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Catholic Health Initiatives Colorado d/b/a Centura Health St. Mary-Corwin Medical Center and Communication Workers of America, Local 7774. Cases 27-CA-092767 and 27-CA-097152

April 24, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, JOHNSON,
AND SCHIFFER

On June 17, 2013, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, and an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish requested information relating to the bargaining unit employees' merit based pay increases and the performance evaluations and standards used to determine them. In addition to the judge's rationale, we rely on the fact that the requested information concerns bargaining unit employees' terms and conditions of employment and therefore is presumptively relevant to the Union's performance of its duties as the bargaining representative of the unit employees. See, e.g., *Ralphs Grocery Co.*, 352 NLRB 128, 134 (2008), reaffirmed and incorporated by reference 355 NLRB 1279 (2010). Accordingly, the Respondent was obligated to furnish the information upon request unless it rebutted the presumption of relevance or established a legitimate affirmative defense to its produc-

¹ The judge inadvertently misstated the wage reopener periods provided for in the parties' collective-bargaining agreement. Art. 24.1 of the parties' contract provides for an "annual wage and benefit reopener period between August 1 and September 15, of 2012, and 2013, if necessary." Also, in the last sentence of the second paragraph before his conclusion of law, the judge inadvertently omitted the word "not." The sentence should read: "In the instant case, silence in the Pay for Performance Agreement does not constitute a waiver."

² We have amended the judge's third conclusion of law to conform to the theory of violation set forth below.

³ We have modified the judge's recommended Order and substituted a new notice to conform to the Board's standard remedial language.

tion. Id. The Respondent failed to make that showing here.

We further agree with the judge that the Respondent failed to establish that the Union clearly and unmistakably waived its right to obtain this information. See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007); *Procter & Gamble Mfg. v. NLRB*, 603 F.2d 1310, 1317-1318 (8th Cir. 1979), *enfg.* 237 NLRB 747 (1978). Even accepting *arguendo* the Respondent's claim that the parties bargained over the availability of the grievance process for disputes about performance evaluations and merit pay, nothing in the parties' agreements (including their pay for performance agreement) addresses the Union's right to request and obtain presumptively relevant information about those subjects. Accordingly, those agreements do not establish a waiver of the right to obtain the information at issue here.⁴

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3

"3. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Catholic Health Initiatives Colorado d/b/a Centura Health St. Mary-Corwin Medical Center, Pueblo, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Replace paragraph 1(a) with the following

"(a) Refusing to bargain collectively with Communication Workers of America, Local 7774 by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 24, 2014

Philip A. Miscimarra,

Member

⁴ We note that the result here would be the same under the "contract coverage" standard that the Respondent contends should apply instead of the "clear and unmistakable" waiver standard that applies under extant Board law.

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Communication Workers of America, Local 7774 by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL furnish the Union with the information it requested on September 4 and November 27, 2012.

CATHOLIC HEALTH INITIATIVES COLORADO
D/B/A CENTURA HEALTH ST. MARY-CORWIN
MEDICAL CENTER

Julia Durkin, Esq. and *Leticia Pena, Esq.*, for the General Counsel.

Melvin B. Sabey (Kutar, Rock LLP), of Denver, Colorado, for the Respondent.

Larry Ellingson, of Greenwood Village, Colorado, for the Union.

DECISION

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Denver, Colorado, on April 16, 2013. On No-

vember 7, 2012, Communication Workers of America, Local 7774 (the Union) filed the charge in Case 27-CA-092767 alleging that Catholic Health Initiatives Colorado d/b/a Centura Health St. Mary-Corwin Medical Center (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. § 151 et seq. (the Act)). The charge was amended on January 24, 2013. On January 28, 2013, the Union filed the charge in Case 27-CA-0973152. On February 27, 2013, the Regional Director for Region 27 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent alleging that Respondent violated Section 8(a)(1) and (5) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following.¹

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Colorado nonprofit corporation with an office and place of business in Pueblo, Colorado, where it is engaged in the business of operating a hospital providing both inpatient and outpatient medical care. During the 12 months prior to issuance of the complaint, Respondent received gross revenues in excess of \$250,000. During that same time period, Respondent purchased and received shipped goods valued in excess of \$50,000 from outside the State of Colorado. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Respondent is a nonprofit organization that operates a hospital in Pueblo, Colorado. The Union represents approximately 300 of Respondent's nonprofessional employees who work throughout different departments of the hospital and its adjunct facility. The Union and Respondent are parties to a collective-bargaining agreement effective by its terms from October 2010 to September 30, 2014. Article 24.1 of the collective-bargaining agreement provides for a wage and benefit reopener from August 1, 2012, to September 15, 2013.

From mid-July to early September 2012, Respondent and the Union negotiated pursuant to the wage reopener of the collec-

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

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tive-bargaining agreement. Ultimately, in early September, the parties reached an agreement on merit-based wage increases for bargaining unit employees (Pay for Performance Agreement). The Pay for Performance Agreement outlines what percentage pay increases bargaining unit employees will receive based on an evaluation period from July 1, 2011, to June 30, 2012. Pursuant to the Pay for Performance Agreement, a bargaining unit employee will receive a base pay wage raise of 0 percent, 2.75 percent, 3.5 percent, or 5 percent, according to whether the employee, "meets" or does not meet" goals and values. Bargaining unit employees are eligible for such an increase if hired before March 31 of the year in which the increase is given.

The Pay for Performance Agreement also specifies that each employee will receive an annual appraisal. The Agreement states, "Performance appraisals which result in a 0% increase will be eligible for only the grievance procedure as stated in Article 8 [of the collective-bargaining agreement], however the grievance will not be eligible for Arbitration or Expedited Arbitration as set forth in Articles 9 or 10." The Agreement is silent as to whether an employee may grieve a certain percentage increase. Finally, the Agreement states that "the performance appraisal shall be discussed with the employee" and that the "employee may request a copy of the performance appraisal."

Negotiations for the Pay for Performance Agreement commenced in mid-July 2012. Lew Ellingson, a staff representative for the Union, met with Michelle Lucero, Respondent's vice president of employee relations. Lucero presented a grid with nine boxes showing how employees would be measured on goals and behaviors. Each box in the grid showed a corresponding percentage wage increase. Lucero told Ellingson that the numbers looked good and that many employees would be getting a 2.75 percent increase, some would be getting a 3.5 percent increase, and that others would receive a 5 percent increase. Lucero told Ellingson the preliminary number of employees that fell into each category.

After this meeting with Lucero, Ellingson had several conversations with James Humphrey, Respondent's vice president of human resources, regarding pay for performance. Ellingson asked how the plan came together and how Respondent slotted people into the nine boxes. Ellingson stated that he needed information to give to employees to show them Pay for Performance was a fair and just plan. Humphrey told Ellingson that every employee had been given a midyear review to let them know what they needed to meet or exceed standards.

Humphrey sent Ellingson a July 26 email in which he stated, "[O]n the question related to disagreeing with an evaluation rating: We would use the procedure under Section 8 of the Grievance Procedure, but would not employ the Arbitration section." Humphrey stated that Respondent would have four conversations with employees per evaluation cycle, as part of the feedback and development process.

A few days later, Ellingson met with employee officers of the Union. The employees could not recall receiving employee evaluations. Thereafter, Ellingson sent an email to Humphrey on August 6, asking whether employees had received their evaluations. Humphrey responded that he would research the matter. Ellingson had another conversation with Humphrey in which Humphrey stated that the employees had received per-

formance evaluations. Ellingson stated that he wanted information about how an employee meets or exceeds standards.

In an email of August 9, Humphrey provided general information about Pay for Performance. Humphrey provided an attachment which he described as showing the "broad categories for which to develop individualized goals" for employees. According to Humphrey "using these categories" each employee and supervisor sits down and mutually agrees on the goal." The attached document shows that each department has these "must-have" goals along the lines of "Culture-Patient Satisfaction," "Culture" and "daily Job Performance."

Humphrey also attached a sample evaluation form to his August 9 email "to show how the form looks and works." Humphrey stated "unfortunately, I cannot give you a live form (to protect confidentiality)."

After receiving this information from Humphrey, Ellingson held a special meeting with unit employees at the union hall. At the meeting, Ellingson showed employees the nine box diagram and asked if they recalled getting their midyear evaluation. None of the employees said that they recalled getting their midyear review.

The next day, Ellingson again spoke with Humphrey. Ellingson said that the Union is agreeing to the Pay for Performance Plan for the 2012 reopener only. He stated that the Union would use this plan and test all aspects of the plan.

On September 5, Humphrey delivered the written Pay for Performance Agreement to Ellingson. Ellingson and the Union's president and vice president signed the Agreement that date. The signed Agreement was submitted to Respondent that date.

On September 4, Debra Kenzel, the Union's Secretary/treasurer, emailed a request for information to Rudy Krasovec, Respondent's human resources director. In the request for information, the Union requested information for "All CWA bargaining unit employees involved in the Pay for Performance from all departments at St. Mary Corwin." For these employees, the Union requested "Names of Employees with their potential percentage increase (if any) from their midyear review and their actual year end result from the current pay for performance—include all date of hire on each employee."

In an email of September 7, Humphrey wrote:

We are not going to provide all CB Unit ratings/names. Rather we will provide distribution % numbers as well as names/rates for only those in the does not meet area (i.e. those who did not get an increase). The reason is that per the agreement they recently signed, the only grievances that can be brought forth are those who did not get an increase based on performance.

On September 7, Ellingson emailed Humphrey, stating that he had not received the requested information. Humphrey emailed Ellingson back, stating that he would a distribution matrix that shows where all unit employees landed in the Pay for Performance plan. Humphrey also stated that he would provide the names of those "who will not receive an increase based on performance vs. all associates and their respective rankings," because "these are the only individuals that would be eligible to grieve their ranking should they so chose."

In an email to Humphrey dated September 12, Ellington stated:

It clearly was the Union's intent to have any employee who could show that there was some "objective reason" why they should have placed higher than what they were slotted, given a chance to "grieve" their ranking. The agreed to language only refers to the process for those not given any increase. It does not preclude those others from "appealing/grieving" their ranking. This clearly was one reason why we chose to go with this plan on a one year basis. If this is going to be the Company's position this plan will be very short lived. Also, the agreed to language states that there should be discussions between the employee and their respective supervisor/manager. I have heard multiple times this did not happen which pretty much puts [sic] this at an end going forward. Thus one of the main reasons for our RFI.

On September 14, Humphrey emailed Ellington an updated nine-box distribution chart, and the name of one employee who did not receive a pay increase. The nine-box chart shows the final number of employees receiving each level of percentage increase under the Pay for Performance Plan.

On September 17, Mary Ann Vargas, Union president, sent an email to Janet Cisneros, Respondent's human resources manager, informing Cisneros that the Union had not received all of the requested information. Cisneros responded by email that she was not involved in the request.

On September 18, Rudy Krasovec, human resources director, spoke with Debra Krenzel, the Union's secretary/treasurer at her desk. Krenzel asked when the Union would receive the requested information. Krasovec answered that the Union would be getting the chart, in reference to the updated nine-box chart provided by Humphrey on September 14.

Later, on September 18, Mary Ann Vargas, emailed Krasovec again requesting the information. Krasovec emailed back that same date stating that he had told Krenzel about the information provided by Humphrey to Ellington. Vargas responded by email dated September 20, that she had received some but not all of the information.

On September 20, Krasovec emailed Vargas and Ellington and stated that the information request was being reviewed by Respondent's attorney. Ellington responded by an email dated September 28, stating that the Union "has requested every represented employee's Pay for Performance ratings and associated information on how that rating was achieved so that we can understand how everything came together."

On October 1, Ellington spoke with Respondent's attorney. Ellington told the attorney that the Union needed the information to make sure that the raises were just, fair, and equitable. The attorney said he would get back to Ellington. On October 1, Melvin Sabey, Respondent's attorney, emailed Ellington asking him to "identify specifically what the Union wants and why it believes that it is relevant to fulfilling its obligations." Ellington responded by email dated October 2, stating, "We asked for exactly what is needed. Every represented employee's 'score' and the method of achieving that score."

On October 2, Ellington and Sabey spoke again regarding the request for information. Sabey indicated a reluctance to

share confidential information with the Union. Sabey said that if the Union could obtain waivers from employees, then Respondent would provide the information for those employees. Ellington argued that he needed every employee's information.

On October 2, Sabey followed up his phone conversation with an email, stating that he told Ellington of Respondent's confidentiality concerns and suggesting that Respondent could provide information for employees who signed a waiver. Sabey asked what alternatives the Union had to this waiver proposal. Ellington answered in an email in which he suggested having Vargas and himself receive the information and determine that correct procedures were followed. He suggested that he and Vargas would discuss the matter with Respondent prior to anyone else seeing such information.

On November 26, Ellington and Sabey had another telephone conversation wherein Sabey requested that the Union withdraw its unfair labor practice charge. Ellington refused to do so.

Respondent did provide the hire dates for all employees. However, Respondent did not provide the names of all unit employees with their potential percentage increase from their midyear review or their actual year end results under the Pay for Performance Plan.

On November 27, Ellington emailed Sabey a second written request for information:

The amount and to whom merit raises were given. 2. The reasons for issuing merit raises to those employees. 3. The supervisor requests for employees merit raises, and 4. The evaluations of all bargaining unit employees for whom merit raises were recommended and 5. The methodology used to arrive at the numerical ratings. 6. The date(s) supervisors talked to employees for their "midyear" review(s) and what it was the employee needed to do to meet and/or exceed their performance.

Sabey responded by email dated November 28, stating that Ellington had requested more information than previously requested. Sabey also stated that the Union had never established the relevancy of the requested information. Ellington responded that he simply stated what was requested so that there would be no mistake as to what information the Union was requesting.

On December 10, Ellington wrote another email to Sabey clarifying that the Union would not agree to Pay for Performance in the future. Ellington again asked that Respondent provide the requested information.

B. Analysis

The General Counsel argues that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide necessary and relevant information to the Union. The Respondent argues that the Union had no right to bargain and to request information regarding employees who received pay increases.

The general rule is that an employer has a statutory obligation to supply requested relevant information which is reasonably necessary to the exclusive bargaining representative's performance of its responsibilities. *Boise Cascade Corp.*, 279 NLRB 429 (1986).

It is well established that a union is entitled to whatever in-

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formation is relevant and necessary to its representation of the bargaining unit, not only for collective bargaining but for grievance adjustment and contract administration. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 (2005). In *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), citing *General Electric*, 290 NLRB 1138, 1147, the Board held that “Once a union has made a good faith request for information, the Employer must provide relevant information promptly, in useful form.”

Respondent contends that the Union could not grieve the pay raise given to any employee but could only grieve on behalf of any employee denied a raise. However, Board law is clear that any such waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The record is clear that the Union intended, at all times, to be able to test any raise given to any employee. In the instant case, silence in the Pay for Performance Agreement does constitute a waiver. See *King Broadcasting Co.*, 324 NLRB 332 (1997).

Accordingly, I find that Respondent violated Section 8(a)(5) and (1) by not supplying the requested information to the Union.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the Union with information relevant to grievance processing.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

The Respondent shall be ordered to furnish the Union the information requested on September 4 and November 27, 2012.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

The Respondent, Catholic Health Initiatives Colorado d/b/a Centura Health St. Mary-Corwin Medical Center, Pueblo, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the Union, by refusing to furnish information relevant for purposes of grievance handling.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

² All motions inconsistent with this recommended order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the information requested on September 4 and November 27, 2012.

(b) Within 14 days after service by the Region, post at its facility in Pueblo, Colorado, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 17, 2013

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with Communication Workers of America, Local 7774, by refusing to furnish information relevant for purposes of grievance processing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaran-

³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

teed them in Section 7 of the Act.

WE WILL furnish the Union with the information it requested on September 4, and November 27, 2012.

CATHOLIC HEALTH INITIATIVES COLORADO D/B/A
CENTURA HEALTH ST. MARY-CORWIN MEDICAL
CENTER