

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ST. FRANCIS REGIONAL MEDICAL
CENTER,

Cases **18-CA-092542**
18-CA-094066

Respondent,

and

SEIU HEALTHCARE MINNESOTA,

Charging Party.

**RESPONDENT ST. FRANCIS REGIONAL MEDICAL
CENTER'S BRIEF IN SUPPORT OF EXCEPTIONS**

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INTRODUCTION¹

This matter was heard before Administrative Law Judge Melissa M. Olivero (“ALJ”) on March 13, 14, and 15, 2013 at the offices of Region 18 of the NLRB in Minneapolis, Minnesota. As fully set forth below, St. Francis Regional Medical Center (the “Employer,” “St. Francis,” or “Respondent”) denies that it has violated the National Labor Relations Act (“NLRA or “the Act”). Counsel for the General Counsel has failed to carry its burden of establishing that Respondent’s actions violated the Act. Respondent has complied with the requirements of the NLRA.

This case is about whether any employee is privileged to violate an employer’s well-founded, nondiscriminatory rules regarding the confidential treatment of medical records simply because the employee is acting under the auspices of “policing the collective bargaining agreement.” Respondent submits that such action is contrary to settled Board law and, in the context of confidential medical information, is an affront to the Employer’s (as well as the employee’s) ethical and legal obligations to protect patient privacy.

The Board has long held that employers have a legitimate interest in keeping certain information confidential. Nowhere is this interest more profound than in the context of a healthcare employer. Indeed, a healthcare employer has both an ethical obligation as well as a federal and state mandate to protect the privacy of its patients’ medical information. In fact, healthcare employers who fail to zealously guard patient privacy face a staggering array of administrative penalties (which in some contexts can range from \$100 to \$1.5 million), state attorney general enforcement actions (which have resulted in at least one employer being barred

¹ Citations in this Brief will be as follows: “T__:_” to indicate the hearing transcripts page and line numbers; “J. Ex. __” to indicate a Joint Exhibit; “R Ex. __” to indicate Respondent’s Exhibits; “GC Ex. __” to indicate an Exhibit of the General Counsel; and “ALJ-JD __:_” to indicate the page and line numbers of the Decision of the Administrative Law Judge.

from doing business in the State of Minnesota for six years) and private lawsuits by patients who come to learn that their provider has failed to maintain the confidentiality required by state and federal law. Thus, the employer's interest in keeping patient records confidential is not simply an aspiration, it is a legal requirement.

To say that healthcare employers such as St. Francis have an *interest* in protecting patient privacy is a serious understatement. It is more accurate to say that St. Francis is *obligated* pursuant to federal and state law to jealously guard patient privacy. When it comes to protecting patient privacy, St. Francis expects much from its employees because it is required to do so under state and federal law. It is these obligations that the ALJ neglected, misconstrued, and misapplied. Given these obligations, the Act cannot be applied so myopically that it loses sight of other, equally-significant Congressional policies and statutory goals which must be balanced, fostered, and advanced. In this case, those other goals include the privacy and security of confidential patient information.

The record is clear that the employees at issue in this case, Maria Wolf and Merideth Theis, were found to have violated patient privacy. The undisputed records show that in the past two years, all employees at St. Francis found to have violated its patient confidentiality rules have been terminated. Wolf and Theis met the same fate. Any claim that Wolf and Theis did not know they were violating St. Francis' confidentiality rules (as well as state and federal law) is irrelevant because this type of "pure heart, empty head" defense is simply not recognized by the policy or by state or federal law. The record here unequivocally shows that St. Francis held its employees (union and nonunion) to the same standard of compliance with patient privacy and, in light of the overwhelming evidence of consistent treatment, it would be wrong to infer any unlawful motive.

In the end, however, this case should not be decided on its merits in this forum. Indeed, this case should, in its entirety, be deferred to the grievance-arbitration procedure pursuant to Collyer. Alternatively, *even if* it is determined that it is inappropriate to defer the delay-in-providing-information allegation, that allegation lacks merit and is subject to dismissal. In any case, as that allegation is separate from the remaining allegations, it is entirely appropriate to defer all of those remaining allegations.

STATEMENT OF THE CASE

St. Francis is an 86-bed general medical and surgical hospital located in Shakopee, Minnesota. St. Francis is a part of Allina Health (“Allina”), which is a family of hospitals, clinics and care services located in Minnesota and Western Wisconsin.

Allina, as an employer/covered entity entrusted with protected health information (“PHI”), must vigilantly ensure that the confidentiality of patients records are maintained so that the patients’ rights are not compromised and that it remains in compliance with HIPAA and state privacy laws. To that end, Allina has implemented patient privacy policies, and has taken affirmative steps to ensure that its employees are trained as to their responsibilities pursuant to the policies.

Allina reasonably expects that its employees are familiar with and will abide by the policies. Allina discharged Theis for using and disclosing patients’ medical records without a proper business reason, in violation of Allina’s policies and state and federal privacy laws, which require Allina to safeguard the confidentiality of patients’ PHI. Allina discharged Wolf for accessing, using, and disclosing patients’ medical records without a proper business reason, in violation of Allina’s policies and state and federal privacy laws, which require Allina to safeguard the confidentiality of patients’ PHI.

Contrary to the ALJ's decision, the Act does not shield an employee who has violated her employer's policy or the law from being disciplined or terminated for the infraction. Nor does the NLRA allow union stewards to violate patient confidentiality policies and federal privacy law in the course of a grievance investigation.

ISSUES PRESENTED

I. Whether the Board and its agents, including the Acting General Counsel and the ALJ, were without power to proceed with the hearing and decide the case. (Exception No. 1.)

II. Whether the ALJ erroneously refused to defer this case to the parties' grievance-arbitration procedure. (Exception Nos. 2, 32, 34, 35, 36, 37, 38, 39, 40.)

III. Whether the ALJ failed to give full effect to Respondent's (as well as its employees') obligations and responsibilities under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as amended. (Exception Nos. 4, 31, 45, 49, 53, 59, 61, 62, 63.)

IV. Whether the ALJ erroneously concluded that Respondent violated Section 8(a)(1) when its agents questioned Wolf regarding her violation of patient privacy? (Exception Nos. 5, 6, 7, 10, 27, 28, 41, 42, 43, 44, 54.)

V. Whether the ALJ erroneously concluded that Respondent violated Sections 8(a)(3) and 8(a)(1) when it terminated Wolf and Theis for violating its confidentiality of patient information policy? (Exception Nos. 3, 5, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 33, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 64, 65, 66, 67, 68, 71.)

VI. Whether the ALJ erroneously concluded that Respondent violated Sections 8(a)(5) and 8(a)(1) by providing the Union with most of the requested-information within one

month of its request and negotiating an accommodation with regard to the later-provided information. (Exception Nos. 24, 36, 69, 70.)

ANALYSIS

I. THE BOARD AND ALL OF THOSE TO WHOM IT DELEGATED POWERS AND RESPONSIBILITIES WERE AND REMAIN WITHOUT POWER TO PROSECUTE OR DECIDE THIS CASE.

In its Answer and in its Post-Hearing Brief, the Employer objected to the ALJ proceeding with the case in light of the decision in Noel Canning v. NLRB, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013).²

First, the Board was without a quorum when the Complaint³ issued on January 16, 2013 and when the Amended Complaint issued on February 28, 2013. Second, for two reasons the Board's delegation of authority to the Acting General Counsel was invalid at those times. One reason was that, in the absence of a quorum, the Board was without power to act. The other was that any self-executing delegation of authority to the Acting General Counsel was invalid. For these reasons, the prosecution of the Complaint was unlawful. Similarly, insofar as the ALJ's authority to hear the case was also derived from a delegation of authority from the Board, she was without power to proceed with the hearing and decide the case.

The ALJ did not address any of the above arguments. (ALJ-JD 01:FN1.) The Board itself has made pronouncements categorically rejecting jurisdictional arguments like those the Employer has raised herein even in the face of decisions adverse to its position. It has stated that it will not yield its jurisdiction in response to decisions of the United States Courts of Appeals

² On June 24, 2013, the Supreme Court granted the Board's request for certiorari. NLRB v. Noel Canning, 133 S. Ct. 2861 (June 24, 2013).

³ Two cases comprise this matter: 18-CA-092542 and 18-CA-094066. These cases were consolidated by the Regional Director on January 16, 2013 pursuant to 29 C.F.R. § 132.33.

and will continue to fulfill its mission until such time as the United States Supreme Court has determined that the jurisdictional arguments set forth have merit. See, e.g., Bloomingdale's, Inc., 359 NLRB No. 113, at 1 (April 30, 2013). Accordingly, Respondent will not set forth its arguments here in detail and merely reserves its position for appellate review that neither Counsel for the Acting General Counsel nor the ALJ had power to proceed as they have herein. Respondent further points out that precedent adverse to the Board's position continues to mount.

Specifically, the Third Circuit Court of Appeals agreed with the D.C. Circuit and held that the clear text of the Constitution limits the President's power to make recess appointments during intersession recesses only. NLRB v. New Vista Nursing and Rehabilitation, No. 12-1936, 2013 WL 2099742 (3d Cir. May 16, 2013). Similarly, in NLRB v. Enterprise Leasing Co. Southeast, LLC, No. 12-1514, 2013 WL 3722388 (4th Cir. July 17, 2013), the Fourth Circuit Court of Appeals agreed with Noel Canning and New Vista that the President's power to make recess appointments is limited to intersession recesses, and refused to enforce two Board orders in the absence of the quorum required by New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010).

The Board remains without a quorum at this time. Accordingly, under the appellate decisions in Noel Canning, New Vista Nursing, and Enterprise Leasing, the Board is without power to review the ALJ's Decision and decide this case. It follows that the Board should refrain from deciding this case or exercising such ministerial authority as it may have to vacate the Decision given the absence of power in the Acting General Counsel and ALJ to proceed as they did. The Employer hereby incorporates by reference the rationales set forth by the D.C. Circuit, the Third Circuit, and the Fourth Circuit in refusing to enforce the NLRB decisions in those cases and submits that the Board has no power to decide the instant case.

The remainder of this Memorandum addresses the merits of the ALJ's Decision assuming, *arguendo*, that the Board decides this case despite its absence of power to do so.

II. THE ALJ ERRONEOUSLY DENIED RESPONDENT'S REQUEST FOR PRE-ARBITRAL DEFERRAL.

The ALJ erroneously denied Respondent's request to defer this matter to grievance arbitration. (ALJ-JD 24:35-40.) Pre-arbitral deferral was warranted here because all of the Collyer elements are met. As the Board notes in its pattern for a Collyer deferral letter:

The Board's deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. Collyer Insulated Wire, 192 NLRB 837 (1971) and United Technologies Corp., 268 NLRB 557 (1984).

NLRB Case Handling Manual, Part I, Unfair Labor Practice Proceedings § 10118.6. In this way, pre-arbitral deferrals "resemble[] the exhaustion requirements often found in administrative regimes and the abstention doctrines employed by federal courts." Hammontree v. NLRB, 925 F.2d 1486, 1490 (D.C. Cir. 1991). That is, pre-arbitral deferral is the "exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed." United Technologies Corp., 268 NLRB 557, 560 (1984). "The Board's doctrine of pre-arbitral deferral is principally derived from the twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes." NLRB General Counsel, Guideline Memorandum Concerning Collyer Deferral, GC 12-01 (Jan. 20, 2012).

In Collyer Insulated Wire, 192 NLRB 837 (1971), the Board considered a Section 8(a)(5) claim arising out of an alleged unilateral change of working conditions by an employer. The Board held that, where certain conditions are met, it would require exhaustion of arbitration remedies within the relevant CBA before it considered the complaint. Id. Since then, the Board

has found pre-arbitral deferral appropriate in Section 8(a)(1), (a)(3) and 8(a)(5) cases where: (1) there is a long-standing bargaining relationship between the parties; (2) there is no claim that the employer generally opposes the employees' exercise of protected rights; (3) the employer manifests a willingness to arbitrate; (4) the CBA's arbitration clause covers the dispute at issue; and (5) the contract and its meaning lie at the center of the dispute. See Collyer, 192 NLRB. at 842; see also National Radio Co., Inc., 198 NLRB 527 (1972); United Technologies Corp., 268 NLRB 557 (1984); NLRB General Counsel, Arbitration Deferral Policy Under Collyer – Revised Guidelines, GC 73-31, at pp. 14-15 (May 10, 1973); NLRB Operations-Management Memo, Appeal Language in Dismissal Letters, OM 05-77 (June 20, 2005). With regard to the instant matter, the dispute is eminently well suited to such resolution because most of these factors are not even in dispute.⁴ For those factors that might be in dispute, it must be concluded that the standard for deferral has been satisfied.

A. THE ALJ ERRED BY FAILING TO FIND A LONG AND PRODUCTIVE BARGAINING RELATIONSHIP.

As to the first factor, there is simply no dispute that the parties have “a long and productive bargaining relationship.” This factor is present where the parties “mutually and voluntarily resolved the conflicts which inhere in collective bargaining.” Columbus & Southern Ohio Electric Co., 205 NLRB 187, 193 n.5 (1973). Here, the relationship between Respondent and the Union has all of the hallmarks of a “long and productive bargaining relationship”: (1) the parties have resolved numerous grievances, including at or before grievance arbitration, and (2) the parties have successfully negotiated successive collective bargaining agreements.

⁴ The ALJ did not find, and Counsel for the Acting General Counsel did not allege, that factors (3), (4), and (5) did not support deferring the case to arbitration. (ALJ-JD 23:FN29.)

First, since September of 2006, the Union has filed a little over 1,300 grievances total across its 18 bargaining units. (Tr. 746.) Of the 1,300, approximately 240 grievances have been filed by the Union at St. Francis. (Id.) All of Allina's union contracts contain a just-cause provision and a grievance procedure which ends in binding arbitration. (Tr. 749-50.) Since September of 2006, approximately 40 just-cause discipline cases have gone to arbitration. (Tr. 750.) Some of these cases involved grievants who were disciplined for alleged breaches of patient confidentiality. (Tr. 753-54.) Clearly, the parties have demonstrated that they are capable and willing to resolve disputes within the framework of the grievance-arbitration process.

Second, since becoming the employees' bargaining representative at St. Francis, the Union and the Respondent have successfully negotiated successive collective bargaining agreements. With respect to the most-recent contract, which would have expired on February 29, 2012, the parties mutually agreed to engage in early negotiations, and were able to reach a new agreement *four months* prior to the agreement's expiration. (Tr. 763.) It should be noted that, during this time, there were no allegations that Respondent engaged in any bad faith bargaining or implemented any unilateral changes in violation of the Act.

The ALJ did her best to ignore this evidence. She initially acknowledged that the bargaining relationship was "productive" from 2006 to 2011, but then concluded that this factor did not weigh in favor of deferral because, in 2011, the relationship became "strained." (ALJ-JD 23:19-24.) In support of this absurd conclusion, the ALJ marshaled the following evidence: "Allina has largely dismantled the strategic alliance, abandoned its previous position of neutrality, and become frustrated with the Union's rejection of its recent proposals." (ALJ-JD 23.) Stated differently, because Respondent took certain positions at the bargaining table and

because it exercised its First Amendment right⁵ to furnish its employees with information relating to union representation, Respondent has sullied an otherwise productive bargaining relationship. This is not Board law.

First, the ALJ simply cannot ignore the overwhelming evidence that the parties have “mutually and voluntarily resolved the conflicts which inhere in collective bargaining,” including the handling of grievances and the successful negotiation of successive collective bargaining agreements. An otherwise productive relationship does not somehow become unproductive every time the parties engage in tough negotiations.

Second, the Board does not – indeed it cannot – premise the finding of a productive bargaining relationship on the employer taking positions during collective bargaining or during an organizing campaign that the union finds “frustrating” or “less than desirable.” If this were the case, no collective bargaining relationship would be considered productive. Provided the employer does not bargain in bad faith, the Act affords the employer the freedom to make any bargaining proposal that it desires and will not force an employer to accept any such proposal. See NLRB v. American National Ins. Co., 343 U.S. 395, 404 (1952) (holding that the Board may not “sit in judgment upon the substantive terms of collective bargaining agreements”). Likewise, Section 8(c) of the Act affords the employer the freedom (within acceptable limitations) to speak its mind regarding unionization, and the Board cannot hold the employer’s tongue under the auspices that doing so will create an unproductive bargaining relationship. See National Ass’n of Mfrs. v. NLRB, No. 12-5068, 2012 WL 4328371 (D.C. Cir. April 17, 2013); see also 29 U.S.C. § 158(c).

⁵ As incorporated by Section 8(c) of the Act. 29 U.S.C. § 158(c).

In this case, there has been no allegation that the Respondent engaged in any bad-faith bargaining or made any unlawful statements during a representation campaign. Likewise, there is no evidence of any labor disputes between the parties or any allegations that Respondent previously failed to provide information in accordance with Section 8(a)(5) of the Act. To the contrary, the parties engaged in early negotiations and managed to reach an agreement approximately four months prior to the contract's expiration. (Tr. 763.)

Finally, the ALJ's comment that the timeliness of Respondent's response to the Union's information requests in the instant matter somehow "reflects poorly on the relationship between the parties" is inapposite. (ALJ-JD 23:25-27.) As an initial matter, the Board has made clear that some "unwarranted foot-dragging" by the employer in complying with the grievance-arbitration mechanism will not foreclose deferral if the arbitration "procedure has not broken down and is still available to the parties." Community Convalescent Hospital, 199 NLRB 840, 841 (1972) (deferring even though employer had delayed and the union had to obtain a court order to force the employer to proceed to arbitration). In addition, as outlined *infra*, Respondent's responses were not untimely and Respondent provided information to the Union in a manner and within the reasonable period required by the Act. More importantly, there is no dispute that the Union received all of the information it requested. Certainly, the parties' ability to negotiate regarding the scope of the union's initial request demonstrates the parties' ability to mutually and voluntarily resolve conflicts.

B. THERE IS NO EVIDENCE OF EMPLOYER ANIMOSITY SUFFICIENT TO PRECLUDE DEFERRAL.

As the ALJ appropriately notes, grievance filing activity and the filing of information requests are protected activity. (ALJ-JD 23:36-37.) However, simply because Wolf and Theis were engaged in these activities around the time of their discipline is not sufficient proof of

animosity to preclude deferral. Instead, for deferral to be inappropriate, there must be proof that the entire grievance procedure is compromised to the point that submitting the dispute to the forum would be futile. No such proof exists in this case.

As the Board wrote in United Technologies:

Although the instant dispute arose in the context of processing of another grievance, the alleged misconduct does not appear to be of such character as to render the use of [the grievance-arbitration] mechanism unpromising or futile. Indeed, both the Respondent and the Union continued to file and process grievances. Thus the record demonstrates full acceptance by the parties of the grievance and arbitration route to the resolution of disputes[.]

268 NLRB at 560 n.21 (internal quotations and case citations omitted). Similarly, in Postal Service, 270 NLRB 1022, 1023 (1984), the Board ordered deferral after finding that the employer did not evidence animosity because the employer's action was not "a broad rejection of the applicability of the grievance-arbitration process." The Board also noted that "there is no contention that the parties are not continuing to process and resolve grievances on other matters." In another case, United Beef Co., Inc., 272 NLRB 66, 67 n.5 (1984), a grievance was filed alleging that a shop steward was harassed and discharged for processing grievances. The Board deferred to arbitration, citing language from United Technologies that this alleged misconduct "d[id] not appear to be of such character as to render the use of [the grievance-arbitration] machinery. . . futile."

In this case, there is no evidence whatsoever in the record to suggest that the alleged misconduct has had the requisite deleterious impact on grievance-processing to render deferral inappropriate. In fact, the testimony of Allina Director of Labor Relations Tim Kohls affirmatively demonstrates that there has been no such impact. This includes (but is not limited to) his undisputed testimony that "these cases are moving about as expeditiously as any case ever has." (Tr. 758.)

Under the ALJ's construction, no case involving grievance filing activity or the filing of an information request could ever be deferred to arbitration. This is not Board law. As explained by then-General Counsel Peter Nash in his oft-cited memo on deferral:

Deferral of charges for arbitration under Collyer is not warranted where the overall history of the collective relationship demonstrates significant employer enmity toward statutory rights. Determination of whether general enmity exists which would preclude deferral should be based on a consideration of the total bargaining history, including the duration and effectiveness of the collective relationship and the character, frequency, and remoteness of unfair labor practices. *A single, animus-motivated unfair labor practice would not necessarily make deferral inappropriate*, but a pattern or a continuing history of such actions denoting general hostility to employee rights and a repudiation of the bargaining principle would require rejection of the deferral procedure. Employer actions motivated by economic or business considerations . . . would be deferrable unless the reoccurrence of such actions reflects a deliberate disregard or rejection of statutory obligations.

NLRB General Counsel, Arbitration Deferral Policy Under Collyer – Revised Guidelines, GC 73-31, at pp. 14-15 (May 10, 1973) (emphasis added). All of the evidence in this case points to the inescapable conclusion that Respondent has not demonstrated any enmity towards statutory rights or collective bargaining that would call this factor into question. Thus, deferral is appropriate.

C. THIS DISPUTE IS WELL SUITED FOR ARBITRATION.

A dispute is well suited for arbitration when the meaning of a contract provision is at the heart of the dispute. See Collyer, 192 NLRB at 842. The ALJ found this case ill-suited for arbitration because this case involves allegations of statutory violations, including Section 8(a)(1) and Section 8(a)(3). (ALJ-JD 23:42-24:08.) However, as set forth below, neither of these facts detracts from the inescapable conclusion that these cases are well suited for arbitration.

As to the Section 8(a)(1) allegation, it is *not* an obstacle to deferral because the alleged unlawful statements directed to Wolf are eminently well suited for resolution by the arbitrator selected to hear and decide the Wolf grievance. The Board has consistently held that independent Section 8(a)(1) allegations are ripe for deferral. See, e.g., Postal Service, 270 NLRB 979 (1984) (deferring an allegation that the employer violated the Act by threatening an employee with discharge because of his activities on behalf of the union); United Technologies Corp., 268 NLRB 557 (1984) (deferring an allegation that a supervisor made an unlawful threat to two employees concerning possible adverse consequences for pursuing a grievance); Postal Service, 270 NLRB 114 (1984) (deferring allegations that the employer made unlawful threats to employees tied to their union activities).

Likewise, the inclusion of a Section 8(a)(5) allegation⁶ is also not an obstacle to deferral. In Medco Health Solutions, 352 NLRB 640, 641 (2008), the Board explained its policy as follows:

In cases alleging a refusal to furnish information, in violation of Section 8(a)(5), the Board has maintained a policy against deferral to arbitration because deferral can result in a “two-tiered” process that may cause delay in resolving the underlying dispute and undue expense for the parties involved, and because the bargaining representative has a statutory right to relevant information that is independent of rights accorded under the contract.

This policy has no application to the present case. Here, it is undisputed that Allina provided all requested information to the Union *prior to the issuance of the Complaint*. (GC Comp. ¶ 10; R. Answer ¶ 14.) Contrary to the ALJ’s finding, there is absolutely no risk of a two-tiered process,

⁶ The Section 8(a)(5) allegation is not, as the ALJ claims, inextricably “linked” to the discharges of Wolf and Theis. (ALJ-JD 24:15-18.) Indeed, the Section 8(a)(5) allegations were the subject of a later-filed charge that was a separate case (18-CA-094066) until the Regional Director consolidated it with 18-CA-094066 on January 16, 2013. Consolidation is not a means to prevent deferral.

inasmuch as – even prior to issuance of the Complaint – the Union possessed all of the requested information.

There is also no risk of delay. In fact, at present, arbitration hearings have been held and both arbitrators are awaiting the parties’ post-hearing briefing before rendering their decision. Not only is there no delay, but these cases are moving as fast or faster than any case since at least 2006 when Director Kohls started at Allina. (Tr. 758.) The entire premise underlying the Board’s normal hesitance to defer simply has no application in this case.

The ALJ discounted Respondent’s reliance on Altoona Hospital, 270 NLRB 1179 (1984) asserting that the case did not involve union activity and that the decision relied on post-arbitral case law. (ALJ-JD 24:21-33.) The ALJ is wrong on both grounds. First, like the matter at hand, Altoona involved the discipline of a bargaining unit employee for what could be construed as union activity – that is, investigating the merits of a grievance. See Altoona, 270 NLRB at 1179 (noting that “[p]rior to a third-step grievance meeting, [the grievant] hired a private investigator” to investigate the misconduct alleged by her employer). Second, it may be true that the Board relied on cases involving post-arbitral deferral, but the case itself clearly was deferred prior to the arbitration. Specifically, based upon the timing of the filing of the charge (9/29/82), the date of the arbitrator’s decision (3/2/83), and the issuance of complaint (6/8/83), it is readily apparent that *the Regional Director must have – as the initial step – deferred the charge to the grievance-arbitration procedure.* See id. at 1180. In any case, the Board said absolutely nothing in its decision to suggest that – while it was deferring to the arbitrator’s award – the case would not have been appropriate for deferral at an earlier stage. Moreover, it would make no sense to suggest that a case that was not initially appropriate for deferral somehow later became

appropriate for deferral *because of* the arbitrator's award, and that is particularly true where – as in Altoona – the arbitrator upheld a discharge for arguably-protected conduct.

Case law cited by the ALJ in support of her conclusion that deferral is inappropriate is also unavailing. (ALJ-JD 23:42-04.) In Union Fork & Hoe Co., 241 NLRB 907 (1979), a steward was discharged following a physical altercation that took place during a grievance meeting. Specifically, a shop superintendent grabbed the steward's front pocket in order to grab a timesheet that another employee had handed to the steward during a dispute with the shop superintendent. Id. at 910. There was also other evidence tending to show that the employer wanted to prevent employees from using the grievance process. Id. at 909. Thus, in Union Fork, the Board found deferral to be inappropriate because there were facts tending to show that there was a genuine obstacle to utilization of the parties' grievance-arbitration process.⁷ No such facts exist here. To the contrary, the record shows that Respondent and the Union have been able to resolve approximately 240 grievances at St. Francis alone. (Tr. 746.) Likewise, since 2006, the parties have arbitrated approximately 40 just-cause discipline cases. (Tr. 750.) Indeed, even the grievances related to Wolf and Theis have moved through the grievance process “as expeditiously as any case ever has.” (Tr. 758.)

The ALJ's citation to Mobil Oil Exploration & Producing, U.S., 325 NLRB 176 (1997) is similarly misplaced. (ALJ-JD 24:01-04.) In Mobil Oil, the employee was discharged for failing to follow instructions to keep an ongoing investigation confidential. Id. at 178. After

⁷ Any appeal to Joseph T. Ryerson & Sons, Inc., 199 NLRB 461 (1972) is similarly unavailing. See Postal Service, 271 NLRB 1297, 1298 (1984) (rejecting Ryerson and holding that because “Respondent has indicated its willingness to resolve the dispute through an arbitral forum and has agreed to waive the timeliness provision of the contractual grievance-arbitration clauses[,] . . . Ryerson is not controlling [because] the General Counsel has not alleged *facts tending to show that there is a genuine obstacle to utilization of the parties' contractually agreed-upon method for dispute resolution.*” (emphasis added)).

specifically finding that the employer's interest in maintaining the confidentiality of the investigation was "minimal,"⁸ the Board concluded that deferral was inappropriate, distinguishing cases where the employer's interest was "substantial," including Altoona. Id. at 178, 179 n.12. Like Altoona (and unlike Mobil Oil), this case is well suited for arbitration because Respondent has "a substantial interest in maintaining the integrity of its confidential hospital patient records from unauthorized disclosure." Id. at 179 n.2.

This is not, as the ALJ suggests, a case where a steward was disciplined for using the grievance-related activities; rather, this is a case where the steward was disciplined for violating the employer's confidentiality policy. The Board has made clear that an employer does not violate the Act by imposing discipline on a steward whose improper use of the grievance procedure was found to be unprotected. See Exxon Mobil Corp., 343 NLRB No. 44 (2004); see also Caterpillar Tractor Co., 242 NLRB 523, 530 (1979), enfd. 638 F.2d 140 (9th Cir. 1981) ("[Section 7] does not permit employees to use grievances as a sword to gain immunity from the consequences of [otherwise unlawful activities]."). Additionally, the conduct at issue in this case is the unprotected disclosure of confidential medical information, not the investigation of a grievance or the filing of an information request – although the unprotected conduct took place in association with the protected conduct.

Ultimately, by allowing the Union to pursue the allegations set forth in the Amended Complaint rather than deferring to the parties' arbitration proceedings, the ALJ failed to give

⁸ In fact, since Mobil Oil, the Board has made clear that an employer actually violates the Act by maintaining a blanket policy that provides that all workplace investigations are "confidential" and instructs employees to not discuss any ongoing investigations. Caesar's Palace, 336 NLRB 271, 272 (2001); see also Hyundai America Shipping Agency, 357 NLRB No. 80, slip op. at 14-15 (2011) (finding an employer violated Section 8(a)(1) by routinely requiring confidentiality of employees involved in investigations without demonstrating a legitimate and substantial justification for adversely impacting that Section 7 right).

effect to the parties' agreement to arbitrate contractual disputes. Accordingly, the Board should rescind the ALJ's Decision and order that the case be deferred to the already-pending arbitration cases.

III. THE ALJ NEGLECTED, MISCONSTRUED, AND MISAPPLIED RESPONDENT'S OBLIGATIONS UNDER HIPAA AND ANALOGOUS STATE LAW.

The rubric by which the ALJ analyzed Wolf's and Theis' conduct was hopelessly flawed. After finding that Wolf's and Theis' breaches to patient privacy took place as part of the *res gestae* of protected activities, the ALJ concluded that Respondent's actions would not be justified unless Wolf's and Theis' conduct was "so violent, or of such obnoxious character, as to render [them] wholly unfit for service." (ALJ-JD 26:36-37 (citing, *inter alia*, Atlantic Steel Co., 245 NLRB 814 (1979).) When viewed through the ALJ's myopic prism, Wolf's and Theis' copying and sharing of Respondent's medical records with representatives of the Union does not seem particularly nefarious. Indeed, it is a basic tenet of labor law that employees can share certain information with each other and with the union, even when the employer considers the information "confidential." It is not until their conduct is viewed in the full light of Respondent's privacy obligations pursuant to state⁹ and federal law that it becomes clear that Wolf's and Theis' conduct was not protected by the Act.

The most critical of the ALJ's errors was her failure to accord significance to the Respondent's obligations under HIPAA. The NLRA is not the only consideration in the

⁹ State patient privacy laws here are important because, as discussed *infra*, Congress has made clear that federal law merely creates a "floor," and states are permitted to adopt more stringent patient privacy protections. See 42 U.S.C. § 1320d-7(a)(2)(B) (HIPAA "shall not supersede a contrary provision of State law, if the provision of State law. . . relates to the privacy of individually identifiable health information."); 45 C.F.R. § 160.203(b) (noting that state law is not preempted if the "State law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter").

analysis. The Board has been admonished by the Supreme Court not to interpret the Act myopically so that it loses sight of the fact that there are other equally significant Congressional policies and statutory goals, which must be balanced, fostered, and advanced. As the Supreme Court held in Southern Steamship Co. v. NLRB, 316 U.S. 31, 46-47 (1942):

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so *single-mindedly that it may wholly ignore other and equally important [c]ongressional objectives*. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

316 U.S. at 47 (emphasis added).¹⁰ In short, HIPAA and its violation by Wolf and Theis is integral to this case and must be carefully considered, weighed, and balanced so as not to defeat HIPAA and the compelling policies underlying it.

The force of the holding of Southern Steamship has been consistently extended and applied in a variety of other contexts implicating other federal statutes. For example, in Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984), the Supreme Court refused to enforce a Board order directing reinstatement of illegal aliens as being in conflict with the Immigration and Nationality Act. See also Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (Board order conflicted with the Immigration and Reform Control Act); NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984) (refusing to enforce a Board order that conflicted with the federal Bankruptcy Code); Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) (rejecting argument that federal antitrust policy should defer to the NLRA); Local 1976, United Broth. of Carpenters & Joiners of America, A.F.L. v. NLRB, 357 U.S. 93 (1958)

¹⁰ In Southern Steamship, the Supreme Court reversed a Board order that awarded reinstatement with backpay to five employees whose strike on a ship amounted to a *mutiny* in violation of federal law. Id. at 46-47.

(precluding Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act).

Even the NLRB has recognized the indisputable fact that it does not operate in an undisciplined manner unfettered by and unmindful of the equally important or, more important, policies underlying other Congressional enactments. Collyer, 192 NLRB 837 (1971) (“Labor law as administered by the Board does not operate in a vacuum[,] isolated from other parts of the Act or, indeed, from other acts of Congress”); United Brotherhood of Carpenters, Local Union No. 1506, 355 NLRB No. 159 (2010) (the Board acknowledged its obligation to accommodate the NLRA to other federal statutes); Can-Am Plumbing, Inc., 350 NLRB 947 (2007) aff’d NLRB v. Can-Am Plumbing, Inc., 340 Fed. App’x 354 (9th Cir. 2009) (same). The ALJ therefore made a clear legal error when she failed to analyze the conduct of Wolf and Theis in light of Respondent’s HIPAA and state law obligations, and when she misconstrued and misapplied the relevant law related to these duties.

A. HIPAA COMMANDS THAT RESPONDENT JEALOUSLY GUARD PATIENT PRIVACY AND DISCIPLINE NON-COMPLIANT EMPLOYEES.

Part 160, subpart C of Title 45 of the Code of Federal Regulations (45 C.F.R. §§ 164.302-164.318) establishes standards for “covered entities”¹¹ relating to the development, implementation and enforcement of policies and procedures for electronic PHI, while subpart E (45 C.F.R. §§ 164.500-164.534) specifies the standards for PHI generally.

A covered entity is required to ensure the confidentiality of all PHI; to protect against uses or disclosures of PHI not permitted by 45 C.F.R. §§ 164.500-164.534; to create, implement and enforce policies and procedures for protecting PHI; and to ensure compliance by its

¹¹ As defined in HIPAA’s regulations, St. Francis is a “health care provider” and a “covered entity”; Wolf, Theis, and St. Francis’ other employees are part of St. Francis’ “workforce.” 45 C.F.R. § 160.103.

workforce with the policies and procedures established by the covered entity in accordance with the regulations. See 45 C.F.R. §§ 164.306(a)(1), (3), (4) and (c)-(d), 164.308, 164.316, 164.514(d), 164.530(c) and (i).

Importantly, the policies and procedures must be designed to prevent, detect, contain, and correct security violations. 45 C.F.R. § 164.308(a)(1)(i). The covered entity is also required to “*apply appropriate sanctions against workforce members* who fail to comply with the security policies and procedures” implemented by the entity. 45 C.F.R. §§ 164.308(a)(1)(ii)(C), 164.530(e)(1).

Additionally, the covered entity must implement policies and procedures to prevent members of its workforce who do not have access to PHI in the normal course of their duties from receiving PHI. 45 C.F.R. §§ 164.308(a)(3)(i), 164.514(d)(2), 164.530(i)(1). The covered entity is also required to identify and respond to suspected or known security incidents, mitigate any harm created by such incidents, and document such incidents and their outcomes. 45 C.F.R. § 164.308(a)(6), 164.530(f), (j).

These commands are not simply platitudes or exhortations for the health care providers. Rather, violations expose the covered entities to significant administrative penalties and civil liability. Part 160, subpart D of Title 45 of the Code of Federal Regulations (45 C.F.R. §§ 160.400-160.426) sets forth the procedures and standards for the imposition of civil money penalties for HIPAA violations. Pursuant to 45 C.F.R. § 160.402(a) and (c), a covered entity is liable for a civil penalty for a violation of any “administrative simplification provision” committed by a “workforce member.”

An “administrative simplification provision” is defined in 45 C.F.R. § 160.103 to include “any requirement or prohibition established by . . . this subchapter.” “This subchapter” in turn

includes the provisions of 45 C.F.R. §§ 160.101-164.534. Accordingly, the civil penalty provisions of HIPAA apply to any violation by a workforce member of a covered entity's policies and procedures protecting the security of PHI developed and implemented in accordance with the requirements and standards mandated by HIPAA.

The penalties assessed against a covered entity for violations of HIPAA requirements and standards can range from \$100 to \$1.5 million. 45 C.F.R. § 160.404; see also 42 U.S.C. § 1320d-5 (civil monetary penalties for violation of the privacy rules by covered entities); 42 U.S.C. § 1320d-6 (criminal penalties for wrongfully obtaining, using, or disclosing protected health information by any person). In determining the amount of a fine, the Secretary is to consider a variety of aggravating and mitigating factors, including whether the violation was intentional, any history of compliance or violations, and whether and to what extent the covered entity has attempted to correct previous violations.

In addition, the Health Information Technology for Economic and Clinical Health Act ("HITECH Act") grants state attorney generals the ability to bring civil actions on behalf of residents of their respective states that have been adversely affected by any HIPAA violation, and to seek injunctive relief and damages of \$100 per violation or up to \$25,000 annually for violations of identical requirements or prohibitions, as well as attorneys' fees. For example, in 2012, the Minnesota Attorney General sued Accretive Health, Inc. in federal district court for alleged patient privacy violations under HIPAA, the HITECH Act, and other state laws. See Press Release, Minn. Atty. Gen. (July 31, 2012).¹² As part of its settlement, Accretive Health, Inc. agreed to pay approximately **\$2.5 million** to the State of Minnesota as well as to cease doing business in the state for six years. See id.

¹² See <http://www.ag.state.mn.us/Consumer/PressRelease/07312012AccretiveCeaseOperations.asp> (last accessed on July 31, 2013).

Health care workers may even face federal criminal prosecution for serious HIPAA and privacy violations. See 42 U.S.C. § 1320d-6. For example, in 2012, a former Mayo Clinic employee was sentenced to three years of probation and 300 hours of community service after she was found guilty of illegally viewing the medical record of a patient she did not treat. See United States v. Wright, Court File No. 11-CR-00135 (PJS/FLN), Judgment [Dkt. No. 28] (D. Minn. May 15, 2012).

B. THE ALJ ERRONEOUSLY EQUATED THE RIGHTS OF EMPLOYEES TO TAKE PHI WITH THE RIGHT OF RESPONDENT TO DISCLOSE PHI UNDER HIPAA.

The ALJ based her conclusion that the conduct of Wolf and Theis was not removed from the protection of the Act because she wrongly concluded that their conduct was not unlawful under HIPAA or state law. Her mistakes were twofold: (1) she conflated Respondent's ability to disclose PHI to the Union with Wolf's and Theis' ability to do the same and (2) she failed to accord any weight to state patient privacy law, which Congress has expressed is not preempted by the federal scheme.

Importantly, it should be noted that even though the ALJ erred by concluding that Wolf's and Theis' conduct did not violate HIPAA and/or state law, a finding to the contrary is not necessary to a finding that Respondent did not violate the Act. Indeed, even if Respondent were somehow mistaken that a HIPAA violation occurred, its investigation and discipline of Wolf and Theis would still be lawful. It is well settled that even where an employer mistakenly believes misconduct occurred, there is no violation of the Act unless the discharge or discipline was because of the employee's protected activity. See, e.g., Yuker Const. Co., 335 NLRB 1072 (2001) (discharge based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity).

1. HIPAA Does Not Permit Employees to Share PHI with the Union without an Authorization.

Contrary to the ALJ’s decision, there is no exception specified in HIPAA that allows for a union member or a union steward to access, use, or disclose patient records to investigate grievances without the requisite authorization. Specifically, the ALJ pointed to HIPAA exceptions for “health care operations” and for disclosures “required by law,” and hastily concluded that no authorization was needed because Wolf’s and Theis’ access, use, and disclosure was “for collective bargaining purposes.” (ALJ-JD 30:11-12.) This is not the law.

Part 160, subpart E of Title 45 of the Code of Federal Regulations also sets forth the general rule that *PHI cannot be used or disclosed by a covered entity except as specifically allowed under the regulations*. See 45 C.F.R. §§ 164.500(a), 164.502(a). Even if an exception applies, the covered entity is required to limit the use or disclosures “to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request.” 45 C.F.R. § 164.502(b). Pursuant to the regulations, disclosure of PHI by the covered entity is permitted without authorization: (1) for treatment of the patient or “health care operations,” and (2) as required by law. 45 C.F.R. §§ 164.502(a)(1)(ii), 164.512(a). In this case, neither of these exceptions protects the improper use and disclosure by Theis and the improper access, use, and disclosure by Wolf.

First and foremost, the exceptions apply only to disclosures by the *covered entity* – not to disclosures by an *employee*. In its preamble to its Final Rule, the Department of Health and Human Services (“HHS”) explained that, in some instances, a covered entity can provide patient data to a union without an authorization:

National Labor Relations Act

Comment: A few comments expressed concern that the regulation did not address the obligation of covered entities to disclose protected health information to collective bargaining representatives under the National Labor Relations Act.

Response: The final rule does not prohibit disclosures that covered entities must make pursuant to other laws. To the extent a covered entity is required by law to disclose protected health information to collective bargaining representatives under the NLRA, it may [do] so without an authorization. Also, the definition of “health care operations” at § 164.501 permits disclosures to employee representatives for purposes of grievance resolution.

65 Fed. Reg. 82485, 82598 (December 28, 2000). Stated differently, while the regulations allow Respondent (i.e., the covered entity) to disclose PHI to the union without patient authorization, the exception does not privilege an employee to disclose confidential patient information to a third-party union. Indeed, the regulations provide that “[a] *covered entity* is permitted to use or disclose [PHI]” and not an individual. See 45 C.F.R. § 164.502(a); see also 45 C.F.R. § 160.103 (defining “covered entity”). Quite simply, the breaches to patient privacy by Wolf and Theis were not protected by any HIPAA exception.

With regard to “health care operations,” the regulations define this term to include conducting quality assessment and improvement activities, training and other actions taken to improve the competence of health care professionals, and “resolution of internal grievances.” 45 C.F.R. § 164.501. Nothing in the regulation provides employees with *carte blanche* to surreptitiously collect PHI in the hopes that it could be useful in a potential grievance or contract violation. Further, while one could imagine this exception potentially applying in a case where a union *needs* a patient’s medical charts to demonstrate that a grievant did not improperly medicate a patient, in this set of circumstances, the grievant would still not be privileged to *take* the patient’s chart – even if she had access to it as part of her job.

Instead, HIPAA and the Act would require the union to request this information from the covered entity – through an information request – and the union would be entitled to only the

amount of PHI that is minimally necessary to accomplish the limited purpose (i.e., if portions of the medical chart were not relevant to the grievance, they would not be included). See 45 C.F.R. § 164.502(b) (whenever a covered entity uses or discloses PHI, the entity must limit such use or disclosures “to the minimum necessary to accomplish the intended purpose of the use, disclosure, or request”); see also 45 C.F.R. §§ 164.506 (a) (requiring all permitted uses and disclosures be “consistent with other applicable requirements of this subpart”), 164.514(d)(1)-(2) (emphasizing obligation of covered entity to comply with “minimum necessary requirements” established by § 164.502(b) whenever PHI is being used or disclosed, including identification of persons in its workforce who routinely need access to PHI to carry out their duties). No such request was made in this case. Moreover, Wolf and Theis both admitted that the patient records were not needed in the investigation of the potential contract violation. (See Tr. 134-37, 253-55.)

As to when a disclosure is “required by law,” the Board has made clear that when a union makes an information request that includes PHI, the Act requires the employer to negotiate with the union regarding a potential accommodation. In Hanson Aggregates BMC, Inc., 353 NLRB 287 (2008), the Board held that the employer violated Section 8(a)(5) when it failed to negotiate with the union regarding a potential accommodation to the union’s request for information that included PHI. Id. at 288; see also Salem Hospital Corp., 359 NLRB No. 82, at 4 (March 22, 2013) (ALJ noting that “there are certainly cases in which some individually identifiable health information, including in some cases the patient’s identity, may have to be disclosed when the Union’s need for that information outweighs the patient’s privacy concerns. One example might be a situation in which a nurse is disciplined for his or her treatment of a particular patient and/or a situation in which the discipline is predicated in part on the patient’s account of the nurse’s

care.”). Here, the use was not protected because the medical records were not necessary to Wolf’s and Theis’ conduct. (See Tr. 134-37, 253-55.) Moreover, assuming that they were, there is a mechanism in place for the Respondent and the Union to negotiate about whether the disclosure is necessary – an information request.

Clearly, under settled law, HIPAA does not sanction the breach of patient privacy by Wolf and Theis. In fact, the Board’s internal Case Handling Manual, which provides nonbinding guidance for the agency’s staff members, warns against “willfully flouting HIPAA’s disclosure rules”:

The exceptions to, and procedures under, the [HIPAA] Privacy Rule are complex and, therefore, Regional Offices should carefully comply with guidance provided in OM Memos 07-60 and 08-34. Of special concern is that ***willfully flouting HIPAA’s disclosure rules could expose Board agents to “aiding and abetting” liability under HIPAA’s criminal provisions and could also expose Board attorneys to sanctions for breach of the ethical responsibility to honor “legal restrictions on methods of obtaining evidence from third parties.”*** See Model Rules of Prof’l Conduct R. 4.4 cmt. 1.

NLRB Case Handling Manual, Part I, Unfair Labor Practice Proceedings § 10054.7 (emphasis added). It would be at least curious for the Board to advise its agents that failing to follow the proper protocol for obtaining documents containing PHI could result in criminal sanctions while, at the same time, finding that Respondent violated the Act by terminating Wolf and Theis for engaging in the ***same conduct***. By misconstruing and misapplying HIPAA and the relevant exceptions, the ALJ erred in finding Respondent unlawfully interrogated Wolf and unlawfully terminated Wolf and Theis.

2. The ALJ Ignored Federal Law by Finding that State Patient Privacy Laws are Preempted.

After misconstruing and misapplying HIPAA, the ALJ continued to ignore Respondent's privacy obligations under state law. According to the ALJ, because she found that Wolf's and Theis' conduct did not violate HIPAA, any contrary finding under state law would be preempted. (ALJ-JD 30:11-13.) This is not the law. HIPAA expressly provides that state laws protecting patient privacy are not preempted. Indeed, Respondent's privacy obligations under state law are as stringent – if not more stringent – than they are under HIPAA. The ALJ therefore clearly erred when she refused to analyze Respondent's conduct in light of privacy obligations under state law.

The Minnesota Health Records Act (“MHRA”), Minn. Stat. §§ 144.291 to 144.298, prohibits anyone who receives health records from a health care provider from releasing them without consent or legal authorization:

A provider, or a person who receives health records from a provider, may not release a patient's health records to a person without:

- (1) a signed and dated consent from the patient or the patient's legally authorized representative authorizing the release;
- (2) specific authorization in law; or
- (3) a representation from a provider that holds a signed and dated consent from the patient authorizing the release.

Minn. Stat. § 144.293, subd. 2(1).¹³ “Health record” is defined as “any information, whether oral or recorded in any form or medium, that relates to the past, present, or future physical or mental

¹³ A separate Minnesota statute, commonly known as the Minnesota Patients' Bill of Rights, provides that “[p]atients and residents shall be assured *confidential treatment of their personal and medical records*, and may approve or refuse their release to any individual outside the facility. . . .” Minn. Stat. § 144.651, subd. 16 (emphasis added).

health condition of a patient; the provision of health care to a patient; or the past, present, or future payment for the provision of health care to a patient.” Minn. Stat. § 144.291, subd. 2(c).

In fact, under the MHRA, “[a] person who . . . negligently or intentionally requests or releases a health record in violation of sections 144.291 to 144.297” is, in turn, “liable to the patient for *compensatory damages* caused by an unauthorized release or an intentional, unauthorized access, plus *costs and reasonable attorney fees*.” Minn. Stat. § 144.298, subd. 2 (emphasis added). That is, unlike HIPAA, the MHRA provides a private right of action against an individual or medical provider who “negligently or intentionally” violates patient privacy. Id.¹⁴

Typically, federal legislation would trump or “preempt” state regulation over the same or similar subject matter. With regard to the protection of PHI, however, Congress made clear that HIPAA was intended to provide only a “floor,” which means that states are permitted to adopt more stringent PHI protections. See 42 U.S.C. § 1320d-7(a)(2)(B) (HIPAA “shall not supersede a contrary provision of State law, if the provision of State law. . . relates to the privacy of individually identifiable health information.”); 45 C.F.R. § 160.203(b) (noting that state law is not preempted if the “State law relates to the privacy of individually identifiable health information and is *more stringent* than a standard, requirement, or implementation specification adopted under subpart E of part 164 of this subchapter” (emphasis added).); see also Law v. Zuckerman, 307 F. Supp. 2d 705, 709 (D. Md. 2004) (“HIPAA and its standards do not preempt state law if the state law relates to the privacy of individually identifiable health information and is ‘more stringent’ than HIPAA’s requirements.”). Thus, to the extent that the MHRA

¹⁴ Despite lacking a private cause of action, civil plaintiffs have successfully used HIPAA’s privacy standards to establish the standard of care in negligence lawsuits. See, e.g., Acosta v. Byrum, 638 S.E.2d 246 (N.C. Ct. App. 2006).

requirements are more stringent than HIPAA, covered entities such as St. Francis must comply with state law. See, e.g., Yath v. Fairview Clinics, 767 N.W.2d 34 (Minn. Ct. App. 2009) (holding that the private cause of action provided by the MHRA did not conflict with HIPAA).

For example, while HIPAA would allow a routine use disclosure in transmitting patient data from one covered entity to another, Minnesota would allow the same disclosure only upon patient authorization. Compare 45 C.F.R. § 164.506 (noting that the “routine use” exception allows a covered entity to disclose protected health information to another covered entity when the disclosure is for treatment, payment, or health care operations) with Minn. Stat. § 144.293 (noting that a patient’s “health record . . . used in assessing the patient's condition . . . shall promptly be furnished to another provider upon the written request of the patient”).

Importantly, courts in Minnesota have held that covered entities such as St. Francis are not only subject to the MHRA, but they may be held liable for breaches to patient confidentiality by their employees. For example, in Yath v. Fairview Clinics, 767 N.W.2d 34 (Minn. Ct. App. 2009), a patient whose medical record was inappropriately accessed and disclosed on a social media site, including the results of her STD test, brought suit against the hospital on several theories including the private right of action provided by the MHRA. On appeal, the court held that the private right of action under the MHRA was not preempted by HIPAA. Instead, the court held that “[r]ather than creating an ‘obstacle’ to HIPAA, Minnesota statutes section 144.335 supports at least one of HIPAA’s goals by establishing another disincentive to wrongfully disclose a patient's health care record.” Id. at 50.

Clearly, state patient privacy laws require employers such as Respondent to take any and all steps necessary to prevent and respond to breaches of patient confidentiality. By failing to

account for the violation of state privacy law by Wolf and Theis, the ALJ erred in finding that Respondent unlawfully interrogated Wolf and unlawfully terminated Wolf and Theis.

IV. THE ALJ ERRONEOUSLY CONCLUDED THAT RESPONDENT UNLAWFULLY INTERROGATED AND THREATENED WOLF.

The ALJ concluded that Respondent interrogated and threatened Wolf in violation of Section 8(a)(1) on October 8 and in emails sent on October 11 and 12. (ALJ-JD 24:44-25:12.) The ALJ's findings and conclusion are mistaken for several reasons, all of which have nothing to do with the ALJ's assessment of credibility. First, as discussed *supra*, the ALJ failed to find that Wolf's access, use, and disclosure of PHI was not protected by HIPAA. Without this crucial distinction, the ALJ improperly cast Respondent's inquiry in terms of identifying "with whom Wolf had engaged in protected, concerted activity" rather than simply the source of a potential breach to patient privacy. (ALJ-JD 25:28-29.) Second, despite acknowledging that Respondent "has an obligation to recover improperly disclosed PHI to protect patient privacy and prevent further unauthorized disclosure," (ALJ-JD 6:27-29), the ALJ concluded that Respondent's conduct in pursuit of such a lawful end violated Section 8(a)(1).

It is well-settled that "[t]he proper test for determining whether an employer's interrogation of an employee violates Section 8(a)(1) is whether, under the circumstances, the interrogation reasonably tended to restrain or interfere with the employees' exercise of the rights guaranteed them under the Act." United Services Automobile Association, 340 NLRB 784, 786 (2003). In Westwood Health Care Center, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations were coercive. These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply. See Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964). After cautioning against the

mechanical application of the Bourne factors, the ALJ neglected three of the five factors and concluded that Respondent's conduct was coercive because the questions were designed to elicit "with whom she had engaged in protected, concerted activity." (ALJ-JD 25:37.) Because the inquiry was limited to activities that violated state and federal privacy laws, the inquiry was not coercive and cannot be used as the basis for finding a violation of Section 8(a)(1).

Where, as here, an employer has a legitimate justification to question an employee, and the employer limits the alleged interrogation to only "unprotected aspects" of an employee's (mis)conduct, the Board has repeatedly held that such an "investigation [i]s neither motivated by an intent to retaliate against [an employee]'s protected [conduct], nor could it reasonably tend to interfere with, coerce, or threaten such activity." DaimlerChrysler Corporation, 344 NLRB 1324, 1328 (2005) (dismissing 8(a)(1) allegations related to "interrogation"); see also Fresenius USA Manufacturing, Inc., 358 NLRB No. 138 (2012) (same); Ogihara America Corp., 347 NLRB 110 (2006) (same). Because the conduct at issue here is analogous to the interrogations the Board deemed lawful in Fresenius, Daimler Chrysler, and Ogihara, the same result is compelled here.

In Fresenius, three union newsletters were found in the employee breakroom with handwritten statements which were vulgar and offensive to female employees, but arguably aimed at encouraging them to read the newsletters. Several female employees complained to the employer about these statements. The employer questioned the suspected author. The Board found that the employer *lawfully* questioned the employee, *rejecting* the General Counsel's argument that the employer investigated and interrogated the employee about protected conduct. The Board reasoned that it "has recognized that employers have a legitimate business interest in investigating facially valid complaints," and that the investigation "was fully consistent with its

antiharassment policy” and its legal obligations under Title VII. Id. at 3 (citing Consolidated Diesel Co., 332 NLRB 1019, 1020 (2000)).

Further, the Board found that the employer’s questioning of the employee did not violate the Act: “The Board has recognized that, as part of a full and fair investigation, it may be appropriate for the employer to question employees about facially valid claims of harassment and threats, *even if that conduct took place during the employees’ exercise of Section 7 rights.*” Id. at 4 (emphasis added) (citing Bridgestone Firestone South Carolina, 350 NLRB 526, 528-29 (2007)). The Board held:

[The questioning] occurred during [the employer’s] legitimate investigation of employees’ complaints about the newsletter comments. [The employer] never asked [the employee] about his union views generally or any of his other union activity. Instead, it focused exclusively on the phrasing of the newsletter comments In these circumstances, we conclude that [the employer] did not violate Section 8(a)(1) by its limited questioning of [the employee] during its lawful investigation of the newsletter comments.[]

Id. at 4 (footnote omitted).

An obvious analogy can be drawn between an employer’s Title VII obligations and a covered entity’s obligations under HIPAA and related patient-confidentiality laws. Moreover, a covered entity’s interest in enforcing its policies regarding patient confidentiality is just as legitimate as an employer’s interest in enforcing anti-harassment and discrimination policies. Here, as in Fresenius, Respondent narrowly tailored the questions to Wolf in order to discover information regarding the scope of the potential HIPAA breach, i.e., asking who gave Wolf the medical records and to whom had Wolf given the records. (Tr. 785 (explaining the “breach assessment” required by HIPAA and clarified by the HITECH Act); Tr. 604-05 (explaining that Allina has an ethical and legal obligation to recover PHI if it is determined to have been distributed inappropriately).) Moreover, Allina made clear to Wolf that it was concerned about a

policy violation regarding patient confidentiality. (Tr. 466; R. Ex. 11.) Selvig and Weiss asked Wolf to provide her with (1) the name of the individual who provided her with the medical records and (2) the name of the transcriptionist to whom she showed the records. (Tr. 468, 607.)

Wolf, as a steward, had sent Respondent numerous information requests – so many in fact that she did not know what Selvig was referring to at the outset of the October 8 meeting. (Tr. 203 (“When [Weiss] got there Ms. Selvig had asked if I had sent an information request. I had asked her to refresh my memory as to which information request she was referring to. She, at that time, did pull out this information request [in question] and showed it to me.”) There is no evidence that Wolf was ever “interrogated” about any of the other numerous information requests she had made. Thus, there is no evidence that Respondent was in any way hostile to Wolf engaging in protected activity via her steward duties, or questioned her regarding any of these protected activities. Rather, Respondent only investigated *this* information request, because it involved patient records, and limited the investigation’s scope to ascertaining the potential HIPAA breach.

DaimlerChrysler Corporation also supports dismissing the interrogation allegations. In that case, an employee/union steward prepared a (draft) information request to the employer that requested, among other things, whether a supervisor “had ever had a substance-abuse problem, and whether he had ever received treatment for, *inter alia*, ‘paranoid schizophrenia, hallucinations, repressed homosexuality, pedophilia, bestiality, etc.’” 344 NLRB at 1327. The supervisor found the draft lying around the workplace. At an investigatory meeting “making specific reference to the offensive portions of the draft information request, [the Labor Relations Supervisor] then asked [the employee/steward] questions about the document, including whether it had been copied, distributed, or circulated in any way, and whether there were any copies

saved on any computer files or disks.” Id. at 1327-28. Contrary to the ALJ, the Board held that this “interrogation” was *lawful*. First, the Board found that “the record does not support a finding that the [employer]’s interrogation was motivated by animus against [the employee/steward]’s other information request and grievance activity.” Id. at 1328. Second, the Board concluded that the “real motivating factor for its interrogation” was the Employer’s “concern about [the employee/steward]’s role in the preparation and dissemination of draft information item 7,” *not* pretext for retaliation. Id. Third, the Board held that the employee’s draft information request was unprotected. Id. Last, the Board noted that in the interview:

[The employer] appropriately limited the scope of its questions to these unprotected aspects of [the employee/steward]’s conduct. [The Labor Relations Supervisor] made it clear, before asking any questions of [the employee/steward], that he was concerned only about the information requested in item 7. [The Labor Relations Supervisor] did not interrogate [the employee/steward] about the legitimate requests made in furtherance of the grievance investigation. Under these circumstances, we find that the [employer]’s investigation was neither motivated by an intent to retaliate against [the employee/steward]’s protected grievance and information request activity, nor could it reasonably tend to interfere with, coerce, or threaten such activity. Therefore, we dismiss the allegation that the interrogation of [the employee/steward] violated Section 8(a)(1) of the Act.

Id.

Similarly, here, the requests to Wolf were narrowly tailored as to the unprotected aspect of her activity – *who* shared the patient record – and was not an interrogation regarding the protected aspect of her conduct (i.e., whether a supervisor was performing bargaining-unit work). The real motivating factor for the questioning was Respondent’s legitimate interest in fulfilling its obligations under HIPAA. Despite recognizing that such a pursuit is lawful as it is required by HIPAA, the ALJ somehow concluded that the end was not Respondent’s true purpose because “no evidence was offered that this was done in other investigations and no

testimony was elicited on the recovery of PHI in other cases.” (ALJ-JD 26:05-06.) Nothing could be further from the truth.

Respondent offered records demonstrating, in 2011 and 2012, over 100 employees were terminated by Respondent for breaching patient privacy. (R. Ex. 46.) All of these cases were preceded by the same privacy investigation that resulted in Wolf and Theis’ termination. *Id.* In addition, the Respondent’s commitment to recover unsecure PHI was demonstrated at the Hearing. Specifically, after it was revealed that the Union possessed PHI that was turned over by Respondent as part of a request for information, Respondent immediately launched an investigation. (Tr. 786-87 (“Q. To your knowledge as Chief Compliance Officer, until today were any -- was anyone in your office made or previously aware of any of those allegations? A. Until last night, no. Q. What would be, if anything, your office’s response to having now learned that there were alleged violations of PHI disclosures to the Union by human resources managers? A. I can tell you that as of this morning we are beginning to investigate that process.”).)

In *Ogihara*, several employees sent a package via FedEx to the employer’s President regarding a supervisor’s alleged poor performance. The employees decided to put the name of another employee, who was unaware of their actions, as the sender on the return address because that employee “opposed union affiliation, and [the other employees] believed that listing [his] name on the return address would be more likely to evoke a response from [the employer] concerning the employees’ complaints.” 347 NLRB at 111. After the employer obtained surveillance footage from the FedEx store via a subpoena, and determined who *actually* mailed the package, the employer questioned that employee about his involvement. *Id.* The Board ***reversed*** the ALJ and found that this “interrogation” of the employee ***was lawful***:

[W]e have found that the sending of the package under false pretenses was not protected. The [employer]’s interrogations of [the employees] in an effort to determine who sent the package were merely part of the [employer]’s legitimate investigation of unprotected conduct. Accordingly, we find that the interrogations would not reasonably tend to restrain, coerce, or interfere with rights guaranteed by the Act.

Id. at 114 (citing HCA/Portsmouth Regional Hospital, 316 NLRB 919, 931 (1995) (“interrogation did not violate the Act where ‘the conduct about which the interrogation took place was not protected’”)).

Selvig did not, as the ALJ concluded, unlawfully “threaten” Wolf with discipline up to and including termination if she failed to provide the requested information. (ALJ-JD 26:07-11.) Contrary to the ALJ’s intimation, it is lawful to terminate employees for not cooperating with investigations that are unrelated to Section 7 activity. See W.R. Grace Co., 240 NLRB 813, 820-21 (1979) (employer did not violate the Act by discharging employee who refused to cooperate in investigation of improper disclosure of confidential salary information). Accordingly, if it is lawful to *actually* discipline the employee, advising of such consequences must also be lawful.

For example, in Beckley, at an investigatory meeting the employer asked nearly identical questions to those alleged to be unlawful here – the Employer “demanded to know how many copies of patient records [the alleged discriminatee] possessed, how she had obtained these documents, and who had assisted her.” 318 NLRB at 907. Notably, the General Counsel *did not even allege* that this constituted an unlawful interrogation. See id. at 908 (stating that the “complaint alleges that the [Employer] violated Section 8(a)(1) by suspending and discharging [her] because of her protected concerted activity or because it believed that she had engaged in protected concerted activity”). Because Respondent can lawfully terminate an employee for failing to cooperate with a privacy investigation, the same conduct cannot as a matter of law serve as the basis for a violation of Section 8(a)(1).

Accordingly, the Board should reverse the ALJ's finding that Respondent violated Section 8(a)(1) by questioning Wolf in conjunction with its privacy investigation.

V. THE ALJ ERRONEOUSLY CONCLUDED THAT RESPONDENT UNLAWFULLY TERMINATED WOLF AND THEIS.

“The fact that an activity is concerted . . . does not necessarily mean that an employee can engage in the activity with impunity.” NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 837 (1984). Indeed, the law is settled that an employer is not “under any legal duty to do more than treat an employee engaged in union activity in the same manner that it treats [other, non-union] employees,” NLRB v. La-Z-Boy Midwest, 390 F.3d 1054, 1062 (8th Cir. 2004), and “misconduct . . . do[es] not have to be tolerated merely because the offenders are among the plant’s most active union supporters,” NLRB v. Evans Packing Co., 463 F.2d 193, 199 (6th Cir. 1972); see also Valley Mkts., Inc., 192 NLRB 125, 130 (1971) (same). The ALJ’s decision casts these principles aside.

A. THE ALJ ERRED BY IGNORING BINDING BOARD LAW FINDING THAT SECTION 7 DOES NOT INSULATE EMPLOYEES FROM DISCIPLINE WHEN THEIR ACTIONS VIOLATE PATIENT PRIVACY.

The Board has long held that an employee is not insulated from discipline for violating the employer’s confidentiality policy even if the employee was arguably engaged in otherwise protected activity at the time of the breach. See, e.g., Altoona Hospital, 270 NLRB 1179 (1984); Beckley Appalachian Hosp., 318 NLRB 907, 909 (1995). Stated differently, the employee’s unlawful means (violating patient privacy) does not become lawful simply because it is in pursuit of a lawful end (advancing the policies of the Act). The ALJ’s decision completely ignores these settled principles and must be overturned.

Instead of analyzing the conduct of Wolf and Theis through the lens of other patient privacy cases, such as Altoona and Beckley, the ALJ analyzed their conduct under the Atlantic

Steel factors, which are criteria developed by the Board to analyze whether employee outbursts (profanity, name-calling, etc.) that take place during otherwise protected activity remain protected. See Atlantic Steel Co., 245 NLRB 814 (1979). This is a legal error. Employees in both Altoona and Beckley were arguably engaged in protected activity at the times when they breached patient confidentiality. Specifically, the RN in

Beckley was investigating the circumstances leading up to her discipline and in preparation for her potential grievance. Similarly, in Altoona, the employee violated patient privacy while investigating facts underlying her grievance. Despite the fact that the employees in Altoona and Beckley were engaged in arguably protected activity, the Board did not analyze the Atlantic Steel factors. This is because the conduct at issue in Altoona and Beckley, like the conduct in this case, involved a potential breach of HIPAA. The Altoona and Beckley line of cases was developed by the Board to accommodate the competing interests of the Act and HIPAA. Despite Respondent's urging, the ALJ did not analyze this line of cases.¹⁵

The law is clear that the Atlantic Steel factors do not apply in all instances where an employee's discipline is somehow related to the employee's protected conduct. For example, the Second Circuit recently held that the Atlantic Steel factors are not applicable when the employee outburst is in the presence of customers. See NLRB v. Starbucks Corp., 679 F.3d 70, 79 (2d Cir. 2012). Atlantic Steel, the court said, was meant to address employee outbursts in the "context [of] the workplace, e.g., the factory floor or a backroom office, and the concern was whether the outburst would impair employer discipline." Id. at 79. "[I]t is arguable . . . that [S]ection 7 never protects an employee who uses obscenities in the presence of customers," even when discussing employment issues. Id. at 80. Here, Wolf and Theis were discharged for breaching Respondent's

¹⁵ In fact, the ALJ did not even address Altoona in her analysis of Respondent's termination of Wolf and Theis. (ALJ-JD 26:14-31:09.)

Confidentiality Policy – not for outbursts in front of managers or customers. Nevertheless, like the conduct at issue in Starbucks, the conduct had effects far beyond the factory floor or back office. Indeed, as noted above, the misconduct had the potential to subject Respondent to significant administrative penalties and/or civil liability under HIPAA and state law. Therefore, the Atlantic Steel test is inapplicable to the case at hand.

Instead, the breaches to patient privacy by Wolf and Theis must be analyzed under the rubric set forth in Beckley and Altoona. These cases attempt to accommodate the conflicting policies of the Act (which seeks to protect concerted activity) and HIPAA (which seeks to protect patient privacy). An employee’s breach to patient privacy cannot be equated with an employee calling a supervisor a “lying son of a bitch”¹⁶ – one violates federal law and the other, while demonstrating a general lack of decorum, *may in fact be true*. With the appropriate standard in mind, it is clear that Respondent did not violate Section 8(a)(3) when it terminated Wolf and Theis for violating patient privacy.

1. Because the Medical Records Were Not Necessary to the Investigation or Request for Information, the Breaches by Wolf and Theis Were Not Protected by *Beckley* or *Altoona*.

In Beckley, RN Carol Kongkasuwan was suspended for violating hospital procedures. Kongkasuwan appealed the suspension and, as part of her own investigation, she obtained patient records from other employees to show that other RNs had committed similar work infractions without being disciplined. Kongkasuwan was represented by the union at the appeal hearing. During the hearing, Kongkasuwan proffered the patient records to show disparate treatment. *Although the patient names had been redacted*, additional identifying information was still visible, in violation of hospital policies. The hospital personnel manager demanded to know how

¹⁶ In Atlantic Steel, the employee was accused of calling his supervisor a “lying son of a bitch” or that the supervisor told a “m– f– lie” or was a “m– f– liar.” 245 NLRB at 814.

many copies of patient records Kongkasuwan possessed, how she had obtained the documents, and who had assisted her. Kongkasuwan refused to reveal the names. The hospital suspended Kongkasuwan for five days for breach of patient confidentiality.¹⁷ Approximately one week later, the hospital converted the suspension into a discharge.

The ALJ in Beckley found that the employer violated the Act by suspending and discharging Kongkasuwan. The Board disagreed. According to the Board, “the use of the confidential records was unprotected.” 318 NLRB at 909. The Board analyzed the issue as follows:

[U]pon acceptance of employment, Kongkasuwan agreed to abide by the Respondent’s confidentiality policy. Notwithstanding this agreement, she breached this policy when she used the confidential records in a way that was clearly prohibited. The Respondent’s rule provides that patient “information is absolutely confidential.” There is to be no disclosure “to persons outside or inside the hospital except in meeting the needs of the patients.” Kongkasuwan’s use of the records was not related to “patient needs”; her use of the records was solely related to her employment dispute with the Respondent. ***In these circumstances, the method and means by which Kongkasuwan made use of the Respondent’s confidential patient records fell outside the protection of Section 7 of the Act.***

Id. at 908 (emphasis added).

Here, like Kongkasuwan, Wolf and Theis agreed to keep the Employer’s patient records confidential, and their actions with respect to the patient records were in violation of the Employer’s Confidentiality Policy. Regardless of their intent, their conduct similarly falls outside the protection of the Act because the “method and means by which [they] made use of the . . . confidential patient records” violated the Employer’s Confidentiality Policy. Id. at 908.

As Theis and Wolf readily admitted, they did not need the documents in order to process a potential grievance or to support an information request. In any case, even if they did, this

¹⁷ The hospital had a policy stating that patient information is not to be disclosed to persons either inside or outside the hospital except when meeting patient needs.

would not justify breaching the Employer's confidentiality policy. As explained by the Board in Beckley:

[W]e note that employee Kongkasuwan *could have used other channels to obtain the necessary information*. More particularly, *Kongkasuwan could have requested that her union, as exclusive representative, make an information request*. The Act encourages this means of obtaining information as part of an effort to foster collective bargaining without denigrating legitimate confidentiality concerns. The Respondent and the Union, in the give-and-take of collective bargaining, could have explored ways to provide the necessary information without jeopardizing the Respondent's confidentiality interests. Kongkasuwan bypassed these established procedures and knowingly violated the Respondent's confidentiality policy by an unauthorized disclosure of the patient records.

Id. at 909 (emphasis added). Indeed, as soon as there was any question about whether a supervisor was performing bargaining unit work, all that was needed was for Wolf or Theis to file an information request.¹⁸

There can be no claim that Wolf or anyone else employed by the Union had a right to see this information as part of the grievance process. Indeed, the Board squarely rejected this argument in Beckley:

[O]ur colleague argues that the patient information was disclosed only to management and union officials, and that they had a right to see and use the information because they were authorized to be present at the grievance hearing. We disagree. *The fact that officials are authorized to participate in grievance procedures does not necessarily mean that each and every one of these officials must see and use sensitive materials*. Decisions can be made to confine the materials to only a few officials. Management has the authority to determine which of its officials can see and use the information, and the collective-bargaining process will determine which union officials can do so. In any event, it was not up to employee Kongkasuwan to unilaterally make this delicate decision.

¹⁸ The fact that the information request could have taken additional time is irrelevant to whether the breach is unprotected. Unprotected conduct does not become protected simply because it is being performed under the auspices of "expediting" the grievance. See Rickel Home Centers, 262 NLRB 731 (1982) (holding that a union steward was discharged for "legitimate cause" and that "his status as union steward provided no immunity" where the steward left his work area and refused to return to work in an attempt to resolve a potential grievance).

Id. at 909 (emphasis added). Patient privacy would mean nothing if an employee or union steward could unilaterally decide that the information is relevant to a grievance, and thereupon remove it from the protections the employer has afforded it. No union or individual employee has the authority to disregard patient confidentiality on the basis that the medical record may contain information that is relevant to a grievance or possible grievance. Indeed, Union President Gulley confirmed this fact during his testimony:

Q. . . . [I]s it SEIU's contention that a steward can violate patient privacy, as long as he or she is performing steward duties?

A. No, *no one that is involved with the union, myself included, is allowed to violate patient privacy.*

(Tr. 395 (emphasis added).)

In Altoona Hospital, secretary/receptionist Marlene Focht received a disciplinary warning for rude and discourteous behavior based on three incidents. The union filed a grievance, which was later arbitrated. Prior to the third step grievance meeting, Focht hired a private investigator *in order to investigate the facts underlying her grievance.* Focht provided the investigator with the name of Shirley Beam who was the mother of a patient treated in the emergency department; Beam's name was listed as the next of kin on a hospital admission form. The supervisor attributed one of the complaints regarding Focht to Beam. The hospital discharged Focht for providing Beam's name to the private investigator, which the hospital treated as disclosing confidential information in contravention of its policies.

The arbitrator upheld the discharge, finding that Focht had "violated the cardinal rule of confidentiality of hospital information." The ALJ, however, declined to defer to the arbitrator's award because, notwithstanding the breach to patient privacy, the investigator was working with

the goal of developing the facts surrounding Focht's termination. In the ALJ's view (as reflected in several places in his decision), this afforded the employee some level of protection:

“. . . Focht was engaged in processing a grievance under a contractually established grievance procedure seeking to enforce her rights under the “just cause” provision in her collective-bargaining agreement. . . . That recourse becomes meaningless when, as here, application of an employer's rules precludes the employee and the Union from determining the facts and preparing a case for presentation in the grievance procedure.”

* * *

“It was therefore essential to any meaningful grievance presentation that Focht find out whether the [Beam] complaint was against her and what it was that she had allegedly done.”

* * *

“Respondent's rules would have prevented the acquisition of evidence necessary for cross-examination of the [complainant] or of the shift supervisor who took Beam's call, if either were to testify. Such a grievance and arbitration proceeding, where only one side is permitted access to the evidence, is not what the Board and the courts envision.”

* * *

“Here application of Respondent's rule to grievance situations prevents employees from acquiring the facts necessary to defend themselves from employer-imposed discipline. Focht, unlike the employee in IBM, 265 NLRB 638 (1982), had no reasonable alternative.”

Id. at 1185-86.

The Board, however, rejected the ALJ's analysis:

It is undisputed that employers have a legitimate interest in keeping certain information confidential; that is unquestionably true with regard to a health care employer whose patient records are especially sensitive. ***An employee's violation of an employer's rule against the disclosure of confidential information may also be the subject of lawful discipline even when the disclosure is made for reasons arguably protected by the Act.*** The test of such discipline is whether the employee's interests in disclosing the information outweigh the employer's legitimate interests in confidentiality. If they do not, then discipline is lawful.

Id. at 1180. The Board then refused to overturn the arbitrator's finding that the employer's confidentiality concerns outweighed the union's grievance needs.

In Altoona Hospital, the Board suggested that, if "the employee's interests in disclosing the information outweigh the employer's legitimate interests in confidentiality," an employee's violation of an employer's rule against the disclosure of confidential information may be protected. Id. This is not that case. Here, there is no employee interest to weigh because, as Theis and Wolf readily admit, *their breach of patient privacy was not necessary to the furtherance of their union activity.*

Significantly, as noted in Altoona, in finding a violation, the ALJ emphasized several times that Focht was seeking to acquire facts related to her grievance. For its part, the Board refused to go along with the ALJ's view that this somehow trumped patient privacy. Indeed, the Board has made plain that an employee may not "denigrat[e] legitimate confidentiality concerns" where the employee "could have used other channels to obtain the necessary information . . . [such as] request[ing] that her union, as exclusive representative, *make an information request.*" Beckley, 318 NLRB at 909 (emphasis added). Stated differently, where the breach is not absolutely necessary to further the employee's interest in disclosure, it cannot serve as a basis for violating the Employer's otherwise legitimate privacy rules.

2. The Board has Recognized Employers' Interest in Maintaining the Confidentiality of Certain Records in the Non-Healthcare Context.

Even in the non-healthcare context, the Board has recognized that employees engage in unprotected conduct when they violate their employer's confidentiality rules. This is particularly true in circumstances where the union may obtain the needed information through an information request. For example, in Montgomery Ward & Co, Inc., 146 NLRB 76 (1964), an employee was laid off for lack of work. In the process of investigating a grievance regarding the layoff, a union

representative asked a clerk in the service department about the availability of work. The clerk looked over the work orders and told the union representative that there were “quite a few work orders pending there,” and added that these orders were “more than one man could take care of.” The district manager found this out and told the clerk that “she was not to give out any information about work orders to anyone, and she was ‘on the spot’ if she did.” The Board wrote:

The Board has held that a collective-bargaining representative has a right, under Section 7 of the Act, to obtain information necessary for the processing of a grievance. Moreover, in the instant case, the information contained in the work schedules was clearly necessary to the processing of Ward’s grievance concerning his layoff for lack of work. ***The Respondent was therefore required, upon proper request, to supply such information to the Union.*** That the Respondent was mindful of this obligation is clearly indicated by Smith’s voluntarily showing some of the work orders to Seegert. However, the work schedules were the property of the Respondent, and it was entitled to full control over them in order to be able to meet its obligation as the need arose. To hold otherwise would be inconsistent with the salutary principle, heretofore enunciated by the Board, that any disagreements which might arise between an employer and the representative of its employees over the conditions for turning over information which the employer is required to furnish should be established at the bargaining table. Consequently, ***because the Respondent had the right to control its records, it had the right, in implementation thereof, to instruct its clerk,*** Enders, not to give such information directly to the Union. Accordingly, the Respondent’s instructions to Enders did not interfere with or coerce Enders within the meaning of the Act. We shall therefore dismiss this allegation of the complaint. [footnotes omitted]

Id. at 78-79.

Similarly, in Bell Federal Savings & Loan Ass’n, 214 NLRB 75 (1974), receptionist Patricia Yock’s job duties included answering the telephone and routing calls. After an organizing campaign, the union’s secretary-treasurer (Montani) met with a group of the employees. During the meeting, Montani indicated uncertainty as to whom would represent the employer in contract negotiations, and he asked whether the name Wellington meant anything to

them.¹⁹ Yock responded that Wellington had called the bank president (Eckert) four or five times on the telephone that day. The employer discovered this in its investigation, and Yock admitted it. The employer suspended Yock for one week for breaching confidentiality of her position as a receptionist and telephone operator by disclosing the calls from Wellington to the bank president.

The Board agreed with the ALJ's determination that the employer did *not* violate Section 8(a)(1) or (3) by disciplining Yock. The ALJ wrote:

The remaining issue is whether, as the Respondent contends, President Eckert's telephone conversations with his legal counsel were confidential information the disclosure of which he had the right to control; or whether, as the General Counsel contends, the information was not confidential and Yock had the right under the Act to disclose it to her Union for its use in facilitating the establishment of good-faith bargaining.

. . . [I]t seems plain that President Eckert had a right to rely on Yock, or any other employee covering the switchboard, not to disclose information about his telephone calls, particularly those from his legal counsel. Eckert was therefore entitled to consider such conduct a breach of trust justifying discipline. Contrary to the General Counsel's contention, I find that Yock's conduct cannot be equated with that of employees who use information obtained at work such as the names and addresses of other employees, openly available from timecards, for organizational purposes. Here, the Union had been certified as the bargaining agent. The Respondent had a duty, inherent in its obligation to bargain, upon request, to provide the Union with information as to the identity of its bargaining representative when that information became available. Moreover, it undoubtedly would have done so if the Union had made such a request of either President Eckert or Wellington, who Polito had informed Montani was the Respondent's legal counsel. The result of Montani's opting for a roundabout rather than the direct approach was not the facilitation of the establishment of a good-faith bargaining relationship between the Union and the Employer, but the creation of mischief which tended to impede the establishment of such a relationship. I find that Yock's imprudent cooperation with Montani's inauspicious tangential approach to bargaining was not protected by the Act.

I conclude that the Respondent did not violate Section 8(a)(1) or (3) of the Act by disciplining Yock for this conduct. I shall therefore recommend that the complaint be dismissed. [footnotes omitted]

¹⁹ Wellington had been the employer's lawyer for the representation case.

Id. at 78.

As is the case here, the unions in Montgomery Ward and Bell Federal could have obtained the information they were seeking by making a request. Rather than simply requesting information relating to any supervisor performing bargaining unit work, Theis and Wolf used and disclosed confidential medical records in violation of the Employer's confidentiality policy. As a result, their conduct was not protected by the Act.

B. EVEN UNDER ATLANTIC STEEL, SECTION 7 DOES NOT PROTECT CONDUCT THAT EXPOSES THE EMPLOYER TO ADMINISTRATIVE CENSURE OR CIVIL LIABILITY.

Rather than applying settled Board law with respect to the violations of patient privacy by Wolf and Theis, the ALJ applied the standard set forth in Atlantic Steel to determine whether their conduct lost the protection of the Act. (ALJ-JD 26:39-27:13.) As discussed *infra*, this is not the law. Nevertheless, even if the Board wrongly applies the standard set forth in Atlantic Steel, the violations to patient privacy by Wolf and Theis caused them to lose the protection of the Act.

Section 7 of the National Labor Relations Act protects employees who engage in “concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C. § 157. Accordingly, employers cannot discharge or discipline employees because of their exercise of Section 7 rights. Id. § 158(a)(1). An employer may, however, discharge an employee for “a good reason, a bad reason, or no reason, so long as it is not for an unlawful reason.” Epilepsy Found. of Ne. Ohio v. NLRB, 268 F.3d 1095, 1105 (D.C. Cir. 2001). Even if the misconduct for which the employee is discharged is part of the *res gestae* of protected concerted activity, “opprobrious conduct” by the employee “lose[s] the protection of the Act.” Atlantic Steel Co., 245 NLRB 814, 816 (1979). Indeed, “[t]he fact that an activity is concerted . . . does not

necessarily mean that an employee can engage in the activity with impunity.” NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 837 (1984). “The employee’s right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.” Dreis & Krump Mfg. Co., Inc. v. NLRB, 544 F.2d 320, 329 (7th Cir. 1976) (quoting NLRB v. Thor Power Tool Co., 351 F.2d 584, 587 (7th Cir. 1965)). Whereas modest improprieties will be overlooked, “flagrant,” “indefensible,” “abusive,” or “egregious” misconduct will not be. Thor Power Tool, 351 F.2d at 587 (“flagrant”); Roadmaster Corp. v. NLRB, 874 F.2d 448, 452 (7th Cir. 1989) (“indefensible or abusive”); see also NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 837 (1984) (“abusive”); Mobil Exploration & Producing U.S., Inc. v. NLRB, 200 F.3d 230, 242-43 (5th Cir. 1999) (“abusive” or “flagrantly insubordinate”); Precision Window Mfg., Inc. v. NLRB, 963 F.2d 1105, 1107-08 (8th Cir. 1992) (“indefensible” or “wanton”); YMCA of Pikes Peak Region, Inc. v. NLRB, 914 F.2d 1442, 1452 (10th Cir. 1990) (“egregious”).

Wolf and Theis were discharged for their intentional access (Wolf only), use, and disclosure of confidential medical information without a legitimate business purpose. As to Theis, there is no question that she violated the Respondent’s confidentiality policy when, in July and August, she began copying and keeping medical records that she came across during the course of her work duties. (Tr. 106, 141.) Although Theis had a legitimate business reason to view these documents when doing so as part of her job to scan them into the electronic medical record, she had no legitimate business purpose for making and keeping copies of these documents. (Tr. 106, 141, 487.) Theis admitted that she made copies of the documents notwithstanding the fact that she did not have an authorization from any of the patients to copy and maintain them. (Tr. 135, 487.) Theis also lacked any legitimate business purpose when she

maintained the documents in her personal cupboard or when she gave the medical records to Wolf. (Tr. 135.) Indeed, as Theis made clear at the hearing, the confidential patient records were *not at all necessary* to the investigation. (Tr. 134-37; *id.* at 137-38 (“Q. . . . [Wolf] only needed the date [and] the transcriptionist’s initials . . . right? Yes? A. Correct.”).)

Wolf similarly breached patient privacy when she accepted the four medical records from Theis and emailed one of the four to two individuals employed at a different hospital and one individual who was not even employed by the Employer’s hospital system. First and foremost, Wolf lacked a business need for the four patient records because all she needed was the transcriptionist’s initials (i.e., DAW) and perhaps the approximate date to look into a possible contract violation. Second, as to attaching the medical record to her email message, Wolf admitted that none of the recipients needed to see the medical record in order for her to make the information request. (Tr. 253-55.) Because Wolf lacked any business-related reason – or, in fact, any need at all – Wolf’s conduct is not protected by the Act.

None of this is disputed.

The ALJ nevertheless determined that the discharges of Wolf and Theis were impermissible retaliation for their engagement in concerted activity. (ALJ-JD 27:11-13.) This decision is wrong because, under Atlantic Steel, Wolf’s and Theis’ violations of Respondent’s confidentiality policy were so serious and inexcusable as to lose Section 7’s protection.

To determine whether an employee has “engage[d] in indefensible . . . conduct,” Trus Joist MacMillan, 341 NLRB 369, 370 (2004), the Board traditionally balances four factors: (1) the situs of the misconduct; (2) the subject matter of the misconduct; (3) the nature of the employee’s misconduct; and (4) whether the misconduct was, in any way, provoked by an

employer's unfair labor practice, see Atlantic Steel Co., 245 NLRB 814, 816 (1979). Contrary to the ALJ's finding, Wolf's and Theis' behavior runs afoul of all four factors.

First, the location of the misconduct, weighs strongly against protection. Although the actual misdeeds of Theis and Wolf took place behind closed doors, this factor weighs against protection because the *effect* of their misconduct reached well beyond the walls of Respondent's conference room. As demonstrated *supra*, because the conduct of Wolf and Theis violated state and federal privacy law, it exposed Respondent to significant administrative penalties and civil liability. Indeed, where the misconduct threatens to lower the employer's reputation with its customers, the Board will find this factor to weigh against protection. Cf. Station Casinos, LLC, 358 NLRB No. 153 n.16 (Sept. 28, 2012) (noting that the misconduct did not threaten to lower the employer's reputation in the eyes of customers); see also NLRB v. Starbucks Corp., 679 F.3d 70, 79 (2d Cir. 2012) (holding that Atlantic Steel factors were not designed to give employees "leeway" where their misconduct took place "in public spaces that risked losing customers").

Second, the subject matter of the misconduct does not merit protection. While Wolf's and Theis' conduct began with the investigation of a potential contract violation, the medium through which Wolf and Theis investigated the potential violation was through the surreptitious copying and removal of four confidential patient medical records, which were first reviewed by Wolf and then sent via email to union stewards at Respondent's other facilities and to one third party. These unprovoked violations of Respondent's policies as well as state and federal laws governing patient privacy do not merit protection under Atlantic Steel or the foundational purposes of the Act.

The lack of protection is even more stark because the misconduct threatens to damage Respondent's reputation with respect to its protection of patient privacy. See Piper Realty Co.,

313 NLRB 1289, 1290 (1994) (noting that even when the Board recognized “some leeway for impulsive behavior” by an employee, it said that such leeway was to be balanced against “an employer's right to maintain order and respect”); DaimlerChrysler, 344 NLRB at 1329-30 (employee's profane outburst unprotected, even though profanity common in workplace, because outburst directed at supervisor); cf. Beverly Health & Rehab. Servs., 346 NLRB 1319, 1322-23 (2006) (protecting a one-sentence remark with one profane word, directed only at co-worker, in light of the isolated location and grievance-related topic).

Third, the nature of Wolf's and Theis' misconduct stripped it of any protection. It violated Respondent's policies, it violated state and federal law, it violated Respondent's ethical obligations, and it could have threatened patient care. The ALJ nevertheless concluded that the nature of Wolf's and Theis' misconduct weighed in favor of protection because, in the ALJ's view, the conduct did not “render them unfit for further service” and the misconduct did not “rise to the level approaching that of a crime.” (ALJ-JD 27:02, 27:08.) That is wrong both factually and legally.

It is wrong factually because, since 2011, Respondent has terminated approximately 100 employees for violating its Confidentiality Policy. All of these breaches to patient privacy were sufficient to render the employee “unfit for service.” In fact, in Bingham v. Allina Health Sys., 2011 WL 69120 (Minn. Ct. App. Jan. 11, 2011), the Minnesota Court of Appeals held that an employee who violates Respondent's Confidentiality Policy will be denied unemployment benefits (even if the conduct occurs on a single occasion) because the conduct constitutes “employment misconduct” under the Minnesota Unemployment Statute. In Bingham, the employee was asked by a co-worker to access the co-worker's daughter's lab-test results. Id. at *1. Allina discharged the employee for accessing these records for the co-worker/mother. Id.

The court determined the employee's actions, however well-intentioned, constituted disqualifying employment misconduct: "We conclude that the ULJ's misconduct determination is contrary to both [Allina's] policy and case law involving disclosure of medical information." Id. at *2. The court recognized in Bingham that "a medical entity *has the right to expect its employees to keep patient health information confidential* and that the failure to do so is employ[ment] misconduct." Id. (emphasis added); see also Group Health Plan, Inc. v. Lopez, 341 N.W.2d 294, 297 (Minn. Ct. App. 1983) ("Confidentiality of patient records is a very important matter in a hospital or any medical situation. Records privacy is the patient's right. . . . A hospital has the right to expect its employees to keep patient records confidential."); Ress v. Abbott Nw. Hosp., Inc., 448 N.W.2d 519, 525 (Minn. 1989) ("[I]f there is one unique area of employment law where strict compliance with protocol and military-like discipline is required, it is in the medical field"); Hatgidakis v. Fairview Health Servs., 2006 WL 2348110, at *1, 3 (Minn. Ct. App. Aug. 15, 2006) (concluding an employee who was terminated for committing a HIPAA violation "demonstrated a substantial lack of concern for [the employer's] interests and constitutes disqualifying misconduct"); Pribble v. Edina Care Ctr., 2003 WL 945782, at *3 (Minn. Ct. App. Mar. 11, 2003) ("[A] violation of patient records confidentiality constitutes [employment] misconduct.").

The ALJ is also wrong legally. The conduct of Wolf and Theis *does* rise to the level of a crime. As detailed *supra*, the conduct of Wolf and Theis violated state and federal privacy law, thereby exposing Respondent to significant administrative penalties and civil liability. 45 C.F.R. §§ 160.400-160.426; see also 45 C.F.R. § 160.404 (outlining the penalties that can be assessed against a covered entity for violations of HIPAA); ARRA § 13410(e) (authorizing state Attorneys General to bring civil actions on behalf of residents who have been adversely affected

by any HIPAA violation, and giving them the ability to seek injunctive relief and damages of \$100 per violation (up to \$25,000 annually), as well as attorneys' fees);²⁰ United States v. Wright, Court File No. 11-CR-00135 (PJS/FLN), Judgment [Dkt. No. 28] (D. Minn. May 15, 2012) (sentencing a former Mayo Clinic employee to three years of probation and 300 hours of community service after she was found guilty of illegally viewing the medical record of a patient she did not treat).

Finally, contrary to the ALJ's finding, the conduct of Wolf and Theis was not in any way provoked by any unfair labor practice on the part of Respondent. The ALJ based her finding of provocation on the fact that a supervisor "was performing [bargaining unit] work, albeit for an outside [employer]." (ALJ-JD 27:09-11.) This conclusion is absurd and completely ignores settled Board law. Under Atlantic Steel, any purportedly provocative behavior by the employer *must be an unfair labor practice*, 245 NLRB at 816, or at least "provocative conduct that likely would have been found to be an unfair labor practice had it been alleged," Felix Indus., Inc., 331 NLRB 144, 145 (2000), enforcement denied on other grounds, 251 F.3d 1051 (D.C. Cir. 2001). Furthermore, the employee's misconduct must have been provoked by, and in response to, the employer's conduct. See Media General Operations v. NLRB, 560 F.3d 181, 188 (4th Cir. 2009) (employee outburst not protected in part because employee had not read letter to which he was purportedly responding, "which further divorces his derogatory remark from the context of the ongoing labor dispute"). In this case, the ALJ failed to identify any actual or likely unfair labor practice to which Wolf's and Theis' misconduct directly responded. Even if a supervisor was

²⁰ For example, in 2012, the Minnesota Attorney General sued Accretive Health in federal district court for alleged patient privacy violations under HIPAA and the HITECH Act and other state laws. See Press Release, Minn. Atty. Gen. (July 31, 2012) (available at <http://www.ag.state.mn.us/Consumer/PressRelease/07312012AccretiveCeaseOperations.asp> (last accessed on April 7, 2013)). As part of its settlement, Accretive Health agreed to pay approximately \$2.5 million to the State of Minnesota as well as to cease doing business in the state for six years. Id.

performing bargaining unit work in violation of the parties' collective bargaining agreement – which was not the case – this would simply be a contract violation and not an unfair labor practice sufficient to somehow provoke the misconduct.

In sum, the ALJ's decision wrongly expanded the Atlantic Steel factors to essentially create a buffer around employee conduct that is unjustified by precedent and unwarranted on the facts, given the nature of Wolf's and Theis' misconduct and given Congress' intent (as manifested in HIPAA and later the HITECH Act) that these records should remain confidential. Media General Operations v. NLRB, 560 F.3d 181, 189 (4th Cir. 2009).

C. EVEN UNDER WRIGHT LINE, RESPONDENT PROPERLY DISCHARGED WOLF AND THEIS.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). Even where the General Counsel has demonstrated that a discharge was motivated by anti-union animus, moreover, an employer does not violate the Act if it proves by a preponderance of the evidence that an adverse employment action “would have occurred in any event and for valid reasons.” NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 400 (1983), overruled on other grounds Office of Workers' Compensation Programs v. Greenwich Collieries, 512 U.S. 267 (1994) (citing Wright Line, 251 NLRB 1083 (1980)); see also Torrington Extend-A-Care Employee Ass'n v. NLRB, 17 F.3d 580, 591 (2d Cir. 1994). This follows from Section 10(c) of the Act, which provides: “[n]o order of the Board shall require the reinstatement of any individual as an employee who has been . . . discharged, or the payment to him of any back pay, if such individual was . . . discharged for cause.” 29 U.S.C. § 160(c); see also Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) (“The statute does not touch the normal exercise of

the right of the employer to select its employees or to discharge them. It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization.” (quotation omitted).

In meeting that burden, Respondent need not show that the adverse action was “inevitable or almost inevitable” in the absence of anti-union animus. Mid-Mountain Foods, Inc., 350 NLRB 742, 743 (2007). Respondent need only show that it was more likely than not to occur. “The Respondent’s defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.” Merillat Indus., Inc., 307 NLRB 1301, 1303 (1992). The required showing under Wright Line, moreover, can be made through evidence of disciplinary action against employees who engage in similar misconduct, but no history of union activity. See Torrington Extend-A-Care, 17 F.3d at 594-95.

Here, the ALJ’s tortured reading of the record permitted her to first find that Wolf and Theis did not violate Respondent’s Confidentiality Policy. Then, the ALJ fashioned non-existent evidence of disparate treatment while, at the same time, completely ignoring overwhelming evidence that Respondent treated Wolf and Theis on par with other employees who violated patient privacy. The ALJ’s other evidence of pretext was also unsupported by the record or by Board law.²¹

1. Wolf and Theis Violated Respondent’s Confidentiality Policy.

The ALJ concluded that Respondent had failed to show that Wolf and Theis violated Respondent’s Confidentiality of Patient Information Policy (“Confidentiality Policy”), contrary to even the admissions by Wolf and Theis. (ALJ-JD 27:15-16.) The ALJ based her decision on

²¹ The ALJ pointed to Respondent’s questioning of Wolf on October 8 and in emails sent on October 11 and 12 as evidence of union animus. (ALJ-JD 28:35-47.) As described *supra*, this questioning did not constitute unlawful interrogations or threats. Accordingly, these events cannot be used as evidence of union animus.

two facts: (1) Respondent does not define legitimate business reason in its policy, (2) the disclosures by Wolf and Theis were protected by the “resolutions of grievances” exception in a separate policy. None of these findings is supported by the record.

There is no support for the ALJ’s finding that the Confidentiality Policy does not define the term “legitimate business reason.”²² Under the subheading “Violating the policy,” the Confidentiality Policy describes that the definition of “legitimate business reason” includes reasons related to payment and treatment:

A provider has a legitimate need to know a patient's medical information ***during the course of treatment***. Note that a treating relationship does not include accessing a spouse, child's or other relative's records. It also does not apply if your role in the treatment of the individual has ended. For someone in the billing office, ***the legitimate business need to know is in the context of obtaining payment for a bill.*** . . .

(R. Ex. 25 (emphasis added).) In addition, the Confidentiality Policy lists 18 different real-world examples of violations of the policy to help employees understand their obligations, including: “sending PHI electronically without appropriate safeguards,” “bringing file containing PHI home without permission,” and “accessing PHI for patient who [the employee] has cared for, after patient has transferred to other area of the Hospital to see how patient is doing, and not in connection with ongoing treatment.” (R. Ex. 25.) Clearly, Wolf and Theis were on notice that if they accessed, used, or disclosed PHI without a treatment or payment-related reason, they were without a legitimate business reason.

²² The Confidentiality Policy, which is distributed to all employees during orientation, discussed in annual compliance training, and maintained online for employees to access at any time, outlines the circumstances when employees are allowed to access, use, or disclose PHI: “Allina Hospitals & Clinics expects you to keep ***all patient health information confidential.*** . . . Allina permits the access, use or disclosure of protected health information ***only for a legitimate business reason.*** . . .” (R. Ex. 25 (emphasis added).) If, and ***only if***, there is a legitimate business reason for the access, use, or disclosure, then the employee “must also consider whether it is the minimum necessary information to accomplish the intended purpose.” (Id.)

As demonstrated by their testimony, both Theis and Wolf had no “legitimate business reason” for accessing, using, and disclosing the patient records at issue in this case. As to Theis, she cannot claim that her copying, maintenance, and disclosure of the records was in any way necessary or antecedent to her reporting a suspected contract violation to her steward. Indeed, as Theis made clear at the hearing, the confidential patient records were *not at all necessary* to the investigation:

Q. [Y]ou asked Ms. Wolf to see if there were any other transcriptionists with those initials.

A. Correct.

Q. You knew the initials were “D.A.W”, right?

A. Correct.

Q. So as a starting point once you have this concern that maybe the supervisor’s doing this transcription, the starting point about whether other transcriptionists have those initials would be a conversation with Ms. Wolf saying, anybody in the department have the same initials as “D.A.W.”, right?

A. Correct.

Q. But instead of doing that you chose not to simply ask that question of Ms. Wolf or ask her to undertake that task, you chose to hand to her four different pieces of paper that came from medical records, correct?

A. Correct.

(Tr. 134.) Theis admitted that only the initials “DAW” and the approximate date transcription was relevant to the investigation:

Q. There was certainly *no reason that she had to know what the diagnosis was*, right?

A. *Correct.*

Q. And there was *no reason that she had to know what the age of the patient was*, correct?

A. *Correct.*

Q. *Or the gender?*

A. *Correct.*

Q. *Or the symptoms.*

A. *Correct.*

Q. *Or any of the treatment.*

A. *Correct.*

Q. . . . There's *no reason* *that Ms. Wolf had to know what kind of prescription medications* this particular patient was taking, correct?

A. *Correct.*

Q. And *no reason* *to know anything further about the relatives*, correct?

A. *Correct.*

Q. *Family history.*

A. *Correct.*

Q. *Post-operative inspections.*

A. *Correct.*

Q. Or even for that matter *who the radiation oncologist was*, correct?

A. *Correct.*

(Tr. 134-37 (emphasis added); *id.* at 137 (“Q. . . . [Wolf] only needed the date [and] the transcriptionist’s initials . . . right? Yes? A. Correct.”).)

Wolf similarly breached patient privacy when she accepted the four medical records from Theis and emailed one of the four to two individuals employed at a different hospital and one individual who was not even employed by the Employer’s hospital system. First and foremost, Wolf lacked a business need for the four patient records because all she needed was the transcriptionist’s initials (i.e., DAW) and perhaps the approximate date to look into a possible contract violation. Second, as to attaching the medical record to her email message, Wolf

admitted that none of the recipients needed to see the medical record in order for her to make the information request:

Q. So you needed the dates that Ms. Walsh worked as a transcriptionist from January 2011 to the present, correct?

A. Yes.

Q. She could have responded to that e-mail – Mary Selvig could have responded to that e-mail by giving you any and all dates, correct?

A. Yes.

Q. *She didn't need to see Joint Exhibit 2 to get you any and all dates on which Ms. Walsh may have performed transcriptionist work*, right? . . . She didn't need the document to give you the dates that Ms. Walsh may have worked as a transcriptionist, right?

A. *No.*

...

Q. *You didn't need to send Joint Exhibit 2 to Ms. Wooten* in order for Ms. Selvig to respond to how many dates and times Ms. Walsh worked as a transcriptionist, did you?

A. *No.*

Q *You didn't need to send Joint Exhibit 2 to Liz Asmus* to get the information from Mary Selvig as to how many dates Ms. Walsh may have worked as a transcriptionist, right? . . . Ms. Asmus didn't have the data, did she? . . .

A. No.

Q. *Ms. Asmus did not need to see this medical record* for Ms. Selvig to give you dates, did she?

A. *No.*

Q. And *Mr. Sarro did not need not to see this medical record*, Joint Exhibit 2, for Ms. Selvig to give you dates, correct?

A. *No.*

(Tr. 253-55 (emphasis added).) Because Wolf lacked any business-related reason – or, in fact, any need at all – Wolf's conduct is not protected by the Act.

The breaches to patient privacy by Wolf and Theis are not, as the ALJ concluded, immunized by the Employer’s policy that references “internal grievances.” (Tr. 427-28.) The policy is called the Minimum Necessary Standards for Information Disclosure Policy (“Minimum Necessary Policy”), and the policy is irrelevant, as an initial matter, because there is no evidence that Wolf or Theis relied on this policy when they violated Allina’s Confidentiality Policy. Second, the Minimum Necessary Policy is expressly limited to the “disclosure of [PHI] by, for and between Allina Business Units.” Because the uses and disclosures of Wolf and Theis were not “by, for [or] between Allina Business Units,” the policy does not apply to them. Third, the policy addresses the “minimally necessary” standard, which, according to Chief Compliance Officer Kang, does not apply unless or until the employee has a legitimate business purpose. (Tr. 800, 804.) Where, as here, the employee has no legitimate purpose whatsoever, the “minimum necessary” standard is simply not implicated.

Accordingly, the ALJ erred when she found that Wolf and Theis did not violate the plain language of the Confidentiality Policy.

2. Respondent Treated Wolf and Theis Evenhandedly with Other Employees Who Violated the Confidentiality Policy.

The record establishes that Wolf’s and Theis’ union affiliation had nothing to do with Respondent’s decision to discharge them. In fact, substantial undisputed evidence in the record documents that no other employee – union or non-union – who engaged in analogous misconduct received different treatment.

Respondent satisfies its burden under Wright Line if it shows that it treated the union-affiliated employee the same way it treated other similarly situated employees. See Overnite Transp. Co., 343 NLRB 1431 at 1434 (2004); see also Torrington Extend-a-Care, 17 F.3d at 594-95. Indeed, the Second Circuit has made clear that the General Counsel “will normally lose if the

employer can establish a record of discharges for similar conduct.” NLRB v. Charles Batchelder Co., Inc., 646 F.2d 33, 40 (2d Cir. 1981). (quoting NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (2d Cir. 1965)). A mere showing of consistent treatment is enough; an employer is “not required to demonstrate that [other] employees . . . were fired under identical circumstances.” Overnite Transp. Co., 343 NLRB at 1434 (holding that the ALJ erred by disregarding evidence that employer discharged other employees for similar infractions) (emphasis in original); Allied Mech., 349 NLRB 1327, 1332-1333 (2007) (“[I]t is rare to find cases of previous discipline that are ‘on all fours’ with the case in question.”).

Here, the ALJ ignored substantial and undisputed evidence documenting Respondent’s consistent treatment of other employees who, like Wolf and Theis, failed to keep patient information confidential. Since 2011, all Level 3 privacy violations at St. Francis have resulted in the employee’s termination. (R. Ex. 47 at pp. 152-53 (D. Forster termination on March 12, 2012); id. at pp. 161-62 (Shannon Hawari termination on Sept. 27, 2012); id. at pp. 167-68 (C. Dikmen termination on Sept. 20, 2012).) In fact, a closer examination of the circumstances involved in the other terminations at St. Francis for privacy violations demonstrates that the terminations of Wolf and Theis are consistent with how similar (and, arguably even less severe) privacy violations have been treated.

First, Diagnostic Technologist Forster was terminated for intentionally accessing private patient procedures and diagnosis comments from a shared electronic worklist for a patient for whom she was not providing care and thereafter disclosing information about the procedure to other coworkers. (R. Ex. 46 at pp. 152-53.) Specifically, Forster claimed she pulled up an MRI procedures worklist in order to locate a coworker. (Id.) While attempting to locate the coworker, she viewed patient information that included the type of MRI specific to that case. (Id.) She

then proceeded to view additional information about the patient, including the diagnosis comment. She then went to the tech work room and commented about that procedure to two coworkers. (Id.) A coworker then turned to Forster and replied, “that’s my son.” (Id.) The intentional inappropriate access and disclosure of this information, with no business need, were determined to be Level 3 violations of the Confidentiality Policy warranting termination. (Id.)

Second, RN Dikmen was terminated in September 2012 for accessing an electronic patient record of one of her prior patients twice within the same shift after the patient had been discharged, without a business/care-related reason and thereafter disclosing test results to coworkers without a legitimate business reason. (R. Ex. 46 at pp. 167-68.) When asked on multiple occasions why she accessed that information, she had conflicting stories, first claiming “educational” reasons and later claiming she had promised the patient she would follow up with her. (Id.) Both the intentional access of the chart and the disclosure to the coworker, without a legitimate business reason, were determined to be Level 3 violations of the confidentiality policy, justifying her “immediate termination of employment.” (Id.)

Finally, Nursing Assistant Hawari was also terminated in September 2012 for accessing an electronic patient record of a coworker with no care-related purpose. (R. Ex. 46 at pp. 161-62). The intentional inappropriate access of this information resulted in “immediate termination.” (Id.)

Significantly, all of these terminations resulted from privacy violations relating to only one patient, and none of them involved the retention or use of patient records. Further, none of the terminations involved disclosure to people *outside* of St. Francis – let alone outside of Allina.

In complete disregard for the above-mentioned disciplines, the ALJ pointed to 10 examples *from other hospitals* that were, in her opinion, “more egregious” than the conduct of

Wolf and Theis as evidence of pretext. (ALJ-JD 29.) Not only does this finding ignore the evidence that all Level 3 breaches at St. Francis resulted in termination, it also ignores unrebutted testimony that, since 2011, Allina has terminated 98 of the little over 100 employees who were determined to have committed Level 3 violations. (Tr. 707-08.) What is most relevant here is that this pattern has everything to do with breaching patient privacy and nothing to do with union affiliation.

In addition, a more careful review of the evidence cited by the ALJ demonstrates that the disciplines at issue were less serious than the actions of Wolf and Theis:

- **GC Ex. 31(d):** the ALJ failed to note that the employee did not disclose any PHI to anyone and did not post it to Facebook. Instead, the information posted was non-identifying census data.
- **GC Ex. 31(zz):** the ALJ did not consider the fact that the patient, who was the employee's family member, had given the employee *permission* to access the patient's medical record. Acting with insufficient consent is considerably different than acting with no consent.
- **GC Ex. 31(bb):** the ALJ speculates that there was not a legitimate business reason for the employee to send an unencrypted email containing PHI to a non-Allina email address or that the email was sent as a result of anything more than an administrative oversight. Because failing to encrypt the message alone is a violation of the Confidentiality Policy, the ALJ wrongfully assumes that one did not exist.
- **GC Ex. 31(oo):** the ALJ failed to note that the discussion was at least tangentially related to the treatment of the patient.
- **GC Ex. 31(ww):** the ALJ ignored the fact that the employee who disclosed the patient's HIV status did so with the intent of protecting her colleagues who would be treating the patient.
- **GC Ex. 31(i):** the ALJ ignored the fact that the employee accessed his mother's chart only *after* she gave the employee verbal consent. Again, acting with insufficient consent is considerably different than acting with no consent.
- **GC Ex. 31(h):** The ALJ completely ignored the fact that the employee *unintentionally* posted the image to Facebook and that the employee immediately deleted the image when notified about it. Contrary to the ALJ's suggestion, it is

entirely possible to unintentionally upload photos to Facebook. Specifically, the Facebook “App.” will automatically upload any photos taken on the phone. See <https://www.facebook.com/help/photosync> (FAQ regarding “How do I turn syncing off”).

- **GC Ex. 31(qq):** The ALJ ignored that the employee did receive a *3-day suspension* (not a written warning) for posting observations she made while working in the ER onto Facebook.
- **GC Ex. 31(p), (q):** The ALJ ignored that no PHI was disclosed when an employee permitted another employee to use her badge to obtain an unauthorized medical test.
- **GC Ex. 23:** The ALJ ignored the fact that, following the investigation, the Respondent determined that the breach to patient confidentiality was unintentional.

Notwithstanding these incidents – which are arguably less severe given the limited amount of information contained in each incident report – Respondent has demonstrated a consistent pattern of terminating employees who violate its Confidentiality Policy. It bears repeating: since 2011, St. Francis has terminated all employees found to have committed a Level 3 privacy offense. Additionally, un rebutted testimony demonstrated that Allina has terminated 98 of the little over 100 employees who were determined to have committed Level 3 violations. This showing is sufficient under Wright Line to rebut any inference that Wolf and Theis were terminated for union activity. Overnite Transp. Co., 343 NLRB at 1434; Allied Mech., 349 NLRB at 1332-33.

3. Other Evidence of Pretext Cited by the ALJ Is Similarly Unsupported by the Record.

The only other evidence of pretext cited by the ALJ was (1) that Respondent unlawfully threatened and interrogated Wolf and (2) that Respondent offered “multiple and shifting justifications” for terminating Wolf and Theis. (ALJ-JD 28:35-47, 29:01-24.) Neither of these findings withstands serious scrutiny.

First, as to the allegedly unlawful threats and interrogation, as demonstrated *supra*, Respondent did not unlawfully interrogate or threaten Wolf. Accordingly, Respondent’s lawful questioning of Wolf in furtherance of its privacy investigation cannot, as a matter of law, serve as evidence of pretext – let alone as “direct evidence of hostility towards Wolf’s union activity.” (ALJ-JD 28:39-40.) The ALJ’s eagerness to find an evil motive or intent – especially when such a finding is based on her own erroneous conclusion – is inconsistent with federal labor law. See NLRB v. McGahey, 233 F.2d 406 (5th Cir. 1956) (“[A]n unlawful purpose is not lightly to be inferred”); Petroleum Transportation Co., 236 NLRB 254 (1978) (adopting the ALJ’s finding that, although the Company may have been eager to terminate the employee the General Counsel failed to establish that the employee was terminated for any reason other than his misconduct, and so this portion of the complaint accordingly was dismissed).²³

Second, contrary to the ALJ’s finding, Respondent did *not* offer shifting reasons for the termination of Wolf and Theis. “Shifting reasons” are defined as reasons that “either did not exist or were not in fact relied upon” International Carolina Glass, Corp., 319 NLRB 171 (1995). In this case, Respondents’ reasons for terminating Wolf and Theis were consistent and credible: Wolf and Theis were terminated for intentionally accessing (Theis only), using, and disclosing confidential medical information without a “legitimate business purpose.” (R. Ex. 5 (noting that Theis “use[d] and disclos[ed] . . . patient records, confidential and protected health information without a permitted business reason”); R. Ex. 6 (noting that Wolf “access[ed], use[d] and disclos[ed] . . . confidential and protected health information without a legitimate

²³ Indeed, on numerous occasions, the ALJ faulted Respondent’s employees for not remembering specifically what was said during conference calls regarding the decision to terminate Wolf and Theis. (See, e.g., ALJ-JD 14:01-02, 14:35-36, 19:26-27.) The inability to detail precisely what was said (and by whom) does not somehow convert an otherwise lawful termination into an unlawful one. Mere suspicion or conjecture is not evidence of pretext.

business reason’).) Indeed, in at least one portion of her decision, the ALJ recognized that the conduct that precipitated the terminations of Wolf and Theis is not disputed: “The nature of the misconduct was twofold: the discovery and retention of medical records . . . and; the disclosure of a partially redacted medical record containing PHI to a union representative and two union stewards at another Allina facility.” (ALJ-JD 26:44-27:01.) If the “nature of their misconduct” is not disputed, there simply cannot be “shifting reasons” for their terminations.

To the extent the term “access” was ever mentioned with regard to the termination of Theis, it was used in reference to the nomenclature contained in the policy – not because Theis was found specifically to have accessed confidential patient information without a legitimate business purpose. Also, the fact that the term “access” was used during the investigation of Theis’ conduct is unsurprising because the Employer was investigating whether Theis had a legitimate business purpose for accessing the confidential medical information.²⁴ Ultimately, the Employer was able to determine that Theis had a legitimate business purpose for *accessing* the confidential patient records, but not for using and disclosing the documents. (R. Ex. 5.)

Respondent’s references to other policies during the course of the investigative process is not, as the ALJ suggests, evidence of pretext. As part of the investigation, Respondent analyzed several related policies to determine whether Wolf and Theis breached patient privacy. For example, the “minimum necessary” was mentioned on several occasions during the

²⁴ Although not specifically relied upon in her analysis, the ALJ wrongfully failed to exclude any evidence relating to what was said during the confidential unemployment hearings of Wolf and Theis. (ALJ-JD 18:10-15, FN26.) Minnesota law created the unemployment proceeding and Minnesota law expressly prohibits any testimony elicited at the hearing from being “used or considered for any purpose, including impeachment, in any civil, administrative, or contractual proceeding.” Minn. Stat. § 268.105, subd. 5(c); see also Fed. R. Civ. P. 501. The ALJ’s eagerness to ignore the state-created privilege for testimony elicited in a state-created proceeding was in error. See Pearson v. Miller, 211 F.3d 57, 61 (3d Cir. 2000) (“A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.”).

investigation. As noted above, the minimum necessary policy is implicated if, and *only if*, there is a legitimate business reason for the access, use, or disclosure. (R. Ex. 25.) Because Wolf and Theis did not have a legitimate business purpose with respect to their use and disclosure of confidential patient information, the “minimum necessary” policy was not implicated. (R. Ex. 25.) Of course, if Wolf and Theis *did* have a legitimate business purpose for their actions, the “minimum necessary” policy would have been implicated, so it is unsurprising that the policy was referenced during the investigation. Indeed, the Management Guidelines reference the “minimum necessary” policy, as well as four other policies (including the Confidentiality Policy and the Minimum Necessary Policy), so it would be entirely appropriate for the Employer to consider other, related policies as part of its investigation. (R. Ex. 28a.)

4. There Is No Support in the Record for the ALJ’s Finding that Respondent’s Privacy Policy is Not Absolute.

In a move designed to distinguish *all* of the cases supporting Respondent’s claim that Wolf’s and Theis’ breach to patient privacy was not protected by the Act, the ALJ held that “Respondent’s patient privacy policies are not absolute.” (ALJ-JD 30:05.) This finding is absurd and not supported by substantial evidence.

The lone fact used by the ALJ to support this sweeping conclusion is the fact that, during the October 8 meeting, Selvig and Weiss permitted union steward Jeff Sarro to leave with the four unredacted medical records. The first problem with this conclusion is the fact that Sarro had already received the unredacted medical record in his inbox. Indeed, the very subject of the privacy investigation was the fact that Wolf had emailed Sarro and others an unredacted medical record. (GC Ex. 7.) Respondent cannot be faulted for not taking away what Sarro already had. The second problem with the ALJ’s finding is that the record is clear that Sarro told Weiss and Selvig that “he was going to get them all collected and make sure there were [no] other ones and

he would give them to [Selvig] immediately.” (Tr. 674.) The ALJ certainly is not suggesting that Weiss and Selvig should have somehow blocked Sarro’s attempt to exit the meeting. Sarro was acting as Wolf’s union steward, and Selvig and Weiss were justified to take him at his word. In fact, in accordance with his word, on October 12, Sarro dropped off an envelope containing the four medical records Theis provided to Wolf. (Tr. 479.)

The ALJ’s finding is also not supported by the record and ignores a host of unrebutted evidence that Respondent treats patient data with absolute privacy. Specifically, in compliance with federal and state law, its professional²⁵ and ethical²⁶ obligations, and its organizational commitment to maintain the security and confidentiality of patient records, Allina and its constituent operating entities, including St. Francis, have adopted various policies, training programs, procedural rules and disciplinary procedures for all of its employees. In addition, Allina expends extraordinary amounts of time and money to train and re-train staff to ensure that employees fully understand and appreciate their privacy obligations and the consequences when they fail to honor these obligations. (Tr. 699-701.)

In its Confidentiality Policy, Respondent forbids the access, use, and disclosure of PHI without a legitimate business reason. (R. Ex. 25.) If, and ***only if***, there is a legitimate business reason for the access, use, or disclosure, then the employee “must also consider whether it is the minimum necessary information to accomplish the intended purpose.” (*Id.*) Respondent also provides annual training on compliance for employees who have access to PHI to ensure that those employees understand the Hospital’s policies and procedures regarding patient

²⁵ The Joint Commission on Accreditation of Healthcare Organizations Standard RI 2.130 requires the provider to “respect[] the needs of patients for confidentiality, privacy and security” by implementing “appropriate information security/access controls”

²⁶ AMA Code of Medical Ethics Opinion 5.05 provides in relevant part: “The physician should not reveal confidential information without the express consent of the patient”

confidentiality. (Tr. 94, 170; R. Ex. 45 (noting that the compliance training is not only “a legal requirement, *it is also an important way to help you understand your ethical and legal responsibilities* in dealing with compliance issues.” (emphasis added)).) This annual compliance training is mandatory for all employees, including Wolf and Theis. (Tr. 94, 170; R. Exs. 41a, 41b , 45.)

Additionally, employees who are in positions where they will have access to PHI, receive additional informal training. (R. Ex. 38 (email sent to Wolf and Theis reminding them that they were required to use encrypted email to send PHI “outside of Allina” and that “outside of Allina” meant *any* email address that does not end in @allina.com).) Employees with jobs similar to Wolf and Theis also receive information detailing the limited instances where employees are permitted to release information without a patient authorization. For example, the Release of Information Guidelines (“ROI Guidelines”), which Wolf and Theis received in November 2011, include a chart of different situations where a particular individual is requesting PHI, and provide the employee with a guide as to whether an authorization is needed from the patient. (R. Ex. 39) According to the ROI Guidelines, while an authorization is not needed where records are requested pursuant to a court order, an authorization *is* required even if attorneys or legal representatives of patients request records. (Id.)

The ALJ’s finding also ignores the fact that Respondent terminated approximately 98 of the little more than 100 individuals who, like Wolf and Theis, were found to have committed a Level 3 breach under the Managing Violation of Confidentiality of Patient Medical Information (“Management Guidelines”). (Tr. 707-08.) Clearly, Respondent takes its obligation to police any breaches to patient privacy very seriously.

D. CONTRARY TO THE ALJ’S CLAIM, HER DECISION PRIVILEGES THE UNION TO RIFLE THROUGH CONFIDENTIAL MEDICAL RECORDS IN VIOLATION OF STATE AND FEDERAL LAW.

As demonstrated above, the Board has clearly established that having an innocent (or even benevolent) intent will not insulate an employee from discipline where his “method and means” cause him to violate patient privacy. Contrary to this long-standing principle, the ALJ’s opinion clearly stands for the proposition that employees are privileged to violate patient privacy where doing so advances the purposes of the Act (in this case, the grievance process).

If this is the case, the Union would be permitted to rifle through the Employer’s patient records with immunity under the auspices of “policing the contract” – *this is not a slippery slope; this is the logical consequence of adopting the ALJ’s standard*. Notwithstanding state and federal laws to the contrary, nothing would prevent the secretary/receptionist in Altoona from giving her private investigator patient names, addresses, and other contact information, as long as she did so for a *purpose* that is arguably related to her “terms and conditions of employment.” Likewise, the nurse in Beckley would be privileged to collect, copy, and review confidential patient records, provided her intent is to show that the employer has violated the contract by treating certain employees differently.

Another example stems from this very case. Theis, in an attempt to prove that there were breaches of patient privacy in the master scanning book, proceeded to log into the master scanning book without any legitimate business purpose, but rather with the desire to vindicate her breach with evidence suggesting that Allina itself was somehow violating patient privacy. (Tr. 652-53.) As Weiss testified, Theis did not have a legitimate business purpose when she accessed these records. (Tr. 652-53.) Nevertheless, under the General Counsel’s standard, the Employer could not discipline her for this conduct, even if she proceeded to print the materials

and send them to the Union. The Employer cannot be made to stand idle in the face of a violation of state and/or federal law; especially given that such violations could expose the Employer to serious administrative and civil penalties. What is more, in the case of Theis, her actions were ultimately unnecessary because the Union obtained the relevant records through the proper channels – i.e., an information request. (GC Ex. 30.)

It does not take long to see that adopting the standard advocated by the General Counsel quickly destroys the essence of patient privacy. Thus, in addition to being contrary to well-settled Board authority, such a standard would also needlessly be at odds with federal and state laws protecting patient privacy.

VI. ALJ ERRONEOUSLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(A)(5) WHEN IT PROVIDED THE MAJORITY OF THE REQUESTED INFORMATION WITHIN FOUR WEEKS OF THE UNION’S REQUEST AND THE BALANCE OF THE DOCUMENTS SHORTLY THEREAFTER.

There is no dispute that the Employer provided all requested information to the Union prior to the issuance of the Complaint. (GC Compl. ¶ 10; R. Answer ¶ 14.) The only question is whether the Employer’s one-month response time in furnishing the requested information violated Section 8(a)(1) and (5). The ALJ concluded that Respondent violated Section 8(a)(5) by “waiting over 2 months” to provide the Union with the information it requested on November 2. (ALJ-JD 32:42.) According to the ALJ, two months was not reasonably prompt given the complexity of the information sought and the availability of the information sought. (ALJ-JD 32:39-41.) The ALJ’s decision is both factually flawed and legally deficient.

Factually, the ALJ first understates the Union’s request and then proceeds to conflate several of the Union’s requests with respect to whether the requested information was “complex”

and “reasonably available.” The ALJ also discounted Respondent’s good faith negotiations with respect to one particularly complex and voluminous request.

Legally, the ALJ first applied the wrong standard and then proceeded to confuse the complexity of certain information requests with others. The ALJ also erred by relying on cases where the employer’s delay impeded the Union’s ability to represent its members or diminished the usefulness of the information. Here, no such facts are present. Given these glaring deficiencies, the Board should reverse the ALJ’s decision and hold that Respondent acted with reasonable diligence in responding to the Union’s requests.

A. THE RECORD DEMONSTRATES THAT RESPONDENT ACTED WITH REASONABLE DILIGENCE IN RESPONDING TO THE UNION’S REQUEST.

According to the ALJ, the Union made several simple requests on November 2, and Respondent delayed furnishing the information for over two months. (ALJ-JD 32:39-42.) Nothing could be further from the truth. The ALJ ignores the undisputed breadth of the Union’s requests and wrongfully implies that Respondent took over two months to respond to the Union’s request.

First, the scope of the Union’s request is important and was completely glossed over by the ALJ. (ALJ-JD 32:39-41.) On November 2, the Union made *17 separate information requests*: nine requests related to Wolf’s termination and eight requests related to Theis’ termination. Specifically, the Union requested the following information with respect to Wolf:

- Any and all disciplines issued for HIPAA, Level 3 Violations in the past 5 years.
- Personnel File.
- Any and all documentation about existence and dissemination of the policy alleged to be violated by grievant.
- Copy of the policy alleged to be violated.
- Copies of all investigation notes and rationale for decision to terminate.
- Any and all disciplines issued for violation of the policy alleged to be violated by the grievant.

- Any and all investigations and results of investigation (discipline or not, including supervisors) where date of service was not redacted.
- Copies of all documents in Scanning Matrix in current redacted or non-redacted form to determine consistency in application of policy.^[27]
- Explanation of what aspect of patient’s privacy was violated, and the harm done to said patient.

(GC Ex. 13 at p. 3.) As to the Theis, the Union requested the following information:

- Any and all disciplines issued for HIPAA, Level 3 Violations in the past 5 years.
- Personnel File.
- Any and all documentation about existence and dissemination of the policy alleged to be violated by grievant.
- Copy of the policy alleged to be violated.
- Copies of all investigation notes and rationale for decision to terminate.
- Any and all disciplines issued for violation of the policy alleged to be violated by the grievant.
- Any and all investigations and results of investigation (discipline or not, including supervisors) where date of service was not redacted.
- Copies of all documents in Scanning Matrix in current redacted or non-redacted form to determine consistency in application of policy.

(GC Ex. 13 at p. 2.) The Union requested this voluminous information by the following Friday, November 9. (GC Ex. 13 at p. 1.)

Second, notwithstanding the ALJ’s best attempt at subterfuge, it is undisputed that Respondent provided the Union with *all of the requested information (except for the scanning matrix documents) on December 4* – or, approximately four weeks after the Union initially requested the information. (Tr. 306; GC Ex. 16.) This is important because the ALJ’s finding of “unreasonable delay” appears to be predicated on her finding that Respondent “wait[ed] over **2 months**” to respond to the Union’s requests. (ALJ-JD 32:39-42 (emphasis added).) This finding is simply not supported by the undisputed record.

²⁷ The “scanning matrix” is a training tool that is available to all Allina employees via the AKN. (Tr. 650; compare GC Ex. 30.) It does not contain PHI and should not be confused with the “master scanning book,” which does contain PHI and is a training tool available for HIM employees only. (Tr. 650-51, GC Ex. 30.) The master scanning book is available only to employees with authorized access in HIM. (Tr. 653.)

The ALJ also ignored other evidence tending to show that Respondent endeavored in good faith to respond to the Union's information requests. First, the parties' negotiating history evidences that the one-month timeline is reasonable. Specifically, on September 26, Wolf requested the following information via email:

The Union is requesting the following information for the investigation and or preparation on behalf of the grievance being considered and or filed on behalf of any/all affected Transcriptionists. This information is needed by October 4, 2012. Please provide the following:

1. Any/all low needs for the SEIU Transcriptionists from May 2012 to present.
2. Any/all dates and times Darlene Walsh has worked as a Transcriptionist from January 2011 to present. . . .

(GC Ex. 7 (emphasis added).) Of course, as part of this request, Wolf attached an unredacted medical record, which was the subject of a privacy investigation which resulted in her termination. Nevertheless, notwithstanding the privacy investigation, Respondent provided the Union with the requested information on October 26 – exactly *one month* after Wolf's initial request. (GC Ex. 27.) Yet, no charge was ever filed relating to the timeliness of Respondent's response to the September 26 request.

The ALJ also ignored the fact that Respondent stayed in close contact with the Union regarding the status of the information request, and the Union actually agreed to the timeline proposed by Respondent. Specifically, on Tuesday, November 20, Respondent informed the Union that it likely would not have the information prior to the week running from Monday, November 26, to Sunday, December 2. (GC Ex. 14 at p. 2.) Without pause, the Union acknowledged the timeline, and suggested that the Step 1 Meeting should be scheduled for the first week of December. (GC Ex. 14 at 1 (“If I won't have the information until next week, *we should look at dates the first week of December.*” (emphasis added)).) It is undisputed that

Respondent provided the information on December 4, which was entirely consistent with its representation to the Union. An employer's response cannot be "unreasonably delayed" if the Union agrees to it. The parties are far better judges of reasonableness, and their expectations and agreements should not be supplanted by a post-hoc adjudication by the ALJ or the Board.

Finally, the ALJ simply ignored evidence that the delay in no way prejudiced the Union. Because the record is clear that the Union did not want to participate in a Step 1 meeting, it cannot claim that it was somehow prejudiced in the Step 1 grievance meetings of Wolf and Theis by Respondent's supposed delay. (GC Ex. 14 at pp. 3-4.) If the Union needed more time to review the documents, Respondent offered to reschedule the meetings in order to accommodate the Union. (GC Ex. 14 ("I understand your concern with having sufficient time to review the material. *We are willing to reschedule the meeting to accommodate your needs, if necessary.* . . ." (emphasis added).) The Union made no such request.

B. THE ALJ ERRED BY APPLYING THE WRONG STANDARD AND BY MISAPPLYING THE LAW TO THE FACTS OF THIS CASE.

As the ALJ acknowledged, there is no bright line rule as to how quickly an employer must respond to a union's request for information. Good Life Beverage Co., 312 NLRB 1060, 1062 fn. 9 (1993). Indeed, the Board's standard whether the employer made "a reasonable good-faith effort to respond to the request as promptly as circumstances allow." West Penn Power Co., 339 NLRB 585, 587 (2003) (quoting Good Life Beverage Co., 312 NLRB 1060, 1062 fn. 9 (1993)). Factors relevant to assessing whether the employer unlawfully delayed responding to an information request include, but are not limited to, "the complexity and extent of information sought, its availability and the difficulty in retrieving the information." Id. (quoting Samaritan Medical Center, 319 NLRB 392, 398 (1995)). Nevertheless, the ALJ made several legal errors

that resulted in an erroneous finding that Respondent “unreasonably delayed” the production of the requested information.

The ALJ’s first legal error was to base her timeliness finding on the complexity and availability of only certain documents requested by the Union. Indeed, after noting that the personnel files of Wolf and Theis were readily available, the ALJ held that Respondent “could have” gathered these documents more quickly than it did. (ALJ-JD 32:32-33.) This is not the standard. The Board does not analyze the overall timeliness of an employer’s response based upon whether it could have provided responses to *individual* requests earlier. This is especially true where, as here, the Union did not request that the Employer provide responses to the Union’s 17 requests in a piecemeal fashion.

The record is clear that on December 4, Respondent provided the Union with all of the requested information (with the exception of the scanning matrix documents) – approximately one month after the Union’s request. This response requires its own independent analysis as to whether the Respondent’s response was untimely, and the ALJ erred by failing to analyze the scanning matrix documents separately.

As to the non-scanning matrix documents, contrary to the ALJ’s intimation, a one-month response time is not unreasonable. See Albertson’s Inc., 351 NLRB No. 21, slip op. at pp. 1-3 (2007) (finding that a 2-month delay in responding to the union’s request for information was not unreasonable); see also Piggly Wiggly Midwest, LLC, 357 NLRB No. 191 (Jan. 3, 2012), slip op. at p. 18 (*rejecting* General Counsel’s contention that a one-month delay between the Union’s December 17, 2009 information request and the Employer’s January 19, 2010 response was unlawful, finding “I believe the [Employer] has demonstrated that a month is a reasonable time to investigate and provide a response to an information request of this volume”). Indeed, the

Union's requests encompass far more than the personnel files of Wolf and Theis. For instance, the requests including: "[a]ny and all documentation about existence and dissemination of the policy alleged to be violated by grievant" and "[a]ny and all investigations and results of investigation (discipline or not, including supervisors) where date of service was not redacted." (GC Ex. 13.) Moreover, as noted above, Respondent responded to the Union's other, arguably simpler request, in the same one-month timeframe. (GC Ex. 27.) Yet, neither the Union nor Counsel for the Acting General Counsel alleged that Respondent unreasonably delayed providing the information.

Rather than supporting the ALJ's decision, cases cited by the ALJ actually support Respondent's position. In U.S. Postal Service, 359 NLRB No. 4 (2012), the union requested five items in relation to a grievance. Id. at 4. The request included single items (i.e., the grievant's overtime request form). Id. While it did take approximately one month for the employer to supply the information, there were several key facts that are not present in this case. First, the record showed that the employer "made *no effort* to furnish the requested information until the last day of the already extended grievance-filing period, and even then it fully complied only after being prodded to do so." Id. at 3 (emphasis added). Here, in contrast, the record is clear that Respondent worked diligently to gather the requested documents and kept the Union reasonably apprised of its status. More importantly, in U.S. Postal Service, unlike the case at hand, the employer's delay in furnishing the requested information had an adverse effect on the grievant – namely that when the grievance was appealed, it "was remanded due to missing information." Id. Here, in contrast, there is no evidence that the one-month delay in any way prejudiced the Union's case.

In U.S. Postal Service, 308 NLRB 547 (1992), the union's request encompassed one lone document: a copy of the grievant's "Form 3972" for 1990. Id. at 550. After subjecting the union to various procedural hoops, including requiring the union to send the request to the manager of labor relations instead of to a supervisor, the employer did not provide the lone document for more than four weeks. Id. More importantly, as was the case in U.S. Postal Service, 359 NLRB No. 4 (2012), there was evidence that the union was prejudiced by the employer's delay. Specifically, the union wanted to use the information in the grievance's step 1 meeting, but the employer did not supply the document until the step 2 meeting. U.S. Postal Service, 308 NLRB at 550.

In Woodland Clinic, 331 NLRB 735, 737 (2000), the Board rejected the employer's assertion that a 7-week delay was minimal and found that the employer's delay in providing information was unlawful. Pertinent to the Board's finding was the fact that the information was provided only *one day* before the employer declared an impasse in bargaining. Accordingly, the Board found that this sequence of events severely diminished the information's usefulness to the union at the time that it was provided.

Unlike the circumstances considered by the Board in U.S. Postal Service, 359 NLRB No. 4 (2012), U.S. Postal Service, 308 NLRB 547 (1992), and Woodland Clinic, 331 NLRB 735, 737 (2000, in this case, there is no evidence that the delay severely diminished the usefulness of the information. Thus, these cases do not support a finding that Respondent unlawfully delayed providing non-scanning matrix documents to the Union.

With regard to the scanning matrix documents, it is true that Respondent did not produce these documents until January 7, approximately two months after the Union's request, but it is also undisputed that these records were complex, voluminous, and contained PHI that needed to

be reviewed by Respondent's compliance department before they could be turned over to the Union. (GC Ex. 30.) The Union knew from its conversations with Theis that the request was voluminous, and not likely to advance the Union's case because, as noted above, the scanning matrix was separate from the master scanning book:

Q. . . . [When] you received the information request from Ms. Selvig, . . . you already talked to Ms. Theis about the work that she had done to go into the scanning matrix?

A. Yes.

Q. So you were aware from her the fact that there were a lot of documents in the scanning matrix, correct?

A. Yes.

(Tr. 358 (emphasis added); Tr. 650-53 (explaining that the "scanning matrix" is available to all Allina employees and does not contain PHI, while the "master scanning book" does contain PHI but is available only to employees with authorized access in HIM).) Indeed, on December 6 and then again on December 21, the Union agreed to limit its request for scanning matrix documents. (GC Ex. 17; Tr. 358.)

In the end, the totality of the circumstances makes clear that the Employer did not unlawfully delay providing information to the Union in response to its November 2 request. It provided information related to all but one of the requests within four weeks and produced the remaining documents after negotiating an accommodation with the Union. Accordingly, the ALJ's finding that Respondent violated Section 8(a)(5) is contrary to both the record and settled Board law and therefore must be reversed.

CONCLUSION

First of all, this case should not be decided on its merits in this forum. Rather, this case should, in its entirety, be deferred to the grievance-arbitration procedure pursuant to Collyer.

Alternatively, *even if* it is determined that it is inappropriate to defer the delay-in-providing-information allegation, that allegation lacks merit and should be dismissed. In any case, as that allegation is separate from the remaining allegations, it is entirely appropriate to defer all of those remaining allegations.

To the extent the merits are addressed, each of the charges in the Complaint should be dismissed in their entirety. Respondent lawfully discharged Wolf and Theis for their breach of the Employer's policy requiring the confidential treatment of patient information. Because the method and means by which Wolf and Theis made use of the Employer's confidential patient records fell outside the protection of the Act, the Employer did not violate Section 8(a)(1) and/or (3) by terminating them. Also, the Employer did not violate Section 8(a)(1) by conducting a narrowly-tailored investigation into a HIPAA breach by Wolf. Finally, the Employer did not violate Section 8(a)(1) and/or (5) by its one-month response time in providing information because the Union consented to the time frame and because the Union knew that its request was voluminous.

Dated: July 31, 2013.

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STATEMENT OF SERVICE

This is to certify that, on July 31, 2013, I caused the **Respondent St. Francis Regional Medical Center's Brief in Support of Exceptions** to be electronically filed with the National Labor Relations Board E-Filing System, and that I electronically mailed the same to the following:

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