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Kaleida Health, Inc. and Communication Workers of America, Local 1168. Case 3–CA–27507

June 1, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND HAYES

On October 18, 2010, Administrative Law Judge Mark Carissimi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

The Board has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings,³ and conclusions, and to adopt the recommended Order as modified.⁴

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kaleida Health, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

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

“(b) Within 14 days after service by the Region, post at its DeGraff Memorial Hospital in Tonawanda, New York, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 3, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Re-

¹ Member Pearce is recused and did not participate in the consideration of this case

² We deny the Respondent’s request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³ In adopting the judge’s finding that the Respondent violated Sec. 8(a)(5) and (1), Member Hayes relies solely on the Respondent’s failure to offer a reasonable accommodation of the Union’s request for incident and STARS (an electronic system for documenting incidents regarding patient care) reports. Member Hayes also finds that the appropriate affirmative remedy is to order the parties to bargain for a mutually acceptable accommodation of their respective interests.

⁴ We shall modify the judge’s recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

spondent customarily communicates with its employees by such means. 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 their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 4, 2010.”

Dated, Washington, D.C. June 1, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kevin Kitchen and Linda Leslie (on brief), Esqs., for the General Counsel.

Robert Weissflach, Esq. (Harter, Secrest & Emery LLP), of Buffalo, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Buffalo, New York on June 21 and August 10, 2010.¹ The charge was filed on January 19, 2010, and the complaint was issued March 31, 2010.

The complaint alleges that since early January 2010, the Respondent has refused to provide the Union, pursuant to its November 5, 2009 request, the following information: “Records of all accidents reports, Star forms and nurses notes for all falls regarding patients from the last 6 months” in violation of Section 8(a)(5) and (1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a not-for-profit corporation, with offices and places of business in the Western New York area, has been engaged in the operation of acute care hospitals and other

¹ On June 21, 2010, Administrative Law Judge John Clark opened the hearing in this matter. Because of a death in the family of a witness for the General Counsel, the case was postponed until August 10, 2010, before any testimony was taken. Because of a conflict in the schedule of Judge Clark the case was reassigned to the undersigned.

health care institutions, including DeGraff Memorial Hospital in Tonawanda, New York. Annually, Respondent, in conducting its business operations, derives gross annual revenues in excess of \$250,000 and purchases and receives at its western New York facilities, goods valued in excess of \$50,000 directly from points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Respondent is a health care institution within the meaning of Section 2(14) of the Act. The Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Request for Information*

The parties have entered into a series of collective-bargaining agreements covering a unit of registered nurses (RNs) at the Respondent's DeGraff Memorial Hospital facility, the most recent of which is effective by its terms from June 1, 2008, through May 31, 2011. The agreement contains a grievance-arbitration procedure. There are approximately 200 RNs in the bargaining unit. The DeGraff Memorial Hospital contains both an acute care facility and a skilled nursing facility, at times referred to as the long-term-care facility. There are approximately 10 RNs in the skilled nursing facility, with the remainder being employed in acute care.

On October 20, 2009, RN Kim Andrews, who worked in the skilled nursing facility, was given a corrective action form by Supervisor Kathleen Murphy indicating that Andrews was suspended, pending review for termination (R. Exh. 1, Attachment A). The corrective action form indicates that Andrews was suspended for:

Failing to report an accident incident, failure to document an accident incident, failure to notify family or physician of accident incident. Failure to use sound nursing judgment. Risking a resident's safety during transfer.

According to the corrective action form, on October 20, 2009, Andrews was notified that a resident at the skilled nursing facility had fallen. As the RN on duty, Andrews assessed the resident for injuries and decided not to complete an incident report because the resident informed her he was not injured. The corrective action form further indicates that Andrews lifted the resident from the floor with a gait belt, rather than following the existing practice of using a mechanical lift. In addition, the corrective action form noted that Andrews failed to notify management, the resident's physician, or the family, all of which are standards in the facility. Finally, the corrective action form indicates Andrews was called back to the facility to complete an incident report, which she had failed to do at the time of the occurrence.

On October 21, 2009, union steward Karen Howard, filed a grievance regarding Andrews' suspension. On October 23, 2009, Ron Hosinski, a union vice president, by letter, requested that the Respondent provide all anecdotal notes pertaining to the incident; any and all witness statements and any previous discipline received by Andrews. The Respondent provided the requested information.

On November 3, 2009, Andrews was terminated after the conclusion of the Respondent's investigation into the incident that occurred on October 20, 2009 (R. Exh. 1). On November 5, 2009, the Union filed a grievance regarding Andrews' termi-

nation. On the same date, Hosinski, by letter, requested information from Kathy Murphy, the manager of the skilled nursing facility, regarding the grievance. The request sought the following information:

1. Employee's calendar for the past six (6) months;
2. All anecdotal notes pertaining to the incident;
3. Any and all witness statements;
4. Personnel file;
5. Previous disciplines;
6. Records of all accident reports, Stars forms, nurse notes for all falls regarding patients from last 6 months; and
7. Copies of all discipline resulting from failure to follow hospital policy and procedure.

Prior to the Union submitting its November 5, 2009 information request, it had been investigating the circumstances of the incident surrounding Andrews' discharge. During the Union's investigation of the grievance, other nurses reported that it was not reported every time a patient fell and, at times, not every step of the reporting policy was followed.

The record establishes that the acute care department at DeGraff Memorial Hospital uses the STARS electronic system for documenting incidents regarding patient care. The skilled nursing facility at the hospital does not use the STARS system, but rather keeps records of incidents involving patient care on paper documents. (Tr. 36, 46, 87-88.)

In mid-November 2009, Howard called Maria Cindrich, the senior human resources generalist at DeGraff Memorial Hospital, to inquire about the status of the Union's November 5 information request.² According to Howard, Cindrich replied that she was working on the request and would get back to Howard.

Cindrich testified that when she received the Union's November 5 information request, she was initially not aware that the hospital did not use STARS reports in skilled nursing, but was informed of that by someone in hospital administration. She testified that she "may have" told Howard that the hospital did not use STARS reports in skilled nursing (Tr. 115-116). Importantly, however, Cindrich indicated that Howard never said that she was only seeking documents confined to skilled nursing (Tr. 112).

Corie Gambini, the union's executive vice president, testified that she had a conversation with Howard in November 2009 in which Howard indicated she had received much of the information requested on November 5, but she had not received the incident reports, STARS reports, or nurses notes.

On November 25, 2009, Cindrich sent an e-mail to Howard requesting clarification as to what the Union was seeking in paragraph 5 of its November 5 request. (Copies of all discipline resulting from failure to follow hospital policy and procedure.) Howard replied that the Union was seeking information regarding discipline given to employees for not following hospital policy regarding patient care. (GC Exh. 7.)

On December 7, 2009, a meeting was held between Howard, Gambini, Christina Khushalani, the administrator of the skilled nursing facility, and Kathy Murphy, the director of nursing for the skilled nursing facility, in which the Union's November 5

² Cindrich manages the day-to-day operations of the human resources department at DeGraff Memorial Hospital. She is involved in the grievance process and is responsible for gathering information sought pursuant to requests made by the Union.

information request was discussed. Howard testified that at this meeting the Union agreed that it would reduce the time period for the information requested in paragraph 6 of its request (records of all accident reports, STARS forms, and nurses notes for all falls regarding patients from last 6 months) from 6 months to 3.

Gambini testified that at the December 7 meeting she indicated that an employee had been terminated and was unemployed and that it was taking months to get the information the Union had requested. Gambini indicated that the Union needed an answer on what the Respondent was going to do, or the Union would have to file a NLRB charge. When Murphy and Khushalani indicated that a substantial amount of information was sought and it would be very time-consuming to compile, Gambini offered to reduce the time period to 3 months, as she was sensitive to the amount of time to take to compile the information. She indicated that if the Union did not obtain sufficient information within a 3 month period to evaluate the grievance, she would request another 3 months of the same information.

Cindrich also testified regarding the December 7 meeting. She testified that Howard asked if anyone had been disciplined for the same reason as Andrews. Both Murphy and Khushalani indicated that no one in the skilled nursing department had ever been disciplined or terminated for failure to follow procedure and failure to report an incident. Cindrich testified that Howard and Gambini did not specifically ask whether such discipline has been imposed in the remainder of the facility. She further testified that Howard and Gambini, when discussing incident reports, did not specifically ask for information regarding the rest of the DeGraff Memorial facility. (Tr. 116.) She also testified, however, that there was no discussion of STARS forms at the December 7 meeting (Tr. 118). After the meeting, Howard had a conversation with Murphy, who requested that she be able to provide information in increments. Howard agreed to that approach.

On December 17, 2009, Howard sent an e-mail to Cindrich regarding the information request. In her e-mail, Howard acknowledged that the Union was seeking a lot of information about "Quality." Howard explained the basis for the request by indicating:

... the employee was terminated based on the fact that she did not follow policy. I want to see the report so I can be assured that the patient was gotten off the floor using the hoier, each and every time, I also need to see that the family was contacted each and every time and that a doctor was contacted to assess the patient. I hope this helps. (GC Exh. 8.)³

By late December 2009, the Respondent had not yet provided the information requested in paragraph 6 of the Union's November 5 request. There was some discussion between Howard and Cindrich regarding Howard coming to Cindrich's office to review that information.

On December 30, 2009, Gambini sent an e-mail to Cindrich that was copied to Michael Connors, the Respondent's associate general counsel for labor and employment law. Gambini indicated that the Union was now being told the information in paragraph 6 of the Union's request was confidential and could

³ The record establishes that a Hoyer lift is a mechanical lift that hospital policy dictates should be used to assist in picking up a patient who has fallen.

not be sent to the Union. Gambini referred to the fact that Cindrich had offered to let Howard come to her office and review the information requested in paragraph 6. (R. Exh. 2.)

On the same date, Connors sent Gambini the following e-mail in response:

I am trying to get into the middle of this. I believe the information requested is the same that would be found on the STARS reports etc. To that end, it is quality assurance material and normally not disclosable. However, I would be more than willing to treat it the same as the information on the STARS report and to review it or have someone review it to determine whether there is exculpatory information contained therein. (R. Exh. 2.)⁴

Later on December 30, 2009, Howard sent an e-mail to Cindrich asking if it was possible for her to come to the office to start to review the information. Cindrich replied that she was waiting to hear from Connors. (GC Exh. 9.)

On January 5, 2010, Howard, by e-mail, asked Cindrich if there was any update regarding the information request. On January 6, 2010, Cindrich replied that she was waiting to hear from Connors. Later on January 6, in an e-mail to Cindrich, Howard and Connors, Gambini indicated that if the Respondent was unable to provide the information to the Union, the Union believed that it may have to have the NLRB make a decision on the matter. On January 7, 2010, Connors responded to Gambini in an e-mail asking again if this information request could be handled "... the same as we handle this in any STARS reports. I don't want to get into long legal fight when we can certainly utilize a method that would serve both our needs." Gambini responded in an e-mail indicating that the Union believed it had a legal right to the incident reports and STARS reports and that the information was needed to evaluate the Andrews grievance. (GC Exh. 10.)

Gambini credibly testified, without contradiction, that in January 2010 she and Connors discussed the offers he had made in his December 30, 2009, and January 7, 2010, e-mails to review the information requested in incident reports and STARS reports to determine if there was exculpatory informa-

⁴ On June 24, 2009, Connors sent an e-mail to the Union in which he proposed that the parties enter into a memorandum of understanding (MOU) regarding the release of STARS reports to the Union (R. Exhibit 3). The record establishes, however, that the parties never executed the proposed MOU regarding the release of STARS reports.

The parties did execute a MOU regarding the release of information to the Union pursuant to the Respondent's "Root Cause Analysis" procedure. (R. Exh. 3.) The "Root Cause Analysis" is a process used by the Respondent to determine if changes are necessary to rectify a systemic problem. In sum, the MOU indicates that the Root Cause Analysis process will not be utilized as an investigatory tool for purposes of administering discipline. Therefore, employees are not permitted to have union representation at Root Cause Analysis conferences. The agreement provides that incident investigations and the imposition of discipline must occur prior to an employee being asked to attend a Root Cause Analysis conference. The MOU also specifically indicates that "no discipline can be imposed nor will any discipline be advanced as a result of information gained during a Root Cause Analysis conference." Finally, the agreement provides that, pursuant to a request by the Union, if the Root Cause Analysis conference developed information "clearing an employee who was disciplined" the information will be forwarded to the Union.

Connors testified that when he sent his December 30, 2009, e-mail he mistakenly believed that the Union had agreed to his proposal with regard to the release of STARS reports.

tion contained in them. Gambini suggested to Connors that, as with other information requests involving patient information, identifying information about the patient could be redacted, except for the medical record number. Gambini explained to Connors that the Union wanted to see the accidents that were reported and what was documented on the form. She indicated the medical record was necessary in order to review the nurses' notes regarding the reported incident. (Tr. 57.) Connors stated that the information would not be disclosed directly to the Union because it was quality assurance information (Tr. 67). Connors did not explain further why the Respondent considered the requested information to be confidential (Tr. 89). Connors proposed that either he or someone else review the requested records and provide to the Union a list of employees who did not make the appropriate notifications regarding a patient's fall or use the appropriate lift to pick up the patient. Gambini informed Connors that this proposal was not acceptable to the Union because her understanding was that a large amount of documentation would have to be reviewed and that she did not believe the Respondent would review the information with the same diligence as the Union, since the Union has the duty to represent the grievant. In addition, she indicated that if the case went to arbitration, the Union would need the actual documents to present to the arbitrator. (Tr. 59–60.)

At the hearing, Gambini explained that the Union sought the disputed information in order to determine whether there was any evidence of disparate treatment with respect to the manner in which the Respondent handled the Andrews termination (Tr. 60). She indicated that the information sought would have substantial bearing on whether she recommended that the Andrews grievance be arbitrated (Tr. 61).

The record establishes that by January 2010 the Union had obtained all of the other information contained in its November 5, 2009 request, except for the information sought in paragraph 6. On January 19, 2010, the Union filed the charge in the instant matter.

Since 1993 the Respondent has maintained a "Long Term Care Incident Reporting Policy" requiring that "Any happening that is not consistent with the operation of the Skilled Nursing Facility or the routine care of a patient must be reported to the Administration, Risk Management and the department concerned." (R. Exh. 5.) Since 1999 a similar policy has existed at Respondent's acute care facilities requiring that such reports be entered into the STARS reporting system (R. Exh. 6). At the trial, Connors credibly testified, without contradiction, that incident reports, whether paper or electronic, are generated for quality assurance purposes and are not used to impose discipline. He further explained, however, that an incident report could raise a question as to whether or not there should be an investigation of an employee for possible discipline. (Tr. 125.) Connors also testified that the Union's request for "accident reports" in its November 5, 2009 request was, in his view, synonymous with a request for what the Respondent referred to as incident reports (Tr. 126).

The incident report form introduced into evidence at the hearing (R. Exh. 8) has a heading indicating "Confidential Quality Assurance Document." The form reflects entries for the patient's name and medical record number and seeks a substantial amount of information regarding an incident in checklist form. For example, there is an area where information regarding all those notified of the incident is set forth. The mental status of the patient prior to the incident is also noted on the

form. The form seeks information in the following 8 categories: surgical procedures; employee incident; falls; intravenous/blood; medication; miscellaneous safety; and treatment/procedure. There are also sections regarding the type and location of an injury. Finally, the form provides an area where additional comments may be made.

Connors testified that it was his decision not to provide the requested information to the Union based on prior conversations he had with individuals in risk management (Tr. 131). Connors further testified that the Respondent treated incident reports and STARS reports as confidential because "we have to pursuant to several New York State statutes." (Tr. 125.) When asked by counsel for the General Counsel which state statutes require the Respondent to treat these reports as confidential, Connors indicated that he believed there were provisions in both the education law and the public health law, but admitted he not did know the specific statutes (Tr. 130).

B. The Confidentiality Defense

In its brief, the Respondent argues that its incident reports, which are quality assurance documents, are to be considered confidential and prohibited from disclosure by New York Public Law, Sections 2805-j; 2805-k; 2805-j; and 2805-m (2); and New York Education Law, Section 6527.⁵

The relevant provisions of the applicable New York statutes are as follows:

2005-j Medical, dental and podiatric malpractice prevention program

1. Every hospital shall maintain a coordinated program for the identification and prevention of medical, dental and podiatric malpractice. Such program shall include at least the following:

(a) The establishment of a quality assurance committee with responsibility to review the services rendered in the hospital in order to improve the quality of medical, dental and podiatric care of patients and to prevent medical, dental and podiatric malpractice. Such committee shall oversee and coordinate the medical, dental and podiatric malpractice prevention program and shall ensure that information gathered pursuant to the program issue is utilized to review and revise hospital policies and procedures. At least one member of the committee shall be a member of the governing board of the hospital who is not otherwise affiliated with a hospital in an employment or contractual capacity;

(b) A medical, dental and podiatric staff privileges sanction procedure through which credentials, physical and mental capacity and competence in delivering health care services are periodically reviewed, and reviewed as otherwise warranted in specific instances and circumstances, as part of an evaluation of staff privileges;

(c) The periodic review and the review as otherwise warranted in specific instances and circumstances of the credentials, physical and mental capacity and competence in delivering health care services of all persons who are employed or associated with the hospital;

(d) A procedure for the prompt resolution of grievances by patients or their representatives related to acci-

⁵ The Respondent does not contend that the requested nurses notes are confidential pursuant to the provisions of New York State law.

dents, injuries, treatment and other events that may result in claims of medical, dental or podiatric malpractice;

(e) The maintenance and continuous collection of information concerning the hospital's experience with negative health care outcomes and incidents injurious to patients, patient grievances, professional liability premiums, settlements, awards costs incurred by the hospital for patient injury prevention and safety improvement activities;

(f) The maintenance of relevant and appropriate information added pursuant to paragraphs (a) through (e) of this subdivision concerning individual physicians, dentists and podiatrists within the physician's dentist's or podiatrist's personnel are credentials file maintained by the hospital;

(g) Educational programs dealing with patient safety, injury prevention, staff responsibility to report professional misconduct, legal aspects of patient care, improved revocation with patients and causes of malpractice claims for staff personnel engaged in patient care activities;

(h) Continuing education programs for medical and dental and podiatric staff in areas of specialty;

Section 2805-k deals with the granting of medical privileges to physicians, dentists or podiatrists; Section 2805-l deals with mandatory reporting requirements for deaths, impairments of bodily functions, fires, equipment malfunction, poisoning, strikes, disasters or other emergency situations, or termination of any service vital to the continued safe operation of the hospital.

Section 2805-m (2) provides as follows in relevant part:

Notwithstanding any other provisions of law, none of the records, documentation or committee actions or records required pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article nor any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules, except as hereinafter provided or as provided by any other provision of law.

New York Education Law, Section 6527 (3) provides in relevant part:

Neither the proceedings of the records relating to performance of a medical or quality assurance review function for participation in the medical and dental malpractice prevention program for any report required by the department of health pursuant to section twenty-eight hundred five of the public health law . . . shall be subject to disclosure under article thirty-one of the civil practice law and rules except as herein provided or as provided by any other provision of law.

The Respondent attached to its brief what it contends is relevant legislative history regarding Section 6527 (3) of the New York Education Law.⁶ The attached document is entitled "Memorandum of the Office of Mental health" and provides, in relevant part:

⁶ The Respondent also attached a document entitled "Governor's Program Memorandum" from the New York State Legislature Annual-1986 which it contends is the relevant legislative history of New York Public Health Law, Section 2805. Because the attached provision of the Governor's program memorandum does not specifically refer to Section 2805, I find it to be of no probative value in determining the intent of the Legislature regarding that Section.

Section 6527 (3) of the Education Law, in part, excludes from discovery certain records and materials compiled by a general hospital during an internal review by an individual or committee performing a medical quality of care review function. The purpose of this exclusion is to assure that the review is thorough in its examination of the hospital's practices and procedures. The discovery exclusion enhances the objectivity of the review process and assures that medical review committees may frankly and objectively analyze the quality of health services rendered in the hospital (Chapter 990 of the Laws of 1971, Committee on Rules-memorandum in support). As a result, hospitals may investigate incidents, learn from past mistakes, rectify faulty practices and improve future patient care.

III. ANALYSIS AND CONCLUSIONS

A. *The Relevancy of the Requested Information*

An employer has a statutory obligation to provide requested information that is potentially relevant in fulfilling its responsibility as the employees' exclusive bargaining representative, including its responsibilities regarding the processing of grievances. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The standard for relevancy is a broad, discovery type standard. *Id.* at 437. Therefore, the information must have some bearing on the issue between the parties but does not need to be dispositive. The Board and the courts have found that information that aids the arbitral process is relevant and generally should be provided. In this regard, the furnishing of information encourages the resolution of disputes, short of arbitration, and assists the arbitration system in not becoming overburdened. *Acme Industrial*, *supra* at 437 fn. 6; *Pennsylvania Power & Light Co.*, 301 NLRB 1104 (1991). See also *Beth Abraham Health Services*, 332 NLRB 1234 (2000); *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

In the instant case, a portion of the disputed information sought by the Union (the incident reports and STARS reports) is information regarding the conduct of bargaining unit employees. The Board has long held that information concerning unit employees' terms and conditions of employment is considered to be presumptively relevant to the union's duty to represent the employees. *Pavilion and Forrestal Nursing & Rehabilitation*, 346 NLRB 458, 463 (2006); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984), and *Curtis-Wright Corp., Wright Aeronautical Division*, 145 NLRB 152 (1963), *enfd.* 347 F. 2d 61 (3d Cir. 1965).

In *Borgess Medical Center*, 342 NLRB 1105 (2004), the Board found information strikingly similar to the disputed information here to be relevant and necessary to a union in preparation for the arbitration of a grievance regarding the discharge of an employee. In *Borgess*, a RN was discharged after committing a medication error and attempting to cover up the error by failing to file an incident report. The incident report was ultimately filed by the nurse's supervisor. A grievance was filed regarding the discharge and the union requested incident reports concerning other medication errors. The employer refused to provide the requested information claiming it was confidential and protected from disclosure by State law. The Board found that the requested information was relevant, but that the employer had established a legitimate confidentiality interest in the incident reports. The Board further found that the employer failed to satisfy its duty to accommodate its inter-

ests with the union's need for the information. While the Board found that the employer violated Section 8(a)(5) and (1) of the Act by failing to offer the union a reasonable accommodation, it did not order the employer to produce the documents, or engage in further bargaining over their provision, because it found that the union did not have a present need for the requested information since the underlying grievance had already been arbitrated and decision had been issued by the arbitrator.

The Board also found requested patient care information to be relevant and necessary with regard to the processing of a grievance regarding employee discipline in *Howard University*, 290 NLRB 1006 (1988). In that case a medical technologist certified that blood to be used in a transfusion was compatible with the patient. During a transfusion, the patient died and the employer's investigation revealed that 2 of the 5 units of blood were, in fact, incompatible with the patient. The employee was discharged. The union filed a grievance and requested, in preparation for arbitration, the physicians' and nurses' progress notes and the autopsy protocol report. The employer refused to provide the information claiming it was confidential. The Board found the requested information to be clearly relevant as it "would be of use to the union" in determining whether the employee's error was the direct cause of the death of the patient. *Id.* at 1007. The Board found that the employer failed to carry its burden of proof with respect to the confidentiality of the information and ordered its production.

In *LaGuardia Hospital*, 216 NLRB 1455 (1982), the Board found that the union's need for relevant information contained in patient charts for use in evaluating grievances that had been filed regarding employee discipline, outweighed the employer's legitimate concerns regarding patient privacy.

When viewed under the standards set forth above, it is clear that all of the information requested in paragraph 6 of the Union's November 5, 2009 letter is relevant and necessary to assess the merits of the grievance involving Andrews' discharge. I note the portion of the request involving incident reports and STARS reports is presumptively relevant as it seeks information regarding the conduct of bargaining unit employees. Beyond that, however, the Union made it clear to the Respondent in Howard's December 17, 2009, e-mail that it was seeking the disputed information in order to determine if there was any evidence of disparate treatment regarding the discharge of Andrews. At the hearing, Gambini reiterated that the Union was seeking the information as it believed it to be relevant to the issue of disparate treatment.

As the cases cited above make clear, the Board applies a broad discovery type standard in assessing the relevancy of information requested to evaluate a grievance. As noted in *Howard University*, supra, at 1007 "The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities'" (citations omitted). Accordingly, I find that the evidence in this case meets this standard and that the information requested by the Union is necessary and relevant to its evaluation of the grievance involving Andrews' termination.

B. Confidentiality

The finding that the requested information is relevant and necessary to the Union in evaluating the grievance requires an analysis of the Respondent's claim that the incident reports are confidential and privileged from disclosure under New York

State law. A claim of confidentiality must be balanced against the Union's need for the information. *Detroit Edison. v. NLRB*, 440 U.S. 301 (1979).

In the instant case, the Respondent contends that the New York statutes referred to above have deemed the requested incident reports to be confidential. The General Counsel contends that the Respondent has failed to establish that the incident reports are confidential under New York law because it did not provide any evidence that the information was collected and maintained pursuant to the state statutes referred to above. In this regard, the General Counsel argues that Connors did not indicate to the Union the precise statutes the Respondent relied, or explain how the incident reports are collected and maintained pursuant to the applicable New York statutes.

New York Health Public Law, Sections 2805-j; 2805-k; 2805-l; 2805-m (2) and New York Education Law, Section 6527 (3) and the legislative history of the latter section establish that New York State law generally protects from disclosure quality assurance documents such as the incident reports and STARS reports at issue. The reason for this policy appears to be the view that excluding such documents from discovery enhances the review process by encouraging a frank and objective analysis of the quality of health services. The goal of this policy is to investigate incidents, learn from past mistakes, and improve future patient care. The evidence establishes that the Respondent maintains its incident reports in accord with this policy. In this connection, the policy and procedure memorandum issued by the Respondent with respect to filing incident reports in the STARS system at (R. Exh. 6, p. 4) specifically indicates:

It is understood that some events may have to be reported to certain governmental agencies in accordance with applicable laws, rules and regulations. It shall be the responsibility of Risk Management and/or Administration to make any required reports and to coordinate any investigation by these agencies. Managers will be required to assist investigations and corrective actions as appropriate.

Event reports will be reviewed and discussed on a regular basis to improve patient safety and quality of care.

It is true, as the General Counsel argues, that Connors did not indicate to the Union the precise statutes that the Respondent relied on in claiming that the requested incident reports were confidential in nature. However, there is, in fact, New York State statutes which indicate that generally such documents are to be considered confidential. The record establishes that the Respondent uses incident reports and STARS reports as part of its quality assurance program to improve patient care. Accordingly, I find that the Respondent has a legitimate concern with regard to the confidentiality of the incident reports and STARS forms. In making this finding, I am guided by the Board's decision in *Borgess Medical Center*. There, the Board found that the incident reports sought by the union were protected from disclosure by a Michigan State statute which indicated that documents that were collected for a professional review function in a health care facility were to be considered confidential.⁷ I can see no meaningful distinction between the

⁷ Michigan's Peer Review Statute states: "The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency, or institution of higher education in this state that has colleges of osteopathic and

Michigan state statute that deemed as confidential incident reports made as part of a professional review function and the New York statutes I have considered herein.

In the instant case, however, the protection from disclosure to such documents granted by the New York State statutes noted above is not absolute. Public Health Law, Section 2805-m (2) provides that no records required pursuant to Sections 2805-j and 2805-k nor any incidents reports that are required shall be subject to disclosure “except as hereinafter provided or as provided by any other provision of law.” New York Education Law, Section 6527 (3) has an identical provision regarding the exception to the general rule of nondisclosure. Thus, the applicable state statutes recognize that there are situations where documents such as the incident reports and STARS reports at issue may have to be disclosed pursuant to other provisions of law. I find that the instant case presents such a circumstance. The incident reports and STARS reports requested deal with records regarding falls by patients. The underlying grievance in this case involves the discharge of a nurse for the manner in which she handled the fall of a patient. The Union made clear to the Respondent that it sought the incident reports and STARS reports to determine whether there was any evidence of disparate treatment regarding the manner in which the Respondent has handled such incidents in the past. The information sought is clearly relevant to the Union’s determination as to whether to arbitrate the Andrews grievance. In this instance, I find that the Union’s need for the information outweighs the general policy of confidentiality regarding incident reports. As noted above, such documents are considered to be confidential so that there can be a frank and objective assessment of an accident with the aim of furthering patient care. Under the circumstances of this case, I find that the specific need of the Union for the information supersedes the general policy against disclosure. Accordingly, I find the provisions of the National Labor Relations Act require the requested information be provided to the Union. I further find that this result is in accordance with the exception to confidentiality contemplated by New York law under certain circumstances.

The Board’s decision in *LaGuardia Hospital* supports this finding. In that case the employer refused to provide patient charts to a union seeking such information in order to represent an employee disciplined for alleged error in patient care. The employer claimed that patient charts were confidential under New York law. The statute at issue provided that patient charts were confidential “except as otherwise provided by law or 3rd party contract.” The Board relied on such language to find that the confidentiality of the patient’s charts was not absolute. In that case, as here, the Board found that the union’s need for the information outweighed the general policy regarding confidentiality. *LaGuardia Hospital*, at 1463.

The Board has found in other cases that a union’s need for requested documents in order to represent an employee in discipline cases has outweighed the general claims of confidentiality made by an employer. In *Howard University* the employer claimed that the records sought by a union to evaluate the grievance of an employee discharged for an allegedly serious error in patient care were confidential. The employer’s rules recognized the confidential nature of the patient’s medical re-

ports but contained an exception to permit disclosure when required by “statute.” In this case, the Board again determined that the union’s need for the information pursuant to the provisions of the National Labor Relations Act outweighed the general policy regarding the confidentiality of patient medical records. In *Borgess Medical Center*, supra, the Board adopted the administrative law judge’s decision that, although the incident reports sought by the union were confidential, the union’s need for the reports in representing a discharged employee outweighed the employers interest in withholding them. I note that the Board made its finding even though the Michigan statute at issue did not contain a provision permitting the disclosure of such documents under other provisions of law. On the basis of all the foregoing, I find that in the instant case the Union’s need for the requested incident reports and STARS reports outweighs the employer’s interest in maintaining their confidentiality.

C. Accommodation

The Board has held that when an employer establishes a legitimate confidentiality interest regarding a request for relevant and necessary information, it must seek an accommodation of its concerns with the union’s need for the information. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105–1106 (1991); *Borgess Medical Center*, supra at 1106. In *Borgess Medical Center*, at 1106 the Board also held “The burden of formulating a reasonable accommodation is on the employer; the union need not propose a precise alternative to providing the requested information unedited.” (Citations omitted).

The Respondent contends that if it is obligated to provide the Union the disputed information, it offered a reasonable accommodation to the Union order to balance it’s confidentially interest with the Union’s interest in obtaining the information. The General Counsel contends that the Respondent’s offer of accommodation did not adequately address the Union’s needs as it did not provide sufficient information to assess the circumstances of each incident.

As set forth above, Connors’ offer of accommodation involved either himself or another agent of the Respondent reviewing the requested information and providing to the Union a list of employees who had not made the appropriate notifications regarding a patient’s fall or use the appropriate lift to pick up a fallen patient. Gambini did not agree to this proposal. She indicated to Connors that, because she had been informed that there was a large amount of records involved, she believed that the Union would more diligently review the information because of its duty of representation toward the grievant. She also indicated that the Union would need the actual documents to introduce into evidence if the case went to arbitration.

I find that the Respondent’s offer did not fulfill its duty to accommodate the Union’s need for the information. Connors offer did not include an offer to provide any evidence regarding the specific circumstances of any previous incidents involving fallen patients. The incident report form itself seeks a detailed description of what each incident involved. In addition, Connors offer did not include any information as to what, if any, discipline employees named in any incident reports had received. In making this finding, I once again rely on the Board’s decision in *Borgess Medical Center*. There, in finding that the employer did not offer a reasonable accommodation to the provision of unedited incident reports, the Board noted that the employer did not offer to provide any evidence regarding the

human medicine, are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena” MCLA 333.20175 (8); see also MCLA 333.21515.

specific circumstances of previous incidents, which would be necessary to determine if the grievant in that case had been treated unfairly. In finding the offer to be deficient, the Board further relied on the detailed information contained in the incident reports regarding the specifics of what had occurred.

Finally, I do not agree with the Respondent's contention that the Union's entering into a MOU regarding the provision of certain information obtained in Root Cause Analysis meetings, supports a finding that the Respondent offered a reasonable accommodation in the present case. I note that before a Root Cause Analysis meeting is held, any discipline against an employee has already been imposed. No discipline can be imposed based upon information gained at a Root Cause Analysis meeting. The MOU between the parties provides that, upon request by the Union, the Respondent will provide exculpatory information regarding an employee that arises out of the meeting. In addition, I note that any unit employees present at a Root Cause Analysis meeting could be asked by the Union to verify any information given to the Union by the Respondent regarding previously disciplined employees. The record does not indicate whether any information given to the Union after a Root Cause Analysis meeting was in testimonial or documentary form. Thus, it is not clear that the information that may be disclosed is similar to the detailed information that may be contained in an incident report or a STARS report.

The fact that the Union agreed to the procedure used by the parties regarding Root Cause Analysis meetings does not mandate that the Union accept the offer made by Connors in the instant case. It is clearly established that a waiver of statutory rights must be clear and unequivocal. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *E. R. Stuebner, Inc.*, 313 NLRB 459 (1998). The Board has specifically applied this standard in determining whether a union has waived its right to information. *American Broadcasting Co.*, 290 NLRB 86 (1988); *PPG Industries*, 255 NLRB 296 (1981), enf. denied 692 F.2d 753 (4th Cir. 1983). It is clear that the MOU between the parties regarding Root Cause Analysis does not constitute a clear and unmistakable waiver of the Union's right to obtain the incident reports and STARS reports at issue in the instant case.

D. The Scope of the Request

The Respondent contends that if it is ordered to provide the information requested in paragraph 6 of the Union's November 5, 2009 request, it should only be required to provide information limited to the skilled nursing facility. The General Counsel contends that since the request seeks STARS reports, the Respondent should be ordered to provide information concerning the entire RN unit, encompassing both the skilled nursing and acute care facilities at Respondent's DeGraff Memorial Hospital.

As set forth above, the Union represents a unit of RNs at the Respondent's DeGraff Memorial Hospital which includes approximately 10 nurses in the skilled nursing facility and 190 in the acute care facility. The Union's November 5, 2009 request seeks "records of all accident reports, Stars forms, nurse notes for all falls regarding patients from last 6 months." It is clear that STARS forms are used only in the acute care facility; the skilled nursing department still uses paper incident report forms. As noted above, the information request was addressed to Kathy Murphy, the manager of the skilled nursing facility.

Cindrich credibly testified, without contradiction, that at the labor-management meeting held on October 7, 2009, Howard

asked if there were any other RNs in the skilled nursing unit that were disciplined for the same reason as Andrews. Khushalani and Murphy both indicated that no RNs in skilled nursing had been disciplined or terminated for failure to follow the procedure and failure to report an accident. (Tr. 109-110.) However, Cindrich indicated that during the discussions that she had with Howard regarding the scope of paragraph 6 of the Union's information request, Howard never indicated that she was only seeking documents confined to the skilled nursing facility (Tr. 112).

Gambini, who was involved in drafting the Union's information request, testified that by requesting the STARS forms, the Union was seeking information from the acute facility as well as skilled nursing. At the hearing, Gambini testified that patients fall in both parts of the hospital (Tr. 91).

I find that paragraph 6 of the Union's November 5, 2009 request seeks information regarding patient falls for both the skilled nursing and acute care facilities at the Respondent's DeGraff Memorial Hospital. The request specifically refers to STARS forms, which are used only in the acute care facility. As explained by Gambini, in addition to the skilled nursing facility, the Union also sought information regarding the acute care facility, because patients also fall in that area. Since the request is limited to seeking information contained in incident reports and STARS reports regarding the conduct of employees in the unit of RNs at the Respondent's DeGraff Memorial Hospital represented by the Union, it seeks presumptively relevant information.

I do not agree with the Respondent that I should construe the request to only refer to the skilled nursing facility. To read the request in that manner would negate the specific reference to it seeking STARS reports. The fact that the Union directed its request to the manager of skilled nursing does not require that I limit the scope of the request to that portion of the unit. In addition, the fact that the Respondent provided information for only the skilled nursing facility in responding to the Union's request for similar discipline given to employees, does not limit the scope of the request in paragraph 6. As noted above, a union must clearly and unequivocally waive its right to relevant information before a finding limiting its production may be made. Applying that standard in this case, I find that the evidence on this issue does not establish that the Union waived its right to seek information regarding any patient falls that occurred within the relevant time period at the acute care facility.

I do find, however, that at the December 7, 2009 meeting Gambini reduced the time period covered by the Union's request to 3 months, with the caveat that the Union would request an additional 3 months of information, if it was needed to properly evaluate the grievance. On the basis of all the foregoing, I find that the Respondent has failed to provide the Union with the information requested in paragraph 6 of its November 5, 2009 request, as modified on December 7, 2009, in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Union is the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act of the employees in the following appropriate unit:

Except as excluded below, all Registered Nurses in all categories of employment, employed by Kaleida Health at its DeGraff Memorial Hospital, 445 Tremont Street will be included in the bargaining unit: Cardiac Service Nurse; Clinical Nurse

Educator; Critical Care Nurse; Infection Control Practitioner; Interventional Nurse; Medical-Surgical Nurse; Nurse Practitioners; Patient Care Coordinator; Residence Care Coordinator; RNFA; Special Procedure Nurse; Staff Nurse SNF; Surgical Service Nurse. All other employees including, but not limited to, Registered Nurses who worked in Employee Health, Human Resources or Risk Management; RCC/Relief Charge Nurses; Nurse Managers, Associate nurse managers, Administrative nurse manager, non-nurse professional employees, office clerical employees, guards and supervisors are excluded.

2. By failing and refusing to furnish the Union with incident reports, STARS reports and nurses notes for all falls regarding patients in relation to the grievance of discharged employee Kim Andrews, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

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

With respect to the affirmative portion of the remedy, the Respondent contends that if a violation of Section 8(a)(5) and (1) of the Act is found, the appropriate remedy would be an order requiring it to bargain over an accommodation with the Union over the provision of the disputed information, rather than an affirmative order to provide the requested incident reports and STARS reports. The Respondent relies on *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) in support of its position.

The General Counsel contends that the Respondent should be ordered to furnish the Union all accident reports, STARS forms and nurses notes for all patient falls for 3 months, and an additional 3 months of such records, if requested by the Union, which are relevant to the grievance of Kim Andrews.

In *Metropolitan Edison Co.* supra, the employer refused the union's request for the names of two informants who provided information to the employer leading to the discharge of an employee for theft of food from the cafeteria. The employer claimed that providing the information would result in retaliation against the informants. The Board found that the confidentiality interest was not so substantial as to justify the refusal to provide any information in response to the union's request for the names of the informants. The Board found that the employer had an obligation to offer an accommodation of its concerns and the union's need for the information. Accordingly, the Board ordered the employer to bargain with the union regarding providing the names of the informants.

In considering the Respondent's argument, I note that in *Borgess Medical Center*, the Board reiterated its policy that the burden of formulating a reasonable accommodation is on the employer and that the union does not have to present any concise alternative to receiving the information unedited.

In the instant case, the Respondent's proposed alternative did not meet its burden of establishing a reasonable accommodation of its interests and the Union's need for the requested information. In my view, to order 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 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 incident 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 the 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. This is especially so when one considers that the underlying grievance in this case will not be resolved until this collateral dispute regarding the provision of information is resolved. The Union has indicated its willingness, consistent with the past practice of the parties, to have the Respondent redact patients' names from the information it seeks. The inclusion of the medical record of a patient in the documents will permit the union to crosscheck incident reports with the nurse's notes regarding the incident, while protecting the anonymity of a patient. In order to assure the confidential nature of the identities of the patients involved I will provide for the redaction of patients names and other safeguards in my Order. In ordering the Respondent to provide the requested information under the conditions as set forth herein, I note that the Board has, in the past, ordered that confidential information be provided under conditions it specified, rather than order bargaining over the provision of such information, where the circumstances indicate that such a remedy was appropriate. *Pennsylvania Power*, 301 NLRB 1104, 1108 fn. 18 (1991).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Kaleida Health, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union by refusing to furnish the Union information relevant to the processing of a grievance.

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

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

(a) Furnish to the Union, in a timely manner, the information it requested on November 5, 2009, as modified on December 7, 2009, specifically, records of all incident reports, STARS reports and nurses notes for all patient falls for 3 months, and an additional 3 months of such records if requested by the Union, which are relevant to the grievance of discharged employee Kim Andrews; provided, however that the names of patients shall be redacted from such records and that upon receipt of these records the Union, its officers, agents, members, and attorneys shall not divulge the information to any other persons who are not involved in or necessary to the resolution of the grievance in question.

⁸ 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.

(b) Within 14 days after service by the Region, post at its DeGraff Memorial Hospital in Tonawanda, New York, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 3, 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 the DeGraff Memorial Hospital any time since January 4, 2010.

(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. October 18, 2010

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

⁹ 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with Communication Workers of America, Local 1168 by refusing to furnish information relevant to the processing of grievances. The appropriate unit is:

Except as excluded below, all Registered Nurses in all categories of employment, employed by Kaleida Health at its DeGraff Memorial Hospital, 445 Tremont St. will be included in the bargaining unit: Cardiac Service Nurse; Clinical Nurse Educator; Critical Care Nurse; Infection Control Practitioner; Interventional Nurse; Medical-Surgical Nurse; Nurse Practitioners; Patient Care Coordinator; RNFA; Special Procedure Nurse; Staff Nurse SNF; Surgical Service Nurse. All other employees including, but not limited to, Registered Nurses who work in Employee Health, Human Resources or Risk Management; RCC/Relief Charge Nurses; Nurse Managers, Associate Nurse Manager, non-nurse professional employees, technical employees, office clerical employees guards and supervisors are excluded.

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

WE WILL, in a timely manner, furnish the Union with the information it requested on November 5, 2009, as modified on December 7, 2009, specifically, records of all incident reports, STARS reports and nurses notes for all patient falls for 3 months, and an additional 3 months of such records if requested by the Union, which are relevant to a grievance regarding an employee's discharge; provided, however, that the names of patients will be redacted from such records and that, upon receipt of these records, the Union, its officers, agents, members, and attorneys, shall not divulge information to any other persons who are not involved in or necessary to the resolution of the grievance in question.

KALEIDA HEALTH, INC.