UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

CHAPIN HILL AT RED BANK

AND Case 22-CA-095604

LOCAL 707 HEALTH EMPLOYEES
ALLIANCE RIGHTS & TRADES (HEART)

ANSWERING BRIEF IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S DECISION

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INTRODUCTION

This brief is filed in response to Chapin Hill at Red Bank's ("Respondent") exceptions to the Administrative Law Judge's ("ALJ") recommended order. Contrary to the Respondent, Counsel for the Acting General Counsel ("AGC") recommends that the Board adopt the ALJ's order in its entirely.

EXCEPTIONS

The Respondent claims that the Administrative Law Judge erred in finding that Respondent must provide the requested information as the stated purpose of such request had been otherwise rendered moot.

The Respondent also claims that the NLRB should adopt a new policy requiring that issues concerning a party's failure to comply with request for information should be the subject of deferral to the parties' collective-bargaining agreement's grievance and arbitration process. [1]

[1] Respondent also moved for member Kent Hirozawa's and Chairman Mark Gaston Pearce's recusal in this matter. Counsel for the Acting General Counsel opposes this request. In this regard, both Member Hirozawa and Chairman Pearce had been separated from their respective law firms, Gladstein, Reif and Mcginnis and Creig, Pearce, Johnson & Giroux, for over two years and have met their recusal obligation under federal law. See *Pomona Valley Medical Center*, 355 NLRB No. 40 (2010).

STATEMENT OF FACTS

A. Background

The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time-time CNAs, COTAs, PTAs, laundry employees, housekeeping employees, cooks, dietary aides, central supply, staffing coordinator, restorative aides, transporters, drivers, accounts payable clerks, rehabilitation technician, rehabilitation aides, unit secretary and telephone operators employed by Respondent at its 110 Chapin Avenue, Red Bank, New Jersey facility,

Respondent has recognized the Union as the exclusive bargaining representative of the Unit at all times material herein. (AGCX 1 (c and e)), (Tr. 13:25-14:3).

This recognition has been embodied in an initial collective bargaining agreement, which is effective by its terms from May 1, 2008 to April 30, 2012. (AGCX 1 (c and e)), (Tr. 14:12-15:1). The contract has an automatic extension on an annual basis continuing it to date. Tr. 14:21-24. There has been no revision to the collective-bargaining agreement since 2011. Tr. 14:25-15:1.

The current collective-bargaining agreement contains an article pertaining to per diem workers. (AGCX 2, pps. 18-20; Tr. 15:21-16:2). This agreement grants Respondent the right to use per diem/no-frills or temporary (including agency) employees on an on-call, as needed basis only to substitute for regularly scheduled employees during their absence ...(AGCX 2 Article 22.1, p. 18) ... up to a maximum of fifteen percent (15%) of the hours worked in each department." AGCX 2 Article 22.4, p. 19). Additionally, Article 22.6 provides that Chapin "shall supply to the Union..., on a monthly basis, a report showing the date and shift in which each per diem/no-frills employee and Agency

personnel worked..." AGCX 2, p. 19. Further the collective-bargaining agreement's clauses regarding union security, union check off, just cause, grievance and arbitration apply to per/diem/no-frills or temporary (including agency) employees. (Tr. 16:5-13). The Respondent does not currently employee any "no frills employees" (Tr. 16:23-25) or temporary employees (Tr. 16:23-17:4)

B. Information Request:

By e-mail dated August 14, the Union, by Odette Machado-Ramadeen, made a request for information to Joseph Schlanger. (AGCX 3, Tr. 17:8-18:60. Joseph Schlanger is the Executive Director of Respondent (JX 1, Tr. 6:5-17, 17:16-18).

In this request, the Union sought the following:

> "time sheets, schedules and assignment sheets for all bargaining unit departments and a list of all non-bargaining unit employees who are assigned bargaining unit work from March 2012 to the current time." (AGCX 3 p.2, Tr. 18:1-6)

Machado-Ramadeen explained that the Union needs that information to be able to properly monitor the collective bargaining agreement; to assist the Union in handling grievances in the event of contract related violations; and to monitor the contract provision regarding over utilization of per diems. (Tr. 18:15-21) Machado-Ramadeen also explained that the Union needed this information on an ongoing basis, because it helps the Union to determine if the per diems or non-bargaining unit employees were given more favorable hours than the bargaining unit employees, to monitor and enforce the contract and to determine whether a grievance concerning the per diem contract provision was meritorious. (Tr. 22:3-9) The August 14, 2012 information request specifically explains the need for the information, i.e. "for the Union to have meaningful discussions with the [Respondent] regarding a resolution for the improper use of non-BU

employees who do bargaining unit work while denying BU employees OT [overtime] and extra hours." (AGCX 3 p.2)

At the time Machado-Ramadeen requested the information, the Union also needed the information for an upcoming arbitration concerning the use of per diem employees. (Tr. 18:22-19:14, 51:18-19) and issued a subpoena for it. (Tr. 22:16-17). Thus the information would have aided the Union in determining if there had been an overuse of per diem and non union employees. It would also have provided the Union with information to determine the amount of hours that per diems received as compared to bargaining unit employees and provide documentation to formulate a remedy for any violation. (Tr. 19:18-24, 21:3-18). The arbitrator's decision issued on November 14 (JX 2, p. 22) Respondent did not respond to the August 2012 information request Tr. 19:25-20:9) and did not provide the subpoenaed documents. (RX 2 at pps. 18-19)

Not having received the information, Machado-Ramadeen continued to orally request this information. (JX 1, Tr.6:5-17, 22:24-23:1, 23:16-25, Tr. 26:13-23, 27:9-28:20, Tr. 30:4-15). She again tried to get this information through her e-mail to Schlanger on October 24, 2012 (AGCX 4) in which she asked for "reports to the Union" among other items, encompassing the information requested in her August 2012 e-mail. (AGCX 4, Tr. 29:1-22). While there is no explicit repetition of the information request in that e-mail, Machado-Ramadeen explained that she felt she was reiterating her earlier request by asking for the documents required to be provided in the collective-bargaining agreement substantially containing the information sought in the previous request. (Tr. 60:14-24. Respondent still did not respond to the Union after its receipt of AGCX 4. (Tr. 30:1-3).

Not having received the information, Charging Party filed the instant charge on December 27, 2012 (GCX1 (a)) and made another request for this information on January 7, 2013. (GCX 5, Tr. 32:12-23). To date, Machado-Ramadeen continued to request this material. (Tr. 35:25-36:25). Although Sherer promised to provide the information at that time, he never did. (Tr. 37:2-6).

Machado-Ramadeen reiterated her request for the information to Sherer on January 17, 2013 (Tr. 37:7-38:15) to no avail. (Tr. 38:17-18). Despite these numerous and repeated requests, Respondent has never provided the Union with any of the information. (Tr. 19:25-20:9, 22:16-20. 30:20-22, 43:4-23).

ARGUMENT

This is a fairly straightforward case. Respondent has admitted that it received the information request and has not provided the information. Respondent does not claim that the information is not relevant. Rather it argues that the information requested is now moot as the arbitrator took an adverse inference to its failure to provide the information in his arbitrator's award and that the Board should change long standing well reasoned precedent and defer the information issue to the parties' grievance- arbitration mechanisms.

Both of these arguments were considered and rejected by the Administrative Law Judge in his decision. As noted by the Administrative Law Judge, the cases cited by Respondent do not support the Respondent's position herein. *Glazers Wholesale Drugs*, 211 NLRB 1063 (1974) is clearly distinguishable as it involves information about the names and addresses of striker replacements which became moot after the strike ended and the employees returned to their original positions before the hearing was held. As

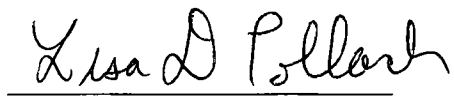
noted by the Administrative Law Judge, here the information remained relevant after the completion of the arbitration as the Union needed the information for multiple purposes including most importantly policing the collective-bargaining agreement. Case law provides that if the Union can show that the information is probably or potentially relevant in carrying out its statutory obligation the employer is obligate to provide it. *See Shoppers Food Warehouse Corp.,* 315 NLRB 258, 259 (1994); *Brazos Electric Power Cooperative, Inc.* 241 NLRB 1016 (1979), *enfd. in relevant part*, 615 F.2d 1100 (8th Cir. 1980). The Union clearly met this requirement and thus is entitled to all of the information it requested.

The second affirmative defense asserts that the charge should somehow be deferred to arbitration. The case law clearly finds no merit to this contention. The Board has long held that issues concerning a refusal to supply information are not subject to deferral to the grievance-arbitration process. *Medco Health Solutions of Spokane, Inc.*, 352 NLRB 640 (2008); *Team Clean, Incorporated*, 348 NLRB 1231 (2005); *United States Postal Service,* 302 NLRB 918 (1991). Moreover the earlier arbitration has been completed and the subject of that arbitration was a contract violation--not an information request.

CONCLUSION

Based on the above, and for the reasons stated by the Administrative Law Judge in his Decision and Order it is submitted that the evidence establishes that Respondent failed to provide information requested by the Union in violation of Section 8(a)(1) and (5) of the Act, and that the Administrative Law Judge's Decision and Order should be affirmed.

Respectfully submitted,



Lisa D. Pollack
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Dated at Newark, New Jersey
This 30th day of September, 2013

CERTIFICATION OF SERVICE

Copies of the Acting General Counsel's Brief to the Administrative Law Judge have been mailed today on the parties and counsel as follows:

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