

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

KALEIDA HEALTH

and

Case 3-CA-27507

**COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1168**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the Acting General Counsel hereby submits this Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's Decision ("ALJD") in the above-captioned case.

The Administrative Law Judge ("ALJ") found that Respondent had a legitimate confidentiality interest in the quality assurance documents at issue, based on the fact that New York State law protects such information from disclosure. (ALJD at pp. 10-12) The ALJ found that the accommodation offered by Respondent to balance its confidentiality interest with the Union's interest in receiving the information was insufficient. (ALJD at pp. 12-14). The ALJ also found that the scope of the request included accident/incident reports for all departments of DeGraff Memorial Hospital, not just the skilled nursing facility ("SNF"), and that the Union agreed to limit the original request to three months of reports (ALJD at pp. 14-15). As a remedy for these findings, the ALJ ordered Respondent to furnish the accident/incident reports requested by the Union for the DeGraff Memorial Hospital facility with patient information redacted and a

confidentiality provision. (ALJD at pp. 15-18). As set forth below, Respondent has excepted to these findings.

Respondent's Exceptions 1 and 2:

In Exception 1, Respondent excepts to the ALJ's finding that the legislative history of the New York Public Health Law and the New York State Education law provisions relied on by Respondent have no probative value. Respondent points out that in the ALJD at p. 8 n.6, the ALJ found that the legislative history had no probative value because it did not specifically refer to Section 2805. Respondent asserts that it supported its confidentiality arguments by the New York State Education Law and New York State Public Health Law provisions and that the ALJ improperly refused to consider the legislative history of these laws. In Exception 2, Respondent excepts to the ALJ's finding that the Union's interest in obtaining the information outweighed Respondent's confidentiality interest.

As an initial matter, the ALJ fully considered Respondent's confidentiality defense, the state statutes on which it relies, and the legislative history. ALJD at pages 7-9. In addition, Respondent's first exception has no legal consequence to the proceeding before the Board because the ALJ found that Respondent has a legitimate confidentiality concern with regard to the incident reports and STARS reports as part of its quality assurance program to improve patient care. ALJD at p. 11. No party is excepting to the ALJ's finding that Respondent has a confidentiality interest in the incident reports under the New York state statutes and Respondent was thus not prejudiced by the ALJ's reading or interpretation of the legislative history. Moreover, as explained below, the legislative history is not needed to interpret the statutes in any event because both statutes

expressly provide that confidential information is discloseable in certain instances. Thus, Respondent's Exception 1 is meritless.

With respect to Respondent's Exception 2, the ALJ properly found that the Union's interest in the reports outweighed Respondent's confidentiality interest. While the ALJ found that Respondent possesses a confidentiality interest in the reports, the ALJ relied on Supreme Court and Board precedent, establishing that a claim of confidentiality must be balanced against a union's need for the information. Detroit Edison v. NLRB, 440 U.S. 301 (1979). In balancing the interests here the ALJ weighed the statutes at issue against the Union's need for the incident reports in representing a discharged employee. As noted above, the statutes at issue expressly provide that any confidentiality protection is not absolute. Both Education Law Section 6527 and Public Health Law Section 2805-m, provide that, even if the information had been collected pursuant to the applicable statutes, confidential information is discloseable "as provided by any other provisions of law." Based in part in such language in a New York state statute, the Board in LaGuardia Hospital, 260 NLRB 1455 (1982), found that the respondent hospital had to provide the union with certain portions of patients' charts that it claimed were confidential. Id. at 1463-1464.¹ The administrative law judge found, and the Board agreed, that the information was relevant to the grievance, and the union's right to the information outweighed the patient's right of privacy. Id. at 1463. Here, the ALJ followed precedent established in Borgess Medical Center, 342 NLRB 1105 (2004), where the Board found that incident reports sought by the union were protected from disclosure pursuant to a Michigan state statute that is similar to the New York state statutes referenced above. The

¹ The statute at issue provided that patients' medical records were confidential, except as otherwise provided by law. Id. at 1460.

Michigan statute provided that documents collected for a professional review function in a health-care facility were confidential. Importantly, the Michigan statute did not contain a provision permitting disclosure “as provided by other provisions of law” or similar provision as that in the New York state statutes at issue in this case. Even in the absence of the provision, however, the Board adopted the ALJ’s decision that, although the incident reports the union requested were confidential, the union’s need for the reports--to prepare for an arbitration of a discharged employee--outweighed the employer’s confidentiality interest. The Board has held in other cases that a union’s interest in securing records for the grievance/arbitration of a discharged employee outweighs an employer’s interest in confidentiality. See, e.g., Howard University, 290 NLRB 1006 (1988) (union’s need under NLRA to obtain patient medical records to evaluate a grievance for discharged employee outweighed employer’s confidentiality concerns). New York state law specifically exempts from the general prohibition against disclosing incident reports and quality assurance documents "as provided by any other provisions of law." As discussed in Howard University, this requirement is satisfied by Section 8(a)(5) of the Act. See also, Transport of New Jersey, 233 NLRB 694 (1977) (employer’s failure to supply union with requested names and addresses of passenger-witnesses to bus accident unlawful). The ALJ properly applied extant, well-established Board law in finding that the Union’s interest outweighed the Respondent’s confidentiality interest.

Respondent's Exception 3:

Respondent excepts to the ALJ's finding that Respondent's proposed accommodation was insufficient to balance the interests of the Union and Respondent. The record establishes that during the investigation of the Andrews grievance, other nurses informed the Union that not all falls were reported, and, at times, not every step of the reporting policy was followed. (ALJD at p.3, line 7-8). Thus, the Union sought evidence of disparate treatment in the incident reports and that information would have a substantial bearing on whether the grievance would be arbitrated. (Tr. 60-61).

Respondent's accommodation consisted of an offer to have an employer official review the requested information and inform the Union if there was any helpful information. Specifically, Respondent offered to provide a list of employees who did not follow the reporting requirements or use a mechanical lift, but refused to provide the Union with actual documents that contained the helpful information. The Union rejected this accommodation as unreasonable. Respondent failed to meet its duty to seek an accommodation with the Union. Respondent's offer to review the requested records and provide to the Union a list of employees who did not make the appropriate notifications regarding a patient fall or the use of an appropriate lift to pick up the patient fell short on a number of levels. (Tr. 59-60). Obviously, relying on an adversary in the grievance-arbitration proceeding to select what it deems "exculpatory evidence" is less than desirable. In addition, inasmuch as Andrews was disciplined in part for failing to complete an incident report, the Union was entitled to secure from Respondent copies of the actual incident reports so that it would know if incident reports were consistently completed for every incident of a fall occurring at the facility that the Union knew about.

This information would obviously show whether the policy for which Andrews was discharged was consistently followed. In this case, the Union, through its investigation, knew of patient fall incidents that were not reported. (Tr. 60). The actual incident reports (or lack of an incident report) would be helpful to the Union in evaluating whether Andrews had been treated fairly and in presenting her case at arbitration. Respondent's accommodation did not allow the Union to see if the patient fall incidents it knew of were consistently memorialized in an incident report. While Respondent argues that the Union rejected this offer because the Union did not trust the Respondent to provide the information, this argument is both disingenuous and simplistic under the circumstances. The Union explained that it needed the information given the detailed, thorough and lengthy examination of the information that was required. (Tr. 59-60) The Union further noted that its purpose was at odds with that of Respondent, and that it would also need copies of the information in Respondent's possession should it pursue the grievance to arbitration. (Tr. 60). The Union offered its own accommodation, i.e., that patient identities be redacted from the information.² (Tr. 55-57).

Respondent's proposal is strikingly similar to that proposed by the respondent in Borgress Medical Center, 342 NLRB 1105 (2004). There, the Board found that the respondent failed to bargain with the union over a reasonable accommodation for medical information where it refused to provide incident reports, but rather asserted that it would verify that other employees who had committed a similar offense to the grievant had not

² Respondent has not raised patient identities as a confidentiality concern. The Board has found that medical information which sets forth the identities of patients has a "legitimate aura of confidentiality." Johns-Manville Sales Corp., 252 NLRB 368 (1980). Thus, the Union addressed any confidentiality concerns about patient identities by agreeing that such information should be redacted.

been disciplined. The Board found this proposal insufficient to meet respondent's obligation to bargain:

We conclude, however, that the Respondent's offer failed to adequately fulfill its duty to accommodate. As the Union attorney explained during her discussion with the Respondent's attorney, the Emergency Department director's testimony could not supply the Union with the information it needed to assess Wagner's grievance. The Respondent did not offer to provide any evidence regarding the specific circumstances of previous incidents, which would be necessary to determine whether Wagner had in fact been unfairly treated. (The incident reports, in contrast, provided some description of what each incident involved.) Certainly, the testimony offered by the Respondent would not establish whether other employees had self-reported and, if not, whether failure to do so had been treated as a coverup warranting discipline...We therefore conclude that the Respondent did not adequately offer to accommodate its confidentiality interests and the Union's need, as required under Section 8(a)(5) and (1).

Id. at 1106.

Likewise, in the instant case, the Respondent's offer to review the information, but not to turn it over to the Union, did not adequately address the Union's need for the information, as the Union would have no basis to assess the circumstances of each incident. Further, the Respondent's "information" would provide the Union with nothing to rely on for purposes of arbitrating the grievance.

In these circumstances, the ALJ was correct in finding that the accommodation was insufficient to balance the interests of the Union and Respondent.

Respondent's Exception 4:

Respondent excepts to the ALJ's finding that the scope of the Union's information request was for information from the entire DeGraff Memorial Hospital facility, rather than from the SNF only. Respondent asserts that any order should be limited to the SNF department. Respondent essentially asks that the Board infer that the Union meant to limit its request to a portion of the bargaining unit. Respondent's argument is based on

the fact that the information request was issued to the SNF manager, SNF administrators were involved in the discussions about the request, and the discussions related to RN's in the SNF facility. The ALJ properly determined that the scope of the request included the entire bargaining unit at DeGraff. The bargaining unit, comprised of all RNs in all categories of employment at the DeGraff Memorial Hospital encompasses both the acute-care and SNF departments. Patients have fallen in both departments. (GC Exh. 2, Tr. 77, 91-92). The written request itself is not limited to the SNF facility, and Respondent conceded that the Union never indicated that its information request was confined to the SNF. (Tr. 112). Further the request includes STARS reports which are only used in the acute-care department, and not in the SNF. (GC Exh. 6, Tr. 36, 46-47,94). Therefore, the request on its face relates to the entire bargaining unit. Information concerning the bargaining unit as a whole is presumptively relevant and the ALJs order is properly limited in scope to the bargaining unit.

As noted by the ALJ, to read the request as encompassing the SNF only, would negate the specific reference to the STARS reports utilized in the acute-care department. The ALJ properly determined that the fact that the Union directed its request to the manager of skilled nursing does not require that the scope of the request be limited to a portion of the bargaining unit. In addition, the fact that Respondent provided information for only the SNF in responding to the Union's request for similar discipline given to employees, does not limit the scope of the request. It is well established that a union must clearly and unequivocally waive its right to relevant information before a finding limiting its production must be made. New York Telephone Co., 299 NLRB 351 (1990). The Union has not waived its right to the information covering the entire bargaining unit. This

is evident from the written request itself and the fact that, as conceded by Respondent, the Union never modified its request to limit it solely to the SNF department.

Therefore, the ALJ was correct in finding that the Union is entitled to information for bargaining unit employees who work in acute care and the SNF.

Respondent's Exception 5:

Respondent excepts to the ALJ's finding that Respondent violated the Act by failing to furnish the accident/incident reports at issue.

An employer is required to supply information requested by a collective-bargaining representative that is relevant to its proper performance of its duties, which includes the filing and processing of grievances. NLRB v. Acme Industrial Co., 385 U.S. 432 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); Beth Abraham Medical Services, 332 NLRB 1234 (2000). Information concerning the terms and working conditions of employees in the bargaining unit is presumptively relevant and the union is not required to demonstrate its relevance. See, North Star Steel Co., 347 NLRB 1364, 1368 (2006); Sunrise Health & Rehabilitation Center, 332 NLRB 1304 (2000). Furthermore, where the information sought concerns grievances, the union is entitled to the information to evaluate whether to file a grievance or determine whether further processing of a grievance is warranted. Reno Sparks Citilift, 326 NLRB 1432 (1998); Ohio Power Co., 216 NLRB 987 (1975).

In addressing information for grievance processing, the Board, in Borgess Medical Center, 342 NLRB 1105 (2004), found information relevant where it was needed to determine whether a grievant's termination was unfair. In Borgess Medical Center, the grievant was terminated for making and then failing to report a medical error. In order to

determine whether the termination was fair, the union sought incident reports concerning other medical errors. Id. The Board adopted the finding of the administrative law judge that such reports were relevant. Id.

The Union in the instant case requested the same type of information. The information sought is needed to determine whether the grievant was treated differently than other bargaining unit employees who did not report a patient's fall, notify the appropriate individuals of the fall, or use a mechanical lift to aid the patient. Thus, the requested information concerns the bargaining unit and is needed for grievance processing.

Therefore, the ALJ was correct in finding that Respondent violated the Act by failing to furnish the accident/incident reports requested by the Union.

Respondent's Exception 6 and 7:

Respondent excepts to the ALJ's finding that the information should be provided to the Union rather than ordering further bargaining on possible accommodations.

As noted by the ALJ in his decision further bargaining in the circumstances of this case would not be an appropriate remedy.

The record establishes that the Union will not make a determination as to whether to arbitrate the grievance of the discharged employee Andrews until it has had an opportunity to review the requested information. There can be an extensive amount of information contained in an accident report form and such detailed information is necessary to determine issues involving disparate treatment. With respect to the Union's request for nurses notes regarding fallen patients, Respondent has not raised any objection to their production in this proceeding. To give Respondent another opportunity to bargain over the provision of the incident report forms and STARS reports which I have found were unlawfully withheld, seems unwarranted under the circumstances of this case. (ALJD at p. 16)

The Union's position on Respondent's accommodation is set forth above. A closer look at the conversation between Respondent's associate general counsel, Michael Connors and the Union's executive vice president, Cori Gambini shows that negotiations between the Union and Respondent for an accommodation did occur. After Connors offered Respondent's accommodation, Gambini explained why the Respondent's offer was not feasible. Respondent did not offer any other suggestions after Ms. Gambini stated her position. Therefore, as noted by the judge, it would serve no purpose to have the parties have further discussions on whether or not the Union is entitled to the accident/incident reports. The Union had already offered its accommodation to redact the patient names and reduce the time period of the request. The Union explained to Respondent's officials that an employee was discharged and unemployed and that it was taking months to get the requested information. For those reasons and the rationale set out by the ALJ, the ALJ correctly found that no further bargaining on a possible accommodation was appropriate under the circumstances.

Respondent relies on Metropolitan Edison Co., 330 NLRB 107 (1999), which is distinguishable. In that case the parties had not bargained over any accommodation, and the appropriate remedy was to give the parties the opportunity to bargain over the conditions under which the union's need for relevant information would be satisfied with appropriate safeguards to protect the employer's confidentiality concerns. Here, the parties have had the opportunity to adjust their differences. The ALJ's remedy in this situation is therefore appropriate. As discussed above, Respondent is required to produce the information requested by the Union since it is relevant to the performance of its duties, including the filing and processing of grievances. Contrary to Respondent's

assertions, the Union did not summarily reject its accommodation proposals. Rather it offered its own accommodations, explained why it could not accept Respondent's offers of accommodation, and attempted over the course of months to come to an agreement with Respondent. It is Respondent's burden to formulate a reasonable accommodation. Borgess Medical Center, supra at 1106. The Union has fulfilled its legal obligations in the accommodation process, and the ALJ's Order that Respondent be required to produce the documents is appropriate especially in light of the redaction and confidentiality provisions of the ALJ's recommended Order. Pennsylvania Power, 301 NLRB 1104 (1991); Howard University, supra. Since the ALJ was correct in finding that Respondent violated the Act when it refused to provide the accident/incident reports, having no legitimate basis for doing so, the ALJ's finding that Respondent cease and desist from violating the Act in this manner is correct. Finally, the Order to disclose the information to the Union with the appropriate confidentiality safeguards is the appropriate remedy under the circumstances of this case.

CONCLUSION

The ALJ's decision that Respondent violated Section 8(a) (1) and (5) of the Act by refusing to provide accident/incident reports should be affirmed.

WHEREFORE, for the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge and affirm his recommended Decision and Order.

DATED at Buffalo, New York this 29th day of November 2010.

Respectfully submitted,

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