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**Washington Hospital Center Corporation d/b/a
Medstar Washington Hospital Center and
National Nurses United.** Cases 05–CA–095883 and
05–CA–099390

May 9, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND SCHIFFER

On September 11, 2013, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief. The General Counsel filed an answering brief in opposition to the Respondent's exceptions and the Respondent filed a reply brief. The Respondent also filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,

¹ In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) by failing to provide the Union with requested information, we find that the Respondent failed to timely raise its claim that the information was confidential under D.C. Code Sec. 44–805. See *Crittenton Hospital*, 342 NLRB 686, 694–695 (2004). Moreover, we agree with the judge that the Respondent failed to establish that any of the requested information is confidential.

Although the judge's decision states that only the 2012 AHRQ survey results and current staffing matrix were requested by the Union, the requested information at issue includes the 2012 AHRQ survey results, the current staffing matrix, tracking tools, and data currently used to follow how many patients are on each unit per shift and how many nurses and patient care technicians work on each unit on each shift, acuity measuring tools currently used by the Respondent, and a spreadsheet showing when and where the patient care technicians have been utilized as sitters in the past 12 months. We have modified the judge's recommended Order and notice accordingly, and to conform to our standard remedial language and with *Durham School Services*, 360 NLRB No. 85 (2014).

Member Johnson finds that the requested 2012 AHRQ survey results are confidential based on D.C. Code Sec. 44–805, a District of Columbia statute designating reports of peer review bodies as confidential. He notes here that such peer review statutes present for the Board significant issues of confidentiality and potential privilege because they serve the important public policy of improving patient outcomes for all. However, in this case, he finds it unnecessary to further discuss such issues because he finds that the Respondent violated Sec. 8(a)(5) by failing to engage in accommodative bargaining concerning the surveys when it did not respond to the Union's final offer of a confidentiality agreement. Based on this finding, Member Johnson would order that the Respondent engage in accommodative bargaining regarding the

and to adopt the recommended Order as modified and set forth in full below.²

ORDER

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

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, National Nurses United, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(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.

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

(a) Furnish to the Union in a timely manner the information requested by the Union on July 11 and October 9, 2012, including the 2012 AHRQ survey results, the current staffing matrix, tracking tools, and data currently used to follow how many patients are on each unit per shift and how many nurses and patient care technicians work on each unit on each shift, acuity measuring tools currently used by the Respondent, and a spreadsheet showing when and where the patient care technicians have been utilized as sitters in the past 12 months.

(b) Within 14 days after service by the Region, post at its Washington, D.C. facility, copies of the attached notice marked "Appendix."³ 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, 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 members by such means. Rea-

survey results. He does not join his colleagues in ordering that the surveys be furnished immediately to the Union.

² We shall modify the recommended Order and notice to accurately reflect all of the information that must be provided to the Union. We also modify the recommended Order and notice to conform to our findings and to the Board's standard remedial language.

³ 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."

sonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 5 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. May 9, 2014

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Nancy Schiffer, Member

(SEAL) 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 abide by 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 collectively with the Union, National Nurses United, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on July 11 and October 9, 2012, including the 2012 AHRQ survey results, the current staffing matrix, tracking tools, and data currently used to follow how many patients are on each unit per shift and how many nurses and patient care technicians work on each unit on each shift, acuity measuring tools currently used by the Respondent, and a spreadsheet showing when and where the patient care technicians have been utilized as sitters in the past 12 months.

WASHINGTON HOSPITAL CENTER CORPORATION
D/B/A MEDSTAR WASHINGTON HOSPITAL
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The Board's decision can be found at www.nlr.gov/case/05-CA-095883 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Letitia F. Silas and Sean R. Marshall, Esqs., for the General Counsel.
M. Carter DeLorme and Scott Medsker, Esqs. (Jones Day), of 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.

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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)¹ assigned to each of Respondent's 35 patient care units at the beginning of each daily shift.

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

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 \$5000 from points outside of the District of Columbia. 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

The AHRQ Survey

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 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 percent of Respondent's nurses completed the survey.

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 confidential. No one at Medstar health will see individual responses."² It does not appear that a nurse taking the survey could identify himself or herself even if they wanted to do so.

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. (GC Exh.

¹ 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.

² 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. (R. Exh. 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.

7, R. Exh. 2.) With regard to the other comments, criticism of specific managers can be inferred.

The Staffing Matrix

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 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.

Adjustments to the staffing levels on each unit may be made 2 hours prior to the shift. For example, 2 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.

Union Information Requests

Requests for the AHRQ Survey Results

The Union first requested the unredacted results of the AHRQ survey on July 11, 2012. (GC 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. (R. Exh. 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." (R. Exh. 10.)

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.

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)³ 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.⁴ On January 7,

³ The PPPSC consists of eight bargaining unit members who are elected from different specialties to make recommendations to management.

⁴ 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.

2013, the Union filed another charge regarding Respondent's refusal to produce the survey.

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 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.⁵

Requests for the Staffing Matrix

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).⁶ 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.⁷

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.)

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. (R. Posttrial Br. at p. 3.)⁸ 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.

Confidentiality

The general rules regarding employer claims of confidentiality are set forth in *Detroit Newspaper Agency*, 317 NLRB

⁵ 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.)

⁶ The nurse staffing and productivity committee (NSPC) is a body established pursuant to art. 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 five representatives from the Union and five from management.

⁷ 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, GC Exh. 22.)

⁸ Thus, *Southern California Gas Co.*, 342 NLRB 613 (2004), relied upon by Respondent at p. 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.

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.

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 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 p. 1073.) The AHRQ survey and the staffing matrix fit into none of these categories.

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 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.)⁹

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 Co. of New Jersey, Inc.*, 248 NLRB 229.

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

⁹ 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 posttrial brief at p. 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."

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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.

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 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.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 any shift.

CONCLUSION OF LAW

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.¹¹

REMEDY

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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

¹⁰ 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*.

¹¹ 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 fn. 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.)

¹² 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 adopt-

ORDER

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

1. Cease and desist from

(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.

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.

(b) Within 14 days after service by the Region, post at its Washington, D.C. facility copies of the attached notice marked "Appendix."¹³ 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.

(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

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.

ed by the Board and all objections to them shall be deemed waived for all purposes.

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."

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