

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KALEIDA HEALTH, INC.

and

COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1168

RESPONDENT KALEIDA HEALTH'S
REPLY BRIEF IN SUPPORT OF
EXCEPTIONS TO ALJ DECISION

Case 3-CA-27507

PRELIMINARY STATEMENT

On November 12, 2010, Respondent Kaleida Health (“Kaleida”) filed exceptions to a Decision and Recommended Order of Administrative Law Judge Mark Carissimi. Counsel for the Acting General Counsel filed an Answering Brief on November 29, 2010. Kaleida Health hereby submits this Reply Brief in further support of its Exceptions.

ARGUMENT

Although Kaleida Health’s principal Brief in support of its Exceptions thoroughly addresses most of the arguments made in the Answering Brief, some new arguments are made by Counsel for the Acting General Counsel (“CAGC”) that are addressed herein. For example, for the very first time in this proceeding, CAGC now takes the position that the incidents reports at issue were requested because they were relevant to the issue of the *failure* of the underlying Grievant to file such a report. CAGC Brief, pp. 5-6. However, Karen Howard, Chief Steward for the Union, conceded under oath at the hearing that reviewing incident reports that had been completed would obviously not be relevant to determining when other RN’s failed to complete such reports. Tr. 36-37. CAGC’s attempt to contradict his own witnesses and inject another (albeit meritless) reason for requesting these incident reports should not be countenanced by the Board.

CAGC also argued that Kaleida was being “disingenuous and simplistic” by asserting that the Union refused the accommodation offered by Kaleida because the Union did not trust Kaleida to provide the information in another form. CAGC Brief, p. 6. However, the notion of not trusting the employer in this case came right out the mouth of a Union witness. Tr. 43-44. Kaleida addresses the sufficiency of this excuse for not accepting the offered accommodation in its principal Brief. *See* Kaleida Brief, pp. 15-16.

CAGC also claims that the accommodation Kaleida offered was inadequate because it did not include the details of the incidents or whether any discipline occurred for those involved. CAGC Brief, p. 5. Presumably, CAGC makes this argument to try to make this case seem similar to *Borgess Medical Center*, 342 NLRB 1105 (2004). *Borgess* is distinguishable from this case for many reasons. First, the hospital in *Borgess* admitted that it had disciplined employees in the past based solely on an incident report, without an independent investigation. The undisputed evidence in this case was that the incident reports requested here were not used to discipline employees. Tr. 125. Moreover, the employer in *Borgess* had offered only to stipulate that no other employees had been disciplined for medication errors. Here, Kaleida had already informed the Union in response to another request that no other employees had been disciplined in the relevant time period for failing to make the required reports/notifications (Tr. 109-110) and was now offering to give the Union the names of any employees who failed to note on incident reports that the required notifications had been made. This was exactly the information that the Union asserts it was seeking from the incident reports. Tr. 39, 43, 57, 67, 71-72, 79, 88.

Importantly, a Union witness at the hearing specifically admitted under oath that additional information concerning the specific circumstances of each incident was not on the incident forms requested, but would be contained in other documents that had not yet been requested (e.g., medical records). Tr. 69, 84. That same Union witness conceded that follow up information requests would have to be made after determining if anyone failed to report a patient fall, which would include requesting medical record entries and/or personnel file information (to determine if discipline occurred). Tr. 36-39, 43, 69, 71-72, 83-84. Thus, it was not appropriate for the ALJ and/or the CAGC to fault Kaleida for not providing information beyond that contained in the documents at issue. Kaleida offered to provide the very information that the Union sought from the incident forms (i.e., the names of employees who did not indicate on the forms that they made the appropriate notifications) and therefore did not violate the National Labor Relations Act.¹

Although the ALJ and CAGC fault Kaleida for not offering to provide additional information beyond what is on the requested incident reports themselves, the Union is at fault for simply rejecting the accommodation offered instead of requesting that Kaleida provide the extra information concerning those employees appearing on the list compiled from the incident reports. The CAGC tries to argue that the Union made a counterproposal (CAGC Brief, p. 11), but tellingly cites no record evidence to support that assertion. Moreover, the alleged substance of the alleged counterproposal (redaction of patient names and reduction of the time period)

¹ Indeed, follow up inquiries and/or information requests would have to be made because the fact that an employee failed to check certain boxes on the incident report does not necessarily mean that he/she did not make the appropriate notifications. Rather, it could simply be that he/she failed to properly complete the form. In this case, not only did the grievant fail to fill out the form in the first instance, but the subsequent and independent investigation revealed that she did not make the required notifications to the physician and family and failed to use a mechanical lift after the patient fell. Resp. Exh. 1; Tr. 33.

demonstrates that no such counterproposal was made. First, redaction of patient information was never an issue in this matter, as Kaleida regularly redacts patient information from information provided to the Union. Tr. 62-63, 84. Moreover, the agreement to reduce the time period of the request occurred on December 9, 2009, before Kaleida even offered an accommodation. Tr. 25, 42, 51-52; Resp. Exh. 2; GC Exh. 10. Thus, the Union did not make a counteroffer and simply proceeded to file an unfair labor practice charge. Tr. 129. *Cf. Northern Indiana Public Service Co.*, 347 NLRB 210, 214 (2006) (“As noted, the Respondent offered accommodations. If the Union wanted more, it could have counterproposed same.”).

Based on the foregoing, the record herein, Kaleida’s Exceptions, and its principal Brief in Support of Exceptions, there is no basis on which to conclude that Kaleida Health violated the National Labor Relations Act.

CONCLUSION

Respondent Kaleida Health requests that the National Labor Relations Board reject the ALJ Decision and Recommended Order in this case, dismiss the Complaint in its entirety, and grant such other relief the Board deems just, proper, and equitable.

DATED: Buffalo, New York
December 13, 2010

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CERTIFICATE OF SERVICE

I, Robert C. Weissflach, Esq., hereby certify that I served the foregoing Reply Brief of Respondent Kaleida Health on the following parties and their representatives via the Board's e-filing system and/or electronic mail, as required by Section 102.114(a) of the Board's rules:

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