

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: December 30, 2003

TO: Gerald Kobell, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice 530-6067-6033
530-6067-6067-5267

SUBJECT: Community Living & Learning, Inc. 530-6067-6067-6067
Case 6-CA-33400 530-6067-6067-7100
530-6067-7600
530-8095

This case was submitted for advice as to whether the Employer unlawfully refused to bargain over an accommodation of its confidentiality interest in patient medical information and investigatory reports into alleged patient abuse requested by the Union in connection with an employee grievance. We conclude that the Employer violated Section 8(a)(5) and (1) by unlawfully refusing to bargain over an accommodation of its legitimate confidentiality interest in these documents.

FACTS

Community Living & Learning, Inc. (Employer) provides services to mentally challenged individuals in group homes in Pennsylvania. SEIU Local 668 (Union) represents a unit of employees providing health care and oversight to adult mentally challenged individuals at community homes, including the Employer.

On October 11, 2002,¹ a patient (Patient) at the Employer's facility alleged that unit employee Foust verbally abused him. On October 18, the Employer completed a "Final Investigative Report" on the allegation. On October 23, the Employer terminated Foust, citing the October 11 incident, as well as a prior case of alleged verbal abuse. The termination letter also referred to past instances of poor performance, including two errors in medication dispensing and failing to follow directions. On October 25, the Union filed a grievance on Foust's behalf, alleging that the Employer discharged her without cause because it failed to consistently retrain and discipline employees.

On January 23, 2003, the Union requested information, including the Patient's Individual Daily Plan (contains a patient's mental health diagnosis) and Individual Performance Plan (IPP) (implements the Daily Plan), and

¹ All dates are in year 2002, unless otherwise noted.

Investigatory Reports² in cases where Patient had accused other workers of physical or verbal abuse, with witness statements from those cases. Employer Human Resources Consultant Reilly informed Union representative Hitchings that this information was not relevant, and that the Union would only obtain it through a subpoena. Hitchings responded that employees are not informed of their patient's tendencies and needs and that the Union needed the information in Patient's history to see if Foust was disparately treated. On January 16, 2003, the Employer responded that "due to confidentiality requirements we cannot release the information you requested on the client including" Patient's Daily Plan and IPP, as well as Investigatory Reports in other cases involving Patient (collectively, the "Confidential Documents").

ACTION

We conclude that the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement, alleging that the Employer unlawfully refused to bargain over an accommodation of its confidentiality interest in the Confidential Documents because Board law, the Health Insurance Portability and Accountability Act (HIPAA),³ and state law permit their disclosure upon the receipt of an individual patient's consent and/or the redaction of individually identifiable information.

² Investigatory Reports are summaries of a facility's investigations into alleged employee misconduct, and include factual information concerning the incident, a summary of the investigative procedure, a list of documentary, physical, and testimonial evidence, and may include a summary of a patient's diagnosis. According to a representative from the Pennsylvania Office of Mental Retardation, community homes like the Employer keep investigatory reports and witness statements in a locked cabinet separate from individual patient records in order to protect the confidentiality of the staff member who is being investigated.

³ Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26 U.S.C., 29 U.S.C., and 42 U.S.C.). HIPAA is a federal law creating a system of national protections for the privacy of individually identifiable health information. The U.S. Department of Health and Human Services Office of Civil Rights (DHHS) implements and enforces HIPAA through the Privacy Rule. See 45 CFR §§ 160 & 164 (2002).

I. Background Law

A union is generally entitled to information that is relevant to its collective-bargaining responsibilities.⁴ Under Detroit Edison v. NLRB,⁵ a union's interest in arguably relevant information does not always predominate over all other interests, such as when an employer asserts a legitimate and substantial interest in maintaining confidentiality. In determining whether an employer has satisfied its burden of establishing this confidentiality interest, the Board considers factors such as whether the information possesses a "legitimate aura of confidentiality"⁶ and whether another law protects the confidentiality of the information.⁷ If an employer satisfies this burden, it generally has a duty to bargain in good faith over an accommodation of its confidentiality concerns.⁸ The accommodation may condition disclosure of the information, such as upon the receipt of employee consent,⁹ or with confidential or individually identifiable

⁴ See NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

⁵ 440 U.S. 301, 318 (1979).

⁶ See Exxon Co. USA, 321 NLRB at 898-99 (identities of persons who disclosed prior drug or alcohol-related arrests, convictions, and rehabilitation); Johns-Manville Sales Corp., 252 NLRB at 368 (employees with a certain medical disorder).

⁷ See Postal Service, 305 NLRB 997, 998 (1991) ("When a defense of confidentiality is raised, the Board must balance the interests of the party seeking the information against those of the party asserting the defense, and may look to other statutes ... as sources of policy to be considered in striking the balance"), citing Detroit Edison, supra, at 318 n.16; Goodyear Atomic Corp., 266 NLRB 890, 891-92 (1983), enfd. 738 F.2d 155 (6th Cir. 1984) (disclosure of aggregate and statistical medical information not prohibited by Privacy Act); LaGuardia Hospital, 260 NLRB 1455, 1463 (1982) (patient's right of privacy not absolute under state law, which authorizes disclosure when otherwise required by law).

⁸ See Pennsylvania Power Co., 301 NLRB 1104, 1105-06, citing Minnesota Mining & Mfg. Co., 261 NLRB 27 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983).

⁹ Compare Johns Manville Sales, 252 NLRB 368, 368 (1980) (employer demonstrated that its refusal to disclose the information was made in good faith because it sought to accommodate the union by submitting the consent forms to a number of employees who had the lung disease, and by turning

information redacted.¹⁰ If the employer fails to bargain over an accommodation of its confidentiality interest, the Board will normally order bargaining as affirmative relief, since the resolution of disputes by resort to the collective bargaining process best effectuates labor peace.¹¹

II. Relevancy

Here, the Confidential Documents are relevant to the Union's processing of Foust's grievance. The Union believes that Patient intentionally causes problems for staff. The Daily Plan and IPP might contain information bolstering this view. The Investigatory Reports and attached witness statements from other incidents might serve a similar purpose, and show how the Employer disciplined other employees also alleged to have abused Patient.

over to the union the names of those who consented) and Detroit Edison v. NLRB, 440 U.S. 301 (1979) (burden on union minimal where union must merely obtain the consent of employees whose grievances it is processing), with Exxon Co. USA, 321 NLRB 896, 897 (1996), enfd. 116 F.3d 1476 (5th Cir. 1997) (employer failed to show that it had even submitted consent forms to employees or that it actually bargained with the union over the issue).

¹⁰ See LaGuardia Hospital, 260 NLRB at 1455-56 (ordering disclosure of only those portions of patient charts containing information relevant to the resolution of grievances, which did not include patient identity information; to preserve patient privacy, Board ordered parties to act in good faith to ensure that patient identities were revealed only to nurses who already had been in a confidential relationship with the patients, and then only if a comparison of the abstracts with the original charts was necessary to verify their accuracy). Accord Washington Gas Light Co., 273 NLRB 116, 117 n.11 (1984) ("Inasmuch as the Union has never sought the confidential medical information, we shall order the Respondent to furnish the Union the disciplinary records with the medical information deleted."). The union there sought disciplinary records, some of which contained confidential references to employee alcoholism.

¹¹ See Exxon Co. USA, 321 NLRB at 899 (although employer confidentiality concerns about "audits" or background checks did not outweigh union's need to know which employees were audited, Board ordered disclosure conditioned on bargaining to a mutually satisfactory confidentiality agreement, protective order, etc.).

III. Confidentiality

a. Daily Plan and IPP

Under Board law, the Daily Plan and IPP are confidential because they contain sensitive and personal information of Patient such as mental diagnoses and treatment, subjects possessing a "legitimate aura of confidentiality."¹² There is also no evidence that the Employer has treated these documents in a non-confidential manner,¹³ or that patients would otherwise expect that the Employer would not maintain their confidentiality.¹⁴

The Daily Plan and IPP are also confidential under HIPAA. First, as a provider of services to mentally retarded individuals, the Employer is a "covered entity" subject to the Privacy Rule's restrictions on disclosure.¹⁵ Furthermore, the Daily Plan and IPP are HIPAA-covered Protected Health Information (PHI) generally shielded from disclosure by covered entities because they relate to Patient's mental health or condition.¹⁶ In a telephone conversation, the DHHS Office of Civil Rights, which enforces HIPAA, confirmed our conclusion that the Employer is a covered entity and the Daily Plan and IPP are PHI.

¹² See Johns-Manville Sales Corp., 252 NLRB at 368; see also Detroit Edison v. NLRB, 440 U.S. at 318 ("The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known ...").

¹³ See Washington Gas Light Co., 273 NLRB at 117

¹⁴ See Wayne Memorial Hospital Assn., 322 NLRB 100, 104 (1996).

¹⁵ A "covered entity" means: a health plan; a health care clearinghouse; or a health care provider who transmits any health information in electronic form. See 45 CFR § 160.102(a)(1)-(3) (2002).

¹⁶ PHI is defined as "individually identifiable health information," which "includ[es] demographic information collected from an individual, and is created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual" See *id.* at § 160.103. Here, there is no contention that the Daily Plan and IPP are not HIPAA-covered PHI.

Pennsylvania state law also accords the Daily Plan and IPP a degree of confidentiality by requiring written consent of a mentally retarded community home resident before releasing contents from his or her records.¹⁷ These regulations specifically include IPPs as part of a patient's records.¹⁸ In a telephone conversation, the Pennsylvania Office of Mental Retardation (OMR), the state agency that enforces the regulations, confirmed that a patient's records include IPPs. The OMR representative also said that, although the regulations do not specifically include a "Daily Plan" as part of a patient's records, a document containing mental health diagnoses would be in the records. Thus, we would consider both the Daily Plan and IPP to be confidential and subject to disclosure restrictions under Pennsylvania law.

b. Investigatory Reports

We conclude that the Investigatory Reports and accompanying witness statements possess a legitimate aura of confidentiality under Board law. Although it appears that the Employer uses them as a tool of employee discipline and not for patient health care purposes, these documents likely contain highly sensitive and personal patient mental health information that would render them confidential.¹⁹

We would not, however, conclude that the Investigatory Reports and accompanying witness statements are subject to the confidentiality requirements of either HIPAA or Pennsylvania law. In our telephone conversation, the DHHS Office of Civil Rights representative explained that if a document is not part of a "Designated Record Set"²⁰ under HIPAA, but is instead kept for employer personnel purposes, then it would likely not be considered PHI. As noted

¹⁷ See 55 Pa. Code § 6400.217.

¹⁸ See *id.* at § 6400.213(7).

¹⁹ Cf. Washington Gas Light Co., 273 NLRB at 117 (although some disciplinary records contained confidential medical information relating to alcoholism, employer's blanket refusal to furnish any disciplinary record held unlawful).

²⁰ See 45 CFR § 164.501. "Designated Record Set" means: (1) a group of records maintained by or for a covered entity that is: (i) the medical records and billing records about individuals maintained by or for covered health care provider; ... or (iii) used ... by or for the covered entity to make decisions about individuals.

above, n.2, investigatory reports are kept separate from the individual patient records. Thus, the Investigatory Reports and witness statements are not HIPAA-protected PHI as they are not part of a "Designated Record Set."

According to the Pennsylvania OMR representative, Investigatory Reports and witness statements are not the "unusual incident reports" that Pennsylvania regulations include in a patient's confidential records subject to the regulatory restrictions on disclosure.²¹ Thus, under Pennsylvania law, the Investigatory Reports and witness statements would not require a patient's written authorization for release.

IV. Failure to Seek and Bargain over an Accommodation

Despite the Employer's legitimate confidentiality interest in the Confidential Documents, we conclude that it unlawfully failed and refused to bargain over an accommodation of this interest. Board law requires the Employer to propose an accommodation, such as consent by an individual to release his or her confidential records, or redaction of confidential information, where a collective bargaining representative requests relevant, confidential information. Neither HIPAA nor Pennsylvania law alters that duty here.²² Redaction of individually identifiable information, such as patient names, is not a viable accommodation of the Employer's confidentiality concerns over Patient's Daily Plan and IPP because the Union already knows Patient's identity. However, Board law, HIPAA and state law all permit the Employer to bargain over an accommodation whereby a patient or his or her guardian may provide written authorization for release of the

²¹ See 55 Pa. Code § 6400.213(2).

²² See Dickerson-Chapman, Inc., 313 NLRB 907, 942 (1994) (OSHA does not relieve employer of statutory obligation to bargain over designation of employee as OSHA-defined "competent person," involving assignment of new duties); Keystone Consolidated Industries, 309 NLRB 294, 298 (1990), enf. den. on other grounds sub nom. Keystone Steel & Wire v. NLRB, 41 F.3d 746 (D.C. Cir. 1994), citing Foodway, 234 NLRB 72, 77 (1978) ("While the mandate and requirements of other Federal statutes may serve to limit the area of discretion which a party may exercise in fulfilling [its] bargaining obligation ... to enter into the bargaining process in good faith is not hereby minimized or obviated.").

Confidential Documents.²³ Thus, we conclude that the Employer unlawfully failed and refused to propose an accommodation, such as patient consent, of its confidentiality interest in the Daily Plan and IPP. The Employer also unlawfully failed and refused to seek an accommodation, such as patient consent or redaction of individually identifiable information, of its confidentiality interest in those portions of the Investigatory Reports and attached witness statements involving past instances of alleged abuse of Patient, which may contain confidential information.²⁴

²³ In support of its claim that it has no obligation to furnish the Confidential Documents to the Union, the Employer points to provisions of Pennsylvania regulations that allow an oversight group to refuse to allow a mentally retarded individual living in a community home and that individual's personal representative access to the individual's file in certain limited situations, such as where disclosure of the information would be a "substantial detriment" to the individual. See 55 Pa. Code § 6400.213(2). The Pennsylvania OMR representative verbally informed us that those situations would likely apply only in limited circumstances, such as where a patient informs the oversight group that he or she might face abuse if a parent or guardian has access to the patient's records, or where a parent requests that a patient with a serious mental illness not view the records' contents because it might trigger an episode. The OMR representative also said that, although a facility could suggest to a patient that he or she not see the records, it would likely not deny access if the individual insisted. The HIPAA Privacy Rule similarly restricts an individual's access to his or her PHI where "a licensed health care professional has determined ... that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person." See 65 Fed. Reg. 82462, 82733 (2002). Neither of these provisions is dispositive of whether the Union may have access to these documents, however. They speak only to non-disclosure to the patient or the patient's guardian in limited circumstances.

²⁴ To the extent that witness statements do not contain confidential patient information, the Employer should furnish them to the Union in accordance with traditional Board law principles regarding witness statements. See Anheuser-Busch, 237 NLRB 982, 984 (1978) (no prearbitration obligation to disclose witness statements). But see Pennsylvania Power Co., 301 NLRB 1104, 1107 (1991) (despite lawful non-disclosure of witness statements, employer must furnish summaries of the statements).

In accordance with the above, we conclude that the Employer unlawfully failed and refused to seek and bargain over an accommodation of its legitimate confidentiality interest in the Confidential Documents. The Employer was not foreclosed from providing these documents because Board law, HIPAA, and state law all permit the Employer to furnish these documents upon the receipt of Patient's consent or the redaction of individually identifiable information, as the appropriate case may be. The Employer, however, failed in its statutory duty to propose these or any other accommodations. Accordingly, the Region should issue a Section 8(a)(5) and (1) complaint, absent settlement.

B.J.K.