UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MIDWEST DIVISION – MMC, LLC d/b/a MENORAH MEDICAL CENTER,	
Respondent,	
and	**Case Nos. 17-CA-088213 and 17-CA-091912**
NATIONAL NURSES ORGANIZING COMMITTEE – KANSAS/NATIONAL NURSES UNITED, affiliated with NATIONAL NURSES ORGANIZING COMMITTEE/NATIONAL NURSES UNITED,	
Charging Party.	

BRIEF *AMICI CURIAE* OF AMERICAN HOSPITAL ASSOCIATION, KANSAS HOSPITAL ASSOCIATION, TEXAS HOSPITAL ASSOCIATION AND TEXAS NURSES ASSOCIATION IN SUPPORT OF MIDWEST DIVISION – MMC D/B/A MENORAH MEDICAL CENTER

W. Terrence Kilroy
Maureen M. Vogel
Polsinelli PC
900 W. 48th Street, Suite 900
Kansas City, Missouri 64112
816-753-1000 (Telephone)
816-753-1536 (Fax)

Counsel for *Amici Curiae* American Hospital Association, Kansas Hospital Association, Texas Hospital Association and Texas Nurses Association

Lawrence Hughes
Assistant General Counsel
Advocacy and Public Policy
American Hospital Association
Liberty Place, Suite 700
325 Seventh St., NW
Washington, D.C. 20004-2802

Deborah Stern
Vice-Pres. Clinical Services and Gen. Counsel
Kansas Hospital Association
215 SE 8th Ave.
Topeka, KS 66603-3906
(785) 233-7436 (phone)
(785) 233-6955 (fax)

Charles Bailey
General Counsel
Texas Hospital Association
1108 Lavaca
Austin, TX 78701-2180
(512) 465-1038

Elizabeth Sjoberg
Associate General Counsel
Texas Hospital Association
1108 Lavaca
Austin, TX 78701-2180
(512) 465-1539

James H. Willmann
General Counsel and Director Governmental Affairs
Texas Nurses Association
8501 N. Mopac Fwy. Suite 400
Austin, TX 78759
(512) 452-0645

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The American Hospital Association, Kansas Hospital Association, Texas Hospital Association and the Texas Nurses Association (collectively the "Associations") respectfully submit this brief *amici curiae*, which addresses whether a hospital employer violates Sections 7 and 8 of the National Labor Relations Act ("NLRA" or "Act") by adhering to state-mandated confidentiality protections afforded to the peer review process and requiring that its employees do the same. The Associations ask that the National Labor Relations Board ("Board" or "NLRB") rule that such prohibitions do not violate the NLRA as a contrary ruling would conflict with state laws and public policy requiring confidential treatment of peer review and would create substantial uncertainty for employer health care providers.

STATEMENT OF INTEREST

The American Hospital Association ("AHA") is a national not-for-profit association that represents the interests of approximately 5,000 hospitals, health care systems, networks, and other health care providers, as well as 37,000 individual members. It is the largest organization representing the interests of the Nation's hospitals. The members of the AHA are committed to finding innovative and effective ways of improving the health of the communities and the patients they serve. The AHA educates its members on health care issues and trends, and it advocates on their behalf in legislative, regulatory, and judicial fora to ensure that their perspectives and needs are understood and addressed.

The Kansas Hospital Association ("KHA") is a non-profit association of health care provider organizations and individuals that are committed to the health improvement of their communities. KHA membership includes 215 member facilities, of which 127 are full-service community hospitals. Founded in 1910, KHA maintains its vision of "an organization of

hospitals working together to improve access, quality and the affordability of health care for all Kansans."

Founded in 1930, the Texas Hospital Association ("THA") is the leadership organization and principal advocate for the state's hospitals and health care systems. Based in Austin, THA enhances its members' abilities to improve accessibility, quality and cost-effectiveness of health care for all Texans. One of the largest hospital associations in the country, THA represents more than 85 percent of the state's acute-care hospitals and health care systems, which employ some 369,000 health care professionals statewide.

The Texas Nurses Association ("TNA") is a nonprofit professional association for registered nurses in Texas. TNA is the only statewide association in Texas representing registered nurses in all areas of practice and all practice settings. Since its founding in 1909, TNA has been an active advocate for nurses and their patients in the public policy arena.

Members of the Associations have implemented peer review with the overarching goal of improving the quality of health care. They mandate, in accordance with the governing state laws, confidential treatment of the information shared and discussed during the peer review processes to effectuate the most meaningful peer review process possible. The ability for individual health care providers to engage in candid and meaningful peer review would be harmed if peer review protected information must be disclosed to individuals or organizations outside of the scope of the peer review process. Therefore, the Associations have a strong interest in the outcome of this case. A Board decision that confidential information must be shared with third party union representatives would destroy the confidential nature of peer review, which is essential for effective peer review, and undermine the overriding goal of improving patient care.

STATEMENT OF THE CASE

This case involves allegations that Respondent Midwest Division-MMC d/b/a Menorah Medical Center ("Menorah") violated Section 8(a)(1) and (5) of the Act by implementing and acting in accordance with a state-mandated policy of confidentiality pertaining to peer review activities of the Nurse Peer Review Committee. The Associations have no independent knowledge of the facts in this case and their interest is in the legal and policy arguments at issue. The Associations recite the facts as they understand them only for purposes of properly articulating their positions on peer review and any implications peer review has on the National Labor Relations Act.

Amicus parties contend that peer review is not a term or condition of employment and does not involve concerted protected activity. Therefore, bargaining responsibilities, including the duty to provide information, are not implicated. Further, since there are no concerted activities in peer review, there are no *Weingarten* rights. Lastly, even if peer review did implicate terms or conditions of employment and involved concerted activities, a hospital's legitimate and substantial interest in confidentiality outweigh any such rights.

ARGUMENT

I. Privacy Obligations Of State Law Prohibiting Disclosure Of Peer Review For State Licensing Purposes Are In The Public's Interest And Critical to Improving Quality Care By Health Care Professionals

A. Peer Review Promotes The Public Interest Of Improving And Maintaining Quality Health Care In The United States

Peer review is a process by which health care professionals critically analyze the medical services performed by their colleagues for the purpose of decreasing instances of medical malpractice through the identification and examination of treatment which may depart from applicable state licensing standards. *See* Kenneth Kohlberg, *The Medical Peer Review Privilege:*

A Linchpin for Patient Safety Measures, 86 Mass. L. Rev. 157, 157 (2002). Peer review is performed in a variety of settings, such as hospital quality assurance programs, medical societies, or managed care organizations. *See Kohlberg*, *supra* at 157. It is the most widely used and effective tool for improving the quality of health care in the United States.

Physicians first developed peer review over sixty (60) years ago to evaluate and improve the quality of health care. In recent times, medical peer review has expanded to other licensed health care professions and become the principal method of evaluating the quality of patient care. Many states have enacted statutes specifically requiring nurse peer review committees.[1]

Peer review proceedings "are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate health care." *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (emphasis added). "The obvious legislative intent is to promote open and frank discussion during the peer review process among health care providers in furtherance of the overall goal of improvement of the health care system." *HCA Health Servs. of Va., Inc. v. Levin*, 530 S.E.2d 417 (2000).[2]

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[1] Alaska Stat. § 18.20.075. & Alaska Admin. Code tit. 7 § 12.860: Risk Management (2012); Ariz. Rev. Stat. Ann. § 36-450.01 (West 2013); Colo. Rev. Stat. Ann. § 12-36.5-103 (West 2013); Ga. Code Ann. § 31-7-15 (West 2012); Idaho Code Ann. § 39-1392f (West 2013); Ind. Code Ann. §§ 34-30-15-5, 34-30-15-7(a) (West 2012); Kan. Stat. Ann. § 65-4922 (West 2012); Mass. Gen. Laws Ann. ch. 111, § 203 (2013); Mo. Ann. Stat. § 190.245 (West 2013); Okla. Stat. tit. 36, § 6907(B)(2)(g) (West 2013); R.I. Gen. Laws Ann. § 23-17-24 (West 2012); Tex. Occ. Code Ann. § 303.0015 (West 2013); Wash. Rev. Code Ann. § 70.41.200(1) (West 2013); Wyo. Stat. Ann. § 35-2-910 (West 2013).

[2] *See also Adams v. St. Francis Reg. Med. Ctr.*, 955 P.2d 1169, 1187 (Kan. 1998) ("[T]he legislature granted a peer review privilege to health care providers to maintain staff competency by encouraging frank and open discussions and thus improving the quality of medical care in Kansas."); *Bredice*, 50 F.R.D. at 250 "(The purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques. They are not part of current patient care but are in the nature of a retrospective review of the effectiveness of certain medical procedures. The value of these discussions and reviews in the education of the

B. Confidentiality Is The Linchpin To A Meaningful Peer Review Process

Confidentiality is critical to the peer review process. Peer review statutes are based on two premises, "first, that exacting critical analysis of the competence and performance of physicians and other health-care providers by their peers will result in improved standards of medical care; and second, that an atmosphere of confidentiality is required for candid, uninhibited communication of such critical analysis within the medical profession." *Mem. Hosp. The Woodlands v. McCown*, 927 S.W.2d 1, 3 (Tex. 1996) (emphasis added) (citations omitted).

"Although these statutes differ with regard to the scope of the privilege and the materials protected by it, without exception they are founded on the strong public policy in favor of peer review proceedings, and are intended primarily to encourage and facilitate participation in such proceedings. The principal means of achieving that goal consist of immunizing participants from civil liability and precluding the materials used and the statements made in such proceedings from being introduced into evidence in a subsequent action for damages; and also by maintaining the confidentiality of such proceedings by prohibiting disclosure to the public." *Dir. of Health Affairs Policy Planning v. Freedom of Info. Comm'n*, 977 A.2d 148, 162 (Conn. 2009) (emphasis added) (*citing* G. Gosfield, comment, "Medical Peer Review Protection in the Health Care Industry," 52 Temp. L.Q. 552, 553 (1979)).

State courts have consistently recognized the essential role of confidentiality for brutally honest assessment of peers in peer review meetings. "A high level of confidentiality is necessary for effective medical peer review." *Baltimore Sun Co. v. Univ. of Md. Med. Sys. Corp.*, 584 A.2d 683 (Md. 1991). One court observed, "[t]he overriding importance of these review

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doctors who participate, and the medical students who sit in, is undeniable. This value would be destroyed if the meetings and the names of those participating were to be opened to the discovery process.")

committees to the medical profession and the public requires that doctors [and other health care providers] have unfettered freedom to evaluate their peers in an atmosphere of complete confidentiality." *Morse v. Gerity*, 520 F. Supp. 470, 472 (D. Conn. 1981). "[T]he need for confidentiality in the peer review process stems from the need for comprehensive, honest, and sometimes critical evaluations of medical providers by their peers in the profession." *Young v. Western Pa. Hosp.*, 722 A.2d 153, 156 (Pa. Super. Ct. 1998).[3] [4]

Courts recognize that a third party's need for information about the details of peer review proceedings is outweighed by the public interest in improving the quality of health care, generally. One court reasoned, "[b]y protecting these records from public access in those situations covered by [the peer review statute], the legislature recognized that a system of effective medical peer review outweighs the need for complete public disclosure." *Baltimore*

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[3] *Bredice*, 50 F.R.D. at 251 ("[t]here is an overwhelming public interest in having [peer review proceedings] held on a confidential basis so that the flow of ideas and advice can continue unimpeded"); *Sanderson v. Frank S. Bryan, M.D., Ltd.*, 522 A.2d 1138 (1987) ("Generally, hospital peer review findings and records are protected from public scrutiny.... The purpose for such protection is to encourage increased peer review activity which will result, it is hoped, in improved health care."), *appeal denied*, 538 A.2d 877 (Pa. Super. Ct. 1988); *Barnes v. Whittington*, 751 S.W.2d 493, 497 (Tex. 1988) (Phillips, C.J., concurring) ("The [peer review] statute reflects a legislative judgment that the overall quality of medical care will be elevated by shielding certain in-house evaluations from public disclosure. Medical professionals are more likely to come forward with information about professional incompetence and misbehavior when protected from personal liability or public disclosure.")

[4] On the contrary, courts have similarly recognized that "external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity...." *W. Covina Hosp. v. Superior Court*, 718 P.2d 119; *see also Morse*, 520 F. Supp. 470, 472 ("[I]f the purpose of the statute is to encourage doctors to evaluate their peers without fear of disclosure, that purpose would be hampered by public release of any proceedings, not just those involving the patient who has sued. The danger of inhibiting candid professional peer review exists by the mere potential for disclosure."); *Trinity Med. Ctr., Inc. v. Holum*, 544 N.W.2d 148, 155 (N.D. 1996) ("[P]hysicians would be unwilling to serve on quality assurance committees, and would not feel free to openly discuss the performance of other doctors practicing in the hospital, without assurance that their discussions in committee would be confidential and privileged. It was this purpose to encourage frank and open physician participation, and the resulting improvement inpatient care, which underlies the privilege.")

Sun, 584 A.2d at 668; *see also Tucson Med. Ctr., Inc. v. Misevch*, 545 P.2d 958 (Ariz. 1976) ("[t]he protection is justified by the overwhelming public interest in maintaining the confidentiality of the medical staff meetings so that the discussion can freely flow to further the care and treatment of patients").[5]

Federal courts also explicitly recognize that the public interest lies in encouraging and maintaining confidential peer review proceedings. *E.g.*, *U.S. v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992) ("[P]eer review materials are sensitive and inherently confidential, and protecting that confidentiality serves an important public interest"); *Laws v. Georgetown Univ. Hosp.*, 656 F. Supp. 824, 826 (D.D.C. 1987) ("[T]his Court recognizes an overwhelming public interest in promoting improvement in health care through the mechanism of staff peer review").[6]

C. Confidential Treatment Of The Peer Review Process Has Been Universally Adopted In All Fifty States

Based largely on the widely accepted understanding that confidentiality is essential to effective peer review, all fifty states and the District of Columbia recognize some form of

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[5] *See also W. Covina Hosp. v. Superior Court*, 718 P.2d 119 (1986) (peer review statute "expresses a legislative judgment that the public interest in medical staff candor extends beyond damages immunity and requires a degree of confidentiality"); *Virmani v. Presbyterian Health Serv. Corp.*, 515 S.E.2d 675 (N.C. 1999) ("[t]he public's interest in access to ... court proceedings, records and documents is outweighed by the compelling public interest in protecting the confidentiality of medical peer review records in order to foster effective, frank and uninhibited exchange among medical peer review committee members").

[6] The ALJ contends that federal courts have refused to recognize state peer review privileges. Critically, however, the cases cited in the ALJ's opinion are irrelevant to the issue here because they pertain to issue of admissibility. The issue in this instance is not whether federal courts have applied state peer review privilege to bar discovery in matters based on federal claims, but whether the overwhelming public interest in protecting the confidentiality of the peer review process outweighs the Union's need for the information under the required balancing test set forth in *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). As fully explored in subsection 2(a) of this brief, the answer is that it does.

medical peer review confidentiality privilege.[7] As one court put it, "[t]he legislatures in every state in the Nation have concluded that without a peer review privilege, physicians will be discouraged from participating in the full and frank expression of opinion that is essential if peer review is to fulfill its vital role in advancing the quality of medical care." *Sevilla v. U.S.*, 852 F.Supp.2d 1057, 1060 (N.D. Ill. 2012).

Federal courts have also recognized peer review privilege. In *Sevilla v. U.S.*, the Court denied plaintiff's motion to compel production of peer review information, reasoning that:

> The policy interests behind the peer review privilege in medical malpractice cases, regardless of the forum in which they are tried, are as substantial as any that can be imagined: "Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations." *Shadur,* 664 F.2d at 1062. *See also Freeman v. Fairman,* 917 F.Supp. 586, 588 –589 (N.D.Ill.1996).

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[7] Ala. Code §§ 6-5-333(d), 22-21-8(b), 34-24-58(a) (2013); Alaska Stat. § 18.23.030 (2013); Ariz. Rev. Stat. § 36-445.01 (2013); Ark. Code Ann. §§ 20-9-503, 16-46-105 (2013); Cal. Evid. Code §§ 1156, 1157, 1157.7 (2013); Colo. Rev. Stat. §§ 12-36.5-104(10)(a-b), 13-21-110 (2013); Conn. Gen. Stat. § 19a-17b(d) (2013); Del. Code Ann. tit. 24, § 1768(b) (2013); D.C. Code Ann. § 32-505(1) (2013); Fla. Stat. ch. 395.0193(8) (2013); Ga. Code Ann. §§ 31-7-133(a), 31-7-143 (2013); Haw. Rev. Stat. § 624-25.5(b) (2013); Idaho Code § 39-1392, 39-1392b, 39-1392e (2013); Ill. Rev. Stat. Ch. 735, para. 5/8-2101, 8-2102 (2013); Ind. Code Ann. §§ 34-30-15-8, 34-30-15-9 (2013); Iowa Code § 147.135(2) (2013); Kan. Stat. Ann. § 65-4915(b) (2013); Ky. Rev. Stat. Ann. § 311.377(2) (2013); La. Rev. Stat. Ann. §§ 40:2205, 13:3715.3(A)(2) (2013); Me. Rev. Stat. Ann. tit. 32 §§ 2599, 3296 (2013); Md. Code Ann. Health Occ. § 14-501(d) (2013); Mass. Gen. Laws Ann. ch. 111, §§ 204(a), 205(b) (2013); Mich. Comp. Laws §§ 333.20175(8), 333.21515 (2013); Minn. Stat. Ann. § 145.64 (2013); Miss. Code Ann. § 41-63-9 (2013); Mo. Rev. Stat. § 537.035(4) (2013); Mont. Code Ann. § 37-2-201(2), 50-16-205 (2013); Neb. Rev. Stat. § 71-2048 (2013); Nev. Rev. Stat. § 49.265 (2013); N.H. Rev. Stat. Ann. § 151:13-a (2013); N.J. Rev. Stat. § 2A:84A-22.8 (2013); N.M. Stat. Ann. § 41-9-5; N.Y. Educ. Law § 6527(3) (2013); N.Y. Pub. Health Law § 2805-m(2) (2013); N.C. Gen. Stat. § 131E-95(b) (2013); N.D. Cent. Code § 23-34-03 (2013); Ohio Rev. Code Ann. §§ 2305.251, 2305.252(B) (2013); Okla. Stat. tit. 63, § 1-1709 (2013); Or. Rev. Stat. § 41.675(3) (2013); Pa. Stat. Ann. tit. 63, § 425.4 (2013); R.I. Gen. Laws § 23-17-25(a) (2013); S.C. Code Ann. § 40-71-20 (2013); S.D. Codified Laws Ann. § 36-4-26.1 (2013); Tenn. Code Ann. § 63-6-219(e) (2013); Tex. Health & Safety Code Ann. § 161.032 (2013); Utah Code Ann. §§ 26-25-1, 26-25-2, 26-25-3 (2013); Vt. Stat. Ann. tit. 26, § 1443 (2013); Va. Code Ann. § 8.01-581.17 (2013); Wash. Rev. Code Ann. §§ 4.24.250, 70.41.230(5) (2013); W. Va. Code § 30-3C-3 (2013); Wis. Stat. Ann. § 146.38(2) (2013); Wyo. Stat. Ann. § 35-17-105.

> The only consequence in not recognizing the privilege is to require the plaintiff in this case to do what plaintiffs in medical malpractice cases are routinely required to do in all other cases, namely adduce proof independent of what occurred in the peer review process.

852 F. Supp. at 1068.

"While the failure to recognize such a privilege may not altogether eliminate peer review, the chilling effect of disclosure will significantly impede the overriding purpose of the peer review process — improving overall patient care."[8] *Veith v. Portage County, Ohio*, No. 5:11CV2542, 2012 WL 4850197, at *4 (N.D. Ohio 2012) (emphasis added).

The Administrative Law Judge ("ALJ") cites from federal cases which she implies holds there is no federal recognition of peer review privilege (*see* p.13, l. 34-5). However, the cases have no application to this proceeding. Three of the cases allowed discovery of peer review committee decisions (presumably with appropriate protective orders) based upon allegations of race or sex discrimination in the administration of peer review. The remaining case involves a state criminal statute involving physician staff privileges (not peer review). Clearly, these cases deal with isolated allegations of violations of federal discrimination laws only. As a result, the cited decisions fail to support the wholesale attack on the peer review process contemplated by the ALJ's decision.

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[8] Federal law, in The Patient Safety and Quality Improvement Act of 2005 (the "PSQIA"), 42 U.S.C. § 299b-21 *et seq.*, "announces a more general approval of the medical peer review process and more sweeping evidentiary protections for materials used therein." *KD ex rel Dieffenbach v. U.S.*, 715 F.Supp.2d 587, 595 (D. Del. 2010). Specifically, the PSQIA creates a privilege for "any data, reports, records, memoranda, analyses (such as root cause analyses), or written or oral statements" that a health care provider assembles or develops and reports to a patient safety organization ("PSO") on a timely basis. 42 U.S.C. §§ 299b-21(7) and 299b-22(a) (2013). Federal law also extends confidentiality to the medical quality assurance activities of some government agencies. *See, e.g.*, Department of Defense (DoD), 10 U.S.C. § 1102 (2012); Coast Guard (USCG), 14 U.S.C. § 645 (2012); Department of Veterans Affairs (VA), 38 U.S.C. § 5705 (2012); and certain programs supported by the Indian Health Service (IHS), 25 U.S.C. § 1675 (2012).

D. Peer Review Information Must Be Maintained Strictly Confidential Because Disclosure To Third Parties Will Result In Waiver Of Peer Review Privilege Protection

Disclosure of peer review information to third parties, such as that contemplated in the ALJ's decision, can waive the privilege protections afforded to information created in the peer review process. "[A] recent judicial trend has been to expand the conduct that constitutes waiver of peer review protections. Several Court decisions have stripped peer review committees of their protection when records were disclosed to non-committee members." Frederick Levy, The Patient Safety and Quality Improvement Act of 2005, 31 J. Legal Med. 397, 422 (2010) (emphasis added) (*citing* Daniel Mulholland & Phil Zarone, Waiver of the Peer Review Privilege: A Survey of the Law, 49 S.D. L. Rev. 424, 428 (2004)).

In *State ex rel. Brooks v. Zakaib*, for example, a patient brought a medical malpractice action against a doctor and hospital. 214 W. Va. 253, 588 S.E.2d 418 (W. Va. 2003). The doctor subsequently filed a defamation action against the hospital and a newspaper, which was later dismissed. Following the dismissal, the patient requested and received records regarding the defamation action, including the doctor's peer review records. *Id.* The court found that the peer review privilege may be waived if a party fails to treat information in a confidential manner. It directed the trial court to determine if the physician and hospital had waived the privilege by introducing peer review documents into evidence in the defamation action. *Id.* at 429.[9]

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[9] *See also*, *Whitman v. U.S.*, 108 F.R.D. 5 (D.N.H. 1985) (finding waiver of privilege as a result of voluntary disclosure of information during deposition); *State ex rel. St. John's Regional Med. Ctr. v. Dally*, 90 S.W.3d 209 (Mo. App. S.D. 2002) (medical center had waived peer review privilege on such materials by putting materials at issue through its pleadings and using peer review privilege as both a shield and a dagger in dispute with radiological service, and without disclosure of materials there was a substantial potential that medical center's conduct would result in an unfair trial for radiological service); *Kymissis v. Rozzi*, No. 93 Civ. 8609, 1997 WL 278055 (S.D.N.Y. May 23, 1997) (disclosure of peer review information to a party outside peer review waives the privilege); *Ronald G. Connolly, M.D., P.A. v. Russell J. Labowitz, M.D., P.A.*, 1984 WL 14132 (Del. Sup. Ct. 1984) (parties giving testimony to a peer review committee

A "shift towards recognizing that a broader scope of activities can waive privilege" undermines the confidential nature of the peer review process, thereby disincentivizing frank and candid participation by medical personnel. *See Levy*, *supra* at 422 (*citing* Charles David Creech, The Medical Review Committee Privilege: A Jurisdictional Survey, 67 N.C. L. Rev. 179, 188 (1988)). Allowing third parties to gain access to peer review protected information will effectively destroy the peer review method of improving health care. *Veith v. Portage County Ohio*, supra.

E. Kansas, Like Other States, Regulates Licensing Of Registered Nurses And Other Health Care Professionals And Mandates Confidential Peer Review As Part Of That Process

All states regulate health care facilities and health care professionals' practices by statute and regulation. Hospital licensure in Kansas is governed by the Kansas Medical Facilities Survey and Construction Act. Kan. Stat. Ann. § 65-410 (2013). The Act's purpose is to provide establishment and enforcement of standards: treatment of patients in medical care facilities; and the maintenance and operation of medical care facilities. Kan. Stat. Ann. § 65-426 (2013). "No person or governmental unit, acting severally or jointly with any other person or governmental unit shall establish, conduct or maintain a medical care facility in this state without a license under this law." Kan. Stat. Ann. § 65-427 (2013). Health professional practice acts are statutory and establish licensing boards to regulate health care practice.

State licensing statutes also establish the level of education and experience required to practice, define the functions of the profession, limit performance of these functions to licensed persons, and establish disciplinary processes related to licensure. In Kansas, nursing licensure is

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can waive the privilege as to their testimony, but not committee deliberations); *Claypool v. Mladineo*, 724 So.2d 373, 391 (Miss. 1998) (peer review privilege "should also be waived when the peer review proceedings are an integral aspect of the defenses raised") (concurring opinion).

defined in the Kansas Nurse Practice Act, Kan. Stat. Ann. § 65-1113, *et seq.* and accompanying regulations. *See e.g.*, Kan. Admin. Regs. § 60-3-101, *et seq.* (2013). Kansas nursing licensure is not unique as all states license nursing.[10]

Like many other states, Kansas "recognizes the importance and necessity of providing and regulating certain aspects of health care delivery in order to protect the public's general health, safety and welfare," and its legislature identified the "[i]mplementation of risk management plans and reporting systems as required by K.S.A. §§ 65-4922, 65-4923 and 65-4924 and peer review pursuant to K.S.A. § 65-4915 and amendments thereto effectuate this policy." Kan. Stat. Ann. § 65-4929 (2013).

Under Kansas law, each medical care facility is required to "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. § 65-4922(a) (2013).

Kansas law requires that risk management plans include a professional practices peer review committee for nurses, and that "[t]he committee shall have the duty to report to the appropriate state licensing agency any finding by the committee that a health care provider acted below the applicable standard of care which action had a reasonable probability of causing injury

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[10] *See E.g.*, California Nursing Practice Act is located in the California Business and Professions Code starting with Section 2700; The DC Nurse Practice Act is in the Health Occupation Revision Act, Title 3, Chapter 12; Missouri Nurse Practice Act, RSMo. § 335.011 *et seq.*; The New York Nursing Practice Act is found in State Education Law, Article 139.

to a patient, or in a manner which may be grounds for disciplinary action by the appropriate licensing agency,[11] so that the agency may take appropriate disciplinary measures." Kan. Stat. Ann. § 65-4923(a)(1), (2) (2013) and Kan. Admin. Regs. § 28-52-3(a)(2013). The jurisdiction of each risk management committee shall be clearly delineated in the facility's risk management plan, as approved by the facility's governing body." Kan. Admin. Regs. § 28-52-3(a) (2013). The hospital risk manager is a designated non-voting member of this committee as a function of her statutory obligation to administer the hospital's internal risk management plan.[12]

It is important to understand that the risk management plan applies to all licensed health care providers and is not directed at nor limited to hospital-employed providers. The regulations specifically require that, "[a]ll patient services including those services provided by outside contractors or consultants shall be periodically reviewed and evaluated in accordance with the plan." Kan. Admin. Regs. § 28-52-1(f) (2013). Those peer review proceedings including its reports, proceedings and findings are not subject to discovery, subpoena or other means of discovery. *Id.* The peer review privilege promotes the public policy of the state of Kansas through a system that provides a reasonable means to monitor the quality of health care, which is "essential to the well-being of the citizens of the state." Kan. Stat. Ann. § 65-4914.

Kansas statutes limit the peer review committee members to individuals or a committee employed, designated, or appointed by a health care provider group and authorized to perform peer review. Kan. Stat. Ann. § 65-4915 defines a "Peer Review Officer or Committee" as "[a]n

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11 Appropriate licensing agency means the agency that issued the license to the individual or health care provider who is the subject of a report under this act. Kan. Stat. Ann. § 65-4921(a) (2013).

12 Risk manager means the individual designated by a medical care facility to administer its internal risk management program. Kan. Stat. Ann. § 65-4921(g) (2013).

individual employed, designated or appointed by, or a committee of or employed, designated or appointed by, a health care provider group and authorized to perform peer review." *Id.* [13]

II. Peer Review Is Not A Term Or Condition Of Employment And Does Not Involve Concerted Protected Activity.

A. The Statutory Procedures Of Peer Review Are Separate And Distinct From Employer Discipline And Are Not Terms of Conditions Of Employment

For medical facilities in Kansas and elsewhere, compliance with statutory peer review provisions, including confidentiality requirements, is nothing more than adhering to the licensing obligations of state law. As a result, compliance with state licensing requirements is not a term or condition of employment which a hospital is obligated to bargain over. An employer's obligation to bargain is limited to "wages, hours and terms and conditions of employment." Section 8(d) of the Act; *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). Employers do not have an obligation to bargain over issues not involving wages, hours or terms and conditions of employment, as those issues are "non-mandatory subjects of bargaining." When a party to negotiations raises a proposal which "settles no term or condition of employment" between an employee and employer and which does not regulate relations between the employee and employer, it *by definition* does not deal with terms and conditions of employment. *Id.* at 350. *See also Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 158, 178 (1971) (changes to retiree health insurance does not vitally affect current employees terms and conditions of employment and is not a mandatory subject of bargaining).

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[13] The term "health care provider group" is defined to include a "health care provider" as defined by Kan. Stat. Ann. § 40-3401, which includes "a medical care facility licensed by the department of health and environment." *Id.* Moreover, "Peer review" means any of the following functions: "(A) Evaluate and improve the quality of health care services rendered by health care providers; (B) determine that health services rendered were professionally indicated or were performed in compliance with the applicable standard of care…" *Id.*

State licensing requirements are non-mandatory subjects of bargaining. *See Economy Stores, Incorporated*, 120 NLRB 1 (1958). In *Economy Stores*, the Board found an employer who insisted on a non-mandatory subject of bargaining to the point of a strike guilty of an 8(a)(5) violation, affirming the administrative law judge who stated: An employer cannot require a union to bargain with respect to, nor can it insist upon inclusion in an agreement of, proposals requiring the posting of performance bonds, compliance with state licensing requirements, acceptance of oral or "members only" contracts .... *Id.* at 65. (emphasis added)

In Kansas, like all other states, all nurses working in hospitals must, as a matter of state law, be licensed by the State. Kan. Stat. Ann. § 65-1114. State licensing is not an issue that can be meaningfully bargained by a union or employer; rather, it is a condition of hiring under state law. *See NLRB v. Wooster Division of Borg-Warner*, *supra*. State licensing is a non-mandatory subject of bargaining. Licensing is a statutory qualification for hiring and, as such, a precondition to employment. *David Wolcott Kendall Memorial School*, 288 NLRB 1205, 1209 (1988) ("faculty degree requirement was a direct result of Kendall's decision to become a degree granting institution and as such constitutes a non-mandatory subject of bargaining"); *Star Tribune Division*, 295 NLRB 1114 (1989) (no obligation to bargain with the union over initial hiring criteria such as passing a drug test); *Local 164, Painters, Decorators and Paperhangers*, 126 NLRB 997 (1960) (union proposal on hiring standards was not a compulsory subject of bargaining).

Licensing is a prerequisite for employment and no bargaining can affect this qualification. It is not a term and condition of employment that is amenable to resolution through the collective bargaining process. The State of Kansas not only requires nurses to obtain and maintain a state license, it also specifies and approves peer review and further action

procedures for referrals for possible licensing discipline. Further, state approved peer review only triggers referrals to the appropriate licensing authority where a *de novo* licensing hearing may occur. As such, licensing is a non-mandatory subject of bargaining. Therefore, there is no legal bargaining obligation over state licensing.

A union's request for information regarding details of peer review meetings and decisions relates to licensing issues only and therefore is not a proper subject of bargaining. Because state licensing is a non-mandatory subject of bargaining, information related to peer review, a component of the licensing process, cannot form a basis for a refusal to bargain allegation that a hospital violated Section 8(a)(5) of the Act. *Dexter Fastner Technology, Inc.*, 321 NLRB 612, 612-13, N.2 (1996); s*ee also*, *A-Plus Roofing, Inc.*, 295 NLRB 967 (1989) (request for social security numbers "not directly related to an employee's terms and conditions of employment.").

A duty to provide information stems from the underlying statutory duty to bargain in good faith on mandatory subjects of bargaining. *Cowles Communication, Inc.*, 172 NLRB 1909 (1968). Peer review is not a mandatory subject of bargaining. *Economy Stores Incorporated, supra.* "There is not duty to furnish information concerning a non-mandatory subject of bargaining." *Pieper Electric, Inc.*, 339 NLRB 1232, 1235 (2003). Thus, a hospital has no duty or obligation to supply information related to peer review to a union. A union cannot file a grievance with respect to peer review process. Further, there is no indication in the ALJ's decision that peer review is an alleged contract violation – or that the union needed the information to police a term of the labor agreement. Thus, there is no proper basis under Section 8(d) of the Act to require a hospital to produce information to the Union about peer review.

B. Peer Review Procedures Do Not Implicate Section 7 Rights As There Is No Concerted Protected Activity

Peer review relates to one individual's state licensing only. Therefore, there is no concerted activity involved in an individual's license procedure. An employee is not engaged in concerted protected activity unless the employee is acting "with or on the authority of other employees". *Meyers II*, 281 NLRB 882 (1986).

Peer review deals exclusively with one employee's license. The situation is akin to a company driver getting a speeding ticket from the State Highway Patrol. It is that driver alone whose license could be affected. Although the loss of his license could disqualify an employee from a driving position with an employer, his protest of the ticket is not concerted activity. The fact that the State Board of Nursing mandated a peer committee to refer its determinations of failure to meet the standard of care to the State Board raises matters solely of concern to one employee.

The ALJ incorrectly finds that peer review implicates *Weingarten* rights because a loss of a state license necessarily means discharge from employment as the consequence. This is a simplistic analysis which ignores critical facts. A hospital's peer review committee is comprised of peers. There is no finding in the decision that management dominates the process or controls its outcome.[14] Furthermore, a hospital's peer review committee doesn't even make a decision on the license – only whether to refer the issue to the state board for a de novo process before a completely different group which ultimately makes the licensing decision.

Peer review does not raise issues within the purview of *NLRB v. J. Weingarten, Inc.*, 420 US 251 (1975). In *Weingarten*, the Supreme Court ruled that bringing a union steward into an investigatory meeting which an employee reasonably believes could lead to discipline is a

[14] Indeed, the Risk Manager is a non-voting member of the committee.

Section 7 right. However, that Section 7 right was based upon the premise that one disciplinary decision could set a "custom or practice" to support employer disciplinary action for other bargaining unit employees covered by the labor agreement. *Id.* at FN. 6. The Supreme Court in *NLRB v. City Disposal Systems*, 465 US 882 (1984) ruled that one individual's honest invocation of a right under that labor agreement is concerted activity and therefore protected by Section 7. This is not the case with peer review. Peer review does not involve rights established by a collective bargaining agreement.

Further, employees are not governed by the labor agreement during peer review; there is no interpretation of a labor agreement in peer review and employees are not being judged for their adherence to the terms of a labor agreement. Rather, nurses are judged by their peers to determine whether they may have breached a standard of care such that a referral to the State Board of Nursing for consideration of possible licensing sanctions should occur. Significantly, ultimate licensing discipline is decided by the State Board – not the hospital's peer review committee.

Peer review also does not refer issues to Human Resources for possible employee discipline. Rather, the peer review process must necessarily be confidential and no discussion with Human Resources is appropriate. Initially, a reported incident could be directed to both the Risk Manager (and the peer review) and a hospital's Human Resources Department for potential discipline under hospital disciplinary policy. Although these two separate tracks (*i.e.*, Hospital related discipline and the peer review process) could occur at the same time, the peer review process can go forward without implicating a threat of discipline. Section 7 rights are implicated only if a referral to Human Resources occurred with an accompanying investigation, interview and the possibility of employer-imposed discipline. *NLRB v. J. Weingarten, Inc., supra.*

Furthermore, the confidential meetings which are part of the peer review are not terms or conditions of employment because hospitals advise employees in writing that the Peer Review Process is voluntary. Health care professionals do not have to participate in peer review. Employees are not disciplined if they choose not to participate in peer review. Therefore, it is not a term and condition of employment. *See Star West Satellite, Inc.*, 2013 WL 5913969 (N.L.R.B. Division of Judges, November 4, 2013) (customer service call policy is not a term and condition of employment if it is clear the post calls were not a job requirement).[15]

III. Even Assuming Arguendo That Rights Under the Act Are Implicated, the Confidentiality Interests of Peer Review Outweigh Any Alleged Rights.

A. Peer Review Confidentiality Outweighs A Union's Right To Information About Peer Review

Assuming arguendo that peer review process is a mandatory subject of bargaining, which the Associations vehemently maintain it is not, state peer review statutes' confidentiality provisions and the confidentiality of medical information still outweigh any right of a union to peer review information. A union's interest in peer review is limited as it does not invoke employee discipline under such labor agreement. Therefore, a union's interests must yield.

The National Labor Relations Board recognizes a public policy interest in the confidentiality of medical information even during disciplinary processes which clearly implicate Section 7 rights. *See Borgess Medical Center*, 342 NLRB 1105 (2004). *Borgess* ruled that, in employer disciplinary procedures under a labor agreement, there is a legitimate confidentiality interest in the incident reports containing patient information. If there are confidentiality interests in medical information involved in employer discipline, there are even greater

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15 In *Star West Satellite*, the ALJ found a violation because he concluded the employees were led to believe that post calls were a mandatory requirement of their jobs in ruling that they were a term or condition of employment. Had it been clear they were voluntary, there could have been no violation.

confidentiality interests in peer review as peer review does not involve employer discipline of an employee. This is especially true given the national and important public policy behind the need for confidentiality in peer review in ensuring the process involved candid discussion and self-critical analysis that is an essential part of assuring quality health care for the public.

The Board is required to determine the issue of confidentiality before it reaches the issue of what, if any, accommodations were necessary in disclosures. *See GTE California Inc.*, 324 NLRB 424, 427 (1997) (after finding confidentiality, the Board engaged in the balancing analysis.) There can be no question that confidentiality interests in health information and peer review exist. *NHS Human Services Inc.*, 2011 WL 1825111 (N.L.R.B. Division of Judges, May 12, 2011) (both Pennsylvania and federal laws hold that personal health information is inherently confidential). Specifically, NLRB Administrative Judge Goldman opined:

> There is medical information, information about the individual's medical diagnosis, prescribed medications, and information about the support required for the individual. There are accounts of the individual's daily status, developments, and functioning included in the plan. If this is not information in which a profound confidentiality interest exists, then the concept of confidentiality has ceased to exist. I note that the General Counsel does not directly take issue with existence of a confidentiality interest in the plan. I find that it is a profoundly confidential document, bearing a weighty confidentiality interest. (emphasis added)

Clearly, medical information is "profoundly confidential." *Id.*

Peer review is a statutorily mandated system intended to be confidential in the interest of improving patient care. The Kansas statutory system of peer review was enacted to protect the public from substandard medicine. The self-critical analysis in a confidential setting is important to ensure peers who participate in peer review are not fearful of voicing criticism. Thus, the names of the committee participants, the matters considered and their deliberative process are critical to achieve the state's objective of brutally honest discussion about a peer's performance of their professional duties.

The ALJ failed to meaningfully analyze Menorah's important confidentiality interest. Rather she declined to evaluate the statute's privilege and confidentiality provisions merely holding there was no meaningful effort to accommodate the confidentiality interests in the union's request. Had she made an effort to evaluate those important interests protected by the statutory confidentiality requirements, she would have concluded the hospital engaged in a proper effort to accommodate any alleged union interests. The hospital's confidentiality interest, which the judge failed to recognize, vastly outweighs the union's alleged need for information about the statutory peer review process.

B. Even Assuming Arguendo That Concerted Activity Or Section 7 Rights Were Implicated By A Peer Review Meeting, An Employee Is Not Entitled To Weingarten Rights If The Peer Meeting Is Limited To Licensing Issues

A *Weingarten* right to request representation "is *limited* to situations where the employee reasonably believes the investigation will result in disciplinary action by the employer. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251(1975) (emphasis added). "Reasonable grounds will . . . be measured . . . by objective standards under all the circumstances." *Id.* at 964, FN 5. Objective standards are determined by the totality of the circumstances of the request. *Southwestern Bell Telephone Co.*, 338 NLRB 552 (2002). Probing the employee's subjective motivations to determine whether a reasonable belief that discipline will result is improper. *NLRB v. J. Weingarten, Inc.*, *supra* at 257.

If an employee has been advised that it is a peer review process and no discipline will be imposed by the employer, an employee cannot have a reasonable belief of employer discipline. Thus, no *Weingarten* rights attach in the context of peer review.

"Exercise of the (*Weingarten*) right may not interfere with legitimate employer prerogatives." *Id.* at 258. With respect to peer review, it is not merely an employer's prerogative that will be impaired, but the hospital's very obligation to comply with state

licensing law. The granting of *Weingarten* rights in peer review would impair the process by waiving confidentiality, which states built into the process to assure full and candid gathering of information. The ALJ in *Menorah* erroneously focused on the peer review statute's failure to explicitly prohibit third party participation. But the statute makes clear the confidentiality of peer review is so critical to the self-critical analysis – and confidentiality will be waived if outsiders are present. A privilege to prevent disclosure of peer review process is lost "if the holder of the privilege has . . . made disclosure of *any part of the matter* . . ." (Kan. Stat. Ann. § 60-437). Thus, adding a union representative to the peer review meeting is contrary to the fundamental privileges and confidentiality obligations imposed by Kansas and so many other states' laws.[16]

The ALJ would have *Menorah* waive the essential privilege against suit for statements made by peer review participants by waiving confidentiality by allowing a third party, the union steward, in the meeting. The ALJ's statement that there was nothing in the statute expressly prohibiting a union steward's participation in peer review is a tunnel vision reading of the Kansas statutory scheme on peer review. The Kansas statute, read in its entirety, would mandate a waiver if the steward participates. Kan. Stat. Ann. § 65-4925. Given the strong public interest in high quality medical care, the Board should not trifle with such interests.

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[16] The following states' statutes provide for confidential nursing peer review: Alaska Stat. § 18.23.030 (2012); Ariz. Rev. Stat. Ann. § 36-2403 (West 2013); Colo. Rev. Stat. Ann. § 12-36.5-104(10) (West 2013); Ga. Code Ann. § 31-7-133 (West 2012); Idaho Code Ann. § 39-1392b (West 2013); Ind. Code Ann. §§ 34-30-15-1 – 34-30-15-3 and 34-30-15-9 – 34-30-15-10 (West 2012); Iowa Code § 147.135 (2013); Mass. Gen. Laws Ann. Ch. 111, § 204(a) (2013); Mich. Comp. Laws § 331.533 (2012); Mo. Rev. Stat. § 537.035 (West 2013); Neb. Rev. Stat. Ann. § 28-435.01 (West 2012); N.C. Gen. Stat. Ann. § 131E-95 (West 2013); Okla. Stat. tit. 63, § 1-1709.1(B)(1) (West 2013); R.I. Gen. Laws Ann. § 23-17-25 (West 2012); Tex. Occ. Code Ann. § 160.007 (West 2013); Vt. Stat. Ann. Tit. 26 §§1441-1443 (West 2013); Wash. Rev. Code Ann. § 4.24.250(1) (West 2013); Wyo. Stat. Ann. § 35-2-910 (West 2013).

If peer review afforded *Weingarten* rights, not only would confidentiality be waived but a union steward would have no obligation to honor a request for confidentiality. The union has a duty to represent the entire bargaining unit – not just the individuals subject to peer review. *Ford Motor Co. v. Hoffman*, 345 U.S. 330, 338 (1953). A steward would interpret that responsibility to require sharing peer review information with other members of the bargaining unit. The only limitation under the Act on a steward sharing information with other employees is that peer review information could not be legally disclosed to other workers in "bad faith." *IBM Corp.*, 341 NLRB 1288, 1293 (2004). That would give the steward broad authority, under the Act, to disclose peer review information to bargaining unit members.

C. Peer Review Confidentiality Is A "Substantial And Legitimate" Reason Which Outweighs Any Section 7 Right Of Health Care Professionals To Discuss Peer Review With Co-workers

Because peer review deals strictly with state licensing and does not invoke hospital discipline, a confidentiality rule restricting employees' right to discuss peer review proceedings is lawful. *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011) (finding a violation of Section 8(a)(1) because it promulgated a blanket rule prohibiting employees from "discussing with other persons any matter under investigation by its human resource department.") (emphasis added). Employees do not have a Section 7 rights to discuss a peer review as it deals strictly with state licensing issues and does not involve the human resources department.

Even assuming arguendo that peer review somehow involves Section 7 rights, state law and the hospital's interest in upholding state law and quality patient care outweigh any alleged Section 7 rights. *Banner Estrada Medical Center*, 358 NLRB No. 93 (2012) makes clear that an employer must only show it has a legitimate justification for confidentiality that outweighs Section 7 rights. Peer review does not have a "blanket policy" prohibiting discussion of matters under investigation by the Human Resource Department. *Hyundai American Shipping Agency*,

supra at 15. The only restriction on discussion of peer review is the confidentiality obligations on peer review participants mandated by state laws. Those restrictions are necessary to protect the peer review process, which constitutes the public policy of all fifty (50) states. Peer review would be seriously compromised if confidentiality of discussions is eroded if the ALJ's decision allowing broad discussion is adopted by the Board.

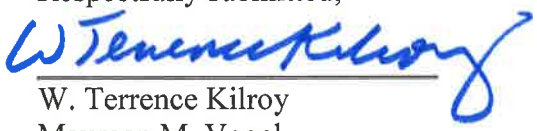
There are no Board decisions ruling that an employee has a right to share, with as many employees as they wish, the issues involved in a peer review proceeding. As ALJ Goldman recognized: "If information (about medicine and treatment) is not information in which a profound confidentiality interest exists, then the concept of confidentiality has ceased to exist." *NHS Human Services, Inc.*, *supra*. Furthermore, candid and full discussion of peer review issues, critical to national health policy, will be seriously undermined, if participants to peer review have an unrestricted right, under the Act, to disregard peer review confidentiality.

CONCLUSION

The ALJ states that there is no Board decision which allows for peer review privilege in NLRB proceedings. In truth, no decision of this Board has ever decided the issue of confidentiality in peer review proceedings. This is a case of first impressions forty (40) years after the Health Care Amendments to the Act.

Medical peer review is a long-established procedure critical for all healthcare providers seeking to provide quality care to patients. For peer review to be meaningful and effective, it is essential that qualified peers engage in frank discussion about medical care. Confidentiality is an important component of that self-critical analysis and fosters the goal of providing high quality and safe care to patients in hospitals throughout the United States. The Board should not compromise the confidentiality of the peer review system.

Respectfully submitted,



W. Terrence Kilroy
Maureen M. Vogel
Polsinelli PC
900 W. 48th Street, Suite 900
Kansas City, Missouri 64112
816-753-1000 (Telephone)
816-753-1536 (Fax)

Counsel for *Amici Curiae* American Hospital Association, Kansas Hospital Association, Texas Hospital Association and Texas Nurses Association

Lawrence Hughes
Assistant General Counsel
Advocacy and Public Policy
American Hospital Association
Liberty Place, Suite 700
325 Seventh St., NW
Washington, D.C. 20004-2802

Deborah Stern
Vice-Pres. Clinical Services and Gen. Counsel
Kansas Hospital Association
215 SE 8th Ave.
Topeka, KS 66603-3906
(785) 233-7436 (phone)
(785) 233-6955 (fax)

Charles Bailey
General Counsel
Texas Hospital Association
1108 Lavaca
Austin, TX 78701-2180
(512) 465-1038

Elizabeth Sjoberg, R.N.J.D.
Associate General Counsel
Texas Hospital Association
1108 Lavaca
Austin, TX 78701-2180
(512) 465-1539

James H. Willmann
General Counsel and Director Governmental Affairs
Texas Nurses Association
8501 N. Mopac Fwy. Ste 400
Austin, TX 78759
(512) 452-0645

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 7th day of February 2014, a true and correct copy of the foregoing document has been served upon the NLRB's via its E-Filing Program and to the following counsel of record via e-mail:

F. Curt Kirschner, Jr.
Jones Day
555 California Street, 26th Floor
San Francisco, CA 94104-1500
ckirschner@jonesday.com

Edward M. Richards
Jones Day
77 West Wacker
Chicago, IL 60601-1692
emrichards@jonesday.com

Micah Berul
2000 Franklin Street
Oakland, CA 94612
mberul@nationalnursesunited.org

Michael E. Werner
National Labor Relations Board, Region 14
8600 Farley Street, Suite 100
Overland Park, KS 66212
michael.werner@nlrb.gov

W. Terrence Kilroy
Counsel for *Amici Curiae*