

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

COLUMBIA MEMORIAL HOSPITAL

and

Case 03-CA-132367

**1199 SEIU UNITED HEALTHCARE
WORKERS EAST**

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Decision of Administrative Law Judge Steven Davis (ALJ), dated February 20, 2015, in the above-captioned case. It is respectfully submitted that in all respects the findings of the ALJ are appropriate, proper and fully supported by the credible record evidence.

I. PRELIMINARY STATEMENT

The ALJ found that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide relevant information to the Union. (ALJD at 19:15-33).¹ More specifically, the ALJ found that Respondent violated the Act by failing to provide the Union with the following relevant information:

1. Copies of contracts of any and all agencies used by the Respondent to cover vacancies in order to avoid the use of mandatory overtime.
2. Dates and times of all calls made to agencies over the last 12 months to avoid the use of mandatory overtime.

¹ Throughout this brief the following references will be used: ALJD at ___:___ for the Administrative Law Judge's Decision at page(s): line(s); GC Exh. ___ (at ___) for General Counsel's exhibit (at page number); and Tr. ___ for transcript page(s).

3. Number of agency nurses used by the hospital over the past 12 months, to include date, shift, and unit worked.
4. Copies of any and all nursing agency contracts utilized by the Respondent over the last 12 months.
5. Number of times the Respondent used and/or attempted to use agency nurses over the last 12 months, including dates and agencies. Name, shift, and detailed explanation of emergency for each time a nurse was mandated over the last 12 months.
6. Any and all documentation showing the Respondent's attempt to prevent mandating over the last 12 months.

(ALJD at 19:15-33).

On March 30, 2015, Respondent filed exceptions with the Board, relating to the ALJ's findings of fact and conclusions of law regarding the requested information covering the last 12 months. However, Respondent did not take any exceptions to the ALJ's finding that copies of the contracts that Respondent has with nursing employment agencies (Items 1 and 4 above) are relevant, would be useful in the prosecution of the Union's grievance and must be provided to the Union. (ALJD at 13:9-10, 40-42; 14:50-52).

II. ARGUMENT

- A. The ALJ properly concluded that the Union needed the requested information in furtherance of its fiduciary obligations to represent unit employees and to police the parties' collective-bargaining agreement. (Respondent's Exceptions 1, 2, 5 and 6)**

Respondent excepts to the ALJ's finding that it violated Section 8(a)(1) and (5) of the Act by failing and refusing to provide relevant information to the Union. (ALJD at 19:15-33). In the decision, the ALJ stated that all of the Union's requests meet the broad definition of relevance and that the requested information would be "of use" to the Union in carrying out its statutory responsibilities. (ALJD at 15:13-15). The ALJ found that the Union reasonably needed the requested information to determine, as part of its grievance, whether Respondent violated its collective-bargaining agreement by its alleged failure to use agency nurses as an alternative to requiring on-duty nurses to work overtime. (ALJD at 15:22-25). The ALJ also found that in

seeking documents for a one year period, the Union properly sought to police and enforce its contract which requires Respondent to “exhaust all efforts to obtain needed staff before requiring its nurses to work overtime.” (ALJD at 18:11-22).

In support of these exceptions, Respondent argues that the Union never disclosed, prior to the administrative hearing, that its requests were necessary to police the parties’ contract or to monitor Respondent’s compliance with the collective-bargaining agreement. More specifically, Respondent asserts that the specific language of the information requests reveal that the sole reason for these requests was to assist in the processing of one grievance, which was filed on March 20, 2014.² Respondent claims that the information requests were not general requests to police the contract or to obtain information to ensure enforcement of a particular contract provision. Thus, Respondent argues that the ALJ erred in erroneously accepting the Union’s justifications, as Respondent was never put on notice of these reasons, and thus gave the Union a *nunc pro tunc* basis for these requests.

However, contrary to Respondent’s arguments, the grievance specifically states, in part, that Respondent violated Article 12, Sections 3 and 5 of the parties’ collective-bargaining agreement, “by mandating employees to work overtime before attempting all alternative staffing identified in the Nurse Coverage Plan.” (ALJD at 7:39-42; GC Exh. 5). The record reveals that Article 12, Section 3 of the parties’ collective-bargaining agreement contemplates offering overtime to nurses on a voluntary basis before mandatory overtime is considered. (GC Exh. 2 at 24). Additionally, Article 12, Section 5(a) of the parties’ collective-bargaining agreement states that “Prior to requiring mandatory overtime, the Employer will exhaust all efforts to obtain needed staff as set forth in Article 12 and as required by Section 167 of Article 5 of the New

² All dates are 2014 unless otherwise noted.

York State Labor Law which restricts mandatory overtime for Registered Nurses and Licensed Practical Nurses.” (GC Exh. 2 at 24). Thus, since the grievance specifically alleges violations of the parties’ contract relating to mandatory overtime, Respondent was certainly on notice that the purpose of the information requests were, in part, to police the contract and ensure that Respondent was in compliance with the provisions relating to mandatory overtime. Moreover, Kelly Sweeney (Respondent’s Director of Human Resources) testified that the Union generally requests information relating to not just grievances, but also for contract enforcement. (Tr. 151). As the ALJ correctly points out, the specific information sought would tend to prove or disprove the Union’s claim in its grievance that nurses had been improperly mandated. (ALJD at 15:30-32).

Respondent also asserts that since it was not given actual or constructive notice of the reasons for the request, then the Union is not entitled to the information. In support of this position, Respondent relies on Emery Industries, 268 NLRB 824 (1984). However, Respondent’s reliance on Emery Industries is misplaced. In Emery Industries, the Board found that the union had waived the right to engage in midterm bargaining over changes in the employer’s absenteeism policy. Thus, the Board found that when a union waives its right to bargain over a change to a term or condition of employment, it no longer is entitled to information requested for that purpose. *Id.* at 824-825. Instead, the Board found that the union is entitled to the information only if the union gives the employer actual or constructive notice of “another legitimate basis for requesting the information.” *Id.* at 825.

However, in the instant case, the Union never waived its right to bargain over mandatory overtime for nurses. The mere fact that two prior grievances relating to mandatory overtime were resolved by the parties does not equate to a clear and unmistakable waiver of the Union’s

right to request and receive information pertaining to mandatory overtime. As the ALJ found, the information requested is relevant to the processing of the grievance and to policing the parties' contract, and Respondent has violated the Act by failing and refusing to provide the requested information.

B. The ALJ properly concluded that the Union had a reasonable belief that the parties' collective-bargaining agreement may have been violated. (Respondent's Exception 3)

Respondent excepts to the ALJ's reliance on Union Delegate Kimberly Bishop's testimony to support a finding that the Union's request for information was justified. In the decision, the ALJ found that the Union had a reasonable belief that its contract may have been violated by Respondent's failure to use agency nurses. (ALJD at 16:1-4). In support of this finding, the ALJ properly relied, in part, on Bishop's testimony that neither she nor any other nurse had seen an agency nurse work at the hospital on a per diem basis in order to avoid the use of mandatory overtime. (ALJD at 15:27-29). The ALJ also points out that although Bishop knew that Respondent had required overtime for several nurses in a seven month period, the Union did not know, until Respondent advised it pursuant to the information request, that Respondent had mandated overtime 14 times in the previous year. (ALJD at 18:12-15; Tr. 42-43).

In support of this exception, Respondent argues that Bishop's testimony is not sufficient proof of a contract violation. However, as the ALJ clearly points out, he does not need to decide whether or not Respondent violated its contract. Instead, the ALJ found only that the Union has established a reasonable belief that the contract may have been violated, which is sufficient to justify the information requests. (ALJD at 15:50-16:5).

C. The ALJ properly concluded that Respondent must provide the requested information, as Respondent failed to establish that the information request was burdensome. (Respondent's Exceptions 4 and 7)

Respondent excepts to the ALJ's finding that it has not introduced any evidence to show that the information requested was "particularly complex, voluminous or burdensome to provide." (ALJD at 17:25-26). See Comar, Inc., 349 NLRB 342, 353-354 (2007). In support of these exceptions, Respondent argues that Sweeney testified that there was a voluminous and burdensome amount of documentation that needs to be pulled together across several departments to comply with the Union's information requests covering a 12 month period. Respondent further asserts that it took the hospital 12 days to assemble the information relating to the three dates in March, in which Respondent mandated overtime for nurses, thereby showing the burdensome nature of the Union's information requests.

However, as the ALJ noted, although Respondent contends that it took the nursing department 10 days to gather the documents for the three dates in March, Sweeney did not know if her request for the number of nurses mandated in the past year (i.e., 14) required the nursing department to review voluminous documents. (ALJD at 17:2-6; Tr. 143). Additionally, the ALJ correctly points out that Sweeney did not know what records were reviewed to report that number to the Union. (ALJD at 17:6-9).

Finally, as the ALJ properly concluded, "Respondent never advised the union that its request was unduly burdensome and never sought clarification from the union in order to narrow the request." (ALJD at 17:17-19), citing Pulaski Construction Co., 345 NLRB 931, 937 (2005). See also Pratt & Lambert, Inc., 319 NLRB 529 (1995); Tower Books, 273 NLRB 671, 671-672 (1984) (finding that onus is on the party asserting a burdensome defense to prove, but must bargain about an accommodation if proven). It is well established that an employer may not

simply refuse to comply with an ambiguous or overly broad information request, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information. See A-Plus Roofing, 295 NLRB 967, 972 n. 7 (1989); Barnard Engineering Co., 282 NLRB 617, 621 (1987).

In this case, if Respondent believed the Union's request was overly broad, it had a duty to ask the Union for clarification regarding the relevance of the information. The record demonstrates that it never did so. Moreover, while the March 20 grievance involves the three mandatory overtime assignments in March, the Union also has a legitimate interest in determining whether other contract violations may have occurred on other dates. Thus, information must be produced when there is "a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative." Associated General Contractors of California, 242 NLRB 891, 893 (1979). See also Bohemia, Inc., 272 NLRB 1128, 1129 (1984). Information is generally to be produced if it would assist the Union in determining whether to proceed with a grievance. See Postal Service, 332 NLRB 635 (2000).

Based on the above, it is clear that Respondent violated the Act by failing to provide the Union with the information it requested on March 19 and April 1, 2014. The information sought by the Union was germane to the processing of the grievance and contract enforcement; it was information which only Respondent possessed; and it was necessary for the Union to engage in intelligent processing of the Union's grievance. The Respondent's failure to discuss accommodations with the Union and its outright failure to provide the information was unwarranted and unlawful, in violation of Section 8(a)(1) and (5) of the Act.

Finally, the ALJ properly concluded that Respondent must provide the requested information. It is a standard remedy in these types of cases to have an affirmative order requiring Respondent to provide the requested relevant information to the Union. See McKenzie-Willamette Medical Center, 362 NLRB No. 20, slip op. at 2-3 (February 24, 2015); Salem Hospital Corp., 360 NLRB No. 95, slip op. at 3-5 (April 30, 2014); Conditioned Air Systems, 360 NLRB No. 97 (April 30, 2014); McIntosh Mirror, Door & Glass, Inc., 358 NLRB No. 149 (2012); Quantum Hotels, LLC, 358 NLRB No. 122 (2012).

D. The ALJ's conclusions of law are proper. (Respondent's Exception 8)

Respondent excepts to the ALJ's conclusions of law. However, Respondent only restates the ALJ's findings, without making any additional arguments. Respondent's general Exception fails to state specifically what findings or conclusions that Respondent excepts to, contrary to Section 102.46(b)(1) of the Board's Rules and Regulations. As this Exception does not comply with the foregoing requirements, it is urged that the Board disregard it. See Section 102.46(b)(2) of the Board's Rules and Regulations; Fuqua Homes (Ohio), Inc., 211 NLRB 399, 400 n.9 (1974).

III. CONCLUSION

For all the reasons set forth above, General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge in their entirety.

DATED at Albany, New York, this 13th day of April, 2015.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that on April 13, 2015, I electronically filed the General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge in Case 03-CA-132367, to the Executive Secretary of the National Labor Relations Board using the NLRB E-Filing System, and I hereby certify that I provided copies of the same documents via electronic mail (e-mail) to the following parties:

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Respectfully submitted,

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