

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON HOSPITAL CENTER CORPORATION  
d/b/a MEDSTAR WASHINGTON HOSPITAL CENTER

and

NATIONAL NURSES UNITED

Case 05-CA-095883  
Case 05-CA-099390

**THE COUNSEL FOR THE ACTING GENERAL COUNSEL'S**  
**BRIEF IN SUPPORT OF EXCEPTIONS**

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## I. STATEMENT OF CASE AND PROCEDURAL HISTORY

On September 11, 2013, Administrative Law Judge (“ALJ”) Arthur J. Amchan issued a Decision and Order in consolidated cases 05-CA-095883 and 05-CA-099390. The issue presented here concerns inadvertent omissions from the Administrative Law Judge’s Decision and Order (“the ALJD”). The omissions require Board clarification in order to avoid unnecessary confusion in interpreting the Decision and unnecessary delay in remedying the violations. Thus, the General Counsel hereby submits this brief in support of its Exceptions to the ALJD.

First, this brief will describe the procedural history of this case. Then, it will describe the facts developed from the July 15 hearing before the ALJ. Finally, the General Counsel (“GC”) will argue that the ALJD should be clarified by the Board because the ALJ inadvertently omitted specific language from the Decision and Order that could lead to a narrow interpretation of the ALJD and failure to fully remedy the unfair labor practices.

Washington Hospital Center Corporation d/b/a MedStar Washington Hospital Center (“Respondent”) is a healthcare facility organized in the District of Columbia. A member of MedStar Health, a non-profit organization, it is a registered non-profit entity and the largest private hospital in the District of Columbia. Respondent employs an array of medical professionals, including nurses. Most of the nurses employed by Respondent are represented by National Nurses United (“the Union”). The bargaining unit consists of:

All regular, Full-time Nurses; all regular, Part-time Eligible Nurses; and all Float Pool Nurses employed by the Hospital at its Washington, D.C. location., [excluding] all nurse administrators, clinical specialists, clinical supervisors, managers, Clinical Care facilitators, educators, students, Part-time Ineligible

Nurses, Temporary Nurses, all other employees, and supervisors as defined by the National Labor Relations Act (J Exh. 1, Art. 1).<sup>1</sup>

There are approximately 1,150 nurses in the bargaining unit (Tr. 150). The Union and Respondent are parties to a collective-agreement (“the contract”), which erected various labor and labor/management committees tasked with improving patient care, staffing practices, and work performance (See J Exh. 1, Art. 30 and 31). For the purposes of the GC’s exceptions and this brief, only one of those committees is relevant, the Nurse Staffing and Productivity Committee (hereinafter “the NSPC”).<sup>2</sup>

Starting on October 9, 2012, the Union began requesting from Respondent information related to Respondent’s analyses and monitoring of its staffing levels and practices, specifically Respondent’s current staffing matrices; the tracking tools and data Respondent uses to monitor its compliance with its staffing matrices; Respondent’s acuity measuring tools; and spreadsheets showing when and where Patient Care Technicians have been utilized as sitters in the past 12 months (collectively referred to as “staffing data”). The Union requested the information for use by the Union representatives on the NSPC. However, Respondent refused to furnish the information to the Union, claiming that it is confidential and citing concerns about wide-spread public disclosure of the information. On March 1, the Union filed charge 05-CA-099390, alleging that Respondent violated Sections 8(a) (1) and (5) of the Act on the grounds that Respondent refused to provide the Union with the requested staffing data (GC Exh. 1-C). Subsequently, the GC investigated the charge, determined that Respondent was violating Section

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<sup>1</sup> Citations to the transcript will appear as “Tr. [page numbers],” while citations to an exhibit will appear as “Exh.,” preceded by a designator for the party who introduced the exhibit (e.g. “GC” for General Counsel, “R” for Respondent, and “J” for Joint).

<sup>2</sup> Another committee, the Professional Practice and Patient Safety Council, was relevant to the GC’s other Complaint allegation that Respondent violated Section 8(a)(5) by failing and refusing to provide the Union with requested information. However, as the ALJ fully found that violation, it is not relevant for the purposes of this brief, which is limited solely to the allegation detailed herein.

8(a) (1) and (5) of the Act by refusing and failing to provide the Union with the requested staffing data, and issued the underlying Consolidated Complaint (GC Exh. 1-H).

On July 15, the Parties appeared at a formal hearing before Judge Amchan. Because Respondent admitted all allegations establishing the GC's prima facie case of violations of Section 8(a) (1) and (5) of the Act, the Parties opened the hearing with Respondent's presentation of evidence relevant to its confidentiality defense.<sup>3</sup> All parties were afforded an opportunity to call witnesses and present testimony and documentary evidence, as well as cross-examine witnesses. As demonstrated by the hearing record, the matter was thoroughly litigated before Judge Amchan.<sup>4</sup> On August 19, the GC and Respondent submitted post-hearing briefs. In its brief, the GC argued at length that Respondent violated the Act by failing to provide the Union with the requested staffing data. Respondent argued in brief that the information is confidential, and it specifically identified its matrix tracking spreadsheets and data as the particular staffing data it is withholding from the Union on grounds of confidentiality.

On September 11, Judge Amchan issued the ALJD, rejecting Respondent's confidentiality defense finding that Respondent violated Section 8(a) (1) and (5) of the Act by failing and refusing to provide the Union with the information requested. However, the GC excepts to the ALJD related only to the staffing data for three limited reasons: (1) although the Consolidated Complaint, the record evidence, and the parties' briefs address all of the staffing data requested by the Union, the ALJD specifically references only "staffing matrix" or "staffing

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<sup>3</sup> However, the GC requested permission to present documentary and testimonial evidence to rebut Respondent's claims of confidentiality and to establish that, should the Judge find that Respondent made out its confidentiality defense, the Union's need for the information requested far outweighed any confidentiality interest Respondent may have. Judge Amchan allowed the GC to present such evidence.

<sup>4</sup> During the hearing, the parties agreed that Union's request for the staffing matrix itself was not in dispute. Rather, as the GC pointed out, the evidence presented at the hearing by both parties concerned Respondent's refusal to provide the remaining staffing data described above (Tr. 121-123, 174-177).

matrices;” (2) the Order does not contain a mandate requiring Respondent to furnish the Union with any staffing data; and (3) the Notice to Employees contains language that does not specify all of the staffing data at issue because it only references “staffing matrices.”

## II. STATEMENT OF FACTS: UNION’S REQUEST FOR STAFFING DATA

On about January 19, 2012, Respondent and the Union entered their first collective-bargaining agreement (J Exh. 1). The term of the contract is May 8, 2011 through November 14, 2014 (Id.). Pursuant to the contract, the NSPC was formed and charged with “collaboratively” developing, monitoring, and improving a staffing matrix for each unit in the hospital where bargaining unit employees work (Tr. 167-168; J Exh. 1, Art. 30 § 30.3(b)).<sup>5</sup> The NSPC is comprised of ten members: five Union appointees and five management appointees (Tr. 167, 227, J Exh. 1, § 30.3(d)).

In October 2012, the Union delegation was preparing for the first NSPC meeting, scheduled for October 12 (Tr. 169). As part of its preparations, the delegation decided what information it would need for the meeting (Tr. 169, 228). Accordingly, on October 9, Chief Union Steward and NSPC member Steven Frum sent an e-mail to Respondent’s Assistant Vice President of Human Resources, Kathleen Chapman, requesting the following information: (1) the current staffing matrix; (2) tracking and data currently used determine how many patients, nurses, and Patient Care Technicians (“PCTs”) are on each unit per each shift; (3) acuity

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<sup>5</sup> The contract provides that “the Hospital shall commit sufficient resources to make the matrix viable.” The agreement further provides that the NSPC shall “strive to discuss staffing objectives and the number of nurses, patient care technicians, agency nurses, and temporary nurses utilized on each nursing unit in a collaborative manner and conduct its business by consensus decision making.” It states that the existing staffing matrix “will continue to be utilized during the deliberations for the [NSPC] and until a new staffing matrix is developed by the committee.” It provides that, “the proper allocation of nursing and non-nursing activities enables nurses to focus on the patient. . . . To the extent consistent with patient care needs, nurses will not be expected to regularly perform non-nursing duties that are the primary responsibility of other employees” (J Exh. 1, pp. 48-50).

measuring tools currently used by Respondent; and (4) a spreadsheet showing when and where PCTs have been utilized in the past twelve months (hereinafter collectively referred to as “staffing data”) (Tr. 169, 228; GC Exh. 12).<sup>6</sup>

According to Frum, the NSPC is responsible for analyzing and revising Respondent’s existing staffing matrix by considering “the number of nurses assigned to units, working on different shifts, [and] caring for patients in the Hospital; [and] measuring the way that those nurses are distributed [considering the] acuity of patients on units” (Tr. 227-230). Frum explained that the staffing matrix is a spreadsheet that outlines how many nurses should be assigned to each inpatient unit based on the number of patients on each unit (Id.). He testified that while the staffing matrix is an overall staffing “plan” for each of the units at Respondent’s facility, the “tracking and data” information he requested would reflect the actual deployment of nurses on each unit (Id.).<sup>7</sup> Thus, the information would be used to compare actual staffing on each inpatient unit to the general plan for each unit (Id., 231).

Rosemarie Paradis, Respondent’s Vice President of Nursing Excellence, testified that each of the 35 inpatient units at Respondent’s facility has its own staffing matrix, which reflects staffing goals for that particular unit (Tr. 57-58; 83). In establishing staffing goals reflected in Respondent’s matrices, Respondent considers the following information: the type of unit involved (e.g. whether it is a medical unit, surgical unit, or intensive care unit); the average acuity of the patients typically on the unit; the number of beds on the particular unit; an account of different shifts; and an account of the number of registered nurses and PCTs (Id., 64). Paradis

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<sup>6</sup> It is undisputed that while Patient Care Technicians are not bargaining unit employees, their staffing levels affect the working conditions of the bargaining unit nurses.

<sup>7</sup> There are about 35 nursing units at Respondent’s facility (Tr. 86).

and other senior leaders use the matrix “to monitor performance at the beginning of each shift for each nursing unit” (Tr. 58). According to her, the matrix itself is not a confidential document because it has been posted in certain locations around Respondent’s facility (Id.).

Frum testified that the Union is seeking Respondent’s acuity measures used to determine the level of staffing necessary for each unit because the information would assist the Union members of the NSPC with determining if the existing matrix for a particular unit (with more or less acute patients) needs to be revised (Tr. 231-232). Frum further testified that the Union is seeking information on PCTs because, although they are not part of the bargaining unit at issue, their staffing affects the working conditions of the bargaining unit nurses (Tr. 232). PCTs serve as assistants to the nurses on each unit of the hospital, and they generally should be available to assist the nurses on each unit (Id., 235). If PCTs are assigned to perform duties usually assigned to other employees, they may not be available to assist the nurses, which affect the nurses’ workload (Id.). If the staffing of PCTs is inadequate, such that bargaining unit nurses are not able to focus on the care of the patients, the Union members of the NSPC could, after reviewing the staffing data with the management members of the committee, recommend that Respondent hire more PCTs (Tr. 235-236; J Exh. 1, Appendix G).<sup>8</sup>

Respondent monitors its staffing performance by comparing data recorded in tracking spreadsheets to its staffing matrices (Id.; See R Exhs. 3 and 4). The spreadsheets track the actual number of nurses and PCTs on a shift each day, as compared to staffing goals set in the matrices. At the beginning of each shift (or at four staffing points: day, evening, early evening, and night),

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<sup>8</sup> Appendix G of the parties’ contract “reflects the parties’ agreement regarding the addition of Full-time Equivalents and [MedStar’s] commitment to achieve the guidelines of the staffing matrix as addressed in Article 30” and the parties’ “mutual interest” in “reducing overtime and agency use and hiring more [registered nurses] and PCTs.” It states, in relevant part, that “while PCTs are not members of [bargaining unit] the Hospital recognizes the importance of PCTs to proper staffing and assisting Nurses in providing patient care. . . .” (J Exh. 1).

a count of actual nurses and PCTs actually present on each unit is done (Tr. 56-59). Then, in consultation with the resource nurse on each unit, Paradis and her department record that data in a tracking sheet, which compares those numbers to matrix goals (Tr. 60-65; R Exh. 3).

The matrix tracking sheet includes two major categories that have smaller subcategories (Id.). The first category is “Operational Indicators,” and its subcategories include: Projected Census (noting that “expected census drives staffing decisions”); Average Daily Projected Census; Average Daily Actual Census; and Variance between Projected and Actual Census (Id.). The second category is Human Resources Indicator, and its subcategories include: RN Staffing (as per matrix) Required at Projected Census; Actual RN Staffing Scheduled/Deployed; and Variance in RN and PCT FTEs (Required vs. Deployed) (Id.). Finally, the tracking sheet has an area labeled “HPPD Variance (Target versus Actual),” and it includes a space for notations explaining “factors that could include staffing above or below matrix” and other staffing issues including: gaps in schedule that could not be filled; unplanned PTO that could not be filled; acuity workload (as defined by the matrix); and “other factors” (Id.).

Once the tracking data is recorded, “the capacity manager or bed manager, the central staffing office staff . . . the staffing manager and . . . the nursing supervisor sit and review the data. They go through each and every unit and look at what is the projected census and what is the staffing” (Id.). During their meeting, the managers and supervisors account for actual or anticipated changes in patient levels and patient care needs on each unit (Id.). They then adjust the projected census information on the tracking sheet and make adjustments to nurse staffing levels (e.g., to satisfy the immediate needs of that day and for long-term planning, if needed) (Tr. 60-65, 70, 84-86, 95-96).

According to Paradis, Respondent's tracking sheets (R Exhs. 3 and 4) do not paint a full picture of the staffing at Respondent's facility for a number of reasons (Tr. 96). Specifically, Paradis testified the tracking sheets do not reflect periods of time outside of the two-hour window before the beginning of each shift (four points: day, early evening, late evening, and night) (Tr. 70-72, 83-84). Therefore, they do not reflect transfers that are made across hospital units (to cure staffing overages or deficits) during a shift (Id.). Paradis testified that because the tracking sheet only reflects snap-shots of Respondent's staffing projections and levels at the beginning of each shift, it may indicate that Respondent was understaffed for an entire shift when in reality it was not (Tr. 64-67). She also testified that the tracking sheets would not reflect manager or clinical care facilitator assistance on a unit (Tr. 83-84).

On October 11, the day before the first NSPC meeting, Chapman responded to Frum's October 9 e-mail by listing proposed topics for the upcoming NSPC meeting, but failing to respond to his request for the staffing data (GC Ex. 12). On the same day, Frum asked Chapman for an update as to the status of the Union's request (Id.). Respondent did not provide any of the requested staffing data prior to the October 12 NSPC meeting.

On October 12, the NSPC met as planned (Tr. 169-170). During that meeting, Frum inquired about the Union's request for staffing data (Id.). Tonya Washington, Respondent's Vice President of Nursing, was present as management's primary representative (Id.; see also Tr. 168-169). During the meeting, Washington stated that there needed to be discussion about entering a confidentiality agreement (Tr. 170). She stated that the NSPC members needed to feel free in discussing issues with each other but she was concerned about information getting to the *Washington Post* (Id.). However, she did not explain her concerns about the *Washington Post* at

that time (Id.). The NSPC did not conduct any business during that meeting, which ended with Washington stating that she would bring a confidentiality agreement to the next meeting, which was scheduled for November 16 (Tr. 171; GC Exh. 13 at p. 2).

Interestingly, Respondent did not call Washington to testify about the October 12 NSPC meeting. Instead, Chapman, although not present at that meeting, provided hearsay testimony that at the meeting the Union was not agreeable to entering a confidentiality agreement covering the members of the NSPC because the contract does not require such an agreement (Tr. 169-170, 123-124).

On November 14, Frum sent an e-mail to Washington, proposing an agenda for the November NSPC meeting. His agenda included each of the staffing data requested in Frum's October 9 e-mail to Chapman (GC Exh. 13). On November 15, Chapman responded to Frum's e-mail, acknowledging that it "includes a request for information" and stating:

The teams have yet to agree and sign a confidentiality agreement. . . . It is important to us that both of our teams have the ability and comfort level to have open, honest discussions about a very complex process and we believe that having clear ground rules, including a Confidentiality Agreement, is an important step in that process (Id.).

On the same day, Frum responded to Chapman, stating that things could "certainly be worked out during tomorrow's meeting" and requesting "copies of the draft confidentiality agreement in advance of the meeting" (R Exh. 18). He reminded Chapman that the Union requested the information back in October and stated, "We are confident that the requested information is necessary in order for the committee to function" (Id.).

Union Representative Bradley Van Waus also sent an e-mail to Chapman on November 15 (GC Exh. 13). He asked whether Respondent would be providing the requested staffing data

(Id.). He pointed out that the staffing data is not protected by HIPAA laws and therefore no confidentiality agreement is necessary (Id.). Respondent did not provide any of the requested staffing data prior to the next NSPC meeting (Tr. 171).<sup>9</sup>

On November 16, the NSPC met again as planned (Tr. 171). Washington announced that she did not have a copy of Respondent's proposed confidentiality agreement (Id.). Because the Union delegation did not have any of the staffing data it needed to conduct NSPC business during the meeting, the meeting ended with the Union delegation requesting to meet with Respondent's representatives in December (Id.). Respondent's representatives stated that they could not meet December and would contact the Union in January with proposed dates to meet again (Id.). Chapman, who did not attend that meeting, testified that the Union was not "agreeable" to a confidentiality agreement (Tr. 126).

On January 4, 2013, Chapman sent an e-mail to Frum, proposing four dates in January for the next NSPC meeting (GC Exh. 14). However, she did not specifically mention the Union's outstanding request for the staffing data; she stated "we are working on a draft and should get that to you in the next few days" (Id.). On the same day, Frum responded, informing Chapman that the Union would get back to her on the dates for the next meeting and asking Chapman to explain what she was drafting (Id.). Chapman did not respond (Id.). Van Waus then responded to Chapman, stating "I think at this point, the Union is only concerned about your providing information about your adherence to the matrix. . . . Do you intend to produce the requested information?" (Id.). Chapman did not respond (Id.).

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<sup>9</sup> In contrast with the other committee involved in the underlying litigation, there is no provision in the parties' contract requiring the members of the NSPC to execute a confidentiality agreement (Compare J Exh. 1, Article 30 and Article 31). Apparently, this is because the NSPC would not be viewing information containing patient protected information, as the PPPSC would.

On January 14, Van Waus contacted Chapman again, asking if Respondent would be providing the Union with the requested staffing data (GC Exh. 15). Chapman did not respond (Id.). On February 1, Van Waus sent another e-mail to Chapman again concerning the Union's request for the staffing data (Tr. 180; GC Exh. 15). Chapman did not respond.

Paradis testified that she does not believe the Union's NSPC delegation needs to review Respondent's staffing levels tracking data (as demonstrated by R Exhs. 3 and 4) in order to execute their duties under the contract because they are charged with improving the matrix, which "comes from certainly looking at staffs' perceptions, general satisfaction among the membership with regards to staffing, [and] comparing it to benchmarks" (Tr. 80-82). However, Paradis also testified that Respondent uses the tracking sheets to record variances from its staffing matrices and to make daily and long-term scheduling adjustments/plans for bargaining unit employees and temporary nurses (Tr. 83-89). Paradis acknowledged that knowing how well a matrix is working – whether its goals are realistic in light of the actual staffing levels at Respondent's facility – requires a consideration of Respondent's tracking sheets reflecting census and staffing projections and indicators (Id.). Paradis admitted that, as of the day of the hearing, the NPSC had not reviewed any documents (such as R Exh. 3) relating to staffing at Respondent's facility because no confidentiality agreement had been reached (Tr. 77-78).

At the hearing, Respondent argued that its tracking spreadsheets are confidential because they portray “an inaccurate picture of staffing at the hospital” and “the data, itself, reflects the evaluation against the goal or matrix” (Tr. 93-94, 96, 134). Paradis testified that such a portrayal could cause regulatory or legislative bodies and members of the public to draw negative conclusions about Respondent’s staffing, which she believes could affect Respondent’s reputation or expose Respondent to litigation ( Tr. 93-94). According to Paradis, only directors, staffing coordinators, and staffing supervisors on each of Respondent’s 35 units view and consider the staffing matrix and tracking sheets for their particular unit (Tr. 73-75). Bargaining unit employees do not view that information (Id.).<sup>10</sup>

Chapman testified that Respondent is requiring the Union to agree to a confidentiality agreement for the staffing data “because certain information they requested can be viewed as confidential. The staffing matrix by itself, maybe not; but, when you ask for all of the other pieces that went to it, we believe that was confidential” (Tr. 123). However, she provided no testimony as to why the “the other pieces” of the staffing data are confidential.

In about February 2012, Respondent provided the Union with a copy of its staffing matrices without claiming that the information was confidential (Tr. 171-172; GC Exh. 22). Van Waus testified that the Union’s October 9 request for a staffing matrix was in light of the Union’s belief that Respondent had modified its matrices since February (Tr. 176). Van Waus testified that bargaining unit nurses have informed him that the matrices are unchanged (Tr. 177).

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<sup>10</sup> Paradis does not believe that Respondent’s concerns could be allayed by adding a disclaimer on the tracking tools, stating that the information is just a snap-shot which does not reflect actual staffing during an entire shift (Id.). She testified that such a disclaimer would not “give the clarity that the public would need” (Id.). When the judge suggested that a bold disclaimer would be enough to put the *Washington Post* on notice that the information reflected is not completely accurate, Paradis responded, “I don’t speak for *The Post*, Sir” (Id.).

Therefore, the Union no longer seeks the staffing matrices themselves, but is seeking the remaining data Respondent uses to track its performance against those matrices (Id.).

As part of its role as collective-bargaining representative, the Union also engages in lobbying activity, seeking legislation to improve working conditions for nurses (Tr. 183-184). Van Waus testified that the Union is currently seeking legislation from the D.C. Council for the improvement of nurse staffing (Id.). At no time during its communications with the Union regarding its requests for the staffing data did Respondent inform the Union that its refusal to provide the information is because of the Union's lobbying or legislative activity (Tr. 187-188). However, subsequent to the issuance of Complaint in the instant case, Respondent's counsel, Carter DeLorme raised the issue with the Union. At that time, Respondent requested from the Union a confidentiality agreement barring disclosure of the requested staffing data to third parties outside of the Union. The Union refused. Van Waus informed DeLorme that if the staffing data reveals serious violations related to the professional practice of bargaining unit nurses, and if the Union was unsuccessful at resolving issues through the collective-bargaining process, the Union would resort to alternative means for resolution of those issues, including filing complaints with the D.C. Department of Health (Tr. 183-184).

### III. ARGUMENT

The evidence developed at the hearing established that Respondent violated Section 8(a) (1) and (5) of the Act by failing and refusing to provide the Union with the requested staffing data.<sup>11</sup> See ALJD at 6, lns. 11-15. As noted above and is readily apparent from the record and

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<sup>11</sup> There was no dispute that the staffing data is relevant and necessary to the Union's role as collective-bargaining representative for Respondent's nurses. There was no dispute that the Union requested the information and Respondent denied the requests. The issues presented at the hearing are: (1) whether Respondent has met its heavy burden of establishing that the information is

the pleadings, there was no dispute in this case as to whether the GC had met the initial burden of proof for the Section 8(a)(5) violation. Rather, the core issue was whether Respondent could establish its affirmative defense that the information was confidential and that it had bargained in good faith for an accommodation. Judge Amchan clearly and unequivocally rejected Respondent's claim of confidentiality. See ALJD at 5, Ins. 5-12, and 6, Ins. 5-15. However, because the language in the ALJD—in what appears to simply be an inadvertent misunderstanding in drafting—refers to this staffing data generally as “staffing matrices,” which were not themselves in dispute, the GC seeks clarification regarding each item of the disputed staffing data, as opposed to strictly “staffing matrices” or “staffing matrix.” Likewise, the GC seeks modification of the Order and the Notice to Employees so that both encompass all of the staffing data requested by the Union.

In all likelihood, Judge Amchan utilized the phrase “staffing matrix” or “staffing matrices” to encompass all of the staffing data requested by the Union. To be certain, the Union certainly requested the staffing matrices in its October 9 information request, but, as detailed above, the Union's request was not strictly limited to the staffing matrices. Rather, the Union's request also asked for other forms of staffing data that is relevant to Respondent's general adherence to the staffing matrices. In sum, the Union's request was for the staffing matrices, and for the data measuring how closely actual employee staffing compared to those matrices. Yet even if the ALJD were to be read to *not* presume an inadvertent use of the term “staffing matrix” to include all the staffing data requested by the Union, the Board is on solid factual and legal grounds modifying the decision to find a violation as to Respondent's refusal and failure to

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confidential; and (2) if Respondent has established that the information is confidential, has Respondent satisfied its obligation to bargain with the Union in good faith for an accommodation to its production of the information.

provide the Union with all the requested staffing data. Should the Board not presume an inartful use of a term, the GC stresses that the Respondent admitted the complaint allegations pertaining to the alleged violation—the hearing was for the purpose of Respondent proffering evidence in support of its affirmative defense that the information requested was confidential.

It is well settled that an employer has a statutory duty to provide a union, on request, with relevant information the union needs for the proper performance of its duties, including contract negotiations and administration. Alcan Rolled Products, 358 NLRB No. 11, slip op. at 8 (2012). In certain instances an employer may assert a confidentiality defense to a union’s demand for relevant information. Id. In considering a union’s request for relevant, but assertedly confidential, information, the Board balances the union’s need for the information against any ‘legitimate and substantial’ confidentiality interest established by the employer. Id. at 9 (citing A-1 Door & Building Solutions, 356 NLRB No. 76, slip op. at 3 (2011)). The party asserting a confidentiality defense “has the burden of proving that such interests exist and that they outweigh its bargaining partner’s need for the information.” Id. (citing Jacksonville Area Assn. for Retarded Citizens, 316 NLRB 338, 340 (1995)); see also United States Postal Service, 359 NLRB No. 115, slip op. at 4 (2013). Furthermore, a party refusing to furnish requested information on confidentiality grounds must timely raise that defense and seek an accommodation from the other party. Id.

The Board has stated that confidential information is limited to a few general categories of information that would reveal, contrary to promises or reasonable expectations, highly personal information. Detroit Newspaper Agency, 317 NLRB 1071, 1073 (1995). These categories include: “individual medical records or psychological test results; that which would

reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.” Id. The Board has stated that its description of confidential information is not intended to be exhaustive. Northern Indiana Public Service Co., 347 NLRB 210 (2006). Rather, whether information is confidential is determined within the context of each case. Id. at 211.

In the instant case, Judge Amchan found that Respondent had not met its burden of proving confidentiality because the requested information “fit into none” of the broad categories of information recognized by the Board to be confidential. ALJD at 5, Ins. 5-12.<sup>12</sup> The GC contends that the Judge’s findings regarding the Union’s October 9 request for staffing data applies to the entire request, not just the “staffing matrix,” because the staffing matrices were not in dispute (Tr. 171-177). For purposes of the staffing data portion of this case, the parties were litigating Respondent’s refusal to furnish the Union with requested tracking spreadsheets and data used to monitor its compliance with its staffing matrix goals and used to adjust staffing levels—not the actual staffing matrices themselves (Tr. 60-65, 70-72, 83-89, 95-96, 123, 174-176, 227-236; GC Exh. 22; R Exhs. 3 and 4).

During the hearing, Respondent presented detailed evidence to establish that its matrix tracking spreadsheets and data are confidential for the following reasons: (1) they portray “an inaccurate picture of staffing at the hospital;” (2) “the data itself reflects the evaluation against the goal or matrix” and not actual staffing levels; and (3) they do not reflect changes that are

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<sup>12</sup> Accordingly, the Judge did not weigh the Union’s need for the information against Respondent’s interest in its confidentiality and did not pass upon whether Respondent met its burden of bargaining in good faith with the Union for an accommodation to its production of the information. ALJD-62, 6.

made to staffing levels during a given shift in order to meet patient demand (Tr. 93-94, 96, 134). The GC presented evidence to rebut Respondent's confidentiality (Tr. 78-93, 167-177, 225-233).

Additionally, the GC and Respondent argued in their respective post-hearing briefs that the staffing data at issue includes tracking spreadsheets and other data Respondent uses to monitor its adherence to and deviations from its staffing matrices; the parties took differing views on the confidentiality of such staffing data. See GC Post-hearing Br. at 26-34, 36-43, and 47-49; R Post-hearing Br. at 5. For example, in its brief, Respondent asserted that the "staffing matrix itself is not a confidential document" and that it "maintains an additional set of records that it considers and treats as highly confidential" (Id.). Those records include: (1) "spreadsheets that rank the number of nurses and PCT's scheduled to work in each unit on a given day, as compared to the goals set out in the staffing matrix;" and (2) "a spreadsheet that combines the daily, unit-specific staffing data to track staffing across the hospital." R Post-hearing Br. at 6.

After considering the record evidence and post-hearing briefs, Judge Amchan found that Respondent unlawfully withheld the requested staffing data from the Union. Specifically, the Judge held that "Respondent made no showing . . . that patients would be likely to go to facilities other than Washington Hospital Center if . . . the staffing matrix were released to the Union or by the Union to the public." See ALJD at 5, Ins. 32-34. As for Respondent's concerns that the matrix, if released to the Union, could be misinterpreted, Judge Amchan stated that, "Respondent's concerns that [the data] can be used to present a misleading impression of the hospital's staffing policies can easily be rectified. The hospital need only slap a cover sheet on the matrix explaining that it does not represent the actual staffing that was present at any unit during any shift." See ALJD at 6, Ins. 11-15.

Even assuming Judge Amchan did not inadvertently omit to address the entirety of the staffing data requested by the Union,<sup>13</sup> his analysis is every bit as applicable to that data as it is to the staffing matrices themselves. There is no dispute as to the relevance of the requested information—Respondent admitted as much in its Amended Answer. GC Exh. 1(N), para. 7. The only questions concerning the staffing data were whether Respondent established that the staffing data was confidential, and whether Respondent bargained in good faith for an accommodation with the Union. This staffing data includes, as Respondent pointed out in its post-hearing brief: (1) “spreadsheets that rank the number of nurses and PCT’s scheduled to work in each unit on a given day, as compared to the goals set out in the staffing matrix;” and (2) “a spreadsheet that combines the daily, unit-specific staffing data to track staffing across the hospital.” R Post-hearing Br. at 6. Just as the staffing matrix fit into none of the categories of information that the Board has traditionally viewed as confidential, the staffing data described above—which is, at root, merely the data which measures actual staffing, versus the targets memorialized in the staffing matrix—cannot be considered to fall into any such categories either. Furthermore, as Respondent failed to show that patients would be less likely to go to the hospital if the staffing matrix was provided to the Union, Respondent failed to show the same if the remainder of the staffing data was provided to the Union. Finally, as Judge Amchan noted, Respondent’s concerns about this data being misinterpreted are easily resolved. In sum, the Board should clarify that Respondent has not met its burden of establishing the confidentiality of

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<sup>13</sup> The GC’s principal contention is that Judge Amchan’s decision reflects an inadvertent misunderstanding in the use of the term “staffing matrix,” and that all his findings and conclusions regarding “staffing matrices” are meant to include the entirety of the staffing data pled in the Consolidated Complaint. As was evident at the hearing and in the parties’ post-hearing briefs, the staffing matrices themselves were never in dispute, and all of the evidence presented at the hearing concerning the Union’s request for staffing data relates to the spreadsheets and tools Respondent uses to track its compliance with the matrices and make adjustments to its staffing levels.

the entirety of the staffing data at issue, and that Respondent's failure and refusal to provide the Union with this information amounts to a violation of Section 8(a)(5).

Consequently, the GC seeks Board modification of the Order and the Notice to Employees so that both correspond to the clarified ALJD. As currently written, the Order does not mandate that Respondent take any action with respect to the requested staffing data. Additionally, the Notice to Employees only references "staffing matrices" generally, as opposed to all of the disputed staffing data.

#### **IV. CONCLUSION**

In sum, Judge Amchan found entirely on behalf of the GC regarding both unfair labor practice violations pled in the Consolidated Complaint, emphatically and unequivocally finding that Respondent had failed to meet its burden of proving that either specie of information requested by the Union was confidential. However, in what appears to be an inadvertent drafting error, the ALJD does not clearly state that the Section 8(a)(5) violation encompasses all of the staffing data the Union requested on October 9, including: (1) tracking and data Respondent utilizes to determine the number of nurses and PCTs on each unit per shift; (3) acuity measuring tools currently utilized by Respondent; and (4) a spreadsheet showing when and where PCTs have been utilized in the past twelve months. Regardless of whether the Board characterizes this omission as inadvertent or finds a need to pass on the requested information, the Board should clarify that Respondent violated Section 8(a)(5) by its failure and refusal to provide this information, and modify the Order and the Notice to Employees accordingly, in order to avoid unnecessary delay and confusion in remedying the violations.

Dated in Baltimore, Maryland, this 25<sup>th</sup> day of October 2013.

Respectfully submitted,

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/s/

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