UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

Cases 5-CA-095883
5-CA-099390

NATIONAL NURSES UNITED

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF OPPOSING RESPONDENT'S EXCEPTIONS TO THE DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Washington Hospital Center Corporation d/b/a MedStar Washington Hospital Center ("Respondent") is a healthcare facility organized in the District of Columbia. Most of the nurses employed at Respondent's facility are represented by National Nurses United ("the Union"). Starting on July 11, 2012, the Union began requesting from Respondent the results from Respondent's voluntary 2012 AHRQ survey[1], which documented employees' opinions and concerns about their working conditions, including patient care. Respondent refused to furnish the information to the Union, claiming that it is proprietary and confidential.

Starting in October, the Union began requesting from Respondent information concerning Respondent's staffing practices. The Union requested the information for use by the Union representatives on a labor-management committee tasked with addressing employee staffing by developing a staffing plan for each of the units where bargaining-unit nurses work. Respondent refused to furnish the information to the Union, claiming the information is confidential and citing vague concerns about release of the information to the *Washington Post*.

On January 7 and March 1 of 2013, the Union filed charges 5-CA-095883 and 5-CA-099390, respectively. The General Counsel ("GC") investigated those charges, and found that Respondent was violating the Act by refusing to provide the Union with the requested survey and staffing data. Accordingly, the GC issued a Complaint and Notice of Hearing, and an Order Consolidating Case, Consolidated Complaint, and Notice of Hearing on April 25th and May 23rd, respectively. Respondent filed Answers to both Complaints (GC Exhs.1-G and 1-L). In both

[1] AHRQ stands for Agency Healthcare Research and Quality. AHRQ is a government agency within the U.S. Department of Health and Human Services. The agency researches, develops, and prepares information for healthcare organizations to assist them with providing safer and better quality care for their patients (See Tr. 22).

Answers, Respondent denied the information's relevance, generally asserted confidentiality, and claimed that it bargained in good-faith for an accommodation to its production of the information. On July 12, Respondent filed an Amended Answer to the Consolidated Complaint, admitting all material allegations except any violation of the Act (GC Exh. 1-N).[2]

On July 15, the Parties appeared at a hearing before Administrative Law Judge Arthur J. Amchan. Because Respondent admitted all allegations establishing the GC's prima facie case of violations of Section 8(a)(1) and (5), the Parties were permitted to open the hearing with Respondent's presentation of evidence relevant to its confidentiality defense.[3] The issues presented at the hearing were whether Respondent met its burden of establishing that the survey results and staffing data are confidential; and if so, whether Respondent bargained in good-faith for an accommodation to its production of the information (ALJD, 4:25-28).

On September 11, Judge Amchan issued a Decision ("ALJD"), finding that Respondent violated Section 8(a)(1) and (5) by failing and refusing to provide the Union with the 2012 AHRQ Survey results and staffing data. In finding so, the ALJ rejected all of Respondent's confidentiality claims, including its, never before asserted, claim that a District of Columbia statute bars disclosure of the information. The ALJ found that Respondent's record confidentiality claims do not fall into any of the categories of confidential information identified by the Board in *Detroit Newspaper Agency*, 317 NLRB 1071 (1995), nor does "fear of

[2] At the hearing, the Complaint was amended to allege Gary Brown, Taryn Hogan, and Janet Orlowksi as supervisors and agents within the meaning of the Act (Tr. 7, 236). It was also amended to include two unnamed agents acting as Respondent's counsel during the events at issue in this case (Tr. 7-8).

[3] 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.

embarrassment for adverse publicity . . . satisfy the principles enunciated in *Detroit Newspaper*" (ALJD, 6:5-6).

On October 25, the GC and Respondent filed with the Board exceptions, and briefs in support thereof, to the ALJD.[4] Respondent excepted to the ALJD on various factual and legal grounds identified and discussed below. On November 8, Respondent filed an Answering Brief as well. This Answering Brief addresses the issues raised by Respondent in its exceptions and supporting brief, as well as Respondent's November 8 brief answering the General Counsel's limited exceptions.

II. STATEMENT OF FACTS

Respondent is the largest private hospital in the District of Columbia. It employs an array of medical professionals, including nurses. Most of the nurses employed by Respondent are represented by 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).[5] There are approximately 1,150 nurses in the bargaining unit (Tr. 150). On about January 19, 2012, Respondent and the Union entered their first collective-bargaining agreement (or "contract"), which created various labor and labor/management committees tasked with improving patient care, staffing practices, and work performance

[4] The General Counsel excepted to the ALJD and accompanying Order only to the extent that they require clarity as to the Judge's findings on the staffing matrix tracking data for three reasons, including: (1) the ALJD alludes to all of the staffing matrix tracking data in issue at the hearing, but only specifically references "staffing matrix" or "staffing matrices" generally; (2) the Order does not contain a mandate requiring Respondent to furnish the Union with any staffing data whatsoever; 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" generally.

[5] 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).

(See J Exh. 1, Art. 30 and 31).[6] Those committees include the Professional Practice and Patient Safety Council ("PPPSC") and the Nurse Staffing and Productivity Committee ("NSPC").

The PPPSC is an eight-member committee comprised of elected bargaining unit nurses, charged with "making evidence-based recommendations to management on safety measures, staffing, [and] improving nurse experience" at Respondent's facility (Tr. 150; see also J Exh. 1, Art. 31 § 31.2). The PPPSC's objectives are:

> To consider constructively the professional practice of nursing; to work constructively for the improvement of patient care and nursing practice; to make recommendations to the Hospital regarding ways and means to improve patient care; to consider constructively the improvement of safety and health conditions which affect nursing practice; to investigate staff nurse identified issues affecting patient care and safety and make recommendations to resolve these issues to the Hospital; to analyze safety indicators and recommend evidence-based risk reduction strategies responsible for improvement in quality, safety, and patient experience outcomes; to quarterly review . . . patient experience scores and provide evidence-based recommendations for improvement; and periodically review satisfaction surveys and ADO forms not related to staffing issues.

(J Exh. 1, pp. 51-52). The NSPC is a labor-management committee comprised of five labor representatives (including bargaining unit employees) and five members of Respondent's management team. It is charged with "collaboratively" developing, monitoring, and improving a staffing matrix for each unit in the hospital where bargaining unit employees work (Tr. 167, 227; J Exh. 1, Art. 30 § 30.3(b)). The Parties' contract provides that the NSPC shall "strive to discuss staffing objectives and the number of nurses, patient care technicians ["PCTs"], agency nurses, and temporary nurses utilized on each nursing unit . . ." (J Exh. 1, pp. 48-50).

[6] The term of the contract is May 8, 2011 through November 14, 2014 (Id.).

A. Union's Request for the 2012 AHRQ Survey Results

In 2010, Respondent began a practice of conducting biannual AHRQ patient safety surveys. The AHRQ survey is intended to measure employee perception of patient care (Tr. 22-23).[7] The survey asks employees to provide feedback on various issues related to their conditions of employment, including staffing, workload, and discipline (Tr. 42-43; GC Exh. 7; R Exh. 2). Barbara Mitchell, Respondent's Vice President of Outcomes Research, oversees the department that administers the AHRQ survey (Tr. 21). That department maintains the data collected by the survey and uses it to address issues that employees identified therein (Id.).

In March 2012,[8] Respondent began advertising its AHRQ Survey (hereinafter "the 2012 Survey") to its employees (Tr. 26 -27). Respondent instructed supervisors and managers to encourage employees to participate (Id.). Respondent also advertised the 2012 Survey to employees by e-mail newsletter and by posting signs in its elevators and cafeteria (Id.; GC Exhs. 17 and 18). Respondent's managers, including Mitchell, communicated to employees that the survey was confidential, meaning that responses to the survey would not be attributed to individual employees (Tr. 28–29, 212–213; GC Exhs. 33 and 34). Mitchell testified at length about the assurances of confidentiality Respondent made to employees because "a hand-full of staff" expressed to her "their concern about taking the survey" and the confidentiality of their responses (Tr. 28).

Respondent subsequently administered the 2012 Survey during the period of March 4

[7] As a healthcare facility accredited by The Joint Commission, formerly the Joint Commission of Accredited Healthcare Organizations, Respondent is required to survey its employees on patient safety at its facility in order to make improvements to the care provided at its facility (Tr. 22-25). Additionally, in order to receive reimbursement for Medicaid, Respondent must be accredited by The Joint Commission (Tr. 25).

[8] Hereinafter, all dates referenced are in the year 2012 unless noted otherwise.

through May 24 (See R Exh. 1). Employees accessed and completed the 2012 Survey via computer portals at Respondent's facility or by a link sent to their personal e-mail accounts (Tr. 198). About forty-two percent of Respondent's work-force completed the survey (Tr. 25). A survey report was generated for each of Respondent's work units (Tr. 30-36). Those reports contain statistical calculations and detailed narrative responses to questions concerning working conditions (Id.). Employees who completed the 2012 Survey did not, nor were they required to, identify themselves at any point in the survey (Tr. 29 -30).

On July 3, Respondent's Chief Nursing Officer, Susan Eckert met with the PPPSC (Tr. 216). During the meeting, Eckert recommended that the PPPSC focus on making "evidence-based" recommendations to management concerning issues that it would address pursuant to the contract (Tr. 216-218). Bargaining-unit nurse Lori Marlow (who is also a Union steward and chair of the PPPSC) suggested that the PPPSC use the results from the 2012 Survey as a starting point, as it would contain the "evidence" from which the PPPSC could make recommendations to management concerning problems identified by employees in their survey responses (Id., 220). Eckert stated that she needed to look into whether the information could be provided to the PPPSC (Tr. 218). Eckert did not follow-up with Marlow or anyone from the Union concerning Marlow's request for the 2012 Survey results (Id.).

On July 11, Marlow e-mailed Kathleen Chapman, Respondent's Assistant Vice President of Human Resources who handles Respondent's labor relations, requesting an "un-redacted copy of the 2012 AHRQ Survey Report on Patient Safety Culture in its entirety" (Tr. 98, 218; GC Ex. 3). Marlow requested the 2012 Survey results because they contained bargaining unit employees' feedback about their everyday working conditions including, but not limited to, staffing levels, discipline, communication, and patient transfers (Tr. 220). Chapman did not

respond to Marlow's request. Instead, she sent Marlow's message to Janet Orlowski, Respondent's Chief Medical Officer, stating: "I cannot imagine ever giving this to them . . . or anyone else …" (GC Exh. 41). On July 13, Orlowski responded to Chapman, agreeing that the Union "should not receive a copy" of the 2012 Survey results (Id.).

Thereafter, from July 13 through August 15, Respondent, without explanation, repeatedly refused to provide the Union members of the PPPSC with the requested 2012 Survey results despite the Union's repeated requests for the information (Tr. 102-106, 154-157, 163-164; GC Exhs. 4, 5, 8; R Exh. 8). Finally, after exhaustive requests from the Union, on August 16, Respondent informed the Union that Respondent would not be providing the 2012 Survey results to the Union because Respondent deemed them to be "confidential and proprietary" information (Tr. 102-106, 161-162; GC Exh. 6; R Exh. 10). Respondent provided no explanation for its confidentiality claim.

Meanwhile, despite its claims of confidentiality, Respondent released the survey results to its department managers with the expectation that they would discuss the results with employees to "identify opportunities . . . to create higher quality and a safer environment" (Tr. 33-34). For example, Taryn Hogan, a supervisor in Respondent's cardiac unit, held a staff meeting in her department, where she discussed the survey results with employees (Tr. 221). During those meetings, Hogan informed employees that Respondent was developing a "Unit Based Clinical Task Force" that would address the areas of concern raised by the survey. She invited employees to join that task force (Tr. 221-222; GC Exh. 35).

Gary Brown, a supervisor in Respondent's emergency department, called a "huddle" with bargaining-unit nurse and PPPSC member Bridgette Barnes and two other nurses, where he discussed the 2012 Survey results (Tr. 199-204). During the huddle, Brown distributed two

documents reflecting the 2012 Survey results for the emergency department (Id.; GC Exh. 7). One document was 2 pages in length and entitled "MWHC Hospital Survey of Patient Safety Culture" (Tr. 199-204). He asked the nurses to circle the top three areas of importance on the second page of that document (Id.). The other document was 11 pages and entitled "The AHRQ Survey Report." It contained a statistical report of employee responses to numerous questions and a collection of employee-authored feedback extracted from the "Comments" section of the surveys (Id.). Barnes and the nurses reviewed both documents. Barnes asked Brown if she could keep the documents. Brown told her that he had only one copy of the documents but permitted Barnes to make a copy (Id.). Brown did not tell Barnes the survey results were confidential and he did not forbid her to discuss the survey results with other employees (Id.).

On August 23, the PPPSC met (Tr. 162-163). Among other PPPSC members, nurses Barnes and Marlow were present, along with Union Representative Bradley Van Waus. During the meeting, Marlow discussed the Union's difficulty with obtaining the 2012 Survey results from Respondent (Id., 204-205). Barnes announced that she had a copy of the 2012 Survey results for the emergency department. She gave Marlow and Van Waus a copy of the survey report she obtained from supervisor Brown (Id; See GC Ex. 7).

Exasperated by its numerous failed attempts to obtain the 2012 Survey results from Respondent, the Union filed an unfair labor practice charge regarding the matter on September 10 (Tr. 106-107, 164). Respondent enlisted the assistance of counsel to negotiate with the Union a confidentiality agreement applicable to the Union's requests for information (Tr. 108-111). Thereafter, the Union and Respondent continued to discuss the Union's requests for the 2012 Survey results. However, they did so primarily through their legal counsel (Id.). The Union was

represented by its attorney, Robert Stropp, and Respondent by its counsel, Scott Medsker and Carter Delorme of Jones Day LLP.

On October 12, Medsker e-mailed Stropp, informing him that Respondent misunderstood the Union's request for the 2012 Survey results (GC Exh. 36). He informed Stropp that Respondent was "willing to produce reports for departments that have bargaining unit members in them, provided that the information is produced to the PPPSC and that the members of the PPPSC sign the confidentiality agreement called for in Article 31.2 (g)" of the Parties' contract (hereinafter "PPI confidentiality agreement") (Id.).[9] On or around October 15, Respondent, by its attorneys, informed the Union that Respondent would be providing the requested 2012 Survey data (See R Exh.13).[10]

Chapman then forwarded Van Waus a PPI confidentiality agreement and a list of bargaining unit nurses as promised (Tr. 111–112, 115-116, 131-132; R Exhs. 12 and 13). The members of the PPPSC did not sign that exact agreement that Chapman sent to Van Waus, although they later executed a final PPI confidentiality agreement (Tr. 132; GC Exh. 39). Based on Respondent's assurances to the Union that it would provide the 2012 Survey results upon the PPPSC members' execution of the PPI confidentiality agreement, the Union accordingly withdrew its ULP charge (Tr. 113-114, 131; GC Exh. 40).

Although Respondent stated that it would furnish the Union with the 2012 Survey results upon the Union's withdrawal of its ULP charge and the Union's execution of the PPI confidentiality agreement, Respondent subsequently began to condition its production of the

[9] Pursuant to Article 31.2(g) of the Parties' contract, the members of the PPPSC are required to execute a confidentiality agreement protecting from disclosure protected patient information (hereinafter "PPI") (Tr. 164–165; J Exh. 1 at p. 52). Specifically, the contract reads: "Confidentiality – All members of the PPPSC shall sign a confidentiality agreement to protect and not disclose any [PPI] that the Council may consider during the course of its duties" (Id.).

[10] Note that R Exh. 13 and GC Exh. 9 are the same. R Exh. 13 is in evidence, which made the admission of GC Exh. 9 unnecessary, although it is marked for identification.

information on an additional confidentiality agreement, which would govern the Union's requests for, and use of, PPI and non-PPI information (hereinafter "PPI/non-PPI confidentiality agreement") (Tr. 114–115; GC Exh. 36).

On November 1, Stropp sent DeLorme and Medsker a proposed confidentiality agreement "covering claims other than the PPI" (Id.). On November 2, DeLorme responded, stating that the non-PPI proposal that Stropp forwarded was inadequate and proposing modifications to the proposed agreement. (Id.).

The same day, Stropp responded, stating that he understood DeLorme to be conditioning the non-PPI agreement on Respondent producing the 2012 Survey results and stating: "that is not what we agreed to in agreeing to withdraw the [ULP] charge. If that is what you are doing, say so and I will get out of the case and the [Union] may re-file its charge" (Id.). DeLorme and Stropp subsequently discussed the confidentiality agreement more via phone, and on November 15, Stropp informed DeLorme that the Union wanted to know if it needed to re-file its charge concerning the 2012 Survey results (Id.). DeLorme responded, attaching a revised confidentiality agreements covering PPI and non-PPI information, and stating, "If they work for your folks, get them signed and we will produce the surveys" (Id.).

On November 21, Stropp forwarded to DeLorme and Medsker a document entitled "WHC Draft Confidentiality Agreement with NNU (PPI and Other Confidential Information)" (Id.). The Agreement applied to PPI and non-PPI information, and stated that PPI would be provided to bargaining unit members of the PPPSC and non-employee Union representatives, "who shall protect and not disclose such PPI to any third party" (See Id.).

On November 27, DeLorme responded to Stropp, stating: "I've forwarded your proposed changes to my people for sign-off" (Id.). On November 30, Medsker replied to Stropp, stating:

> We've received approval on the agreements attached, which are the same versions you circulated earlier this week. . . . Substantively it is the same as your last version. Once we have signed copies, we will get the documents produced (GC Exh. 37).

Accordingly, Medsker attached to his e-mail two confidentiality agreements: (1) the PPI confidentiality agreement; and (2) the PPI/non-PPI confidentiality agreement that Stropp attached to his November 21 e-mail (Id.).

On the same day, Stropp replied, asking for clarification and whether Respondent would be designating the 2012 Survey results "confidential" at the time that it provided them to the Union "so that they would be subject to arbitration" under the procedure provided in the PPI/non-PPI confidentiality agreement (See GC Exh. 38). DeLorme responded to Stropp, stating that he had not discussed with Respondent whether the surveys would be designated as confidential and was not sure, but guessed Respondent would do so (Id.). Unsatisfied that the 2012 Survey results could still be designated as "confidential," Stropp informed DeLorme that Respondent's production of the 2012 Survey results was not conditioned on the execution of PPI/non-PPI Confidentiality Agreement (Id.).

Still, the Union executed the PPI/non-PPI confidentiality agreement and returned it to DeLorme (Tr. 179; GC Exh. 39). The members of the PPPSC then executed the PPI confidentiality agreement as mentioned earlier (Tr. 165-166; GC Exh. 40). Despite receiving the executed versions of both confidentiality agreements, Respondent refused to provide the Union with the requested 2012 Survey results (Tr. 118-119, 138-140). On December 20, Stropp contacted DeLorme, expressing surprise at Respondent's reneging on their negotiated Agreement (GC Exh. 40). Even as Respondent appeared to be backing away from the bargained-for PPI/non-PPI confidentiality agreement, the Union continued to request the 2012 Survey results

and discuss with Respondent's counsel ways that the information could be provided to the Union (Tr. 179–180).

On January 3, 2013, Van Waus e-mailed Chapman, asking if Respondent would be providing the 2012 Surveys and requested a response by the following day (GC Exh. 11). He informed Chapman that her failure to provide the information by the stated deadline would result in the Union re-filing its ULP charge regarding the 2012 Survey (Id.). Chapman did not respond by the following day. Therefore, on January 7, 2013, the Union filed the charge in Case 05-CA-095883, alleging that Respondent violated the Act by refusing and failing to provide the Union with the requested 2012 Survey results (GC Exh. 1-A).

On January 30, DeLorme e-mailed Union representative Van Waus, requesting a meeting to "discuss the most recent ULP filed by the Union related to information requests" (GC Exh. 26). On January 31, DeLorme and Van Waus spoke over the phone to discuss the 2012 Survey results (Id.). Van Waus asked DeLorme why Respondent "had reneged on the PPI/Non-PPI confidentiality agreement" (Id.). DeLorme claimed he had "gotten ahead" of his client in negotiating that agreement (Id.). DeLorme informed Van Waus that Respondent was concerned the Union would resort to use of the agreement's arbitration provision in order to contest Respondent's designation of certain information as "confidential" (Tr. 188; see GC Exh. 10). Van Waus stated that Respondent had provided copies of the survey results to bargaining unit employees (Id.). DeLorme represented that disclosure to bargaining unit employees had been "a mistake" (Id.). DeLorme stated that Respondent would make the 2012 Survey results available to the Union at Respondent's facility, where the Union could view them and take hand-written notes, but could not make any copies (Tr. 181-182; see also Tr. 120-121, 133-134). Van Waus declined the offer, asserting that the Union has a right to have copies of the requested

information (Tr. 181). Van Waus and DeLorme only discussed the 2012 Survey and not the Staffing Matrix Tracking Data results during their January 31 conversation (Id.).

As the July 15 hearing in the instant case approached, DeLorme continued to represent to the Union that Respondent wanted to resolve their dispute by furnishing the 2012 Survey results, provided that the Union agreed to more conditions placed on the information (Tr. 139, 182). Specifically, DeLorme told Van Waus that Respondent would provide the 2012 Survey results if the Union agreed to allow Respondent to redact any and all management names that might appear in survey answers because disclosing that information would be "disruptive to the workplace" (Id.). Van Waus agreed to allow Respondent to redact all names from the surveys (Id.). Still, Respondent failed to provide the Union with the 2012 Survey results and the matter proceeded to the instant hearing (Id.).

B. Union's Request for Staffing Matrix Tracking Data

The facts underlying the Union's request for Respondent's Staffing Matrix Tracking Data are recited in detail in the GC's October 25 Brief in Support of Exceptions. To avoid unnecessary redundancy, the recitation of the facts here is abridged.

In preparation of an October 12 NSPC meeting, on October 9, Chief Union Steward and NSPC member Steven Frum contacted Chapman, requesting Respondent's staffing matrix and Staffing Matrix Tracking Data (Tr. 169, 228; GC Exh. 12). He requested the matrix for use by the Union delegation of the NSPC, which is, along with management, responsible for analyzing Respondent's existing matrix and revising it as necessary (Tr. 230). Frum also requested Respondent's Staffing Matrix Tracking Data to determine the actual deployment of nurses and Patient Care Technicians on each unit (Id.).[11] Thus, the Union delegation of the NSPC would

[11] There are about 35 nursing units at Respondent's facility (Tr. 86).

use the staffing information to compare actual staffing on each inpatient unit to the general plan for each unit, and make recommendation to management accordingly (Id., 231).

On October 11, 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 Matrix Tracking Data prior to the October 12 NSPC meeting.

On October 12, the NSPC met as planned (Tr. 168-170). During that meeting, Frum inquired about the Union's request for the Staffing Matrix Tracking Data (Id.). Tonya Washington, Respondent's Vice President of Nursing, stated that before Respondent provided the requested staffing data, there needed to be discussion about entering a confidentiality agreement (Id.). She expressed unspecified concern about information getting to the *Washington Post* (Tr. 170). Washington said that she would bring a confidentiality agreement to the next NSPC meeting scheduled for November 16 (Tr. 171; GC Exh. 13 at p. 2).[12]

On November 16, the NSPC met as planned, and Respondent's representatives did not provide the Union with a proposed confidentiality agreement as promised (Tr. 171). Thereafter, Respondent continued to evade the Union's requests for its Staffing Matrix Tracking Data and failed to furnish the Union with its proposed confidentiality agreement covering the data (See GC Exhs. 14, 15; Tr. 180). Thus, on March 1, the Union filed charge 05-CA-099390, alleging that Respondent violated the Act by refusing provide the Union with the requested Staffing Matrix Tracking Data (GC Exh. 1-C).

[12] 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).

III. UNFAIR LABOR PRACTICE PROCEEDINGS

On July 15, the Parties appeared at a formal hearing before the ALJ. The issues presented at the hearing were whether Respondent met its heavy burden of establishing that either type of the information, the 2012 Survey results and the Staffing Matrix Tracking Data, is confidential; and if either type of the information is confidential, whether Respondent bargained in good faith for an accommodation to its production of both types of the information (See ALJD 4:25-28).

A. Respondent's Confidentiality Defense Regarding 2012 Survey Results

During the hearing, Respondent raised, and presented evidence in support of, two identifiable confidentiality defenses to its refusal to provide the 2012 Survey results to the Union: (1) Respondent's concerns about potential public disclosure of the 2012 Survey results to third parties, whom Respondent believes would misuse the surveys "by taking them, twisting them, and publishing them in such a way that would damage [Respondent];" and (2) Respondent's concerns about representations that it made to its employees in administering the 2012 Survey to them (See ALJD 5:14-16; Tr. 36-37, 47-48, 51-52, 140-143).

Respondent presented two witnesses, who testified about its concerns about the possible effects of public disclosure of the 2012 Survey results. One was Mitchell, and the other was James Hill, Respondent's Senior Vice President of Administrative Services who is also responsible for Respondent's labor relations. Mitchell testified that if the 2012 Survey results were shared outside of the hospital, she would have "grave concerns" because employee answers to those questions could be misunderstood or misconstrued by individuals outside of the hospital setting (Tr. 32, 38). Mitchell did not identify any specific portions of the survey results that would be particularly susceptible to misinterpretation; she did not explain how the information

could be taken out of context; and she did not explain what might happen if the surveys were publicized.

As far as Respondent's secondary confidentiality defense, Mitchell testified extensively about representations Respondent made to its employees regarding confidentiality and the "expectation" that "[the 2012 Survey] responses would be held in confidence" (Tr. 28-29, 31, 36-37). Mitchell indicated that some employees expressed to her concerns regarding anonymity in their survey responses (Id.). Hill testified that Respondent's concerns regarding any public disclosure of the 2012 Survey results include "a number of things," including: (1) the potential that the information could be disclosed to a third party, narrowly construed, and distorted; and (2) disclosure of the 2012 Survey results to the Union would breach employees' trust and potentially affect employee participation in future surveys (Tr. 142-143).

As to the first point, Hill provided uncorroborated hearsay testimony that at some time in 2010, Respondent provided the Union with a copy of its 2010 Survey results, and "in early 2011," Respondent was contacted by an unnamed *Washington Post* reporter who claimed to be in possession of the 2010 survey results (Tr. 140-141). He testified that the reporter stated that she obtained information about the survey from "NNU" (Id., 142). Hill testified that Respondent met with that reporter and, consequently, the reporter did not run a story about Respondent's survey (Id.). Hill testified that when he became involved with the Union's request for 2012 Survey results, he "immediately thought of our experience in early 2011 and the issue of *The Post* . . ." (Id.).

As to the second point, Hill testified that Respondent, "represented to our employees, associates, everyone who was actually a respondent to the survey that the information . . . would be kept confidential" (Tr. 143). He explained, "if it were the case that we weren't able to

preserve the confidentiality of the survey, I can't imagine that we would be successful [with future surveys] going forward insofar as we would have breached that trust with our workers" (Id.).

B. Respondent's Confidentiality Defense Regarding the Staffing Data

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). Respondent's evidence in support of its claims of confidentiality in the Staffing Matrix Tracking Data was presented primarily through the testimony of Rosemary Paradis, Respondent's Vice President of Nursing Excellence.

Paradis testified that Respondent monitors its staffing performance by comparing staffing data recorded in tracking spreadsheets to its actual staffing matrices (See J Exh. 1, Appendix G; R Exhs. 3 and 4). She testified that because the tracking sheet only reflects snap-shots of Respondent's staffing 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). According to Paradis, only directors, staffing coordinators, and staffing supervisors on each of Respondent's 35 units view Respondent's Staffing Matrix Tracking Data (Tr. 73-75). Bargaining unit employees do not (Id.). Paradis testified that an unfavorable public depiction of Respondent's staffing practices 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).

Chapman testified that the Staffing Matrix Tracking Data is confidential "because certain information . . . can be viewed as confidential. The staffing matrix by itself, maybe not; but,

when you ask for all of the other pieces [such as the Staffing Matrix Tracking Data], we believe that was confidential" (Tr. 123).

IV. ARGUMENT

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. A party refusing to furnish requested information on confidentiality grounds must timely raise that defense, discuss its confidentiality concerns with the requesting party, and seek an accommodation from that party. *Postal Service*, 359 NLRB No. 115, slip op. at 4 (2013); *National Grid USA Service Co.*, 348 NLRB 1235, 1244 (2006) (citing *The Good Life Beverage Co.*, 312 NLRB 1060, 1062 (1993)). Furthermore, the party asserting confidentiality as a defense has the burden of proving such. *Crittenton Hospital*, 342 NLRB 686, 694 (2004). A blanket claim of confidentiality, without more, will not satisfy the burden of proof. 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 at 1073. These categories include: individual medical records or psychological test results; that which would reveal substantial proprietary information, such a 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). The Board considers whether information is

confidential within the context of each case. Id. at 211. Thus, the Board has also found that an employer has a legitimate confidentiality interest in incident reports documenting medication errors where there exists a state law protecting the those types of documents from disclosure and where there is an underlying public policy in ensuring that patients do not suffer serious injury or death as a result of medication errors. *Borgess Medical Center*, 342 NLRB 1105, 1006 (2004).

This Answering Brief will demonstrate why Respondent's confidentiality claims should fail and why the ALJ reached the proper conclusion. First, the GC will address the arguments advanced by Respondent in its Brief in Support of Exceptions. Then it will demonstrate that, assuming Respondent met its burden of establishing a legitimate and substantial confidentiality interest in either the 2012 Survey results of Staffing Matrix Tracking Data, Respondent failed to bargain in good-faith for an accommodation to its production of that information.

A. Borgess Medical Center Does Not Apply to the Instant Case

1. The 2012 Survey Results and the Staffing Matrix Tracking Data are Not Similar to the Incident Reports In Borgess Medical Center

Although asserted for the first time in its post-hearing brief, Respondent claims that the 2012 Survey results and the Staffing Matrix Tracking Data are confidential because they are records "obtained by a medical peer review body" and the D.C. Code §§ 44-801 to 44-805(3)(c) ("the D.C. Code") recognizes such documents as confidential. Respondent claims that since the Board treated the incident reports in *Borgess* as confidential based on a Michigan peer review statute, the information at issue in the instant case should also be recognized as confidential by the Board. The ALJ correctly rejected Respondent's claim of confidentiality based on the D.C. Code and *Borgess* on the grounds that they are irrelevant to the instant case (ALJD-62, 5 n. 9).

Respondent asserts that the ALJ erred in his finding because Respondent claims that the 2012 Survey results and Staffing Matrix Tracking Data constitute a "review of the quality, efficiency, or utilization of services provided" by a healthcare facility and are similar to the incident reports the employer maintained in *Borgess.*

In *Borgess Medical Center*, the employer completed and maintained incident reports documenting medication errors, in "contemplation of litigation." Id. at 1111. A registered nurse was discharged after administering the wrong medication to a patient and trying to cover her error. Id. at 1105. Her supervisor completed an incident report. The nurse grieved the discharge. Id. In processing her grievance, the union requested the employer's incident reports concerning medication errors for the purpose of determining "if medication errors were reported on incident reports where no discipline was administered as a result." Id. About nine days after the union's request, the employer informed the union that Michigan state statutes precluded the release of the requested incident reports. Id. The employer discussed its confidentiality concerns with the union. Id. A few days later, the employer informed the union that the incident reports were privileged pursuant to Michigan's Peer Review Privilege statute 333.20175(8) and 333.21515. Id. at 1112. The employer informed the union that it would not provide the incident reports because the employer's interest in "reducing mortality" and protecting patients outweighed the union's need for the information. Id.

At a trial before an ALJ, the employer's witness testified that upon completion of incident reports, the reports were submitted to the employee's director and then submitted to the employer's Legal Affairs Risk Management Department, where the employer's general counsels and legal team worked. Id. The employer's general counsel testified that the incident reports were all maintained "in anticipation of possible litigation" and that the employer was concerned

that release of the reports to anyone outside of the Legal Affairs Department could subject them to subpoena. Id.

The Board held that the employer established a legitimate confidentiality interest in the incident reports because non-disclosure of such reports was protected by Michigan's Peer Review Privilege statutes and the state had a public policy interest in ensuring that healthcare facilities are able to keep confidential documentation that is self-critical and used to "reduce the likelihood that a patient will suffer serious injury or death as a result of a treatment error." Id. at 1105.

Respondent's reliance on *Borgess* is misplaced for two reasons: (1) neither of the information at issue is similar to the incident reports in *Borgess*; and (2) the facts underlying the Union's request for Respondent's 2012 Survey are distinct from those in *Borgess*.

The documents at issue in the instant case are distinctly different from the incident reports in *Borgess*. At first glance, Respondent's identification of a local statute protecting "peer review" information from disclosures may give the appearance that *Borgess* is similar to the instant case. However, it is not. The documents at issue in *Borgess* were reports of specific incidents of medication errors. The employer made and maintained the reports "in contemplation of litigation" and to track patterns in medication errors as part of its efforts to reduce the likelihood that a patient mortality. The instant case involves surveys containing general employee feedback on their working conditions, and staffing documents used to determine staffing of the bargaining unit employees. Respondent does not claim that either the 2012 Survey results or the Staffing Matrix Tracking Data are documents created and maintained in anticipation of litigation or for the purpose of reducing patient injury or mortality.

For example, there were no questions on the 2012 Survey that asked employees to identify and describe specific incidents of medication error and resulting patient injury or death. The questions on the Survey were in the form of statements that required a "yes" or "no" response, and included:

1.We have enough staff to handle the workload.
2. We use more agency/temporary staff than is best for patient care.
3. We work in "crises" mode trying to do too much, too quickly.
4. Whenever pressure builds-up, my supervisor/manager wants us to work faster, even if it means taking short-cuts.
5. Staff feel free to question the decisions or actions of those with more authority.
6. Staff are afraid to ask questions when something does not seem right.
7. Staff feel like mistakes are held against them.
8. Staff work that mistakes are kept in their personnel file.

(GC Exh. 7). Similarly, the Staffing Matrix Tracking Data documents no medication errors. Respondent uses the Staffing Matrix Tracking Data to adjust the schedules and work areas of bargaining-unit employees and non-unit employees whose work materially affects the working conditions of bargaining-unit employees (Tr. 60-65, 70, 84-86, 95-96).

The facts in *Borgess* are distinctly different from those in the instant case. In *Borgess,* the union requested the information for the purpose of processing a grievance and determining how many other nurses made medication errors without discipline. Thus, the union was essentially asking the employer to reveal every incident where a patient had been administered the wrong medication by its employees. Here, the Union members of the PPPSC and NSPC, committees organized under the Parties' collective bargaining agreement, requested the information at issue for the purposes of administering their respective duties under the contract. Respondent has not claimed that either the 2012 Survey results or the Staffing Matrix Tracking Data would reveal specific incidents of medication errors, in other words, sensitive patient data.

Furthermore, in *Borgess*, the employer timely informed the union that state law precluded disclosure of its reports, and discussed the matter with the union. Here, Respondent made no such claim to the Union. Respondent raised the D.C. Code in its defense for the first time in its post-hearing brief. See ALJD 5 n. 9. In *Borgess*, the employer's witnesses testified about the applicability of the Michigan statute to its incident reports. Here, Respondent made no such offers of proof at the hearing. Id. Based on the stark differences between *Borgess* and the instant case, the ALJ appropriately found that *Borgess* is irrelevant to the instant case.

2. Respondent's Claim Based on the D.C. Code is Untimely and Unsupported by the Hearing Record

Although Respondent petitions the Board to rely on *Borgess* in the instant case, the controlling case is *Crittenton Hospital*, 342 NLRB at 686 instead, as the facts in that case more closely resembling those at issue here. In *Crittenton Hospital*, the Board found that an employer hospital failed to establish a confidentiality interest in safety meeting minutes, despite the employer's assertion that the minutes were protected from disclosure by Michigan state law where the employer's claim was untimely and unsupported by the hearing record. Id. at 694 n. 1. In that case, a union representing a unit of nurses requested from the employer copies of the employer's safety committee meetings minutes. Id. at 692. The union requested the information to address concerns about the well-being and safety of bargaining-unit nurses, as the meeting minutes purportedly reflected nurse injuries at the employer's hospital facility. The employer expressed to the union a general concern about the confidentiality of the meeting minutes.

At the hearing before the ALJ, the employer for the first time asserted that it was relying on two Michigan statutes as a reason for not providing the meeting minutes to the union. Id. at 693 n. 22. One of statutes, MCLA 333.21515, was the same statute at issue in *Borgess*. It provided that "records, data, and knowledge collected for or by individuals or committees

assigned a review function described in this article are confidential and . . . shall not be public records, and shall not be available for court subpoena." The other statute provided that "records, data, knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency are confidential . . . are not public records, and are not subject to court subpoena." Id. The ALJ rejected the employer's confidentiality claim because it amounted to a post-hoc and blanket confidentiality claim. Specifically, in reaching his finding, the judge noted that: (1) the employer's claim that the statutes prohibited the disclosure of the safety meeting minutes was untimely, as the employer "never asserted to the union that the hospital was barred by state law from complying with the information request;" (2) the employer did not raise the statutes as a defense at any time prior to the hearing; (3) the employer offered scant witness testimony as to its reliance on the statutes as its rationale for not providing the union with the information; (4) there was no "credible evidence produced [at the hearing] to show that disclosure of the safety committee minutes was indeed prohibited by the [Michigan statutes];" (5) there was no evidence, beyond one witness's general assertion, "to show that the hospital's safety committee performs a review function within the meaning of the [statutes];" and (6) "no documents . . . such as the committee's or hospital's bylaws, rules, or regulations were produced to corroborate [the employer's] bare description of the safety committee as a review committee." Id. at 694-965.

Here, Respondent's confidentiality claim based on the D.C. Code is similar to the employer's confidentiality defense in *Crittenton Hospital* because it is untimely raised and unsupported by the hearing record. Therefore, it should likewise be rejected. Specifically, at no time prior to the close of the hearing in the instant case did Respondent assert that the D.C. Code, or any law, precludes its release of the 2012 Survey results or the Staffing Matrix Tracking Data

to the Union. Instead, in August 2012, over a month after the Union's request for the 2012 Survey results, Respondent made only a blanket claim to the Union that the information is "confidential and proprietary," and it did not discuss its confidentiality concerns with the Union, although it was required to do so at that time. See *National Grid USA Service Company, Inc.*, 348 NLRB at 1244 (party asserting confidentiality must timely raise that defense and discuss its confidentiality concerns with the requesting party).

Respondent made a similar general claim of confidentiality concerning the Staffing Matrix Tracking Data several weeks after the Union requested the information. Even when it made its vague confidentiality concerns about the *Washington Post* known to the Union, Respondent failed to discuss the matter with the Union (Tr. 170). Instead, Respondent's representatives continued to insist on an unnecessary confidentiality agreement (which it also never proffered) as a condition to its providing the Union with the Staffing Matrix Tracking Data.

In neither of its Answers to the General Counsel's Complaints and Consolidated Complaint, did Respondent raise the D.C. Code in its defense (GC Exhs. 1-G, 1-L, 1-N). At no time during the hearing before the ALJ did Respondent defend its claims of confidentiality by pointing to the D.C. Code or any other local law. In fact, the hearing record contains absolutely no reference or allusion to the D.C. Code. As noted above, Respondent raised two bases for its claims of confidentiality: (1) potential public disclosure which could negatively impact Respondent's reputation; and (2) violating assurances of confidentiality Respondent gave employees, both of which were rejected by the Judge (ALJD, 5:14-30).

Respondent claims that Mitchell and Paradis offered testimony in support of Respondent's assertion that "both staffing matrix tracking data and [2012] Survey results" are self-critical documents, similar to the incident reports in *Borgess*, and therefore come under the

scope of the D.C. Code 44-805(a). However, the hearing record shows that not once during the hearing did Respondent raise the D.C. Code, or any other law, as the rationale for its refusal to provide the information at issue to the Union. Of particular importance is that none of Respondents four witnesses, including Mitchell and Paradis, testified that Respondent withheld the information from the Union because of the D.C. statute.

In fact, when probed by the General Counsel as to the confidential nature of the 2012 Survey results, Mitchell testified that if the information were released she would have "grave concerns" because employee answers to those questions could be misunderstood or misconstrued by individuals outside of the hospital setting (Tr. 32, 38). When the General Counsel questioned Paradis as to the confidential nature of the Staffing Matrix Tracking Data, she testified that Respondent was concerned that an unfavorable depiction of Respondent's staffing practices 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).

Furthermore, Hill claimed Respondent's confidentiality claims rested on its concerns that the 2012 Survey Results would be released to the press and that release of the information would undermine employee confidence in taking the survey, which could adversely affect future survey participation. Chapman testified that the Staffing Matrix Tracking Data is confidential "because certain information [the Union] requested can be viewed as confidential." As for the 2012 Survey results, Chapman provided scant, if any, testimony as to why they are confidential.

In sum, the hearing record, or lack thereof, speaks for itself on the issue of the D.C. Code. There is simply no basis in the hearing record supporting Respondent's argument.

3. The D.C. Code is Not Applicable and is Otherwise Preempted by the Act

Respondent has failed to meet its burden of showing that the D.C. Code applies to the either the 2012 Survey results or the Staffing Matrix Tracking Data. Even if those documents would come under the scope of the D.C. Code, the statute would be pre-empted by the National Labor Relations Act to the extent that it interferes with employees' Section 7 rights.

As noted by Judge Amchan, Respondent, "for the first time in its post-hearing brief," cited the D.C. Code in support of its confidentiality claims. Thus, the ALJ found that Respondent failed to show that the D.C. Code applies to the information at issue in this case (ALJD, 5 n. 9). The Judge noted that Respondent failed to establish that the 2012 Survey is a "medical peer review," as defined by the D.C. Code and that the bargaining-unit nurses who completed the surveys constitute "an entity tasked with monitoring, evaluating, and taking actions to provide the delivery, quality, and efficiency of services," under the meaning of the D.C. Code (Id.).[13]

Respondent claims "the ALJD provided no basis for concluding that neither the [2012 Survey] results nor the staffing matrix tracking data are "reviews of the quality, efficiency, or utilization of services provided by a . . . healthcare facility" (Res. Br. p. 9). However, the ALJD provides a sound basis for reaching that conclusion: the absence of any record evidence showing that the D.C. Code applies to the instant case or that Respondent relied on that Code in its refusals to provide the information to the Union. As previously stated, Respondent neither cited nor alluded to any law in its confidentiality claims asserted in its pre-hearing pleadings or at the hearing. By not presenting any evidence in support of its claim that D.C. Code applies to the documents in the instant case, Respondent has made a blanket claim of confidentiality, which should fail. See *Detroit Newspaper Agency*, 317 NLRB at 1073 (Board finding that employer

[13] The Judge did not reference the Staffing Matrix Tracking Data specifically when he found that Respondent failed to show that the D.C. Code applies to the instant case.

failed to establish a confidentiality interest in its purported "self critical" audit reports where its confidentiality contentions was not supported by hearing record).

Apparently, Respondent claims that because its managers consider the 2012 Survey results and Staffing Matrix Tracking Data internally in order to "identify trends and improve patient care," Respondent itself constitutes a "peer review body" as defined by the D.C. Code, and therefore those documents constitute a "peer review" report or record that are "confidential" and "shall neither be discoverable nor admissible into evidence in any civil, criminal, legislative or administrative proceeding," pursuant to D.C. Code 44-805(a)(1).

However, courts in the District of Columbia have found such broad interpretations of this statute to be erroneous. See *Ervin v. Howard University*, 445 F.Supp.2d 23, 26-27 (D.D.C. 2006) (The purpose of the D.C. Code is ensuring "confidentiality of peer review proceedings" and therefore "not . . . every recollection or document that involves efforts in the improvement of patient safety and delivering patient care is protected." The district court also interpreted "peer review" and "peer review body" under D.C. Code 44-805(a), and held that "a physician's observations of events in the hospital, opinions on patient on patient care and the skills of colleagues, or documentation of problems or concerns are not privileged" except where such information is submitted to a peer review body, and peer review body means "procedure."); accord *Jackson v. Scott*, 667 A.2d 1365, 1368 (D.C. 1995) (the "key" to whether DC Code 44-805 applies is whether the files, reports, and records themselves "owe their existence to the peer review investigation"); see also *Ali v. MedStar*, 2003 WL 22005014 (D.C. Super. 2003) (peer review is a part of a hospital's investigative procedure and involves a review of a medical professional's conduct or skills by his professional peers).[14]

[14] Respondent was an interested party in *Ali v. MedStar* and should be aware of the limitations of the D.C. Code and that it is inapplicable to the information at issue in the instant case.

Additionally, the Union did not request information from Respondent was in connection with any "civil, criminal, legislative, or administrative proceeding." Rather, the Union requested it in the context of collective-bargaining and for use by the PPPSC and the NSPC in satisfying their roles under the Parties' contract, as Frum and Marlow both testified during the hearing (Tr. 211-212, 216-217, 225-235). Thus, the Board should reject Respondent's reliance on the D.C. Code in the instant case. See *Howard University*, 290 NLRB 1006 (1988) (Board rejecting hospital employer's claims of confidentiality based on D.C. Code 14-307, which governed "in court" evidentiary disclosures and thus was not applicable to the union's request for the employer's autopsy protocol report in preparation for hearing before an arbitrator).

Accepting Respondent's interpretation of the D.C. Code means that Respondent would be able to withhold from the Union any of its documents – including pay scale data, work schedules, work incentive plans, and disciplinary records, personnel files, and any other documents concerning the terms and conditions of employment for employees – simply by claiming that it analyzes the information to improve the "quality, efficiency, and utilization" of services at its facility. This is especially true where the D.C. Code purportedly precludes disclosure of information at the heart of the collective-bargaining relationships between employers and employee representatives, including: (1) "matters affecting employment and the terms of employment of a health professional by a healthcare facility, agency or group practice;" and (2) "review of qualifications , activities, conduct or performance of any health professional, including a grievance against a health professional." D.C. Code § 44-801(C) and (E).

Even if the Board could find that Respondent has demonstrated that the D.C. Code applies to the 2012 Survey results and the Staffing Matrix Tracking Data, the Board should find that where that Code interferes with the Section 7 rights of employees to bargain collectively through

representatives of their choosing (in this case the Union) - and one aspect of that right is to bargain over (in this case) "matters affecting employment and the terms of employment of a health professional," including staffing, discipline, and workplace relations - the Code would be preempted by the Act, which grants bargaining-representatives the right to receive requested information that is relevant and necessary to its role as collective-bargaining representative. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act . . . due regard for the federal enactment requires that state jurisdiction must yield"); *Holiday Inn on the Bay*, 317 NLRB 479, 483 (1995) (Board affirming ALJ's rejection of employer's claim, in part on preemption grounds, that its personnel files were confidential because California state law prohibited the disclosure of the files). There is no dispute that both the requested 2012 Survey results and the Staffing Matrix Tracking data are relevant. Thus, the Union has a federal statutory right to the information under the Act, and the D.C. Code must yield to that right.

4. There is No General Public Policy Underlying the D.C. Code that Should Shield the 2012 Survey Results or Staffing Matrix Tracking Data from Disclosure

The Board should not infer a general public policy underlying the D.C. Code that would bar the Union from obtaining the 2012 Survey Result and the Staffing Matrix Tracking Data, documents that indisputably concern bargaining unit employees' terms and conditions of employment and are necessary for the Union to administer and police its collective-bargaining agreement with Respondent.

Respondent cites *Borgess* in support of its argument that the Board should recognize a public policy underlying the D.C. Code that would make the 2012 Survey results and the

Staffing Matrix Tracking Data confidential. Respondent claims that, like the incident reports in *Borgess*, the 2012 Survey results and the Staffing Matrix Tracking Data are "self-critical analyses that the Hospital uses to identify trends and improve patient care." However, the incident reports in *Borgess* were used to track medication errors for specific patients, and the underlying public policy interest in keeping those reports confidential was reducing "the likelihood that a patient would suffer from serious injury or death as a result of a treatment error." This interest of ensuring the health and well-being of specific patients seems superior to an interest in improving services generally.

No similar public policy exists here. Respondent administers the surveys to obtain employee feedback on their general working conditions. Similarly, Respondent collects staffing data for the purpose of making adjustments to the work schedules, assignments, and locations of bargaining unit employees. With these two goals in mind, there exists no immediate public policy of protecting patients from serious injury or death as a result of medication errors, as was the interest found in *Borgess.*

5. Respondent's Assertion of the D.C. Code 44-801 is a Shifting Defense

Finally, Respondent's tardy invocation of the D.C. Code to justify its refusal to provide the Union with the 2012 Survey results and the Staffing Matrix Tracking Data should be rejected as a disingenuous shifting defense. *Earthgrains Co.*, 349 NLRB 389, 396 (2007) *enfd. in part, denied in part on other grounds sub nom. Sara Lee Bakery Group, Inc. v. NLRB* 514, F.3d 422 (5th Cir. 2008).

In *Earthgrains Co.,* the Board rejected an employer's defense because it was an untimely raised shifting defense. Id. at 397. In that case, the union requested an employer's subcontracting agreement in connection with processing a grievance concerning whether the

subcontracting arrangement violated the collective-bargaining agreement with the union. Id. at 395. The employer failed to provide the information, and the union filed an unfair labor practice charge. In its position statement to an investigating Board agent, the employer did not assert any claims of confidentiality. Id. at 396. A month after tendering the position statement, which by then was more than three months after the initial request, the employer's counsel informed the union that the agreement was confidential due to its financial terms. The employer also asserted confidentiality in its Answer to the General Counsel's Complaint.

At the hearing before the ALJ, the employer's witness did not raise any issue concerning the confidentiality of the requested agreement. Id. at 397. Considering these facts, the ALJ rejected the employer's confidentiality claim as pretextual, stating :

> [T]he company's failure to raise the issue of confidentiality in its first and second responses to the information request cast grave doubt on the legitimacy of this defense. . . . The timing of the Company's assertion of this defense leads [to an] a strong inference that it is merely a makeweight reason offered as a means to fend off the General Counsel's investigation and the Complaint.

Id. (citing *Desert Toyota*, 346 NLRB 118, 121 (2005) (belatedly adding "makeweight reasons" for employer's conduct suggest the employer was "simply making up defenses as it went along")).

In the instant case, although Respondent asserted various claims of confidentiality throughout the General Counsel's investigation and at the hearing, its post-hearing brief was the first time it raised the D.C. Code, or any local law, in support of its claims of confidentiality. As noted earlier, at no time prior to the close of the hearing in the instant case did Respondent assert to the Union or the General Counsel that the reason it refused to provide the 2012 Survey results and Staffing Matrix Tracking Data to the Union was because D.C. law bars such information from disclosure. Respondent making this assertion in its post-hearing filings is similar to the

employer in *Earthgrains Co.* raising confidentiality as a defense for the first time several months after the union's request for relevant information and after the union filed an unfair labor practice charge. In both instances, the employer failed to discuss its specific confidentiality concern with the union, thereby depriving the union was an opportunity to respond to the employer's claims. Respondent's belated assertion of the D.C. Code as the rationale for its refusal to provide the Union with the 2012 Survey Results and the Staffing Matrix Tracking Data "raises the inference that the employer is grasping for reasons to justify" unlawful conduct. Id. at 397 (citing *Meaden Screw Products*, 336 NLRB 298, 302 (2001)).

B. The ALJ Correctly Identified and Rejected Respondent's Confidentiality Claims

The ALJ accurately classified Respondent's claims of confidentiality in the 2012 Survey results and the Staffing Matrix Tracking Data. At the hearing, Respondent's confidentiality claims regarding the 2012 Survey results was premised on two points: (1) Respondent's concerns about public disclosure of the 2012 Survey results to third parties, whom Respondent believes would misuse the surveys "by taking them, twisting them, and publishing them in such a way that would damage [Respondent];" and (2) Respondent's concerns about assurances of confidentiality it made to its employees in administering the 2012 Survey (ALJD -62, 5:14-18; Tr. 36-37, 47-48. 51-52, 140-143).

Respondent made a single claim of confidentiality with respect to the Staffing Matrix Tracking Data. At the hearing, Respondent's officials Paradis and Hill testified at length that Respondent's Staffing Matrix Tracking Data 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, who provided the most testimony in this regard, 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 legal liability (Tr. 93-94).

Again, for the first time in its post-hearing brief, Respondent advanced a new theory to support its claims of confidentiality: that release of the 2012 Survey results and Staffing Matrix Tracking Data to the Union could adversely affect its competitive standing. Respondent now claims that the ALJ misunderstood its "nuanced position" on its claims of confidentiality presented at the hearing (Res. Br., p. 10). Respondent claims that it is "concerned that release of the information would not only affect its competitive standing but would also undermine public trust that is essential to any hospital's functioning." (Id.)

However, as Judge Amchan noted, Respondent "has made no showing that patients would likely go to facilities other that [Respondent's facility] if either the survey results or the staffing matrix [tracking data] were released to the Union or by the Union to the public;" and Respondent has presented "no evidence that patients or doctors choose a hospital on the basis of staffing statistics or how satisfied the nursing staff may be" (ALJD 5). In advancing this newly tailored confidentiality claim, Respondent cites nowhere in the hearing record where any of its four witnesses stated that Respondent's concerns are based on its competitive standing. In fact, the words "competitive," "competition," and "competitors" are wholly absent from the record.

The record is silent as to any comparison between Respondent's facility and other hospital facilities in the area. Yet, Respondent contends that because its post-hearing, bare-bones assertion of confidentiality based on a "competitive standing" argument was unpersuasive to the judge, the judge's finding on the matter "defies conventional wisdom" (Res. Br., p.11). Respondent has merely presented a "take our word for it" confidentiality claim to support its

competitive standing argument, and no evidence whatsoever that would adequately clothe this "nuanced" claim to make it viable and worthy of any finding contrary to the ALJ's.

In support of its "competitive standing" confidentiality claim, Respondent cites *Stella D'oro Biscuit Co*, 355 NLRB 769 (2010) *rev'd on other grounds sub nom. SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281 (2nd Cir. 2013). Respondent claims that in *Stella D'oro Biscuit*, "the Board found that an employer had a legitimate confidentiality interest in an audited financial statement, where disclosure of the statement would draw attention to the employer's poor financial condition and potentially cause its vendors and suppliers to cease doing business with it" (Res. Br., p. 11). However, in that case, both the Board and the ALJ rejected the employer's claims of confidentiality identified by Respondent. *Stella D'oro Biscuit Co*, 355 NLRB at 7. The Board and the ALJ found that the employer violated the Act by refusing and failing to furnish the union with the audited financial statement. Id. at 7-8. Although the ALJ noted that the employer's confidentiality concerns were "legitimate," he did not find that they were substantial, and he found that the employer was required to furnish the information to the union. Id. at 45. Furthermore, upon consideration of the ALJ's dicta that employer raised "legitimate" concerns regarding its financial statement, the Board stated that those concerns were "weak." Id. at 8; but see *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281 (2nd Cir. 2013) (denying enforcement of the Board's Order and finding that union was not entitled to employer's financial statement where employer did not plea inability to pay at the bargaining table. No finding on whether or not employer had confidentiality interest under Board precedent).

Moreover, *Stella D'oro Biscuit* is factually distinct from the instant case and is therefore irrelevant. Specifically, that case concerned a request for financial information that is not presumptively relevant. The instant case concerns the Union's request for information

Respondent has admitted are relevant. Furthermore, the bases for the Union's requests are distinct. The union in *Stella D'oro Biscuit* requested the employer's financial statement to verify claims of financial turmoil that the employer made during contract negotiations. In the instant case, the Union requested the 2012 Survey results and the Staffing Matrix Tracking Data for the purposes of fulfilling its roles on the PPPSC and the NSPC under the contract, policing the contract, and administering the contract.

Respondent asserts that disclosure of the 2012 Survey results and the Staffing Matrix Tracking Data could undermine "public confidence" in its services. However, Board law is replete with cases where employers have been required to furnish the Union with information that could potentially undermine public confidence in the employer's business. See e.g. *Mt. Clemens General Hospital*, 335 NLRB 48 (2001) *enfd.* 328 F.3d 837 (6th Cir. 2003) (employer required to furnish information on the amount of money spent on the employment of contract and outside agency nurses); *Westinghouse Electric Corp.*, 239 NLRB 106 (1978) (employer required to furnish information concerning its compliance with EEO laws, including complaints filed by employees against the employer under the Equal Pay Act and Title VII).

C. Respondent Waived Any Plausible Claim It Might Have In The 2012 Survey Results And Staffing Matrix Tracking Data

Respondent has not met its burden of establishing that it has a confidentiality interest in the 2012 Survey results or the Staffing Matrix Tracking Data. Assuming, arguendo, that Respondent's "fear or embarrassment or adverse publicity" constitutes a legitimate confidentiality interest, Respondent waived any such interest it may have in the 2012 Survey results by freely sharing the Survey results with its employees (ALJD, 6 n. 11).

Mitchell testified that Respondent released the 2012 Survey results to its department managers with the expectation that they would discuss the results with employees to "identify opportunities . . . to create higher quality and a safer environment" (Tr. 33-34). She did not testify that Respondent instructed the managers against providing copies of the survey to employees. As the ALJ aptly noted, she merely testified that she – personally – did not "expect" the managers to do so.

Second, emergency department supervisor Brown held an employee "huddle" in his department, where he showed the survey reports to employees and asked them to mark one of the survey documents to identify the three top areas of concern to them. He allowed employee Barnes to make a copy of the survey results to retain for herself (Tr. 199-204). Respondent points out that Barnes testified that she was unaware of any other employees who obtained a copy of the survey. However, Respondent fails to point out that Barnes also testified she did not ask any other employees if they obtained a copy of the survey (Tr. 208-209). Supervisor Hogan discussed the survey results with employees in her unit during several staff meetings (Tr. 221). She told employees that Respondent was developing a "Unit Based Clinical Task Force" that would address the areas of concern raised by the survey, and invited employees to join that Task Force (Tr. 221-222; GC Exh. 35).

Respondent asserts that the Staffing Matrix Tracking Data is confidential because it has never shared the tracking data with any persons outside of management. However, the ALJ correctly found that the Staffing Matrix is not confidential in the first place because it fits into none of the categories of information considered by the Board to be confidential (ALJD, 6). See *Detroit Newspaper Agency*, 317 NLRB at 1073.

D. The Union's Need for the Information Outweighs Respondent's Confidentiality Concerns

Even if the Board finds that Respondent has established a substantial and legitimate confidentiality interest in the 2012 Survey Results, the record evidence still shows that the union's need for the 2012 Survey results far outweighs Respondent's interest in keeping the information secret. Specifically, under the contract, the PPPSC, a union committee, is charged making "evidence-based" recommendations to management concerning matters that directly affect the terms and conditions of employment of the bargaining unit employees. The 2012 Survey reports contain employees' candid responses to questions regarding their working conditions (e.g., staffing levels, equipment availability, supervision). In order for the Union to accurately, responsibly, and effectively execute its duties as bargaining representative, it must have this information, as it would inform the Union as to the issues affecting the work of the bargaining unit employees and which of those issues are most pressing to the employees.

As for the Staffing Matrix Tracking Data, even if the Board finds that Respondent has a confidentiality interest in the data, the record evidence shows that the Union's need for the information far outweighs Respondent's specious confidentiality concerns. Here, the Union is the bargaining representative for over 1,000 of Respondent's nurses. It is also represented on the NSPC, which is responsible for working "collaboratively" with Respondent in order to "develop, monitor, and improve" the staffing matrices for 35 of Respondent's inpatient units. Additionally, the NSPC has the responsibility to recommend the hire of more PCTs or nurse staff if necessary. It follows then that the Union has a superior interest to the requested staffing data because the Union is seeking the information for the purposes of administering the contract, executing its duties as a member of the NSPC, and negotiating staffing goals and actual staffing levels with Respondent.

The Union members of the NSPC cannot effectively analyze or make recommendations to Respondent for the development of a new staffing matrix without having a complete view of Respondent's staffing patterns and practices. Even if the information includes only a snap-shot of Respondent's operations at four points during each day, having that information is certainly better than having nothing at all.

1. The ALJ Gave Respondent's Evidence Appropriate Evidentiary Weight

Respondent claims the ALJ ignored its concerns that the Union would misuse the 2012 Survey results and the Staffing Matrix Tracking Data. According to Respondent, the misuse would include disclosing the information to the D.C. City Council and potentially sharing the information with the *Washington Post*. First, the ALJ considered these claims and found that "the Union and unit members have a right to appeal to the public and to public agencies. The protection afforded by Section 7 extends to employees efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside of the immediate employee-employer relationship" (ALJD, 5) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)); see also *Westinghouse Electric Corp.*, 239 NLRB 106 (union's actions in initiating and joining in the filing and prosecution of anti-discrimination charges and lawsuits are in no way inconsistent with its duty as bargaining representative where its contract with the employer contained an anti-discrimination provision).

Second, Respondent's confidentiality claims regarding the 2012 Survey results and the Staffing Matrix Tracking Data were speculative, uncorroborated, contradictory, and largely based on hearsay testimony. Respondent offered two witnesses to testify about the possible damaging effects of public disclosure of the 2012 Survey results: Mitchell and Hill. Neither pointed to specific information in the 2012 Survey that would be embarrassing, and neither of

them clearly identified the ways that the information could be damaging to the hospital (e.g. loss of business, loss of competitive standing, legal liability under the DC Code or any other law, etc.) (See Tr. 38, 133).

Additionally, although Respondent's witness Hill testified about an incident involving the *Washington Post*, his testimony on this point should be afforded little or no evidentiary weight because it is uncorroborated, contradictory, vague, and plainly hearsay. First, Hill's testimony is uncorroborated by any of the three other senior officials who testified at the hearing, including Chapman, the official charged with labor relations, and Mitchell, the official charged with administering the survey and ensuring its integrity. In fact, Mitchell testified that prior to the instant litigation, she had never heard of the AHRQ survey results being disclosed outside of the hospital. Curiously, Chapman, who is responsible for the employer's day-to-day labor relations, provided no testimony as to why the 2012 Survey results are confidential, or how the *Washington Post* came to be in possession of the 2010 Survey.[15]

Second, Hill's testimony was vague and completely lacking in detail. He failed to identify the purported "reporter" as well as to whom at Respondent's facility the "reporter" allegedly spoke. Hill used the general term "we" to describe Respondent's alleged interactions with the reporter. He testified that "we" met with the reporter, but did not state who specifically met with the reporter and whether he was actually a party to those conversations. Furthermore, Hill's testimony, seen in one light, is plainly hearsay. He testified that the reporter identified the Union as the reporter's source for the 2010 survey results. If offered for the truth of the matter asserted, such testimony is plainly hearsay that should be afforded little or no weight,

[15] Casting doubt on the veracity of Hill's claim is Respondent's initial institutional reaction to the Union's request for the 2012 Survey results. The July e-mail communications between Chapman and Orlowski demonstrate that Respondent simply did not want to give the 2012 Survey results to the Union, as neither Chapman nor Orlowski mention anything about the *Washington Post* (of the D.C. Code) as the basis for their decision that the Union "should not receive a copy" of the survey results (GC Exh. 41).

especially considering that it is not corroborated by other testimony or contemporaneous documentary evidence. However, since Hill's testimony on this point was elicited to determine his state of mind with regard to his "concerns" regarding the release of the 2012 Survey results, his testimony regarding whom the reporter stated informed the *Washington Post* about the 2010 survey results should be given the appropriate evidentiary weight.

2. Respondent Has the Burden of Proof, Not the Union

Respondent claims that the Union has not articulated any reason why Respondent's requests for a confidentiality agreement would hinder the Union in performing its representative function. Respondent justifies its failure to provide the information at issue to the Union because "the Union has not demonstrated any need for unfettered access to the [2012 Survey] results and the Staffing Matrix Tracking Data" (Res. Brief in Support of Exceptions, p. 16).

It is well settled that an employer has a statutory duty to provide a union, on request, with relevant information that the union needs for the proper performance of its duties. *Alcan Rolled Products*, 358 NLRB No. 11, slip op. at 8. If the employer refuses to provide the information on confidentiality grounds, it has the burden of proving that it has a substantial and legitimate confidentiality interest in the information. *Crittenton Hospital*, 342 NLRB at 694.

Here, there is no dispute that the 2012 Survey Results and the Staffing Matrix Tracking Data are relevant to the Union's role as collective bargaining representative of Respondent's employees (See GC Exh. 1-N; Tr. 9-12). Thus, Respondent, not the Union, has the burden to establish that both types of information are confidential. The ALJ appropriately found that Respondent failed to meet its burden (ALJD, 5-6).

Pointing to the Board's decision in *Southern California Gas Co.*, 342 NLRB 613 (2004), Respondent implies that it suspects that the Union has an illegitimate motive in requesting the

2012 Survey results and the Staffing Matrix Tracking Data. In *Southern California Gas Co.*, the Board held that a union is not entitled to information it seeks from an employer for the sole purpose of pursuing legal action against the employer outside of the collective-bargaining relationship. Id. at 617. In that case, a union filed a complaint against the employer with a state agency. Id. at 614. To obtain documentary evidence to submit to the agency in furtherance of its complaint, the union requested from the employer certain information related to the complaint. The employer refused to provide the information on the grounds that the union's request was not made in the context of collective bargaining, namely "related to a grievance or general negotiations." Id. at 616. The Board held that the union was not entitled to the information because it was not relevant to the union's role as collective-bargaining representative, where the union's request was admittedly related "solely to an action outside the collective-bargaining context." Id. at 617.

Respondent's suspicion that the Union's request for the 2012 Survey results and Staffing Matrix Tracking Data is motivated by ulterior motives, unrelated to collective-bargaining, is unwarranted and unsupported by the hearing record. Respondent's argument is similar to that raised by the employer in *Westinghouse Electric Corporation*, 239 NLRB at 110-111. In that case, the Board held that an employer must furnish information to the union concerning the employer's compliance with equal employment opportunity laws, including: statistical data on minority-group and female employees as well as copies of charges and complaints filed by employees against the employer under the Equal Pay Act, Title VII, federal affirmative action mandates, and state employment practice laws. Id. at 107-115. The employer refused to provide the information to the union, claiming that the union sought the information for the purpose of pursing legal action against the employer.

The Board rejected the employer's claims because the parties' collective bargaining agreement contained an anti-discrimination provision and the information requested related to possible race and sex discrimination. Id. at 107-108. Thus, the Board found that the Union's request for the information constituted an effort to monitor and police the contract. Id. Therefore, the information was relevant to the union's role as collective-bargaining representative. The Board stated that although the union indicated that, if necessary, it would use the information in litigation, "such was not a valid basis for nondisclosure where the conduct is a legitimate function of the union and there was no basis for finding that the union was attempting to abuse the Board's processes by utilizing Section 8(a)(5) to bypass the Federal rules."

Here, the Union requested the survey results and staffing data in connection with its role as collective bargaining representative, namely to assist the PPPSC and the Union delegation of the NSPC with executing the functions delegated to them under the Parties' collective-bargaining agreement. Unlike the information at issue in *Southern California Gas Co.*, the information sought in the instant case is admittedly relevant to the Union's role as collective-bargaining representative. Second, unlike the union in *Southern California Gas Co.,* but like the union in *Westinghouse Electric Corporation,* the Union here has not claimed that the sole reason it requested the information from Respondent is to support a complaint against Respondent that is pending before a federal, state, or local agency.[16]

[16] As part of its role as collective-bargaining representative, the Union also engages in lobbying activity by which it seeks 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 Matrix Tracking 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 the Complaint in the instant case, Respondent's counsel, DeLorme raised the issue with the Union. At that time, Respondent requested from the Union a confidentiality agreement barring disclosure of the requested Staffing Matrix Tracking Data to third parties outside of the Union. The Union refused. Van Waus informed DeLorme that if the data reveals serious violations related to the professional practice of bargaining unit nurses, and if the Union was unsuccessful at resolving issues through the

Based on the foregoing, *Southern California Gas Co.* is irrelevant to this case. Accordingly, the Board should apply its holding in *Westinghouse Electric Corporation*, and find that where the Union requested information related to its role as collective-bargaining representative, and it has not claimed that its sole purpose in requesting the information is pursuing legal action against Respondent outside the context of collective-bargaining, there is no basis for concluding that the Union is attempting to abuse the Board's processes and, therefore, it is entitled to the information.

E. Respondent Failed to Bargain for an Accommodation

Even if Respondent has established that both the 2012 Survey data and Staffing Matrix Tracking Data are confidential, the hearing record evidence demonstrates that Respondent failed to bargain in good faith with the Union for an accommodation to its production of each because Respondent: (1) negotiated in bad faith over a confidentiality agreement covering the 2012 Survey results; (2) offered an inadequate access accommodation to the Union for the production of the 2012 Survey results; and (3) simply ceased responding to the Union's request for the staffing data.

1. Inadequate Offer of Access to the 2012 Surveys

Respondent's offer to grant the Union access to redacted 2012 Surveys and no opportunity to make copies of the surveys does not meet its burden of bargaining in good faith for an accommodation. The Board has found that when the records a union requests are voluminous, covering thousands of employees or including detailed personnel information, good-faith bargaining requires an employer grant the union access to the information "with an

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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).

opportunity for the union to make a copy of such information if it so desires." *Abercrombie & Fitch, Co.*, 206 NLRB 464 (1973); *Lasko Metal Products, Inc.*, 148 NLRB 976 (1964) *enfd.* 363 F.2d 529 (6th Cir. 1966) ("Good-faith bargaining requires only that such information be made available at a reasonable time and in a reasonable place and with an opportunity for the union to make a copy of such information if it so desires").

Here, the 2012 Survey results the Union requested are detailed and potentially voluminous. About forty-two percent of Respondent's substantial work-force completed the survey, and a survey report was generated for each of Respondent's work units. Those reports contain statistical analyses and individual detailed narratives concerning working conditions. Therefore, the *access* accommodation Respondent offered the Union is inadequate and does not satisfy its burden of bargaining in good faith for an accommodation. See *United Aircraft Corp.*, 192 NLRB 382 (1971) *enf'd in part, denied in part* 534 NLRB F.2d 422 (2nd Cir. 1975) (opportunity to make copies of requested information required where information was voluminous records covering thousands of employees); *Lasko Metal Products Inc.*, 148 NLRB at 978 (opportunity to make copies necessary where information requested included names, hire dates, and wage rates of new hires and employees hired since start of strike).

Furthermore, Respondent's inadequate offer to grant the Union access to the 2012 Survey results was an attempt to cloak Respondent's outright refusal, and lack of intention, to provide the survey results to the Union in an illusion of good-faith bargaining. Specifically, Respondent only offered the Union access to the survey results after: (1) the Union filed the September 2012 ULP charge concerning Respondent's failure to provide the survey results; (2) Respondent refused to provide the survey results upon the Union's withdrawal of the September 2012 ULP

charge, despite its promise to the Union; and (3) Respondent walked away from the bargained-for PPI/non-PPI Confidentiality Agreement after it was executed by the Union.

2. Failure to Execute Confidentiality Agreement Covering the 2012 Surveys

Respondent's refusal to execute the PPI/non-PPI confidentiality agreement negotiated by its authorized agents, who conveyed to the Union that Respondent had agreed to it, is evidence of bad-faith bargaining. Therefore, Respondent cannot point to that agreement in order to meet its burden of showing it bargained an accommodation to the Union's request for the 2012 Survey results.

The hearing record establishes that Respondent enlisted attorneys DeLorme and Medsker to negotiate with the Union's attorney, Stropp, a confidentiality agreement covering the 2012 Survey results (Tr. 109 -112, 114-115, 133; see also GC Exhs. 36-40). Attorneys DeLorme, Medsker, and Stropp engaged in detailed, painstaking negotiations for a confidentiality agreement that would cover non-PPI information, which includes the 2012 Survey results (GC Exh. 36 and 10). Medsker represented to Stropp that the Parties had a meeting of the minds on the resulting PPI/non-PPI confidentiality agreement because he, Medsker, obtained Respondent's approval of the agreement (GC Exh. 37; see also GC Exh. 10). Stropp secured execution of the agreement by the Union and returned the agreement to Respondent.

Shockingly, Respondent backed away from its bargained-for deal, citing fears that the Union would resort to the arbitration provision in the agreement to challenge Respondent's designation of the 2012 Survey results as confidential. Such conduct in itself is evidence of bad faith bargaining. See *Miron & Sons* Laundry, 338 NLRB 5 (2002) (where there was a meeting of the minds, refusal to execute written contract embodying that agreement is unlawful); *Gadsden Tool, Inc.*, 327 NLRB 164 (1998) *enfd.*, 233 F.3d 577 (11th Cir. 2000) (employer

violated the Act by refusing to sign collective-bargaining agreement after union surprised employer by accepting employer's position on several subjects); see also *W.R. Mollohan, Inc.*, 333 NLRB 1339 (2001) *enfd.*, 309 F.3d 1 (D.C. Cir. 2002) (requiring the execution of a contract if the party's representative possesses apparent authority).

3. Failure to Bargain an Accommodation for the Staffing Data

Respondent failed to bargain in good faith with the Union for an accommodation concerning its production of the Staffing Matrix Tracking Data because Respondent: (1) strung the Union along about wanting to enter a confidentiality agreement covering the data; (2) failed to provide the Union with any proposed confidentiality agreement covering the staffing data, as it promised; and (3) altogether ceased responding to the Union's inquiries about the information.

The hearing record shows that on October 12, Washington, one of Respondent's representatives on the NSPC, informed the Union delegation of the NSPC that Respondent wanted them to a execute confidentiality agreement before viewing Respondent's staffing data. However, Washington did not make any proposals as to the terms of such an agreement at that time. Instead, she stated that she would provide the NSPC delegation with a proposed confidentiality agreement at their next meeting, which was scheduled for November 16. On November 16, Washington did not provide any confidentiality agreement to the Union. Thereafter, Respondent never provided to the Union its proposed confidentiality agreement covering the Staffing Matrix Tracking Data and stopped communicating with the Union on the matter altogether.

V. CONCLUSION

There is no dispute that the requested 2012 Survey results and the Staffing Matrix Tracking Data are relevant and necessary to the Union's role as collective-bargaining representative for Respondent's nurses. There is no dispute that the Union requested the information and Respondent denied the requests. The only issues presented are whether Respondent has met its heavy burden of establishing that either type of the information is confidential and, if it has, has it bargained in good faith for accommodation. The evidence developed at the hearing establishes that Respondent has not met its burden of showing that either the requested 2012 Survey results or the Staffing Matrix Tracking Data is confidential. Even if Respondent has a possible confidentiality interest in ether type of the information, the record evidence shows that the Union's need for the information far outweighs any confidentiality interest Respondent claims to have. Thus, the record evidence shows that Respondent violated, and continues to violate, Section 8(a) (1) and (5) by failing and refusing to provide the Union with the requested 2012 Survey results and Staffing Matrix Tracking Data.

Dated in Baltimore, Maryland, this 22nd day of November 2013.

Respectfully submitted,

/s/ Letitia F. Silas

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CERTIFICATE OF SERVICE

I hereby certify that the following document was electronically filed through the NLRB's electronic case-filing system, and that I served the document by e-mail on the 22nd day of November 2013, on the parties listed below:

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1. Counsel for the General Counsel's Answering Brief Opposing Respondent's Exceptions to the Decision of the Administrative Law Judge

Dated at Baltimore, MD, this 22nd day of November 2013.

Respectfully submitted,

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