

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

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.**

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

The Respondent, Olean General Hospital (the "Hospital"), submits this reply brief in further 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 Hospital's exceptions, statement of the case, questions presented by the exceptions, and statement of facts, the Hospital respectfully refers the Board to its exceptions and supporting brief, which were filed on November 7, 2013.

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"). The ALJ ruled in favor of the Union on both of these claims.

The reasons for the Board to reverse the ALJ's decision that the Hospital violated the Act by failing to engage in decisional and effects bargaining over, and provide information regarding, the Alfred State program are fully set forth in the Hospital's brief in support of its exceptions. The Hospital does not repeat those reasons here. Instead, the Hospital submits this reply brief for the sole purpose of responding to the arguments of General Counsel and the Union concerning disclosure of the Joint Commission report. Simply put, both General Counsel and the Union are completely off base with respect to the proper analysis of whether the report should be disclosed to the Union. When the issue is analyzed correctly, it is clear that the Joint Commission report is protected from disclosure to the Union.

In her response to the Hospital's exceptions, General Counsel erroneously declares that the Hospital "misstates the standard" in balancing (a) the interests of the Union in obtaining the report against (b) the confidentiality interests of the Hospital and statutory protections applicable to the report. Contrary to General Counsel's assertions, the Hospital's analysis is correct as it is the same analysis as applied by the Board in *Kaleida Health*, 356 NLRB No. 171 (2011). Despite the fact that *Kaleida Health* involves the exact same statute that protects the Joint Commission report from disclosure in this case, General Counsel, like the ALJ, effectively ignores that decision. Indeed, General Counsel dedicates a single sentence to the decision, stating the Hospital "ignores the fact that the Board has previously ordered the disclosure of incident reports protected by the same statute in *Kaleida Health, Inc.*, 356 NLRB No. 171 (2011)." *See* General Counsel Response, p. 12. This statement is false. The Hospital did not "ignore" any aspect of the *Kaleida Health* decision. Rather, in its brief in support of exceptions, the Hospital dedicated

approximately three pages to explaining the *Kaleida Health* holding and its application to this case.

As explained in the Hospital's brief, in *Kaleida Health*, the Board recognized the statutory protections of N.Y. Education Law § 6527(3) and their potential application in the context of a union's request for hospital reports. However, based on the specific facts involved in that case, the Board determined disclosure to the union was appropriate. As fully explained in the Hospital's brief in support of its exceptions, upon applying the Board's analysis in *Kaleida Health* to the facts of this case, it is clear the Joint Commission report must be protected from disclosure to the Union.

General Counsel is also mistaken in her reliance on *Resorts Int'l Hotel*, 307 NLRB 1437, 1438 (1992), for the proposition that "in order for [the balancing] test to be applicable Respondent must first establish a legitimate and substantial confidentiality interest, which it failed to do." See General Counsel Response, p. 13. It seems General Counsel is citing and paraphrasing the language from *Resorts Int'l Hotel* that states, "in order to have a defense of accommodation, the Respondent must first prove its claim of confidentiality." *Resorts Int'l Hotel*, 307 NLRB at 1438. However, the cited language from *Resorts Int'l Hotel* has no applicability to this case, as the Hospital does not plead a "defense of accommodation."

General Counsel concludes her discussion of the Joint Commission report with the outlandish statement that "[i]n balancing the Union's statutory right to relevant information against Respondent's conclusory statement, the balance is in favor of disclosure." General Counsel Response, p. 14. This statement completely ignores *the Hospital's statutory right* to protect the Joint Commission report from disclosure. Again, New York Education Law § 6527(3) protects the Joint Commission report from disclosure and the Board, in *Kaleida Health*,

found the protections of that statute to apply in the context of union requests for information under the Act. The proper analysis is to balance the Union's interest in requesting the Joint Commission report, which was nothing more than a fishing expedition, against the statutory and public policy considerations in protecting it from disclosure. Clearly, the balance favors the Hospital.

The Union spends much of its response recounting the bases for the ALJ's decision that, as fully explained in the Hospital's brief in support of its exceptions, were erroneous on several grounds. Most significantly, the ALJ's decision disregarded clearly applicable Board authority and failed to properly balance the interests of the Union in requesting the Joint Commission report against the Hospital's interests in, and statutory right to, protect the report from disclosure.

Unlike General Counsel and the ALJ, the Union does, at least, discuss the Board's holding in *Kaleida Health*. It also attempts to distinguish the case of *Zion v. New York Hosp.*, 183 A.D.2d 386 (1st Dep't 1992), which the Hospital cited in support of its position. However, the Union's analysis of those decisions and their application to this case is entirely incorrect. Rather than applying these cases in tandem, as the Hospital clearly articulates must be done to properly apply them to this case, the Union considers the cases separately and concludes that they are inapplicable on independent bases. The Union, like the ALJ, fails to understand that the Hospital cites *Zion* for the fact that New York courts have held that Joint Commission reports are protected from disclosure under the New York Education Law. The Union then fails to connect this fact to the Board's holding in *Kaleida Health*, which clearly states that, under federal labor law, the Board does not reject but, rather, accepts application of that statute in the context of union requests for information – the issue presented in this case. Upon consideration of these

decisions and their application to the facts of this case, it is clear the Joint Commission report is protected from disclosure.

In sum, the ALJ's conclusions of law are unsupported by the record and relevant legal authority. General Counsel and the Union have provided no reason to alter this conclusion. Upon consideration of the Hospital's exceptions, supporting brief and this reply brief, the Board should reverse the ALJ's decision. There is no basis to conclude the Hospital violated the Act and, therefore, the Consolidated Complaint should be dismissed.

Dated: Buffalo, New York
December 5, 2013

JAECKLE FLEISCHMANN & MUGEL, LLP

By: s/James N. Schmit
James N. Schmit, Esq.
Michael E. Hickey, Esq.
Attorneys for Respondent
Olean General Hospital
Avant Building – Suite 900
200 Delaware Avenue
Buffalo, New York 14202-2107
Telephone No.: (716) 856-0600
Email: jschmit@jaeckle.com

CERTIFICATE OF SERVICE

I, James N. Schmit, Esq., hereby certify and affirm that on the 5th day of December, 2013, I caused Respondent Olean General Hospital's Reply Brief in Further Support of Its Exceptions to the Administrative Law Judge's Decision 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:

Linda Leslie, Esq.
National Labor Relations Board, Region 3
Niagara Center Building, Suite 630
130 South Elmwood Avenue
Buffalo, New York 14202
Email: Linda.Leslie@nlrb.gov

Claire Tuck, Esq.
Director, Legal Department
New York State Nurses Association
131 West 33rd Street, Fourth Floor
New York, NY 10001
Email: Claire.Tuck@nysna.org

s/James N. Schmit

James N. Schmit, Esq.
Jaeckle Fleischmann & Mugel, LLP
Attorneys for Respondent
Olean General Hospital
Avant Building – Suite 900
200 Delaware Avenue
Buffalo, New York 14202-2107
Telephone No.: (716) 856-0600
Email: jschmit@jaeckle.com