

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

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**In the matter of**

**OLEAN GENERAL HOSPITAL,**

**Respondent,**

**AND**

**Case Nos. 03-CA-097918  
03-CA-104444  
03-CA-104462**

**NEW YORK STATE NURSES ASSOCIATION,**

**Charging Party.**

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**RESPONDENT OLEAN GENERAL HOSPITAL'S BRIEF IN SUPPORT OF ITS  
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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## TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT .....	1
STATEMENT OF THE CASE.....	1
QUESTIONS PRESENTED.....	2
STATEMENT OF FACTS .....	3
ARGUMENT .....	8
I.    The ALJ Erred in Finding that the Hospital Violated the Act by Failing to Engage in Decisional Bargaining With Respect to the DEU Program (Exceptions 1-7).....	8
A.    The Hospital Did Not Have a Duty to Bargain Over the DEU Program and the ALJ Failed to Even Consider This Threshold Issue (Exceptions 1-2) .....	8
B.    The ALJ Improperly Concluded that Section 10.13 of the CBA Did Not Cover this Situation (Exceptions 1, 3, 7).....	9
C.    The ALJ's Decision to Distinguish the Past Practice Between the Hospital and the Union is Not Supported by the Record (Exceptions 1, 4-6).....	11
II.   The ALJ Erred in Finding that the Hospital Was Obligated to Provide Information and Engage in Effects Bargaining With Respect to the DEU Program (Exceptions 8-10) .....	12
III.  The ALJ Improperly Concluded the Joint Commission Report Was Not Protected from Disclosure by Statute and, In Doing So, Failed to Consider Directly Applicable Board Authority (Exception 11).....	15
CONCLUSION.....	20

## **PRELIMINARY STATEMENT**

The Respondent, Olean General Hospital (the "Hospital"), submits this brief in support of its exceptions to the Administrative Law Judge's September 24, 2013 decision in which he found the Hospital had violated the Act. For the reasons stated below, the ALJ's decision should be reversed.

## **STATEMENT OF THE CASE**

The Complaint is based on three consolidated charges originally filed with the NLRB by the New York State Nurses Association (the "Union"). A hearing was held in this matter before The Honorable Arthur J. Amchan on August 13, 2013, during which exhibits were entered into evidence and testimony was taken from two witnesses for the General Counsel (NYSNA Nursing Representative Karen Wida and NYSNA Program Representative Dennis Zgoda) and two witnesses for the Hospital (Director of Clinical and Regulatory Systems Diane Haughney and Senior Vice President of Human Resources Timothy McNamara).

The Consolidated Complaint alleges the Hospital violated the Act by: (a) failing to engage in decisional and effects bargaining over, and provide information regarding, a program it entered into with Alfred State, SUNY College of Technology ("Alfred State" or "College"), and (b) declining to provide the Union with a copy of a report by the Joint Commission on the Accreditation of Healthcare Organizations ("Joint Commission"). Based on the testimony and exhibits provided during the hearing, it is undeniable that the Hospital did not unlawfully fail to engage in decisional bargaining, as it had no duty to bargain in the first place. Further, the Hospital acted in accordance with past practice and the clear language of the Collective Bargaining Agreement between the Hospital and the Union. The allegations related to effects bargaining and an "information request" fail as the Hospital repeatedly asserted to the Union its willingness to discuss the program with the College and provide relevant information. Finally,

the Hospital did not act unlawfully in declining to provide the Joint Commission report because such report is shielded from disclosure by New York State statute.

In his decision, the ALJ concluded, with little discussion, that the Hospital was obligated to engage in decisional and effects bargaining over, and provide information concerning, its arrangement with the College. In doing so, the ALJ failed to consider the threshold issue of whether the Hospital had a duty to bargain. Further, the ALJ improperly distinguished the parties' past practice and the relevant contract language. The ALJ further found that the Hospital was obligated to provide the Union with a copy of the Joint Commission report, but ignored applicable NLRB authority that supports the opposite conclusion. As set forth below, the Board should consider all of the evidence and legal authority applicable to this matter and, upon such consideration, reverse the decision issued by the ALJ.

### **QUESTIONS PRESENTED**

1. Whether the ALJ erred in finding that the Hospital violated the Act by failing to engage in decisional bargaining with respect to the at-issue Dedicated Education Unit Program ("DEU Program") (Exceptions 1-7).

2. Whether the ALJ erred in failing to even consider the threshold issue of whether the Hospital had a duty to bargain over the DEU Program and, if so, whether the Hospital has any such duty to bargain (Exceptions 1-2).

3. Whether the ALJ improperly concluded that Section 10.13 of the CBA did not cover this situation (Exceptions 1, 3, 7).

4. Whether the ALJ's decision to distinguish the past practice between the Hospital and the Union is supported by the record (Exceptions 1, 4-6).

5. Whether the ALJ erred in finding that the Hospital was obligated to provide information and engage in effects bargaining with respect to the DEU Program (Exceptions 8-10).

6. Whether the ALJ improperly concluded the Joint Commission report was not protected from disclosure by statute and whether, in reaching such conclusion, the ALJ failed to consider directly applicable Board authority (Exception 11).

### **STATEMENT OF FACTS**

The Hospital was party to a Collective Bargaining Agreement with the Union, effective February 1, 2010 to January 31, 2013 (the "CBA") (GC-9).<sup>1</sup> The CBA was extended to May 1, 2013, but is now expired. The bargaining unit covered by the CBA consists of most non-management Registered Nurses ("RNs") employed by the Hospital.

As noted above, the Complaint in this matter is based on Charges filed by the Union with the NLRB concerning the Hospital's decision to enter into a clinical training program with Alfred State, the Union's requests for information concerning that program, and the Union's request for a Joint Commission report. The facts underlying these claims are as follows.

### **The DEU Program**

In November 2012, Jeffrey Zewe, the Hospital's Chief Nursing Officer, informed Ms. Wida that the Hospital was entering into an arrangement with Alfred State and he explained the nature of the arrangement (TR 16, 46).<sup>2</sup> The arrangement was called the Dedicated Education Unit Program (the "DEU Program"). Through this program, Alfred State nursing students came to the Hospital to gain hands-on clinical experience. Registered Nurses (RNs) employed by the

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<sup>1</sup> Citations in the form "GC-\_\_" refer to the exhibits introduced by the General Counsel during the hearing held in this matter on August 13, 2013.

<sup>2</sup> Citations in the form "TR \_\_" refer to the official transcript of the hearing held in this matter on August 13, 2013.

Hospital were matched with student interns to provide training. The RNs providing the training were paid preceptor pay in accordance with the CBA. Section 10.13 of the CBA states:

An employee who is assigned the responsibilities of preceptor of a graduate nurse, registered nurse or **student nurse intern** shall be paid a differential of one dollar (1.00) per hour while working in said assignment. To be assigned preceptor, an employee must successfully complete the in-service program for preceptors.

(GC-9, Section 10.13) (emphasis added).

In addition to the preceptor pay, the RNs who participated in the program were to receive a stipend from Alfred State for the service they were providing. For administrative reasons, in order to receive this stipend, the RNs needed to be denominated adjunct faculty of the College (TR 30).

This arrangement with Alfred State was similar to many other clinical training arrangements the Hospital has entered into with colleges and universities in the past. Indeed, the Hospital has often allowed nursing students to use its facilities in order to develop their clinical technical skills and further their education. For example, in January 2011, the Hospital entered into an agreement with Jamestown Community College under which students would be provided with "technical/educational experience" at the Hospital's facilities (R-2).<sup>3</sup> The Hospital entered into similar agreements with Jamestown Community College in March 2006 (R-3), Alfred State in May 2005 (R-4), and the University of Pittsburgh in June 2005 and June 2013 (R-5).

Under these arrangements, as was the case with the DEU Program and in accordance with the CBA, RNs who provided direct supervision and training to the student interns were paid preceptor pay (TR 85-87). For example, during off-shifts (night shifts, weekend shifts, etc.), Hospital RNs directly worked with and trained the student interns and received preceptor pay

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<sup>3</sup> Citations in the form "R-\_\_" refer to the exhibits introduced by Respondent Olean General Hospital during the hearing held in this matter on August 13, 2013.

(TR 87-88, 94). Significantly, the March 2006 agreement between the Hospital and Jamestown Community College specifically addressed the teaching and supervision of the student nurse interns by preceptors employed by the Hospital during the interns' "internship or preceptorship experience." (R-3 at ¶ 21). Because the DEU Program involved training by an RN (as there was no College-employed clinician involved in the program), all of the RNs participating in the Program received preceptor pay in accordance with the CBA and past practice under that CBA (TR 85-88). The Union did not object to this practice (TR 40).

When first told of the DEU Program, Ms. Wida said that "it sounded like a good idea." (TR 16). In early December 2012, Ms. Wida was provided documents and information concerning the DEU Program by a bargaining unit member (TR 47). Subsequently, Mr. McNamara, Mr. Zewe and Ms. Wida exchanged e-mails about the DEU program (GC-2). Although Mr. Zewe suggested having a conference among various Hospital and Union representatives, none of the parties pushed for such a conference, and their discussions did not progress any further at that time (*Id.*).

On January 2, 2013, Ms. Wida sent Mr. McNamara and Mr. Zewe an e-mail, stating "Please see the attached concerns and questions related to the preceptor/internship program...." (GC-3). Attached to that e-mail was what appeared to be a list of concerns related to the DEU Program (*Id.*). There is no evidence of Ms. Wida following up on this e-mail or that she subsequently mailed or otherwise presented a hard copy of her concerns to any Hospital representative at any time. Further, there is no evidence of Mr. McNamara, Mr. Zewe or any other Hospital representative directly refusing to provide information concerning the DEU Program or refusing to meet with the union to discuss the program.

Only a month after Ms. Wida's e-mail, on February 7, 2013, the Hospital was served with an 8(a)(5) Charge filed by the Union with the NLRB (Case No. 03-CA-097918) (GC-1(a)). This Charge stated that the Hospital violated the Act when it "refused to respond to [the Union's] request for information" with respect to the DEU Program (*Id.*).

On May 6, 2013, the Union filed a second Charge (Case No. 03-CA-104444) alleging that the Hospital violated Section 8(a)(5) by refusing to respond to the Union's request for information concerning the DEU Program and refusing to meet with the Union regarding the DEU Program (GC-1(c)). Since the allegation that the Hospital refused to respond to an information request was duplicative of the earlier Charge in Case No. 03-CA-097918, it was subsequently withdrawn (*See* R-1).

Significantly, Ms. Wida **did speak to** Mr. McNamara about at least one of the concerns listed in her e-mail. Indeed, as Ms. Wida testified, Mr. McNamara answered her question regarding liability in person (TR 27). Further, in May 2013 and early August 2013, the undersigned spoke with Ms. Wida and offered to meet and provide all information concerning the DEU Program (TR 27-28). Despite the information provided by Mr. McNamara and further offers by the Hospital to meet with the Union to discuss the DEU Program and provide relevant information, the Charges were not withdrawn; instead, a consolidated Complaint was served by the NLRB (GC-1(l)), an Answer was served by the Hospital (GC-1(p)), and the matter was set for hearing (GC-1(m)).

With respect to the claim alleging a failure to comply with an information request, it was clarified at the hearing in this matter that the General Counsel is only contending the Hospital unlawfully failed to provide information responsive to items 2 and 7 on Ms. Wida's e-mailed list

of concerns (TR 23-25). Although item 3 was referenced in the Complaint (*see* GC-1(l), § VII(a)(2)), any allegations related to item 3 were withdrawn at the hearing (TR 5).

### **Joint Commission Report**

On or about March 1, 2013, representatives from the Joint Commission visited the Hospital to perform a survey of the quality of Hospital services and patient safety (TR 66, 68). The Joint Commission does not survey staffing ratios (TR 69). The Hospital's participation in this survey was voluntary (TR 65-66). Prior to leaving the Hospital, the Joint Commission representatives issued a verbal report of their preliminary findings to certain Hospital administrators (TR 68). This report noted some areas in which the Hospital was deficient. A final written report was provided weeks later (TR 75).

After receiving the preliminary, verbal report, the Hospital immediately took action to correct the noted deficiencies. On March 6, 2013, President and CEO Timothy Finan issued a memorandum to the Department of Surgery, Department of Anesthesiology and the Surgical Nursing Staff, which listed certain deficiencies that were identified by the Joint Commission and instructed the recipients of the memorandum to correct the deficiencies (GC-8).

Prior to Mr. Finan's memorandum, on March 4, 2013, Mr. Zgoda sent a letter to Mr. McNamara noting that he was aware the Joint Commission had visited the Hospital and requesting a copy of the Joint Commission's report, including a "list of any and all deficiencies." (GC-5). This request was repeated on April 1, 2013. The Hospital declined to provide the report to the Union because (1) it is protected from disclosure by a New York State statute and (2) contrary to Mr. Zgoda's apparent contention, the report contained no information relevant to the pending contract negotiations between the Hospital and the Union.

After the Hospital justifiably declined to provide the requested information, on or about May 7, 2013, the Union filed an NLRB Charge in Case No. 03-CA-104462, alleging that the Hospital violated Section 8(a)(5) of the Act by refusing to provide the preliminary Joint Commission report. Such Charge is referenced in, and acts as one basis for, the Complaint in this matter.

## **ARGUMENT**

### **I. The ALJ Erred in Finding That the Hospital Violated the Act By Failing to Engage in Decisional Bargaining With Respect to the DEU Program (Exceptions 1-7).**

In his decision, the ALJ concludes that the Hospital's implementation of the DEU Program without engaging in decisional bargaining with the Union violated the Act (ALJ Decision at 6). This conclusion lacks support in law and fact. Indeed, for the reasons set forth below, the Hospital did not have a duty to engage in any such decisional bargaining. As such, the ALJ's decision must be reversed.

#### **A. The Hospital Did Not Have a Duty to Bargain Over the DEU Program and the ALJ Failed to Even Consider This Threshold Issue (Exceptions 1-2).**

The Hospital has no legal obligation, under any circumstances, to negotiate with the Union regarding a decision to enter into clinical programs in general or with Alfred State in particular. To quote the oft-cited concurring opinion of Justice Stewart in *Fibreboard Paper Products v. NLRB*, 379 U.S. 203 (1964), those are managerial decisions, "which lie at the core of entrepreneurial control." *Id.* at 223. They are uniquely related to the scope and nature of the employer's business and are no more subject to negotiation than decisions relating to scope of services, banking relationships, or similar activities.

Further, the Hospital's authority to enter into an arrangement to provide clinical programs with Alfred State is clearly encompassed within the Management Rights clause in the CBA. That clause states that the Hospital retains the sole right to, *inter alia*, determine "the nature and extent

of services provided," "assign and delegate work" and "determine staffing patterns." Entering into an arrangement with Alfred State whereby RNs act as preceptors for student interns falls within this clause. As such, there is no basis to conclude the Hospital had an obligation to bargain with the Union under the circumstances of this case.

In his decision, the ALJ discusses the parties' past practice of not negotiating over the Hospital's arrangements with other schools and the clearly applicable preceptor provision in the parties' contract (both of which are discussed below). However, the ALJ fails to consider – or even mention – the threshold issue of whether there was any duty to bargain with the Union over the DEU Program. For the reasons stated above, the answer to that question is "no, there is no such duty to bargain." The ALJ's failure to reach such a conclusion – or even consider the issue – must be reversed by the Board.

**B. The ALJ Improperly Concluded that Section 10.13 of the CBA Did Not Cover this Situation (Exceptions 1, 3, 7).**

Having RNs train student nurse interns was specifically contemplated and negotiated by the Hospital and the Union. Indeed, Section 10.13 was put in the CBA by the parties to deal with that exact situation. Therefore, the Hospital did not fail to bargain with the Union, as concluded by the ALJ. The Hospital bargained with the Union prior to implementing the DEU Program and acted in accordance with the bargained-for procedures.

As stated by the D.C. Court of Appeals:

When [an] employer and union bargain about a subject and memorialize that bargain in a [CBA], they create a set of rules governing their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract.

*NLRB v. USPS*, 8 F.3d 832, 836 (D.C. Cir. 1993).

Here, it is clear that the DEU Program is a "matter covered by the [CBA]." The DEU Program involves RNs acting as preceptors for student nurse interns (TR 86-87). The CBA states that, in that exact situation, the RNs are "assigned" by the Hospital to act as preceptors for "student nurse interns" and such assigned RNs are paid "preceptor pay." (DC-9, § 10.13). The Hospital assigned certain RNs to work as preceptors with student interns from Alfred State, and it paid preceptor pay to those RNs. The parties negotiated and agreed to this procedure prior to the DEU Program even being considered by the Hospital. The Hospital had no duty to again bargain about this procedure. It had satisfied its bargaining obligation. As such, there is absolutely no basis to find that the Hospital failed to bargain in this case.

Significantly, Ms. Wida admits that the Hospital acted in accordance with the CBA. Ms. Wida admits that Section 10.13 of the CBA addresses the situation in which an RN provides training to a student intern (TR 33). She admits that neither the Union nor the subject RNs objected to receiving preceptor pay for participation in the DEU Program (TR 39). She further admits that it is within the discretion of Hospital management to assign RNs to work as preceptors (TR 42-43). These issues were considered and negotiated by the parties prior to the DEU Program. There are no issues over which the Hospital failed to bargain.

The ALJ distinguishes Section 10.13 of the CBA based on the fact that the RNs received a stipend from the College in addition to their preceptor pay. The ALJ states that "this is essentially the granting of a unilateral wage increase to a small number of bargaining unit members" (*see* ALJ Decision at 4). However, this stipend **provided by the College** does not constitute a "unilateral wage increase" and, further, it has no impact on the Hospital's lack of a duty to bargain. The Hospital has a duty to bargain over changes in terms and conditions of employment. This includes benefits provided by the Hospital to bargaining unit members. It

would grossly obscure the purpose and plain language of the Act if the Hospital were also obligated to bargain over benefits provided by a third-party. The College provided the RNs with a stipend – not the Hospital. Ms. Wida admitted this fact (TR 46). The Hospital has no duty to bargain over actions taken by the College. In fact, it has no authority to do so. Similarly, ancillary benefits provided by a third-party (here, a stipend provided by the College) cannot possibly constitute a "wage increase" by the Hospital. The ALJ's finding to the contrary must be reversed by the Board.

**C. The ALJ's Decision to Distinguish the Past Practice Between the Hospital and the Union is Not Supported by the Record (Exceptions 1, 4-6).**

The Hospital's unilateral decision to implement the DEU Program was consistent with past practice and, therefore, the Hospital had no obligation to bargain with the Union. *See Gannett Co.*, 331 NLRB 1331, 1332 (2000) (affirming ALJ's ruling that employer was not required to bargain with the Union because there was no change from past practice). Indeed, the parties have a consistent past practice of not bargaining over the Hospital's decision to enter into arrangements with colleges and universities to provide training to student nurse interns or for members of the bargaining unit to provide such training. The Hospital acted consistent with this past practice.

The DEU program is substantially the same as every other program concerning student nurse interns in which the Hospital has been involved. As noted above, the Hospital entered into similar arrangements with Jamestown Community College in January 2011 and March 2006 (R-2, R-3), Alfred State in May 2005 (R-4), and the University of Pittsburgh in June 2005 and June 2013 (R-5). The ALJ's attempt to distinguish the DEU Program by stating that "[o]ther training programs included oversight by an on-site instructor" is belied by the record (*see* ALJ Decision at 4). Indeed, Mr. McNamara testified that, under training programs other than the DEU

Program, RNs were paid preceptor pay at times when an instructor from the school was not present or involved (TR 87-88). No credible evidence was submitted to contradict this testimony. Further, the March 2006 agreement with Jamestown Community College specifically addressed preceptors employed by the Hospital directly teaching and supervising the student nurse interns as was the case with the DEU Program (R-2 at ¶21).

Contrary to the ALJ's apparent conclusion, a requirement that RNs sign an agreement with the College, their receipt of training from the College and their receipt of a stipend from the College do not make the DEU program different from past arrangements in any material way. The work performed by the RNs in the DEU program and the pay they received from the Hospital is consistent with past practice. That is all that matters. Agreements, training and payments involving, and provided by, third parties are wholly irrelevant.

The Hospital and Union never engaged in negotiations with respect to any of these past programs (TR 40, 84). Ms. Wida directly admitted this fact during the hearing (TR 40). Therefore, entering into the DEU Program without further negotiations with the Union was consistent with past practice. There was no unilateral change by the Hospital and, therefore, there is absolutely no basis to claim the Hospital had a duty to bargain.

**II. The ALJ Erred in Finding that the Hospital Was Obligated to Provide Information and Engage in Effects Bargaining With Respect to the DEU Program (Exceptions 8-10).**

The General Counsel alleged that the Hospital failed to provide requested information concerning the DEU Program (*see* GC-1(1), § VII(a)(1), (3) and (4)). The General Counsel also seemed to allege the Hospital failed to engage in effects bargaining with the Union. The ALJ ruled in favor of the General Counsel on both of these points, ordering the Hospital to cease and desist from "failing to...bargain over the...effects of the implementation of the DEU Program"

and "refusing to furnish the Union with relevant information it had requested" (ALJ Decision at 6). This order is not supported by the evidence presented at the hearing and lacks legal basis.

As explained above, the CBA directly deals with the situation involved here **and** the Hospital acted in accordance with past practice. There is no reason to engage in effects bargaining or respond to information requests where the Hospital and Union have already negotiated and agreed to procedures concerning the Hospital's proposed actions and the Hospital acts in accordance with that agreement and past practice. *See Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005) (holding that, because the contract covered the subject that is the focus of the dispute, there was **no need to engage in decisional or effects bargaining** and, further, stating "[i]t would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects of that decision."). Under these circumstances, engaging in effects bargaining and providing information is unnecessary and unwarranted.

Further, the Hospital satisfied any obligation to provide information concerning the DEU Program and engage in effects bargaining by providing information to the Union and repeatedly asserting its willingness to meet with the Union to discuss the DEU Program and provide all relevant information. The ALJ fails to address this point in his decision. The only mention of the Hospital's alleged failure to provide information is at the very end of the ALJ's decision where he orders the Hospital to cease and desist from "failing and refusing to bargain in good faith with the Union by refusing to furnish the Union with relevant information it had requested" (ALJ Decision at 6). The ALJ does not acknowledge or even mention the fact that the Hospital had already offered to meet and provide information concerning the DEU Program.

As stated by Ms. Wida, the DEU Program was explained to her in November 2012 by Mr. Zewe. Her response was that "it sounded like a good idea." (TR 16). Then, in early December 2012, Ms. Wida was provided with documents and information concerning the DEU Program by a bargaining unit member (TR 47). Subsequently, Mr. McNamara, Mr. Zewe, and Ms. Wida exchanged e-mails about the DEU program (GC-2). Although Mr. Zewe suggested having a conference, none of the parties pushed for such a conference, and their discussions did not progress any further at that time (*Id.*).

On January 2, 2013, Ms. Wida sent an e-mail stating, "Please see the attached concerns and questions related to the preceptor/internship program...." Attached to that e-mail was what appeared to be a list of concerns related to the DEU Program. There is no evidence of Ms. Wida following up on this e-mail or sending her list of concerns by mail or otherwise presenting a hard copy of her concerns to any Hospital representative at any time. Further, there is no evidence of Mr. McNamara, Mr. Zewe or any other Hospital representative refusing to provide information concerning the DEU Program or refusing to meet the Union to discuss the program. Nonetheless, the Union filed a Charge over the Hospital's alleged failure to respond to an information request only about a month after Ms. Wida's e-mail (GC-1(a)).

Significantly, Ms. Wida **did speak to** Mr. McNamara about at least one of her concerns. Indeed, as Ms. Wida testified, Mr. McNamara answered her question regarding liability in person (TR 27). Further, in May 2013 and early August 2013, the undersigned spoke with Ms. Wida and offered to provide information concerning the DEU Program (TR 27-28). Any allegation that the Hospital failed to engage in effects bargaining or comply with an information request is belied by the information provided by Mr. McNamara and further offers from the Hospital to meet with the Union to discuss the DEU Program and provide relevant information.

In sum, the evidence does not show a failure to provide information or a refusal to engage in effects bargaining. It shows an employer offering information and opportunities to meet and a union ignoring such offers and forging ahead with baseless charges. The ALJ's failure to address this evidence was a significant error. Based on such evidence, the Board should reverse the ALJ's decision and find that no violation of the Act occurred.

**III. The ALJ Improperly Concluded the Joint Commission Report Was Not Protected from Disclosure By Statute and, In Doing So, Failed to Consider Directly Applicable Board Authority (Exception 11).**

The Union requested a copy of a Joint Commission report without a sound or justifiable reason to do so. The Hospital rightfully declined to provide the requested information because it is protected from disclosure by state statute and, quite simply, because it is not relevant to the pending contract negotiations or any other matters concerning the Union. As discussed below, in his decision, the ALJ improperly found the relevant state statute not to apply and, in doing so, failed to consider the relevant legal authority, including Board case law, cited by the Hospital.

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

Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to . . . the public health law . . . shall be subject to disclosure . . . .

N.Y. Educ. Law § 6527(3). New York courts have ruled that this statute shields Joint Commission reports from disclosure.

In *Zion v. New York Hospital*, 183 A.D.2d 386 (1<sup>st</sup> Dept. 1992), a medical malpractice case, the plaintiff asked a hospital to provide a report by the Joint Commission on the Accreditation of Hospitals ("JCAH") (now Joint Commission on the Accreditation of Healthcare Organizations). The Appellate Division concluded that the Hospital **was not** required to turn over the report because such reports are exempt from disclosure under N.Y. Educ. law § 6527(3).

The Court recognized that affording privilege to Joint Commission records "furtheres the goal of improving the quality of hospital care...." *Id.* It reasoned that to "provide plaintiff with a certain survey and review of the JCAH" would go against the confidentiality of JCAH reports which encourages the surveyed hospital to engage in open and candid discussion of hospital conditions, thereby enabling the hospital to learn from its mistakes, and stripping the records of confidentiality would frustrate this purpose." *Id.* at 389. Furthermore, the Court noted that "JCAH's services are performed at the request of and paid for by the organization seeking its accreditation, upon the express understanding that the survey report and recommendations are to be kept confidential." *Id.*

*Zion* dictates that Joint Commission reports are statutorily privileged from disclosure under any circumstances. Notably, the reasons for applying the statutory privilege to the Joint Commission report in *Zion* are equally applicable in this case. Indeed, forcing the Hospital to disclose the report to the Union would jeopardize the open discussion and review of hospital conditions and procedures which leads to improved quality of hospital care.

The ALJ fails to even mention the *Zion* decision even though a New York appellate court applying the confidentiality provision in the Education Law to the **exact same type of report at-issue here**. Quite significantly, the ALJ also failed to consider a decision by the Board in which the importance of N.Y. Educ. law § 6527(3)'s protections was considered.<sup>4</sup> In that case, the NLRB found that the confidentiality rule applied to certain reports touching on the quality of

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<sup>4</sup> Quizzically, the ALJ states that the Hospital claimed confidentiality applies to the Joint Commission report "citing *Borgess Medical Center*." However, the Hospital did not cite that case, which deals with Michigan law, to support its position. Instead, it cited a Board decision that considers the same New York statute that shields the Joint Commission report from disclosure in this case. As discussed in this brief, the ALJ's failure to consider the *Kaleida Health* decision and, upon doing so, apply the confidentiality provision in New York Education Law in this case must be reversed by the Board.

patient care, but found that an exception to confidentiality was necessary given the particular circumstances of that case. However, as discussed below, such circumstances are not present here.

In *Kaleida Health, Inc.*, 356 NLRB No. 171 (2011), the Board considered an employer's New York Education Law § 6527(3) confidentiality defense in a case involving a union's request for hospital incident reports used in the evaluation of a disciplinary grievance. There, the Board stated:

New York Education Law, Section 6527(3) and [its] legislative history . . . establish that New York State law generally protects from disclosure quality assurance documents . . . . 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.

*Kaleida*, at \*6.

The Board initially found that, based on the New York Education Law, the incident reports were confidential. The Board continued on to find that an exception to confidentiality was warranted based on its finding that "the Union's need for the information outweighs the general policy of confidentiality regarding incident reports." *Kaleida*, at \*7. Specifically, the union made clear that it sought the incident reports to determine whether there was any evidence of disparate treatment regarding the manner in which the employer had handled similar incidents in the past. The Board agreed with the union's argument, and decided that the requested information should be disclosed. The union requested information to help process a grievance. The Board found that "the specific need of the Union for the information supersedes the general policy against disclosure." *Id.*

Here, as in *Kaleida*, the Joint Commission report is confidential and not subject to disclosure, based on the New York Education Law. Unlike in *Kaleida*, the Union does not – and cannot – articulate any "specific need" for the information contained in the Joint Commission report that would possibly warrant an exception to the statutory confidentiality of the report. When the Union's purported need for the report is balanced against the general, public policy of confidentiality regarding such reports, there is no question that confidentiality prevails.

As discussed, Mr. Zgoda admitted that he had no idea what information was included in the report and that the sole purpose of his request was to see if anything in the report could be used "if at all." He essentially admitted that he sought the report merely for the purpose of "fishing" for information to potentially use in negotiations:

Q In fact, you did not know what, if anything, was in that report?

A That's correct.

Q You mentioned with respect to possibly modifying and revising or initiating proposals. You didn't know there was anything in that report that had anything to do with any proposal on the table, did you?

A No.

Q So basically, am I being unkind when I [sic] when I'm saying you're looking for the report for the purpose of fishing to seeing if there is anything in it that you could use?

...

[A] I feel that you are being unkind because I want to evaluate what the findings were, and I want to utilize that to evaluate our position on certain issues that are being presented at bargaining; and I didn't know, upon request, what was or wasn't in that report; but that's the purpose of requesting information, to evaluate it, to see how it can be utilized – if at all.

(TR 60).

At one point, he tries to claim that the report was relevant to current contract negotiations regarding staffing (TR 54), but then he admits that he has no knowledge of such information being in the report (TR 59-60). Moreover, Ms. Haughney confirmed that the report does not address staffing (TR 69).

The Union provides no legitimate or compelling reason for requesting the Joint Commission report. It falls well short of satisfying the Board's threshold for disclosure as discussed in *Kaleida*. Allowing the Union to obtain a copy of the report under these circumstances would greatly frustrate the purposes of N.Y. Educ. L. § 6527(3). Simply put, the general policy against disclosure supersedes the Union's fishing expedition. In his decision, the ALJ failed to perform the necessary balancing test and wrongly concluded that the Joint Commission report was not confidential.

Contrary to the ALJ's ruling, it is clear that the protections of N.Y. Educ. law § 6527(3) are not limited to information requested pursuant to the New York civil practice law. As discussed, in *Kaleida*, the Board initially found incident reports to be protected from disclosure under the New York Education Law. *Kaleida* did not involve a request for information under the New York civil practice law. Rather, the union sought information pursuant to obligations created by the Act. In initially finding the incident reports to fall within the protections of N.Y. Educ. law § 6527(3), the NLRB acknowledged that the statute's protections expanded beyond requests falling under the New York civil practice law. On these grounds, the ALJ's attempt to avoid applying N.Y. Educ. law § 6527(3) in this case based on his finding that the request did not fall under the New York civil practice law should be rejected. The ALJ's decision should be reversed and the Board should find that the Joint Commission report is statutorily protected from disclosure.



**CERTIFICATE OF SERVICE**

I, James N. Schmit, Esq., hereby certify and affirm that on the 7th day of November, 2013, I caused Respondent Olean General Hospital's Exceptions to the Administrative Law Judge's Decision and Supporting Brief to be electronically filed with the National Labor Relations Board using the Board's electronic filing system, and I further caused same to be served upon the following parties by electronic mail at the e-mail addresses designated for that purpose:

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