

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

_____)	Case Nos. 07-CA-201332
HURON VALLEY-SINAI HOSPITAL)	07-CA-205971
Respondent,)	07-CA-213556
and)	07-CA-217647
MICHIGAN NURSES ASSOCIATION)	
Charging Party.)	
_____)	

**RESPONDENT HURON VALLEY-SINAI HOSPITAL'S ANSWERING BRIEF TO
COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Dated: July 26, 2019

Kevin J. Campbell
The Allen Law Group, P.C.
3011 W. Grand Boulevard, Suite 2500
Detroit, Michigan 48202
(313) 871-5500
kcampbell@alglawpc.com
Counsel for Respondent Hospital

TABLE OF CONTENTS

INTRODUCTION.....1

ARGUMENT.....1

 I. The General Counsel’s Exceptions One Through Five Regarding
 the Hospital’s Blank Exit Interview Form are Meritless and Should be
 Denied1

 II. The General Counsels Sixth Exception Regarding the Hospital’s
 Proposed Confidentiality Agreement is Meritless and Should be
 Denied3

 III. The General Counsel’s Seventh Exception Regarding the Alleged
 Presumptive Relevance of the Exit Interview Forms is Meritless
 And Should be Denied.....5

 IV. The General Counsel’s Eighth Exception Regarding Alleged Overbreadth
 is Meritless and Should be Denied.....6

CONCLUSION.....8

CERTIFICATE OF SERVICE.....9

TABLE OF AUTHORITIES

Cases

Alcan Rolled Prods.--Ravenwood, LLC, 358 N.L.R.B. 37 (2012).....8

Anheuser-Busch, Inc., 237 NLRB 982 (1978).....7

ASARCO, Inc. v. NLRB, 805 F.2d 194 (6th Cir. 1986).....7

Borgess Med. Ctr. & Michigan Nurses Ass'n, 342 NLRB No. 109 (2004).....7

Crittenton Hosp., 342 N.L.R.B. 686 (2004).....6

E. I. Du Pont de Nemours & Co. v. NLRB, 744 F.2d 536 (6th Cir. 1984).....5

NACCO Material Handling Group, Inc., 359 N.L.R.B. 1192 (2013).....5

NLRB v. Noel Canning, 573 U.S. 513 (2014).....5

NLRB v. Rockwell-Standard Corp., 410 F.2d 953, 957 (6th Cir. 1969).....5

NLRB v. St. Joseph's Hosp., 755 F.2d 260 (2nd Cir. 1985).....2

NLRB v. Western Elec., 559 F.2d 1131 (8th Cir. 1977).....5

San Diego Newspaper Guild v. NLRB, 548 F.2d 863 (9th Cir. 1977).....5

SDBC Holdings, Inc. v. NLRB, 711 F.3d 281 (2nd Cir. 2011).3

Shell Oil Co. v. NLRB, 457 F.2d 615 (9th Cir. 1972).....2

Shen Lincoln-Mercury-Mitsubishi, Inc., 321 N.L.R.B. 586 (1996).....4

Tritac Corp., 286 N.L.R.B. 522, 528 (1987).....8

Statute

National Labor Relations Act.....passim

INTRODUCTION

To the extent the General Counsel’s Exceptions are not a continuation of meritless arguments advanced elsewhere, they illustrate the sloppiness of the ALJ’s Decision. The Exceptions focus primarily on issues surrounding the ALJ’s conclusion that the Respondent, Huron Valley-Sinai Hospital (“Hospital” or “HVSH”), failed to provide the Charging Party, Michigan Nurses Association (“MNA” or “Union”), with the information in a blank exit interview form, which the ALJ relegated to a perfunctory footnote. The perfunctory nature of the legal conclusion might explain, at least in part, how the ALJ concluded that the Hospital failed to provide the MNA with the information within a blank eight-page form with twenty brief questions when, in fact, the Hospital did so.

In addition to sloppiness and errors, the ALJ’s Decision, if adopted, will inevitably discourage good faith actions by employers, like the Hospital, to take proactive steps to learn of suspected legal, policy or ethical concerns from exiting employees so that they can take self-corrective actions if necessary. These actions will be discouraged because employers, like the Hospital, will cease the practice altogether to avoid liability or employees will choose to be less candid with empty promises of confidentiality. The Board should, therefore, deny the General Counsel’s Exceptions and reverse the ALJ’s Decision.

ARGUMENT

I. The General Counsel’s Exceptions One Through Five Regarding the Hospital’s Blank Exit Interview Form are Meritless and Should be Denied in Their Entirety

The General Counsel’s first five exceptions pertain to the blank exit interview form. In the seventh footnote of his Decision, the ALJ concluded that the Hospital’s “failure to provide the blank interview form to the Union violates Section 8(a)(5) and (1).” The General Counsel objects because this conclusion is neither included in the ALJ’s Conclusions of Law, nor addressed in his

Order and Notice to Employees. The General Counsel characterizes these exceptions as “ministerial.”¹

A. General Legal Principles

It is well-settled that a union is not “automatically entitled to...information in the exact manner requested...” *NLRB v. St. Joseph's Hosp.*, 755 F.2d 260, 263 (2nd Cir. 1985); *see also Shell Oil Co. v. NLRB*, 457 F.2d 615, 620 (9th Cir. 1972) (holding that "presentation of bona fide concerns by the Company, coupled with reasonable proposals designed to satisfy the needs of the Union and to achieve a mutually satisfactory resolution of the Union request, is simply not a refusal to bargain. On the contrary this is precisely the conduct the Labor Act is designed to foster.")

In addition, ““when the employer presents a legitimate, good faith objection...[to providing access to information], and offers to cooperate with the union in reaching a mutually acceptable accommodation, it is incumbent on the union to attempt to reach some type of compromise with the employer...” *St. Joseph's Hosp.*, 755 F.2d at 265 (quoting from *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1098 (1st Cir. 1981)).

B. The General Counsel’s Exceptions One Through Five Should be Denied in Their Entirety

Assuming *arguendo* that the blank exit interview form is relevant to the issue of whether allegedly low staffing is a cause of nurse turnover at HVSH, the Hospital articulated a good faith concern that its internal and confidential form might be tampered with.² For example, false information could be inserted into the form and circulated to deliberately put the Hospital in a bad light. There is no evidence in the record suggesting that this concern was ill founded and unreasonable, particularly given the circumstances.

¹ General Counsel Brief in Support of Exceptions, p. 1.

² Tr. at p. 112 (Ayer).

Notwithstanding this legitimate concern, the Hospital allowed the MNA “to review [the form] for as long as they wanted and to take notes if they wanted.”³ At trial, Vincent Schraub admitted that the Hospital offered him an unlimited amount of time to access the information in the form. In fact, Mr. Schraub was unable to identify any restrictions on his access.⁴ While the ALJ apparently concluded, without any analysis, that only a photocopy could provide the MNA with knowledge of the form’s content, there is no evidence in the record to support this conclusion. The form is only eight pages and contains twenty short questions. A reasonable person could record the twenty questions down without burden.

In short, by affording the MNA with unrestricted access to its exit interview form, the Hospital fully complied with its obligations under the National Labor Relations Act. In a similar case, the Second Circuit Court of Appeals held that the employer “fully complied with [its] obligation by affording the Union multiple opportunities to examine and take notes on the 19-page Financial Statement that the Union had requested.” *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281, 292-293 (2nd Cir. 2011).

Accordingly, the Hospital respectfully requests that the Board deny the General Counsel’s first five Exceptions.

II. The General Counsels Sixth Exception Regarding the Hospital’s Proposed Confidentiality Agreement is Meritless and Should be Denied

The General Counsel argues that the ALJ erred “in his findings when he found that Respondent requested that the Charging Union sign a confidentiality agreement for the completed exit interviews.”⁵ The General Counsel argues that the MNA “testified credibly that Respondent

³ Tr. at p. 101 (Ayer).

⁴ Tr. at p. 58 (Schraub).

⁵ General Counsel Exceptions, ¶ 5.

refused to provide the actual exit interviews, but wanted the confidentiality agreement for the blank form.”⁶

This argument fails for several reasons. First, it is contrary to the great weight of the evidence. The General Counsel relies exclusively on Mr. Schraub’s general and uncorroborated testimony that the Hospital offered no accommodation in reply to the MNA’s request for the unredacted exit interview forms.⁷ On the other hand, Shaun Ayer—an attorney licensed with the State Bar of Michigan—testified in great detail about the accommodations offered by the Hospital in reply to the MNA’s request. And Mr. Ayer’s testimony is corroborated by the Hospital’s bargaining notes.⁸ Indeed, the notes twice reference the Hospital’s confidentiality interest in the unredacted exit interview forms, in addition to its proposal for a confidentiality agreement and redaction of irrelevant, but confidential, information.⁹

Second, the ALJ observed the witnesses testify, observed their demeanor, and credited the testimony of Mr. Ayer rather than Mr. Schraub. As such, the Board should give appropriate deference to the ALJ’s credibility determinations. *See Shen Lincoln-Mercury-Mitsubishi, Inc.*, 321 N.L.R.B. 586, 589 (1996) (“Weight is given to the administrative law judge’s credibility determinations because she ‘sees the witnesses and hears them testify, while the Board and the reviewing court look only at the cold records.’”) (quoting from *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)).

Accordingly, the Hospital respectfully requests that the Board deny the General Counsel’s sixth Exception.

⁶ General Counsel Brief in Support of Exceptions, p. 6.

⁷ Tr. at p. 19 (Schraub).

⁸ Respondent Exhibit 3.

⁹ *Id.* (“Confidentiality of Exit w/ Redacted info.”)

III. The General Counsel’s Seventh Exception Regarding the Alleged Presumptive Relevance of the Exit Interview Forms is Meritless and Should be Denied

In its seventh Exception, the General Counsel argues that the ALJ erred “when he found that the exit interview forms were not presumptively relevant.”¹⁰ The General Counsel reasons that “the issue is not who filled out the interviews”—i.e., former bargaining unit members—“but what the information is about.”¹¹

However, the General Counsel’s argument fails because it is contrary to binding precedent. It is well-settled that “where the request is for information concerning employees outside of the bargaining unit, the Union must show that the requested information is relevant to bargainable issues.” *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867-868 (9th Cir. 1977); *see also NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969); *E. I. Du Pont de Nemours & Co. v. NLRB*, 744 F.2d 536, 538 (6th Cir. 1984) (holding that a “union’s demonstration of the relevance of non-unit information must involve something more than the formulation of a merely general theory.”); and *NLRB v. Western Elec.*, 559 F.2d 1131, 1133 (8th Cir. 1977) (“When a union requests information concerning employees outside of the bargaining unit, the union must show that the requested information is relevant to bargainable issues.”)

Finally, the General Counsel’s cited authorities do not support its position. For example, the General Counsel relies on *NACCO Material Handling Group, Inc.*, 359 N.L.R.B. 1192 (2013). However, this decision was issued by a Board panel subsequently found invalid by the Supreme Court in *NLRB v. Noel Canning*, 573 U.S. 513 (2014). In addition, the General Counsel relies on *Crittenton Hosp.*, 342 N.L.R.B. 686 (2004). However, this decision recognized that “no such

¹⁰ General Counsel Exceptions, ¶ 7.

¹¹ General Counsel Brief in Support of Exceptions, p. 8.

presumption of relevance attaches to requested information that relates to matters or operations affecting employees *outside the unit represented by the union.*” *Crittenton Hosp.*, 342 N.L.R.B. at 694 (emphasis added). Thus, *Crittenton Hosp.*, in fact supports the Hospital’s position.

Accordingly, the Hospital respectfully requests that the Board deny the General Counsel’s seventh Exception.

IV. The General Counsel’s Eighth Exception Regarding Alleged Overbreadth is Meritless

In its eighth exception, the General Counsel objects to the redaction in the ALJ’s remedy, namely the deletion of the names of those who are the subject of “unflattering reference[s],” because the adjective is allegedly overly broad.

However, the General Counsel’s conclusory argument fails because it is entirely unsupported by reasoning or legal authority. Instead, the General Counsel reargues its position that the Hospital did not have a legitimate and substantial confidentiality interest in answers to questions fifteen through nineteen of the exit interview forms. In doing so, the General Counsel effectively ignores Mr. Ayer’s uncontradicted testimony about these interests, namely legal exposure to HVSH and a chilling effect on future exit interviews. While the General Counsel attempts to belittle these interests, it fails to explain why they are illegitimate. Indeed, the General Counsel does not deny that exiting nurses are promised confidentiality in these interviews. Nor does the General Counsel offer any analysis as to why it is unreasonable for the Hospital to conclude, consistent with commonsense, that a breach of this promise will have a chilling effect on the process in the future. And unsurprisingly, the General Counsel does not deny the detriment of this chilling effect on good employers, like the Hospital, who endeavor to proactively maintain a workplace compliant with the law and its policies.

Second, the General Counsel ignores binding precedent regarding an employer's inherent interest in facilitating candid reporting to enable appropriate investigations and corrective actions. For example, the Sixth Circuit Court of Appeals recognized an employer's confidentiality interest in an internal self-critical report, holding as follows:

The ALJ gave no weight to ASARCO's other argument that disclosure of the self-critical analysis would seriously affect the candor of future critiques and have a chilling effect that would defeat the critique's primary purpose. Although the ALJ gave lip service to the settled principle that the Union's need for information must be balanced against legitimate confidentiality interests of the employer...in actuality he summarily concluded that, because the report was not prepared in anticipation of litigation, the Union's right to the information was thereby established. We cannot sustain this conclusion...***The ability of an employer to engage in self-critical analysis and speculation unhindered by concern that such material will be disclosed to the Union is a substantial, legitimate interest.***

ASARCO, Inc. v. NLRB, 805 F.2d 194, 199 (6th Cir. 1986) (emphasis added); *see also Anheuser-Busch, Inc.*, 237 NLRB 982, 984 (1978) ("Witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed...Requiring either party to a collective bargaining relationship to furnish witness statements to the other party would diminish rather than foster the integrity of the . . . process."); and *Borgess Med. Ctr. & Michigan Nurses Ass'n*, 342 NLRB No. 109, 1106 (2004) ("We acknowledge the State of Michigan's public policy interest in such self-critical documentation in the health care context. Furthermore, the Michigan Supreme Court has recognized the importance of the 'assurance of confidentiality' provided by state law in fostering candid self-assessment by health care facilities to improve patient care. We therefore find that the Respondent has established a legitimate confidentiality interest in the incident reports.")¹²

¹² The Michigan Court of Appeals has repeatedly recognized the importance of these confidentiality interests. For example, the court observed that "[h]ospital personnel are expected to give their honest assessment and reviews of the performance of other hospital staff in incidents such as the one in the present case. Absent the assurance of confidentiality as provided by §§ 21515 and 20175(8), the willingness of hospital staff to provide their candid assessment will be greatly diminished. This will have a direct effect on the hospital's ability to monitor, investigate, and

Third, the General Counsel ignores Board precedent recognizing an employer's interest in protecting itself against liability as legitimate and substantial. For example, the Board affirmed an administrative law judge's conclusion that an employer's asserted interest in "protecting itself against potential liability in the event of disclosure" of employee polygraph test results, which a union had requested, was a legitimate confidentiality interest because of the potential legal exposure to the employer. *Tritac Corp.*, 286 N.L.R.B. 522, 528 (1987). *See also Alcan Rolled Prods.--Ravenwood, LLC*, 358 N.L.R.B. 37, 43 (2012).

Accordingly, the Hospital respectfully requests that the Hospital respectfully requests that the Board deny the General Counsel's eighth Exception.

CONCLUSION

For the foregoing reasons, Respondent Huron Valley-Sinai Hospital respectfully requests that the National Labor Relations Board deny the General Counsel's Exceptions, reverse the Administrative Law Judge's Decision in its entirety, and dismiss the Complaint in this matter.

Respectfully Submitted,

THE ALLEN LAW GROUP, P.C.

By: /s/ Kevin J. Campbell
Kevin J. Campbell P66367
3011 W. Grand Blvd., Ste. 2500
Detroit, Michigan 48202
(313) 871-5500
kcampbell@alglawpc.com
Counsel for Respondent Hospital

Dated: July 26, 2019

respond to trends and incidents that affect patient care, morbidity, and mortality." *Dorris v. Detroit Osteopathic Hosp. Corp.*, 460 Mich. 26, 42-43, 594 N.W.2d 455, 463-464 (1999).

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing document via the Board's electronic filing system, and served copies on the Reginal Director, Counsel for the General Counsel, and the Charging Party's Counsel on July 26, 2019 as follows:

BY ELECTRONIC FILING

Hon. Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Ms. Terry A. Morgan
Reginal Director
National Labor Relations Board
Region 7
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

BY ELECTRONIC MAIL

Amy E. Bachelder, Esq.
Nickelhoff & Widick, PLLC
333 W. Fort, Suite 1400
Detroit, Michigan 48226
abachelder@michiganlabor.legal

Donna Nixon, Esq.
Field Attorney
National Labor Relations Board
Region 7
477 Michigan Avenue, Room 300
Detroit, Michigan 48226
Donna.Nixon@nlrb.gov