

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

WILLAMETTE VALLEY MEDICAL CENTER

and

Case 19–CA–265597

OREGON NURSES ASSOCIATION

*Helen Fiorianti, Esq.*,  
for the General Counsel,  
*Timothy A. Davis, Esq.*,  
*Glenn R. Bunting, Esq.*,  
for the Respondent.  
*Aruna Masih, Esq.*,  
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried virtually using the Zoom for Government platform on May 10, 2021. The Oregon Nurses Association (the Union or Charging Party) filed the charge on September 2, 2020, and the General Counsel issued the complaint on January 15, 2021.<sup>1</sup> Willamette Valley Medical Center (the Respondent or WVMC) filed a timely answer denying all material allegations.

The complaint alleges the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by failing and refusing to provide and/or unreasonably delaying in providing the Union with relevant requested information.

FINDINGS OF FACT

I. JURISDICTION

At all material times, WVMC has been a State of Delaware limited liability corporation with an office and place of business in McMinnville, Oregon, where it is engaged in the business of operating an acute care hospital. In conducting its operations during the last 12 months, which

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<sup>1</sup> All dates are in 2020 unless otherwise indicated.

is representative of all material times, WVMC derived gross revenues in excess of \$250,000 and purchased and received goods and services valued in excess of \$50,000 directly from points located outside the State of Oregon. At all material times, WVMC has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## II. FACTS

### A. *The Parties*

Willamette Valley Medical Center is a full-service 60-bed acute care hospital in McMinnville, Oregon. LifePoint Health, a Tennessee-based hospital company, purchased WVMC in 2018.

The Union was certified as the collective-bargaining representative of around 160 registered nurses at WVMC on December 27, 2019.

### B. *Bargaining and Information Requests*

The first bargaining session between the Respondent and the Union occurred on June 17.<sup>2</sup> John Karebian, a consultant for the American Federation of Teachers, was the Union’s chief negotiator.<sup>3</sup> About seven bargaining unit nurses also participated. Attorney Glenn Bunting negotiated for the Respondent, along with Kristen Ferren, the Respondent’s chief nursing officer, Jill Bowman, a nurse manager, and the human resources manager.<sup>4</sup>

Prior to bargaining, the nurses brought safety concerns to the Union’s attention. Among other issues, nurses had concerns about workplace violence, particularly in the emergency department. Nurses also mention problems about “floating” and the impact of a nurse they believed was not adequately trained.

On March 2, Karebian emailed Clark, cc’ing Bunting among others, requesting 23 enumerated items of information, including:

11. Copies of any unsafe staffing/safety concerns filed by nurses over the course of the last three years.
12. Procedure for reporting safety concerns.

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<sup>2</sup> The Union had hoped to start bargaining in April, but these efforts were complicated by the COVID-19 pandemic. Karebian, who was hired as a consultant in February 2020, worked with the Michigan Nurses Association for 32 years, and 9 years with Associated Professional Advisors. His office is in Northville, Michigan.

<sup>3</sup> Oregon Nurses Association is an affiliate of the American Federation of Teachers.

<sup>4</sup> Lisa Clark was the human resources manager until July 2020.

(Jt. Exh. 1.)<sup>5</sup> Karebian requested this information because nurses had told the Union they had numerous safety concerns. The Union wanted to analyze the forms over three years to determine trends in the various unit in order to come up with proposals to address safety concerns. Karebian requested the information regarding the procedure for reporting safety concerns because he was not aware of how the nurses reported their complaints.

By April 30, the Respondent provided most of the information. Regarding items 11 and 12, Bunting emailed Karebian the following response: In response to Nos. 11 & 12 of the Union’s information request, attached please find the minutes of the 2020 Nurse Staffing Committee meetings.” (Jt. Exh. 2.) The attached minutes were from the 2020 and 2017 staffing committee meetings. The minutes provided a summary of so-called “5 minute frustration” forms and referred committee members to actual attachments of the forms for details. The attached forms were not provided, nor were any unsafe staffing or other safety reports the nurses filed. The procedure for reporting safety concerns was not explicitly identified.

As noted above, the parties met for bargaining on June 17. At the initial bargaining sessions, the parties exchanged some proposals. The Union made initial proposals based on model language, including proposals for safe staffing and patient advocacy, health and safety, nurse practice council, and technology. (Jt. Exh. 4.) Karebian intended to have further discussions about these issues over the course of negotiations and after receipt of requested information.

On July 15, Karebian reiterated his request for copies of any unsafe staffing/safety concerns filed by nurses over the course of the last three years and the Respondent’s procedure for reporting safety concerns, among other items. Bunting responded that he would review the referenced items and get back to him as soon as possible. (Jt. Exh. 3.)

Karebian followed up again on August 3, reiterating his request for information regarding staffing and work issues, noting that without this information the Union could not bargain intelligently with the Respondent. Specifically, Karebian stated, “We have had some goo (sic) discussions at the table regarding staffing but I believe we are at a juncture where you will be presenting a proposal and we will need to evaluate evidence based data and the effects that staffing has on the retention of nurses and the standards of care.” Karebian offered an additional week for the Respondent to provide the information.

On August 10, Bunting provided Karebian with staffing committee meeting minutes from 2018 and 2019, apologized for his initial oversight in failing to provide them sooner, and stated:

The Hospital objects to any further compilation of data associated with this request on grounds of relevance and overbreadth, inasmuch as this requested data predates the

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<sup>5</sup> The only items in dispute are the requests numbered 11 and 12. Abbreviations used in this decision are as follows: “R Exh.” for the Respondent’s exhibit; “Jt. Exh.” for joint exhibit; “GC Br.” for the General Counsel’s brief; “R Br.” for the Respondent’s brief, and “CP Br.” for the Charging Party’s brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record.

Union’s representation of this bargaining unit by almost three years and encompasses appreciably different historical conditions including the composition of Hospital staff and management.

5 (Jt. Exh. 6.) This was the first time the hospital objected on the grounds of relevance or overbreadth. Bunting followed up on August 11, adding:

10 Supplementing the message below, the procedure for reporting safety and clinical concerns related to staffing is to advance those concerns for investigation and review by the statutorily-created Staffing Committee, composed of an equal number of staff and managers.

15 Concerns may also be brought to the Hospital’s attention by means of an internal electronic reporting process known as “Stars,” or by submitting a form entitled “5 Minute Frustration” to the employee’s manager (attached).

20 (Jt. Exh. 7.) The attached 5 minute frustration form was blank. Bunting reiterated the Respondent’s objection to any further responses to the Union’s requests using the same language as he did in his August 10 email, but adding, “Nevertheless, the Hospital remains willing to discuss this with the Union and consider means by which the Union’s and the Hospital’s respective interests may be accommodated.” (Jt. Exh. 7.)

25 Karebian was unaware of the STARS reporting system prior to receiving Bunting’s August 11 email. He learned from the nurses that 5 minute frustration forms were quick and fairly short, while the STARS records were more comprehensive and provided detail about the problem the nurse had encountered.

30 On August 13, the Respondent submitted its counterproposal to the Union’s Nurse Practice Council proposal. (Jt. Exh. 10.)

Karebian responded to Bunting’s August 11 email on August 26, stating in relevant part:

35 Glenn, the Union is entitled to the information regarding the 5 Minute Frustration forms or “stars” electronic reporting records. We have a right to relevant and completed 5 Minute Frustration forms and “stars records” that are necessary for the performance of our functions as the collective bargaining representative of nurses at WVMC. The information is needed to better understand the nature of the complaints that nurses have had within the Hospital as we consider the exchange of proposals related to staffing, health and safety, and the RN scope of practice. These are major issues at the bargaining table and nurses complete the forms when they believe their assignments are unsafe or have other concerns with their working conditions. These forms proceed through the chain of command and are also specifically addressed by the Staffing Committee. It is important to understand the nature of concerns and the plan of correction, especially since this is a central topic discussed at the bargaining table. Providing us only a blank 5  
45 Minute Frustration Form is disrespectful of the union. So that we are clear, I am requesting a copy of completed 5 Minute Frustration forms and any “stars” electronic records filed by nurses over the course of the last three years.

...

I would appreciate this information expeditiously so as to avoid any additional delays in our ability to address these issues at the bargaining table. We are entitled to this information and ONA will pursue legal remedies if we do not have the information we requested by August 28 by the close of business.

(Jt. Exh. 8.)

The following day, Karebian and Bunting spoke on the phone. Bunting told Karebian that providing the stars and 5-minute frustration forms to the Union would violate the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Karebian suggested redacting patient information, but did not receive an affirmative response. Karebian also told Bunting that the Union was willing to accept the forms from the last year rather than the last three years as initially requested, and then determine whether more information was needed. He also informed Bunting that, in a previous negotiation involving another facility, the Union had accepted a few months of data to start.

On August 28, Bunting responded in relevant part as follows:

With regard to the second paragraph of your correspondence pertaining to the Union's request for "copies of any unsafe staffing/safety concerns filed by nurses over the course of the last three years," the Hospital has demonstrated its good faith by providing the Union with a complete copy of the minutes of the Staffing Committee over that three year period. This, despite the fact that the time period of that requested data predates the Union's representation of this bargaining unit by almost three years and encompasses appreciably different historical conditions, including the composition of Hospital staff and management.

Moreover, given that the Staffing Committee whose minutes you now possess is the statutorily created body with the legal responsibility for reviewing the concerns you've requested, and given that essentially one-half of the Staffing Committee is composed of bargaining unit personnel, the Hospital renews its objection to tasking other personnel at this extremely challenging time (in the midst of a global pandemic) to a duplicative search of records for the fulfillment of this request.

Further, even if the Hospital were to reassign its Human Resources and/or clinical operations personnel from their critically important daily duties of operating the hospital, any duplicative documentation that such a search might reveal would need to then be closely scrutinized and redacted for any PHI (Protected Health Information) pursuant to HIPAA – further diverting the time and attention of these individuals from the safe and effective operation of this acute care facility.

Given the Hospital's previously asserted objection with regard to the overbreadth and irrelevance of the Union's request, and both parties' obligation under the NLRA to attempt to discuss and resolve such objections in a mutually acceptable manner, I would request that the Union engage in good faith in that endeavor, rather than following

through on the threat below to “pursue legal remedies” if this information is not produced within two days - by the close of business today.

5 I would be happy to discuss this further with you before or after our scheduled bargaining sessions next week.

(Jt. Exh. 9.)

10 Karebian did not find the meeting minutes to be responsive. He was looking for the detailed information on the actual forms the nurses submitted so he could identify problems and determine appropriate interventions. The minutes did not have sufficient detail to accomplish this objective.

15 The parties continued to meet for bargaining roughly four times per month, but as of the time of the hearing, no collective-bargaining agreement had been reached, and no copies of unsafe staffing/safety concerns filed by nurses had been provided.

20 C. *LifePoint Patient Safety Organization and the Patient Safety and Quality Improvement Act*

In its answer to the complaint, the Respondent asserted for the first time that part of the information the Union requested was privileged and confidential and is therefore not subject to disclosure under applicable federal and state law, including but not limited to the Patient Safety and Quality Improvement Act of 2005 (PSQIA) and the Public Health Act.<sup>6</sup>

25 The Respondent became a member of LifePoint patient safety organization (PSO) on June 1, 2019.<sup>7</sup> (R Exh. 2.) PSOs, created under the PSQIA, assist hospitals to improve the safety and quality of healthcare they deliver through analysis of patient safety data among member hospitals. Hospitals become members of a PSO through a process managed under the  
30 Agency for Healthcare Research and Quality. Each member hospital has a designated liaison, referred to as the PSO field manager, who oversees local activities at the hospital. Additional hospital employees receive, analyze, and aggregate data. Each hospital develops a patient safety evaluation system where safety reports nurses and other workers provide are separately, securely, and confidentially stored. Once information is received, it is placed in a secured software system  
35 and analyzed for common risk factors.

40 Amy Beitler is the director of LifePoint patient safety organization and safety data management.<sup>8</sup> In this capacity, she leads LifePoint’s patient safety organization (PSO). Beitler’s work entails overseeing the collection of patient safety work product coming from LifePoint’s member hospitals, and maintaining the security and confidentiality of the systems LifePoint uses, including ensuring compliance with the PSQIA. The safety data includes: (1) root cause analyses, which is a retrospective analysis of the causal factors of a safety incident from which to

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<sup>6</sup> The Respondent did not raise any violation of state law or the Public Health Act either during the hearing or in closing brief.

<sup>7</sup> LifePoint PSO LLC is a subsidiary of LifePoint Health.

<sup>8</sup> Beitler works in Brentwood, Tennessee, where LifePoint is located.

5 formulate actions to improve; (2) prospective risk analysis, safety and quality assessment, which involves looking at practices and assessing how they are working; (3) patient safety reports, including near-miss unsafe conditions, harm and non-harm clinical events and other clinical concerns; and (4) meeting minutes and other materials specific to patient safety and quality committee meetings.

Hospitals can lose their PSOs by failing to comply with the requirements of the PSQIA, including failure to ensure compliance under HIPAA and other confidentiality standards. Disclosure of privileged information may result in fines for each disclosure.

10 Under the PSQIA, patient safety work product is privileged. Pursuant to 42 U.S.C. § 299b–21(7)(A), patient safety work product means:

15 [A]ny data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements (or copies of any of this material)

(i) which

20 (I) are assembled or developed by a provider for reporting to a patient safety organization and are reported to a patient safety organization; or

(II) are developed by a patient safety organization for the conduct of patient safety activities; and which could result in improved patient safety, health care quality, or health care outcomes; or

25 (ii) which identify or constitute the deliberations or analysis of, or identify the fact of reporting pursuant to, a patient safety evaluation system.

30 There are exclusions from the definition of patient safety work product under 42 U.S.C. § 299b–21(7)(B):

Clarification

35 (i) Information described in subparagraph (A) does not include a patient's medical record, billing and discharge information, or any other original patient or provider record.

40 (ii) Information described in subparagraph (A) does not include information that is collected, maintained, or developed separately, or exists separately, from a patient safety evaluation system. Such separate information or a copy thereof reported to a patient safety organization shall not by reason of its reporting be considered patient safety work product.

(iii) Nothing in this part shall be construed to limit--

45 (I) the discovery of or admissibility of information described in this subparagraph in a criminal, civil, or administrative proceeding;

(II) the reporting of information described in this subparagraph to a Federal, State, or local governmental agency for public health surveillance, investigation, or other public health purposes or health oversight purposes; or

5 (III) a provider's recordkeeping obligation with respect to information described in this subparagraph under Federal, State, or local law.

See also 42 C.F.R. § 3.20. These criteria are embodied in the contract between the Respondent and LifePoint PSO. (R Exh. 2.)

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The STARS system or ClearSight STARS is the mechanism used to report near-miss events, unsafe conditions, harm or non-harm clinical events where something didn't happen as it was expected to at WVMC. The system is accessible to staff to capture patient safety reports. Beitler testified that as part of the patient safety evaluation system, STARS reports are confidential patient safety work product. Information in the STARS reports is used internally in the hospital for purposes of improvement.

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#### DECISION AND ANALYSIS

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Pursuant to Section 8(a)(5) of the Act, each party to a bargaining relationship is required to bargain in good faith. Part of that obligation is that both sides are required to furnish relevant information upon request. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The employer's duty to provide relevant information exists because without the information, the union is unable to perform its statutory duties as the employees' bargaining agent. Like a flat refusal to bargain, "[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of the Act" without regard to the employer's subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.*, 237 NLRB 747, 751 (1978), *enfd.* 603 F.2d 1310 (8th Cir. 1979). In determining possible relevance, the Board does not pass upon the merits, and the labor organization is not required to demonstrate that the information is accurate, not hearsay, or even ultimately reliable. *Postal Service*, 337 NLRB 820, 822 (2002).

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Information concerning employees in the bargaining unit and their terms and conditions of employment, is deemed "so intrinsic to the core of the employer-employee relationship" to be presumptively relevant. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *Sands Hotel & Casino*, 324 NLRB 1101, 1109 (1997). Presumptively relevant information must be furnished on request to employees' collective-bargaining representatives unless the employer establishes a legitimate affirmative defense to the production of the information. *Metta Electric*, 349 NLRB 1088 (2007); *Postal Service*, 332 NLRB 635 (2000). "If an employer effectively rebuts the presumption of relevance, however, or otherwise shows that it has a valid reason for not providing the requested information, the employer is excused from providing the information or from providing it in the form requested." *United Parcel Service of America.*, 362 NLRB 160, 162 (2015).

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"When a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished." *Regency Service Carts*, 345 NLRB 671, 673 (2005). The duty to furnish



information requires a reasonable, good-faith effort to respond to the request as promptly as circumstances allow. See *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). “An unreasonable delay in furnishing relevant requested information is as much a violation of Section 8(a)(5) as a refusal to furnish the information at all.” *Linwood Care Center*, 367 NLRB No. 14, slip op. at 4 (2018).

“To determine whether requested information has been provided in a timely manner, the Board considers a variety of factors, including 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.” *TDY Industries, LLC d/b/a ATI Specialty Alloys & Components, Millersburg Operations*, 369 NLRB No. 128, slip op. at 2 (2020), citing *Safeway, Inc.*, 369 NLRB No. 30, slip op. at 7 (2020); see also *Linwood Care Center*, slip op. at 4-5 (finding 6-week delay in providing requested information about wage increases unreasonable where information was not difficult to retrieve and respondent provided no justification for the delay).

#### A. *Relevance of Information Requested*

I find that the information requested, i.e. copies of any unsafe staffing/safety concerns filed by nurses over the course of the last three years and the procedure for reporting safety concerns pertain to the nurses in the bargaining unit. Specifically, both items relate to nurses reports regarding potential unsafe working conditions. There can be no doubt that information pertaining to the safety of the bargaining unit employees’ working conditions is relevant to the employees’ bargaining representative. See *Crittendon Hospital*, 342 NLRB 686 (2004). As such, the Union’s requests are presumptively relevant.<sup>9</sup>

#### B. *Procedure for Reporting Safety Concerns*

The Union first asked the Respondent what the procedure for reporting safety concerns was on March 2. There was no response until August 11, more than 5 months after the request. Considering the simplicity of responding to this request along with the fact that the Respondent did not contemporaneously explain its reasons for the delay, I find this information was not provided in a timely manner, in violation of Section 8(a)(5) and (1) of the Act.<sup>10</sup>

<sup>9</sup> Even if these requests were not presumptively relevant, Karebian explained that he needed this information to bargain intelligently over the nurses’ safety concerns in negotiating the parties’ initial contract, and therefore relevance has been established.

<sup>10</sup> The General Counsel requests that the pleadings be conformed to the record evidence under *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959); *Meisner Electric, Inc.*, 316 NLRB 597, 597 (1995), aff’d mem., 83 F.3d 436 (11th Cir. 1996); *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf’d, 920 F.2d 130 (2d Cir. 1991). (GC Br. 18.) I grant this request, and note that it is minimal and non-prejudicial given that the Board has consistently found a delay in providing information is essentially the same violation as refusing to provide it.

C. *Copies of Unsafe Staffing/Safety Concerns Filed by Nurses*

The Union first requested copies of unsafe staffing/safety concerns filed by nurses on March 2, and reiterated this request on July 15, August 3, and August 26. The Respondent had not provided this information as of the date of the hearing, asserting various defenses discussed below.

1. Overbreadth and burdensomeness

On August 10, more than five months after the Union’s March 2 request for the information, the Respondent asserted that the request was overly broad. On August 28, nearly six months after the Union’s request, the Respondent asserted that providing the information would be unduly burdensome. “If . . . the employer has a legitimate claim that a request for information is unduly burdensome or overbroad, it must articulate those concerns to the union and make a timely offer to cooperate with the union to reach a mutually acceptable accommodation.” *United Parcel Service of America.*, above, citing *Mission Foods*, 345 NLRB 788, 789 (2005). Here, the concerns were not timely raised and there was no timely offer to cooperate with the Union to reach a mutually acceptable accommodation. Accordingly, any defense of overbreadth or burdensomeness fails.

2. Confidentiality under HIPAA

The Respondent first raised confidentiality concerns under HIPAA with regard to providing the 5 minute frustration forms and the STARS reports on August 27.

An employer’s legitimate confidentiality claims may justify a refusal to furnish or a delay in furnishing otherwise relevant requested information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 319–320 (1979). “However, ‘a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation’ between the union’s needs and the employer’s legitimate interests, and a respondent normally must raise any confidentiality claim in its initial response to the information request.” *TDY Industries*, supra, quoting *West Penn Power Co.*, 339 NLRB 585, 590 (2003), enfd. in relevant part 394 F.3d 233 (4th Cir. 2005). The Respondent bears the burden to prove its confidentiality defense. *Island Creek Coal Co.*, 289 NLRB 851 (1988), enfd. sub nom. *Mine Workers Dist. 31 v. NLRB*, 879 F.2d 939 (D.C. Cir. 1989).

The confidentiality concerns clearly were not raised in the Respondent’s initial response to the information request, and there was no contemporaneous explanation for the delay in raising this defense. As such, I find the confidentiality concerns were not timely raised.

Nonetheless, the Respondent contends that it accommodated the Union by providing the staffing committee minutes. This at least seems to implicitly acknowledge that the Union never requested meeting minutes, so providing them was at best an accommodation. The problem with the argument, however, is that the evidence shows Respondent did not, prior to providing the minutes, seek a mutually acceptable accommodation as was its duty. Instead, it unilaterally provided the staffing committee meetings as an initial response to the Union’s request without engaging with the Union to seek a mutually acceptable accommodation.

In *Olean General Hospital*, 363 NLRB 561 (2015), the Board found that the employer violated Section 8(a)(5) when it refused to provide a report on patient care surveys, despite a legitimate confidentiality concern based on a state privacy statute, because the information was important to ongoing negotiations and because the employer had an obligation to attempt to accommodate the privacy issues. Here, despite the Respondent’s delayed confidentiality claim, it was the Union that attempted to accommodate the Respondent’s concerns by offering to accept reports with identifying information redacted, and by offering to initially receive a year’s worth of reports rather than three. The Respondent chose not to act upon these offers or provide any contemporaneous explanation for failing to do so.

Curiously, the Respondent appears to fault the Union for not specifically requesting the 5 minute frustration forms and STARS reports until August 26. I need not belabor that the Union asked the Respondent to identify the safety reporting procedures on March 2, but this information was not provided until August. Regardless, they *never* needed to be specifically identified to trigger the obligation to timely respond and either provide them or articulate a defense and an offer to accommodate. The initial request for “copies of any unsafe staffing/safety concerns filed by nurses over the course of the last three years” was clear enough, and the 5 minute frustration forms and STARS reports were obviously responsive to that request.

Based on the foregoing, I find the Respondent’s confidentiality defense fails. I am mindful, however, of the Respondent’s obligations under HIPAA, and this is reflected in the remedies section of this decision.

### 3. Privilege and confidentiality under PSQIA

In its answer to the complaint, on January 29, 2021, the Respondent first raised a defense that “all or part of the information the Union requested is privileged and confidential and is therefore not subject to disclosure under applicable federal and state law, including but not limited to the Patient Safety and Quality Improvement Act and the Public Health Act.” Specifically, the Respondent alleges that the STARS reports are privileged patient safety work product under the PSQIA and cannot be disclosed even in redacted form. Though the privilege and confidentiality defense was raised belatedly, I address it more thoroughly because of the potential for the remedy to run afoul of another federal statute if decided purely on timeliness grounds.

Even where the party which possesses the requested information claims a specific and legitimate privilege in not disclosing the information, the Board and courts require bargaining over an accommodation which satisfies the requesting party’s needs without jeopardizing the disclosing party’s interests. *Detroit Edison v. NLRB*, 440 U.S. 301 (1978); *Minnesota Mining & Manufacturing Co.*, 261 NLRB 27 (1982); *Pennsylvania Power & Light Co.*, 301 NLRB 1104 (1991). An employer with legitimate and substantial confidentiality concerns is “entitled to discuss confidentiality concerns regarding the information request with the union so as to try to develop mutually agreeable protective conditions for its disclosure to the union.” *Silver Brothers Co.*, 312 NLRB 1060 (1993). As the party seeking to invoke the privilege, the Respondent bears the burden to prove it applies. See *Pertec Computer Corp.*, 284 NLRB 810 (1987); *Washington Gas Light Co.*, 273 NLRB 116 (1984).

The Charging Party points out that the STARS reports prior to June 1, 2019, when the Respondent became a member of LifePoint PSO, were not part of the protected patient safety evaluation system because it did not yet exist. I agree, and find that the Respondent is obligated to provide the STARS reports that predate June 1, 2019. The 5 minute frustration forms, which are not alleged to be part of the privileged patient safety evaluation system, likewise are not encompassed in this defense, and the Respondent is obligated to provide them.

The only remaining question is how to balance the PSQIA privilege of the STARS reports from June 1, 2019 to the present, with the obligation to provide relevant information under the Act. The Board applies the balancing test set forth in *Detroit Edison*, supra at 318–320, which balances the union’s need for requested information against any “legitimate and substantial confidentiality interests established by the employer.”

Beitler’s testimony that the STARS reports, as part of the patient safety evaluation system under the PSO are confidential and privileged patient safety work product, is unrefuted. Based on this testimony, the reports appear to potentially fall within the definition of patient safety work product pursuant to 42 U.S.C. § 299b–21(7)(A)(iii).<sup>11</sup> Even if it does not meet the PSQIA’s definition strictly, like with the HIPAA confidentiality concerns, the Respondent clearly has a legitimate interest in protecting patient and employee privacy, which need to be addressed and reflected in any remedy. Moreover, a review of various federal and state court cases to address the confidentiality and privilege aspects of the PSQIA reveals an area of law that has not yet been well developed, and about which there are conflicting interpretations.<sup>12</sup> I find the Respondent has raised a legitimate and substantial concern that disclosure of the STARS report may violate the PSQIA.

I also find the Union’s need for the information, which goes to the heart of the nurses’ concerns about their working conditions, i.e. safety in the workplace, is highly significant. Without reviewing the safety issues the nurses had raised with the Respondent, the Union’s bargaining position regarding safety measures is uninformed and thus weakened.<sup>13</sup>

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<sup>11</sup> There are numerous other requirements that the record does not resolve. For example, under 42 U.S.C. § 299b–21(7)(A), for a record “assembled or developed” by a provider to a PSO to qualify as patient safety work product, it must actually be reported to the PSO. Though Beitler described the reporting process, she did not provide any testimony regarding whether the STARS reports at issue here were, in fact, submitted to the PSO. The record is devoid of who sent the forms to the PSO, how they were sent, when they were sent, etc. See *Tanner v. McMurray*, 405 F. Supp. 3d 1115, 1222 (D.N.M. 2019) (Employer did not indicate on which dates the documents they referenced were entered into the patient safety evaluation system, and they did not expressly state that any particular document to which they refer was created for the express purpose of reporting to a PSO, both prerequisites to qualify for the PSQIA privilege). This does not negate my finding, however, that the Respondent has raised a legitimate and substantial concern that disclosure of the STARS reports may violate the PSQIA.

<sup>12</sup> See, e.g., *Tanner v. McMurray*, supra; *Dep’t of Fin. & Prof’l Regulation v. Walgreen Co.*, 361 Ill.Dec. 186, 970 N.E.2d 552, 557 (Ill.App.Ct.2012); *Tibbs v. Bunnell*, 448 S.W.3d 796 (Ky. 2014); *Shands Teaching Hosp. & Clinics, Inc. v. Azar*, No. 1:17-cv-245-MW/GRJ, 2018 WL 7350670 (N.D. Fla. June 22, 2018). These cases also illustrate that confidentiality and privilege under the PSQIA may turn on application of state law.

<sup>13</sup> I note the Union is only requesting safety concerns filed by nurses, and not by any other medical or non-medical personnel.

To argue that the documents are confidential and privileged, and not subject to disclosure even if redacted, the Respondent points to the confidentiality and privilege sections of the PSQIA at 42 U.S.C. § 299–22, which provide:

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(a) Privilege - Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c), patient safety work product shall be privileged and shall not be—

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(1) subject to a Federal, State, or local civil, criminal, or administrative subpoena or order, including in a Federal, State, or local civil or administrative disciplinary proceeding against a provider;

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(2) subject to discovery in connection with a Federal, State, or local civil, criminal, or administrative proceeding, including in a Federal, State, or local civil or administrative disciplinary proceeding against a provider;

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(3) subject to disclosure pursuant to section 552 of title 5 (commonly known as the Freedom of Information Act) or any other similar Federal, State, or local law;

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(4) admitted as evidence in any Federal, State, or local governmental civil proceeding, criminal proceeding, administrative rulemaking proceeding, or administrative adjudicatory proceeding, including any such proceeding against a provider; or

(5) admitted in a professional disciplinary proceeding of a professional disciplinary body established or specifically authorized under State law.

30

(b) Confidentiality of patient safety work product - Notwithstanding any other provision of Federal, State, or local law, and subject to subsection (c), patient safety work product shall be confidential and shall not be disclosed.

(R. Br. 18.) There are exceptions to the privilege and confidentiality defenses, however, as set forth in the same statutory provision:

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(2) Exceptions from confidentiality

Subsection (b) shall not apply to (and shall not be construed to prohibit) one or more of the following disclosures:

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(A) Disclosure of patient safety work product to carry out patient safety activities.

(B) Disclosure of nonidentifiable patient safety work product.

45

(C) Disclosure of patient safety work product to grantees, contractors, or other entities carrying out research, evaluation, or demonstration projects authorized, funded, certified, or otherwise sanctioned by rule or other means by the Secretary, for the purpose of

conducting research to the extent that disclosure of protected health information would be allowed for such purpose under the HIPAA confidentiality regulations.

5 (D) Disclosure by a provider to the Food and Drug Administration with respect to a product or activity regulated by the Food and Drug Administration.

(E) Voluntary disclosure of patient safety work product by a provider to an accrediting body that accredits that provider.

10 (F) Disclosures that the Secretary may determine, by rule or other means, are necessary for business operations and are consistent with the goals of this part.

15 (G) Disclosure of patient safety work product to law enforcement authorities relating to the commission of a crime (or to an event reasonably believed to be a crime) if the person making the disclosure believes, reasonably under the circumstances, that the patient safety work product that is disclosed is necessary for criminal law enforcement purposes.

20 (H) With respect to a person other than a patient safety organization, the disclosure of patient safety work product that does not include materials that--

(i) assess the quality of care of an identifiable provider; or

(ii) describe or pertain to one or more actions or failures to act by an identifiable provider.

25 (3) Exception from privilege

Subsection (a) shall not apply to (and shall not be construed to prohibit) voluntary disclosure of nonidentifiable patient safety work product.

30 The Respondent argues that the information cannot be provided because the regulations require that the provider—here WVMC—will necessarily be identified due to the nature of the request, and this runs afoul of the PSQIA’s privilege and confidentiality provisions. (R Br. 20–22.) The Charging Party counters that the regulations permit disclosure of patient safety work product if certain information is redacted. (CP Br. 19–20.)

40 I could find no caselaw directly on point regarding nonidentifiable patient safety work product and specifically whether it can be sufficiently redacted under facts similar to those here. Fortunately, resolution of this case does not depend upon resolution of the matter under the PSQIA. Balancing the legitimate interests of both parties, I find the Respondent is obligated to bargain with the Union over an accommodation that will provide the Union the information it needs to engage in informed bargaining while addressing WVMC’s concerns about violating the confidentiality and privilege provisions of the PSQIA. As one court noted, “nothing about these documents being privileged renders the facts that underlie the patient safety work product as also privileged.” *Daley v. Tereul*, 107 N.E.3d 1028 (Ill. Ct. App. 2018). Accordingly, the Respondent will be ordered to promptly and in good faith bargain with the Union over an accommodation that will provide the Union with the information it requested, regardless of

whether or not the safety issue the nurse raised was also reported on a STARS form, after June 1, 2019.<sup>14</sup>

#### CONCLUSIONS OF LAW

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By failing and refusing to provide the Union with relevant requested information, and by unreasonably delaying providing the Union with relevant requested information, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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#### REMEDY

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

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Having found the Respondent failed and refused to provide the Union with relevant requested information, the Respondent will be ordered to cease and desist from this activity and to provide the Union with the information it requested, i.e. copies of any unsafe staffing/safety concerns filed by nurses over the course of the last three years. This includes, but is not limited to, the 5 minute frustration forms filed in the three years prior to the request and the STARS forms that pre-date June 1, 2019. It also includes any other responsive documents. The information provided may be redacted to comply with HIPAA.

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30

Having found the Respondent failed and refused to provide the Union with information it asserts is privileged under the Patient Safety and Quality Insurance Act, and failed to bargain with the Union over mutually agreeable accommodations, the Respondent will be ordered to cease and desist from this activity, and will be ordered to immediately bargain in good faith with the Union over a mutually agreeable accommodation in a manner that does not unfairly or unreasonably burden the Union in the performance of its representational duties.

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Having found the Respondent unreasonably delayed in providing the Union with relevant requested information, i.e., the procedure for reporting safety concerns, the Respondent will be ordered to cease and desist from this action.

40

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase.

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<sup>14</sup> Nothing in this decision should be interpreted as ordering the Respondent to turn over the actual STARS forms to the extent the Respondent has a genuine and legitimate belief they are privileged under the PSQIA. There are numerous ways the information can be provided without requiring the Respondent to turn over the STARS forms, and the give-and-take of bargaining will hopefully yield a mutually acceptable result.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

ORDER

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The Respondent, Willamette Valley Medical Center, McMinnville, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Failing and refusing to furnish information in response to requests made by Oregon Nurses Association.

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(b) Failing to bargain over a mutually agreeable accommodation to information it asserts is privileged under the Patient Safety and Quality Improvement Act of 2005.

(c) Failing and refusing to respond in a timely manner to information requests made by Oregon Nurses Association.

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(d) 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.

25

(a) Within 14 days of this Order, furnish the Union with the information it requested by letter dated March 2, 2020. With regard to the STARS reports filled out on or after June 1, 2019, that were submitted to LifePoint PSO, LLC, promptly and without delay bargain mutually agreeable accommodations in good faith, and in a manner that does not unfairly or unreasonably burden the Union in its performance of its representational duties, regarding providing the information the Union requested.

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(b) Within 14 days after service by the Region, post at its facility in McMinnville, Oregon, copies of the attached notice marked “Appendix.”<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily

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<sup>15</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>16</sup> 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.”



communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2, 2000.

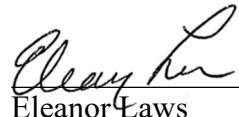
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(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C. July 26, 2021

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Eleanor Laws

Administrative Law Judge

**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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT refuse to bargain collectively with the Oregon Nurses Association (the Union) by refusing to provide or unreasonably delaying in providing the Union with information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of its unit employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL raise with the Union any valid specific privacy or confidentiality concerns we have under the Patient Safety and Quality Improvement Act of 2005 regarding providing the Union with STARS forms nurses filed after June 1, 2019, and promptly bargain mutually acceptable accommodations in good faith, and in a manner that does not unfairly or unreasonably burden the Union in its performance of its representational duties.

WE WILL provide the Union with all other information that it requested in its March 2, 2020, information request.

**WILLAMETTE VALLEY MEDICAL CENTER**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078  
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/19-CA-265597](http://www.nlr.gov/case/19-CA-265597) 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.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (206) 220-6284.