

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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SALEM HOSPITAL CORPORATION  
a/k/a MEMORIAL HOSPITAL OF  
SALEM COUNTY

*and*

HEALTH PROFESSIONALS AND  
ALLIED EMPLOYEES (HPAE)

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: Case No. 04-CA-64458  
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**EMPLOYER’S BRIEF IN SUPPORT OF ITS  
EXCEPTIONS TO THE DECISION OF  
CHIEF ADMINISTRATIVE LAW JUDGE ROBERT A. GIANNASI**

As the Employer in the above-captioned case, Salem Hospital Corporation, a/k/a Memorial Hospital of Salem County (hereafter, “Salem” or the “Hospital”) hereby submits, pursuant to §102.46 of the Rules and Regulations of the National Labor Relations Board (hereafter, the “Board”), the following Brief in Support of the Exceptions to the Decision of Chief Administrative Law Judge Robert A. Giannasi, dated April 17, 2012 (hereafter, the “Exceptions”).

## STATEMENT OF THE CASE

### **I. The Underlying Representation Proceedings**

As the ALJ remarked, the representative case was comprised of relatively extensive proceedings. By way of a simple summary, the proceedings arose from a Petition for Certification of Representative (hereafter, the “Petition”) filed on May 19, 2010 by Health Professionals and Allied Employees (hereafter, the “HPAE” or the “Union”), which sought to represent the Registered Nurses employed by the Hospital, which operates a small acute care facility in Salem, New Jersey.

Following a hearing on the Petition, the Regional Director for Region 4 issued a Decision and Direction of Election, whereby she rejected the arguments raised by the Hospital and, aside from the exclusion of a few Charge Nurses, directed an election in the unit sought by the Union. The Union prevailed in the election and the Hospital filed timely objections. The objections were the subject of various actions by the Regional Director and the Board. Ultimately, on August 3, 2011, the Board issued a Decision and Certification of Representative, whereby the Board overruled the Hospital’s objections and issued a Certification of Representative in favor of the Union.

### **II. The Underlying Refusal to Bargain Proceedings**

On September 14, 2011, the Union filed with the Board a Charge which alleged that Salem had refused to recognize and bargain with the Union in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, as amended, (hereafter, the “Act”). On September 19, 2011, the Regional Director, on behalf of the Acting General Counsel (hereafter, for ease of reference, the “General Counsel”), issued a Complaint and Notice of Hearing, which adopted and reiterated the Union’s allegations. On November 29, 2011, the Board issued a Decision holding that all of the Hospital’s defenses raised in its Answer were or could have been litigated in prior proceedings, and granting the General Counsel’s Motion for Summary Judgment. In response, the Hospital filed a Petition for Review with the United States Court of Appeals for the District of Columbia Circuit. This “testing of certification” proceeding remains pending before the DC Circuit.

## **II. The Instant Charge**

On September 14, 2011, the Union filed with Region 4 the instant Unfair Labor Practice Charge, whereby the Union alleged that the Hospital violated Sections 8(a)(1) and 8(a)(5) of the Act due to Salem’s refusal to provide information requested by the Union. On December 13, 2011, the General Counsel issued a Complaint that incorporated the Union’s allegation. On December 27, 2011 the Hospital filed an Answer to the Complaint, which

was amended by the Hospital on February 16, 2012. A hearing was held on the Complaint on March 5, 2012 before Chief Administrative Law Judge Robert A. Giannasi (“ALJ Giannasi”) in Philadelphia, Pennsylvania.

At the Hearing held before ALJ Giannasi, the Hospital made an Offer of Proof on the subject of the Affirmative Defense averred by Paragraph 14 of the Hospital’s Amended Answer. (Tr. 14) By way of the Offer of Proof, the Hospital sought to enter evidence into the record to support the proposition that the Board’s underlying Certification in this case was not valid or enforceable, insofar as the Certification arises from the Board’s Healthcare Rule (29 C.F.R. Part 103), which is no longer valid or enforceable due to the issuance of the Board’s Decision in Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011). The Hospital’s Offer of Proof was rejected by ALJ Giannasi, but was placed into the Rejected Exhibit File. (Tr. 14) At that time, the General Counsel stated its position that the Specialty Healthcare decision was inapplicable to the case at bar, due to the fact that it dealt with units in nursing homes rather than acute care facilities. (Tr. 15)

Next, the General Counsel solicited testimony from one witness, Ms. Sandra Lane, a staff representative of the Union. Ms. Lane testified that following the issuance of the Certification, she had written a letter,

requesting information from the Hospital. (GC Ex. 4) The letter was a full page in length and included requests for information concerning, *inter alia*: (1) Bargaining unit employee information for the past two years (which the Union requested the Hospital “provide in a Microsoft Excel file”); (2) “Total costs” for various Hospital benefits, including on-call pay, paid time off, shift differential payments, and education payments; (3) The total number of hours worked by Agency staff and a list of all Agency staff currently working at the Hospital, including a copy of their contracts; (4) Information concerning the Hospital’s pension and benefit programs; (5) Information concerning the Hospital’s staffing policies and procedures; and (6) Copies of all the Hospital’s policy and procedure manuals. (Id.)

Ms. Lane further testified that the Union was aware that their requests for information concerning agency staff concerned individuals outside of the bargaining unit, and notably, concerned the information of individuals who were not even employed by the Hospital. (Tr. 20) As to a number of the other information request items; specifically Items A(2), A(3), A(4), A(6), A(7), A(8), B and C, Ms. Lane testified that despite the wording of its Information Request, the Union intended only to seek information about bargaining unit employees. (Tr. 19-20, 25)

After the close of the hearing before ALJ Giannasi on March 5, 2012, the parties submitted Post-Hearing Briefs to ALJ Giannasi on April 5, 2012. In its Post-Hearing Brief, the Hospital requested that ALJ Giannasi take official notice of the record in the underlying representation and refusal to bargain proceedings. Based upon that record, the Hospital urged ALJ Giannasi to find that the Union's Certification was invalid and unenforceable, and accordingly to dismiss the Complaint in the instant case. The Hospital next argued that the underlying Certification was invalidated by the Board's Decision in Specialty Healthcare & Rehabilitation Center of Mobile, 357 NLRB No. 83 (August 26, 2011), which had the effect of overruling the Board's Healthcare Rule. Consistent with the defenses averred by its Answer, the Hospital also argued in its Post-Hearing Brief that the Union's information request was both overly broad and unduly burdensome due to both the enormous amount of information sought by the Union and the Union's lack of effort to pare down its information request, as well as the fact that the Union's information request was overly broad and ambiguous on its face. Finally, the Hospital argued that the Union's information request sought confidential and proprietary information for which the Union had failed to make the requisite showing of relevance. Finally, the Hospital explained that it was under no duty to request that the

Union modify its information request, due to the fact that the testing of Certification proceedings in the case are ongoing. For all these reasons, the Hospital urged ALJ Giannasi to dismiss the Complaint.

On April 17, 2012, ALJ Giannasi issued his Decision in the instant case. ALJ Giannasi declined to consider the Hospital's evidence regarding the impact of the Board's Decision in Specialty Healthcare upon the instant case, concluding that the Hospital had not presented the "special circumstances" necessary to relitigate an issue which ALJ Giannasi ruled could have been raised in the prior representation proceedings underlying the instant case. Decision p. 4. ALJ Giannasi ruled that, as to the information request itself, the information request involved "mostly" information pertaining to employees in the bargaining unit. Id. p. 6. Additionally, ALJ Giannasi concluded that the information sought regarding contract employees also met the Board's standards for relevance. Id. Finally, ALJ Giannasi held that the Hospital was obligated to seek accommodations from the Union as to the overly broad, unduly burdensome and confidential and proprietary information sought by the Union, and ruled that the Employer's defenses were without merit due to the fact that the Hospital had not submitted any evidence as to these defenses at the hearing before ALJ Giannasi on March 5, 2012. Id. As a result, ALJ Giannasi

found that the Hospital had violated Section 8(a)(5) and (1) of the Act. Id. p. 7.

### QUESTIONS PRESENTED

- 1.) Whether ALJ Giannasi erred by failing to consider the Hospital's arguments regarding the validity of the underlying Certification of the Union. See Exception Nos. 1, 5.
- 2.) Whether ALJ Giannasi erred by failing to consider the Hospital's defense under Specialty Healthcare. See Exception Nos. 2, 5.
- 3.) Whether ALJ Giannasi erred by failing to find that the Union's information request was overly broad and unduly burdensome. See Exception Nos. 3, 5.
- 4.) Whether ALJ Giannasi erred by failing to rule that the Union's information request improperly sought both confidential and proprietary information from the Hospital. See Exception Nos. 4, 5.

### ARGUMENT

#### **1.) THE ALJ ERRED BY FAILING TO CONSIDER THE HOSPITAL'S ARGUMENTS REGARDING THE VALIDITY OF THE UNDERLYING CERTIFICATION**

Despite the fact that ALJ Giannasi accepted the Employer's offer to consult the record in the underlying representation and unfair labor practice cases involved in this case (see FN 4), ALJ Giannasi failed to

address the Hospital's arguments related to the validity of the underlying Certification, save for the Hospital's argument relating to the issuance of the Board's Decision in Specialty Healthcare. A number of errors were made in the course of the underlying proceedings, all of which affect the validity of the Certification, and all of which were referred to ALJ Giannasi for review by the Hospital in its Post-Hearing Brief. For ALJ Giannasi to review the record from the representation case, but then decline to address the defenses averred by Salem's Answer is to deny the Hospital the opportunity to have a large, if not majority, portion of its argument unheard in this case. At the same time, the Judge's failure to address and resolve the Hospital's defenses equates to a violation of the Administrative Procedure Act. Accordingly, the Board should sustain Salem's Exception No. 1.

**2.) THE ALJ ERRED BY FAILING TO CONSIDER THE RAMIFICATIONS OF THE BOARD'S DECISION IN SPECIALTY HEALTHCARE**

Though ALJ Giannasi did discuss in his Decision the Hospital's argument regarding the impact of the Board's Decision in Specialty Healthcare, he did not reach the merits of the Hospital's argument. Instead, ALJ Giannasi ruled that the Hospital should have litigated the Specialty Healthcare argument during the representation proceedings before the

Board, and that the fact the Board's Decision in Specialty Healthcare was issued after the Board certified the Union in the underlying proceedings did not amount to the "special circumstances" to litigate the defense. ALJ Giannasi ruled that the Hospital had not shown the special circumstances necessary to justify consideration of the Hospital's argument.

ALJ Giannasi's Decision regarding the Hospital's arguments involving Specialty Healthcare ignores the reality of litigation, particularly responsible case development. In Specialty Healthcare, for unit determinations taking place for the non-acute care industry, the Board abandoned the agency's "pragmatic community of interest" approach, whereby the agency considered, amongst other sources, the record developed as part of the Healthcare Rule. In large measure, the Board abandoned the pragmatic community of interests approach due to the "dynamic" nature of the non-acute care industry, which had undergone significant change since the Healthcare Rule was promulgated in 1989. Aside from the fact that the Hospital's attorneys required a fair opportunity to simply review, and analyze the implications of, Specialty Healthcare, Salem's attorneys required a fair opportunity to investigate the changes the acute care industry has experienced since the promulgation of the Healthcare Rule roughly twenty-three years ago, and once the changes were ascertained,

determine the best methods by which to prove the changes. Needless to say, such a survey of an industry requires a considerable amount of time, and Salem's work was not yet done by the time the Answer was filed as part of the refusal to bargain proceedings before the Board, which, in any event, promptly granted the General Counsel's Motion for Summary Judgment. This practical explanation provides precisely the type of "special circumstances" contemplated by the Board in Pittsburgh Plate Glass. Therefore, ALJ Giannasi should have reviewed the merits of the Hospital's arguments regarding Specialty Healthcare, and consequently, determined the ramifications of the Board's Decision upon the case at bar.

**3.) THE ALJ ERRED BY FAILING TO FIND THE UNION'S INFORMATION REQUEST OVERLY BROAD AND UNDULY BURDENSOME**

The Hospital provided in its Post-Hearing Brief factual and legal arguments to support its position that the Union's information request was both overly broad and unduly burdensome. However, ALJ Giannasi, in issuing his April 17, 2012 Decision, primarily took the Hospital to task for not raising these matters with the Union and providing the Union with an opportunity to answer the Hospital's concerns regarding the breadth and burden of the information request. ALJ Giannasi's position in his Decision ignores completely the Hospital's argument, presented in its Post-Hearing

Brief, that the Hospital was not required to take such steps in the particular situation at bar. The Hospital argued, and ALJ Giannasi himself acknowledged in his Decision, that the testing of Certification proceedings are ongoing in this case. (See Decision FN 2). Accordingly, the Hospital argued that the Hospital should not be deemed to be under any obligation to provide such notification to the Union. ALJ Giannasi did not in any way address the Hospital's position in his Decision, despite the fact that he acknowledged that the testing of Certification proceedings were currently pending, and therefore his Decision must not stand.

Furthermore, ALJ Giannasi failed to appreciate the Hospital's position, again supported by legal precedent, that the fact that some of the information sought by the Union was presumptively relevant did not preclude the Hospital's arguments that the information request was unduly burdensome and overly broad. Therefore, ALJ Giannasi's conclusion that the information request involved "mostly" information that was presumptively relevant misses the point that the information request could still be considered overly broad and unduly burdensome, and therefore, that further analysis of the issue was required on the part of ALJ Giannasi. In conclusion, therefore, ALJ Giannasi's analysis of this issue in his Decision fell short of the complete review that ought to have been conducted in this

case. As elsewhere, ALJ Giannasi did not reach and address the merits of the Hospital's argument, and therefore his Decision remains incomplete.

**4.) THE ALJ ERRED BY FAILING TO RULE THAT THE UNION'S INFORMATION REQUEST SOUGHT CONFIDENTIAL AND PROPRIETARY INFORMATION**

ALJ Giannasi made the same error twice in his Decision, when in his analysis of the Hospital's claim that the information request sought proprietary and confidential information he stated that the Hospital was obligated to inform the Union of its concerns and provide the Union with an opportunity to rectify its information request. As stated above, the Hospital argued in its Post-Hearing Brief that, due to the fact that the testing of Certification proceedings are ongoing in this case, the Hospital is not obligated to follow the procedure of informing the Union of its concerns regarding the information request.

Furthermore, ALJ Giannasi faulted the Hospital for failing to present evidence in support of the argument that the information request sought confidential information from the Hospital. The ALJ's decision was, in this regard, improper. Though ALJ Giannasi is correct in his assertion that the Hospital did not introduce additional evidence of the confidential nature of the information sought by the Union, this fact alone does not necessitate a

finding that the information request did not improperly seek confidential information. Rather, it illustrates the fact that the Union's information request was problematic on its face – it simply required no additional evidence to prove this fact. Instead, the Hospital relied upon the plain language of the information request and Board precedent to make its argument on this point, and should not have been faulted by ALJ Giannasi for doing so.

### CONCLUSION

For all the foregoing reasons, the Employer excepts to the Decision of Chief Administrative Law Judge Robert A. Giannasi, and respectfully requests that his Decision be overturned.

Dated: West Hartford, Connecticut  
May 15, 2012

Respectfully Submitted,

Kaitlin K. Brundage

Kaitlin K. Brundage, Esq.  
Attorney for Salem Hospital Corporation,  
a/k/a Memorial Hospital of Salem County  
147 Loomis Drive

West Hartford, Connecticut 06107  
(860) 307-3223  
brundagekk@gmail.com

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**CERTIFICATE OF SERVICE**

The Undersigned, Kaitlin K. Brundage, Esq., being an Attorney duly admitted to the practice of law, does hereby certify that, pursuant to 28 U.S.C. §1746, that the Employer's Brief in Support of Exceptions to the Decision of Chief Administrative Law Judge Robert A. Giannasi was e-filed on Tuesday, May 15, 2012 with the National Labor Relations Board through the website of the National Labor Relations Board ([www.nlr.gov](http://www.nlr.gov)).

The Undersigned does hereby certify that, on May 15, 2012, a copy of the Employer's Brief in Support of Exceptions to the Decision of Chief Administrative Law Judge Robert A. Giannasi was served by email upon the following:

William Slack, Jr.

Counsel for the Acting General Counsel  
National Labor Relations Board, Region 4  
615 Chestnut Street, 7<sup>th</sup> Floor  
Philadelphia, Pennsylvania 19106  
William.Slack@nlrb.gov

The Undersigned does hereby certify that, on May 15, 2012, a copy of  
the Employer's Brief in Support of Exceptions to the Decision of Chief  
Administrative Law Judge Robert A. Giannasi was served by email and  
overnight carrier upon the following:

Lisa Leshinski, Esq.  
Attorney for the Charging Party  
Health Professionals and Allied Employees  
208 White Horse Pike  
Haddon Heights, New Jersey 08035

Dated: May 15, 2012  
West Hartford, Connecticut

Respectfully Submitted,

Kaitlin K. Brundage

Kaitlin K. Brundage, Esq.  
Attorney for Salem Hospital Corporation,  
a/k/a Memorial Hospital of Salem County  
147 Loomis Drive  
West Hartford, Connecticut 06107  
(860) 307-3223  
brundagekk@gmail.com