Wayne Memorial Hospital Association *and* Service Employees International Union, AFL–CIO, Local 668. Case 4–CA–22953

September 5, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

The issue presented in this case[1] is whether the judge correctly found that the Respondent violated Section 8(a)(5) and (1) of the Act by maintaining a policy that requires a Union to obtain written authorization from an employee in order to obtain concededly relevant information from employee personnel files, and by directing the Union to submit its information request to its attorney. 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,[2] and conclusions and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wayne Memorial Hospital Association, Honesdale, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (b).

"(a) Within 14 days after service by the Region, post at the Honesdale, Pennsylvania facility copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 4, 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. 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 July 25, 1994.

"(b) 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."

H. P. Baker, Esq., for the General Counsel.[1]
Robert Ufberg and *Joseph Sileo, Esqs. (Rosenberg & Ufberg)*, of Scranton, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried before me on June 23 and July 18, 1995, in Scranton, Pennsylvania. The charge in this matter was filed by Service Employees International Union, AFL–CIO, Local 668 (the Union) on July 25, 1994, and amended on August 31, 1994.[2] On October 26, the Regional Director for Region 4 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging that the Respondent, Wayne Memorial Hospital Association, engaged in certain conduct that violates Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). By answer dated November 7, the Respondent admitted some and denied other allegations in the complaint, and denied having committed any unfair labor practices.

On the entire record in this proceeding,[3] including my observation of the demeanor of the witnesses, and after considering briefs filed by the General Counsel and the Respondent,[4] I make the following

[1] On March 14, 1996, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge that the Respondent violated Sec. 8(a)(5) of the Act by directing the Union's business agent to submit his August 16 information request to the Respondent's labor counsel, we do not suggest that designation of a particular agent for receipt and handling of information requests would never be permissible. Here, however, there was no evidence that the Respondent's labor counsel had the requested information and the judge found that the Respondent sought to circumvent its information obligation by directing the Union to go through this individual for such information.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[1] Herein referred to as the General Counsel.

[2] Unless otherwise indicated, all dates herein are in 1994.

[3] References in this decision to transcript pages and exhibit numbers are as follows: Transcript (Tr.); General Counsel's Exhibits (G.C. Exh.); Respondent's Exhibits (R. Exh.). R. Exhs. 15, 16, 29, were rejected at the hearing (Tr. 325–326), but were inadvertently included among Respondent's exhibits received in evidence, rather than placed in a "Rejected Exhibits" file.

[4] The Respondent's request to file a response to the General Counsel's brief was denied. However, it appears that through inadvertence, a reply brief was forwarded for my consideration. That reply brief was returned to the Respondent unread, and has played no part in this decision.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a nonprofit Pennsylvania corporation engaged in the operation of an acute care hospital in Honesdale, Pennsylvania. During the past year the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $250,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania. The 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 it is a health care institution within the meaning of Section 2(14) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.[5]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*[6]

The complaint alleges, and the General Counsel contends, that the Respondent violated Section 8(a)(5) and (1) of the Act by:

(1) Requiring that the Union obtain written consent from unit employees before providing it with relevant information from their personnel files necessary to process employee grievances.

(2) Requiring that the Union submit all requests for information regarding a grievance filed by an employee directly to its labor counsel.

(3) Refusing to comply with the Union's July 21 oral request to see an employee's personnel file.

The Respondent disputes the above allegations, contending that its "written consent" policy is justified on confidentiality grounds; that the Union in any event waived its right to object to its "written consent" policy; that it never *required* but merely *asked* the Union to submit its information requests directly to its labor counsel in accordance with a past practice; and that the Union never requested to see employee Audrey Quales' personnel file. The Respondent further contends that the allegations in the complaint were rendered moot by a settlement agreement it entered into on February 14, 1995, with the Union and employee Quales, and should be dismissed.

B. *Factual Background*

The Respondent and the Union are parties to a 4-year collective-bargaining agreement covering certain of Respondent's employees which, by its terms expired on January 27, 1996.[7] On June 17, unit employee Quales was terminated by Respondent from her nurses' aide position for allegedly violating the rights of a resident at Respondent's facility (R. Exh. 8). Quales was notified of her discharge at a June 17 meeting attended by Respondent's nursing director, Virginia Fries, its director of human resources, George Rable, and the Union's chief steward, Kathy Firmstone (R. Exh. 3). On June 23, Firmstone filed a grievance on Quales' behalf and, on July 6, asked Fries, in writing, to provide her with a copy of Quales' counseling form, and with copies of any evaluations and written warnings contained in Quales' personnel file. Firmstone's letter stated that Quales had orally consented to the release of the information on July 5 (G.C. Exhs. 3 and 5).[8] Fries responded to Firmstone, in writing, that same day stating that Firmstone had already been given a copy of the counseling form at the June 17, meeting, and that to receive copies of "Evaluation Reports and any Written Warnings" from Quales' personnel file, Firmstone would have to obtain a written release from Quales (G.C. Exh. 6). Fries advised Firmstone that Respondent follows this procedure for all employees "when they request personal information from their files, or someone else requests such information," and that Respondent treats such requests in the same manner as a request for release of medical records.[9] Fries further advised that on receipt of a written release from Quales identifying the documents to be released, the request would be reviewed and the appropriate documents forwarded to her or Quales. It appears that Quales had in fact written to Fries on July 6, authorizing release of the requested documents but the "date stamp" on the letter suggests Fries may not have received it until July 8 (R. Exh. 2).

On July 18, Fries furnished Firmstone with a copy of a November 1993 warning from Quales' personnel file, but did not provide any of Quales' evaluations. On July 21, Firmstone conversed with Fries over the phone at which time Firmstone informed her she had not provided any of Quales' evaluations as requested. On July 22, Firmstone wrote to Fries to remind her of the missing evaluations. By letter dated August 1, Fries forwarded Quales' evaluation to Firmstone, and apologized for having failed to do so earlier,

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[5] Although the answer denies the Union is a labor organization, the Respondent admitted at the hearing that the Union is the exclusive bargaining representative of its employees in an appropriate unit, and that it was bound to a collective-bargaining agreement with the Union that was to expire January 27, 1996.

[6] The General Counsel at the hearing withdrew the allegations in pars. 6(a), (d), and 8(b) of the complaint, along with a reference to par. 6(a) contained in par. 8(a), which had alleged that Respondent refused to comply with the Union's July 7 and August 16 information request.

[7] The collective-bargaining agreement was executed by the Union's predecessor, SEIU Local 406, which merged with the Union. The Union assumed its representational duties on January 1, 1994.

[8] Firmstone testified that on becoming the Union's chief steward in 1993, she began a practice of obtaining an employee's consent to obtain information from a personnel file before filing a grievance on the employee's behalf so as ensure that the employee was serious in pursuing the grievance. There is no indication from her testimony that such request was expected to be in writing. While Firmstone admitted to being aware of Respondent's "written consent" requirement, there is further no indication that her practice of getting an employee's consent was instituted in response to, or as an acknowledgment of, Respondent's alleged "written consent" practice. Nor is there any indication from Firmstone's testimony as to when she became aware of Respondent's alleged practice.

[9] In her letter, Fries' makes no mention of the particular policy or procedure she was relying on. It is reasonable to assume given her overall testimony that she was relying on a practice presumably found in Respondent's "Personnel Policies and Procedures Manual" (the PPPM), the relevant portions of which were received into evidence as R. Exh. 27 (1991 PPPM) and R. Exh. 26 (1994 amended PPPM). The Respondent also maintains an employee handbook that purports to summarize the PPPM, excerpts of which were also received in evidence as R. Exh. 24 (1991 handbook) and R. Exh. 25 (1994 amended handbook).

stating that it was merely an "oversight." Fries further informed Firmstone that there were no other documents in Quales' personnel file within the category of items authorized for release by Quales (R. Exh. 12).[10] The parties agree that Firmstone was provided copies of whatever evaluations and warnings were contained in Quales' file, and no contention has been made that the delay in furnishing the evaluation was unlawful (Tr. 45–47).

The record reflects that during this time period, the Respondent was in the process of closing its Skilled Nursing facility (SNF). On July 15, Union Business Agent Paul Donovan wrote to Respondent's senior vice president, Richard Garman, to request bargaining over the effects of the decision to close the SNF. In his letter, Donovan advised Garman that Firmstone had not been provided with relevant information needed to investigate Quales' grievance, and expressed his opposition to Respondent's requirement that the Union obtain an employee's written consent before it could obtain information from an employee's personnel file. Donovan reminded Garman that under the Act, the Union is legally entitled to review an employee's file for such information as "job performance evaluations; disciplinary records; wage records; job classifications; seniority dates; and all other relevant information" regardless of any policy Respondent may have restricting access to employee files, and reiterated that "since the information requested . . . is relevant and necessary to process a grievance, we are, therefore demanding that you comply with our requests within a reasonable time." (G.C. Exh. 8.)

In response to Donovan's letter, a meeting was held at Respondent's premises on July 21, attended by Donovan, Firmstone, Garman, and Rable. Quales was present during the start of the meeting but was subsequently asked to leave. It is undisputed that the parties during this meeting discussed the closing of the SNF, and engaged in some discussion on whether Fries had fully complied with the information request. It is also fairly clear that towards the latter part of the meeting, presumably during the discussion on Fries' lack of response to the information request, Donovan asked if Respondent intended to continue requiring an employee's written consent before it would release information from a personnel file, to which Respondent replied affirmatively. The parties, however, strongly disagree on whether Donovan asked to examine Quales' personnel file at this meeting, with Donovan and Firmstone claiming, and Garman and Rable denying, that such a request was made.

On August 16, Donovan wrote to Garman to inform him that an arbitrator had been selected to hear Quales' grievance. In his letter, Donovan asked Garman to provide him with the disciplinary files for all unit employees for the past 3 years, stating that the Union needed this information to prepare for the arbitration. In an August 23 letter, Garman acknowledged receipt of Donovan's information request, but stated that because the case is "proceeding to arbitration and the hospital is represented in that matter by Attorney Robert Ufberg . . . I would respectfully request that all inquiries and requests for information concerning the case be addressed directly to our counsel." (G.C. Exhs. 9 and 10.)[11]

It appears that on or about August 29, Donovan spoke with Ufberg, as evident from a September 12, letter from Ufberg to Donovan confirming the conversation (R. Exh. 4). Ufberg's letter states that he had just returned from a trip to Israel, was not yet fully "oriented," and had not had time to read his mail. The letter goes on to describe Ufberg's willingness to meet or to have a substantive phone conversation with Donovan "to discuss this matter and, hopefully, resolve it." However, Ufberg points out in his letter that he expected to be busy during the next 2 weeks due to pending litigation and religious observances, and suggested that Donovan call him during the week of September 26, "to confirm a meeting (or telephone conference) for the purpose stated above." The only indication in the letter that Ufberg was referring to Donovan's information request is the notation therein reading, "Re: Wayne Memorial Hospital Information Request."

The parties had no further contact with each other regarding the August 16, information request until January 11, 1995, when Donovan again wrote to Garman reminding him, inter alia, that he had not yet complied with the information request (R. Exh. 7). Rable responded the following day to Donovan's letter informing him that a search of the hospital records failed to disclose any disciplinary incidents of the type sought by Donovan. Rable, however, did provide him with information concerning a 1991 disciplinary incident involving a nonunit employee (R. Exh. 20).

On February 14, 1995, the Respondent, the Union, and Quales entered into a settlement agreement that, inter alia, resulted in a withdrawal of Quales' grievance and of the demand for arbitration.

C. *Discussion and Findings*

1. The Respondent's "written consent" policy

a. *The confidentiality issue*

The law regarding an employer's disclosure of information to a labor organization is quite clear. Thus, the Board and the courts have long held that an employer is statutorily required, upon request, to provide information that is relevant to and necessary for its employees' bargaining representative to carry out its statutory duties and responsibilities. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enfd. sub nom. *NLRB v. Electrical Workers IBEW Local 309*, 763 F.2d 887 (7th Cir. 1985); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338 (1995). This obligation extends to information requested and required by a union to process grievances on behalf of the employees it represents. *Pfizer*, supra; *Jacksonville Area Assn.*, supra at 340; *WGN of Colorado*, 300 NLRB 716 (1990); *New Jersey Bell Telephone*, 289 NLRB 318 (1988) (*New Jersey Bell II*). A union's entitlement to such information, however, is not

[10] By letter dated August 2, Fries advised Quales that the requested information had been furnished to Firmstone.

[11] Unaware that Garman had responded to his August 16, letter, Donovan sent Garman another letter dated August 25, reiterating his earlier information request, stating that for purposes of clarification, the Union would like "to view and copy only those disciplinary records of employees accused and/or guilty of alleged abuse toward or neglect to a resident of Wayne Memorial Hospital or the Skilled Nursing Facility over the last three (3) years." (R. Exh. 1.)

without limitations. Thus, in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Supreme Court held that under certain circumstances, confidentiality claims may justify a failure or refusal to provide relevant information to a union. See *New Jersey Bell Telephone Co. v. NLRB*, 720 F.2d 789, 791 (3d Cir. 1983) (*New Jersey Bell I*). When an employer raises a "legitimate and substantial" claim of confidentiality, the Board must balance the union's need for the information against the legitimate confidentiality interest established by the employer. *Aerospace Corp.*, 314 NLRB 100, 103 (1994), citing to *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984). However, in those instances, the employer "bears the burden of demonstrating that its refusal to furnish relevant and necessary information to a labor organization is excusable because the requested data is privileged information." *Aerospace Corp.*, supra at 103 fn. 10.

The Respondent has not met its burden in this case. As an initial matter, I note that the Respondent does not dispute that the particular information requested by the Union, e.g., Quales' evaluations and written warnings, is necessary for and relevant to the Union in the processing of her grievance. In fact, that information was readily provided to the Union shortly upon receipt of a written release from Quales. Nor does it contend that Quales' entire personnel file would not be relevant to the Union in the furtherance of the grievance, for it readily admits in its posthearing brief that had Quales provided a written release, it would have, without question, provided the Union with her entire personnel file (R. Br. 78).[12] The gist of the Respondent's confidentiality defense, therefore, is not that the particular information requested by the Union is in and of itself confidential, but rather that it has a legitimate and substantial interest in keeping an employee's entire personnel file confidential because of the likelihood it may contain sensitive information that should be shielded from disclosure to protect the privacy rights of employees, as well as the rights of the hospital and its patients. It therefore argues that its policy of requiring an employee's written consent before releasing a personnel file or any information contained therein, regardless of its relevancy to the Union, is designed to protect those rights and is justified under *Detroit Edison v. NLRB*, supra.

The Respondent's argument, in essence, boils down to an assertion that its employees' personnel files are per se confidential. That argument, however, has long been rejected by the Board. Thus, in *Washington Gas Light Co.*, 273 NLRB 116 (1984), the employer, like the Respondent here, argued that its employees' personnel files were confidential in their entirety and declined to release any information contained therein to the union without the individual's consent. The Board, reversing an administrative law judge's finding that the employer's confidentiality plan was reasonable, stated that it has "repeatedly rejected the blanket confidentiality claims as an inadequate defense for an employer's per se refusal to furnish any information from an employee's file, referencing its decisions in *Southwestern Bell Telephone Co.*, 251 NLRB 612 (1980), and *Fawcett Printing Corp.*, 201 NLRB 964 (1973). See also *NLRB v. Electrical Workers IBEW Local 309*, supra (rejecting an employer's claim that its personnel files are per se confidential). In light of the Board's holding in *Washington Gas Light*, and related cases cited supra, I find no merit in the Respondent's claim that it was justified in keeping Quales' entire personnel file confidential, and in refusing, without her written consent, to provide the Union with the evaluations and written warnings contained therein.[13]

Further, the Supreme Court's holding in *Detroit Edison v. NLRB*, supra, contrary to the Respondent, offers no support for its position.[14] Thus, in *New Jersey Bell II*, supra at 319, the Board also addressed the question of whether the Court's holding in *Detroit Edison* could be read to justify such broad claims of confidentiality. In finding it did not, the Board stated:

> Regarding to [sic] the Respondent's position generally that it should be entitled to deny requests for relevant information from personnel records simply because its privacy plan requires an employee consent, we find no support in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), on which the Respondent also relies, for any such blanket claim of confidentiality (citations omitted). Certainly an employer should not be able to "bootstrap" a confidentiality claim as a barrier to disclosure

[12] Respondent's assertion in this regard was made in response to the complaint allegation that on July 21, Donovan requested to see Quales' entire personnel file. As discussed infra, this complaint allegation is found to be without merit.

[13] Quales' failure to consent would not, in any event, have privileged the Respondent to withhold the information from the Union, for as the Board noted in *New Jersey Bell II*, supra at 319, "the mere fact that an employee does not give formal consent—or might even object—to the disclosure of such information does not in itself constitute grounds for refusing to provide such information when it is relevant to the bargaining representative's performance of its representational duties." The Board in *New Jersey Bell II* cited to the following supporting language from the Eighth Circuit's decision in *WCCO Radio v. NLRB*, 844 F.2d 511, 515 (1988):

> One of the consequences of collective bargaining is that it 'subordinates the particular interests of individual employees to the collective interest of the unit. Hence, a preference for confidentiality on the part of some WCCO employees does not nullify [the Union's] right to the information.

[14] The instant case, in any event, is fundamentally different from *Detroit Edison*. Unlike *Detroit Edison*, where the union therein sought to obtain employee aptitude tests scores, which the Court viewed as "highly sensitive," the information sought here by the Union—Quales' evaluations and written warnings—is of the type frequently used in arbitration proceedings and routinely disclosed to unions for purposes of evaluating the merits of a particular grievance, and clearly is not of the same sensitive and confidential nature as aptitude test scores. *Pfizer, Inc.*, supra at 919. Further, except for its general claim that employees knew their files were kept confidential, there is no evidence that Respondent ever advised employees that their evaluations and written warnings would remain confidential. Finally, unlike *Detroit Edison*, where the aptitude test scores were maintained absolutely confidential, even from managerial scrutiny, here the documentary evidence of record, in particular excerpts of the 1991 and 1994 employee handbook (R. Exhs. 24 and 25), and Rable's own testimony, makes clear that employee personnel files are subject to disclosure without employee consent to any number of individuals and governmental entities (see discussion infra). The instant case is factually distinguishable from *New Jersey Bell I*, supra, in that in the latter case, unlike here, the information being sought involved sensitive medical records, and the union in *New Jersey Bell I*, unlike the Union here, deliberately sought to obstruct release of the information by directing employees not to sign the releases in question.

> of information to the bargaining representative simply by relying on a plan through which employees, including bargaining unit employees, are promised that a broad range of personal information will remain confidential.

Clearly then, to meet its burden of proof with respect to its confidentiality claim, the Respondent must affirmatively establish that it has "a confidential interest in the *particular information requested.*" (Emphasis added.) *Washington Gas Light*, supra at 117. However, except for a general claim that its confidentiality policy emanates from a "legitimate, ernest [sic] concern for protection of employee (as well as patient and Hospital business) confidentiality" (R. Br. 78),[15] the Respondent here has not shown, or indeed alleged, that the particular items requested by the Union—Quales' evaluations and written warnings—are inherently confidential or contain sensitive data, or that it has some other legitimate and rational basis for wanting to protect Quales' evaluations and written warnings from being disclosed to the Union. In these circumstances, I find that the Respondent has failed to demonstrate a legitimate claim to confidentiality either with respect to employee files in general or to the particular information requested by the Union.

The Respondent's confidentiality claim is further undermined and rendered specious by other evidence of record. For example, the employee handbook and Rable's testimony make clear that Respondent allows a "laundry list" of individuals and entities to have access to information in employee files without employee consent. Thus, the 1991 employee handbook (R. Exh. 24) states that employee personnel files are "considered confidential and may be perused only by the employee, the employee's Department Head, or a member of the Administration."[16] The category, "member of the Administration," is not defined in the handbook, and no explanation was proffered by Respondent at the hearing as to who would be included in this category. Absent any such explanation, one may reasonably infer, as I do here, that any and all persons forming part of Respondent's managerial hierarchy are considered as falling within this category. Further, Rable testified that the Respondent provides information in employee files to Federal and state governmental agencies (State Unemployment Offices; EEOC; IRS, etc.), without employee consent and that, when necessary, will use information contained in the files to defend itself against lawsuits, which arguably includes civil and administrative proceedings involving the Union. Clearly, Respondent's willingness to release information in employee files to the above-mentioned individuals and entities without employee consent, and to utilize such information for its own defense in litigation, is hardly consistent with its stated concern for the privacy rights of its employees. Further, it is fundamentally unfair for the Respondent to restrict the employees' bargaining representative from obtaining access to relevant information in employee personnel files, while at the same time allowing its own representatives to have unrestricted access to any and all information contained in such files.[17] Finally, there is no evidence to show that employees had ever asked Respondent to keep their personnel files or any of its contents confidential, or that they reasonably anticipated that information such as evaluations and written warnings would not be made readily available to the Union without their consent. *Jacksonville Area Assn. for Retarded Citizens*, supra at 340; *Remington Arms Co.*, 298 NLRB 266, 272 (1990). For the above-stated reasons, I find Respondent's confidentiality defense to be without merit.

[15] Its assertion in this regard, however, was made in defense of its claim that it was justified in keeping an employee's entire personnel file confidential, and was not proffered to explain why it could not, without Quales' consent, turn over the particular items requested by the Union.

[16] In July 1994, the employee handbook was amended to include the employee's "authorized representative" among those entitled to access the employee's personnel file without consent (see R. Exh. 25).

[17] See *Aerospace Corp.*, supra, where an administrative law judge, with Board approval, likewise found it to be "fundamentally unfair for the [employer] to be able to rely on the 'confidential' information for its own defense while, at the same time, denying the employees' bargaining representative access to the information."

b. *The waiver defense*

The Respondent claims that its "written consent" policy has been in effect for more than 20 years, and that the Union was fully aware of the practice but has not, prior to the Quales' grievance, complained or objected to it. While conceding that the Union's failure to object would not, without more, constitute a waiver, it nevertheless argues that the Union's inaction in this regard, when viewed together with the Union's purported acknowledgment, acquiescence, and adherence to the policy, clearly established "a mutual, long-standing practice" between the parties, and amounted to a clear and unmistakable waiver by the Union of its right to access personal files without written authorization from employees. I disagree.

The law regarding waivers of statutory rights is fairly well settled. As the Respondent readily acknowledges in its posthearing brief, such a waiver must be clear and unmistakable, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *New York Telephone Co.*, 299 NLRB 351, 352 (1990), and will not be lightly inferred by the Board. *Owens-Corning Fiberglas Corp.*, 282 NLRB 609 (1987). Further, when relying on a claim of waiver of a statutory right, the employer bears the burden of proving that a clear relinquishment of that right has occurred, *NLRB v. Challenge-Cook Brothers of Ohio*, 843 F.2d 230, 233 (6th Cir. 1988); and the fact that "the parties contract is silent on the issue, or that the union may have acquiesced in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." See *Register-Guard*, 301 NLRB 494, 496 (1991), citing *Owens-Corning Fiberglas*, 282 NLRB 609 (1987); *H. J. Scheirich Co.*, 300 NLRB 687, 689 (1990); *Peerless Publications*, 231 NLRB 244, 258 (1977). See also *St. Luke's Hospital*, 314 NLRB 434, 440 (1994); *E. R. Steubner, Inc.*, 313 NLRB 459 (1993).

The Respondent has not sustained its burden of showing that the Union "clearly and unmistakably" waived its right to contest Respondent's "written consent" policy or to receive relevant information from an employee's personnel file without the employee's written consent. Initially, I find little in the way of record evidence to support Respondent's assertion that the Union and employees were fully aware of the existence of its "written consent" policy. Among the factors

relied on by Respondent to show union and employee knowledge is its claim that the practice is contained in its PPPM and employee handbook, copies of which are either distributed to the Union and employees or made readily available to them, that the personnel policies were discussed during the recent 1992 negotiations, and that, according to testimony from the Union's former president and business agent, Joseph O'Hara, the Union was aware of and had observed the practice for many years.

Contrary to the Respondent, although the employee handbook, which purports to summarize for employees the contents of the PPPM, advises employees that their personnel files are deemed confidential, there is no mention either in its 1991 version, or its amended 1994 version, of any requirement that employee written consent is needed for the release of any information contained therein (see R. Exhs. 25 and 26). Thus, the fact that the Union and employees may have been provided with copies of the handbook, or as claimed by Rable that he goes over the handbook "page by page" with each new employee, is of no consequence as nothing therein would have alerted them to such a practice.

The Respondent suggests that language in the PPPM, stating that "No Information other than verifying job title and the employment dates will be released to outside groups (such as banks, prospective employers) without a consent form signed by the employee from the organization requesting information" (see R. Exhs. 26 and 27), constitutes evidence of its "written consent" policy. Record evidence, however, makes clear that this provision is not applicable to the Union, but applies instead to other business institutions seeking references from Respondent regarding employees. The above provision, as noted, is included in both the 1991 PPPM, and in the 1994 amended PPPM, and Rable's testimony is that the 1994 amendments were solely designed to clarify and explain, and did not alter or change, any existing policies.[18] A review of the 1994 amended PPPM reveals that, unlike the 1991 PPPM, the above provision was incorporated under the heading, "Outside Reference Requests," confirming that the provision applies only to outside business entities seeking references on employees, and not the Union. Further, the plain language of this provision makes clear that the only information to be released to a third party is an employee's job title and employment dates. Respondent's admission in its posthearing brief, that it would have released Quales' entire personnel file to the Union had it obtained a written release from Quales, runs counter to the explicit language of the provision limiting disclosure to only the employee's job title and employment, and undercuts the suggestion that the provision applies to the Union.[19] Indeed, it is undisputed that the Union received copies of Quales' evaluations and written warnings. If, as Respondent suggests, the above provision applies to the Union, then Respondent failed to adhere to the above provision when it released to the Union information other than Quales' job title and employment dates. Thus, Respondent's own conduct undermines its very argument that the Union is subject to the above provision. Except for the above provision, which I find does not apply to the Union, the PPPM contains nothing that can be construed as requiring the Union to obtain an employee's "written consent" before being allowed to access an employee's file. Nor can the Respondent rely, as support for its waiver defense, on the access restrictions contained in the 1994 amended PPPM, as those changes went into effect on July 1, 1994, just 1 week after Quales' grievance was filed, and consequently could not have been part of any long-established practice between the parties regarding the release of information from employee files.

Although unclear as to its purpose, the Respondent at the hearing elicited testimony from Rable to the effect that dur-

[18] Rable's testimony is cited here for the sole purpose of demonstrating the discrepancies and conflicts in Respondent's argument as to its past practice, and not because his testimony on this point is deemed credible. Indeed, the inconsistencies discussed below convince me that Rable was not being truthful in his testimony that the amendments to the employee handbook and the PPPM were mere clarifications, rather than substantive modifications or changes, to existing practices. A perfect example of such a discrepancy involves the language in the employee handbook relating to "Personnel Files." Rable testified that the "Personnel Files" provision in the 1991 handbook was not changed when the handbook was amended in July 1994 (R. Exh. 24). However, a comparison of both exhibits shows Rable to be wrong in his assertion. Thus, on July 1, 1994, the "Personnel Files" provision in the handbook was amended to include an employee's "*authorized representative*" among the individuals entitled to "peruse" an employee's file without consent. A cursory review of the same provision in the 1991 handbook reveals no mention of "authorized representative." But if, as testified to by Rable, the 1994 amendments only clarified and did not change an existing practice, then the inclusion of the words "*authorized representative*" in the 1994 handbook simply codified, without altering, the right of its employees' authorized representative, which undoubtedly includes the Union, to access employee files without consent. Thus, Rable's testimony that the 1994 amendments to the employee handbook created no substantive change in Respondent's past practice regarding the release of information from employee files, if accepted as true, contradicts Respondent's claim of a long-established practice requiring that the Union obtain written consent before being allowed to access employee personnel files. Ironically, it would also contradict the PPPM, as amended in July 1994. Thus, the "Personnel Files" section in the PPPM was amended in 1994 to include the following language not found in the 1991 PPPM: "If the employee authorizes a third party to have access to information in the personnel file, the employee must complete the 'Authorized Access To Personnel File Information Form' (Exh. H). This information must be completed prior to third party access to this information."Again, if Rable's testimony is accepted as true, then the above amendment to the PPPM reflects a mere codification of an existing past practice that requires the Union to obtain written consent for release of information in employee files. This would, however, be at odds with, and indeed, contradict the above-described corresponding language in the employee handbook (which according to Respondent merely summarizes PPPM policies) which allows the employee's "authorized representative" access to such information without consent. These inherent inconsistencies created by Rable's testimony renders the latter's testimony regarding the changes to the PPPM and the employee handbook not credible. Rather, I find that the 1994 changes to the PPPM and the employee handbook were new and not simply a codification of existing practices.

[19] I also find the provision to be somewhat ambiguous in that it is not clear whether the consent form referred to therein is to be signed by the employee of the Respondent or by the employee of the institution seeking the information. Further, although the provision makes specific reference to a "consent form," Rable testified that prior to the 1994 amendments to the PPPM, the Respondent did not have any particular form by which employees could give their written consent for the Union to access their personnel files, which led him to create the form entitled "Authorized Access to Personnel Files Information" a copy of which is attached to R. Exh. 26.

ing the 1992 negotiations, the Union sought to have certain of Respondent's personnel policies incorporated into the new contract because, according to Rable, the Union preferred those policies over what was contained in the prior agreement. Apparently, none of the policies were incorporated into the new agreement. The Respondent cites this testimony in its posthearing brief, but offers no explanation as to what such testimony is intended to show. However, to the extent it seeks to argue that there was a contractual waiver by the Union of its right to contest the Respondent's purported "written consent" policy or to obtain information without employee consent, that argument is clearly lacking in merit. To meet the "clear and unmistakable" standard of *Metropolitan Edison v. NLRB*, supra, on the basis of a contractual waiver, the party asserting waiver must point to specific language in the contract establishing the waiver, or alternatively show "that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter." *Trojan Yacht*, 319 NLRB 741 (1995). Here, the fact that the parties' contract is silent on the question of the Union's right to obtain information does not constitute proof of a clear and unmistakable waiver. *H. J. Scheirich Co.*, 300 NLRB 687, 689 (1990). Further, assuming arguendo that the parties held extensive discussions regarding the possible inclusion into the new contract of certain of Respondent's policies, nothing in Rable's testimony or in notes he took during said negotiations indicates that the Respondent's alleged "written consent" policy was among those discussed during negotiations. Thus, it cannot be said that the Union "consciously yielded" its right to obtain relevant information from an employee's personnel file without employee consent. I note in any event that Respondent, except for its reference to Rable's above testimony, has not asserted either at the hearing or in its posthearing brief, contractual waiver as a defense, and instead relies solely on the theory that the Union acquiesced to a past practice. To the extent Rable's testimony was elicited to show union knowledge of the "written consent" policy, it fell woefully short of its goal for, as noted, nothing in Rable's testimony suggests that any such policy was discussed during those negotiations.

The Respondent, as noted, relies on O'Hara's testimony to establish the Union's familiarity with, and acquiescence to, its "written consent" policy. O'Hara, who was subpoenaed by Respondent to testify in this proceeding, served as Local 406's president and business agent for more than 20 years, until he was discharged by the Union on July 15, 1993. He testified he was involved in all contract negotiations with the Respondent since their inception in 1972, until the most recent one in 1992, and that regarding requests for information from employee files, for more than 20 years he followed the same procedure with Respondent as he did with other employers under contract with the Union, to wit, he would obtain written consent from the employee. O'Hara further testified that he never objected to this policy because "every year during negotiations," when he and his negotiating team met with the Hospital's representatives to review, update, or change the personnel policies, the Respondent "made it very clear that they wouldn't authorize anyone to go through their personnel files without anybody signing off and giving permission." (Tr. 416–417.)

I found O'Hara's testimony to be neither convincing nor trustworthy. O'Hara's demeanor as a witness was poor, and while he may not have displayed any outwardly signs of hostility toward the Union, his attitude and parts of his testimony suggest that he harbored some resentment towards the Union stemming from his abrupt termination as president and business agent for Local 406 after more than 20 years of service. While O'Hara remains a union member and receives two monthly pension checks from the Union, I was left with the distinct impression that he had an "ax to grind" with the Union resulting from his discharge, and that it was this attitude which led him to be cooperative with Respondent's counsel during his direct examination, and which caused him to suddenly develop a poor memory and become vague and evasive during cross-examination by the General Counsel.[20] For this reason, I found O'Hara's testimony to be unreliable. Also undermining his credibility is the fact that his testimony that the Respondent and the Union held yearly negotiations to discuss changes or modifications to the personnel policies was not corroborated by either Respondent or General Counsel's witnesses.[21]

Garman's, Rable's, and Fries' testimony regarding the "written consent" policy was also unconvincing. Garman, for example, testified only that he recalls this particular practice being in place "for as long as I can remember, I would say back to when I first joined the hospital" in November 1993. Fries' testimony was only slightly more detailed than Garman's regarding the alleged practice. Like Garman, she testified that the practice has been in effect for the entire 18 years she has been employed by Respondent. She claimed that the practice is contained in the PPPM, but could not recall where in particular it might be found. This fact, along with other evidence of record, convinces me that Fries was not all that familiar with the practice in general. For example, in her July 6 letter to Firmstone advising that Quales' written consent was needed for the release of information,

[20] O'Hara, for example, recalled on direct examination the name of the individual, Al Cavarino, who helped him organize Respondent in 1972, the name of Respondent's attorney involved in those negotiations, Salomon Rosenberg, the person who represented the Respondent after the first contract was negotiated, Sherwood, the name of the Union's attorney back then, Tom Jennings, and the name of the Union's steward, Ronnie Adolfson. On cross-examination, however, O'Hara suddenly had difficulty recalling more recent events and names. He could not, for example, recall the name of any individual on the Hospital's negotiation teams with whom he had dealt from 1991 through 1993, could not recall much regarding the issues raised during the more recent discussions, and could not recall who served as union steward at Respondent during his last year of employment with the Union. I am convinced that O'Hara was being deliberately uncooperative with the General Counsel and, for this reason, reject his testimony as unreliable.

[21] If O'Hara is correct in his assertion that he never objected to Respondent's "written consent" policy because "Respondent wouldn't authorize anyone to go through their personnel files without anybody signing off and giving permission," then the clear implication of such testimony is that it would have been futile for the Union to have objected to the alleged "written consent" policy, or much less to propose that it be eliminated or modified. The Board has held that it will not find a waiver where a unilateral change has been made irrevocable prior to any notice of the intended change, or where the change has been announced as a matter on which the employer will not bargain. See *W-1 Forest Products Co.*, 304 NLRB 957, 961 (1991).

Fries states, albeit erroneously, that employees are also required to provide written consent when they themselves seek to review information in their own files. Clearly, no such requirement is found either in the PPPM or the employee handbook.

Further, Fries' testimony that copies of the PPPM are kept in a loose-leaf binder in her department and accessible to all employees does not ipso facto establish that employees, or indeed the Union, are aware of the contents of the PPPM, or of its alleged "written consent" policy in particular. Fries also claimed that she handled Quales' request just like any others previously handled by her. Her testimony in this regard was not persuasive. Thus, when asked if she had received such requests in the past, Fries initially responded rather vaguely, "I presume that we have." Only when prodded by Respondent's counsel did she finally state in general fashion that she had indeed received such similar requests and that she handled them just as she handled the Quales' request. The Respondent's counsel made no effort to elicit further testimony from Fries regarding the particulars of these past requests which, given her initial vague response, could have helped her credibility on this point. As it is, I do not credit her testimony that she has handled similar requests in the past. However, even if her testimony in this regard were accepted as true, it would not suffice to establish that the Union either knew or was somehow aware of Respondent's alleged "written consent" practice.

Rable's testimony, in my view, fares no better than Garman's or Fries' in terms of credibility. Rable testified he has been employed by Respondent for 5 years, and that he was told by Respondent's former president and CEO, John Sherwood, of the "written consent" policy soon after he assumed his duties as director of human resources. To show that the Union must have known of its "written consent" policy, Rable testified he provided O'Hara with a copy of Respondent's PPPM just prior to the 1992 contract negotiations, and also provided O'Hara's successor, Adelle Snyder, with a copy. However, the fact that O'Hara and Snyder may have received copies of the 1991 PPPM, which was the only version in effect at the time, is of no consequence for, as noted, the 1991 PPPM makes no mention of any "written consent" policy applicable to the Union. Rable's testimony in any event was not credible on this point. Thus, as noted, a comparison of the changes made in 1994 to the PPPM and employee handbook with that contained in the 1991 versions renders illogical and meaningless Rable's testimony that the 1994 amendments did not change or alter any existing practice (see fn. 18, supra). Further, Rable's erroneous statement that there was no change in the wording of the "Personnel Files" language of the employee handbook when it was amended in 1994 demonstrated that he, like Fries, was not wholly familiar with Respondent's practices and procedures as set forth in the PPPM and employee handbook. Clearly, if Respondent's own managers were unfamiliar with the Hospital's practices and policies, it would be absurd to expect that the Union would be so knowledgeable.[22]

In furtherance of its acquiescence theory, the Respondent points to the Union's purported failure to object when employees Sandra Menotti and Laurie McElroy submitted written requests to Respondent authorizing the release of information from their files to the Union. Initially, the Menotti request (R. Exh. 1), makes clear that it was Menotti, not the Union, that was requesting information from her personnel file. Further, Fries credibly and without contradiction testified to having no knowledge that such a request had been made by Menotti, and that she received items from Menotti's file from Menotti herself rather than from Respondent. Thus, there is no basis for assuming that the Union knew of, and thereby acquiesced in, the written request submitted by Menotti to Respondent. Regarding McElroy, although the record shows that she authorized Respondent to provide Union Steward Beth Donahue with access to her entire personnel file, as in Menotti's case, there is no evidence to suggest that the Union knew that such a written request had been made. The only testimony regarding the McElroy matter came from Rable who stated that on receipt of McElroy's written request, he contacted Donahue and made an appointment for her to come in and review the file. There is no indication from his testimony that he informed Donahue that McElroy had provided a written request authorizing Donahue to see her file. Further, McElroy's request was obviously submitted pursuant to the changes made by Respondent on July 1, 1994, to its PPPM, which included the insertion of a new policy requiring such written consent for release of information, and was not made in accordance with any established past practice.

The weight of the record evidence does not, in my view, establish unequivocally the existence of any longstanding practice or policy requiring that the Union obtain "written consent" before being allowed to access information in an employee's personnel file. Clearly, prior to the July 1, 1994 amendments, no reference to such a practice or policy was to be found in Respondent's PPPM. Further, assuming arguendo that Respondent had such an unwritten practice, the evidence does not clearly establish that the Union was fully apprised of its existence or that, even if had such knowledge, it "clearly and unmistakably" waived its right to object to the policy. Finally, the fact that the Union may not have previously objected to this alleged unwritten practice or policy or that it can be deemed to have somehow acquiesced in the practice does not, as noted, forever bar it from asserting its statutory right to obtain relevant information without an employee's written consent. See *St. Luke's Hospital*, supra, and other cases cited above. Accordingly, Respondent's waiver defense is found to be without merit.

[22] Nor do I find credible Rable's testimony that he reviewed Pennsylvania law, in particular 43 P.S. 1322 and 1322.1, to insure that Respondent's "written consent" policy conformed to state law. Rable's testimony was elicited through leading questions posed by Respondent's counsel and, in my view, is unreliable. Indeed, Rable's demeanor during this line of questioning was suggestive of one unfamiliar with the subject matter. Thus, when questioned by me, Rable admitted that the language of 1322 calling for written authorization for release of information from an employee's file was discretionary, but stated that this "was something that we needed to do." However, he subsequently testified in response to questioning by Respondent's counsel that under 1322.1, he was "required" to obtain written authorization from the Union before releasing any such information. It was patently clear to me that Rable was confused regarding the purposes and intent of the above provisions and am convinced that, contrary to his testimony, Rable did not review or rely on such provisions.

2. The alleged July 21 request for Quales' personnel file

The General Counsel alleges, and the Respondent denies, that during the July 21 meeting, Donovan asked to see Quales' personnel file, and that Garman's refusal to show him the file without a written release from Quales violated Section 8(a)(5) and (1) of the Act. Resolution of this issue depends on whose testimony is to be believed, that of General Counsel's witnesses Donovan and Firmstone, who testified that a request was made, or the contrary testimony of Respondent's witnesses, Garman and Rable. Clearly, unless a formal request for information is made, the Board will not find that an unlawful refusal to furnish information has occurred. *Reebie Storage & Moving*, 313 NLRB 510, 513 (1993); *W. Schlesinger Geriatric Center*, 304 NLRB 296, 297 (1991). Upon a careful and full review of all testimony and evidence of record, I credit Garman and Rable that Donovan did not make a request to see Quales' file at the July 21 meeting.[23]

Donovan's testimony regarding the July 21 meeting was not convincing. While he seemed to be testifying in a forthright manner during his direct examination by the General Counsel, on cross-examination Donovan developed a more selective recollection of these events and, in my view, became deliberately evasive, casting doubt on the validity of his version of the July 21 meeting. On direct examination, for example, Donovan stated clearly that he specifically asked to see Quales' file, and testified that when Garman refused, the discussion ended at that point. Donovan made no reference to anything else being said either by him or Garman. However, when his memory was put to the test on cross-examination, Donovan had difficulty recalling certain specifics of the meeting. He was unable, for example, to recall who arranged the meeting, and intimated that Firmstone may have done so. Firmstone, however, contradicted him on this point, testifying instead that Donovan himself set up the meeting. Nor could Donovan recall how long the meeting lasted, or whether he took notes at the meeting.[24] Further, Donovan's testimony, that Garman asked Quales to leave the meeting, is contradicted not only by Garman and Rable, but also by Firmstone who testified that Donovan, not Garman, asked Quales to leave. Donovan's inconsistencies and poor recollection renders his testimony regarding the July 21 meeting unreliable and not credible.

I am not unmindful of the fact that Firmstone, who was generally a very credible witness, testified during rebuttal testimony, in apparent agreement with Donovan, that the latter asked to see Quales' personnel file at the July 21 meeting. Firmstone, however, was questioned extensively by the General Counsel on various matters during his case-in-chief, but for reasons known only to him, the General Counsel chose not to inquire into Firmstone's recollection of the July 21 meeting and, on conclusion of her testimony, gave no indication that she would be recalled as a rebuttal witness. Accordingly, on conclusion of her testimony, Firmstone was permitted to remain in the hearing room as an observer, notwithstanding that a sequestration order remained in effect, as her presence would not have contravened the sequestration order. As an observer, Firmstone heard all testimony given by Donovan, Garman, and Rable regarding the events of the meeting. At the close of the Respondent's presentation of its case, the General Counsel recalled Firmstone as a rebuttal witness to dispute Garman's and Rable's denial, and affirm Donovan's claim, that an oral request for Quales' file was made at the July 21 meeting. While the General Counsel was allowed, over Respondent's objection, to recall Firmstone, I find her rebuttal testimony to be unreliable and of little probative value given her presence at the hearing during Donovan's testimony, and because of the vagueness of certain of her responses during her rebuttal testimony. In light of the above findings, I conclude that the General Counsel has not made out a prima facie showing that a request to see Quales' file was made on July 21. Accordingly, this complaint allegation is dismissed.

3. Donovan's August 16 request for information

The General Counsel, as noted, contends that the Respondent further violated Section 8(a)(5) and (1) by refusing to comply with Donovan's August 16, request to see the disciplinary files of all unit employees. The Respondent does not dispute that a request was made, nor the relevancy of the information sought. It does, however, disagree with the General Counsel's claim that Garman, to whom the information request was directed, declined to provide the information when he instructed Donovan to submit all such requests relating to Quales' upcoming arbitration directly to its labor counsel, Ufberg. Rather, the Respondent argues that in his letter, Garman was simply *requesting*, and *not requiring*, Donovan to submit his information request to Ufberg, in accordance with what Respondent claims is an established practice whereby the Union's business agent and attorney, Ufberg, confer directly with each other on a variety of issues and disputes arising between the parties.

The Respondent's claim that Garman's letter was simply a request and not a directive rings hollow, along with its claim that it was simply following an established practice of referring such matters to its labor counsel. Clearly, an employer's obligation on receipt of a request for relevant information, absent some legitimate reason for not being able to do so, is to comply with that request, and it cannot avoid its responsibility in this regard by suggesting that the information is obtainable from some other source or third party. *Illinois-American Water Co.*, 296 NLRB 715, 724 (1989); *Interstate Food Processing*, 283 NLRB 303, 306 (1987). The Respondent here does not claim hardship as a reason for not directly providing the Union with the requested information. Rather, Garman's refusal to provide the information was premised solely on the fact that the matter was proceeding to arbitration. However, the fact that Quales' grievance was proceeding to arbitration was not sufficient justification for Respondent to refuse to furnish directly to the Union the information requested by Donovan, for the Board has held that "information which aids in the arbitral process is relevant and should be provided regardless of whether the request is at the grievance stage or made after the parties have agreed to arbitration." *Jacksonville Area Assn.*, supra at 340. Rather

[23] The fact that Garman and Rable have been discredited regarding other aspects of their testimony does not render all their testimony unworthy of belief. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

[24] Donovan's reference in his direct testimony to certain notes regarding the July 21 meeting raises a suspicion that he may indeed have taken notes of the meeting, and serves to cast further doubt on the reliability of his testimony regarding the meeting.

than provide the information as it was statutorily required to do, the Respondent sought instead to circumvent its obligation by directing that the Union go through Respondent's labor counsel for such information.

Further, Respondent's argument, that Garman's use of the phrase "respectfully request" suggests that no outright denial of the information request occurred or was intended, is disingenuous, to the say the least, for regardless of what Garman may have intended with his polite choice of words,[25] the fact remains that Respondent did not provide the information as it was required to do, but instead directed Donovan to address himself to its labor counsel, and gave Donovan no indication or assurance that it intended to comply with his request, or that it had instructed Ufberg to do so. Further, Ufberg's September 12 letter (R. Exh. 4), sent to Donovan 2 weeks after the two conversed on the phone on August 29, gave no indication of any intent by Ufberg to comply with Donovan's information request. Rather, in his letter Ufberg states only that he would like to "discuss this matter and, hopefully, resolve it," but that he would be unavailable for the next 2 weeks on other matters. Clearly, there was nothing about Donovan's information request that needed resolving. The information request was clear on its face, and the Respondent does not contend that it referred the matter to its labor counsel because it found the request ambiguous or because it did not understand what was being sought. Accordingly, there was nothing for Ufberg to discuss with Donovan regarding the information request. Indeed, his comments that he wanted to discuss the matter but would be too busy during the next 2 weeks to do so, when viewed in light of Respondent's and his own failure to follow up on the request until after Donovan's January 11, 1995 demand to Garman that the information be provided, confirms my belief that Respondent was simply trying to avoid its obligation of providing the Union with relevant information by directing Donovan to its labor counsel.

Further, I find absurd Respondent's argument that the Union should be found to have abandoned its request for information because Donovan did not repeat his request for information until January 11, 1995, almost 5 months later, when he wrote to Garman seeking the information. The fact remains that it was incumbent on the Respondent to supply the Union with the information on request, and not for the Union to make repeated requests for the same information until such time as the Respondent saw fit to comply. Clearly, the Respondent should not be allowed avoid liability for refusing to provide relevant information by shifting responsibility to the Union to renew its requests for information every so often or risk having its request considered abandoned. The Respondent also points out that the Union never objected or protested Garman's "request" that it submit all information requests to its labor counsel. While Donovan may not have, in so many words, expressed his objection to Garman's letter directing him to take his information request to Ufberg, the fact that he directed all his letters, including the January 11, 1995, one, regarding the information request directly to Garman, rather than to Ufberg, convinces me that Donovan expected the Respondent, and not Ufberg, to comply with the information request, and inferentially that he opposed Garman's directive that all union information requests pertaining to the Quales' grievance go through Respondent's labor counsel.

The Respondent, as noted, further argues that it was simply adhering to an established practice whereby the Union and its labor counsel conferred directly on a variety of labor relations issues and disputes. There is, however, scant evidence in the record to support such a finding. Garman, for example, to whom the information request was directed, testified generally that it was not unusual for him to direct the Union to his labor counsel on various issues, not just contract negotiations. However, he readily admits that he has not been involved in labor relations matters for some 4–5 years because of a change in his duties and responsibilities, and that all such matters are handled by Rable as director of human resources. He further admitted that he had never received an information request from the Union prior to Donovan's August 16 request. Clearly, Garman's testimony contains nothing that can be construed as evidence establishing the existence of any such practice.

Rable, the individual who would most likely be able to shed light on the existence of such a practice, could not do so. Thus, when asked by the General Counsel to identify any instance in which he directed the Union to address an employment-related matter to Attorney Ufberg, Rable could not recall any. Indeed, his only recollection in this regard involved the 1992 contract negotiations in which he asked the Union to speak with Ufberg regarding the scheduling of sessions, and the interpretation of a particular ruling. These two isolated instances, in my view, hardly constitute evidence of the established practice alluded to by Respondent in defense of the allegation that it refused to comply with the August 16 information request.

Indeed, rather than establishing the existence of such a practice, the record evidence, if anything, shows that the Union more often than not dealt directly with Respondent's management on various issues and was not referred to Respondent's labor counsel.[26] For example, when Donovan requested a meeting to discuss the SNF issue, the Respondent met with Donovan directly, and there is nothing in the record to indicate that Donovan was ever asked to address himself to Ufberg regarding this matter. Similarly, Firmstone's request for information regarding Quales was handled by Fries directly, again without any evidence showing that Firmstone was asked to direct her information request to Ufberg. Further, Firmstone credibly and without contradiction recalled having met with Garman and other management representatives directly, without being referred to Ufberg, on grievances filed by employees Menotti and McElroy (Tr. 449–450). In summary, I find that the Respondent's conduct in directing the Union to submit all information and other requests pertaining to the Quales' grievance directly to its labor counsel violated Section 8(a)(5) and (1) of the Act, as alleged.

4. Mootness issue

As a final argument, the Respondent claims that the issues in this case were rendered moot by the settlement agreement entered into between the Respondent, the Union, and Quales

[25] I am in any event convinced that Garman chose his words carefully so as to mask Respondent's real intent not to comply with the information request.

[26] O'Hara's testimony to the contrary is not credited.

on February 14, 1995. The Respondent's claim is without merit. The settlement agreement, while resolving the grievance filed by Quales regarding her termination, gives no indication, contrary to Respondent's assertion in its posthearing brief, that it was intended to resolve the unfair labor practice allegations resulting from Respondent's insistence that the Union obtain written consent before obtaining information from employee personnel files, and from its refusal to provide the Union with information by directing that the Union submit all information requests through its attorney.[27] The Respondent suggests that even if the case is not rendered moot by the settlement agreement, dismissal of the allegations is nevertheless appropriate because the information requested is no longer relevant. The relevancy of the information, however, is determined as of the time the information requests and subsequent refusals were made. *Finn Industries*, supra. It should be noted, in any event, that the General Counsel here readily admits that the information has been provided, and is not seeking as part of any remedy that the information be furnished again to the Union. Rather, as noted in his posthearing brief, the General Counsel seeks only that the Respondent be ordered to cease and desist from engaging in the above found unlawful conduct, a remedy which I find wholly reasonable under the circumstances of this case.[28]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By maintaining a policy that conditions release of information in an employee's personnel file on the Union's obtaining written authorization from the employee, and by directing that the Union submit all information requests pertaining to a grievance through its attorney, the Respondent violated Section 8(a)(1) and (5) of the Act.
4. By the conduct described in paragraph 3 above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.
5. The Respondent has not engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist 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 recommended[29]

ORDER

The Respondent, Wayne Memorial Hospital Association, Honesdale, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Conditioning release of relevant information from an employee's personnel file on the Union's obtaining a written authorization from the employee.

(b) Directing that the Union submit all requests for relevant information pertaining to a grievance through its attorney.

(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 action necessary to effectuate the policies of the Act.

(a) Post at its facility in Honesdale, Pennsylvania, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered up by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[27] Although Respondent ultimately complied with Donovan's August 16 information request some 5 months later, such compliance did not render moot the complaint allegation that Respondent violated the Act by directing that the Union submit its information requests to its labor counsel. See *Finn Industries*, 314 NLRB 556, 558 fn. 13 (1994); see also *Gloversville Embossing Corp.*, 314 NLRB 1258, 1265 (1994); *WGN of Colorado*, supra at 718.

[28] *C-B Buick v. NLRB*, 506 F.2d 1086 (3d Cir. 1974), and *Glazers Wholesale Drug Co.*, 211 NLRB 1063 (1974), cited by Respondent in support of its mootness argument are factually distinguishable from the case at hand. In *C-B Buick*, the court declined to enforce the remedial portion of the Board's order requiring the employer to provide the union with certain requested information that had been sought while the parties were engaged in contract negotiations. The court reasoned that while the information had at one point been relevant, the parties had long since entered into a collective-bargaining agreement and the Board had failed to show in amending its order to require production of the information the continued relevancy to the union of the requested information. The court, contrary to Respondent's suggestion here, found that the issues had not been mooted and, indeed, enforced the Board's finding of a violation and its issuance of a cease and desist order. Likewise, in *Glazers*, the Board found that the union therein had not established the relevance of the information sought regarding nonunit employees (e.g., striker replacements), and further, the refusal to provide the requested information had not been final.

[29] 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.

[30] 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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT condition release of relevant information from an employee's personnel files on the Union's obtaining a written authorization from the employee.

WE WILL NOT instruct the Union to submit all requests for relevant information pertaining to employee grievances through our attorney.

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.

WAYNE MEMORIAL HOSPITAL ASSOCIATION