UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AMERICAN MEDICAL RESPONSE WEST

and **Case 20-CA-234200**

UNITED EMS WORKERS,
AFSCME LOCAL 4911

Min-Kuk Song, Esq.
for the General Counsel

Daniel F. Fears, Esq.
Payne & Fears, LLP.
for the Respondent

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in San Francisco, California on June 18, 2019, based upon a Complaint and Notice of Hearing ("Complaint") dated March 25, 2019. The Complaint alleges that American Medical Response West ("Respondent") violated Section 8(a)(1) and (5) of the National Labor Relations Act ("the Act") by failing to provide, and delaying in providing, United EMS Workers, AFSCME Local 4911 ("Charging Party" or "Union") with certain information that was necessary and relevant to the Union's performance of its duties as the collective bargaining representative of Respondent's employees. Respondent denies the allegations.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel and Respondent, I make the following findings of fact and conclusions of law.[1]

I. JURISDICTION AND LABOR ORGANIZATION

Respondent, a California corporation, maintains a facility in San Francisco, California, where it provides ambulance and wheelchair van transportation services. It derives annual gross

[1] Unless otherwise noted, witness demeanor was the primary consideration used in making all credibility resolutions. Testimony contrary to my findings has been specifically considered and discredited.

revenues in excess of $500,000, while purchasing and receiving goods and services valued in excess of $5,000 from points originating outside of the State of California. 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. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2] (GC. 1(d), 1(f); JX. 1)

II. FACTS

A. General Background

The Union represents a bargaining unit of Respondent's Northern California based employees including paramedics, drivers, dispatchers, and emergency medical technicians ("EMTs"). There are about 2,200 unit employees throughout Northern California and 300 working out of Respondent's San Francisco office. Casey Vanier ("Vanier") serves as the Union's representative responsible for overseeing the bargaining unit. Nick Cheatham ("Cheatham") is a Union shop steward who works in Respondent's San Francisco office. Rodney Brouhard ("Brouhard") works as Respondent's San Francisco operations manager; he has held this position for about five years. Brouhard has worked a total of 29 years for Respondent, most of which was spent working as a member of the bargaining unit; he even served as a shop steward. (Tr. 24–25, 88–90, 102–03, 125; GC. 1(d), 1(f); JX. 1)

Respondent and the Union were parties to a collective-bargaining agreement whose terms ran from January 1, 2015 through June 30, 2018 ("2015 CBA"). On June 28, 2018, the parties signed an agreement extending the terms of the 2015 CBA through August 31, 2018; the agreement was not further extended. From October 2018 through March 2019 the parties were in the process of negotiating a successor agreement. Thereafter, they reached agreement on a successor contract, and gave retroactive effect to the terms of the new agreement so that it was effective from September 1, 2018, through August 31, 2022 ("2018 CBA"). (JX. 1–3; R. 1)

Both the 2015 CBA and the 2018 CBA contain just cause provisions regarding employee discipline with the following language:

> **5.1 Corrective Action and Discharge**
>
> The Employer shall have the right to issue corrective action and discharge employees for just cause.
>
> **5.2 Procedure**
>
> The Employer and the Union recognize the intent of corrective action is to remedy performance problems and modify behavior. While the Employer will attempt to accomplish those objectives through training and progressive

[2] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Joint Exhibits are denoted by "GC," "R," and "JX" respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

corrective action, the Employer reserves the right to issue corrective action, up to and including discharge, based on just cause and the circumstances of each case. Serious or repeated offenses may call for corrective action commensurate with the offense or totality of the circumstances and not necessarily based upon the premise of progressive corrective action.

Article 6 of both CBAs outline the parties' grievance and arbitration mechanism. Absent minor changes which are not relevant here, the wording in Article 6 is identical in both agreements. Article 6 allows for either the employee or the Union to file a grievance within 15 days of the occurrence giving rise to the grievance. It then provides for a three-step grievance process culminating with binding arbitration.

Article 18 of both CBAs is titled "No Discrimination/Harassment." The language in Article 18 is identical in both the 2015 CBA and the 2018 CBA and reads as follows:

18.1 Gender Intent

Whenever words denoting a specific gender are used in this Agreement they are intended and shall be construed to mean any gender with which a worker identifies.

18.2 Non-Discrimination/Harassment/Retaliation

The Employer and the Union agree that neither party shall discriminate, harass, or retaliate against any person because of race, color, sex, religion, age, disability, national origin, citizenship, veteran status, sexual orientation, or any other status protected by federal, state or local law.

The Union acknowledges that the Employer may be obligated to reasonably accommodate disabled employees in accordance with the American with Disabilities Act. The Union agrees that the Employer may undertake such reasonable accommodations notwithstanding the terms and conditions of this Agreement except for seniority rights which shall be recognized and respected when evaluating the reasonableness of any accommodation.

18.3 Grievance/Arbitration Election and Waiver

Grievances alleging unlawful discrimination or harassment in violation of this Agreement may be pursued and resolved through the grievance and arbitration procedure contained in this Agreement, provided that all requirements for the filing and maintenance of a grievance through arbitration are satisfied and that the employee and/or Union have not initiated or filed a complaint or legal action based on the same event(s) with a federal, state or local agency or court. The initiation or filing of a complaint or legal action alleging unlawful discrimination or harassment with a federal, state, or local agency or court shall waive the employee's and/or Union's right to pursue the same matter as a grievance

> pursuant to this Agreement. Any grievance alleging unlawful discrimination or harassment shall be deemed withdrawn at any step of the grievance and arbitration procedure upon the filing of such a complaint or legal action. Employees and the Union are not required to exhaust the grievance and arbitration procedure of this Agreement before initiating or filing a complaint or legal action alleging unlawful discrimination or harassment with any federal, state, or local agency or court.

B. The discharge of Karis Arce and the Union's information requests

1. Background

Karis Arce (Arce) worked for Respondent as a San Francisco based EMT. She was a member of the bargaining unit until her discharge on November 6, 2018 for making certain statements on Facebook. The Union did not believe that Arce's termination met the just cause standard outlined in the CBA, so Vanier worked with Arce and Cheatham to file a grievance over her termination. On November 18, 2018, Cheatham emailed the grievance to Brouhard, and sent a copy to Vanier. (Tr. 25–26; R. 2; JX. 1, 4)

The grievance was filled-out on a pre-printed form used by the Union, and states that it was being filed by the Union on Arce's behalf. In the box on the form asking for a "Description of Grievance" the Union wrote the following:

> The Discipline issued to the Grievant was without Just Cause. Evidence of lack of Just Case is shown through severity of Discipline without precedent, progressive discipline, or adequate warning of probable consequences of their conduct. [sic]

In the box on the grievance form that reads "Applicable Contract provisions include, but are not limited to, section(s)," the Union wrote "Article 5.1 Just Cause, Article 5.2 Procedure." Finally, at the bottom of the grievance form the Union requested the following information that it deemed relevant and necessary to process the grievance:

> Copy of Discipline given to Grievant, Evidence relied upon during the investigation, Other Acts of Discipline involving social media with regards to Employer, History of previous Disciplines to Grievant prior to current Grievance. All interviews or statements/evidence collected during investigation of person filing complaint and employee. [sic]

In his email to Brouhard, Cheatham also proposed certain dates the parties could meet to discuss the grievance. Once Brouhard received the email, he reached out to Cheatham to discuss dates for a meeting. (Tr. 26–28, 48, 92; JX. 4–5)

On Wednesday, November 28, 2018, the parties exchanged a series of emails regarding the grievance and the Union's information request. In the first email Cheatham wrote Brouhard

asking to reschedule their grievance meeting to December 6, as the Union needed additional time to prepare. Cheatham also asked Brouhard:

> [W]ho would I need to talk to about getting those grievance materials requested? This includes: 1) Copy of Discipline given to Grievant; 2) Evidence relied upon during the investigation; 3) Other Acts of Discipline involving social media with regards to Employer; 4) History of previous Disciplines to Grievant prior to current Grievance; 5) All interviews or statements/evidence collected during investigation of person filing complaint and employees. [sic]

Brouhard replied to Cheatham by email saying that he was on leave from December 4–7, and if Cheatham could not meet during the current week, they could meet at another time. However, Brouhard noted that he needed Cheatham to "grant an extension for us to do that." As for the information request, Brouhard wrote that he was home sick, but when he returned to work "I will scan everything to your email." Cheatham replied saying that he would coordinate the matter with the Union, and it seemed like they would have to meet to discuss the matter the week following Brouhard's leave. (JX. 5)

2. Arce contacts the State of California over her discharge

Arce retained an attorney who sent Brouhard a letter dated November 28, 2018; Brouhard received it the next day. The letter informed Respondent that Arce had contacted that State of California Division of Labor Standards Enforcement (DLSE) and the State of California Department of Fair Employment and Housing (DFEH) over her discharge and asserted that that the reasons Respondent advanced for Arce's discharge were pretext.[3] The letter further states:

> I am currently enclosing:
>
> 1) a retaliation claim which was filed with the State of California Division of Labor Standards Enforcement (DLSE) for her comments made on the internet which were supporting her rights under the labor code for non-exempt employees to get rest breaks; plus,
>
> 2) a claim for violations of FMLA accommodation and disability discrimination, retaliation and wrongful termination, since she was specifically warned as a result of taking PTO and/or FMLA leave for her disability was her Final Warning of being absent any days from work (sick or not) would result in termination instructing her she 'could not call in sick for the next two years' filed with the State of California Department of Fair Employment and Housing (DFEH). [sic]

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[3] The DLSE is a California "state agency that adjudicates wage claims, investigates discrimination and public-work complaints, and enforces the Labor Code and Industrial Welfare Commission orders." *Louis v. McCormick & Schmick Rest. Corp.*, 460 F. Supp. 2d 1153, 1162 (C.D. Cal. 2006) (citing Cal. Labor Code §§ 82–83). The DFEH is a "California agency responsible for enforcing various state and federal employment discrimination laws." *Peterson v. State of Cal. Dep't of Corr. & Rehab.*, 319 F. App'x 679, 680 (9th Cir. 2009). See also Cal. Gov't Code § 12930 (West 2019).

The letter also contains twelve pages of enclosures, including printouts from the DLSE and DFEH confirming submissions to those agencies.[4] (Tr. 29, 122; JX. 6)

3. Respondent pronounces the Union's grievance as being withdrawn

Between November 29 and December 4, 2018 Brouhard and Cheatham exchanged a series of emails about Arce's grievance, culminating with Brouhard pronouncing that Respondent had deemed the grievance withdrawn. In the first email, sent on November 29, Cheatham asked Brouhard whether they could meet on December 12, 13 or 14 for Arce's grievance meeting. Brouhard replied the next day saying he was open to meet on December 12, but was waiting for Vanier to get back to him regarding the grievance, and recommended that Cheatham speak with Vanier before they set a firm meeting date. On December 3, Cheatham replied to Brouhard asking to get the information the Union had requested in the grievance. On December 4, Brouhard replied saying that Respondent had received a notice from Arce's lawyer saying that he had filed complaints with both state and federal agencies regarding Arce's discharge. In his email, Brouhard then quotes from Section 18.3 of the CBA, and states that "[t]his grievance has been withdrawn." (JX. 7)

Cheatham forwarded Brouhard's email to Vanier, who then emailed Brouhard on December 6. Vanier sent Brouhard two emails that day. In the first email Vanier asks Brouhard for a complete copy of Arce's personnel file, and includes in the email a declaration signed by Arce authorizing Vanier to obtain the file. In the second email Vanier states that he received Brouhard's email to Cheatham and further says that the "Union has made no mention of withdrawing our grievance." He then asks whether the Union should interpret Brouhard's email to mean that Respondent would not meet with the Union regarding the grievance on December 12 as they had scheduled. Regarding the Union's information requests, Vanier wrote that, regardless of Respondent's position on the grievance meeting, the Union was still entitled to the information. (Tr. 30–31; JX. 7–8)

Brouhard responded to Vanier's email the night of December 6 and copied Cheatham with his response. In his email Brouhard apologized if he had previously been unclear. He went on to recount that Respondent was notified that Arce filed a complaint with the DFEH alleging the company "subjected her to disability discrimination and alleging she was wrongfully terminated in retaliation for utilizing FMLA/CFRA leave." Therefore, Brouhard stated "it is very clear that Section 18.3 of the CBA applies and thus 'the grievance is deemed withdrawn.'" Brouhard offered to have an informal meeting, as a "good faith courtesy" to discuss issues regarding Arce. However, he said the company would not consider the "meeting a grievance meeting because . . . the grievance was 'deemed withdrawn' when Ms. Arce filed her DFEH complaint and therefore there is no basis for a grievance meeting under the grievance/arbitration section of the CBA." Regarding the Union's information requests, Brouhard stated his willingness to give the Union a copy of Arce's termination notice "as a courtesy," but said that Respondent was declining to provide any of the other information the Union requested "because

[4] The letter's enclosures show that Arce's attorney had only filed an "intake form" with the DFEH, and that an initial intake interview was scheduled for May 21, 2019. (JX. 6, p. 6) Indeed, it was not until May 22, 2019, that a formal complaint of discrimination was filed with the DFEH over Arce's discharge. (JX. 16)

it is no longer relevant to any pending grievance." Brouhard ends the email by asking whether the Union wanted to have an "informal meeting" on December 12. (JX. 7)

Cheatham emailed Brouhard on December 10, recommending the parties meet on December 14 "to go over the details and potentially hammer out any misunderstandings" regarding Arce. In the email, Cheatham again asked for Arce's termination notice. The parties ultimately agreed to meet on December 14, at 10:00 a.m. (JX. 9)

4. December 14 meeting between the parties

The parties met to discuss Arce's grievance on December 14, 2018, in a conference room at Respondent's San Francisco office. When Vanier and Cheatham arrived for the meeting, they interrupted another meeting that Brouhard was having with his supervisors. Cheatham told those present that the Union was there for a step 1 grievance meeting, and the various supervisors left; Brouhard, Vanier and Cheatham then began their meeting. Vanier and Cheatham presented the Union's case in support of their argument that Arce was not terminated for just cause. Brouhard said his hands were tied, and that the grievance was withdrawn. He further explained it was the company's position that Arce waived her right to file a grievance, pursuant to Section 18.2 and 18.3 of the CBA, when her attorney filed a discrimination complaint against the company with the DFEH. The Union argued that they were not involved in whatever action Arce and her attorney were undertaking, and that they were just pursuing the allegations contained in the grievance. Also, Vanier told Brouhard that the Union still needed to get the information it had requested. Brouhard said that he needed to speak with the company's legal counsel and would contact them afterwards. However, Brouhard did provide the Union with a copy of Arce's termination letter; this was the first time Respondent had provided this document to the Union. Before the meeting ended, the parties discussed a possible settlement of the grievance, with the Union asking whether Respondent would accept Arce's resignation in lieu of her being fired. Brouhard said the company would be willing to consider the proposal. Ultimately, these settlement discussions went nowhere, as Arce informed the Union that she was not interested in the proposed settlement. (Tr. 33–34, 51, 56, 97–99)

5. Continued emails after the December 14 meeting

After the parties met on December 14, they continued to exchange emails over Arce's grievance and the Union's remaining information requests. On December 21, 2018, Vanier emailed Brouhard, with a copy to Cheatham, thanking Brouhard for the December 14 meeting, referring to it as a "the step 1 grievance meeting on Karis Arce's case." In the email, Vanier also asks Brouhard about the status of the Union's request for Arce's personnel file, and whether it would be produced to the Union along with the other information they requested in the grievance. Vanier ends his email saying that he was looking forward to Brouhard's "step 1 response to our meeting." Brouhard responded by email on December 21, saying he was "still working on both questions," that he would probably not have any answers until after Christmas, and would let Vanier know "as soon as I get the gears moving." (JX. 9)

On Friday, January 4, 2019, Vanier emailed Brouhard saying he wanted to "follow up" and that the Union wanted the information they requested "as soon as possible." He also asked

Brouhard for "the step 1 grievance meeting response as well." Brouhard replied the same day by email saying that he had some personal issues come up, was working on Arce's "grievance today and I should have an answer Monday." (JX. 9)

On Monday, January 7, 2019, Brouhard emailed Vanier and Cheatham a letter regarding Arce's termination and grievance. Consistent with his December 6, 2018 email, in the letter Brouhard details the background involving Arce's lawyer providing Respondent notice of the filing of a complaint with the State of California alleging the company subjected Arce to disability discrimination and claiming she was wrongfully terminated for using leave protected by the Family Medical Leave Act and the California Family Rights Act. Brouhard's letter further states that, "[p]er section 18.3 of the CBA, Ms. Arce's decision to act civilly withdraws any grievance." In the letter, Brouhard also says that Arce was "free to request an in-person review of her employee file . . . per section 23.8 of the CBA," and ends the letter saying "[p]lease consider this communication as the Company response in this matter." (JX. 10)

On January 8, 2019, Vanier emailed Brouhard, with a copy to Cheatham, thanking Brouhard "for your response to our step 1 grievance meeting," and saying that he and Cheatham would be reaching out to schedule "a step 2 grievance meeting in the very near future." In the email Vanier also says that the Union was still waiting to receive all the information they requested and asks Brouhard for an update; it does not appear that Brouhard responded to Vanier's email. (JX. 11)

On January 17, 2019, Cheatham emailed Brouhard, with a copy to Vanier, saying that the Union had decided to move forward with a Step 2 grievance meeting and would be contacting Brouhard "shortly to decide on what time would work best for all of us." In the email, Cheatham asks that Brouhard send the Union the information they requested "as soon as possible." As for Arce's grievance, Cheatham said that "[t]here is no room for negotiation on whether or not this qualifies as a matter now requiring a Step 2 grievance meeting and [we] are moving forward as such." Again, it does not appear from the record that Brouhard replied to this email. (JX. 12)

On January 24, 2019, Cheatham sent Brouhard another email, with a copy to Vanier. The email, whose subject matter was "Karis [A]rce step 2 meeting update," reads as follows:

> I'm tired of pussyfooting around. I will be sending an email every hour from now until you respond confirming you received our request for employee documents as well as setting up a meeting time, specifically next Wednesday at 10 AM. The ball is in your court.

Brouhard replied by email the same day saying that, while he appreciated Cheatham's passion, he did not appreciate his language. Brouhard further said that he had spoken to Vanier the previous day, and the company's position that the grievance was withdrawn pursuant to Section 18.3 of the CBA had not changed. Brouhard explained that Arce had "chosen to act civilly and her attorney is in communication with" the company. Therefore, according to Respondent, because "there will be no grievance in this matter, there is no further information to share with the union." (JX. 13)

It is undisputed that, other than Arce's termination notice, which the Union received on December 14, 2018, the Union did not receive any of the other information that it had requested. As for the status of the grievance itself, Vanier testified that it was on hold pending receipt of the information; no demand for arbitration had been made. (Tr. 76)

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III. ANALYSIS

A. Legal Standard.

10 An employer is obligated under Section 8(a)(5) of the Act to supply a union, upon request, with information that will enable it to negotiate effectively and perform its duties as the collective-bargaining representative of the employer's workforce. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2017), enfd. 902 F.3d 296 (D.C. Cir. 2018). This includes information requested by the union for the purposes of processing and evaluating 15 grievances, and information needed to properly administer a collective-bargaining agreement. Id. When the information requested concerns employees in the bargaining unit, it is deemed to be presumptively relevant as such information goes "to the core of the employer-employee relationship." Id. When the information sought concerns nonunit employees, "the union has the burden of establishing relevance." Id. "In either situation, the standard for relevance is the 20 same: a liberal discovery-type standard." Id. (internal quotations omitted). Potential or probable relevance is enough to require the employer to provide the information requested. Id. at fn. 12 (citing *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994)).

B. The relevance of the Union's information requests

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The Board has found the type of information that the Union requested here to be relevant, as it relates specifically to a grievance filed over the termination of a unit employee. Thus, the Union's requests for Arce's personnel file, any disciplinary notices issued to Arce, and disciplines issued to other employees for similar infractions, are relevant. *Grand Rapids Press*, 30 331 NLRB 296, 299 (2000) (collecting cases and noting the Board has required employers to provide unions with personnel files of employees, copies of disciplines, and printouts showing disciplines issued to other employees); see also *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 22 (2015) (union's request for comparative discipline and employer's investigations of similar allegations is relevant to establishing potential disparate treatment, even 35 where the request seeks information for nonunit employees). The same is true regarding the Union's request for the evidence Respondent relied upon during the investigation of Acre's conduct, as this request relates directly to the grievance over Arce's discharge and Respondent's decision to issue discipline. See *Square D Electric Co.*, 266 NLRB 795, 797 (1983) (violation where the employer refused to provide union with videotape evidence allegedly showing 40 employees stealing company property, which employer relied upon to terminate employees). And, the Union's request for witness interview/statements taken during the investigation of Arce's conduct is also relevant. *Piedmont Gardens*, 362 NLRB 1135, 1139 (2015), enfd. on other grounds 858 F.3d 612 (D.C. Cir. 2017) (relevant witness statements must be produced

absent a showing of legitimate and substantial confidentiality interests outweighing the union's need for the information).[5]

C. The Union was entitled to the information it requested

As a defense to the Complaint allegations, Respondent contends that the Union's right to file a grievance over Arce's discharge was waived, pursuant to Section 18.3 of the CBA, when she filed a civil charge with the DFEH over her discharge. (Resp't Br., at 4, 8; JX. 10).[6] Accordingly, Respondent argues that Arce's filing of civil charges challenging her discharge operated as a withdrawal of the grievance. And, since there was no outstanding grievance, the Union's information request was not relevant. (Resp't Br., at 2, 4, 8; JX. 10, 13) The General Counsel asserts that Section 18.3 of the CBA, by its explicit terms, only applies to grievances alleging discrimination and harassment, and therefore there was no waiver. (GC. Br., at 22)

Here, I believe that the plain and unambiguous language of the CBA shows that the Section 18.3 applies only to those grievances alleging unlawful discrimination or harassment which are specifically prohibited in Section 18.2. The purpose of Article 18 is to prohibit discrimination, harassment, or retaliation "against any person because of race, color, sex, religion, age, disability, national origin, citizenship, veteran status, sexual orientation, or any other status protected by federal, state or local law." (JX. 2, R. 1) Nowhere in the CBA do the parties expand the scope of Section 18.3 beyond the non-discrimination provisions set forth in Article 18. Had the parties wanted to expand the reach of Section 18.3 to other grievances, including those filed pursuant to the just cause provisions in Article 5, they would have specifically done so. They did not, and Respondent's attempt to enlarge the scope of Section 18.3 does not comport with the plain reading of the parties' agreement. Accordingly, because the Union's grievance asserts that Arce's termination lacked just cause, and violated the just cause provisions set forth in Article 5 of the CBA, I find that there was no waiver, or withdrawal of the grievance, and the Union was entitled to the information it had requested.

Moreover, even if Respondent is correct, and Section 18.3 removes the grievance over Arce's discharge from the grievance and arbitration provisions of the CBA, "before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all." *Safeway Stores, Inc.*, 236 NLRB 1126 fn. 1 (1978), enfd. 622 F.2d 425 (9th Cir. 1980). "Grievability is not a threshold issue in the unfair

[5] Respondent has not asserted any confidentiality claims regarding any of the requested information. See *Exxon Co. USA*, 321 NLRB 896, 898 (1996) (in order to trigger a balancing test, an employer must first timely raise and prove its confidentiality claim); *Piedmont Gardens*, 362 NLRB 1135, 1135 (2015) (where employer has a confidentiality interest in protecting witness statements from disclosure, the Board will apply the balancing test in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979), to balance the union's need for requested information against any legitimate and substantial confidentiality interests established by the employer).

[6] At no time did Respondent claim that the expiration of the 2015 CBA absolved it of the obligation to provide the Union with the information. Instead, Respondent asserts that the parties have expressly applied the terms of the 2018 CBA retroactively to September 1, 2018. (Resp't Br., at 11) And, as Respondent correctly notes (Resp't Br., at 12), the grievance procedures of a collective-bargaining agreement survive the expiration of the contract, even if the arbitration provision does not. See *Genstar Stone Production Co.*, 317 NLRB 1293, 1300 (1995); *McGraw-Hill Broadcasting Co., Inc.*, 355 NLRB 1283, 1295–96 (2010).

labor practice inquiry." *NLRB v. Safeway Stores, Inc.*, 622 F.2d 425, 428 (9th Cir. 1980), cert. denied, 450 US 913 (1981). While the ultimate merits of the Union's grievance over Arce's discharge, including whether Section 18.3 of the CBA applies to the grievance, may ultimately be resolved by an arbitrator, "[a] union cannot be put to the expense of arbitration only to learn later that it's complaint had no merit." Id. at 430 (citing *NLRB v. Acme Industrial Co.*, 385 US 432, 438–39). "The Board may order production of information relevant to a dispute if there is some probability that it would be of use to the union in carrying out its statutory duties," one of which "is to evaluate and sift out unmeritorious claims." Id. It makes no difference whether the question before an arbitrator is the merits of the grievance, or the "arbitration of grievability." Id. at 430. An employer does not have the "right to withhold from the [u]nion the information the [u]nion needs to evaluate the grievance," as it is possible that the union, with proper information, might withdraw the grievance "without incurring the expense of arbitrating grievability." Id.

Respondent's argument here, that the information requested by the Union was not relevant because the underlying dispute was not grievable, was rejected by the both Board and the Ninth Circuit. As the Ninth Circuit noted, "[w]e have already rejected Safeway's argument that the information was not relevant because the underlying dispute was not, or had not been deemed to be, grievable." *Safeway Stores, Inc.*, 622 F.2d at 430. Therefore, because the information requested by the Union was relevant to its collective-bargaining duties, including the duty to intelligently evaluate the merits of the Arce grievance, Respondent violated Section 8(a)(1) and (5) of the Act by refusing to the provide the information.[7]

D. Delay in providing Arce's termination letter

The Union requested a copy of Arce's discipline on November 18, 2018, but did not receive her termination letter until 26 days later, on December 14. The General Counsel asserts that the nearly four-week delay constitutes an unfair labor practice.

Absent evidence of justification, an unreasonable delay in furnishing relevant information is as much a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all. *PAE Aviation and Technical Services, LLC.*, 366 NLRB No. 95, slip op. at 3 (2018). It is an employer's duty to furnish relevant information as promptly as possible, given the circumstances, as a union is entitled to the information at the time the information request is made. Id. In determining whether a party has failed to produce information in a timely manner, "the Board considers a variety of factors, including the nature of the information sought (including whether the requested information is time sensitive); the difficulty in obtaining it (including the complexity and extent of the requested information); the amount of time the party takes to provide it; the reasons for the delay in providing it; and whether the party contemporaneously communicates these reasons to the requesting party." *General Drivers, Warehousemen & Helpers Local Union No. 89*, 365 NLRB No. 115, slip op. at 2 (2017). "The

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[7] Any claim by Respondent that no violation should be found because the Union had alternate sources for the documents is without merit. (Resp't Br., at 11, fn. 4) The Board has specifically rejected these arguments where, as here, there are no special circumstances presented. *King Soopers, Inc.*, 344 NLRB 842, 844 (2005) ("[A]bsent special circumstances, a union's right to information is not defeated merely because the union may acquire the needed information through an independent course of action."); *Bel-Air Bowl, Inc.*, 247 NLRB 6, 11 (1980).

analysis is an objective one; it focuses not on whether the employer delayed in bad faith or in an attempt to avoid production, but on whether it supplied the requested information in a reasonable time." *Management & Training Corp.*, 366 NLRB No. 134, slip op. at 3 (2018).

Here, while the nature of the information sought, Arce's termination letter, was not necessarily time sensitive, it was easy to obtain; Brouhard was the one who had drafted the letter. It took Respondent 26 days, after three requests from the Union, to eventually provide the letter and the company gave no explanation for the delay. Under these circumstances, I find that Respondent's delay constituted a violation of Section 8(a)(1) and (5) of the Act.[8] See, e.g. *Postal Service*, 308 NLRB 547, 551 (1992) (Four-week unexplained delay unlawful where information was not shown to be difficult to retrieve).

CONCLUSIONS OF LAW

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

2. The Charging Party, United EMS Workers, AFSCME Local 4911 is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regularly scheduled part-time employees in Northern California, including: EMT-1 s, EMT-2s, EMT-Ps, Drivers, Wheelchair Van Drivers, Paramedic CCTs, EMT CCTs, Gurney Van Drivers (Sacramento only), and RNs in Alameda, Contra Costa, Marin, Placer, Sacramento, San Benito, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Solano, Sonoma, Stanislaus, Tulare and Yolo Counties and any distinct CCT and IFT divisions; Dispatchers, Call-takers/Customer Service Representatives, System Status Controllers in Santa Clara, Sacramento, San Mateo (BayCom), Sonoma (REDCOM) and Stanislaus (LifeCom) Counties; Pre-billers, Billers, Clerk 1s, Clerk 2s, Stockers, Washers, Vehicle Service Technicians, Mailroom Clerk (Alameda only), Couriers, Deployment Coordinators and Schedulers in Alameda, Contra Costa, San Mateo, Santa Clara, Stanislaus (Vehicle Service Technician only) and Tulare (Clerk 1s and Clerk 2s only), and any distinct CCT and IFT divisions; Facilities Coordinators (Santa Clara, Stanislaus only and CCT and IFT divisions only).
>
> Excluding EMT-ls and EMT-Ps in Tracy and Turlock, EMT-Ps in San Mateo County, and all other personnel, including guards, and supervisors as defined by the National Labor Relations Act, as amended.

[8] While Brouhard testified that he did not initially respond to the Union's November 18, 2018 information request until the end of the month because of a death in his family, there is no evidence that he communicated this reason to the Union. (Tr. 122–24)

4. By refusing to provide the Union with the information it requested in the grievance filed on November 18, 2018, and as further set forth in the emails between the Union and Respondent sent on November 28, 2018 and December 6, 2018, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. By unreasonably delaying in providing the Union with Arce's termination letter, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the polices of the Act.

Specifically, having found Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to provide the Union with information that is relevant and necessary to its duties as the collective-bargaining representative of Respondent's employees, I shall order Respondent to provide the Union with the information requested as set forth herein. With respect to the Union's request for information that encompasses witness statements, there is nothing in this record to indicate that any of the information requested involves significant confidentiality interests, nor did Respondent assert any such interests. Notwithstanding, given the posture in which this case was presented, in the event Respondent has a legitimate confidentiality interest in protecting any such witness statements from disclosure, including statements or other documents disclosing the identity of the complainant, Respondent shall be allowed at the compliance stage to make a particularized showing of such legitimate confidentiality concerns.[9] See *Jacksonville Area Association for Retarded Citizens*, 316 NLRB 338, 341 fn. 14 (1995) (Board allows employer at the compliance stage to make a particularized showing that specific records sought by the Union involve legitimate and significant confidentiality concerns requiring a balancing of the Union's need for the information against those confidentiality interests); *Fairmont Hotel Co.*, 304 NLRB 746, 746 fn. 3 (1991) (Union is entitled to the identity of and contact information for a complaining guest, unless the employer has promised the guest anonymity or the guest had a reasonable expectation of privacy, and the employer has offered to accommodate its confidentiality concerns with the union's needs for the information).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order:[10]

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[9] In the event of any substantial and legitimate claims of confidentiality, Respondent still has an obligation to seek an accommodation with the Union that will meet the needs of both parties. *Columbia Memorial Hospital*, 362 NLRB 1256, 1267 (2015) (citing *National Steel Corp.*, 335 NLRB 747, 748 (2001)).

[10] 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.

ORDER

The Respondent American Medical Response West, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the Respondent's employees.

(b) Unreasonably delaying in responding to the Union's information request.

(c) 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 actions necessary to effectuate the policies of the Act:

(a) Promptly provide the Union with the information it requested, as set forth in the grievance filed over Arce's termination, and in the Union's November 28, 2018 and December 6, 2018 emails to Respondent, including: a copy of Arce's personnel file; evidence relied upon during the investigation of Arce; other acts of discipline involving social media; Arce's history of previous disciplines; and all interviews or statements and evidence collected during the investigation of Arce and the person filing the complaint against her. Respondent shall have the right during the compliance phase to raise any legitimate and significant confidentiality interests regarding witness statements or the identity of the complainant, as set forth in the Remedy section above.

(b) Within 14 days after service by the Region, post at its San Francisco, California facility copies of the attached notice marked "Appendix A."[11] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or 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 expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 18, 2018.

[11] 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."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 20 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 with this order.

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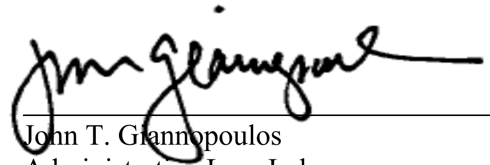
Dated, Washington, D.C., August 23, 2019



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John T. Giannopoulos
Administrative Law Judge

APPENDIX "A"

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 a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with United EMS Workers, AFSCME Local 4911 (Union) by refusing to provide, or delaying in providing, the Union with information it requested that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of our employees.

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

WE WILL promptly provide the Union with all relevant information requested in its grievance over the discharge of Karis Arce ("Arce"), and as further requested in the Union's November 28, 2018 and December 6, 2018 emails, including: a copy of Arce's personnel file; evidence relied upon during the investigation of Arce; other acts of discipline involving social media; Arce's history of previous disciplines; and all interviews or statements and evidence collected during the investigation of Arce and the person filing the complaint against her.

American Medical Response West
(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.

901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-234200 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 (628) 221-8875.