departments of the hospital and its adjunct facility. The Union and Respondent are parties to a collective-bargaining agreement effective by its terms from October, 2010 to September 30, 2014. Article 24.1 of the collective-bargaining agreement provides for a wage and benefit reopener from August 1, 2012, to September 15, 2013.

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From mid-July to early September 2012, Respondent and the Union negotiated pursuant to the wage reopener of the collective-bargaining agreement. Ultimately, in early September, the parties reached an agreement on merit-based wage increases for bargaining unit employees (Pay for Performance Agreement). The Pay for Performance Agreement outlines what percentage pay increases bargaining unit employees will receive based on an evaluation period from July 1, 2011, to June 30, 2012. Pursuant to the Pay for Performance Agreement, a bargaining unit employee will receive a base pay wage raise of 0 percent, 2.75 percent, 3.5 percent, or 5 percent, according to whether the employee, “meets” or does not meet” goals and values. Bargaining unit employees are eligible for such an increase if hired before March 31 of the year in which the increase is given.

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¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

5 The Pay for Performance Agreement also specifies that each employee will receive an
annual appraisal. The Agreement states, “Performance appraisals which result in a 0% increase
will be eligible for only the grievance procedure as stated in Article 8 [of the collective
bargaining agreement], however the grievance will not be eligible for Arbitration or Expedited
10 Arbitration as set forth in Articles 9 or 10.” The Agreement is silent as to whether an employee
may grieve a certain percentage increase. Finally, the Agreement states that “the performance
appraisal shall be discussed with the employee” and that the “employee may request a copy of
the performance appraisal.”

15 Negotiations for the Pay for Performance Agreement commenced in mid-July 2012. Lew
Ellingson, a staff representative for the Union, met with Michelle Lucero, Respondent’s vice
president of employee relations. Lucero presented a grid with nine boxes showing how
employees would be measured on goals and behaviors. Each box in the grid showed a
corresponding percentage wage increase. Lucero told Ellingson that the numbers looked good
and that many employees would be getting a 2.75-percent increase, some would be getting a
20 3.5-percent increase, and that others would receive a 5- percent increase. Lucero told Ellingson
the preliminary number of employees that fell into each category.

25 After this meeting with Lucero, Ellingson had several conversations with James
Humphrey, Respondent’s vice president of human resources, regarding pay for performance.
Ellingson asked how the plan came together and how Respondent slotted people into the nine
boxes. Ellingson stated that he needed information to give to employees to show them Pay for
Performance was a fair and just plan. Humphrey told Ellingson that every employee had been
given a midyear review to let them know what they needed to meet or exceed standards.

30 Humphrey sent Ellingson a July 26 email in which he stated, “[O]n the question related to
disagreeing with an evaluation rating: We would use the procedure under Section 8 of the
Grievance Procedure, but would not employ the Arbitration section.” Humphrey stated that
Respondent would have four conversations with employees per evaluation cycle, as part of the
35 feedback and development process.

40 A few days later, Ellingson met with employee officers of the Union. The employees
could not recall receiving employee evaluations. Thereafter, Ellingson sent an email to
Humphrey on August 6, asking whether employees had received their evaluations. Humphrey
responded that he would research the matter. Ellingson had another conversation with
Humphrey in which Humphrey stated that the employees had received performance evaluations.
Ellingson stated that he wanted information about how an employee meets or exceeds standards.

45 In an email of August 9, Humphrey provided general information about Pay for
Performance. Humphrey provided an attachment which he described as showing the “broad
categories for which to develop individualized goals” for employees. According to Humphrey
“using these categories” each employee and supervisor sits down and mutually agrees on the
goal.” The attached document shows that each department has these “must-have” goals along
the lines of “Culture-Patient Satisfaction,” “Culture” and “daily Job Performance.”

Humphrey also attached a sample evaluation form to his August 9 email “to show how the form looks and works.” Humphrey stated “unfortunately, I cannot give you a live form (to protect confidentiality).”

5 After receiving this information from Humphrey, Ellingson held a special meeting with unit employees at the union hall. At the meeting, Ellingson showed employees the nine box diagram and asked if they recalled getting their midyear evaluation. None of the employees said that they recalled getting their midyear review.

10 The next day, Ellingson again spoke with Humphrey. Ellingson said that the Union is agreeing to the Pay for Performance Plan for the 2012 reopener only. He stated that the Union would use this plan and test all aspects of the plan.

15 On September 5, Humphrey delivered the written Pay for Performance Agreement to Ellingson. Ellingson and the Union’s president and vice president signed the Agreement that date. The signed Agreement was submitted to Respondent that date.

20 On September 4, Debra Kenzel, the Union’s Secretary/treasurer, emailed a request for information to Rudy Krasovec, Respondent’s human resources director. In the request for information, the Union requested information for “All CWA bargaining unit employees involved in the Pay for Performance from all departments at St. Mary Corwin.” For these employees, the Union requested “Names of Employees with their potential percentage increase (if any) from their midyear review and their actual year end result from the current pay for performance – include all date of hire on each employee.”

In an email of September 7, Humphrey wrote:

30 We are not going to provide all CB Unit ratings/names. Rather we will provide distribution % numbers as well as names/rates for only those in the does not meet area (i.e. those who did not get an increase). The reason is that per the agreement they recently signed, the only grievances that can be brought forth are those who did not get an increase based on performance.

40 On September 7, Ellingson emailed Humphrey, stating that he had not received the requested information. Humphrey emailed Ellingson back, stating that he would a distribution matrix that shows where all unit employees landed in the Pay for Performance plan. Humphrey also stated that he would provide the names of those “who will not receive an increase based on performance vs. all associates and their respective rankings,” because “these are the only individuals that would be eligible to grieve their ranking should they so chose.”

45 In an email to Humphrey dated September 12, Ellington stated:

It clearly was the Union’s intent to have any employee who could show that there was some “objective reason” why they should have placed higher than what they were slotted, given a chance to “grieve” their ranking. The agreed to language only refers to the process for those not given any increase. It does not preclude those others form “appealing/grieving” their ranking. This clearly was one reason why we chose to go with this plan on a one year basis. If this is going to be the Company’s position this plan will

be very short lived. Also, the agreed to language states that there should be discussions between the employee and their respective supervisor/manager. I have heard multiple times this did not happen which pretty much puts [sic] this at an end going forward. Thus one of the main reasons for our RFI.

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On September 14, Humphrey emailed Ellingson an updated nine-box distribution chart, and the name of one employee who did not receive a pay increase. The nine-box chart shows the final number of employees receiving each level of percentage increase under the Pay for Performance Plan.

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On September 17, Mary Ann Vargas, Union president, sent an email to Janet Cisneros, Respondent's human resources manager, informing Cisneros that the Union had not received all of the requested information. Cisneros responded by email that she was not involved in the request.

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On September 18, Rudy Krasovec, human resources director, spoke with Debra Krenzel, the Union's secretary/treasurer at her desk. Krenzel asked when the Union would receive the requested information. Krasovec answered that the Union would be getting the chart, in reference to the updated nine-box chart provided by Humphrey on September 14.

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Later, on September 18, Mary Ann Vargas, emailed Krasovec again requesting the information. Krasovec emailed back that same date stating that he had told Krenzel about the information provided by Humphrey to Ellingson. Vargas responded by email dated September 20, that she had received some but not all of the information.

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On September 20, Krasovec emailed Vargas and Ellingson and stated that the information request was being reviewed by Respondent's attorney. Ellingson responded by an email dated September 28, stating that the Union "has requested every represented employee's Pay for Performance ratings and associated information on how that rating was achieved so that we can understand how everything came together."

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On October 1, Ellingson spoke with Respondent's attorney. Ellingson told the attorney that the Union needed the information to make sure that the raises were just, fair, and equitable. The attorney said he would get back to Ellingson. On October 1, Melvin Sabey, Respondent's attorney, emailed Ellingson asking him to "identify specifically what the Union wants and why it believes that it is relevant to fulfilling its obligations." Ellingson responded by email dated October 2, stating, "We asked for exactly what is needed. Every represented employee's 'score' and the method of achieving that score."

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On October 2, Ellingson and Sabey spoke again regarding the request for information. Sabey indicated a reluctance to share confidential information with the Union. Sabey said that if the Union could obtain waivers from employees, then Respondent would provide the information for those employees. Ellingson argued that he needed every employee's information.

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On October 2, Sabey followed up his phone conversation with an email, stating that he told Ellingson of Respondent's confidentiality concerns and suggesting that Respondent could provide information for employees who signed a waiver. Sabey asked what alternatives the Union had to this waiver proposal. Ellingson answered in an email in which he suggested having

Vargas and himself receive the information and determine that correct procedures were followed. He suggested that he and Vargas would discuss the matter with Respondent prior to anyone else seeing such information.

5 On November 26, Ellingson and Sabey had another telephone conversation wherein Sabey requested that the Union withdraw its unfair labor practice charge. Ellingson refused to do so.

10 Respondent did provide the hire dates for all employees. However, Respondent did not provide the names of all unit employees with their potential percentage increase from their midyear review or their actual year end results under the Pay for Performance Plan.

15 On November 27, Ellingson emailed Sabey a second written request for information:

15 The amount and to whom merit raises were given. 2. The reasons for issuing merit raises to those employees. 3. The supervisor requests for employees merit raises, and 4. The evaluations of all bargaining unit employees for whom merit raises were recommended and 5. The methodology used to arrive at the numerical ratings. 6. The date(s) supervisors talked to employees for their “midyear” review(s) and what it was the employee needed to do to meet and/or exceed their performance.

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25 Sabey responded by email dated November 28, stating that Ellingson had requested more information than previously requested. Sabey also stated that the Union had never established the relevancy of the requested information. Ellingson responded that he simply stated what was requested so that there would be no mistake as to what information the Union was requesting.

30 On December 10, Ellingson wrote another email to Sabey clarifying that the Union would not agree to Pay for Performance in the future. Ellingson again asked that Respondent provide the requested information.

B. Analysis

35 The General Counsel argues that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide necessary and relevant information to the Union. The Respondent argues that the Union had no right to bargain and to request information regarding employees who received pay increases.

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 The general rule is that an employer has a statutory obligation to supply requested relevant information which is reasonably necessary to the exclusive bargaining representative’s performance of its responsibilities. *Boise Cascade Corp.*, 279 NLRB 429 (1986).

45 It is well established that a union is entitled to whatever information is relevant and necessary to its representation of the bargaining unit, not only for collective bargaining but for grievance adjustment and contract administration. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435—436 (1967); *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 (2005). In *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), citing *General Electric*, 290 NLRB 1138, 1147, the Board held that “Once a union has made a good faith request for information, the Employer must provide relevant information promptly, in useful form.”

Respondent contends that the Union could not grieve the pay raise given to any employee but could only grieve on behalf of any employee denied a raise. However, Board law is clear that any such waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The record is clear that the Union intended, at all times, to be able to test any raise given to any employee. In the instant case, silence in the Pay for Performance Agreement does constitute a waiver. See *King Broadcasting Co.*, 324 NLRB 332 (1997).

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) by not supplying the requested information to the Union.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information relevant to grievance processing.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

The Respondent shall be ordered to furnish the Union the information requested on September 4 and November 27, 2012.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

The Respondent, Catholic Health Initiatives Colorado d/b/a Centura Health St. Mary-Corwin Medical Center, Pueblo, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

² All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing and refusing to bargain collectively and in good faith with the Union, by refusing to furnish information relevant for purposes of grievance handling.

5 (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

10 (a) Furnish the Union with the information requested on September 4 and November 27, 2012.

15 (b) Within 14 days after service by the Region, post at its facility in Pueblo, Colorado, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily
20 communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its
25 own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2012.

30 (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 17, 2013

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Jay R. Pollack
Administrative Law Judge

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³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with Communication Workers of America, Local 7774, by refusing g to furnish information relevant for purposes of grievance processing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL furnish the Union with the information it requested on September 4, and November 27, 2012.

CATHOLIC HEALTH INITIATIVES COLORADO
d/b/a CENTURA HEALTH ST. MARY-CORWIN
MEDICAL CENTER

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433
(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.