UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

AMBOY CARE CENTER

and **Case Nos. 22-CA-29214**
22-CA-29276

SEIU 1199 UNITED HEALTHCARE WORKERS EAST

Saulo Santiago, Esq., Counsel for the General Counsel.
Ellen Dichner, Esq., Gladstein, Reif & Meginnis LLP, Counsel for the Charging Party.
Sheila Coleman, Administrator, and Daniel Bruckstein, Regional Director, for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on April 8 and May 17, 2010 in Newark, New Jersey. The Consolidated Amended Complaint herein, which issued on February 9, 2010 and was based upon unfair labor practice charges that were filed on November 15, 2009[1] and January 5, 2010 by SEIU 1199 United Healthcare Workers East, herein called the Union, alleges that Amboy Care Center, herein called the Respondent, violated Section 8(a)(1)(5) of the Act by refusing to furnish the Union with information that it requested between about September 1 and December 18, and provided some of that information, albeit, in an untimely manner.

Findings of Fact

I. Jurisdiction

The Respondent operates a nursing and rehabilitation center in Perth Amboy, New Jersey. The Amended Complaint alleges, and the Respondent admits, that during the proceeding twelve month period, it derived gross revenue in excess of $100,000 and, during the same period, it purchased and received at its Perth Amboy facility goods valued in excess of $5,000 directly from suppliers located within the State of New Jersey, including PSE&G of New Jersey and Comcast of New Jersey, each of which suppliers received said supplies directly from points outside the State of New Jersey. I therefore find that at all material times the Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

II. Labor Organization Status

In response to the Complaint allegation that the Union is a labor organization within the meaning of Section 2(5) of the Act, the Respondent's Answer states: "The Union has been the designated exclusive collective bargaining representative of Amboy Care Center since 2002 and

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2009.

the most recent bargaining agreement became effective on December 18, 2008 to June 1, 2011." I therefore find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

The Union has been the collective bargaining representative for certain of the Respondent's employees since about 2002. The most recent agreements between the parties were an agreement effective for the period April 1, 2005 through June 15, 2008, herein called the 2005 Agreement, and a Memorandum of Agreement dated December 18, 2008 and effective through June 15, 2011, herein called the 2008 Memorandum of Agreement. The 2005 Agreement states:

> 1.1 The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees, excluding registered nurses, licensed practical nurses, office and clerical employees, supervisors, watchmen and guards, maintenance and cooks. In the event any dispute arises as to whether or not an employee does, in fact, come within one of the excluded categories above mentioned, such dispute shall be submitted to arbitration for settlement and determination in the manner hereinafter provided.

Two contractual provisions are relevant to the issues herein. Article 25 of the 2005 Agreement, not changed by the 2008 Memorandum of Agreement, entitled "Scheduling" states: "Employer to provide at least one (1) weekend out of three (3) off, if possible alternate weekends. There shall be no reduction for those employees who are enjoying better." Section 3 of the 2008 Memorandum of Agreement entitled "Wages" states, *inter alia*: "All post-probationary bargaining unit employees shall receive the following increases to their wages as follows: (a) December 22, 2008 lump sum payment in the amount of $250." That section also states: "The parties shall meet to prepare the minimum rates for the recreation classification." The contract also provides for arbitration of disputes between the parties and names three arbitrators to hear such disputes.

The sole witness at the hearing was Ellen Dichner, Esq.[2] of the firm Gladstein, Reif & Meginnis, LLP, counsel to the Union since 1987, and counsel to the New Jersey region of the Union since 2004. She negotiated the 2008 Memorandum of Agreement between the Union and the Respondent, has handled arbitrations involving the Respondent, and has filed unfair labor practice charges on behalf of the Union against the Respondent. She testified to three subjects that were disputed by the parties, were grieved and scheduled for arbitration. As a result of these disputes, she made requests for information from the Respondent that are the subject of the Complaint herein.

Dichner testified that in 2009 the Union sent a grievance file to her alleging that the Respondent had reduced the pay rate of certain of its activity aides and had also unilaterally removed some of the activity aides from the Union. By letter dated November 17, she wrote to Respondent's administrator, Sheila Coleman and one of the named arbitrators, Robert Snyder, demanding arbitration of the following dispute: "The Employer has ceased to recognize the Union as the collective bargaining representative of certain activity aides and reduced their rate of pay in violation of Articles 1 and 2 of the collective bargaining agreement." On November 20,

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[2] Not only was here testimony credible, but it was logical and was supported by the documentary evidence.

Dichner again wrote Coleman stating, *inter alia*:

> This firm represents 1199 SEIU United Healthcare Workers East-NJ Region. In connection with the arbitration concerning Amboy Care's withdrawal of union recognition for the activity aides and reduction in their wage rates, 1199 demands the following documents be produced to me no later than December 10, 2009:
>
> > Payroll documents for the period January 1, 2009 to through November 15, 2009 for all activity aides, including but not limited to Diana Rivera, Maria Torres and Natalie Hoggard, showing their hourly rate of pay, hours worked and payroll deductions.
>
> This demand for inspection is made so that the Union will have an adequate opportunity to prosecute the grievance in arbitration and narrow the scope of issues to be arbitrated.

Dichner testified that she made this request because the Union had pay stubs for these three employees showing that Union dues had been deducted from their pay, and then the dues deduction stopped and, at the same time, their pay was reduced. On February 22, 2010 she received from the Respondent a large stack of documents, allegedly, in response to her November 20 demand. A review of these documents revealed that the Respondent transmitted payroll reports and time cards for four activity aides, but not for activity aide Natalie Hoggard, and that some of the reports were incomplete, and nothing was provided for Hoggard.

Dichner testified that in about November she was told that Union members employed by the Respondent were not getting weekends off, as set forth in the 2005 Agreement so, by letter dated November 17, she wrote to Coleman and the arbitrator, *inter alia*:

> This firm represents 1199 SEIU United Healthcare Workers East-NJ Region. On behalf of the Union, we demand arbitration concerning the following dispute:
>
> > The Employer failed to grant week-ends off in violation of Article 25 of the collective bargaining agreement.
> >
> > The Union demands as a remedy that all employees be made whole in every way for the contractual violations, including the granting of week-ends off.

By letter to Coleman dated November 20, Dichner wrote, *inter alia*, that the Union demanded that the following documents be produced no later than December 10, 2009:

> Documents, including work schedules and employee time reporting documents that show all week-end days each bargaining unit employee was assigned to work during the period January 1, 2009 through October 31, 2009.
>
> This demand for inspection is made so that the Union will have an adequate opportunity to prosecute the grievance in arbitration and narrow the scope of the issues to be arbitrated.

Dichner testified that the work schedules or time recording documents was the easiest and most efficient way of presenting this issue before the arbitrator. Having received no response from Coleman to her two requests, she wrote to Coleman again, by letter dated December 18, in which she repeated her requests for the information regarding the activity aides and employees' weekend time off. On February 22, as part of the stack of documents that

the Union received from the Respondent, there was some information responsive to Dichner's other request. Although Dichner asked for this information for all the bargaining unit employees, the Respondent provided daily time reports for some of the activity aides (but not Hoggard) and nothing for the other unit employees. Shortly after receiving these documents, she asked Coleman why she didn't send her the work schedules, and Coleman said that the Respondent did not maintain these schedules, and that the facility's owner told her that the Union was not entitled to the work schedules. Dichner asked Coleman why she didn't provide any documents for Hoggard. Coleman told her that the owner of the facility told her that Hoggard was not an activity aide; rather she was a smoke monitor, who follows residents who go outside the facility to smoke to make sure that they do it in a safe manner, and therefore she was not in the bargaining unit. She also said that Torres and Rivera were activity aides and smoke monitors. Dichner responded that since the Union had a broad recognition agreement, whether the Respondent considered them recreation aides or smoke monitors, they were still in the unit, and that the owner could not unilaterally withdraw employees from the unit and reduce their wages.

The final grievance involved herein relates to the lump sum payment of $250 set forth in Section 3 of the 2008 Memorandum of Agreement. Dichner testified that the Respondent pro-rated this $250 lump sum payment for its part-time employees, while the Union alleged that all employees, part-time or full-time, were entitled to the full amount. By letter dated June 22 to Coleman and the arbitrator, the Union demanded arbitration of this dispute, asking that all employees be made whole for this alleged contract violation. By letter dated October 13, Dichner wrote to Coleman with the following information request regarding the contractual lump sum payment:

1. The name and date of hire for all bargaining unit employees employed prior to and on December 22, 2008.
2. Documents showing the names and regular weekly hours of work for all part-time bargaining unit employees employed prior to and on December 22, 2008.
3. Payroll documents showing the amount of the December 2008 lump sum paid to each bargaining unit employee.
4. A list of all bargaining unit employees employed prior to and on December 22, 2008 who did not receive the lump sum payment.

Dichner testified that this information would establish which unit employees did not receive the lump sum payment, and which employees received only a portion of the lump sum payment. The first response that the Union received for this request was a letter dated February 5, 2010 from Coleman stating:

> I am writing to advise you that a $250 lump sum payment has been paid to all employees and anyone who was pro-rated have been paid the balance up to the agreed upon amount.
>
> I have enclosed a list of every employees' name and date of disbursements. Therefore, I conclude that this matter is resolved as of the above date.
>
> Should you have any additional questions or concerns related to this matter, contact me at the above number.

Attached was a list of eighty three employees stating when they received the $250 bonus payment. Dichner testified that this letter was not fully responsive to her October 13 request in that it did not respond to items 1, 2 and 4, which the Union needed in order to determine who was employed on or prior to December 22, 2008 so that they could determine whether <u>all</u>

eligible employees received the payment. In March 2010 she had a telephone conversation with Coleman where she told her that she needed a listing of all bargaining unit employees with their dates of hire so that she could check to see that all eligible employees received the lump sum payment. She testified that she cannot recollect Coleman's response to this request other than that she said that the Respondent would not provide the Union with information regarding Hoggard because its position was that she was a smoke monitor, and not a bargaining unit employee.[3] There is no evidence that the Respondent provided the Union with any further information responsive to Dichner's October 13 and November 20 letters.

IV. Analysis

This is a rather straightforward case involving three alleged contract violations: removing employees from the bargaining unit and, simultaneously, reducing their wage rates; failing to grant certain employees weekends off as required by Article 25 of the Agreement; and failing to pay part-time employees the full amount of the lump sum payment as required by Section 3 of the 2008 Memorandum of Agreement. Upon learning of these alleged violations, Dichner wrote to the arbitrators demanding arbitrations of these alleged violations and subsequently wrote to the Respondent requesting the information that would be relevant to prosecuting these three arbitrations. The evidence establishes that of the information that Dichner requested on October 13 and November 20, some was never provided and some was provided in February 2010. In response to her October 13 request for information, Dichner received a letter from Coleman on about February 5, 2010 containing a list of eighty three employees who were paid the $250 lump sum payment. While this responded to Item 3 in her letter, there was no response to Items 1, 2 and 4. As for her November 20 requests, she received a large stack of documents from Coleman on February 22, 2010 that were partially responsive to her requests in that they provided some of the information regarding some of the activity aides, but not for Hoggard or the other unit employees, and did not provide the work schedules requested in Item 1.

It is well settled that under Section 8(a)(5) of the Act an employer's duty to bargain in good faith with the union representing its employees includes the obligation to supply the union with requested information that will assist and enable the union to properly perform its duties as the collective bargaining representative of these employees, whether in enforcing the terms of the collective bargaining agreement, or litigating an arbitration pursuant to its contract with the employer. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). *King Soopers, Inc.*, 332 NLRB 23 (2000). There can be no doubt of the relevance of the information requested by the Union herein. The Union has three pending arbitrations involving the subjects discussed above. The information requests sent to the Respondent shortly after the arbitration demands pertain directly to the arbitrations and are clearly necessary for the Union in the prosecution of the arbitration hearings. *Fleming Companies, Inc.*, 332 NLRB 1086 (2000); *The New York Presbyterian Hospital*, 354 NLRB No. 5 (2009). I therefore find that by failing to provide the Union with certain of the information that it requested on October 13 and November 20, the Respondent violated Section 8(a)(1)(5) of the Act.

In addition to the obligation to respond to a request for information that is relevant to the Union as the collective bargaining representative of certain of its employees, an employer must make a reasonable good faith effort to respond to the request in a timely manner and as promptly as circumstances allow. *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992). *Silver Brothers Co., Inc.*, 312 NLRB 1060, 1062, fn. 9 (1993). An unreasonable delay in

[3] Coleman's February 5, 2010 letter states that Diana Rivera and Maria Torres were paid the lump sum payment.

furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to provide the information. *American Signature,* Inc., 334 NLRB 880, 885 (2001). There is no per se rule in making this determination. The Board considers the totality of the circumstances in determining whether an employer unlawfully delayed responding to the information request. *West Penn Power Co.,* 339 NLRB 585, 587 (2003). The Respondent herein never sought to justify its three month delay in providing the Union with certain of the requested information. It only alleged that it didn't furnish any information regarding Hoggard because she was a smoke monitor rather than an activity aide, and therefore was not a unit employee, and that it did not provide the Union with work schedules because they did not maintain work schedules and that the Respondent's owner said that the Union was not entitled to the work schedules. By providing some of the requested information in an untimely manner, the Respondent violated Section 8(a)(1)(5) of the Act.

Conclusions of Law

1. Respondent violated Section 8(a)(1)(5) of the Act by refusing to provide the Union with certain of the information that it requested on October 13 and November 20, 2009, information that was relevant to, and necessary for the Union as the collective bargaining representative of certain of the Respondent's employees in the processing of pending grievances and arbitrations.

2. Respondent violated Section 8(a)(1)(5) of the Act by failing to provide information to the Union, which was relevant to the prosecution of pending grievances and arbitrations, in a timely manner.

Remedy

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

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Amboy Care Center, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to furnish information, relevant to grievance and arbitration processing to the Union or furnishing the information to the Union in an untimely manner.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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[4] 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of a request, make available to the Union the information that it requested on October 13 and November 20, in connection with the pending arbitrations.

(b) Within 14 days after service by the Region, post at its facility in Perth Amboy, New Jersey, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 13, 2009.

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

Dated, Washington, D.C., June 15, 2010.

Joel P. Biblowitz
Administrative Law Judge

[5] 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."

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 unreasonably delay, or refuse to furnish information, relevant to processing grievances and arbitrations, to SEIU 1199, United Healthcare Workers East ("the Union").

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

WE WILL, within 14 days of a request, furnish the Union with the information that it requested on October 13 and November 20, 2009.

AMBOY CARE CENTER
(Employer)

Dated_____ **By**_____
(Representative) **(Title)**

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

Two MetroTech Center (North), Jay Street and Myrtle Avenue, 5th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.