

Peer Review: The Next Union Battleground?

By **Matt Lynch**
Shareholder
Sebris Busto James



Hospitals are well aware of the importance of peer review in maintaining quality patient care and compliance with Federal and State quality measures. All 50 states require providers to conduct peer review as a means to ensure patient care standards. Usually, peer review is a confidential process not subject to public disclosure, but that may change if the National Labor Relations Board upholds an administrative law judge's decision requiring a Kansas hospital to open peer review proceedings and documentation to union representatives.

In *Midwest Div.-MMC, LLC (Menorah Medical Center)*, the hospital notified several nurses that they were to appear before the hospital's Medication Diversion Prevention Committee as part of separate investigations regarding the nurses' conduct. The committee was one of several peer review committees the hospital maintained to investigate patient care issues. The hospital's nursing peer review committee, made up only of nurses, investigated incidents concerning discipline and determined whether a referral to the state board of nursing was required. The nurses, who were in a bargaining unit of other RNs represented by the National Nurses Organizing Committee-Kansas/National Nurses United, requested that a union representative accompany them to their respective peer review committee meetings. The hospital denied their requests, stating that the meetings were closed to all except the targets of the investigation and the committee members. The nurses appeared without union representation and there were no resulting disciplines of either nurse. Following these meetings, the union submitted information requests to the hospital seeking information regarding the

makeup of the committees, and the identities and disciplinary records of these and other nurses who were subject to peer review investigation. The hospital denied the union's requests, stating that "all business conducted in the committee is confidential between the Hospital and the State."

During this time, the hospital maintained a strict policy of confidentiality concerning peer reviews and investigations. The policy read:

"No Hospital employee, Medical Staff Member, or Allied Health Professional shall disclose information concerning reportable incidents except to their superiors, Hospital Administration, the Risk Manager, the appropriate Hospital and Medical Staff committees, legal counsel for the Hospital, or the applicable licensing agencies, unless authorized to do so by the Risk Manager, Administration, or legal counsel."

The confidentiality policy appeared to be based on a Kansas statute providing that peer review investiga-

tion materials were privileged and not subject to discovery or other public disclosure.

The union filed an unfair labor practice charge with the NLRB, alleging the hospital unlawfully refused to allow the nurses' to have a union representative present during the peer review "investigatory" meeting as required by *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975)(so-called "*Weingarten* rights"). The union also claimed that Menorah unlawfully refused to disclose the requested information. The NLRB issued a complaint, and the matter went before an administrative law judge, who agreed with the union that the hospital violated the employees' *Weingarten* rights and should have provided the requested information.

In her decision, the judge found the state law did not require or justify the hospital's implementation of a broadly worded policy or decision to exclude union representatives from investigatory meetings, which nurses reasonably believed could result in disciplinary action. The ALJ said Kansas law required each medical facility in the state to maintain a risk management program "to monitor the standard of care provided to patients by the medical facility and investigate

complaints that the standard of care has been violated." She acknowledged this required hospital plans to include procedures for investigating and analyzing reportable incidents and that serious incidents must be reported to state licensing authorities. Though hospital officials interpreted the Kansas statute to preclude an employee under investigation from being accompanied by anyone during a committee session, the ALJ said this was wrong because the Kansas law does not expressly prohibit employees from having union representatives present in peer review committee meetings. The confidentiality policy was "overly broad on its face." Furthermore, the ALJ said that the employer's denial of representation to the two nurses violated the nurses' *Weingarten* rights, and that the hospital unlawfully failed to respond to the union's requests for information concerning peer review proceedings because they were relevant to and necessary for the union's representation of employees. *Midwest Div.-MMC, LLC*, NLRB ALJ, No. 17-CA-88213, December 12, 2013.

The hospital has appealed the ALJ's ruling to the National Labor Relations Board. Already, the American Hospital Association and allied groups have filed *amicus*

briefs requesting that the NLRB reject the ALJ's decision as contrary to the purposes and policies behind peer review investigations. Hospitals in Washington should monitor this case carefully. Though Washington statutes and a recent Washington Supreme Court case provide peer review confidentiality and discovery protections similar to those in Kansas, there are no express prohibitions against disclosure to union representatives, which the ALJ in *Menorah* found to be the overriding determining factor. Until there is finality to this issue at the NLRB and in the courts, you should anticipate your unions will attempt to become more active players in any peer review proceedings.

Matt Lynch is a shareholder with Sebris Busto James. Matt represents private and public sector health care and other employers in all aspects of labor relations, including in collective bargaining, grievances and labor arbitrations. He has handled many cases in front of the NLRB and PERC, and also advises employers on day-to-day and strategic employee relations issues, including discipline and discharge, employee leaves, employment agreements, policy development, handbooks, wage and hour and discrimination. Contact Matt at mlynch@sebrisbusto.com or 425-450-3387.

Reprinted with permission from the Washington Healthcare News. To learn more about the Washington Healthcare News visit wahcnews.com.