

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 ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

Submitted by:

Julia M. Durkin
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower
Denver, Colorado 80202-5433
(303) 844-3551

Table of Contents

Table of Authorities 3

I. INTRODUCTION 4

II. RELEVANT BACKGROUND 5

III. RESPONSE TO RESPONDENT’S EXCEPTIONS 9

 A. The Judge did not err in concluding that Respondent was obligated to furnish the Union with relevant requested information pertaining to Unit employees’ merit-based pay increases. 9

 B. The Judge did not err in applying waiver principles rather than the contract coverage standard. 16

 C. The Judge did not err by concluding that the Union’s requested information is relevant for grievance processing. 18

 D. The Judge did not err by failing to address Respondent’s wholly unsupported argument that the requested information is confidential or private. 22

IV. CONCLUSION 27

Table of Authorities

Supreme Court Cases

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 14, 17, 26

NLRB v. Acme Industrial Co., 385 U.S. 432 (1967) 10, 11, 14

Circuit Court Cases

Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992) 17

NLRB v. Postal Service, 8 F.3d 832 (D.C. Cir. 1993) 17

Regan-Touhy v. Walgreen Co., 526 F.3d 641 (10th Cir. 2008) 22

NLRB Cases

American Baptist Homes of the West, 359 NLRB No. 46, slip op. (2012) 10

Boise Cascade Corp., 279 NLRB 429 (1986) 10

Boston Herald-Traveler Corp., 110 NLRB 2097 (1954) 24

Detroit Newspaper Agency, 317 NLRB 1701 (1995) 15, 25

GTE Automatic Electric Inc., 261 NLRB 1491 (1982) 15

Heartland Health Care Center – Plymouth Court, 359 NLRB No. 155, slip op. (2013) 17, 26

Industrial Welding Co., 175 NLRB 477 (1969) 12

Living and Learning Center, Inc., 251 NLRB 284 (1980) 15

Michigan Bell Telephone Co., 306 NLRB 281 (1992) 15

O & G Industries, 269 NLRB 986 (1984) 21

Provena St. Joseph Medical Center, 350 NLRB 808 (2007) 17, 25

Safeway Stores, Inc., 236 NLRB 1126 (1978) 21

TCI of New York, 301 NLRB 822 (1991) 15

The Aerospace Corp., 314 NLRB 100 (1994) 24, 25

York International Corp., 290 NLRB 438 (1988) 11

I. INTRODUCTION

This case is based on charges filed by Communications Workers of America, Local 7774 (Union) against Catholic Health Initiatives Colorado d/b/a Centura Health – St. Mary-Corwin Medical Center (Respondent) alleging that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (Act), by failing and refusing to provide relevant requested information. Specifically, the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 27-CA-092767 and 27-CA-097152, as amended (Complaint), alleges that on about September 5 and November 27, 2012, the Union requested several pieces of information pertaining to bargaining-unit employees’ recent merit-based pay increases and that Respondent failed and refused to provide the information. (G.C. Ex. 1(j) and G.C. Ex. 2).¹

The trial in this matter was held on April 16, 2013, in Denver, Colorado, before The Honorable Jay R. Pollack, Administrative Law Judge (Judge). Thereafter, Counsel for the Acting General Counsel (Acting General Counsel) and Respondent submitted briefs to the Judge. On June 17, 2013, Judge Pollack issued a Decision and Order finding that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with the requested information. (ALJD P7 L20-21).

Respondent has filed four exceptions to the Judge’s Decision and Order. In its exceptions, Respondent does not dispute the Judge Pollack’s factual findings, but takes issue with the Judge’s legal analysis and ultimate conclusion of law that Respondent violated Section 8(a)(5) and (1). Respondent’s exceptions contain four principle arguments (and many associated sub-arguments). First, Respondent argues that Judge Pollack erred by not finding that certain

¹ “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, followed by the relevant page and line numbers. “ALJD” refers to the Administrative Law Judge’s Decision and Order in this case, followed by the relevant page and line numbers.

subjects are reserved in the parties' collective-bargaining agreement as management's rights, and that, therefore, the Union has no right to information pertaining to those subjects and Respondent is not obligated to provide it. Second, Respondent argues that the Judge erred by not applying contract coverage principles to conclude that certain subjects are covered by the parties' collective-bargaining agreement and agreement on merit-based pay increases, and that, therefore, the Union has no right to bargain over those covered subjects, including no right to request related information. Third, Respondent argues that Judge Pollack erred by finding that the Union could file grievances regarding employees' merit-based pay increases. Respondent asserts that the parties' agreements do not allow for such grievances and, therefore, the requested information is not relevant and the Judge should have found that Respondent is not obligated to provide it. Lastly, Respondent argues that the judge erred in not considering and upholding Respondent's argument that the requested information is "personal" and, therefore, the Union is not entitled to it and Respondent is not obligated to provide it.

The Acting General Counsel submits that Judge Pollack did not err in his legal analysis of the issues in this case and in his ultimate conclusion of law that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with the requested information.²

II. RELEVANT 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 at an adjunct facility (Unit). (Jt. Ex. 1; Tr. 14:5-25;

² The Acting General Counsel does not dispute the Judge's conclusion that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide information. However, the Acting General Counsel has taken exceptions to the breadth of the Judge's conclusion of law and related provisions in his Recommended Order and Notice to Employees.

ALJD P2 L26-27). Respondent and the Union's current collective-bargaining agreement covering Unit employees (CBA) is effective from October 1, 2010 to September 30, 2014. (Jt. Ex. 2).

Certain provisions of the CBA are relevant to understanding Respondents exceptions and arguments in support thereof. Article 2 of the CBA contains a broad management's rights provision reserving to management the exclusive right to take any action it deems appropriate, unless explicitly limited by another provision of the CBA. (Jt. Ex. 2). Article 2 also contains a long list of specific rights exclusively reserved by management, including "the establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship required." (Jt. Ex. 2). Article 2 states that "[a]ll other rights of management are also expressly reserved, even though not enumerated above, unless they are limited by the clear and explicit language of some other provision of this Agreement." (Jt. Ex. 2). Article 20 of the CBA contains a standard zipper clause stating that the parties agree "that the other shall not be obligated to bargain, with respect to any subject matter whatsoever since this [CBA] is the sole source of rights for the employees."

Most relevant to the background of this case is Article 24 of the CBA, which provides for two wage and benefit reopener periods between August 1 and September 15 in years 2012 and 2013.³ (Jt. Ex. 2). Beginning at the end of July 2012⁴ and continuing into early September, Respondent and the Union negotiated over wages pursuant to the wage reopener in the CBA. Union Staff Representative Lew Ellingson (Ellingson) and Respondent's Vice President of

³ The Acting General Counsel filed an exception to the Judge's Decision and Order on the basis that Judge Pollack incorrectly described the wage and benefit reopener period as being from August 1, 2012 to September 15, 2013. In this Brief, the Acting General Counsel relies on the wage and benefit reopener periods as explicitly stated in the parties' CBA.

⁴ All dates hereinafter are in 2012, unless otherwise specified.

Human Resources James Humphrey (Humphrey) were the parties' respective bargaining agents. By September 5, the Union and Respondent reached an agreement on merit-based pay increases for Unit employees, whereby Unit employees would receive a 0%, 2.75%, 3.5%, or 5% wage increase based on how they performed on certain goals and behaviors, as measured in their individual performance appraisals (Pay for Performance Agreement or Agreement).⁵ (Jt. Ex. 3). Under the Agreement, for the evaluation period of July 1, 2011 to June 30, 2012, Unit employees are judge on whether they meet, do not meet, or exceed various unspecified goals and values that are established by Respondent. (Jt. Ex. 3).

The Pay for Performance Agreement specifies "an employee's direct supervisor shall have meaningful input in the employee's annual evaluation" and that "[e]ach Employee will receive an annual performance appraisal." (Jt. Ex. 3). During negotiations over the Agreement, Humphrey also informed Ellingson that employees had received a mid-year evaluation in anticipation of merit-based pay increases. (Tr. 27:6-25; ALJD P3 L7-8). The Pay for Performance Agreement states that the "performance appraisal shall be discussed with the employee" and that "[t]he Employee may request a copy of the performance appraisal." (Jt. Ex. 3). Despite suggestions by Respondent in support of its exceptions, the Agreement does not state who else may or may not request a copy of a Unit employee's performance appraisal or state that the Union may *not* request a copy.

The Pay for Performance Agreement further states: "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

⁵ Respondent refers to this Pay for Performance Agreement as a Letter of Agreement or "LOA" throughout its exceptions and brief in support of exceptions. Both descriptions refer to the same agreement on merit-based pay increases.

9 or 10.” (Jt. Ex. 3). Article 8 of the CBA broadly describes a grievance as “a dispute or controversy between the Employer and the employee.” (Jt. Ex. 2). Article 9 of the CBA describes an “arbitrable grievance” as “a dispute or controversy over the specific written terms of [the CBA].” (Jt. Ex. 2). Article 10 provides for expedited arbitration for grievances involving a discharge or layoff. (Jt. Ex. 2). Contrary to suggestions by Respondent, the Pay for Performance Agreement does not contain any provision concerning what, if any, grievance and arbitration processes are available to an employee whose performance appraisal results in higher than a 0% increase in pay.

On September 4,⁶ just before the Pay for Performance Agreement was executed, the Union requested information pertaining to the expected merit-based pay increase. (Jt. Ex. 8A; ALJD P4 L19-20). The Union requested: “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.” (Jt. Ex. 8B; ALJD P4 L21-25). Subsequently, on November 27,⁷ the Union requested the following information relating to the Agreement:

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.

⁶ 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; ALJD P4 L19-20).

⁷ 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; ALJD P6 L14-21).

(Jt. Ex. 16; ALJD P6 L14-21). Judge Pollack found that, with the exception of providing employee hire dates,⁸ Respondent did not provide the Union with any of the information it requested on September 4 or November 27. (ALJD P6 L9-11 and P 7 L9-10). Judge Pollack's Recommended Order affirmatively requires Respondent to furnish the Union with all of the information that the Union requested on September 4 and November 27. (ALJD P8 L10-11).

III. RESPONSE TO RESPONDENT'S EXCEPTIONS

A. The Judge did not err in concluding that Respondent was obligated to furnish the Union with relevant requested information pertaining to Unit employees' merit-based pay increases.

Respondent first excepts to Judge Pollack's Decision on the basis that Judge Pollack erred in concluding that Respondent has an obligation to bargain with the Union, and therefore provide information, regarding the "establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship," where such undertakings are exclusively reserved as management rights in the parties' CBA. At first blush, Respondent's first exception is confusing, because Judge Pollack did not actually address Respondent's reservation of these particular management rights. Nor did Judge Pollack explicitly find that Respondent must bargain with the Union regarding the "establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship" in reaching his conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the requested information.

It appears that Respondent takes issue with Judge Pollack's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide *all* of the requested information,

⁸ The evidence admitted at the hearing establishes that Respondent provided the Union with Unit employees' hire dates on January 2, 2013, not in response to the Union's September 4 or November 27 information requests, but according to a separate contractual obligation requiring Respondent to furnish such information on three set dates each year. (Tr. 70:9-17; G.C. Ex. 7A and 7B).

because some of the requested information arguably relates to “the establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship,” which Respondent asserts is a management right. Respondent argues that since this subject is reserved as a management right, the Union has no right to bargain over the subject and, therefore, no right to request any related information. For this reason, Respondent seemingly asserts that Judge Pollack should have concluded that Respondent is not obligated to provide any of the Union’s requested information.

Respondent’s argument is severely lacking for several reasons. First, Judge Pollack correctly stated the applicable Board precedent outlining the Union’s right to relevant requested information. In his Decision, Judge Pollack did not rely on any determination that the Union is entitled to the requested information because it is entitled to bargain over a subject that Respondent asserts is a management right. Rather, Judge Pollack stated the long-standing general principle 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 L41-43) (citing *Boise Cascade Corp.*, 279 NLRB 429 (1986)). Furthermore, Judge Pollack relied on the oft-cited U.S. Supreme Court case of *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967) in stating that “[i]t 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.” (ALJD P6 L45-48) (citing *Acme Industrial Co.*, 385 U.S. at 435-436). The Board continues to apply the principles of *Acme Industrial Co.* See, e.g., *American Baptist Homes of the West*, 359 NLRB No. 46 (2012). Therefore, Judge Pollack applied the correct legal standard in analyzing whether the Union was entitled to the requested information of September

4 and November 27. Judge Pollack also correctly concluded that the Union is entitled to the relevant information. The requested information relates to Unit employees' wages and therefore, it is presumptively relevant. *York International Corp.*, 290 NLRB 438 (1988). The requested information is also relevant to the Union in policing the Pay for Performance Agreement. *Acme Industrial Co.*, 385 U.S. at 435-438.

In support of its first exception, Respondent argues that the parties' CBA specifically reserves to management the right to "the establishment of quality and quantity standards and the judgment of the quality and quantity of workmanship." Respondent argues that the Union has no right to bargain over this subject and, by extension, no right to request related information. At the outset, Respondent is correct that Article 2 of the parties' CBA gives management such exclusive right. However, here, the Union did not seek to bargain with Respondent over the establishment of quality and quantity standards or the judgment of the quality and quantity of workmanship, nor did the Union request information related to that CBA provision. Any suggestion to the contrary is unfounded. The Union clearly requested information relating to the Pay for Performance Agreement and Unit employees' merit-based wage increases. The subject line of the emails submitting both the September 4 and November 27 request refer directly to the Pay for Performance Agreement. (Jt. Ex. 8A and 16).

In its November 27 request, the Union seeks, among other items, "the evaluations of all bargaining unit employee for whom merit raises were recommended," the "reasons for issuing merit raises to those employees," and "[t]he methodology used to arrive at the numerical ratings." (Jt. Ex. 16). Respondent appears to assume that these items seek information relating to "the establishment of quality and quantity standards or the judgment of the quality and quantity of workmanship." However, taken in context of the rest of the Union's entire request

and the discussions leading up to the request, these items clearly seek information pertaining to how Respondent determined the percentage pay increase given to each Unit employee under the Pay for Performance Agreement. The Union's request does not seek information to challenge or bargain over a management right to establish quality standards or judge quality workmanship.

Even assuming that Respondent is correct, and certain items in the Union's November 27 request seeks information pertaining to "the establishment of quality standards and the judgment of quality and quantity of workmanship," Respondent is incorrect that the Union has no right to such information. The Board has held that, even where a subject becomes a management right, a waiver of the right to negotiate over that subject does not encompass a waiver of the right to related information. *See, e.g., Industrial Welding Co.*, 175 NLRB 477 (1969) (adopting the Administrative Law Judge's decision that even assuming the union waived the right to negotiate over merit increases the union did not give up its right to know the names of the employees receiving merit increases and the amounts).

This is especially true here, where the requested information is presumptively relevant, and has obvious relevance separate and aside from any management right. Therefore, Respondent is still obligated to provide the information. In support of its exception, Respondent mischaracterizes hearing testimony of Lew Ellingson⁹ to suggest that the Union's *only* purpose

⁹ Respondent quotes testimony by Lew Ellingson stating that the Pay for Performance Agreement will not be the subject of bargaining sessions (in the 2013 wage reopener period). Respondent selectively omitted this testimony immediately following that statement:

Q: You testified that you sold the employees on the pay for performance agreement in September of this year.

A: I did.

Q: Have you sold the employees for the pay for performance agreement for next year?

A: I think it's pretty much sold itself out.

Q: Is the information that the Union requested, do you have any purpose in using that information for future bargaining sessions?

A: We could have.

(Tr. 114: 25 – 115:9).

in requesting the information was to challenge “the establishment of workmanship standards” and “supervisors’ judgments in their ratings of employees,” which Respondent asserts are management rights.

However, the record evidence is clear that the Union repeatedly explained and demonstrated the requested information’s various relevant purposes. In his first July bargaining conversation with Vice President of Human Resources James Humphrey, Ellingson explained the need to get information about Pay for Performance to show employees that the plan is fair and just. (Tr. 27:1-5). In another telephone conversation, Ellingson told Humphrey he was concerned that two Unit employees did not get midyear reviews and that is why he wanted information on every employee. (Tr. 33:3-6). In an August 27 email to Humphrey, Ellingson stated that the Union will agree to Pay for Performance on a one-year basis and test it for accuracy and reasonableness. (Jt. Ex. 7). In this email, Ellingson also stated that the Union would monitor any appeals of employees’ ratings. (Jt. Ex. 7). The very title of the Union’s email attaching the September 4 information request stated the purpose of the request as “TO ASCERTAIN FAIRNESS AND OBJECTIVENESS OF PAY FOR PERFORMANCE PLAN.” (Jt. Ex. 8B). Ellingson later repeated to Humphrey in a September 12 email that one of the “main reasons” for the request for information relates to verifying if employees had their midyear discussions with supervisors. (Jt. Ex. 10). In a September 28 email to Humphrey, Ellingson also explained that the Union requested the information to “understand how everything came together.” (Jt. Ex. 14). Later, on October 1, when Ellingson spoke to Respondent Attorney Melvin Sabey (Sabey) about the request, he told Sabey that the Union needs the requested information to make sure the raises given were just, fair, and equitable and to make sure employees had their midyear reviews. (Tr. 62:16-25). Finally, in an October 3 email to Sabey,

Ellingson offers that he and Union President Mary Ann Vegas (Vegas) will review the requested information to determine that the correct procedures were followed in establishing employees' scores. (Jt. Ex. 15).

In this case, the requested information is clearly relevant for purposes beyond any management rights provision, and, therefore, Respondent must provide the information. For these reasons Judge Pollack did not err in concluding that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the requested information.

In further support of its first exception, Respondent argues that Article 20 in the parties' CBA, which states that neither party is obligated to bargain during the term of the CBA, relieves Respondent from bargaining with the Union regarding the requested information. This provision is a standard "zipper clause" that relieves the parties from midterm bargaining. Initially, in this case, it is evident that the Union was not seeking midterm bargaining with Respondent over any subjects covered in the CBA; the Union was merely seeking information relating to Unit employees' merit-based pay increases as determined under the Pay for Performance Agreement. It is well settled that an employer's obligation to furnish a union with relevant requested information is a continuing one, extending beyond contract negotiations and "applies to labor-management relations during the term of an agreement." *Acme Industrial Co.*, 385 U.S. at 435-436.¹⁰

The Board has held that a union only relinquishes a statutory right, such as the right to relevant requested information, by a clear and unmistakable waiver. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Board has held that the clear and unmistakable waiver

¹⁰ Some of Respondent's arguments appear to be founded on an incorrect belief that a union's right to relevant information is dependent on present bargaining, and is extinguished once the parties' reach a negotiated agreement.

standard applies to zipper clauses, such as the one found in the CBA. *Michigan Bell Telephone Company*, 306 NLRB 281, 282 (1992). Such zipper clauses relieve the parties from bargaining over subjects during the term of the contract only if those subjects are specifically contemplated during bargaining as subject to the zipper clause. *See, e.g., GTE Automatic Electric Inc.*, 261 NLRB 1491, 1491-1492 fn. 3 (1982); *TCI of New York*, 301 NLRB 822 (1991). Here, there is no record evidence concerning the parties' negotiations for the current CBA. There is no evidence that the parties discussed the Union's right to request relevant information relating to future wage proposals during those negotiations or that the issue would be subject to the zipper clause. Therefore, Respondent cannot substantiate an argument that this clause constitutes a clear and unmistakable waiver of the Union's right to such information.

Finally, in the alternative to arguing that it has no obligation to bargain with the Union over the requested information, Respondent asserts that it did adequately bargain with the Union regarding the information requests, because Respondent repeatedly offered to discuss the requests. In his Decision, Judge Pollack correctly outlined the requirement that "once a union has made a good faith request for information, the Employer must provide relevant information promptly, in useful form." (ALJD P6 L9-12) (citing *Detroit Newspaper Agency*, 317 NLRB 1701, 1702 (1995)). Respondent does not satisfy its obligation to provide relevant requested information by merely discussing the request. In this case, instead of providing the requested information, Respondent repeatedly required the Union to explain the relevance of the requests. Where, as here, information is presumptively relevant, the employer has the burden of proving lack of relevance, and a union is not required to make a specific showing of relevance unless the employer has submitted evidence to rebut the presumption. *See Living and Learning Center, Inc.*, 251 NLRB 284, 288 fn.3 (1980), *enfd.* 652 F.2d 209 (1st Cir. 1981). Moreover, as

described above, the Union in fact repeatedly explained the relevance of the requested information to Respondent, above and beyond its burden. In this case, Respondent neither provided the requested information to the Union nor asserted any argument to rebut the presumptive relevance of the requested information. Therefore, the Union had no obligation to continue discussing its requests with Respondent and was simply entitled to receive the requested information.

In conclusion, Respondent offers many arguments in support of its first exception. All of these arguments are either lacking a basis in Board precedent or an accurate depiction of the undisputed facts of the case. Therefore, for the reasons discussed above, none of Respondent's arguments are sufficient to challenge Judge Pollack's conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with the requested information.

B. The Judge did not err in applying waiver principles rather than the contract coverage standard.

In its second exception, Respondent initially asserts that Judge Pollack erred in applying waiver principles to determine that the Union had a right to request information relevant for grievance processing. Respondent asserts that Judge Pollack should have applied contract coverage principles to this case. Respondent then argues that the Judge should have concluded that certain of the requested items relate to management's rights that are "covered by" the CBA. The Acting General Counsel submits that Judge Pollack did not err in applying longstanding waiver principles in lieu of the contract coverage standard. Moreover, as addressed above, even conceding that certain management rights are expressly reserved to Respondent in the CBA, without relying on contract coverage principles, these management rights do not relieve Respondent from providing the relevant requested information.

Respondent correctly asserts that the Court of Appeals for the D.C. Circuit and other circuit courts have applied a “contract coverage” standard to analyze whether a certain subject is covered in the parties’ bargained-for agreement, thereby satisfying an employer’s statutory obligation to bargain with the union. *See, e.g., NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992). However, the Board expressly rejected this contract coverage standard in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), in favor of upholding the Board’s longstanding clear and unmistakable waiver standard, i.e., that an employer must bargain with the union over mandatory subjects of bargaining unless the union has clearly and unmistakably waived the right. *Id.* at 815. Since *Provena*, the Board has continued to apply the clear and unmistakable waiver principle in lieu of the contract coverage standard. *See Heartland Health Care Center – Plymouth Court*, 359 NLRB No. 155, slip op. at 3 fn. 1 (2013).

In his Decision, Judge Pollack applied the Board’s longstanding waiver standard to address whether the Union had waived the right to file grievances over merit-based pay increases above 0%. The Judge found that a waiver of such a right must be clear and unmistakable and that silence in the Pay for Performance Agreement did not constitute such waiver. Judge Pollack was correct in his assessment of the Board’s waiver principles. *Metropolitan Edison Co.*, 460 U.S. 693; *King Broadcasting Co.*, 324 NLRB 332. And the contract coverage standard has no applicability in this case.

Additionally, in support of its second exception, Respondent repeats an argument it offers in support of its first exception. Specifically, Respondent argues that certain management rights are found in, or “covered by,” the parties’ CBA and, therefore, Respondent has no obligation to bargain with the Union over these subjects, including by providing related information. The

Acting General Counsel addressed this argument above in discussing Respondent's first exception. To summarize, even agreeing with Respondent that certain rights are reserved exclusively to management in the CBA, the requested information is not related to or dependent upon bargaining over those rights. The information is relevant for several other stated purposes, on top of its presumptive relevance. Therefore, Judge Pollack's ultimate conclusion that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the information is sustained.

C. The Judge did not err by concluding that the Union's requested information is relevant for grievance processing.

In its third exception to the Judge's Decision, Respondent argues again that the Judge erred by concluding that the Union's requested information is relevant for grievance processing. Respondent argues that the Pay for Performance Agreement, read in conjunction with the CBA, does not give the Union the right to file grievances for employees receiving more than a 0% pay increase, and therefore, the Union has no right to request information relating to these employees' pay increases. Even following the contract interpretation standards that Respondent maintains, Respondent's argument must fail because it ignores critical undisputed facts. Moreover, assuming *arguendo* that Respondent is correct in its interpretation of the scope of the grievance procedures in the Pay for Performance Agreement, all of the Union's requested information is still relevant for grievance processing and Respondent is obligated to provide it.

Respondent argues that Judge Pollack erred in this Decision in finding that the Union did not waive a right to file grievances for employees who received more than a 0% merit-based pay increase under the Pay for Performance Agreement. Judge Pollack based this finding on the fact that nothing in the Pay for Performance Agreement specifically prohibits the Union from filing

such grievances. He found that the Agreement is silent in this regard and that the Union intended at all times to be able to test any employee's pay increase. (ALJD P7 L5-7). The Agreement merely states that "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." (Jt. Ex. 3). Respondent asserts that Judge Pollack should have interpreted the silence with regard to employees receiving more than a 0% pay increase as evidence that the Union specifically does not have the right to file grievances for those employees.

In support of this argument, Respondent recites Article 2 of the CBA, which states that all rights are reserved to management unless limited by clear and explicit language of some other provision in the CBA. (Jt. Ex. 2). Respondent declares that this provision means that the Union does not have any right unless it is clearly and explicitly stated in the CBA. By extension of this argument, Respondent claims that since the right to file grievances for employees receiving more than a 0% increase is not clearly and explicitly recited in the Pay for Performance Agreement, the Union has no such right. Respondent also argues that there is a clear pattern in the CBA so that if the eligibility for a particular benefit is not stated, that benefit is not applied. In this regard, Respondent contends that since the Pay for Performance Agreement does not affirmatively state that employees receiving pay increases over 0% are eligible for the benefit of filing grievances, no such benefit is afforded those employees.

Without even addressing the legal logic of Respondent's arguments, which is unsupported by any Board law, the arguments are clearly insufficient to alter Judge Pollack's conclusion that the Union can file grievances for employees with higher than 0% pay increases. Respondent's arguments ignore the critical fact that the Union's right to file the grievances is

explicitly covered by the parties' CBA and not solely the Pay for Performance Agreement. Article 8 of the CBA broadly defines a grievance as "a dispute or controversy between the Employer and the employee." (Jt. Ex. 2). Article 9 of the CBA describes an "arbitrable grievance" as "a dispute or controversy over the specific written terms of [the CBA]." (Jt. Ex. 2). Respondent does not dispute that the Pay for Performance Agreement is incorporated into the written terms of the CBA. These CBA provisions concerning grievances give the Union the "clear and explicit" right to file grievances concerning any dispute between Respondent and Unit employees, including disputes over pay increases larger than 0%. Nothing in the Pay for Performance Agreement, or elsewhere in the CBA, limits this right to file grievances with respect to employees who receive more than a 0% pay increase. (Jt. Ex. 3).¹¹ Therefore, even under Respondent's own logic and contract interpretation standards, the CBA gives the Union the right to file these grievances. Therefore, Judge Pollack did not err in finding this to be the case, even if the Judge reached the conclusion by a different theory.¹²

Furthermore, even assuming, without agreeing, that Respondent is correct and the CBA and Pay for Performance Agreement provide no right for the Union to file grievances for Unit employees receiving higher than a 0% pay increase, the requested information is still relevant for grievance processing and the Union is entitled to receive it. The Union disputes Respondent's interpretation of the grievance procedures in the Pay for Performance Agreement. (Tr. 89:7-13).

¹¹ Respondent's reading of the grievance language in the Pay for Performance Agreement critically misplaces the word "only," so as to read the agreement as essentially stating that only employees who receive a 0% pay increase can file grievances. The Agreement actually states that "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." (Jt. Ex. 3). The word "only" clearly modifies what grievance provisions employees with a 0% pay increase have access to. The word does not modify which employees have access to grievance procedures generally.

¹² Judge Pollack found that the Union did not clearly and unmistakably waive the right to file grievances for employees receiving a pay increase larger than 0%, because the Pay for Performance Agreement is silent in this respect. (ALJD P7 L1-7).

And the Union always intended to be able to challenge, or grieve, any employees' merit-based pay increase (once it finds out what they are) if there is an objective reason to believe it is unfair. (Jt. Ex. 10). In any event, the parties' apparent dispute over applicable grievance procedures is immaterial to the issue presented to Judge Pollack, which is whether the requested information is relevant to grievance processing. It is well established that information must be turned over to the union so that it may determine for itself whether there is merit to a potential grievance, before any decision on a grievance's arbitrability is made. *See O & G Industries*, 269 NLRB 986, 987 (1984) (an employer's assertion that a grievance is not arbitrable is not a basis for denying a related information request); *Pennsylvania Power Co.*, 301 NLRB at 1105 (the Board is not concerned with whether a potential grievance is ultimately arbitrable under the parties' contract). The Union is entitled to relevant information for grievance processing, even if future grievances are doomed to fail. Here, the Union is entitled to the requested information regarding all Unit employees' pay increases, even if an arbitrator would ultimately decide that the CBA and Pay for Performance Agreement do not allow the Union to grieve or arbitrate pay increases over 0%.

Finally, Respondent admits that the Union can at least file grievances for employees who receive a 0% merit-based pay increase, and one employee did in fact receive no increase. (G.C. Ex. 9). A union is not required to pursue a grievance in an information vacuum and can request comparator information. *Safeway Stores, Inc.*, 236 NLRB 1126, 1128-29 (1978). The requested information regarding all Unit employees' merit-based pay increases is relevant for the Union to determine the fairness of even one employee's 0% pay increase. Therefore, the information the Union requested on September 4 and November 27 is relevant to potential future grievances, even under Respondent's own interpretation of the scope of access to the grievance procedures.

For all of the reasons described above, Judge Pollack did not err in finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide information relevant to grievance processing.

D. The Judge did not in err by failing to address Respondent’s wholly unsupported argument that the requested information is confidential or private.

In its fourth exception, Respondent asserts that Judge Pollack erred by not addressing and upholding the “bargained-for confidentiality and privacy provisions of the [Pay for Performance Agreement].” Essentially, Respondent argues, as it did in its post-hearing brief to the Judge, that the Pay for Performance Agreement contains a negotiated provision that makes employees’ performance evaluations personal and private, and, therefore, confidential, even from the Union. Respondent appears to argue that it should be relieved from providing the Union with any of the requested information on this basis. Respondent’s argument lacks any support in Board precedent and relies on a distortion of the language of the Pay for Performance Agreement and the undisputed facts of the case. For these reasons, Judge Pollack did not err by ignoring Respondent’s argument in his Decision.

In support of its fourth exception, Respondent initially states that “[a]s a general rule, employment records are confidential, particularly where the employee is not even a party to the litigation.” Respondent cites to the case of *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641 (10th Cir. 2008), which involves a private suit by an individual against a pharmacy for breach of confidentiality and disclosure of confidential medical information. The case does not implicate the Act or a union’s right to relevant information pertaining to represented employees. Therefore, Respondent’s initial reliance on this case is entirely misplaced.

Board precedent is clear and settled on the topic of relevant requested information that is allegedly confidential. “The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality claims will be upheld, but blanket claims of confidentiality will not.” *Pennsylvania Power Co.*, 301 NLRB at 1105-1106. In response to the Union’s information requests on September 4 and November 27, Respondent claimed that the requested information was confidential, but never specified exactly what pieces of the requested information were confidential. (Tr. 112:6-17). Therefore, Respondent did not even clear the initial hurdle of asserting a legitimate confidentiality claim, rather than merely a blanket claim. Only after the hearing in this matter, in its post-hearing brief to the Judge and its brief in support of exceptions, did Respondent somewhat specify that the asserted confidential information is employees’ performance evaluations. This post-hoc description is insufficient to satisfy the bargaining obligation with the Union.

Moreover, there is no record evidence to substantiate Respondent’s asserted confidentiality concern. At the hearing, Respondent submitted no evidence that Unit employees have any expectation of, or concern regarding, the confidentiality of their performance evaluations and information relating to their merit-based pay increases. Only after the fact, in support of its exceptions, does Respondent proffer an argument to attempt to substantiate its confidentiality concern. Respondent cites to testimony by one Unit employee – Union Secretary/Treasurer Debra (Krenzel) – that her performance appraisal was only accessible to her and her supervisors. While it is true that Krenzel’s testimony establishes that appraisals are initially available electronically to only the relevant employee and their supervisor, this fact does not establish that Unit employees generally have an expectation that their evaluations will be kept confidential, especially from their own collective-bargaining representative. (Tr. 124: 3-

17). Similarly, it is insignificant that Lew Ellingson testified that he “would understand a person wanting [their evaluations] to be kept confidential.” (Tr. 91:7-8). Contrary to Respondent’s assertions, the fact that a union representative can understand that an unspecified employee may want their evaluations to be kept confidential does not establish that actual employees reasonably expect their evaluations to be kept confidential, from their collective-bargaining representative no less, or that the evaluations in fact contain confidential information.¹³ See, e.g., *Boston Herald-Traveler Corp.*, 110 NLRB 2097, 2099-2100 (1954) (employer’s confidentiality claim rejected because the argument that some employees might prefer financial anonymity rested on a speculative basis, and, in any event, such individual desires must yield to the interests of the great majority of workers represented in the unit); *The Aerospace Corp.*, 314 NLRB 100, 104 (1994) (no evidence that the employer promised employees that the evaluations would be confidential, therefore, they are not confidential and respondent not privileged to withhold them).

In addition to the fact that Respondent has not met its burden of substantiating a legitimate confidentiality claim, the record evidence in this case clearly establishes that the requested information is categorically not confidential. The Board only recognizes a few categories of confidential information, those being information:

which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.

¹³ The fact that Judge Pollack sustained a motion for a single Unit employee’s name to be redacted from the hearing record similarly bears to plausible relevance to the issue of whether Respondent had a legitimate and substantiated confidentiality interest in refusing to provide the Union with the requested performance evaluations for Unit employees.

Detroit Newspaper Agency, 317 NLRB at 1073. Here, none of the requested information falls into one of these categories of information that the Board considers to be confidential. The evidence shows that Unit employees' evaluations do not contain employees' social security numbers or other personal identifying information or personal medical information. (G.C. Ex. 8; Tr. 123:16-24). There is also no record evidence that the requested information contains proprietary information, the identity of witnesses or privileged information. Moreover, the Board has held that some of the specific information requested in this case, namely employee evaluations, is not the type of information that should be confidential from employees' collective-bargaining representative. *The Aerospace Corp.*, 314 NLRB at 104 (supervisors' ratings of employees' employment attributes and on-the-job performance is not private and can be readily observed by coworkers).

Respondent primarily argues that the Board should put aside all "general notions of what is or is not considered personal, private and confidential information" in this case, because the parties have expressly agreed that the requested information is "personal" and agreed to who may have access to it. Respondent argues that since this issue is "covered by" the Pay for Performance Agreement, the Judge erred by not deferring to the terms of the Agreement in this regard. Respondent further argues that since the Agreement does not explicitly state that the Union may request the employees' performance appraisals, the Union does not have such a right.

Respondent is incorrect that the contract coverage analysis applies in these circumstances. As discussed above, the Board has refused to apply the contract coverage standard to determine if an employer is relieved of bargaining with the union. The Board continually applies the clear and unmistakable waiver standard to determine if a union has waived a statutory right to bargain over a particular subject. *Provena St. Joseph Medical Center*,

350 NLRB 808; *Heartland Health Care Center – Plymouth Court*, 359 NLRB No. 155, slip op. In his Decision, Judge Pollack correctly states the Board law applicable for finding a contractual waiver of a statutory right, in that the waiver must be “clear and unmistakable.” (ALJD P7 L3-5) (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)). Applying this legal standard, he accurately finds that silence in a collective-bargaining agreement does not constitute a waiver. (ALJD P7 L6-7) (citing *King Broadcasting Co.*, 324 NLRB 332 (1997)).¹⁴ Because the Pay for Performance Agreement is completely silent as to the Union’s right to request Unit employees’ performance evaluations, or any other information pertaining to the merit-based pay increase, the Union’s statutory right to such information is not waived. Therefore, Respondent is not relieved from providing the requested information.

Finally, even under contract coverage principles, which are decidedly inapplicable here, Respondent’s argument must fail. Respondent asserts that the parties bargained over and agreed that employees’ performance evaluations are private or confidential, even from the Union. In support of this argument, Respondent relies on the fact that the Pay for Performance Agreement states that “performance appraisals are intended for personal feedback and for individual development” and that “the employee may request a copy of the performance appraisal.” (emphasis added by Respondent). As previously stated, the Agreement is devoid of any reference to the Union’s right to request evaluations. (Jt. Ex. 3). Furthermore, the record evidence demonstrates that throughout the negotiations for the Pay for Performance Agreement, the Union sought information from Respondent about the merit-based wage increase plan and how it would impact Unit employees. (Jt. Ex. 4A, 5, 6A, and 7; ALJD P3 L26-42). The Union even submitted its first formal request for information on September 4, before officially

¹⁴ Although Judge Pollack stated these principles in relation to a separate issue, the same standard is nonetheless applicable.

executing the Agreement. (Jt. Ex. 8A and 8B). Since the Union's right to request Unit employees' performance evaluations is not stated, mentioned, or even indirectly referred to in the Pay for Performance Agreement, it is by no means "covered by" the Agreement. It is also illogical to suggest that silence in the Agreement implies that the Union negotiated away its right to request relevant information, especially where the Union was actively seeking to obtain such information throughout negotiations for the Agreement. Therefore, even Respondent's contract coverage argument is unsupported by the facts of this case.

For the reasons described above, Respondent's confidentiality claims, as argued both in its post-hearing brief to the Judge and in its brief in support of its exceptions, are wholly unfounded and inadequate. Therefore, Judge Pollack did not err by ignoring these arguments in his Decision. Even had Judge Pollack addressed the arguments, application of longstanding Board precedent yields the obvious conclusion that the requested information is not confidential, and that the Union did not waive its right to obtain Unit employees' performance evaluations. Both conclusions do not alter Judge Pollack's ultimate decision that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the requested information.

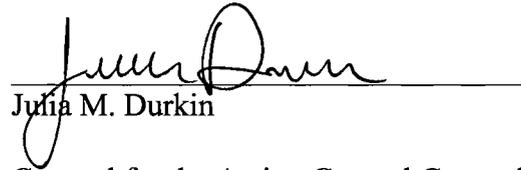
IV. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel respectfully urges the Board to overrule all of Respondent's exceptions and to affirm the Judge's Decision and Order.¹⁵

¹⁵The Acting General Counsel respectfully requests that the Board uphold the Judge's Decision and Order, except to the extent excepted to by the Acting General Counsel on July 15, 2013.

DATED at Denver, Colorado, this 29th day of July, 2013.

Respectfully submitted,



Julia M. Durkin

Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower
Denver, Colorado 80202-5433
(303) 844-3551

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions**, together with this Certificate of Service, was E-Filed or E-mailed as indicated below, to the following parties on: July 29, 2013.

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
E-FILED at: www.nlr.gov

Honorable Jay R. Pollack
Administrative Law Judge
c/o the Deputy Chief Judge
Division of Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, CA 94103-1779
E-FILED at: www.nlr.gov

Mr. Melvin B. Sabey, Esq.
Kutak Rock, L.L.P.
1801 California Street, Suite 3100
Denver, CO 80202-2626
E-MAILED at: melvin.sabey@kutakrock.com

Ms. Jane Cisneros
Human Resources Manager
Catholic Health Initiatives Colorado
d/b/a Centura Health – St. Mary-Corwin Medical Center
1008 Minnequa Avenue.
Pueblo, CO 81004-3733
E-MAILED at: JaneCisneros@Centura.org

Mr. Lew Ellingson
Staff Representative
Communications Workers of America, District 7
8085 E. Prentice Avenue,
Greenwood Village, CO 80111-2705
E-MAILED at: lellingson@cwa-union.org



Julia M. Durkin
Counsel for the Acting General Counsel
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower
Denver, Colorado 80202-5433
(303) 844-3551