

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

COMMUNICATION WORKERS OF  
AMERICA, LOCAL 7774

Cases        27-CA-092767  
                  27-CA-097152

**CATHOLIC HEALTH INITIATIVES COLORADO d/b/a CENTURA  
HEALTH-ST. MARY CORWIN MEDICAL CENTER'S BRIEF IN SUPPORT  
OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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Catholic Health Initiatives Colorado d/b/a Centura Health – St. Mary-Corwin Medical Center (“Respondent”), through its counsel, Kutak Rock LLP, hereby submits its Brief in Support of Exceptions to Administrative Law Judge’s Decision in the above-captioned matter.

### **STATEMENT OF THE CASE**

On November 7, 2012, Communication Workers of America, Local 7774 (the “Union”) filed a charge—Case 27-CA-092767—against Catholic Health Initiatives Colorado d/b/a Centura Health St. Mary-Corwin Medical Center (the “Hospital”). The charge alleged that the Hospital committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the “Act”), 29 U.S.C § 151 et. seq., and was amended on January 24, 2013. On January 28, 2013, the Union filed another charge—Case 27-CA-097152. These charges were based on the Hospital’s alleged failure to provide information requested by the Union on two separate occasions—September 4, 2012, and November 27, 2012. On February 27, 2013, The Regional Director for Region 27 of the National Labor Relations Board (“Board”) issued a complaint and notice of hearing against the Hospital.

The cases were consolidated and heard by Administrative Law Judge (“ALJ”) Jay R. Pollack on April 16, 2013 in Denver, Colorado. In his decision dated June 17, 2013, the ALJ found that the Hospital had violated Section 8(a)(5) and (1) of the Act by “failing and refusing to furnish the Union with information relevant to grievance processing.” (D: 7, L: 21-22).<sup>1</sup> ALJ ordered the Hospital to cease and desist from:

- (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

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<sup>1</sup> References to the Decision will be indicated by: D:\_, L:\_ to indicate the page of the decision and the applicable lines of the decision.

- (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. (D: 8, L: 1-5).

In addition, the ALJ ordered that the Hospital furnish the Union with the information it had requested on both September 4 and November 27, 2012, post a notice attached to the decision informing employees of the violation by the Hospital within 14 days after service, and file a sworn certification with the Regional Director advising what steps the Hospital has taken to comply with the ALJ decision within 21 days of service.

### **STATEMENT OF THE RELEVANT FACTS**

On November 11, 1974, the NLRB certified the Union as the exclusive collective bargaining representative of a unit generally consisting of non-professional employees. Since that time, the parties to this proceeding have been parties to many collective bargaining agreements. Official Report of Proceedings before the NLRB Region 27, April 16, 2013, TR 16:8-17.<sup>2</sup> Joint Exhibit 2 is the current collective bargaining agreement (hereafter referred to as “CBA”). Article 24 of the CBA provides for an annual wage reopener to be conducted during the period between August 1 and September 15 of 2012. Joint Exhibit 2, at p.33.

On September 5, 2012, the Hospital and the Union entered into a Letter of Agreement amending Article 25, the wage article, of the CBA. Joint Exhibit 3 (hereafter referred to as “LOA”). Mr. Lew Ellingson was the only agent for the Union who was involved in the process of generating the LOA. TR 77:15-18. He understood that, other than the modifications contained in the LOA, the CBA would remain unchanged and in full force and effect. TR 78:7-11. When the Union received the proposed LOA, the Union had the opportunity to review it and

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<sup>2</sup> Hereinafter, the transcript of those proceedings will be designated as “TR” followed by the page and line numbers of the cited testimony.

make any suggested or desired changes to the LOA. TR 87:15-18. The only changes requested by the Union were the insertion of the letter “s” in three places, to correctly reflect the name of the Union. TR 87:19-88:17; Respondent’s Exhibit 1, Tab 6.

In the LOA, the parties agreed to amend the CBA in three respects. Respondent’s Exhibit 1, Tab 5. Section 25.6 establishes a Pay for Performance provision and defines the range of wage increases that would be available to bargaining unit employees. It correlates the 5%, 3.5%, 2.75%, and 0% increases to specified final performance ratings. TR 86:24-87:5. Section 25.7 defines which employees would be eligible for increases. TR 87:6-10. Section 25.8 defines the conditions under which the Union or an employee could access the grievance process for pay for performance issues. TR 87:11-14.

The dispute that is the subject of this case arose from two requests for information (“RFI”). The first RFI is Joint Exhibit 8B, dated September 5, 2012. In response to that RFI, the Hospital gave the Union the information in Joint Exhibit 11B. It showed the Union the numbers of bargaining unit employees who fell within each category of pay for performance wage increases. It also identified the one employee who received a zero percent wage increase and who was eligible to grieve that increase under the terms of Section 25.8 of the LOA. The Union subsequently sent an RFI on November 27, 2012 that requested additional information. *See*, Joint Exhibit 16, at p.2, email from Lew Ellingson to Mel Sabey.

The Union requested the information that is the subject of the charges in this case, “so that it could potentially challenge the establishment of the quality standards utilized in the final performance ratings” and “challenge the supervisors’ judgment of the employees quality of workmanship” that was contained in the final performance ratings. TR 96:5-97:2. Although Mr. Ellingson initially testified that the Union wanted information to be able to sell the union

membership on the Pay for Performance plan, he subsequently conceded that, as of the date on the first RFI, which was the same day the Union officers signed the LOA, that process of selling the union membership had already been done. TR 101:1-10.

Despite the express provisions in the LOA limiting the opportunity to challenge the Pay for Performance outcomes to the circumstances in which a performance appraisal resulted in a zero percent increase, the Union demanded information regarding all bargaining unit employees. Only one employee received a zero percent increase and the Union did not grieve that increase; nor has it sought to grieve any other increase. Despite the limitations of Section 25.8 of the LOA, the Union's position in this case is that it "could challenge the final performance rating of any employee" (TR 95:11-15 (emphasis added)) and that it could both grieve and arbitrate that challenge. TR 79: 3-9. The LOA did not allow arbitration of any challenge, not even the challenge of a zero percent increase.

### **QUESTIONS PRESENTED**<sup>3</sup>

1. Is Management obligated to bargain with the Union, and therefore to provide it with information, about the establishment of standards and supervisors' evaluations of workmanship when the negotiated, memorialized terms of the CBA grant these rights exclusively to Management?

2. Where the Union and Management negotiated and reached agreement on the specific subjects at issue, was the ALJ in error in relying on waiver principles rather than contract interpretation principles?

3. Is the Union entitled to information for all employees when the CBA and the LOA limit the employees for whom the Union can file a grievance to those receiving a 0% increase?

4. Did the ALJ err by not addressing and upholding the bargained-for confidentiality and privacy provisions of the LOA?

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<sup>3</sup> Questions Presented track the Exceptions filed (i.e., Exception 1 is addressed in Question 1).

## ARGUMENT

**I. THE ALJ ERRED BY CONCLUDING THAT MANAGEMENT WAS OBLIGATED TO BARGAIN WITH THE UNION, AND THEREFORE, TO PROVIDE INFORMATION TO THE UNION, ABOUT ESTABLISHMENT OF STANDARDS AND SUPERVISORS' EVALUATIONS OF WORKMANSHIP WHEN THE NEGOTIATED TERMS OF THE COLLECTIVE BARGAINING AGREEMENT ("CBA") GRANTED MANAGEMENT THE EXCLUSIVE RIGHT TO ESTABLISH STANDARDS AND EVALUATE WORKMANSHIP.**

**A. The Negotiated, Memorialized Collective Bargaining Agreement ("CBA") Enumerated And Reserved Exclusive Rights To Management.**

The CBA, negotiated between the Hospital and the Union, specifically enumerated and reserved exclusive rights to the Hospital's Management.

First, Article 2.2 of the CBA enumerated many specific rights granted to Management. Among these rights is the "exclusive right in accordance with the Employer's judgment" regarding "the establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship required." This removes from the Union any rights whatsoever related to establishment of standards or judging the "quality and quantity of workmanship."

Additionally, Article 2.4 of the CBA reserves to Management "[a]ll other rights of management...even though not enumerated above, unless they are limited by the clear and explicit language of some other provision of this Agreement." The Union was well aware that Section 2.4 protected and reserved the rights of Management. Mr. Ellingson testified:

Q. You understood at the time you were involved in the questions regarding pay for performance that under 2.4 the rights of management could only be limited by clear and explicit language in the CBA or its signed amendments, right?

A. Correct.

TR 101: 20-25.

These two provisions, taken together, confirm that the Union does not have any rights whatsoever related to establishing standards or judging the “quality and quantity of workmanship,” unless there is language elsewhere in the CBA that “clearly and explicitly” grants the Union some right on this matter. Absent any clear exceptions to this exclusive grant of power, the Management retains and holds all the rights regarding establishing standards and evaluating workmanship.

**B. The Negotiated, Memorialized CBA Contains An Express Waiver.**

In addition to the rights granted and reserved to Management, Article 20 of the CBA states that:

[T]he Hospital and the Union for the life of this Agreement, each agree that the other shall not be obligated to bargain, with respect to any subject matter whatsoever since this Agreement is the sole source of rights for the employees.

In this Article, the parties broadly and conclusively agreed that neither party is obligated to bargain about any subject while the Agreement is in force because the CBA memorializes all the topics and subjects that both parties have agreed upon during the bargaining process. It further establishes that all of the rights granted to either party are fixed during the life of the Agreement (with the exception of amendments agreed to during the two wage and benefit re-opener periods).

**C. While The Hospital Did Attempt To Bargain With The Union, The Union Did Not Have A Right To Bargain About The Establishment Of Standards Or The Judgment Of Supervisors’ Ratings Related To The Pay For Performance Plan.**

- i. The Hospital did not have an obligation to bargain with the Union about the establishment of standards or the judgment of supervisors’ ratings related to the Pay for Performance plan.*

During the administrative hearing, witness Lew Ellingson, representative of the Union, conceded that the Union requested the information regarding evaluations of all bargaining unit

employees under the Hospital's Pay for Performance Plan because the Union wanted to be able to evaluate the judgments and standards of the Plan:

Q. So what you wanted to do with the information that you requested dated September 5 and in November, in your email to me, was to be able to challenge the rating that an employee received, the supervisor judgment about that, or the process of establishing those standards.

A. I would agree with that.

TR 101: 11-16.

Further, when the Board counsel attempted to establish that information requested in the RFIs might be needed for 2013 bargaining in the wage reopener period, Mr. Ellingson made it clear this was not a reason the Union wanted the information:

Q. Will the pay for performance agreement possibly be the subject of those bargaining sessions?

A. There is no way in hell.

TR 114:18-23.

As Mr. Ellingson's testimony demonstrated, the Union wanted information about the Pay For Performance Plan to challenge the establishment of the workmanship standards and the supervisors' judgments in their ratings under the Pay for Performance Plan. However, according to the plain language contained in Article 2.2 and 2.4, the right to establish standards and evaluate workmanship was exclusively granted to Management. The Union did not have a right to bargain about workmanship standards evaluations and, therefore, had no right to request information regarding those subjects.<sup>4</sup>

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<sup>4</sup> The duty to provide information derives from a duty to bargain. See, e.g., *Norris, a Dover Resources Co. v. NLRB*, 417 F.3d 1161, 1168 (10<sup>th</sup> Cir. 2005) ("The employer's duty to bargain collectively 'includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."); *NLRB v. PDK Investments, LLC*, 433 Fed. Appx. 297, 300 (5<sup>th</sup> Cir. 2011) ("The duty to bargain collectively includes the duty to 'provide information needed by the bargaining representative for the proper performance of its duties.'"); *North Bay Dev. Dis. Serv. v. NLRB*, 905 F.2d 476, 480 (D.C. Cir. 1990) (It is not an

In addition, the waiver contained in Article 20 releases Management from an obligation to bargain with the Union about this subject, or any subject outside of the agreement. Therefore, even if the Union may have desired those terms to be different, and even if the Union may have desired to bargain regarding the standards and evaluations of bargaining unit employees, Article 20 makes it clear that Management was not obligated to bargain.

Finally, the Union had previously exercised its right to bargain on the subject at the time the CBA was drafted. That agreement was entered into on October 1, 2010, and remains in effect until September 30, 2014. Allowing the Union the right to bargain and demand information regarding subjects and terms already covered by the negotiated contract will undermine the efficacy and potency of the CBA itself.

- ii. *Even though the Hospital was not obligated to bargain with the Union about the subjects for which it was requesting information, the Hospital did attempt to keep discussion open regarding the Union's requests for information.*

Joint Exhibits 15 and 16 accurately reflect the electronic discussions between the representatives of the Union and the Hospital. TR 105:12-17. After first becoming involved in the issue of the Union's RFI, and suspecting that it was seeking information so that it could challenge the standards or the supervisors' judgment in ratings for all employees, counsel for the Hospital asked the Union representative on October 1, 2012 to help him by identifying "what the Union wants and why it believes it is relevant to fulfilling its obligations." Joint Exhibit 15, p. 2. The only response to that inquiry was the production of the November 27, 2012 email RFI. Joint Exhibit 16, page 2; TR. 107:6 – 108:18. That RFI did provide additional items that the Union was then seeking, but, the Union never provided any rationale, reason or justification for why it was seeking the information. When the Union responded on October 2<sup>nd</sup> at 2:06 a.m. with a first

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unfair labor practice to refuse to supply information relevant to a subject about which a party does not have an obligation to bargain.).

response, threatening the filing of a charge, counsel for the Hospital replied by suggesting a way to resolve that issue and confirming, “I remain available to discuss the issue.” Joint Exhibit 15. Rather than discuss, the Union filed an unfair labor practice charge. After receiving the November 27 expanded RFI, counsel for the Hospital sought information to enable the Hospital to understand the basis for the RFI and concluded: “When you have a chance, call me and let’s discuss this.” Joint Exhibit 16. Clearly at all stages of the process, the Hospital was inviting discussion.

However, despite the Hospital’s willingness to continue discussions, the Union representative on November 28 responded: “End of discussion.” Joint Exhibit 16. Mr. Ellingson confirmed that the Hospital representative would be justified in relying on what he said. TR 106:2-4. He confirmed that he meant what he said, i.e., that he was “done discussing.” TR 106:20-22. Throughout this process, the Hospital was inviting discussion. It was the Union that ended discussion. The Hospital never refused to bargain or to talk about and negotiate about the information the Union was seeking. It was the Union that ultimately refused to bargain.

## **II. THE ALJ WAS IN ERROR WHEN HE RELIED UPON “WAIVER” PRINCIPLES RATHER THAN CONTRACT INTERPRETATION PRINCIPLES.**

### **A. There Is An Important Distinction Between The “Waiver” And “Contract Coverage” Standards.**

In his decision, the ALJ employed principles of waiver in determining whether the Union had a right to the requested information for purposes of the grievance process. The decision quoted the familiar standard from *Metropolitan Edison Co. v. NLRB* which provides any waiver of a Union’s statutory rights must be “clear and unmistakable.” 460 U.S. 693, 708 (1983). Under

this standard, any waiver of Union right must be “explicitly stated” and will not be inferred “from a general contractual provision.” *Id.* at 708.<sup>5</sup>

However, following the lead of the D.C. Circuit Court, several Circuit Courts have instead adopted a “contract coverage” test for determining whether the Union, under the terms of a CBA, has been granted a right or not. *See NLRB v. USPS*, 8 F.3d 832 (D.C. Cir., 1993)<sup>6</sup>; *Enloe Med. Ctr. V. NLRB*, 433 F.3d 834 (D.C. Cir. 2005); *Bath Marine Draftsmen’s Ass’n v. NLRB*, 475 F.3d 14, 24 (1<sup>st</sup> Cir. 2007)(specifically stating, after discussing the “waiver” and “contract coverage” tests, that “we adopt the District of Columbia Circuit’s contract coverage tests to determine whether the Unions have already exercised their right to bargain); *Gratiot Community Hosp. v. NLRB*, 51 f.3d 122 (6<sup>th</sup> Cir. 1995); *Johnson v. Lodge # 93 of the FOP*, 393 F.3d 1096 (10th Cir. 2004).

Under this test, the inquiry conducted is whether or not a subject is “covered by” a CBA. *USPS*, 8 F.3d at 836. Unlike the “clear and unmistakable” waiver test, the subject matter does

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<sup>5</sup> *Metro. Edison Co.* is distinguishable from the present case. In *Metro.*, the issue of waiver was not related to clear, explicit language found in a collective bargaining contract. In that case, Metropolitan Edison Co. argued that “the union’s failure to change the relevant contractual language in the face of two prior arbitration decisions constitutes an implicit contractual waiver.” *Id.* The actual holding as it related to waiver in this case was that the two arbitration awards did not “establish a pattern of decisions clear enough to convert the union’s silence into binding waiver...We conclude that there is no showing that the parties intended to incorporate the two prior arbitration decisions into the subsequent agreement.” *Id.* at 710. In a situation where there is no clearly applicable language and one party is arguing for an implied waiver as was the case in *Metro.*, the “clear and unmistakable” waiver standard makes more sense; to the extent that waiver is not clearly stated and can only be implied, a court should not necessarily be bound to read a waiver into the language. This proposition is distinct from a case where a waiver does not need to be implied because there is negotiated language in the CBA specifically including a waiver (see Article 20 of the present CBA) as well as a negotiated clause reserving rights to one party absent “clear and explicit” contract language (See Article 2.4 of the present CBA).

<sup>6</sup> The facts of *NLRB v. USPS* are extremely similar to the present case. In *USPS*, the Postal Service refused to bargain with the Union regarding service reductions and the effect of those reductions on bargaining unit employees. *USPS*, 8 F.3d at 835. They did so because the CBA negotiated between the Postal Service and the American Postal Workers Union included a broadly-worded management rights clause. *Id.* The Management clause gave the management the exclusive right to, among other rights, “transfer, assign, and retain employees” and “determine the methods, means, and personnel by which such operations are to be conducted.” *Id.* The D.C. Circuit Court held that the Postal Service did not have to bargain with the Union about the service reductions because they concluded the service reductions were covered by the rights granted to the Postal Service in the Management clause. *Id.* at 838. Similarly, in the present case, a broadly-worded Management clause grants the Hospital exclusive rights to establish standards and evaluate workmanship. It follows that this subject was therefore covered by the Management clause and, as such, under *USPS*, the Hospital should not have to bargain with the Union about issues related to such workmanship standards and evaluations.

not need to be specifically addressed to be “covered by” the CBA. *See Connors v. Link Coal Co.*, 970 F.2d 902, 906 (D.C. Cir. 1992); *USPS*, 8 F.3d at 838 (“The Board relies on the fact that nothing in the management rights clause ‘specifically refers’ to the ‘type of employer decision’ at issue in this case. We have, however, rejected just such a crabbed reading of the ‘waiver’/ ‘covered by’ distinction”). Instead, if it is “covered by” the CBA, this means that the union has exercised “its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties’ rights and forecloses further mandatory bargaining as to that subject....” *Local Union No. 47, International Brotherhood of Electrical Workers, etc. v. NLRB*, 927 F.2d 635, 640, (D.C. Cir. 1991); *Connors*, 970 F.2d at 905 (stating that “to the extent that a bargain resolves any issue, it removes that issue *pro tanto* from the range of bargaining.”); *USPS*, 8 F.3d at 837 (stating, “[i]n such a case as this one, where the employer acts pursuant to a claim of right under the parties’ agreement, the resolution of the refusal to bargain charge rests on an interpretation of the contract at issue.”). Thus, if a matter is covered by the contract, “there is no continuous duty to bargain during the term of an agreement” *USPS*, 8 F.3d at 836.

Further, the courts that have adopted the “contract coverage” test have stated that, if a matter is covered by contract, “waiver” is an incorrect, irrelevant, and meaningless analytical framework. If the contract has already established the rights regarding a subject, the appropriate analysis is not whether the Union has “waived” its right to further bargaining about that subject. *Local Union No. 47*, 927 F.2d at 641; *Bath Marine Draftsmen’s Ass’n*, 475 F.3d at 24. Instead, if the terms appear in a contract, the Union has already bargained for and agreed to an allocation of rights associated with that issue:

“a waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the

collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant.”

*USPS*, 8 F.3d at 836 (quoting *Dep’t of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)); see *Local Union No. 47*, 927 F.2d at 641.

Finally, if there is a negotiated, memorialized bargaining agreement, courts are “bound to enforce” the terms of the negotiated agreements:<sup>7</sup>

Thus, neither the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement. Quite the contrary, the courts are bound to enforce lawful labor agreements as written.

*Id.* Once the collective bargaining agreement has therefore been reached, the CBAs should be interpreted according to their terms, not according to whether or not there is a clear enough “waiver” of a Union right. Indeed, it has been suggested that the Board’s “clear and unmistakable” waiver standard is an “artificially high burden on an employer who claims its authority to engage in an activity is granted by such an agreement....” *Enloe*, 433 F.3d at 837. Also, whatever a Union’s subjective intentions might be regarding an issue, if those intentions are not included into the language of the agreement, they cannot be enforced by a court.

**B. The Correct Standard For This Case Is The “Contract Coverage” Test.**

In the current dispute between the Hospital and the Union, the issue is not whether, as the ALJ suggested, the Hospital refused to bargain by not supplying the information requested by the Union. Instead, the issue is whether the Union can force further bargaining (and therefore demand information) about subjects that have already been bargained and memorialized in the CBA and the LOA. As such, the “waiver” test is not the correct test to apply in the present case.

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<sup>7</sup> The U.S. Supreme Court in *Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc., v. NLRB*, 501 U.S. 190, 202-203 (1991), has stated that in matters of contract interpretation, courts and arbitrators are the “principal” sources of interpretation, even in disputes surrounding unfair labor charges. *Id.* The Court stated that deference does not have to be paid to the Board’s interpretation of a contract. *Id.*

In an email exchange between counsel for the Hospital and Mr. Ellingson, the Union requested information about how the Management judged the performance of all the bargaining unit employees, specifically asking for “the evaluations of all bargaining unit employees for who merit raises were recommended,” “reasons for issuing merit raises to those employees,” and “[t]he methodology used to arrive at the numerical ratings” (Joint Exhibit 16, email exchange from Lew Ellingson to Melvin Sabey, November 27, 2012, 11:49am).

However, all of these requests for information directly relate to “establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship required.” Those issues are squarely within the exclusive rights granted to Management under Article 2.2 of the CBA. Since this exclusive right was granted to Management, it therefore is a “covered” subject, one that has already been bargained for and previously incorporated into the CBA. The Union did not “waive” its rights to negotiate about establishment of standards and judgment of workmanship; rather, it had already exercised its rights to negotiate about such subjects at the time each party entered into the agreement.

Further, under Article 2.4 of the CBA, as discussed previously, Management was granted a reservation of “all other rights of management...unless they are limited by the clear and explicit language.” Conceding that this is a broad delegation of rights, it is still a bargained for, memorialized delegation. It shows that “management rights” was a covered subject of negotiation, and that any exception to those broad Management rights could only be found where there are clearly, explicitly stated limitations elsewhere in the CBA.

As such, “waiver” is not the appropriate standard for the issue in the present case. Rather, this is a case where the subjects at issue already appear in the CBA and the LOA. The ALJ judge erred in applying the “clear and unmistakable” waiver analysis.

**III. THE ALJ ERRED WHEN HE CONCLUDED THAT THE UNION NEEDED THE REQUESTED INFORMATION IN ORDER TO PROCESS GRIEVANCES FOR ALL EMPLOYEES BECAUSE THE CBA AND LETTER OF AGREEMENT (“LOA”) LIMIT THE EMPLOYEES FOR WHOM THE UNION COULD FILE A GRIEVANCE TO THOSE RECEIVING A 0% INCREASE.**

**A. The LOA Must Be Read In Conjunction With Article 2.2 and 2.4 Of The CBA.**

First, the agreed language of the LOA must be read in conjunction with Article 2.2 and 2.4 of the CBA because those provisions govern Management rights. Article 2.2, as discussed previously, gives Management the right to establish standards for and make judgments about workmanship. Article 25.8 states that, “[e]ach employee will receive an annual performance appraisal.” Article 25.6 clearly defines the ratings an employee must meet to receive a specific increase. For example, to receive a 5% base wage increase, an employee must “[e]xceed Expectations for the Goals (“What”) and Exceeds Expectations for the Values (“How”). Beyond defining the rating/wage increase relationship, the LOA does nothing to reduce or alter the Management Rights enumerated in Article 2.2 of the CBA.

Additionally, the ALJ decision stated that “[t]he 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 [not]<sup>8</sup> constitute a waiver.” (D: 7, L: 5-7). However, Article 2.4 stipulates that there must be clear and explicit language to indicate that Management has given one of its reserved or enumerated rights to the Union. If there are no explicit words in the LOA granting the Union a specific right, then the Union has not been granted that right from the reservoir of what is otherwise a right of Management. Consequently, under Article 2.4, a “waiver” of all Union claims to Management’s rights, unless explicitly stated otherwise, was

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<sup>8</sup> In the ALJ decision, the language regarding waiver actually read, “In the instant case, silence in the Pay for Performance Agreement does constitute waiver” (D: 7, L: 7-8). There was no “not” included to have it read, “does *not* constitute waiver” in the actual decision. However, the reasoning in that portion of the decision did not make sense without including the “not.” Thus, we are proceeding as though Judge Pollack meant to include the “not.”

negotiated clearly into and covered by the contract. As such, silence really is a waiver in the present case. For the LOA to be correctly understood, it must be construed in light of these two Management Rights provisions.

**B. The LOA Must Be Read In Conjunction With Article 20 Of The CBA.**

In addition to reading the LOA in conjunction with Article 2.2 and 2.4 of the CBA, the LOA should be read in conjunction with Article 20, the express “waiver” provision. This provision releases either party from an obligation to bargain about any subject because both parties agreed to consider the CBA the “sole source of rights.” Once the LOA was negotiated and signed into effect by both parties, it became incorporated as part of the “sole source of rights” between the two parties. By reading the LOA in conjunction with Article 20, both the Union and the Hospital are released from the duty to negotiate further about the subjects found in the LOA.

Further, since Article 20 was negotiated into the CBA, the duty to bargain about any subjects whatsoever became a subject “covered” by the agreement at the time of the signing. The terms and stipulations of Article 20, even though broadly worded, must be enforced.

**C. There Is An Established Pattern In The CBA Clearly Defining Eligibility For Entitlements.**

In addition to construing the LOA in light of Articles 2.2 and 2.4 and 20 of the CBA, the entire pattern of the CBA indicates that when there are conditions upon which eligibility for some benefit or opportunity depends, those conditions are clearly stated. If those conditions are not met, there is no eligibility for the benefit. Patterns established through collective bargaining agreements are relevant considerations for establishing terms of the agreement. *See Metro. Edison*, 460 U.S. at 709-710 (suggesting that assessing a party’s duties will depend on the circumstances, such as patterns established, of each case); *see also Local Union No.47*, 927 F.2d

at 640-642 (discussing how bargaining parties' history is "crucial to understanding the purpose" of a CBA's language).

Pages 79-85 of the hearing transcript contain Mr. Ellingson's testimony regarding numerous provisions of the CBA that establish conditions under which an employee may be eligible for some opportunity or benefit. Review of that testimony reveals a clear and consistent pattern:

Q: Okay. So, after reviewing all those, is it accurate to state that where, in the CBA, there are conditions specified for eligibility for some opportunity or benefit, if the specified conditions are not met, there is not eligibility, correct?

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A: That would be correct.

TR 85:5-21.

The CBA establishes a pattern for clear definition of eligibility for benefits and opportunities. When read in conjunction with the LOA, this means that only those who meet the specified eligibility conditions are entitled to the benefits or opportunities that are referenced in the LOA. Mr. Ellingson's response to a hypothetical situation confirmed his understanding of that fact:

Q. So if the CBA had contained a provision -- this is a hypothetical. If the CBA had contained a provision requiring the Hospital to serve pepperoni pizza in the cafeteria every day, the Union could insist that the Hospital do so and could grieve and arbitrate the issue if it failed to do so, right?

A. That would be correct.

Q. But the Union could not complain about or bargain about the kind of dough used in making the pepperoni pizzas, if it had not negotiated into the CBA a provision requiring or regarding the pizza dough, right?

A. Hypothetically.

Q. And if it could not complain or bargain about the dough, you would agree that it would have no right to demand information about the recipe used in making the dough, right?

A. Hypothetically.

Q. When you say “hypothetically,” you mean hypothetically yes?

A. Well, hypothetically to your question, yes, correct.

TR 104:19-105:11.

**D. The Clear And Explicit Terms Of The LOA Grants The Union Grievance Rights Only For Employees Receiving A 0% Increase.**

*i. The Union has taken the position that it is entitled to grieve and arbitrate all employees' Pay For Performance increases.*

Under the CBA negotiated between the Union and the Hospital, the general procedure for a bargaining unit employee who believes he/she has been disciplined unfairly is to go through a grievance process and then arbitration if not satisfied with the dispute. Mr. Ellingson confirmed this understanding in the administrative hearing.

Q: Now, under the terms of the Collective Bargaining Agreement, if an employee was disciplined and believed that there was not just cause for the discipline, he or she could go through a grievance process and then arbitrate the dispute, if not satisfied by the grievance, right?

A: That is correct.

TR 78:11-16.

Mr. Ellingson stated that it was the Union’s position that the Union should be able to grieve and arbitrate any pay increase for any bargaining unit employee.

Q: Now assume for a moment that, after entering in to the letter agreement, Joint Exhibit 3, I was an employee who had received a 3.5 percent increase, but I thought I should have gotten a five percent increase. Is it the Union’s position that I would be entitled to take that issue to arbitration?

A: It is...

TR 79: 3-9.

- ii. *The agreed language in the LOA does not support the Union's position regarding grievance and arbitration under the Pay For Performance Plan.*

The agreed language in the LOA does not support the Union's position that it may grieve and then arbitrate any pay increase. Under Article 25.6, the parties agreed to a Pay For Performance plan for all bargaining unit employees, and that all such employees "shall be paid in accordance with their final performance rating." In conjunction with this, Article 25.8 limits the availability of a grievance to an employee who received no pay increase. This provision states:

25.8 Grievance Process: Each employee will receive an annual performance appraisal. Performance appraisals are intended for constructive personal feedback and for individual development. Performance appraisals will not be substituted for progressive discipline. Performance appraisals which result in a 0% increase will be eligible for only the grievance procedure as stated in Article 8, however the grievance will not be eligible for Arbitration or Expedited Arbitration as set forth in Articles 9 or 10.

The plain language of this provision shows that availability of grievance for a pay increase was bargained-for and covered. As such, under the "contract coverage" test, the terms agreed to about this issue should be enforced. *USPS*, 8 F.3d at 836.

The plain language defines eligibility to grieve as applying only to those employees who receive a 0% increase. There is no language to grant the Union a right to grieve for an employee who, for example, received a 3.5%, or a 2.75% increase. Also, this provision states that even if an employee receiving 0% increase grieves that increase, the grievance will not be subject to arbitration.

Mr. Ellingson confirmed that Section 25.8 of the LOA "defines the conditions under which the Union or an employee could access the grievance process for pay for performance issues." TR 87:11-14. He then testified as follows:

Q: Okay. Now let's turn to tab 7 [of Respondent's Exhibit 1]. In referring to 25.8 in the letter of agreement, what category of performance appraisals does 25.8 say will be eligible for the grievance procedures?

A: As highlighted here, it says performance appraisals which result in a zero percent increase will be eligible for the grievance procedure, as stated in Article 8.

TR 88:22-89:3.

In reference to the provisions of the LOA, Mr. Ellingson testified:

Q: Is there any clear and explicit provision allowing any challenge by an employee or the Union of any wage increase, other than a zero percent increase?

A: There is no language in here.

TR: 102:25-103:3.

#### **IV. THE ALJ ERRED BY NOT ADDRESSING AND UPHOLDING THE BARGAINED-FOR CONFIDENTIALITY AND PRIVACY PROVISIONS OF THE LOA.**

As a general rule, employment records are confidential, particularly where the employee is not even a party to the litigation. *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 648-49 (10<sup>th</sup> Cir. 2008). The 10<sup>th</sup> Circuit has noted, "personnel files often contain sensitive personal information...and it is not unreasonable to be cautious about ordering their entire contents disclosed willy-nilly." *Id.* Further, the 10<sup>th</sup> Circuit has stated that while an employer's duty to bargain collectively under Section 8(a)(5) of the NLRA does include providing relevant information needed by the Union to fulfill its duties, that duty is not unlimited:

The employer's duty to bargain collectively does not, however, impose an unlimited duty to produce requested information...

In particular, when the union requests "relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer."

*Norris v. NLRB*, 417 F.3d 1161, 1169 (10<sup>th</sup> Cir. 2005)(quoting *Pa. Power & Light Co.*, 301 NLRB 1104, 1105 (1991)).

In the present case, the LOA, by which the Hospital's Pay for Performance plan was agreed upon, contained express provisions designed to protect the privacy of employees. For example, Section 25.8 provides that performance appraisals are intended for personal feedback and for individual development. TR 89:25-90:8. *See, also*, Respondent's Exhibit 1, Tabs 8 and 9. Section 25.8 also provided that the performance appraisal would be discussed with the employee, not with the Union, the Union steward or officer or anyone else. Additionally, Section 25.8 states that the employee may request a copy of the performance appraisal. It does not say that the Union, the Union steward or Union officer may request a copy of the performance appraisal. TR 91:9-13; 92:20-93:6; *see, also* Respondent's Exhibit 1, Tabs 10 and 11.<sup>9</sup> Under the "contract coverage" standard, a court is bound to enforce these terms as they relate to this negotiated privacy interest.

From the beginning, the Hospital included provisions in the LOA designed to protect the privacy interests of its employees. The Union accepted and agreed to those provisions, including the provision that it was the employees who could request a copy of their performance appraisals. The Hospital has acted consistently to protect the privacy and confidentiality of the employment evaluations. As the Union's witness, Debra Krenzel, testified, General Counsel Exhibit 8, her year-end performance review for 2012, which rates her employee performance, was only accessible to her and her supervisors. TR 124:3-125:4.

Additionally, the Union's agent conceded the privacy interest that employees have in keeping information relating to their employment evaluations and their financial information

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<sup>9</sup> Any argument that relies on general notions of what is or is not considered personal, private and confidential information is inapposite in a case such as this, where the parties have expressly agreed that the information is personal and have expressly provided for who may have access to that information.

private and confidential. TR 90:9-91:8. Judge Pollack also recognized that privacy interest with regard to the one employee who received a zero percent wage increase by agreeing to only include in the record and in Exhibit 11B the initials of that employee. There is therefore a conceded privacy interest in employment evaluations and in the personal information contained in employment evaluations.

Consequently, the record and the LOA show that employee privacy was a valid interest as well as a covered subject in the contract between the Hospital and the Union. The ALJ therefore erred by not addressing or considering this concern of the Hospital when it did appear as a negotiated subject in the contract.

### **CONCLUSION**

For the above reasons, the Hospitals requests the Board to reverse the decision by the ALJ and dismiss the unfair labor charges filed against the Hospital. As discussed above, per the terms of the CBA and the LOA, the Hospital did not have a duty to bargain with the Union regarding the grievance process. Additionally, the ALJ did not address the Hospital's valid concern regarding confidentiality.

Respectfully submitted this 10<sup>th</sup> day of July, 2013.

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ATTORNEYS FOR RESPONDENT

