

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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OLEAN GENERAL HOSPITAL : Case Numbers:03-CA-097918  
 : 03-CA-104444  
-and- : 03-CA-104462  
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NEW YORK STATE NURSES ASSOCIATION :  
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**OPPOSITION OF CHARGING PARTY, NEW YORK STATE NURSES ASSOCIATION,  
TO EXCEPTIONS FILED BY OLEAN GENERAL HOSPITAL**

Charging Party New York State Nurses Association (“NYSNA”) respectfully submits this answering brief in opposition to Respondent Olean General Hospital’s Exceptions to the Administrative Law Judge’s Decision in the above-captioned cases.

**PRELIMINARY STATEMENT**

After a hearing and with ample opportunity for all parties to present evidence, an ALJ has found that Olean General Hospital (“Olean”) violated Section 8(a)(5) by unilaterally implementing a clinical nursing student program and failing to provide relevant information, including the patient care deficiency report of a hospital accrediting body. Olean now makes several desperate arguments in another attempt to avoid its statutory obligations. First, Olean asserts that it had no threshold duty to bargain regarding this new nursing student program, even though this program involved increased pay, new training and new responsibilities for certain bargaining unit members. Second, Olean argues that this new nursing student program, cited by the nursing school as the “first” rural program of its kind in New York State, with different training, compensation and job duties for participating RNs, is substantially similar to previous nursing student programs. Olean next argues that the patient care deficiency report is barred

from disclosure under the New York Education Law, relying on an inapplicable statute governing discovery in New York State court litigation.

The ALJ's decision in this matter is well-supported by both the facts and the law. Olean's last-ditch effort to avoid compliance with the NLRA should be rejected and the ALJ decision should be affirmed by the Board.

### **STATEMENT OF FACTS**

#### **The Parties**

The New York State Nurses Association ("NYSNA") is a union representing RNs across New York State, including RNs working at Olean General Hospital.

Olean General Hospital ("Olean" or the "Employer") is an acute care hospital located in Western New York providing a range of patient care services. Olean and NYSNA are parties to a CBA that expired January 31, 2013 and are currently negotiating a new CBA. *See* GC Ex. 9.

#### **Unilateral Implementation and Failure to Provide Information Regarding the Dedicated Education Unit Program**

On or about the last week of November, 2012, Jeff Zewe, the Vice-President of Nursing for Olean informed Karen Wida, NYSNA Nursing Representative, of a new program planned for the hospital entitled the Alfred State Dedicated Education Unit Program ("DEU" program). Tr. 15-17. Under the DEU program, the hospital would provide extended clinical experience for nursing students at Alfred State College and RNs at Olean would serve as Clinical Teachers while simultaneously providing patient care at Olean. Tr. 16; GC Ex.2, pp.2-3. RNs at Olean serving as Clinical Teachers would be required to become staff of Alfred State College and would receive payment from Alfred State College while also performing their RN duties at Olean. Tr. 21-22; GC Ex. 2, p.2. Subsequently, Wida became aware that Olean had approached

at least one RN directly and asked her to participate in the DEU program prior to any further discussions with NYSNA. Tr. 17.

In addition, Alfred State College sent a letter dated November 26, 2012 to Olean RNs who were prospective participants in the DEU program. GC Ex. 4; ALJ Decision at p.3. This letter states that Olean and Alfred State College were piloting “the first rural model DEU in the State of New York,” under which Olean RNs would become “hospital clinical teachers” and would be representatives of both Olean and Alfred State College. GC Ex. 4 at p.1; ALJ Decision at p.3. Further, Olean RN “hospital clinical teachers” would be “required to attend a mandatory orientation on curriculum design, student outcomes, and clinical reasoning instruction held by Alfred State nursing faculty” provided on Olean premises. GC Ex. 4 at p.2; ALJ Decision at p.3.

On December 4, 2012, Wida sent an e-mail to Zewe and Timothy McNamara, the Olean SVP Human Resources, stating that the DEU program “is something that needs to be negotiated,” and requesting “dates and times you are both available to negotiate something for this program.” GC Ex. 2. McNamara responded via e-mail that “I do not understand what part of this needs to be negotiated.” GC Ex. 2, p.2. Zewe also responded via e-mail on December 4, 2012 questioning whether there was a need to negotiate and directed his secretary Annette to schedule a meeting with NYSNA regarding the DEU program. GC Ex. 2, p.3. Other than this e-mail, Olean did not respond to NYSNA’s demand to bargain, or negotiate with NYSNA at all regarding the DEU program. Tr. 20. Subsequently, Olean unilaterally implemented this program for the Spring 2013 semester without negotiating or further responding to NYSNA’s demand to bargain. The DEU program was distinct from all other student internship programs offered by Olean as RNs involved in the DEU program were required to become employees of and were compensated by Alfred State College. Tr. 94; ER Exs. 2-5 (affiliation agreements with

other nursing schools did not require RNs to become Clinical Teachers or to become employed or compensated by the relevant nursing school).

On January 2, 2013, Wida sent another e-mail to McNamara requesting certain information regarding the DEU program, including: (1) who the RNs would take their orders from while working simultaneously for Olean and Alfred State College, (2) the type of education that was being provided to the RNs selected to be Clinical Teachers for the program, (3) the curriculum and weekly expectations for the students in the program. GC Ex. 3, p.2. Wida never received any written response to this e-mail nor any of the information requested. Tr. 21. James Schmitt, outside counsel for Olean, only approached Wida regarding the information she requested after the relevant information request charge was filed and the DEU program was already implemented, in an effort to settle the pending charge. Tr. 27-28.

#### Failure to Provide JCAHO Report

Since November 2012, NYSNA and Olean Hospital have been engaged in negotiations for a successor collective bargaining agreement. Tr. 52. One of the major issues in collective bargaining negotiations has been the importance of adequate RN staffing and the relationship between staffing and safe patient care. Tr. 54. NYSNA's position in negotiations is that there is a direct correlation between adequate RN to patient ratios and patient safety. Tr. 58. NYSNA has made several collective bargaining proposals on this issue. Tr. 54.

The Joint Commission on Accreditation of Healthcare Organization ("JCAHO") is an accrediting body for hospitals that requires hospitals to submit to periodic on-site surveys in order to maintain their accreditation. Tr. 53. In February 2013, JCAHO performed a survey of Olean to assess patient care and determine whether Olean would maintain its JCAHO accreditation. JCAHO found approximately 40 deficiencies in the patient care at Olean. Tr. 74;

ALJ Decision at p.4. On March 6, 2013, Timothy Finan, the President and CEO of Olean, wrote a memorandum to the Department of Surgery, Department of Anesthesiology and Surgical Nursing Staff identifying specific patient care deficiencies within the Operating Room OR and stating that the hospital will have “zero tolerance” if employees fail to remedy these deficiencies. GC Ex. 9.

On March 4, 2013, NYSNA Program Representative Dennis Zgoda wrote a letter to Olean Hospital requesting this JCAHO report in connection with its survey, including the list of patient care deficiencies. GC Ex. 5. NYSNA requested this report in order to review the patient care deficiencies at Olean as determined by JCAHO, to analyze its current proposals on staffing and to determine if existing proposals should be modified or if new proposals should be made regarding any of the issues raised by the JCAHO report. Tr. 54. On March 8, 2013, McNamara replied to Zgoda that he had referred Zgoda’s letter to Olean’s outside counsel, James Schmit. GC Ex. 6. Zgoda reiterated his request for information in a April 1, 2013 letter. GC Ex. 7. Zgoda never received the requested JCAHO report and deficiencies or any additional response from the employer on this matter. Tr. 55.

#### Administrative Law Judge’s Decision

On September 24, 2013, the Administrative Law Judge (“ALJ”) held that “the DEU program with Alfred State is sufficiently different from [previous nursing student programs] that Respondent was obligated to provide the Union with prior notice and an opportunity to bargain over the implementation of the DEU program.” ALJ Decision of September 24, 2013, at p.4 (“ALJ Decision”). The ALJ also found that Olean “violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith with the Union by not furnishing the Union with relevant information it had requested concerning . . . the DEU program.” ALJ

Decision at p.6. Further, the ALJ held that Olean's belated claim of confidentiality with respect to the JCAHO survey must fail as the New York law cited by Olean, (1) "is completely irrelevant to this case" because NYSNA is not seeking the JCAHO survey under the New York Civil Practice law, and (2) even if it was relevant, the law "expressly exempts disclosure under other provisions of law, such as the Section 8(a)(5) of the NLRA." ALJ Decision at pp. 5-6.

### ARGUMENT

I. The ALJ Did Not Err in Holding that Olean Unlawfully Unilaterally Implemented the DEU Program

It is a basic tenant of the National Labor Relations Act ("NLRA"), that employers have a duty to bargain prior to implementing unilateral changes regarding "wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d) (Section 8(d) of the NLRA). *See also Ford Motor Co. v. NLRB*, 441 U.S. 488, 494 (1979) ("employer and union must bargain" regarding "terms and conditions of employment defined in Section 8(d)"). Terms and conditions of employment undisputedly include compensation, training, and changes in job duties. *See Southern California Gas Co.*, 346 NLRB 449, 449 (2006) (employee training program mandatory subject of bargaining); *Bozeman Deaconess Foundation*, 322 NLRB 1107, 1108 (1997) (modification of RN job duties constituted unlawful unilateral change). Consistent with this basic tenant of labor law, the ALJ held that Olean unlawfully implemented unilateral changes to terms and conditions of employment through the DEU program. ALJ Decision at pp.4, 6.

Olean first argues that it did not have a threshold duty to bargain regarding the DEU program. This argument fails on its face as there is no factual dispute that the Olean DEU program resulted in additional compensation, new training and a change in job duties for certain bargaining unit RNs. Similarly, in a misguided attempt to justify its unilateral changes, Olean

argues that Section 10.13 of the CBA somehow waives NYSNA's right to bargain over these changes. Section 10.13 of the CBA states that:

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

GC Ex. 9 (emphasis added). As the ALJ held, the plain language of this CBA provision proves that it does not apply to the DEU program as there is no mention in Section 10.13 of a \$1,000 stipend, training to be provided by the relevant nursing school or a requirement that RNs represent both Olean and the relevant nursing school while performing their RN job duties. *See* ALJ Decision at p.3, 4 (Olean's argument regarding Section 10.13 "is belied by the fact that the contract does not provide for a \$1,000 payment to the nurse from any educational institution."); GC Ex. 4 at p.1 (letter from Alfred State to prospective RN DEU program participants).

Olean continues to argue that "[t]he DEU program is substantially the same as every other program concerning student nurse interns in which the Hospital has been involved." Respondent Olean's Brief in Support of Its Exceptions at p.11 ("Respondent's Brief"). Yet, Olean fails to account for the undisputed fact that none of these other nursing student programs required Olean RNs to simultaneously work for or receive additional wages or training from any other educational institution. Tr. 94; ER Exs. 2-5 (affiliation agreements with other nursing schools did not require RNs to become Clinical Teachers or to become employed or compensated by the relevant nursing school); ALJ Decision at pp. 4, 6. Moreover, the fundamental differences between the DEU program and earlier student nurse programs offered at Olean (including those offered by Alfred State College) are confirmed by Alfred State College's letter to Olean RNs describing the program as "the *first* rural model DEU in the State of New

York.” GC Ex. 4 at p.1; ALJ Decision at p.3 (emphasis added). Consequently the ALJ’s conclusion that “material differences” existed between the DEU program and previous student nurse programs is well-supported by the record and should be affirmed. ALJ Decision at p.6.<sup>1</sup>

Finally, as a last-ditch attempt to excuse its patently unlawful conduct, Olean argues that conversations between NYSNA and Olean or its counsel which occurred *after* the charges were filed and after the DEU Program had run its course for the semester somehow excuse its violation of the NLRA. Tr. 27-28 (May and August conversations between NYSNA representative Wida and Olean attorney James Schmit where Mr. Schmit offered to “resolve” the charges).<sup>2</sup> These after-the-fact settlement discussions do not cure an underlying violation of the NLRA and certainly cannot be relied upon as a defense to the charges at issue here.

II. The ALJ Properly Concluded that New York Law Did Not Trump the NLRA and Preclude Disclosure of the JAHCO survey

NYSNA requested the JCAHO survey with the list of patient care deficiencies in order to assess its collective bargaining proposals with respect to RN staffing and safe patient care and to determine if it should draft new proposals on these issues. Tr. 54; ALJ Decision at p.5. Thus, the JCAHO survey implicates RNs working conditions and it is presumptively relevant on this basis alone. *Southern California Gas Co.*, 346 NLRB at 449. *See also* ALJ Decision at p.5 (holding that “the record reflects that staffing has been a major issue in contract negotiations [and] the deficiencies noticed in the JCAHO [survey] may at least arguably be

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<sup>1</sup> Further, the ALJ is correct that another distinction between the DEU program and past nursing student programs is that for past nursing student programs, a nursing instructor from the relevant nursing school was present during student clinical rotations, with the exception of nights and weekends. Tr. 87-88 (testimony of Olean’s Senior VP of Human Resources).

<sup>2</sup> Olean also erroneously states in its brief that “there is no evidence that [Olean] refus[ed] to provide information concerning the DEU Program or refus[ed] to meet the Union to discuss the program.” Respondent’s Brief at p.14. To the contrary, Karen Wida testified that Olean failed to set up negotiations regarding the DEU program despite her demand to bargain and that Olean did not respond at all to her information requests. Tr. 20-23.

related to staffing issues”). Olean’s witness Diane Haughney acknowledged the obvious connection between adequate staffing of RNs and patient care. ALJ Decision at p.5 (testimony “that the number of RNS working on any given unit can impact the patient care provided”); Tr. 75-76. Further, Olean acknowledged the relevance of the JCAHO survey to RN terms and conditions of employment when it sent a memorandum to all Surgical Nursing Staff RNs identifying specific patient care deficiencies cited by JCAHO and implying that RNs could be subject to discipline if they failed to remedy these deficiencies. *See* GC Ex. 9.

Olean has the burden to prove its affirmative defense that it is not obligated to provide this patient care information for reasons of confidentiality because of New York Education Law Section 6527(3).<sup>3</sup> *Howard University*, 290 NLRB 1006, 1008 (1988) (employer failed to carry burden of proof of confidentiality for patient care information). This statute states that:

Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program . . . *shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law.*

New York Education Law Section 6527(3) (emphasis added). This statute is not applicable here as, first, NYSNA is not seeking this information for purposes of discovery in pending litigation in New York State court under Article 31 of the New York Civil Practice Law. ALJ Decision at p.5. Second, as the ALJ found, even if somehow this New York statute applies, there is a specific exemption under the statute for “other provisions” of law, such as Section 8(a)(5) of the

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<sup>3</sup> As the ALJ noted, Olean failed to raise confidentiality at all until it filed its answer on July 19, 2013, approximately four months after NYSNA requested the JCAHO survey. ALJ Decision at p.5, n.1; GC Ex. 5. Thus, even if there was any validity to Olean’s claims of confidentiality, Olean has failed to notify the union promptly or propose an accommodation as required pursuant to Board precedent. *See Kaleida Health Inc.*, 356 NLRB No. 171, at \*13 (2011).

NLRA. ALJ Decision at pp.5-6. Consequently, because Section 8(a)(5) requires disclosure of the JCAHO survey, the New York Education Law does not apply here.

Olean's heavy reliance on *Zion v. New York Hosp.*, 183 A.D.2d 386 (App. Div. 1st Dept 1992) illustrates precisely why New York Education Law Section 6527(3) does not apply here and why this defense must fail. *Zion* involved a discovery request for the relevant report under the New York Civil Practice Law, while the request at issue here occurred under federal labor law. *See also* ALJ Decision at p.5. Olean contends that the ALJ's failure to mention *Zion* in his decision constitutes error, Respondent's Brief at p.16, yet *Zion* has zero relevance to the information request at issue here because NYSNA requested the JCAHO survey under federal labor law not pursuant to the New York Civil Practice Law. ALJ Decision at p.5.

Olean also relies on *Kaleida Health Inc.*, 356 NLRB No. 171, at \*9 (2011), yet *Kaleida Health* actually supports NYSNA's position. In *Kaleida Health*, the union sought all patient care incident reports involving patient falls. The ALJ considered the employer's argument that New York Education Law (including Section 6527(3)) barred the disclosure of the information but ultimately ordered the employer to provide the relevant reports pursuant to the NLRA. *Id.* at \*11-13, 17 ("the Union's need for the [patient care] information outweighs the general policy of confidentiality" outlined in New York Education Law Section 6527(3)). This ALJ decision was subsequently affirmed by the Board. *Id.* at \*1. Thus, this NLRB precedent only supports NYSNA's position that the JCAHO survey may not be withheld for reasons of confidentiality.

**CONCLUSION**

For the foregoing reasons, the Board should affirm the ALJ's decision.

Dated: November 21, 2013

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Certificate of Service

I hereby certify that I caused a copy of the foregoing brief to be served by electronic mail this 21<sup>st</sup> day of November 2013 upon:

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