

U.S. Postal Service and National Postal Mailhandlers' Union, Local 313, NPMHU. Case 24–CA–010805

May 2, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

The reviewing court remanded this information-request case to the Board to take account of the employees' confidentiality interest in their application test scores and to balance the employees' interest against the Union's need for that information. Applying the law as directed, we find that the Union's need for the requested information outweighs the employees' privacy interests, and we reaffirm our finding that the Postal Service violated Section 8(a)(5) and (1) by refusing to furnish information requested by the Union. As shown below, however, we have devised a remedy that fully satisfies the employees' confidentiality concerns while providing the Union with the necessary information.

Background

On January 5, 2011, the National Labor Relations Board issued a Decision and Order in this proceeding. The Board found that the Postal Service violated Section 8(a)(5) and (1) of the Act by refusing, on request, to furnish the Union with certain information, including the test scores of 22 employees hired by the Postal Service in 2007. Underlying that finding, the Board found that the Union needed the information in order to police the Postal Service's administration of the seniority provisions of the parties' collective-bargaining agreement. The Board further found that the Postal Service failed to establish that its employees have a legitimate and substantial confidentiality interest in their test scores. The Board ordered the Postal Service, *inter alia*, to furnish the Union with the requested information.¹

Subsequently, the Board filed an application for enforcement of its Order with the United States Court of Appeals for the First Circuit. On October 27, 2011, the court denied the application for enforcement. The court held that the affected employees have a legitimate and substantial privacy interest in their test scores, and it concluded that the Board erred in failing to balance that interest against the Union's interest in obtaining the scores. The court vacated the Board's Decision and Order and remanded this case to the Board for further proceedings consistent with the court's opinion.² On May 7, 2012, the Board invited all parties to submit statements

of position concerning the issues raised by the remand. No party filed a statement of position.

We accept the court's opinion as the law of the case. Balancing the employees' and the Union's interests as instructed, we find that the Postal Service violated the Act by failing to furnish some of the requested information without reasonably accommodating the Union's need for it to police the Postal Service's adherence to the collective-bargaining agreement. Our remedy does not require the Postal Service to furnish individually identifiable test scores to the Union.

The Facts

As explained in further detail in our earlier decision, the Postal Service requires all applicants for its mail handler position to take "Test 473." The test measures each applicant's cognitive skills as well as certain personal characteristics—conscientiousness, interpersonal skills, professional service orientation, self-management, and ability to deal with work pressures. Passing scores range from 70 to 100 points. Applicants may receive a veterans' preference of an additional 5 or 10 points based on service in the armed forces. An applicant's "final rating" is the sum of his test score and veterans' preference points, if any. Once the final rating is determined, applicants who received a passing score are placed on a local hiring register. The register contains each applicant's name, date of birth, exam date, veterans' points, test score (also called "basic" score), final rating, and standing, *i.e.*, position on the register relative to other applicants. Veterans' preference applicants are ranked ahead of applicants with the same final rating who lack that preference. Under standard Postal Service procedure, its human resources department considers the three top-ranked applicants for each job opening. Once an applicant is hired, he is removed from the hiring register. Thereafter, his "enter-on-duty" (EOD) date—his first day of work—is used to calculate seniority. Before taking Test 473, applicants are informed that, under the Privacy Act, 5 U.S.C. § 552a(b), their personal information and test scores will remain confidential, with certain exceptions—including that the Postal Service will disclose such information to a labor organization "as required by law."

The Union represents the mail handlers employed at a Postal Service facility in San Juan, Puerto Rico. Article 12 of the collective-bargaining agreement between the Postal Service and the Union, effective from 2006 to 2011, provided that the parties would "continue relative seniority standing properly established under past principles, rules and instructions." The Postal Service concedes that, under article 12, an employee may request a correction of his seniority standing if he believes that his

¹ 356 NLRB 483

² *NLRB v. Postal Service*, 660 F.3d 65 (1st Cir. 2011).

EOD date should precede that of another employee because he took Test 473 before the other employee and had an equal or higher final rating.

Sometime before July 2, 2007,³ Union President Julio Figueroa received complaints from several mail handlers, all veterans of the armed forces, that several nonveterans had been hired before them, even though the veterans had applied much earlier.⁴ On July 2, the Union requested from the Postal Service “the register listing for those candidates qualified for hiring,” specifying that “[t]he listing should include the veteran employees as well as non-veterans and their position in the roster.” On July 26, the Postal Service replied that Labor Relations Manager Keith Reid would followup on the request.

In August, having received no further response, Figueroa reminded Reid of the outstanding information request and explained that he had received complaints from employees who were veterans that nonveterans had received preferential hiring treatment. By letter dated October 18, the Postal Service replied that the Union’s request was extensive and encompassed confidential information. The Postal Service further stated that the request was being processed and that Figueroa would be informed when all of the documents were available. About 1 month later, having heard nothing more from the Postal Service, the Union filed the unfair labor practice charge in this case.

By email dated December 17, Postal Service Attorney Leslie Rowe informed Figueroa that the Postal Service would redact the test scores from the requested hiring-register information before furnishing it to the Union unless Figueroa obtained the applicants’ consent to release them. Figueroa emailed Rowe a few hours later and insisted on full compliance with the information request. By letter dated December 19, Postal Service Labor Relations Manager Juan Delgado told Figueroa that the information would be available for review in Delgado’s office. On December 20, however, Rowe sent Figueroa an email stating that the Respondent was willing to provide the 2007 hiring register, but with the basic and final scores redacted as “a way to satisfy your request without compromising the privacy of the test takers.”

The next day, in Delgado’s office, Figueroa reviewed a small portion of the hiring register with the test scores

and final ratings redacted. Immediately thereafter, Figueroa sent Rowe an email explaining that the redacted register did not satisfy the information request.

In January 2008, the Postal Service sent the Union a copy of the hiring register, but it had redacted the applicants’ test scores and final ratings. This register did not contain listings for the 22 employees hired in 2007, as their names had been removed upon their hire.⁵ The Postal Service never furnished the requested information to the Union.

The Board’s Initial Decision

The Board found that the employees’ hiring-register information, including their test scores, is relevant to the Union’s statutory duty to police the seniority clause in the collective-bargaining agreement. The Board further found that the Postal Service failed to prove that employees have a legitimate and substantial confidentiality interest in their test scores and other hiring-register information. The Board reasoned that, regardless of any possible employee sensitivity to disclosure, the employees have no legitimate expectation that their test results will not be disclosed to the Union because each of them was given notice, prior to taking the test, that under the Privacy Act the Postal Service could release test-related information to a labor organization as required by law. Based on those notices, the Board distinguished this case from *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), where the employer had expressly promised applicants that it would maintain the confidentiality of their test scores. Consequently, the Board found that the Postal Service violated Section 8(a)(5) of the Act by refusing to furnish to the Union the register listings, including individually identifiable test scores, for the 22 employees hired in 2007.⁶ To remedy the unfair labor practice, the Board ordered the Postal Service to furnish that requested information.

The First Circuit’s Opinion

On review, the court of appeals disagreed with the Board’s finding that the employees lack a legitimate and substantial confidentiality interest in their test scores. The court found that employees have a reasonable expectation of privacy in their scores on Test 473 because, as in *Detroit Edison*, supra, those scores are indicative of employees’ basic competence. The court found, contrary to the Board, that the Privacy Act notices did not extinguish employees’ reasonable expectation of privacy be-

³ All dates hereafter are in 2007, unless otherwise specified.

⁴ At the unfair labor practice hearing in April 2008, Figueroa testified without contradiction that “in one strange case [] we had a person, a veteran who did not get a position, but his score was an 85 or 90 which when you add the 10 veteran points would have put him up at 100 percent, and yet there were other persons who having less points had gotten the positions.”

⁵ Those 22 employees were among the highest scorers of the more than 8000 applicants who had passed the test and who were on the register in 2007.

⁶ The Board affirmed the judge’s finding that the Union did not need, and was therefore not entitled to, the 2007 register in its entirety.

cause such notices do not require disclosure of sensitive employee information to unions any more than the Act itself requires such disclosure. And the determination of whether the Act does so here, said the court, requires a careful balancing of interests, weighing the interest of the Union in obtaining the information against the privacy interests of the employees. The court accordingly remanded this case to the Board for that purpose.

Discussion

“The duty to supply information under Section 8(a)(5) turns upon ‘the circumstances of the particular case,’ and much the same may be said for the type of disclosure that will satisfy that duty.” *Detroit Edison*, 440 U.S. at 314–315 (citation omitted). If a party asserts that requested information is confidential, the Board balances the union’s need for relevant information against any legitimate and substantial confidentiality interests established by the employer. *Piedmont Gardens*, 359 NLRB 499, 450 (2012) (citing *Detroit Edison*, 440 U.S. at 318–320). Additionally, where an employer has proven a legitimate and substantial confidentiality interest, it may not simply deny the union’s request; it must propose a reasonable accommodation of its concerns and the union’s need. *Kaleida Health, Inc.*, 356 NLRB 1373, 1379 (2011) (citing *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991); *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004)).

The Supreme Court’s seminal decision in *Detroit Edison* resulted in the dismissal of the complaint brought against that employer. Like the present case, it involved a union request for employees’ aptitude test scores and an employer’s offer to furnish the scores only if the union obtained employee consent. In that case, the union sought the test scores in aid of a grievance alleging that the employer had breached a provision in a collective-bargaining agreement to base promotions on seniority “whenever reasonable qualifications and abilities of the employees being considered are not significantly different.” 440 U.S. at 304–305. The employer refused to furnish the test scores of named employees, but did furnish the scores with names redacted and offered to provide individually identifiable scores with an employee’s consent.

The Court assumed for argument’s sake that the test scores were potentially relevant to the Union’s grievance, but found that the employees had a legitimate and substantial confidentiality interest in their scores and would be sensitive to disclosure of “information that may be taken to bear on [their] basic competence.” *Id.* at 318. The Court noted that the employer had committed to keep the scores confidential and that the disclosure of individual scores in the past had resulted in harassment

of some lower-scoring test takers. *Id.* at 319. The Court concluded that “any possible impairment of the function of the [u]nion in processing the grievances of employees is more than justified by the interests served in conditioning the disclosure of the test scores upon the consent of the very employees whose grievance is being processed.” *Id.*

In the present case, the First Circuit found that “the interest of the USPS employees in the confidentiality of their aptitude test scores is as great as the interest of *Detroit Edison*’s employees.” 660 F.3d at 72. As great, but no greater. *Detroit Edison* concerned the scores of unit employees who had failed an aptitude test. Here, by contrast, each of the 22 employees at issue passed Test 473. Indeed, the employees here performed so exceptionally well that they ranked at or near the top of a hiring register containing more than 8000 applicants. Thus, the potential for disclosure of their scores to embarrass or otherwise harm the employees is certainly no greater than it was for the employees in *Detroit Edison*.

We further find that the Union’s need for employees’ test scores (and other hiring-register information) is substantially *greater* than was the union’s need for the test scores in *Detroit Edison*. As the court observed, the relevance of the requested information is unquestioned. The test scores here play a specific and uniquely important role in the parties’ administration of the collective-bargaining agreement’s seniority clause. As explained above, an employee’s seniority is calculated based on his EOD date. Given that the Postal Service considers the three highest-ranked applicants for each job vacancy and that an applicant’s ranking depends on his final rating, an employee’s EOD date is almost exclusively a function of the sum of his test score and veterans’ preference points. And, as stated above, the Postal Service admits that an employee is authorized to request a correction of the seniority list if he believes that the Postal Service passed over him to hire a lower-rated applicant off the register. Consequently, the test scores and other hiring-register information are crucial to administering the seniority clause. Indeed, without those 22 test scores, the Union would be unable to determine whether the Postal Service is breaching or complying with the parties’ agreement regarding unit employees’ relative seniority standing. In *Detroit Edison*, by contrast, the relevance of the test scores to the union’s statutory duties was “vigorously dispute[d],” and the Court merely assumed without deciding that the scores had some potential relevance to the union’s claim that the tests there failed to fairly distinguish between qualified candidates. 440 U.S. at 317. In short, while the test scores in *Detroit Edison* might have helped the union determine whether

the test there was “unfair,” the test scores here are necessary for the Union to evaluate the veteran employees’ seniority complaints.

In our view, we are presented with a situation where there are two weighty competing interests. The 22 affected employees here have a confidentiality interest deserving protection. At the same time, we have found that the Union has a strong need for the test scores, and disclosure is unlikely to negatively affect anyone’s view of the applicants’ “basic competence.” *Id.* at 318. Under these circumstances, we find that the balance of interests favors requiring a limited disclosure to the Union.

Further analysis supports our weighing of the interests. The Postal Service contends that, under *Detroit Edison*, it reasonably accommodated the Union’s need when it offered to furnish the test scores if the Union obtained employees’ consent. We do not agree. Unlike the test scores in *Detroit Edison*, the test scores here are critical to evaluating and, if need be, pressing the veterans’ complaints regarding their seniority standing. In addition, the Union needs *all* of the scores. Unlike in *Detroit Edison*, if one or more of the nonveteran employees withholds his consent, the Union will be effectively precluded from determining whether the Postal Service has complied with the collective-bargaining agreement. Moreover, there is a substantial risk that one or more nonveteran employees will withhold their consent because they stand to suffer a reduction in seniority if the Union were to prevail on a grievance. Because the Postal Service’s proposal leaves open the distinct, and perhaps likely, possibility that the information provided will be incomplete, and thus that the agreement will go unenforced, we find that it is unreasonable. This is not to say that the Postal Service was obligated to furnish individually identifiable test scores or final ratings to the Union. Rather, the Postal Service could have complied with its statutory duty by furnishing anonymous data enabling the Union to determine whether management had adhered to the parties’ agreement. *Cf. Kaleida Health*, 356 NLRB 1373, 1379 (holding that employer’s proposed accommodation was unreasonable because it would not have given union sufficiently detailed information regarding prior incidents of nurse misconduct and discipline imposed while protecting patient confidentiality). In sum, given the facts and balance of interests presented here, we find that the offer by the Postal Service to furnish test scores if the Union obtained employee consent was unreasonable. Accordingly, we find that the Postal Service violated Section 8(a)(5).

REMEDY

Section 10(c) of the Act authorizes the Board to issue an order requiring a party who has engaged in an unfair

labor practice to “take such affirmative action . . . as will effectuate the policies of th[e] Act.” The remedial power vested in the Board by this provision is a “broad discretionary one.” *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (internal quotation mark omitted); see also *NLRB v. Solutia, Inc.*, 699 F.3d 50, 72 (1st Cir. 2012) (“The Board has wide discretion in selecting remedies.”) (internal quotation marks omitted).

Under the circumstances of this case, we find that it would not effectuate the policies of the Act to order the Postal Service to engage in further bargaining with the Union over an appropriate accommodation of the Union’s need for the information and the employees’ privacy interest in their test scores. The parties were unable to reasonably accommodate those interests during either the 8 months that elapsed between the initial information request and the issuance of the complaint or the subsequent 6 years that this case has been litigated. Thus, we shall order a limited disclosure of information needed by the Union while preserving the confidentiality of the employees’ test scores. *Cf. Kaleida Health, Inc.*, 356 NLRB 1373, 1381 (ordering limited disclosure of requested information while preserving confidentiality); *Pennsylvania Power Co.*, 301 NLRB at 1108 and fn.18 (same).

To effectively police the collective-bargaining agreement, the Union does not need to know, at this stage, which employees received which scores on Test 473. It only needs to know whether the Postal Service hired an applicant in 2007 with a lower final rating than that of another applicant who appeared on the hiring register at the same time. Requiring the Postal Service to disclose each individual’s test score, veterans’ preference points, final rating, exam date, and enter-on-duty date—without identifying the employees by name—will satisfy the Union’s need.

However, requiring the above disclosure of anonymous data still creates some risk of a confidentiality breach because Respondent’s Exhibit 1, which contains the names and EOD dates of all 22 employees hired by the Postal Service in 2007, reveals that 3 of those employees have unique EOD dates. By cross-referencing that exhibit with the anonymous data, it would be possible for the Union to deduce the particular test scores of those three individuals.⁷ To obviate that risk, we shall order the Postal Service to seek the consent of the three employees with unique EOD dates to disclose to the Un-

⁷ The remaining 19 employees share an EOD with at least one, and as many as nine, other employees. Thus, if their hiring-register data is furnished without identifying employees by name (and without placing employees with a common EOD date in alphabetical order), a reader would be unable to deduce the test score of any of those 19 individuals.

ion their test scores, veterans' preference points, final rating, exam date, and EOD date. If all three consent, the Postal Service shall furnish to the Union the test score, veterans' preference points, final rating, exam date, and enter-on-duty date of each of the 22 employees hired in 2007, without identifying any employee by name. If one or more of the three employees withholds his or her consent, the Postal Service shall allow the Regional Director or her agent to view, at the Postal Service's premises, the test score, veterans' preference points, final rating, exam date, and enter-on-duty date of each of the 22 employees hired in 2007, without identifying any employee by name. The Regional Director or her agent should then inform the parties whether it appears that the order of hiring in 2007 comports with that data, and, if it does not, the respect in which it does not. The Union may then proceed accordingly.

ORDER

The Respondent, United States Postal Service, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with National Postal Mailhandlers' Union, Local 313, NPMHU (the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

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

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

(a) Seek the consent of the three employees hired in 2007 having unique enter-on-duty dates to disclose to the Union their test scores, veterans' preference points, final ratings, exam dates, and enter-on-duty dates.

(b) If the three employees referred to above consent to disclosure, furnish to the Union the test score, veterans' preference points, final rating, exam date, and enter-on-duty date of each of the 22 employees hired in 2007, as specified in the remedy section of this decision, without identifying any employee by name.

(c) If any of the three employees referred to above does not consent to disclosure, allow the Board's Regional Director or her agent to view, at the Respondent's premises, the test score, veterans' preference points, final rating, exam date, and enter-on-duty date of each of the 22 employees hired in 2007, without identifying any employee by name.

(d) Within 14 days after service by the Region, post at its San Juan, Puerto Rico facilities copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 during 2007.

(e) 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

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT refuse to bargain collectively with National Postal Mailhandlers' Union, Local 313, NPMHU

⁸ 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."

(the Union) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL seek the consent of the three employees hired in 2007 with unique enter-on-duty dates to disclose to the Union their test scores, veterans' preference points, final ratings, exam dates, and enter-on-duty dates.

If the three employees referred to above consent to disclosure, WE WILL furnish to the Union the test score,

veterans' preference points, final rating, exam date, and enter-on-duty date of each of the 22 employees hired in 2007, without identifying any employee by name.

If any of the three employees referred to above does not consent to disclosure, WE WILL allow the Board's Regional Director or her agent to view, at our premises, the test score, veterans' preference points, final rating, exam date, and enter-on-duty date of each of the 22 employees hired in 2007, without identifying any employee by name.

U.S. POSTAL SERVICE