

**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)

Nos. 15-1312
15-1359

Respondent/Cross-Petitioner)

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

Intervenor)

**OPPOSITION OF MENORAH MEDICAL CENTER TO PROPOSED
JUDGMENT OF THE NATIONAL LABOR RELATIONS BOARD AND
REQUEST FOR ENTRY OF ALTERNATIVE PROPOSED JUDGMENT**

Midwest Division – MMC, LLC d/b/a Menorah Medical Center (“Menorah” or the “Hospital”) opposes entry of the proposed judgment submitted by the National Labor Relations Board (“NLRB” or the “Board”) on August 22, 2017. Menorah respectfully requests entry of the attached proposed judgment instead, in order to ensure that this Court’s judgment conforms to both the requirements of Kansas law and this Court’s August 18, 2017 opinion (the “Opinion”).

Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, a party that disagrees with an agency’s proposed judgment may submit its own proposed

judgment that “the party believes conforms to the opinion.” Fed. R. App. P. 19. In two respects, the Board’s proposed judgment fails to conform to the Opinion’s recognition of the Kansas regulatory scheme that governs the Hospital.

First, by requiring the Hospital to “revise or rescind” the confidentiality rule contained in its Risk Management Plan (the “Plan”) within 14 days of entry of judgment enforcing the Board’s order, the NLRB’s proposed judgment ignores the requirement that the State of Kansas first approve changes to the Plan. Indeed, as a condition of its *license to operate* in the State of Kansas, the Hospital is required to maintain a Plan that has been approved by the State.

Second, by requiring the Hospital to provide to the National Nurses Organizing Committee – Kansas/National Nurses United (the “Union” or “NNOC”) all of the information at issue—without any limitations on the information’s use or dissemination—the Board’s proposed judgment ignores the Hospital’s obligations under Kansas law to maintain the confidentiality of certain of the requested information. Indeed, notwithstanding the Court’s order to produce certain information to Union, the Opinion itself recognized the confidentiality interests associated with that information.

ARGUMENT

I. The Board’s Proposed Judgment Fails to Conform to the Opinion, Which Recognized the State of Kansas’s Role in Approving the Risk Management Plan.

Kansas law requires the Hospital to maintain a risk management program, one component of which is a *State-approved* Risk Management Plan. As this Court recognized:

Kansas state law aims to “protect the public’s general health, safety and welfare” by establishing a peer-review system to monitor the quality of care provided by medical practitioners. Kan. Stat. Ann. § 65-4929(a). Under state law, every hospital must maintain a risk-management program designed to identify violations of the applicable standard of care and to facilitate the reporting of breaches to the Kansas State Board of Nursing (the Nursing Board). *See id.* §§ 65-4922(a), 65-4923.

Opinion at 4; *see also id.* at 10 (“[T]he Kansas statute makes each hospital responsible for ‘establish[ing] and maintain[ing]’ its own system of risk management, subject to the requirements of state law.” (quoting Kan. Stat. Ann. § 4922(a))).

Kansas law further provides that the same regulatory scheme requires Menorah to submit the Plan to the Kansas Department of Health and Environment for approval, and “[f]ailure to submit such a plan shall result in denial of the renewal of the facility’s license.” (Hospital’s Final Br. at 12; Hospital’s Final Reply Br. at 27-28 (citing Kan. Stat. Ann. § 4922(b).) Critically, the Hospital also

must submit for the State's approval any changes to its Risk Management Plan. Specifically, Kansas law provides, "[a]fter an initial plan is approved, any amendments to the plan shall be submitted to the department." K.A.R. § 28-52-1(f); Kan. Stat. Ann § 65-4922(b). And, as with the initial Plan, the State reviews, and either approves or disapproves, the changes. K.A.R. § 28-52-1(g) ("Upon review of the facility's risk management plan or any amendments the department shall notify the facility in writing if the plan or amendments have been approved or disapproved.").

The Board's proposed judgment is inconsistent with the Opinion's acknowledgement of Kansas's regulatory scheme, including the requirement that the State must approve the Plan and any amendments to it. The Hospital's attached proposed judgment, by contrast, rectifies this inconsistency by requiring Menorah, within 14 days of entry of judgment enforcing the Board's order, to submit its revised Plan to the State Department of Health and the Environment. Within 14 days of receiving the State's approval, the Hospital would then issue the revised Plan to employees. The Hospital's proposed judgment harmonizes the Hospital's obligations under this Court's Opinion while also showing due regard for the Hospital's obligations under state law. *Cf. Conference of State Bank Supervisors v. Conover*, 710 F.2d 878, 882 (D.C. Cir. 1983) (noting rule of construction "which avoids finding a conflict [between state and federal law] if at all possible").

II. The Board’s Proposed Judgment Ignores the Confidentiality Interest That Remains in Certain of the Information to be Produced to NNOC.

The Hospital has an obligation under Kansas law to maintain the confidentiality of information that falls within the Kansas peer review privilege, notwithstanding the Union’s competing interest in obtaining the information for specified purposes. By requiring production of confidential information *without any limitation on the information’s use or dissemination*, the Board’s proposed judgment ignores the Hospital’s confidentiality obligations, which the Opinion recognized.

Specifically, the Opinion explained that:

Kansas law attaches a confidentiality privilege to certain aspects of peer-review proceedings:

[T]he 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 . . .

Opinion at 5. The Court construed the privilege as “attach[ing] to documents created to satisfy the peer-review requirements of state law, including eventual consideration by the applicable peer-review committee.” *Id.* at 19. To be sure, the Court upheld the Board’s finding that the Union’s interest in the information prevailed over the Hospital’s confidentiality interest. But the Opinion did not hold

that information that is otherwise privileged and confidential under Kansas law loses its confidential nature for *all* purposes if it is also relevant to the Union's interest in accessing the information for a *particular* purpose.

By requiring the Hospital to produce all of the information at issue *without any limitations on its use or dissemination*, the Board's proposed judgment fails to conform to the Opinion, because it ignores the confidentiality interest that remains in certain of the information to be produced to NNOC. The Hospital's proposed judgment corrects this imbalance. Under Menorah's proposed judgment, the Hospital would produce information that is confidential under Kansas law, but it would do so subject to a confidentiality agreement between Menorah and the Union. Information that the Union requested but that is not confidential under state law would not be subject to the confidentiality agreement.

Specifically, the Opinion classified the information at issue into three categories. The first category includes "information describing the Committee, including the Committee's structure, purpose, and functions, along with the names of committee members and those present for the hearings." Opinion at 17. Such information falls outside the privilege and therefore would not be subject to the confidentiality agreement. The second and third categories—"information about allegations investigated by the Committee, including the names of nurses notified that they were under investigation, the nature of the allegations against them, and

copies of investigatory information used by the hospital” and “disciplinary documents issued by the Committee” —fall within the privilege and therefore would be produced subject to the confidentiality agreement. *Id.*¹

III. The Issues Raised in this Opposition were Properly Preserved on Appeal.

In its September 1, 2017 letter to the Court, the Board argued that the Hospital’s objections to the Board’s proposed judgment are beyond the Court’s jurisdiction because they were purportedly not raised before the Board. Letter from Linda Dreeben to Mark Langer, Dkt. No. 51, at 2. But Menorah properly preserved these issues.

In determining whether an issue was adequately raised before the Board, “the critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue *might* be pursued on appeal.” *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 829 (D.C. Cir. 2012) (citations omitted) (emphasis in original). Thus, when the scope of an issue raised before the Board is “made evident by the context in which it is raised, section 10(e) [of the

¹ Finally, the NLRB’s originally proposed judgment incorrectly listed Menorah’s location as Denver, Colorado. The Hospital’s proposed judgment corrects this mistake by providing the Hospital’s accurate location, *i.e.*, Overland Park, Kansas. *See, e.g.*, Opinion at 2 (describing Menorah as a “Kansas acute-care hospital.”). On September 1, 2017, the NLRB agreed in a letter to this Court that the Hospital’s location should be corrected.

NLRA] does not shield the Board's resolution of those issues from review.”

Consol. Freightways v. NLRB, 669 F.2d 790, 794 (D.C. Cir. 1981).

That standard is readily satisfied here. Throughout the appellate process, the Hospital has challenged the Board's Order regarding both the confidentiality provision of the Plan and the obligation to produce certain confidential information to the Union. *First*, the Hospital repeatedly raised the need for state approval of the Risk Management Plan, including its confidentiality provisions, in its arguments to both the Board and this Court. *See* DA at 344, ¶ 16 (excepting to ALJ's finding that Menorah drafts its risk management plan “independently”); Brief in Support of Exceptions to the ALJ's Decision, at 28 (discussing the state approval process for the risk management plan and the history of state approval of confidentiality related amendments); Hospital's Brief in Support of Petition for Review, at 12, 14 (same). Indeed, in briefing before this Court, the Board *itself* noted on several occasions that the Hospital's Risk Management Plan was subject to state approval. Answering Brief of the NLRB, at 4-5 (“Pursuant to Kansas State law and regulations, the Hospital has developed, and submitted to the state for approval, an internal risk-management plan”)

Second, the Hospital objected to the Board's failure to “balance the Union's need for the [requested] information against the legitimate and substantial confidentiality interests established by Respondent.” DA at 346, ¶ 32. The

Hospital's proposed edit to the Judgment, requiring a confidentiality agreement to protect against the improper use of confidential information, follows logically from the Hospital's argument for "balance" between the Union's needs and the confidentiality interests recognized by Kansas law. *See May Department Stores Co. v. NLRB*, 326 U.S. 376, 386 n.5 (1945) (general exception to paragraph including cease and desist order as "not supported or justified by the record" sufficient to preserve issue of the proper scope of that order).

CONCLUSION

For the foregoing reasons, Menorah opposes the proposed judgment submitted by the Board and respectfully requests that the Court enter the attached proposed judgment.

Dated: September 1, 2017

Respectfully submitted,

/s/ Shay Dvoretzky

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CERTIFICATE OF COMPLIANCE

This Opposition complies with the type-volume limitations of Fed. R. App. P. 27(d)(2). This Opposition contains 1,724 words.

This Opposition complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because this Opposition has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, font size 14.

Dated: September 1, 2017

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JUDGMENT

Before: GARLAND, *Chief Judge*, and KAVANAUGH and SRINIVASAN,
Circuit Judges.

THIS CAUSE came to be heard upon a petition filed by Midwest Division–MMC, LLC d/b/a Menorah Medical Center to review an Order of the National Labor Relations Board dated August 27, 2015, in Case Nos. 17-CA-088213 and 17-CA-091912, reported at 362 NLRB No. 193, and upon a cross-application for enforcement filed by the National Labor Relations Board to enforce said Order. The Court heard argument of all parties and has considered the briefs and agency record filed in this cause. On August 18, 2017, the Court, being fully advised in the premises, handed down its opinion granting in part the petition of Midwest Division–MMC, LLC d/b/a Menorah Medical Center and granting in part the Board’s cross-petition for enforcement. In conformity therewith, it is hereby

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ORDERED AND ADJUDGED by the Court that Midwest Division–MMC, LLC d/b/a Menorah Medical Center, Overland Park, Kansas, its officers, agents, successors, and assigns, shall abide by said order (See Attached Order and Appendix).

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

Judge, United States Court of Appeals
for the District of Columbia Circuit

ENTERED:

NATIONAL LABOR RELATIONS BOARD

v.

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

ORDER

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

1. Cease and desist from

- (a) Promulgating, maintaining, and enforcing a confidentiality rule prohibiting employees from discussing with other employees discipline or ongoing investigations.
- (b) Refusing to bargain collectively with the National Nurses Organizing Committee—Kansas/National Nurses United, affiliated with National Nurses Organizing Committee/National Nurses United (the Union) by failing and refusing to furnish it with requested information that is necessary and relevant to the Union's performance of its functions as the exclusive collective-bargaining representative of the employees in following unit:

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

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days of the Board's Order, submit a revised Risk Management Plan to the Kansas Department of Health and Environment for approval that does not prohibit employees from disclosing information concerning reportable incidents.
 - (b) Within 14 days of receiving the Kansas Department of Health and Environment's approval of the revised Risk Management Plan, furnish employees with an insert for the current risk management plan that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised risk management plans that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.
 - (c) Furnish to the Union in a timely manner the information requested by the Union on June 1 and 5, 2012, with the information in categories two and three as described in the court's opinion that is confidential under Kansas state law produced pursuant to a confidentiality agreement.
 - (d) Within 14 days after service by the Region, post at its Overland Park, Kansas facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2012.

- (e) Within 21 days after service by the Region, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES
COURT OF APPEALS ENFORCING AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

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

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL revise or rescind the confidentiality rule prohibiting you from disclosing information concerning reportable incidents.

WE WILL furnish you with an insert for the current risk management plan that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or

WE WILL publish and distribute revised risk management plans that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

WE WILL furnish to the Union in a timely manner the information requested by the Union on June 1 and 5, 2012.

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

The Board's decision can be found at www.nlr.gov/case/17-CA-088213 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



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Intervenor)

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2017, I electronically filed the foregoing document with the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ Shay Dvoretzky _____
Shay Dvoretzky
Jones Day
51 Louisiana Ave., N.W.
Washington, D.C. 20001-2113

Dated at Washington, D.C.
this 1st day of September,
2017