UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PROSPECT CHARTER CARE, LLC

and

Cases 01–CA–200126
01–CA–214788

UNITED NURSES & ALLIED
PROFESSIONALS, LOCAL 5110

Alan L. Merriman, Esq. and *Thomas E. Quigley, Esq.,*
for the General Counsel.
Paul Rosenberg, Esq. and *Andrea R. Milano, Esq.,*
Baker Hostetler, for the Respondent.
Chris Callaci, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Cranston, Rhode Island, on July 24, 2018. The Charging Party, United Nurses & Allied Professionals, Local 5510 (Union/UNAP/Local 5510) filed the charges on June 6, 2017, and February 14, 2018.[1] The General Counsel issued the complaint on March 27, 2018. The complaint alleged that Respondent failed and refused to furnish the Union with information requested on May 3, 2017, May 30, 2017 and January 18, 2018 in violation of Section 8(a)(5) and (1) of the Act.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Prospect Charter Care, LLC, a for-profit corporation, is engaged in the operation of a hospital, Our Lady of Fatima Hospital, providing inpatient and outpatient care in

[1] All dates are in 2017 unless otherwise indicated.

[2] I granted the General Counsel's on the record motion to amend complaint paragraph 7b to add July 24 as one of the dates that the Union requested the information referred to in that paragraph. (Tr. 65-66).

its offices and place of business in North Providence, Rhode Island.[3] Annually, Respondent, in conducting its business operations, derives gross revenues in excess of $250,000, and purchases and receives at its North Providence, Rhode Island facility, goods valued in excess of $50,000, directly from points outside the State of Rhode Island. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

Central to this case is Respondent's North Providence, Rhode Island Our Lady of Fatima Hospital. At all times relevant to this case, the following employees have been supervisors and agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act:

David Kobis- President, Our Lady of Fatima Hospital
Marc La Bella- Director, Labor Relations
Lynn Leahey- Chief Nursing Officer
Shannon Silva- Director, Surgical Services
Darlene Cunha- Chief Operating Officer
John J. Holiver- CEO, Charter Care Health Partners
Catherine Shitara- Vice President, Corporate Regulatory and Accreditation Programs

(Tr. 7; Jt. Exh. 3.) Respondent's hospital is a part of Charter Care Health Partners, established in about 2014 under the parent company, Prospect Medical Holdings.[4]

B. The Union

The following employees of Respondent constitute a unit (Nurses' Unit) appropriate for the purposes for collective bargaining within the meaning of Section 9(b) of the Act: all full-time and regular part-time registered nurses employed by the Employer at its Our Lady of Fatima Hospital (Fatima facility) and School of Nursing, located at 200 High Service Avenue, North Providence, Rhode Island, as described in Article 1, "Recognition" in the collective-bargaining agreement between Respondent and the Union. (Jt. Exh. 1, p. 1.) The following employees of Respondent constitute a unit (Service and Maintenance Unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: all full-time, regular part-time, and per diem Service and Maintenance employees employed by the Employer at its Our Lady of Fatima Hospital (Fatima facility), located at 200 High Service Avenue, North Providence, Rhode Island, as described in Article 1, "Recognition" in the collective-bargaining agreement between Respondent and the Union. (Jt. Exh. 2, p. 1).

[3] The complaint, paragraph 2a, was amended, without objection, to reflect that Respondent is a "for profit corporation." (Tr. 10).

[4] Other of Charter Care Health Partners' and/or Prospect Medical Holdings' hospitals/medical facilities in Rhode Island include Roger Williams Medical Center, St. Joseph's Healthcare Center and Charter Care Medical Associates (physician owned practice). (Tr. 154).

At all material times, the Union has been the designated collective-bargaining representative of the Nurses' Unit and Service and Maintenance Unit, and has been recognized as such by Respondent. This recognition has been embodied in collective-bargaining agreements CBAs), the most recent of which are effective from September 23, 2016 through July 31, 2019 for the Nurses' Unit, and October 30, 2016 through October 29, 2018 for the Service and Maintenance Unit (initial agreement).[5] At the time of the trial, the Union was preparing for contract negotiations on the service and maintenance employees' agreement. (Tr. 19). At all relevant times, the Union has been the exclusive collective-bargaining representative of both of these Units pursuant to Section 9(a) of the Act. Chris Callaci is the general counsel for the Union.[6] Lynn Blais is the president of the nurses' unit and Cindy Fenchel is president of the service and maintenance unit.

C. Relationship between the Union and Respondent

The parties admit that the Union and Respondent have had a somewhat contentious relationship. The Union initiated a corporate campaign against the Respondent and its holding company in about 2016–2017, which continued through all times relevant to this case. As discussed later in this decision, this campaign sought to expose and seek public support regarding various alleged deficiencies in health care delivery to patients, as well as adverse treatment of employees in the terms and conditions of their employment. (R. Exh. 2).

D. Requests for Information

1. May 3, 2017 Request for Information- JCAHO mock survey

On May 3, 2017, Blais, on behalf of the Union, requested, in writing, information related to a mock survey conducted by Respondent at its facility on about April 26, 2017, in preparation for the actual Joint Commission on Accreditation of Hospital Organizations (JCAHO/Joint Commission) survey, and to assess the hospital's compliance with JCAHO standards.[7] (GC Exh. 2). The JCAHO is an independent, not-for-profit organization that "accredits and certifies nearly 21,000 health care organizations and programs in the United States. Joint Commission accreditation and certification is recognized nationwide as a symbol of quality that reflects an organization's commitment to meeting certain performance standards."[8] Hospital accreditation by an organization such as JCAHO is also required by Medicare and Medicaid for services rendered. Normally, the actual JCAHO survey team makes unannounced visits every few years to inspect hospital policies and procedures, delivery of patient care and equipment. In 2016,

[5] Complaint paragraph 6c was amended at trial, without objection, to reflect that the service and maintenance unit contract was an initial contract. (Tr. 10). I also note that the General Counsel also amended complaint paragraph 7d to change "unit" to "units." (Tr. 11).

[6] As General Counsel, Callaci handles contract negotiations; represents the Union in arbitrations, before the Board and in state and federal court; and provides general legal advice on labor issues. (Tr. 18–19).

[7] Callaci prepared this written request, at Blais' direction and with her input regarding the mock survey results with "problematic" results. (Tr. 20). Respondent referred to this mock survey as its "Enterprise-Wide Internal Survey Readiness Assessment." (R. Exh. 2–3).

[8] See https://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx."

the Joint Commission established a new methodology called, "safer matrix" for determining the degree of risk of patient injury and whether or not findings were rare, moderate or widespread. (Tr. 158–159).

The Union advised that it had come to their attention that the mock survey had uncovered a number of violations in the operating room (OR), "eerily similar to those found in at least one of Prospect's California hospitals that resulted in the shutdown of a surgical suite as documented by the California Department of Public Health." (GC Exh. 2). The Union further stated that this was a mutual concern that, pursuant to Article 16.1 of the CBA, required a joint labor-management committee meeting to discuss such matters.[9] The Union wrote that Article XVII requires the hospital to provide nurses with equipment and supplies necessary to perform their jobs safely, and that Article XXIII requires the hospital to provide training and instruction on any substantial revisions to existing procedures.[10] The Union did not believe that the hospital was providing either, in regard to the mock survey results, and thereby requested that Respondent provide:

> [A]ny/all notes and/or documentation related to the recent mock survey, including but not limited to the above referenced corrective action plan. It is my intention to study and investigate the apparent violations in advance of 1) calling for a joint labor-management committee meeting under Article 16.1, 2) addressing employee health and safety issues under Article XVII, and addressing issues that will arise under Article XXIII.

Callaci testified that the Union also sought this information, regarding how the hospital planned to address the deficiencies, due to concerns as to whether or not any of the deficiencies found in the mock survey might result in discipline of any unit employees or insertion of negative information in their personnel files or potential adverse information being reported to the nurses' licensing board.[11] (Tr. 22–23).

On May 9, 2017, Callaci, sent a follow-up email regarding the status of the Union's May 3 request. (GC Exh. 3). By email dated May 10, Marcelino La Bella refused to provide the requested information, stating that it was "a confidential and proprietary document subject to attorney-client privilege that we will not be providing to UNAP. There have not been any substantial changes to existing procedures warranting training and instruction." La Bella did, however, state that they would welcome a joint labor-management committee pursuant to Article 16.1 to discuss any health and safety concerns of the Union, and would work with the Union to schedule a meeting. (GC Exh. 4). On May 30, Callaci informed La Bella that the

[9] The Union references "Article 16.1" regarding the joint labor-management committee meetings part of the CBA, but the portion of CBA pertaining to the joint labor-management committee meetings is actually "Section 16.1" (and Sections 16.2-16.3) under Article XVI. Here, I will reference this section as the Union has. (See GC Exh. 1, table of contents, page iii).

[10] Callaci testified that the same issues and concerns raised in this request are relevant to the service and maintenance unit employees and their bargaining agreement. (Tr. 24).

[11] It is undisputed that an employer can report any nurse's practice that is outside recognized standards of care to the State of Rhode Island, and that the Union can represent members before their professional boards in the event a complaint is filed. (Tr. 23–24).

Union had filed a charge against Respondent based on Respondent's failure to provide the information relating to the mock survey. (GC Exh. 5). Respondent provided no explanation as to why the information sought was either confidential or otherwise privileged.

Blais initiated the request for information regarding the mock JCAHO survey after several of her bargaining unit employees in the OR told her that Shannon Silva, director of surgical services (also Blais' manager), advised them that had the deficiencies found during the mock survey shown up during an actual JCAHO survey, the OR would have been "shut down." She explained that Silva had confirmed these concerns with her during a subsequent conversation, and related that she (Silva) had been tasked with bringing in a consultant firm to evaluate the instruments in the OR. (Tr. 103–105).[12]

Respondent, to date, has refused to furnish the Union with the mock JCAHO mock survey, corrective action plans, or other documents requested in connection with the survey.

2. May 30 and July 24, 2017 Requests for Information- Aesculap Presentation

a. Initial request on May 30

In the same email to La Bella, dated May 30, 2017, Callaci informed that he learned that Respondent had "publicly posted at Fatima hospital – 'Aesculap Surgical Asset management Quickscan Final Presentation.'"[13] (GC Exh. 5; Tr. 27). Callaci wrote that this document could not possibly be confidential given its public posting, and therefore, requested that Respondent provide the Union with a copy of the final/entire copy of the Aesculap presentation "and any/all documents related thereto." (GC Exh. 5). Aesculap is a health care device company and consulting firm that provides medical devices, and also, as a service, in-depth qualitative and quantitative examination and reporting of surgical instruments, focusing on instrument quality and optimization. After not receiving a response, Callaci emailed La Bella on June 12 inquiring about the status of the request. (GC Exh. 6).

On June 23, La Bella responded that:

> [F]or privacy reasons we will not disseminate the Presentation outside of the Our Lady of Fatima facility. As previously conveyed, we would welcome a joint-labor-management committee meeting to discuss any health and safety issues the union may have. In that same vein, the Union is free to arrange a time to review the Presentation on site and raise any questions regarding its contents.

[12] I credit Blais' testimony regarding how these conversations with unit members and Silva prompted her to request information regarding the mock survey. On cross-examination, Respondent's counsel attempted to discredit this testimony with evidence that Blais'July 19 meeting notes did not mention her discussions about and with Silva. However, Callaci's July 19 notes reflect his written reminder to ask "Lynn…who said that if [it] were a real JCAHO survey, the OR would've been shut down…confirm this at mtg." (GC Exh. 11). Further, Silva did not testify, and Respondent did not otherwise present evidence to rebut that these conversations took place.

[13] Aesculap conducted the onsite assessment on April 24–27.

(GC Exh. 7). On June 26, Callaci wrote La Bella that Respondent was violating the Act by refusing to provide the Union with a copy of the Aesculap presentation, and that he was renewing the Union's request and "[reserving] its right to file a Charge Against Employer if the employer fails to comply." Callaci also requested, notwithstanding, to schedule a time for the Union to review the presentation and pose questions if necessary. He advised him of the Union's intent to "avail itself of a labor/management meeting on the subject matter in issue but [insisted] that [the Union] be provided with the relevant information it has requested to date prior to such a meeting." He insisted that "[m]eeting without having had an opportunity to review the relevant information in advance, or at all, makes no sense." (GC Exh. 8).

On about June 29, La Bella responded that Respondent "refutes and denies the allegation that we have violated the law with our response to the union's request for the Aesculap Presentation." He also advised that Respondent "respectfully [disagreed] that the union has been denied the opportunity to review relevant information." He pointed out that, as per Section 16.1 of the CBA, the joint labor-management committee was a "forum to discuss matters of mutual interest," but not "designed to address grievances or negotiable matters." La Bella further wrote that:

> The Union's claim that it needs additional information beyond what the Employer has offered to share to participate in such a meeting suggests it is on a self-serving fishing expedition and there are no pressing matters for discussion. If, however, this is not the case and the Union has real issues of a mutual concern which it would like to discuss, please send a proposed agenda to Chief Human Resources Director Dick Kropp as set forth in Article 16.1.

(GC Exh. 9) The parties subsequently agreed to meet with each other in order to allow the Union to review the Aesculap summary presentation on July 19, between 2:00 and 2:30 p.m. in a human resources office training room. (GC Exh. 10).

b. July 19 meeting for review of the Aesculap summary

Present at the meeting on July 19 for the Union were Callaci, Blais and Cindy Fenchel (president of the service unit). La Bella and Darlene Cunha, Charter Care chief operating officer, represented Respondent. (Tr. 37, 85). La Bella permitted the Union representatives to view and take notes from the summary Aesculap presentation. Callaci testified that the summary report he viewed reflected an analysis of surgical instruments found in the OR such as damaged, eroded and advanced wear equipment. The report set forth the consequences of using them in those conditions and recommended actions to take. He asked some questions, but believed that he was at a disadvantage due to the short period of time he had to read the document. He admitted, however, that La Bella agreed to allow them to return on July 20 to read and take notes "without being rushed." He also recalled that the Aesculap report recommended training staff on identifying damaged or old equipment, such as "pitting corrosion on surgical instruments." (Tr. 42–43). La Bella told them that Respondent would not allow them to take copies of the report because they feared the Union would take the document out of context and use it to intentionally mislead the public about Respondent and the quality of care received at the hospital. Callaci explained that during a "follow-up

conversation with Mr. La Bella on that day in the parking lot," he agreed with La Bella that labor relations between the hospital and the Union should improve. However, when La Bella raised concern about the Union using the requested reports outside the hospital, Callaci admitted that based on what he had seen in the meeting, the Union would utilize the information as part of its public campaign. (Tr. 46, 79–80). Callaci returned on July 20 to review the report and take notes. There was only one management representative present, but only to monitor Callaci's review of the document.

In his handwritten notes from the meeting on July 19, Callaci made several notations to remind him that there was a more detailed report and that there were potential issues with discipline that could result from or implicate the contract for both units. (Tr. 48–50; GC Exh. 11).

On about May 27, Blais had personally observed a summary of the Aesculap Surgical Asset Management QuickScan report posted in the physician's lounge in the surgical area. She testified that this unlocked lounge was and is assessable to employees. The report was posted on a tri-fold board on a table with the middle section containing the presentation and the other sections containing "multiple other pieces of paper that showed pictures of actual instruments and documentation of what the problems were with each of them and things that needed to be done to fix them." There was nothing on the board indicating that its contents were confidential. Blais confirmed that the posted board included some, but not all, of the information, "in context" that was set forth in the initial Aesculap presentation summary which they viewed in the July 19 meeting. (See GC Exh. 20; Tr. 108–109). During that July 19 meeting, she asked Cunha several questions regarding some instrumentation issues that occurred after this report was posted, such as some cord material left in a gamma nail used to nail or repair a broken hip, and some genitourinary equipment containing contamination. (Tr. 112). She admitted that she did not ask questions about all issues that she was aware of.

Cunha confirmed that the Aesculap Surgical Asset Management QuickScan Final Presentation, dated May 19, 2017, represented Aesculap's initial assessment, and that Respondent had not shared with the Union the more detailed, final report. (Tr. 201; GC Exh. 20).

c. July 24 request[14]

On July 24, Callaci sent a follow-up request in writing for Respondent to provide "a copy [of] the document you showed us at our meetings, a copy of the full report, and any/all other supporting documentation." (GC Exh. 12). La Bella responded in writing, on August 2, that "[a]s previously conveyed, for privacy reasons, we will not disseminate the Aesculap Presentation (the 'Presentation') or its underlying report outside of the Our Lady of Fatima facility." He further explained that:

[14] The General Counsel amended, without objection, complaint paragraph 7b to add this follow-up July 24 request for results and documentation associated with the Aesculap presentation/reports. In turn, Respondent amended paragraph 7b of its answer to include this date. (Tr. 65–66).

> [T]he Presentation resuscitates the salient details of the report which Aesculap prepared in a user friendly format for display to our employees. We provided UNAP the opportunity to review and raise questions regarding the Presentation's contents. Thus, we have given UNAP access to the Presentation as well as a forum to have its concerns (if any) addressed.
>
> If the Union continues to have issues of a mutual concern it would like to discuss, our invitation to schedule a joint-labor-management committee in accordance with the CBA remains open.

(GC Exh. 13).

The Union alleges that since about June 3, 2017, Respondent has failed and refused to furnish the Union with the requested information- in other words, the summary and final detailed reports and any related documentation, training information, etc. resulting therefrom. Regarding the requests surrounding the Aesculap findings, Respondent insists that it provided the Union with both a response and reasonable accommodation by permitting the Union representatives the opportunity to review the summary report on July 19 and 20.

3. January 18, 2018 Request for Information- Actual JCAHO Survey

On January 18, 2018, Blais on behalf of the Union, requested, in writing, the results of the actual JCAHO survey, conducted on December 5–7, and any documents related to the deficiencies uncovered by the survey, as well as any JCAHO follow-up review/report.[15] (GC Exh. 14). The Union pointed out that Article 21.1 of the Nurses' CBA requires that nurses comply with JCAHO standards, and that Article 21.2 "calls for…a joint labor-management staffing committee to discuss…the development of staffing plans using external benchmarks reflective of better performing hospitals, and utilization of a mutually agreeable process for addressing staffing issues."[16] (GC Exh. 14; Jt. Exh. 1). The Union restated the nurses' CBA requirements for a joint labor-management committee to meet and discuss matters of mutual concern, such as the JCAHO survey; for the hospital to provide nurses with equipment and supplies in order to perform their jobs safely; and for training and instruction if there are substantial revisions to existing procedures. The Union specifically requested, "[g]iven the magnitude of deficiencies found by JCAHO in its ongoing survey, and the number of contractual provisions in play…any/all notes and/or documentation, electronic or otherwise, relative to the deficiencies found in the survey." (Id.) Finally, the Union noted that:

> As exclusive bargaining agent on behalf of some 600 employees at the hospital, this information is relevant to our ability to address a broad range of issues that have surfaced in the wake of the recent JCAHO survey…It is also relevant to our representational responsibilities under Articles XVII, XXIII and other related articles in both contracts for both bargaining units.

[15] Callaci also prepared this request for Blais, on behalf of the Union.

[16] Articles 21.1 and 21.2 referenced by the Union are actually set forth in Jt. Exh. 1, Article XXI, Sections 21.1 and 21.2. (Jt. Exh. 1, p. 33).

(Id.)

On February 15, 2018, La Bella responded that Respondent would agree to meet with and discuss the Union's questions regarding the JCAHO's survey pursuant to the labor-management committee structure. He did not mention at that time why Respondent would not provide the information. (GC Exh. 15).

On March 1, 2018, the Union met with hospital representatives. Callaci, Blais and Cindy Fenchel represented the Union, and La Bella, David Kobis (hospital president), Lynn Leahey (chief nursing officer) and Sandy Nastory (human resource generalist) represented management. During this meeting, which lasted approximately half an hour, Respondent did not provide the documents requested by the Union on January 18, 2018, maintaining that the documents were confidential. (Tr. 58–59). Callaci recalled that instead, management expressed willingness to "speak and verbally address generally…the deficiencies shown" in the survey. He testified that La Bella said that he would get back to him (Callaci) with a definition or explanation of what he meant by "confidential." (Id.) Callaci also recalled management stating that they submitted 30 corrective action plans pursuant to 30 JCAHO deficiency findings, but that management only discussed two or three of the deficiencies. Callaci remembered Leahey informing that there had been some "reeducation of employees in both bargaining units, the R.N. unit, the service and maintenance unit." (Id.) Callaci testified that he requested all 30 corrective action plans, along with a list of the names of all bargaining unit employees who were subject to re-education or training. La Bella, in turn, asked him to put this request in writing, and promised to provide him with the names of those bargaining unit employees by the end of the next week. (Tr. 60).

Callaci's handwritten notes, taken during the meeting, confirm Kobis only giving verbal information, "30 findings" and "plan of correction." He wrote that, "Lynn L. submitted action plans millions of dollars," and "reeducation of front line staff nursing, ancillary," including both bargaining units." He also noted La Bella stating that he would have to get back to them in a week "about what we mean by confidentiality," and management only providing general and amending the request to ask for "findings beyond deficiencies." (GC Exh. 16).

Blais' handwritten notes, also taken during the meeting, reflect that there were 4 surveyors who visited the hospital on December 5–7, 2600 categories, 30 findings and a return and clearance. They also stated that the hospital submitted "about 30" action plans, which were accepted. She noted action plans included items needing repair such as a " 2.8 million for HVAC in OR," and issues with "logs on room temps in OR and humidity." Blais further noted "[d]ocumentation on front line staff," change work flow," "staff re-educated- policy and form changed." She indicated that education included "ER mandatory code on malignant hyperthermia," " EMR changes" and other policy issues. Blais' notes also stated that management would get back to them with the basis of their confidentiality claim. (GC Exh. 17)

Lynn Leahey's type-written notes reflect her opening remarks and her summary of what occurred during the meeting.[17] (Tr. 67; R. Exh. 5). They include items relating to the age of the

[17] According to Respondent's counsel, chief nursing officer Lynn Leahey did not testify due to a

building, inaccuracies found, policies not followed and a notation that "[s]taff have been involved with some of the changes." Leahey noted under "[a]sked for specifics," that documentation was missing and checklists and policy were not followed by a PACU RN. She stated that in relation to TEE equipment, a surveyor witnessed that "staff left the scope at patient bedside longer than policy and recommendation by manufacturer," [s]taff did not perform point of disinfection or ask anyone else to get the scope down to the decontam room for processing" and "[s]taff following MD instruction to immediately download the image/film." She appeared to have noted a couple of other survey findings as well, in addition to indicating that all staff members were educated in an area, while "[r]e-education of frontline staff provided," including "members of the bargaining unit." Finally, under "NOTES," she wrote "[d]id very well in Patient Care," "30 days for a corrective action plan" and "[a]ll education to staff: documented attendance sheets/competencies." (R. Exh. 5).

Following the March 1 meeting, on the same day, Callaci provided Respondent with a follow-up request of the additional documents that he requested during the meeting. (GC Exh. 18). In this email, Callaci requested and stated in part the following:

> [T]he names of all bargaining unit members (both units) who attended the re-training Lynn Leahey referred to during the meeting, and copies of all 30 corrective action plans referred to by David Kobis during our meeting (which is a request that is already captured by our information request of January 18, 2018).
>
> Also, when we requested information relative to 'deficiencies' in our January 18, 2018 letter, we also want such information relative to all 'findings' to the extent that you believe those terms to be different.
>
> Lastly, we find your conduct during; today's meeting dilatory in nature.
>
> Our information request was sent to you electronically six (6) weeks ago Therein, we explained in more than sufficient detail why we believed the information we are seeking is relevant and [sufficiently] specific as to what information we were requesting.

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death in her family. Therefore, the parties agreed to the admission of Leahey's notes from the March 1, 2018 meeting. The parties stipulated that Leahey's notes reflect her opening remarks, while the remaining ones summarize her version of the rest of the meeting. They also agreed to the meaning of several abbreviations, as well as "that during the meeting, Ms. Leahey provided examples of deficiencies that JCAHO found during its survey and she did not cover all the deficiencies during the meeting." (Tr. 66–68; R. Exh. 5). Respondent's counsel made an offer of proof that Leahey would have testified that "the number 30 was referenced into the amount of days in which the hospital had submitted what is called corrective action plans to JCAHO not the actual number of deficiencies, that would be a factual issue…" While the General Counsel stipulated to and acknowledged this offer of proof, he disagreed as to its factual accuracy; i.e., he only agreed that it was the testimony Leahy would provide. (Id.) I also note there is a typographical error on Tr. 68, line 4: "March 1, 2008" should read "March 1, 2018."

> Today, for the first time since the initial request was made you notified us that you will not provide a single document on the basis of a claim of confidentiality. When I asked you to explain the basis of the confidentiality claim, you failed to do so.
>
> While Mr. Kobis offered to respond verbally to our January 18, 2018 information request, you said your responses would only be general in nature. While Ms. Leahey and Mr. Kobis identified thirty (30) findings by JCAHO, which capture all deficiencies, she spoke generally to only, three (3) of those thirty (30). When I requested a more robust verbal response; you failed to give one.
>
> You also asked me today to explain what it was we were seeking, even though that was set forth quite clearly in the initial request six (6) weeks ago. Of note, not once in the last six (6) weeks did you notify Ms. Blais, the author of the January 18, 2018 letter, or any other Union official that you needed clarification.
>
> To date, notwithstanding your newly raised defense of confidentiality, you have also failed to offer any accommodation with respect to disclosure of any of the information you claim is confidential.
>
> Please be advised that this conduct is unlawful and unacceptable. We reiterate our request for information, consistent with the initial request of January 18, 2018, and ask for the additional information set forth above.
>
> We expect a prompt response rather than more delay and empty discussion.

(GC Exh. 18).

The Union alleges that since January 18, 2018, Respondent has failed and refused to furnish the Union with information that it requested regarding the JCAHO's survey, or related findings, corrective action plans, training or employees trained. Respondent claims that it reasonably accommodated the Union's request by facilitating a rare meeting with its top executives and discussing some, but admittedly not all, of the JCAHO deficiencies set forth in and subsequently corrected.

E. Summary of Reasons for Requests for and Refusals to Provide Information

a. Union's reasons for the requested information

The Union contends that all of the information sought is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the Units. Callaci and Blais acknowledged that this was the first time the Union had requested JCAHO surveys, despite the fact that they had occurred about every 3 years. Callaci also admitted that the Union had not filed grievances on behalf of the nurses as a direct result of mock or actual JCAHO survey or the Aesculap report findings. Further, to his knowledge, employees had not,

to date, complained about their performance evaluations or any licensure issues in connection with the mock or actual JCAHO survey and Aesculap report findings. (Tr. 71–75). However, both representatives explained the information was necessary in order to be prepared to represent the interests of nurses and other unit employees in connection with potential safety issues, grievances arising from any findings, training, staffing, nurses' licensure and disciplinary issues, as well as contract administration and negotiations. There were potentially ongoing concerns.

Regarding Callaci's admission that he would use (and did use) information sought on the Union website in connection with the corporate campaign against Respondent and Prospect Medical Holdings, Callaci testified that the purpose of the corporate campaign "is obviously to create leverage whether you are dealing with an employer or issues that have to do with contract administration or bargaining or upcoming bargaining," as well as preparing for any labor-management meetings. (Tr. 80, 88–90, 97–98, 100–101).

Blais explained that the information sought was "critical" for the member RNs, and the work they do, and would help protect patients and protect the nurses from any issues that might arise with the licensing board or performance ratings. (Tr. 107, 145–146). When asked why she had never requested information in connection with JCAHO survey results in the past, Blais testified that, "[w]e have seen a market change in the hospital since Prospect Charter Care has taken over. We have seen issues with infection control problems. We have seen issues with equipment and supply issues." Respondent took over the hospital after the JCAHO conducted the last survey. In connection with the reports relevant to this case, Blais testified that in her area, Silva (her manager) had informed the nurses, in regular staff meetings, that survey findings required the need for recovery room improvements relating to documentation of history and physical as well as discharging instructions, and regarding control of temperature and humidity. (Tr. 116–118). Therefore, she explained that, "[i]t is even more important for us to have the information of where the deficiencies were, what the actual plans were, to make sure that we are as nurses complying with the standards set forth by JCAHO." (Tr. 115–116). She also testified that prior reviews dealt more with physical plant and cosmetic issues rather than procedural issues. (Tr. 144–147). As to the mock survey, Blais explained this was the first conducted at the hospital, and that in lieu of mock surveys in the past, management had conducted a type of "walk through/sweep" primarily related to physical rather than operational issues, such as doors left open or boxes on the floor. [18] When asked why she had never filed grievances regarding equipment and supply issues, nor mentioned these concerns in the March 1 meeting, Blais claimed that the March 1 meeting "was not the appropriate time," and she had raised these issues during joint labor- management and staffing meetings in the past.[19] (Tr. 145).

Blais testified that after the Aesculap report, there were other equipment issues that occurred in the OR. She explained that she raised a couple of these issues during the July 19 meeting. One concerned a piece of OR equipment not working because of "residual bone fragments left in the piece of equipment…[t]he equipment had to be moved," and "[t]he patient

[18] No one disputed this testimony in regard to past mock and JCAHO survey findings.

[19] Respondent did not refute that Blais had not raised such issues in past labor-management or staffing meetings.

had to be tested for communicable diseases and had to be notified that there was a malfunction." The other involved foreign matter found on another piece of cystoscopy equipment. (Tr. 136–137). Blais testified that she received only "generalized responses," and that in the July 19 meeting, she and management disagreed about whether or not the deficiencies she brought up had occurred. (Tr. 136–137).

Blais further testified that after the JCAHO survey was conducted, there were in fact two employees in the service and maintenance unit (central sterilizing technicians (CST)) who were disciplined for violating standards similar or related to those required by the JCAHO. Respondent disciplined those employees, Kathleen Bergeron and Judy Donnelly, in connection with failing to properly sterilize, clean and/or process equipment.[20] Blais stated that these employees performed the same CST duties as those referenced in Leahey's March 1 meeting notes about deficiencies found in the JCAHO survey. (Tr. 123–125).

Blais also acknowledged that she did not mention in the meetings with management, as she had in her Board affidavit, that the survey and/or report findings resulted in an "overhaul" of the OR. However, her March 1 meeting notes reflect Respondent's action plans involving a $2.8 million repair of the OR's HVAC system, as well as other changes in the OR. Similarly, Leahey's March 1 meeting notes show that "millions of dollars" had been allocated to correct deficiencies in the facility. (R. Exh. 5). This may not have been an "overhaul," but it certainly appears to have represented substantial changes made by Respondent. (GC Exh. 17).

b. Respondent's reasons for not providing the documents requested

Cunha, Respondent's COO, testified that she recommended to and agreed with upper management that the information requested by the Union should not be provided because it was confidential, and had not been provided in the past. La Bella informed her that UNAP had requested the reports, and she (Cunha) recommended that they not be shared because the "relationship has been contentious," and she did not want information to go public, be taken out of context and create a sense of fear. They believed that taken out of context, publication of the surveys and Aesculap results would paint a false picture with the public that Respondent was providing poor quality of care, and undermine hospital operations. More specifically, Cunha testified that the mock survey was as important as the "real deal," and not shared with anyone other than those in upper level management for those reasons. In light of the discord between Respondent and the Union, and because of "information that has been posted on [the Union's] website," she simply did not want the mock survey or the other reports to fall "in the wrong hands." (Tr. 166, 218–219).[21] She further testified that sharing these documents would

[20] Bergeron received two written warnings, in February and March 2018, for two incidents of failing to properly clean contaminated instruments. (R. Exhs. 8–9). Donnelly received a termination notice on March 19, 2018, for repeated incidents of improperly processing and sterilizing instrumentation. (R. Exh. 10). Blais testified that she was aware that both filed grievances, but the matters had been otherwise resolved. She did not have knowledge as to whether the warnings remained in the employees' files. I credit Blais' testimony in this regard, as Respondent did not present evidence that grievances had not been filed, or if filed, had not been resolved. (Tr. 134–135).

[21] Cunha referred to upper level managers included on memoranda and emails sent by Catherine Shitara, corporate vice president regulatory and accreditation programs, announcing the mock survey

impact the hospital's ability to be "self-critical" or to self-assess, as the staff would be fearful of reporting anything they felt might be a part of a public record. (Tr. 168). Cunha believed that Respondent's various reasons for not disclosing information to the Union were "equally important." (Tr. 224).[22] Respondent did not, however, provide evidence that staff had in fact been afraid to self-criticize or self-assess after the Union publicly posted portions of the Aesculap summary. Nor was there any evidence that employees' names or other personally identifiable information were divulged in any of the reports.

In support of its justification for not providing the Union's information requests, Respondent introduced webpages from the Union's website, "prospectsecrets.com" in order to show that the information requests were aimed at obtaining negative information to share with the public in connection with the Union's campaign against the company and hospital. (See R. Exh. 1). The Union's statements on its site included: "Prospect's poor care was exposed in California, citing "some of what federal government health inspectors [allegedly] found in Prospect California's hospitals." The site noted that "Prospect Medical Holdings, the new operator of Fatima Hospital and Roger Williams Medical Center, says they provide 'quality health care.' Federal health regulations tell a different story." The site declares that the Union "won't stand for" the "poor care [that was] exposed in California," in Rhode Island. Other of the information states that in taking over Fatima Hospital, Roger Williams Medical Center, St. Joseph's Health Center and Elmhurst Extended Care health care facilities, Prospect unfairly treated employees and broke promises to create more jobs. Callaci admitted that the Union posted information from the Aesculap summary on the last page, set forth in R. Exh. 1, which states that, "[r]ecently, [Prospect's] consultants examined the equipment used in the operating room at Fatima Hospital and found," for example, "'surgical instruments contaminated with foreign material…corroded…broken…bent, and posing risks to patient safety.'" The Union also announced that "Prospect refuses to make the consultant's report public, but this is far too important to keep under wraps, Patients and their families have a right to know." (Id.) Therefore, there is no doubt, that the Union did, and would, at least in part, without some sort of confidentiality agreement, use requested information in pursuit of its corporate campaign against what it perceived as Respondent's poor treatment of employees and poor quality of care. However, I find credible, and reasonable, the explanations by Callaci and Blais that the Union also requested the documents at issue in order to be better prepared to represent its constituent nurses and service and maintenance employees regarding potential grievances, safety, patient care and liability issues.

Regarding the Union's request for information in connection with revisions to existing procedures, Cunha testified that revisions to existing procedures were "not substantial," and insisted there was never a threat of a complete overhaul or shutdown of the OR due to findings from the mock survey or the final survey. She explained that the mock survey identified areas where the hospital could improve their processes. When asked again if there were any

(also referred to as the "Enterprise-Wide Internal Survey Readiness Assessment"). Shitara sent these communications to John Holiver, CEO, Charter Care, as well as to Cunha and other Charter Care officers and managers. (R. Exhs. 2-3).

[22] She testified that "[t]he impact on self critical analysis is extremely important," and then stated that both reasons, including not wanting the information disclosed to the wrong people, were "equally important." (Tr. 224).

substantial changes to hospital procedures, she responded that she "would not characterize them as substantial." She reluctantly admitted , however, that the Union would be in a better position to assess whether or not changes in practice and procedures had been substantial or not. (Tr. 209–210). The evidence also reveals, as stated above, that nurses and other unit employees were in fact re-educated on various policies and procedures concerning survey and report findings, safety issues and the work they performed.[23]

Regarding the Aesculap presentation, Cunha explained how they came to hire the company to assess OR instrumentation according to the standard of care to examine OR equipment due to wear and tear, repairs, and they do a "magnification of equipment that the naked eye can't see." She testified that this assessment was not done in preparation for the mock or actual JCAHO surveys. She said the standards were related and they would "heed" their findings, but that the Aesculap surveyors did not discuss anything about JCAHO. (Tr. 205–206). She explained that Respondent did not post the full assessment or final report because it was an internal review, but confirmed the public trifold posting of parts of the summary, detailing deficiencies in OR equipment/instruments. She explained that the OR educator at the time wanted to share it with staff as a type of teaching tool on how to improve the process. (Tr. 190). This further bolsters Blais' testimony as to when Silva told her she had been tasked with getting a company to evaluate the equipment after the mock survey findings.

Cunha, Respondent's only witness, did not recall whether or not she and other managers, discussed whether or not a confidentiality agreement would be offered in an effort to accommodate Respondent's requests for information. (Tr. 214–215). Nevertheless, there is no evidence that Respondent discussed, considered or made such a proposition regarding either of the requested reports and related documents.

Regarding Respondent's contention that documents were attorney-client privileged, emails between Catherine Shitara, corporate vice president, regulatory and accreditation programs, concerning the mock survey and attaching the final mock survey report, contained a subject matter line of "Attorney Client Communication – Privileged and Confidential."[24] The evidence shows that the only attorney included in the email chain was Ellen Shin, corporate counsel for Prospect Medical. However, Cunha admitted that Shin did not communicate any information or advice in these emails, but was only copied on them. The only other indication that an attorney was involved, was Cunha's testimony that once mock survey corrective action plans are developed, they are "reported up through our attorney." When on re-direct examination by Respondent's counsel, Cunha was asked if Shin was on the conference calls where management officials discussed the Union's information requests, Cunha equivocally responded, "I believe she was." (Tr. 163, 211–212, 220–223).

[23] I find that the safety and other procedures on which unit employees were re-educated or trained appear to be significant enough such that they might reasonably be considered substantial.

[24] The emails contain what appears to be a standard company warning that the messages contained therein and attachments thereto "may be confidential or privileged," and may not be shared or disclosed to others not named above. (Tr. 222–223; R. Exh. 3).

F. Additional Credibility Findings

Respondent challenges the Union's motivations for requesting the information at issue; however, as discussed above, I credit the Union's reasons proffered for requesting and needing the information. Testimony from Callaci and Blais was straightforward and credible, and Callaci admitted his intent to incorporate information into the corporate campaign as well as needing it in connection with other representational duties. This was not something that he tried to hide. Regarding other disparities such as the number of deficiencies found in the JCAHO report, and whether or not there was an overhaul of the OR, I credit both Callaci and Blais as to what they heard during the March 1 meeting. Leahey's notes are not materially inconsistent with their testimony, and there was no testimony from other management officials who were present at this meeting. The notes do not state the number of deficiencies, but overall, the evidence reflects that the reports cited more than a few, and that Respondent made several corrective action plans. [25]

III. DISCUSSION AND ANALYSIS

A. Legal Standards

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). An employer's duty to bargain includes a general duty to provide information requested by the union that "is potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees' bargaining representative." *E.I. DuPont de Nemours and Co.,* 366 NLRB No. 178, slip op. at 4 (2018), citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *Postal Service*, 332 NLRB 635, 635 (2000). See also, *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). Thus, the Board has determined that information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant and necessary to the union's role as exclusive collective-bargaining representative, and must be produced unless the employer can establish lack of relevance. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005); *Duquesne Light Co.*, 306 NLRB 1042, 1043 (1992). Where the requested information is not presumptively relevant, it is the union's burden to demonstrate relevance. *United States Testing*, 324 NLRB 854, 859 (1997), enfd. 160 F.3d 14 (D.C. Cir. 1998); *Reiss Viking*, 312 NLRB 622, 625 (1993) *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

However, the Union's burden to establish relevancy is "not exceptionally heavy." *A-1 Door & Building Solutions*, above; *Shoppers Food Warehouse*, 315 NLRB at 259; *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983). Rather, "[t]he standard for relevancy is a 'liberal discovery-type standard,' and the sought-after evidence need not be necessarily dispositive of the issue between the parties but, rather, only of some bearing upon it and of probable use to the labor organization in carrying out its statutory

[25] Regardless of whether or not Callaci and Blais misunderstood or confused the number of deficiencies with the number of days Respondent had to make corrections or file action plans, there is no evidence that they intentionally misstated (or intended to misstate) what management officials said.

responsibilities." *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), quoting *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997) (citations omitted), enf. 172 F.3d 57 (9th Cir. 1999). See also *McKenzie-Williamette Medical Center Associates*, 362 NLRB 135, 135 (2015), quoting *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 437. It merely requires "a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances." *Public Service Co. of New Mexico*, above at 574. See also *Disneyland Park*, 350 NLRB 1256, 1258 (2007); *Shoppers Food Warehouse*, 315 NLRB at 259.

The Board has decided not to pass on the merits of a union's claim that the employer has breached the collective-bargaining agreement or committed an unfair labor practice, and the information that triggered the union's request may be based on hearsay and need not be accurate or ultimately reliable. *E.I. DuPont de Nemours and Co.,* above, 366 NLRB No. 178, slip op. at 4; *Shoppers Food Warehouse*, above, 315 NLRB at 259–260; *Reiss Viking*, 312 NLRB 622, 625 (1993). Thus, a pending grievance is not a prerequisite for requested information to be considered relevant to a union's statutory responsibilities. Indeed, the union is entitled to information to assess whether it should exercise its representative function and whether the information will warrant further action, such as filing a grievance or bargaining about a disputed matter. See *Public Service Co. of New Mexico*, 360 NLRB at 574, citing *Disneyland Park*, 350 NLRB 1256, 1258 (2007) (information presumptively relevant to union's statutory duty to represent unit employee "in any possible future dispute with the Respondent over the retained information"); *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 fn. 7 (2000), enfd. on other grounds 263 F.3d 345 (4th Cir. 2001) (the union may retain information relevant for potential future use for its performance of its representational duties); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

In addition, the Union, and not the employer, should decide what information can be of use to it. See *FirstEnergy Generation, LLC.*, 362 NLRB 630, 636 (2015). In the same vein, a union is entitled to verify an employer's assertions or representations regarding relevance. See *Finch, Pruyn & Co.*, 349 NLRB 270, 275–277 (2007), enfd. 296 Fed. Appx. 83 (D.C. Cir. 2008).

Where, as here, an employer raises confidentiality concerns, the employer has the burden of establishing a legitimate claim of confidentiality that would justify refusal to provide the requested information. *Medstar Washington Hospital Center*, 360 NLRB 846, 846, fn. 1 and 4 (2014), citing, *NLRB v. Detroit Edison*, 440 U.S. 301 (1979). The Board has determined that, "[w]hen balancing a claim of confidentiality against a union's need for information under *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318–319 (1979)," it may consider state law on the matter. *Olean General Hospital*, 363 NLRB No. 62, slip op. at 2–3 (2015); see also, *Borgess Medical Center,* 342 NLRB 1105 (2004). Even if a confidentiality concern is established, however, the employer must offer to accommodate both its concern and its bargaining obligation, "as is often done by making an offer to release the information conditionally or by placing restrictions on [its] use . . . . [T]he onus is on the employer because it is in the better position to propose how best it can respond to a union request for information. The union need not propose the precise alternative to providing the information unedited." *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998). Similarly, offers of summaries or alternative

documents do not reflect the type of accommodation required. Id. at 22. Failure to bargain in good faith about such accommodation amounts to a violation of Section 8(a)(5). Id. See also *Borgess Medical Center*, above, 342 NLRB at 1106, citing authorities.

B. Information Requested by the Union Is Relevant to Representational Duties

Respondent has not directly challenged the relevancy of the Union's requested information in its responses to those requests. Instead, it grounded its refusal in an assertion of confidentiality and fear that the Union would expose contents of the documents to the public. In its brief, however, Respondent argues that its legitimate interest in maintaining confidentiality of the documents requested outweighs the Union's illegitimate, incredible need for the information. Respondent further contends that the Union failed to accept and/or fully participate in Respondent's offers to accommodate.

Nevertheless, in applying the above principles here, I find that the information sought by the Union regarding the mock survey, Aesculap and JCAHO survey results was relevant and potentially relevant to the Union's representative responsibilities to its membership, as it clearly involved unit employees' (of both units) terms and conditions of employment. Findings from these reports directly involved the quality of patient care administered by hospital personnel, including the Union's nurse and technician members. They specifically involved deficiencies in unit members' administration of patient care, as well as in their maintenance and care of equipment, particularly in the OR and recovery units. The Union sought this information, regarding how the hospital planned to address the problems, due to concerns as to whether or not any of them found in the mock survey, the Aesculap report and/or the JCAHO survey might result in discipline of any unit employees or insertion of negative information in any of their personnel files or potential adverse information being reported to the nurses' licensing board.[26] (Tr. 22–23). As such, the evidence also shows, beyond a mere suspicion, that the findings implicated parts of the CBAs such as Article XVII and XVIII of the nurses unit CBA requiring the hospital to provide nurses with equipment and supplies necessary to perform their jobs safely and training and instruction on any substantial revisions to existing procedures. Although Respondent's one witness, Cunha, denied that the hospital provided any "substantial" training or re-training of nurses or other personnel on policies and procedures, she admitted that there was some training or re-training of employees. She also acknowledged that without information regarding the nature and types of training, the Union would not be able to determine whether or not it was "substantial."

The Union pointed out that the nurses' CBA requirements (Articles 16.1 and 16.2) for a joint labor-management committee to meet and discuss matters of mutual concern, such as findings in the JCAHO survey. Callaci explained that the Union needed to see the reports at issue in this case, deficiencies contained therein and corrective actions taken in order to properly prepare for such a meeting. Respondent, on the other hand, argues that it offered the Union an opportunity to participate in a labor-management meeting to discuss these issues, and that the Union had enough information at all times to go forward with such a meeting. I disagree. These

[26] It is undisputed that an employer can report any nurse's practice that is outside recognized standards of care to the State of Rhode Island, and that the Union can represent members before their professional boards in the event a complaint is filed. (Tr. 23–24).

meetings, as described in the CBA, are clearly part of the Union's bargaining responsibilities on behalf of its members. It is more than reasonable that the Union would need the information requested in order to prepare for them.

Additionally, relevancy is not challenged because the Union acknowledged wanting to use the information in connection with its corporate campaign, as there is no evidence that the Union engaged in such a campaign aside and apart from its statutory representational duties. See *Richboro Community Mental Health Clinic, Inc.,* 242 NLRB 1267 (1979). In *Richboro Community Health Clinic*, above, the Board disagreed with the judge, finding that the employer violated the Act by denying an employee a promotion because of statements in a public letter made in protest of respondent's discharge of another employee due to his alleged union activities. The letter was sent to the head of the federal funding source for the respondent, with copies to a congressman, local newspaper and respondent, referencing the deterioration in the quality of respondent's operations and how the discharge of a valuable employee due to his union activities had "irresponsibly undermined Respondent's program." Id. at 1268. The Board concluded that the employee's criticism of his employer "was not a personal attack unrelated to his protest of Respondent's labor practices." See also, *Community Hospital of Roanoke Valley, Inc.*, 220 NLRB 217, 223 (1975), enfd. 538 F.2d 607 (4th Cir. 1976) (employees did not lose the protection of the Act, nor were they "misleading and disloyal," with their public remarks via letters to a newspaper linking underpayment and shortages of nursing staff to potential poor quality of care).

Although there is no specific contention here that the Union lost the protection of the Act, Respondent produced no evidence that the Union's concerns expressed in its public campaign were unrelated to any ongoing labor dispute concerning apparent ongoing issues with quality of care and treatment of employees represented by the Union. Therefore, I find that the information requested was relevant to the duties of the Union as sole representative of both the nurses and service and maintenance units. Next, I determine whether Respondent provided the information, or had a legitimate reason for not doing so.

C. Respondent Failed to Provide the Union with Requested Information

Regarding all of the requested information in connection with the mock survey, the Aesculap presentation and the JCAHO survey, there is no dispute that Respondent declined to provide any of the actual full, detailed reports and related documentation requested by the Union. Arguably, the only exception was when Respondent allowed the Union representatives to view and take notes from the summary Aesculap report on July 19 and 20.[27] However, during the March 1 meeting to discuss the JCAHO survey, Respondent did not permit the Union to view the report and take notes as it did with the Aesculap summary. Further, Respondent never contradicted testimony that it promised but failed to deliver an explanation of the basis of its confidentiality claim. Nor did Respondent provide the Union with information regarding the training that unit employees had received as a result of the report findings.[28]

[27] I do not find that the March 1 meeting to give the Union an opportunity to ask questions and discuss the JCAHO survey constituted an accommodation, given the limited nature of the meeting and the responses.

[28] Respondent did not controvert testimony that managers said they would provide training

D. Respondent's Confidentiality Interest in the Mock Survey, Aesculap Presentation and JCAHO Survey

Respondent asserted for the first time at trial that its confidentiality claims in response to the three reports at issue were based on Rhode Island State statutes prohibiting disclosure of records and reports, including the types of reports at issue here, generated by peer review boards such as the JCAHO. See Rhode Island's peer review statute (R.I. Gen. Laws. § 23-17-25(a), R.I. Gen. Laws § 5-37-1(12) (definition of "Peer Review Board") and The Rhode Island Patient Safety Act of 2008 (R.I. Gen. Laws § 23-17.21.1) (R. Exhs. R6-R7) (R. Exhs. 6–7). Respondent argues that medical professionals prepared all three reports based on their evaluations of the hospital's systems and procedures, and that the hospital relies on self-reporting of its employees, which the Rhode Island statutes recognize, in order to "deliver superior patient care." R. Br. at 13. However, there is no evidence that Respondent considered these statutes when it decided to deny access to the Union. In fact, Cunha admitted that she had never reviewed, seen nor discussed these statutes until Respondent's counsel introduced them to her during trial preparation.

R.I. Gen. Laws. § 23-17-25(a) reads in part:

> (a) Neither the proceedings nor the records of peer review boards as defined in §5-37-1 shall be subject to discovery or be admissible in evidence in any case save litigation arising out of the imposition of sanctions upon a physician.

Under case notes, the statute describes "1. DISCOVERY OF RECORDS" in part:

> Only the records and proceedings which originate with the peer- review board are immune from discovery, thus, a hospital's records along with documents originating from sources other than a peer- review board are not protected simply because they were utilized by the peer- review board during proceedings. [*Cofone v. Westerly Hosp.*, 504 A.2d 998 (R.I. 1986).]

(R. Exh. 6). Next, under R.I. Gen. Laws § 5-37-1(12), the definition of "Peer review board" in part reads as follows:

> (12)(i) "Peer review board" means any committee of a state or local professional association or society including a hospital association, or a committee of any licensed health care facility, or the medical staff thereof, or any committee of a medical care foundation or health maintenance organization, or any committee of a professional service corporation or nonprofit corporation employing twenty (20) or more practicing professionals, organized for the purpose of furnishing medical service, or any staff committee or consultant of a hospital service or medical service corporation, the function of which, or one of the functions of which is to evaluate and improve the quality of health care rendered by providers of health care service or to determine that health care services rendered were

information for unit employees.

> professionally indicated or were performed in compliance with the applicable standard of care or that the cost of health care rendered was considered reasonable by the providers of professional health care services in the area and shall include a committee functioning as a utilization review committee under the provisions of 42 U.S.C. § 1395 et seq. (Medicare law) or as a professional standards review organization or statewide professional standards review council under the provisions of 42 U.S.C. § 1301 et seq. (professional standards review organizations) or a similar committee or a committee of similar purpose, to evaluate or review the diagnosis or treatment of the performance or rendition of medical or hospital services which are performed under public medical programs of either state or federal design.

(Id.) Finally, what Respondent refers to as The Rhode Island Patient Safety Act of 2008 (§ 23-17.21-8- "Privilege and confidentiality protections"), states, in part:

> (a) Privilege. Notwithstanding any other provision of federal, state, or local law to the contrary, and subject to subsection (c) herein, patient safety work product and a document log shall be privileged and shall not be: (1) subject to a federal, state, or local civil, criminal, or administrative subpoena or order, including in a federal, state, or local civil or administrative disciplinary proceeding against a provider; (2) subject to discovery in connection with a federal, state, or local civil, criminal, or administrative proceeding, including in a federal, state, or local civil or administrative disciplinary proceeding against a provider; (3) subject to disclosure pursuant to §552 of title 5, United States Code (commonly known as the Freedom of Information Act), Title 38, chapter 2 of the general laws (commonly known as the Access to Public Records Law), or any other similar federal, state, or local law; (4) admitted as evidence in any federal, state, or local governmental civil proceeding, criminal proceeding, administrative rulemaking proceeding, or administrative adjudicatory proceeding, including any such proceeding against a provider; or (5) admitted in a professional disciplinary proceeding of a professional disciplinary body established or specifically authorized under state law.
>
> (b) Confidentiality of patient safety -- work product and document log -- notwithstanding any other provision of federal, state or local law to the contrary, and subject to subsection (c) herein, the patient safety work product and document log shall be confidential and shall not be disclosed.
>
> (R. Exh. 7).

In *Olean General Hospital*, the employer established a legitimate and substantial confidentiality interest in a JCAHO survey of its patient care. In that case, the report listed 40+ patient care deficiencies. The union representative, who at the time was engaged in bargaining for a new collective-bargaining agreement with the respondent, requested a copy of the survey and a list of deficiencies. The Union wanted to know if staffing of nurses, a bargaining issue, had been "implicated in the report," and the hospital president advised several departments and

the surgical nursing staff, via a memo, that there would be "zero tolerance" for failure to correct the deficiencies that were basic to patient safety. Although the respondent informed the Union that its request had been referred to its legal counsel, respondent provided no response or further explanation despite a second request by the union. Id. at 7. Nevertheless, the Board initially found that the hospital had a "legitimate and substantial confidentiality interest in the [JCAHO] survey and its contents."[29] Id. at 8.

While the actual JCAHO survey and, arguably, the mock survey, fall under the type of peer review board product that the Rhode Island State laws above speak to, I do not find that the Aesculap presentation/summary does. Respondent publicly published parts of that report, including findings of the corporate entity in areas of the hospital for purposes of sharing with employees. Therefore, I find the Respondent has demonstrated a legitimate confidentiality interest in the mock and actual JCAHO surveys, but not the Aesculap summary, final report and related documents as requested by the Union.

E. Respondent Failed to Timely Notify the Union and Seek to Accommodate

As the Board noted in *Olean General Hospital*, above, "that does not end the matter." The Board subsequently determined that the hospital's legitimate and substantial confidentiality interest did not absolve it from its obligation to notify the union in a timely manner and seek to accommodate the union's request and the confidentiality concern." *Olean General Hospital*, above, slip op. at 9; see also, *American Baptist Homes of the W.*, 362 NLRB 1135 (2015); *Borgess Medical Center*, above, 342 NLRB 1106. Thus, it found that the respondent unlawfully failed to either notify the union of its confidentiality claim or offer to accommodate for its concern. In doing so, the Board recognized that the respondent had not "even raised any confidentiality concerns until it filed its answer to the unfair labor practice complaint." Id.

Although Respondent here voiced its confidentiality concern in its responses to the Union's information requests, or as in the case with the JCAHO survey, during the March 1 meeting, it never mentioned or introduced the Rhode Island State confidentiality laws as a basis for its refusal to provide the Union with the surveys and report until trial. In fact, as stated, Cunha admitted that she had not reviewed, discussed or even seen these statutes until trial preparation. Thus, there is no evidence that these laws formed a basis for Respondent not supplying the requested information to the Union. Instead, on May 10, 2017, Respondent generally notified the Union that it would not supply the mock survey because it was "a confidential and proprietary document subject to attorney-client privilege." (GC Exh. 4).

In response to the mock survey request, Respondent flat out refused to provide the requested information, stating that it was "a confidential and proprietary document subject to attorney-client privilege," and that there were no "substantial changes to existing procedures

[29] Olean General Hospital, 363 NLRB No. 62, slip op. at 8, citing: Kaleida Health, Inc., 356 NLRB 1373, 1373, 1378–1379 (2011) (affirmed judge's finding that a New York State's policy against disclosure of certain information raised a legitimate confidentiality interest regarding incident reports, despite being relevant to the union's need of them in assessing a grievance); Borgess Medical Center, 342 NLRB 1105, 1105 (2004) ("state law deeming certain information confidential may be considered in assessing whether there is a legitimate confidentiality interest in that information").

warranting training and instruction." Respondent did not give a basis for its confidentiality concern or offer any accommodation to address the concern. Similarly, Respondent never explained its attorney-client privilege assertion. Instead, La Bella informed that Respondent would welcome a joint labor-management committee meeting pursuant to Article 16.1 of the CBA. I find this offer for a labor- management meeting insufficient, without any additional specification about the basis for the confidentiality concern or an accommodation that met, related to or addressed Respondent's confidentiality claim. There is no dispute that Respondent never provided nor intended to provide the presentation and the surveys to the Union.

Next, Respondent argues that it accommodated the Union's request for all of the Aesculap reports (summary and detailed) and associated documentation by permitting the Union representatives to meet with its high ranking management officials and review and take notes on July 19 and 20 from the 10-page summary report. Initially, La Bella responded on June 23–24 days after the Union's May 30 request- that Respondent would not "disseminate the Presentation outside of the Our Lady of Fatima facility." (GC Exh. 7). He also repeated the offer to engage in a joint labor-management meeting to discuss health and safety issues. Although La Bella provided the summary report for review only, Respondent did not offer or allow the Union to review and take notes from the full, detailed Aesculap report, or submit or even address any related documentation. I find this attempt an insufficient accommodation as the summary report was essentially a summary of the information that Respondent permitted to be posted in an area open to its employees. In addition, La Bella indicated to Callaci that Respondent would not allow them to take copies of the Aesculap summary report because they feared the Union would take the document out of context and use it to intentionally mislead the public. However, Respondent failed to offer accommodation, for example, in the form of some type of confidentiality agreement. Again, Respondent had already made parts of this report public, and had no substantial confidentiality interest in it.

Regarding the actual JCAHO survey, Respondent argues that it accommodated the Union with the March 1 meeting, permitting the Union to meet with and ask questions of Prospect's high ranking officials. Respondent offered to meet in its February 15, 2018 response to the Union's information request sent about 23 days earlier on January 18. During this meeting, Respondent basically told the Union representatives that the JCAHO report was without explanation, confidential, and only shared general information about the survey and some of the findings and corrective action taken. Finally, Blais and Callaci offered uncontroverted testimony that La Bella promised on March 1 that he would get back to them with the basis for Respondent's confidentiality claim. La Bella did not do so, nor did he supply the Union with any information about unit employees who underwent any training or retraining, or with any of the corrective plans.[30] (Tr. 58–60, 127–128).

Cunha did not recall any communications with management officials in which they discussed whether or not to provide the Union with a confidentiality agreements in connection with its information requests, and there is no evidence that they did so.

[30] As a follow-up to the March 1 meeting, the Union requested names of all bargaining unit members in both units who attended the retraining that Leahey referred to in the meeting, copies of all 30 corrective action plans referred to by Kobis, in addition to all deficiencies and findings referenced in its January 18 request. (GC Exh. 18).

Cunha's concerns regarding protecting identities of participants/interviewees involved with the reports are unwarranted as they were not identified in the survey.[31] Further, there is no reason for Respondent to believe that the hospital will be inhibited from conducting the surveys or instrumentation reviews in the future. Respondent's own publication of deficiencies found in the Aesculap presentation apparently did not so inhibit employees from participating in the JCAHO survey. Cunha insisted that participants could be identified by the descriptions of their work areas and deficiencies reported, but there was no evidence that this was the case. Further, Respondent is required to perform the JCAHO surveys in order to maintain its accreditation.

Similarly, I find that Respondent's issue with negative publicity is unfounded. In *Medstar Washington Hospital Center*, above, 360 NLRB at 849–850, the Board determined that an employer hospital's similar concerns with negative publicity were illegitimate, finding that "[f]ear of embarrassment or adverse publicity does not satisfy the principles enunciated in the *Detroit Newspaper* case." Contrary to Respondent's contention, Respondent and the Union were engaged in ongoing labor disputes regarding patient health and safety (for which they were responsible) as well as staffing and unit employees' treatment in the terms and conditions of employment. Section 7 protects employees' attempts to improve terms and conditions of their employment through communications to the public that are part of or related to ongoing labor disputes. Id. , citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) and *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 230–231 (1980) (Board found the "touchstone was not whether the communication constituted a virtual carbon copy of the specific arguments raised with the respondent, but was, rather, whether the communication was a part of and related to the ongoing labor dispute.")

The Board has determined that a respondent refusing to provide requesting information, must seek an accommodation that would allow the union an opportunity to have the information it needs while at the same time protect the respondent's interest in confidentiality. *United States Postal Service*, 364 NLRB No. 27, slip op. at 2 (2016). Therefore, I find that in this case, Respondent failed to timely reply and adequately accommodate.

I discount Respondent's argument that the Union waived any lack of accommodation claim when it refused to consider or discuss the accommodations that the hospital offered. Respondent relies on a Board decision in *BP Exploration*, 337 NLRB 887, 887 (2002) (employer did not violate the Act by only offering 1-page summaries of various reports requested by the union) and *Silver Bros. Co., Inc.,* 312 NLRB 1060 (1993) (employer did not violate the Act by refusing to provide information when the union refused to meet and discuss confidentiality concerns in a neutral location). Respondent insists that the Union here similarly rejected its repeated invitations to initiate a joint labor-management committee meeting, and that Blais asked only "two measly" questions, and Callaci asked none, when Respondent gave them "unprecedented access to Cunha to inquire about" the contents of the Aesculap summary. Respondent argues that Blais failed to raise a variety of her alleged concerns regarding health

[31] Although Cunha testified that employees who participated in these reviews might be identified based on their positions, department or area and the type of deficiency, I find that there is no evidence that this would be the case. And, her concern is belied by the hospital's posting of deficiencies in the Aesculap reports. See *Medstar Washington Hospital Center*, above, 360 NLRB at 849–850.

and safety matters and "fantastical changes" the hospital made to OR protocols. I find that the cases cited by Respondent are inapplicable here. First, *BP Exploration*, *Inc.*, above, involved a finding that the employer did not violate the Act by refusing to provide parts of confidential documents because they were found to clearly be subject to the attorney-client privilege. There is no such showing here that documents requested by the Union were protected by this privilege, as is discussed below. Further, Respondent only offered parts of the Aesculap presentation summary, which it had already released in part to staff. In *Silver Bros. Co., Inc.*, the union refused to agree to a neutral meeting place in which the union and employer could bargain over the disputed issues, including the requested information. The Board accepted the judge's finding that the employer insistence on the neutral meeting site for bargaining was a "'red herring to avoid resuming negotiations'" within the entire bargaining context. In doing so, the Board concluded that the employer was entitled to discuss with the union confidentiality concerns "so as to try to develop mutually agreeable protective conditions for its disclosure to the Union." Contrary to Respondent's claim, there is no evidence here that the Union stalled or refused to meet with Respondent. In fact, the Union did so on two occasions, and as I have found, Respondent did not offer sufficient accommodation or any protective confidentiality conditions for disclosure to the Union. Further, the Union reasonably explained that it needed the reports in order to fully engage in a joint labor-management meeting. Nevertheless, the evidence shows that contrary to Respondent's contentions, Union officials did ask questions about the reports and raised concerns about safety and health issues in the meetings. The evidence also reveals that Respondent did in fact provide training on new or revised procedures, as well as institute costly and substantial changes, as a result of the reviews in question.

Finally, I reject Respondent's indication that because two internal emails referencing the Aesculap Presentation, contained the subject line: "Attorney Client Communication – Privileged and Confidential" the documents discussed were protected by the attorney-client privilege. Respondent raised this defense in its response to the Union's request regarding the mock survey. However, there is no evidence that this information was generated from an attorney or directed to an attorney. (Tr. 211, 220–223; R. Exhs. 2–3). In fact, Cunha admitted that corporate counsel Ellen Shin was only copied on one of the emails regarding dissemination of the Aesculap Presentation. (R. Exh. 3). The burden is on the party asserting the attorney-client privilege to prove that it applies, and Respondent has not met that burden. *Lansing Automakers Federal Credit Union*, 355 NLRB 1345, 1353 (2010). Moreover, copying documents to a counsel, along with others, as in this case, does not make them privileged. Rather, "[i]t is communication between attorney and client related to the giving of legal advice that is privileged." *Patrick Cudahy*, 288 NLRB 968, 971 (1988). In its brief, Respondent also argues that the mock survey was privileged because its regulatory department oversaw it. (R. Br. at 14–15). However, as stated, there is no evidence that this oversight included attorney-client privileged communications. For example, there was no evidence of Respondent's counsel directing that reviews be conducted, reports created or investigations initiated. Nor was there evidence that an attorney directed that the reports or their contents be attorney-client privileged. See *BP Exploration*, above, 337 NLRB 887–888. Therefore, Respondent has not established that any of the documents requested by the Union in this case were so privileged.

F. The Union's Need for Information Outweighs Respondent's Confidentiality Interest

I find that Respondent's confidentiality interest does not outweigh the Union's need for information requested by the Union. Respondent did not offer any accommodation relating to its confidentiality concerns in connection with the mock survey. Regarding the Aesculap summary report, Respondent's privacy concerns are undermined by its publication of the substance of the deficiencies in the report, along with pictures, in an open area to be viewed by hospital staff. Moreover, Respondent overall failed to reasonably accommodate, as stated above, or offer any confidentiality agreement to address its privacy concerns in connection with all three reports. Although Respondent did not issue a memo warning discipline and a zero tolerance policy concerning the reports and lists of deficiencies as was the case in *Olean General Hospital*, above, Respondent's did post the Aesculap report trifold, with deficiencies, for view by its employees, and a nurse manager discussed with unit members her concern that mock survey results would have resulted in an OR shut down had it been the real survey. Indeed, these very real concerns immediately preceded and prompted the Union's initial requests for information.

Further, in this case, Respondent did not respond to Respondent's requests for the Aesculap Presentation and related documents until 24 days after the Union's initial request, and 11 days after a second request. Similarly, Respondent waited until approximately 23 days to provide any response to the Union 's request for the actual JCAHO survey. Therefore, in addition to failing to offer accommodation, or sufficient accommodation in connection with the Aesculap reports, Respondent failed to timely respond to both the Aesculap related requests and the JCAHO survey.

Respondent further claims that its confidentiality interests far outweigh the needs of the Union because the Union failed to show that it had other purposes for the information requested other than "demonizing" Prospect. I have decided below that the Union's requests for the three reports were made in good faith, and for the various reasons stated, notwithstanding this contention. See *Six Star Cleaning & Carpet Services*, 359 NLRB 1323, 1334 (2013) ("the existence of even one legitimate purpose would nonetheless render the request valid"); see also, See *Beverly Health and Rehabilitation Services, Inc.*, 328 NLRB 885, 889 (1999).

For similar reasons, The Board in *Olean General Hospital*, above, concluded that the Union's need outweighed the confidentiality interests, including the state's policy against disclosure, with the needs of the Union. Therefore, I find such is the case here.

G. Respondent's Remaining Defenses

1. Union's requests were not made in bad faith

In its "Amended Answer and Defenses," Respondent raised a number of other defenses, including that the Union bargained in bad faith in response to the offer to accommodate the request for information.[32] However, there is no evidence whatsoever that the Union bargained

[32] I find that other defenses raised by Respondent have either been addressed above or unsupported by the evidence.

in bad faith. In order to establish that a union requested information in bad faith, a respondent must show that the only purpose for the request was one of bad faith. Thus, "the existence of even one legitimate purpose would nonetheless render the request valid." *Six Star Cleaning & Carpet Services*, above, 359 NLRB 1323, 1334. The Board has held that a request for information was made in good faith, "notwithstanding the employer's contention that it was made in bad faith due to the union's publication of 'Bad Care at Beverly' a document, which, according to the employer, the union disparaged and vilified Beverly." *Beverly Health and Rehabilitation Services, Inc.*, above, 328 NLRB at 889. As discussed above, I have found that the Union in this case posited several credible representational reasons, including its corporate campaign, for needing the information requested of Respondent. There is no doubt that the reports here could be expected and did in fact impact terms and conditions of unit employees.

2. Any purported need asserted by the Union for the information is not moot

The Board in *Olean General Hospital*, 363 NLRB No. 62, slip op. at 7, fn. 16, rejected the employer's argument that the request for information was moot since the parties had completed negotiations. Instead, the Board found that "the duty to bargain does not cease when negotiations have been completed, and staffing issues and disciplinary concerns may arise during the term of a collective-bargaining agreement." Id. Therefore, it matters not that the Union here did not file grievances around report findings on behalf of the nurses. In fact, the potential for grievances and potential reporting to licensure boards continues, for example if nurses or other technicians violate any procedures or standards that may be set forth in the reports at issue. Further, issues may arise in any pending or future bargaining. Therefore, Respondent's contention that the matter is moot because the Union did not file a grievance within the designated time period proscribed by the CBA is without merit.[33]

3. The undersigned ALJ has authority to act in this matter

a. There is no Appointments Clause violation

Respondent argues that my appointment does not comply with the requirements of the Appointments Clause, and therefore, I am constitutionally ineligible to preside over this matter. Nevertheless, Respondent acknowledges that the Board rejected this contention in *WestRock Services, Inc.*, 366 NLRB No. 157, slip op. at 1 (2018). Indeed, the Board in *WestRock Services* flatly rejected the argument that the Board's Members do not collectively constitute a "Head of Department," finding that "contrary to the Respondent's contention, the Board is a Department within the meaning of the Appointments Clause." Id, citing *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 512–513 (2010). In summary, the *WestRock Services* Board concluded that it collectively, as the Head of Department, validly appoints its administrative law judges in accordance with the Appointments Clause and has validly appointed each of its existing administrative law judges." Therefore, the Board has validly appointed me, and I reject arguments that there are any Appointments Clause violation.

[33] Blais provided uncontroverted testimony that two of the service and maintenance unit technicians had been disciplined for improperly maintaining equipment and violating hospital procedures related to JCAHO standards and requirements.

b. Removal limitation is not in violation of constitutional separation of powers

Finally, the Respondent insists that "[t]o avoid constitutional concerns, the Board should narrowly construe 'good cause' restrictions on removing administrative law judges." In other words, Respondent challenges the constitutional validity of my appointment because of the statutory removal constraints for administrative law judges. There is no support for this argument, and the Court in Lucia, 585 U.S. ___, 138 S.Ct. 2004, 2050 n. 1 (2018) declined to decide this issue. (See R. Br. at 24–25). Therefore, it is also without merit.

CONCLUSIONS OF LAW

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

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

3. The Union is, and, at all material times, was the exclusive bargaining representative of the following appropriate Unit (Nurses' Unit): "[A]ll full-time and regular part-time registered nurses employed by the Employer at its Our Lady of Fatima Hospital ("Fatima facility ") and School of Nursing, located at 200 High Service Avenue, North Providence, Rhode Island, including all registered nurses – general staff, in-service instructors, case managers," described in Article 1, "Recognition" in the collective-bargaining agreement between Respondent and the Union. The Union is, and, at all material times, was also the exclusive bargaining representative of the following appropriate Unit (Service and Maintenance Unit): "[A]ll full-time, regular part-time, and per diem staff employed by the Employer including Admission Registration, Breast Health Patient Navigators,…Central Services Tech, Central Sterile CSD Aid, Certified Nursing Assistant…" at its Our Lady of Fatima Hospital ("Fatima facility "), located at 200 High Service Avenue, North Providence, Rhode Island, as described in Article 1, "Recognition" in the collective-bargaining agreement between Respondent and the Union.

4. By the following conduct, Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act:

(a) Failing and refusing to bargain in good faith with the Union over accommodations between confidentiality concerns in the mock and actual Joint Commission (JCAHO) reports, and related documents, requested by the Union and the Union's need for the information.

(b) Failing to provide documents related, but not a part of the mock and JCAHO survey reports, including any and all training documentation and names of Unit members who received training on any procedures resulting from these surveys, along with documentation requested of any changes in hospital procedures or policies resulting from the mock and JCAHO surveys, regardless of what Respondent deems substantial.

(c) Failing to provide the Union with the Aesculap Presentation summary

and final reports and related documents requested by the Union, including any and all training documentation and names of Unit members who received training on any procedures resulting from these reports, along with documentation requested of any changes in hospital procedures or policies, regardless of what Respondent deems substantial.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices set forth above, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act. Respondent argues that if found liable under the Act, the appropriate remedy would be to order it to bargain over a reasonable accommodation. The General Counsel, on the other hand, contends that the appropriate remedy here should be ordering Respondent to provide all of the documents. Respondent relies on *Borgess Medical Center*, 342 NLRB 1105, 1107 (2004) citing *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) wherein the Board emphasized an opportunity to bargain as an appropriate remedy "regarding the conditions under which the Union's need for relevant information could be satisfied with appropriate safeguards protective of the Respondent's confidentiality concerns." *Metropolitan Edison Co.*, 330 NLRB 107, 109 citing *Exxon Co. USA*, 321 NLRB 896, 899 (1996).

In *Olean General Hospital*, above, the Board found that it would order the employer to turn over the JCAHO survey and list of deficiencies with all patient identifiers redacted rather than requiring the employer to bargain about an accommodation. 363 NLRB No. 62, slip op. at 11. It determined this remedy was consistent with that in *Kaleida Health, Inc.*, 356 NLRB 1373 (2011), in which the Board found the union's need for the reports in order to process a pending grievance outweighed the employer's confidentiality interests. However, the Board in *Kaleida* ordered the employer to provide the requested information with names redacted since the employer had failed to offer a reasonable accommodation of its interests along with the union's need for the requested information. *Kaleida*, above at 1379–1382. In determining its remedy, the Board in *Oleans*, similarly found that the employer failed to meet its burden of timely raising its confidentiality claim and never sought an accommodation. It also limited, as did the Board in *Kaleida*, access to the JCAHO information to those persons who are involved in or necessary to the Union's representational functions. *Oleans*, above at 11–12, citing *Kaleida*, 356 NLRB 1373 1373, 1373.

Respondent here argues that *Oleans* is distinguishable because unlike the respondent in that case, it raised its confidentiality claim in responses to the union's information requests, and sought accommodations. Although Respondent here raised its confidentiality claim with the Union, except for the mock survey, it did so almost a month after the Union made the requests for the JCAHO survey and Aesculap documents, without explaining the genesis of its claim and without providing adequate accommodations. Nevertheless, I find that the appropriate remedy in this case, only with regards to the mock and actual JCAHO survey results, is to order Respondent to bargain in good faith with the Union accommodations between confidentiality

concerns in the surveys requested by the Union and the Union's need for such information. I come to this result due to some distinction in *Oleans* and *Kaleida*,[34] that the state laws involved "expressly" allowed disclosure of such surveys as they might be permitted by any other provision of law. Such general language does not appear in the Rhode Island State laws in this case. However, I also find that Respondent should provide any and all training documentation and names for unit members who received training on any procedures resulting from these surveys, along with documentation requested of any changes in hospital procedures or policies resulting from the mock and JCAHO surveys, regardless what Respondent deems substantial. Respondent should redact any identifying patient information, if contained therein.

Regarding the Aesculap summary and final reports, I find that the appropriate remedy is for Respondent to provide to the Union these reports and related documents requested by the Union, including any and all training documentation and names of Unit members who received training on any procedures resulting from these reports, along with documentation requested of any changes in hospital procedures or policies, regardless of what Respondent deems substantial. Respondent should redact any identifying patient information, if contained therein. This remedy is consistent with the Board's remedy in *Kaleida*, supra. In *Kaleida*, the Board found that the union's need for the requested information outweighed the employer's asserted confidentiality concerns, and that the employer had failed to offer a reasonable accommodation to balance its interests with the union's needs. The Board decided that the appropriate remedy was for the employer to submit the information to the union. *Kaleida*, above. Moreover, I have found that Respondent has not shown a substantial confidentiality interest with regard to the Aesculap documents.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[35]

ORDER

The Respondent, Prospect Charter Care, LLC, North Providence, Rhode Island, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union over accommodations between confidentiality concerns regarding the mock and actual Joint Commission (JCAHO) reports and related documents requested by the Union and the Union's need for such information.

(b) Failing to provide documents related but not a part of the JCAHO survey, including any and all training documentation and names of Unit members who received training on any procedures resulting from these surveys, along with documentation requested of any

[34] See *Olean*, above at slip op. at 9 and *Kaleida*, above 1378–1379.

[35] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

changes in hospital procedures or policies, regardless what Respondent deems substantial, resulting from the mock and JCAHO surveys.

(c) Failing to provide the Union with the Aesculap Presentation summary and final reports and related documents requested by the Union, including any and all training documentation and names of Unit members who received training on any procedures resulting from these reports, along with documentation requested of any changes in hospital procedures or policies, regardless of what Respondent deems substantial.

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

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

(a) Bargain in good faith with the Union over accommodations between confidentiality concerns regarding the mock and actual JCAHO survey reports by the Union and the Union's need for such information.

(b) Provide the Union with any and all training documentation and names for unit members who received re-training on any procedures resulting from the mock and actual JCAHO survey reports, including documentation of any changes in hospital procedures or policies, regardless of what Respondent deems substantial. Respondent should redact any identifying patient information, if contained therein.

(c) Provide the Union with the Aesculap Presentation summary and final report and related documents requested by the Union, and failing to provide the Union with the Aesculap Presentation summary and final report and related documents requested by the Union, redacting any patient information if applicable.

(d) Within 14 days after service by the Region, post at its Our Lady of Fatima Hospital facility in North Providence, Rhode Island copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own

[36] 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."

expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 2017.

(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.

Dated, Washington, D.C. March 11, 2019

Donna N. Dawson
Administrative Law Judge

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 in good faith with United Nursed and Allied Professionals, Local 5110 (the Union) by failing and refusing to bargain over reasonable accommodations between confidentiality concerns regarding mock and actual Joint Commission (JCAHO) reports requested by the Union and the Union's need for such information.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to provide it with requested documents, relating to training of Unit employees and policy and procedure changes resulting from mock and JCAHO reports.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to provide it with all requested documents relating to the Aesculap summary and final reports, including those related to training provided to Unit employees and policy and procedure changes resulting from the reports.

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

WE WILL bargain in good faith with the Union over accommodations between confidentiality concerns regarding the mock and actual JCAHO survey reports by the Union and the Union's need for such information.

WE WILL provide the Union with requested documents, relating to training and policy and procedure changes resulting from mock and JCAHO reports, except any identifying patient information if contained therein.

WE WILL provide the Union with requested documents relating to Aesculap summary and final

reports, including, training and policy and procedure changes resulting from them, except any identifying patient information if contained therein.

PROSPECT CHARTER CARE, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

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

Region 1
10 Causeway Street, 6th Floor, Boston, MA 02222-1072
(617) 565-6700, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-200126 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (857) 317-7816.