

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

WASHINGTON HOSPITAL CENTER  
CORPORATION d/b/a MEDSTAR  
WASHINGTON HOSPITAL CENTER

Case Nos. 5-CA-095883  
5-CA-099390

and

NATIONAL NURSES UNITED

*Letitia F. Silas and Sean R. Marshall, Esqs.*, for the General Counsel.  
*M. Carter DeLorme and Scott Medsker, Esqs., Jones Day, Washington, D.C.*  
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on July 15, 2013. The Charging Party, National Nurses United, filed charges on January 7, and March 1, 2013. The General Counsel issued the instant consolidated complaint on May 23, 2013.

The General Counsel alleges that Respondent, which operates a hospital in Washington, D.C., has violated Section 8(a)(5) and (1) in refusing to provide the Charging Party Union complete copies of a survey conducted of its Registered Nurses (RNs) in March 2012. The survey, the AHRQ (Agency Healthcare Research and Quality) survey measures the perceptions of the RNs, who are represented by the Charging Party Union, with regard to the quality of care rendered to patients at the hospital.

The General Counsel also alleges that Respondent has violated the Act in refusing to provide the Union with the staffing matrix that Respondent uses to plan the number of RNs and patient care technicians (PCTs)<sup>1</sup> assigned to each of Respondent's 35 patient care units at the beginning of each daily shift.

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<sup>1</sup> The PCTs are not bargaining unit members. However, the staffing of PCTs affects the workload of the unit RNs. The bargaining unit is described as all regular, full-time, part-time eligible nurses and all float pool nurses employed at Respondent's Washington, D.C. location.

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

## FINDINGS OF FACT

### I. JURISDICTION

10 Respondent operates a hospital in Washington, D.C. where it annually derives gross  
revenues in excess of \$250,000. Respondent purchases and receives goods valued in excess of  
\$5,000 from points outside of the District of Columbia. Respondent admits, and I find, that it is  
15 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

#### *The AHRQ Survey*

20 In March 2012 Respondent conducted its second bi-annual survey on patient safety  
culture amongst its registered nurses. This survey is designed to assess the nurses' perceptions  
regarding the care Respondent provides to patients. The survey is conducted pursuant to  
25 requirements of a Joint Commission which accredits hospitals. Although the hospital is required  
by the Commission to conduct the survey, participation by the nurses is voluntary. In 2012 42%  
of Respondent's nurses completed the survey.

30 The nurses completed the survey via computers. They are not asked to identify  
themselves and none of those completing the survey did so. However, they must identify the  
unit in which they work (e.g., emergency department, cardiac unit, etc.). The hospital assures the  
nurses taking the survey that the Patient Safety Group, which collects the data from the survey,  
ensures confidentiality. The instructions state that "all submissions are anonymous and  
35 confidential. No one at Medstar health will see individual responses."<sup>2</sup> It does not appear that a  
nurse taking the survey could identify himself or herself even if they wanted to do so.

40 The survey consisted of multiple choice questions and a blank space in which the nurse  
could enter free text comments. Some nurses made extensive comments. A few included  
criticisms of some of Respondent's managers by name, Exh. G.C. – 7, Exh. R-2. With regard to  
the other comments, criticism of specific managers can be inferred.

#### *The Staffing Matrix*

45 Respondent uses a staffing matrix to determine what the expected or average number of  
nurses and patient care technicians will be required in each patient care unit at the beginning of

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<sup>2</sup> It is true that no management person at Medstar health could see which nurse made a specific  
comment. However, managers did see the free text comments without these being attributed to any  
individual, Exh. R – 2. Gary Brown, an assistant manager in the emergency department, had an 11 page  
document containing the free text comments for that department which he allowed unit member Bridgette  
Barnes to copy.

5 each shift. Staffing per the matrix varies according to the type of unit, (i.e., surgical, intensive care, etc.), acuity of the patients (i.e., how sick they are), day versus night shift and the number of beds in the unit.

10 Adjustments to the staffing levels on each unit may be made 2 hours prior to the shift. For example, two hours prior to each shift Respondent may determine whether to use nurses from a temporary employment agency. The matrix does not reflect changes that are made during a shift. For example, if one unit is overstaffed and another is understaffed due to circumstances occurring once a shift starts, a nurse might be shifted to the understaffed unit. This would not be reflected on the matrix.

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### *Union Information Requests*

#### *Requests for the AHRQ Survey Results*

20 The Union first requested the unredacted results of the AHRQ survey on July 11, 2012, G.C. Exh. 3. At a Labor-Management Meeting on August 2, 2012, Union Labor Representative Bradley Van Waus again requested that Respondent provide the Union with the safety survey, Exh. R-8, p. 4. On August 17, 2012 Kathleen Chapman, Assistant Vice-President for Human Resources, emailed Van Waus. She informed him that the Hospital would not release the safety survey results or raw data “as it is considered confidential information,” Exh. R-10.

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30 On August 24, and September 4, 2012, Union Steward Stephen Frum questioned Chapman regarding the hospital’s confidentiality claim. Frum noted, as discussed in footnote 2 of this decision, that a manager had already shared the patient survey results for the emergency department with RNs on that unit.

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35 On September 10, the Union filed an unfair labor practice charge. On October 18, Respondent sent the Union a draft confidentiality agreement. On October 22, the Union withdrew its ULP charge. The withdrawal of the charge, however, resulted from differing interpretations of what the parties had agreed upon or a change of heart on the part of Respondent, Tr. 131. On October 25, Union Steward Frum wrote to Chapman stating that while nurses who were members of the Union’s Professional Practice and Patient Safety Committee (PPPSC)<sup>3</sup> would sign a confidentiality statement in accordance with the provisions of the collective bargaining agreement, this had nothing to do with the production of the AHRQ study.<sup>4</sup> On January 7, 2013, the Union filed another charge regarding Respondent’s refusal to produce the survey.

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45 Thereafter, Respondent offered the Union the opportunity to review the AHRQ survey and to take notes. However, the Union would not be allowed to copy the survey. The hospital’s “in-camera” review was also conditioned on the removal of information that identified

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<sup>3</sup> The PPPSC consists of 8 bargaining unit members who are elected from different specialties to make recommendations to management.

<sup>4</sup> Members of the PPPSC signed a confidentiality agreement agreeing not to disclose any protected patient information. The AHRQ study contains no such information. Respondent found this confidentiality agreement to be an insufficient basis for providing the Union the results of the survey.

5 individuals and the narrative comments in the survey. It also was conditioned on the survey results not being communicated to the nurses directly or to persons outside of the hospital without the hospital's approval, Tr. 139. The Union rejected this offer.<sup>5</sup>

#### *Requests for the Staffing Matrix*

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On October 9, 2012, Union Steward Stephen Frum emailed Kathleen Chapman requesting that a number of items of information be provided to the Union prior to the October 12 scheduled meeting of the Nurse Staffing and Productivity Committee (NSPC).<sup>6</sup> Among the items Frum requested was the current staffing matrix. Respondent refused to provide the matrix without a confidentiality agreement covering it and signed by the union members of the NSPC.<sup>7</sup>

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On October 12, 2012, at the only meeting of the NSPC thus far, Tonya Washington, one of Respondent's Vice-Presidents, informed the Union that Respondent was insisting on a confidentiality agreement regarding the staffing matrix. The reason she gave the Union was that she was concerned with the information going to *The Washington Post*, Tr. 170.

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#### *Analysis*

Respondent does not dispute that the AHRQ survey results and the current staffing matrix are relevant and necessary to the Union's role as bargaining representative of its nurses, Respondent's post-trial brief at page 3.<sup>8</sup> The only issues in this case are whether this information is confidential and if so, whether Respondent has bargained in good faith for an accommodation to the production of this information.

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#### *Confidentiality*

The general rules regarding employer claims of confidentiality are set forth in *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). First of all, an employer's obligation to furnish relevant information is not excused merely because a union may have alternative sources for the information. Thus, the fact that the Union in this case could conduct its own survey of bargaining unit nurses does not alter Respondent's duty to provide its survey.

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<sup>5</sup> Just prior to trial in a conference call with another Judge, the Union agreed to the redaction of the names of all managers, Tr. 182.

<sup>6</sup> The Nurse Staffing and Productivity Committee (NSPC) is a body established pursuant to Article 30 of the parties collective bargaining agreement "to collaboratively develop, monitor, and improve a staffing matrix for each nursing unit where Nurses work, using the current staffing matrix as a starting point," Jt. Exh. 1, p. 48. The NSPC consists of 5 representatives from the Union and 5 from management.

<sup>7</sup> Although the record is rather confusing on this point, it appears that Respondent provided the staffing matrix to the Union in February 2012 and that the Union was seeking to see whatever changes had been made to the matrix in October 2012. Apparently no significant changes had been made, which the Union learned through bargaining unit members, rather than from Respondent, Tr. 171-177, Exh. G.C. -22.

<sup>8</sup> Thus, *Southern California Gas Co.*, 342 NLRB 613 (2004) relied upon by Respondent at page 17 of its brief is irrelevant to this case. In that case the Board found that the requested information was not relevant and necessary to the Union's role as collective bargaining representative.

5           However, substantial claims of confidentiality may justify refusals to furnish otherwise  
 relevant information. Confidential information is limited to a few general categories: that which  
 would reveal, contrary to promises or reasonable expectations, highly personal information, such  
 as individual medical records, that would reveal substantial proprietary information, such as  
 10           trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such  
 as the identity of witnesses; and that which is traditionally privileged, such as memoranda  
 prepared for pending lawsuits, *Id.*, at page 1073. The AHRQ survey and the staffing matrix fit  
 into none of these categories.

15           Respondent's claim of confidentiality with respect to the survey is twofold: that it would  
 violate its assurances to survey participants and that it could be used to cast the hospital in an  
 unfavorable light in the press and before proceedings of the District of Columbia Council. The  
 concern regarding the identity of survey participants is completely unwarranted since they did  
 not identify themselves. Respondent has no reason to believe that nurses will be inhibited from  
 20           participating in future surveys if it is released to the Union. There is also no reason to believe  
 that the hospital will be inhibited from conducting this survey in the future since it is required to  
 perform such surveys to maintain its accreditation by the Joint Commission, Tr. 23.<sup>9</sup>

25           The concern for adverse publicity is similarly illegitimate. Staffing is a contentious issue  
 at this hospital and many others. The Union and unit members have a right to appeal to the  
 public and to public agencies. The protection afforded by Section 7 extends to employee efforts  
 to improve terms and conditions of employment or otherwise improve their lot as employees  
 through channels outside the immediate employee-employer relationship. See *Eastex, Inc. v.*  
*NLRB*, 437 U.S. 556, 565 (1978). Thus, Section 7 protects employee communications to the  
 public that are part of and related to an ongoing labor dispute. See, e.g., *Allied Aviation Service*  
 30           *Co. of New Jersey, Inc.*, 248 NLRB 229.

35           Finally, Respondent has made no showing, as it suggests at page 14 of its brief, that  
 patients would be likely to go to facilities other than Washington Hospital Center if either the  
 survey results or the staffing matrix were released to the Union or by the Union to the public.  
 There is no evidence that patients or doctors choose a hospital on the basis on staffing statistics  
 or how satisfied the nursing staff may be. Moreover, to choose another hospital on this basis, a  
 doctor or patient would have to know that the staffing situation at the other hospital was better  
 than at Respondent.

40           The list of types of information listed in *Detroit Newspaper Agency* that may be  
 confidential is not exhaustive, *Northern Indiana Public Service Co.*, 347 NLRB 210, 211  
 (2006). However, if that list is not narrowly drawn it can encompass virtually any type of

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<sup>9</sup> Respondent has not shown that the Board's decision in *Borgess Medical Center*, 342 NLRB 1105 (2004) is relevant to this case. That decision rules that an employer has a legitimate confidentiality interest in reports recognized as confidential by state law. Respondent, for the first time in its post-trial brief at page 11, cites to D.C. Code Section 44-805(a)(1) which protects from disclosure "evaluations and reports of a medical peer review body." Respondent has not established that the AHRQ survey is a report of a "medical peer review body." At first blush, it seems unlikely that the bargaining unit nurses are "an entity tasked with monitoring, evaluating and taking actions to improve the delivery, quality and efficiency of services" at Washington Hospital Center. First of all, the nurses were asked to respond to the survey as individuals, not as a member of any "entity."

5 information that an employer does not wish to disclose. Fear of embarrassment or adverse  
 publicity does not satisfy the principles enunciated in the *Detroit Newspaper* case. Since I find  
 that Respondent does not have a legitimate confidentiality interest in either the survey or the  
 staffing matrix, it would be improper and unnecessary to balance the Union's need for this  
 information with Respondent's interest in its confidentiality.<sup>10</sup>

10 With regard to the staffing matrix, Respondent's concern that it can be used to present a  
 misleading impression of the hospital's staffing policies can easily be rectified without  
 withholding this information from the Union. The hospital need only slap a cover sheet on the  
 matrix explaining that it does not represent the actual staffing that was present in any unit during  
 15 any shift.

### *Conclusion of Law*

20 For the reasons stated above, I find that Respondent has not established any legitimate  
 confidentiality interest in either the AHRQ survey or the staffing matrix. Therefore, it has  
 violated Section 8(a)(5) and (1) in refusing to provide these documents to the Union.<sup>11</sup>

### REMEDY

25 Having found that the Respondent has engaged in certain unfair labor practices, I shall  
 order it to cease and desist therefrom and to take certain affirmative action designed to effectuate  
 the policies of the Act.

30 On these findings of fact and conclusions of law and on the entire record, I issue the  
 following recommended<sup>12</sup>

### ORDER

35 The Respondent, Washington Hospital Center Corporation, d/b/a Medstar Washington  
 Hospital Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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<sup>10</sup> This is particularly true since the Union appears agreeable to the redaction of any judgments on the performance of Respondent's managers, see member Stephens' partial dissent in *Detroit Newspaper Agency*.

<sup>11</sup> I would also note that the record does not support Respondent's contention that it has consistently treated the requested information as confidential. The staffing matrix was provided to the Union in February 2012 without any claim of confidentiality. The results of the AHRQ survey for their department were provided to emergency department employees by a manager without any claim of confidentiality. Respondent's assertion in footnote 2 of its brief that the director of the Emergency Department "disobeyed instructions" is not supported by the record. The record only establishes that his sharing of the results was contrary to the "expectations" of Barbara Mitchell, Respondent's Vice President of Outcomes Research, Tr. 33-35.

<sup>12</sup> 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.

5 (a) Refusing to bargain with National Nurses United by failing and refusing to promptly furnish the results of the 2012 AHRQ survey and its current and future staffing matrices.

(b) 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.

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

(a) Furnish the Union a complete copy of the results of the 2012 AHRQ survey except for the redaction of the names of managers.

15 (b) Within 14 days after service by the Region, post at its Washington, D.C. facility copies of the attached notice marked "Appendix."<sup>13</sup> Copies of the notice, on forms provided by the Regional Director for Region 5, 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 expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2012.

20 (c) 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. September 11, 2013

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Arthur J. Amchan  
Administrative Law Judge

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13 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."

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 with the Union, National Nurses United, by failing and refusing to promptly furnish information necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of our registered nurses.

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 furnish the Union complete copies of the results of the 2012 AHRQ survey except for the names of managers, which will be redacted, and WE WILL furnish the Union our current staffing matrices.

WASHINGTON HOSPITAL CENTER  
CORPORATION d/b/a MEDSTAR  
WASHINGTON HOSPITAL CENTER

\_\_\_\_\_  
(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.nlr.gov](http://www.nlr.gov).

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061  
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

**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, (410) 962-2864.