

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

ST. FRANCIS REGIONAL MEDICAL
CENTER,

**Cases 18-CA-092542
18-CA-094066**

Respondent,

and

SEIU HEALTHCARE MINNESOTA,

Charging Party.

**RESPONDENT’S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

St. Francis Regional Medical Center (“Respondent”) hereby takes exception to the decision of Administrative Law Judge Melissa M. Olivero (“ALJ”) dated June 12, 2013 (“Decision” or “ALJ-JD”), and to determinations made during the hearing but not addressed in the Decision itself, as follows:

1. Finding that the Board, including its agents and delegates, do not lack authority to issue the Decision because the recess appointments of members Block and Griffin were unconstitutional. ALJ-JD 1:FN1 (A).¹ See Supporting Brief² at Part I.

¹ “A” shall denote that exception is taken on the basis that the portion of the Decision excepted to is unsupported by law. “B” shall denote that exception is taken on the basis that the portion of the Decision excepted to is unsupported by substantial evidence.

² “Supporting Brief” shall refer to Respondent’s Brief in Support of Exceptions filed herewith; the reference to the specific portion of the Supporting Brief shall incorporate all arguments and evidence cited therein.

2. Failing to consider all testimony regarding whether the Union’s relationship with Respondent was “strained” since 2011. ALJ-JD 5:36-39 (B). Contra T. 763-65, 766; see also 767. See Supporting Brief at Part II.A.

3. Failing to consider that none of Respondent’s policies permit the redacting or sharing of PHI in the absence of a legitimate business reason. ALJ-JD 7:12-14 (B). Contra R Ex. 25 (“Allina Hospitals & Clinics expects you to keep all patient health information confidential. . . . Allina permits the access, use or disclosure of protected health information only for a legitimate business reason. . . .”); T. 134, 135-37, 460, 253-55. See Supporting Brief at Part V.C.

4. Finding that “[d]e-identification is only to be performed when information is being used for a research study or for a mandatory report or disclosure to a federal agency.” ALJ-JD 7:FN8 (A), (B). Contra R. Ex. 30. See generally Supporting Brief at Part III.

5. Implying that Respondent knowingly “shared PHI with the Union in responding to information requests.” ALJ-JD 8:32 (B). Tr. 786-87. See Supporting Brief at Parts IV, V.C.

6. Finding that “Selvig started the [October 8th] meeting by asking Wolf why she had sent the information request and attached redacted medical record.” ALJ-JD 11:21-22 (B). Contra Tr. 466, 468, 607; see also R. Ex. 11. See Supporting Brief at Part IV.

7. Crediting Wolf’s testimony that she did not show the medical record to a transcriptionist, and completely ignoring un rebutted testimony and record evidence that Respondent genuinely believed that Wolf had stated that she disclosed the medical record to a transcriptionist. ALJ-JD 11:FN19 (B). Contra Tr. 469, 607, 469; see also R. Ex. 11. See Supporting Brief at Part IV.

8. Finding that “[n]either Selvig nor Weiss mentioned that [Wolf] had violated Allina policies by using and disclosing PHI.” ALJ-JD 12:04-05 (B). Contra T. 466, 609; see also R. Ex. 11. See Supporting Brief at Part V.C.

9. Finding that “[n]either Selvig nor Weiss expressed concern that the documents were given to or removed from the room by Sarro” ALJ-JD 12:09-10 (B). Contra Tr. 674, 479; GC Ex. 9. See Supporting Brief at Part V.C.

10. Finding that “Selvig’s notes indicate that Allina attempted to recover this email in order to determine to whom it was sent and whether any documents were attached to it, but was unable to do so.” ALDJ 13:FN22 (B). Contra R. Ex. 18. See Supporting Brief at Part IV.

11. Finding that “Respondent’s witnesses recalled little about what happened” during the October 26 investigative team meeting. ALJ-JD 14:01-02 (B). Contra GC Ex. 11; R. Ex. 22a. See Supporting Brief at Part V.C.

12. Finding that Respondent had “already decided the level of privacy violation and to terminate Theis and Wolf” before the October 30 investigative team meeting. ALJ-JD 14:31-32 (B). Contra Tr. 506. See Supporting Brief at Part V.

13. Implying animus based upon her finding that “none of Respondent’s witnesses could recall with any helpful degree of specificity what was said during” the October 30 investigative team meeting. ALJ-JD 14:35-36 (A), (B). Contra Tr. 643-45, 506. See Supporting Brief at Part V.C.

14. Finding that “[a]n employee at another Allina facility was issued a one-day suspension for accessing patient census data without authority and then posting information about a co-worker gleaned from the census data on Facebook.” (ALJ-JD 15:29-31, 29:29-31) (B). Contra GC Ex. 31(d). See Supporting Brief at Part V.C.2.

15. Finding that an “employee was not terminated after accessing multiple patient records 15 times over a period of 18 months.” ALJ-JD 15:31-33, 29:31 (B). Contra GC Ex. 31(zz). See Supporting Brief at Part V.C.2.

16. Implying that there was not a legitimate business reason for the employee to send an unencrypted email containing PHI to a non-Allina email address or that the email was sent as a result of anything more than an administrative oversight. ALJ-JD 15:33-35, 29:32-33 (B). Contra GC Ex. 31(bb). See Supporting Brief at Part V.C.2.

17. Failing to note that the discussion of PHI was limited to Respondent’s employees and at least tangentially related to the patient’s treatment. ALJ-JD 15:35-36, 29:34 (B). Contra GC Ex. 31(oo). See Supporting Brief at Part V.C.2.

18. Failing to note that the employee who disclosed a patient’s HIV status did so only to Respondent’s employees and did so with the intent of protecting her colleagues. ALJ-JD 15:36-37, 29:34-35 (B). Contra GC Ex. 31(ww). See Supporting Brief at Part V.C.2.

19. Failing to note that the employee accessed his mother’s chart only after she gave the employee verbal consent. ALJ-JD 15:37-38, 29:35 (B). Contra GC Ex. 31(i). See Supporting Brief at Part V.C.2.

20. Failing to note that the employee unintentionally posted the image to Facebook and that the employee immediately deleted the image when notified about it. ALJ-JD 15:38-40, 29:35-36 (B). Contra GC Ex. 31(h). See Supporting Brief at Part V.C.2.

21. Ignoring that the employee received a 3-day suspension and not a written warning for posting observations she made while working in the ER onto Facebook. ALJ-JD 15:38-40, 29:35-36 (B). Contra GC Ex. 31(qq). See Supporting Brief at Part V.C.2.

22. Ignoring that no PHI was disclosed when an employee permitted another employee to use her badge to obtain an unauthorized medical test. ALJ-JD 15:40-16:03, 29:37-38 (B). Contra GC Ex. 31(p); GC Ex. 31(q). See Supporting Brief at Part V.C.2.

23. Ignoring that, following the investigation, the Respondent determined that the breach to patient confidentiality was unintentional. ALJ-JD 16:04-13 (B). Contra GC Ex. 23. See Supporting Brief at Part V.C.2.

24. Ignoring that on November 8, which was within five business days of the Union's initial request for information, Schmoyer informed the Union that Respondent would be unable to provide the requested information by November 9. ALJ-JD 16:46-47 (B). Contra GC Ex. 14 at pp. 3-4. See Supporting Brief at Part VI.A.

25. Considering statements supposedly made by Selvig during the state unemployment hearings for Wolf and Theis. ALJ-JD 18:10-15 (A). See Supporting Brief at Part V.C.

26. Finding that "none of Respondent's witnesses recalled what might have been discussed regarding Theis and Wolf engaging in union activity." ALJ-JD 19:26-27 (B). Contra T. 722, 723. See Supporting Brief at Part V.C.

27. Finding that Selvig is not a credible witness and ignoring her consistent and corroborated testimony that Wolf and Theis' union activity played no part in the privacy investigation process. ALJ-JD 19:36 (B). Contra T. 466; R. Ex. 11. See Supporting Brief at Parts IV, V.

28. Finding that Weiss is not a credible witness and ignoring her consistent and corroborated testimony that Wolf and Theis' union activity played no part in the privacy investigation process. ALJ-JD 20:15 (B). Contra T. 609. See Supporting Brief at Parts IV, V.

29. Implying that Theis was discharged for encountering medical records that were part of her normal work duties. ALJ-JD 21:15-18 (B). Contra T. 50, 57, 162-63; see also T. 226. See Supporting Brief at Part V.C.

30. Finding that Szlachtowski is not a credible witness and ignoring her consistent and corroborated testimony that Wolf and Theis' union activity played no part in the privacy investigation process. ALJ-JD 21:20 (B). Contra T. 722, 723. See Supporting Brief at Part V.C.

31. Implying that the HIPAA regulations authorized the disclosures by Wolf and Theis. (ALJ-JD 22:10-12) (A). See generally Supporting Brief at Part III.

32. Finding that any differences between the testimony of Kohls and Gulley are simply a matter of opinion. ALJ-JD 22:21-23 (B). Contra T. 763-65, 766, 767. See Supporting Brief at Part II.A.

33. Ignoring that Wolf admitted that she had no legitimate need to send the medical record to Selvig, Asmus, Sarro, and Wooten. ALJ-JD 22:32-34 (B). Contra T. 253-55. See Supporting Brief at Part V.C.

34. Ignoring that three of the six factors weigh in favor of deferring the matter to arbitration. ALJ-JD 23:07-15 (A), (B). See generally Supporting Brief at Part II.

35. Finding that there is not a long and productive bargaining relationship between Respondent and the Union. ALJ-JD 23:19-20 (A), (B). Contra T. 741-45, 763, 746, 750. See Supporting Brief at Part II.A.

36. Noting that Respondent failed to timely respond to various information requests by the Union. ALJ-JD 23:25-27 (A), (B). Contra GC Ex. 27; T. 219, 519-20. See generally Supporting Brief at Parts II, VI.

37. Finding the case not well suited for arbitration. ALJ-JD 23:42-24:08 (A). See Supporting Brief at Part II.C.

38. Finding that the employee in Altoona Hosptial, 270 NLRB 1179 (1984) was not engaged in “union activity” when she attempted to investigate the facts surrounding her discipline. ALJ-JD 24:27-30 (A). See Supporting Brief at Part II.C.

39. Finding that Altoona Hosptial, 270 NLRB 1179 (1984) involved post-arbitral deferral. ALJ-JD 24:30-33 (A). See Supporting Brief at Part II.C.

40. Finding deferral inappropriate. ALJ-JD 24:35-40 (A). See generally Supporting Brief at Part II.

41. Finding Respondent interrogated and threatened Wolf for refusing to reveal the name of the employee who provided her with four medical records containing PHI. ALJ-JD 24:44-47 (A). See Supporting Brief at Part IV.

42. Finding Respondent interrogated and threatened Wolf for refusing to identify any other employee with whom she had shared medical records containing PHI. ALJ-JD 25:01-03 (A). See Supporting Brief at Part IV.

43. Finding Respondent threatened Wolf for failing to assist Respondent in retrieving all unsecure documents containing PHI. ALJ-JD 25:02-03 (A), (B). See Supporting Brief at Part IV.

44. Ignoring that the purpose of the October 8 meeting was to retrieve and secure all documents containing PHI. ALJ-JD 25:23-25 (B). Contra T. 466; R. Ex. 11. See Supporting Brief at Part IV.

45. Ignoring un rebutted testimony and the ALJ’s own finding that Respondent has a statutory duty to recover PHI. ALJ-JD 26:05-06 (B). Contra Tr. 468, 475-76, 604-05; GC Ex.

10; see also ALJ-JD 6:27-28 (“Allina has an obligation to recover improperly disclosed PHI to protect patient privacy and prevent further unauthorized disclosure.”). See Supporting Brief at Part III.

46. Improperly applying the Atlantic Steel factors to the undisputed misconduct of Wolf and Theis. ALJ-JD 26:28-30 (A). See Supporting Brief at Part V.A.

47. Finding that the actions of Wolf and Theis were not of such a nature to render them unfit for further service. ALJ-JD 27:01-02 (A), (B). See Supporting Brief at Part V.A.

48. Implying that violation of a healthcare employer’s patient privacy rules can be protected by the Act. ALJ-JD 27:03-04 (A). See Supporting Brief at Parts V.A., V.B.

49. Finding that the actions of Wolf and Theis did not “rise to a level approaching that of a crime, such as forgery.” ALJ-JD 27:08-09 (A). See Supporting Brief at Parts III, V.A. V.C.

50. Finding that the unlawful acts of Wolf and Theis were somehow “provoked” by Respondent because one of its supervisors was working for an outside transcription service. ALJ-JD 27:08-09 (A), (B). See Supporting Brief at Part V.B.

51. Finding that Wolf and Theis did not violate Respondent’s confidentiality rule. ALJ-JD 27:15-16 (B). Contra R Ex. 25 (“Allina Hospitals & Clinics expects you to keep all patient health information confidential. . . . Allina permits the access, use or disclosure of protected health information only for a legitimate business reason. . . .”); Tr. 134, 135-37, 460, 253-55. See Supporting Brief at Part V.C.

52. Ignoring that Wolf and Theis admitted that they did not have a legitimate business reason for using and disclosing the PHI contained in the four medical records. ALJ-JD 27:16-19 (B). Contra Tr. 134, 135-37, 460, 253-55. See Supporting Brief at Part V.C.

53. Finding the breach of Respondent's confidentiality rule was protected under the Act. ALJ-JD 28:18-19 (A). See Supporting Brief at Parts III, V.

54. Finding Respondent's questioning of Wolf to be evidence of union animus. ALJ-JD 28:39-40 (A), (B). See Supporting Brief at Parts IV, V.

55. Finding Respondent had "multiple and shifting justifications" for the terminations of Theis and Wolf. ALJ-JD 29:01-02 (B). Contra T. 50, 57, 162-63; see also T. 226. See Supporting Brief at Part V.C.

56. Finding that Respondent advanced a multitude of reasons for its discharges of Theis and Wolf. ALJ-JD 29:09-10 (B). Contra T. 50, 57, 162-63; see also T. 226. See Supporting Brief at Part V.C.

57. Finding that "numerous employees" were treated less harshly than Theis and Wolf for violating Respondent's patient privacy rules and ignoring that over 100 employees were terminated for violating Respondent's patient privacy rules. ALJ-JD 29:38-39 (B). Contra R. Ex. 46; see also GC Ex. 31(d); GC Ex. 31(zz); GC Ex. 31(bb); GC Ex. 31(oo); GC Ex. 31(ww); GC Ex. 31(i); GC Ex. 31(h); GC Ex. 31(h); GC Ex. 31(qq); GC Ex. 31(p); GC Ex. 31(q). See Supporting Brief at Part V.C.

58. Finding it "inconceivable that Selvig and Weis would have let Sarro leave the October 8 meeting with the four partially redacted medical records in his possession." ALJ-JD 29:42-30:01 (B). Contra Tr. 479; GC Ex. 9. See Supporting Brief at Part V.C.

59. Ignoring that Respondent's previous disclosures of PHI to the Union were unknown at the time of the hearing and were permissible under HIPAA. ALJ-JD 30:04 (B). Contra Tr. 786-87. See Supporting Brief at Parts IV, V.C.

60. Finding Respondent's patient privacy policies to not be absolute. ALJ-JD 30:05, 30: 32-33 (B). Contra R Ex. 25 ("Allina Hospitals & Clinics expects you to keep all patient health information confidential. . . . Allina permits the access, use or disclosure of protected health information only for a legitimate business reason. . . ."). See Supporting Brief at Part V.C.4.

61. Finding Respondent's policies do not provide a lawful basis for terminating Wolf and Theis. ALJ-JD 30:05 (A), (B). Contra R Ex. 25; T. 134, 135-37, 460, 253-55. See Supporting Brief at Parts III, V.A, V.B., V.C.

62. Ignoring that the HIPAA Privacy Rule contemplates disclosure of PHI by a "covered entity" and not by a union representative to a third party, and ignoring that Respondent's policies permitted no such disclosure. ALJ-JD 30:10-13 (A), (B). Contra R Ex. 25; T. 134, 135-37, 253-55, 460. See Supporting Brief at Part III.B.

63. Concluding that HIPAA preempts any state law providing greater protections for patient privacy. ALJ-JD 30:05 (A). See Supporting Brief at Part III.B.

64. Ignoring evidence that, regardless of the meaning of legitimate business purpose, Theis and Wolf admitted that they had no such reason for their use and disclosure of PHI. ALJ-JD 30:23 (B). Contra Tr. 134, 135-37, 460, 253-55. See Supporting Brief at Part V.C.

65. Ignoring that Theis was not terminated for accessing the four medical records containing PHI but rather for her use and disclosure of these documents without a legitimate business reason. ALJ-JD 30:24-25 (B). Contra T. 50, 57, 162-63; see also T. 226. See Supporting Brief at Part V.C.

66. Ignoring that Wolf and Theis were repeatedly trained and instructed not to disclose PHI to anyone, including coworkers, without a legitimate business reason. ALJ-JD

30:33-34 (B). Contra T. 778 (“I think someone who works in healthcare and says they are ignorant or don’t understand the law, that would be, quite frankly, surprising or shocking to me.”); see also T. 134, 135-37, 253-55, 460. See Supporting Brief at Part V.C.

67. Finding that Respondent’s reasons for terminating Wolf and Theis were pretextual. ALJ-JD 31:01-06 (A), (B). Contra T. 50, 57, 162-63, 226. See generally Supporting Brief at Part V.

68. Concluding that Respondent terminated Wolf and Theis for investigating and filing a request for information despite a complete lack of any evidence of Employer animus toward any of these activities. ALJ-JD 31:01-06 (B). Contra T. 260, 260-61, 746. See generally Supporting Brief at Part V.

69. Ignoring that the Union knew at the time it requested the scanning matrix documents that the request was voluminous. ALJ-JD 32:14-15 (B). Contra T. 358. See Supporting Brief at Part VI.A.

70. Finding that Respondent could have complied with the Union’s request for information within a week. ALJ-JD 32:39-42 (A), (B). Contra T. 358. See Supporting Brief at Part VI.B.

71. Ignoring that the ALJ’s decision provides a license for employees to rifle through confidential medical records where doing so advances the policies of the Act. ALJ-JD 33:38-40 (A), (B). See ALJ-JD 26:39-27:13; see also Tr. 652-53. See Supporting Brief at Part V.D.

72. Concluding that Respondent violated Sections 8(a)(1) of the Act. ALJ-JD 34:06-07 (A). See all evidence and brief cites above.

73. Concluding that Respondent violated Sections 8(a)(5), and 8(a)(1) of the Act. ALJ-JD 34:09-11 (A). See all evidence and brief cites above.

74. Concluding that Respondent violated Sections 8(a)(3) and 8(a)(1) of the Act. ALJ-JD 34:13-14 (A). See all evidence and brief cites above.

75. Concluding that deferring to the parties' grievance-arbitration procedure is inappropriate. ALJ-JD 34:20-21 (A). See all evidence and brief cites above.

Dated: July 31, 2013.

FELHABER, LARSON, FENLON & VOGT, P.A.

s/ Grant T. Collins

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STATEMENT OF SERVICE

This is to certify that, on July 31, 2013, I caused the **RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** to be electronically filed with the National Labor Relations Board E-Filing System, and that I electronically mailed the same to the following:

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