

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SEVENTH REGION

CATHOLIC HEALTH INITIATIVES COLORADO
D/B/A CENTURA HEALTH – ST. MARY-CORWIN
MEDICAL CENTER

and

Cases 27-CA-092767
27-CA-097152

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 7774

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S BRIEF
IN SUPPORT OF LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW
JUDGE’S DECISION AND ORDER**

Counsel for the Acting General Counsel of the National Labor Relations Board (“the Acting General Counsel” and “the Board,” respectively) submits this Brief in Support of Limited Exceptions to the Administrative Law Judge’s Decision and Order in this matter, pursuant to the Board’s Rules and Regulations, series 8, Section 102.46.

STATEMENT OF THE CASE

The Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, as amended, in Cases 27-CA-092767 and 27-CA-097152 (Complaint) is based on charges filed by Communications Workers of America, Local 7774 (Union). The Complaint alleges that Catholic Health Initiatives Colorado d/b/a Centura Health – St. Mary-Corwin Medical Center

(Respondent) has violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). Specifically, the Complaint alleges that since about September 5 and November 27, 2012,¹ Respondent has failed and refused to provide the Union with requested information relevant to its duties as collective-bargaining representative of Respondent's employees. (G.C. Ex. 1(J) and G.C. Ex. 2).²

The trial in this matter was held on April 16, 2013, in Denver, Colorado, before The Honorable Jay R. Pollack, Administrative Law Judge (Judge). On June 17, 2013, Judge Pollack issued a Decision and Order. (ALJD P1-8). Judge Pollack found that 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. (ALJD P7 L20-21). The Judge's Recommended Order requires Respondent to cease and desist from failing and refusing to bargain collectively and in good faith with the Union, by refusing to furnish information relevant for purposes of grievance handling. (ALJD P8 L1-2). Affirmatively, the Recommended Order requires Respondent to furnish the Union with information it requested on September 4 and November 27. (ALJD P8 L10-11). The Recommended Order also requires Respondent to post at its facilities in Pueblo, Colorado a notice, which is attached to the Judge's Decision and Order as an appendix, stating that Respondent will not refuse to bargain collectively with the Union by refusing to furnish information relevant for purposes of grievance processing. (ALJD P8 L13-14 and Appendix). As discussed more fully below, the Acting General Counsel contends that Judge Pollack failed to make a sufficiently broad conclusion of law and failed to order appropriate relief.³

¹ All dates are in the year 2012, unless otherwise specified.

² "G.C. Ex." refers to exhibits offered by the Acting General Counsel at the hearing on April 16, 2013. "Jt. Ex." refers to exhibits offered jointly by the Acting General Counsel and Respondent at the hearing. "Tr." refers to the transcript of the hearing. "ALJD" refers to the Administrative Law Judge's Decision and Order.

³ The Acting General Counsel also contends that Judge Pollack made an error in stating a relevant fact in the case.

STATEMENT OF THE ISSUES

1. Whether Judge Pollack inadvertently erred in stating the facts of the case. (Exception 1).
2. Whether Judge Pollack erred by failing to broadly conclude that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish information. (Exception 2).
3. Whether Judge Pollack erred by failing to order appropriate relief. (Exceptions 3 and 4).

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE ERRED IN STATING THE FACTS OF THE CASE

A. The Administrative Law Judge erred in stating that Article 24.1 of the parties' collective-bargaining agreement provides for a wage and benefit reopener from August 1, 2012, to September 15, 2013.

Judge Pollack stated in his decision that Article 24.1 of the parties' collective-bargaining agreement, effective October 1, 2010 to September 30, 2014, provides for a wage and benefit reopener "from August 1, 2012, to September 15, 2013." (ALJD P2 L29-30). The parties' collective-bargaining agreement was admitted into evidence during the hearing in this matter. (Jt. Ex. 2; Tr. 8:16). The relevant language of Article 24.1 states that there will be an "annual wage and benefit reopener period between August 1 and September 15, of 2012, and 2013, if necessary." (Jt. Ex. 2). The Acting General Counsel contends that Judge Pollack erred in describing the wage and benefit reopener dates specified in Article 24.1 of the parties' collective-bargaining agreement, so it appears that there is only one reopener period spanning over a year as opposed to two reopener periods – one in 2012 and one in 2013. Thus, the Decision should be corrected to reflect the correct reopener dates as set forth in Article 24.1 of the parties' agreement.

II. THE ADMINISTRATIVE LAW JUDGE ERRED BY FAILING TO BROADLY CONCLUDE THAT RESPONDENT VIOLATED SECTION 8(A)(5) AND (1) OF THE ACT BY REFUSING TO FURNISH INFORMATION

- A. The Administrative Law Judge failed to find that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information that is relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Respondent's employees.**

Judge Pollack concluded that 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. (ALJD P7 L20-21). However, the Judge failed to make a broader conclusion of law that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish information that is relevant beyond mere grievance processing, and is generally relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Respondent's employees.

As background, Respondent is a non-profit organization that operates a hospital in Pueblo, Colorado (St. Mary-Corwin). (G.C. Ex. 1(l); Tr. 13:24-25; ALJD P2 L25). The Union represents approximately 300 of Respondent's non-professional employees who work throughout different departments of St. Mary-Corwin, including an adjunct facility (Unit). (Tr. 14:5-25; ALJD P2 L27-27).

In early September 2012, pursuant to the wage reopener in the parties' collective-bargaining agreement, the Union and Respondent agreed to a merit-based pay increase for Unit employees (Pay for Performance Agreement), whereby employees would receive a certain percentage pay increase based on how they performed on goals and behaviors, as measured in a performance evaluation. (Jt. Ex. 3). The Complaint in this matter alleges that the Union requested, and Respondent failed and refused to provide, information pertaining to Unit

employees' merit-based wage increases. (G.C. Ex. 1(j) and G.C. Ex. 2). Specifically, the Complaint alleges, and Judge Pollack found, that on September 4,⁴ the Union requested information relating to the Pay for Performance Agreement, described as follows: "Names of employees with their potential percentage increase (if any) from their midyear review and their actual year end results from the current pay for performance plan – include all date of hire on each employee." (G.C. Ex. 1(j); G.C. Ex. 2; ALJD P4 L19-26). Furthermore, the Complaint alleges, and Judge Pollack found, that on November 27,⁵ the Union requested the following information relating to merit-based pay increases:

1. The amount and to whom merit raises were given,
2. The reasons for issuing merit raises to those employees,
3. The supervisor requests for employee merit raises, and
4. The evaluations of all bargaining unit employees for whom merit raises were recommended
5. The methodology used to arrive at the numerical ratings.
6. The dates(s) [sic] supervisor's [sic] talked to the employees for their "mid-year" review and what it was the employee needed to do to meet and/or exceed their performance.

(G.C. Ex. 1(J); G.C. Ex. 2; ALJD P6 L13-22). The Complaint alleges that the requested information described above is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit. (G.C. Ex. 1(j)).

In his legal analysis, Judge Pollack correctly stated 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." (ALJD P6 L41-44, citing *Boise Cascade Corp.*, 279 NLRB 429 (1986)). Judge Pollack also correctly stated that "a union is entitled to whatever information is relevant and necessary to its representation of the

⁴ The Complaint alleges the date of the information request as on or about September 5, 2012. (G.C. Ex. 1(j) and G.C. Ex. 2). The evidence admitted into the record at the hearing showed, and the Judge found, that the request was actually made on September 4, 2012. (Jt. Ex. 8A and 8B and ALJD P4 L19-20).

⁵ The Complaint alleges the date of the information request as about November 28, 2012. (G.C. Ex. 1(j) and G.C. Ex. 2). The evidence admitted into the record at the hearing showed, and the Judge found, that the request was actually made on November 27, 2012. (Jt. Ex. 16 and ALJD P6 L13-22).

bargaining unit, not only for collective bargaining but for grievance adjustment and contract administration.” (ALJD P6 L45-48, citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 (2005)).

The record in this matter establishes that all of the information requested by the Union on September 4 and November 27 is presumptively relevant and necessary for various purposes relating to the Union’s performance of its functions as exclusive collective-bargaining representative of the Unit. Foremost, the requested information is presumptively relevant, because it relates to wages of represented employees. *York International Corp.*, 290 NLRB 438 (1988). The requested information is relevant and necessary for the Union to formulate wage proposals in connection with contract bargaining, specifically the 2013 wage and benefit reopener specified in the parties’ collective-bargaining agreement. See *Northwest Publications, Inc.*, 211 NLRB 464, 465 (1974); *Bacardi Corp.*, 296 NLRB 1220, 1223 (1989). The information is also clearly relevant and necessary for the purposes of policing the Pay for Performance Agreement and ensuring that Unit employees are given merit-pay increases in a fair and just manner. See *General Controls Co.*, 88 NLRB 1341 (1950) (names, classifications, rates of pay, and merit rating scores necessary for union to police current collective bargaining agreement and to form future bargaining proposals). Finally, the requested information is relevant and necessary in order for the Union to pursue grievances and disputes relating to the level of merit-pay increases granted to Unit employees, without regard to whether any grievances have actually been filed. See *O & G industries*, 269 NLRB 986, 987 (1984); *Safeway Stores, Inc.*, 236 NLRB 1126, 1128-29 (1978); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991).

In addition to the Union’s requested information being presumptively relevant, Judge Pollack credited evidence showing that the Union specified the information’s relevant purposes,

including policing the Pay for Performance Agreement and pursuing possible grievances, to Respondent. (ALJD P4 L11-14, P4 L44-52, and P5 L35-37). Judge Pollack also correctly found that the Union had not waived its right to file grievances to test any raises given to Unit employees, which if the Union had waived such a right may have limited, but not extinguished, the requested information's relevant purposes. (ALJD P7 L6-8).

Judge Pollack appropriately found that, with the exception of employees' hire dates, Respondent did not provide the information the Union requested on September 4 and November 27. (ALJD P6 L9-12 and P7 L9-11). However, despite recognizing the broad purposes for which a union may request relevant information, i.e., performance of its functions as collective-bargaining representative, including collective bargaining, grievance adjustment, and contract administration, and for which the Union in this case did request information, Judge Pollack made only a limited conclusion of law that Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish information relevant to grievance processing. (ALJD P7 L20-21). The Judge erred by not stating, consistently with his findings and analysis, a conclusion of law that Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish information that is relevant for purposes broader than just grievance processing. Thus, the conclusions of law should include a statement that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information that is relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Respondent's employees.

III. THE ADMINISTRATIVE LAW JUDGE ERRED BY FAILING TO ORDER APPROPRIATE RELIEF

- A. The Administrative Law Judge failed to include in his Recommended Order and Notice to Employees the standard remedy for a conclusion of law that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information, including an order that Respondent cease and desist from failing and refusing to furnish the Union with information that is relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Respondent's employees.**

Judge Pollack concluded that 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. (ALJD P7 L20-21). Additionally, as argued above, the Acting General Counsel contends that the Judge should have more broadly concluded that Respondent violated Section 8(a)(5) and (1) of the Act by and refusing to furnish the Union with information that is relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Unit employees, not just for grievance processing. Notwithstanding the breadth of the Judge's conclusion of law, the Judge failed to order appropriate relief for Respondent's violation of Section 8(a)(5) and (1) of the Act by only ordering Respondent to cease and desist from refusing to furnish information relevant for purposes of grievance handling. (ALJD P8 L1-2).

In cases where the Board has upheld a violation of Section 8(a)(5) and (1) of the Act based on a respondent's refusal to provide information, the Board has consistently adopted the administrative law judge's recommended order with broad language requiring respondent to cease and desist from refusing to furnish information to the union that is relevant and necessary to the Union's performance of its duties as exclusive collective-bargaining representative of respondent's employees. The Board does not limit the cease and desist orders with any qualifying statement that respondent need only refrain from refusing to furnish information relevant for a particular purpose, such as grievance processing. *See, e.g., Dover Hospitality*

Services, Inc., 359 NLRB No. 126, slip op. 1 (2013) (Board modified the judge’s recommended order in several respects, but retained broad cease and desist language regarding refusal to provide information “relevant and necessary to the Union’s performance of its functions as the collective-bargaining representative of the Respondent’s employees”); *see also National Extrusion & Manufacturing Company*, 357 NLRB No. 8 (2011); *Bud Antle, Inc.*, 359 NLRB No. 140 (2013).

Moreover, in cases where the Board itself initially formulates the cease and desist language for a respondent’s refusal to provide information, the Board similarly orders that the respondent cease and desist from refusing to provide information that is generally relevant and necessary to the union’s performance of its duties as exclusive collective-bargaining agent, rather than solely for a particular purpose. *See Sprain Brook Manor Nursing Home, LLC*, 348 NLRB No. 84, slip op. 4 (2006) (in granting a motion for summary judgment on an allegation that respondent failed to provide certain presumptively relevant information the Board provided broad cease and desist language); *Park Avenue Investments, LLC*, 359 NLRB No. 134, slip op. 7 (2013) (in granting default judgment on allegation that respondent failed to provide requested scheduling and hours information the Board provided for issued broad cease and desist language). This is true even in the case where a union requested information that was allegedly relevant to grievance processing. *Atlantic Express of L.A., Inc.*, 348 NLRB No. 40, slip op. 7 (2006) (in granting default judgment on allegation that respondent refused to provide information requested in connection with processing a grievance the Board ordered broad cease and desist language).

In his Recommended Order, Judge Pollack ordered that Respondent cease and desist from failing and refusing to bargain collectively and in good faith with the Union, by refusing to

furnish information relevant for purposes of grievance handling. (ALJD P8 L1-2). The Judge erred in not ordering Respondent to cease and desist from failing and refusing to bargain collectively and in good faith with the Union, and by refusing to furnish the Union with information that is relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Respondent's employees. Thus, in this regard, the Recommended Order should be corrected to include a broader cease and desist statement.

B. The Administrative Law Judge's failure to include in his Recommended Order and Notice to Employees the standard remedy for a conclusion of law that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide information, including notice language that Respondent will not refuse to bargain collectively with Communication Workers Of America, Local 7774, by refusing to furnish information that is relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Respondent's employees.

In his Recommended Order, Judge Pollack ordered Respondent to post a notice at its facilities with language stating that Respondent will not refuse to bargain collectively with the Union by refusing to furnish information relevant for purposes of grievance processing. (ALJD P8 L13-14 and Appendix). This notice language is parallel to the cease and desist language in the Judge's Recommended Order that the Acting General Counsel takes exception to above. For the same reasons that the Acting General Counsel has argued the cease and desist language is inappropriately narrow, the Acting General Counsel asserts that the Judge's Recommended Notice to Employees is also deficient.

In cases where the Board has found a violation of Section 8(a)(5) and (1) based on a respondent's refusal to provide information (in both cases where the Board upholds an administrative law judge's decision and cases where the Board grants summary judgment or default judgment) the Board has consistently approved and ordered notice language stating that

the respondent will not refuse to bargaining collectively with the union by failing and refusing to furnish the union with information that is relevant and necessary to the union's performance of functions as the exclusive collective-bargaining representative of the respondent's employees. The Board does not provide for limited notice language merely stating that respondent will not refuse to provide information relevant for a particular purpose, such as grievance processing. *See, e.g., Dover Hospitality Services, Inc.*, 359 NLRB No. 126, slip op. 3 (2013) (Board substituted the judge's recommended notice with a notice including language that respondent will not refuse to bargain collectively with the union "by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative"); *see also National Extrusion & Manufacturing Company*, 357 NLRB No. 8 (2011); *Bud Antle, Inc.*, 359 NLRB No. 140 (2013); *Sprain Brook Manor Nursing Home, LLC*, 348 NLRB No. 84 (2006); *Park Avenue Investments, LLC*, 359 NLRB No. 134 (2013); and *Atlantic Express of L.A., Inc.*, 348 NLRB No. 40 (2006).

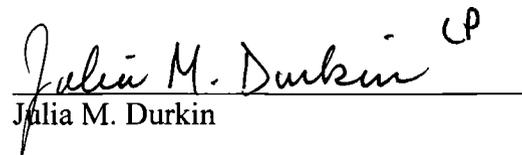
In his Recommended Order and Notice to Employees, Judge Pollack ordered that Respondent post a notice stating that Respondent will not refuse to bargain collectively with the Union by refusing to furnish information relevant for purposes of grievance processing. (ALJD P8 L13-14 and Appendix). The Judge erred in not ordering Respondent to post a notice with more general language that Respondent will not refuse to bargain collectively with the Union, by refusing to furnish the Union with information that is relevant and necessary to the Union's performance of its functions as exclusive collective-bargaining representative of Respondent's employees. Thus, in this regard, the Notice to Employees should be corrected to include the broader statement.

CONCLUSION

The Acting General Counsel respectfully requests that the Board modifies the Judge's Decision and Order with respect to the statement of fact, conclusion of law, cease and desist order, and notice language discussed above. In all other respects, the Acting General Counsel agrees with the Judge's Decision and Order and urges that it be adopted by the Board.

DATED at Denver, Colorado, this 15th day of July, 2013.

Respectfully submitted,

 CP

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Counsel for the Acting General Counsel's Brief in Support of Limited Exceptions to the Administrative Law Judge's Decision and Order**, together with this Certificate of Service, was E-Filed or E-mailed as indicated below, to the following parties on: July 15, 2013.

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