No Weingarten Rights for Nurses in Peer Review Proceeding, Federal Appeals Court Rules

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Nurses had no right to union representation in their hospital employer’s peer review committee proceedings, the Court of Appeals for the District of Columbia Circuit has ruled. Midwest Division – MMC, LLC, dba Menorah Medical Center v. NLRB, No. 15-1312 (D.C. Cir. Aug. 18, 2017). The Court, however, found the hospital violated the National Labor Relations Act by refusing to provide the union information it requested about the peer review committee and by maintaining an overbroad confidentiality rule.

Menorah Medical Center maintains a peer review committee consistent with Kansas law. The committee investigated two nurses for substandard conduct. The nurses’ union filed an unfair labor practice charge with the National Labor Relations Board about this investigation. It alleged Menorah violated the NLRA by refusing to allow the nurses to have union representation at the committee’s hearings; refusing to provide information the union requested about (i) the structure and functions of the peer review committee and its members, (ii) allegations against nurses investigated by the committee (and the sources of those allegations), and (iii) any discipline issued by the committee; and maintaining an overly broad confidentiality rule.

The NLRB upheld an administrative law judge’s decision finding the conduct alleged by the union violated the NLRA.

The appeals court rejected the NLRB’s finding that the nurses had a right to union representation at the peer review committee hearings. The Court explained that under the U.S. Supreme Court’s decision in NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), an employee’s rights under the NLRA are infringed when an employer compels him to appear at an investigatory interview the employee reasonably believes might result in disciplinary action, but denies him union representation. Conversely, absent compulsory attendance, the right to union representation does not arise. Here, the nurses received letters advising them the peer review process “afforded an opportunity” to appear before the committee “if you choose.” The letters also invited them to “submit a written response...if you wish in lieu of an appearance.” Accordingly, the Court ruled the nurses were not compelled to attend a hearing and, therefore, had no Weingarten right to union representation.

The Court next ruled the union was entitled to the information it requested. Menorah argued its confidentiality interests based upon Kansas peer review statutes justified its refusal to provide the information. The Court found the state law privilege was not so broad as to attach to “any document that may incidentally come into committees’ possession.” The requested information was relevant and the union’s interest in the requested information prevailed over Menorah’s asserted confidentiality interests, the Court ruled.

Finally, the Court agreed with the NLRB that Menorah’s confidentiality policy was overbroad because employees would reasonably understand the rule’s prohibition on disclosure of reportable incidents as barring discussion of events underlying peer review investigations. Therefore, the rule was unlawful because these underlying events also could be the subject of grievances under the collective bargaining agreement, making such discussion protected by the NLRA.

In a partial concurrence and dissent, one judge on the three-judge panel questioned whether Weingarten rights apply in peer review interviews, because they are part of the state’s regulatory apparatus, rather than the...
employer's disciplinary process. This judge also would have vacated the NLRB's order to the extent it ruled the union was entitled to all of the peer review information it requested and would have remanded the case to the NLRB to properly re-balance Menorah’s confidentiality interest against the union's asserted need for the information.

Hospitals should review their peer review policies and consider appropriate revisions to address the Court’s analysis of the scope of Weingarten rights and the duty to furnish information to unions.

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