

McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center and Service Employees International Union Local 49, CTW-CLC. Cases 19-CA-077096 and 19-CA-095797

July 29, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On June 3, 2013, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

¹ The Respondent argues that the Board cannot decide this case because it lacks a validly appointed quorum. We reject this argument. The Respondent further argues that the Acting General Counsel at the time was not validly appointed and therefore lacked the authority to issue a complaint. In support of this argument, the Respondent asserts that the Federal Vacancies Reform Act (Vacancies Act) does not apply to the office of General Counsel because there is a specific procedure under the National Labor Relations Act for filling the vacancy. Contrary to the Respondent's assertion, the express terms of the Vacancies Act make it applicable to all executive agencies, with one specific exception inapplicable here, 5 U.S.C. § 3345(a); see 5 U.S.C. § 105 ("Executive agency" defined to include independent agencies), and to all offices within those agencies, such as the office of General Counsel, that are filled by presidential appointment with Senate confirmation, 5 U.S.C. § 3345(a). The Respondent's assertion is also contrary to Sec. 3347 of the Vacancies Act, which makes the Vacancies Act the exclusive means for designating an acting official for a covered position except when another statutory provision, such as Sec. 3(d) of the NLRA, provides for such designation. In that event, the Vacancies Act provides a valid "alternative procedure." S. Rep. No. 105-250, at 17 (1998). The President may elect either the Vacancies Act or Sec. 3(d) as the means to temporarily fill the vacancy. Therefore, the Acting General Counsel was properly appointed under the Vacancies Act. See *Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542-543 (S.D.W. Va. 2008), *affd.* 570 F.3d 534 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel designated pursuant to the Vacancies Act).

Finally, even if the appointment had not been proper under the Vacancies Act, that defect would not constitute grounds for attacking the complaint. It is the enforcement provision of the Vacancies Act, 5 U.S.C. § 3348, which deems an office "vacant" and actions taken by its occupant of "no force or effect" if it was temporarily filled in a manner inconsistent with the Vacancies Act. This provision, by its terms, is expressly and specifically inapplicable to the office of the Board's General Counsel. 5 U.S.C. § 3348(e)(1). Thus, regardless of whether the Acting General Counsel was properly appointed under the Vacancies Act, the complaint is not subject to attack based on the circumstances of his appointment.

I.

The complaint, issued on February 19, 2013, alleges that the Respondent violated Section 8(a)(5) and (1) on two occasions: (1) by unreasonably delaying the furnishing of relevant information requested by the Union² in connection with the processing of a grievance; and (2) by failing altogether to furnish requested information about health insurance changes affecting unit employees. A hearing was held on March 12, 2013.

Approximately 2 months after the hearing closed, the Respondent and the Union filed a joint motion requesting that the judge approve the withdrawal of the charges and dismiss the complaint in light of a non-Board settlement between them. The General Counsel opposed the motion, and the judge ultimately denied it, finding that the non-Board settlement did not meet the requirements of *Independent Stave Co.*, 287 NLRB 740 (1987). The judge subsequently issued the attached decision finding both of the alleged violations. The Respondent excepted both to the judge's decision to reject the settlement agreement and to his decision on the merits of the allegations. Contrary to the judge, and for the reasons set forth below, we approve the settlement and dismiss the complaint.

II.

In the settlement, the Respondent agreed that "as a quid-pro-quo for the withdrawal by the Union" of the Board charges, the Respondent would respond to the Union's future information requests in a "timely fashion."³ The Respondent also agreed in the settlement not to "propose any modifications to the current health benefits or contribution rates of bargaining unit employees" until the parties begin negotiating for a successor collective-bargaining agreement and not to implement changes until it reaches an agreement with the Union or the parties reach impasse. The agreement does not require the

² The Union has represented a unit of the Respondent's non-professional employees since about July 2004.

³ The settlement agreement states that "in a timely fashion" means:

that the Hospital will provide the Union with the information being sought, subject to the following, with ample time following the Union's receipt of the information, so as not to prejudice the Union's review and use of the information, including but not limited to information in regards to the investigation of any grievance and/or the filing and processing of any grievance[]

and

that, in the event the Hospital determines that the Union is not entitled under the Act to any given information being sought, the Hospital shall inform the Union in writing of such determination with ample time following such notification so as not to prejudice the Union in seeking to obtain the information through whatever available means of recourse.

Respondent to turn over the previously requested healthcare benefits information or to post any remedial notice.

III.

The Board has long had a policy of encouraging the peaceful, nonlitigious resolution of labor disputes. *Independent Stave*, supra, 287 NLRB at 741. In determining whether to approve a privately negotiated settlement agreement, the Board assesses whether approving the agreement would effectuate the purposes and policies of the Act, based on considerations including: (1) whether the charging party, the respondent, and any of the individual discriminatees have agreed to be bound and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements. *Id.* at 743. As discussed below, these factors do not uniformly weigh in favor of approval or disapproval of the parties' settlement, making this a close case. On balance, and in the particular circumstances presented here, we approve the settlement agreement.

As mentioned, the General Counsel opposes the settlement, arguing that it should not be approved given the late stage of the litigation, the vagueness of the settlement's language, the lack of a Board-approved remedy and enforcement mechanism, and the fact that the Respondent is a "recidivist."

The General Counsel's opposition to the settlement is an important consideration weighing against approval. See, e.g., *Clark Distribution Systems*, 336 NLRB 747, 750 (2001). The fact that the parties signed the settlement agreement late in the decisional process, 2 months after the hearing had closed and after the deadline for posthearing briefs had passed, also weighs against approving the settlement, as it does not lead to any significant conservation of Board resources. See *TNS, Inc.*, 288 NLRB 20, 22 (1988). This is especially true where, as here, the case does not raise any novel or complex issues of law. *Id.* Neither of these considerations is determinative, however, and we find that the countervailing factors outweigh these concerns.

The Respondent and the Union both agreed to the settlement. Although only the Respondent asks that we approve the settlement, the Union has not opposed this

request,⁴ and there are no individual discriminatees bound by the settlement. Further, there are no allegations of fraud, coercion, or duress in reaching the settlement. Contrary to the General Counsel's assertion, there also is no evidence in the record that the Respondent has a history of violating the Act or has breached previous settlement agreements.⁵

We also find, contrary to the judge and the General Counsel, that the settlement is reasonable in all the circumstances. Significantly, the Respondent has agreed not to propose any modifications to the current health benefits or contribution rates of bargaining unit employees until the parties begin negotiating for a successor collective-bargaining agreement, and not to implement any changes until it reaches an agreement with the Union or the parties reach an impasse in negotiations. Because the Union's request for health benefits information was made in response to the Respondent's apparent intent to make such changes, this commitment by the Respondent appears to be of substantial value to the Union and would appear to obviate the Union's immediate need for that information. In addition, the Respondent has agreed to timely respond to future requests for information.

We recognize that the settlement does not provide all the remedies that would be included in a Board order. The typical Board remedy for a respondent's unlawful failure to provide information is to require the respondent to provide the information and post a notice, accessible to employees, stating that it will cease and desist from refusing to provide the requested information (or from unreasonably delaying providing it), that it will provide the requested information, and that it will not "in any like or related manner" interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Union here agreed to a settlement that does not include these remedies. Even so, we do not agree with the judge and the General Counsel that the lack of a full remedy

⁴ The Union did not file a post-hearing brief to the judge and did not file any exceptions or an answering brief to the Respondent's exceptions.

⁵ As evidence of prior misconduct, the General Counsel cites a prior settled case involving the Respondent (Case 36-CA-010726), which involved conduct that took place in 2010. The General Counsel also alleges that the Respondent's parent company Community Health Services, or CHS, has a history of similar allegations of unlawful conduct, citing two prior cases, one from 2010 and one from 2012, both of which settled. Even assuming that CHS is the Respondent's parent company and that the Respondent may be charged with responsibility for CHS's alleged misconduct, we cannot find that the Respondent has engaged in a pattern of unlawful conduct. The record contains no details of any of these prior settlement agreements from which it can be determined whether they involve only allegations of misconduct or may, instead, serve to establish a pattern of misconduct. See *Southwest Chevrolet Corp.*, 194 NLRB 975, 975 (1972), *enfd. sub. nom. Behrendt v. NLRB*, 1972 WL 3090 (7th Cir. 1972).

warrants rejecting the settlement here, given the commitments made by the Respondent in return for the withdrawal of the charges.

As an initial matter, it is well established that approval of settlements under *Independent Stave* does not require that the remedies provided by the settlement be coextensive with the remedies that the Board would provide if the General Counsel were to prevail on all of the complaint allegations. *Independent Stave*, supra, 287 NLRB at 743. In this case, although the Respondent is not immediately required to provide the requested information to the Union, once the Union begins preparing for successor negotiations it may request any information necessary to prepare its healthcare proposals or to evaluate the Respondent's proposals on that subject. See *Kraft Foods North America*, 355 NLRB 753 (2010). Further, although the settlement does not contain a provision requiring the Respondent to cease and desist from failing to provide relevant information (or from unreasonably delaying providing it), the Respondent has affirmatively agreed to timely respond to future requests, and the Union remains free to file a new unfair labor practice charge in the event the Respondent fails to do so.

The settlement agreement's failure to require the Respondent to post a remedial notice is more problematic. In the context of settlements, such notices are meant to reassure employees of their rights under Section 7 of the Act and to outline the action taken in connection with the settlement. The absence of a notice-posting requirement is thus an important consideration in deciding whether the Board will approve a settlement, but it is not determinative. See *Flint Iceland Arenas*, 325 NLRB 318, 319 fn. 4 (1998).

As a general matter, we do not endorse the settlement of alleged unfair labor practices without a notice to employees of the alleged violations and the actions taken to settle them. But we do not find that the lack of a notice posting here is enough to overcome our well-established policy of encouraging settlements between the parties. The alleged violations did not result in any employee discipline or discharges, did not involve any threats or coercion, and had a limited impact on individual employees. In these circumstances, we do not find it necessary to reject the settlement agreement due to its lack of a notice-posting requirement. Compare *Longshoremen ILA Local 1814 (Amstar Sugar)*, 301 NLRB 764, 765 (1991) (approving settlement that lacks notice posting, saying that the purposes of the Act are best served by settlement "even at the cost of public vindication of the unfair labor practice").

We also do not agree with the judge and the General Counsel that the settlement agreement lacks an accepta-

ble enforcement mechanism. The settlement agreement does not explicitly address what will happen if the Respondent fails to provide requested relevant information "in a timely fashion" in the future. As stated, however, no provision of the settlement agreement purports to waive the Union's access to the Board, and the Union may file an unfair labor practice charge over any subsequent unreasonable delays or outright refusals to provide requested relevant information. Compare *Hughes Christensen Co.*, 317 NLRB 633, 634 (1995) (giving effect to releases that did not waive employees' statutory rights of access to the Board for incidents arising after execution of releases). Further, future noncompliance with the agreement or new violations of the Act could also result in the revocation of the settlement agreement and the continuation of proceedings in this case. See *Twin City Concrete*, 317 NLRB 1313, 1313-1314 (1995); *Norris Concrete Materials*, 282 NLRB 289, 291 (1986).⁶ With these safeguards in place, the lack of a separate enforcement mechanism does not preclude us from approving this particular settlement.

IV.

On balance, we find that the parties' settlement adequately serves the policies underlying the Act as well as the Board's longstanding policy encouraging the amicable resolution of disputes. See *Hospital Perea*, 356 NLRB 1204 (2011). Accordingly, we approve the settlement and dismiss the complaint.⁷

ORDER

The complaint is dismissed.

MEMBER HIROZAWA, ruling on motion.

The Respondent, by its attorney, Don T. Carmody, has moved for my recusal in this matter. The Respondent contends that in 1997, Carmody, brought a civil action on his own behalf against Communications Workers of America (CWA); that I was retained to represent CWA in that action, deposed Carmody, and filed counterclaims against him on CWA's behalf; and that the litigation was "acrimonious." The Respondent contends that my role in that case would cause a reasonable person to question my impartiality here, relying on 28 U.S.C. § 455 (the statutory standard applicable to Federal judges) and 5 C.F.R. §§ 2635.101 and 2635.501 (ethical standards for executive

⁶ In addition, the Respondent's noncompliance with the parties' settlement could have implications under Sec. 301 of the Labor Management Relations Act. 29 U.S.C. § 185.

⁷ Because we dismiss the complaint on these grounds, we find it unnecessary to pass on the remainder of the judge's analysis and the Respondent's other exceptions.

branch employees). The motion is denied for the following reasons.

Pursuant to 28 U.S.C. § 455, “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned” or “[w]here he has a personal bias or prejudice concerning a party” By its terms, 28 U.S.C. § 455 applies only to Article III judges, see *Greenberg v. Board of Governors of the Federal Reserve*, 968 F.2d 164, 167 (2d Cir. 1992), and it would not warrant recusal here even if it applied. I harbor no personal bias or prejudice against Carmody. While some of the events giving rise to the lawsuit may have entailed acrimony,¹ I have no recollection of any acrimony or hostility between Carmody and myself in the course of the litigation or at any other time. A reasonable person would not question my impartiality based on these circumstances. Moreover, the courts have “drawn a sharp distinction between alleged hostility between judge and party and alleged hostility between judge and attorney.” *U.S. v. Helmsley*, 760 F.Supp. 338, 342 (S.D.N.Y. 1991), affd. 963 F.2d 1522 (2d Cir. 1992). Section 455 designates “personal bias or prejudice concerning a party,” 28 U.S.C. § 455(b)(1) (emphasis added), and not bias or prejudice against a party’s lawyer, as grounds for recusal. “[B]ias against a lawyer, even if found to exist, without more is not bias against his client.” In re *Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988), cert. denied 490 U.S. 1102 (1989). “Except in ‘extreme’ and ‘rare’ cases, . . . the appearance of hostility on the part of the judge toward an attorney has been ruled an insufficient basis for recusal.” *Helmsley*, supra, at 342 (citation omitted; emphasis in original). I have never expressed any form of hostility toward the Respondent, nor does the Respondent allege that I have.

The Respondent also contends that 5 C.F.R. § 2635.101 requires recusal, in particular, the provisions stating that executive branch employees “shall act impartially and not give preferential treatment” to anyone and “shall endeavor to avoid actions creating the appearance that they are violating . . . the ethical standards set forth in this part.” The regulations provide that whether particular circumstances create such an appearance “shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.” *Id.*; see also 5 C.F.R. § 2635.501. In the present case, the Respondent baselessly speculates that I “would give preferential treatment to the General Counsel and/or the Union due to the prior litigation that featured the [Respondent’s counsel] squaring off against Member Hirozawa.” As noted

¹ I was not involved in any of those events.

above, I have no recollection of any acrimonious interactions with Carmody, and any such events would have occurred approximately 17 years ago. Under these circumstances, no reasonable person would conclude that my participation in this case violated ethical guidelines.²

Finally, the Respondent makes no argument based on Executive Order 13490, “Ethics Commitments by Executive Branch Personnel,” but I observe that my participation in this case is consistent with the provisions of the Order. Under Executive Order 13490, a member of the executive branch may not, for a period of two years from the date of his appointment, “participate in any particular matter involving specific parties that directly and substantially related to [the member’s] former employer or former clients, including regulations and contracts.” Executive Order No. 13490, 74 Fed.Reg. 4673 (2009). See *NLRB v. Regency Grande Nursing & Rehabilitation Center*, 453 Fed.Appx. 193, 197 (3d Cir. 2011). My current employment with the National Labor Relations Board began in 2010.

The motion for recusal is denied.

Adam D. Morrison, for the Acting General Counsel.

Don Carmody, for the Respondent.

Gene Mechanic, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. Service Employees International Union Local 49, CTW-CLC (the Charging Party or Union) filed the respective charges, as amended, on March 22 and May 23, 2012,¹ and January 3, 2013, and the Acting General Counsel (the General Counsel) issued the consolidated complaint (complaint) on February 19, 2013. The Respondent, McKenzie-Willamette Regional Medical Center Associates, LLC d/b/a McKenzie-Willamette Medical Center (Respondent or McKenzie), filed a timely answer on March 5, 2013, denying all material allegations and setting forth affirmative defenses.²

The complaint alleges that Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) for unreasonably delaying the furnishing of relevant information requested by the Union and by failing to furnish infor-

² In any event, the contention makes little sense in the context of this case, in which the Union and the Respondent entered into a settlement and the Union does not oppose the Respondent’s effort seeking its approval.

¹ All dates are in 2012, unless otherwise indicated.

² More than once at hearing and in its answer, the Respondent argues, citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that the Board cannot decide this case because it lacks a quorum due to the alleged unconstitutional recess appointment of two of the three current Board members. For the reasons stated in *Bloomingtondale’s Inc.*, 359 NLRB 1015 (2013), and *Belgrove Post Acute Care Center*, 359 NLRB 633 (2013), these arguments are rejected. In any event, the Acting General Counsel is not a recess appointee.

mation requested by the Union. This case was heard on March 12, 2013, in Eugene, Oregon. On March 11, ahead of hearing, I denied Respondent's petition to revoke the General Counsel's document subpoena and I ordered Respondent to produce records at trial. (GC Exh. 19.) Respondent failed to produce any documents at trial without any satisfactory explanation why it would not produce the subpoenaed documents.³

On the entire record,⁴ including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel,⁵ I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Jurisdiction

At all times material, Respondent, a Delaware corporation with an office and place of business in Springfield, Oregon, has been operating an acute care hospital providing inpatient and outpatient medical care. In about 2010, Community Health Systems (CHS), a national hospital corporation, purchased Respondent's hospital. Respondent admits, and I find, that during the calendar year ending December 31, 2012, it derived gross revenues in excess of \$250,000 and purchased and received goods valued in excess of \$5000 directly from points outside of Oregon. Respondent also admits, and I find, that at all material times, it has been a health care institution within the meaning of Section 2(14) of the Act and has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties further admit, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. Background Facts

At all material times since about July 29, 2004, based on Section 9(a) of the Act, the Respondent has recognized the Union as the exclusive bargaining representative for the unit of nonprofessional employees (the unit) which constitute a unit

³ At hearing, the General Counsel moved and I granted *Bannon Mills*, 146 NLRB 611, 614 fn. 4 633-634 (1964), sanctions and drew adverse inferences against Respondent and barred Respondent from presenting any evidence challenging the information requests or the underlying relevancy of those requests for Respondent's continued failure to produce documents at trial in response to a February 22, 2013 document subpoena. See Tr. 13-16, 33-34; GC Br. at 7-9; GC Exh. 19; and *Teamsters Local 776 (Pennsylvania Supply)*, 313 NLRB 1148, 1154 (1994) (adverse inference properly drawn against the party who refuses to comply with the subpoena with respect to the subject matters sought by the subpoena).

⁴ The transcript errors have been noted and corrected.

⁵ Despite an April 16, 2013 posthearing brief filing deadline communicated to all parties at hearing, only the Acting General Counsel timely filed a posthearing brief on April 16, 2013. On May 10, 2013, more than 3 weeks after the previously-mentioned posthearing brief filing deadline, the Respondent and the Charging Party filed and served a joint motion requesting that I approve the withdrawal of charges and dismissal of the consolidated complaint in this action due to a non-Board Settlement Agreement dated April 30, 2013, between the Respondent and the Charging Party, which motion was denied by me on May 30, 2013, for failure to satisfy the factors laid out in *Independent Save Co.*, 287 NLRB 740, 743 (1987).

appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.⁶ The Union and the Respondent have entered into successive collective-bargaining agreements (CBA's), the most recent of which was effective from May 11, 2011, through December 31, 2013 (the current CBA). The CBA contains a grievance and arbitration procedure and specifies that health insurance will be provided to employees by Respondent using the CHS health benefit plan, its own self-insured plan.

The parties further admit, stipulate to, and I find that Respondent's vice president of human resources, Megan O'Leary (O'Leary), is a supervisor of Respondent, within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. Furthermore, the parties admit, stipulate to, and I further find that Respondent's perioperative director, Dee Boshaw, and its cardiovascular operating room (CVOR) director, Vivian Hoppe (Hoppe), are both supervisors of Respondent, within the meaning of Section 2(11) of the Act and also agents of Respondent within the meaning of Section 2(13) of the Act.

C. Unfair Labor Practices

Joseph West (West) has been employed by the Union as its primary organizer at the Respondent since 2010. West represents unit employees at the Respondent and, among other things, he recruits and trains union stewards, makes sure that unit members at worksites have appropriate information and he handles numerous grievances, information requests, worksite meetings with Respondent's human resources officers, and he deals with all worksite restructures.

Lynn-Marie Crider (Crider) has also been employed by the Union as a bargaining coordinator for approximately 6 years with a break in service from 2009 to September 2011, when she returned to the Union. Crider expects to be the primary negotiator for the Union when negotiations with the Respondent come due for a successor CBA later this year. In her capacity as bargaining coordinator, Crider also assists less skilled bargainers with collective bargaining, handles negotiations for new contracts, and with a specialty in healthcare and healthcare policy issues, she often comes into bargaining when there are issues related to healthcare and employee health benefits.

The complaint in these cases, as amended, alleges one continuing unlawful delay by the Respondent in providing information requested by West on behalf of the Union first in February, and one unlawful failure to furnish information requested in November by Crider on behalf of the Union.

First, the General Counsel alleges that since February 23 and continuing to September 23, the Respondent unreasonably delayed providing the Union repeatedly requested relevant information. Specifically, the requested information relates to the personnel files, including disciplinary and corrective actions, of certain named bargaining unit employees which support the Respondent's February 21 grievance response letter concerning one named bargaining unit employee's work performance and

⁶ The unit employees are more particularly described in the nonprofessional positions set forth in appendix A annexed and incorporated by reference in the complaint. GC Exh. 1(n) at 3 and appendix A.

behavior along with the weekly CVOR (CVOR) department work schedules for January and February.

Second, it is further alleged that the Respondent, despite repeated requests beginning in November, unlawfully failed to furnish the Union requested information which generally relates to information about the Respondent's health insurance plan covering its bargaining unit employees. The request for this health insurance plan information was made after the Respondent informed the Union of its intent to make changes to the plan prior to the expiration of the current CBA.

1. The Union's February 23 and May 14, 2012 requests for information

As described above and in paragraphs 6(a), (b), (g)–(i), 7 and 8 of the complaint, the General Counsel alleges that since February 23 and continuing to September 23, the Respondent unreasonably delayed providing the Union repeatedly requested relevant information. Specifically, the requested information relates to the personnel files, including disciplinary and corrective actions, of certain named bargaining unit employees which support the Respondent's February 21 grievance response letter concerning one named bargaining unit employee's work performance and behavior along with the weekly cardiovascular operating room department schedules for January and February.

In early February, West filed a grievance with O'Leary on behalf of unit employee Melissa Frost (Frost), a unit employee scrub technician in the CVOR, alleging abuse discrimination and retaliation directed toward Frost by Hoppe and O'Leary and West requested all information regarding the investigation concerning the work environment in the CVOR. (GC Exhs. 2 and 3.)⁷

On February 21, O'Leary responded to West and Frost's step 1 grievance by denying it on grounds that included that the grievance does not state a cognizable violation of the CBA and does not state sufficient facts to support a winning grievance. Moreover, the response lays blame on Frost's own conduct for any alleged hostile work environment. (GC Exh. 4.)

After receiving O'Leary's February 21 grievance response, West advance Frost's grievance to step 2. On February 23, West requested information from O'Leary in support of Frost's step 2 grievance including, but not limited to, personnel files of Frost, another unit employee, and current and former employees connected to the CVOR, all disciplinary actions and all corrective action for the same employees, a list of employees and documents that relate to interactions between these employees from May 2011 including the Respondent's response to the interactions, and all documents relied on by the Respondent in denying Frost's step 1 grievance. (GC Exh. 5.)

The Respondent provided no information to the Union's information request and on March 14, West repeated his request to O'Leary on behalf of Frost. (GC Exh. 6.) After receiving no information from the Respondent, West advanced Frost's grievance to step 3 on March 19. (GC Exh. 7.)

West sent additional informational requests to O'Leary on

March 21 and 22, and May 14 that repeated the original request for information and added a request for the weekly CVOR work schedules for all of January and February. (GC Exh. 8–10.) The Respondent did not respond to these information requests at that time and did not object to any of the requests on any grounds.

Eventually, the Union received the information from the Respondent on September 23. By this time, the Union had already processed the grievance up to the point of arbitration. After finally receiving the requested information, the Union rescinded Frost's grievance based on the information it received and its legal counsel's reconsideration of the merits of the grievance.

2. The Union's November 21, 2012 request for information

As described above and in paragraphs 6(c)–(g), (j), 7 and 8 of the complaint, it is further alleged that the Respondent, despite repeated requests beginning in November, unlawfully failed to furnish the Union requested information which generally relates to information about the Respondent's health insurance plan covering its bargaining unit employees.

The CBA provides that the Respondent shall provide the Union with advance written notice of any proposed health plan benefits modifications. (GC Exh. 12 at 38–41.)

O'Leary had previously provided the Union with such advance notice tied to proposed changes in Respondent's health care benefits for 2011, and the Union responded by requesting information tied to the proposed modifications. The Respondent provided the Union some of the requested information and O'Leary later told Crider that the Respondent was withdrawing its proposed changes to its health benefits in 2011.

In mid-November, West had conversations with O'Leary after she asked to meet with him to provide him proposed health plan benefit modifications for early enrollment for employees in advance of the upcoming 2013 health plan year. O'Leary provided West with a basic summary containing the Respondent's proposed increased benefits costs for employees and their family for Respondent's various medical plans effective for 2013. (GC Exh. 11.) West told O'Leary that the Union had a right to respond and request additional information concerning the proposed changes to the health plan benefits brought on by the basic summary provided to him by O'Leary.

Later in November, West passed on the same basic summary information he had just received from O'Leary (GC Exh. 11), to Crider as the Union's CBA bargaining coordinator and she continued the dialogue between the Union and the Respondent from that point forward with O'Leary.

As she had done in the past, Crider reviewed the Respondent's basic summary of proposed changes to the health plan benefits for 2013 and on November 21, Crider prepared and sent to O'Leary a request for health insurance plan information with a production deadline of December 10 after the Respondent informed the Union of its intent to make changes to the plan prior to the expiration of the current CBA which includes the following:

- (i) Copy of Summary Plan Description;

⁷ Although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

- (ii) Financial impact of the plan design and employee contribution rate changes;
- (iii) Actuarial value of the plan;
- (iv) Cost of the plan to McKenzie-Willamette [Respondent];
- (v) Method of fixing plan cost to McKenzie-Willamette;
- (vi) Reserves (for payment of claims);
- (vii) Experience (reporting figures);
- (viii) Medical claims cost and administrative expenses;
- (ix) Medical claims incurred for services at CHS-affiliated hospitals;
- (x) Actual cost to supply services at CHS-affiliated hospitals;
- (xi) Contractual discounts for services provided at CHS-affiliated hospitals; and
- (xii) Prices to the plan of services provided at McKenzie-Willamette entities, other network providers, and non-network providers.

(GC Exh. 13.)

Crider explained that this information was needed so that she and the Union could effectively bargain with Respondent about its proposed changes to its health plan. Her 4-page November 21 letter contains further reasons why the Union needed the information. (GC Exh. 13.) Significantly, Crider explained that the summary plan documents were needed to establish a baseline for discussions of proposed changes to the plan, financial information was needed for an independent analysis of the overall cost of the plan to evaluate what portions of the proposed plan cost increases should be shouldered by the unit employees versus other ways to shift costs elsewhere, local Respondent operating costs were needed to compare to the CHS national plan costs, and information related to costs at other CHS-affiliated hospitals would be used for comparison and alternate proposals at anticipated bargaining sessions.

The Respondent did not provide any of the requested information to the Union by December 10 or any other time.

On December 14, Crider called and left O'Leary's staff a telephone message asking O'Leary to call Crider back.

Crider called O'Leary again on December 17, and told her that she was calling to follow up on the November 21 information request letter and Crider asked her if the Respondent intended to respond to the request for information. O'Leary told Crider that she had sent the request letter on to Respondent's lawyers and they would be talking to the Union. The two further discussed the Union's need for the requested information and that the Union would take the necessary steps to obtain the requested information. O'Leary acknowledged that she understood this.

Moreover, Crider pointed out to O'Leary that it was unclear to the Union whether the Respondent intended to make the proposed changes to its health care plan beginning in less than a month as referenced in the basic summary proposal that O'Leary gave to West just a month before. In addition, Crider further pointed out to O'Leary that the Union had not yet received the written formal notice of the proposed modifications

to the health plan called for in the CBA. O'Leary responded by telling Crider that Respondent was not planning "at that moment" to make any changes to its health plan but that Respondent was talking to both of its unions about such proposed changes. O'Leary further commented that she believed that formal notice to the Union is only necessary to make changes that allow the Respondent to terminate the CBA.

On December 18, Crider received O'Leary's December 17th written notice of proposed changes to Respondent's 2013 health plan benefits addressed to the Union's president, Ms. Meg Niemi (Niemi), which contradicted O'Leary's oral statement to Crider the day before that Respondent was not planning to make changes to its health plan. (GC Exh. 14.)

On December 20, Union President Niemi sent O'Leary a letter acknowledging receipt of O'Leary's December 17 letter proposing changes to certain benefit plans. The December 20 letter requested that discussions between the Respondent and the Union begin as soon as possible concerning the proposed changes and the letter pointed out to O'Leary that the information requested on November 21 had not yet been provided and that the information was necessary to complete good-faith bargaining about the Respondent's proposed changes to health plan benefits. The letter further states that despite Respondent asking its employees to enroll for the 2013 health plan and Respondent's notice of contemplated changes to the plan, the Union notes that it would object if the proposed changes are effective on January 1, 2013, as the December 17th notice letter does not specify a proposed effective date for the changes. (GC Exh. 15.)

On January 15, 2013, Crider emailed O'Leary another reminder request for the same information requested as of November 21 pointing out that whether Respondent wishes to pursue changes in the health plans in 2013, the Union needs the requested information in order to evaluate the plans, determine whether or not the plans conform to the ACA, develop proposals for the bargaining unit for a successor contract, and engage in meaningful bargaining at that time. The letter further mentions that Respondent has ignored and not provided any of the requested information.

None of the information requested in the November 21 information request was provided to the Union by the Respondent and the Respondent did not object to any of the requests on any grounds.

Analysis

A. The Respondent's Untimely Responses to the Union's February and May Information Requests

An employer has an obligation to provide a union with relevant information during collective-bargaining negotiations. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956). It is well settled that an employer must provide information relevant to a union's decision to file or process grievances. See *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976). If the information sought relates to the processing of a grievance (or potential grievance), the legal test is whether the information is relevant to the grievance and the determination of relevancy is made based on a liberal, discovery type of

standard. *Acme*, 385 U.S. at 437; *Knappton Maritime Corp.*, 292 NLRB 236 (1988). In determining possible relevance, the Board does not pass upon the merits, and the labor organization is not required to demonstrate that the information is accurate, not hearsay, or even, ultimately reliable. *Postal Service*, 337 NLRB 820, 822 (2002). Like a flat refusal to bargain, “[t]he refusal of an employer to provide a bargaining agent with information relevant to the union’s task of representing its constituency is a per se violation of the Act” without regard to the employer’s subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), enf. 603 F.2d 1310 (8th Cir. 1979).

Information concerning employees in the bargaining unit and their terms and conditions of employment, is deemed “so intrinsic to the core of the employer-employee relationship” as to be presumptively relevant. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997). Presumptively relevant information must be furnished on request to employees’ collective-bargaining representatives unless the employer establishes legitimate affirmative defenses to the production of the information. *Metta Electric*, 349 NLRB 1088 (2007); *Postal Service*, 332 NLRB 635 (2000). However, when the requested information does not concern subjects directly pertaining to the bargaining unit, such material is not presumptively relevant, and the burden is upon the labor organization to demonstrate the relevance of the material sought. *Disneyland Park*, 350 NLRB at 1257; *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000).

Here, I find that the information requested in this case, personnel files, disciplinary actions, and CVOR work schedules for some unit employees in connection with a unit employee’s step 2 grievance is presumptively relevant. See *Booth Newspapers, Inc.*, 331 NLRB 296, 300 (2000); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992); *Castle Hill Healthcare*, 355 NLRB 1156, 1179 (2012). Nonetheless, this requested information was produced by the Respondent on September 23 without objection and I find that all objections to its production at this time have been waived and also, as referenced above, because I draw adverse inferences from Respondent’s continued failure to produce documents at hearing, the complaint allegations stand un rebutted as related to the information requests and the underlying relevance of those requests.

Moreover, the primary issue here is whether the 7-month delay in producing the requested information is a violation of the Act itself.

The first written request for this information was on February 23. The information was provided on September 23, 7 months after the initial written request for information. While there is no per se rule regarding timeliness of furnishing information, the law requires a “reasonable good faith effort to respond to the request as promptly as circumstances allow.” *Allegheny Power*, 339 NLRB 585, 587 (2003); see also *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). “An employer must respond to the information request in a timely manner” and “[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) as a refusal to furnish the information at all.” *Amersig Graphics, Inc.*,

334 NLRB 880, 885 (2000); see also *Newcor Bay City Division*, 345 NLRB 1229, 1237 (2005) (and cases cited therein). The complexity and extent of the information sought, its availability, and the difficulty in retrieving the information are factors considered in determining whether an employer has responded with reasonable promptness. *Id.*, citing *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

The Board recently affirmed the ALJ’s finding in *Mountain View Country Club, Inc.*, 359 NLRB 914 (2013), where she found that a 3-month, 21-day delay period was adequate to find a violation of the Act.

Here, Respondent is a single-location employer and does not assert that the information sought by the Union was difficult to retrieve. The personnel files, disciplinary records, and corrective actions for two unit employees in the CVOR as well as the CVOR employee work schedules for January and February would not appear to be complex and there is no evidence in the record that complexity of the information sought was a factor in the timing of production of the documents. The requested information relates specifically to unit employee Frost’s step 2 grievance. Finally, there is no evidence that the information was unavailable. Thus, the factors of complexity, availability, and extent of the information sought militate toward a prompt response. However, each time the Union reiterated its request for information, Respondent’s representative merely ignored the requests. From the lack of evidence providing an adequate explanation for the delay in production, I find that Respondent’s representative made no attempt to gather the information and provide it to the Union from February 23 until September 23 when the information was finally provided to the Union.

The Respondent offered no evidence at hearing as to why it failed to supply the requested information in a timely manner. Thus, I find that for the 7-month period from February 23 to September 23, Respondent failed to provide the information in a reasonably prompt manner and thereby bargained in bad faith with the Union. See *Mountain View Country Club, Inc.*, supra (Board affirms ALJ who found a 3-month, 21-day delay in providing information to be untimely and a violation of Section 8(a)(1) and (5) of the Act.)

For the reasons stated above, I find that Respondent’s 7-month delay in producing the requested information responsive to the February 23 information request is a violation of Section 8(a)(1) and (5) of the Act.

B. The Information Sought in the Union’s November 21, 2012 Request for Information Is Relevant and Must Be Produced

Under Section 8(a)(5) and 8(d) of the Act, an employer is required to provide the union with relevant information needed to enable it to properly perform its duties as the employees’ bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) (holding that an employer had a duty to provide information relevant to bargainable issues upon requests from the union); see also *Detroit Edison v. NLRB*, 440 U.S. 301, 303 (1979) (noting the duty to supply information turns upon “the circumstances of the particular case”) (citing *Truitt Mfg. Co.*,

351 U.S. at 153).⁸

When the union's request for information pertains to employees within the bargaining unit, the information is presumptively relevant and the employer must provide the information. *Disneyland Park*, 350 NLRB 1256, 1257 (2007). As a general rule, information regarding a bargaining unit employee's wages, hours, and other terms and conditions of employment is also presumptively relevant. *Whitin Machine Works*, 108 NLRB 1537, 1541 (1954).

The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). Here, the Respondent never produced any information responsive to the Union's November 21 information request. The information requested by the Union, here, is presumptively relevant. Information concerning the bargaining unit's health plan is presumptively relevant. See *Honda of Hayward*, 314 NLRB 443 (1994) (Information about bargaining unit employees' health insurance plans are presumptively relevant). In *Aztec Bus Lines, Inc.*, the Board affirmed the ALJ's finding that basic information such as the carrier of the health benefit plan was as much of a "component" of the health and welfare plan as was the level of coverage. *Aztec Bus Lines, Inc.*, 289 NLRB 1021, 1037 (1988). Similarly, information about the claims experience and history of unit employees on the health plan is also presumptively relevant. *Hanson Aggregates BMC, Inc.*, 353 NLRB 287, 288 (2008); *North American Soccer League*, 245 NLRB 1301, 1306 (1979).

Similarly, the Union's request for information concerning items including those itemized in its request are presumptively relevant, as the Union states, to understand the ramifications of the Respondent's mid-November proposed health plan changes—this information was needed so that the Union could effectively bargain with Respondent about its proposed changes to its health plan. Crider's November 21 letter request contains detailed reasons why the Union needed the information and the specific types of documents requested. (GC Exh. 13.) Significantly, as stated above, Crider explained that the summary plan documents were needed to establish a baseline for discussions of proposed changes to the plan, financial information was needed for an independent analysis of the overall cost of the plan to evaluate what portions of the proposed plan cost increases should be shouldered by the unit employees versus other ways to shift costs elsewhere, local Respondent operating costs were needed to compare to the CHS national plan costs, and information related to costs at other CHS-affiliated hospitals would be used for comparison and alternate proposals at anticipated bargaining sessions. See *New Surfside Nursing Home*, 330 NLRB 1146, 1146 fn. 1, 1149 (2000) (Board af-

⁸ "A broad disclosure rule is crucial to full development of the role of collective bargaining contemplated by the Act. Unless each side has access to information enabling it to discuss intelligently and deal meaningfully with bargainable issues, effective negotiation cannot occur." *Detroit Newspaper Printing & Graphic Communications Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979). "[R]elevancy is synonymous with 'germane'; and a party must disclose information if it has any bearing on the subject matter of the case." *Id.* (internal citations omitted).

firmed the ALJ's finding of relevance for information requested by the union regarding a submission to government agencies, such as Medicare, and finding that the requested information assisted the union in evaluating the employer's economic proposals and demands during bargaining).

Further, the Respondent has failed to establish any other legal basis for not producing the requested information. See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996). No evidence was offered in support of these general boilerplate objections and, on that basis, I find no loosely asserted objection warranted refusal to furnish the information. Also, as referenced above, because I draw adverse inferences from Respondent's continued failure to produce documents at hearing, the complaint allegations stand un rebutted as related to the information requests and the underlying relevance of those requests.

I observed Crider opine persuasively and with confidence that she would not have prepared and sent the November 21 request for information if she had not received the basic summary from O'Leary that caused her to request information related to the proposed health plan benefits cost increases unilaterally raised in mid-November by the Respondent.⁹ I further find that Respondent's mid-November proposed changes to its health plan covering bargaining unit employees triggered, a year ahead of the CBA's actual expiration date, the Union's need for the requested information. I further find that it was reasonable for Crider to believe that contract negotiations were resuming with Respondent's unilateral action and necessary to determine whether the Union could accept the proposed changes to Respondent's health plan benefits. Even though O'Leary denied that Respondent would seek to unilaterally propose a change to its health plan benefits in the mid-December telephone conversation with Crider, O'Leary contradicted herself when she sent formal notice to the Union of the proposed unilateral changes in her December 17 letter received the very next day by the Union. It is with this backdrop that I further find that Respondent became obliged to furnish the requested information as the General Counsel has proven that the Union raised concerns related to timely contract negotiations once the Respondent proposed its unilateral changes to its health plan benefits and that the requested information is needed to effectively bargain with the Respondent about its proposed changes.

Therefore, I find that Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent McKenzie-Willamette Regional Medical

⁹ Consistent with Respondent's unilateral or "lone wolf" strategy at the start of trial, Respondent proceeded without any witnesses to call and proclaimed, without support, that the parties had fully settled their differences over the preceding weekend and trial had become unnecessary. The General Counsel and Charging Party vehemently disagreed with Respondent's counsel about any settlement development. I asked Respondent's counsel if he had a signed settlement agreement to produce so we would not have to waste any further resources with trial. Respondent's counsel responded that he did not have a signed settlement agreement to present to me so trial went forward.

Center Associates, LLC, d/b/a McKenzie-Willamette Medical Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Service Employees International Union, Local 49, CTW-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By unreasonably delaying the furnishing of information set forth in paragraphs 6(a), (b), (g)–(i), 7, and 8 of the complaint, the Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

4. By failing and refusing to furnish the information set forth in complaint paragraph 6(c)–(g), (j), 7, and 8 of the complaint, the Respondent has engaged in an unfair labor practice

within the meaning of Section 8(a)(5) and (1) of the Act.

5. The Respondent's above-described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, it shall be ordered not to unreasonably delay the supply of relevant requested information and to produce the information and post and mail a notice to employees attached as the appendix.

[Recommended Order omitted from publication.]