

Nos. 15-1312 & 15-1359

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MIDWEST DIVISION – MMC, LLC,
D/B/A MENORAH MEDICAL CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**NATIONAL NURSES ORGANIZING
COMMITTEE-KANSAS/NATIONAL NURSES UNITED**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

ROBERT J. ENGLEHART
Supervisory Attorney

JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2978
(202) 273-2989

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

1. Midwest Division—MMC, LLC, d/b/a Menorah Medical Center (“the Hospital”) was the respondent before the Board (Board Case Nos. 17-CA-088213, 17-CA-091912) and is the Petitioner and Cross-Respondent before the Court.

2. The Board is the Respondent and Cross-Petitioner before the Court; its General Counsel was a party before the Board.

3. The National Nurses Organizing Committee-Kansas /National Nurses United, was the charging party before the Board and is the Intervenor before the Court.

4. The American Hospital Association, the Kansas Hospital Association, the Texas Hospital Association, and the Texas Nurses’ Association filed a combined amicus brief with the Board on behalf of the Hospital. These parties, along with the Federation of American Hospitals, American Organization of Nurse Executives, and the Texas Organization of Nurse Executives, filed a combined amicus brief in this proceeding. The HR Policy Association also filed an amicus brief on behalf of the Hospital in this proceeding.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on August 27, 2015, reported at 362 NLRB No. 193.

C. Related Cases

This case has not previously been before the Court. The Board is not aware of any related cases either pending or about to be presented before this or any other court.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 26th day of May, 2016

TABLE OF CONTENTS

Headings	Page(s)
Statement of jurisdiction	1
Statement of the issues	3
Relevant statutory provisions.....	3
Statement of the case.....	3
I. The Board’s findings of fact	4
A. Background.....	4
B. The Hospital maintains a confidentiality clause in its risk-management plan	7
C. The Hospital investigates conduct of nurses Sherry Centye and Brenda Smith.....	8
1. Sherry Centye.....	8
2. Brenda Smith.....	10
D. The Union requests information from the Hospital	12
II. The Board’s conclusions and order	15
Summary of argument.....	16
Standard of review	18
Argument.....	19
I. The Hospital unlawfully denied employees’ requests for a union representative at nursing peer-review committee meetings	19
A. The Board reasonably rejected the Hospital’s argument that the Board lacked jurisdiction over the Committee.....	21

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
1. The Board's construction of the narrow "political subdivision" exemption to the Act's broad definition of "employer" is entitled to deference	21
2. The Committee was not directly created by the state of Kansas so as to constitute a department or administrative arm of the government.....	23
3. The Committee is not administered by individuals who are responsible to public officials	28
B. Substantial evidence supports the Board's findings that the Hospital unlawfully denied Centye's and Smith's requests for a union representative.....	30
1. An employer violates the Act by interviewing an employee, after denying her valid request for a union representative, without advising her at that point that she may leave or voluntarily remain unaccompanied by a representative	30
2. Employees Centye and Smith were entitled to a <i>Weingarten</i> representative	32
a. Centye and Smith each requested that a union representative accompany them before the Committee.....	32
b. Centye and Smith reasonably believed that the peer-review proceedings could result in discipline.....	33
c. The Hospital unlawfully refused Centye's and Smith's requests for a <i>Weingarten</i> representative.....	35
II. Substantial evidence supports the Board's findings that the Hospital unlawfully failed to provide the Union with relevant information.....	40
A. An employer violates its duty to bargain under the Act by refusing to provide the Union with information relevant to the investigation of grievances or the enforcement of a collective-bargaining agreement.....	40

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
B. The Hospital refused to furnish the Union with the requested relevant information	42
1. The Union requested relevant information	42
2. The Hospital failed to establish a legitimate and substantial confidentiality interest in any of the requested information	44
C. The Board did not abuse its discretion by admitting testimony related to peer-review proceedings or revoking the protective order covering this testimony	48
III. Substantial evidence supports the Board's finding that the Hospital's confidentiality rule violates the Act.....	51
A. An employer may not maintain a rule that employees would reasonably construe as restricting their Section 7 right to communicate with one another, or their representative, about terms and conditions of employment	51
B. The Hospital's confidentiality rule is unlawfully overbroad	53
Conclusion	57

TABLE OF AUTHORITIES

Cases	Page(s)
<i>*Adams v. St. Francis Regional Medical Center</i> , 264 Kan. 144 (1998)	24, 44, 46
<i>Adkins v. Christie</i> , 488 F.3d 1324 (11th Cir. 2007)	50
<i>Adtranz ABB Daimler-Benz Transportation v. NLRB</i> , 253 F.3d 19 (D.C. Cir. 2001)	54
<i>AFGE, Local 1941, v. FLRA</i> , 837 F.2d 495 (D.C. Cir. 1988)	37
<i>Allied Mechanical Services, Inc. v. NLRB</i> , 668 F.3d 758 (D.C. Cir. 2012)	19
<i>Bally’s Park Place, Inc. v. NLRB</i> , 646 F.3d 929 (D.C. Cir. 2011)	19
<i>Beth Israel Hospital v. NLRB</i> , 437 U.S. 483 (1978)	51
<i>Brewers and Maltsters, Local Union No. 6 v. NLRB</i> , 414 F.3d 36 (D.C. Cir. 2005)	43
<i>Cintas Corp. v. NLRB</i> , 482 F.3d 463 (D.C. Cir. 2007)	51, 52
<i>City of Arlington v. FCC</i> , ___ U.S. ___, 133 S. Ct. 1863 (2013)	22
<i>Conner v. Salina Regional Health Center, Inc.</i> , 56 Fed. App’x. 898 (10th Cir. 2003)	27, 29

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Crestline Memorial Hospital Association, Inc. v. NLRB</i> , 668 F.2d 243 (6th Cir. 1982)	22
<i>Crowley Marine Services, Inc. v. NLRB</i> , 234 F.3d 1295 (D.C. Cir. 2000)	40, 42, 47
<i>DaimlerChrysler Corp. v. NLRB</i> , 288 F.3d 434 (D.C. Cir. 2002)	41
<i>Detroit Edison Co. v. NLRB</i> , 440 U.S. 301 (1979)	41
<i>EEOC v. Illinois Department of Employment Security</i> , 995 F.2d 106 (7th Cir. 1993)	49, 50
<i>Eldred v. Reno</i> , 239 F.3d 372 (D.C. Cir. 1991), <i>aff'd</i> , 537 U.S. 186 (2003)	21
<i>Florida Steel v. NLRB</i> , 529 F.2d 1225 (5th Cir. 1976)	52
<i>Guardsmark, LLC v. NLRB</i> , 475 F.3d 369 (D.C. Cir. 2007)	53
<i>Hill v. Sandhu</i> , 120 F.R.D. 548 (D. Kan. 1990)	44, 46
* <i>Hyundai America Shipping Agency, Inc. v. NLRB</i> , 805 F.3d 309 (D.C. Cir. 2015)	52, 55
* <i>Kentucky River Community Care, Inc. v. NLRB</i> , 193 F.3d 444 (6th Cir. 1999)	24, 25

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Lathrop v. Donahue</i> , 367 U.S. 820 (1961).....	25
<i>Lennox Industries, Inc. v. NLRB</i> , 637 F.2d 340 (5th Cir. Unit A Feb. 1981)	33
<i>Local 13, Detroit Newspaper Printing & Graphic Communications Union v. NLRB</i> , 598 F.2d 267 (D.C. Cir. 1979).....	41
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004)	52
<i>Memorial Hospital v. Shadur</i> , 664 F.2d 1058 (7th Cir.1981)	51
<i>Metropolitan Edison Co.</i> , 330 NLRB 107 (1999)	41
* <i>Mobil Oil Corp.</i> , 196 NLRB 1052 (1972), <i>enf. denied on other grounds</i> , 482 F.2d 842 (7th Cir. 1973)	36, 39
<i>Mount Vernon Tanker Co. v. NLRB</i> , 549 F.2d 571 (9th Cir. 1977)	35
<i>Museum Associates v. NLRB</i> , 688 F.2d 1278 (9th Cir. 1982)	23
<i>New York & Presbyterian Hospital v. NLRB</i> , 649 F.3d 723 (D.C. Cir. 2011).....	40
<i>New York Institute for the Education of the Blind</i> , 254 NLRB 664 (1981)	24

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>New York Rehabilitation Care Management, LLC v. NLRB</i> , 506 F.3d 1070 (D.C. Cir. 2007).....	21
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432 (1977).....	40, 41
<i>NLRB v. City Disposal Systems Inc.</i> , 465 U.S. 822 (1984).....	22
<i>NLRB v. E.C. Atkins & Co.</i> , 331 U.S. 398 (1947).....	22
<i>NLRB v. Griffin</i> , 243 F. App'x 771 (4th Cir. 2007).....	50
<i>NLRB v. Hearst Publications</i> , 322 U.S. 111 (1944).....	27
* <i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975).....	14, 19, 21, 31, 32, 33, 36, 38, 39
<i>NLRB v. Miller</i> , 341 F.2d 870 (2d Cir. 1965).....	52
<i>NLRB v. North Bay Plumbing, Inc.</i> , 102 F.3d 1005 (9th Cir. 1996).....	50
* <i>NLRB v. Natural Gas Utility District of Hawkins County</i> , 402 U.S. 600 (1971).....	22, 23, 27, 28
<i>NLRB v. Parents and Friends of the Specialized Living Ctr.</i> , 879 F.2d 1442 (7th Cir. 1989).....	23
<i>NLRB v. Pope Maintenance Corp.</i> , 573 F.2d 898 (5th Cir. 1978).....	23

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>NLRB v. Princeton Memorial Hospital</i> , 939 F.2d 174 (4th Cir. 1991)	22, 23, 29
<i>NLRB v. Randolph Electric Membership Corp.</i> , 343 F.2d 60 (4th Cir. 1965)	27
<i>NLRB v. Truck Drivers Local Union No. 449</i> , 353 U.S. 87 (1957).....	21
<i>NLRB v. United States Postal Service</i> , 689 F.2d 835 (9th Cir. 1982)	35
<i>NLRB v. United States Postal Service</i> , 888 F.2d 1568 (11 th Cir. 1989)	44
<i>Norris v. NLRB</i> , 417 F.3d 1161 (10th Cir. 2005)	41
<i>Nova Southeastern University v. NLRB</i> , 807 F.3d 308 (D.C. Cir. 2015)	46
<i>Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB</i> , 711 F.2d 348 (D.C. Cir. 1983)	40, 41
<i>Pennsylvania Power & Light Co.</i> , 301 NLRB 1104 (1991)	41
<i>R. Sabee Co.</i> , 351 NLRB 1350 (2007)	50
<i>Regional Medical Center at Memphis</i> , 343 NLRB 346 (2004)	28

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>Resident Counsel v. HUD</i> , 980 F.2d 1043 (5th Cir. 1993)	21
<i>Sonnino v. University of Kansas Hospital Authority</i> , 220 F.R.D. 633 (D. Kan. 2004)	51
<i>StarTran, Inc. v. Occupational Safety & Health Review Commission</i> , 608 F.3d 312 (5th Cir. 2010)	28
<i>State Bar of New Mexico</i> , 346 NLRB 674 (2006)	25
<i>Stephens Media, LLC v. NLRB</i> , 677 F.3d 1241 (D.C. Cir. 2012)	33
<i>Super Value Stores, Inc.</i> , 236 NLRB 1581 (1978)	37-38
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	18
<i>Tavoulareas v. Washington Post Co.</i> , 737 F.2d 1170 (D.C. Cir. 1984)	48
<i>Truman Medical Center v. NLRB</i> , 641 F.2d 570 (8th Cir. 1981)	26
<i>UFCW, Local 204 v. NLRB</i> , 506 F.3d 1078 (D.C. Cir. 2007)	18
<i>United States Postal Service v. NLRB</i> , 969 F.2d 1064 (D.C. Cir. 1992)	31

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases-Cont'd	Page(s)
<i>United States Postal Service,</i> 241 NLRB 141 (1979)	36
<i>United States Testing Co. v. NLRB,</i> 160 F.3d 14 (D.C. Cir. 1998)	41, 47
<i>University of Vermont,</i> 297 NLRB 291 (1989)	24
<i>Universal Camera Corp. v. NLRB,</i> 340 U.S. 474 (1951)	18
<i>Veritas Health Services, Inc. v. NLRB,</i> 671 F.3d 1267 (D.C. Cir. 2012)	48
<i>Virmani v. Novant Health Inc.,</i> 259 F.3d 284 (4th Cir. 2001)	50-51
<i>Yukon-Kuskokwim Health Corp. v. NLRB,</i> 234 F.3d 714 (D.C. Cir. 2000)	20
<i>Woelke & Romero Framing, Inc. v. NLRB,</i> 456 U.S. 645 (1982)	45-46

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Statutes:	Page(s)
National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.)	
Section 1 (29 U.S.C. § 151)	2, 31
*Section 2(2) (29 U.S.C. § 152(2)).....	17, 20, 22, 23, 30
Section 2(3) (29 U.S.C. § 152(3)).....	27
*Section 7 (29 U.S.C. § 157)	15, 16, 19, 30, 31, 39, 51, 52, 54, 55
*Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3, 15, 30, 32, 39, 40, 51
*Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3, 15, 40
Section 10(a) (29 U.S.C. § 160(a))	2
*Section 10(e) (29 U.S.C. § 160(e))	2, 18, 45, 51
Section 10(f) (29 U.S.C. § 160(f))	2
KAN. STAT. ANN. § 65-4915(b).....	7, 24, 44, 46, 55
KAN. STAT. ANN. § 65-4922(a)	24
KAN. STAT. ANN. § 65-4929(b).....	26-27, 28
KAN. STAT. ANN. § 65-4929(c)	27
Regulations:	
Kansas Administrative Regulations, 28-52-4(a).....	5
Federal Rule of Evidence 501	50

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

- “the Act” National Labor Relations Act, 29 U.S.C. § 151 et seq.,
as amended
- “the Board” National Labor Relations Board
- “Br.” Hospital’s opening brief
- “the Committee” .. Nursing Peer-Review Committee
- “DA” Deferred Appendix
- “the Hospital”..... Midwest Division – MMC, LLC, d/b/a Menorah Medical
Center
- “Tr.” Transcript of the hearing before the administrative law
judge
- “the Union” National Nurses Organizing Committee –
Kansas/National Nurses United

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 15-1312 & 15-1359

**MIDWEST DIVISION – MMC, LLC,
D/B/A MENORAH MEDICAL CENTER**

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**NATIONAL NURSES ORGANIZING
COMMITTEE-KANSAS/NATIONAL NURSES UNITED**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF JURISDICTION

This case is before the Court on the petition of Midwest Division – MMC, LLC, d/b/a Menorah Medical Center (“the Hospital”) for review, and the cross-

application of the National Labor Relations Board for enforcement, of the Board's Order issued against the Hospital, reported at 362 NLRB No. 193, 2015 WL 5113235 (Aug. 27, 2015) (DA 373-98).¹ The National Nurses Organizing Committee – Kansas/National Nurses United (“the Union”), which represents a unit of the Hospital's employees and was the charging party before the Board, has intervened on the Board's behalf.

The Board had jurisdiction over this matter under Section 10(a) of the National Labor Relations Act (“the Act”) 29 U.S.C. §§ 151, 160(a). The Board's Decision and Order is final under Section 10(e) and (f) of the Act, which provides the basis for this Court's jurisdiction and for the filing of petitions for review and cross-applications for enforcement in this Circuit. 29 U.S.C. § 160(e) and (f). The petition and cross-application were timely; the Act imposes no time limit on such filings.

¹ “DA.” refers to the deferred appendix. “Tr.” refers to the transcript of the hearing before the administrative law judge. “Br” refers to the Hospital's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

STATEMENT OF ISSUES

1. Does substantial evidence support the Board's finding that the Hospital violated the Act by denying employees' requests for union representation before the Hospital's Nursing Peer-Review Committee?

2. Does substantial evidence support the Board's finding that the Hospital refused to bargain by refusing to furnish the Union with relevant information it requested?

3. Does substantial evidence support the Board's finding that the Hospital violated the Act by promulgating, maintaining, and enforcing a confidentiality rule prohibiting employees from discussing with other employees or their representatives discipline or ongoing investigations?

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the Addendum to this brief.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Hospital committed several unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. 29 U.S.C. § 158(a)(1) and (5). Specifically, the complaint alleged that the Hospital unlawfully refused two employees' requests for union representation before the

Hospital's Nursing Peer-Review Committee; refused to provide relevant information requested by the Union; and promulgated, maintained, and enforced a rule prohibiting employees from talking with other employees or their representatives about discipline or ongoing investigations.

After conducting a hearing, an administrative law judge issued a decision and recommended order on December 23, 2013, finding that the Hospital violated the Act as alleged. On August 27, 2015, in response to the Hospital's exceptions, the Board issued a Decision and Order affirming the judge's rulings, findings, and conclusions, and adopting a modified version of the judge's recommended Order. (DA 373.)

I. THE BOARD'S FINDINGS OF FACT

A. Background

Menorah Medical Center, located in Overland Park, Kansas, is an acute-care hospital that is part of the Health Corporation of America chain of hospitals. The Hospital and Union are parties to a collective-bargaining agreement covering a unit of registered nurses. (DA385-86; 251 (Tr. 153-54), 6-11, 12-18.)

Pursuant to Kansas State law and regulations,² the Hospital has developed, and submitted to the state for approval, an internal risk-management plan to

² The Board took judicial notice of the Kansas Peer Review and Risk Management statutes and regulations. (DA 386 n.9.)

“monitor the standard of care” provided to patients. Among other features, the plan establishes a system of reporting, investigating, and evaluating incidents in which standards of care, broken down into 4 levels as defined by Kansas State regulations, were allegedly violated.³ The plan provides that certain incidents must be reported to the Kansas State Board of Nursing (i.e., “reportable incidents”). (DA 386; 19-35.)

Potentially reportable incidents are initially referred to the Hospital’s risk manager, who is responsible for administrating the risk-management plan. Jennifer Cross was the risk manager during the relevant time period. The risk manager receives notice of potentially reportable incidents from a variety of sources, including patients, staff members, and physicians. (DA 386; 253 (Tr. 163), 274 (Tr. 246).) If a preliminary evaluation suggests an incident may be reportable, the risk manager refers the matter, pursuant to the risk-management plan, to the Initial Peer-Review Committee. If that committee determines that there is evidence indicating the standard of care has not been met, it refers the matter to the appropriate peer-review committee for investigation. Incidents

³ Standards of care are defined by Kansas Administrative Regulations, 28-52-4(a), and include four categories to describe a nurse’s actions: (1) [s]tandards of care met; (2) standard of care not met, but with no reasonable probability of causing injury; (3) standards of care not met, with injury occurring or reasonably probable; (4) possible grounds for disciplinary action by the appropriate licensing agency. (DA 374 2 n.10; 177.)

involving nurses are referred to the Nursing Peer-Review Committee (“the Committee”). (DA 386-87; 255 (Tr. 169), 19-35.)

Incidents can also be referred to peer-review committees by the Medication Diversion Prevention Committee, which investigates incidents in which medications were potentially diverted (i.e., misused or not properly wasted). (DA 387; 249 (Tr. 147-48), 260 (Tr. 189), 188-202.) If the diversion-prevention committee determines there is the possibility of inappropriate action, it refers the matter to both the appropriate peer-review process and the Hospital’s disciplinary process (described below).

The Committee consists of registered nurses, nursing supervisors, and nursing managers employed by the Hospital. When investigating an incident, the Committee reviews relevant medical records and witness statements and consults professional literature and state-issued guidelines. If it finds that the incident is potentially reportable, the nurse under investigation is given the opportunity to appear before the Committee. It then makes a final standard-of-care determination. If it determines that the nurse’s conduct falls within either standard-of-care level 3 or 4 categories, the risk manager prepares a report and notifies the Kansas State Board of Nursing, which then initiates an independent investigation of whether grounds exist to suspend or revoke the nurse’s license. (DA 387; 247 (Tr. 138), 255 (Tr. 170), 258 (Tr. 184), 19-35.)

The Hospital also maintains an internal disciplinary process. Incidents of potential misconduct that are reported to risk management can also be referred to the individual's supervisor or to the Human Resources department for an investigation and disciplinary action. Likewise, an adverse standard-of-care determination by the Committee may be identified in a nurse's performance evaluation and may lead to internal discipline. (DA 387; 250 (Tr. 150-52), 251 (Tr. 156).)

B. The Hospital Maintains a Confidentiality Clause in its Risk-Management Plan

The Hospital's risk-management plan contains a confidentiality clause that states:

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 committees, legal counsel for the Hospital, or the applicable licensing agencies, unless authorized to do so by the Risk Manager, Administration, or legal counsel.

(DA 387; 54-70.) The Hospital modeled this policy on the confidentiality clause in Kansas's statute addressing peer review, which provides that "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...." KAN. STAT. ANN. § 65-4915(b).

The Hospital maintains that this statutory provision precludes the individual being investigated from discussing with others the fact that she was notified of the potentially reportable incident or the discussions that occur in peer-review committee meetings. Because of this, the Hospital does not tell the individual of the facts underlying the investigation until the Committee meets. (DA 388; 273-74 (Tr. 245-46).) While acknowledging that the statute does not prohibit a union representative from accompanying an individual to a peer-review committee meeting, it has interpreted the statute that way. (DA 388; 267 (Tr. 220).)

C. The Hospital Investigates Conduct of Nurses Sherry Centye and Brenda Smith

1. Sherry Centye

Sherry Centye began working for the Hospital as a registered nurse in December 2000. Beginning in April 2012, she also served as a union representative on her floor of the hospital. (DA 388; 223 (Tr. 24).)

By letter dated May 4, 2012, the Hospital notified Centye that its “Peer Review Diversion Prevention Committee” had “reviewed cases in which [Centye] may have exhibited unprofessional conduct,” in March 2012, as defined by the Kansas Nurse Practice Act and Menorah Medical Center.⁴ It stated that “[t]his

⁴ The Hospital never had a Peer-Review Diversion Prevention Committee. Cross incorrectly used this to describe the newly formed Medication Diversion Prevention Committee. (DA 375 n.12, 386; 260 (Tr. 190-91).)

conduct has preliminarily been determined to be a Standard of Care Level 4: *grounds for disciplinary action.*” (DA 71 (emphasis in original)). The Hospital explained that, “[a]s governed by Kansas Statute, a final Standard of Care level 4 determination must be reported to the Kansas Board of Nursing,” and that she had the opportunity to address the peer review committee at its next meeting, scheduled for May 31, 2012, or submit a written statement. The Hospital explained that “the Committee [could not] fairly and accurately make a final decision without more details that can only be provided by [Centye].” (DA 388; 71.)

Centye consulted with union representative Julie Perry about the letter. Perry advised her to ask the Hospital to allow Perry to accompany her to the committee meeting. (DA 388; 224 (Tr. 25), 226 (Tr. 44).) Centye then contacted Risk Manager Cross, informed her that she would appear before the committee, and asked whether Perry could accompany her as her union representative. (DA 388 & n.15; 224 (Tr. 26), 226 (Tr. 44).) Cross said she could not bring a union representative because the meeting was closed to all except her and the committee members. (DA 388; 224 (Tr. 26).) Cross then refused to reveal the specific allegations against Centye and told her she would learn the specifics of the matter at the committee meeting. (DA 388; 224 (Tr. 26-27).)

Centye appeared before the Committee on May 31, without a union representative. (DA 388; 224 (Tr. 26-27), 226-27 (Tr. 44-45).) The Committee,

through Cross, advised her that the incident under investigation involved her alleged failure to properly dispose of medication left over from a dose she had administered to a patient. (DA 388; 309-10, 286 (Tr. 298-99.) Centye remembered the matter and explained what had occurred. (DA 388; 310-12.) She then left before the Committee deliberated. Later that day, Cross informed Centye that the committee determined she had violated standard of care 2—“standards of care not met, but with no reasonable probability of causing injury”—which was not reportable to the Kansas State Board of Nursing. (DA 388; 313.) She eventually received written confirmation of the Committee’s determination. (DA 388 & n.16; 226 (Tr. 43-44), 263 (Tr. 203), 72.) She received no discipline for this incident. (DA388; 230 (61-62).)

2. Brenda Smith

Brenda Smith worked for the Hospital as a registered nurse from May 2009 until she resigned in February 2013 to work at another Health Corporation of America facility. (DA 388; 232 (71), 234 (84).) By letter dated July 23, 2012, the Hospital notified Smith that its “Peer Review Diversion Prevention Committee” had “reviewed cases in which [Smith] may have exhibited unprofessional conduct” in April 2012, as defined by the Kansas Nurse Practice Act and Menorah Medical

Center.⁵ It stated that “[t]his conduct has preliminarily been determined to be a Standard of Care Level 4: *grounds for disciplinary action.*” (DA 74 (emphasis in original.)) The Hospital explained that, “[a]s governed by Kansas Statute, a final Standard of Care level 4 determination must be reported to the Kansas Board of Nursing,” and that she had the opportunity to address the peer review committee at its next meeting, scheduled for August 9, 2012, or submit a written statement. (DA 388-89; 74.)

Upon receiving the letter, Smith called Cross and asked her for more information about the incident. Cross responded that it involved medication diversion. (DA389; 233 (Tr. 73).) Based on the seriousness of the charge, Smith felt she had to attend to defend her integrity and answer the Committee’s questions. (DA 389; 233 (Tr. 73-74), 329-30.)

Smith attended the committee meeting on August 9. At the beginning of the meeting, Cross handed Smith a paper listing incidents involving her that were being investigated. (DA 389; 321-22.) Smith then told Cross that she had seen brochures throughout the facility recommending that employees have a union representative present in all meetings that might lead to discipline, and asked

⁵ The Hospital previously sent Smith a nearly identical letter dated May 4, 2012, informing her she could appear before the Peer-Review Diversion Prevention Committee on May 31, but Smith’s address was incorrect. It resent the letter on May 11, but Smith did not receive it until May 31, so she did not attend that meeting. (DA 389; 232-33 (Tr. 71-72), 265 (Tr. 209-10), 73).

whether she should have a union representative with her before the Committee. Cross responded that it was not allowed. (DA 389; 323.) Smith then explained her actions concerning the incidents in question and left before the Committee deliberated. (DA 389; 325.) A few days later, Cross informed Smith that the Committee determined she had violated standard of care 2, which was not reportable to the Kansas State Board of Nursing. (DA 389; 326, 266 (Tr. 213).) She eventually received written confirmation of the Committee's determination. (DA 389; 326, 75.) She received no discipline for this incident. (389; 235 (87).)

D. The Union Requests Information from the Hospital

On June 1, 2012, union organizer Sheila Garland sent an email to the Hospital's Vice President of Human Resources Richard Cybulski, and Human Resources Secretary Vickie Sivewright, requesting certain information. (DA 389; 76-79.) In relevant part, the Union requested copies of discipline issued by the Peer-Review Diversion Committee, along with documents related to the allegations against Centye, the identity of those present at the committee meeting, a description of the committee including its first meeting date, its purpose, related state statutes, and whether committee discipline is placed in personnel files or elsewhere. (DA 389-90; 76-79.)

On June 5, Garland submitted a second information request. Noting that an unspecified number of nurses received letters to appear before the Peer-Review

Diversion Committee, she asked for the names of nurses who received such notification, copies of discipline issued to nurses who had appeared before the committee, the location where such discipline was placed, and information regarding the nature of the allegations against the nurses. (DA 390; 76-79.)

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.” (DA 390; 76-79.) On June 26, Garland and other union representatives met with the Hospital’s Director of Labor Relations Douglas Billings and Human Resources Specialist Amy Hunt. They discussed the peer-review committee and the allegations against Centye, and the Union requested a meeting with risk management. During that meeting, the Union asked the Hospital to respond to its information requests. (DA 390; 241 (114), 85.)

On June 27, at Billings’ request, Garland sent an email asking for the same information she had previously requested by email and at the June 26 meeting. (DA 390; 80-82.) Later that day, Billings responded. He denied the Union’s request to meet with risk management; stated that the committee does not impose discipline but rather investigates reportable incidents; stated that the committee’s business is confidential; stated that the Human Resources department had no knowledge of the outcomes or contents of the committee’s meetings; and concluded that it “d[id] 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." (DA 390; 80-82.)

On June 29, Garland called Billings to request the same information about the peer-review committee and to inform him that Centye and other nurses appearing before the Nursing Peer-Review Committee were entitled to exercise their *Weingarten* right to be accompanied by a union representative.⁶ (DA 390; 241 (Tr. 115-16).) She followed up that call with an email to Billings reiterating her points. (DA 390; 83-84.) She also emailed him on July 2 to ask the Hospital to clarify its position about whether a nurse can exercise *Weingarten* rights if called before the Committee. (DA 390; 83-84.) Billings denied the request, stating that the peer-review process is separate from the Hospital's disciplinary process, and that the information sought is confidential. He also denied the Union's request to participate in committee meetings. (DA 390; 85.)

Around July 30, Billings provided Garland with some of the information requested on June 1, including a copy of the risk-management plan. (DA 390; 86-104.) With respect to requests related to the Peer-Review Diversion Committee, Hunt responded "n/a" because she was unaware of the existence of such a

⁶ As discussed in detail below, *Weingarten* refers to the Supreme Court's determination 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).

committee. (DA 390; 284 (Tr. 290-91), 86-104.) Garland then emailed Billings, Hunt, and Cybulski to clarify that the Union's information requests pertained to the committee referenced in the letters received by Centye and other nurses. (DA 390-91; 86-104.) Billings and Garland emailed back and forth to clarify this issue. In the end, the Hospital provided the Union with the peer-review policy and otherwise only responded "n/a" to Garland's questions about the "Peer Review Diversion Committee." (DA 390; 86-104.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On August 27, 2015, the Board (Chairman Pearce and Member Hirozawa; Member Johnson, concurring and dissenting in part) issued a decision and order finding that the Hospital violated Section 8(a)(1) of the Act by denying Centye's and Smith's requests for union representation at investigatory interviews; violated Section 8(a)(5) and (1) by failing and refusing to furnish relevant information requested by the Union; and violated Section 8(a)(1) by promulgating, maintaining, and enforcing a confidentiality rule prohibiting employees from discussing with one another or their representatives discipline and ongoing investigations. (DA 375, 378.)

To remedy those violations, the Board ordered the Hospital to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with employees' exercise of their Section 7-guaranteed

rights. (DA 378-79.) Affirmatively, the Board ordered the Hospital to furnish the Union with all of the information it requested on June 1 and 12, 2012; revise or rescind its confidentiality rule prohibiting employees from disclosing information concerning reportable incidents and either notify employees if the Hospital rescinds the policy or provide the employees with any revised policy; and post a remedial notice. (DA 379.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the Hospital has unlawfully interfered with its employees' rights guaranteed by Section 7 of the Act, 29 U.S.C. § 157. The Hospital unlawfully refused its employees' requests to have a union representative present when they were interviewed by the Committee concerning allegations that they engaged in conduct that might constitute grounds for disciplinary action. The Hospital was obligated under the Board's well-established *Weingarten* rule, to grant the requests, discontinue the interviews, or inform each employee that she was free to either participate in the interview unaccompanied by a union representative or have no interview at all. The Hospital chose none of these options, and instead simply proceeded to interview each employee, thereby violating the Act. Although the Hospital argues that neither Centye nor Smith was entitled to a union representative because their participation

was voluntary and because they could not have reasonably believed that the meetings could lead to discipline, the Board rejected these arguments.

The Hospital attempts to excuse its failure to comply with *Weingarten's* straightforward requirements by claiming that the Committee was a “political subdivision” within the meaning of Section 2(2) of the Act, 29 U.S.C. § 152(2), and thus not a statutory employer subject to the Board’s jurisdiction. But the Committee was neither created directly by the state of Kansas, nor administered by individuals who are responsible to public officials or to the general electorate, leading the Board to reasonably reject the Hospital’s argument.

Substantial evidence also supports the Board’s finding that the Hospital violated its duty to bargain in good faith with the Union by refusing to provide the Union with information pertaining to the Committee and its investigation of alleged misconduct by bargaining-unit members. That information would be of use to the Union in carrying out its statutory duties and responsibilities, satisfying the Board’s liberal, discovery-type relevance requirement by which such requests are judged. Although the Hospital asserts that it has a legitimate and substantial confidentiality interest in the information sought because it is protected by Kansas State law, the information did not pertain to the type of internal peer-review committee deliberations that the law is designed to shield and, in any event, does not outweigh the union’s need for the information. Relatedly, the Board did not

abuse its discretion by admitting testimony related to the Committee or revoking a limited protective order put into place to cover potentially confidential testimony.

Finally, substantial evidence supports the Board's finding that the Hospital violated the Act by maintaining an overly broad confidentiality rule that employees would reasonably construe as prohibiting them from discussing with one another, or their representatives, any information about incidents that the Committee was investigating. The Hospital failed to establish that state law, or any other ground, furnished it with a legitimate and substantial business justification for its broad rule.

STANDARD OF REVIEW

The Board's interpretation of the Act must be upheld if reasonably defensible. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). The Board's findings of fact are "conclusive" when supported by substantial evidence on the record considered as a whole. 29 U.S.C. § 160(e). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). A reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Id.* at 488; *accord UFCW, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007). Rather, the Board's decision "may be supported by substantial

evidence even though a plausible alternative interpretation of the evidence would support a contrary view.” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 771 (D.C. Cir. 2012). “Indeed, the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary.”

Bally’s Park Place, Inc. v. NLRB, 646 F.3d 929, 935 (D.C. Cir. 2011).

ARGUMENT

I. THE HOSPITAL UNLAWFULLY DENIED EMPLOYEES’ REQUESTS FOR A UNION REPRESENTATIVE AT NURSING PEER-REVIEW COMMITTEE MEETINGS

In *NLRB v. J. Weingarten, Inc.*, the Supreme Court forcefully approved the Board’s construction of Section 7 of the Act, 29 U.S.C. § 157, as creating “a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline” 420 U.S. 251, 256 (1975). Likewise, the Court endorsed the Board’s clear guidelines that “shaped the contours and limits of the statutory right.” In doing so, the Court ensured both that employees are able to determine what they must do to invoke the right to a representative, and what options are available to an employer once that right is properly invoked. As will be discussed below, this does not require that an employer allow a union representative to attend an interview. An employer may deny the request, but at that point it must either discontinue the interview or simply advise the employee of her right not to participate or to voluntarily remain

unaccompanied by a representative, leaving the employer free to act on the basis of information obtained from other sources.

Here, the Hospital failed to follow those specific guidelines. In response to two nurses' valid requests for union representation in interviews before the Committee, the Hospital denied the requests without then advising the employees of their rights. Accordingly, applying its now long-established *Weingarten* standard, the Board found that the Hospital violated the Act and ordered it to cease and desist from doing so.

Before addressing the *Weingarten* issue, however (see Subsection I.B. and I.C., below), the Board will respond (Section I.A.), to the Hospital's argument that the Committee is a "political subdivision" of the state of Kansas, and thus expressly excluded from the definition of "employer" found in Section 2(2) of the Act, 29 U.S.C. § 152(2), and exempt from the Board's jurisdiction. As found by the Board (DA 385 n.7, 391-92),⁷ the Hospital has failed to establish that the

⁷ The Hospital's assertion (Br. 34) that the Board "completely ignor[ed]" this jurisdictional argument is patently false. The Board affirmed the ALJ's findings, discussed below, rejecting the Hospital's argument. By contrast, in *Yukon-Kuskokwim Health Corp. v. NLRB*, cited by the Hospital (Br. 35-36), this Court found that, although the Board reasonably rejected a Native American tribe's political subdivision argument, it failed to address the tribe's related argument that, because of its statutory authority to operate a federal hospital, it shares in the separate Section 2(2) exemption granted to the federal government. 234 F.3d 714, 715 (D.C. Cir. 2000). Accordingly, the Court remanded that proceeding to the Board for further consideration.

Committee fits within this narrow exemption to the Board’s broad congressional grant of jurisdiction.⁸

A. The Board Reasonably Rejected the Hospital’s Argument that the Board Lacked Jurisdiction Over the Committee

1. The Board’s construction of the narrow “political subdivision” exemption to the Act’s broad definition of “employer” is entitled to deference

In reviewing the Board’s interpretation of the Act, courts have long recognized that “the function of striking [a] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.” *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957); *see also Weingarten*, 420 U.S. at 266 (noting that the Board’s “special competence” in applying the Act “is the justification for the deference accorded [to] its determination[s]”). This deferential standard of review applies to every interpretation of the Act by the Board; no exception exists for interpretations

⁸ Amicus curiae HR Policy Association separately argues (HR Policy Brief 26-27), that the Board should have exercised its discretion to decline jurisdiction over this case. The Hospital, however, waived any such argument by not presenting it in its opening brief. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007). Moreover, it is well-settled that an amicus cannot expand the scope of an appeal to raise issues not argued by the parties. *See Eldred v. Reno*, 239 F.3d 372, 378-79 (D.C. Cir. 1991), *aff’d*, 537 U.S. 186 (2003) (*quoting Resident Counsel v. HUD*, 980 F.2d 1043, 1049 (5th Cir. 1993) (“amicus constrained by the rule that it generally cannot expand the scope of an appeal to implicate issues that have not presented by the parties to the appeal”)).

regarding “jurisdictional or legal question[s] concerning the coverage of the Act.” *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 830 n.7 (1984); *see also City of Arlington v. FCC*, ___ U.S. ___, 133 S. Ct. 1863, 1868 (2013) (holding *Chevron* analysis applies to agency’s interpretation of its jurisdiction). Therefore, the Board’s interpretation regarding its jurisdiction must be upheld “if it has a reasonable basis in the evidence and is not inconsistent with the law.” *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403-04 (1947).

Although Section 2(2) provides that “political subdivisions” are not “employers” subject to the Board’s jurisdiction under the Act, that term is not defined and the legislative history does not contain any explicit consideration of its meaning. *See NLRB v. Natural Gas Util. Dist. of Hawkins Cnty.*, 402 U.S. 600, 604 (1971). As the Court noted in *Hawkins County*, however, “[t]he legislative history does reveal . . . that Congress enacted [this] exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.” *Id.* (internal citations omitted); *see also NLRB v. Princeton Mem’l Hosp.*, 939 F.2d 174, 178 (4th Cir. 1991) (exemption “reflects Congress’s intention of precluding the NLRB’s involvement in the employment relationships between states and local governments on the one hand, and their employees on the other”); *Crestline Mem’l Hosp. Ass’n, Inc. v. NLRB*, 668 F.2d 243, 246 (6th Cir. 1982) (explaining “NLRB

has generally found dispositive the inability of the employer to bargain effectively because control over labor relations is retained by the state or its subdivisions”); *NLRB v. Pope Maint. Corp.*, 573 F.2d 898, 903-04 (5th Cir. 1978).

In *Hawkins County*, the Supreme Court endorsed the Board’s political subdivision test, which requires the entity seeking the exemption to establish that it was “(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.” 402 U.S. at 604-05. The Court explained that the Board’s construction of the term “political subdivision” is “entitled to great respect.” *Id.* at 605. It is settled that the Board’s jurisdiction under Section 2(2) is to be interpreted broadly, while exemptions under Section 2(2), including for political subdivisions, are to be construed narrowly. *Princeton Mem’l Hosp.*, 939 F.2d at 177; *NLRB v. Parents and Friends of the Specialized Living Ctr.*, 879 F.2d 1442, 1448 (7th Cir. 1989); *Museum Assocs. v. NLRB*, 688 F.2d 1278, 1280 (9th Cir. 1982).

2. The Committee was not directly created by the state of Kansas so as to constitute a department or administrative arm of the government

As found by the Board (DA 391), the Hospital, a private limited-liability corporation, and not the state of Kansas, directly created its internal peer-review committees. The Kansas statute’s requirement that the Hospital establish a peer-

review committee cannot be equated to the state *directly creating* it. The Hospital's argument otherwise ignores the explicit language of the Kansas statute, which requires that "each medical care facility *establish* and maintain an internal risk management program." KAN. STAT. ANN. § 65-4922(a) (emphasis added). This must be distinguished from entities at issue in the cases cited by the Hospital (Br. 30), which were brought into existence by state statute. *See Univ. of Vt.*, 297 NLRB 291 (1989) (university created by Vermont legislature); *N.Y. Inst. for Educ. of the Blind*, 254 NLRB 664, 667 (1981) (corporation formed by New York legislature); *see also Ky. River Cmty. Care, Inc. v. NLRB*, 193 F.3d 444, 450 (6th Cir. 1999) (care center not directly created by state despite claim "that it would not exist but for the initiative of the various public officials involved"). Thus, despite the Hospital's facile argument (Br. 30) that but-for the Kansas statute, the peer-review committee would not exist, more must be shown to establish that it was created directly by the state.⁹

⁹ Moreover, the Hospital's argument that the State, and not it, created the Committee is inconsistent with its later attempt (Br. 49) to claim that certain information requested by the Union was privileged pursuant to subsection 65-4915(b). That subsection explicitly provides that only "the legal entity creating the peer review committee or officer" may claim the privilege. KAN. STAT. ANN. § 65-4915(b); *see also Adams v. St. Francis Reg'l Med. Ctr.*, 264 Kan. 144, 158 (1998) (explaining hospital, not Kansas State Board of Nursing, is entitled to claim privilege under 65-4915(b)).

The Board's decision in *State Bar of New Mexico*, 346 NLRB 674 (2006), on which the Hospital heavily relies (Br. 29-33), does not compel a different result. There, the Board determined that the "created directly by the state" requirement was satisfied because the State Bar Association was directly created by a judicial rule promulgated by the New Mexico Supreme Court, and found no reason to distinguish between entities created by legislative or judicial action. *Id.* at 676-77 (citing *Lathrop v. Donahue*, 367 U.S. 820, 824 (1961) (State Supreme Court's establishment of bar association has the force of law)). Unlike the Bar Association in *State Bar of New Mexico*, the Committee was not created directly by any branch of the Kansas State government.

Because the Hospital fails to establish that the Committee was created by the state, it is unnecessary to also evaluate whether the state intended it to operate as an arm of the state government, but it is nevertheless evident that the Hospital cannot establish that part of the standard either. *See Ky. River Cmty. Care, Inc.*, 193 F.3d at 450 (if entity cannot show it was created directly by state, unnecessary to determine whether it is was intended to operate as arm of state government); *State Bar of New Mexico*, 346 NLRB, at 676 (even if state's degree of control supports argument that entity is administrative arm of state, the entity must still have been "created directly by the state"). The fact that Kansas law requires the

Hospital to submit its risk-management plan to the state for approval is insufficient to convert the Committee to an arm of the State.¹⁰

The fact that the Committee does not operate as an arm of state government is supported by the Eighth Circuit's analysis in *Truman Medical Center v. NLRB*, 641 F.2d 570, 572 (8th Cir. 1981). There, a hospital exhibited much greater resemblance to a state entity than does the Hospital, yet the court enforced the Board's finding that it was not a political subdivision. Although the hospital was run by Kansas City before being reorganized as a not-for-profit at the city's insistence, and was treated as a governmental agency by some federal agencies including the IRS, and its books were subject to inspection, it was not created directly by the state to constitute an arm of the government. *Id.* at 572-73 & n.2. Its operation was not governed by laws applicable to government agencies, its employees were not covered by governmental merit system, it held no power to tax or exercise any other sovereign power, and its books and records were not treated as public documents under state law. *Id.*

The Hospital's argument is not advanced by the provision of Kansas law characterizing members of peer-review committees as "state officers." KAN. STAT.

¹⁰ The Hospital (Br. 31), states that it must provide the state with the names of staff members involved in the peer-review process, but acknowledges (Br. 34) that the state does not specify the committee's composition.

ANN. § 65-4929(b).¹¹ In *Hawkins County*, the Supreme Court agreed with the Board that a state-court decision characterizing an entity as organized under state law for a public purpose was not controlling, explaining that federal, rather than state, law governs the Board's political-subdivision determination. 402 U.S. at 602-04 (quoting *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60, 63 (4th Cir. 1965) ("scope [of Act] is [not] to be limited by varying local conceptions, either statutory or judicial"); cf. *NLRB v. Hearst Publ'ns, Inc.*, 322 U.S. 111, 123 (1944) (definition of "employee" under Section 2(3) of the Act, 29 U.S.C. § 152(3), is question of federal, not state law).

Here, the "state officer" provision found in subsection 65-4929(b) cannot be read as broadly as the Hospital wishes (DA 392 n.25), as it is intended merely to extend state immunity to peer-review committee members. See *Conner v. Salina Reg. Health Ctr., Inc.*, 56 Fed. App'x. 898, 901 (10th Cir. 2003). Likewise, subsection 65-4929(c) compels a narrow interpretation, stating that this section is not to be construed as compelling healthcare providers "to be subject to or comply with any other law relating to or regulating state agencies, officers or employees." Cf. *id.* at 902 (dismissing Section 1983 claim, finding Kansas Risk Management

¹¹ This section provides that peer-review committee members "shall be considered to be state officers engaged in a discretionary function and all immunity of the state shall be extended to such health care providers and committees, including that from the federal and state antitrust laws."

Act does not establish state action, despite reporting requirements imposed on healthcare facilities and Section 4929(b)'s "mere application" of term "state official" to peer-review participants).

3. The Committee is not administered by individuals who are responsible to public officials

An entity is a "political subdivision" under the second prong of *Hawkins County* only if it is "administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-05. To determine whether an entity satisfies this requirement, the Board has consistently examined whether the administering individuals are appointed by, and subject to removal by, public officials. *See Reg'l Med. Ctr. at Memphis*, 343 NLRB 346, 359-60 (2004); *see also Hawkins Cty.*, 402 U.S. at 607-08 (focusing on facts that Board of Commissioners were appointed by elected county judge and subject to removal procedures applicable to all public officials); *StarTran, Inc. v. Occupational Safety & Health Review Comm'n*, 608 F.3d 312, 324 (5th Cir. 2010) (entity satisfies second *Hawkins County* prong where board of directors' members are selected and removable by public official).

Here, as explained by the Board (DA 391; 248 (Tr. 143), 336-37), the Committee members are supervised, compensated, hired, appointed, and evaluated by the Hospital without input from the state. The fact that the Committee must submit "reportable incidents" to the state's Nursing Board, which itself consists of

public officials, and must seek approval of the risk-management plan that the Hospital creates, does not make them responsible to those officials. *Cf. Conner*, 56 Fed. App'x. at 902-03 (although KRMA establishes certain review and reporting requirements, it does not “mandate or even suggest peer review procedures for medical care facilities to implement”).

The Hospital's exclusive reliance on *NLRB v. Princeton Memorial Hospital*, 939 F.2d 174 (4th Cir. 1991), to establish this requirement, is misplaced. There, the board members of the entity in question, Memorial Hospital, were appointed and subject to removal by the board of directors for the Princeton Community Hospital, whose board of directors consisted of public officials who were removable by the municipal council. *Id.* at 178. Although the Memorial Hospital board members were one step removed from public officials, there was a close link between the two. Moreover, by contract, the Community Hospital provided the day-to-day administration of Memorial Hospital, which included, “developing and implementing procedures regarding hours, wages, terms and conditions of employment.” *Id.*, at 179. By contrast, the Committee members here are selected by the Hospital, not the state or public officials, and the Hospital manages the day-to-day operations of the Committee.

Because the Committee was created directly by the Hospital, and is not administered by individuals who are responsible to public officials or to the

general electorate, the Board reasonably rejected the Hospital's argument that the Board lacked jurisdiction over the Committee in this case.¹²

B. Substantial Evidence Supports the Board's Findings that the Hospital Unlawfully Denied Centye's and Smith's Requests for a Union Representative

1. An employer violates the Act by interviewing an employee, after denying her valid request for a union representative, without advising her at that point that she may leave or voluntarily remain unaccompanied by a representative

Section 7 of the Act, 29 U.S.C. § 157, guarantees employees “the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), implements these guarantees by making it an unfair labor practice for an employer to “interfere with, restrain, or coerce, employees in the exercise of rights guaranteed in [S]ection 7.”

¹² If the Court were to determine that the Board lacked jurisdiction over the Committee, and thus the Hospital's employees were not entitled to be represented by a union representative when appearing before the Committee, this determination would have no effect on the Board's separate violations found against the Hospital, and discussed below. There is no question that the Hospital is an “employer” subject to the Board's jurisdiction under Section 2(2). Accordingly, the Hospital violated the Act by refusing to furnish the Union with relevant information in the Hospital's possession about the Committee's actions, which as discussed can lead to discipline of bargaining-unit members. The Hospital also violated the Act by maintaining a confidentiality rule that interferes with employees Section 7 rights.

Unquestionably, an employee's right to engage in Section 7 activity includes the right to be accompanied by a union representative to an investigatory interview that the employee reasonably believes will result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256-60 (1975); accord *United States Postal Serv. v. NLRB*, 969 F.2d 1064, 1066 (D.C. Cir. 1992). As the *Weingarten* Court explained, the Board's construction of the Act in this regard "effectuates the most fundamental purposes of the Act," which "declares that it is the goal of national labor policy to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.'" *Id.* at 261-62 (quoting 29 U.S.C. § 151). Requiring an employee to attend such an interview alone "perpetuates the inequality [of bargaining power] that the Act was designed to eliminate," and creates the potential that an employee "may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262.

On the other hand, the Supreme Court recognized that an employee's exercise of this right "may not interfere with legitimate employer prerogatives." *Id.* at 258. Accordingly, an employer may refuse an employee's request for a representative, but, at that point, must either discontinue the meeting and "carry on [its] inquiry without interviewing the employee," or "advise the employee that it

will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. *Id.* at 258-59. Here, the Hospital ignored the Board's clear *Weingarten* rule by refusing the nurses' requests and continuing on with the interviews without advising the nurses of their rights, thereby violating Section 8(a)(1) of the Act.

2. Employees Centye and Smith were entitled to a *Weingarten* representative

Substantial evidence supports the Board's finding that the Hospital unlawfully refused Centye's and Smith's requests for a *Weingarten* representative. After each nurse made a valid request for a union representative, reasonably believing that the interview could ultimately result in discipline, the Hospital ignored its *Weingarten* obligations by refusing the requests yet proceeding with the interviews in violation of the Act.

a. Centye and Smith each requested that a union representative accompany them before the Committee

Initially, there is no dispute that both Centye and Smith requested that union representatives accompany them before the Committee. The judge (DA 373 n.3, 374,395) credited their testimony on this point over conflicting testimony of Risk Manager Cross. Although the Hospital mentions that conflicting testimony in its brief (Br. 17 n.4) it does not challenge the judge's credibility determination, which would require a showing that it is "hopelessly incredible, self-contradictory, or

patently unsupportable.” *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation omitted).

b. Centye and Smith reasonably believed that the peer-review proceedings could result in discipline

Substantial evidence supports the Board’s finding (DA 374) that an objective employee would reasonably believe that the Committee meeting could lead to discipline. In making this determination, the Board’s standard is an objective one; it does not rely on the subjective impressions of a particular employee. *See Weingarten*, 420 U.S. at 257 n.5. As the Fifth Circuit explained in *Lennox Industries, Inc. v. NLRB*, even if an employer has no intention of disciplining an employee based on the interview, “information could be elicited . . . which might enable the employer to build a case against the employee, culminating in discipline at some later date.” 637 F.2d 340, 344 (5th Cir. Unit A Feb. 1981). Moreover, the risk of discipline, whether immediately after an interview or at some time in the future, “reasonably inheres” to an interview in which a superior seeks information concerning an employee’s poor work. *Lennox*, 637 F.2d at 344.

The Hospital’s letters to Centye and Smith each stated (DA 071, 074), that the Hospital had preliminarily determined that their conduct amounted to “Standard of Care Level 4: *grounds for disciplinary action*.” The letters contained no language indicating that potential discipline was limited to that imposed by the Kansas State Board of Nursing.

The Hospital insists (Br. 45-47) that the nurses could not reasonably believe that the Committee meetings could result in discipline because they understood that the Committee does not discipline employees but merely refers reportable incidents to the Board of Nursing. The Board (DA 374) reasonably rejected this argument, explaining that even if it were clear that only the licensing agency, and not the Committee, could impose discipline, the employees remained entitled to a *Weingarten* representative. Centye and Smith would reasonably understand that if the proceeding ultimately led to the suspension or revocation of their nursing license, this would impact their employment with the Hospital, and thus lead to their suspension or discharge.¹³ (DA 396.) Although the Hospital (Br. 8, 48) attempts to dispute this finding by arguing that Kansas law permits a nurse with a suspended or revoked license to perform “auxiliary patient care services,” the Hospital’s former Vice President of Risk and Quality Kaye Blom testified that the “[t]he loss of a license would preclude that nurse from working anywhere in the state,” including at the Hospital.¹⁴ (DA 374, 380 n.1; 249 (Tr. 147).)

¹³ Moreover, the record establishes that Committee action can lead to discipline. The risk-management plan itself provides that internal institutional actions may be taken as a result of a risk-management investigation into an incident, which former VP Blom explained can include “[s]pecific institutionally driven disciplinary actions.” (DA 387; 229 (Tr. 56).)

¹⁴ Even if the Hospital had furnished some evidence that, if a nurse’s license were suspended or revoked, it would have continued to employ her in some capacity,

Nor do the cases cited by the Hospital support its position. The Committee does not use these meetings to merely notify nurses of discipline that was previously determined. *Cf. Mt. Vernon Tanker Co. v. NLRB*, 549 F.2d 571, 575 (9th Cir. 1977) (Br. 38-39) (sea captain lawfully refused seaman's request to be represented at a "logging" proceeding at which seamen are merely notified that entries have been made in the ship's log relating to misconduct; discussing unique nature of relationship between captain and crew). Nor are these meetings limited to informal discussions that, by agreement, are not considered discipline and cannot be used against employees in any way. *Cf. NLRB v. U.S. Postal Serv.*, 689 F.2d 835, 837 (9th Cir. 1982) (Br. 45-47) (employer lawfully denied *Weingarten* request at informal meeting circumscribed by collective-bargaining agreement). Rather, these meetings are one stage in an investigation that can result in a nurse's loss of license, and separately can end up in an employee's personnel file.

c. The Hospital unlawfully refused Centye's and Smith's requests for a *Weingarten* representative

Once an employee makes a valid request for a union representative at an interview that an objective employee would reasonably fear may result in discipline, the employer must respond in one of three ways: (1) grant the request; (2) discontinue the interview; or (3) inform the employee that she is free to either

that change in position could constitute discipline, though that would be a question for the Board to address in the first instance.

participate in the interview unaccompanied by a union representative or have no interview at all. *See Weingarten*, 420 U.S. at 258-59 (quoting *Mobil Oil Corp.*, 196 NLRB 1052, 1052 (1972), *enf. denied on other grounds*, 482 F.2d 842 (7th Cir. 1973)). With respect to this third option, an employee may choose not to appear and thereby protect her right to representation, but she loses the benefit of participating in the meeting. In that case, the employer “would then be free to act on the basis of information obtained from other sources.” *Id.* Only after an employer elects this third option, and the employee chooses to remain unaccompanied by a union representative, may the employer continue the interview. *See Postal Serv.*, 241 NLRB 141, 141 (1979).

The requirement that an employer select from these three options is long-established and easily-satisfiable for employers who wish to deny employees the right to a *Weingarten* representative. By contrast, as discussed above, this standard “effectuates the most fundamental purposes of the Act,” by protecting employees’ right to engage in concerted activity for “mutual aid or protection.” *Weingarten*, 420 U.S. at 261-62. The Hospital’s failure to elect one of the three available options violates the Act.

The Hospital’s attempts to excuse its failure to comply with this standard are unavailing. It argues (Br. 43) that it was not required to inform employees of their *Weingarten* rights. The Board did not find otherwise. Only after Centye and

Smith each requested a representative was it then incumbent on the Hospital to select from the options above and notify Centye and Smith of the decision.

The Hospital also argues (Br. 41) that an employer only violates the Act if it compels an employee to appear unassisted. It insists that it did not do that here; instead, it merely offered Centye and Smith the opportunity to appear or submit a written statement. But as the Board explained (DA 374), an employer need not compel an employee to appear in order to trigger the employee's right to be accompanied by a *Weingarten* representative. The right arises once an employee requests the presence of a union representative at a meeting that an objective employee reasonably fears could result in discipline. *Cf. AFGE, Local 1941 v. FLRA*, 837 F.2d 495, 500 (D.C. Cir. 1988) (“decisive consideration” in *Weingarten* was not whether employee was compelled to appear but whether employee requested union representative and reasonably believed discipline was possible).

Accordingly, once Centye and Smith made their requests, the Hospital was obligated, “at that point” (DA 374), to decide whether to grant the request, discontinue the interview, or give the employees the opportunity to cease their participation in the meetings. Clarifying the employee's rights in this manner ensures, as the Board explained, that the employee understands that she would not “antagonize the employer and jeopardize [her] job by walking out of the meeting or by refusing to answer questions.” (DA 396) (citing *Super Value Stores, Inc.*,

236 NLRB 1581, 1591 (1978)). The Board's finding in this respect is perfectly consistent with the Supreme Court's admonition that an employer may not compel an employee to appear unassisted in an interview. *See Weingarten*, 420 U.S. at 257. While doing so plainly violates the Act, as the Board explained here (DA 374), the employer also violates the Act by refusing a valid request for a representative, then proceeding with the interview without first offering the employee the choice of continuing unrepresented or having no interview at all. The Board has thus not announced a "new right" (Br. 4) entitling employees to be represented in voluntary proceedings, but instead has applied its time-worn standard to find that the Hospital violated the Act when it simply proceeded with the interviews without first properly advising Centye and Smith of their options.

The Board also reasonably rejected (DA 373, 395) the Hospital's argument, repeated here (Br. 48-49), that the presence of a *Weingarten* representative would interfere with its legitimate objectives to comply with confidentiality and privilege provisions found in the Kansas peer-review law. Indeed, the Hospital acknowledged (DA 395; 267) that the statute does not compel a healthcare facility to disallow a union representative from accompanying an employee to a peer-review committee meeting. Rather, the Hospital broadly interpreted the statute as preventing a representative's presence. The Hospital has offered nothing more

than conclusory statements that the presence of a union representative would negatively impact Committee meetings.

Regardless, the Hospital's arguments over its confidentiality concerns evince a fundamental misunderstanding of what *Weingarten* requires. As discussed above, in *Weingarten*, the Supreme Court explained that an employer "has no obligation to justify [its] his refusal to allow union representation," but may instead either carry on the interview without the employee or "advise the employee it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by [a] representative." 420 U.S. at 258-59 (quoting *Mobil Oil Corp.*, 196 NLRB at 1052). In other words, the very structure of the Board's *Weingarten* standard appropriately accommodates an employer's "legitimate needs," including the need for confidentiality of proceedings, which the Hospital (Br. 48-49) complains the Board ignored here. The Hospital was permitted to refuse Centye's and Smith's requests for a union representative, but was then obligated to either discontinue the interview or advise them of their right to remain unaccompanied. It was not permitted to ignore the *Weingarten* rule and simply press on with those interviews. By doing so, it interfered with Centye's and Smith's Section 7 right "to self-organization, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," in violation of Section 8(a)(1) of the Act.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE HOSPITAL UNLAWFULLY FAILED TO PROVIDE THE UNION WITH RELEVANT INFORMATION

A. An Employer Violates Its Duty To Bargain Under the Act by Refusing To Provide the Union with Information Relevant to the Investigation of Grievances or the Enforcement of a Collective-Bargaining Agreement

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of [its] employees.” 29 U.S.C. § 158(a)(5). It is well established that an employer’s duty to bargain in good faith includes the obligation “to provide information that is needed by the bargaining representative for the proper performance of its duties.” *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1977); accord *N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 729 (D.C. Cir. 2011). The failure to furnish such information thus violates Section 8(a)(5) and, derivatively, Section 8(a)(1). See *Crowley Marine Servs., Inc. v. NLRB*, 234 F.3d 1295, 1296 (D.C. Cir. 2000).

“The union’s need and the employer’s duty depend, in all cases, on the ‘probability that the desired information [is] relevant, and that it [will] be of use to the union in carrying out its statutory duties and responsibilities.’” *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 359 (D.C. Cir. 1983) (quoting *Acme Indus. Co.*, 385 U.S. at 437). Accordingly, the threshold question in determining an employer’s obligation to furnish requested information is one of relevance. See *N.Y. & Presbyterian Hosp.*, 649 F.3d at 730. The

Supreme Court has adopted a liberal, discovery-type standard by which the relevance of requested information is to be judged. *Acme Indus*, 385 U.S. at 437 & n.6; accord *Local 13, Detroit Newspaper Printing & Graphic Commc'ns Union v. NLRB*, 598 F.2d 267, 271 (D.C. Cir. 1979). Information related to the investigation of potential grievances falls comfortably within this definition. *DaimlerChrysler Corp. v. NLRB*, 288 F.3d 434, 443 (D.C. Cir. 2002) (citing *Acme Indus*, 385 U.S. at 437-38).

An employer may resist the disclosure of relevant information based on confidentiality concerns. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318-19 (1979). To make out such a defense, the employer must establish a legitimate and substantial confidentiality interest in the information withheld, and that its interest outweighs the union's need for the information. *Id.* at 315; accord *Oil, Chem. & Atomic Workers*, 711 F.2d at 362. In such circumstances, the employer has the obligation to propose an approach to releasing the information that would accommodate both the confidentiality concern and the union's need for the information. See *United States Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998); *Norris v. NLRB*, 417 F.3d 1161, 1169 (10th Cir. 2005); *Metro. Edison Co.*, 330 NLRB 107, 107-08 (1999); *Pa. Power & Light Co.*, 301 NLRB 1104, 1105-06 (1991). The Board's determination whether requested information should be

produced is entitled to “great deference.” *Crowley Marine Servs., Inc.*, 234 F.3d at 1297.

B. The Hospital Refused To Furnish the Union with the Requested Relevant Information

1. The Union requested relevant information

On June 1, after learning that Centye was scheduled to appear before the Committee, the Union sent to the Hospital a written request for information (DA 389-90; 76), including copies of discipline issued by the Peer-Review Diversion Committee, documents related to the Hospital’s allegations against Centye, names of the committee members and others present during the meeting about Centye, documents describing the Committee, and where the Committee discipline was placed. On June 5, the Union sent a second request for information (DA 390; 76), including the names of nurses notified to appear before the Committee, copies of discipline issued to those nurses, and information regarding the nature of the allegations against them. The Union renewed these requests several times. In response, the Hospital furnished the Union with its risk management plan. Regarding requests related to the Peer-Review Diversion Committee, Human Resources Director Amy Hunt, responded “n/a,” later explaining she was unaware of the existence of such a committee.¹⁵

¹⁵ The information requests, like the notices sent to Centye and Smith, referred to the Peer-Review Diversion Committee, which, as described above (p.8, note 4),

Substantial evidence supports the Board's findings (DA 375, 392) that the requested information was relevant to the Union's performance of its duties as the nurses' collective-bargaining representative. Its access to Committee information would allow the Union to compare incidents that prompted committee investigations and to ensure nondiscriminatory treatment. Moreover, it would allow the Union to determine whether to file grievances on behalf of employees.

The Hospital's half-hearted argument (Br. 49-51) that the requested information is not relevant is based on its assertion that the Committee cannot directly impose discipline. But, as described above (p. 33-34), Committee proceedings can lead to employee discipline. Moreover, the information is relevant to the Union's ability to effectively monitor and enforce the terms of the collective-bargaining agreement, enable the Union to compare incidents that cause nurses to become targets of investigations, and determine whether to file a grievance on behalf of unit employees who might have unknowingly been the victims of discriminatory investigations and discipline. *See Brewers and Maltsters, Loc. Union No. 6 v. NLRB*, 414 F.3d 36, 45-46 (D.C. Cir. 2005) (information pertaining to investigation and processing of grievances is relevant);

did not exist. The Board (DA 375 n.12, 388 n.14), finding that the confusion was caused by the Hospital, construed the requests as referring to the Nursing Peer-Review Committee. The Hospital has not challenged this finding in its opening brief.

NLRB v. United States Postal Serv., 888 F.2d 1568, 1570-1572 (11th Cir. 1989)

(information sought was relevant to issue of disparate treatment of unit employees). In sum, the Board has far exceeded the low relevancy threshold required of such requests.¹⁶

2. The Hospital failed to establish a legitimate and substantial confidentiality interest in any of the requested information

The Board reasonably rejected (DA 376, 392-93) the Hospital's argument that it has a legitimate and substantial confidentiality interest, grounded in Kansas law, in any of the requested information. The Board acknowledged that Kansas has enacted a state-law privilege designed to protect the deliberations of peer-review committees. (DA 376) (citing KAN. STAT. ANN. § 65-4915(b)). As the Kansas Supreme Court has explained, because that privilege was "enacted in derogation of the common law," which disfavors such privileges, the statute "must be strictly construed." *Adams v. St. Francis Reg'l Med. Ctr.*, 264 Kan. 144, 162 (1998); *see also Hill v. Sandhu*, 120 F.R.D. 548, 550 (D. Kan. 1990).

¹⁶ Amicus Curiae American Hospital Association argues (AHA Br. 19-20) that the information is not relevant because state-licensing determinations are non-mandatory subjects of bargaining. The Hospital never raised this argument so, as discussed (p. 21, note 8), the amicus is barred from doing so now. Moreover, the Board did not find that the Union may bargain over the state's licensing determinations, but rather (DA 375 n.13) that the Hospital exercises substantial discretion in how it implements the state's requirement that it maintain a peer-review process, including drafting its own plan and selecting its members.

In addressing the Union's specific requests, the Board first found (DA 376) that the Union's request for information that related to the structure and function of the Committee and its members "does not touch on the Committee's deliberations." Accordingly, there is no basis for denying the Union's request for that information. Likewise, documents related to the allegations against the nurses, and information used by Committee members in making those allegations, refer to materials generated outside of the Committee's deliberations and, as the Board further noted (DA 376 n.15), nothing in the record suggests that they were prepared exclusively for the Committee.

The Hospital (Br. 52-54) challenges this finding by arguing that the statute covers information "submitted to" a peer-review committee, and that the Board erred by relying on a prior version of the Kansas peer-review statute that only covered the "records of" a peer-review committee. Its argument lacks merit for several reasons. First, the Hospital never argued to the Board that that the Board relied on a prior version of the statute and has not suggested that extraordinary circumstances prevented it from doing so. As a result, Section 10(e) of the Act jurisdictionally bars this Court from considering that argument. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Woelke & Romero Framing*,

Inc. v. NLRB, 456 U.S. 645, 665-66 (1982) (“[T]he Court of Appeals lacks jurisdiction to review objections that were not urged before the Board.”); *accord Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015).

Second, and in any event, the Board properly referred (DA 376) to the amended version of the state law, which was amended in 1997 to exempt from discovery or other legal compulsion not only “records of” peer review committees or officers, but also “records submitted to or generated by peer review committees.” KAN. STAT. ANN. 65-4915(b). Although the Board cited to *Hill v. Sandhu*, which predated the amendment, for the proposition that the privilege set forth in subsection 65-4915(b) is designed to only protect information pertaining to a peer-review committee’s internal deliberations, it also cited to the Kansas Supreme Court’s decision in *Adams*, in which the Kansas Supreme Court interpreted the amended version of the statute consistent with the district court’s decision in *Hill*. 264 Kan. at 162 (agreeing with analysis from *Hill* that medical records cannot be protected as privileged merely by sending them to a peer-review committee). Moreover, the Board (DA 377) rejected the argument that the “submitted to” language in the amended statute protects records unrelated to the Committee’s deliberative process, and indeed dissenting Member Johnson agreed. (DA 380 n.2) (amended provision “does not create a privilege for ‘evidence and

information’ relevant to conduct that is *also* the basis of a referral to the committee merely because such information is also included in hospital records”).

With respect to the Union’s request for the disciplinary letters sent to nurses, the Board reasonably found (DA 376-77), based on the letters sent to Centye and Smith (DA 071, 075), that they did not trench on the Committee’s internal-deliberative process. They did not reveal details about the Committee’s deliberations, patient information, or incidents that purportedly violated the standards of care. Therefore, requiring the Hospital to provide them would run little risk of interfering with the state’s interest in promoting frank discussions during Committee deliberations. Accordingly, the Board found that the Hospital failed to establish any legitimate and substantial confidentiality interest outweighing the Union’s need for the information. This finding, as this Court explained in *Crowley Marine Services*, is entitled to “great deference.”¹⁷ 234 F.3d at 1297.

¹⁷ Because the Board found that the Hospital failed to establish a legitimate and substantial confidentiality interest, it did not reach the question of whether the Hospital engaged in bargaining to accommodate both its confidentiality concern and the Union’s need for the information. Accordingly, in the event that the Court, despite the deference owed to the Board’s finding, finds that the Hospital had a legitimate and substantial confidentiality interest, the Board requests that the Court remand that portion of the case so that the Board can address the accommodative bargaining question. See *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20 (D.C. Cir. 1998) (“An employer is not relieved of its obligation to turn over relevant information simply by invoking concerns about confidentiality, but must offer to accommodate both its concern and its bargaining obligations, as is often done by

C. The Board Did Not Abuse its Discretion by Admitting Testimony Related to Peer-Review Proceedings or Revoking the Protective Order Covering this Testimony

Just as the Hospital insists incorrectly that it had a legitimate-confidentiality interest in the information requested by the Union that pertained to peer-review proceedings, it argues (Br. 59-60), on the basis of those same confidentiality concerns, that the Board erred by admitting testimony related to those proceedings and her revocation of the protective order covering that testimony.¹⁸ Such evidentiary rulings are overturned only when they constitute an abuse of discretion. *Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 (D.C. Cir. 2012) (court reviews ALJ's evidentiary rulings for abuse of discretion); *Tavoulaareas v. Washington Post Co.*, 737 F.2d 1170, 1171-73 (D.C. Cir. 1984) (per curiam) (whether to lift or modify a protective order is a decision committed to the sound discretion of the trial court).

The judge, and by extension the Board (DA 373 n.2), acted well within its discretion by admitting testimony about the peer-review proceedings and revoking the limited protective order that the judge had put in place with the stipulation that, once the hearing closed, she would reconsidered her ruling. (DA 391; 224-25

making an offer to release information conditionally or by placing restrictions on the use of that information.”)

¹⁸ The transcript pages covered by the now-revoked protective order follow: 34 (line 14)-43 (line 21); 57 (line 7)-61 (line 10); 74 (line 22)-81 (line 11); 94 (line 4)-98 (line 7); 212 (line 7-22); 222 (line 9)-225 (line 10); 269 (line 8)-272 (line 19).

(Tr. 27-32).) The judge took those protective measures to address the Hospital's assertions that certain evidence was privileged under the Kansas peer-review privilege, discussed above (p. 46-47). Following the hearing, the judge revoked the protective order, explaining that the privilege is not binding on the Board.

The Board acted well within its discretion in admitting the testimony. As the Board explained (DA 373 n.2), and in accordance with its findings that the Hospital unlawfully refused to furnish the Union with relevant information it requested, the testimony that was elicited under the protective order concerned the employees' appearances before the Committee without describing or otherwise implicating the Committee's protected deliberations. It therefore did not fall within the state-law privilege. Moreover, the testimony was critical to determining whether the Hospital violated its employees' federal rights under the Act. Accordingly, the Board reasonably found that the Hospital could not insulate those facts from discovery.

Moreover, as the Board explained (DA 391), it is not bound by a state-law evidentiary privilege. As the Seventh Circuit explained in *EEOC v. Illinois Dept. of Employment Security*, the Supremacy Clause of the Constitution gives federal statutes controlling force over state statutes. 995 F.2d 106, 107 (7th Cir. 1993). Accordingly, "[s]tate privileges are honored in federal litigation only when state law provides the rule of decision, and when federal law governs, as it does here,

only privileges recognized by the national government matter.” *Id.*; *see also NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1009 (9th Cir. 1996) (state-law privilege not relevant in determining enforceability of subpoena; “in federal question cases, federal privilege law applies”); *NLRB v. Griffin*, 243 F. App’x 771, 775 (4th Cir. 2007) (per curiam) (finding Board did not err “in declining to allow a state evidentiary privilege to trump the need for relevant and probative evidence in this federal proceeding”); *see also* Fed. R. Evid. 501 (“the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience”); *R. Sabee Co.*, 351 NLRB 1350, 1350 n.3 (2007) (explaining that even if statements are privileged under state law, Federal Rule of Evidence 501 renders privilege inapplicable in federal proceedings).

The Board also correctly found (DA 391) that the Supreme Court and several U.S. courts of appeals have refused to recognize a federal peer-review privilege.¹⁹ *See Adkins v. Christie*, 488 F.3d 1324, 1330 (11th Cir. 2007); *Virmani*

¹⁹ Amicus curiae The American Hospital Association (AHA Br. 13-14) and HR Policy (HR Policy Br. 9), relying on the federal Patient Safety and Quality Improvement Act of 2005, argues that the Board’s Order runs afoul of an applicable federal peer-review privilege. But the Hospital never raised any such argument in its exceptions to the Board, so once again, amicus cannot expand the scope of appeal by raising it now (see above, p. 21 note 8), and the Court is

v. Novant Health Inc., 259 F.3d 284, 292 (4th Cir. 2001); *Mem. Hosp. v. Shadur*, 664 F.2d 1058, 1063 (7th Cir.1981) (per curiam); *cf. Sonnino v. Univ. of Kansas Hosp. Auth.*, 220 F.R.D. 633, 643 (D. Kan. 2004) (declining to recognize, in federal proceeding, Kansas state-law privilege covering risk-management records). Based on these findings, the Board acted well within its discretion in admitting the testimony at issue.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE HOSPITAL’S CONFIDENTIALITY RULE VIOLATES THE ACT

A. An Employer May Not Maintain a Rule that Employees Would Reasonably Construe as Restricting Their Section 7 Right To Communicate with One Another, or Their Representative, About Terms and Conditions of Employment

The Supreme Court has “long accepted the Board’s view that the right of employees to self-organize and bargain collectively established by § 7 of the Act, 29 U.S.C. § 157, necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 & n.9 (1978); *accord Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007) (Section 7 protects employee’s right to discuss the terms and conditions of her employment with other employees). An employer violates Section 8(a)(1) by maintaining a rule that “would reasonably tend to chill

jurisdictionally barred from considering it pursuant to Section 10(e) of the Act (see above, p. 44).

employees in the exercise of their statutory rights.” *Hyundai Am. Shipping Agency, Inc. v. NLRB*, 805 F.3d 309, 313 (D.C. Cir. 2015).

In determining whether an employer rule runs afoul of this prohibition, the Board first looks at whether the rule explicitly restricts concerted protected activity. *Id.* Even in the absence of an explicit restriction, an employer violates the Act by maintaining a rule that (1) employees would reasonably construe as prohibiting Section 7 activity; (2) was promulgated in response to union activity; or (3) has been applied to restrict the exercise of Section 7 rights. *Id.*; *Cintas Corp.*, 482 F.3d at 467; *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004)). In conducting this inquiry, any ambiguity must be held against the employer as the party that promulgated the rule, rather than against the employees expected to abide by it. *See NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965); *see also Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1231 (5th Cir. 1976) (collecting cases). It does not matter whether the employer has applied or enforced the rule in question, for “mere maintenance of a rule likely to chill section 7 activity” constitutes an unfair labor practice. *See id.* at 467-68. If the rule runs afoul of this standard, it is invalid unless the employer can establish a legitimate and substantial business justification for the rule that outweighs the adverse effect on the interests of employees. *Hyundai Am.*, 805 F.3d at 315. The Board’s conclusion that an employer’s workplace rule unlawfully restrains or interferes with employee

activity that the Act protects “are entitled to considerable deference so long as they are reasonably defensible.” *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007).

B. The Hospital’s Confidentiality Rule is Unlawfully Overbroad

The Board reasonably found (DA 373 n.3, 394, 395) that, by including within its risk-management plan a rule prohibiting employees from “disclos[ing] information concerning reportable incidents except to their superiors,” the Hospital has unlawfully barred employees from discussing discipline and ongoing investigations with one another and with their representative assisting them in defending against assertions of wrongdoing.²⁰ Employees would reasonably construe this rule as not merely prohibiting conversations about the Committee’s deliberations, but as encompassing discussions pertaining to the underlying facts related to the investigation, potential discipline, and related terms and conditions of employment.²¹ In light of this broad language, the Board reasonably rejected the

²⁰ The rule states:

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 committees, legal counsel for the Hospital, or the applicable licensing agencies, unless authorized to do so by the Risk Manager, Administration, or legal counsel.

²¹ The Hospital (Br. 55) mischaracterizes the Board’s findings in this regard by selectively quoting from the Board’s decision. The Board did not find that the rule unlawfully prohibits employees from discussing both “what transpires” at

Hospital's argument, repeated here (Br. 57), that nurses would understand the confidentiality rule's reference to "reportable incidents" as only pertaining to the Kansas state-law privilege, discussed above, protecting information "submitted to or generated by peer review committees or officers." Moreover, the Hospital is incorrect in arguing that a rule purportedly promulgated to comply with other laws cannot reasonably be construed as chilling Section 7 activity. The sole case it relies on, *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), does not stand for such a broad proposition. Rather, in that case the Court found that a rule prohibiting the use of "abusive or threatening language," was justified, in part, based on the need to maintain a zero-tolerance policy against language that could be perceived as harassing, thus opening up an employer to civil liability. *Id.* at 27.

Substantial evidence also amply supports the Board's finding (DA 373 n.3, 394) that the Hospital failed to establish a legitimate and substantial business justification for the confidentiality rule. Although the Hospital argues that the state peer-review statute mandated the confidentiality rule, it acknowledged that the statute does not address whether employees can discuss "reportable incidents" with

Committee meetings and "the events underlying" those proceedings. Rather, it found (DA 373 n.3) that the rule is unlawful because employees would reasonably construe it "to include not only what transpires . . . but also discussions about the events underlying the peer reviews investigations." (Emphasis added.)

one another or with their representative. And certainly nothing in the statute prohibits employees from discussing with one another or their representatives the facts underlying a committee investigation. Nor did the Hospital present evidence establishing the need for such a rule. Aside from conclusory assertions about the need to maintain open discussions during Committee deliberations, it did not seek to establish that investigations, or patient care, would be compromised in the absence of the rule. In short, it failed to meet its burden of establishing that any confidentiality interest it may have outweighs the employees' exercise of their Section 7 rights. *See Hyundai Am.*, 805 F.3d at 314 (“confidentiality rule was so broad and undifferentiated that the Board reasonably concluded that Hyundai did not present a legitimate business justification for it.”).

The Hospital (Br. 56) faults the Board for reading “one phrase” of the confidentiality rule—that employees “shall not disclose information concerning reportable incidents except to their superiors” (DA 34)—in isolation from the risk-management plan that it is part of. It points to no other provision in that plan, however, that limits that sweeping language. The Hospital also argues (Br. 56-57) that, because the rule only concerns “reportable incidents,” which derives its meaning from the peer-review statute (KAN. STAT. ANN. § 65-4915(b)), nurses should understand that they are only prohibited from disclosing information “submitted to or generated by peer review committees or offices,” as provided in

that provision. Such a parsing of the rule is not evident on the rule's face and such a legalistic parsing does not undermine the Board's straightforward interpretation, entitled to deference, of its broad prohibition.

Finally, the Hospital complains (Br. 58-59) that the Board merely dismissed its business-justification argument in a footnote, forcing the Hospital "to "surmise the Board's rationale." In fact, as the Board explained in that footnote (DA 373 n.3), and discussed above, the Board affirmed the judge's lengthy findings (DA 394-95) rejecting the Hospital's argument, leaving no doubt as to its rationale.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Hospital's petition for review and enforcing the Board's Order in full.

/s Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

/s Jeffrey W. Burritt
JEFFREY W. BURRITT
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570
(202) 273-2978
(202) 273-2989

RICHARD F. GRIFFIN
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

May 2016

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIDWEST DIVISION – MMC, LLC,	*
D/B/A MENORAH MEDICAL CENTER	*
	*
Petitioner/Cross-Respondent	* Nos. 15-1312
	* 15-1359
v.	*
	* Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	* 17-CA-088213
	* 17-CA-091912
Respondent/Cross-Petitioner	*
	*
and	*
	*
NATIONAL NURSES ORGANIZING COMMITTEE-	*
KANSAS/NATIONAL NURSES UNITED	*
	*
Intervenor	*
	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,110 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 26th day of May, 2016

ADDENDUM

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIDWEST DIVISION – MMC, LLC,	*	
D/B/A MENORAH MEDICAL CENTER	*	
	*	
Petitioner/Cross-Respondent	*	Nos. 15-1312
	*	15-1359
v.	*	
	*	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD	*	17-CA-088213
	*	17-CA-091912
Respondent/Cross-Petitioner	*	
	*	
and	*	
	*	
NATIONAL NURSES ORGANIZING COMMITTEE-	*	
KANSAS/NATIONAL NURSES UNITED	*	
	*	
Intervenor	*	
	*	

STATUTORY ADDENDUM

National Labor Relations Act, 29 U.S.C. §§ 151, et. seq.

Section 1 (29 U.S.C. § 151)	2
Section 2(2) (29 U.S.C. § 152(2)).....	2
Section 2(3) (29 U.S.C. § 152(3)).....	2
Section 7 (29 U.S.C. § 157)	3
Section 8(a)(1) (29 U.S.C. § 158(a)(1)).....	3
Section 8(a)(5) (29 U.S.C. § 158(a)(5)).....	3
Section 10(a) (29 U.S.C. § 160(a))	3
Section 10(e) (29 U.S.C. § 160(e))	3
Section 10(f) (29 U.S.C. § 160(f)).....	4

Kansas Statute Annotated

KAN. STAT. ANN. § 65-4915(b).....	5
KAN. STAT. ANN. § 65-4922(a).....	5
KAN. STAT. ANN. § 65-4929(b).....	6
KAN. STAT. ANN. § 65-4929(c).....	6

NATIONAL LABOR RELATIONS ACT

Section 1 of the Act (29 U.S.C. § 151): Findings and Policies.

* * *

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2 of the Act (29 U.S.C. § 152): Definitions

When used in this subchapter—

(2) The term “employer” includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Section 7 of the Act (29 U.S.C. § 157): Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the Act (29 U.S.C. § 158): Unfair Labor Practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
- (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10 of the Act (29 U.S.C. § 160): Prevention of Unfair Labor Practices.

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such

petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

Kansas Statute Annotated

Kan. Stat. Ann. § 65-4915: Peer review; health care providers, services and costs; definitions; authority of peer review officer or committee; records and testimony of information contained therein privileged; licensing agency disciplinary proceedings; exceptions

(b) 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 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. The peer review officer or committee creating or initially receiving the record is the holder of the privilege established by this section. This privilege may be claimed by the legal entity creating the peer review committee or officer, or by the commissioner of insurance for any records or proceedings of the board of governors.

Kan. Stat. Ann. § 65-4922: Medical care facilities; risk management program required; submission of plan; inspections and investigations; approval of plan; reports and records confidential

(a) Each medical care facility shall establish and maintain an internal risk management program which shall consist of:

- (1) A system for investigation and analysis of the frequency and causes of reportable incidents within the facility;
- (2) measures to minimize the occurrence of reportable incidents and the resulting injuries within the facility; and
- (3) a reporting system based upon the duty of all health care providers staffing the facility and all agents and employees of the facility directly involved in the delivery of health care services to report reportable incidents to the chief of the medical staff, chief administrative officer or risk manager of the facility.

Kan. Stat. Ann. § 65-4929: Purpose of risk management programs; status of entities conducting programs; antitrust immunity

(b) Health care providers and review, executive or impaired provider committees performing their duties under K.S.A. 65-4922, 65-4923 and 65-4924 and peer review pursuant to K.S.A. 65-4915 and amendments thereto for the purposes expressed in subsection (a) and 65-4915 and amendments thereto shall be considered to be state officers engaged in a discretionary function and all immunity of the state shall be extended to such health care providers and committees, including that from the federal and state antitrust laws.

(c) Nothing in this section shall be construed to require health care providers or review, executive or impaired provider committees to be subject to or comply with any other law relating to or regulating state agencies, officers or employees.

