

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

In the Matter of:

**AMERICAN BAPTIST HOMES OF
THE WEST d/b/a PIEDMONT
GARDENS,**

Case No. 32-CA-063475

Employer,

and

**SERVICE EMPLOYEES
INTERNATIONAL UNION, UNITED
HEALTHCARE WORKERS-WEST,**

Union.

**RESPONDENT'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS TO
THE DECISION AND RECOMMENDED ORDER OF THE
ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

In this Complaint, Counsel for the Acting General Counsel (“General Counsel”) alleges that American Baptist Homes of the West, d/b/a/ Piedmont Gardens (hereinafter “Employer”) violated Sections 8(a)(1) and (5) of the Act by refusing to provide two categories of information to the Service Employees International Union, UHW-West (hereinafter “Union”) in the form requested. The first category relates to three employees’ witness statements that were provided to the Employer during the course of a confidential investigation into allegations that employee Arturo Bariuad was sleeping on the job. The second category of information sought was the names and job titles of employees who submitted those witness statements.

On April 16, 2012, Administrative Law Judge Gerald M. Etchingham (the “ALJ”) issued his Decision and Recommended Order (“Decision”). As to the first category of information, *i.e.*, the witness statements regarding Mr. Bariuad’s misconduct, the ALJ correctly found that the Employer did not violate Sections 8(a)(1) and (5) when it withheld the statements from the Union. These statements were provided under the Employer’s assurances of confidentiality, and are categorically protected from disclosure by the Board rule established in *Anheuser-Busch, Inc.*, 237 NLRB 982 (1978). The General Counsel wishes to overturn *Anheuser-Busch*, the law of the land for over thirty years, in favor of a balancing-of-interests approach under *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In the Employer’s Brief Answering the General Counsel’s Limited Exceptions, filed concurrently, the Employer agrees with this portion of the ALJ’s decision and submits that the *Anheuser-Busch* rule should not be overturned.

As to the second category of information, the ALJ incorrectly found that the Employer violated the Act when it did not provide the Union with the names and job titles of the witnesses. Under the United States Supreme Court’s decision in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), adopted by the Board in *Pennsylvania Power*

Co., 301 NLRB 1104 (1991), the parties' interests in withholding or obtaining this information must be balanced in order to determine the Employer's duty to provide the information to the Union. Here, the Employer has a substantial interest in keeping its promise to protect from disclosure the identities of those brave enough to cooperate in the investigation, in order to encourage employees to report resident abuse and neglect. In reaching its conclusion that the Employer has not demonstrated a legitimate and substantial interest in keeping witness identities and job titles confidential from the Union, the ALJ relied upon his inaccurate finding that there was "no danger" of abuse or neglect of residents, even if employees are sleeping on the job. (ALJD at 7:43-48 n. 10).¹ This finding contradicts the credible testimony of the Employer's Executive Director, misconstrues the testimony of one of the Charge Nurse witnesses, and flies in the face of common sense. There should be no doubt that the safety and well-being of infirm residents, who have enlisted the services of the Employer because they require assistance with simple everyday tasks, can suffer if they are neglected by their caretakers. The Employer submits that the ALJ's illogical finding on this point should be overturned, and that the Board should hold that the Employer sufficiently demonstrated its interest in keeping the identities of witnesses to employee misconduct confidential.

As to the second part of the *Detroit Edison* test, the Union's interest in obtaining the information from the Employer is minimal because the Union can easily determine the identities of the witnesses in this small universe of employees without forcing the Employer to violate its assurances of confidentiality. All three of the witnesses were Mr. Bariudad's co-workers on the Assisted Living night shift, and two of those co-workers had worked the same shift as Mr. Bariudad for 1-2 years. Indeed, they were the *only* co-workers on Mr. Bariudad's shift. The Union did not need the Employer to provide it with

¹ References to the official transcript are referred to as "Tr. ____." References to the Decision of the ALJ are "ALJD at ____." General Counsel's Exhibits are referred to as "G.C. Exh. ____."

this information; it simply had to ask Mr. Bariuad the names of his shift co-workers and supervisor.² The ALJ incorrectly credited Union representative Donna Mapp's testimony that she tried, and failed, to determine the names of witnesses; as explained below, if she had simply asked Mr. Bariuad who his shift co-workers were, the Union would have learned the names of the witnesses.

Based on this balancing of interests, the Employer's only obligation was to commence a dialogue with the Union in an attempt to reach an accommodation of the competing interests. As the ALJ recognized, the Employer satisfied that obligation by offering to provide the Union with a summary of the witness statements without identifying the witnesses. The Union never responded to this offer, preferring instead to litigate. Under *Pennsylvania Power*, 301 NLRB 1104 (1991), the Employer's offer of accommodation was sufficient to fulfill its obligations. Although the Union rejected this offer, the Employer continues to be willing to provide this accommodation.

Finally, the Employer's position is that the *Detroit Edison* test should not apply to an employer's obligation to provide the identities of witnesses to employee misconduct. Instead, the *Anheuser-Busch* categorical exclusion for witness statements should also apply. The same considerations that prompted the Board to create a blanket exception to the disclosure of statements of witnesses gathered by the employer during the course of confidential investigations (potential pre-arbitration coercion of witnesses, reluctance of witnesses to volunteer information about employee misconduct, *etc.*) apply with equal force to the identities of those witnesses.

As a result, the Employer requests that the Board dismiss the ALJ's Decision and Recommended Order as to the findings that the Employer unlawfully failed to provide the Union with witness names and job titles.

² Indeed, at this point the Union has already learned the identities of all three witnesses through the course of the administrative hearing.

II. STATEMENT OF FACTS

A. Piedmont Gardens' Assisted Living Unit.

Employer American Baptist Homes of the West, d/b/a Piedmont Gardens, is a non-profit Continuing Care Retirement Community in Oakland, California, providing housing and care for over 300 seniors. (Tr. 86:21-87:4; ALJD at 4:23-25). The community operates different types of residential units, depending on the level of care required, including: independent living, assisting living, memory support, and skilled nursing care. (Tr. 86:21-24; ALJD at 4:23-25).

Approximately 34-37 seniors reside in Assisted Living (Tr. 88:12-13; ALJD at 23:27-28). As the name implies, the elderly residents in that unit require assistance with “activities of daily living” –putting on their clothes, bathing, eating, taking their medication, using the restroom, *etc.* (Tr. 87:15-21; ALJD at 4:30-32). The employees who are entrusted with their care must be aware at all times of the condition of their charges. If a resident fell, for example, and employees did not immediately respond, serious harm could occur to the resident’s health and well-being. (Tr. 87:22-88:3). For this reason, residents in Assisted Living carry “pendants” and have wall-mounted systems in their apartments that allow them to “page” staff for assistance. (Tr. 97:1-3; ALJD at 5:15-18). When a resident pages for help, the CNAs and shift supervisor (an LVN, referred to as a “charge nurse”) on duty are alerted. (Tr. 97:4-7; 98:6-10; ALJD at 5:15-18). Each CNA has a floor assignment so they know which residents are their responsibility. (Tr. 98:13-15). The chief responsibility for responding to residents’ pages lies with the CNA, not the charge nurse.³ (ALJD at 5:22-26; Tr. 98:11-15 (testimony from the Director of Assisted Living noting only that the charge nurse is “available to assist”)).

³ Significantly, the ALJ mistakenly found that the charge nurse, not the CNA, was responsible for responding to residents’ pages.

B. Arturo Bariuad.

Arturo Bariuad was a certified nursing assistant (CNA) who worked on the night shift in Assisted Living. (Tr. 44:19-24). Generally, two CNAs and one charge nurse are employed on this shift. (Tr. 88:20-22). The identities of the other two employees on Mr. Bariuad's shift, CNA Rhonda Burns and charge nurse Lynda Hutton, are not in dispute. (Tr. 54:14-20; ALJD at 5:18-20). Their schedules were available two weeks in advance, and were posted by the time clock in Assisted Living, in full view of anyone who wanted to know which employees worked on the various shifts and had responsibility for which floors. (Tr. 91:10-22; 92:23-93:1).

C. The Employer Investigated A Report That Mr. Bariuad Was Repeatedly Sleeping On The Job And Gave Assurances Of Confidentiality To Three Witnesses Who Saw Mr. Bariuad's Misconduct.

On or around June 6, 2011, a charge-nurse-in-training (Barbara Berg) reported to the Director of Assisted Living, Allison Tobin, that she had seen Mr. Bariuad sleeping during his shift. (Tr. 99:1-11; ALJD at 5:1-3). Ms. Tobin asked Ms. Berg to provide a written statement documenting Mr. Bariuad's misconduct so that she and Human Resources could begin an investigation. Ms. Tobin assured Ms. Berg that her statement would be kept confidential. (Tr. 99:18-24; ALJD at 5:3-5).

Ms. Tobin subsequently contacted charge nurse Lynda Hutton, who had been training Ms. Berg on the NOC shift that night. (Tr. 100:3-9; 5:49). Ms. Hutton informed Ms. Tobin that she had also seen Mr. Bariuad sleeping on "numerous occasions," including the night in question. (ALJD at 7:3-6). However, she was hesitant to document what she saw, as she had experienced threats and intimidation tactics from Mr. Bariuad in the past, and was concerned that he might threaten her safety if he knew that she had reported him. (Tr. 64:5-25; 67:4-12; 100:18-101:1). Mr. Bariuad had made specific statements to Ms. Hutton that "If you do anything to take me out of here, I'm going to take you out of here with me and everybody else" (Tr. 64:13-21; ALJD at

6:11-13).

Ms. Hutton enters and leaves the facility at night for her shift and was worried that if he knew she had reported him, Mr. Bariudad could be waiting for her in the parking lot. (Tr. 100:23-101:1). Ms. Tobin assured Ms. Hutton that both her statement and identity would remain confidential, and the Employer allowed Ms. Hutton to park in a special parking spot that minimized her safety risk as she came and left work. (Tr. 67:6-12; 101:2-6).⁴ Following these assurances of confidentiality,⁵ Ms. Hutton submitted her witness statement (which she subsequently revised due to a confusion about dates). (Tr. 102:14-103:10; ALJD at 7:20-22).

Ms. Tobin also contacted a third employee, a CNA named Rhonda Burns who also regularly worked on the NOC shift with Mr. Bariudad, regarding whether she had observed Mr. Bariudad sleeping on the job. (Tr. 101:12-15; ALJD at 5:28-30). Ms. Burns informed Ms. Tobin that she had observed Mr. Bariudad sleeping on the job many times, and would be willing to draft a witness statement to that effect. (Tr. 101:22-102:2; ALJD at 5:20-21). However, Ms. Burns was concerned about confidentiality and didn't want the fact that she reported Mr. Bariudad to "get back" to the Union.⁶ (Tr. 102:4-8). Ms.

⁴ This undisputed fact, which supports Ms. Hutton's testimony that she feared retaliation from Mr. Bariudad, was omitted completely from the ALJ's decision.

⁵ There is some confusion in the testimony as to who initiated the idea of Ms. Hutton giving a statement. Ms. Hutton testified that she voluntarily wrote the witness statement without any prior prompting or assurances of confidentiality from Ms. Tobin, and that she only received assurances of confidentiality after she had already submitted her statement. (Tr. 59:19-23). Ms. Tobin testified that she first approached Ms. Hutton to obtain her written statement, and gave assurances of confidentiality at that time. (Tr. 104:7-12). However, this confusion on a collateral point is legally irrelevant. The relevant *Anheuser-Busch* analysis only requires the employer to provide that the assurance was made, not that the employer provided the assurance *before* any witness statement is submitted. In any event, as the ALJ correctly acknowledged, Hutton testified that she was well aware of the Employer's practice and policy of keeping witnesses and statements confidential before she submitted the statement, and that this confidentiality policy was important to her. (ALJD at 16:31-34; Tr. 65:3-9). Indeed, Ms. Hutton testified that "if I thought [the witness statement] was not going to be confidential, I probably would have considered leaving Piedmont Gardens . . . [o]ut of fear." (Tr. 65:20-66:1).

⁶ At the hearing, the General Counsel elicited a response from Ms. Burns that she was not "scared" to submit a witness statement for fear of "repercussions from the Union" or Mr. Bariudad. (Tr. 50:12-51:2; ALJD at 5:35-37). Whether she was "scared" (as General Counsel put

Tobin assured Ms. Burns that her statement and identity would be kept confidential from the Union. (Tr. 50:5-8; 102:4-8; ALJD at 5:31-33). Ms. Burns testified that it was important to her that Ms. Tobin gave her assurances of confidentiality before she prepared her statement. (Tr. 55:4-8; ALJD at 5:34-35).

Based on the results of the Employer's investigation and the witness statements obtained from the three employees, the Employer terminated Mr. Bariudad for misconduct. (Tr. 28:15-19; ALJD at 4:36-37). Subsequently, the Union filed a grievance over his termination. (Tr. 28:20-29:14; ALJD at 8:38; G.C. Exh. 5).

D. The Union Requested The Names And Statements Of The Witnesses To Mr. Bariudad's Misconduct.

On June 15, 2011, the Union requested that the Employer provide the statements and identities of all employees "involved in the investigation" of Mr. Bariudad's misconduct. (Tr. 29:24-30:15; ALJD at 8:12-15; G.C. Exh. 6). On June 17, 2011, the Employer responded by providing Mr. Bariudad's statement responding to the allegation that he was sleeping on the job, and by identifying Ms. Tobin and the Acting HR Director as the employee involved with the investigation. (Tr. 32:14-33:15; ALJD at 8:21-36; G.C. Exh. 7). The Employer did not provide the statements and identities of the employees who witnessed Mr. Bariudad's misconduct and were interviewed during the investigation, citing confidentiality concerns, but expressed a willingness to "work with the Union regarding an accommodation to disclosure." (Tr. 33:13-19; ALJD at 8:30-32; G.C. Exh. 7).

On June 17, the Union responded, proposing that the Employer make all the witnesses "available for the Union to interview." (Tr. 35:1-5; ALJD at 8:38-44; G.C. Exh. 8). On June 21, the Employer responded that the Union's proposal was not

it) or merely "concerned" (as Ms. Tobin put it) about the need for confidentiality is irrelevant as the record evidence is undisputed that Ms. Tobin assured Ms. Burns that her identity and statement would remain confidential, nor do the parties dispute Ms. Burns' testimony that the Employer's assurance of confidentiality was important to her. (Tr. 55:4-8; ALJD at 5:34-35).

acceptable, but offered, instead, to provide the Union with a summary of the witness statements without identifying the witnesses by name. (Tr. 36:15-21; ALJD at 9:1-9; G.C. Exh. 9).

The Union never responded to the Employer's offer to provide witness statement summaries, but the Union representative testified at the hearing that this offer was unacceptable. (Tr. 36:20-37:4; ALJD at 9:11-16). The Employer remains willing to provide witness statement summaries to the Union.

E. The Union Had Easy Access To The Names Of Witnesses To Mr. Bariuad's Misconduct.

There is no dispute in that only two other employees, CNA Rhonda Burns and charge nurse Lynda Hutton, regularly worked with Mr. Bariuad on the night shift in Assisted Living. Ms. Burns had worked with Mr. Bariuad on the night shift for a year prior to his termination, and Ms. Hutton had been Mr. Bariuad's supervisor on the shift for approximately two years. (Tr. 52:18-25; 67:17-23; ALJD at 5:12-15, 6:3-5). There was also no dispute that the schedules of CNAs and charge nurses were regularly posted two weeks in advance next to the time clock in Assisted Living, available to any individual who wanted to know who was working which shifts on any particular day that month. (Tr. 91:10-22; 92:23-93:1).

At the hearing, the Union representative, Donna Mapp, testified unconvincingly that she was "very diligent" in investigating the facts surrounding Bariuad's termination. (Tr. 44:5-14; ALJD at 7:33-36). The ALJ incorrectly credited this testimony. (ALJD at 7:33-36). Had Ms. Mapp been very diligent (or even simply asked Mr. Bariuad who was on his shift), she would have easily determined the names of the employees who had reported Mr. Bariuad's misconduct.⁷ According to her, the first thing she did was to

⁷ The union's duty of fair representation extends to the investigation of a grievance. Indeed, the Board has found that a union breaches its duty of fair representation when it fails to interview individuals involved in a dispute with the employer. *Beverly Manor Convalescent Ctr.*, 229 NLRB 692 (1977).

determine the names of the employees on his shift in order to find out who may have reported him sleeping. (Tr. 45:23-46:1; ALJD at 7:33-36). She claimed that she found out the names of Mr. Bariuad's shift co-workers and spoke with them, but that those employees claimed that the Employer did not ask them about Mr. Bariuad sleeping on the job, and that they did not provide any statements to the Employer. (Tr. 45:9-22; ALJD 7:40-42, 8:1). She did not remember the names of those employees with whom she allegedly spoke, but testified unequivocally that she did not speak with CNA Rhonda Burns. (Tr. 46:2-18, 21-24; ALJD at 7:36-40). Indeed, Ms. Mapp testified that when she asked Mr. Bariuad who his shift co-workers were, he didn't mention Rhonda Burns at all. (Tr. 46:15-18; ALJD at 7:36-40). Rhonda Burns testified that no Union representative ever asked her about her role as a witness in the investigation of Bariuad's misconduct. (Tr. 52:6-17).

Ms. Mapp's testimony, which was credited by the ALJ, defies logic. Mr. Bariuad was on the same shift with two co-workers for 1-2 years. If Ms. Mapp had asked him who his shift co-workers were on the night in question, he would have been able to provide the names of the witnesses to his misconduct.

III. ARGUMENT

The identities, and job titles, of the witnesses to Mr. Bariuad's misconduct are protected from disclosure under the *Detroit Edison* balancing-of-interests test, subsequently adopted by the Board in *Pennsylvania Power*. For the same reasons, even if the Board determines that the *Anheuser-Busch* rule should be overturned, and applies the *Detroit Edison* balancing test to the Employer's obligation to turn over witness statements, the witness statements should also be protected from disclosure.

Further, it is the Employer's position that the *Anheuser-Busch* rule should exclude witness *identities* from the Employer's obligation to provide information to the Union.

A. *Detroit Edison and Pennsylvania Power Protect The Names And Job Titles Of Witnesses From Disclosure To The Union.*

In *Pennsylvania Power*, 301 NLRB 1104 (1991), the Board adopted the *Detroit Edison* test for determining the employer's right to withhold witness names from the union. In that case, the employer was a public utility that operated both nuclear and fossil power production plants. *Id.* at 1107. The employer's drug and alcohol policy allowed it to test an employee if there is a "suspicion" that the employee was under the influence. *Id.* at 1104. Pursuant to this policy, the employer obtained information and written statements from employee witnesses about potential violations, subsequently terminating five employees and suspending five other employees. *Id.* The union filed grievances on behalf of these employees, and requested the names and statements of the witnesses who "tipped off" the employer. *Id.* The employer refused, asserting that it had promised the witnesses confidentiality. *Id.*

Following the *Detroit Edison* "balancing-of-interests" approach, the Board agreed with the employer that the Union was not entitled to the statements *or identities* of the informants. *Id.* at 1107. The Board explained:

The Respondent contends that if it is not able to maintain strict confidentiality in its drug program, informants will be deterred from coming forward with information regarding drug use by other employees. The Respondent further claims that identifying informants potentially subjects them to harassment. We find these arguments persuasive. Like the employer in Detroit Edison, supra, the Respondent has demonstrated the strength of its concerns, and we find no national labor policy warranting a remedy that would "unnecessarily disserve" the legitimate interest in confidentiality here. Detroit Edison, supra, 440 U.S. at 341. Although we agree that the names and addresses of the informants here are relevant to the Union's collective-bargaining responsibilities, we find that in investigations of this kind of criminal activity, a potential for harassment of informants, with a concomitant chilling effect on future informants, it is sufficiently likely that the Respondent has a legitimate interest in keeping the informants' identities confidential and that this confidentiality interest outweighs the Union's need for the informants' names and addresses. (Id. (emphasis added))

Similar confidentiality interests exist in this case. Given that the Union had easy access to the names of witnesses (and therefore, limited need to obtain the names from

the Employer), the balance of interests tips sharply in favor of the Employer. Finally, because the balance of interests favors the Employer, it has satisfied its obligation under Section 8(a)(5) and *Pennsylvania Power* by offering to provide the Union with summaries of the witness statements.⁸

1. Piedmont Gardens Has A Weighty Interest In Keeping Witness Names Confidential.

As explained above, *all* employers have a significant interest in keeping witness information confidential. But these interests apply with extra force to Piedmont Gardens due to the sensitive safety issues at the retirement community, and the specific confidentiality concerns expressed by the employee witnesses at the administrative hearing. *See N. Indiana Pub. Serv. Co.*, 347 NLRB 210, 212 (2006) (noting that the Board has “considered whether the information was sensitive or confidential within the factual context of each case”).

Here, as conceded by the ALJ, the Employer has traditionally maintained a policy and practice of witness confidentiality, which its employees have come to depend upon. (Tr. 90:15-19; ALJD at 14:13-15). This practice is especially critical at the retirement community because the Employer is unable as a practical matter to have supervisors “watching CNAs 24/7” to make sure they are not engaging in neglect or abusive conduct. (Tr. 88:23-89:6). Accordingly the Employer relies in significant part upon its employees to observe and report incidents of resident abuse or neglect as well as other employee misconduct that could lead to resident harm. (Tr. 89:7-15). As testified to by the Executive Director, it is “crucial” that employees “feel comfortable coming forward to report abuse and neglect” because employee information is an important way for Piedmont Gardens to ensure the safety of their residents. (Tr. 89:17-23). Like the

⁸ During the hearing and in its Post-Hearing Brief, the General Counsel cited to footnote 5 in *Anheuser-Busch* for the proposition that employers have an absolute duty to furnish names of witnesses to an incident for which an employee was disciplined. (Tr. 19:7-14). *See Anheuser-Busch*, 237 NLRB at 984 n.5 (citing *Transport of New Jersey*, 233 NLRB 694 (1977)). However, as noted by the ALJ, this footnote is simply dictum. (ALJD at 13:50-51 n. 17).

employer in *Pennsylvania Power*, Piedmont Gardens must maintain strict confidentiality in its investigations in order to foster an atmosphere where employees feel comfortable engaging in the inherently uncomfortable task or reporting one's co-worker. Also, like in *Pennsylvania Power*, identifying these witnesses potentially subjects them to harassment. The *Pennsylvania Power* Board found that both of these considerations were "persuasive" demonstrations of the strength of the employer's confidentiality concerns.

The ALJ attempted in his Decision to distinguish *Pennsylvania Power* based on his observation that the employer's interest in preventing "substance abuse at a nuclear power plant and criminal conduct" is greater than the safety interests at issue in this case. (ALJD at 15:4-8). However, a similar observation was squarely addressed, and summarily dismissed, by the Board in *Alcan Rolled Products*, 358 NLRB No. 11 (2012). In that case, two union-represented employees told a supervisor—in confidence—that a third employee was "unsafe to work with." *Id.* The Board affirmed the ALJ's finding that the employer had demonstrated a legitimate interest in preserving the confidentiality of the witness names:

[U]nder the more expansive understanding of confidentiality involving employee informants that the case law presents, *one is hard pressed to say that the employer's interest in the confidentiality of the identity of those making reports about Bush—even if not as weighty as in some cases—is not legitimate.* If Alcan's operation does not pose a significant risk to public safety, it clearly contains many inherent dangers for employees that make the safe operation of equipment a priority. *There can be no doubt that Alcan has a significant and legitimate interest in encouraging employees to report other employees who may be acting in ways that endanger themselves, their co-employees or the facility.* "The connection of confidentiality to the safety of . . . other employees and to job performance is plain." (*Id.* at *7 (citations omitted; emphases added))

Indeed, Board law protecting the confidentiality of witness informants is not restricted to employers who operate nuclear power plants, or employees engaged in criminal conduct. *See also Metro. Edison Co.*, 330 NLRB 107 (1999) ("However, we do not agree with the judge that a confidentiality claim is not legitimate or substantial when it involves informants about workplace theft rather than drug use or other conduct

impacting public or employee safety.”). Here, the ALJ wrongly disputes the common sense conclusion that sleeping on the job in an assisted living facility whose residents are dependent on the staff for their safety and well-being, presents real and significant dangers to the residents. (ALJD at 15:2-4; Tr. 87:22-88:3). Even the General Counsel conceded the “severity of the situation in terms of people sleeping on the job” at a retirement community. (Tr. at 97:15-16). Executive Director Gayle Reynolds testified that “if someone fell and injured themselves and no one responded, it could lead to serious harm to that resident, which would have an effect on their health and well-being.” (Tr. 87:22-88:3). Charge Nurse Lynda Hutton further testified that Mr. Bariuad’s sleeping instead of responding to his residents’ pages for assistance “could” have created a danger to facility residents had other CNAs not been paying attention. (Tr. 68:18-21). Fortunately, no resident in Assisted Living fell and injured themselves that night while Mr. Bariuad was sleeping during his shift. (Tr. 69:2-7). However, simply because no actual harm occurred on this particular occasion does not mean that serious safety concerns are not implicated by employees sleeping on the job at Piedmont Gardens.

The witnesses also articulated other specific concerns about confidentiality and potential harassment. Ms. Hutton was concerned for her safety and wanted to be sure that her identity and statement would not be disclosed to either Mr. Bariuad or the Union. (Tr. 100:17-20). She testified that she felt “intimidated” by Mr. Bariuad, and that he made various threats to her in order to keep her from reporting his misconduct. (Tr. 64:5-7; 64:16-21). She felt afraid of coming into and leaving the facility at night. (Tr. 67:4-7). Indeed, Ms. Hutton was so frightened of Mr. Bariuad and the Union finding out about her report, that had Piedmont Gardens not maintained a policy of confidentiality, she would have considered “resigning” out of “fear,” rather than participating in the investigation, even though Ms. Hutton has been a Piedmont Gardens employee for over 40 years. (Tr. 57:9-13; 65:20-66:5). To alleviate her concerns and obtain her full cooperation in the investigation, the Employer assured her of its confidentiality policy and allowed her to

park in a special location. (Tr. 67:6-12; 101:2-6).

In the face of this evidence, the ALJ incorrectly found “no credible record evidence of fear by employees of retaliation or physical threat from Mr. Bariuad or the Union if they were identified.” (ALJD at 14:7-8). Based on nothing but his own speculation, the ALJ incorrectly decided that Ms. Hutton had “simply allowed [Mr. Bariuad’s] work naps without any problems” because they were “work colleagues.” (ALJD at 10:47-49, n. 14). Indeed, the ALJ’s Decision completely overlooked Ms. Hutton’s credible and un rebutted testimony that she was so frightened of potential retaliation from Mr. Bariuad that she requested (and received) a special parking space so that she could safely enter and exit the facility before and after her night shift. (Tr. 67:6-12; 101:2-6).

In its Brief in Support of Limited Exceptions, the General Counsel argues that the Employer does not have a confidentiality interest in withholding employees’ witness statements (and presumably, identities) because (1) two of the witnesses were supervisors whose job duties required them to report misconduct; and (2) one of the witnesses was a former employee, at no risk of harassment by the Union or Mr. Bariuad. G.C. Brief, at pp. 7-8. The General Counsel will presumably repeat these arguments in answering the Employer’s Limited Cross Exceptions; however, neither of these points hold any merit. *First*, as recognized by the ALJ, *Anheuser Busch* and its progeny do not distinguish between witness statements provided by employees or supervisors. (ALJD at 16:22-25). *Second*, the fact that one of the witnesses subsequently decided to resign her employment has no bearing on this issue. Whether a witness is a current or former employee at the time of the union’s request, the witness should feel comfortable relying on the employer’s assurances of confidentiality *at the time* he or she decides to volunteer information about co-worker misconduct to the employer.

For the above-stated reasons, the Employer has demonstrated a strong interest in keeping the identities of witnesses confidential from the Union in this case.

2. The Union's Need For The Employer To Provide The Witness Identities Is Minimal Because It Had Easy Access To The Information.

The second step in the *Detroit Edison* analysis is determining the Union's need for the information from the Employer. Here, in the face of overwhelming evidence, the ALJ incorrectly rejected the Employer's argument that the Union could easily have discovered the names and job titles of the witnesses to his misconduct. On the contrary, the Union could have easily determined the names of the witnesses who reported his misconduct through either or both of two simple and obvious methods: by asking Mr. Bariuad who his co-workers were, and/or by checking the posted work schedule for the night shift in the Assisted Living department.

First, Union representative Donna Mapp could have asked Mr. Bariuad who his co-workers were. Her testimony that she did ask, and still could not determine who the witnesses were, is not worthy of credibility. It is not disputed that only two other employees worked on the NOC shift with him; that each of those two employees (Rhonda Burns and his supervisor Lynda Hutton) had worked the night shift for one and two years, respectively; and that these two co-workers were both witnesses to Mr. Bariuad's misconduct. Mr. Bariuad probably also knew that a third employee, Barbara Berg, was in training as a charge nurse that night. Thus, simply asking Mr. Bariuad who his co-workers were would have yielded the names of at least two out of the three witnesses. Donna Mapp, of course, testified that she *had* asked Mr. Bariuad who his co-workers were, but that she did not recall "at this time" the names of any of the co-workers he named. (Tr. 46:21-24). Incredibly, she claims that he did not name Rhonda Burns as one of the individuals who worked the night shift in Assisted Living, and that none of the individuals he identified had admitted to submitting witness statements. (Tr. 46:7-18).

Given that Mr. Bariuad only had two regular co-workers on the night shift in the Assisted Living Unit, and that one of them had been his direct supervisor for two years, Ms. Mapp's testimony cannot be believed. The ALJ should not have credited her

testimony, and should not have theorized (without any basis in the record), that the witness statements “could have come just as well from unidentified residents at the facility.” (ALJD at 14:34-37).

Second, it was also not disputed that work schedules are posted two weeks in advance in “public view” next to the time clock in the Assisted Living unit. (Tr. 91:4-18). Thus, the Union did not need the Employer to provide it with a list of witnesses interviewed by the Employer.

Citing *King Soopers, Inc.*, 344 NLRB 842, 845 (2005), the ALJ claims that “there is no duty on the Union to obtain the requested information on its own.” (ALJD at 14:37-41). This proposition misses the point. The *Detroit Edison* balancing test requires the employer’s confidentiality interest to be *weighed against* the union’s ability to get the requested information on its own. The Board has dismissed complaints alleging 8(a)(5) violations where the Union has easy access to the names of witnesses to employee misconduct. See *Columbus Prods. Co.*, 259 NLRB 220, n.1 (1981) (distinguishing *Transport of New Jersey*, 233 NLRB 694 (1977) on the grounds that in *Transport*, the union had “no other way of knowing who the passenger [witnesses] were and was unable to interview them without securing their names from the employer”).

For these reasons, even assuming that the remedy of providing the witness identities has not been rendered moot by the instant proceedings, the Employer’s interests in keeping the witness identities confidential far outweighs the Union’s need for the information.

3. The Employer Fulfilled Its Obligation Under *Detroit Edison* By Offering Witness Statement Summaries.

Even though the balance-of-interests test tilts in favor of the Employer, the Employer is required under *Detroit Edison* to seek an accommodation to resolve the Union’s competing need for the information and the Employer’s confidentiality concerns. In *Pennsylvania Power*, the Board found witness statement summaries to be a suitable

accommodation. 301 NLRB at 1107. The ALJ correctly found that the Employer already offered this as an accommodation, and although the Union rejected this offer at the hearing, the Employer continues to be willing to provide it.

B. The *Anheuser-Busch* Rule Should Be Extended To Protect The Identities Of Witnesses To Employee Misconduct.

The Employer further excepts to the ALJ's decision to apply the *Detroit Edison* balancing test to the employer's duty to disclose the identities of witnesses to co-worker misconduct. It is the Employer's position that the same considerations that compelled the Board in *Anheuser-Busch* to create a blanket exclusion for witness *statements*, also apply to witness *identities*. Therefore, the same blanket exclusion should apply.

First, a case-by-case confidentiality analysis is inappropriate in the context of witness identities, as in witness statements, because employers *always* have a "legitimate and substantial" interest in keeping witness identities confidential. There is *always* the risk of the dangers identified in *Anheuser-Busch*: that exposing witness information (identities or statements) to the Union could lead to the intimidation of witnesses prior to arbitration, a chilling effect on witness' willingness to participate in investigations, and a decrease in the quality of employer investigations. Regardless of whether the employee being investigated has made explicit threats against potential witnesses, a bright-line rule protecting witness information from disclosure is necessary in order to encourage employees to come forward with knowledge of employee misconduct. Employers *universally* have an interest in stamping out misconduct, just as all employees have an interest in knowing they are able to provide information to their employer without it being "leaked" to the union or their co-workers. Without this bright-line rule, employees will be discouraged from candidly participating in employer investigations into workplace misconduct. That is precisely the rationale behind *Anheuser-Busch*: "a desire to proclaim a clear, simple, and all-encompassing rule rather than one which entails detailed examination and balancing of all the particular facts." *See also Whirlpool Corp.*,

281 NLRB 17, 25 (1986) (“I have also concluded that there is a parallel between handing over a written statement, as in *Anheuser-Busch*, and handing over an employee to make a written or oral statement”).

Second, applying a case-by-case approach is inappropriate because it inevitably places HR practitioners in the difficult position of having to perform legal analysis every time they conduct a routine investigation into employee misconduct. A case-by-case approach results in a legal morass wherein the HR practitioner must interview witnesses *at their own risk*, without any clear guidance as to whether certain witness information would be required to be disclosed to the union. Non-attorney HR practitioners are not qualified to determine whether in any given situation the employer’s confidentiality interest is “legitimate and substantial,” whether its assurances of confidentiality to witnesses are legally credible, or whether any concerns about confidentiality expressed by witnesses are sufficient to protect the information from disclosure. In effect, the lack of guidance in a case-by-case approach requires attorneys to be involved in every run-of-the-mill HR investigation into employee misconduct, in order to assess the strength of the employer’s confidentiality interest. Such a requirement is impractical and should not be imposed.

Third, Board cases support the Employer’s interest in the confidentiality of names of witnesses who participated in internal investigations of misconduct, especially in situations where disclosing names would single out the adverse witnesses who reported the misconduct. In a case decided shortly after *Pennsylvania Power*, the Board adopted an ALJ’s decision which held that the union was not entitled to the names of employee witnesses who had complained about the inattentive driving of a Union forklift driver. *Boyertown Packaging Corp.*, 303 NLRB 441, 444-45 (1991). The ALJ noted:

Moreover, the singling out of witnesses adverse to a grievance spotlights them as opponents to the grievant’s cause and, by so doing, unnecessarily enhances the possibility they may be subject to coercion or intimidation in an effort to persuade them to change or retract their oral reports previously given to the employer. *It is precisely this possibility of coercion and*

intimidation of witnesses that the Board's decision in Anheuser-Busch was designed to prevent, and I perceive no logical reason why that same policy of preventing coercion and intimidation of witnesses should not apply to requests limited to the names of employee witnesses who complained. (Id. (emphasis added))

See *Metro. Edison Co.*, 330 NLRB 107, 120 (1999) (“It seems essentially impossible to distinguish between the disclosure of witness statements and witness identities where the issue is potential intimidation of those witnesses”);⁹ see also *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995) (information that gives rise to a confidentiality interest includes “that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses”).

IV. CONCLUSION

For each and all of the foregoing reasons the Employer requests that the ALJ’s Decision be reversed and the Complaint dismissed as to the issues addressed herein.

May 25, 2012

Respectfully submitted,



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WEST d/b/a PIEDMONT GARDENS

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⁹ In that case the Board concluded that the employer violated 8(a)(5) by refusing to provide the identities of employees who had provided information to the employer about the grievant’s misconduct, but that was because the employer had failed to come forward and offer an accommodation to the union, a failure not shared by the Employer in the instant case.

PROOF OF SERVICE

1
2 1. I am over eighteen years of age and not a party to this action. I am employed in the County
3 of San Francisco , State of California. My business address is 3 Embarcadero Center, 7th
Floor, San Francisco, CA 94111.

4 2. On May 25, 2012, I served the following document(s):

5 RESPONDENT'S BRIEF IN SUPPORT OF LIMITED CROSS-EXCEPTIONS TO THE
6 DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW
JUDGE

7 The document(s) served are included in the attached List of Documents.

8 3. I served the document(s) on the following person(s):

9 Noah J. Garber
10 William A. Baudler
National Labor Relations Board - General Counsel
11 1301 Clay Street, Suite 300N
Oakland, CA 94612
noah.garber@nlrb.gov
12 william.baudler@nlrb.gov

13 Yuri Y. Gottesman
14 Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
15 Alameda, CA 94501
ygottesman@unioncounsel.net

16
17 The names, addresses, and other applicable information about the persons served is
18 included in the attached Service List.

19 4. The documents were served by the following means:

20 **By U.S. mail.** I enclosed the document(s) in a sealed envelope or package addressed to the
person(s) at the address(es) in Item 3 and (**check one**):

21 deposited the sealed envelope with the United States Postal Service, with the postage
22 fully prepaid.

23 placed the envelope for collection and mailing, following our ordinary business
practices. I am readily familiar with this business' practice for collecting and processing
24 correspondence for mailing. On the same day the correspondence is placed for collection
and mailing, it is deposited in the ordinary course of business with the United States Postal
25 Service, in a sealed envelope with postage fully prepaid.

26 I am employed in the county where the mailing occurred. The envelope or package was
placed in the mail at San Francisco, California.

27 **By Overnight Delivery/Express Mail.** I enclosed the documents and an unsigned copy of
28 this declaration in a sealed envelope or package designated by
[name of delivery company or U.S. Postal Service for Express Mail] addressed to the
persons at the address(es) listed in Item 3, with

1 [Express Mail postage or, if not Express Mail, delivery fees] prepaid or provided for. I
2 placed the sealed envelope or package for collection and delivery, following our ordinary
3 business practices. I am readily familiar with this business' practice for collecting and
4 processing correspondence for express delivery. On the same day the correspondence is
5 collected for delivery, it is placed for collection in the ordinary course of business in a box
6 regularly maintained by

7 [name of delivery company or U.S. Postal Service for Express Mail] or delivered to a
8 courier or driver authorized by [name of delivery company] to receive documents.

9 **By Messenger Service.** I served the documents by placing them in an envelope or package
10 addressed to the persons at the address(es) listed in Item 3 and providing them to a
11 professional messenger service for service. (See Declaration of Messenger below.)

12 **By Facsimile Transmission.** Based on an agreement between the parties to accept service
13 by facsimile transmission, which was confirmed in writing, I faxed the document(s) and an
14 unsigned copy of this declaration to the person(s) at the facsimile numbers listed in Item 3
15 on [type date], at [type time]. The transmission was reported as complete without error by a
16 transmission report issued by the facsimile machine that I used immediately following the
17 transmission. A true and correct copy of the facsimile transmission report, which I printed
18 out, is attached hereto.

19 **By Electronic Service (E-mail).** Based on a court order or an agreement of the parties to
20 accept service by electronic transmission, I transmitted the document(s) and an unsigned
21 copy of this declaration to the person(s) at the electronic notification address(es) listed in
22 Item 3 on May 25, 2012 before 5:00 p.m. PST.

23 The transmission of the document was reported as complete and without error by
24 electronic receipt of a delivery confirmation, a true and correct copy of which is attached
25 hereto.

26 I did not receive, within a reasonable time after the transmission, any electronic
27 message or other indication that the transmission was unsuccessful.

28 **Via Court Notice of Electronic Filing.** The document(s) will be served by the court via
NEF and hyperlink to the document. On [type date], I checked the CM/ECF docket for this
case or adversary proceeding and determined that the person(s) listed in Item 3 are on the
Electronic Mail Notice List to receive NEF transmission at the email addresses indicated in
Item 3 [or on the attached service list, if applicable].

STATE: I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

FEDERAL: I declare that I am employed in the office of a member of the bar of this court
at whose direction the service was made.

Dated: _____ Signature: _____
Type or Print Name: _____

DECLARATION OF MESSENGER

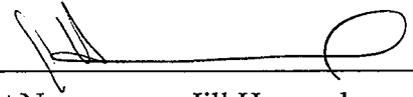
By personal service. I personally delivered the envelope or package received from the
declarant above to the persons at the addresses listed in Item 3. (1) For a party represented
by an attorney, delivery was made to the attorney or at the attorney's office by leaving the
documents in an envelope or package, which was clearly labeled to identify the attorney
being served, with a receptionist or an individual in charge of the office or in a conspicuous
place in the office, between the hours of nine in the morning and five in the evening.

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(2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening. At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding. I served the envelope or package, as stated above, on **[type date]**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: 5/25/12

Signature: 

Type or Print Name: Jill Hernandez