

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIDWEST DIVISION – MMC, LLC d/b/a
MENORAH MEDICAL CENTER,

Respondent

and

Case Nos. 17-CA-088213
17-CA-091912

NATIONAL NURSES ORGANIZING
COMMITTEE – KANSAS/NATIONAL NURSES
UNITED, affiliated with NATIONAL NURSES
ORGANIZING COMMITTEE/NATIONAL
NURSES UNITED,

Charging Party.

Michael E. Werner, Esq., for the General Counsel.

F. Curt Kirschner, Jr., Esq. and *Edward M. Richards, Esq.*, for the Respondent.

Micah Berul, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge¹. This case was tried in Overland Park, Kansas on August 6 and 7, 2013. The National Nurses Organizing Committee – Kansas/National Nurses United, affiliated with National Nurses Organizing Committee/National Nurses United (Charging Party/Union) filed the charges in cases 17-CA-088213 and 17-CA-

¹ The Respondent argues that any actions taken by this Board, including its agents and delegates, lacks authority because the court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (no. 12-1281), found the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid. Thus, according to Respondent, the Board lacks a quorum. The Board does not accept the decision in *Noel Canning*, in part, because there is a conflict in other circuits regarding this issue. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at **fn. 1 (2013). Furthermore, the Board has determined that while the question regarding the validity of the recess appointments remains in litigation and is pending a definitive resolution, it will continue to fulfill its obligations under the Act. See *Bloomingtondale, Inc.*, 359 NLRB No. 113 (2013); *ORNI 8, LLC*, 359 NLRB No. 87 (2013).

091912 on August 28 and October 24, 2012², respectively. The General Counsel issued the consolidated complaint and notice of hearing on May 28, 2013.

5 The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when in May and August 2012, Respondent, through Jennifer Cross, denied requests by its employees Sherry Centye and Brenda Smith to be represented by the Union during investigatory interviews.³ The complaint also alleges that Respondent violated Section 8(a)(1) of the Act when since May 1, Respondent has promulgated and maintained a policy that restricts employees Section 7 rights;⁴ and since about June 1, Respondent failed and refused to provide the union with relevant and necessary information related to the discipline of union members and for purposes of carrying out the collective-bargaining agreement in violation of Section 8(a)(1) and (5) of the Act.⁵ (GC Exh. 1-I.)⁶

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

FINDINGS OF FACT

I. JURISDICTION

20 Respondent, a full-service acute care hospital with a location in Overland Park, KS, provides in-patient and out-patient medical care. Respondent is part of the Health Corporation of America (HCA) hospital chain. (Tr. 153.) During the 12-month period ending April 30, 2013, Respondent as described above, purchased and received at its facility, goods valued in excess of \$50,000 directly from points outside the State of Kansas. During the 12-month period ending April 30, 2012, Respondent derived gross revenues in excess of \$250,000. Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2)⁷, (6), and (7) of the Act. (GC Exh. 1-K, 1-L.)

30 At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

² All dates are 2012, unless otherwise indicated.

³ This allegation is alleged in pars. 5(a) and (b) of the complaint.

⁴ This allegation is alleged in par. 6 of the complaint.

⁵ This allegation is alleged in pars. 8(a), (b), and (d) of the complaint.

⁶ Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; "R. Exh." for Respondent's exhibit; "R. Br." for Respondent's brief; "CP Exh." for Charging Party's exhibit; "CP Br." for Charging Party's brief; "ALJ Exh." for administrative law judge exhibit; and "Jt. Exh." for Joint Exhibit. My findings and conclusions are based on my review and consideration of the entire record.

⁷ Respondent admitted in its answer to the consolidated complaint that it is an employer within the meaning of Section 2(2). However, in its first amended answer to the consolidated complaint, Respondent raised as an affirmative defense that the Peer Review Committee members are "state officers" of Kansas. Therefore, Respondent argues the Board should not assert jurisdiction because the Peer Review Committee members constitute a political subdivision of the State of Kansas and is not an employer within the meaning of Section 2(2). This defense will be discussed later in the decision.

II. ALLEGED UNFAIR LABOR PRACTICES

OVERVIEW OF RESPONDENT'S OPERATION

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As a full-service, acute care hospital, Respondent employs physicians, nurses, pharmacists, medical support staff, and administrative staff at its Menorah Medical Center (MMC) Campus in Overland Park, Kansas.

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At all material times since approximately October 18, 2000, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following bargaining unit:

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All full-time, part-time and PRN registered nurses employed by Menorah Medical Center, excluding nurse educators, regularly assigned charge nurses, Vascular Lab Techs, infection control/employee health nurses, risk management/performance improvement coordinators, administrative employees, confidential employees, managerial employees, guards and supervisors, as defined in the Act, and all other employees. (GC Exh. 1-K, L.)

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The Union and Respondent have entered into successive collective-bargaining agreements (CBAs), the one relevant to the issues before me was effective from September 8, 2009, through September 7, 2012. (Jt. Exh. 16.)

Respondent's Managerial and Administrative Staff

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Jennifer Cross (Cross) began her employment with Respondent in October 2011, as the interim risk manager and transitioned into that position full-time in April 2012. Cross reports to Kathy Chrobot, director/vice president of quality and risk management. (Tr. 163.) In her role as risk manager, Cross is responsible for overseeing the implementation of Respondent's risk management program, patient complaint process, national patient safety goals, and risk reduction program. (Tr. 164-165.)

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Since August 2012, Amy Hunt (Hunt) has been Respondent's human resources director. From January 2010, until she became the human resources director, Hunt was a human resources specialist. Richard Cybulski (Cybulski) was the human resources director before Hunt assumed the role. (Tr. 281-282.) As the human resources director, Hunt, among other duties, oversees the hospital's employment policies, employee relations, employee benefit packages, employee orientation, and employee pay rates. She also works with managers to administer employee discipline. (Tr. 282.)

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Zachary McMahon (McMahon) began his employment with Respondent in September 2009, as a staff pharmacist. In December 2009, he was appointed interim director of pharmacy and became the full-time director in February 2011. He continues to work as the director of pharmacy. (Tr. 296.) In his role as director of pharmacy, McMahon oversees "the medication management of the hospital, medication distribution throughout the facility, management of diversion prevention, and ... manag[es] employees." (Tr. 297.)

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From September 2010 to October 2011, Kaye Blom (Blom) worked for Respondent as vice president of risk and quality. Her duties involved carrying out the quality and risk management functions of the hospital. (Tr. 132.)

5 Respondent's Risk Management Plan and Peer Review Committees

10 Kansas' State law⁸ requires medical facilities within the state to develop and submit to the state for approval an internal risk management program.⁹ On or about May 2012, Respondent submitted its risk management plan to the state for approval. (Tr. 243; Jt. Exh. 1.) However, the state returned the plan with instructions to revise it. Subsequently, Respondent submitted an amended risk management plan to the state, which was approved. (Tr. 243; J. Exh. 3.) The risk management plan relevant to the issues before me became effective March 2012.¹⁰ (Tr. 167-168; Jt. Exhs. 2, 3.)

15 One of the primary functions of Respondent's risk management plan is to set forth a system to monitor the standard of care provided to patients by the medical facility and investigate complaints that the standard of care has been violated. Kansas requires that risk management plans include a means of investigating and analyzing reportable incidents; measures to minimize reportable incidents and injuries in the medical facility; and an effective system for reporting reportable incidents. Violations of standard of care¹¹ level 3 or 4 are defined by the State of Kansas as "reportable incidents" which requires they be reported to the appropriate state licensing agency. (Tr. 192-194; R. Exh. 10; Jt. Exh. 1.) A potentially reportable incident is brought to the attention of the risk manager, in this instance, Cross. She can receive notification of a reportable incident from a myriad of sources, e.g. patient, physician, staff member, medical facility administration, incident reporting system. (Tr. 246.)

Once Respondent is notified of a potentially reportable incident, it is referred to the Initial Peer Review Committee. The committee is comprised of at least one physician and directors

⁸ Kan. Stat. Ann. §65-4922 (West 2012).

⁹ I am granting Respondent's oral motion to take judicial notice of the Kansas Peer Review and Risk Management statutes and regulations over the objection of counsel for the Charging Party. Federal Rule of Evidence (FRE) 201 allows judges to take judicial notice (also referred to as "official" or "administrative" notice) of adjudicative facts that are not subject to reasonable dispute. Further, FRE 201 does not "regulate judicial notice of so-called "legislative facts". (FRE 201, author's comments) The Board also supports the taking of judicial notice. See *Mimbres Memorial Hospital & Nursing Home*, 342 NLRB 398, 403 fn. 14 (2004), *enfd.* 483 F.3d 683 (2007) (judicial notice taken of requirements mandated by state statutes).

¹⁰ The risk management plan effective March 2012, replaced the plan effective March 2011 to March 2012. The evidence is undisputed that the sole change in the plans is the establishment of the Initial Peer Review Committee, included in the plan effective March 2012. (Tr.168; Jt. Exh. 1.) Although the Initial Peer Review Committee is also referred to by Respondent as the Multidisciplinary Review Committee, I will only refer to it as the Initial Peer Review Committee to avoid confusion.

¹¹ Kan. Admin. Regs. §28-52-4(a) establishes four levels (or categories) for standard of care determinations: "(1) [s]tandards of care met; (2) standards of care not met, but with no reasonable probability of causing injury; (3) standards of care not met, with injury occurring or reasonably probable; or (4) possible grounds for disciplinary action by the appropriate licensing agency." A determination by a peer review committee that level 3 or 4 has been violated is referred to the appropriate Kansas State licensing agency. Kan. Admin. Regs. §28-52-4(b); K.S.A. §65-4922.

from the nursing units and ancillary departments. (Tr. 168.) The Initial Peer Review Committee determines whether the incident potentially violates the standard of care or internal processes. If there is evidence that indicates the standard of care has potentially not been met, the committee refers the matter to the appropriate peer review committee for investigation. (Tr. 169.) The
 5 Initial Peer Review Committee held its first meeting in July 2012. (Tr. 183.)

Incidents involving non-medical or non-nursing practitioners are reviewed by the Ancillary Peer Review Committee. It determines whether an incident involving those practitioners must be reported to the applicable state board (e.g., Kansas State Board of
 10 Pharmacy, Kansas Department of Health and Environment). (Tr. 169, 185.)

The Nursing Peer Review Committee addresses issues of reportable incidents involving nurses. The committee is comprised solely of nurses. It decides if there is sufficient evidence to sustain a complaint of a reportable incident, which requires a referral of its findings to the
 15 Kansas State Board of Nursing for action. (Tr. 170, 184.) The Nursing Peer Review Committee's finding may be reported in a nurse's performance evaluation, which may lead to "[s]pecific institutionally driven disciplinary actions" being taken against the nurse. (Tr. 150-151, 156.) The first Nursing Peer Review Committee meeting was held in October 2011. It meets at least quarterly and since October 2011, it has held 12 meetings. (Tr. 188, 196-197.)
 20 Cross facilitates the meetings but is not a voting member. (Tr. 189.)

The Medical Staff Peer Review Committee is composed of physicians. It makes a finding on whether a complaint alleging a violation of the standard of care should be sustained because a "physician had not met the standard of care or caused harm or willfully violated a
 25 policy of applicable regulation." (Tr. 170.) If the Medical Staff Peer Review Committee finds that the incident is "reportable", their findings are forwarded to the Medical Executive Committee. The Medical Executive Committee has several options: ratify the Medical Staff Peer Review Committee's final determination and forward it to the Kansas State Board of Healing Arts for action; conduct its own investigation; send it to an external peer review committee for
 30 investigation; or return it to the Medical Staff Peer Review Committee for further investigation. (Tr. 184-185.)

In 2012, Respondent created the Medication Diversion Prevention Committee,¹² which held its first meeting in April 2012. (Tr. 189.) Unlike the other committees, the Medication
 35 Diversion Prevention Committee is not a peer review committee. It is a "committee that HCA¹³ [as] a corporation mandated at each facility to investigate potential [medication] diversion...". (Tr. 189.) Prior to the creation of the Medication Diversion Prevention Committee and the Initial

¹² Respondent uses an automated medicine dispensing system called Pyxis to track medication and medical devices used by certain medical staff to give to patients. Users input their user name and fingerprint into the system to access medication contained in locked cabinets. (Tr. 299-300.) The Pyxis system also tracks the "wasting" of medication. Wasting refers to the appropriate disposal of unused medication by medical staff. Pyxis records the medication/medical device name dispensed, amount, date, time, and, if applicable, name of the employee "wasting" the medication. (Tr. 300.) Respondent also uses an electronic system, RxAuditor, for a statistical comparison of its nurses to determine if there are medication deviations that would indicate a potential medication diversion problem. If a problem is indicated, the information to the Medication Diversion Prevention Committee for review. (Tr. 307-308.)

¹³ HCA is the acronym for Health Corporation of America. (Tr. 153.)

Peer Review Committee, reports implicating nurses in potential medication diversion incidents were submitted to Cross who forwarded them directly to the Nursing Peer Review Committee. (Tr. 215-216, 218.)

5 Respondent’s Internal Disciplinary Process

The evidence established that Respondent can address patient care complaints through various means. Upon receipt of a reported incident to the risk manager, it would be forwarded to the appropriate peer review committee for investigation and, if applicable, referred to the appropriate state licensing board. The incident report could also be sent to the individual’s supervisor or the Human Resources Department for an investigation and disciplinary action. (Tr. 10 140, 152, 181-182, 185.) If the complaint involves a potential medication diversion issues it would be forwarded to the Medication Diversion Prevention Committee for review. However, potential medication diversion incidents can also be forwarded to the appropriate supervisor or 15 Human Resources Department for investigation and hospital-imposed discipline. (Tr. 248-249, 284-286; R. Exh. 9)

Risk Management Plan Confidentiality Clause

20 As noted above, on or about May 2012, Respondent submitted its risk management plan to the state for approval. (Tr. 243; Jt. Exh. 1.) However, the state returned the plan with instructions to revise it. Subsequently, Respondent submitted an amended risk management plan to the state, which was approved. (Tr. 243; Jt. Exh. 3.) The General Counsel alleges that the confidentiality clause contained in Respondent’s risk management plan establishes a rule that 25 violates Section 8(a)(1) of the Act. The confidentiality provision reads in relevant part:

No Hospital employee, Medical Staff Member, or Allied Health Professional shall disclose information concerning reportable incidents except to their superiors, Hospital Administration, the Risk Manager, the appropriate Hospital and Medical Staff 30 committees, legal counsel for the Hospital, or the applicable licensing agencies, unless authorized to do so by the Risk Manager, Administration, or legal counsel. (Jt. Exh. 3.)

It is undisputed that Respondent modeled its confidentiality clause on Kan. Stat. Ann. §65-4915(b) which provides, in pertinent part, as follows:

35 Except as provided by K.S.A. 60-437 and amendments thereto and by subsections (c) and (d), the reports, statements, memoranda, proceedings, findings and other records submitted to or generated by peer review committees or officers shall be privileged and shall not be subject to discovery, subpoena or other means of legal compulsion for their release to any person or entity or be admissible in evidence in any judicial or 40 administrative proceeding. Information contained in such records shall not be discoverable or admissible at trial in the form of testimony by an individual who participated in the peer review process. Kan. Stat. Ann. §65-4915(b).

Respondent interprets this part of Kansas State statute and thus its confidentiality clause to preclude the target of an investigation from discussing the notification of the incident report and the discussions that occur in the peer review committee meetings with anyone except the 45 officials specified in the confidentiality clause. (Tr. 245-246.) Consequently, the target of the

investigation is not notified of the facts underlying the complaint against him/her until the target appears before the peer review committee. Respondent also acknowledges that state law does not specifically prohibit union representation in the peer review committee meetings, but it “has interpreted the state statute to not allow anybody to accompany the affected practitioner.” (Tr. 220.) The incident report (also referred to as the notification form) is confidential, but an individual may discuss the facts underlying the incident report to the extent patient information protected by Health Insurance Portability and Accountability Act (HIPPA) is not disclosed. (Tr. 200-201, 203, 245.)

10 Sherry Centye and the Request for Representation

Beginning in December 2000, Sherry Centye (Centye) began working as a registered nurse for Respondent. Since April 2012, she has also served as the union representative for the floor where she works. (Tr. 24.) By letter dated May 4, 2012, Respondent notified Centye, in relevant part:

Menorah Medical Center’s Peer Review Diversion Prevention Committee¹⁴ has reviewed cases in which you may have exhibited unprofessional conduct as defined by the Kansas Nurse Practice Act and Menorah Medical Center, specifically policy non-compliance, in March 2012. This conduct has preliminarily been determined to be a Standard of Care Level 4: *grounds for disciplinary action.*” (J Exh. 4.)

The letter went on to read:

As governed by Kansas Statute, a final Standard of Care level 4 determination must be reported to the Kansas Board of Nursing. Pursuant to Menorah Medical Center’s Risk Management Plan, a practitioner is afforded an opportunity to address the Peer Review Committee regarding any potentially reportable incident prior to any final determination of a Standard of Care by the Committee. Additionally, the Committee cannot fairly and accurately make a final decision without more details that can only be provided by you. (J Exh. 4.)

Respondent, via the letter, explained that Centye could respond in person before the Nursing Peer Review Committee or submit a written response in lieu of an appearance. Failure to notify the committee of her intention to appear in person constituted a waiver of her opportunity to appear. (Tr. 25; Jt. Exh. 4.)

Upon receipt of the letter, Centye consulted with Julie Perry (Perry), union representative, for guidance. Perry counseled her to ask Respondent for a union representative to accompany her before the Nursing Peer Review Committee. (Tr. 44.) Subsequently, Centye contacted Cross to inform her that she would appear before the committee. During their discussion, Centye asked Cross whether Perry could accompany her as her union representative

¹⁴ The record is undisputed that the Peer Review Diversion Prevention Committee has never existed. Cross admitted that on several correspondences, including the one to Centye, she incorrectly identified the Medication Diversion Prevention Committee as the Peer Review Diversion Prevention Committee. (Tr. 190-191; Jt. Exhs. 4, 6, 7, 8.)

at the Nursing Peer Review Committee meeting.¹⁵ Cross told her that Perry could not attend because the meeting was closed to all except the target of the investigation and the committee members. (Tr. 26.) She also refused to divulge to Centye the specific charge against her and told her the committee would inform her of the specifics of the offense at the meeting. Based on her perception of the “severe implications” of the letter, Centye was afraid and wanted to appear to determine the specific nature of the offense she was charged with committing. (Tr. 26-27.)

On May 31, Centye appeared before the Nursing Peer Review Committee without a union representative. (Tr. 26-27, 203.) Approximately a dozen people were in attendance, including the committee members and Cross. (Tr. 36, 227.) The committee members consisted of at least 2 nurse managers and 2 nurse educators. (Tr. 36-37). Cross began the meeting by reading the specific charge against Centye. The incident involved her failure to properly “waste” morphine she checked out from the Pyxis system in April 2012. Cross asked her if she remembered the incident. Centye recalled the incident and explained her actions to the committee. (Tr. 39-41.) After she finished her explanation, the committee members thanked her for her time and she left. Centye was not privileged to the deliberation process of the committee members. On the afternoon of May 31, Cross informed Centye by telephone that the committee determined she had violated standard of care level 2, which was not reportable to the Kansas State Board of Nursing. Cross told her she would receive written notification of the nursing peer review committee’s determination.¹⁶ (Tr. 42.) Ultimately, Centye was not disciplined by the Kansas State Board of Nursing or Respondent.

Brenda Smith and the Request for Representation

Brenda Smith (Smith) worked for Respondent as a registered nurse from May 2009, to February 2013. By letter dated May 11, 2012,¹⁷ Respondent notified Smith that the Menorah Medical Center’s Peer Review Diversion Prevention Committee¹⁸ had preliminarily determined that based on reviewed cases she had “exhibited unprofessional conduct as defined by the Kansas Nurse Practice Act and Menorah Medical Center, specifically policy noncompliance, in April 2012. This conduct has preliminarily been determined to be a Standard of Care Level 4: *grounds*

¹⁵ Cross denies that Centye requested a union representative. According to Cross, Centye asked if she needed to have a lawyer present at the meeting, to which Cross responded she did not because it was not a legal proceeding. (Tr. 203-204.) I credit Centye’s testimony on this point. Based on my personal observations, I found Centye’s testimony was thoughtful, consistent, and plausible. Further I find that her testimony was more plausible than Cross’ version on whether Centye requested union representation. The evidence is undisputed that on receipt of the letter charging her with violating patient standard of care, Centye consulted the Union for guidance and was told to ask for union representation in the meeting. (Tr. 44.) Centye, herself a union representative, was aware of her Weingarten rights and given her concern about the letter (and Perry’s advice), I find it unlikely she did not ask to have union representation at an investigatory meeting with management. (Tr. 44.)

¹⁶ Centye finally received a copy of the letter after Perry or Sheilah Garland (union organizer) obtained a copy for her from Respondent’s human resources office. (Tr. 43, 203; Jt. Exh. 5.)

¹⁷ Cross testified that she initially sent the letter to Smith on May 4 but mailed it to the wrong address. (Tr. 209.) The May 11, letter is her second attempt to contact Smith.

¹⁸ Again, the record is undisputed that the “Peer Review Diversion Prevention Committee” has never existed and Cross incorrectly identified the Medication Diversion Prevention Committee as the “Peer Review Diversion Prevention Committee” on several correspondences, including letters to Smith. (Tr. 190-191; Jt. Exhs. 4, 6, 7, 8.)

5 *for disciplinary action.*” (Jt. Exh. 6.) (emphasis in original). The letter continued by informing Smith that she could either appear in person at the Nursing Peer Review Committee meeting scheduled for May 31, or submit a written response in lieu of an appearance. Failure to notify the committee of her intention to appear in person constituted a waiver of her opportunity to appear. (Tr. 25; Jt. Exh. 6.)

10 The meeting was held on May 31, but Smith did not attend because she did not retrieve the May 11 letter, from her post office box until the day of the meeting. On receipt of the letter, Smith immediately telephoned Cross and left a voicemail message asking for additional information about the content of the letter. Subsequently, Cross responded in a voicemail message asking her to return her call. Smith did not return the call, nor attend the meeting because it had occurred by the time she got the letter from her post office box.¹⁹ (Tr. 71-72, 81.) Due to the mix-up with Smith’s address, the committee decided to provide Smith with another opportunity to appear by convening again on August 9 to address the charges leveled against her. 15 (Tr. 222.) By letter dated July 23, Cross sent Smith a letter identical to the one sent May 31, notifying her that she had an opportunity to address the “Peer Review Diversion Prevention Committee” on August 9. (Tr. 72, 222; Jt. Exh. 7.) Smith telephoned Cross and during their discussion Smith asked her for more specific information about the charge against her. Cross responded that the investigation involved “medication administration, times and documenting.” 20 (Tr. 73.) Cross also used the phrase “diverting medication from the hospital.” (Tr. 73.)

25 On August 9, Smith appeared before the Nursing Peer Review Committee without a union representative. (Tr. 73-74, 203.) Smith acknowledged her appearance before the committee was voluntary to the extent it was a choice between appearing in person or responding in writing. Based on the seriousness of the charge, she felt that she had to attend the committee meeting to “defend my integrity and answer the questions that they had.” (Tr. 95-96.) Upon entering the meeting, Cross handed her a paper listing the dates and times of the incidents that were the subject of the investigation. (Tr. 75-76.) Those incidents occurred in April 2012. (Tr. 30 209, 211.) Six to twelve individuals were in the peer review meeting. At the start of the meeting each person introduced themselves to Smith. (Tr. 77.) After the introductions, Smith commented to Cross that she had seen brochures throughout Respondent’s facility “recommending” employees have a union representative in all meetings that might result in discipline. At which point she asked Cross “shouldn’t I have a Union representative in here” to which Cross explained that it was not allowed.²⁰ (Tr. 77-79.) Thereafter, the committee members asked her a series of questions about the incidents of April 12. Smith explained her actions to the committee, 35 they thanked her for her time, and she left. Smith was in the Nursing Peer Review Committee meeting between 25 to 35 minutes. (Tr. 79.) She was not privileged to the deliberation process of the committee members. (Tr. 79.) A few days after her appearance before the committee

¹⁹ Cross and Smith gave contradictory testimony about the exact date of their conversation following Smith’s receipt of the letter dated May 11. Regardless, I do not find this to be a material issue of fact that I must resolve in order to rule on the issues before me.

²⁰ Cross denied that Smith ever asked if she needed or could have a union representative in the meeting. (Tr. 211-212.) I credit Smith’s testimony over Cross’ version of the exchange. Cross relied on closed questions and answers to deny the occurrence of the discussion. Further, Smith’s testimony and overall demeanor were more credible than Cross’ denials of the conversation. Smith detailed the date, location, and approximate time of the conversation. Also, her description of the content of the discussion has the ring of truth when viewed in context of the entire situation.

members, Cross informed Smith by telephone that the committee determined she had violated standard of care level 2, which was not reportable to the Kansas State Board of Nursing. Cross told her she would receive written notification of the Nursing Peer Review Committee's determination. (Tr. 80, 213; Jt. Exh. 8.) Ultimately, Smith was not disciplined by the Kansas State Board of Nursing or Respondent.

Union's Information Request

Sheilah Garland (Garland), local union organizer for Missouri and Illinois, represented the nurses at Respondent's facility from May 2012 through September 2012. Her responsibilities include labor representation, contract enforcement, and grievance processing. (Tr. 108.) After learning that Centye was scheduled to appear before the Nursing Peer Review Committee, on June 1, Garland sent, via email, an information request to Respondent's Vice President of Human Resources, Richard Cybulski (Cybulski) and Human Resources Secretary, Vickie Sivewright (Sivewright). (Tr. 109; Jt. Exh. 9.) The June 1, email requested in relevant part:

3. Copy of discipline issued by Peer Review Diversion Committee along with all documents related to the Hospital's allegations against Ms. Centye; documents utilized, names of all members of the committee and all individuals present for the meeting, including title, department and brief description of their job functions.

4. Complete description of the Peer Review Diversion Committee, to include inception of committee, first meeting date, purpose of the committee, members, how members or individuals serve on the committee, any related state statutes outlining the function, scope and role of the committee within a Hospital.

9. Copy/record of where the Peer Review Diversion Committee discipline was placed, that is, in personnel record or any other record(s) within or outside the Hospital. (J Exh.9)

On June 5, Garland submitted a second information request to Cybulski and Sivewright noting an unspecified number of nurses had received letters to appear before the Peer Review Diversion Committee. Therefore, Garland asked for the following information:

1. the names of all nurses who have received such notification.

2. copies of any/all disciplines issued to any nurses who have appeared before the "Peer Review Diversion Committee" and the location of any disciplines that may have been issued either within or outside Menorah Medical Center.

3. all information regarding the nature of the allegations against all nurses so summoned, copies of investigatory information the hospital utilized to make allegations with respect to nurses so summoned. (J Exh. 9.)

Garland also requested a meeting to discuss "the role of the Peer Review Diversion Committee and the proper application of the contract to the conduct of the committee with respect to bargaining unit RNs." (Jt. Exh. 9.) By June 21, Respondent had not provided the Union with a response to its information requests. (Jt. Exh. 9.) However, on June 26, Garland and the Union's Nurse Representatives, Pam Darple (Darple) and Sandy Baldry (Baldry), met

with Respondent's Director of Labor Relations Douglas Billings (Billings) and Human Resource Specialist Amy Hunt²¹ (Hunt) to discuss the peer review committee and Centye, and to request a meeting with Risk Management.²² (Tr. 114; Jt. Exh. 10.) During the meeting, the Union again asked Respondent to respond to the information request to no avail. (Tr. 115.)

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Following the meeting, Billings emailed Garland telling her to send the "formal" information request regarding the Risk Department/Peer Review Committee. By email sent June 27, Garland submitted another request for the information outlined in her prior emails and the meeting held on June 26. (Tr. 113-115.; Jt. Exh. 10.) Several hours later, Billings responded to Garland's email, writing, in relevant part:

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With regards to the Nursing Peer Review Committee:

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1. The union asked to meet with the Risk Department in order to gather information about the committee. This request is denied. The Hospital's HR department will continue to be the focal for all information requests and continue to provide data per union information requests. All union requests for information should be directed to the MMC HR staff and myself.

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2. The committee does not offer, impose or suggest discipline to RNs, it investigates reportable incidents and provides to the State its findings as per the Kansas Statutes.

3. All business conducted in the committee is confidential between the Hospital and the State.

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4. The MMC HR department has no knowledge of any specific outcomes or content of the committee's meetings.

5. Therefore, the Hospital does not see the relevance of the union's request for information concerning the committee as part of the Hospital's responsibility to administer the CBA. (Jt. Exh. 10.)

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On June 29, Garland telephoned Billings to again try to convince him to provide the information she had previously requested about the peer review committee. She also informed him that the Union believed Centye and other nurses appearing before the Nursing Peer Review Committee were entitled to exercise their *Weingarten*²³ rights. (Tr. 115-116.)

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Subsequently, Garland emailed Billings twice to follow-up on their discussion about the Nursing Peer Review Committee. On June 29, Garland emailed Billings reiterating the points she made to him in the meeting earlier in the day. (Jt. Exh. 11.) She emailed him again on July 2, to ask for clarification regarding Respondent's position on a nurse exercising his/her *Weingarten* rights if called before the Nursing Peer Review Committee. (Jt. Exh. 11.) Billings responded by writing in part:

²¹ From January 2010 to August 2012, Hunt was the human resource specialist. In August 2012, she replaced Cybulski as the Human Resource Director. (Tr. 281-282.)

²² Hunt testified that she did not recall meeting with the union representatives to discuss the information request. (Tr. 293.) I credit Garland's testimony on this point because she had a clear recollection of the meeting and the email messages indicate that Hunt attended the meetings. (Jt. Exh. 10.)

²³ *Weingarten* rights refers to a Supreme Court ruling that employees have the right to union representation in investigatory interviews provided certain factors are met. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

The peer review process undertaken by the Committee is independent and separate from any internal, hospital-initiated disciplinary investigation or action.

5 For the reasons outline (sic) herein, the information requested by the union that seeks
 disclosure or discovery of materials, documents or recommendations developed as part of
 the peer review process, is confidential within the meaning of the Kansas statutes
 identified above. As such, the union’s request is denied. For these same reasons, the
 10 union’s request to participate in the confidential Peer Review Committee meetings is also
 denied. (Jt. Exh. 12.)

In response to the Union’s information requests, on or about July 30, Billings finally
 provided Garland with, among other items not relevant to the charge at issue, Respondent’s risk
 management plan and a written response to the Union’s June 1, information request. (Jt. Exh.
 15 13.) In addition, Hunt responded to the information requests related to the “Peer Review
 Diversion Committee” with “n/a” because she was unaware of the existence of a Peer Review
 Diversion Committee. (Tr. 290-293; Jt. Exh. 13.) Hunt acknowledged that she did not ask
 Garland to clarify the information request or investigate, other than to ask Billings, to determine
 the existence of a “Peer Review Diversion Committee”. (Tr. 290-293.) On July 30, Garland sent
 20 an email to Billings, Hunt, and Cybulski in an attempt to make clear that her information
 requests pertained to the committee referred to in the letters received by several nurses, including
 Centye. (Tr. 117-118; Jt. Exh. 14.) On August 1, Billings responded:

25 To clarify the request you made on June 5, 2012, the Hospital does not have a “Peer
 Review Diversion Committee”. Are you referencing the Diversion Committee that is
 mandated by Kansas Statute KSA 65-4915 and further defined in 65-4915(4)? (Tr. 118;
 Jt. Exh. 15.)

30 In response, on August 1, Garland emailed Billings:

Yes, you’re correct; specifically, does the Hospital have a policy/policies dealing with the
 Peer Review Diversion committee. This is the specific information request along with the
 names of all nurses summoned before the Peer Review Diversion Committee. (Jt. Exh.
 35 15.)

Respondent has provided the Union with peer review policy. The only other information
 Respondent has provided the Union was to respond “n/a” to Garland’s specific questions about
 the peer review or diversion prevention committees referenced in the letters Cross sent to Centye
 and Smith. (Tr.119; Jt. Exhs. 4, 5, 6, 7, 13.)
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III. DISCUSSION AND ANALYSIS

45 A. Preliminary Motions on Judicial Notice, Protective Order, and Jurisdiction

During the hearing, Respondent raised several preliminary issues that I must first address
 before ruling on the merits of the consolidated complaint. Respondent made a motion for me to

take judicial notice of the Kansas Peer Review and Risk Management statutes and regulations. (Tr. 362–363.) Charging party objected based on relevancy and ease of discovering the Kansas statutes and regulations through independent research. (Tr. 363.) Based on Board cases²⁴ approving of taking judicial notice and the Federal Rules of Evidence (FRE) 201, I grant Respondent’s motion.

Second, Respondent requested that portions of the hearing transcript pertaining to discussions in the peer review committee meetings be placed under a protective order. The General Counsel agreed to a “limited protective order with respect to testimony regarding . . . what took place at the peer review committee” with the stipulation that once the hearing closed, I reconsider my ruling and reverse the protective order. (Tr. 27–32.) During the hearing, I granted Respondent’s motion for a limited protective order to cover witness testimony regarding meetings of the Nursing Peer Review Committee. (ALJ Exhs. 1, 2.) In their posthearing briefs, the parties set forth their positions on the continued necessity of the protective order. According to Respondent, the protective order is justified because the Nursing Peer Review Committees’ communications in its meetings and its deliberative process are privileged under Kansas law. The General Counsel argues that I should reverse the protective order because state confidentiality laws do not preempt the Act. Charging Party objected to the protective order. (Tr. 33; ALJ Exh. 3.)

The Board has held that state confidentiality laws are not binding in NLRB proceedings. Admissible evidence is not rendered inadmissible in Board proceedings because it is privileged under State law. See *R. Sabee Co.*, 351 NLRB 1350, 1350 fn. 3 (2007); *North Carolina License Plate Agency #18*, 346 NLRB 293, 294 fn. 5 (2006), *enfd.* 243 Fed. Appx 771 (4th Cir. 2007).

Moreover, the Supreme Court and several federal courts have refused to recognize a state privilege against the disclosure of peer review information. A presumption exists against privileges unless it would achieve a “public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” *Trammel v. United States*, 445 U.S. 40, 50 (1980). This is a high standard which is exceedingly difficult to overcome. Factors to consider in determining whether an evidentiary privilege should be created include: 1) the needs of the public good; 2) if the privilege is ingrained in the need for confidence and trust; 3) the evidentiary benefit of the denial of the privilege; and 4) consensus among the states. *Jaffee v. Redmond*, 518 U.S. 1, 10–16 (1996) There is no Board or federal case that holds federal law allows for a peer review privilege in NLRB proceedings. See *Virmani v. Novant Health, Inc.*, 259 F.3d 284, 289 (4th Cir. 2001); *Mem’l Hosp. v. Shadur*, 664 F.2d 1058, 1063 (7th Cir. 1981) (*per curiam*); *Adkins v. Christie*, 488 F.3d 1324, 1328–1330 (11th Cir. 2007); *Sonnino v. University of Kansas Hosp. Authority*, 220 F.R.D. 633 (2004).

Accordingly, based on a careful consideration of the evidence and Board case law, I am rescinding the protective order issued in this matter.

Respondent also contends that the Board does not have jurisdiction over this case pursuant to Section 2(2) of the Act because Respondent’s Nursing Peer Review Committee

²⁴ *Mimbres Memorial Hospital & Nursing Home*, 342 NLRB 398, 403 fn. 14 (2004), *enfd.* 483 F.3d 683 (2007) (judge properly took judicial notice of requirements mandated by state statutes).

operates as a political subdivision of the State of Kansas. Even assuming the Nursing Peer Review Committee is not a political subdivision of the State of Kansas, Respondent asserts that I should exercise my discretion and decline to assert jurisdiction based on policy reasons. I reject both arguments.

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Section 2(2) of the Act exempts “political subdivision” from the definition of employer. An entity is a political subdivision if “(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.” *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971). Respondent’s peer review committees do not satisfy either prong of the *Hawkins* test. Respondent is a private corporation, which independently drafts and establishes its risk management plan and peer review committees. Respondent readily admits it is not a political subdivision of the State of Kansas. (Tr. 150.) Despite Respondent’s contention to the contrary, I find that the Nursing Peer Review Committee members are not state officials, nor do they operate as an arm of the government. The Nursing Peer Review Committee members are supervised, compensated, hired, appointed, and evaluated by Respondent without input from the state. (Tr. 143, 224–227) Simply because medical providers’ peer review committees must conform to state requirements does not make them a political subdivision that is exempt from the Act.²⁵

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B. COMPLAINT ALLEGATIONS

I. Union’s request for information

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The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when on or about June 1 and 5, Respondent failed and refused to provide the Union with relevant and necessary information related to the peer review committees.

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Respondent contends that the Union sought information that is confidential and privileged. Further, Respondent argues that despite the confidential and privileged nature of the requests, it formulated a reasonable accommodation by meeting with the Union and providing it with “non-confidential information relating to its risk management and peer review process.” (R. Br. 42.) Last, Respondent claims that despite the ambiguous and vague nature of the Union’s requests, it complied with its obligation to request clarification and/or provide the information to the extent that it is necessary and relevant. (R. Br. 46.)

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Section 8(a) (5) of the Act mandates that an employer must provide a union with relevant information that is necessary for the proper performance of its duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co.* 351 U.S. 149, 153 (1956); *Detroit Edison v. NLRB* 440 U.S. 301, 303 (1979). “[T]he duty to bargain unquestionably extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.” *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967). Information requests regarding bargaining unit employees’ terms and conditions of employment are “presumptively

²⁵ Respondent relies on Kan. Stat. Ann. §65-4929(b) to support its argument that the individuals who serve on the peer review committees are responsible to public officials. However, I find that the statute does not justify such a broad reading.

relevant” and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 649 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). The standard for establishing relevancy is the liberal, “discovery-type standard”. *Alcan Rolled Products*, 358 NLRB No. 11, slip op. at 4 (2012), citing and quoting applicable authorities.

In *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992), the Board summarized its application of these principles as follows:

... the Board has long held that Section 8(a)(5) of the Act obligates an employer to furnish requested information which is potentially relevant to the processing of grievances, an actual grievance need not be pending nor must the requested information clearly dispose of the grievance. It is sufficient if the requested information is potentially relevant to a determination as to the merits of a grievance or an evaluation as to whether a grievance should be pursued. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731 (1973).

The requested information does not have to be dispositive of the issue for which it is sought, but only has to have some relation to it. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991). The Board has also held that a union may make a request for information in writing or orally. Further, if an employer fails to respond timely to a request for information, the union does not need to repeat the request. *Bundy Corp.*, 292 NLRB 671, 672 (1989). An unreasonable delay in responding to a valid request for information is a violation of the Act. See *Airo Die Casting, Inc.*, 354 NLRB 92 (2009); *Oaktree Capital Mgmt.*, 353 NLRB 1242 (2009).

The law is well settled that the type of information at issue is presumptively relevant and must be furnished on request. See *Booth Newspapers, Inc.*, 331 NLRB 296 (2000), and the cases cited therein; See also, *Salem Hospital Corp.*, 358 NLRB No. 82 (2013), (employer violated Sec. 8(a)(5) of the Act when it ignored and refused to furnish the requested disciplinary records).

a. Relevancy of information

An employer is required to provide, on request, a union with information that is necessary and relevant to its role as the bargaining representative of its constituency. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975). I find that the requested information is necessary for the Union to effectively monitor and enforce the terms of the CBA. Its access to the peer review committee information enables the Union to compare the incidents that cause nurses to become the target of an investigation and ensure that the Respondent is not using the committee to discriminate against bargaining unit employees. Additionally, the information requested in this matter is relevant and necessary because it enables the Union to make a determination on whether to file a grievance on behalf of unit employees who might have unknowingly been the victim of discriminatory investigations and ultimately discipline. This is a legitimate function of the Union and the requested information is necessary for it to fulfill that duty. *United Technologies Corp.*, 274 NLRB 504 (1985); *TRW, Inc.*, 202 NLRB 729, 731(1973); *United Graphics, Inc.*, 281 NLRB 463, 465 (1986) (the Board held that information presumptively relevant to the

union's role as bargaining agent must be provided to the union as it "relates directly to the policing of contract terms.").

b. Confidentiality of information

Respondent argues that even assuming the information requested by the Union is relevant and necessary, the Union's interest in the information does not outweigh Respondent's legitimate interest in complying with Kansas' statute establishing a peer review committee privilege and requiring that information related to the peer review process remain confidential.

It is well settled law that the party asserting confidentiality has the burden of proof. *Postal Service*, 356 NLRB No. 75 (2011); *Detroit Newspaper Agency*, supra; *Northern Indiana Public Service Co.*, 347 NLRB, 210 (2006). Even assuming that Respondent meets its burden, it cannot simply refuse to furnish the information, but rather must engage in accommodative bargaining with the Union to seek a resolution that meets the needs of both parties. In *Alcan Rolled Products*, supra at 15, the Board explained:

Confidential information is limited to a few general categories that would reveal, contrary to promises or reasonable expectations, highly personal information. *Detroit Newspaper Agency*, 317 NLRB 1071, 1073 (1995). Such confidential information may include "individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits." *Id.* Additionally, the party asserting the confidentiality defense may not simply refuse to furnish the requested information, but must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Id.* at 1072.

Respondent insists that meeting with the Union and providing it with Respondent's risk management plan reasonably accommodated the Union's request. Respondent notes its risk management plan provided the Union with "a detailed description of the NPRC [Nursing Peer Review Committee], information relating to the purpose of the NPRC, a description of how members serve on the committee, and information relating to how Kansas statutes outline the function, scope and role of the committee within the Hospital." (R. Br. 45-46; Jt. Exh. 3.) Further, Respondent argues that although the Union's written questions referencing the peer review process were "vague and ambiguous" because they incorrectly identified the nursing peer review committee as the peer review diversion committee, its "n/a" responses were justified because no such committee existed and reemphasized that the risk management plan accommodated the Union's requests. (R. Br. 42, 46-47; Jt. Exh. 13.)

I find that Respondent failed to engage in the accommodative process. Beginning June 1 and on numerous occasions thereafter, Garland emailed the director of labor relations requesting information on the nursing peer review committee. In addition, Garland met with labor relations officials (Billings, Hunt), requested a meeting with the risk manager, and repeatedly telephoned labor relations officials to get the requested information. By contrast, Respondent took more than a month before acknowledging Garland's initial information request and providing its risk management plan, denied the Union's request to meet with the risk manager about the peer

review committees, provided nonresponsive answers to Garland’s written questions about the peer review committee, and feigned confusion regarding Garland’s request for information on the “peer review diversion committee.” Although the Union received a copy of Respondent’s risk management plan, the evidence is clear that Respondent refused to respond to the specific questions. Respondent did not make a reasonable attempt to accommodate the Union’s request but simply denied the requests, noting “the information requested by the union that seeks disclosure of discovery of materials, documents or recommendations developed as part of the peer review process, is confidential within the meaning of the Kansas statutes identified above. As such, the union’s request is denied.” (Jt. Exh. 12.)

Respondent’s final argument that it was justified in its written responses of “n/a” to the Union’s request for information on the “Peer Review Diversion Committee” also fails. (Tr. 290–293; Jt. Exhs. 13, 15.) Respondent concedes that in her correspondences to Centye and Smith, Cross mistakenly identified the Medication Diversion Prevention Committee as the Peer Review Diversion Committee. Nevertheless, when the Union identified the committee in the same manner as Cross used in her letters, Respondent responded by claiming the committee did not exist without clarifying to Garland that Cross mistakenly labeled the committee name. It is Respondent’s mistake that caused the confusion about the peer review process. Consequently, Respondent cannot now use the confusion that its mistake created to prevent the Union from obtaining necessary and relevant information.

I find that it is not necessary for me to determine that Respondent failed to show that the Union’s interest in the information does not outweigh Respondent’s legitimate interest in complying with Kansas’ statute establishing a peer review committee privilege and confidentiality provision. Even assuming Respondent met its burden of proof showing that its confidentiality interest outweighed the Union’s need for information, Respondent failed to show that it made a valid attempt at an accommodation.

Based on the evidence, I find that the information requested is relevant and necessary to the Union’s representational role. Further, the facts unequivocally establish that the Respondent had the information readily available, yet did not make a valid attempt at an accommodation. Accordingly, I find the Respondent’s delay and refusal to provide the requested information violates Section 8(a)(5) and (1) of the Act.

2. Rule Precluding Employees Subject to Investigations by Peer Review Committees from Discussing Reportable Incidents

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, or enforcing a rule prohibiting employees who are the target of peer review committee investigations from discussing with anyone the ongoing investigations conducted by the peer review committees against employees.

Respondent argues “the Hospital has an obligation under state law to maintain confidentiality of peer review proceedings in order to foster free discussion of the standard of care, which is intended to improve the quality of healthcare services.” (R. Br. 47.) In addition, Respondent insists that Respondent’s registered nurses “would not reasonably construe the language in the confidentiality provision at issue as restricting Section 7 activity when viewed

within the broader framework of the Plan and Kansas' risk management statutes and regulations." (R. Br. 48.)

Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc.*, 354 NLRB 441, 441 (2009).

The Board has held that if a rule specifically restrains Section 7 rights, the rule is invalid. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *Waco, Inc.*, 273 NLRB 746, 748 (1984) (work rule explicitly prohibits employees from discussing wages with coworkers, a restriction on Sec. 7 rights). Even if the rule does not specifically restrict protected activity, the Board has determined that the rule will constitute a violation of Section 8(a)(1) if "(1) the employees would reasonably construe the language to prohibit [protected] activity; (2) the rule was promulgated in response to union activity; and (3) the rule has been applied to restrict the exercise of [protected] rights." *Lutheran Heritage Village-Livonia*, at 647; *Longs Drug Stores California, Inc.*, 347 NLRB 500, 500-501 (2006). The Board also stated, "in determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Id.* at 646. See also *Lafayette Park Hotel*, 326 NLRB 824 at 828 (1998) (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

The Board requires that the judge use a balancing test in determining if the employer's right to promulgate a rule to maintain discipline in the workplace outweighs the employees' right to engage in Section 7 activity. In order to justify a rule prohibiting employee discussions of ongoing investigations, the Respondent must show that it has a legitimate business justification. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (the Board held no legitimate and substantial justification when an employer promulgates a blanket prohibition against employees discussing matters under investigation). The question becomes whether the Respondent's stated legitimate and substantial business reasons outweigh the employees' exercise of their Section 7 rights. See also *Banner Estrella Medical Center*, 358 NLRB No. 93, slip op. 2 (2012) (the Board quoting from *Hyundai America Shipping Agency*, "Rather, in order to minimize the impact on Section 7 rights, it was the Respondent's burden 'to first determine whether in any give[n] investigation witnesses need [ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up.'"). *Id.*

I find that Respondent's confidentiality rule is overly broad and unlawful on its face. As written it prohibits employees from disclosing any information discussed in the peer review committee meetings, particularly if it involves "reportable incidents." Consequently, it restricts employees' right to discuss potential discipline, working conditions, and "other information that employees are entitled to know and to share with coworkers." *Hyundai America Shipping Agency*, at 21. This is a restriction on employees' right to discuss the terms and conditions of their employment for the purpose of "collective bargaining or other mutual aid or protection." *Brighton Retail, Inc.*, at 441.

It is undisputed that Respondent modeled the confidentiality rule set forth in its risk management plan on Kan. Stat. Ann. §65-4915(b). It is also undisputed that Respondent precludes targets of peer review investigations (and committee members) from disclosing information about “reportable incidents” to anyone except those officials designated in its confidentiality clause. (Tr. 268.) The Respondent explains that it established the rule to comply with state law and to ensure witnesses will freely share information to improve the quality of patient care and protect the welfare of patients. Although Cross tells the targets their responses are confidential and will not be disclosed to other individuals by the committee members, she acknowledges that she does not tell them they are likewise precluded from divulging information discussed in the meeting. (Tr. 267–268.) Cross testified confidentiality of the peer review process was important to ensure that “people” were confident that they could fully share information to the committee members. (Tr. 200.) Cross noted she has not encountered a situation where someone has violated the confidentiality provision so it is unclear the type of discipline, if any, would be taken against an employee for violating it. (Tr. 268.)

I find that Respondent failed to show that its business justification for promulgating such an overly broad confidentiality rule outweighs the employees’ exercise of their Section 7 rights. Although Respondent argues Kansas statute mandates the confidentiality clause, it admits the statute does not specifically restrict targets of investigation from being represented by the Union in the peer review committee meetings or discussing “reportable incidents” with others. The evidence established that despite the lack of a specific restriction in this area, Respondent decided on its own to broadly interpret the Kansas confidentiality statute to preclude all discussion of information shared in the peer review committee meeting about “reportable incidents”. This overly broad restriction unnecessarily precludes employees’ from seeking counsel and representation for charges that could possibly threaten employees’ livelihood, i.e., revocation of their professional license.

Second, I find that Respondent presented no evidence to show that it could not protect the integrity of the investigation and pursue its goal of ensuring quality patient care without enforcement of a rule that tramples on its employees rights to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(1) of the Act. The Respondent did not assert, nor present evidence that it conducted an analysis to determine if the integrity of its investigations would have been threatened without issuing the confidentiality rule. It is most likely that Centye and Smith would have been unable to compromise the investigation in any significant manner because they were unaware of the witnesses or evidence that the committee members were using in their deliberative process. Further, there is no evidence either Centye or Smith attempted to contact committee members before or after their appearance to coerce, threaten, or influence them to provide information or rule in their favor. Likewise, there is no evidence that during the investigations employees or committee members accused Centye or Smith of asking or coercing them to fabricate testimony on their behalf, or threatened them with physical harm for testifying against them.

Last, Respondent failed to show that patient care would have been compromised without the confidentiality rule. In fact, Cross testified that if there was a concern that the target of an investigation posed a “potential danger” to patient care and a peer review committee meeting was not shortly scheduled, she would follow-up with the nurse’s manager to ensure the nurse was not compromising patient safety. (Tr. 230–232.) Cross agreed that incidents involving the human resources office and the targeted employee’s supervisor’s investigation of reportable incidents are not subject to the confidentiality clause and can be freely discussed, except for

matters excluded by HIPPA. This is just one example of a less intrusive means Respondent can and has implemented to carry out the intent of the Kansas statute and guarantee quality patient care without violating employees Section 7 rights. The rule at issue is clearly a restraint on Centye’s, Smith’s, and other employees’ Section 7 right to speak with fellow employees to obtain evidence in support of a defense against the charges or to speak with their representative to assist them in the defending against the charges.

Based on the evidence of record, I find the Respondent has failed to demonstrate that a legitimate and substantial justification exists for promulgating and enforcing a blanket rule that restricts employees from exercising their Section 7 rights. Accordingly, I find that the Respondent has unlawfully maintained an overly broad and discriminatory rule prohibiting employees from discussing matters under investigation by the peer review committees. The Respondent has violated Section 8(a)(1) of the Act as alleged in the complaint.

3. Respondent Rejection of Employees Weingarten Rights

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act when it denied Centye’s and Smith’s requests to be represented by a union representative at the Nursing Peer Review Committee meetings.

Respondent argues it was justified in its actions because (1) neither Centye nor Smith requested Union representation; (2) Centye’s and Smith’s appearance before the Nursing Peer Review Committee was voluntary; (3) based on their training and experience, Centye and Smith could not reasonably believe that the peer review process would result in Hospital-imposed discipline; and (4) allowing Centye and Smith to have Union representation at the Nursing Peer Review Committee meetings would interfere with Respondent’s legitimate prerogative to maintain the confidentiality of the peer review process. (R. Br. 1-2.)

In *NLRB v. J. Weingarten, Inc.*,²⁶ the Supreme Court held an employee has a right to union representation in an investigatory interview which the employee reasonably believes might result in disciplinary action. An objective standard that analyzes all the facts and not just the employee’s subjective motivation is used to determine the reasonableness of an employee’s belief. *Weingarten*, supra 257, fn. 5. The employee must request representation and the right to representation “may not interfere with legitimate employer prerogatives.” *Id.* at 258. Moreover, the employer is not obligated to bargain with the union representative who attends the investigatory interview with the employee. If the employer refuses an employee’s request to have union representation in the investigatory interview, the employer and employee have several options. *Weingarten* quoting the Board in *Mobil Oil Corp.*, 196 NLRB 1052 (1972).

The employer may, if it wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of the information obtained from other sources.

²⁶420 U.S. 251 (1975).

If the employer continues the investigatory interview without granting the requested union representation, the interview cannot continue unless the employee “voluntarily agrees to remain unrepresented after having been presented by the employer with the choices” described above, or “is otherwise made aware of these choices.” *United States Postal Service*, 241 NLRB 141, 142 (1979) (emphasis in original); see also *Penn Dixie Steel Corp.*, 253 NLRB 91 (1980).

I find that Respondent violated the Act by continuing its interviews of Centye and Smith after denying them representation. Respondent argues that allowing nurses to have representation in the peer review committee meetings would interfere with Respondent’s obligations to adhere to State confidentiality laws and privileges, and inhibit participants ability to be “frank and open” in the interviews. (R. Br. 32–33.) Respondent also insists Centye’s and Smith’s presence before the peer review committees was voluntary and their beliefs that the investigatory interviews might result in discipline were unreasonable. Last, Respondent contends that neither Centye nor Smith requested union representation.

I find Respondent’s arguments unpersuasive. The evidence establishes that the Kansas statute²⁷ relied on by Respondent does not specifically prohibit nurses from having representation before the committees. It is silent on this point. Respondent acknowledged it has *interpreted* the statute to mean nurses are banned from having representation in the peer review committee meetings. (Tr. 220.) Therefore, I find that honoring Centye’s and Smith’s *Weingarten* rights would not have interfered with a legitimate employer prerogative to comply with state confidentiality laws. Second, Respondent failed to provide anything other than conclusory statements to show how allowing nurses to have union representatives accompany them into the interview would inhibit participants in being frank and open in the interviews. (R. Br. 32.)

Respondent also argues that neither Centye, nor Smith requested to have union representatives accompany them into their interviews before the Nursing Peer Review Committee. Previously in the decision, I credited the testimony of Centye and Smith and found that they asked for union representatives to accompany them before the Nursing Peer Review Committee but were denied by Respondent. Accordingly, I reject Respondent’s argument.

Although Respondent argues nurses’ appearances before the Nursing Peer Review Committee is voluntary, the evidence establishes otherwise. Based on the evidence, it is clear that the choice to not appear before the committee is an illusionary one. Cross admitted that the letter sent to Centye and Smith contained insufficient information for them to submit a written response. Both were told that they would not be provided with the specifics of the charges against them until they appeared before the committee. Consequently, Centye’s and Smith’s decision to appear was a forced action disguised by Respondent as a voluntary choice. In fact, Centye’s letter explicitly stated the committee could not make a final decision on the charges against her without more details that “can only be provided by you.” (Tr. Jt. Exh. 4.) Since, however, the letter did not give her specifics regarding the charge against her, the only means Centye could use to provide the details that the committee needed was to appear in person. The situation Centye and Smith faced was similar to that described in *American Federation of Government Employees Local 1941 v. FLRA*, 837 F.2d 495, 499–500 (D.C. Cir. 1988). The court found:

²⁷ Kan. Stat. Ann. §65-4915(b).

5 The fact [the employee] had the privilege to absent himself, however, should not control. This hearing is the only hearing he ever would have. It settled the facts... It is obvious [the employee] was in fact compelled to attend if he wished to be heard on the issues relating to his professional competence and continued career at Noble Army Hospital. The record was about to be developed. He knew he faced disciplinary action which could include the loss of his job... The decisive consideration governing the employee's right to union representation was not whether the employee was formally required to respond to an investigation of his conduct but whether he wanted union support and reasonably believed he faced disciplinary sanctions. Both of these factors were present here.

10 The Board has held that an employer cannot avoid violating the Act for denying an employee's valid request for union representation by pointing to the fact that the employee participated in the investigation. In *Super Value Stores, Inc.*, 236 NLRB 1581, 1591 (1978), the Board explained:

15 The fact that [the employee] stayed, and answered the questions put to him, did not make his participation voluntary or constitute a waiver of his right to union representation. It should not be a requisite to the continued maintenance of the properly asserted right of union representation that the lone employee further antagonize the employer and jeopardize his job by walking out of the meeting or by refusing to answer questions.

Based on the evidence and case law, I find Respondent argument on this point fails.

25 I also reject Respondent's argument that it was unreasonable for Centye and Smith to believe that the investigatory interviews might result in discipline. The letters sent to Centye and Smith requesting their appearance before the Nursing Peer Review Committee read in relevant part:

30 Menorah Medical Center's Peer Review Diversion Prevention Committee has reviewed cases in which you may have exhibited unprofessional conduct as defined by the Kansas Nurse Practice Act and Menorah Medical Center, specifically policy non-compliance in March 2012²⁸. This conduct has preliminarily been determined to be a Standard of Care Level 4: *grounds for disciplinary action*. (Jt. Exhs. 4, 6, 7) (emphasis in original)

35 Measured by an objective standard, Centye's and Smith's beliefs that the interviews might result in disciplinary action were reasonable because their letters clearly stated that their conduct had preliminarily been determined to be "*grounds for disciplinary action*." Respondent argues that the letter's reference to "Kansas statute, the Kansas Nurse Practice Act, standard of care determinations, Menorah's Risk Management Plan, and the peer review process" makes it clear
40 "that the [Nursing Peer Review Committee] meetings cannot lead to Hospital-impose discipline." (R. Br. 38.) Further, Respondent suggests that Centye and Smith should have known the letter did not infer any Hospital-imposed discipline because during their employee orientation they were given information about Respondent's quality and risk management policies. I, however, am at a loss to understand how a brief introduction to Respondent's risk management plan would

²⁸ The letters sent to Smith used identical language as the one sent to Centye, except the noncompliance date listed on Smith's letter was April 2012.

contradict the plain language of the letters sent to Centye and Smith noting there were potentially “grounds for disciplinary action” against them. Moreover, there is no evidence that either Centye or Smith were familiar with the “Kansas statute, the Kansas Nurse Practice Act, standard of care determinations, Menorah’s Risk Management Plan, and the peer review process” referenced in the letters. (Jt. Exh. 4, 6, 7.)

Even assuming Centye and Smith were familiar with the state statutes governing Respondent’s risk management plan, there is nothing in the statutes that precludes both the Kansas State Board of Nursing and Respondent from taking action against a nurse found to have violated standard of care level 3 or 4. Respondent acknowledged this fact. (Tr. 153, 160–161, 232.) Practically speaking, if a nurse were stripped of her license by the state board for violating level 3 or 4, Respondent would be compelled to take disciplinary action against the nurse by terminating him/her for failing to maintain a valid nursing license. (Tr. 147.)

With the letters containing nothing more than a vague reference to charges of unprofessional conduct that is grounds for disciplinary action, it was reasonable for Smith and Centye to believe the meeting before the Nursing Peer Review Committee could lead to disciplinary action. Centye credibly testified that she was confused and scared by the severe implications of the letter and her ignorance of the purpose of a peer review committee. (Tr. 26.) Smith was also frightened by the letter because it “used the description of [she] exhibited unprofessional conduct and there (sic) could be grounds for discipline.” (Tr. 80.)

Respondent also argues that Smith and Centye’s fears were baseless because the “peer review process has never led to discipline imposed by Menorah.” The evidence does not support this statement either way. There is no evidence that Centye or Smith knew that throughout the entire existence of the Nursing Peer Review Committee it had never led to Respondent imposed discipline. Even assuming as true that the Nursing Peer Review Committee’s determinations had never led to Respondent imposed discipline, it is irrelevant. The appropriate question would remain whether the targets of the investigatory interviews reasonably believed that they could be subject to disciplinary action. I agree a nurse’s knowledge that Respondent had never imposed discipline against a nurse based on the Nursing Peer Review Committee’s determination could support a finding that his/her belief is unreasonable. However, there is no evidence to support such a finding in this case.

Based on the totality of the circumstances and using an objective standard, I find that it was reasonable for Smith and Centye to believe that their appearances before the Nursing Peer Review Committee might result in Respondent taking disciplinary action against them. I also find that Centye and Smith requested and were entitled to representation when called before the Nursing Peer Review Committee. Accordingly, I find that Respondent violated Section 8(a)(1) of the Act when it denied them their *Weingarten* rights.

CONCLUSIONS OF LAW

1. The Respondent, Midwest Division – MMC, LLC d/b/a Menorah Medical Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. National Nurses Organizing Committee – Kansas/National Nurses United, affiliated with National Nurses Organizing Committee/National Nurses United is a labor organization within the meaning of Section 2(5) of the Act.

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3. By promulgating, maintaining, and enforcing an oral rule prohibiting employees from discussing with other employees discipline or ongoing investigations, the Respondent violated Section 8(a)(1).

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4. By failing and refusing to fully provide relevant information requested by the Union beginning June 1, 2012, 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.

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5. By denying Sherry Centye's request for union representation at an investigatory interview held on or about May 31, 2012, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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6. By denying Brenda Smith's request for union representation at an investigatory interview held on or about August 9, 2012, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

7. The above violations are an unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act.

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8. The Respondent has not violated the Act except as set forth above.

REMEDY

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

As I have concluded that the Respondent unlawfully promulgated, maintained, and enforced a confidentiality rule prohibiting employees from discussing with other employees discipline or ongoing investigations, the recommended order requires that the Respondent revise or rescind the unlawful rule, and advise its employees in writing that said rule has been so revised and rescinded.

As I have concluded that the Respondent unlawfully failed to produce relevant information in response to the Union's request, the Respondent will, therefore, be ordered to produce the requested and relevant information.

As I have concluded that the Respondent unlawfully denied employees' lawful request for union representation at investigatory interviews, the recommended order requires that it must cease and desist from engaging in such conduct in the future and to take certain affirmative action designed to effectuate the policies of the Act.

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Further, Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

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The Respondent, Midwest Division – MMC, LLC d/b/a Menorah Medical Center, Overland Park, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Promulgating, maintaining, and enforcing a confidentiality rule prohibiting employees from discussing with other employees discipline or ongoing investigations.

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(b) Refusing to provide the Union, National Nurses Organizing Committee – Kansas/National Nurses United, affiliated with National Nurses Organizing Committee/National Nurses United, information requested that is necessary and relevant to its role as the exclusive representative of the employees in following unit:

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All full-time, part-time and PRN registered nurses employed by Menorah Medical Center, excluding nurse educators, regularly assigned charge nurses, Vascular Lab Techs, infection control/employee health nurses, risk management/performance improvement coordinators, administrative employees, confidential employees, managerial employees, guards and supervisors, as defined in the Act, and all other employees.

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(c) Denying employees' request for union representation at interviews the employees reasonably believe might result in discipline.

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

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

²⁹ 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.

(a) Within 14 days from the date of the Board’s Order, advise employees that it has revised or rescinded the confidentiality rule prohibiting employees from discussing with other employees discipline or ongoing investigations.

5 (b) Within 14 days from the date of the Board’s Order, furnish the Union with all information it requested beginning June 1, 2012.

10 (c) Within 14 days from the date of the Board’s Order, advise employees that it will not deny employees’ request for union representation at interviews the employees reasonably believe might result in discipline.

15 (d) Within 14 days after service by the Region, post at its facility in Overland Park, Kansas, copies of the attached notice marked “Appendix.”³⁰ Copies of the notice, on forms provided by the Regional Director for Region 14 Sub-region 17, 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 and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent 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 its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2012.

20 (e) 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.

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Dated, Washington, D.C. December 23, 2013

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Christine E. Dibble (CED)
Administrative Law Judge

³⁰ 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.”

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
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from discussing with other employees discipline or matters under investigation by us or our peer review committees.

WE WILL NOT refuse to bargain collectively with the Union (National Nurses Organizing Committee – Kansas/National Nurses United, affiliated with National Nurses Organizing Committee/National Nurses United) by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective bargaining representative of the employees in the following unit:

All full-time, part-time and PRN registered nurses employed by Menorah Medical Center, excluding nurse educators, regularly assigned charge nurses, Vascular Lab Techs, infection control/employee health nurses, risk management/performance improvement coordinators, administrative employees, confidential employees, managerial employees, guards and supervisors, as defined in the Act, and all other employees.

WE WILL NOT deny employees' request for union representation at investigatory interviews that employees believe might result in disciplinary action.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

**MIDWEST DIVISION-MMC, LLC d/b/a MENORAH
MEDICAL CENTER**

(Employer)

DATED: _____ **BY** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

1222 Spruce Street, Suite 8.302

St. Louis, Missouri 63103-2829

Telephone: (314) 539-7770

Fax: (314) 539-7794

Hours of Operation: 8:30 a.m. to 5:00 p.m. CST

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7770.