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Peer Review Processes Under Attack by the National Labor Relations Board

By W. Terrence Kilroy and Maureen M. Vogel

In a case of first impression, on Aug. 27, 2015, the National Labor Relations Board held that a Kansas hospital: (1) must afford an employee *Weingarten*[1] rights before a nursing peer review committee, (2) must allow the union access to peer review documents and information on prior peer review matters and (3) was prohibited from enforcing a confidentiality rule limiting discussion of issues pending before the peer review committee (*Midwest Division–MMC LLC d/b/a Menorah Medical Center*, 362 NLRB No. 193, 8/27/15).

In the *Menorah* case, the NLRB ruled the hospital's failure to afford *Weingarten* rights allowing a union steward to attend the peer review meeting with the professional, its refusal to produce peer review records to the union and its confidentiality rule violated the National Labor Relations Act (NLRA). The hospital recently filed a petition for review of the NLRB decision and order with the U.S. Court of Appeals for the District of Columbia Circuit.[2]

The NLRB decision poses a real threat to confidentiality provisions of most state peer review statutes, which are designed to improve and insure quality patient care and skill of staff by encouraging frank and open discussions in peer review. The following strategies can help protect the important policies of peer review and minimize the risk of NLRB challenges to the process while the D.C. Circuit reviews the case.

The Facts

The *Menorah* case involved two nurses who were represented by a union and were notified by the hospital's Peer Review Diversion Prevention Committee that the committee had reviewed cases that indicated the two nurses may have engaged in unprofessional conduct that the committee could be required to report to the Kansas State Board of Nursing.

The two nurses asked for union representation (*Weingarten* rights) but the hospital denied the request citing the confidentiality requirements of the peer review process. Attendance at the committee meeting was limited to members of the committee and each nurse. The union also asked for documents and information about the committee process. The information the union sought included: (1) a copy of the disciplinary action issued by the committee, all documents utilized by the committee and identification of all committee members; (2) a description of the committee, its purpose, members, member selection process and the role of the committee; (3) a copy/record of where the committee's discipline was placed (personnel file or other files), whether inside or outside the hospital; (4) the names of all nurses who had received a notice to appear before the committee; (5) copies of all professional disciplinary actions issued to any nurse; and (6) ''all information'' regarding allegations of professional disciplinary actions against all nurses. The hospital denied the re-

[1] *Weingarten* refers to *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). The Supreme Court ruled in that case that an employee may request and be entitled to union representation in an employer's investigatory interview that the employee reasonably believes could lead to disciplinary action.

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[2] (*Midwest Division-MMC, LLC v. NLRB*, D.C. Cir., No. 15-01312, *filed* 9/4/15). The petition is available at http://www.bloomberglaw.com/public/document/Midwest_Division__MMC_LLC_v_NLRB_Docket_No_1501312_DC_Cir_Sept_04.

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quests for information, stating that the information sought was not relevant and that it was confidential under the state peer review statute.

The hospital also had a rule restricting employee discussion of matters that had come before the committee and events underlying peer review investigations. The hospital believed that this rule was necessary to comply with the statutory confidentiality requirements for the peer review process.

Hospital Association Arguments

The NLRB granted the American Hospital Association, the Kansas and Texas Hospital Associations, and the Texas Nurses Association (and other Associations), the right to file amicus briefs in the *Menorah* case.[3] The amicus briefs argued that statutory peer review, including its confidentiality requirements, was required by state professional licensing and that peer review and its confidentiality were not terms and conditions of employment established by the employer.

The briefs said peer review was not a proper subject of bargaining and there should be no obligation, pursuant to a bargaining relationship, to provide information to the union about the particulars of a peer review proceeding. They noted that information from the committee in the *Menorah* case was shared with the state licensing authorities, as required by state law, *but not with the hospital's human resource department,* and that the union should not be able to file a grievance over peer review or its recommendations. They said there should be no need for the union to have access to that information and further argued that *Weingarten* rights should not apply because the professional interviewed in peer review would not reasonably believe the subjects covered in that interview would lead to the *employer* imposing disciplinary action, a condition for *Weingarten* rights to apply. The board rejected these arguments.

Kansas Peer Review, Risk Management Laws

The NLRB interpreted Kansas law on peer review and its implications for federal labor law. Subject to specific exceptions, which did not apply here, the law states 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 to any person or entity* or be admissible in evidence in any judicial or administrative proceeding.'' (Emphasis added.) The law specifies that ''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'' (Kan. Stat. Ann. § 65-4915(b)).

Kansas risk management statutes and regulations require medical care facilities to establish an internal risk management program and a system for reporting to the state licensing authorities. Medical care facilities are required to investigate incidents in a peer review process and report certain incidents to appropriate state licensing authorities (Kan. Stat. Ann. § 65-4922, § 65-4923 and § 65-4924, Kansas Admin Regs. § 28-52-4(a)). The stated purpose of the law is to provide and regulate certain aspects of health-care delivery in order to protect the public's general health, safety and welfare (Kan. Stat. Ann. § 65-4929).

The Kansas Supreme Court, in a medical malpractice lawsuit, held that a peer review committee's decision-making process, conclusions and final decisions are protected from discovery by the statutory privilege (*Adams v. St. Francis Regional Medical Center*, 955 P.2d 1169, 1186-1187 (1998)). In *Adams*, the court held that plaintiffs were entitled only to access to ''relevant facts'' obtained in peer review (*Id*). The court also held that the trial judge must conduct an *in camera* inspection and craft a protective order which would permit plaintiffs access to the ''relevant facts'' but redact information about the committee's deliberations, conclusions and final decisions (*Id*).

Weingarten Rights and Peer Review

The NLRB rejected the hospital's refusal to allow union representation during a peer review meeting. It held that employees have *Weingarten* rights if they are faced with attending a committee meeting and reasonably believe that professional discipline can be imposed as a result of that review. The NLRB rejected the argument that *Weingarten* rights do not apply because peer review committee reports are submitted only to state licensing authorities and are not submitted to the employer for disciplinary action. The NLRB unanimously held that a *Weingarten* right to union representation before a peer review committee occurs because the committee had an obligation to refer certain standard-of-care violations to the Kansas State Board of Nursing which could potentially cost employees their health-care licenses and employees without health-care licenses their jobs as health-care providers at the hospital.

Once a nurse requested union representation in peer review, the NLRB held the employer had three options: (1) grant the request, (2) cease or not conduct the interview or (3) offer the nurse a choice of either conducting the interview unaccompanied by a union representative or forgoing the interview. For hospitals determined not to have union stewards sitting in peer review committee meetings, option three may be most appropriate. No outsider would attend peer review committee meetings whether the nurse chose to attend the interview without representation or forgo the interview.

There are other options to limit union participation in peer review. Hospital employers may limit employee interviews to factual matters or opt to use written questions with the professional in lieu of an in-person interview. All deliberations, decision-making processes, conclusions, and final decisions should be conducted outside the presence of anyone who is not a designated member of the committee to protect confidentiality and privilege.

Applying *Weingarten* rights to peer review has potential application for hospitals with nonunion professionals. Currently, *Weingarten* rights are limited to employ-

[3] The authors were counsel to the American Hospital Association, the Kansas Hospital Association, Texas Hospital Association and the Texas Nurses Association in the *Menorah* case before the NLRB.

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ees represented by labor organizations. However, NLRB General Counsel Richard F. Griffin Jr. notified NLRB regional directors in February 2014 that if an NLRB region receives a charge ''involving applicability of *Weingarten* in non-union settings,'' the case should be sent to the NLRB's Office of Advice. Thus, the general counsel has signaled his likely intent to restore *Weingarten* rights to nonunion employees, as was the case with the NLRB during the Carter and Clinton administrations. If the *Menorah* decision is affirmed and the NLRB makes *Weingarten* applicable to nonunion employees, this could affect peer review for all professionals, not just represented employees.

Request for Information About Peer Review

A majority of the NLRB also rejected the hospital's argument that the union had no right to information about the committee, the record of peer review ''discipline'' and all records of nurses called before the committee. The NLRB, after reviewing state law, found that the committee did not meet its burden to establish a legitimate and substantial confidentiality interest in the requested information. The NLRB required all requested documents to be produced and all information disclosed.

In his concurring and dissenting opinion, Member Harry I. Johnson III wrote that the majority gave ''short shrift . . . to the policies behind [peer review] statutes'' and criticized the majority for its ''refusal to give such policies significant weight . . . .'' He argued that the majority was improperly second-guessing ''the state's determination that non-disclosure of some information is fundamental to its regulatory scheme'' and objected to requiring the committee to provide documents and information about past cases. He argued that the hospital had a ''legitimate confidentiality interest in maintaining the integrity of . . . the process by protecting the candor required for peer review to effectively function, which . . . safeguards and improves public health outcomes.'' Ultimately, the dissent asserted that the public health interest ''outweighs'' an employer's typical obligation to disclose documents.

The majority and dissent had differing interpretations of the *Adams* case. The majority acknowledged that deliberations of the committee are privileged but ultimately required the hospital to produce all of the information and documents requested by the union. The dissent contended that *Adams* protection of peer review information is broader and argued that *Adams* obligated the trial court to conduct an *in camera* inspection and issue a protective order to permit plaintiffs access to the facts of the event, while redacting protected information. Thus, the dissent would have found that employees' discipline as well as records ''created for and submitted to the committee for purposes of its decision-making'' were privileged.

However, the dissent conceded the majority properly required the hospital to disclose general procedural information about the peer review committee to the union. It also stated that the hospital should have offered to engage in bargaining with the union about the confidentiality of the prior peer review matters to see if some accommodation could be reached.

Implications of Restricting Confidentiality

Lastly, the hospital had a written rule that prohibited employees and members of the committee from discussing ongoing investigations by peer review committees and discussing ''reportable incidents'' with co-workers. The NLRB found these rules prohibited discussions of events that occurred at peer review committee meetings *and* events underlying peer review investigations. Such a rule, the NLRB held, interfered with an employee's right, under Section 7 of the NLRA, to engage in concerted activities, including an employee's right to share information about terms and conditions of employment with co-workers. The NLRB unanimously held that there was no ''legitimate basis'' for those prohibitions and that the rule was unlawful under the act. The NLRB relied on the failure of the Kansas peer review statute to specifically require confidentiality by employees participating in peer review.

The NLRB's decision rejecting confidentiality for employees ignores the potential waiver of peer review privilege associated with employees discussing peer review with co-workers. Hospitals desiring to preserve the privilege under their state laws should consider appointing nonemployees or supervisors (who are not covered by Section 7 rights) to peer review committees. Following this decision, hospitals may be able to appoint committee members who can be required to keep peer review matters confidential; however, confidentiality obligations cannot be imposed on employees who appear before peer review committees.

The NLRB's decision prohibiting the hospital's confidentiality rule requiring its employees not to discuss peer review applies to all hospitals, not just those with union represented professionals. Section 7 rights of employees to discuss terms and conditions of employment apply to all employees, not just represented employees.

Conclusion

This decision, if upheld, will impact the manner in which health-care employers, particularly those with represented professionals, conduct peer review. It also will diminish the employer and employees' expectation of confidentiality of the process.

The petition for review filed by the hospital offers no short-term help for hospitals. During the pendency of the appeal to the D.C. Circuit, hospitals with represented professionals who choose to ignore the decision and apply policies and procedures that the NLRB found to violate the NLRA do so at their peril. If the NLRB files charges against hospitals with similar policies and actions, the general counsel is likely to issue complaints, hold hearings and urge judges and the NLRB to find NLRA violations.

Thus, hospitals should review their state peer review statutes, internal peer review policies and documents utilized in their peer review processes in order to develop strategies to protect the confidentiality of peer review and to manage potential union requests for information and *Weingarten* requests.