

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DHSC, LLC, D/B/A AFFINITY	:	Case Nos.	08-CA-090083
MEDICAL CENTER	:		08-CA-090193
	:		08-CA-093035
<i>and</i>	:		08-CA-095833
	:		
NATIONAL NURSES	:		
ORGANIZING COMMITTEE	:		

**RESPONDENT’S REPLY BRIEF TO COUNSEL FOR THE ACTING GENERAL
COUNSEL’S AMENDED ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS
TO THE DECISION ISSUED BY ADMINISTRATIVE LAW JUDGE ARTHUR J.
AMCHAN**

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For the reasons set forth below, the Board should reject the arguments set forth by the Amended Answering Brief filed by the General Counsel in response to the Exceptions and Brief in Support of Exceptions filed by the Hospital in response to the Decision.¹

1.) Affinity's Refusal to Bargain

The General Counsel effectively requests that the Board view with suspicion or disfavor the fact that Affinity did not disclose the existence of the Agreement until after the issuance of the Certification. See AB, page 7. The reason for Affinity's non-disclosure is simple – for as long as possible, Affinity was seeking to honor the confidentiality provisions of the Agreement.² However, upon the NNOC's refusal to defend the Objections in the context of the parties' agreed-upon forum of arbitration, and even more so, upon the General Counsel's issuance of the Complaint, Affinity had every need and justification to reveal the existence of the Agreement to the Board so that Affinity could properly explain and defend the Hospital's actions.

The General Counsel asks the Board to focus upon, and think only about, the fact that Affinity entered into a Consent Election Agreement and had an opportunity to offer evidence in support of the Objections. See AB, page 7. The General Counsel essentially asks the Board to ignore, as though the matter were irrelevant to the agency's mission, the fact the no adjudicator – not an arbitrator, not the Board, not a judge – has ever reviewed and decided whether the Election should be set aside based upon the Objections. Affinity is ready to litigate the Objections at the drop of a hat. All that the Hospital is missing is the opportunity to do so. Affinity should not be penalized for the fact the Hospital elected to honor the parties' Agreement

¹ For purposes of this Reply Brief, Affinity shall employ the very same shorthand references used by the Hospital's Brief in Support of Exceptions. The Hospital shall also cite to the General Counsel's Answering Brief as "AB," and Affinity's Brief in Support of Exceptions as "BSE."

² The question of whether or not the confidentiality provisions existed, and if so, what precisely they required / prohibited, is yet to be established for the Board, given the Judge's erroneous determination that Affinity was not entitled to offer any evidence relating to the Agreement.

and the Board, respectfully, would shirk its own responsibility to endorse the Election's outcome in circumstances where the record presents no signals the Election was the product of employees' free choice.³

The General Counsel also expresses doubt that, as a legal matter, the parties' could refer challenges and objections to an arbitrator for binding resolution. See AB, page 8. In other words, for these matters, so the General Counsel's view apparently would be, the Board's jurisdiction is exclusive. Notably, as part of making these dictates, the General Counsel chose not to address the fact that, amongst other authority, the very case cited by Judge Amchan, Advanced Architectural Metals, expresses the Board's recognition that, in some cases, representation matters may be referred to an arbitrator.

Affinity also wishes to address the General Counsel's contentions as they relate to the 4th Affirmative Defense. Firstly, lest the General Counsel's confusion affect the Board, Affinity notes that the Hospital's refusal to bargain was not based solely upon the affiliation (see AB, page 9), but rather, originally arose from the pendency of the Objections, and more recently, is tied to the question of whether the Certification is legally void under Noel Canning. Moving on to the substance of the arguments, the General Counsel makes incendiary comments to the effect the 4th Affirmative Defense was only a ruse, designed to interfere with the General Counsel's efforts to prosecute the case. See AB, pages 9-10. Such casting of aspersions only foretells the fact the General Counsel, much like the Union, has no grounds to explain the sense or fairness in the Judge's decision that Affinity ought to be able to litigate the Defense, but with one hand tied

³ Though they were denied an opportunity to intervene, as the record before the Board will reflect, several of Affinity's own employees made formal attempts to intervene in both the representation proceedings as well as the unfair labor practice proceedings so that they could expose the NNOC's suppressive activity in connection with the dozens of RNs who opposed the Union's organizing efforts.

behind its back. Not surprisingly, the General Counsel makes reference to the Judge's invitation for the Hospital to make an offer of proof, as though such an option was the modicum of procedural justice to which the Hospital was entitled. See AB, pages 10-11. Like the ostrich sticking its head in the sand, the General Counsel disclaims any knowledge of Judge Laws' Protective Order and the fact that any offer of proof at the time of the proceedings before Judge Amchan would have risked a violation of Judge Laws' Protective Order. See AB, page 11, fn. 11. Whereas the General Counsel makes the opening point that discriminatory actions do not take place in a vacuum (see AB, page 4), the General Counsel ought to realize that the same is true with the agency's legal proceedings.

2.) Ms. Wayt's Termination

Like the Union, the General Counsel goes to great lengths to stretch Ms. Wayt's union support to reaches that do not match up with the Judge's findings. See AB, pages 12-13. The Decision will speak for itself in terms of the fact that, aside from his misguided inferences as to the Orthopedic RNs' general union support, the Judge relied simply and solely upon the flyer. Similarly, the suggestion that a *prima facie* case can be made out in the absence of evidence that the employee's direct supervisor (here, Ms. Zinsmeister) and the employer's clearinghouse for terminations (here, Ms. Boyle) had knowledge of the employee's union support (see AB, page 13) is absurd on its face.

On the question of animus, the General Counsel argues that Affinity cannot ignore the Hospital's nine violations of the Act (see AB, page 14), as though they arise from a previously adjudicated case, and do not constitute the case that the General Counsel must presently struggle to defend. The General Counsel goes on to suggest that, essentially because the Judge reviewed the record as a whole, somehow the individual components of his analysis are immune from

attack. See AB, page 14. In reality, just as a chair will collapse once every leg is taken away, so too does the Judge's analysis when evaluated by its constituent parts.

The Hospital recognizes that timing is “a” factor that may be considered by the Judge, but here, the timing does not suggest any discriminatory motive. Contrary to the General Counsel's representation (see AB, page 15), the Judge did not find that Ms. Kress' investigation began on August 28th. Instead, as reflected by the Decision, Ms. Kress' investigation began on August 29th, after she spoke with Mr. Montabone, and the reasons – nay, the need – for Ms. Kress to commence a prompt investigation are beyond reproach. The General Counsel actually suggests that Affinity should have acted more promptly in removing Ms. Wayt from the workplace (see AB, page 16), though the argument only puts Affinity on the other side of a double-edged sword, for had the Hospital taken that route, no doubt the General Counsel would have shoehorned that evidence into an allegation of overly aggressive action.

The General Counsel also looks to play a game of semantics in terms of whether the September 5th meeting was an “investigation” or an “audit” (see AB, page 17), ignoring the core facts of import, namely, that Ms. Wayt voluntarily re-affirmed the accuracy of her entries. Even the Judge, who saw evidence of animus in practically every direction he looked, did not infer any animus from the September 5th meeting.

Taking the Judge's lead, the General Counsel asks the Board to evaluate Affinity's conduct only up to the point the termination decision was originally made (see AB, page 17), as though the fact that Affinity quickly set the decision aside in favor of further investigation is empty of probative value. Insofar as the General Counsel seeks to defend the Judge's rulings based upon his review of the record as a whole, the General Counsel would be hard-pressed to explain why the Board should not also consider Affinity's investigation as a whole.

The General Counsel's contention that Affinity's failure to discipline Ms. Harrison reflects the Hospital's discriminatory animus constitutes a prime example of the hollow nature of the General Counsel's case. See AB, page 17. The record does not include any evidence that Ms. Harrison failed to perform the skin assessment. Indeed, as reflected by the picture that Ms. Harrison took (see Respondents' Ex. 18), she did perform the assessment. Ms. Harrison's error, therefore, consisted of a single clerical oversight, which does not even begin to compare with Ms. Wayt's malfeasance.

The General Counsel's assertion that, after the September 13th meeting, the Hospital "refused to consider probative facts showing Wayt performed patient care" (see AB, page 18) is analogous to saying that an employee should not be terminated for embezzlement because she stole only fifty of the one hundred dollars in the cash drawer. The Judge did find that Ms. Wayt was in the patient's room at 10:00 am – to give Ms. Smith some paperwork and talk to the patient's family. See Decision, page 8. The fact that Ms. Wayt administered pain medication at 12:00 pm did not, obviously, provide her with any justification to not perform the assessment or the hourly rounds, much less falsify the patients' chart. Likewise, the General Counsel's suggestion that Affinity should have been swayed by the fact that Ms. Smith acknowledged that Ms. Wayt may have performed the assessment while she was at lunch (see AB, page 18) ignores, yet again, the fact that, by virtue of the change in Ms. Wayt's story as revealed by Ms. Mahon's letter, Ms. Lesjak was now the sitter relevant to the determination of whether Ms. Wayt did the assessment. And as confirmed by Ms. Lesjak's statement (see G.C.'s Ex. 7, page 15), she specifically informed the Hospital's management that Ms. Wayt had not performed the assessment in her presence. Though the General Counsel may be forever convinced that Ms. Wayt did, in fact, perform the assessment, how, in these circumstances, the General Counsel

could question the good faith nature of Affinity's contrary findings will forever be impossible to understand.

Lastly, the General Counsel makes only a half-hearted effort to defend the Judge's conclusion that Affinity did not follow the Hospital's own policy. See AB, page 19. In fact, the General Counsel's defense essentially consists of reference back to what quickly becomes the hackneyed refrain that the Judge "considered the record as a whole." The fact is Affinity's policy provided clear-cut authority for the Hospital to terminate Ms. Wayt's employment based solely upon her misconduct on August 28th.

3.) Affinity's Reporting of Ms. Wayt to the Board of Nursing

Essentially, the General Counsel defends the Judge's determination here by pointing out that the Hospital has not reported other RNs who seriously jeopardized patient care. See AB, page 19-20. There is a difference, clear and compelling, between those RNs who, because of negligence, lack of skill or paucity of experience, make a mistake and thereby put a patient's health at risk and a RN who makes a deliberate choice not to provide basic care to a patient (particularly one as vulnerable as the elderly, injured and demented patient here) only to then systematically lie about her care in the context of the medical documentation that is the resource used by every other care provider, including the patient's physicians. In addition, just as Ms. Sockman's conduct violated a law (to wit, HIPAA), the falsification element of Ms. Wayt's conduct violated a law as well (to wit, the Ohio Nursing Practices Act). See BSE, page 45, fn. 21. Certainly, though the errors made by Ms. Bowser and Ms. Shapiro were serious, neither RN's conduct violated any outside law, nor were they exacerbated by deceit.

4.) Ms. Wayt's Written Warning

The General Counsel's contentions as to the calculated timing of the warning and the "makeweight" role the discipline was designed to play (see AB, page 21) are sky-bound conjectures that are unanchored to the record. As the record so plainly shows, the fact the written warning was not imposed until September 5th is due to the fact that Ms. Zinsmeister, i.e., Ms. Wayt's direct supervisor, was on vacation until September 4th. Similarly, Affinity's managers all testified that the warning played no role in Ms. Wayt's termination. See Tr. 806, 877-78, 935. To the extent the Hospital was looking to broaden the grounds for Ms. Wayt's termination, one surely would wonder why the Hospital did not also take the position that Ms. Wayt violated HIPAA in connection with the preparation of Ms. Mahon's letter.

In looking at the disciplinary action itself, the General Counsel has looked down, nose to the paper, at the policy alone, choosing to ignore Ms. Zinsmeister's testimony as to the RNs' real-world practices. The record shows that Ms. Wayt knew that, particularly in the case of narcotics, such as Percocet, the practice was to resolve the discrepancy immediately. The record includes no evidence to suggest that, by taking the minute or two necessary to resolve the discrepancy, Ms. Wayt would have risked the care of any patient. There is a reason why Ms. Wayt apologized for her conduct, and any suggestion that she was too sheepish to contest the discipline is undercut by her invocation of her Weingarten rights, her working with Ms. Mahon on her letter, and her unilateral disengagement from the meeting in which she was informed of her termination.

Lastly, on the subject of the disparate treatment evidence, the General Counsel points in one direction to the evidence that none of the employees Mr. Perone reported for rude behavior were disciplined, and in the other direction to the evidence that no employee has been disciplined for refusing to resolve a medication discrepancy. See AB, page 22. Along the way, the General

Counsel pays no mind to the fact that, in order for the disparate treatment evidence to carry any probative value, the two subjects must be considered as one, for Ms. Wayt was disciplined for her failure to follow policy combined with her unprofessional conduct.

5.) Ms. Mahon's Exclusion

In asking the Board to adopt the Judge's findings that Ms. Mahon did not violate HIPAA, the General Counsel asks the Board to consider the question boxed into the four corners of Ms. Mahon's letter, which is obviously an artificial context. Ms. Mahon's letter was distributed not only to the Union's attorneys, but also to numerous employees of the Hospital. The General Counsel, who claims to understand the key importance of HIPAA to Affinity, does not even try to explain how, as part of the Union's representation of Ms. Wayt, these employees needed to have access to Ms. Mahon's letter. Notably, several of these employees worked in Orthopedics. Therefore, putting aside the Judge's misplaced point that employees would have no motive in seeking out the other information necessary to identify the patient, several of the recipients, simply by virtue of working in the area in which the patient was admitted, would already possess the further information necessary to identify the patient. The fact is that Ms. Mahon, who had recently received training on HIPAA and provided her assurances that she would respect patients' privacy, distributed the letter indiscriminately, making no effort to help preserve the anonymity of the patient. Ms. Mahon simply did not care, or at the very least, in spite of her training on HIPAA, simply failed to appreciate the sacrosanct nature of a patient's privacy.

The General Counsel seeks to extract from Ms. Kline's testimony an admission that does not exist. Specifically, the General Counsel suggests that Ms. Kline would normally issue a verbal warning for the offense committed by Ms. Mahon. See AB, page 23. In fact, Ms. Kline's reference to a verbal warning took place in the context of the disciplinary action that would

normally be imposed upon Ms. Wayt, who provided the PHI to Ms. Mahon. Ms. Kline's testimony was clear that, in the case of Ms. Mahon, who had disseminated the information to a much larger audience, including those with absolutely no need for the information, there was an "increase in the exposure of the violation." See Tr. 1159-60. Similarly, the General Counsel seeks to amend the record by omitting the fact that, contrary to the claim that the Hospital used Ms. Mahon's letter to permanently exclude the Union from the facility (see AB, page 23), the Hospital permitted at least one other organizer, Mr. Moy, to remain at the facility. Furthermore, to the extent the record would even show any exclusion of the Union, *qua* institution, such action was taken due to the NNOC's refusal to honor the Agreement once the Union had squeezed out all of its value.

6.) The ADOs

Not surprisingly, the General Counsel wishes to flag and sensationalize Ms. Kress' conduct related to the ADOs (see AB, pages 24-25), but does not squarely confront the fact that the lawfulness of her conduct rises or falls on the question of whether an RN's completion of an ADO equates to protected concerted activity, which, as the Hospital has pointed out already, is an undecided and important question of law, given the NNOC's widespread use of these forms. The General Counsel attempts to make the open and shut case that, because the ADOs reflect RNs' concerns about the terms and conditions of their employment, e.g., staffing levels, the RNs' completion of the forms constitute protected concerted activity. See AB, page 25.

The General Counsel offers the assurance that the ADOs do not put patient care at risk, going so far to characterize the Hospital's concerns as "ludicrous." See AB, page 25. However easy it may be for the General Counsel to dismiss the Hospital's concerns, for obviously the General Counsel has no responsibility for ensuring the safe care of Affinity's patients, the

Hospital has every right and every obligation to ensure the safe care of its patients, and make no mistake, the ADOs put that care at risk. Contrary to the attributions the General Counsel would like to make to Affinity, the Hospital has never contended that the ADOs lead to any work stoppage. See AB, page 25. Instead, Affinity's contention has always been that the ADOs purport to create a parallel risk management system for Affinity, which the Hospital did not create, does not manage and may not change. To the extent the General Counsel is looking for a ludicrous contention, he may stop with the idea that the Hospital ought to cede any degree of control over its responsibility for patient care to an outside third party with no responsibility of its own to patients.

Furthermore, seemingly not realizing the effect of the point, the General Counsel almost congratulates the NNOC for the fact that, as reflected by Ms. Kress' reaction, the ADO forms worked as intended. See AB, page 25. Yet, the General Counsel leaves unanswered the question of how in the world the policies of the Act, and the goal of stable labor relations, are to be realized on account of a form that is designed to bring about the expression of frustration exhibited by Ms. Kress. Again, as Ms. Mahon revealed to Ms. Keener, the basic purpose of the ADO is to "**agitate.**" See Tr. 997-98. The forms have no other, genuine purpose, and as the facts here show, also constitute a tool by which the Union may coerce RNs into collective action.

Lastly, leaving the Judge on his own, the General Counsel offers no argument in support of the Judge's belief that, by requiring the RNs to use Affinity's risk management system at the exclusion of the ADOs, the Hospital has violated the Act. Thus, the General Counsel effectively recognizes that no violation of the Act takes place merely on account of Affinity's implementation of its own processes.

CONCLUSION

For all the reasons set forth above, Affinity respectfully requests that the Board reject the arguments set forth by the General Counsel's Amended Answering Brief, sustain the entirety of the Hospital's Exceptions and dismiss the Complaint.

Dated: September 20, 2013
Glastonbury, CT

Respectfully submitted,

/s/ _____

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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the Respondent’s Reply Brief to Counsel for the Acting General Counsel’s Amended Answering Brief to Respondent’s Exceptions to the Decision Issued by Administrative Law Judge Arthur J. Amchan was served on September 20, 2013 upon the following:

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 September 20, 2013

Respectfully submitted,

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