

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

OLEAN GENERAL HOSPITAL

and

**Cases 3-CA-097918
3-CA-104444
3-CA-104462**

**NEW YORK STATE NURSES
ASSOCIATION**

GENERAL COUNSEL'S ANSWERING BRIEF

I. PRELIMINARY STATEMENT

Administrative Law Judge (ALJ) Arthur J. Amchan issued a Decision and Recommended Order on September 24, 2013. Respondent filed exceptions to the Decision and Recommended Order, and the General Counsel (GC) answers Respondent's Exceptions, herein.

The facts of the case are fully set forth in the ALJ's Decision at pages 2-4 (ALJD) and the GC's Brief to the ALJ at pages 2-8. Briefly, the record evidence establishes and fully supports the ALJ's decision that Respondent failed to notify and bargain with the New York State Nurses Association (Union) about the decision and the effects of implementing the dedicated education unit (DEU) program and failed and refused to provide the Union with information it requested concerning the DEU program and the Joint Commission survey.

The record demonstrates that Respondent's creation of the DEU program was a significant departure from its prior clinical offerings. Respondent created the DEU program exclusively for Alfred State SUNY College of Technology (Alfred) nursing students and designed the program to provide them with an extended clinical experience. Seven bargaining unit RNs acted as the students' clinical teachers. The clinical teachers were selected by Respondent's Vice-President of Patient Care Services/Chief Nursing Officer Jeff Zewe. The

selected RNs then signed a contract with Alfred to become adjunct faculty and attended a one-day training session conducted by Alfred, which had never occurred before. Respondent paid the clinical teachers preceptor pay as set forth in the collective-bargaining agreement¹ and they also received a \$1000 stipend from Alfred while working with the students. In an e-mail dated December 4, 2012, the Union requested that Respondent bargain over this program. In response, Respondent indicated there was nothing to bargain over, but agreed to schedule a meeting. No meeting ever took place. Subsequently, by e-mail dated January 2, 2013, the Union requested certain information about the DEU that Respondent did not provide. (ALJD, Tr. 15-21, 29-32, 37, 46, GC Ex. 1(l), 2, 4 and 9).

The record also supports the ALJ's finding that Respondent failed to provide the Union with the Joint Commission survey. The Joint Commission conducts a survey at Respondent's Hospital every three years to determine whether Respondent meets its standards for retaining accreditation. Most recently, a survey was completed on March 1, 2013. The Joint Commission first provided an oral report of its findings and followed up with a written report listing the facility's deficiencies. On March 6, 2013, Timothy Finan, Respondent's President and CEO, sent a memo to the departments of surgery, anesthesiology and the surgical nursing staff listing certain deficiencies found by the survey and stating that there would be zero tolerance for failing to take corrective action. On March 4 and April 1, 2013, the Union requested the findings of the report from the Joint Commission's survey and a list of deficiencies identified. Respondent responded to the Union's requests for the information by sending a letter stating that its attorney

¹ Section 10.13 of the contract is entitled Preceptor Differential and states: An employee who is assigned the responsibilities of preceptor of a graduate nurse, registered nurse or student nurse intern shall be paid a differential of one dollar (\$1.00) per hour while working in said assignment. To be assigned preceptor, an employee must successfully complete the in-service program for preceptors. (GC Exh. 9).

would respond to the request. He never did so. (ALJD p. 6, lines 15-17,² Tr. 53-54, 57-58,63, 65-69, 74, 75, CG Ex. 5, 6,7, 8).

II. THE JUDGE WAS CORRECT IN FINDING THAT RESPONDENT VIOLATED THE ACT BY IMPLEMENTING THE DEU PROGRAM AND FAILING TO PROVIDE REQUESTED INFORMATION ABOUT THE PROGRAM. (EXCEPTIONS 1, 2, 3, 4, 5, 6, 7, 9 and 10)

Respondent excepts to the ALJ's finding that it violated the Act by failing to notify and bargain with the Union about the decision to implement the DEU program. In support of this exception, Respondent asserts that the ALJ failed to determine that it had a legal obligation to bargain about the DEU program. Respondent argues that implementing the DEU program was a managerial decision under Fibreboard Paper Products v. NLRB, 379 U.S. 203 (1964) akin to decisions relating to banking relationships, and therefore it had no duty to bargain. (R. Br. p. 8).³ However, Respondent's argument ignores First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), where the Supreme Court found that the duty to bargain attaches to management decisions that "are almost exclusively an aspect of the relationship between employer and employee," or have "a direct impact on employment ... but [have] as [their] focus only the economic profitability of" the business. Id. at 676-677.⁴ Although Respondent argues that the DEU program had "only an indirect and attenuated impact on the employment relationship" and therefore it had no duty to bargain, the record demonstrates that the DEU directly impacted the working conditions, including pay, of at least the seven employees selected for the program, and also the remaining employees who were not selected to participate in the program. Thus, the

² Throughout this document the following reference will be used: ALJD p. ____, lines ____ for the Administrative Law Judge's Decision.

³ Throughout this document the following reference will be used for Respondent's Brief in support of its exceptions: R.Br. p. ____.

⁴ The Court noted that in the latter circumstance an employer may not have a duty to bargain where it can demonstrate that the burden of bargaining would outweigh the benefits to the employer, its employees and the public. In this case, Respondent has not argued nor has it presented evidence that the burden of bargaining over the decision and effects of the implementation of the DEU would outweigh the benefits.

DEU falls into the category of decisions which are exclusively an aspect of the relationship between an employer and employee and therefore an obligation to bargain exists. *Id.* at 679.

Significantly, in finding a violation, the ALJ inherently determined that Respondent had a duty to bargain over the DEU. The ALJ expressly found that the DEU program is sufficiently distinguishable from other student nursing programs to require bargaining. (ALJD p. 4, lines 28-47). In making this finding, the ALJ discussed Section 10.13 of the collective-bargaining agreement and prior student nursing programs. (ALJD p. 4, lines 30-47). Further, the ALJ considered whether the Union had waived its right to bargain over a mandatory subject of bargaining by contract or past practice and found that it had not.

The Board holds that in order to establish a waiver of a statutory right to bargain over a mandatory subject, the employer must demonstrate that the union clearly and unmistakably relinquished that right. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 702 (1983); Exxon Research & Engineering Co., 317 NLRB 675 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996). This right can be waived in three ways: by express contract language, by conduct (including past practice, bargaining history, and action or inaction), or by a combination of the two. American Diamond Tool, 306 NLRB 570 (1992); Chesapeake & Potomac Telephone Co. v. NLRB, 687 F.2d 633, 636 (2d. Cir. 1982). In order for a contract to constitute a waiver, the language of the contract must be specific, or it must be shown that the parties fully discussed the issue and explored it and thereafter the union consciously yielded its interest in the matter. Trojan Yacht, 319 NLRB 741, 742 (1995).

Waiver by Past Practice

Here, the ALJ examined the prior student nursing programs and concluded, “no prior program for student nurses involved having unit nurses sign an agreement with the educational institution. No prior program required unit nurses to be trained by the school or provided for payment to the nurses by the school. Other training programs included oversight by an on-sight

instructor for the institution.” ALJD p. 4, lines 39-42. Respondent’s only factual challenge to this finding is its contention that other programs also lacked on-site institutional instructors.⁵ (R. Br. pp. 11-12, R. Exception 6). In support, Respondent cites to Senior Vice-President of Human Resources Timothy McNamara’s testimony that RNs were paid preceptor pay at times when an instructor from the school was not present or involved. However, his testimony fails to establish that other programs lack on-site institutional instructors.

On occasion we have student nurse interns who work- they’re not employees, but they work in the Hospital with a Preceptor, typically on an evening shift or a night shift or a weekend shift; and those arrangements are made, again, through the school under this Affiliation Agreement and with are nursing management, and a Preceptor is assigned. (Tr. 87).

...[W]hen there’s an individual student intern, in this case- the most recent I’m talking about is evening shift, night shift and weekend shifts, they’re assigned a a Preceptor, and they receive Preceptor pay. On a clinical rotation, where the Instructor from the educational institution is the lead trainer, and there is not a Preceptor assigned, a Preceptor, who is a Registered Nurse employed by the Hospital, and there’s no preceptor pay involved in that circumstance. (Tr. 87-88).

When asked on cross-examination if he was aware of any examples of when a student made arrangements to have a clinical rotation not under the guidance of an institutional instructor, but rather an RN preceptor, McNamara replied, “**I don’t have a personal knowledge of any individual time it happened.**” (Tr. 84 emphasis added).

In support of its argument concerning the similarities of the clinical programs, Respondent points to Respondent’s Exhibit 2, paragraph 21, as evidence that Respondent’s RNs played the same roles with Jamestown Community College as they did in the DEU program.⁶ However, there is no evidence in the record that a Jamestown Community College instructor was ever absent during its students’ clinical rotation. As noted above, the only witness Respondent

⁵ Respondent does not claim Alfred provided on-site instructors from the institution.

⁶ Exhibit 2 does not contain a paragraph 21. This may be a reference to Respondent’s Exhibit 3, which does have a paragraph 21.

presented that testified on this topic testified that he had no, “personal knowledge of any individual time it happened.” (Tr. 84). It is also important to note that while the Jamestown agreement specifies that “[t]he College will provide instructors, who hold a current Registered Nurse license in New York for teaching and supervision of students assigned to the Agency [hospital] for clinical experience”, this agreement is dated 2006 and there is a more recent agreement for the same educational institution dated 2011 that does not contain this provision. (R. Ex. 2; R. Ex. 3, par. 2).⁷ Moreover, the Jamestown agreement did not require the RNs to become adjunct faculty with the educational institution, or to receive training or pay from the educational institution. More significant, however, is the fact that Karen Wida, the Union’s Nursing Representative, testified that for other student nursing programs, a clinical instructor from the educational institution was present when its students were doing their clinical rotation at the hospital. (Tr. 49).

In attempting to minimize the significant differences between the DEU program and the other clinical programs, Respondent contends that the fact that Alfred State provided training to the nurses, paid them a stipend and had them sign an agreement was “wholly irrelevant.” (R. Br. p. 12). Respondent further argues that it is not responsible for the actions of a third party, Alfred. However, the record establishes that Respondent created the program with Alfred, thereby agreeing to changes in employees’ terms and conditions of employment, and selected the employees to act as instructors in the program and be subject to its terms of employment. (Tr. 16-18, 30).

Respondent argues that its past practice is not to bargain with the Union about its clinical agreements with educational institutions and thus it was not required to bargain with the Union

⁷ Respondent’s brief misconstrues the facts on pages 4 and 5 in stating “[u]nder these arrangements, as was the case with the DEU Program and in accordance with the CBA, RNs who provided direct supervision and training to student interns were paid preceptor pay.” The record as cited above demonstrates that the one witness who testified about this matter, McNamara, had no personal knowledge that this had occurred under the other arrangements. (Tr. 84).

about the DEU. (R. Br. p. 11). This argument is belied by Respondent's contention that the collective-bargaining agreement covers the DEU and therefore it bargained with the Union over the terms under which unit nurses would provide instruction to students. Finally, as noted extensively above, the other agreements do not have the same terms as the DEU, a finding that the ALJ specifically made in his decision. (ALJD p. 4, lines 30-47).

Waiver by Contract

These significant differences also support the ALJ's accurate conclusion that the DEU program was not covered by Section 10.13 of the collective-bargaining agreement. (ALJD p. 4, lines 44-47). The ALJ based his finding on the fact that the collective-bargaining agreement did not "provide for a \$1,000 payment to the nurse from any educational institution." (ALJD p. 4, lines 45-46). The ALJ correctly found that this payment constituted "essentially the granting of a unilateral wage increase to a small number of bargaining unit members." (ALJD p. 4, lines 46-47). Section 10.13 of the collective-bargaining agreement contains no provision requiring employees to become employed by an educational institution, to receive training or pay from that institution, and there is nothing in the collective-bargaining agreement that relates to the presence or absence of on-site instructors from the school. Accordingly, nothing in the language of the collective-bargaining agreement demonstrates that the Union waived its right to bargain over the DEU.

Along these same lines, by citing to portions of the management rights clause in the collective-bargaining agreement, Respondent implicitly contends that the Union waived its right to bargain. (R. Br. pp. 8-9). However, Respondent ignores the Board's holding that a party's waiver of a right to bargain over a mandatory subject of bargaining must be "clear and unmistakable." As such, in the contract, the parties must "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."

Provena Hospitals, 350 NLRB 808, 811 (2007). There is absolutely no evidence that the collective-bargaining agreement contains such a waiver. The contract makes no mention of the DEU, Alfred State College or any other educational institution. (Tr. 92-93). Further, there is nothing in the collective-bargaining agreement that grants Respondent the right to enter into agreements that require its employees to become dually employed by other entities. (Tr. 92-93). Finally, the contract neither makes mention of RNs becoming adjunct faculty members, nor contemplates a relationship between Respondent and any educational institution. (Tr. 92-93).

In support of its argument that the DEU is covered by the contract, Respondent erroneously states that Wida admitted it acted in accordance with the collective-bargaining agreement. However, Wida's testimony, as well as her December 4, 2012 e-mail, demonstrates that she did not consider the DEU program to be covered by the contract. In the December 4 e-mail, Wida requested bargaining over the DEU and identified the DEU's significant differences. (Tr. 17-21, GC Ex. 2). The ALJ noted that in the e-mails Wida indicated that the DEU program "was inconsistent with the contract and established past practice in that it made the participating nurses adjunct members of the Alfred University staff and called for the payment to the nurses from Alfred State." (ALJD p. 2, lines 42-45, GC Ex. 2).

Respondent also attempts to distinguish the fact that nurses received \$1000 for participating in the DEU when they previously never received such pay by contending it is not responsible for the actions of Alfred. (R. Br. p. 10-11). On this basis, Respondent also challenges the ALJ's comparison of this stipend to a unilateral wage increase. Respondent's argument is defeated by the fact that it is not simply a pawn with no control over its employees' terms and conditions of employment. Rather, Respondent selected the participants, created the program and entered into the agreement with Alfred. The record establishes that the nurses received this pay as part of their employment with Respondent. Thus it is clearly a departure from prior programs and is essentially a unilateral wage increase as Respondent did not negotiate

with the Union over it. (Tr. 17-21). Thus, the ALJ's determination is fully supported by the record.

Effects

Contrary to Respondent's assertions, the ALJ's determination that Respondent violated the Act by failing to bargain over the effects of implementing the DEU program is fully supported by the record evidence and Board precedent. In this regard, the ALJ accurately ordered Respondent to cease and desist from this conduct. (ALJD p. 6, lines 23-28, 31-32, p. 7 lines 1-2). Wida's testimony established that the parties never bargained over the decision to implement the DEU program much less its effects. (Tr. 20). The record further establishes, as detailed above concerning decisional bargaining, the Union never waived bargaining over the effects of the DEU either by past practice or by contract. As with decisional bargaining, the Board holds that "[i]n the absence of a clear and unmistakable waiver by the Union concerning effects bargaining, such bargaining is still required." Natomi Hospitals of California, 335 NLRB 901, 902 (2001). Accordingly, Respondent's argument that under the collective-bargaining agreement and past practice there was no reason to engage in effects bargaining, is belied by the record and Board precedent.

Respondent also claims that it satisfied its obligation to engage in effects bargaining by "repeatedly asserting its willingness to meet with the Union to discuss the DEU program." (R. Br. p. 13). The record establishes that this "willingness" consists of Respondent's failure to schedule a meeting about the DEU after advising the Union that the program was covered by the collective-bargaining agreement and indicating there was nothing to bargain over. (Tr. 20, GC Ex. 2). It is also noteworthy that Respondent advised the Union that it would meet to provide information about the DEU program and not, as Respondent asserts, for the purpose of bargaining over the effects of the DEU. Furthermore, this "offer" only occurred after the Union filed an unfair labor charge over Respondent's failure to provide information about the DEU.

(Tr. 27-28, GC Ex. 1(a), 1(g)). Specifically, Wida testified, “[m]y conversation with Mr. Schmit [Respondent’s attorney] on two different occasions, was he wanted see if we could get the information from them and put this to rest.” (Tr. 27). Wida testified that Mr. Schmit was referring to the charge. (Tr. 28). She also testified that these conversations occurred in May 2013 and also one week prior to the hearing. (Tr. 27). This offer was made to settle the charge and occurred three months after the Union filed the charge and five months after the Union requested the information. (GC Ex. 1(a) and 3). Thus, the record belies Respondent’s assertions that it repeatedly offered to bargain over the effects of the DEU, and thus there is no merit to this exception.

DEU Information
(Exception 8)

Respondent contends that it did not violate the Act based on its belated offer to meet with the Union. However, this offer was not made in order to simply provide information, but rather to settle the unfair labor practice charge concerning its failure to provide information about the DEU.⁸ (R. Br. pp.12-15). Wida’s testimony detailed above addresses Respondent’s offer to provide the information, which notably occurred after the charge was filed. Furthermore, contrary to Respondent’s assertions, the ALJ specifically noted that while Respondent orally offered to provide the information, it never did so. (ALJD p. 3, lines 14-15). Clearly, this supposed willingness to provide the information followed by its failure to do so was insufficient

⁸ The Union requested this information in an e-mail to Respondent dated January 2, 2013. It requested items numbered 2 and 7 in the e-mail:

2. The problem becomes if the nurse is working for both employers at the same time, who do they take their orders from, the hospital or the college? This puts the nurse in a lose/lose situation. They have to protect their license.

7. What type of education is being provided to the selected nurses to provide the education/clinical experience the college is looking for as well as the curriculum and weekly expectations of the students. (ALJD p. 3, lines 1-12, GC Ex. 3).

to persuade the ALJ there was no violation.⁹

III. THE JUDGE WAS CORRECT IN FINDING RESPONDENT VIOLATED THE ACT BY FAILING TO PROVIDE THE JOINT COMMISSION SURVEY. (Exception 11)

Respondent states a number of times that it declined to provide the survey to the Union. (R. Br. pp. 7, 8, 15). However, the record establishes that Respondent never bothered to respond to the Union's request for the survey beyond stating that its attorney would provide a response, which he never did. (Tr. 54-55, GC Ex. 6). Thus, Respondent never informed the Union that it was refusing to provide the survey, nor did it raise any confidentiality concerns.¹⁰ As the ALJ noted, Respondent did not raise this defense until it filed its Answer to the Consolidated Complaint on July 19, 2013. (ALJD p. 5, fn. 1). He further noted that “[p]rior to that, it simply ignored the Union’s request for the survey.” (ALJD p. 5 fn. 1).

The ALJ also stated, “[g]enerally, if an employer had a legitimate confidentiality concern, it must notify the union promptly and explore the possibility of an accommodation of its confidentiality concerns and the union’s need for the information.” (ALJD p. 5, fn. 1). See e.g., Earthgrains Co., 349 NLRB 389, 397 (2007), enf. denied on other grounds 514 F.3d 422 (5th Cir. 2008) (failure to raise confidentiality defense in a timely fashion undermines its legitimacy). Under Board law, an employer asserting confidentiality “may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and seek accommodation from the other party.” Detroit Newspaper Agency, 317 NLRB 1071, 1072 (1995); see also, Alcan Rolled Products, 358 NLRB No. 11 slip. op. at 9 (February 27, 2012).

⁹ Respondent also contends that it did not have to provide the information because it acted in accordance with the contract and past practice. (R. Br. 13). However, the record is devoid of any evidence the Union waived its right to information concerning bargaining unit members’ terms and conditions of employment. American Broadcasting Co., 290 NLRB 86 (1988) (applying the clear and unmistakable standard in determining whether a union waived its right to information). Thus, Respondent’s challenge to the ALJ’s finding must fail.

¹⁰ The Board, in IronTiger Logistics, Inc., 359 NLRB No. 13, slip op. at 2 (2012), found that an employer must in some manner respond to a request for information, even where it may have a justification for not providing the information. In IronTiger Logistics, Inc., the requested information was found not to be relevant; however, the employer still violated the Act because it failed to provide a response to the union’s request for information.

Here, Respondent never raised the issue of confidentiality in response to the Union's information requests, and further never sought to accommodate the information request in light of Respondent's alleged concerns about confidentiality.

Respondent also mistakenly argues that the ALJ found that Section 6527(3) of New York State's Education Law did not apply and therefore he did not consider relevant legal authority. (R. Br. pp. 15-19). Significantly, Education Law § 6527(3) provides in pertinent part:

Neither the proceedings nor the records relating to performance of a medical or quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health law... shall be subject to disclosure under article thirty-one of the civil practice law and rules except as herein provided or as provided by any other provision of law. (emphasis added).

The ALJ considered this statute in his decision. While the ALJ concluded that the Union was not seeking the survey under article thirty-one of the New York civil practice law and therefore the statute was not relevant, he also found that "assuming this section is relevant, it expressly exempts disclosure under other provisions of law, such as Section 8(a)(5) of the NLRA." (ALJD p. 5-6, lines 40-42 and 1-3). Thus, contrary to Respondent's assertions the ALJ did consider this statute and still found that the NLRA permitted disclosure of the survey.

Respondent's asserts that under Zion v. New York Hospital, 183 A.D.2d 386 (1st Dept. 1992), the survey cannot be disclosed under any circumstances. (R. Br. 16). However, this ignores the provisions of New York State Education Law Section 6527(3) that state that reports protected by this statute can be disclosed under other provision of law. It also ignores the fact that the Board has previously ordered the disclosure of incident reports protected by the same statute in Kaleida Health, Inc., 356 NLRB No. 171 (2011).

In further support of this exception, Respondent argues that the ALJ failed to apply the necessary balancing test for confidential information and that under this test the Union is not

entitled to the information because it has no specific need for it. However, in order for this test to be applicable Respondent must first establish a legitimate and substantial confidentiality interest, which it failed to do. (ALJD pp. 5-6). See Resorts International Hotel, 307 NLRB 1437, 1438 (1992) (holding that in order to invoke a balancing test, an employer must first prove its confidentiality claims); see also, Gas Spring Co., 296 NLRB 84, 99 (1989) (finding a confidentiality claim belatedly raised and brought up as an afterthought not upheld).

Even assuming that Respondent raised legitimate confidentiality concerns, as the ALJ did in his decision, Respondent misstates the standard the Union must satisfy. (ALJD pp. 5-6). Rather than a specific need, the Union must demonstrate that the information is relevant and then in response to a claim of confidentiality the Board balances the need for the information against any legitimate and substantial confidential interests. See, Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979); see also, Detroit Newspaper Agency, 317 NLRB 1071, 1074 (1995). In his decision, the ALJ specifically found that the requested information was potentially relevant as staffing has been a major issue in contract negotiations and that the survey is arguable related to staffing. In this regard, Respondent's witness Diane Haughney conceded the number of RNs on a unit can impact patient care.¹¹ (ALJD p. 5, lines 5-14). In addition to the staffing issues, and contrary to Respondent's claim that the Union was on a fishing expedition, the record further demonstrates the relevancy of the requested information. This relevance is evidenced by the memo issued by Respondent's president and CEO instructing bargaining unit RNs on how to remedy deficiencies found by the Joint Commission, directing them to make certain changes regarding patient care

¹¹ Respondent did not except to the ALJ's finding that the requested information was potentially relevant. Any challenge Respondent raises to this finding in its brief should be disregarded as it fails to comply with Section 102.46 of the Board's Rules and Regulations. Section 102.46(b)(1) requires that each exception "set forth specifically the questions of procedure, fact, law, or policy to which exception is taken," and that if a supporting brief is filed, it should present "argument ... in support of the exceptions." Section 102.46(c) provides that "[a]ny brief in support of exceptions shall contain no matter not included within the scope of the exceptions[.]" Accordingly, as Respondent did not include a challenge to the ALJ's finding in its exceptions it is not before the Board. A-1 Door & Building Solutions, 356 NLRB No. 76, slip op. at 3 (2011), see also Engineered Comfort Systems, 346 NLRB 661, 661 (2006).

based on the deficiencies and stating that there would be zero tolerance for failing to follow these practices. (ALJD p. 4, lines 17-22, GC Ex. 8). Thus, the information requested relates to employees' terms and conditions of employment. Disneyland Park, 350 NLRB 1256, 1257 (2007)(where the information request pertains to bargaining unit employees, the information is presumptively relevant and the employer must provide the information).

Accordingly, the Union demonstrated the relevancy of the information and in response, Respondent belatedly raised its confidentiality concerns by asserting in its brief that disclosure, "would jeopardize the open discussion and review of hospital conditions and procedures which leads to improved quality of hospital care." (R. Br. p. 16). In balancing the Union's statutory right to relevant information against Respondent's conclusory statement, the balance is in favor of disclosure.

CONCLUSION

The ALJ's findings and conclusions are well-reasoned and supported by the record. The ALJD should be affirmed by the Board, and Respondent ordered to take the actions required in the ALJ's Recommended Order.

DATED at Buffalo, New York this 21st day of November 2013.

Respectfully submitted,

/s/ Linda M. Leslie
LINDA M. LESLIE
Counsel for the General Counsel
NATIONAL LABOR RELATIONS BOARD
Third Region
Niagara Center Building, Suite 630
130 South Elmwood Avenue
Buffalo, New York 14202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on November 21, 2013, the following document was electronically filed with the National Labor Relations Board and copies were served on the following parties by electronic mail:

General Counsel's Answering Brief to Respondent's Exceptions

James N. Schmit, Esq.
Jaeckle Fleischmann & Mugal LLP
Attorneys for Respondent
jschmit@jaeckle.com

Claire Tuck, Esq.
New York State Nurses Association
Claire.tuck@nysna.org

Dated November 21, 2013

/s/ Linda M. Leslie, Esq. _____

Linda M. Leslie, Esq.
Counsel for the General Counsel
Linda.Leslie@nlrb.gov