JD(NY)-43-09
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

THE BROOKLYN HOSPITAL CENTER

and Case No. 29-CA-29323

NEW YORK STATE NURSES ASSOCIATION

Ashok Bodke, Esq., of Brooklyn, NY for the General Counsel
James S. Frank, Esq. and *Philip H. Wang, Esq.*, (*Epstein, Becker & Green, PC*) of New York, NY for the Respondent
Gillian Costello, Esq., (*Spivak, Lipton, Watanabe, Spivak & Moss, LLP*) of New York, NY for the Charging Party.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge: Pursuant to charges and amended charges filed by New York State Nurses Association, (the Union, Charging Party or NYSNA), the Director for Region 29 issued a Complaint and Notice of Hearing on March 18, 2009, alleging that The Brooklyn Hospital Center, (Respondent) violated Section 8(a)(1) and (5) of the Act by refusing to supply relevant information to the Union and by mailing letters to employees identifying them as being in the top or bottom percent of performers in their peer group, and by holding a breakfast gathering and providing a $100 gift card to employees in the top 10% without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

The trial with respect to the above complaint allegations was held before me in Brooklyn, NY on May 27, 2009.

At the opening, I granted General Counsel's motion to withdraw the complaint allegations that Respondent violated the Act by mailing the above described letters to the employees without bargaining with the Union. It also withdrew the complaint allegation that the subjects described in these complaint allegations were mandatory subjects of bargaining.

Briefs[1] have been filed by all parties and have been carefully considered.

[1] In its brief, General Counsel, upon due notice to the parties, requested withdrawal of paragraphs 14(b) and 15(a) of the complaint dealing with two items of information requested by

Continued

Based upon the entire record, including my observation of the demeanor of the witnesses, I issued the following:

FINDINGS OF FACTS

I. Jurisdiction and Labor Organization

Respondent is a corporation with its place of business at 121 DeKalb Avenue, Brooklyn, NY, where it is engaged in the operation of an acute care hospital providing inpatient and outpatient care.

Annually, Respondent derives gross revenues in excess of $250,000, and purchased and received at its Brooklyn facility goods and materials valued in excess of $5000 directly from suppliers located outside the State of New York.

Respondent admits, and I so find, that it is and has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

It is also admitted and I so find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

The Union has been the collective representative for Respondent's employees in a unit of registered nurses (RNs) for 25 years. The parties have executed a collective bargaining agreement, effective from July 1, 2005 through June 30, 2009.[2] There are approximately 520 RNs in the unit, whose salaries range from $67,371 to $92,215 per year. The contact provides for extra pay for shift differential, experience differential, education differential and certification differential, resulting in some unit members earning in excess of $100,000 per year.

Respondent also has had long standing collective bargaining relationships and contracts with various other unions representing other employees, including the largest units represented by Local 1199 SEIU.

In 2005, Respondent entered bankruptcy and reorganization proceedings. In late 2007, Respondent emerged from bankruptcy, and on June 30, 2008[3], Dr. Richard Becker became the new President and Chief Executive Officer.

Ira Warm became Respondent's Vice President of Human Resources in April 2008. Opal Chung has been Respondent's Chief Nursing Officer, who is responsible for the executive leadership of nursing services at the hospital.

Camille Edwards has been the Nursing Representative for the Union for about eight years. In that capacity, Edwards administers the contract, handles grievances and engages in negotiations with Respondent concerning the RNs.

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the Union. The request to withdraw these paragraphs is granted.

[2] Respondent and the Union have extended the contract during their current negotiations.

[3] All dates hereinafter referred to are in 2008 unless otherwise indicated.

Press Ganey is a healthcare consultant company that Respondent has been using for many years to measure patient satisfaction with the hospital and its staff. Press Ganey prepares and provides all patients a survey and questionnaires for them to fill out concerning their experiences as a patient. It asks questions concerning several specific areas, such as friendliness, courtesy, promptness to calls, attitude toward requests, attention to special needs, keeping patients informed and skills of employees.

The questionnaires also provide space for comments, negative and positive, concerning employees and at times the patient will provide the names of the employees involved.

Upon receiving the questionnaires from the patients, Press Ganey compiles the results and measures the scores against three groups of peer hospitals. The three groups are: a New York State peer group consisting of 117 hospitals in the state; a New York City peer group consisting of 23 hospitals in New York City; and a "TBHC Custom Peer Group" consisting of "17 other like hospitals in the Greater New York City Area."

Respondent has, according to Warm, received consistently poor Press Ganey ratings over the years. Press Ganey reports quarterly to Respondent.

When Respondent received the Press Ganey report for the third quarter of 2008, once more its employees performed poorly in comparison to its peer groups. CEO Becker decided to initiate multiple initiatives in response to this report, according to Warm. Dr. Becker informed Respondent's supervisory staff that he was very concerned about what appears to be unsatisfactory patient satisfaction scores. Dr. Becker instructed Respondent's department heads to identify the top 10% and bottom 10% of the employees under their supervision. Dr. Becker indicated to the department heads that they should consider areas such as reliability with patients, visitors and staff and general competence in the performance of their job.

Prior to so instructing Respondent's department heads, Dr. Becker discussed his idea of sending letters to the top and bottom 10% with Warm. Warm agreed that "we could make this happen," but suggested to Dr. Becker that it must be clear that the letters not be considered discipline. Dr. Becker agreed.

After receiving the list of the bottom and top performers from Respondent's department heads, letters were prepared and distributed to the employees involved.

The letter sent to the top 10% of employees was dated November 12, and read as follows:

> Congratulations! You were identified by your supervisor as a Brooklyn Hospital Center employee with a work performance in the top 10% of your peer group. We are very focused on improving the level of service we deliver to our patients. This takes teamwork and high performance at every level of the hospital, and your outstanding work is a significant part of how will become the hospital of choice in Brooklyn for patients, physicians and employees.
>
> We want to thank you for your hard work and commitment to our hospital and express our sincere appreciation for the terrific job that you do. We will be honoring you, along with the other top

> performers in the hospital, at a gathering to be scheduled shortly. In the meantime, please accept my personal gratitude for your exemplary work!
>
> Sincerely,
> Richard Becker, MD

The letters to the bottom 10% were handed personally to the employees by their department heads, and were dated November 14. This letter is also set forth below:

> We are very focused on improving the level of service we deliver to our patients. This takes teamwork and high performance at every level of the hospital. We are looking carefully at each area of the hospital to determine who is contributing in a manner that demonstrates excellence and also who is providing service in a manner that needs improvement in order for us to accomplish our objectives.
>
> Unfortunately, your performance at work is in the lower 10% of your peers and is, therefore, in need of immediate improvement. Please meet with your supervisor within two weeks of the date of this letter to discuss why and how you need to improve. Our hope is that, with some guidance, you can raise the level of your work performance to a level that is more consistent with our hospital goals and objectives. Thank you in advance for your attention to this matter.
>
> Sincerely,
> Richard Becker, MD

According to Warm, Respondent's supervisors and department heads, prior to their preparing their lists of top and bottom performers, were not provided copies of the Press Ganey report. Warm did concede however that subsequently, Respondent did provide copies of the report to its department heads, which included the names of patients and employees. The department head or supervisor would then speak to the patient about their complaint, and then discuss the complaint with the employee involved, in order to improve the patient's experience and to improve the Respondent's Press Ganey scores.

Warm also insisted that the bottom 10% letters were not disciplinary in any way. They were not placed in the employees' files and that "no employee was told that they're going to receive additional disciplinary action as a result of the letter." Warm further testified that the purpose of these letters were to serve as "a catalyst for a conversation between the employee receiving the letter and that employee's supervisor to speak about the importance of providing patient satisfaction at an appropriate level."

In mid-November, Warm met with Edwards in Warm's office at the hospital. Warm informed Edwards that Respondent had mailed the letters to the top 10% of the unit employees and that the supervisors would be distributing letters personally to the bottom 10% of such employees. Warm gave Edwards copies of both letters. Warm also told Edwards that similar letters also were sent to management employees, as well as to employees represented by Local 1199 and by other unions. Additionally, Warm informed Edwards that the scores of Respondent's employees on the Press Ganey report were appalling, Respondent needed to

make changes and that the report was the basis for releasing these letters to the nurses and to the other employees.

A day or two later, on November 19, Respondent and the Union met for a labor management meeting. Present on behalf of Respondent were Warm, Chung and HR managers, Nicole Scott and Brian Tunney. In addition to Edwards, four unit employees, who were members of the union's executive committee, were present on behalf of the Union.

At this meeting, Warm again stated that the Press Ganey scores of Respondent's nurses were "appalling" and that there were issues with the employee evaluation process, which was not effective. Thus, Respondent intended to use the Press Ganey report to look at who was performing well versus who wasn't performing well.

Edwards asked Warm what criteria Respondent used to determine the top and bottom 10% and whether the criteria was written. Warm responded that the employees were judged based upon a number of factors, including reliability, congeniality, relationship with colleagues, cooperation, competence and teamwork. Edwards requested that the criteria used be furnished in writing. Warm responded that the criteria were not set out in writing. Warm also repeated at the meeting what he had told to Edwards in their pervious conversation. That is, that the letters to the bottom 10% were non-disciplinary, that they would not be placed into the employees' files and that their purpose were "solely to engender a conversation between the employees and their supervisor." Warm also told the Union that similar letters went to the bottom 10% performers in management and to employees represented by Local 1199 and by other unions.

Edwards replied that she disagreed with Warm's assertion that the letters were not disciplinary in nature. She asserted that the letters were "in essence a counseling" because the nurse is required to see his/her supervisor to discuss what he or she needs to improve. In this regard, Edwards testified that she believed that the letters constituted discipline in view of the fact that Respondent's manual details its disciplinary procedure including counseling.

It reads as follows:

The Brooklyn Hospital Center
Human Resources Policy and Procedure Manual

Subject: Disciplinary Action: Warning, Suspension, Termination

Policy: HR VIII-2

Procedures
There are four levels of disciplinary action that shall be used when hospital rules are violated or minimum performance standards are not met. While there is an essential sequence for disciplinary action, selection of a specific action shall be based on the individual case circumstances. The determination of the appropriate action shall be discussed with the Vice President of Human Resources, or his/her designee, prior to implementation.

1. Counseling – A counseling is a private meeting between a Supervisor and employee to advise an employee that his or her conduct does not meet standard and that, unless corrected, further corrective action may be necessary.

2. Warning – This is a formal warning for repetition of actions previously the subject of verbal warning, or for a serious infraction of the rules that warrants significant initial disciplinary response. Where applicable, this notice shall make reference to any prior verbal counseling. The written warning shall be specific as to the employee's deficiencies, i.e. quality and quantity of work, accuracy, etc. It shall also state the action to be taken if there is no improvement, i.e. suspension or termination. The written warning is a permanent record in the employee's personnel file.

3. Suspension – This is disciplinary time off without pay, for failure to improve after prior written warning or for a very serious violation of hospital rules. The employee shall receive written notice of the suspension. The notice shall be specific as to the dates of the suspension and shall specify the action to be taken if improvement is not noted, i.e. termination.

4. Termination – This is an involuntary separation from employment with the hospital. This action is normally the final step in the disciplinary process. However, specific circumstances may require termination as the just and only action.

   For employees represented by a union, a Corrective Discipline Report is required.

On November 24, the Union filed a written grievance, plus an accompanying information request. These documents are set forth below:

New York State Nurses Association

November 24, 2008

Richard Becker, MD
President and Chief Executive Officer

and

Ira Warm
Senior Vice President, Human Resources
The Brooklyn Hospital Center
121 DeKalb Avenue
Brooklyn, NY 11201

Re: Grievance #204381, Step Three: Class Action – Unjust Disciplines and Standards being Implemented without Bargaining with the Union

Dear Dr. Becker and Mr. Warm:

This grievance is being filed on behalf of the Professional Registered Nurses who received inappropriate performance

letters. The behavior revealed here is disrupting the process of patient care by creating an unfavorable work environment, which sharply reduces on-the-job satisfaction, increases turnover, and will make it challenging to retain staff. This behavior also harms the facility's reputation and can further lower patient satisfaction.

As indicated in 2007 to TBHC with NYSNA administration present, the association communicated that we would not be able to continue to participate with the service excellence/labor management hospital committees. In this earlier notification, the association outlined the following concerns that have been ignored by THBC management.

- Service Excellence Programs including codes of conduct or other policies that can be a basis for discipline are mandatory subjects of bargaining, and therefore such policies cannot be implemented by an employer without bargaining with the union. See e.g., Peerless Publications, 124 LRRM 1331 [NLRB 1987].
- Teams – are mentioned as being a part of this model [service teams, standards teams, and measurement teams]. As we have discussed in the past [i.e. Six Sigma] there are some types of Employee Involvement and Employer Communication that may constitute direct dealing and be considered unlawful. See Electromation, Inc 309 NLRB at 990, 995,997; E.I. du Pont, 311 NLRB, 893, 894, 895; Aero Detroit 321 NLRB, 1101, 1114, 153, BNA 1281-86 [1996] and Polaroid, 329 NLRB, No 47, 162 LRRM BNA.
- Attitude and new behavior standards – attempting to legislate employee behavior [section 3 page 3] and evaluate attitude [section 3 page 4] may be very subjective. NYSNA reserved the right to utilize "just cause" standards in evaluating whether discipline of employees is unjust. An example of legislated behavior that comes to mind is the statement Studer consultants stated should be said to every patient, specifically, "Is there anything else I can do for you, I have time." RNs have the obligation and right to use professional judgment in assessing whether we have the time or resources to give quality patient care as may be documented by a contractual Protest of Assignment form.
- Low Performance – this rating system [section 4 pages 19 & 20] begs the question –what happens if someone is labeled a "low performer." The creation of this system may interfere with employee's contractual rights to just cause pursuant to the collective bargaining agreement.
- Peer interview and review – again evaluation of peers [section 4 page 19] can erode supervisory lines and bargaining unit members should not evaluate each other related to Studer "codes of conduct."
- No changes to the existing collective bargaining agreement may be made as a result of Studer methods**.** Pursuant to section 16.06 of the current collective bargaining agreement there is no obligation to discuss any changes during the life of the agreement.

Any agreement, which might be negotiated between the parties, may be subject to ratification by the members.

- Rewards systems – [see first section-page 12 of manual and section 5]. Any rewards system is a mandatory subject of bargaining.

To that end, this is a request for disclosure of all essential facts and documents that TBHC replied upon in its decision to discipline the nurses who are fully represented by the New York State Nurses Association.

The Employer has a duty to furnish information so the union can evaluate a grievance. Disclosure must be made at the earliest possible time, noting that the Employer has a continuing and ongoing duty to disclose any possible relevant facts and documents whenever that information becomes available. To do otherwise, is a violation of the union member's due process rights (NLRB v. Acme Industrial Co.).

The New York State Nurses Association hereby requests copies of the following documents including, but not limited to:

- Written TBHC policy outlining the specific criteria used for each nurse
- Complete list of each nurse that received letters from the CEO regarding their "performance"
- Copy of the most recent Press Ganey patient satisfaction report for TBHA.
- Final copy 2008 Nursing Budgeted positions by title and department as well as current vacancies for all RN titles
- Complete overtime hours worked for each affected nurse as seen by the ADP payments to the affected nurses
- Written evidentiary documentation that corresponds to each nurse listed in the "performance" correspondence
- The name of supervisory person that performed each rating for the referenced nurse and what method used
- Dates of hire to TBHC for Nursing Directors, Managers, Assistant Directors and Per Diem nursing supervisors
- Complete list of LOA's from January 2008 to present
- Report of the names of nurses who have participated as well as the expenses reimbursed in educational institutes, workshops, or meetings from January 2008 to present (Section 3.03J)
- List of nurses who received Preceptor differential from January 2008 to present as per ADP
- List of nurses who have received charge pay from January 2008 to present as per ADP.

The association is requesting that this discipline and all written correspondence be removed from the hospital and the nurse's file immediately. The association takes this action by TBHC to be extremely arbitrary and capricious as well as a unilateral decision

with personal bias.

TBHC has created an organizational stressor which includes poor staffing patterns and mandated customer service without resources to deliver on those expectations. TBHC has failed to involve staff in the decision making on the issues that affect their work. There is a difference in constructive criticism and assault in print. These letters to the NYSNA members of TBHC was a written, libelous attack on their professionalism.

All of these requested materials are to be received in 10 business days.

Your timely attention and cooperation is appreciated. The dates that I have available to meet regarding this issue is December 15th, 16th and 17th. Please confirm a hearing date as soon as possible. You may call me with any questions or comments at 212-785-0157, ext. 169.

Respectfully,

Camille F. Edwards, RN, MS
Nursing Representative
Economic and General Welfare Program

Cc: Elaine Charpentier, JD – NYSNA Labor Relations Representative
Opal Sinclair-Chung, RN – Section Vice President of Nursing
Brian Tunney – Labor Relations Specialist
TBHC Executive Committee

GRIEVANCE FORM – 204381

Employment Facility – The Brooklyn Hospital Center
Name of Employee – Class Action
Job Title – All Titles
Date Submitted – November 24, 2008

Complete Details of Grievance – Violation of the CBA between the NYSCA and TBHC including but not limited to Section 3.03, Staff Development Programs paragraph G – evaluation and paragraph J – list of participants; Section 4.06, Post Probationary Discipline; Section 14, abuse of Management Rights; Section 15, Non-Discrimination; Section 16.04, Separability – JCAHO; NYS Board for Nursing; OSHA; National Labor Relations Act.

Remedy Requested – Make nurses whole for any and all losses incurred. These letters are to be removed from any and all hospital files for the referenced nurses immediately. Cease and desist implementing policies/standards and changing the

collective bargaining agreement without bargaining with NYSNA.

Employee – Filed by Camille F. Edwards, RN, MS – NYSNA Nursing Representative.

Approximately a week after the top and bottom letters were issued, Respondent conducted a senior staff meeting. Dr. Becker stated that he felt that Respondent should recognize the employees, who received the top 10% letters, by having a celebration. After some discussion, it was decided that 8:00 am would be the best time to have the celebration, and that Respondent would provide a free breakfast to all attendees. Someone at the meeting suggested that since the holidays were coming up Respondent should consider providing a gift. Warm said it would be nice to provide a pin to each recipient, so they could wear them on their lapels. That suggestion was agreed upon.

One of the Respondent's officials from the finance department suggested giving each employee a gift card. There was a discussion back and forth about how much to provide. They considered various figures and finally settled on a $100 gift card. Warm testified that he said that $100 was an appropriate gift that wouldn't break the bank or cause an issue. Warm shared with the group the discussion he had with Edwards, where she was unhappy with the letters and that she had viewed the bottom 10% letters as discipline. Warm then informed the group that he thought that it would be a good idea to invite Edwards and the representative from Local 1199 to attend the breakfast and participate. He thought that he would invite the union leaders up to the podium, and hopefully would state that they were pleased that many of their members were identified as top performers and that patient satisfaction was really important. It was agreed that Warm would invite the union representatives. There was no discussion at the meeting whether or not the breakfast and gifts would be repeated in the future.

Further, neither Warm nor anyone else at the meeting brought up the subject of whether it would be appropriate or necessary to ask the Union for their views as to whether or not to have the breakfast or provide the gift cards.

It was agreed that the breakfast would be held on December 3. A few days prior to December 3, Edwards telephoned Warm to schedule a grievance meeting concerning the Union's grievance filed on November 24. During the course of that discussion, Warm informed Edwards that Respondent would be holding a breakfast on December 3 for the employees, who received the top 10% letters. Warm asked Edwards to attend because Respondent wanted the Union to help honor the good performance of the nurses. Edwards responded that she couldn't believe it, that morale is getting worse and this is going to be something that splinters the environment at the hospital. Edwards suggested that maybe Respondent should have a breakfast for everybody to say thank you. Warm answered that no, the breakfast would only be for the top 10% of employees.

According to Edwards, Warm didn't inform her during the conversation about the gift cards or the pins. She also asserts that she told Warm at that time that she would not be present at the breakfast.

Warm, on the other hand, asserts that Edwards asked him during this conversation, whether Respondent would be giving anything to the employees. Warm further testified that he responded that Respondent would be giving the employees a pin and a $100 Amex gift card. According to Warm, Edwards' only response was "Ira." Warm contends that he replied that "This is really important. We have to do something about those patient scores." Warm contends that he continued as follows: "I would like it if you spoke at the meeting. I think that would be good. I

realize that you have a problem with the letters. They are not discipline. I'd like you to be present and supportive." According to Warm, Edwards answered that she would let him know if she would attend.

There is no dispute that the breakfast was held and Edwards did not attend. Although also asked, the union representative for Local 1199 did not attend either. The breakfast was held as scheduled on December 3. All the employees and managers, who received the top 10% letters, received a pin and a $100 gift card as well as a free breakfast. The breakfast was served from the hospital cafeteria, and included eggs, waffles, bacon, bagels, croissants, juice and coffee. Warm estimated the cost to be approximately four or five dollars per person. The nurses' unit, as noted, consists of approximately 520 employees. About 45 nurses attended the meeting and received the gift cards and pins.[4]

According to Edwards, she did not find out about the fact that employees received gift cards at the breakfast until she was so informed by nurses, who attended the event.

Shortly, thereafter, while Edwards was in the process of scheduling the December 16 grievance meeting with Tunney, she informed Tunney that she was surprised that nobody had informed her that money was given to the nurses. Tunney responded that it was part of the breakfast.

Respondent made no response to the Union's information request of November 10. On December 16, Edwards renewed the Union's request in writing, dated January 9, 2009, while confirming a grievance meeting for December 16 and amending the Union's grievance. The letter reads as follows:

> December 10, 2008
>
> SECOND REQUEST
>
> Richard Becker, MD
> Chief Executive Officer
>
> Ira Warm
> Senior Vice President Human resources
> The Brooklyn Hospital Center
> 121 DeKalb Avenue
> Brooklyn, NY 11201
>
> Re: Grievance #204381, Step Three: Class Action – Unjust Disciplines and Standards Being Implemented without Bargaining with the Union
>
> Dear Dr. Becker and Mr. Warm:
>
> This letter is to confirm our grievance hearing date for <u>Tuesday, December 16, 2008 at 12:30 p.m.</u>
>
> In addition, the information request from The Brooklyn Hospital

[4] This included the chairperson of the Union's Negotiating Committee.

Center was not received by NYSNA. The Association is amending this grievance to include but not limited to Section 14, abuse of Management Rights – intentional erosion of the bargaining unit.

Please release the NYSNA committee on Association business:

Mary Welch, RN – L&D
Gweneth Fisher, RN – Case Management
Patricia Mitchell, RN – MICU
Lisa Williams, RN – Home Care
Ingred Boyce, RN – ED
Shakiru Habeeb, RN - ED
Joyce Cave –Anderson, RN – Peds
Beverly Savory, RN – Endo

Please verify the meeting location as soon as possible.

If there are any questions or concerns, contact me at 212-785-0157 ext. 169. Thank you in advance for your cooperation.

Sincerely,
Camille F. Edwards, RN, MS
Nursing Representative
Economic and General Welfare Program

Cc: Opal Sinclair-Chung, RN – TBHC Section Vice President, Nursing
Elaine Charpentier, JD – NYSNA Labor Relations Representative
Brian Tunney – Labor Relations Specialist
TBHC Executive Committee

On December 16, the parties met at a conference room at the hospital. Present were Warm, Chung, Edwards and the Union's Executive Committee. Edwards began the meeting by asking for the information that the Union had requested on November 24. Warm replied that he did not have anything to give the Union. Warm asked Edwards what remedy the Union was seeking in its grievance. Edwards replied that the Union wanted the letters to be withdrawn.

Warm repeated what he had told Edwards previously about the letters. That is that the bottom 10% letters were not discipline, and that it was a communication that the individuals were performing at a level below their peers. Warm added that the letters asked the employees to meet with their supervisor in an effort to raise their performance, and that the hospital did not use a score system or put the letters in the employees' files. Warm also stated that the letters were not a warning notice, but were issued in order to call attention to the performance of the staff.

Warm made several references to the Press Ganey report, and how poorly the nurses had performed therein, and that Respondent's employees scored in the 15% percentile. Thus, 85% of employees at other hospitals scored better than Respondent's employees. Finally, Warm told Edwards that Respondent had not changed its annual evaluation tool.

Edwards, however, notwithstanding Warm's assurances, continued to insist that the

Union viewed the letters as discipline since it required employees to talk to their supervisor. Edwards also asserted that the letters could cause hostility amongst the employees.

Although Respondent did not supply any of the requested information to the Union in writing at this meeting, Warm did respond to the Union's request for the criteria used by Respondent's supervisors in selecting the employees for the top and bottom 10% under their supervision. Warm told Edwards that the supervisors were instructed to consider several factors, including competency, reliability and how they engage patient families and staff.

During this meeting Edwards also complained about the gift cards. She said that she viewed the gift as a bonus without negotiating with the Union. Warm responded that he disagreed with Edwards, and that he did not see any violation in Respondent's conduct.

The Union did not receive any further information from Respondent, and sent a third request while confirming a meeting for January 23, 2009, as follows:

> January 9, 2009
>
> THIRD REQUEST
>
> Richard Becker, MD
> President and Chief Executive Officer
>
> Ira Warm
> Senior Vice President Human resources
> The Brooklyn Hospital Center
> 121 DeKalb Avenue
> Brooklyn, NY 11201
>
> Re: Grievance #204381, Step Three: Class Action – Unjust Disciplines and Standards Being Implemented without Bargaining with the Union
>
> Dear Dr. Becker and Mr. Warm:
>
> This letter is to confirm our second grievance hearing date for Friday, January 23, 2009 at 3:00 p.m. in the Executive Board Room. This is also to confirm our mutual agreement to hold this issue in abeyance until we have this additional meeting.
>
> In addition, the information request from The Brooklyn Hospital Center was not received by NYSNA.
>
> Please release the NYSNA committee on Association business:
>
> Mary Welch, RN – L&D
> Gweneth Fisher, RN – Case Management
> Patricia Mitchell, RN – MICU
> Lisa Williams, RN – Home Care
> Ingred Boyce, RN – ED
> Shakiru Habeeb, RN - ED
> Joyce Cave –Anderson, RN – Peds

Beverly Savory, RN – Endo

If there are any questions or concerns, contact me at 212-785-0157 ext. 169. Thank you in advance for your cooperation.

Sincerely,
Camille F. Edwards, RN, MS
Nursing Representative
Economic and General Welfare Program

Cc: Latha S. Catlin, RN – NYSNA Associate Director
Opal Sinclair-Chung, RN – TBHC Section Vice President, Nursing
Elaine Charpentier, JD – NYSNA Labor Relations Representative
Brian Tunney – Labor Relations Specialist
TBHC Executive Committee

On January 23, 2009, the parties met again at the hospital. Dr. Becker was present at this meeting along with Warm, Chung, Tunney, and Edwards, members of the Union's Executive Committee and some of the grievants.[5]

The meeting began with Edwards asking again about the Union's information requests. Warm introduced an individual named Ano Ira, who works in the quality management department, who presented a power point presentation, which included a summary of the Press Ganey report. Ira discussed the summary, which consisted of six actual pages from the Press Ganey report. These pages were given by Respondent to the Union. (These pages are included as Appendix A as "Press Ganey Summary.")

These documents reveal that the surveys conducted by the report covered the period from 10/1/08 through 12/31/08. These dates are somewhat puzzling since the Union had asked in its information requests in November for the "most recent" Press Ganey report. Further, the record is clear that Respondent did rely on a Press Ganey report at least in part when it decided to send out the letters in issue. However, it does not appear that the report relied on was the report submitted to the Union in January 2009. I make this conclusion somewhat hesitantly because none of the parties or the witnesses appeared to have picked-up on this discrepancy. Thus, the report submitted to the Union in January 2009 couldn't have been relied on by Respondent in November 2008 since it had yet been prepared. I therefore conclude that Respondent relied on a different Press Ganey report, i.e. the report covering the third quarter of 2008, when it issued the letters. However, Warm credibly testified that the report submitted to the Union in 2009 was similar to the previous reports, with Respondent's nurses performing poorly as compared to their peer groups.

Moreover, the summaries submitted in 2009 did include in part, comparison scores for previous quarters. Indeed, Warm testified that the report did include more than a year's worth of scores focused on the RNs.

As I have detailed above, neither Edwards nor anyone else apparently noticed the problem of the dates of the survey, and nothing was mentioned about the issue. Edwards did,

[5] The grievants were employees, who received the bottom 10% letters.

however, state at the meeting that the Union wanted to see the entire Press Ganey report. Warm responded that the entire report was very large, and Respondent would not provide it. Edwards replied that the Union wanted to see the full report, which included the underlying data that led to the summaries in the report. She added that the report made no reference to some nursing areas (Home Case and Clinics), who had received letters. Warm replied that the summaries provided to the Union were all that Respondent intended to provide to the Union.

Warm testified that Respondent did not provide the entire report because it was too cumbersome,[6] and that there was a lot of data in the report that did not relate to the employees represented by the Union. Warm also testified that the Home Case and Clinics Departments were not included in the Press Ganey report, which explains why these departments were not included in the summaries.

The parties also discussed the letters once again with Edwards again insisting that they were disciplinary since Respondent was requiring the nurses to meet with their supervisors. Edwards also repeated her previous assertion that Respondent's providing of gift cards was a bonus and should have been negotiated with the Union. Warm responded that the letters were not disciplinary, and urged the Union to withdraw its grievance as well as its unfair labor practice charge.[7] Edwards responded that the Union would not withdraw either the grievances or the unfair labor practice charges.

Dr. Becker, in discussing the letters, stated that Respondent would continue to do "performance maintenance," which made it clear to Edwards that Respondent intended to continue to send out the letters.

According to Edwards, the parties then went over a number of the informational items requested by the Union, and Edwards responded to Warm's requests for a "rationale" as to why the Union needed each item. With respect to the Union's request for written criteria used by Respondent's supervisors to evaluate each nurse, Edwards claims that she stated that she viewed the letters as a change in performance evaluation, and the Union believed it to be an overall change in hospital policy.[8]

Edwards contends that she explained that the Union wanted to see overtime hours because the Union felt that overtime hours showed that nurses worked beyond the call of duty. In that regard, Edwards had been informed by some of the nurses, who received bottom 10% letters that they had worked overtime and rotated off their normal shifts to assist the hospital. Edwards testified that in her view this was "beyond the call of duty," and should have been considered by Respondent in deciding which employees would receive the top and bottom 10% letters.

The Union had also requested the name of the supervisors, who performed each rating for the nurses. Edwards stated that the Union wanted this information because it needed to

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[6] Warm didn't know how many pages it was, but asserted that it was thinner than a dictionary and about the size of an atlas.

[7] The Union filed its unfair labor practice charges on December 10, 2008 and an amended charge on December 16, 2008.

[8] As noted above, Warm had previously responded to this request by informing the Union that Respondent had no document detailing written criteria by supervisors, and that he detailed to the Union orally the criteria used by supervisors in determining which nurses were to be included in the top and bottom 10% categories.

know whether the evaluations were done through direct observation or watching clinical skills, and whether the evaluation was by a director or a patient use manager. Edwards also asserts that she explained why the Union asked for a list of employees on leaves of absence from January 2008 to present. She contends that she informed Respondent that some of the nurses, who receive bottom 10% letters, were on leave of absence and some were out on disability or workman's compensation. Thus, the Union wanted to see if the Respondent had rated bottom 10% nurses based on time that they were not at work.

The Union also had asked for names of nurses, who had participated in, as well as expenses reimbursed for, education institutes' workshops from January 2008 to the present. Edwards asserts that she explained that this information would show which nurses were improving skills and in her view going "beyond the call of duty."

Respondent has a procedure wherein nurses can volunteer to act as a "preceptor," who assists in training and teaching new employees or employees transferred from other areas. Nurses, who act as preceptors, receive extra compensation for this work. The Union requested a list of nurses, who received preceptor differential from January 2008 to present. Edwards explained that she was informed that some nurses, who volunteered to act as preceptors, received bottom 10% letters, and that the person that they precepted received a top 10% letter. Edward viewed that result as a "conflict" since she believed that volunteering to act as a preceptor demonstrates cooperation by performing "extra duty."

Charge nurses at the hospital are staff nurses, who receive extra pay for being responsible for activity in the unit at various times. Edwards asserts that she requested information concerning what nurses received charge nurse pay for similar reasons.

Edwards asserts that after she provided her explanations as described above as to why the Union requested the above information, Warm responded that Respondent believed that the Union did not need the information requested.

Warm denied that Edwards informed Respondent of the reasons why the Union needed the information requested as Edwards testified, but he does not substantially dispute her testimony that most of the information requested by the Union was not provided by Respondent.

Warm testified that most, if not all, of the information requested by the Union was not furnished because he deemed such information not relevant to any grievance or any issues in dispute between the parties. Warm asserted that none of the information requested was used in Respondent's determination of which employees would receive the top or bottom 10% letters, and had nothing to do with Respondents' decision to give employees a gift card or to provide them with a free breakfast.

More significantly, although Warm denied that Respondent used the Press Ganey report in determining the top and bottom 10% employees, he conceded that the report was the impetus for the decision to instruct supervisors to assess which employees were in the top and bottom 10%, which ultimately led to the letters and gift cards and breakfast. Indeed, Warm testified that after considering the Union's request for the Press Ganey report, he deemed it to be relevant to the grievances and decided that "I knew I had to do something relevant to Press Ganey." Therefore, he instructed his staff to prepare a summary of the report, which was submitted to the Union on January 23, 2009 along with a PowerPoint presentation and the answering of any questions that the Union had about the report. Although Edwards on behalf of the Union continued to insist upon receiving the entire report, Warm admitted that he refused that request since he deemed the summary provided to be sufficient.

Warm also testified that Respondent did not consider which employees had worked overtime, in deciding which employees were in the top or bottom 10% in each area. Warm testified further that Respondent in fact supplied this overtime information to the Union in connection with negotiations about a month prior to the hearing.[9]

Warm also asserted that he was not sure whether Respondent provided to the Union the list of supervisors, who performed the ratings. Warm claimed that Respondent intended to provide that information, and he thought that Tunney may have provided it at the first grievance meeting. However, Warm was not certain that this information was provided.[10]

Warm concede that Respondent did not supply the information requested by the Union concerning which employees acted as preceptor, charge nurse, was on leave of absence or who had participated in educational institutes, workshops or similar meetings. According to Warm, he deemed these items not to be relevant since they had nothing to do with the gift card, breakfast or letters. However, Warm admitted that he did not know whether any supervisor used any of these factors in ranking the employees in their departments. Warm also admitted that he did not have any discussions with any of the supervisors, who participated in the rankings after they prepared their evaluations, and therefore did not know whether any of them may have relied on some of these items in their ranking decisions.

Further, Warm also testified that with regard to the Union's request for information concerning which nurses attended educational institutes, workshops or meetings, this information is kept in a binder in Chung's office. Warm asserts that the binder is available for anyone to see, including Edwards. Warm however did not inform Edwards in response to the Union's request, that she could obtain this information by viewing it in Chung's office.

Moreover, Warm also testified to what appears to be an alternative reason for Respondent's failures to supply most of the information requested by the Union. Thus, Warm testified that in his view, these requests were not only irrelevant but the Union was "just making us go through this torturous process to collect data" and demonstrate the "lack of a constructive relationship that we unfortunately have with NYSNA." Warm further points to the Union's refusal to participate in the "service excellence program," unlike NYSNA representatives at other hospitals, which would "elevate patient satisfaction."

III. Analysis

A. The Gift Cards and Breakfast

The complaint alleges that Respondent held a breakfast gathering and provided gift cards to employees, who received the top 10% letters, without prior notice and without affording the Union an opportunity to bargain with respect to such conduct.

The primary issue to be decided in order to resolve this complaint allegation is whether Respondent's conduct described above is considered as involving terms and conditions of employment or gifts. The Board has recently summarized the applicable law on this subject in

[9] The trial was held on May 27, 2009.

[10] Edwards denied that the Union ever received this information. Tunney did not testify. I therefore find that this information was not provided to the Union.

North American Pipe, 347 NLRB 836 (2006); review denied 546 F.3d 239 (2nd Cir. 2008).

The general principles involved here are well established. An employer and the representative of its employees are obligated to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The mandatory duty to bargain is limited to those subjects; as to all other matters, each party is free to bargain or not to bargain. Ibid. Among those other matters not requiring bargaining are gifts to employees by their employers. See, e.g., *Benchmark Industries*, 270 NLRB 22 (1984), affd. *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985).

The inquiry here is whether the Westlake stock award was a gift or whether it was wages or a term and condition of employment. The Board has construed the term "wages" as used in the Act to include "emoluments of value…which may accrue to employees out of their employment relationship." See generally *Inland Steel Co.*, 77 NLRB 1, 4 (1948), enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949). On the other hand, it is recognized that gifts do not become wages or terms and conditions of employment simply because they are made in the context of an employment relationship. An employer can make such payments as it pleases. *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965), denying enf. in pertinent part to 147 NLRB (1964).

If the ostensible gifts are so tied to the remuneration which employees receive for their work that they are in fact a part of the remuneration, they are in reality wages and subject to the statute's mandatory duty to bargain. Ibid.[6] A sufficient relationship to remuneration may exist if the payment is tied to various employment-related factors. See *Benchmark Indus.*, 270 NLRB at 22 fn. 5 (explicitly adopting the analysis used by the Eighth Circuit in *NLRB v. Wonder State Mfg.*, supra, and by former Member Kennedy in his dissent in *Nello Pistoresi & Sons*, 203 NLRB 905, 907 (1973)); see also *Freedom WLNE-TV, Inc.*, 278 NLRB 1293, 1297 (1986). These factors include work performance, wages, regularity of the payment, hours worked, seniority, and production.[7]

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[6]In *NLRB v. Wonder State Mfg. Co.*, 344 at 213, the Eighth Circuit stated the rule as follows:

> The rule is that gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make such payments as he pleases, but if the gifts or bonuses are so tied to the remuneration which employees received from their work that they were in fact a part of it, they are in reality wages and within the statute. This is a

question of fact…Id at 837.

[7]See, e.g. *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001); *Stone Container Corp.*, 313 NLRB 336, 337 (1993); *Mr. Potty Inc.*, 310 NLRB 724, 729-730 (1993); *Phelps Doge Mining Co.*, 308 NLRB 985 (1992), enf. denied 22 F.3d 1493 (10th Cir. 1994); *Freedom WLNE-TV*, 278 NLRB at 1297; *Benchmark Indus.*, supra.

Significantly, all parties have cited *North American Pipe* in support of their respective positions. I am in agreement with General Counsel and Charging Party that the gift cards and breakfast here under *North American Pipe*, as well as other precedent, were terms and conditions of employment of Respondent's employees since they were "emoluments of value which may accrue to employees out of their employment relationship"[11] and are not gifts.

As the Board related in *North American Pipe* and supported by the Circuit Court opinion, the crucial factor in determining whether bargaining is required is whether the benefits granted are tied to the remuneration which employees received for their work. A sufficient relationship to remuneration exists if the benefits are tied to various employment related factors such as work performance, wages, regularity of payment, hours worked, seniority and production. *North American Pipe*, supra at 837; *Unite Here*, supra, 546 F.3d at 242; *Benchmark Industries,* supra at 22.

Here there can be no question that the gift cards and breakfast were tied to work performance since Respondent furnished gift cards to and invited to the free breakfast only those employees, who received the top 10% letters. Thus, the benefits granted were clearly based on performance and subject to bargaining. *North American Pipe,* supra; *Exxel-Atmos Inc.*, 323 NLRB 884, 885-886 (1997), enfd. denied 147 F.3d 972, 977 (D.C. Cir. 1998) (first time bonus of $100 based on increased sales performance of employees)[12]; *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001) (holiday bonus based in part on individual performance); *Sykel Enterprises*, 324 NLRB 1123, 1125 (1995) (Christmas bonus given to different employees in different amounts by management); *Mr. Potty Inc.*, 310 NLRB 724, 729-730 (1993) (Christmas bonus, which varied from $25 to $150, based on manager's assessment of employee performance); *Cypress Lawn Cemetery*, 300 NLRB 609, 613 (1990) (award of paid vacations to Hawaii and other locations as a reward for good work); *Loredo Coca-Cola*, 241 NLRB 167, 174 (1979) enfd. 613 F.2d 1338, 1342-1343 (5th Cir. 1980) (Christmas bonus including cash, beer, soda, hams and fruitcakes based on employee earnings and subjective evaluation of employee's performance and attitude); *Aero Motive Mfg. Co.*, 195 NLRB 790, 792 (1972) ($100 bonus paid only to employees, who crossed picket line).

Respondent argues however that since all eligible employees received the same amount, i.e. $100 "whether they were the highest paid managers or the lowest paid hourly employees," *North American Pipe,* supra at 838 that it was not tied to employee remuneration and therefore not a gift. I disagree. Respondent has misapplied the word "eligible employees" as

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[11] *North American Pipe*, supra at 837.

[12] While as noted, *Exxel-Atmos*, supra was reversed by the Circuit, I am bound by the Board's decision. More importantly, even under the Circuit's view, a violation would be found. The Court reversed the Board primarily because the bonus there was not tied to seniority or any individual employee's performance, which the Court viewed as required. Here as noted, the benefits were undisputedly based on the individual performance of the employees, since they were granted only to recipients of the top 10% letters.

used by the Board in *North American Pipe*. The Board determined therein that the determination of eligibility of employees for the stock award was not based on performance or any other employment related factors. The Board concluded that the benefit granted, the award of stock, was based solely on the market demand for the stock and not on any employment related factors.[13]

Further, Respondent conveniently ignores the other portions of the Board's decision in *North American Pipe*, where it explicitly relied on the fact that the stock award was not tied to work performance unlike *Mr. Potty*, supra at 726, and unlike the instant case where the gift cards and the breakfast were directly tied to employee performance, i.e. their receipt of the top 10% letters.

Respondent also argues that the benefits here were not subject to bargaining because they were one-time gifts and were not paid over a sufficient length of time to have become a reasonable expectation of the employees, and therefore, part of their anticipated remuneration. *Unite Here*, supra, 546 F.3d at 243.

It also cites *North American Pipe*, supra at 838, where the Board observed that the award there was related to a one-time event—the parent corporation's IPO—with no promise or prospect of repetition.

However, the facts here do not establish that these benefits were a one-time event as argued by Respondent. In that regard, while at one point, Warm did testify in response to a leading question that the gift card was "a one-time event," this testimony is neither probative nor conclusive. In fact, Warm testified that when the decision was made by Respondent to furnish the gift cards and provide a free breakfast to the top 10% employees, there was no discussion of whether or not the breakfast and gifts would be repeated in the future. Thus, Warm provided no testimony or other evidence as to whether or when, or by whom a decision was made that these benefits would be "one-time event."[14]

Further, at the grievance meeting in January 2009, the parties discussed the Union's grievance during which Edwards complained about the letters as well as about Respondent's failure to negotiate with the Union about the gift cards, which the Union considered to be a bonus. During that meeting, Dr. Becker stated that Respondent would continue to do "performance maintenance" referring to the letters the Respondent had sent out, which Edwards reasonably concluded to be an assertion that Respondent would continue to send out the 10% letters. Thus, since the letters were admittedly the basis for Respondent's awarding of the gift cards and breakfast, it cannot be concluded here, unlike in *North American Pipe*, that the benefits were a "first and only giveaway …with no promise or prospect of repetition." Id at 838. Rather, based on Dr. Becker's comments, there is evidence that these benefits might be

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[13] Member Walsh dissented, concluding contrary to the majority that employment related factors, such as seniority, was used in determining eligibility and based on *Exxel-Atmos*, supra, the award required bargaining. The majority distinguished *Exxel-Atmos* on the grounds that there unlike in *North American Pipe*, the award was based on employee's increased sales performance. Here as noted, these distinctions are inconsequential since the award here is based on employee performance.

[14] I note that Dr. Becker, the originator of and decision maker concerning these benefits, did not testify. I conclude that an adverse inference is warranted based on his failure to do so. *International Automated Machine*, 285 NLRB 1122, 1123 (1987). I conclude that no decision was made at the time as to whether the benefits would be continued.

repeated since he indicated that Respondent intended to continue its program of "performance maintenance," which included the 10% letters, and the letters led to the gift cards... Moreover, the stock award in *North American Pipe* was by its nature a one-time event since as the Board pointed out, it was predicated on the parent corporation's IPO. There is no such inference here, and as I have detailed above, there is some indication the benefits may be repeated.

I also find that Respondent's reliance on the quote in *Unite Here*, supra, 546 F.3d at 243 that an award is not subject to bargaining when it is not "paid over a sufficient length of time to have become a reasonable expectation of the employees and therefore, part of their anticipated remunerations," to be misplaced. In my view, this analysis is more appropriate in cases where an employer discontinues granting of a benefit rather than a situation as here where the employer initiates a benefit without bargaining with the Union. See Developing Labor Law (fifth edition) 2009, cumulative supplement, p. 291.

The Board articulated this concept in the much cited case of *Niles-Bement-Pond Company*, 97 NLRB 165, 166-167 (1951), enfd. 199 F.2d 713, 714 (1952). The Board evaluated a Christmas bonus that had been given regularly over the course of 12 years in amounts related to their wages or earnings. It concluded that since the bonus was paid regularly over a substantial period of time, it was "sufficient to justify the expectation on the part of the employees that, absent a change in circumstances, they would continue to receive a year-end bonus upon which they might rely as part of their wages." 97 NLRB at 166. The 2nd Circuit affirmed the Board and concluded that since the alleged "gifts" were made over a substantial period of time, "the Board was free to treat them as bonuses not economically different from other special kinds of remuneration like pensions, retirement plans or group insurances to name but a few, which have been held within the scope of the statutory bargaining requirement." 199 F.2d at 714. Subsequently, there have been numerous cases wherein the Board, as well as the Courts, has wrestled with the difficult issue of whether based on the regularity and nature of the benefits granted, employees would reasonably expect to receive the particular benefit as part of their remuneration for work. *Waste Management of Puerto Rico*, 348 NLRB 565 fn.2 (2006); *Waxie Sanitary Supply*, 337 NLRB 303, 304 (2001); *Flambeau Airmold Corp.*, 334 NLRB 165, 179 (2001); *Sykel Enterprises*, 324 NLRB 1123, 1125 (1997); *Q-1 Motor Express*, 323 NLRB 767, 775 (1997); *Phelps Dodge Mining Co.*, 308 NLRB 985, 999-1000 (1993), enfd. denied 22 F.3d 1493, 1496-1498 (10th Cir. 1994); *Getty Refining Co.*, 279 NLRB 924, 925 (1986); *Freedom WLNE-TV*, 278 NLRB 1293, 1296-1297 (1986); *Stovall Mfg. Co.*, 275 NLRB 220, 237 (1985); *Loredo Coca-Cola*, supra at 174; enfd. 613 F.2d 1344; *Gas Machinery Co.,* 221 NLRB 862, 863-865 (1975); *Ryder Technical Institute*, 199 NLRB 570, 573-574 (1972), enfd. 488 F.3d 457, 460-461 (3rd Cir. 1973); *Nello Pistoresi and Sons*, 203 NLRB 905, 906 (1973), enfd. denied 560 F.2d 399, 401 (9th Cir. 1974) *Wonder State Mfg. Co.*, 147 NLRB 179, 180 (1964), enfd. denied 344 F.2d 210, 213-215 (8th Cir. 1965); *General Telephone Co. of Florida*, 144 NLRB 311, 313-315 (1963), enfd. in pertinent part 337 F.2d 452, 454 (5th Cir. 1964).

As can be seen from reading these and other cases, it can sometimes be a difficult issue to ascertain whether a benefit is sufficiently regular or consistent to warrant the conclusion that employees are justified in reasonably regarding the benefit as part of their compensation. It is notable that several Courts disagreed with the Board concerning this issue. Nonetheless, all of these cases involved benefits that were allegedly discontinued by the employers. Thus, the analysis concerning regularity, consistency and other factors are relevant in assessing employees' reasonable expectations. However, these areas are generally not relevant to cases where an employer unilaterally grants a benefit since past history cannot be considered as it involves a first time benefit.

Indeed, in the cases where the Board has considered the lawfulness of the grant of first

time benefits, these considerations are normally not mentioned or discussed. *Exxel-Atmos*, supra at 885; *Boise Cascade Corp.*, 304 NLRB 94, 95-96 (1991); *Cypress Lawn Cemetery*, supra at 613; *S&W Motor Lines*, 236 NLRB 938, 951 (1978); *Swedish Hospital Medical Center*, 232 NLRB 16, 19-21 (1977) enfd. 619 F.2d 33 (9th Cir. 1988); *Highland Plastics Co.*, 256 NLRB 146, 164 (1981); *Aero Motive Mfg. Co.*, 195 NLRB 790, 792 (1972). I recognize that the Board, as well as the Court, in *North American Pipe*, supra did not make reference to this principle in their decisions. However, the Board referred to it only in distinguishing *United Shoe Machinery. Co.*, 96 NLRB 1309, 1321-1322, 1326 (1951) (a previous case where the Board had found the discontinuance of an award of stock, which had been regularly granted for over 25 years.) Indeed, the Board observed that unlike *North American Pipe*, *United Shoe Machinery* "is comparable to those cases in which the Board has found that an employer cannot unilaterally discontinue a bonus if it is of a fixed nature and has been paid over a sufficient length of time or with an explicit promise of future payments, thereby creating a reasonable expectation among employees that the payment will be received as part of their remuneration from employment." Id at 838 citing *Waxie Sanitary Supply*, supra and *Loredo Coca-Cola*, supra. The Board then once again referred to the stock award in *North American Pipe*, as distinguished from *United Shoe*, as a one-time event. As I have observed above, while this finding may be applicable to stock award based on an IPO of the parent company, which is unlikely, if not impossible to recur, it cannot be made here. Further, as I also detailed above, there is record evidence that at least indicates that it is reasonable to conclude that the benefits granted could very well be repeated in conjunction with Respondent's "performance maintenance" program.

Accordingly, based on the foregoing analysis and authorities, I conclude that the gift cards and the free breakfast are mandatory subjects of bargaining. However, that is not the end of the inquiry. Respondent contends that the changes did not have a significant, substantial and material impact on the employees, terms and conditions of employment. If so, the Board has held that an employer is not obligated to bargain over changes so minimal that lack such an impact. *WI Forest Products Co.*, 304 NLRB 957, 959 (1991); *Rust Craft Broadcasting*, 225 NLRB 327 (1976).

Turning to this issue, I shall first consider the distribution of the $100 gift cards. In that regard, Respondent contends that the $100 amount is "*de minimis*," particularly where as here, the registered nurses' salaries range from $67,000 to $150,000 per year. I disagree. In my view, $100 is still a significant amount of money regardless of the salaries of the employees involved. See *Rubatex Corp.*, 235 NLRB at 835, where the Board rejected a similar argument that a $100 cash bonus paid to non-strikers was "trivial" in view of the total pay received by even the lowest paid employee.

Further, the Board has consistently found payments or charges of $100 or less to be payments about which employers must bargain. *Exxel-Atmos*, supra, 323 NLRB at 885-886 ($100 Christmas bonus); *Bell Atlantic Corp.*, 332 NLRB 1592, 1595 (2000) (employer unilaterally instituted a surcharge of $1 to $5 per pay period on employees' salaries subject to garnishment); *Rangaire Co.*, 309 NLRB 1043 (1992) (unilateral change by eliminating 15 minute paid Thanksgiving lunch break); *Xidex Corp.*, 297 NLRB 110, 115 (1989), enfd. 924 F.2d 245, 253 (D.C. Cir. 1991) (change from a 30 minute unpaid lunch break to a 15 minute paid lunch break, which lasted only two days); *Litton Microwave Cooking Products*, 300 NLRB 300 NLRB 324, 426 (1990), enfd. 949 F.2d 249, 251-252 (8th Cir. 1991) (employer discontinued practice of granting extra paid half hour lunch period before Christmas); *NLRB v. Beverly Enterprises-Massachusetts*, 174 F.3d 13, 28-30 (implementation of $5 fee for lost timecard not *de minimis*); *Millard Processing Services*, 310 NLRB 421, 424-425 (1993) (unilateral implementation of $15 fee for replacement of lost paychecks; found to be a material substantial and significant change in employment terms); *Owens-Corning Fiberglass*, 282 NLRB 609, 612-613 (1987) (unilateral

modification of employee purchase program, calculated by ALJ to average $112.85 per employee per year); *Gas Machinery Co.*, 221 NLRB 862, 863-865 (1975) (bonus of $25); *Getty Refining and Market Co.*, 274 NLRB 924, 925-926 (1985) (fund set-up by employer with contributions not to exceed $35 per employee used to fund employee social activities, found to be a mandatory subject of bargaining, substantial benefit to employees and not a gift); *Southern States Distribution*, 264 NLRB 1, 2-3 (1982) (Christmas bonus of $25); *Swedish Hospital*, supra, 232 NLRB at 17, 19-22 (1977) (bonus of one compensatory day off with pay); *Rubatex*, supra ($100 bonus); *Czas Publishing Co.*, 205 NLRB 958, 969-971 (1973), enfd. 495 F.2d 1367 (2nd Cir. 1974) (Christmas bonus of $50); *Ryder Technical Institute*, 199 NLRB 570, 571, 573-574, enfd. 88 F.2d 457, 460-461 (3rd Cir. 1973) (Christmas bonuses of $25 to $50); *Aero Motive Mfg. Co.*, supra, 195 NLRB 790, 791-793 (bonus of $100); *General Telephone Company of Florida*, supra, 149 NLRB at 313-314 (bonuses from $5 to $10); *Central Illinois Public Service Co.*, 139 NLRB 1407, 1409, 1415, enfd. 324 F.2d 916, 918-919 (7th Cir. 1963) (employee discount on gas purchased for heating worth an average of $48 per employee per year).

Accordingly, based on the above precedent, I conclude that the $100 gift card was a material, substantial and significant change in the employees' terms and conditions of employment.

The status of the free breakfast is more problematic. Prior to *Benchmark,* supra, 270 NLRB at 22, the Board routinely found that an employer's practice, if sufficiently regular, of providing turkeys, hams, picnics and other food items to be part of the employees "emoluments of value" and couldn't be changed or unilaterally implemented without bargaining with the union. *Southern States Distribution Inc.*, 264 NLRB 1, 2-3 (1982) (elimination of providing turkeys at Thanksgiving); *Highland Plastics*, supra, 256 NLRB at 164 (unilateral granting of Thanksgiving turkeys); *Presto Casting Co.*, 262 NLRB 346, 350-351 (1982), enfd. 708 F.2d 495, 499 (9th Cir. 1983) (unilateral suspension of 14-year practice of distribution of turkeys at Christmas; employer rectified error on advice of counsel by distributing turkeys in February; Board and Court found that violation was not *de minimis* and not cured); *Atlantic International Corp.*, 246 NLRB 291, 294-296 (1979) (discontinuance of practice of providing employees with turkeys and hams at Thanksgiving and Christmas); *Loredo Coca-Cola*, supra, 241 NLRB at 174 (unilateral discontinuance of distribution of case of Coca-Cola, case of beer, ham and fruitcake at Christmas); *Harowe Servo Controls*, 250 NLRB 958, 1039 (unilateral discontinuance of providing turkeys at Christmas); *Simpson Lee Paper Co.*, 186 NLRB 781, 783 (1970) (Christmas turkey); *Wald Mfg. Co.*, 176 NLRB 839, 845 (1969), enfd. 426 F.2d 1328, 1333 (6th Cir. 1970) (cancellation of annual company summer picnic); *K&D Mfg. Co.*, 169 NLRB 57, 60, 64 (1968), enfd. 419 F.2d 467, 468 (5th Cir. 1969) (cancellation of policy of providing Christmas gifts of fruit basket, hams or turkeys).

It is interesting that while as noted 8(a)(5) violations were found with respect to the discontinuance of these holiday gifts, there was virtually no discussion in these cases concerning whether these benefits were material, significant or substantial, or whether the violations were "*de minimis*."[15]

However, in the much cited *Benchmark* decision in 1984, the Board, as related above, dismissed a complaint based on an employer's decision to discontinue its prior practice of providing Christmas hams and Christmas meals to its employees.

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[15] The exception is *Presto*, supra, where there was brief discussion of the issue by the judge and the court, but primarily dealing with the issue if the violation was cured by providing the benefit (turkeys) two months later than normal.

The Board's primary reason for dismissing the complaint was its reliance on the fact that the dinners and hams "were given to all employees regardless of their work performance, earnings, seniority, production or other employment related factors." 270 NLRB at 22. This factor, as I have noted above, is the crucial issue in *North American Pipe*, supra as well as in other cases in assessing whether the "benefit" involved was a gift or a mandatory subject of bargaining.

However, *Benchmark* also provided an alternative ground for dismissing the complaint. I note that the Board initially referred to the benefits granted as "token items," and later in the decision it responded to the dissent's view that a violation is warranted. The Board observed, "It is also a view which would burden the Board and the parties before it with cases where there is nothing more at stake than a dinner and a five pound ham given once a year. We do not believe that the litigation of such an issue furthers the purposes and policies of the Act." Id.[16]

Subsequently, *Benchmark*, supra has been followed with respect to this issue. In *EIS Brake Parts*, 331 NLRB 1466, 1469 (2001), the Board revered an ALJ's decision finding that an employer had violated the Act by unilaterally providing Gatorade to its employees contrary to its prior ruling restricting food and drink on the factory floor, and by unilaterally ceasing its practice of providing pizza to employees in recognition of 100% productivity.

The Board concluded that with respect to the Gatorade "the effect on employees of the Respondent's implementation of the policy is at most *de minimis*."

As to the pizza lunch, the Board cited *Benchmark* as holding that "an employer's occasionally providing small food items to employees…is not a sufficiently substantial benefit to constitute 'terms and conditions of employment' for purposes of sustaining a violation." 331 NLRB at 1469.

Similarly, in *Stone Container Corp.*, 313 NLRB 336, 337 (1993), the Board upheld an Administrative Law Judge's dismissal of an allegation that an employer violated Section 8(a)(5) of the Act, by discontinuing a program, wherein it had provided employees donuts, hot dogs or catered barbeque meals, depending upon safety factors in the plant. The Board adopted the judge's finding that "awarding this small amount of food did not rise to the level of a benefit or compensation that required bargaining."[17]

Accordingly, based on *Benchmark*, supra, *Stone Container*, supra and *EIS Brake*, supra, I conclude that the employer's furnishing of a free breakfast to employees was not a significant, material or substantial change in the terms of employment, and did not require bargaining with the Union. I shall therefore recommend dismissal of this allegation in the complaint.

I have found above that Respondent's decision to provide $100 gift cards to certain employees was a mandatory subject of bargaining, and a material, substantial and significant

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[16] Member Zimmerman's dissent responded to the majorities' reference to this issue by asserting that "what appears to be a token item to one person may indeed be a valuable item to another." Id at 23.

[17] Member Stephens dissented from this finding citing *Litton*, supra, 300 NLRB at 331, where the Board had affirmed a finding that an extra half-hour of paid lunch required bargaining. The majority distinguished *Litton*, supra on the grounds that the extra half-hour paid lunch was in essence a wage increase for that day.

change in their employment terms. That raises the next question of whether Respondent engaged in this conduct without prior notice to the Union, and without affording the Union an opportunity to bargain with it with respect to this conduct. In this regard, Respondent argues that the Union waived its right to bargain about these matters by failing to request bargaining and by virtue of the management rights clause in the contract.

Dealing with the former contention first, a credibility issue is presented *vis a vis* the testimony of Warm and Edwards concerning their conversation a few days prior to the breakfast meeting of December 3, where the gift cards were distributed. I find it unnecessary to resolve this credibility issue since even under Warm's version of the conversation, the Union has not waived its right to bargain over the subject. Thus, under Warm's version of the conversation, which I shall assume without deciding to be accurate, Edwards asked Warm if Respondent would be giving anything to the employees during the breakfast meeting. Warm replied that the employees would be receiving a pin and a $100 Amex gift card. According to Warm, Edwards' only response was "Ira." Thus, Edwards made no request to bargain about the gift card.

However, the record is clear that Respondent had made its decision to provide the gift cards prior to this conversation, and its purpose in notifying the Union was not to provide it an opportunity to bargain but to persuade Edwards to attend and/or participate in the meeting. In this circumstance, Respondent presented the Union with a "*fait accompli*" during the conversation, and did not provide the Union with an opportunity to engage in bargaining before implementing this change. The Board in *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001) set forth the law on this subject, which is dispositive of the issue here.

> The issues of "fait accompli," "request to bargain," and "waiver" are related in the sense that a finding of fait accompli will prevent a finding that a failure to request bargaining is a waiver. As stated in *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982):
>
> > The Board has long recognized that, where a union received timely notice that the employers intends to change a condition of employment, it must promptly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli.
>
> In other words, "a union cannot be held to have waived bargaining, over a change that is presented to it as a *fait accompli*," *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 402 (5th Cir. 1981), and "[a]n employer must a least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). See also *Ladies Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972) "Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated." Thus,

> "[w]here notice is given shortly prior to implementation of the change because of a lack of intent to alter its position, then the notice is merely informational about a fait accompli and fails to satisfy the requirements of the Act." *Gannett Co.*, 333 NLRB 355 (2001) (citing *Ciba-Geigy Pharmaceutical Division*, supra). Id at 1023.

Accordingly, since Respondent had made its decision to furnish the gift cards prior to the conversation between Edwards and Warm, the Union did not waive its rights to bargain by Edwards' failure to request bargaining on that subject. *Pontiac Osteopathic*, supra and cases cited therein.

Turning to the management rights' clause, Respondent contends that the clause in its contract constitutes a waiver of the Union's right to bargain over the gift cards because it provides Respondent "with the authority to take such action in its discretion." The clause in question reads as follows:

> 14. MANAGEMENT RIGHTS
> Except as in this agreement otherwise provided, Employer retains the sole and exclusive right to promulgate rules and regulations; direct, designate, schedule and assign duties to the work force; plan, direct and control the entire operation of the Hospital; discontinue, consolidate or reorganize any department or branch; transfer any or all operations to any other location or discontinue the same in whole or in part; merge with any other institution; make technological improvements; install or remove equipment regardless of whether or not any such action causes a reduction of any kind in the number of employees, or transfers in the work force, requires the assignment of additional or different duties or causes the elimination or addition of nursing titles or jobs; and carry out the ordinary and customary functions of management whether or not possessed or exercised by the Hospital prior to the execution of this agreement, except as limited herein. All rights, powers, discretion, authority and prerogatives possessed by Employer prior to the execution of this agreement, whether exercised or not, are retained by and are to remain exclusively with the Employer, except as limited herein.
>
> The Association on behalf of the employees, agrees to cooperate with the Employer to attain and maintain full efficiency and maximum patient care and the Employer agrees to receive and consider constructive suggestions submitted by the Association toward these objectives pursuant to Section Three.

However, it is well settled that a waiver of a statutory right must be clear and unmistakable. *ANG Newspapers*, 350 NLRB 1175 fn. 3, 1181 (2007); *Success Village Apartments*, 348 NLRB 579, 828 (2006). Further, management rights' clauses with general language, as here, do not operate as a waiver of a union's right to bargain over a subject, which is not mentioned in the clause. *Bohemian Club*, 351 NLRB 1065, 1067 (2007); *ANG Newspapers*, supra, 350 NLRB at 1187; *Success Village*, supra, 348 NLRB at 628-629.

Here the management rights' clause does not refer either directly or indirectly to the gift

cards, and there is no bargaining history evidence that the parties intended the management rights' clause to waive the union's right to bargain regarding the gift cards. *Waxie Sanitary Supply*, supra, 337 NLRB at 304-305; *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992), enfd. per curiam 25 F.3d 1044 (5th Cir. 1994); *Bohemian Club*, supra; *ANG Newspaper*, supra.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with a meaningful opportunity to bargain concerning the gift cards.

B. The Refusal to Supply Information

An employer has the statutory obligation to provide on request, relevant information that the union needs for the proper performance of its duties as collective-bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). This includes the decision to file or process grievances. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). Where the union's request is for information pertaining to employees in the bargaining unit that information is presumptively relevant and the respondent must provide the information.

The employer has the burden of rebutting that presumption and establishing lack of relevance. *Certco Distribution Centers*, 346 NLRB 1214, 1215 (2006); *AK Steel Corp.*, 324 NLRB 173, 183 (1997). With respect to such information, the union is not required to show the precise relevance of the requested information to particular bargaining unit issues. AK Steel, supra; *A-plus Roofing*, 295 NLRB 467, 470 (1989); *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315 (8th Cir. 1979). Where the requested information pertains to employees or matters outside the bargaining unit, the union has the burden of demonstrating the relevance of such information. *National Broadcasting Company*, 352 NLRB 90, 97 (2008); *Dodger Theatrical Holdings*, 347 NLRB 953, 967 (2006).

The standard for relevancy in either situation is the same "a liberal discovery type standard." *Acme Industrial*, supra at 437. The information used not be dispositive of the issues between the parties but must merely have some bearing on it. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991), or that it would be of use to the union in carrying out its statutory duties and responsibilities. *National Broadcasting*, supra at 97; *Wisconsin Bell Co.*, 346 NLRB 62, 64 (2005).

Where the union is obligated to establish relevance, it need only demonstrate a reasonable belief based on objective facts that the requested information is relevant. *Disneyland Park*, 350 NLRB 1256, 1258 (2007); *Dodger Theatrical*, supra, 347 NLRB at 367. Further, the Board does not pass on the merits of the union's grievance, or assertion that the employer may have violated its contract in assessing whether information relating to the processing of a grievance is relevant. *National Broadcasting*, supra, 352 NLRB at 97; *Certco Distribution center*, supra, 346 NLRB at 1215; *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

Before assessing the above principles, it is necessary to consider Respondent's preliminary contention, which it asserts, warrants dismissal of the complaint allegations dealing with the information requests. Respondent asserts that an employer has no duty to furnish information regarding non-mandatory subjects of bargaining. *BC Industries*, 307 NLRB 1275 (1992); *Cowles Communications*, 172 NLRB 1909 (1968). Respondent further argues that here the Union's grievance protested the letters, the selection process for recipients of the letters and the breakfast and gifts, and all of these items are non-mandatory subjects of bargaining. Accordingly, Respondent contends that it was not obligated to provide any of the information

requested by the Union. *Ingham Regional Med. Center*, 342 NLRB 1259, 1262 (2004); *Detroit Edison Co.*, 314 NLRB 1273, 1274-1275 (1994); *BC Industries*, supra.

However, I note that I have found above, contrary to Respondent's contentions, that Respondent's decision to provide gift cards was a mandatory subject of bargaining, and that it violated Section 8 (a)(1) and (5) of the Act by failing to provide the Union an adequate opportunity to bargain about the decision. Since as Respondent concedes, the Union's grievance in effect protests the gift cards, to that extent[18] Respondent's assertion must be rejected.

Respondent argues that the decision to send the letters is not a mandatory subject of bargaining, relying on the director's decision to withdraw the complaint allegations so contending, as well as the allegation that Respondent violated the Act by failing to notify and bargain concerning said decision. Initially, I note that said withdrawal of these complaint allegations does not necessarily establish that the General Counsel views the decision to be non-mandatory[19], and more importantly, even if it can be so viewed, such a conclusion is not binding on me. However, I find it unnecessary to decide the issue of whether the decision to send the letters constituted a mandatory subject of bargaining.

Even assuming that to be so, it does not preclude a finding that Respondent must supply relevant information, where as here, the Union had need for the information on grounds relevant to subjects other than the decision to send the letters. *Star Tribune*, 295 NLRB 543, 548-550 (1998) (although the Board finds that drug and alcohol testing for applicants is a non-mandatory subject of bargaining, and employer did not violate the Act by refusing to bargain about the decision, it was obligated to supply information to the union regarding the union's claim that policy was discriminatorily applied); *North Star Steel Co.*, 347 NLRB 1364, 1368 (2006) (although no obligation to bargain with union about decision to transfer work, employer must supply information relevant to union's claim that transfer of unit work may have violated contract); *Southern California Gas*, 346 NLRB 449 fn. 2 (2006) (whether or not training program was a mandatory subject of bargaining, union is entitled to information concerning its implementation); *Certco Distribution Centers*, 346 NLRB 1214, 1215, 1226 (2006) (although no violation found concerning transfer of unit work and no bargaining obligation concerning facility where employer transferred work to, information must still be supplied regarding possible "effects bargaining," and union's grievance that work transfer may have violated contract); *Blue Cross Blue Shield*, 288 NLRB 434, fn. 1 (1988) (although union waived its right to bargain over the decision to implement home overtime policy by management rights clause, union did not waive its right to verify the circumstances of this implementation or to monitor the program. Thus, union is entitled to information for these purposes).

As the above precedent establishes, where the union has established a relevant, independent ground to protest respondent's conduct apart from objecting to the decision to send the letters, the union is entitled to information relevant to these issues. Here, it is clear that the Union, in part, is grieving the alleged "arbitrary and capricious" conduct of Respondent in

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[18] While the grievance itself makes no mention of the gift cards, the cards were intimately connected with the letters by Respondent's decision to provide such gift cards only to those employees, who received top 10% letters. Further, it is clear that in the further processing of the grievance, the Union, by Edwards, did complain about the gift cards and the alleged arbitrary selection process of Respondent.

[19] Indeed, there can be numerous reasons for the director's decision to withdraw these allegations.

implementing the letters policy and is complaining about the selection process. In such circumstances, Respondent's defense that the alleged non-mandatory nature of the letters precludes a finding that the information need not be supplied is rejected. *Star Tribune*, supra[20]; *Blue Cross Blue Shield*, supra; *North Star Steel*, supra.

Having rejected Respondent's primary defense, I now turn to the relevance issue and the principles discussed above. In that connection, I conclude that most of the information requested by the Union falls within the category of information pertaining to the employees in the unit and which is presumptively relevant. *Disneyland Park*, supra, 350 NLRB at 1257. That includes the Union's request for: overtime hours; lists of LOAs; reports of nurses, who participated in educational institutes and workshops; lists of nurses, who received preceptor differential; and lists of nurses, who received charge pay. All of these items are clearly presumptively relevant, which requires Respondent to come forward with evidence rebutting the presumption and establishing the lack of relevance. *Certco Distribution Centers*, supra, 346 NLRB at 1215; *AK Steel*, supra, 324 NLRB at 183. I find that Respondent has fallen far short of meeting its burden in this regard.

Respondent presented Warm as its sole witness on this issue, who testified essentially that he made the decision not to furnish any of these items to the Union because he deemed that they were not relevant to the Union's grievance. In that regard, Warm testified that the supervisors, who prepared the top 10% letters, did not consider any of these issues in assessing which nurses should receive the top 10% or bottom 10% letters, or which employees would receive the gift cards. However, this self-serving and conclusionary testimony is insufficient to meet Respondent's burden particularly since Warm admitted that he did not know whether any supervisors used any of those factors in ranking the employees in their departments, and that he had no discussions with any supervisors, who prepared the evaluations, about what items they relied on in their recommendations.

Edwards, on the other hand, furnished testimony concerning the reasons for her requesting of these items. She testified that had she received information from her unit members that some nurses, who received bottom 10% letters, had worked a lot of overtime, had been reimbursed for educational expenses and had acted as charge nurses. Edwards considered this conduct to be "beyond the call of duty," and she felt that these factors should have been considered in deciding which employees would receive the top and bottom letters. As for the LOA request, Edwards was informed that some nurses, who received the bottom 10% letters, were on leaves of absence or out on disability. Thus, she wanted to see if Respondent had rated the bottom 10% nurses based on time that they were not at work. Finally, Edwards testified that she also was informed that some nurses, who volunteered to act as preceptors, received bottom 10% letters, and the person they precepted received a top 10% letter. Edwards viewed that result as a "conflict" since she believed that volunteering to act as a preceptor demonstrated cooperation by performing "extra duty."

Respondent rejects Edwards' testimony in this regard by contending that it had no objective basis and was nothing more than speculation and hypothetical. Thus, it is argued that the Union did not have a reasonable belief based on objective evidence that these items were relevant to its grievance. *Disneyland Park*, supra, 350 NLRB at 1258; *Sheraton Hartford Hotel*, 289 NLRB 463, 464 (1988); *Anchor Motor Freight*, 296 NLRB 944, 948 (1989). However, these

[20] In this regard, I note that the grievance alleges that one of the contract clauses alleged by the union to have been violated by the respondent is the non-discrimination clause in the agreement.

cases are inapplicable since they concern non-presumptively relevant items, where the union has the burden to establish relevance by a reasonable belief based on objective evidence. The items in question here do not require the union to establish relevance since it is presumed.

Moreover, I find that Edwards' testimony is based on "a reasonable belief based on objective evidence" contrary to Respondent's assertion. Her requests were based on evidence obtained from unit members that some of them had engaged in these activities, such as overtime, preceptor, charge nurse and educational enhancement, and either did not receive top 10% letters or received bottom 10% letters. Further, she was informed that some employees on leaves of absence received bottom 10% letters. This evidence, although hearsay, is objective evidence that may be considered by the Union in forming a reasonable believe that the contract may have been violated. *National Broadcasting*, supra, 352 NLRB at 97; *Dodger Theatricals*, supra, 347 NLRB at 968; *Contract Flooring Systems*, 344 NLRB 925, 928 (2005).

While Edwards might not have had objective evidence that in fact any of these factors were considered by any of the supervisors in making their evaluations, she was informed by Warm while discussing the criteria used by Respondent in their determinations that one of the factors considered was whether nurses were "going the extra mile." Thus, Edwards was certainly reasonable in believing that "going the extra mile" either could have or should have included nurses, who work overtime, act as preceptors or charge nurses or seek educational enhancements. Further, Warm also explained to Edwards that Respondent used various criteria in making the assessments, including competency, reliability, teamwork, cooperation with others and how they engaged with family and staff. I also find it reasonable for Edwards to conclude that the items requested by the Union could have or should have had some bearing on these factors.

I once again emphasize the self-serving and conclusionary nature of Warm's testimony as to whether the supervisors relied on any of the items information requested and his admission that he did not know whether any of the supervisors involved had in fact done so. Moreover, even if one accepts Warm's testimony, this does not preclude the Union from arguing that Respondent should have considered some or all of these items in its determination of which employees received the top and bottom 10% letters, and consequently, the gift cards. I note that the Union in its grievance is attacking the selection process utilized by Respondent in making its assessments contending it to be "arbitrary and capricious." Therefore, I conclude that the items requested, as discussed above, are clearly relevant to the Union's grievance and must be supplied to the Union.

Respondent also makes some additional arguments concerning the obligation to supply the overtime records and the educational expense records. With respect to the overtime information, Warm testified that Respondent supplied that information to the Union in connection with negotiations on approximately April 27, 2009. Even if Warm's testimony is accepted as accurate, it would not provide a defense to Respondent's failure to produce this information. With respect to relevant information, an employer is required to furnish it in a timely fashion. *U.S. Postal Service*, 332 NLRB 635, 639 (2000); *Civil Service Employees Assn.*, 311 NLRB 6, 9 (1993). Here, Respondent has advanced no justification for its failure to produce the information requested for over five months, *Crittenton Hospital*, 343 NLRB 719, 744 (2004). Indeed, Warm testified that the information was submitted to the Union in connection with bargaining, not in response to its request for the information in connection with its grievance. In these circumstances, the delay was unreasonable, and Respondent has violated Section 8(a)(1) and (5) by failing to furnish this information to the Union in a timely manner. *Crittenton Hospital*,

supra, 343 NLRB at 744 (four-month delay); *Civil Service Employees Assn.*, supra at 9 (ten-week delay).[21]

Respondent also contends that the information requested by the Union with respect to educational reimbursement was available to the Union to see in a binder kept in Director of Nursing Chung's office. Respondent argues that "the Union was notified by the Hospital that a binder is available in the office of Ms. Opal Chung, Senior Vice President of Nursing, containing a list of all employees, who participated in educational institutes; workshops or meetings; and the expenses reimbursed thereto, pursuant to the CBA, since January of 2008." Therefore, Respondent asserts that this information was provided and/or made available to the Union.

However, the record does not support Respondent's contentions. The only evidence presented on this subject was Warm's response to a question whether Edwards was informed that the binder was available for her to see.

Warm responded as follows: "My understanding is that the availability of the binder for anyone to see was the result of the negotiation for the prior bargaining, for the current bargaining agreement, the prior, the current bargaining agreement." I find this vague, conclusionary, hearsay and uncertain testimony far from sufficient to establish that Edwards or the Union were notified that the information requested was available for them to see in Chung's office.

Thus, Warm did not testify as how he obtained "his understanding" that the Union was notified of this fact or on what such an understanding was based. Clearly, it was not based on Warm being present when such notification was allegedly made. Further, Warm did not testify when this notification allegedly occurred, or which Union officials were so informed, or what official of Respondent allegedly informed the Union of these facts. Most importantly of all, Warm conceded that despite receiving several requests by the Union for this information that he did not inform Edwards that she or the Union could go into Chung's office to obtain the information requested. In such circumstances, I find that the failure of Respondent to notify the Union that it could obtain the information in Chung's office, in response to the Union's request, precludes Respondent from relying on the alleged availability of the information in Chung's office. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995) (employer did not offer the opportunity to the union to make safety inspections when it refused to furnish requested audit); *The Kroger Co.*, 226 NLRB 513-514 (1976) (employer obligated to inform union that union could obtain or had information already).

Moreover, it is well settled that a union's right to information is not defeated merely because the union may acquire the needed information through an independent source of investigation. *JHP & Associates*, 349 NLRB 1088, 1092 (2007); *Southern California Gas*, 346 NLRB 449 fn. 3 (2006); *King Soopers*, 344 NLRB 842, 845 (2005); *BP Exploration*, 337 NLRB 887, 889 (2002*); Hospitality Care Center*, 307 NLRB 1131, 1135 (1992); *Illinois-American Water Co.*, 296 NLRB 715, 724 (1989); enfd. 933 F.2d 1368, 1377-1378 (7th Cir. 1991).

Accordingly, I conclude that Respondent has not meet its burden of establishing that the Union is not entitled to the educational reimbursement information, and that it has further

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[21] I note that at the time of the filing of the charge, Respondent had not provided the information requested. Thus, there was a violation of Section 8(a)(1) and (5). To the extent that this information may have been supplied later, these matters can be addressed in compliance proceedings. *Milford Manor Nursing*, 346 NLRB 50 fn. 2 (2005).

violated Section 8(a)(1) and (5) of the Act by failing to supply such information to the Union.

That leaves for consideration two other items of information requested by the Union. The Union also requested that Respondent provide the "most recent" Press Ganey report. Respondent contends that it was not obligated to supply such report since it concerned Respondent's efforts to improve patient satisfaction, and therefore was not "presumptively relevant." *Disneyland Park*, supra. I disagree.

Although the report may have been primarily concerned with improving patient satisfaction, it did, in my view, directly impact employee's terms and conditions of employment. It is undisputed that the report was the impetus for the letters and consequently the gift cards, which I have found to have been a mandatory subject of bargaining. See *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1106 (1991) (information concerning accusations of drug abuse, which "set the entire machinery" of testing in motion). Furthermore, the report did contain evaluations of employees' performance *vis a vis* their relationship with patients and families. The fact that the report may have contained group evaluations rather than individual evaluations does not change the fact that the report is an evaluation of performance, which affects the unit, and about which the Union has the right to bargain and/or to grieve. Indeed, evaluations and surveys and questionnaires, including evaluations, have long been considered information to which the unions are entitled. *LBT Inc.*, 339 NLRB 504, 505 (2003) (evaluations of employees presumptively relevant); *Allied Mechanical Services*, 332 NLRB 1600, 1612 (2001) (employee evaluations); *U.S. Postal Service*, supra, 332 NLRB at 637 ("climate assessment" report containing data regarding unit employees and their employment relationships among themselves and their supervisors, presumptively relevant); *Hofstra University*, 324 NLRB 557, 558 (1997) (questionnaires prepared by outside consultant evaluating clerical staff, found to be related to "job responsibilities and content" and presumptively relevant); *Washington Hospital Center*, 270 NLRB 396, 399, 400-407 (1984) (report prepared by consulting firm evaluating employee performance, presumptively relevant), *NLRB v. Pratt & Whitney*, 799 F.2d 121, 130 (2nd Cir. 1986) (survey of employees' attitudes regarding workplace and evaluation of employees' knowledge of and attitudes toward benefit programs provided by employer must be provided to union); *Proctor and Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1315-1317 (8th Cir. 1979) (job evaluation plan); *Safeway Stores*, 270 NLRB 193, 196-199 (1984) (job evaluation system).

Moreover, even if I were to conclude that the report was not presumptively relevant, I find that the Union has more than met its burden of establishing a reasonable belief based on objective evidence that the report was relevant to its statutory responsibilities. Thus, the Union is contending in its grievance that Respondent acted "arbitrarily" in its selection process concerning the letters[22] that the bottom 10% letters constituted "discipline," and that Respondent violated various provision in the contract including the disciplinary and evaluation provisions included therein. The objective evidence relied upon by the Union in its assertions included the similarity in language between the contract language detailing "counseling," and the letters, as well as the fact that Edwards learned that Respondent required the Director of Nurse Operations to be present at the meetings, where the supervisor discussed the bottom 10% letters, which emphasized employee performance and how it could be improved.

Respondent argues that no relevance has been established for the Press Ganey report

[22] See *Tex Ton Welhauson Co. v. NLRB*, 419 F.2d 1265, 1271 (5th Cir. 1969), vacated on other grounds, 397 U.S. 1516 (1970) (union entitled to information in order to test the fairness of productivity standards instituted by the employer).

because the meetings were not disciplinary since the letters were not placed in employees' personnel files and were not used to discipline employees in any way. Respondent further argues that the Press Ganey report was not shown to any supervisors prior to the supervisors preparing their top and bottom 10% recommendations, so it therefore has no relevance to the Union's grievance. I do not agree.

With regard to Respondent's assertion that the letters were not disciplinary, the Union is not required to rely on Respondent's assertions that the letters were not disciplinary, and it was entitled to make its own evaluation about its claims, including the applicability of the agreement. *Southern California Gas*, supra, 346 NLRB at 455; *Beth Abraham Health Services*, supra at 1234, 1241, 1242; *Shops' Food Warehouse*, 315 NLRB 258, 259 (1994); *Reis Viking*, 312 NLRB 622, 625 (1993).[23]

I emphasize that it is not for me or the Board to decide whether Respondent's conduct constituted "discipline," or whether Respondent has violated the various contractual provisions as alleged by the Union in its grievance. These are issues for the arbitrator since the Board does not pass upon the Union's claims that the contract has been violated. *National Broadcasting Co.*, supra, 252 NLRB at 94; *Dodger Theatricals*, supra, 347 NLRB at 969; *Certco Distribution*, supra, 346 NLRB at 1215; *Pennsylvania Power & Light*, supra, 301 NLRB at 1105.

While Respondent argues that the Press Ganey report was not used by its supervisors in determining eligibility for the letters, I repeat that the Union is not obligated to accept Respondent's assertions in this regard, and is entitled to make its own evaluation of this alleged fact. *Southern California Gas*, supra; *Shoppers Food Warehouse*, supra. I note in this connection that Warm conceded that he did not know what criteria was actually used by supervisors in making their determinations as to the top and bottom 10% performers. Thus, it is possible that some information from the Press Ganey report did come to their attention of supervisors prior to their recommendations. Indeed, Warm conceded that at some point supervisors were supplied copies of the report including comments about individual employees and that supervisors followed up on this information by discussing these comments with the employees.

Moreover, even if Respondent did not use the information from the report in determining eligibility for the letters or gift cards, this does not preclude the Union's need for the information. Since the information contained in the report is presumptively relevant to the Union's fulfilling its obligations as statutory bargaining representative, it must be supplied even if Respondent made no use of the report. *Hofstra University*, supra, 324 NLRB 557-558 (employer terminated study by consultant and did not use draft report; Board finds draft report nonetheless relevant to union's obligations as statutory representative, and ordered draft report be turned over to the union). Here, the Press Ganey report contained comments from patients about the performance of particular employees. The Union could very well argue that even if Respondent did not consider such comments in its decisions on the letters and gift cards that it should have done so. This could support the Union's claim of an arbitrary selection process.

Further, as related above, Warm conceded that employees were spoken to by supervisors about the comments made about them in the report. This could strengthen the

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[23] See also *Champion Enterprises Co.*, 350 NLRB 788 fn. 7 (2007) (union is entitled to employer's complaint policy in order to determine whether there was any follow through on complaints that might result in discipline; union not obligated to rely on statement by employer that it is "likely" no employee would be disciplined based on such complaints.)

Union's argument that the letters constituted discipline, or alternatively could permit the Union to assert that the discussions about the comments in the report were disciplinary in and of themselves, apart from any connection to the letters.

Accordingly, based on the foregoing, I reject Respondent's contentions and conclude that the Press Ganey report was relevant to the Union's obligations as statutory bargaining representative of Respondent's employees and must be furnished.

Respondent also argues that it satisfied any obligation that it had to turn over the Press Ganey report by furnishing a summary of the report to the Union. Before assessing that issue, I note that I have found above in the facts that the summary report provided to the Union in January 2009 summarized the fourth quarter report ending on December 31, 2008. However, the Union had requested the "most recent" report. This apparently caused some confusion since the report did not appear to be the report that the Union was seeking. Thus, the Union made its request in mid-December 2008 for the most "recent" report. Thus, it appears that the Union was seeking the third quarter report, which presumably covered the period between July 1, 2008 and September 30, 2008. It also appears to have been this report that Respondent considered in deciding to institute its performance review, including the letters and gift cards. I make this conclusion somewhat hesitantly since neither the Union nor any of the parties in this proceeding mentioned this issue. However, since the date of the report summarized was in January 2009, covering a period subsequently to the decision to send the letters, I conclude that Respondent submitted the wrong report. I do not attribute any bad faith on Respondent's part in that decision, and find it understandable in view of the Union's request for the most "recent" report. I note further that the Union did not object to the summary report on the basis that it was the wrong report, and merely objected to the summary rather than the entire report.

I therefore conclude nonetheless that, although inadvertent, Respondent failed to supply the third quarter report, which was what the Union was actually requesting.

Again, I make this finding somewhat reluctantly since no one has raised this issue. I shall leave to compliance further resolution of the matter. Thus, if the Union is interested solely in the fourth quarter report, then Respondent need not turn over the third quarter report as I will order. In either event, it is necessary for me to decide the issue of whether Respondent must turn over the entire report as requested by the Union, and/or whether the summary provided by Respondent was sufficient to meet its obligation. I conclude that neither party is correct in their positions.

I do not believe that the Union has presented sufficient evidence to warrant the furnishing of the entire report, inasmuch as a substantial portion of the report detailed comments from patients concerning employees in other bargaining units as well as supervisors and managers. Since this is clearly not presumptively relevant information and the Union has advanced no reason for seeking this data, the Union is not entitled to such information. *Safeway Store*, supra 270 NLRB at 196-197.

On the other hand, I do not deem Respondent's submission of the summary of the Press Ganey report to be sufficient to meet its obligations. The summaries did not contain any of the raw data utilized by Press Ganey in making its conclusions and calculations. This includes the questionnaires completed by the patients as well as any comments made by the patients or their families that appeared in the report. For the reasons that I have detailed above, I conclude that the Union is entitled to the information in order to test the "arbitrariness" of Respondent's selection process concerning the letters as well as in conjunction with its assertion that Respondent was engaging in "discipline" by its use of the report. Therefore, I find that the

summaries were insufficient, and that Respondent must supply the above described information to the Union insofar as it relates to employees in its bargaining unit. *Washington Hospital Center*, supra, 270 NLRB at 401 (summaries of study insufficient); *LBT*, supra, 339 NLRB at 505 fn. 10 (redaction by employer of names of employees in evaluation plan improper). Accordingly, I find that Respondent has violated Section 8(a)(5) of the Act by failing to furnish the Union the relevant portions of the Press Ganey report.

Finally, the Union also requested the names of the supervisors, who made the decisions to rate employees in the top and bottom 10%. This is clearly not presumptively relevant information since it deals with terms and conditions of employments of supervisors, who are non-unit personnel.

In such situations, as stated above, the Union must show a need for such information by demonstrating relevance. I conclude that the Union has met its burden in this regard by demonstrating a reasonable belief, supported by objective evidence that such information is relevant. *National Broadcasting System*, supra, 352 NLRB at 97.

Edwards explained that she had learned from unit members that when some employees spoke to their supervisors about the letters, they were advised to get the Director of Nursing involved. This led Edwards to wonder whether the ratings were done by supervisors or patient care managers. Edwards was interested in ascertaining whether the employee was evaluated through direct observation or through an evaluation of clinical skills. Thus, since the Union is challenging the selection process used by Respondent in its grievance, and is alleging that the evaluation clause of the contract was violated, the Union had demonstrated relevance of the information requested. *U.S. Postal Service*, supra, 332 NLRB at 636 (information related to supervisor relevant, where disparate treatment is alleged); *NLRB v. U.S. Postal Service*, 888 F.2d 1568, 1571-1572 (11th Cir. 1989) (alleged disparate treatment sufficient to require information regarding supervisors); *Global Stores Inc.*, 227 NLRB 1251 (1977) (information about group mangers relevant to issues of policing contract); *Northwest Publications Inc.*, 211 NLRB 464, 465-466 (1974) (information about supervisors relevant to issues of unit work); Curtis Wright Corp. v. NLRB, 347 F.2d 61, 70-71 (3rd Cir. 1965) (information concerning administrative non-unit employees relevant to status of employees as unit employees).

Respondent also argues that since Respondent provided the Union with the names of each employee that met with their supervisor that this is sufficient compliance since the Union could ascertain the information requested directly from the employees. However, as I have observed above, it is well established that the Union's ability to obtain the information elsewhere does not excuse an employer's obligation to provide the requested information. *Southern California Gas*, supra, 346 NLRB at 449; *King Soopers*, supra, 344 NLRB at 845; *JHP Associates*, supra, 349 NLRB at 1092; *Allied Mechanical Services*, 332 NLRB 1600, 1612 (2001); *Global Services*, supra, 227 NLRB at 1254.

Therefore, I conclude that Respondent has violated Section 8(a)(1) and (5) of the Act by failing to supply the information requested concerning the identity of supervisors, who evaluated employees for the purposes of eligibility of the top and bottom 10% letters.

Conclusions of Law

1. The Respondent, the Brooklyn Hospital Center, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and is a health care institution within the meaning of Section 2 (14) of the Act.

2. The Union, New York State Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (5) of the Act by providing its employees with a $100 gift card without prior notice to the Union, and without affording the Union an opportunity to bargain with respect to this conduct.

4. The Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to supply complete and timely information to the Union.

5. The Respondent has not violated the Act in any other manner as alleged in the complaint.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it cease and desist there from, and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the Respondent's refusal to supply the Press Ganey report to the Union, as I have detailed above, I shall recommend that the Respondent furnish the third quarter report (insofar as it relates to unit personnel). However, I shall recommend that the Union retains the option to request instead the fourth quarter report (to the extent not provided but still excluding information relating to non-unit personnel).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[24]

ORDER

The Respondent, the Brooklyn Hospital Center, Brooklyn, NY, its officers, agents, successors and assigns shall

1. Cease and desist from:

(a) Unilaterally granting its employees a gift card or any other benefit without providing notice to the Union and an opportunity to bargain.

(b). Refusing to bargain with the Union by refusing to supply timely and complete information to the Union that is relevant and necessary to the Union's role as the

[24] If 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.

exclusive representative of Respondent's unit employees.

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

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

(a) Furnish to the Union, in a timely and complete manner, the following information: the Press Ganey report for the third quarter of 2008, to the extent that it deals with unit personnel, in the manner discussed in my decision; overtime usage for unit employees; a list of unit employees, who served in the "preceptor" and "charge nurse" capacity; the name of each supervisor, who rated unit employees' performance in connection with the letters sent to employees identifying them as being in the top or bottom 10% of performers in their peer group; a complete list of unit employees' leaves of absence for the period beginning January 2008; and a report of unit employees, who have participated in educational institutes, workshops or meetings, and the expenses reimbursed thereto from the period beginning January 2008.

IT IS FURTHER RECOMMENDED that the complaint be dismissed with respect to any violations of the Act alleged in the complaint not found herein.

(b) Within 14 days after service by the Region, post at its place of business copies of the attached notice marked "Appendix B."[25] Copies of the notice, on forms provided by the Regional Director for Region 29, 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. It shall take reasonable steps 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 November 19, 2008.

(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. December 10, 2009

Steven Fish
Administrative Law Judge

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "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."

APPENDIX A

Press Ganey Summary

APPENDIX B

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 unilaterally grant our employees a gift card or any other benefit without providing notice to the Union and an opportunity to bargain.

WE WILL NOT refuse to bargain with the Union by refusing to supply timely and complete information that is relevant to the Union and necessary to the Union's role as the exclusive representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL furnish to the Union, in a timely and complete manner, the following information: the Press Ganey report for the third quarter of 2008, to the extent that it deals with unit personnel; overtime usage for unit employees; a list of unit employees, who served in the "preceptor" and "charge nurse" capacity; the name of each supervisor, who rated unit employees' performance in connection with the letters sent to employees identifying them a being in the top or bottom 10% of performers in their peer group; a complete list of unit employees' leaves of absence for the period beginning January 2008; and a report of unit employees, who have participated in educational institutes, workshops or meetings, and the expenses reimbursed thereto from the period beginning January 2008.

THE BROOKLYN HOSPITAL CENTER
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, 100 Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.