STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF RHODE ISLAND STATE LABOR RELATIONS BOARD -AND- STATE OF RHODE ISLAND DEPARTMENT OF BEHAVIORAL HEALTHCARE, DEVELOPMENTAL DISABILITIES AND HOSPITALS	:	CASE NO. ULP-6261/6270

DECISION AND ORDER

TRAVEL OF CASE

The above entitled consolidated matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") on two separate Unfair Labor Practice Complaints (hereinafter "Complaint"), issued by the Board against the State of Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals (hereinafter "Employer" or "BHDDH") based upon an Unfair Labor Practice Charge (hereinafter "Charge I") dated October 18, 2019 and filed on the same date by National Association of Government Employees (NAGE), Local 79 (hereinafter "Union") and a second Unfair Labor Practice Charge (hereinafter "Charge II") dated February 26, 2020 and filed on the same date by NAGE Local 79.

The original Charge I alleged as follows:

> That on or about July 18, 2019, a member of the bargaining unit received notice of termination of her employment. On or about July 23, 2019, NAGE Local 79 filed a timely grievance on her behalf alleging a violation of the collective bargaining agreement. On or about July 25, 2019, NAGE Local 79 requested of BHDDH the production of certain documents pertaining to the termination of her employment. BHDDH failed and/or refuses to provide the information requested. On or about August 22, 2019, NAGE Local 79 once again requested the same production of documents from the Department of Administration. To date, the Department of Administration has failed and/or refuses to provide the information requested.

Charge II alleged as follows:

> That on or about October 21, 2019, a member of the bargaining unit received written notice that her employer was contemplating the termination of her employment and scheduled a pre-termination hearing on October 31, 2019. On or about October 25, 2019, Ms. Melissa Ferrario, President of NAGE Local 79, requested all complaints, statements, reports, findings and recommendations made as part of the investigation of this matter. President Ferrario received no response to her request. That on or about December 17, 2019, said member of the bargaining unit received written notice that her employment had been terminated. That on

> or about December 19, 2019, President Ferrario filed a timely grievance on her behalf alleging a violation of the collective bargaining agreement. On December 19, 2019, President Ferrario made a second request for any written complaint, along with copies of all statements from witnesses as well as any reports, findings, or recommendations made as part of the investigation of the incident. President Ferrario received no response to this request. On or about January 3, 2020, President Ferrario made a third request for any written complaint, along with copies of all statements from witnesses as well as any reports, findings, or recommendations made as part of the investigation of the incident. To date, the Department of Administration has failed and/or refuses to provide the information requested.

Following the filing of Charge I and Charge II, each party submitted written position statements and responses as part of the Board's informal hearing process. On December 12, 2020, the Board issued its Complaint on the original Charge (Charge I), alleging the Employer violated R.I.G.L. § 28-7-13 (6), (7) and (10) when, through its representative, the Employer failed and refused to produce or provide, as requested by the Union, certain documents and/or information that the Union claimed were relevant to and/or pertained to the termination of employment of a bargaining unit member. On May 26, 2020, the Board issued its Complaint on the second Charge (Charge II), alleging the Employer violated R.I.G.L. § 28-7-13 (6), (7) and (10) when, through its representative, the Employer failed and refused to produce or provide, as requested by the Union, certain documents and/or information that the Union claimed were relevant to and/or pertained to the termination of employment of a bargaining unit member. The Board held remote formal hearings for these matters on February 25, 2020, October 29, 2020 and May 11, 2021 (the last two hearing dates were held after these matters were consolidated by the Board at the request of the parties). Post-hearing Briefs were filed by the Employer and the Union on July 1, 2021 after each party had requested and received extensions. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and Exhibits submitted at the hearings and the arguments contained within the post-hearing Briefs submitted by the parties.[1]

FACTUAL SUMMARY

The matter before the Board is the Union's claim of unfair labor practices against the Employer in two separate disciplinary cases due to the Employer's failure and/or refusal to provide or produce certain documents and information which the Union had requested as relevant to its analysis, defense and processing of the termination of two bargaining unit members.

The facts surrounding both ULP-6261 and ULP-6270 (as consolidated herein) are not in dispute between the parties. The Union and the Employer were, at all times relevant to the instant proceedings, parties to a Collective Bargaining Agreement. (Joint Exhibit 1). The Union represents all full-time and regular part-time registered nurses

[1] As noted, because of the similarity of the issues involved in the two Unfair Labor Practice filings, the Board has consolidated these matters (see Transcript at page 57).

employed by the Employer. The Collective Bargaining Agreement contains language that authorizes the Employer to discipline Union employees only if it has just cause to do so. (Joint Exhibit 1, Article XXIX). The Collective Bargaining Agreement also provides that disputes arising out of the terms of the contract are to be resolved through a grievance and arbitration process set forth in the Agreement. (Joint Exhibit 1, Articles XXX and XXXI). As noted above, the individual cases now consolidated before the Board were set in motion due to the termination of two bargaining unit nurses, Millicent (ULP-6261) and Theresa (ULP-6270). While mostly similar, there are some factual differences in how the cases proceeded and, for ease of reference, the Board will address the facts separately.

1. ULP-6261

Millicent (hereinafter "MB") was a registered nurse employed by BHDDH and assigned to the Eleanor Slater Hospital (hereinafter "Hospital"). MB was placed on administrative leave on May 15, 2019 pending an investigation into allegations of misconduct (see Transcript at page 23). MB received notice of her administrative leave from Pamela Moscarelli, Deputy Personnel Administrator, Department of Administration. (Joint Exhibit 2). The misconduct, which involved allegations of patient abuse, was a joint investigation by the Employer involving personnel from both Human Resources and the Hospital's Risk Management Office (see Transcript at pages 99 – 100). On or about July 2, 2019, MB received another written notice from Ms. Moscarelli informing her that the investigation had been completed and that the Employer was considering the termination of her employment. (Joint Exhibit 3; Transcript at pages 27 – 28). The notice also indicated that a pre-disciplinary hearing was scheduled for July 5, 2019 at which MB and her representatives were free to provide evidence and information to the Employer as to why its recommendation of termination should not be implemented. The notice also provided MB with details of the allegations against her. (Joint Exhibit 3). MB was notified on July 8, 2019, after having participated in the pre-disciplinary hearing, that the allegations against her were sustained and that her employment with the Employer was terminated effective July 10, 2019. (Joint Exhibit 4; Transcript at pages 30 – 32). Thereafter, on July 23, 2019, the Union filed a timely grievance to contest MB's termination. (Joint Exhibit 5).

On the same date that the Union filed its grievance on behalf of MB, the President of Union Local 79, Melissa Ferrario, sent an email to Genevieve Simard and Stacey Suazo, concerning the grievance involving MB and specifically requesting "all documentation and materials related to the investigation" of MB. (Joint Exhibit 6 and Respondent Exhibit 2; Transcript at pages 33 – 34). On July 24, 2019, Ms. Simard responded to the Union President's request for information by providing her with copies of letters previously received by MB. (Joint Exhibit 7). Ms. Simard also noted in her response that "HR Investigative files are confidential so we do not provide them however, if there are specific records you are requesting, please let us know." (Joint Exhibit 7). The next day, Ms. Ferrario sent a second email to Ms. Simard in which she more specifically

requested certain documentation regarding the disciplinary action taken against MB. In her request, Ms. Ferrario stated:

> The Union is asking for any complaint, written or verbal pertaining to this matter. Also, copies of any and all statements, either written or verbal from any witnesses pertaining to this incident. As well as any report, findings, or recommendations made by any investigator pertaining to this incident.
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> (Joint Exhibit 8).

On August 20, 2019, Ms. Simard responded to Ms. Ferrario's email by refusing to provide the Union with the information that had been requested. The refusal noted that the information was, in part, "confidential work product." (Joint Exhibit 9; Transcript at page 38). The Union President also made a request for the same information a third time on August 22, 2019, this time directing her request to Daniel Ballirano, a labor employment relations attorney with the State Department of Administration (see Transcript at pages 38 – 39), No response was received by the Union to this third request for information (Transcript at page 39).

Subsequent to receiving this refusal by the Employer to provide the information requested by the Union, the Union filed a timely demand for arbitration of MB's termination. In preparation for the arbitration, the Union requested the arbitrator issue a subpoena duces tecum directing the Employer to provide the Union with the information it had been requesting regarding MB's termination (Transcript at page 40). The Employer filed a motion to quash the subpoena and on December 30, 2019, the arbitrator issued her decision denying the Employer's motion to quash and directing it to provide the Union with the information it had previously requested. (Joint Exhibit 12). The Employer complied with the arbitrator's decision and provided the information as requested to the Union (Transcript at pages 50 – 51).

2. ULP-6270

Theresa (hereinafter "TK") was also a registered nurse employed by BHDDH and assigned to the Hospital. On August 16, 2019, TK was placed on administrative leave pending an investigation into allegations of patient neglect (Transcript at pages 68 – 69). As with the investigation involving MB, the investigation of the allegations against TK was handled by both the Employer's Human Resources and the Hospital's Risk Management offices. The investigation of the allegations against TK was concluded in October and on October 21, 2019, TK was sent a letter detailing the allegations against her and offering her an opportunity to respond to those allegations. (Joint Exhibit 15; Transcript at pages 70 – 71). Once again, the written notice was signed by Ms. Moscarelli. As with MB, in the written notice TK was informed that a pre-disciplinary hearing was scheduled for October 31, 2019 at which time she would have the opportunity to provide the Employer with evidence and information as to why its recommendation of termination should not be implemented. (Joint Exhibit 15). However, unlike the situation involving MB, the Union requested from the Employer copies of any written or verbal complaint and copies of

written or verbal statements from witnesses and any report, investigative findings or recommendations made by the investigator prior to the scheduled date of the pre-disciplinary hearing. (Joint Exhibit 16; Transcript at pages 71 – 72). The Union did not receive a written response to its October 25, 2019 request and it did not receive the documents it had requested prior to the date of the pre-disciplinary hearing (Transcript at page 74). The pre-disciplinary hearing was held on the scheduled date and TK was notified in a letter dated December 17, 2019 from Ms. Moscarelli that the Employer was terminating her employment effective December 19, 2019. (Joint Exhibit 17; Transcript at pages 74; 75 – 76).

As with MB, the Union filed a timely grievance on behalf of TK alleging that her termination had been made without just cause. (Joint Exhibit 18). At the same time, the Union President composed a second request for documents and material that mirrored the original information request. (Joint Exhibit 19; Transcript at pages 76 – 78). Again, the Union President received no written response to this second request, nor did she receive the requested documents (Transcript at pages 78 – 79). On January 3, 2020, the Union President sent a third request for information that, once again, tracked the request she originally sent dated October 25, 2019. (Joint Exhibit 20; Transcript at page 79). Again, the Employer failed to respond to the Union's third request for documents and it did not provide any of the requested documents (Transcript at page 80).

On January 7, 2020, the Union filed a timely demand for arbitration concerning the termination of TK. (Joint Exhibit 23). As of the completion of the hearings before the Board and the submission of memoranda of law by the parties, the Union has still not received any of the information it requested regarding TK's termination.

POSITION OF THE PARTIES

Union:

The Union asserts that the Employer engaged in unfair labor practices when the Employer, in two separate cases, failed and refused to provide the Union with information it requested and claimed was relevant to its administration of the termination of two bargaining unit members. The Union argues that in matters of employee discipline the Employer has an obligation to provide the Union with copies of all complaints, written and verbal witness statements and investigative reports and findings and other relevant material requested by the Union to assist in the processing of the disciplinary case. The Union claims that this obligation of the Employer to provide relevant requested documents applies whether the request by the Union is made before or after the scheduling of a pre-disciplinary hearing pursuant to *Cleveland Board of Education v. Loudermill*, 470 U. S. 532 (1985). The Union further argues that the Employer's failure to provide the documents as requested constitutes a failure by the Employer to comply with its bargaining obligation under R.I.G.L. 28-7-13 and 36-11-7.

Employer:

In its memorandum of law to the Board, the Employer contends that it did not violate the Rhode Island State Labor Relations Act (hereinafter "Act") when it failed and/or refused to provide certain documents requested by the Union in the disciplinary matters involving MB and TK. Initially, the Employer claims that statements from witnesses taken during an investigation should be determined by this Board to be exempt from disclosure. The Employer also argues that it has a substantial and legitimate interest in protecting and maintaining the confidentiality of witness statements and documents produced or created during a disciplinary investigation. The Employer also posits that the interview notes taken by investigative personnel of the Employer are privileged materials and not subject to disclosure. The Employer further argues that it accommodated the Union's interest in obtaining confidential materials and that its (the Employer's) substantial interest in the confidentiality of the documents outweighs the Union's right to receive them. Finally, the Employer makes a constitutional argument, claiming the Board has no authority to determine whether the Employer violated the Due Process Clause of the U. S. Constitution when it refused to produce the documents requested by the Union prior to the pre-disciplinary hearing of TK.

DISCUSSION

A. The Union's Request for Relevant Information to Process Grievances Should Have Been Honored by the Employer

The issue before the Board is whether the actions of the Employer in failing and refusing to provide the Union with certain requested documents, materials and other information the Union claimed to be relevant to its administration of two pending termination cases involving members of its bargaining unit constitutes a violation of the Act. As discussed in more detail below, it is the Board's view that the documents and information requested by the Union in the cases of MB and TK were relevant to the Union's administration of the respective termination cases and the Employer's need for confidentiality regarding those documents does not outweigh the Union's need to obtain the information it requested, As such, the Employer's refusal to produce the requested information constitutes a violation of the Act. In addition, in failing to provide those certain documents, witness statements and/or other information requested by the Union, the Employer has also violated its bargaining obligation with the Union and, therefore, also violated the Act.

As noted, this case involves whether the Employer is required to produce information that the Union requests and claims is relevant to its administration of pending disciplinary actions against bargaining unit members. This is an issue that this Board, the National Labor Relations Board ("NLRB") and the United States Supreme Court have all previously addressed. *See City of Cranston,* ULP-5744*; Roseburg Forest Products Co.,* 331 NLRB 999 (2000); *National Labor Relations Board v. Acme Industrial Co.*, 385 US 432 (1967); *Detroit Edison v. NLRB*, 440 US 301 (1979). In each of these cases and many more cases decided by the NLRB and the courts, it is clear that an Employer must provide

"relevant information needed by a labor union for the proper performance of its duties as the employee's bargaining representative." *See Detroit Edison v. NLRB*, 440 US at 303.

In its most recent decision addressing this issue, this Board, in the *City of Cranston* case, was presented with a situation involving the termination of a bargaining unit member and the Union's request for a copy of the terminated member's personnel file. The City, claiming that the personnel file was confidential, would not provide a copy to the Union unless and until the Union secured the written permission of the impacted member. In determining that the City's refusal to produce the personnel file as requested was a violation of the Act, the Board noted as follows:

> It is well established that an employer is obligated to supply requested information that is potentially relevant and will be of use to the Union in fulfilling its responsibilities as exclusive bargaining representative. *Roseburg Forest Products Co.*, 331 NLRB 999, 1000 (2000). The purpose of this rule is to enable the union to understand and intelligently discuss the issues raised in grievance handling and contract negotiations. *Rivera-Vega v. Conagra*, 70 F.3d 153, 158 (1st Cir. 1995). Information relating to wages, hours and other terms and conditions of employment is presumptively relevant and necessary for the Union to perform its obligations. *Roseburg*, supra. While the right to obtain relevant information is not unfettered, the party asserting confidentiality bears the burden of proof. *Roseburg*, supra.
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> *City of Cranston*, ULP-5744, page 3.

The above language makes clear that a request for documents and/or other information that the Union claims is relevant to its processing and understanding a grievance and arbitration matter is material that an Employer, upon receiving the request, is obligated to comply with under most circumstances. A failure to provide such information without a justifiable explanation for refusing to do so makes the Employer's conduct a violation of the Act.

In the instant consolidated case, the Union was faced with two separate cases where bargaining unit members, MB and TK, were terminated by the Employer. In each situation, the Union requested that the Employer provide specific and detailed documents (i.e., written and verbal witness statements, notes, investigative reports) in order to be able to understand and process the grievances of the two terminated employees. In each case, despite multiple requests by the Union to the Employer seeking relevant documentation as outlined (see Joint Exhibits 6, 8, 16, 19 and 20), the Employer denied the Union's requests and refused to provide the information (Joint Exhibit 7) or failed to respond at all.[2] In refusing the Union's request for the claimed relevant information in MB's case, the Employer stated that it believed the requested information to be subject to

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[2] In its lone response to the Union's document and information requests, the Employer stated that its "investigative files are confidential" and, therefore, the Employer would not provide that information to the Union. (Joint Exhibit 7). The Employer did not respond to other requests made by the Union specifically with regard to TK's termination. In addition, the Employer has raised confidentiality as associated with witness statements and other documents in its possession, privilege and work product defenses as reasons why it should not be required to produce the documents and materials requested by the Union. As discussed later in this Decision, the reasons put forth by the Employer in this matter do not state a sufficient justification for the Employer to refuse to provide the relevant materials requested by the Union.

confidentiality concerns and, therefore, the Employer was not required to produce the requested information.[3] The Employer made this pronouncement without ever discussing with the Union a possible accommodation that would allow the Union to obtain relevant information while still maintaining the confidentiality the Employer thought was appropriate. As will be discussed further below, the Employer did not engage in the balancing test set forth in *Detroit Edison*, nor did it seek to try and find any type of solution that would provide the Union with even some of the relevant information it had requested. This failure on the Employer's part was, in this case, fatal to its confidentiality claims.

Under both our Act and the National Labor Relations Act (NLRA at Section 8(a)(5)), there is a general obligation imposed upon Employers "to furnish a union with relevant information necessary to the union's proper performance of its duties as the collective bargaining representative of its employees, including information that the union needs to determine whether to take a grievance to arbitration." *American Baptist Homes of the West*, 362 NLRB 1135, 1136 (2015), citing *NLRB v. Acme Industrial Co.*, 385 US 432 (1967); see also R.I.G.L. 36-11-7; *Belanger v. Matteson,* 346 A.2d 124 (R.I. 1975). As the Supreme Court noted in *Acme Industrial*:

> Providing a union with information relevant to the processing of grievances not only aids the union in representing grievants, but allows it to "sift out unmeritorious claims."
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> *NLRB v. Acme Industrial Co.*, 385 US at 438.

Following this line of thinking in a long line of cases, the NLRB has applied a liberal test to determine whether information is relevant by looking at whether the requested information is of "probable" or "potential" relevance. *Transport of New Jersey*, 233 NLRB 694 (1977); *American Baptist*, at 1136-1137.[4] As the NLRB stated in *Pennsylvania Power Co.*, 301 NLRB 1104 (1991), "the information need not be dispositive of the issue between the parties but must merely have some bearing on it. In general, the Board [NLRB] and the courts have held that information that aids the arbitral process is relevant and should be provided." *Id.* at 1105.

In the present case, there was no evidence submitted to this Board that in any way demonstrated the information requested by the Union on behalf of MB and TK was not relevant to the processing of their individual termination cases. In fact, the Employer did not even argue against the relevancy claims made by the Union regarding the information requests. The Union's request for information on behalf of MB sought "any complaint, written or verbal pertaining" to MB's case plus "copies of any and all statements, either

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[3] As noted in footnote 2, the Employer did not specifically respond to the Union's information requests regarding TK. However, because the cases are so similar and the information requested almost identical, the Board has assumed, for purposes of this Decision, that the Employer was also relying on confidentiality concerns in refusing to produce the information the Union sought on behalf of TK.

[4] As this Board has noted in numerous prior cases, this Board and the courts of this State have, with respect to labor law issues, consistently looked to federal labor law for guidance. (See *Town of North Kingstown v. International Association of Firefighters, Local1651, AFL-CIO,* 107 A.3d 304 (R.I. 2015); and *Town of Burrillville v. Rhode Island State Labor Relations Board*, 921 A.2d 113, 120 (R.I. 2007)).

written or verbal from any witnesses pertaining to this incident" as well as "any report, findings, or recommendations made by any investigator pertaining to this incident." (Joint Exhibit 8). As to TK, the Union requested, on multiple occasions, virtually the same information it had requested on behalf of MB. (Joint Exhibits 16, 19 and 20). Specifically, the Union sought "any complaint, written or verbal" associated with TK's pre-disciplinary hearing plus "copies of any and all statements, either written or verbal from any witnesses pertaining to this incident" plus "any report, investigations, findings, or recommendations made by any investigator pertaining to this incident." (Joint Exhibit 16). As noted above, the Employer submitted no evidence to the Board to suggest that the documents and materials requested by the Union for MB and TK's cases were not relevant to aid the Union in analyzing and processing both of those matters. In fact, when the Union asked an arbitrator for a subpoena duces tecum to secure the requested documents and material in MB's case, the arbitrator denied the Employer's motion to quash and ordered the Employer to produce the requested documents to the Union noting in her decision that "there can be no more relevant and material information than the three categories of documents sought by the Union." (Joint Exhibit 12 at page 4). This Board, as it noted in its *City of Cranston* decision, agrees with the reasoning and conclusion stated by the arbitrator.

In short, the Employer has provided no reasonable explanation or justification for its failure to produce the documents and material requested by the Union with regard to the termination cases of MB and TK. As such, the Board finds that the Employer has violated the Act by its conduct in this matter.

B. The Employer's Defenses

The Employer has raised a number of defenses as justification for its refusal to provide the relevant documentation requested by the Union. As will be discussed below, while some of these items can, in certain circumstances, legitimately support a withholding of otherwise relevant documents, in the instant matter, the Employer's evidence and arguments do not sustain its position that the requested information should be withheld from the Union.

1. Confidentiality

The Employer initially argues that its refusal to produce documents requested by the Union[5] was based on a need for confidentiality surrounding those documents.[6] (See Joint Exhibit 7; Employer Memorandum of Law at pages 17 – 21). As the Employer

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[5] According to the Employer, the Union was "seeking three different types of documents: (1) witness statements, (2) interview notes and (3) any reports that may have been generated as a result of the investigation." (Employer Memorandum of Law at page 11).

[6] The Employer appears to both include and carve out witness statements regarding its confidentiality argument. As to the carve out portion of its argument, the Employer in its memorandum urges the Board to ignore recent case law from the NLRB overturning a long-standing blanket rule exempting witness statements from the general obligation to honor union requests for information. *See American Baptist Homes of the West*, 362 NLRB 1135 (2015). While this Board is not willing to adopt the Employer's suggestion of abandoning NLRB decisions as guidance, for purposes of this discussion, the Board presumes that witness statements are included as documents that the Employer would deem confidential and not subject to production.

acknowledged in its memorandum to the Board, and as the Board has previously adopted, determining whether documents that an Employer considers confidential must be provided to a Union in response to a request for information is resolved through the application of a balancing test that weighs the Union's need for the documents against the Employer's need for confidentiality. As noted by the NLRB in *Pennsylvania Power and Light*:

> In dealing with a union request for relevant, but assertedly confidential information, the Board is required to balance a union's need for the information against any "legitimate and substantial" confidentiality interests established by the employer. The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. Thus, when a union is entitled to information concerning which an employer can claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's informational needs and the employer's justified interests.
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> *Pennsylvania Power & Light*, 301 NLRB at 1105 - 1106 (citations omitted).

See also City of Cranston, ULP-5744 at pages 3 - 4. As established by the Supreme Court in *Detroit Edison*, 440 US at 318 - 320, the balancing test consists of three elements: the first element is the Union's ability to establish that the information it has requested is relevant for purposes of contract administration or a grievance processing. If the Union is able to demonstrate relevancy, then the burden shifts to the Employer to show a "legitimate and substantial" interest in maintaining the confidentiality of the requested documents. Assuming the Employer can meet its burden, the final question becomes whether the Employer's interest in the confidentiality of the information outweighs the Union's need for the information. *See American Baptist of the West*, 362 NLRB at 1137 citing *Detroit Edison*, 440 US at 318 - 320; *see also City of Cranston*, ULP-5744 at page 6.

In the instant case, there is little legitimate argument and the Board, having reviewed the evidence and Exhibits submitted in this case, has no doubt that the information requested by the Union in both MB and TK's cases was relevant to the Union's processing of those two grievances and proceeding with those cases to arbitration.[7] In both MB and TK's cases, the Union was asking to receive copies of written or verbal complaints and witness statements and any reports, findings or investigative recommendations pertaining to the investigations of alleged incidents involving MB and TK. (See Joint Exhibits 7, 16, 19 and 20). This information, on its face, has "some bearing" on the issues that are the subject of MB's and TK's terminations. (See *Pennsylvania*

[7] As previously noted, the Board's determination of relevancy is supported not only by the evidence (and the Employer's failure to challenge the issue), but the decision of the arbitrator ruling on the Union's subpoena duces tecum request involving MB's case. (Joint Exhibit 12).

Power and Light, 301 NLRB at 1105. Thus, the information is clearly relevant to the Union's ability to analyze, process and defend MB and TK in their respective termination cases.[8] Equally as important, the Employer has submitted no evidence, nor has it even argued that the information requested by the Union in each case was not relevant to its processing and defending the grievances of MB and TK.

Having determined that the documents requested by the Union were relevant to the Union's processing of the grievances, the Board turns to whether the Employer can demonstrate a "legitimate and substantial" interest in maintaining the confidentiality of the documents in question. In support of its confidentiality argument, the Employer noted that it offered confidentiality for witnesses being interviewed in the investigations into the conduct of MB and TK. (Transcript at page 107). The Employer asserted that confidentiality was necessary to protect witnesses against coercion and intimidation. (Transcript at pages 108 – 109; 145 – 146). The Employer further noted that since some of the witnesses against MB and TK were members of the same bargaining unit, the possibility that witnesses would feel pressure to not come forward or be intimidated not to testify against their fellow Union members was extremely high. The Employer further asserted that without confidentiality of witness statements and other documents, employees would be fearful of coming forward which would impact the Employer's ability to learn about and correct wrongdoing in the workplace as employees are the best source of such information. (Transcript at pages 108 – 109; 145 – 146; 204 – 205; 215). The Employer also puts forth the idea that the alleged conduct of MB and TK amounted to serious misconduct which is much more difficult for an Employer to learn about without the assistance of co-workers and that assistance will be lost without confidentiality of witness statements (see Employer Memorandum of Law at pages 17 – 18). Finally, the Employer also argues that ensuring confidentiality of witnesses will promote patient health and safety as witnesses will feel less afraid about coming forward to report abuse or neglect by their co-workers.

While the Board recognizes the possibility that employees who come forward as witnesses against their colleagues alleged wrongdoing can be subject to coercion, harassment, intimidation or worse, and while the Board acknowledges that these concerns are legitimate and to be taken seriously, there is little evidence in the record before this Board that supports the Employer's contention that these issues should override the Union's need for the requested documents. The Board is not attempting to delegitimize or ignore the seriousness of witness harassment or intimidation, but, in the instant case, the Employer's evidence that such harassment or intimidation occurred or was threatened is extremely limited. (See *American Baptist,* 362 NLRB at 1137 where, citing *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 14 – 15 (2011), the NLRB stated "Establishing a legitimate and substantial confidentiality interest requires

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[8] As the NLRB applies a liberal test to determine whether information requested by a union is relevant, requested information need only be of "probable" or "potential" relevance in order to be available to the union (see *American Baptist*, 362 NLRB at 1136 – 1137, citing *Transport of New Jersey*, 233 NLRB 694 (1977).

more than a generalized desire to protect the integrity of employment investigations. An Employer must instead "determine whether in any give[n] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, [or] there is a need to prevent a cover up.*""*). In addition, the Board must balance the legitimate concerns witnesses have about coming forward with the Union's legitimate need to know not only what is being alleged against an employee (in this case either MB or TK) but also the particulars of the allegations so that the information can be tested for its veracity.

Notwithstanding the Board's concern that the Employer submitted limited evidence regarding potential witness harassment or intimidation, because the Board believes the Employer's burden of proof on this issue is not particularly onerous, the Board accepts the Employer's testimony on this issue as being sufficient to meet its burden for purposes of this case. Therefore, the Board now turns to whether the Employer's need for confidentiality of the requested documents outweighs the Union's need to receive those documents. In reviewing all the evidence and Exhibits submitted to the Board and the arguments contained in the memoranda of law submitted by counsel, it is apparent to this Board that the Union's need for the documents clearly outweighs the Employer's need for confidentiality in the requested documents.[9] As indicated previously, there can be little doubt that the Union needs the requested information in order to properly prepare and defend the cases of MB and TK against the Employer's attempt to terminate each of them, a penalty that is the employment version of the death penalty. Witness statements that ostensibly provide some first-hand knowledge of the incidents alleged against MB and TK and investigative reports that discuss information collected that is either damning or possibly exculpatory toward MB and TK's alleged conduct cannot and should not be concealed from the Union. As the arbitrator noted in her decision regarding whether the requested documents should be produced by the Employer, she stated the following:

> With respect to discipline and remedy in a termination case, there can be no more relevant and material information than the three categories of documents sought by the Union. Obtaining all information upon which the Employer based its decision to terminate Grievant is paramount to the Union's ability to defend her against the ultimate disciplinary penalty.
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> (Joint Exhibit 12 at page 4).

In the present case, the Board could not be more in agreement with the statements set forth by the arbitrator. The information sought by the Union is not only relevant, it is essential to the Union's ability to defend MB and TK against the charges leveled by the

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[9] The NLRB has noted that the flexible approach of Detroit Edison adequately protects the interests of Employers and witnesses while preserving the general right of requesting unions to obtain relevant information. See *American Baptist*, 362 NLRB at 1139. As the NLRB found in *Metropolitan Edison Corp.*, 330 NLRB 107 (1999), even where the Employer's confidentiality claim was legitimate and substantial, the Employer's "blanket refusal to provide information was not justified." Instead, the Employer "had an obligation to offer an accommodation with regard to the disclosure of the information." *Id.* at 107

Employer. The Employer's need for confidentiality, while certainly important, simply does not outweigh the Union's need for the requested information in the instant case. In the Board's view, the Employer's claim of confidentiality regarding the witness statements and the possibility of harassment or intimidation of the witnesses if the statements are produced is simply too speculative in the present case to support a finding by this Board that the statements should be kept from the Union.

2. Witness Statements Should be Exempt From Production

The Employer, somewhat ironically in the Board's view, argues that the Board, in this case, should abandon its long-standing position of looking to NLRB case decisions and ignore the NLRB's 2015 decision in *American Baptist* that overturned a blanket rule exempting witness statements from an Employer's general obligation to honor Union requests for relevant information. The Board is not inclined to follow the Employer's suggestion in this matter. Having thoroughly reviewed the *American Baptist* decision, the Board believes it was well reasoned and properly decided and effectively integrates the concerns raised and discussed in this Decision concerning relevancy of information requested, confidentiality concerns by Employers and the balancing of those competing positions.

The Board notes with interest that the *American Baptist* decision does not abandon the balancing test of *Detroit Edison* and *Pennsylvania Power and Light*, nor does it ignore the obligation on the part of the Employer to "seek an accommodation that would allow the requestor to obtain the information it needs" even while protecting the Employer's interest in confidentiality. *American Baptist*, 362 NLRB at 1137. In other words, even where the NLRB concludes that the confidentiality interest of the Employer outweighs the need of the Union to receive the documents, the Employer cannot simply refuse to provide the information to the Union but must, instead, seek an accommodation with the Union, i.e., bargain with the Union to come to some middle ground, if possible, on providing the requested information or some portion thereof. *American Baptist*, 362 NLRB at 1137; fn 7; *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004).[10] In the present case, the Employer offered no accommodation to the Union with regard to its request for information in either the MB or TK cases. In the MB case, the only information provided was what had previously been sent to MB regarding the allegations against her (Joint Exhibit 7; Transcript at pages 34 – 36). In TK's case, the Employer did not respond to any of the three requests for information made by the Union. (Transcript at pages 71 – 72; 74;

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[10] As the NLRB explained in *American Baptist* at fn 7, the decision of the NLRB simply made witness statements subject to the same concerns of confidentiality that other information was subjected to. Thus,

> Although the Employer must assert the claim of confidentiality (or waive it) in response to the union's request for information, the Employer is then obligated only to offer an accommodation. If the union is dissatisfied with the offer, it is then required to respond and explain why the proffered accommodation is insufficient. (citation omitted) If this bargaining process fails, and an Unfair Labor Practice Charge is filed, the board will then adjudicate the interests of the parties. This procedure removes the board from the process, but it remains available to prevent parties from circumventing their obligation to share non-confidential information and to bargain over disputes.

76 – 80). In other words, even if this Board had determined that the Employer's need for confidentiality in the requested documents outweighed the Union's need to receive the documents, it would still have found that the Employer violated the Act as it failed to engage in its bargaining obligation with respect to attempting to accommodate the Union's request so that some middle ground might be achieved while still preserving the confidentiality the Employer needed (see *Pennsylvania Power and Light*, 301 NLRB at 1107; *American Baptist*, 362 NLRB at 1139 – 1140).

The Employer attempts to defend against its failure to bargain some accommodation with the Union by arguing that the pre-disciplinary letters sent to MB and TK as part of the *Loudermill* process "are extremely detailed 'so that the employee knows exactly what the allegations are and they are able to defend themselves'." (Employer Memorandum of Law at page 26, citing Transcript at pages 105 – 106). The Employer further asserts that the providing of the pre-termination letter to MB and TK (Joint Exhibits 3 and 15, respectively) satisfied its accommodation obligation. *Pennsylvania Power & Light*, 301 NLRB at 1107. The Board rejects this assertion by the Employer. While the pre-disciplinary letters (Joint Exhibits 3 and 15) do provide a somewhat detailed summary of the allegations against MB and TK, respectively, these letters do not represent, in this Board's view, an offer of the type of accommodation to the Union that the case law directs or this Board expects. Instead, the pre-disciplinary letters are a take-it-or-leave-it situation where the Union has no opportunity to disagree with the contents of the correspondence or to discuss and suggest changes or additions to the correspondence that would provide more information or perhaps offer exculpatory information in the possession of the Employer. Certainly, the pre-disciplinary letters do not offer even an adequate summary of the witness testimony that might otherwise be acceptable in situations where confidentiality needs outweigh the need for production to the Union (see *Pennsylvania Power and Light*, 301 NLRB at 1107). Further, nowhere within this scenario does the Union have an opportunity to even discuss receiving some of the information it may have requested. Under these circumstances, it is the Board's view that the Employer did not satisfy its bargaining obligation with respect to this aspect of its assertion of confidentiality.

The Employer also argues that the Union had other means or methods in which to acquire the information it was requesting from the Employer. Specifically, the Employer suggests that the Union was present for witness interviews regarding its bargaining unit members and that the Union was able to take notes and ask questions during those interviews without interference from the Employer (see Transcript at pages 186; 188). While acknowledging that the Union would not be present for interviews for individuals who were not members of the Union's bargaining unit (see Transcript at page 193), the Employer asserted that the Union was free to do its own investigation of the circumstances as an alternative to receiving the requested information (see Transcript at pages 196 – 197). The Board rejects this argument for several reasons. Initially, this argument places all of the burden of discovering information regarding alleged wrongdoing against MB and TK on the Union when the burden of production clearly is on the Employer. In addition, the Union certainly could be exposed to potential accusations

of witness intimidation and harassment if it were to conduct such an investigation whether such harassment or intimidation occurred or not.[11] Perhaps most concerning to the Board with regard to this suggestion by the Employer is the fact that the Union has no real authority in conducting such an investigation. In other words, the Union has no ability to require individuals not members of the Union's bargaining unit to speak to the Union and answer its questions regarding the alleged incident. In fact, the Board could envision a situation where it is more likely than not that such individuals would refuse to cooperate with the Union. Thus, in the Board's view, the Employer's suggestion does not appear to provide the Union with a particularly effective method of securing all the information it would need nor does it offer the Union the same type of information it could receive by the Employer producing the information requested by the Union.

3. Interview Notes and the Work Product Doctrine

The Employer also argues that the interview notes taken by its representatives should not be subject to production as these notes are privileged and subject to a work product exemption. In essence, the Employer claims that "documents prepared by human resources personnel when investigating potential misconduct by Union members is protected by the privilege afforded to documents prepared in anticipation of litigation." (Employer Memorandum of Law at page 24 citing *Sprint Communications d/b/a Central Telephone Company of Texas*, 343 NLRB 987 (2004)). The Board must also reject this argument by the Employer. As noted in the dissent to the *Sprint Communications* case, it is this Board's view that applying the work product doctrine to notes prepared by human resource personnel expands the work product doctrine beyond its intended scope, disregards the universally-followed principal that documents prepared in the ordinary course of business are not protected and impairs a Union's ability to protect its members' contractual and statutory rights. *Sprint Communications*, 343 NLRB at pages 991 – 994. In addition, a review of the *Sprint Communications* decision reveals that it is distinguishable from the facts presented to the Board in the instant case. Of particular relevance is the fact that the HR specialist who conducted the interviews and prepared the statements of the witnesses that were the subject of the *Sprint Communications* case was in communication with and taking direction from the company's in-house legal counsel. In other words, the HR specialist in *Sprint Communications* was preparing the notes and witness statements at the direction of and for the use of the company's in-house attorney, a clear use of the work product doctrine that would shield that material from Union eyes. In the instant case, however, the interviews and statements taken and notes written by the Employer's HR personnel were no different or of any greater significance than were those conducted in numerous other similar investigations. While clearly the disciplinary action against MB and TK was termination thereby making the situations more serious, these were not the only termination matters investigated by either

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[11] The Board notes that, in its view, allowing the Union to conduct its own investigation of the "serious misconduct" alleged in the MB and TK cases appears to conflict with the Employer's arguments of needing confidentiality for witness statements to protect witnesses from possible harassment or intimidation.

of the HR individuals (Ms. Moscarelli and Ms. Simard) during their careers with the Employer. (Transcript at pages 96; 144). Thus, this Board finds that the notes drafted by the HR personnel pursuant to investigation of MB and TK's cases are not subject to the work product doctrine, are not privileged and are appropriate for production to the Union as part of its request for information.

4. Miscellaneous

The Employer makes several additional arguments in an attempt to defend its failure to provide the Union with the relevant information contained in its multiple requests. These arguments include the contention that the Board does not have the authority to determine whether the Employer violated the due process clause of the United States Constitution concerning the Employer's refusal to turn over requested documents prior to the *Loudermill* pre-termination hearing for TK, that contract language contained the appropriate process for determining the documents the Employer must produce to the Union and that the information requested by the Union was actually information developed by the Risk Management Division of BHDDH for purposes of self-assessment and, therefore, was not subject to production. The Board need not spend significant time dwelling on each of these arguments as none are persuasive enough to alter the Board's findings and determinations in this matter. With respect to the constitutional claim, the Board's Decision does not specifically address, and the Board takes no position, as to when documents and information should be provided to a Union in response to a request for such information made prior to a *Loudermill* hearing. Instead, this Decision directs the Employer to provide relevant information to the Union by making a "reasonable good-faith effort to respond to the request as promptly as circumstances allow" upon receipt of the request for the information (see *United Electrical Contractors Association*, 347 NLRB 1, 3 (2006). If an Employer has a legitimate claim of confidentiality as discussed above then the Employer may raise that issue as appropriate *(Pennsylvania Power and Light*, 301 NLRB at 1105). Should confidentiality be brought forth, then this Decision outlines how the Employer and the Union should act in attempting to resolve the conflict about whether and which documents are to be produced (see *City of Cranston*, ULP-5744; *Detroit Edison*, 440 U.S. 301 (1979).

As to the risk management argument, the Board rejects the notion that the investigation of MB and TK's cases were not disciplinary investigations but, instead, investigations by the Hospital in order to learn how to provide better, more competent, more qualified and a safer patient experience. That is not the evidence that was presented to this Board in this case. In short, the Employer cannot shield the production of relevant information requested by the Union under such an umbrella and certainly not based on the facts of this case.

Finally, in the Board's view, the Employer's contract argument is without merit. While the Board agrees with the Employer's assertion that the Board does not have the authority to interpret contract language, the Board rejects the notion that the pending unfair labor practice cases should be left to arbitration and not resolved by the Board.

The Union is not required by this Decision or by any case law of which this Board is aware to wait for the production of documents until just prior to the commencement of an arbitration proceeding as apparently the Employer suggests. Even the Collective Bargaining Agreement (Joint Exhibit 1, Article 30.3) makes clear, as the Employer states, that the Employer "on request, will produce payroll and **other records**, as necessary." (Emphasis supplied). That language is certainly broad enough in the Board's view to require the Employer to have provided all the documents that the Union requested whenever the Union made its request and without any restriction or limitation. There is certainly nothing in that sentence that requires the Union to wait to make its request until just prior to arbitration, nor is there any restriction on the phrase "other records" that would allow the Employer to limit or refuse to produce documentation requested by the Union. However, the Board does not rely on the contract language nor its reading of Article 30.3 for purposes of reaching a decision in this matter. The evidence before the Board is clear that the Union made a request for relevant information in both MB and TK's cases and the Employer's claim of confidentiality was not sufficient or substantial enough to outweigh the Union's need and right to receive the requested information. Thus, the Employer's failure and refusal to provide the Union with the relevant information it requested is a violation of the Act.

FINDINGS OF FACT

1. The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2. The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with Employers in grievances or other mutual aid and protection and as such is a "labor organization" within the meaning of the Rhode Island State Labor Relations Act.
3. The Union and the Employer were subject to a Collective Bargaining Agreement dated July 1, 2017 through June 30, 2020.
4. MB and TK were registered nurses employed by BHDDH and assigned to the Eleanor Slater Hospital
5. On or about May 15, 2019, MB received a written notice from the Employer informing her that she was being placed on paid administrative leave pending the outcome of an investigation into alleged misconduct.
6. On or about July 2, 2019, MB received a second written notice from the Employer informing her that the Employer's investigation was completed and that it was considering the termination of MB's employment. The notice also scheduled a pre-disciplinary hearing for MB for July 5, 2019.
7. The pre-disciplinary hearing for MB was held and on July 8, 2019 MB was notified in writing that her employment with the Employer was terminated effective July 10, 2019.
8. On July 23, 2019, the Union President submitted a request for information to the Employer seeking "documentation and materials related to the investigation" of MB.

9. On July 24, 2019, the Employer responded to the Union's information request by producing copies of letters previously received by MB. The Employer asserted that other "HR investigative files" were confidential and, therefore, would not be provided to the Union.

10. On July 25, 2019, the Union President sent a second request for information to the Employer specifically asking to receive any written or verbal complaint or witness statements and report, findings or recommendations completed by investigators and pertaining to the investigation involving MB.

11. The Employer responded on August 20, 2019, stating that it would not produce the requested documents and information.

12. The Union then filed a demand for arbitration. After the arbitrator was appointed, the Union filed a subpoena duces tecum requesting the documents previously requested from the Employer. The Employer filed a motion to quash the subpoena.

13. On December 30, 2019, the arbitrator issued her decision granting the Union's request and denying the Employer's motion to quash stating, in part, that there could be "no more relevant and material information" than the documents being sought by the Union. The Employer complied with the arbitrator's decision and produced the requested information.

14. On or about August 16, 2019, TK received a written notice from the Employer informing her that she was being placed on paid administrative leave pending the outcome of an investigation into alleged misconduct.

15. On or about October 21, 2019, TK received a second written notice from the Employer informing her that the Employer's investigation was completed and that it was considering the termination of TK's employment. The notice also scheduled a pre-disciplinary hearing for TK for October 31, 2019.

16. On October 25, 2019, the Union President submitted a request for information to the Employer seeking any written or verbal complaint, witness statements and any report, investigation findings or recommendations pertaining to the investigation involving TK. The Union President did not receive a response to her request for information.

17. The pre-disciplinary hearing for TK was held on October 31, 2019 and on December 17, 2019 TK was notified in writing that her employment with the Employer was terminated effective December 19, 2019.

18. On or about December 19, 2019, the Union President filed a grievance on behalf of TK and sent a second request for information to the Employer. The Union did not receive any response to its second request for information nor did it receive the information it had requested.

19. On or about January 3, 2019, the Union President sent a third request for information to the Employer. The Union did not receive any response to its third request for information nor did it receive the information it had requested.

CONCLUSIONS

1. The Union has proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(6) and (10) when it failed and refused to provide the Union with documents, materials and other information the Union had specifically requested and which the Union claimed were relevant to its administration of two termination cases involving bargaining unit members MB and TK.

2. The Union has proven by a fair preponderance of the evidence that the Employer committed a violation of R.I.G.L. § 28-7-13(6) and (10) when it failed and refused to bargain with the Union over the Employer's refusal to provide the Union with documents, materials and other information the Union had specifically requested and which the Union claimed were relevant to its administration of two termination cases involving bargaining unit members MB and TK.

ORDER

1. The Employer is hereby ordered to cease and desist from refusing to provide relevant documents, witness statements, reports, notes and information to the Union which the Union claims are relevant to its administration of disciplinary matters involving bargaining unit members.

2. The Employer is hereby ordered to provide the Union with the documents, witness statements, reports, notes or other materials the Union has requested pertaining to the investigation involving TK.

3. The Employer is hereby ordered to post a copy of this Decision and Order for a period of not less than sixty (60) days in each building where bargaining unit personnel work, said posting to be in a location where other materials designed to be seen, read and reviewed by bargaining unit personnel are posted.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Scott G. Duhamel, Member

Kenneth B. Chiavarini, Member

Derek M. Silva, Member

Harry F. Winthrop, Member

BOARD MEMBER ARONDA R. KIRBY WAS NOT IN ATTENDANCE DURING VOTE ON CONCLUDED CASE.

BOARD MEMBER, STAN ISRAEL, WAS ABSENT FOR SIGNING OF THE DECISION & ORDER

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: August 24, 2021

By: _____
Lisa L. Ribezzo, Interim Administrator

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF	:	
RHODE ISLAND STATE LABOR RELATIONS BOARD	:	
-AND-	:	CASE NO. ULP-6261/6270
STATE OF RHODE ISLAND - DEPARTMENT OF BEHAVIORAL HEALTHCARE, DEVELOPMENTAL DISABILITIES & HOSPITALS	:	

NOTICE OF RIGHT TO APPEAL AGENCY DECISION
PURSUANT TO R.I.G.L. 42-35-12

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of Case No. ULP-6261/6270, dated August 24, 2021, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after **August 24, 2021.**

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: August 24, 2021

By: Lisa L Ribezzo
Lisa L. Ribezzo,
Interim Administrator