

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

HOPE NETWORK BEHAVIORAL HEALTH
SERVICES, a wholly owned subsidiary of
HOPE NETWORK,

Respondent,

Case 07-CA-094365

and

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION,
AFL-CIO

Charging Union

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Counsel for the Acting General Counsel Sarah Pring Karpinen, pursuant to Section 102.46 of the Board's Rules and Regulations, respectfully submits this Answering Brief to the Exceptions to the Administrative Law Judge's decision (hereafter ALJD) filed by Respondent.¹

I. INTRODUCTION

This case was tried before Administrative Law Judge (ALJ) Michael A. Rosas on May 21, 2013. Judge Rosas issued his decision and recommended order (ALJD) on July 11, 2013. In his decision, the ALJ found that Respondent unlawfully made unilateral changes to employee health coverage (ALJD p. 15, lines 24-25), failed to provide relevant information to the Charging

¹ The following abbreviations are used in this brief:
ALJD: Administrative Law Judge Decision
GC Ex or Exhs: General Counsel Exhibit(s)
Tr.: Transcript

Union (ALJD p. 17, lines 3-5), and was dilatory in providing information to the Charging Union.(ALJD p. 17, lines 16-21). Respondent excepts to several of the ALJ’s factual and legal findings.

II. BACKGROUND

Respondent is a provider of a variety of mental health and behavioral services. Its office, support and paraprofessional employees are represented by the Charging Union. (ALJD p. 2, lines 24-28). The most recent collective bargaining agreement between the Charging Union and Respondent expired on April 30, 2011. (ALJD p. 3, lines 14-15; GC Ex. 2). At issue in this case is the healthcare clause of that agreement (sometimes referred to as the “me too” clause), which is contained in Article 52 and states as follows:

[T]he health, dental and vision coverage shall change to the insurance plans implemented by the Agency on October 1, 2009. Union specifically waives the right to bargain over any changes made to the insurance plans during the term of the collective bargaining agreement and Agency agrees to give bargaining unit members the same health, dental and vision insurance it gives to other HNBHS [Hope Network Behavioral Health Service] employees.

(ALJD, p. 4, lines 1-6; GC Ex. 2, p. 60).

On October 1, 2012, Respondent implemented changes to its unit employees’ health plans. These changes included significant increases in the amount of premiums employees had to pay. Those changes, along with Respondent’s failure to provide (and failure to timely provide) information in response to an information request made by the Charging Union later that month, are the principal issues in this case.

A. Bargaining history

Historically, the Charging Union has resisted Respondent's efforts to make unilateral changes to employee health insurance. Respondent made unilateral changes to employee health coverage in 2007. The Charging Union filed unfair labor practice charges, and an arbitrator ruled that Respondent had to restore its employees' previous health coverage. (ALJD p. 4, lines 18-21; Tr. 20). Respondent made unilateral changes to health care again in 2008, and the Union again filed charges. The parties reached a settlement that included agreeing to the 2008-2011 collective bargaining agreement containing Article 52, quoted above. (ALJD p. 4, lines 21-25; Tr. 20). During discussions over Article 52, Norm Hawkins, who was representing Respondent in the negotiations, told the Charging Union that once the collective bargaining agreement expired, negotiations would have to take place concerning any changes to employee health coverage. (ALJD p. 4, lines 24-25; Tr. 20).² During the life of the collective bargaining agreement, Respondent made changes to employee health coverage pursuant to Article 52 only once, in 2010. (ALJD p. 4, lines 25-28; Tr. 21).

B. Respondent agrees not to make changes to health care in 2011

Prior to the expiration of the 2008-2011 agreement, negotiations began for a successor agreement. (ALJD p. 4, lines 30-32; Tr. 21). On August 11, 2011, Respondent's general counsel, Allison Reuter, informed the Charging Union's bargaining representative, Joseph Marutiak, that Respondent intended to make certain changes to employee health coverage

² Respondent excepts to the ALJ's finding that Respondent's representative recognized that any future changes to healthcare would require bargaining after the contract expired as "contrary to the record evidence." (Exception 1). However, it provides no support for this exception in its brief, and its own general counsel, Allison Reuter, testified that it was her understanding that the waiver would not survive the expiration of the contract. (Tr. 194).

pursuant to the “me too” provision of the expired agreement. (ALJD p. 4, lines 33-39; GC Ex. 3, p. 1). Marutiak responded that it was the Charging Union’s position that the “me too” clause was no longer in effect, and that any changes to unit employee healthcare plans would have to be bargained with the Charging Union. (ALJD p. 5, lines 1-3; GC Ex. 3, p. 1; Tr. 23). Reuter responded via email on September 1, stating that Respondent believed that it was obligated to offer the unit employees the same health coverage as the non-unit employees, pursuant to the expired agreement. (ALJD p. 5, lines 5-7; GC Ex. 3, pp. 2-3). The Charging Union reiterated its position that the “me too” language expired with the collective bargaining agreement and that any unilateral changes would be unlawful. (ALJD p. 5, lines 8-11; GC Ex. 3, pp. 4-5].

On September 8, 2011, Reuter responded, stating that if the Charging Union would agree not to file an unfair labor practice charge, Respondent would not make any changes to the unit employees’ health plans when it changed the non-unit employee plans. The Charging Union agreed. (ALJD p. 5, lines 11-15). In her September 8 email, Reuter also stated that Respondent would be “maintaining the status quo post expiration of the contract by extending the current benefits until we reach agreement or impasse.” [GC Ex. 3, p. 6]. At the hearing, Reuter testified that by those words, Respondent “was agreeing to maintain the current benefits until we could reach agreement or impasse.” (Tr. 178).

C. The parties continue negotiations

The parties continued to negotiate toward a new agreement, with Charging Union servicing representative Jeff Fleming taking over for Marutiak as the Union’s chief negotiator in March 2012. (ALJD p. 5, fn. 9, Tr. 36). The parties met for bargaining on March 14, 2012 and exchanged proposals. With respect to healthcare, Respondent sought to include the “me-too”

provision from the expired agreement in any new agreement with the Charging Union. (ALJD p. 5, line 21, GC Ex. 5). The Charging Union sought to eliminate that language and make any changes to unit employee health coverage subject to negotiation between the parties. (ALJD p. 5, line 25; GC Ex. 6; Tr. 42).

On May 31, 2012, Respondent's human resources director, Lisa Green, asked Respondent's insurance broker, HUB International, for renewal rates for its two insurance providers, Priority Health and Blue Care Network. (ALJD p. 5, lines 31-34; GC Ex. 32; Tr. 237). On June 1, Green informed the Charging Union that Priority Health was raising its rates by over 31 percent, and Respondent was looking for alternative coverage. (ALJD p. 6, lines 1-11; GC Ex. 8; Tr. 47). Included with the e-mail to the Charging Union were three spreadsheets demonstrating the different options Respondent was considering, which included eliminating Priority Health completely and replacing it with a single Blue Care Network plan for all of Respondent's employees, and a union-only plan entitled "BHS Union Only- All to BCN Design," and a plan entitled "BHS Union." [GC Ex. 8, pp. 2-4; Tr. 48]. The packet also included plan quotes from Blue Care Network labeled "Union Buy Up Renewal." [GC Ex. 8, pp. 5-8]. There was no mention on these spreadsheets that the rates for unit and non-unit employees must be the same. (ALJD p. 6, lines 23-24).

Respondent continued to communicate with its insurance broker regarding its options. On June 21, 2012, in response to an e-mail from Lola McLincha, Respondent's vice-president for talent management, about whether Respondent would "really save 70k," HUB stated that Respondent would save significantly by going into a single BCN plan and using the same contribution levels for the unit employees as the non-union employees. (ALJD p. 6, lines 28-30; GC Ex. 36). On June 22, HUB sent Respondent an e-mail stating that Respondent would

achieve a \$34,340 annual premium savings by consolidating all employees into one health care plan under Blue Care Network. (ALJD p. 7, lines 1-3; GC Ex. 33).

On June 26, 2012, Respondent sent an e-mail to the Charging Union with a new proposal that would raise employees' premium rates to 25 percent of the total insurance cost. This represented a significant increase in unit employees' premium rates. (ALJD p. 7, lines 5-9; GC Ex. 9, Tr. 50). At the next bargaining session on July 6, the Union objected to the proposed increases in premium rates and to changes in coverage for employees. (ALJD p. 7, lines 10-13; Tr. 52, 54).

During her testimony at the hearing in this matter, Respondent's vice-president for talent management, Lona McLincha, admitted that Respondent never asked Blue Care Network whether the unit employees could be covered under plan terms separate from the non-unit employees. (ALJD p. 7, fn. 23, Tr. 267). She also acknowledged that the decision about what percentage of premium costs would be paid by the employees and what benefits would be provided were all made by Respondent, and not Blue Care Network. (ALJD p. 7, fn. 23; Tr. 266). Reuter also testified that the decision as to what percentage of premium costs would be borne by employees was not made by Blue Care Network, but by McLincha. (ALJD p. 7, fn. 23; Tr. 193).³

The parties continued to negotiate. On August 3, 2012, Respondent presented the Charging Union with a new proposal requiring unit employees to pay 31.35 percent of their health care premiums, significantly more than the 25 percent proposed by Respondent previously. (ALJD p. 7, lines 25-28). The Union presented Respondent with another concept

³ Respondent excepts to a number of factual findings by the ALJ regarding the role Respondent played in determining what health care plans it would offer employees and at what terms as contrary to the record evidence. (Exceptions 2-4). However, Respondent provides no support for these exceptions in its brief and provides no examples of record evidence that contradicts the ALJ's findings in this regard.

proposal at the August 3 meeting. In its concept proposal, the Charging Union discussed phasing in the premium increase over time to ease the impact on low-paid employees, as well as a wage reopener and a joint compensation task force to review wage rates. (ALJD p. 8, lines 1-5; Tr. 69; GC Ex. 16).

On August 8, 2012, Reuter sent the Charging Union a letter stating that Priority Health refused to quote Hope Network's renewal rates, and would not provide a self-funded option. (ALJD, p. 8, lines 7-10; GC Ex. 15). She informed the Charging Union that Respondent rejected its proposal to phase in the increases in premium rates, based on Respondent's calculations as to cost. (ALJD, p. 8, lines 11-12; GC Ex. 15). The parties met again on August 15. The Charging Union presented Respondent with a new proposal at this meeting, and asked about the status of open enrollment for employees. (ALJD, p. 8, lines 16-18; GC Ex. 17, Tr. 71). Reuter informed the Charging Union that things were in the air and the union group was on hold. Reuter also stated that Respondent was working on a new proposal. (ALJD, p. 8, lines 18-19; Tr. 72).⁴

D. Respondent implements changes to unit employee health care plans

On August 22, 2012, Fleming sent an e-mail to Reuter, asking if Respondent had prepared its new proposal yet. He received an e-mail from Lona McLincha in response, stating that Reuter was out and that Respondent was planning to start open enrollment on a new plan year starting October 1. (ALJD, p. 8, lines 23-26, GC Ex. 18, p. 4; Tr. 73). Fleming responded that it was his understanding that open enrollment was on hold for the unit employees. (ALJD,

⁴ Respondent excepts to the ALJ's finding that Reuter told the Union that insurance options were still under consideration and that Respondent's next proposal would be forthcoming as contrary to the record evidence. (Exception 5). However, it provides no support for this contention and cites to no contradictory evidence in the record.

p. 8, lines 26-28; GC Ex. 18, p. 4). McLincha's reply was that Respondent must move forward with open enrollment. (ALJD p. 8, lines 30-37, p. 9, lines 1-4). Fleming responded that it was his understanding that the Charging Union would receive another proposal from Respondent after the last bargaining session, and asked what terms would be implemented. (ALJD, p. 9, lines 6-8; GC Ex. 18). McLincha responded that it would be the Blue Care Network benefit levels and premium co-pays that Respondent shared with the Charging Union. (ALJD, p. 9, lines 6-8; GC Ex. 18, p. 2).

Respondent sent open enrollment information out to members of the bargaining unit on August 28, 2012. (ALJD, p. 9, lines 14-17; GC Ex. 20, Tr. 76).⁵ On September 7, Reuter sent an e-mail to Fleming stating that Respondent intended to implement its proposed changes to the unit employees' health insurance plan. (ALJD, p. 9, lines 19-21; GC Ex. 21, Tr. 78). She stated that "we intend to test our legal position and implement our benefits plan pursuant to the me-too provision, also relying on past practice of changing contributions, premiums and benefit levels during the annual open enrollment periods." Reuter claimed Respondent's actions were privileged under the D.C. Circuit's decision denying enforcement in *E.I. DuPont de Nemours & Co. v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012).⁶ (ALJD, p. 9, lines 21-24; GC Ex. 21). Fleming

⁵ Respondent excepts to the ALJ's findings of fact with respect to the August 28 email to employees as contrary to the record. (Exception 6). However, it provides no support for this contention and cites to no contradictory evidence in the record.

⁶ Respondent has not filed any exceptions based on its past practice argument, but it is worth noting that reliance on past practice is an affirmative defense, and Respondent bears the burden of establishing that the parties had a past practice that would privilege its actions here. See *Caterpillar, Inc.* 355 NLRB 521, 522 3 (2010). (The employer must show that the practice occurred with "such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis," citing *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).) See also *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001). Respondent has failed to meet its burden here.

In *E.I. DuPont de Nemours*, 682 F.3d 65 (2012), the D.C. Circuit refused to enforce a Board decision finding that the employer unlawfully made unilateral changes to employee health insurance pursuant to a clause in the expired collective bargaining agreement which reserved to the employer the right to make changes to employee health coverage. The employer had made annual changes to the plan at the time of enrollment, but the Board found

responded that he disagreed with Reuter's legal analysis, and offered some new bargaining dates. (ALJD, p. 9, lines 24-25; GC Ex. 21, p.1; Tr. 78).

The parties met again on September 18, 2012. At this session, Respondent gave the Charging Union a new proposal, which included significant concessions for unit employees. (ALJD, p. 9, lines 27-32; GC Ex. 22, Tr. 79). In this proposal, Respondent sought to strike out the phrase "during the term of the collective bargaining agreement" from the "me too" provision and gain the right to make changes after the collective bargaining agreement expired. (ALJD, p. 9, lines 30-32; GC Ex. 22, p. 69, Tr. 80). Respondent also proposed wage rates that would increase the starting rate for employees, but dramatically reduce the wages of employees that had been with Respondent for longer than seven years. (ALJD, p. 9, lines 31-32; Tr. 82). In response to the Charging Union's questions about the proposal, Respondent stated that it had done its own market study using an outside consulting firm and outside consultant to derive the proposed wage scale. (ALJD, p. 9, lines 35-38; Tr. 82, 125).

During the meeting, the Charging Union urged Respondent to minimize the impact of the health care changes on employees by moving them all to the Blue Care Network plan, while leaving the benefits they received and the amount of premiums they had to pay the same. (ALJD, p. 9, lines 38-39). Reuter rejected the proposal, but did not say that BCN would be

that this past practice did not privilege the employer to make such changes during a hiatus between contracts, because it had never made such changes between contracts before. *E.I. DuPont de Nemours*, 355 NLRB No. 177, slip op at 1 (2010). In refusing to enforce the Board's Order, the D.C. Circuit found that the employer did have an established past practice of making annual changes to the health care plan, even if they had never taken place during a contract hiatus before. To that end, the facts of that case showed that the employer had been making annual changes to employee health coverage for at least six years before the alleged unlawful unilateral change. *E.I. DuPont de Nemours*, 682 F.3d 65, 67 (2012).

The facts of that case are easily distinguishable from those present here. It is undisputed that Respondent made changes to the employee health care plan pursuant to the "me too" clause only once, in 2010. A single instance is insufficient to establish a past practice. *McGraw-Hill Broadcasting Company, Inc.*, 355 NLRB No. 213, fn.10 (2010), citing *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. 112 Fed.Appx. 65 (D.C. Cir. 2004) (alleged past practice must be shown to have occurred with regularity and frequency over an extended period of time). Consequently, Respondent may not rely upon the D.C. Circuit's decision in *DuPont* to justify its actions.

unable to provide Respondent with separate plans at separate benefit and contribution levels. (ALJD p. 10, lines 1-2; Tr. 75, 83, 276).

At the next bargaining session, Respondent offered another wage proposal, as well as a new proposal concerning “Status 9,” or on call employees (ALJD, p. 10, lines 4-5; GC Ex. 24). The Charging Union offered another concept proposal, and continued to take the position that Respondent could not lawfully implement the changes to unit employee health care that had been announced. (Tr. 84).

On October 1, 2012, Respondent implemented the changes to its healthcare plan. The changes included significant premium increases, as well as increases in the amount employees would have to pay for services such as MRI’s, physical therapy and emergency room visits (ALJD, p. 10, lines 10-15; GC Ex. 19; Tr. 89).

E. The Charging Union’s information request

On October 23, 2012, the Charging Union sent the Respondent an information request seeking the following five items to be provided by October 30: (1) a copy of the market study and any associated documents regarding unit classifications that were used as a basis for Respondent’s bargaining proposals; (2) a copy of the market study and associated documents regarding classifications outside the unit; (3) the amount of overtime earned by unit members over past 12 months; (4) the estimated savings for management’s proposal to offer hours to on-call staff before unit members; and (5) the number of unit members who selected BCN Core and Buy-Up plans. (ALJD, p. 10, lines 22-33, p. 11, lines 1-9)

Fleming did not hear from Respondent until November 27, 2012, when Reuter e-mailed him to let him know Respondent had not forgotten about the information request, and was

“working through some licensing issues” with respect to the Charging Union’s request for a market study. (ALJD, p. 11, lines 10-15; GC Ex. 27, p. 2; Tr. 95). On December 5, Reuter sent her initial response to the information request. In her response, Reuter states that Respondent objected to the Charging Union’s first two requests (for the market study information) on the grounds that it sought “information that is confidential, covered by an End-User Licensing Agreement with ERI Economic Research Institute, Inc. and PAQ Services, Inc., is irrelevant, and is privileged under the *Berbiglia* work product privilege.” She further stated that “the wage proposal that was part of Option C and provided to the Union on September 18, 2012, was based on wage information pulled from a database that is subject to the licensing agreement above.” She then referred the Union to ERI’s website for additional information. (ALJD, p. 11, lines 16-34; GC Ex. 28, p. 1)

At the hearing, Respondent’s witnesses provided conflicting testimony as to the existence of a market study and/or database. Based on this conflicting testimony, which he found not to be credible, the ALJ determined that Respondent relied upon a wage database in formulating its September 18 and 25 wage proposals, but never shared this information with the Charging Union, or offered to enter into a confidentiality agreement that would protect any confidential information from disclosure. (ALJD, p. 12, lines 9-18).

The overtime information requested in item 3 was not provided until December 24, 2012, despite the fact that it was accessible and available prior to December 7. (ALJD, p. 13, lines 1-5). At the hearing, Reuter stated that there was no reason that the information provided would not have been available before December 7. (Tr. 176).

With respect to the information requested in item 4, Reuter asserted that Respondent had no responsive documents, but that the information could be “gleaned from the overtime report

and the knowledge that overtime is offered to union employees before the use of on-call staff who would not work overtime hours.” (ALJD, p. 13, lines 8-12; GC Ex. 28; Tr. 98).

Finally, with respect to item 5, Respondent provided the information on December 5, 2012; however, Respondent gave no explanation for why it had taken so long to provide information that was available to Respondent as of the end of open enrollment for employees on October 1. (ALJD, p. 13, lines 14-16, fn. 56; Tr. 99).

III. ARGUMENT

Respondent excepts to the ALJ’s legal conclusions with respect to the unilateral change in employee healthcare, asserting that it had “both the statutory right and the statutory obligation to implement unilateral changes in health insurance to preserve the dynamic status quo.” (Exceptions 14-20, 29; Respondent’s Brief in Support of Exceptions, p. 18). Respondent also argues that it made a good faith effort to furnish the request information to the Charging Union, and that the ALJ erred in finding otherwise, (Exceptions 26 and 30; Respondent’s Brief, p. 30) and that it was not dilatory in furnishing the information that it did provide. (Exceptions 27-28, 30; Respondent’s Brief, p. 35). Respondent also excepts to some of the ALJ’s credibility findings with respect to its witnesses, and to the weight he gave certain evidence related to the information allegations. (Exceptions 8-13, 21-25). Finally, Respondent excepts to the recommended Order and remedy in this matter. (Exceptions 31-32). Respondent’s exceptions should be rejected as without merit. The ALJ’s findings in this matter are firmly supported by both the record evidence and the case law, and Respondent has failed to demonstrate why the ALJD should be overturned.

A. The ALJ correctly found that Respondent's unilateral changes to the unit employee health care plans were unlawful

During bargaining for a successor agreement, an employer is obligated to refrain from making unilateral changes to employees' terms and conditions of employment until the parties reach agreement or bargain to a lawful impasse. *In re WKYC-TV, Inc.*, 359 NLRB No. 30, slip op at 3 (2012); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198-199 (1991). See also *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The policy behind this prohibition is to keep a level playing field during negotiations. As the Supreme Court has noted, "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton*, supra, 501 U.S. 198.

1. The ALJ correctly found that the facts in *The Finley Hospital* are distinguishable from the facts of this case

Respondent cites *The Finley Hospital*, 359 NLRB No. 9 (2012) for its position that it had a legal obligation to make changes to unit employee health plans pursuant to the "me too" provision of the expired agreement. Respondent's reliance on *Finley* is misplaced. In *Finley*, an employer failed to give employees a pay adjustment on their anniversary date after their collective bargaining agreement expired. The expired agreement stated, "[f]or the duration of this agreement, the Hospital will adjust the pay of Nurses on his/her anniversary date." The Board found that even though the contractual obligation expired, the statutory obligation to maintain the status quo did not, and the employer was still obligated to pay the increases on the employees' anniversary dates.

Unlike *Finley*, which involved a quantifiable event that would happen annually, this case involves a discretionary decision on the part of Respondent to change employee health insurance

coverage. There is overwhelming record evidence, including various spreadsheets, e-mail exchanges between Respondent and its broker, and Respondent's own bargaining proposals, demonstrating that the changes that would be made to the healthcare plans, the amount of premiums that employees would have to pay, and the services employees would be offered were in flux in the months leading up to the implementation of the changes, and that Respondent had considerable discretion over what changes would ultimately be implemented.

During bargaining for a new agreement, an employer may be obligated to make changes in employees' terms and conditions of employment, "when those changes are an established part of the status quo." *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), slip op. at 5. However, the "corollary to this rule...is that an employer must always bargain over the discretionary aspect of the change in question." *Id.*, citing *Oneita Knitting Mills, Inc.*, 205 NLRB 500 (1973). In applying those cases to the facts presented here⁷, the ALJ held that Respondent's argument that "there is no discretionary status quo is simply inconsistent with the belief that it was entitled to unilaterally exercise its discretion to require unit employees to choose from the same health plans as nonunion employees. The record demonstrates that Respondent had several health insurance choices available to it, but used its discretion to limit the ones available to all employees, including unit employees." (ALJD, p. 14, lines 31-35).

Respondent asserts that the ALJ "failed to explain how the 'me too' clause was distinguishable from the 3 percent wage increase in *Finley*." (Respondent's brief, p. 23). This argument is without merit. In fact, the ALJ devoted two paragraphs of his decision to explaining that finding (ALJD, p. 14, lines 25-42, p. 15, lines 1-2), and his determination that the "me too" provision was discretionary in nature is fully supported by the record. While Respondent

⁷ Respondent excepted to the ALJ's reliance on *Alan Ritchey*, stating that the "analysis and reasoning of that decision is not applicable to the current facts" (Exception 14); however, Respondent failed to articulate how that case is inapplicable to the present one.

characterizes employee health insurance as something that could just “change,” for better or worse (Respondent’s Brief, p. 23), it is clear that Respondent was fully in control both of what changes would be made, and what impact those changes would have on employees. Both Reuter and McLincha admitted in their testimony that Respondent made the decisions regarding what plan options would be offered and at what rates they would be provided. The emails between Respondent and its insurance broker and providers further bolster this finding. It is clear that Respondent exercised a great deal of discretion in this process, and that the ALJ properly ruled that the Charging Union had the right, as the employees’ collective bargaining representative, to be involved in that process.

2. Respondent’s reliance on *Bowling Green- Warren County Comm. Hospital Corp. v. NLRB* is misplaced

In its brief, Respondent cites *Bowling Green- Warren County Comm. Hospital Corp. v. NLRB*, 756 F.2d 41 (6th Cir. 1985) as support for its argument that the ALJ erred in finding that Respondent violated the Act when it made unilateral changes to employee health plans. (Respondent’s Brief, p. 26). Respondent argues that it was “between a rock and a hard place” in deciding what to do about employee health coverage. Respondent conveniently ignores the fact that any dilemma it faced was self-created. Unlike the employer in *Bowling Green*, who announced a raise prior to the start of an organizing drive, and then had to decide whether or not to grant the increase, Respondent held all of the cards in its self-created healthcare dilemma. As was clear from the emails between HUB International and Respondent, and from the testimony of McLincha and Reuter, Respondent’s health insurance providers were simply making recommendations with respect to the share of premium rates that employees would pay and the

coverage they would receive. The final decision was Respondent's, and Respondent clearly enjoyed a great deal of discretion in determining what coverage it would offer and at what rates.

As for Respondent's claims that it could have faced an unfair labor practice charge from the Charging Union if it failed to increase unit employee premium costs while reducing their coverage, the Charging Union had already made it clear in 2011 that it would not file an unfair labor practice charge if its members' coverage remained the same, and would doubtlessly have given Respondent the same assurances in 2012.

B. The ALJ correctly found that Respondent failed to provide relevant information to the Charging Union

In its role as collective bargaining representative, a union is entitled under the Act to such information as may be relevant to it in the performance of its duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The Board applies a liberal discovery standard when determining whether requested information is relevant. *Id.* When information "has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason cannot be furnished to the requesting party." *House of Good Samaritan Medical Center*, 319 NLRB 392, 397, (1995) citing *Somerville Mills*, 308 NLRB 425 (1992).

1. The ALJ correctly found that Respondent's witnesses were not credible in their testimony regarding the existence of a wage study

Respondent asserts that the ALJ erred by not crediting the testimony of Stephen Canum, Respondent's director of business services, as the final word on whether or not a market study or database existed, and by finding that Reuter was evasive on the subject in her testimony and that

McLincha's testimony was not credible. (Exceptions 8, 9, 11, 12; Respondent's brief, p. 32).

The Board has a well established policy of not overruling the credibility findings of an ALJ unless the clear preponderance of the evidence convinces the Board that the ALJ was incorrect in his determination. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635, fn. 3 (2001); *Standard Drywall Products*, 91 NLRB 544 (1950). Here, the ALJ's credibility findings are well supported by the record evidence and should not be overturned.

Canum testified that he drafted the proposed wage schedule for Respondent using an internal payroll system. Respondent argues that this testimony should have been accepted by the ALJ as proof that no separate database or wage study existed. (Respondent's brief, p. 34). This argument ignores the fact that Canum first claimed that he used only "progression wage information," and only acknowledged using the payroll database on cross examination. He also alluded to other "versions" of the progression report, and then claimed an inability to recall doing even the progression that ended up in Respondent's proposal. (ALJD, p. 12, fn. 51, citing Tr. 209-214, R. Exh. 1, GC Exh. 27).

With respect to Reuter, the ALJ noted that her testimony was "conflicting, shifting and less than credible testimony" regarding Respondent's access to the database. (ALJD, p. 12, fn. 52). The ALJ's finding in this regard is fully supported by the record. When the Charging Union initially asked for the market study, Reuter responded that it was confidential and covered by a licensing agreement. She also stated that the wage proposal was based on information pulled from a database that was also subject to a licensing agreement. She did not deny the existence of the database until the hearing in this matter, at which point she claimed that she asked McLincha for a copy of the licensing agreement (a fact McLincha denied). Reuter also admitted to giving a sworn affidavit stating that Respondent reviewed "a database, the average

age for a worker, and the geographical location” in making its wage proposals, but disavowed that statement at the hearing. (ALJD, p. 12, fn. 52, and transcript cites therein).

Further bolstering the ALJ’s decision with respect to whether Respondent accessed a market study or database in formulating its wage proposals was the testimony given by Lona McLincha, which the ALJ found also lacked credibility. (ALJD, p. 12, fn. 50). As the ALJ noted, McLincha’s testimony that Respondent hired a consultant in September 2012 to train an employee in operating the ERI database, but that no other employee, including employees in the IT department, knew how to access the database makes no sense. Why would Respondent train employees in operating a database that no one could access or use? Further, even if only one employee had access to the database, Respondent could have called upon that employee to access it at the time the Charging Union made its information request. (ALJD, p. 12, fn. 50, Tr. 216-219).

The record supports the ALJ’s finding that the information sought by the Charging Union existed, if not in the form of a market study, then “at the very least, in the form of the ERI wage database maintained on a Company computer.” Respondent should have provided an accommodation to the Charging Union, whether that accommodation was alternative information that was relevant to its request, or a confidentiality agreement that would allow the Charging Union to access Respondent’s database. ALJD, p. 17, lines 1-5, citing *Alcan Rolled Products—Ravenswood, LLC*, 358 NLRB No. 11, slip op. at 9 (2012)). The ALJ correctly found that by doing neither, Respondent violated its duty to provide information to the Charging Union.

Respondent asserts that the ALJ failed to give “proper weight to the record evidence that the September 18, 2012 wage proposal was subsequently withdrawn by Respondent. (Exception 24). While it is true that this proposal was later withdrawn, the Union was still entitled to the

information to evaluate Respondent's subsequent proposals and formulate its own counterproposals. The ALJ did address this issue, but held that once the market study was identified "as a source of information relevant to the issue of unit employees' wages," the Charging Union was entitled to it. ALJD, p. 16, lines 31-36, citing *Mary Thompson Hospital*, 296 NLRB 1245 at 1250 (1989), *enfd.* 943 F.2d 741 (7th Cir. 1991).

2. The ALJ correctly found that Respondent is obligated to provide information responsive to the Charging Union's request for estimated savings Respondent hoped to achieve from its on-call proposal

Respondent's December 5 response to the Charging Union's request for the estimated cost savings it would realize from its on-call proposal was inadequate. Even if the Charging Union could glean that information from the overtime reports, the "existence of alternative means for a union to obtain requested information normally fails as a justification for an employer's refusal to furnish it." *The Finley Hospital*, 359 NLRB slip op. at 38, citing *River Oak Center for Children, Inc.*, 345 NLRB 1335, 1336 (2005). A union is not obligated to go through the burdensome procedure of sifting through information when the employer may have it more readily available. *Id.* Respondent's claim that it had no other information relevant to this information request is implausible, as it seems unlikely Respondent would not have "costed out" its bargaining proposals prior to presenting them to the Charging Union. The ALJ correctly found that Respondent was obligated to provide this information to the Charging Union. (ALJD, p. 13, lines 8-13, p. 18, lines 36-40).

C. The ALJ was correct in finding that Respondent was dilatory in providing information to the Charging Union

Respondent was dilatory in providing the Charging Union with the information it requested concerning how many employees were enrolled in each healthcare plan, and overtime reports. The request for this information was made on October 23, 2012, and Fleming asked that the information be provided by no later than October 30. Respondent did not contact him until late November, and at that time its only explanation for the delay was that it was trying to work out some licensing issues with respect to the Charging Union's request for information related to the market study. Respondent gave no excuse for its delay in providing the other information. Fleming's request states that the Union would accept a partial response while Respondent worked on the remaining information, so Respondent could have provided the rest of the information while it worked out its licensing issues with respect to the market studies.

In its Brief in Support of Exceptions, Respondent claims that it was not dilatory in providing this information if the complexity and extent of the information sought, along with the difficulty of retrieving it, is taken into account. Respondent claims that the ALJ "paid no lip service to the totality of the circumstances but rather cited to the mere fact that the Respondent failed to provide any explanation for the delay." (Respondent's brief, p. 36). It would be difficult for the ALJ to take circumstances into account when Respondent admits that it did not provide an explanation for the delay. In *House of Good Samaritan Medical Center*, 319 NLRB 392, 398 (1995), the Board noted that the availability and difficulty in retrieving information should be considered in determining whether an employer promptly responded to a union's information request. *Id.* The facts of that case were similar to this one, in that the employer argued that its delay in providing information was justified because negotiations were not

scheduled to start until three months after the union made its information request and the information requested was not readily available. The Board found that the employer did not adequately prove that the information was not readily available to it, nor did the employer prove that it was overly burdensome to produce. Rather, the evidence showed that the information was readily available from the employer's own records. The delay in negotiations did not justify the delay in providing the information. *Id.*

Here, the ALJ correctly found that the delay in providing the information was not reasonable. The information was readily available to Respondent, and Respondent's own witnesses could provide no excuse for why the information was not timely provided. Even if the Charging Union did not formulate any bargaining proposals based on the information until several months after it was received, it is not Respondent's place to decide when the Charging Union needs the information and for what purpose. As the ALJ noted, the "only issue is whether the Union is entitled to the information *at the time it makes its request* and, unless the employer has a valid defense, the employer must promptly hand over the information." (ALJD, p. 17, lines 25-29, citing *Woodland Clinic*, 331 NLRB 735, 737 (2000)).

IV. CONCLUSION

For the reasons set forth above and in the Administrative Law Judge's Decision, it is urged that Respondent's Exceptions be denied in their entirety. It is further requested that the Board affirm the ALJ's findings of fact, conclusions of law, and recommended Remedy and Order.

Dated at Detroit, Michigan this 22nd day of August, 2013.



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CERTIFICATE OF SERVICE

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