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Crittenton Hospital and Local 40, Office and Professional Employees International Union, AFL-CIO. Case 7-CA-44284

July 30, 2004

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On June 13, 2002, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, except as modified here, and to adopt the recommended Order as modified.³

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to notify and bargain with the Union over the change made to its dress code policy in October 2001,⁴ prohibiting the

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Although the judge provides several different dates in his decision, we note that the change in the Respondent's dress code policy, which required the registered nurses to purchase at their own expense and wear "Ceil Blue" colored scrubs, was implemented in April 2001.

No exceptions were filed to the judge's findings that (1) deferral of the complaint allegations to the grievance-arbitration procedures of the parties' agreement was not appropriate; and (2) the Respondent did not unlawfully engage in direct dealing with employees regarding the change to the dress code made by the Respondent in April 2001.

Members Schaumber and Meisburg find that on this record the Respondent's unilateral change to the uniform policy, which required nurses to purchase new scrubs at a not insignificant cost, violated the Act. In doing so, they agree that the judge's analysis is consistent with extant Board law and that the evidence does not reflect an established past practice of such changes.

³ We shall modify the recommended Order and notice provisions that information be furnished to the Union by deleting "on request," in accordance with our decision in *I & F Corp.*, 322 NLRB 1037 fn. 1 (1997), enfd. mem. 191 F.3d 452 (6th Cir. 1999).

We also amend the judge's remedy to provide that interest be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁴ All dates are in 2001, unless otherwise noted.

registered nurses (RNs) from using acrylic or artificial nails on the job. We disagree.

The relevant facts can be summarized as follows. The Respondent is an acute care hospital. The Michigan Nurses Association (MNA) was the bargaining representative for the Respondent's RNs for several years before it ultimately lost a second election to the Union. In April, the parties reached an agreement that made no reference to the dress code policy that had been in place under the prior MNA contract. In October, Michael Jagels, the Respondent's director of human resources and chief negotiator, changed the dress code policy by prohibiting employees who provided hands-on health care to patients, such as RNs, from wearing acrylic or artificial nails. Under the prior policy, fingernails could not be longer than 1/8 inch past the tip of an employee's fingers and the use of acrylic and decorated nails was "strongly discouraged."

In finding that the Respondent unlawfully failed to notify and bargain with the Union over the October change made to its dress code policy, the judge reasoned, among other things, that apparel rules were a mandatory subject of bargaining under Board law. While we do not dispute this precedent, not all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices. The imposed change must be a "material, substantial, and significant" one. E.g., *Fresno Bee*, 339 NLRB No. 158, slip op. at 3 (2003), citing *Peerless Food Products*, 236 NLRB 161 (1978). "A change is measured by the extent to which it departs from the existing terms and conditions affecting employees." *Southern California Edison Co.*, 284 NLRB 1205 fn. 1 (1987), enfd. mem. 852 F.2d 572 (9th Cir. 1988).

The General Counsel failed to show that the October change in the dress code policy prohibiting RNs from wearing acrylic/artificial nails was material, substantial, and significant. On its face, the revised dress code does not constitute a material departure from the previous policy, under which fingernails could not be longer than 1/8 inch past the tip of an employee's fingers and the use of acrylic and decorated nails was "strongly discouraged." Further, apart from presenting evidence of the change itself, the General Counsel presented no evidence how this change affected or would affect the RNs' terms and conditions of employment. Specifically, the General Counsel did not call any witnesses to testify regarding the extent to which unit employees wore acrylic or artificial nails under the prior policy. To the con-

trary, because acrylic or artificial nails were already strongly discouraged under the old policy, it is reasonable to conclude that the RNs did not use them and, thus, this dress code change would not be significant to them. Therefore, we cannot conclude from the record that the October change in dress code policy was material, substantial, and significant.

On the basis of the limited facts presented, the General Counsel has not shown by a preponderance of the evidence that the Respondent violated the Act by failing to bargain over its October change to its dress code policy.

ORDER

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

1. Substitute the following for paragraph 2(c).

“(c) Furnish the Union with the safety committee meeting minutes as requested in its March 5, 2001 letter.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 30, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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 unilaterally change our dress code policy without giving the Union, which represents our employees in the appropriate unit described below, prior notice and an opportunity to bargain over such changes. The unit includes:

All full-time and regular part-time registered nurses employed by us at our Rochester, Michigan hospital; but excluding vice-president of nursing and patient care services, administrative directors, department managers, nursing shift supervisors, nurse manager for psychiatric services, emergency department manager, director of community health education, head nurses, patient care coordinators, Home Health Outreach nurses, and guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT refuse to provide the Union with requested information that is relevant to and necessary for its performance as exclusive bargaining representative of the above-described unit employees.

WE WILL NOT restrain or coerce the Union's steward at our Hospital facility by threatening to report the steward to the supervisor for engaging in protected or union activities on behalf of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the unlawful unilateral changes that we made to the dress code in April 2001, and WE WILL make unit employees whole for losses they may have incurred due to said unlawful changes.

WE WILL comply with the Union's March 5, 2001 request for copies of the safety committee meeting minutes.

CRITTENTON HOSPITAL

Judy Schulz, Esq., for the General Counsel.

Lawrence F. Raniszewski, Esq., for the Respondent.

Scott A. Brooks, Esq., for the Charging Party.

DECISION

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 19–20, 2002, following the filing of an unfair labor practice charge by Local 40, Office and Professional Employees International Un-

ion, AFL–CIO (the Union or Local 40), on August 13, 2001,¹ which was amended on October 18, and issuance of a complaint on November 30, by the Regional Director for Region 7 of the National Labor Relations Board (the Board) alleging that Crittenton Hospital (the Respondent or the Hospital), had violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that on August 2, the Respondent, through Chief Operating Officer Bart Buxton, an admitted statutory supervisor and agent, violated Section 8(a)(1) by threatening an employee for engaging in activities protected by Section 7 of the Act. It further alleges that the Respondent violated Section 8(a)(5) by changing its dress code policy in late May and in October without giving the Union prior notice of, and an opportunity to bargain over, those changes, and by refusing the Union's several requests for the minutes of the Hospital's safety committee meetings held since November 1999.

In a timely filed answer dated December 14, the Respondent denies engaging in any unlawful conduct. It further avers in its answer that the Union waived any right to notice or to bargain over changes in the dress code policy, and to the information requested. Finally, it contends that all allegations in the complaint should be deferred to the grievance-arbitration procedures of the parties' collective-bargaining agreement.

All parties at the hearing were afforded full opportunity to call and examine witnesses, to submit relevant oral and written evidence, to argue orally on the record, and to file posthearing briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following²

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporate entity, operates an acute care hospital facility in Rochester, Michigan. During the calendar year ending December 31, 2000, the Respondent's gross revenues exceeded \$250,000 and, during the same period, it purchased and had shipped and delivered directly to its Rochester, Michigan facility from points located outside the State of Michigan goods valued in excess of \$50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Factual background*

1. The collective-bargaining agreement

On November 22, 1999, the Union was certified as the exclusive collective-bargaining representative of all full-time and regular part-time registered nurses (RN's) employed by the Respondent at its Rochester, Michigan facility. Prior thereto, the RN's

had, since 1969, been represented by the Michigan Nurses Association (MNA) in conjunction with the Crittenton Hospital Registered Nurses Staff Council (CHRNSC).³

Respondent's human resources administrator, Michael Jagels, testified that he took part in the contract talks with the Union, which began in June 2000, and that a prior contract between the Respondent and MNA, received into evidence as Respondent's Exhibit 3, was used as the framework for the negotiations. Jagels recalls that the parties held more than 20 bargaining sessions, and that the Union submitted between 47–55 different proposals or changes to the MNA contract for the Respondent's consideration. While the Hospital also submitted their own proposals, Jagels claims they were fewer in number than those presented by the Union.

RN Barbara Chubb, who has been employed by Respondent for approximately 25 years, is the Union's chief steward at the Hospital. She was also involved in the negotiations between the Hospital and the Union. She affirmed that the MNA contract was used by the Union as the basis for the new Local 40 contract, that the Union "kind of went through every paragraph" of the MNA agreement and that, while changes were made, the Union "kept most of it" (Tr. 24).

The record reflects that on February 8, the parties reached agreement on a 3-year contract containing many of the same provisions found in the prior MNA contract. The agreement, for example, continued in effect 10 Hospital committees, including a "Nursing Dress code committee," which had been established under the prior MNA contract, and which called for Union representation on said committees.⁴ According to article XVI, section 7, the purpose for establishing such committees was to allow the parties to maintain "open channels of communication" which would be mutually beneficial to both parties.⁵ Jagels admitted that the specific functions or duties of the committees were not discussed with the Union during negotiations. (Tr. 218, 225). Chubb similarly explained that "we may have skimmed over" the committees during negotiations. She testified that she understood the purpose of the committees to be precisely what was stated in the contract, to wit, "to meet, have discussions, and, basically, . . . keep the channels of communication open" (Tr. 27–28). The contract, it should be noted, is silent on whether the union member representatives on these committees were authorized to bargain on the Union's behalf as to matters affecting the RN's terms and conditions of employment which might

³ A 1993–1995 collective-bargaining agreement between the Respondent and MNA, received into evidence as R. Exh. 3, reflects that MNA had previously been certified as the RN's bargaining representative by the Michigan Employment Relations Commission in 1969. (See art. I, sec. 1 of R. Exh. 3.)

⁴ See art. XVI, sec. 7 of GC Exh. 2 and R. Exh. 3. While the contract establishes a dress code committee, it makes no mention of a dress code policy which had been in effect before the Union became the RN's bargaining representative. The Respondent also maintained other committees in which the Union had no representation or participation (see GC Exh. 15). One such committee is the "Safety Committee" which is comprised only of management personnel.

⁵ The MNA contract contained the identical language.

¹ All dates are in 2001, unless otherwise indicated.

² The parties' unopposed joint motion to correct certain spelling, grammatical, and other inaccuracies in the transcript is granted and made part of the record as GC Exh. 20.

fall within a particular committee's jurisdiction. Chubb testified in this regard that at no time during the negotiations did the Union ever suggest to, or tell, the Respondent that it was delegating its bargaining authority in the respective areas assigned to these committees.

The "management-rights" and "zipper" clauses of the MNA contract were likewise carried over without change into the Local 40 contract.⁶ The management-rights clause, entitled "HOSPITAL RIGHTS" and found in article XIII, section 1 of the parties' agreement, in relevant part, reads as follows:

The Hospital retains the sole right to manage and operate the Hospital including but not limited to the sole and exclusive right to . . . maintain order and efficiency and to make rules of conduct for employees . . . The Hospital shall have the sole and exclusive right to administer all matters not specifically and expressly covered by this Agreement, without limitation, implied or otherwise.

The zipper clause, at article XIII, section 5, reads as follows:

This Agreement is the sole is the sole and entire agreement between the parties and supersedes all prior agreements, practices, and understandings between the employees covered hereby and the Hospital. In the event OPEIU believes the Hospital is abusing Article XIII, Section 5, OPEIU on ten (10) calendar days written notice to the hospital, can re-open this Section 5 for negotiation.

Jagels was never asked, and the record does not disclose, whether either or both of these provisions was the subject of any discussion between the parties during their negotiations. Jagels, however, understood the language of the zipper clause to mean that the Hospital's past practices were being superseded by the parties' contract (Tr. 225–226).

2. The April and October changes in dress code policy

The Respondent maintains a hospital-wide dress code policy as well as a separate dress code policy for the nursing (RN's) department.⁷ On April 1, the Respondent instituted certain changes in the RN's dress code policy.⁸ Endoscopy Department Manager Kathleen Van Poppelen, the only management employee on the dress code committee, testified that in the fall of 2000, the committee, comprised of employees represented by various unions, including two from Local 40,⁹ met to discuss complaints and

concerns being expressed by employees that "the hospital was starting to look very sloppy" and to see what could be done to the dress code to remedy those concerns (Tr. 239). A meeting of the committee was thereafter held at which it was agreed that all committee members would work together to draft some recommendations on how the dress code policy might be improved. The committee subsequently came up with certain recommended changes which were submitted to Hospital management for approval. Among the recommendations was a suggestion that the color of the RN's uniform or "scrubs" and shoes be changed, and that the Hospital bear the cost of the change. While the Hospital agreed with the changes proposed by the dress code committee, it declined to pay for the RN's' new scrubs.¹⁰ Van Poppelen testified that the target date for implementing the changes in the dress code policy initially was set for September 15, but that the implementation date was subsequently changed to April 15, 2002, in order to give RN's more time to "save up" the money needed to acquire their new scrubs. Although Local 40 members Kowalski and Loyson were on the committee and may have participated in developing the proposed changes to the dress code policy, Van Poppelen admitted that the Union was never notified of the changes proposed by the committee, but explained in this regard that when such changes had occurred in the past, the matter "was always just negotiated among the committee" (Tr. 247). She did not, however, elaborate further on when or how often these alleged prior changes may have occurred, or the specific nature of and circumstances surrounding said changes. Chubb, it should be noted, testified that, to the best of her knowledge, the dress code had been changed only once before during her 25 years of employment at the Hospital (Tr. 69).¹¹

Jagels also testified regarding the dress code changes. He testified that at a management meeting held in early 2001 Van Poppelen informed him that the dress code committee, following suggestions from RN's, was proposing that changes be made in the dress code policy so as "to have some uniformity to the appearance of staff RN's in the Hospital." (Tr.

¹⁰ The new change required RN's to purchase at their own expense and wear "Ceil Blue" scrub uniforms.

¹¹ A review of copies of the dress code policy received into evidence as GC Exhs. 3 and 5 appear to bolster Chubb's claim that the RN's dress code policy had only been changed once before the changes unilaterally instituted by Respondent in April. Thus, GC Exh. 3 reflects that the RN's dress code policy was first instituted in "10/67." Below the "10/67" effective date shown in GC Exh. 3 is an entry showing that the dress code policy had last been revised in "9/97." GC Exh. 5, which again is a copy of the RN's dress code policy, reflects the contested revision made by Respondent to the policy in "4/01." Next to the "4/01" entry in the "Date of Revision/Review" box is a "9/97" date reflecting, as in GC Exh. 3, the last revision made to the dress code policy. There is nothing on either of these documents to suggest that changes in the dress code policy had occurred at any time prior to "9/97." It is reasonable to believe that had such changes occurred, the Respondent would have recorded the date such changes were made in the revision box, as it did on GC Exh. 5, or produced other copies of the dress code policy reflecting that such changes had indeed been made.

⁶ Compare art. XIII, secs. 1 and 5 of GC Exh. 2 and R. Exh. 3.

⁷ The hospital-wide and nursing department dress code policies are generally consistent with each other. Where differences occur, the hospital-wide policy prevails.

⁸ While the changes in the dress code were made official on April 1, as noted infra, actual implementation was delayed for a year. (GC Exh. 5; Tr. 248).

⁹ The Local 40 representatives were RN's Sue Kowalski and Peggy Loyson. Chubb testified without contradiction that she learned from Kowalski that the latter was asked by a nurse manager to serve on the dress code committee. There is no indication how Loyson came to be on the committee. Van Poppelen testified she was first appointed to the committee in 1994, and after a brief departure from the hospital, was again asked to serve on the committee when she returned in December 2000 (Tr. 238–239).

194–195.). Jagels explained that he felt the change was needed so that patients and nonhospital personnel would be able to distinguish licensed nurses from other nonlicensed or auxiliary personnel at the Hospital. Jagels claims that the usual practice whenever such changes were to be made was for the dress code committee to notify him after it had met to discuss and draft the changes, but that management, not the dress code committee, had the final word on what, if any, changes proposed by the committee would be implemented (Tr. 218). The committee’s purpose, according to Jagels, was “to meet on an as needed basis to make recommendations regarding changes to the dress code (Tr. 189).” Jagels admits that the Respondent did not notify the Union of the dress code changes before implementing them. Once the changes in the dress code were adopted, the Hospital posted notices at different nurses’ units, and placed inserts in a Hospital publication, advising employees of the changes.

On May 21, the Union’s chief steward at the Hospital, RN Barbara Chubb, wrote to Jagels that she had received inquiries from unit members about the proposed changes to the dress code. Chubb advised Jagels in the letter that the Board defines a dress code as a mandatory bargaining subject that cannot be adopted, changed, or eliminated without first notifying the Union and affording it an opportunity to bargain over any desired change. She then requested that Jagels provide her with a copy of the proposed changes for the Union’s approval and for an opportunity to request bargaining before they were implemented. (GC Exh. 4.) Chubb testified that about a week or two after sending her letter, the changes in the dress code were posted at the various nursing units and on a conference room bulletin board located in the labor and delivery unit. She also recalls seeing the changes in the employee newsletter sometime in June.

By letter dated June 11, Jagels explained to Chubb why the change in the dress code policy was needed, and that the Hospital’s intent in revising the dress code was to answer its patients’ needs and foster customer satisfaction. He stated that the revisions to the dress code policy were developed by staff employees and management, and that Local 40-represented employees Kowalski and Loyson, served on the dress code committee (GC Exh. 7). The June 11, letter, however, did not explain why the Union was never notified or given an opportunity to bargain over the April change in the dress code. At the hearing, Jagels gave conflicting, and not very credible, explanations for the Hospital’s failure to do so. Thus, when asked on direct examination by Respondent’s counsel why management felt it had the right to unilaterally change the dress code, Jagels replied that the management-rights clause gave it that right. A little later in his testimony, Respondent’s counsel again asked Jagels why he did not believe the Hospital was under any obligation to notify or bargain with the Union over the dress code changes. Jagels this time did not cite the management rights clause as support for the Hospital’s unilateral action but instead alluded to a past practice defense by claiming that, “based on a twenty plus history of working with staff RN’s and the dress code committee, no one felt there was a need” to do so.¹² Yet, when asked by the trial judge if

¹² Jagels, like Van Poppolen, offered no testimony as to when or how often the dress code had been changed in the past, nor as to the nature of and circumstances surrounding any such alleged prior

he believed the Hospital was required to bargain with the Union over changes in the dress code, Jagels replied that bargaining would have been required if the Union had requested it, but added that no such request had been made by the Union and that the latter had, in any event, “delegated their responsibility to [the] committees,” including presumably the dress code committee (Tr. 190, 192, 203).

Regarding the alleged “delegation of bargaining authority” claim, Union Vice President Sydney Villerot testified, credibly and without contradiction, that the Union never agreed that the Local 40 representatives on the dress code and other committees were authorized to bargain on behalf of the Union regarding the subject matters covered by the committees, and that she never told or authorized Kowalski or Loyson to negotiate on behalf of the Union regarding changes to the dress code. Chubb likewise credibly testified that she never told Kowalski or Loyson that they had authority to bargain on the Union’s behalf regarding this dress code issue. (Tr. 37; 103–104.)

In October, Jagels made another change to the Hospital’s dress code policy by prohibiting individuals engaged in providing hands-on health care to patients, such as RN’s, from using acrylic or artificial nails on the job.¹³ The change, he claims, was prompted by discussions he had had with, and information in literature provided to him by, the Hospital’s infection control manager showing that acrylic and/or artificial nails could be a potential transmitter of diseases. Jagels admits he did not notify the Union before making this change because the issue involved the health and safety of the patient, a matter over which, in his view, the Respondent was not required to bargain under article XIII, section 1 of the parties’ agreement (Tr. 198).

The complaint, as noted, alleges, the General Counsel contends, and the Respondent denies, that its failure and refusal to notify and bargain with the Union over the changes made to its dress code policy in February and October violated Section 8(a)(5) and (1) of the Act. I find merit in the allegation.

Discussion

It is a well settled that an employer has a statutory duty to bargain in good faith with the duly chosen representative of its employees regarding the latter’s wages, hours, and other terms and conditions of employment, commonly referred to as “mandatory” subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958). The matter of appropriate wearing apparel at the workplace has been found to constitute a mandatory bargaining subject. *St. Luke’s Hospital*,

change. He concedes, however, that the changes made to the dress code in February and October were the first since the Union became the RN’s’ bargaining representative, and that whatever dress code changes may have been made in the past occurred during MNA’s tenure as the RN’s’ representative (Tr. 219–220). The record does not reveal whether MNA ever acquiesced in any such unilateral action by the Hospital.

¹³ Under the prior policy, the use of acrylic and decorated nails was only “strongly discouraged” and not banned outright. (See GC Exh. 5, par. K.)

314 NLRB 434, 440 (1994); See also *Public Service Co. of New Mexico*, 337 NLRB 193 (2001); *Transportation Enterprises, Inc.*, 240 NLRB 551, 560 (1979).

The Respondent does not quarrel with the above propositions. Rather, in support of the unilateral changes made to the dress code, the Respondent, on brief, argues that in article XVI, section 7 of the parties' agreement, the Union effectively waived its right to bargain with the Hospital over changes in the dress code policy by delegating its bargaining authority in this regard to the dress code committee. The Respondent further argues that its right to make unilateral changes in the dress code policy was, in any event, justified under article XIII, section 1, the "Hospital [management] Rights" clause, and because of its past practice of making such unilateral changes without notifying or bargaining with the employees' chosen representative. I find its arguments to be without merit.¹⁴

The law is clear that a union's right to be consulted regarding unilateral changes in the terms and conditions of employment of employees it represents is a statutory one, and not one derived by contract. *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979), *enfd.* 646 F.2d 1173 (6th Cir. 1981). A union may contractually relinquish a statutory bargaining right provided the relinquishment is expressed in clear and unmistakable terms. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Such a waiver, however, will be found to have occurred only if there is clear and unequivocal contractual language or comparable bargaining history evidence indicating that the particular matter at issue was fully discussed and consciously explored during negotiations, and that the union consciously yielded its interest in the matter. *Metropolitan Edison Co. v. NLRB*, 460 U.S., *supra* at 708 (1983); *Regal Cinemas, Inc.*, 334 NLRB 304 (2001); *Hi-Tech Corp.*, 309 NLRB 3 (1992). Applying the above principles to the instant case, I find nothing either in article XVI, section 7, which establishes, *inter alia*, the dress code committee, or article XIII, section 1, the Hospital (or management) rights clause, of the parties' agreement to indicate that the Union clearly and unmistakably waived its right to bargain over changes in the dress code policy.

Thus, article XVI, section 7, which, as noted, was carried over without discussion from the former MNA contract, does nothing more than provide for the creation of various committees, the dress code committee being one of them, and calls for union representation on the dress Code and certain other committees. It does not, however, set forth or otherwise describe what the functions or duties of the dress code committee, or for that matter those of the other committees, would be, or how those functions were to be performed. Further, there is nothing in the plain lan-

guage of article XVI, section 7 to indicate that the union delegated its right to bargain over changes in the Hospital dress code to the dress code committee, or that the union member representatives on the committee had been authorized by the Union to negotiate on its behalf over any such changes. Nor, for that matter, is there anything in article XVI, section 7 to indicate that the dress code committee had any bargaining authority whatsoever, for the provision, as stated, gives no clue on how the committee was to function or what its duties would be. Indeed, the sole purpose stated in article XVI, section 1 for the dress code committee is that of serving as a "channel of communication" between the Hospital and the Union presumably on matters relating to the dress code. This rather vague description of the dress code committee's purpose, however, cannot, by any reasonable stretch of the imagination, be construed as a clear and unmistakable waiver of the Union's statutory right to notice and bargaining over changes in the dress code, nor as a delegation of its bargaining authority to the dress code committee or to its member representatives on that committee.

Nor is there anything in the language of article XIII, section 1, the management-rights clause, that can be read as a waiver by the Union of its right to bargain over changes in the Hospital dress code policy, for article XIII, section 1 makes no reference, either directly or indirectly, to the dress code policy. While conceding, on brief, that the management-rights clause "does not address the dress code in particular," the Respondent nevertheless insists that the Union's acceptance of the broad language in that provision, giving Respondent "the sole right to manage and operate the Hospital," and the "exclusive right to administer all matters not specifically and expressly covered by [the] agreement, without limitation, implied or otherwise," amounted to a waiver of its right to bargain over changes to the dress code (R. Br. 27). I disagree, for the test governing the waiver of a statutory right, such as the right to bargain over a mandatory subject, is not whether the contract can be reasonably construed to effect such a waiver, but rather whether, as the Supreme Court made clear in *Metropolitan Edison*, the undertaking is "explicitly stated," that is, whether the bargaining right was clearly and unmistakably waived. *Id.* at 708. See also *AK Steel Corp.*, 324 NLRB 173, 181 (1997); *Michigan Bell Telephone Co.*, 306 NLRB 281 (1992). Thus, in determining what constitutes a clear and unmistakable waiver, the Board examines the precise wording of the provision in question, and will not infer that a waiver of a statutory right has occurred from a broadly worded management-rights clause couched in general terms only and which makes no reference to any particular subject area. *Waxie Sanitary Supply*, 337 NLRB 303, 312 (2001); *KIRO, Inc.*, 317 NLRB 1325, 1327 (1995); *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992); *Bath Iron Works Corp.*, 302 NLRB 898, 902 (1991). Here, article XIII, section 1, as stated, neither mentions nor makes reference to the Hospital's dress code policy or, for that matter, to any particular mandatory bargaining subject. Accordingly, article XIII, section 1, like article XVI, section 7, neither contains, nor can be read as constituting, a waiver of the Union's right to bargain over changes to the Hospital's dress code policy. Nor was the

¹⁴ The inconsistent explanations proffered by Jagels at the hearing for why the Respondent acted unilaterally, and the fact that Jagels in his June 11, letter to Chubb never cited any contractual provision or past practice to justify the Respondent's unilateral conduct, leads me to doubt the Respondent's claim that it acted unilaterally because it believed it had the right to do so under the contract or pursuant to an established past practice. Rather, I am persuaded that the reasons given by Jagels at the hearing for not notifying and bargaining with the Union regarding the changes in the dress code are nothing more than post hoc attempts by Jagels to rationalize and legitimize his unilateral actions. Notwithstanding my above doubts, the merits of the Respondent's arguments will be duly considered *seriatim*.

dress code policy the subject of any discussion by the parties during their negotiations. Consequently, it cannot be said that the Union relinquished its right to bargain over this subject at the bargaining table.¹⁵ *General Electric Co.*, 296 NLRB 844 (1990); *Johnson-Bateman Co.*, 295 NLRB 180, 186 (1989).

As to its assertion that the April unilateral change in the dress code was consistent with an established past practice, the Respondent, who bears the burden of proving the existence of such a past practice, has not done so.¹⁶ The only evidence cited by Respondent in support of this claim is Jagels' testimony that, during 20 years of working at the Hospital, changes to the dress code have been worked out between staff RN's and the dress code committee, and Van Poppelen's testimony that, in the past, such changes were discussed only among dress code committee members. As noted, however, neither Jagels nor Van Poppelen provided any specifics on what, if any, unilateral changes to the RN's dress code the Hospital had made in the past, or when and how often such alleged unilateral changes had occurred. Their rather vague testimony, therefore, falls far short of proving that whatever unilateral changes the Respondent may in the past have made to the RN's dress code occurred with such frequency and regularity as to have become a common and established practice.

Chubb's undisputed testimony, which I credit, that the RN's dress code had been changed only once before during her 25-year employment tenure at the Hospital, further undermines the Respondent's past practice defense, for this one-time change in the dress code, even if undertaken unilaterally by the Hospital without consulting with MNA, the RN's former bargaining representative, hardly qualifies as a longstanding and established past practice.¹⁷ See, e.g., *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); also, *Mackie Automotive Systems*, 336 NLRB 347 (2001). Moreover, there is no evidence that MNA knew of, consented to, or acquiesced in, any prior unilateral change the Hospital may have made to the dress code during MNA's tenure as the RN's bargaining representative. In sum, the Respondent has produced no credible evidence to support its claim that the unilateral changes it made to the dress code were consistent with an established past practice.

Finally, even if the Respondent had, in the past, changed the RN's dress code without notifying or consulting with MNA, a fact not established here, it was not at liberty, once Local 80 became certified as the RN's new bargaining representative, to con-

tinue acting unilaterally regarding changes in RN's dress code or, for that matter, as to any other term and condition of the RN's employment. *Eugene Iovine, Inc.*, 328 NLRB 294 (1999); *University of Pittsburgh Medical Center*, 325 NLRB 443 (1998); *Porta-King Building Systems*, 310 NLRB 539, 543 (1993). Nor, in any event, would any prior alleged acquiescence by MNA in the Respondent's alleged unilateral actions have been binding on Local 80. *Eugene Iovine, Inc.*, supra at 297.

In sum, the Respondent's claim that the Union waived its right to bargain over changes to its dress code is without merit, as is its alternative claim that the unilateral changes it made to the dress code were justified based on a past practice. Accordingly, the Respondent's failure and refusal to notify and bargain with the Union regarding the changes it made to the dress code in April and October, constituted violations of Section 8(a)(5) and (1) of the Act, as alleged in the complaint.¹⁸

3. The information request

On March 5, Union Vice President Sydney Villerot wrote to the Hospital's director of environmental health and safety, Joan Wideman, to advise that Local 40 had replaced MNA as the RN's exclusive bargaining representative, and that Local 40 "took the health and safety of its members very seriously." In her letter, Villerot asked Wideman to furnish the Union with copies of the minutes of the Hospital's safety committee meetings from November 1999 to the present (GC Exh. 16). Villerot also recalls meeting with Wideman that same day to discuss the minutes. She testified that the Union's reason for requesting the information was "because nurses come in contact with a fair amount of hazardous materials," were often stuck by hypodermic needles, and that the Union was "trying to insure that their [RN's] well-being and their safety [was] really being protected" because it believed this to be part of its function as the RN's bargaining representative. (Tr. 108.) She explained that obtaining copies of the safety committee meeting minutes would be helpful to the Union in carrying out its obligation because the safety committee receives reports from other committees, such as the infection control committee, regarding needle-related injuries sustained by employees. The safety committee minutes, therefore, would purportedly reflect a consensus of all such injuries occurring

¹⁵ The Respondent's further claim at the hearing, that a waiver should be found from the Union's failure to request bargaining on the subject of changes to the dress code, is without merit, for a union's silence during negotiations on a particular mandatory bargaining subject does not give rise to a waiver. *Johnson-Bateman Co.*, supra at 195; *Challenge-Cook Brothers of Ohio*, 282 NLRB 21, 27 (1986); *PRC Recording Co.*, 280 NLRB 615, 636 (1986).

¹⁶ The burden of showing that an established past practice exists is on the party raising it as a defense. *Eugene Iovine, Inc.*, 328 NLRB 294, 295 fn. 2 (1999).

¹⁷ Chubb's testimony does not conflict with Jagels' or Van Poppelen's testimony for, as noted, neither Jagels nor Van Poppelen provided any detail on how many times the dress code had allegedly been unilaterally changed by the Respondent in the past. Nor was any documentary evidence, such as past copies of the RN's dress code reflecting changes made, produced by the Respondent to refute Chubb's testimony.

¹⁸ I am not, however, convinced that the Respondent engaged in any direct dealing with employees regarding the change to the dress code made by the Respondent in April. Rather, the evidence reveals only that the dress code committee, on its own and in response to employee complaints, proposed changes to the dress code which the Respondent subsequently approved in part. There is no evidence that the Respondent initiated such changes, or that it solicited employee views regarding changes in the dress code, or promised to change the dress code in response to employee concerns. In short, the Respondent never dealt directly with employees but simply acquiesced, in part, to the changes proposed to it by the dress code committee. Accordingly, the "direct dealing" allegation added to the complaint during the hearing is found to be without merit.

at the Hospital.¹⁹ During their conversation, Wideman admitted that she was not fully aware of the contents of the safety committee minutes, but expressed a general concern about the confidentiality of information contained therein regarding the identify of individuals who might have suffered needle injuries.²⁰ Villerot told Wideman she would discuss the matter with Union President Kasper to ascertain the format in which the information should be provided, and commented that she might be able to provide Wideman with a sample of the safety committee minutes the Union had obtained from Mt. Clements General Hospital.

Wideman did not testify. Villerot's version of her March 5, conversation with Wideman is therefore credited. It bears noting that while Wideman expressed concern that the safety committee minutes might contain information, such as employee names, incidents, and possibly some medical reports, which she believed to be confidential and would be reluctant to turn over to the Union, Wideman, according to Villerot's credited account, never stated that she would not comply with the Union's request. In fact, Villerot explained that from her discussion with Wideman it was apparent that Wideman was not familiar with the contents of the safety committee minutes and therefore could not decide what information could or could not be provided to the Union. (Tr. 128.)

In a followup March 31, letter, Villerot informed Wideman that the Union could not furnish her with a copy of the Mt. Clements Hospital safety committee minutes to use a format because they contained confidential information, but suggested that Respondent could supply the minutes of the requested safety committee meetings in whatever format it chose so long as it contained information pertaining to workman's compensation cases, OSHA violations, "needle sticks," etc. Villerot concluded by asking that Wideman send the current information, including the year 2000 minutes, as soon as possible. (GC Exh. 17). On receiving no response from Wideman, Villerot, on May 14, wrote to Jagels advising him of the Union's request for the safety committee minutes, and of her discussion with Wideman wherein the latter had expressed "some concerns about the confidentiality of the information contained in the minutes." Villerot further informed Jagels that the Union had a responsibility to ensure the health and safety of its members, and that the information requested was needed to achieve that goal. Villerot then assured Jagels that the Union would keep whatever information was contained in the minutes confidential (GC Exh. 18).

By letter also dated May 14, Jagels responded that it was the "Hospital's responsibility, not the Union's, to ensure the health and safety of all employees including members of [the Union]." He then declined to provide the Union with the requested infor-

mation because he did not believe that the Union "is entitled to copies of these documents under the current contract," but advised Villerot that if she was "aware of any safety issue," he "would be pleased to forward [her] concerns to appropriate members of the Safety Committee." (GC Exh. 19.) Jagels' letter makes no mention of confidentiality as a basis for his denial of the Union's request. Jagels, however, explained at the hearing that he did not cite confidentiality in his letter as a reason for not complying with the request because Wideman purportedly had already done so. I found Jagels' explanation in this regard not to be credible, for there is simply no evidence to indicate that during her March 5, conversation with Villerot, or at any time thereafter, Wideman informed Villerot that the information sought by the Union was confidential and would not be provided.

Thus, neither in her testimony nor in her May 5, letter to Jagels did Villerot ever state or convey the impression that Wideman had refused, for confidentiality reasons, to comply with the Union's information request. Moreover, Jagels never claimed to have been so informed by Wideman. Nor, for that matter, did Jagels testify to having had any discussion with Wideman about her March 5, conversation with Villerot, or of having consulted with Wideman about the Union's information request, prior to receiving Villerot's May 14, letter. In short, Jagels' assertion at the hearing, that he did not address the confidentiality issue in his May 14, letter to Villerot because Wideman had already done so, lacks evidentiary support.

Respondent's chief operating officer, Buxton, did provide some testimony on the confidentiality question. Thus, he testified to having been informed by Respondent's legal counsel that under Michigan law, the safety committee minutes were considered confidential and that, to his knowledge, the Hospital has followed this practice during the 14 months he has been in its employ.²¹ He explained that because the safety committee dealt with quality issues at the Hospital, it, along with other committees which addressed similar quality and medical issues, were deemed to be confidential precluding disclosure of their minutes and other related matters.

Buxton's testimony regarding his knowledge of the safety committee was not very convincing. Buxton, for example, was unable to identify who sat on the safety committee or how often it met. Further, despite claiming on direct examination that the minutes of safety committee meetings "are stamped with a confidentiality statement that identifies the [Michigan] statute," on cross-examination he could not identify what the stamp read, and, more importantly, was forced to concede that he had never actually saw any of the safety committee minutes and, thus was not sure if they contained any such confidentiality stamp. (Tr. 160-161.) These inconsistencies, and his general unconvincing demeanor on the witness stand, leads me to doubt the reliability of Buxton's testimony as to the confidentiality of the safety committee minutes. No evidence, such as a Hospital document reflecting the existence of a confidentiality policy regarding the

¹⁹ Villerot's further testimony that she and Wideman discussed the contents of the letter on March 5, and that she told Wideman that the new union "needed to have the information," leads me to believe that Villerot fully explained to Wideman why the Union needed the safety committee meeting minutes. (Tr. 109.) Villerot claims that her knowledge as to what might be contained in the safety committee meeting minutes came from information provided to the Union by another hospital facility, Mt. Clements Hospital (Tr. 108).

²⁰ Villerot testified that Wideman simply told her she did not think the Union "would find it necessary to have" information about certain incidents or medical reports.

²¹ Jagels testified that the confidentiality of the safety committee minutes was a matter of policy at the Hospital.

safety committee minutes, or testimony from the Hospital's attorney who purportedly informed Buxton of the Michigan statute and of the alleged confidential nature of the safety committee minutes, was produced by Respondent to corroborate Buxton's testimony.²²

Villerot received no further response from Jagels or any other management official regarding the Union's information request. The Respondent, to date, has not complied with the information request, nor has it offered to accommodate the Union's need for the information with its alleged confidentiality concerns.

The General Counsel contends that the Respondent's refusal to provide the Union with the information requested, e.g., the minutes of the safety committee meetings amounted to a further violation of Section 8(a)(5) of the Act. The Respondent, on brief, counters that it was under no obligation to comply with the Union's information request because the Union never demonstrated that the safety committee minutes "are related to the Union's function as bargaining representative" or that production of the minutes was "reasonably necessary" for the Union's performance of its role as bargaining representative. Finally, it contends that the information sought was confidential and not subject to disclosure. (R. Br. 30, 32.) I find no merit in the Respondent's contentions.

Discussion

As a general rule, an employer must provide a union with requested information "if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties as the employees' exclusive bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). "The burden of proving the relevance of the requested information shifts according to the nature of the information sought." *Boise Cascade Corp.*, 279 NLRB 422, 429 (1986). Thus, if the information being sought relates to the terms and conditions of employment of employees represented by a union, the information is deemed to be presumptively relevant and necessary, and must be produced, unless the employer can establish a lack of relevance. *Duquesne Light Co.*, 306 NLRB 1042, 1043 (1992); *A-Plus Roofing*, 295

²² Indeed, the Respondent at the hearing was reluctant to reveal the particular Michigan statute on which it purportedly relied to deny the Union's information request. Only after Respondent's counsel was advised that refusal to identify the statute in question might have the effect of weakening its case did the Respondent's counsel cite Michigan statutes "MCLA 333.21515 and 333.20175" as the provisions it had relied on (Tr. 156). MCLA 333.21515, which is part of the Michigan public health code, reads as follows:

The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided in this article, shall not be public records, and shall not be available for court subpoena.

MCLA 333.20175 states:

The records data, knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency are confidential, shall be used for the purposes provided in this article, are not public records, and are not subject to court subpoena.

NLRB 967, 970 (1989); *Boise Cascade Corp.*, supra. In such cases, no specific showing of relevance is required. *Boise Cascade Corp.*, supra. However, no such presumption of relevance attaches to requested information that relates to matters or operations affecting employees outside the unit represented by the union. In this latter circumstance, the union seeking such nonbargaining unit-related information bears the burden of establishing its relevancy. *Id.*

In the case at hand, the information sought by the Union, as described in Villerot's first request to Wideman dated March 5, and in her subsequent May 14, letter to Jagels, consisted of the minutes of meetings conducted by the Hospital's safety committee from November 1999 through the year 2000. As Villerot explained, credibly and without contradiction, the Union needed the information in order to ascertain the degree to which unit employees had, during the period in question, been injured on the job through use of hazardous materials, such as hypodermic needles. While Villerot did not precisely explain what the Union planned to do with the information sought, her explanation, that the Union was seeking to "insure . . . the well-being . . . and safety" of unit employees, strongly suggests that the Union intended to use the information to monitor the safety of the workplace environment and to address and hopefully resolve whatever safety concerns might be gleaned from safety committee minutes. That such information was relevant and necessary to the Union's performance of its statutory role as the RN's bargaining representative is, in my view, beyond question, for it is well-settled that information regarding the health and safety of employees is both necessary and relevant to a union's role as collective bargaining representative because "the environment of the workplace and its effect on the health and well-being of employees is fundamentally related to conditions of employment." *New Surfside Nursing Home*, 322 NLRB 531, 534 (1996); *Anthony Motor Co.*, 314 NLRB 443, 453 (1994); also *American National Can Co.*, 293 NLRB 901, 904 (1989), *enfd.* 924 F.2d 518 (4th Cir.1991); *Borden Chemical*, 261 NLRB 64, 75 (1982).

As the information sought by the Union in this case is presumptively relevant, it was incumbent on the Respondent "to prove a lack of relevance . . . or to provide adequate reasons as to why [it] cannot, in good faith, supply such information." *A-Plus Roofing, Inc.*, supra. The Respondent here has presented no evidence to refute the presumptive relevancy of the information sought by the Union. Instead, the Respondent seeks to place the burden on the Union to establish relevancy by asserting in its answer, at the hearing, and again on brief, that it was somehow justified in refusing to comply with the Union's information request because the Union had not shown "why production of the safety committee minutes is related to its function as bargaining representative, or how the production of the minutes is necessary for the performance of its functions as bargaining representative" (GC Exh. 1[I]; Tr. 17; R. Br. 31). However, as the information sought by the Union pertained to a mandatory bargaining subject affecting unit employees, it was, as previously stated, presumptively relevant. With presumptively relevant information, "a union is not required to prove the precise relevance of such informa-

tion unless the Respondent submits evidence sufficient to rebut the presumption of relevance.” *Watkins Contracting, Inc.*, 335 NLRB 222 (2001). The Respondent, as stated, has not done so here.²³

Regarding the Respondent’s confidentiality defense, it is well settled that in certain situations, confidentiality claims may justify a refusal to provide relevant information. See *Jacksonville Area Assn. For Retarded Citizens*, 316 NLRB 338, 340 (1995), citing *NLRB v. Detroit Edison Co.*, 440 U.S. 301 (1979). When a claim of confidentiality has been made, “the trier of fact must balance the union’s need for the information sought against the legitimate and substantial confidential interests of the employer (footnote omitted).” *Jacksonville*, supra. In this balancing of interests test, the burden of proof rests with the party raising the claim of confidentiality, here the Respondent. *Id.*; also *Lasher Service Corp.*, 332 NLRB 71 (2000). The confidentiality claim, however, must be timely raised and proven before the balancing test is triggered. Further, a blanket claim of confidentiality, without more, will not satisfy the burden of proof. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995); *Jacksonville*, supra. Finally, even where the employer can prove a legitimate confidentiality concern, it has a duty to seek an accommodation through the bargaining process. *Lenox Hill Hospital*, 327 NLRB 1065, 1068 (1999).

The Respondent has not sustained its burden of showing that it has a legitimate and substantial confidentiality interest in the safety committee minutes so as to justify its refusal to disclose said information to the Union. First, its claim that the safety committee minutes are confidential and not subject to disclosure was not, in my view, timely raised. Thus, in his May 14, letter to Villerot denying the Union’s request for information, Jagels, as noted, never cited confidentiality as a reason for not complying with the request. Rather, Jagels denied the Union’s request solely because of his belief that the Hospital had no contractual obligation to provide the information. Jagels’ May 14, letter was the first notification to the Union that the information requested would not be provided, for while Wideman, in her earlier discussion with Villerot, may have expressed some concern that certain information in the safety committee minutes might be considered confidential, Villerot’s undisputed and credited testimony makes clear that Wideman never told Villerot that the safety committee minutes would not be provided. Nor was confidentiality raised as a defense by the Hospital in its statement of position to the Region in response to the charges filed against it, or in its initial December 14, 2001 answer to the complaint (Tr. 215; CCX-1[g]). Rather, the Respondent’s first mention of confidentiality as justification for not turning over the safety committee minutes is found in an amended answer to the complaint filed by Respondent on February 14, 2002, just 5 days prior to the start of the hearing. Given these facts, I find that the Respondent’s asserted confidentiality defense was not timely raised. See *Detroit News-*

²³ The Union, in any event, did make the relevancy of the requested information known to the Respondent when Villerot informed Wideman during their March 5 meeting that the information was needed to ascertain the degree to which unit employees were being injured on the job, and to better to safeguard the health and well-being of unit employees.

paper Agency, supra at 1072 (confidentiality claim raised for first time during or shortly before hearing untimely).²⁴

Second, even if the confidentiality claim had been timely raised, the Respondent still would not prevail for it has not credibly explained nor shown why the information contained in the safety committee minutes should be treated as confidential. Its sole explanation in this regard is that disclosure of said information contravenes Hospital policy and is furthermore prohibited by Michigan Public Health Code MCL 335.21515. The Hospital policy alluded to by Jagels in his testimony, however, was never produced, or, for that matter, described by Jagels at the hearing. Further, Buxton, who testified about the alleged confidential nature of the safety committee minutes, made no mention in his testimony of the existence of a Hospital policy prohibiting disclosure of such information. Buxton testified only to having been advised by legal counsel that disclosure of the requested information was prohibited by state law, and that the Hospital has adhered to this practice, e.g., not disclosing safety committee minutes, during the time that he has been in its employ. At no point in his testimony did Buxton claim that this practice had been codified into a formal Hospital policy. Given the lack of corroboration for his claim as to the existence of a Hospital policy prohibiting disclosure of safety committee minutes, as well as his lack of credibility on other matters, Jagels’ contention that the Hospital maintains such a policy is found not to be credible.

Nor was any credible evidence produced to show that disclosure of the safety committee minutes was indeed prohibited by MCL 333.21515.²⁵ As described above, MCL 333.21515 provides that “[t]he records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential.” There is, however, no record evidence, other than Jagels’ general assertion at the hearing, to show that the Hospital’s safety committee performs a “review function” within the meaning of MCL 333.21515. Jagels at first identified the safety committee as a “quality” committee and then, in response to a leading question from Respondent’s counsel, stated that, as a quality committee, the safety committee was “a review committee of sorts.” (Tr. 186). No documents, however, such as the committee’s or Hospital’s bylaws, rules, or regulations were produced to corroborate Jagels’ bare de-

²⁴ The Respondent’s assertion, in further support of its confidentiality defense, that it is prohibited from disclosing the safety committee minutes under Michigan statutes MCLA 333.21515 and 333.20175, was also untimely raised, for Jagels never asserted to the Union that the Hospital was barred by state law from complying with the information request, nor were the above statutory provisions raised by the Respondent as a defense at any time prior to the hearing.

²⁵ Although the Respondent at the hearing referenced MCLA 333.21515 and 333.20175 as the statutory provisions it was relying on in support of its confidentiality defense, on brief it makes reference only to “MCL 335.21515”. I shall assume that the Respondent on brief intended to cite MCLA 333.21515, and not MCL 335.21515. The Respondent on brief makes no mention of MCL 333.20175, leading me to believe that it is no longer relying on this latter provision.

scription of the safety committee as a review committee or to explain the duties and functions of the safety committee.²⁶ Jagels bare and rather unconvincing description of the safety committee as “a review committee of sorts” falls far short of establishing that the safety committee in fact performs a “review function” which would render the minutes of its meetings confidential under MCL 333.21515. Accordingly, I find that the Respondent has not met its burden of showing that it had a legitimate and substantial interest in maintaining the safety committee minutes confidential. “Where the employer fails to demonstrate a legitimate and substantial confidentiality interest, the union’s right to the information is effectively unchallenged, and the employer is under a duty to furnish the information.” *Watkins Contracting*, supra. Finally, even when the employer can prove that it has a legitimate confidentiality concern, it has a duty to seek an accommodation through the bargaining process. *Exxon Co., U.S.A.*, 321 NLRB 896, 898 (1996). The Respondent admits it did not do so despite assurances from Villerot that the requested information would be kept confidential. In light of these facts, I find that the Respondent was not justified in refusing to provide the Union with the information requested in Villerot’s March 5, and May 14, letters, to Wideman and Jagels, respectively, and that by refusing to comply with said requests, it violated Section 8(a)(5) and (1) of the Act, as alleged.

4. The Chubb-Grimms incident

The complaint, as noted, alleges that the Respondent violated Section 8(a)(1) by threatening to retaliate against Chubb because of her union activities. The operative facts relevant to this allegation reveal that on August 2, Chubb, who at the time was serving as the Union’s chief steward, received a call from RN Mark Wisner in the psychiatric unit complaining that nurse manager, Joyce Grimms, had instructed the nurses in the unit that one of them would have to remain beyond their normal shift to work the mid-night shift. Under the parties’ agreement, overtime was not mandatory unless there was a local, State, or Federal emergency. Chubb testified that she then contacted Grimms believing that the latter might not be aware of the contractual provision and, on reaching her, asked if she knew that the contract did not have a mandatory overtime clause. Grimms, according to Chubb, then began to cite MNA’s former overtime policy to her, but Chubb replied that what was contained in the former MNA contract was irrelevant if it was not found in the current Local 40 contract.²⁷

Grimms told Chubb that she had 16 patients to cover and needed another nurse, and was at a loss on what to do. Chubb replied that Grimms, unlike RN’s, is on call 24 hours a day, 7

²⁶ In deciding what constitutes privileged and confidential information under MCLA 333.21515, Michigan case law holds that “the court should consider the hospital’s bylaws, internal rules, and regulations and whether the committee’s function is that of retrospective review for purposes of improvement and self-analysis and thereby protected, or part of current patient care.” *Gallagher v. Detroit-Macomb Hospital Assn.*, 171 Mich. App.761, 769 (1988). As noted, the Respondent here has produced no such evidence.

²⁷ Art. IX, sec. 3 of Local 40’s agreement with Respondent provides that the “assignment of required overtime shall be limited to circumstances of an unusual or unexpected nature such as late call-ins or in emergency situations.” The MNA contract contained no similar restriction on mandatory overtime.

days a week, and suggested that Grimms might want to negotiate with the Union to provide a stipend as a way of inducing one of the nurses to volunteer for the overtime work.²⁸ Grimms indicated she would discuss the matter with the mid-night supervisor and get back to her.

Chubb then called Kasper and, while discussing what rate of pay might be negotiated for the overtime work being sought by Grimms, received a call from Buxton. Chubb’s version of that conversation is that Buxton initially mentioned that he had spoken to Grimms and then accused Chubb of overstepping her bounds by acting as a supervisor. Buxton went on to tell Chubb that her sole responsibility as a union steward was to write grievances and request information. Chubb replied that she had not instructed Grimms to do anything and had only suggested a way by which Grimms could resolve her overtime dilemma. According to Chubb, Buxton reiterated that she had overstepped her bounds by acting as management, and that this was not the first time Chubb had done so. Chubb recalls that Buxton then accused her of being insubordinate with Grimms, and stated he was going to report Chubb to her nurse manager the following morning. Chubb replied that she planned to file a grievance over the mandatory overtime issue, at which point Buxton stated that a nurse, Stephanie Silva, had already volunteered to work the necessary overtime. Chubb asked Buxton why, if someone had volunteered to work overtime and the overtime work had not been mandatory, she had received complaints from employees. She again repeated to Buxton that she would be filing a grievance over the matter. Although she perceived that Buxton was angry during his phone call, Chubb recalls that Buxton did not yell and that the conversation was generally a nonconfrontational one.

Buxton recalled receiving a call from Grimms on August 2, complaining about being short-staffed and expressing concern that she might not be able to get one of the nurses to work an additional shift. According to Buxton, Grimms told him she had had a confrontation with Chubb wherein the latter stated that employees could not be forced to work overtime. Grimms purportedly told Buxton that she was upset and felt threatened by her confrontation with Chubb. Buxton told Grimms he would discuss the matter with Chubb.

Buxton’s recollection of his conversation with Chubb is that after speaking with Grimms, he called Chubb and stated that the perception that employees were being required to work overtime was not true because such mandatory overtime was prohibited under the contract. Chubb, however, insisted that the employees had indeed been asked to work mandatory overtime, and that this was an example of how the Hospital administration had gone back on its word. This exchange, according to Buxton, repeated itself several times after which Buxton told Chubb that Grimms was very upset about Chubb’s confrontational manner, and asked Chubb to refrain from dealing with the house supervisor in such a manner. He re-

²⁸ Under the parties’ contract, employees agreeing to work overtime received a \$40 stipend. Chubb, however, testified that the Hospital had in the past been willing to increase the stipend to \$80 as a way of inducing nurses to stay and work overtime.

calls telling Chubb that if she had a concern about how the Hospital was handling its staffing needs, she should file a grievance and that the matter would be dealt with the following day. He further told Chubb that whichever nurse volunteered to work the overtime would receive the normal remuneration paid for such overtime work. Buxton claims that Chubb was not satisfied with his answer and continued to insist that employees were being required to work overtime. Chubb told Buxton she would be filing a grievance over the matter, and that she intended to go to the local press over the matter and to make the local community aware of how the administration was renegeing on its agreement. Buxton purportedly told Chubb not to threaten him with such remarks, that such remarks were inappropriate. Buxton described his conversation with Chubb as being a very spirited one, without anger. He further denied threatening Chubb during that conversation, accusing her of being insubordinate, or stating that he was going to report her to the nurse manager. Rather, he recalls telling Chubb only that he would be meeting with nurse management in the morning to determine whether or not the overtime work had been mandated. Buxton insisted that he never made any recommendation that Chubb be disciplined because he did not find anything particularly wrong in his conversation with Chubb.

Grimms was not called either to corroborate Buxton's assertion that she complained to him about Chubb's alleged confrontational demeanor or of feeling threatened by Chubb, or to refute Chubb's version of their conversation. I credit Chubb and find that Grimms did make reference to the MNA contract during her discussion with Chubb. While Chubb's version does not indicate that Grimms was insisting she had a right to require employees to work overtime, I am convinced from her reference to the MNA contract that this indeed was her intended message. I also accept as true Chubb's version of her discussion with Buxton and find that he indeed accused Chubb of overstepping her authority during her discussion with Grimms by trying to assume a managerial role and of being insubordinate, and that Buxton indeed threatened to report Chubb to the nurse manager the following day. Buxton's denial that he made any such remarks to Chubb or that he threatened to report her was not convincing.

Chubb, in my view, was not being insubordinate when she informed Grimms that the issue of overtime work was governed by the Local 80, not the MNA, contract. Rather, it would appear that as the union steward at the Hospital, Chubb was simply carrying out her function of calling Grimms' attention to the contractual provision prohibiting mandatory overtime. Chubb's conduct in this regard was clearly protected. *Buck Brown Contracting Co., Inc.*, 283 NLRB 488, 521 (1987); see also *Postal Service*, 258 NLRB 1414 (1981). Buxton's threat to report her for engaging in such conduct was, as argued by the General Counsel, retaliatory in nature and designed, in my view, to limit and restrict her rights as union steward. Accordingly, I find that by accusing Chubb of being insubordinate, and thereafter threatening to report her to her supervisor for engaging in such activity, the Respondent, through Buxton, violated Section 8(a)(1) of the Act, as alleged. *Id.* That Buxton did not follow through with his threat to report Chubb, or the fact that Chubb may not have felt personally threatened by his remark, does not render Buxton's remark lawful or diminish its coercive effect. *Merrill Iron & Steel, Inc.*, 335 NLRB 171(2001); *Clinton Electronics Corp.*, 332 NLRB 479 (2000).

5. The *Collyer* deferral issue

The Respondent seeks to have all complaint allegations resolved under the grievance-arbitration procedure of its agreement with the Union under *Collyer Insulated Wire*, 192 NLRB 837 (1971).²⁹ I do not find deferral to be appropriate in this case. For one, the allegation that the Respondent unlawfully refused to provide the Union with relevant and necessary information is not deferrable. *DaimlerChrysler Corp.*, 331 NLRB 1324 (2000), *enfd.* 288 F.3d 434 (D.C. Cir. 2002); *Mt. Sinai Hospital*, 331 NLRB 895 (2000); *Postal Service*, 302 NLRB 918 (1991). Further, the language in the no-discrimination clause, article XVI, section 4, of the parties' agreement, stating that "grievances alleging claims of discrimination based on union activity are not arbitrable," would appear to preclude deferral of the 8(a)(1) complaint allegation involving the unlawful threat directed at Chubb for performing her Union steward duties. It is fairly apparent, therefore, that deferral to the parties' grievance-arbitration procedure of *all* complaint allegations, as the Respondent on brief insists is the proper course of action here, would not be appropriate. The Respondent, it should be noted, has given no indication that it would agree to a deferral of some of the allegations if others are found not to be deferrable. Such "piece-meal" deferral of the complaint allegations is, in any event, not favored by the Board which prefers to have an entire dispute resolved in a single proceeding. See *Beverly Healthcare & Rehabilitation*, 335 NLRB 635, 670 (2001).

Further, the bargaining relationship between the Respondent and the Union can hardly be classified as "long and productive" one within the meaning of *Collyer*. The record, as noted, makes clear that at the time of the misconduct alleged in the complaint, the Respondent and the Union had only recently executed their first collective bargaining agreement. Thus, following months of negotiations, the parties entered into a collective-bargaining agreement in February. However, in March, just 1 month later, the Union sought and the Respondent unlawfully declined to provide it with, information that was necessary for and relevant to the Union's performance of its duties as the RN's bargaining representative, and in April, just 2 months after the agreement was signed, the Respondent, without notifying or bargaining with the Union, unilaterally and unlawfully changed its dress code. In August, 6 months after signing the agreement, the Respondent unlawfully threatened Union Steward Chubb with retaliation for performing her duties as steward. While there is no question that the parties did have a bargaining relationship, the above facts make patently clear that the relationship was neither a longstanding one, nor particularly productive. Fur-

²⁹ In *Collyer*, the Board held that deferral to a grievance arbitration mechanism would be appropriate if the following criteria are present: The dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution.

ther, Buxton's unlawful threat to retaliate against Chubb simply for performing her duties as union steward reflects a certain level of animosity and hostility by the Respondent towards employee exercise of their Section 7 rights. For all the above reasons, I find that deferral under *Collyer* of the complaint allegations to the grievance-arbitration procedures of the parties' agreement would not be appropriate.

CONCLUSIONS OF LAW

1. The Respondent, Crittenton Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 40, Office and Professional Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Since November 22, 1999, the Union has been the certified exclusive collective-bargaining representative of the Respondent's employees in the following bargaining unit:

All full-time and regular part-time registered nurses employed by the Respondent at its Rochester, Michigan hospital; but excluding vice-president of nursing and patient care services, administrative directors, department managers, nursing shift supervisors, nurse manager for psychiatric services, emergency department manager, director of community health education, head nurses, patient care coordinators, Home Health Outreach nurses, and guards and supervisors as defined in the Act, and all other employees.

4. By threatening to retaliate against employee Chubb for performing her duties as union steward, the Respondent has violated Section 8(a)(1) of the Act.

5. By unilaterally changing its dress code policy in February and October without first notifying and giving the Union an opportunity to bargain over said changes, and by refusing to provide the Union with copies of the safety committee meeting minutes requested on March 5, 2001, the Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The above-described unlawful conduct are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

To remedy the unlawful unilateral changes made to the dress code, the Respondent shall be ordered to, upon request, rescind such changes, to bargain with the Union over the changes,³⁰ and to make unit employees whole for any losses they may have incurred as a result of the Respondent's unlawful unilateral change in the dress code. The Respondent shall also be required to, upon request, comply with the Union's March 5, 2001 request for copies of the safety committee meeting minutes. Finally, the Respondent shall be required to post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³¹

ORDER

The Respondent, Crittenton Hospital, Rochester, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing its dress code policy without first notifying and affording the Union an opportunity to bargain over any such changes.

(b) Failing and refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its statutory role as exclusive collective-bargaining representative of the Respondent's employees in an appropriate unit.

(c) Restraining or coercing the Union's steward at the Hospital by threatening to report the employee to the supervisor for engaging in protected activity on behalf of other unit employees.

(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.

(a) On request, rescind the unlawful unilateral changes made in the dress code, and notify and bargain with the Union before making any such changes.

(b) Make unit employees whole for any losses incurred by them due to the Respondent's unlawful unilateral change in the dress code.

(c) On request, furnish the Union with the safety committee meeting minutes as requested in its March 5, 2001 letter.

(d) Within 14 days after service by the Region, post at its facility in Rochester, Michigan, copies of the attached notice marked "Appendix."³² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered 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 for-

³¹ 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.

³² 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."

³⁰ See *St. Luke's Hospital*, 314 NLRB 434, 435 (1994).

mer employees employed by the Respondent at any time since April 1, 2001.

(e) 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.

APPENDIX

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

The National Labor Relations Board has found that we violated the 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 unilaterally change our dress code policy without giving the Union which represents our employees in the appropriate unit described below prior notice and an opportunity to bargain over such changes. The unit includes:

All full-time and regular part-time registered nurses employed by the Respondent at its Rochester, Michigan hospital; but ex-

cluding vice-president of nursing and patient care services, administrative directors, department managers, nursing shift supervisors, nurse manager for psychiatric services, emergency department manager, director of community health education, head nurses, patient care coordinators, Home Health Outreach nurses, and guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT refuse to provide the Union with requested information that is relevant to and necessary for its performance as exclusive bargaining representative of the above-described unit employees.

WE WILL NOT restrain or coerce the Union's steward at our Hospital facility by threatening to report the steward to the supervisor for engaging in protected or union activities on behalf of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, rescind the unlawful unilateral changes that we made to the dress code in April and October, 2001, and WE WILL make unit employees whole for losses they may have incurred due to said unlawful changes.

WE WILL, on request, comply with the Union's March 5, 2001 request for copies of the Safety Committee meeting minutes.

CRITTENTON HOSPITAL