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The Permanente Medical Group, Inc. and National Union of Healthcare Workers. Case 28–CA–273219

February 9, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS WILCOX AND PROUTY

On June 16, 2022, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

¹ The Respondent has implicitly 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.

For the reasons stated in his decision, we affirm the judge’s finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to furnish and by delaying in furnishing the Union with information it requested on December 8, 2020. However, in affirming his finding that the Respondent unlawfully failed to fully respond to the Union’s information request 1(b) (complaint par. 5(d)(2)), we do not rely on the judge’s citation to *Oncor Electric Delivery Co.*, 364 NLRB 677, 681 (2016), or on the judge’s finding that the relevance of the information was apparent to the Respondent based on its partial provision of the information. Instead, we rely on the judge’s finding that the Union established the relevance of the information through its explanation to the Respondent at the time of the request.

Member Wilcox further notes that, with respect to the Union’s Information Requests 1(a) and (b) (complaint pars. 5(d)(1) and 5(d)(2)), the Respondent did not challenge their relevance at the time of the Union’s request and instead waited until after the Union filed an unfair labor practice charge. See generally *Salem Hospital Corp.*, 359 NLRB 695, 695 *fn.* 1 (2013) (finding of unlawful failure to furnish information based in part on the employer having waited until the hearing to first raise confidentiality and overbreadth concerns), *affd.* 361 NLRB 962 (2014), *enfd.* 669 Fed.Appx. 80 (3d Cir. 2016). To the extent that these requests

ORDER

The National Labor Relations Board orders that the Respondent, The Permanente Medical Group, Inc., Oakland, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with National Union of Healthcare Workers (the Union) by failing and refusing to furnish and/or by unreasonably delaying in furnishing 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) To the extent it has not already done so, furnish to the Union in a timely manner the information requested by the Union on December 8, 2020, with the exception of the number of return visits scheduled within 14 days of the initial visit and the number of health plan members referred for in-patient hospital services outside of the Kaiser network.

(b) Post at its facility in Oakland, California, copies of the attached notice marked “Appendix.”³ Copies of the

sought information that was not presumptively relevant, Member Wilcox notes that the Respondent could not simply refuse to provide the information without seeking clarification. See *American Medical Response of Connecticut*, 371 NLRB No. 106, slip op. at 1–2, *fn.* 4 (2022), and cases cited therein.

Further, with respect to the Respondent’s failure to provide information responsive to the Union’s Information Request 1(b) (complaint paragraph 5(d)(2)), Member Wilcox notes that the Union specifically sought quarterly data on the number of Health Plan members, and the Respondent provided only end-of-year data. See generally *Boeing Co.*, 364 NLRB 158, 159–160 (2016) (employer violated Sec. 8(a)(5) by failing to furnish specific data and analysis requested by the union and failing to explain to the union how information it had previously provided satisfied its request).

² We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language and in accordance with our decision in *Paragon Systems*, 371 NLRB No. 104 (2022). We shall substitute a new notice to conform to the Order as modified.

³ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic

notice, on forms provided by the Regional Director for Region 28, 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 internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps 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 December 8, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28 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. February 9, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

David M. Prouty, 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

means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with National Union of Healthcare Workers (the Union) by failing and refusing to furnish and/or by unreasonably delaying in furnishing 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 you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, furnish to the Union in a timely manner the information requested by the Union on December 8, 2020, with the exception of the number of return visits scheduled within fourteen days of the initial visit and the number of health plan members referred for in-patient hospital services outside of the Kaiser network.

THE PERMANENTE MEDICAL GROUP, INC.

The Board's decision can be found at www.nlr.gov/case/28-CA-273219 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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."

Lisa J. Dunn, Esq., for the General Counsel.
Michael R. Lindsay, Esq., Irene Scholl-Tatevosyan, Esq. (Nixon Peabody, LLP), and *April L. Weaver, Esq. (Kaiser Permanente Legal Department)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANOPOULOS, Administrative Law Judge. This case was tried before me on January 25 and January 26, 2022, based upon a complaint and notice of hearing (Complaint) alleging that The Permanente Medical Group, Inc., (Respondent or TPMG) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing to furnish relevant information to the National Union of Healthcare Workers (Union or NUHW). (GC 1(c)) At trial, the complaint was amended to allege that Respondent further violated the Act when it delayed in providing the Union with documents related to one specific information request. Respondent denies that its actions violated the law.¹ (GC 1(a)); (GC 18).

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel and Respondent, I make the following findings of fact and conclusions of law.²

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a professional corporation of physicians engaged in the operation of medical offices and professional health care services within the State of California. In conducting its business operations, Respondent annually purchases and receives goods valued in excess of \$5000 directly from points outside the State of California, and derives yearly gross revenues in excess of \$250,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. Accordingly, this dispute affects commerce and the National Labor Relations Board (the “Board”) has jurisdiction pursuant to Section 10(a) of the Act.

II. FACTS

A. General Background

TPMG is a medical group that manages health-care practitioners who provide services to patients enrolled in health insurance plans provided by Kaiser Foundation Health Plan, Inc. and who receive care at facilities operated by Kaiser Foundation Hospitals, Inc. *NorthBay Healthcare Group, Inc. v. Kaiser Found. Health Plan, Inc.*, 305 F. Supp. 3d 1065, 1067 (N.D. Cal. 2018). The three companies are separate legal entities; collectively they are responsible for managing the Kaiser integrated health care

system in California, and use the registered trade name “Kaiser Permanente.” Id. at 1068.

Since about December 2015, Respondent has recognized the NUHW as the exclusive collective-bargaining representative for the following unit of TPMG’s psychologists, social workers, and related clinical therapists and assistants (referred to as the “Therapist Unit”):

All full-time and regular part-time non-supervisory staff Neuropsychologists, Psychologists, Licensed Clinical Social Workers, Marriage and Family Therapists, Licensed Professional Clinical Counselors and Chemical Dependency Counselors I & II, Unlicensed Case Managers, Psychiatric Social Worker Assistants, Marriage and Family Therapist Assistants, Psychological Assistants and Professional Clinical Counselor Assistants who perform clinical work and provide patient care in the Northern California Region; excluding Psychologists, Chemical Dependency Counselors, Licensed Clinical Social Workers, Marriage and Family Therapists and Licensed Professional Clinical Counselors who work in supervisory, administrative and/or research capacities or function as Chiefs, Division Chiefs, Coordinators, Sub-Regional Chiefs/Coordinators, students and volunteers, guards, managers, and supervisors as defined in the Act.

TPMG and the Union have been party to a series of collective-bargaining agreements involving the Therapist Unit, the most recent of which is a 71-page agreement that was effective from October 1, 2018, to September 30, 2021 (the “2018 CBA”). In July 2021 the parties began negotiations for a successor agreement, and since then have been operating under the terms of the 2018 CBA. (Tr. 60–61, 246; J. 1, 2.)

B. The Model of Care Committee

The 2018 CBA contains various letters of understanding between the parties, including one that is titled “Letter of Understanding–Model of Care.” The Model of Care LOU establishes a committee to work as a collaborative group of clinicians (referred to as the “Collaborative”), consisting of both managers and NUHW members, whose purpose is “(1) To improve internal capacity to provide psychotherapy; (2) To develop innovative approaches to feedback informed care, case conferencing, caseloads, [and] treatment planning in order to provide effective, evidence-based care; [and] (3) To integrate new approaches to care, including telehealth, [and] digital therapeutics.” (J. 2; GC 4)

The Model of Care LOU states that Collaborative’s objective is to “develop specific recommendations for improving the delivery of effective, high quality clinical care, including but not limited to the following: (1) Initial and return access for psychotherapy; (2) Availability of evidence-based psychotherapy

¹ Transcript citations are denoted by “Tr.” with the appropriate page number. Citations to the General Counsel, Respondent, and Joint exhibits are denoted by “GC,” “R,” and “J,” respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based

upon the entire record and may include parts of the record that are not specifically cited.

² Testimony contrary to my findings has been specifically considered and discredited.

treatments; [and] (3) Identified [sic] existing and emerging best practices, including new approaches to care, and recommendations for evaluation and spread.” According to the Model of Care LOU, the Collaborative was supposed to work for a period of 6 months to focus on redesigning the model of care and it was scheduled to provide an update on its work within 3 months of its first meeting. (J. 2)

The composition of the Collaborative consisted of members of the Regional Professional Practices Committee (RPPC) “and other therapists and doctors mutually agreed upon and designated by the RPPC.” (J. 2) The RPPC is a group of up to eight people, divided equally between union and management representatives, whose makeup and work is also provided for in the 2018 CBA. According to the CBA, the RPPC is to assist in: enhancing professional performance; improving quality patient care, access and service; and identifying opportunities for operational improvement. Every quarter, the RPPC provides a quarterly written report to the company’s regional director of mental health and chemical dependency with a summary of the issues the RPPC has addressed during the quarter. (GC 2; J. 2, p. 55)

Pursuant to the Model of Care LOU, all recommendations made by the Collaborative needed to be based upon “consensus decision making,” and submitted to the RPPC executive steering group. Within 30 days of “ratification” the RPPC was then required to convene in order “to identify preliminary data to be considered in constructing metrics and targets.” (J. 2; GC 4)

The Collaborative started meeting in August 2020. In early December 2020 the Collaborative gave a progress report to the RPPC, discussing the various subjects the committee was reviewing, and asking for a 1-month extension to complete their work. In mid-March 2021 the Collaborative presented its final recommendations, which included a PowerPoint presentation along with an addendum.³ The Collaborative had three subgroups (Treatment Planning, Standards & Partnership, and Communications). Each subgroup presented its findings at the meeting, as did three smaller workgroups (Core Programming, Treatment Tracks, and Regional Resources). (Tr. 138, 206–211; R. 6D)

The overall presentation highlighted six key points: (1) the Collaborative recommended a model that encompassed three major service groups (Psychiatry, Addiction Medicine & Recovery Services, and Integrated Care Services); (2) the committee believed their review was successful and strongly recommended that they reconvene every 3 years; (3) the Collaborative encouraged Kaiser to recognize that, to be effective, patient mental health care requires strong and consistent communication along with enforcement of treatment expectations and patient responsibilities; (4) the recommended team-based model called for patients to be assigned a primary mental health provider to work with multiple other providers across the Kaiser network in order to help patient/members access the type of mental health care they needed; (5) the Collaborative’s recommendations were

designed to work as part of a comprehensive, cooperative treatment system, and attempts to piecemeal the recommendations could result in staff dissatisfaction along with ineffective patient outcomes; and (6) the COVID pandemic had a silver lining which allowed the committee to reexamine how to utilize telehealth technologies in order to create a more robust and integrated mental health system for all members. (R. 6D)

C. The Union’s Information Request

On December 8, 2020, Gregory Tegenkamp, the Union’s division director for Kaiser, sent a letter to Respondent with a detailed request for information. (J. 3A) In the letter, Tegenkamp referenced the Collaborative’s work, noting the committee’s purpose was to improve “internal capacity to provide psychotherapy,” that its objective was to improve “initial and return access,” and that the Collaborative was charged with making recommendations at the conclusion of its work. Therefore, Tegenkamp stated that, in order to evaluate any recommendations made by the Collaborative, and to effectively move forward with implementing any accepted recommendations, the Union needed the following information:

[1] Access/Utilization.

- a) By medical center, for each month from January, 2019 through November 2020, for the departments of Psychiatry, broken down by Adult v. Child, the following: number of new patients booked; number of new patients seen; number of new patients seen within fourteen calendar days of request; %age of new patients who cancel or fail to keep their appointment (note: “new patients” include transfer patients); number of return appointments booked; number of return appointments kept; number of return visits scheduled within fourteen days of the initial visit; %age of established patients who cancel or fail to keep their return appointments;
- b) The number of Health Plan members, by service area, at the end of each quarter beginning December 31, 2018 and through November 30, 2020;
- c) The percentage of Health Plan members, by service area, seeking mental health services (also referred to as the “penetration rate”) for each month from January 2019 through November 2020;
- d) The number of Psychiatry Department patients, by service area, referred to Intensive Outpatient Programs (IOP) for each month from January 2019 through November 2020;
- e) The number of patients (indicating whether Health Plan members or not), by service area, for each month from January 2019 through November 2020 who have presented to a Kaiser Emergency department, including the number of these patients who were placed on psychiatric hold (5150);
- f) The number of Health Plan members referred for 1) crisis stabilization and 2) inpatient hospital services outside of Kaiser, by service area, for each month from January 2019 through

³ Although the presentation included a detailed addendum, which was presented along with the information in the PowerPoint, the addendum was not introduced into evidence. (R. 6D, p. 11–12) (Tr. 209–210)

November 2020;

g) The number of group mental health appointments performed by Kaiser's internal provider network of non-MD clinicians, by medical center, during each month since January 1, 2019 and the total number of enrollees participating in group mental health appointments for each month during this time period;

h) By medical center, for each month from January 2019 through November 2020, for the departments of Psychiatry, the number and percentage of patients seen via video and via phone; and

i) The total number of appointments booked by therapists assigned to the Northern California Region's Connect to Care (C2C) program for each month beginning in January 2019 to present, disaggregated by appointment type and appointment modality (i.e., telephone or video).

[2] Subcontracting/Outside Referrals.

a) For each Medical Center, for each month from January, 2019 through November 2020, the total number of Health Plan members (unique medical record numbers) referred out to outside vendors and/or outside providers for out-patient mental health non-MD services; and

b) Number of individual treatment appointments performed by Kaiser's external provider network of non-MD clinicians during each month since January 1, 2019.

Tegenkamp emailed the letter with the information request to Albert Mossman, Respondent's regional director of employee and labor relations. That same day, Mossman replied by email, acknowledging receipt of the letter and saying that Deborah Glasser, one of Respondent's senior labor relations consultants, along with "TPMG Leadership" would respond to the information request. Mossman copied Glasser and Agnes Amistoso on his December 8 reply; Amistoso is Respondent's regional mental health administrator and is also the regional director for strategies and programs. (Tr. 27, 102; J. 1, 3, 4)

On January 11, 2021, Tegenkamp emailed Mossman, Glasser and Amistoso asking about the status of the December 8, 2020 information request, noting that over a month had passed without any substantive response from the company. Glasser replied the same day, by email, saying multiple people were working on the response, that she would "check to see what may be ready to send and forward to you" and as additional information became available, the company would complete the request accordingly. However, Respondent did not send any information to the Union. On February 19, 2021, the Union filed the unfair labor practice charge in this matter. And, on February 25, 2021, Tegenkamp emailed Glasser, Mossman, and Amistoso saying the Union had still not received any information from the company nor an update from anyone. (GC 1(a); J. 1, 5, 6, 7)

D. Respondent's March 10 response

Glasser replied to Tegenkamp on March 10, 2021 with an email saying, "attached you will find the Employer's response." (J. 8A1) Attached to the email was a letter responding to each specific information request, and a series of spreadsheets. Respondent's March 10 letter reads as follows:

Greg,

Please see the Employer's responses to your information request.

[1] Access/Utilization.

a) By medical center, for each month from January, 2019 through November 2020, for the departments of Psychiatry, broken down by Adult v. Child, the following: number of new patients booked; number of new patients seen; number of new patients seen within fourteen calendar days of request; %age of new patients who cancel or fail to keep their appointment (note: "new patients" include transfer patients); number of return appointments booked; number of return appointments kept; number of return visits scheduled within fourteen days of the initial visit; %age of established patients who cancel or fail to keep their return appointments;

- [Response:] Much of the data drilldown being requested is not readily available in our system of reporting. See attachment.

b) The number of Health Plan members, by service area, at the end of each quarter beginning December 31, 2018 and through November 30, 2020;

- [Response:] See attachment.

c) The percentage of Health Plan members, by service area, seeking mental health services (also referred to as the "penetration rate") for each month from January 2019 through November 2020;

- [Response:] The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union's rationale on how this information is necessary and relevant.

d) The number of Psychiatry Department patients, by service area, referred to Intensive Outpatient Programs (IOP) for each month from January 2019 through November 2020;

- [Response:] The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union's rationale on how this information is necessary and relevant.

e) The number of patients (indicating whether Health Plan members or not), by service area, for each month from January 2019 through November 2020 who have presented to a Kaiser Emergency department, including the number of these patients who were placed on psychiatric hold (5150);

- [Response:] This information is not collected by the Employer in the manner being requested. Please provide the Union's rationale on how this information is necessary and relevant to assessing recommendations from the Collaborative.

f) The number of Health Plan members referred for 1) crisis stabilization and 2) inpatient hospital services outside of Kaiser, by service area, for each month from January 2019 through November 2020;

- [Response:] Please provide the Union's definition for 1) "crisis stabilization." 2) The Employer does

not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union's rationale on how this information is necessary and relevant.

g) The number of group mental health appointments performed by Kaiser's internal provider network of non-MD clinicians, by medical center, during each month since January 1, 2019 and the total number of enrollees participating in group mental health appointments for each month during this time period;

- [Response:] This information is not collected by the Employer in the manner being requested. Please provide the Union's rationale on how this information is necessary and relevant to assessing recommendations from the Collaborative.

h) By medical center, for each month from January 2019 through November 2020, for the departments of Psychiatry, the number and percentage of patients seen via video and via phone; and

- [Response:] See attachment.

i) The total number of appointments booked by therapists assigned to the Northern California Region's Connect to Care (C2C) program for each month beginning in January 2019 to present, disaggregated by appointment type and appointment modality (i.e., telephone or video).

- [Response:] See attachment.

[2] Subcontracting/Outside Referrals.

a) For each Medical Center, for each month from January, 2019 through November 2020, the total number of Health Plan members (unique medical record numbers) referred out to outside vendors and/or outside providers for out-patient mental health non-MD services; and

- [Response:] The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union's rationale on how this information is necessary and relevant.

b) Number of individual treatment appointments performed by Kaiser's external provider network of non-MD clinicians during each month since January 1, 2019.

- [Response:] The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union's rationale on how this information is necessary and relevant.

The first spreadsheet attached to Glasser's March 10 email is titled "NCAL [Northern California] New Access 2019 and 2020 for Adult and Child." The spreadsheet is broken out by month and by medical center, for both adults and children. It shows the percent of patients that were seen within 14 calendar days of a request for an appointment from January 2019 through December 2020. The spreadsheet also contains a section labelled "NCAL Membership 2019 and 2020" and gives the total number of Kaiser health plan members in Northern California for the 12 months ending December 31, 2019 and December 31, 2020. The second spreadsheet attached to the email is titled "NCAL

[Northern California] Telephone & Video Visits for 2019 and 2020." This spreadsheet is also broken out by month and by medical center, and shows the percentage of visits that occurred by telephone and video, for both adults and children, from January 2019 through December 2020. (Tr. 42-44, 171-174, 190-191; J. 8)

On March 15, 2021, Tegenkamp sent Glasser, Mossman, and Amistoso a long email, detailing the Union's perceived deficiencies in Respondent's response and replying to the company's relevance objections. In the email, Tegenkamp noted that TPMG had earlier told him that it was collecting, and would supply, the information. Therefore, Tegenkamp said that raising relevance issues now was disingenuous. Regarding the company's general relevance objections, Tegenkamp stated that the Collaborative's purpose was to improve internal capacity to provide psychotherapy, and to improve return access for individual psychotherapy. Without the requested information, Tegenkamp said that the Union "cannot determine if internal capacity is improved or if access is improved without the baseline data." As for the Union's request for information related to patient demand for services and staffing levels, Tegenkamp wrote that these two components were key to determining access, and it was therefore necessary and relevant for the Union to have this information. In the email Tegenkamp further addressed each specific response Respondent provided to the individualized information requests. Glasser replied to Tegenkamp on March 15, saying that she was in receipt of his email and would follow up with him after further review. However, she never did so. (J. 1, 9, 10)

III. ANALYSIS

A. Legal Standard

Section 8(a)(5) of the Act imposes on an employer the duty to bargain collectively which includes a duty to supply a union with requested information that will enable it to perform its duties as bargaining representative. *New York & Presbyterian Hospital v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011), enfg. 355 NLRB 627 (2010). Information requests concerning bargaining-unit employees are presumptively relevant, as they go to the core of the employer-employee relationship. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2017), enfd. 902 F.3d 296, 302 (D.C. Cir. 2018). Where the information sought is not presumptively relevant, the burden is on the union to demonstrate the relevance. *Id.* see also *Disneyland Park*, 350 NLRB 1256, 1257 (2007). To satisfy this burden, the union needs to show a reasonable belief, supported by objective evidence, that the requested information is relevant. *Id.* The Board applies a "liberal discovery-type standard" to determine the relevance of an information request. *Id.*; See also *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) ("Board is to apply a liberal discovery-type standard" to information requests). The standard for relevancy is broad; the "information must have some bearing on the issues between the parties but does not need to be dispositive." *Kaleida Health, Inc.*, 356 NLRB 1373, 1377 (2011).

B. The December 8, 2020 Information Requests

1. Complaint paragraph 5(d)(1)

The first information request in the Union's December 8 letter seeks material dealing with patient access and utilization, and reads as follows:

a) By medical center, for each month from January, 2019 through November 2020, for the departments of Psychiatry, broken down by Adult v. Child, the following: number of new patients booked; number of new patients seen; number of new patients seen within fourteen calendar days of request; % age of new patients who cancel or fail to keep their appointment (note: "new patients" include transfer patients); number of return appointments booked; number of return appointments kept; number of return visits scheduled within fourteen days of the initial visit; %age of established patients who cancel or fail to keep their return appointments. (J. 3)

In its March 10 response, Respondent stated that "[m]uch of the data drilldown being requested is not readily available in our system of reporting. See attachment." (J. 8A1) The attachment contained spreadsheets showing the percentage of patients (both adults and children) seen within 14 calendar days of a request for an appointment, by medical center, for 2019 and 2020.

Tegenkamp responded on March 15 by email, noting that the company did not dispute the relevance of the request and saying that when the Union had asked for this information previously, the Respondent had provided most of the data requested. Tegenkamp complained that TPMG only responded to two of the sixteen requests, and the information that was provided was inadequate, as the Union had asked for the number of patients and not percentages. Tegenkamp ended his response by saying the company's claim that the data was not readily available was "specious and somewhat laughable," as TPMG had 3 months to provide the information. Respondent did not reply to Tegenkamp, and no other information was provided. (Tr. 49–51; J. 9)

a. Respondent violated the Act by not providing the majority of the information requested

Standing alone, a request for patient census data is not presumptively relevant. *Hamilton Park Health Care Center*, 365 NLRB No. 117, slip op. at 9 (2017); *Camelot Terrace*, 357 NLRB 1934, 1996 (2011), enfd. 824 F.3d 1085 (D.C. Cir. 2016). Thus, it was incumbent upon the Union to show the relevance of the information requested. Here the Union did so.

The Collaborative was a creation of the parties' collective-bargaining agreement, via the Model of Care LOU, which states that the committee's purpose was to "improve internal capacity to provide psychotherapy" and to develop innovative approaches to, among other things, caseloads. (GC 4) The Model of Care LOU further states that the Collaborative's objective was to develop specific recommendations for improving the delivery of

clinical care, including the "initial and return access for psychotherapy" and the "availability of evidence-based psychotherapy treatments." (GC 4) In the Union's information request, Tegenkamp said the Union needed the information to evaluate the Collaborative's ultimate recommendations, referencing the fact that the committee's primary purpose was to improve internal capacity for psychotherapy and its objective was to improve initial and return access. Tegenkamp again referenced these reasons in his March 2021 email, after Respondent questioned the relevance of the Union's request, and further said that the Union would be unable to determine if internal capacity or access had improved without having this baseline data.

Applying a liberal discovery-type standard, I believe the Union's explanation as to why it needed the data was sufficient to meet its burden to show the request was relevant. The Union sought information involving Respondent's patient capacity, along with the availability of, and patient access to, psychotherapy services. The Collaborative was charged with making recommendations about these issues directly to the RPPC, which contained union representatives. The RPPC, in turn, was supposed to convene, "within 30 days of ratification," to "identify preliminary data to be considered in constructing metrics and targets," regarding the Collaborative's recommendations. (GC 4) Under these circumstances, I find that the information the Union requested, in order to evaluate the Collaborative's ultimate recommendations to the RPPC, was relevant and necessary for the Union to fulfill its duties as the collective-bargaining representative of employees working in the Therapist Unit. See e.g., *Beverly Health & Rehabilitation Services, Inc.*, 328 NLRB 885, 889 (1999) (union's information request seeking patient care and staffing information was relevant as it affected employee workloads and the labor-management committee in the proposed contract was empowered to address these issues).⁴

Respondent's argument that the information was not relevant because the Collaborative's "work was not data-driven" misses the mark. (R. Br., at 2, 4, 8) To establish relevance, the Union need only show a "reasonable belief, supported by objective evidence, that the information request is relevant." *Disneyland Park*, 350 NLRB at 2157–2158. The specific wording of the Model of Care LOU, regarding the Collaborative's objective and purpose, along with the RPPC's duty to review the Collaborative's work and identify preliminary data to be considered in constructing metrics and targets, fulfill these requirements; Union representatives sit on the RPPC and would be part of this review. Moreover, the actual data the Union requested only needs to have "some bearing on the issues between the parties but does not need to be dispositive." *Kaleida Health, Inc.*, 356 NLRB 1373, 1377 (2011); see also *Teachers College, Columbia University v. NLRB*, 902 F.3d 296 (D.C. Cir. 2018) (under a discovery-type standard the fact the information requested is of probable or potential relevance is sufficient to give rise to an obligation to provide it). The Union's request here meets this standard. The information requested goes directly to the

⁴ Although the Board's decision in *Beverly Health*, was subsequently vacated pursuant to a settlement agreement, *Beverly Health &*

Rehabilitation Services, 332 NLRB No. 170 (2000) (not reported in Board volumes), I find the Board's analysis to be persuasive.

Collaborative's objectives and purpose, as identified in the Model of Care LOU, and would allow the Union to assess the Collaborative's recommendations using data showing existing practitioner caseloads, and patient access to Respondent's psychotherapy services.

Respondent's complaint about the timing of the information request also does not privilege its failure to provide the information. (R. Br. at 4–5) The Model of Care LOU required the Collaborative to provide the RPPC steering committee with an update of its work within 3 months of its first meeting, and that update happened on December 9. The Union's information request occurred 1 day before the update was given, and 3 months before the Collaborative presented its final recommendations to the RPPC steering committee in mid-March 2020. Requesting relevant data 3 months before the Collaborative presented its final report, in order to prepare for a review of those recommendations, is not somehow premature or temporally inappropriate. Indeed, depending upon the circumstances, the Board has found that an information request made 15 months in advance was appropriate. *Kraft Foods North America*, 355 NLRB 753, 755 (2010) (given employer's history of failing to comply with a previous information request, or reach an accommodation, it was reasonable for the union to assume it needed to submit its request 15 months before bargaining started in order to obtain timely enforcement through the Board if necessary). The Union's timing of its information request here was well within the standards of reasonableness. This is especially true considering Respondent has a prior history of failing and refusing to furnish the Union with relevant information in a timely manner. See *The Permanente Medical Group, Inc.*, 368 NLRB No. 131 (2019) (referred to as "TPMG I").

Other than the two spreadsheets, Respondent's only reply to this request was that "much of the data drilldown being requested is not readily available in our system of reporting," in essence saying the data was available, but required some time, or work, to retrieve; Respondent did not assert that the data requested did not exist. Indeed, if that had been the case, Respondent was obligated to timely disclose this fact to the Union. *Graymont PA, Inc.*, 364 NLRB 356, 361 (2016). The fact Respondent never made this claim supports a finding that the data the Union requested did, in fact, exist but that Respondent did not put forth the effort to retrieve and produce the information. *Jack Cooper Transport Co.*, 365 NLRB No. 163, slip op. at 3 fn. 11 (2017) (Board rejects company's asserted defense that no responsive information existed, where the employer did not timely inform the Union of this contention, as required by the Act).

Also, there is no evidence that the company ever told the Union that the information request was somehow overbroad, costly, or burdensome. *Six Star Janitorial*, 359 NLRB 1323, 1330–1331 (2013) ("In general, the Board maintains that the employer has an affirmative duty to inform the Union that it believes the

information request is overbroad and burdensome, at which point the parties should then bargain as to how the costs should be allocated."). Instead, the Respondent failed to provide the Union with the information it had requested. "[S]imply rejecting the information request is not a sufficient action on the part of the employer." *Id.* at 1331. Accordingly, except as set forth below, by failing to provide the information requested in Complaint paragraph 5(d)(1), Respondent violated Section 8(a)(1) and (5) of the Act.

b. Collateral estoppel precludes the relitigation of the Union's request for return visit information

Respondent asserts that the Union's request seeking information showing the number of return visits scheduled within 14 days of the initial visit was made in bad faith, as the Board previously found that the company no longer maintains this information. (R. Br., at 10) The Union had requested this same information in 2018, in preparation for collective-bargaining negotiations. Respondent's failure to provide this information in 2018 was litigated, with the General Counsel alleging that the company's conduct violated Section 8(a)(1) and (5) of the Act. *TPMG I*, 368 NLRB No. 131, slip op. at 3, 5, 7 (2019). In *TPMG I*, the ALJ held that there was no violation regarding this request, finding that "Respondent no longer maintains records on follow-up visits scheduled within 14 days and that it is not required by regulatory standards to do so." *Id.*, slip. op at 7. The ALJ further held that the data, even if it had existed, was stored on a phased-out "Legacy Report System" that was no longer accessible and operated on a computer system Respondent no longer used or maintained "DOS versus Windows." *Id.* No party filed exceptions to these findings which were adopted by the Board.

During the hearing in this matter, the General Counsel was asked about the preclusive effects of the findings in *TPMG I*, as it related to the Union's request regarding the number of return visits within 14 days of an initial visit. In its brief, the government asserts that the judge's findings on this issue have no preclusive effect because they were adopted pro-forma by the Board without any party filing exceptions.⁵ (GC Br. 41) However, while a decision adopted by the Board in the absence of exceptions may lack precedential legal authority, it can still be relied upon in a subsequent case involving the same parties where all the requirements of collateral estoppel are met. See e.g., *Hitchens v. County of Montgomery*, 98 Fed. Appx. 106, 111–115 (3d Cir. 2004) (hearing officer's proposed decision that was adopted by a state labor agency in the absence of exceptions was a final order sufficient to bar relitigation of the same issues in a subsequent federal action involving the same parties or their privies); *Moulton Mfg. Co.*, 152 NLRB 196, 207–209 (1965) (rejecting the respondent's argument that decisions adopted by the Board in the absence of exceptions should be given no more effect than a settlement agreement); *Operating Engineers Local 12*, 270

⁵ The General Counsel asks that I take an adverse inference from the fact that Respondent did not call any witnesses within its control regarding this issue. However, I decline to do so. Given the ALJ's findings in *TPMG I*, it was the General Counsel's burden to show changed

circumstances. *Sabine Towing & Transportation Co.*, 263 NLRB 114, 121 (1982) (the General Counsel has the burden of showing materially changed circumstances).

NLRB 1172, 1172–1173 (1984) (Board relies upon previous decision by ALJ adopted in the absence of exceptions to find respondent has a proclivity to violate the Act).

The question here is whether the principles of res judicata or collateral estoppel apply. “Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.” *Sabine Towing & Transportation Co.*, 263 NLRB 114, 120 (1982). Because the Union’s December 8 information request was separate and distinct from the information request in *TPMG I*, res judicata is inapplicable. *Id.* (res judicata does not apply where the “request for access made in 1976” was separate from the one made a few years earlier and therefore could be regarded as a separate cause of action). Nevertheless, it appears that the General Counsel is barred from litigating this issue by the doctrine of collateral estoppel.⁶ While ‘collateral estoppel’ is an “awkward phrase . . . it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.” *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Absent a change in circumstances, the Board applies collateral estoppel and prevents a party from relitigating issues that were litigated in a prior Board proceeding. *Wynn Las Vegas, LLC*, 358 NLRB 690, 690 fn. 1, 692 (2012); *Sabine Towing*, 263 NLRB at 121–122. For collateral estoppel to apply: “(1) The issue to be concluded must be identical to that involved in the prior action; (2) in the prior action the issue must have been ‘actually litigated’; and (3) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.” *Id.* “[A]n administrative law judge may rely on the factual findings in a prior case under the doctrine of collateral estoppel.” *Wynn Las Vegas*, 358 NLRB at 692.

Here, *TPMG I* involved the same parties, who litigated the exact same issue with respect to information requested by the Union for follow-up visits scheduled within 14 days of an initial appointment. In *TPMG I*, the judge found that Respondent no longer maintains this information and there was no violation as an employer cannot violate the Act by failing to provide information that it does not have. *TPMG I*, 368 NLRB No. 131, slip op. at 7. The judge’s decision on this issue became a valid and final judgment when it was adopted by the Board without exceptions. Accordingly, I find that all of the elements of collateral estoppel are present, and the General Counsel has not shown any changed circumstances exist regarding the request for follow-up visits scheduled within 14 days. Therefore, I dismiss the allegations contained in Complaint paragraph 5(d)(1), as they apply to the Union’s information request seeking the “number of return visits scheduled within fourteen days of the initial visit.” (J. 3) See *Sabine Towing*, 263 NLRB 114, 121–122 (1982) (applying collateral estoppel, Board dismisses complaint as the matters in

question were previously litigated by the parties in a prior proceeding, and the General Counsel failed to show any materially different circumstances).

2. Complaint paragraph 5(d)(2)

The second information request in the Union’s December 8 letter seeks “[t]he number of Health Plan members, by service area, at the end of each quarter beginning December 21, 2018 through November 20, 2020.” (J. 3A) In its March 10 response, the company said, “See attachment,” and included a spreadsheet/chart showing the total number of health plan members in Northern California at the end of calendar years 2019 and 2020. (J. 8A1) In his March 15 email to Glasser, regarding this request, Tegenkamp replied that the “Union requested quarterly data for two years. The Employer provided end of year data only. This request has not been fulfilled.” (J. 9) Respondent did not reply to Tegenkamp’s response, nor did it provide the Union with any of the quarterly data it had requested. (Tr. 49–51, 172, 175; J. 8)

In its brief, the General Counsel asserts that a violation occurred because Respondent did not provide quarterly data, but instead only provided year-end information; furthermore the information was not broken out by service area as the Union had requested. (GC Br. at 12) And, the General Counsel stresses that the Union specifically explained to the company in Tegenkamp’s March 15 email that its “request has not been fulfilled” as the Union had requested quarterly data for 2 years, but the company only provided end of year data. (GC Br. at 36) The Respondent’s brief does not specifically address this information request.

Standing alone, the Union’s request for the number of health plan members was not presumptively relevant, as it did not go directly to unit employees’ terms and conditions of employment. *Stericycle, Inc.*, 367 NLRB No. 106, slip op. 1 fn. 1 (2019) (union’s request for information pertaining to respondent’s customers was not presumptively relevant, as it did not directly relate to unit employees’ terms and conditions of employment). However, it appears from the record that, under the circumstances presented, the relevance of the information the Union requested regarding the number of health plan members was apparent to TPMG, as it provided some of the information the Union sought and unlike other of the Union’s requests the company never raised the issue of relevance with the Union. *Oncor Electric Delivery Co.*, 364 NLRB 677, 681 (2016) (where the requested information is not presumptively relevant, the General Counsel must show either: (1) the union demonstrated the relevance of the information or (2) the relevance should have been apparent to the employer under the circumstances) (citing *Disneyland Park*, 350 NLRB at 1258). Also, at the time of the request, Tegenkamp explained that the Union needed the information sought in order to evaluate the Collaborative’s recommendations; the total number of health plan members, by facility,

⁶ The Board may apply collateral estoppel sua sponte, even if a party has failed to raise it as a defense. *A.W. Farrell & Son, Inc.*, 362 NLRB 1195, 1204 fn. 28 (2015) (citing *U.S. v. Sioux Nations of Indians*, 448 U.S. 371, 432 (1980) (“While res judicata is a defense which can be

waived, . . . if a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised.”)).

certainly relates to the issues of patient access and capacity, two of the issues which the Collaborative was studying. Accordingly, I find that the Union had shown the relevance of this information at the time of the request, and that the relevance was readily apparent to the Respondent, which is why the company never raised the issue with the Union. By only partially responding to the Union's information request, Respondent violated Section 8(a)(1) and (5) of the Act.

3. Complaint paragraph 5(d)(3)

The third request in Tegenkamp's December 8 letter asks for the "percentage of health Plan members, by service area, seeking mental health services (also referred to as the 'penetration rate') for each month from January 2019 through November 2020." (J. 3A) In reply, on March 10, the Respondent stated: "The Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union's rationale on how this information is necessary and relevant." (J. 8A1)

In his March 15 email to Glasser, regarding this request, Tegenkamp said that the number of Kaiser health plan members seeking behavioral health services provided by unit employees is critical to any determination regarding demand for services, workload and staffing. Tegenkamp also referred Glasser generally to the opening paragraph of his email, which highlighted that the Collaborative's purpose was to improve internal capacity and return access for providing psychotherapy treatment, and said that without the information to form a data baseline, the Union would not be able to determine whether internal capacity or access had improved. The Union did not receive any responsive information regarding this request. (Tr. 49–51; J. 9)

Because patient census information along with customer data is generally not presumptively relevant, it was incumbent upon the Union to demonstrate the relevance of the information it requested. For the reasons set forth earlier, regarding Complaint paragraphs 5(d)(1) and 5(d)(2), I find that the Union has demonstrated the relevance of this request. Tegenkamp explained to Respondent why the Union needed information showing the percentage of members seeking behavioral health, as this data would help show the demand for mental health services along with staffing and workload levels of unit employees. Given that the Collaborative's purpose was to improve internal capacity to provide psychotherapy, to develop innovative approaches for caseloads, and to make recommendations for improved access, applying a "discovery type standard," I find that the information requested is "of probable or potential relevance" so as "to give rise to an obligation" on behalf of Respondent to provide the data. *Teachers College, Columbia University v. NLRB*, 902 F.3d 296, 302 (DC. Cir. 2018). By not providing the information requested, Respondent violated Section 8(a)(1) and (5) of the Act.

4. Complaint paragraph 5(d)(4)

In its December 2020 information request, the Union also asked for "[t]he number of Psychiatry Department patients, by service area, referred to Intensive Outpatient Programs (IOP) for each month from January 2019 through November 2020." (J. 3A) Glasser responded that TPMG did not believe this request

was relevant to assessing the recommendations of the Collaborative, and asked the Union to provide its rationale as to how this information was necessary and relevant. (J. 8A1) In reply, Tegenkamp cited the opening paragraph of his March 15 email, and further said that the "IOP services are an integral part of the current model of care and therefore an understanding of demand for IOP services is critical for evaluating any recommendation that would modify the current model of care." (J. 9) The Union did not receive any responsive documents. I find that Tegenkamp's explanation was sufficient to establish the relevance of this request, with respect to the Union's need to evaluate the ultimate recommendations of the Collaborative, as this information goes directly to caseloads, and capacity. Accordingly, by not supplying the Union with the information it requested, Respondent violated Section 8(a)(1) and (5) of the Act.

5. Complaint paragraph 5(d)(5)

In its fifth request, the Union sought the "number of patients (indicating whether Health Plan members or not), by service area, for each month from January 2019 through November 2020 who have presented to a Kaiser Emergency department, including the number of these patients who were placed on psychiatric hold (5150)." (J. 3A) In its March 10 response, TPMG said that "[t]his information is not collected by the Employer in the manner being requested. Please provide the Union's rationale on how this information is necessary and relevant to assessing recommendations from the Collaborative." (J. 8A1) In reply, on March 15, Tegenkamp wrote to Glasser saying that the company had made the same claim in response to the Union's 2018 information request, but that Respondent later admitted that it had the information. Tegenkamp quoted the relevant part of the decision in *TPMG I*, and reminded Glasser that the company had been ordered to produce the information. As to the relevance of the information requested, Tegenkamp stated that emergency services were an integral part of the current model of care and therefore an understanding of demand for these services was critical for evaluating any recommendation from the Collaborative that would modify the status quo. Respondent never produced the information. (Tr. 49–51, 184, 195; J. 9)

I find that Tegenkamp's explanation of the need for the data requested, which at its core is a ratio of emergency room patients placed on psychiatric hold to overall emergency room patients, is sufficient to establish the relevance of the Union's need for the information, as a patient placed on a psychiatric hold would, most likely, be in need of psychotherapy treatments. One of the Collaborative's objectives was to develop specific recommendations for improving the delivery of initial access for psychotherapy, and its purpose included a directive to improve TPMG's internal capacity to provide psychotherapy. Knowing the number of emergency room patients placed on a psychiatric hold certainly touches upon these issues, and satisfies the discovery type standard for relevance.

In response to the Union's December 8 information request, Respondent did not claim that the information did not exist, but only said that it was not collected "in the manner being requested," without any further elaboration. *Endo Painting Service, Inc.*, 360 NLRB 485, 486 (2014) enf. 679 Fed.Appx. 614

(Mem) (9th Cir. 2017) (employer must respond to an information request in a timely manner, including an obligation to timely disclose that the requested information does not exist). If there were substantial costs involved with compiling the information in the precise form requested by the Union, it was incumbent upon the Respondent to show that production of the data would be unduly burdensome and to bargain with the Union in good faith about the cost of production. *Tower Books*, 273 NLRB 671, 671 (1984), *enfd. mem.* 772 F.2d 913 (9th Cir. 1985). Here, Respondent did not do so. It never claimed that production was unduly burdensome, nor did it establish any other valid reason as to why the information was not produced. *House of Good Samaritan*, 319 NLRB 392, 398 (1995) (when the union seeks information that is presumptively relevant, or where the relevance of the request has been established, the burden is on the respondent to show the request is not relevant, does not exist, or for some other valid and acceptable reason the data cannot be furnished). Under these circumstances, I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to produce the information requested.

6. Complaint paragraph 5(d)(6)

The Union's sixth request asked for the following information: "[t]he number of Health Plan members referred for 1) crisis stabilization and 2) in-patient hospital services outside of Kaiser, by service area, for each month from January 2019 through November 2020." (J. 3A) In reply, on March 10 Glasser asked Tegenkamp for the Union's definition of "crisis stabilization." She also said TPMG did "not believe this information is relevant to assessing recommendations from the Collaborative," and asked the Union to provide its rationale on how the information was necessary and relevant. (J. 8A1) Regarding this request, in his March 15 response, Tegenkamp wrote as follows:

First off, I am surprised that the Employer does not know what crisis stabilization means and wonder if the Department of Managed Health Care knows this. It seems to me the Employer should know how to define a service it is required to provide. To help you out, here is a common, well understood definition: "Crisis stabilization is defined as a direct service that assists with deescalating the severity of a person's level of distress and/or need for urgent care associated with a substance use or mental health disorder." Also, see my general response to the relevance issue above. (J. 9)

Tegenkamp did not hear back from Glasser, nor did he receive the information requested.

Regarding the Union's request for the number of health plan members referred for crisis stabilization, as further defined by Tegenkamp in his March 15 email, I find that the Union has shown the relevance of this request, as one of the purposes of the work done by the Collaborative was to improve Respondent's internal capacity to provide psychotherapy. Information about patients being transferred outside Respondent's network for substance use or mental health issues certainly relates to Respondent's internal capacity to provide psychotherapy services. Accordingly, by not supplying this information, I find that Respondent violated Section 8(a)(1) and (5) of the Act.

However, I do not believe the Union has shown the relevance of its second request, regarding patients transferred outside the network for "in-patient services." On its face, this request is broad, and is not limited to psychotherapy patients, or to patients serviced by members of the Therapist Unit. The request, as written, covers any and all patients transferred outside the Kaiser network, for whatever ailment. I do not believe the Union has shown why it needed such a broad array of information on all patients, or how information on patients seen by physicians outside of the Therapist Unit was relevant and necessary. Accordingly, I recommend that Complaint paragraph 5(d)(6), as it relates to this request, be dismissed.

7. Complaint paragraph 5(d)(7)

For his seventh request Tegenkamp asked that Respondent provide "[t]he number of group mental health appointments performed by Kaiser's internal provider network of non-MD clinicians, by medical center, during each month since January 1, 2019 and the total number of enrollees participating in group mental health appointments for each month during this period." (J. 3A) In reply Glasser wrote, "[t]his information is not collected by the Employer in the manner being requested. Please provide the Union's rationale on how this information is necessary and relevant to assessing recommendations from the Collaborative." (J. 8A1) In response Tegenkamp stated "[p]lease provide the information in whatever manner it is collected. As with other behavioral health services, groups are an integral part of the integrated behavioral health system that is the essence of the model of care. Also, see my general response to the relevance issue above." (J. 9)

I believe the Union has demonstrated the relevance of this request. Group therapy is part of the work that Therapist Unit providers perform, and the Collaborative was working on recommendations to improve both the delivery of access for psychotherapy and the capacity to perform these services. (Tr. 188–189) Knowing the number of current group mental health appointments would certainly assist the Union in reviewing the Collaborative's ultimate recommendations on expanding access and improving capacity, and would serve as a baseline for ultimately determining whether access and capacity has been improved. Respondent did not claim that the data did not exist, or that it would be burdensome to provide. *Endo Painting*, 360 NLRB at 486; *Tower Books*, 273 NLRB at 671; *House of Good Samaritan*, 319 NLRB at 398. And, the Union offered to accept data in whatever manner it was collected by TPMG. Under these circumstances, I find that Respondent violated Section 8(a)(1) and (5) of the Act by not providing the information.

8. Complaint paragraphs 5(d)(8) and 5(k)

Complaint paragraph 5(d)(8) involves the Union's request for the "number and percentage of patients seen via video and via phone" for the departments of Psychiatry, by month and by medical center, from January 2019 through November 2020. (J. 3) In her March 10 response, Glasser attached two spreadsheets and wrote "see attachment;" one spreadsheet was for 2019 and the other for 2020. (J. 8A1) Both showed the percentage of visits that occurred by video and telephone for each medical center;

they were further broken down to show visits by adults and visits by children. On March 15, Tegenkamp wrote “[t]hanks for providing this information.” (J. 9)

In its brief the General Counsel acknowledges that the information TPMG ultimately provided satisfied the Union’s information request. (GC Br. at 14) Notwithstanding, before calling its first witness at the hearing the government made an oral motion to amend the Complaint to add an allegation that Respondent unlawfully delayed in providing this information to the Union in violation of Section 8(a)(1) and (5) of the Act. The General Counsel was advised to put the motion in writing, and the motion to amend was subsequently granted over Respondent’s objections.⁷ *Rogan Brothers Sanitation, Inc.*, 362 NLRB 547, 549 fn. 8 (2015) enfd. 651 Fed. Appx. 34 (2d. Cir. 2016) (motion to amend complaint, which added a single employer allegation and was made prior to the government resting its case, was properly granted by the trial judge). *Id.* (under Section 102.17 of the Board’s Rules and Regulations a trial judge has wide discretion to grant or deny motions to amend complaints). (Tr. 24–25; GC 18)

“The duty to furnish information requires a reasonable, good-faith effort to respond to the request as promptly as circumstances allow.” *TDY Industries, LLC*, 369 NLRB No. 128, slip op. at 2 (2020). To determine whether an unlawful delay occurred, the Board considers the totality of the circumstances and reviews a variety of factors, such as “the nature of the information sought, the difficulty in obtaining it, the amount of time the employer takes to provide it, the reasons for the delay, and whether the party contemporaneously communicates these reasons to the requesting party.” *Id.*; see also *Endo Painting Services, Inc.*, 360 NLRB 485, 486 (2014) (Board considers the totality of the circumstances).

Considering the events that occurred here, I find that TPMG’s 3-month delay in providing the Union with the information it requested constitutes a violation. When Tegenkamp emailed Respondent on January 11, 2021 asking about the status of the information request, Glasser replied to him saying “multiple people” were working on the response, that she would “check to see what may be ready to send and forward to you,” and that as additional information became available the company would complete the request accordingly. (J. 8A1) However, the company never provided any response until March 15. And, when Tegenkamp emailed Respondent on February 25, 2021 saying that the Union had neither received any information nor an update from Respondent, there was no response until 2 weeks later, when Glasser ultimately sent Tegenkamp the information. Respondent never explained to the Union why it took them 3 months to respond. Under these circumstances, I find that the company’s 3-month delay in providing the information on video and telephone visits to be a violation, as it was not accompanied by any legitimate reason or excuse for the delay and Respondent provided no evidence showing that the information requested was particularly difficult or time-consuming to gather.

⁷ Regarding the General Counsel’s motion to amend the Complaint, Respondent was advised that, upon request, the company would be

Woodland Clinic, 331 NLRB 735, 737 (2000) (Employer’s 7 week delay in providing information a violation, as a union is entitled to relevant information at the time the initial request, and the employer presented no evidence justifying its delay).

9. Complaint paragraphs 5(d)(9)

The Union’s ninth request asked for the “total number of appointments booked by therapists assigned to the Northern California Region’s Connect to Care (C2C) program for each month beginning in January 2019 to [the] present, disaggregated by appointment type and appointment modality (i.e., telephone or video).” (J. 3A) “Connect to Care” is Respondent’s tele-psychiatry center, where licensed mental health therapists provide initial assessments for patients from all over the region. (Tr. 127)

Respondent did not contest the relevance of this request, and in its March 10 response to the Union said, “see attachment.” (J. 8A1) However, no information responsive to this specific request was attached. (Tr. 127) In his March 15 response to Glasser, Tegenkamp noted that no information was included and said “[p]lease send.” (J. 9) The Union did not receive anything further from Respondent.

As with the other requests, I find the Union has shown the relevance of the information requested, as it goes directly to the capacity and access for psychotherapy services, which were items the Collaborative was reviewing. Under these circumstances, where TPMG provided no reason as to why the information was not provided, I find that Respondent violated Section 8(a)(1) and (5) of the Act. *Cf. Public Service Company of New Mexico*, 360 NLRB 573, 602 (2014), enfd. 843 F.3d 999 (DC Cir. 2016) (Violation where employer’s representative thought she had responded to the union’s relevant information request, but no response was submitted into evidence and there was no testimony offered regarding the contents of the alleged response).

10. Complaint paragraphs 5(d)(10) and 5(d)(11)

Complaint paragraphs 5(d)(10) and 5(d)(11) concern requests for information made by the Union regarding referrals to providers outside the Kaiser network. Paragraph 5(d)(10) involves the Union’s request for the following:

For each Medical Center, for each month from January, 2019 [sic] through November 2020, the total number of Health Plan members (unique medical record numbers) referred out to outside vendors and/or outside providers for out-patient mental health non-MD services.

Paragraph 5(d)(11) involves the Union’s request for the “[n]umber of individual treatment appointments performed by Kaiser’s external provider network of non-MD clinicians during each month since January 1, 2019.” (J. 3) In response to both of these requests, Glasser wrote “[t]he Employer does not believe this information is relevant to assessing recommendations from the Collaborative. Please provide the Union’s rationale on how this information is necessary and relevant.” (J. 8A1) In

allowed a reasonable amount of additional time to prepare its defense regarding the amendment. (Tr. 64) However, no such request was made.

response, Tegenkamp wrote as follows:

See my general response to the relevance issue above. Also note that improving internal capacity, which is a key objective of the MOC committee, is in large part dependent on reducing outside referrals. Finally, please note that the ALJ in the aforementioned NLRB decision ruled that information related to subcontracting and outside referrals was necessary and relevant to the Union's collective bargaining obligations. No different here. (J. 9)

The Union did not hear back from Respondent regarding these two requests.

I find that the information the Union requested regarding the number of referrals to outside vendors/providers and the number of appointments performed by the company's external network of non-MD clinicians are both related to issues of access and capacity so as to be relevant. Indeed, Article 28, Section 4 of the CBA states that TPMG may assign patients to outside providers when appointments are not available. Thus outside referrals and the number of appointments performed by non-Kaiser clinicians is a gauge of the Respondent's capacity to provide psychotherapy services, an issue which the Collaborative was working on. Respondent did not claim that providing the information was burdensome, nor did it provide any other valid reason as to why the information could not be produced. *House of Good Samaritan*, 319 NLRB at 398. Accordingly, by failing to provide the information requested, I find that Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent The Permanente Medical Group, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, National Union of Healthcare Workers, is a labor organization within the meaning of Section 2(5) of the Act.

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

All full-time and regular part-time non-supervisory staff Neuropsychologists, Psychologists, Licensed Clinical Social Workers, Marriage and Family Therapists, Licensed Professional Clinical Counselors and Chemical Dependency Counselors I & II, Unlicensed Case Managers, Psychiatric Social Worker Assistants, Marriage and Family Therapist Assistants, Psychological Assistants and Professional Clinical Counselor Assistants who perform clinical work and provide patient care in the Northern California Region; excluding Psychologists, Chemical Dependency Counselors, Licensed Clinical Social Workers, Marriage and Family Therapists and Licensed Professional Clinical Counselors who work in supervisory, administrative and/or research capacities or function as Chiefs, Division Chiefs, Coordinators, Sub-Regional Chiefs/Coordinators, students and volunteers, guards, managers, and supervisors as defined in the Act.

4. By failing to timely comply with the Union's request for the number and percentage of patients seen by video and telephone for the department of Psychiatry, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. By failing and refusing to provide the Union with the information it requested on December 8, 2020, Respondent has been engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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 actions designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with certain relevant information that it requested on December 8, 2020, I shall order the Respondent to provide that information to the Union. I shall also order the Respondent to post an appropriate remedial notice to employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁸

ORDER

Respondent The Permanente Medical Group, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(b) Refusing to timely comply with the Union's request for information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of the Respondent's employees.

(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) Promptly provide the Union with the information the Union requested in its letter dated December 8, 2020, with the exception of: the number of return visits scheduled within 14 days of the initial visit; and the number of health plan members referred for in-patient hospital services outside of the Kaiser network.

(b) Within 14 days after service by the Region, post at its Northern California Region facilities, copies of the attached

⁸ 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.

notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 28, 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.¹⁰ In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 December 8, 2020.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the

Dated, Washington, D.C. June 16, 2022

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the National Union of Healthcare Workers (the Union) by failing and refusing to furnish the Union with requested information that is relevant and necessary to the performance of its functions as the collective-bargaining representative of our Northern California unit employees.

⁹ 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.”

¹⁰ If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in

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

WE WILL furnish the Union with the information the Union requested in its December 8, 2020 letter, with the exception of: the number of return visits scheduled within fourteen days of the initial visit; and the number of health plan members referred for in-patient hospital services outside of the Kaiser network.

THE PERMANENTE MEDICAL GROUP, INC.

The Administrative Law Judge’s decision can be found at www.nlr.gov/case/28-CA-273219 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means, and to the reading of the notice to employees.