

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

SODEXO AMERICA LLC

Case No. 21-CA-39086

and

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND  
USC UNIVERISTY HOSPITAL

and

Case No. 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Case Nos. 21-CA-39328  
21-CA-39403

NATIONAL UNION OF HEALTHCARE  
WORKERS

**AFFIDAVIT OF EVA HERBERGER IN SUPPORT OF MOTION  
BY RESPONDENT USC UNIVERSITY HOSPITAL  
FOR SUMMARY JUDGMENT**

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Attorneys for Respondent  
USC UNIVERSITY HOSPITAL

I, Eva Herberger, hereby make the following statement:

1. I have been employed by Respondent USC University Hospital (the "Hospital") as Manager, Human Resources since April 1, 2009. In that capacity, I am responsible for the implementation and administration of the Hospital's human resources policies and managing compliance with all applicable collective bargaining agreements. I am over the age of eighteen (18) years and I am competent to give this statement. This affidavit is based on my personal knowledge of the facts and review of relevant documents.

2. The Hospital is a private research and teaching hospital located near Downtown Los Angeles. It specializes in acute care. Prior to April 2009, the facility was owned and operated by Tenet Healthcare Corporation ("Tenet"). I was employed by Tenet at the Hospital as a Senior Human Resources Generalist from June 2004 through August 2005, when I was promoted to Human Resources Manager. I remained in that position after the Hospital was acquired by the University of Southern California ("USC") in April 2009. I was also employed by Tenet in the human resources department at Daniel Freeman Memorial Hospital from 1998 through 2002, Century City Hospital from 2002 through 2003, and Queen of Angels-Hollywood Presbyterian Medical Center from 2003 through 2004.

3. In June 2004, SEIU United Healthcare Workers - West ("SEIU") won an election to represent a unit of service and maintenance employees and a unit of professional employees at the Hospital. From that time, the Hospital worked with SEIU as the representative of those employees and complied with all of the requirements of the subsequently negotiated collective bargaining agreements. USC began operating the Hospital on April 1, 2009. Neither USC nor the Hospital has signed any agreement relating to the bargaining unit at issue in these proceedings. Rather than overturning the status quo, however, the Hospital has voluntarily

complied with the wage schedules provided for by the last Tenet-SEIU contract, participated in the grievance process with SEIU, and has provided benefits to members of the unit that, where possible, are comparable to those called for in the Tenet-SEIU contract.

4. In May 2010, the National Union of Healthcare Workers (“NUHW”) won an election to represent the service and maintenance unit previously represented by SEIU. The majority of the professional unit voted for no union. NUHW immediately called for negotiations on a new contract, which are ongoing.

5. From the time I first began working at the Hospital in 2004, through the present, there has been in effect an Off-Duty Access Policy (the “Policy”), which bars employees from the Hospital’s premises when they are not scheduled to work except when they are visiting a patient or are themselves obtaining medical care. The Policy is contained in the Human Resources Manual, which is available, in printed form, to all Hospital employees and is also available to all employees on the Hospital’s intranet. The Policy has also been continuously posted on bulletin boards since before my arrival in June 2004. A true and correct copy of the Policy, in its current form, is attached as Exhibit 1. As indicated in the box at the bottom right, the Policy was first enacted (by Tenet) in 1991. It was revised in 2000, 2005 and 2008. Copies of the 2000 and 2005 versions of the Policy are attached hereto as Exhibits 2 and 3, respectively. Except for the numbering in the Policies Manual, the Policy has remained essentially unchanged. Tenet maintained and enforced the same policy at each of the Tenet hospitals at which I have worked.

6. It is my understanding, based on discussions with Tenet’s Labor Relations Department, that Tenet intended the Policy to be strictly enforced so as to reduce claims for wages and overtime for off-the-clock work performed by employees claiming they had stayed or

come back onto the facility outside their scheduled work hours. In 2004, Tenet's Director of Labor Relations, Hector Chavez, came to the Hospital to check that the Policy was properly disseminated. At that time, he reiterated to me and the rest of the Hospital's management that enforcement of the Policy was designed to prevent employees from working off the clock and that it was necessary to reduce claims for additional wages, overtime and other pay premiums. Mr. Chavez further stated that failure to enforce the policy had resulted in numerous claims for unpaid wages and overtime compensation at several Tenet facilities.

7. The Human Resources Department has the responsibility for monitoring compliance with the Policy and providing direction and guidance to supervisors in enforcing it. However, in my experience, the Policy is well known and very much a part of the Hospital's culture. In my capacity as Manager, Human Resources I have applied the Policy at the Hospital for the purpose of eliminating claims for off-the-clock work. The Policy has helped accomplish this purpose because it requires management approval before employees can work outside their scheduled hours. It has also been effective in reducing the number of claims for workers' compensation.

8. To my knowledge employees rarely, if ever, violate the Policy. I am not aware of any instance in which we knowingly allowed an employee to violate the Policy without consequence. Nor did SEIU complain to me about the Policy or its enforcement or file an unfair labor practice based on the Policy at any time prior to September 2009.

9. Pursuant to the Policy, employees may be in the Hospital when they are held over or called in to work at times they are not scheduled to work in order to cover emergencies or other staffing shortages. At those times, they are at the Hospital for no other purpose than to perform their job duties at the specific direction of management. The only other exceptions to

the Policy are for Hospital employees who are in need of medical care or who wish to visit a patient. When employees come to the Hospital for any other purpose than performing their assigned job duties, they are required--as would any member of the public--to use the visitor entrance, sign in with Hospital security, and obtain a visitor pass. They may not wear their employee uniform or display their employee badge. Except under these very limited circumstances, off-duty employees are not allowed in the interior of the Hospital.

10. Employees who obtain medical care at the Hospital can take advantage of a waiver of co-pay requirements which otherwise would be required under their health plans. They can enter the Hospital in the same capacity and following the same procedures as any other patient and, except for the waiver of the co-pay requirement, they receive no different treatment. I have, on at least two occasions, encountered employees who were in the Hospital for medical treatment. Consistent with the Policy, they were not wearing a uniform or employee badge and were only approved for access to specific areas of the Hospital as necessary for their treatment. More frequently, I have also observed employees waiting at the reception area to see friends or relatives who were admitted to the Hospital. They too were not wearing their employee uniform or badge and they were not admitted to working areas of the Hospital.

11. The Hospital requires its subcontractors, such as Sodexo America, LLC, which operates the Hospital's cafeteria, to enforce the Policy both with respect to its own and Hospital employees. The cafeteria is inside the Hospital and does not have a separate entrance. In the summer of 2010, Officer Charles Holloway of USC's Career and Protective Services division recommended to the Hospital's management that the Hospital's cafeteria not be open to the public so as to safeguard the safety of our patients. Officer Holloway informed us that, in making that recommendation, he was relying on a review of the Hospital's security procedures

conducted by the Los Angeles Police Department. We accepted his recommendation. The Hospital's cafeteria is only open to on-duty employees, physician staff, and visitors who are visiting admitted patients. A true and correct copy of the Hospital's cafeteria policy is attached as Exhibit 4.

12. The University of Southern California has adopted policies and guidelines to comply with the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Hospital has adopted those policies. A true and correct copy of Policy No. GEN-104, titled "Limiting Uses and Disclosures of Protected Health Information to the Minimum Necessary," is attached as Exhibit 5. It explains that the Hospital will make reasonable efforts to limit access by persons authorized to receive confidential patient information to only the categories of information they are authorized to have. The Hospital's ability to limit access to confidential information to those authorized to have it and to limit the information those authorized persons have would be severely hampered if employees had free, unsupervised access to every part of the Hospital at all times. The Hospital is approximately 530,000 square feet and has multiple stories.

13. On May 4, 2010, the Hospital suspended respiratory therapist Michael Torres with pay after he entered various working areas of the Hospital, including the Bronchoscopy Lab, without authorization while off-duty and was disrespectful and uncooperative with management (including myself) and Hospital security. Although I advised Mr. Torres that he was on suspension and not allowed on Hospital premises, he returned the next day and again engaged in disrespectful and insubordinate behavior. The Hospital engaged an outside investigator, Michael Wolfram, to investigate the facts regarding Mr. Torres' presence at the Hospital, his conduct and interactions that day and the applicability of any Hospital policies or practices relating to the facts he may find. After interviewing Mr. Torres and several other

witnesses, Mr. Wolfram reported his findings to me. I also received the reports of other supervisors who came in contact with Mr. Torres on May 4 and May 5. Based on the totality of the investigation, including Mr. Torres' prior disciplinary record, the Hospital demoted Mr. Torres on May 13, 2010 from his position as Lead and issued a final warning based on his insubordination, failure to cooperate with management and security personnel, poor judgment, and violation of the Policy. A true and correct copy of the written warning issued to Mr. Torres, dated May 13, 2010, is attached as Exhibit 6. Mr. Torres' previous disciplinary record includes disciplinary action for his confrontational, belligerent, and unprofessional behavior. That previous disciplinary action was upheld in arbitration. A true and correct copy of the arbitration decision upholding the previous discipline, dated February 26, 2007, is attached as Exhibit 7.

14. On June 25, 2010, NUHW organized a loud demonstration at the office of the Hospital's CEO to protest what they wrongfully believed was going to be the Hospital's failure to grant scheduled pay increases. The Hospital did not interfere with this demonstration. However, three employees (Ruben Duran, Alex Corea, and Noemi Aguirre) who were not scheduled to work that day but entered the Hospital were verbally warned by their supervisors for their violation of the Policy. They were wearing their employee badges and did not sign in at security.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing affidavit is true and correct.

Executed this 31 day of January, 2011 in Los Angeles, California.

  
\_\_\_\_\_  
Eva Herberger

**PROOF OF SERVICE**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 888 S. Figueroa Street, 15th Floor, Los Angeles, California 90017.

On January 31, 2011, I caused to be served the foregoing documents described as AFFIDAVIT OF EVA HERBERGER IN SUPPORT OF MOTION BY RESPONDENT USC UNIVERSITY HOSPITAL FOR SUMMARY JUDGMENT on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed per the service list below.

By MAIL as follows: I am "readily familiar" with Bate, Peterson, Deacon, Zinn & Young LLP's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of party served, service shall be presumed invalid if postal cancellation date or postage meter is more than one (1) day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

Executed on January 31, 2011, at Los Angeles, California.

  
\_\_\_\_\_  
Jeremy Ra

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# **Exhibit 1**

USC NORRIS CANCER HOSPITAL  
USC UNIVERSITY HOSPITAL  
OPERATING POLICIES

MANUAL:	Human Resources	POLICY #:	C-115		
SUBJECT:	Off-Duty Access	EFFECTIVE DATE:	03/22/1991		
		REVISED DATE:	05/27/2008		
		AUTHORIZED APPROVAL:			
PERSONNEL COVERED:	All Employees	PAGE:	1	OF	1

PURPOSE

This Policy outlines the Hospital's guidelines regarding access to the Hospital's property by off-duty employees.

POLICY

Access to Hospital property by off-duty employees is permitted except as expressly prohibited by this Policy.

Guidelines

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

1. An off-duty employee is defined as an employee who has completed his/her assigned shift.
2. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.
3. Any employee who violates this Policy will be subject to disciplinary action.

PROCEDURE

1. Supervisors
  - a. If you observe any violation of this Policy you should immediately contact Human Resources.
2. Human Resources
  - a. Monitor compliance with this Policy.
  - b. Provide direction and guidance to supervisors in enforcing this Policy.
  - c. Contact Divisional Human Resources whenever you intend to discipline or discharge an employee for violating this Policy.

Effective/Revision Dates to Policy # C-115	
Effective:	03/22/1991
Revised:	06/13/2000
	06/28/2005
	05/27/2008     Governing Board (was #0-117)
	00/00/0000
Keywords:	Off-duty, access

## **Exhibit 2**

**USC UNIVERSITY HOSPITAL  
OPERATING POLICIES**

DEPARTMENT: Human Resources	POLICY # 0-120
SUBJECT: Off-Duty Access	EFFECTIVE DATE: 3/22/91
	REVISED DATE: 6/13/00
PERSONNEL COVERED: All Employees	AUTHORIZED APPROVAL:
	PAGE 1 OF 1 PAGE(S)

**Purpose**

This Policy outlines the Hospital's guidelines regarding access to the Hospital's property by off-duty employees.

**Policy**

Access to Hospital property by off-duty employees is permitted except as expressly prohibited by this Policy.

**Guidelines**

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

- A. An off-duty employee is defined as an employee who has completed his/her assigned shift.
- B. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

Any employee who violates this Policy will be subject to disciplinary action.

**Procedure**

**IF YOU HAVE ANY QUESTIONS REGARDING THIS POLICY PLEASE CONTACT THE HOSPITAL'S HUMAN RESOURCES DIRECTOR.**

## **Exhibit 3**

USC UNIVERSITY HOSPITAL  
OPERATING POLICIES

DEPARTMENT:	Human Resources	POLICY #:	0-117		
SUBJECT:	Off-Duty Access	EFFECTIVE DATE:	03/22/91		
		REVISED DATE:	06/13/00;6/28/05		
		AUTHORIZED APPROVAL:			
PERSONNEL COVERED:	All Employees	PAGE:	1	OF	1

**Purpose**

This Policy outlines the Hospital's guidelines regarding access to the Hospital's property by off-duty employees.

**Policy**

Access to Hospital property by off-duty employees is permitted except as expressly prohibited by this Policy.

**Guidelines**

Off-duty employees are not allowed to enter or re-enter the interior of the Hospital or any work area outside the Hospital except to visit a patient, receive medical treatment or to conduct hospital-related business.

- A. An off-duty employee is defined as an employee who has completed his/her assigned shift.
- B. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

Any employee who violates this Policy will be subject to disciplinary action.

**Procedure**

**Supervisors**

If you observe any violation of this Policy you should immediately contact Human Resources.

**Human Resources**

1. Monitor compliance with this Policy.
2. Provide direction and guidance to supervisors in enforcing this Policy.
3. Contact Divisional Human Resources whenever you intend to discipline or discharge an employee for violating this Policy.

<b>Effective/Revision Dates for Policy # 0-117</b>	
Effective:	03/22/91
Revised:	06/13/00 06/28/05 00/00/0000
Keywords:	Off-duty, access

## **Exhibit 4**

**USC UNIVERSITY HOSPITAL  
OPERATING POLICIES**

<b>MANUAL:</b>	Food and Nutrition	<b>POLICY #:</b>	FN-100		
<b>SUBJECT:</b>	<b>Scope of Services:</b> Food and Nutrition Services Clinical Nutrition	<b>EFFECTIVE DATE:</b>	02/23/2004		
		<b>REVISED DATE:</b>	06/08/2010		
		<b>AUTHORIZED APPROVAL:</b>			
<b>PERSONNEL COVERED:</b>	Nutrition	<b>PAGE:</b>	1	<b>OF</b>	3

**PURPOSE**

1. The purpose of this policy is to describe what the Food and Nutrition Services (FNS) and the Clinical Nutrition Service scope of service entails.
2. To improve security, minimize risk and provide a safe and secure environment for our employees, patients and visitors.

**POLICY**

1. The Food and Nutrition staff of USC University Hospital, in partnership with Sodexo, is committed to serving patients' needs. The Sodexo contract supports all regulatory agencies and will ensure all standards are met. A copy of the contract is on file in the Food Service Director's office. The Policies and Procedures of USC will be followed unless policies are specific to Sodexo.
2. The USC University Hospital dining facility is restricted for use only for on duty hospital employees and physician staff, and visitors who are visiting admitted patients at the University Hospital facility. The USC University Hospital dining facility is not a public dining facility and has the right to refuse services to anyone.

**SCOPE OF SERVICE**

1. Food & Nutrition Services provides nutrition care for all patients that reflect the goals and mission of the Hospital.
2. The Food and Nutrition Services (FNS) Department provides:
  - a. Nutritionally adequate, attractive and satisfying meals to patients, employees and visitors, with accurate diet modifications for patients as ordered by the medical staff.
  - b. A safe and sanitary food service environment, according to standards of quality as established by federal, state and local agencies.
  - c. Initial and ongoing training and education of FNS employees to achieve the standards of quality as established in the FNS Policy and Procedure Manual.
  - d. Ongoing evaluation of the quality of meal service provided to patients, employees and visitors.
  - e. A quality food service system to provide individual patient needs. No more than 14 hours shall elapse between the evening meal and breakfast of the following day.
  - f. Patient meals are available after regular meal hours per policy.
3. Clinical nutrition care and intervention are based on the level of nutrition risk and involves collaboration and integration with other disciplines.

USC UNIVERSITY HOSPITAL  
OPERATING POLICIES

MANUAL:	Food and Nutrition	POLICY #:	FN-100
SUBJECT:	Scope of Services: Food and Nutrition Services Clinical Nutrition	EFFECTIVE DATE:	02/23/2004
		REVISED DATE:	06/08/2010
		PAGE	2 OF 3

4. Nutrition care consists of the following processes:
- a. **Nutrition Practice Guidelines:** provide tools for timely and effective nutrition intervention for specific disease states based on level of nutrition risk.
  - b. **Assessment and Care of Patient:** The nursing staff performs an initial nutrition screening to identify the nutritional risk of inpatients. Dietitians conduct a comprehensive initial nutrition assessment to develop an intensive care plan for nutrition therapy for patients at severe nutritional risk. Patient is reassessed at regular intervals to determine if expected goals and outcomes remain appropriate and/or are being met. Reassessment also occurs on change of condition or diagnosis. (Refer to Nutritional Assessment Guidelines)
  - c. **Patient and Family Education:** The nutrition team conducts an assessment of patient learning needs, abilities and readiness to learn, cultural and religious practices, barriers to learning, desire and motivation to learn, physical and/or cognitive limitations and language barriers. Nutrition education is subsequently provided to the patient, caregiver and/or family in a manner that they can comprehend. A written material is appropriate to learning ability. Discharge planning will determine the time for inpatient education. (Refer to Patient & Family Education Policy)

**STAFFING**

1. The department provides an adequate number of employees to meet needs based on volume, type of meal and delivery system, and locations of patient and non-patient meal service areas in the Hospital. Employee experience and training is required to serve and fulfill the standards and goals of the department.
2. The department is staffed seven days a week from 5:00 A.M. to 8:00 P.M. Clinical Nutrition Services are available seven days a week. During periods of fluctuating census, clinical and food service staff will be adjusted.
3. In the event of an emergency, all staff will stay as needed or will be called per the departmental disaster call list. A minimum of one Clinical Dietitian will be necessary to staff the department during an emergency.
4. Dietitians are required to be registered through the Commission of Dietetic Registration. Nutrition staffing is based on the hospital census and number of patients at nutritional risk.

**HOURS OF OPERATION**

Patient Services: 7:00 A.M. to 7:30 P.M.  
 Cafeteria: 6:30 A.M. to 7:45 P.M. (Weekdays – Excluding Major Holidays)  
 7:00 A.M. to 6:30 P.M. (Weekends and Major Holidays)

**VENDING**

Vending Services at the hospital are provided by an outside vending service. This is a sub-contracted service and is in compliance with federal, state and local regulations.

USC UNIVERSITY HOSPITAL  
OPERATING POLICIES

MANUAL:	Food and Nutrition	POLICY#:	FN-100
SUBJECT:	Scope of Services: Food and Nutrition Services Clinical Nutrition	EFFECTIVE DATE:	02/23/2004
		REVISED DATE:	06/08/2010
		PAGE	3

CATERING

The professional catering staff and Executive Chef work closely for staff and guests and accommodate groups for breakfast/lunch/dinner events, meetings, quarterly executive board and doctors' social events and receptions

REFERENCE(S)

- Title 22 Acute Care
- Nutritional Assessment Guidelines
- Patient & Family Education Policy

ATTACHMENT(S)

- Food and Nutrition Services Department Organization Chart

<b>Effective/Revision Dates for Policy #FN-100</b>	
Effective:	02/23/2004
Revised:	02/13/2010 Policy Committee (was 02-102)
	06/08/2010
	00/00/0000
Keywords:	Scope of Service, Food Nutrition, Dietary, Contract

## **Exhibit 5**

**SUBJECT:** HIPAA PRIVACY RULE:  
LIMITING USES AND DISCLOSURES OF PROTECTED  
HEALTH INFORMATION TO THE MINIMUM  
NECESSARY

**HIPAA CITES:** 45 CFR §§164.502(b); 164.514(d)

**POLICY NUMBER:** GEN - 104

**ISSUED:** April 14, 2003

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**I. POLICY:**

- A. Minimum Necessary Standard. When using or disclosing Protected Health Information<sup>1</sup> or when requesting Protected Health Information from another entity covered by the HIPAA privacy regulations, the University of Southern California (USC)<sup>2</sup> makes reasonable efforts to limit Protected Health Information to the minimum necessary to accomplish the intended purpose of the use, disclosure or request, except as set forth in Section I.B. below. The minimum necessary standard applies to uses and disclosures for payment and health care operations.
- B. Exceptions to Minimum Necessary Standard. USC is not required to apply the minimum necessary standard under the following circumstances:
1. For Treatment. Disclosures to or requests by a health care provider for purposes of diagnosing or treating a patient.
  2. To Patient. Uses or disclosures made to the patient.
  3. Pursuant to Patient's Authorization. Uses or disclosures pursuant to a valid patient authorization. USC's use or disclosure of information must be consistent with any limitations imposed by the authorization.

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<sup>1</sup> Protected Health Information is defined as identifiable information that relates to the individual's past, present or future physical or mental health condition or to payment for health care.

<sup>2</sup> For purposes of the HIPAA Privacy Rule, USC is defined as those components/units that provide clinical services within the School of Pharmacy, the School of Dentistry and the Independent Health Professions (e.g., Physical Therapy, Occupational Therapy, Nursing) as well as USC Care Medical Group, Inc., the USC-affiliated faculty practice plan corporations at the Keck School of Medicine, the USC affiliated faculty practice plans of Physical Therapy and Occupational Therapy, clinical researchers who conduct research that involves clinical treatment and those units that support the clinical functions, such as the Office of the General Counsel and the Office of Audit and Compliance.

4. To HHS. Disclosures to the Director, Office for Civil Rights of the U.S. Department of Health and Human Services ("HHS") for HIPAA compliance purposes.
5. Required by Law. Uses or disclosures that are required by law (i.e., a mandate that is contained in law that compels USC to use or disclose Protected Health Information and that is enforceable in a court of law, e.g., court orders, court-ordered subpoenas, civil or authorized investigative demands, Medicare conditions of participation).
6. Required for Compliance with HIPAA Administrative Simplification Provisions. Uses or disclosures that are required for compliance with the regulations implementing the HIPAA transactions and code sets standard, security and electronic signature standards, etc.

## II. PROCEDURES:

### A. General Procedures for Implementing Minimum Necessary Standard

This policy recognizes that each unit at USC that uses or discloses Protected Health Information has a unique organizational structure and that an employee of the unit may perform various functions for the unit that require different levels of access to Protected Health Information. Further, the responsibilities designated to these functions vary across each unit at USC and cannot be determined solely based on job title or description.

For these reasons, it is the responsibility of each unit at USC that uses and discloses Protected Health Information to determine the level of access required to perform particular functions and responsibilities within that unit. As an example, an individual who performs the function of a receptionist who registers patients most likely will not require access to that patient's entire medical record to perform that responsibility. However, the resident that is assisting a physician in treating the patient would require access to the entire medical record.

- ### B. Limitation of Access. Once persons within USC who need access to Protected Health Information and categories of information are identified, USC must make reasonable efforts to limit access of such identified persons only to their respective identified categories of Protected Health Information.

The unit should consider reasonable physical, administrative and technical security controls when using or disclosing Protected Health Information, including the following:

1. Sign-In Sheets. The Privacy Rule does not require USC to abandon the practice of using sign-in sheets. However, ideally, patient intake should be handled to minimize patient contact with another patient's health information.
  2. Waiting Rooms. USC employees should be mindful that waiting rooms are public areas, not clinical treatment spaces. Staff should be mindful not to divulge clinical information in the waiting room, such as diagnoses or scheduled tests.
  3. Medical Records Use and Storage. The Privacy Rule requires clinical units to keep medical records secure (for example, in locked cabinets and not left in treatment rooms overnight). When a patient is expected in the office, care should be taken to keep the medical record shielded and inaccessible to other patients. Staff should avoid placing patient information on the outside of the patient file. For computerized medical records systems, the unit should consider creating access codes that limit access to identified persons and identified categories of Protected Health Information.
  4. Treatment Rooms. Consistent with common sense and good clinical judgment, health care providers and their staff should seek to maintain privacy in patient treatment rooms.
  5. Wallboards/Displays. If a practitioner office uses a wallboard to track patient information, the practitioner and staff should consider whether the wallboard is viewable by patients or visitors and should make reasonable efforts to minimize the information kept on public wallboards. Where information is highly sensitive, it should not be placed on a wallboard.
- C. Type of Disclosure or Request. The type of use, disclosure or request dictates what procedures are required:
1. Routine. When a use, disclosure or request is of the type that occurs on a routine or recurring basis, USC, through the relevant clinical unit, shall implement a standard protocol that limits the Protected Health Information disclosed or requested to the amount reasonably necessary to achieve the purpose of the disclosure.

For example, for billing purposes, the protocol may be to disclose

only records for service at issue. For outside billers, the protocol may be to disclose only that portion of the medical record that the biller needs to prepare the bill.

2. Non-Routine. Each clinical unit at USC shall develop a process for evaluating non-routine uses, disclosures and requests and shall incorporate criteria to limit the Protected Health Information disclosed to the amount reasonably necessary to accomplish the purpose of the disclosure or request. In addition, all designated staff administrators must be trained to review workforce requests for use or disclosure of Protected Health Information on an individual basis in accordance with such criteria.

Appropriate criteria for evaluating non-routine requests should include the following:

- i. The purpose of the request or disclosure;
- ii. The nature and extent of information requested;
- iii. The extent to which requested Protected Health Information can be extracted from the rest of the medical record without undue burden and without viewing unnecessary parts of the record;
- iv. The location where Protected Health Information will be viewed or used;
- v. The availability of physical, technical and other security measures at the place of viewing or use; and
- vi. The immediacy or urgency of the need for the requested Protected Health Information

- D. Responding to Requests for Disclosures. USC faculty, staff and other covered workforce may rely on a requested disclosure as the minimum necessary for the stated purpose (if reliance is reasonable under the circumstances) in the following situations:

1. When making disclosures to public officials under USC HIPAA Policy GEN - 103 [concerning disclosures based on public policy considerations without a patient's authorization) if the requesting official represents that the information requested is the minimum necessary for the stated purpose.
2. When the information is requested by another covered entity.
3. When the information is requested by a health care professional (e.g., a physician or nurse) who is a member of USC's workforce or is a

business associate of USC for the purpose of providing professional services to USC, if the professional represents that the information requested is the minimum necessary for the stated purpose(s).

4. When the information is requested for research purposes and the person requesting the information has provided documentation or representations that comply with USC HIPAA Policy RES - 301.
- E. Entire Medical Record. As a general rule, USC should not use, disclose or request an entire medical record of a patient unless the entire medical record is specifically justified as the amount that is reasonably necessary to accomplish the purpose of the use, disclosure or request. For example, access to the entire medical record is appropriate for treating practitioners as well as fellows, residents and students who are performing clinical functions as part of their training.

## **Exhibit 6**

**To:** Michael Torres  
**From:** Sharon Lee  
Associate Administrator  
**Subject:** Final Written Warning/Demotion--- Violation of Hospital Policies,  
Insubordination, Failure to Cooperate with Management and Security Personnel  
and Poor Judgment

This is to inform you of disciplinary action being taken against you in connection with an investigation into various incidents in which you were involved on May 4 and 5, 2010. As you know, these incidents were the subject of an investigation conducted by outside investigator Michael L. Wolfram. You were interviewed in the course of that investigation, along with several other people who were present or have knowledge of the events.

The investigation revealed that, on May 4, 2010, you were present at various locations within the Hospital, including Environmental Services, the Bronchoscopy Lab and the main Cafeteria, primarily (if not exclusively) for the purpose of conducting union business on behalf of the National Union of Healthcare Workers ("NUHW"). You were not scheduled to work that day. During your time on premises, you engaged in a number of inappropriate actions.

1. Rudeness to Supervisor James Guy.

According to your statement, you saw James Guy when you first entered the Hospital, coming in through the basement. You stated that your purpose in being in the area was to find an EVS co-worker, Williams. Although you told the investigator that you had no conversation with James Guy, your statement is not credible, given all of the other evidence that the investigation uncovered, including Mr. Guy's verbal report of the conversation immediately upon it occurring, and his written account of the conversation shortly thereafter, and the consistency of his account with events that occurred subsequently, and the inconsistency of your account with events that occurred subsequently. In the course of that conversation you told an NUHW organizer, among other things, to ignore Mr. Guy, and that he was a "nobody". Your behavior was arrogant, rude and inappropriate - all behaviors toward a supervisor about which you have been previously disciplined.

2. Violation of the Off-Duty Access Rule

As an off duty employee, you are forbidden to enter the Hospital premises except for certain designated purposes. Although you told the investigator that you came to the Hospital to attend an In Service class for which you were not scheduled, that class, if you had attended it, was to take place in the Bronch Lab. There was no reason for you to be in the EVS break room, nor in the basement, nor, as you later were, in the cafeteria. Even if you thought you had permission to attend the class, you had no permission to be in these other areas, and your presence there violated Hospital policy. You informed the investigator that you were not exactly aware of an off duty access policy, and you had never had an issue with access. This statement is not forthcoming on your part since you have been directly confronted about the

access policy, both in your capacity as an employee, and on behalf of the Union, on a number of occasions. You unilaterally determined that the policy did not apply to you because you were there to campaign on behalf of the union, and deliberately chose to disregard it, even after being repeatedly advised that you should not be on the premises. You do not have authority to unilaterally disregard Hospital policies.

3. **Lack of Cooperation with Security and Management**

According to your own statement, at least Ms. Whalen, Ms. Herberger, and Captain Drake informed you that you were not supposed to be in the Hospital. While there are disputes between you and various witnesses as to exactly what was said, there is no dispute that you knew that management indicated, on a number of occasions, that you should not be on the premises. In each instance you argued about management's statement, and offered your own interpretation of the rules, insisting that you had a right to be on the premises. As you have previously been warned, it is not appropriate for you to contradict management and insist on your own way of doing things. As an employee you are required to listen to the information conveyed by security and management, and to cooperate, not argue and contradict. If you believe that something has been done incorrectly, your remedy is to file a grievance, not to contradict management, and refuse to honor their requests. This unilateral acting out on your own interpretation of what you think the policies should be is inappropriate, and has been the subject of prior disciplinary action.

4. **Failure to Respect the Investigatory Suspension**

By your own admission, you were advised on May 5 that you were on investigatory suspension. Yet, you came to the Hospital on May 5, and again argued and disputed with security when you were told to leave. Although you claim that you "could not hear everything that was said" when you were put on suspension, because of a bad telephone connection, as an 18 year Hospital employee, a union steward, and a former SEIU employee, it is simply not credible that you did not understand the meaning of an investigatory suspension, or that you conceivably could have thought that your arrival on the Hospital grounds was anything other than direct insubordination.

5. **Poor Judgment**

Throughout these two days you engaged in poor judgment. You escalated conflict, argued with supervision and security, were not forthcoming when questioned by management and were disrespectful. As a Lead you are expected to enforce Hospital policies and rules, and to set an example of good conduct in front of patients, and other Hospital personnel. You have previously been warned about de-escalating, rather than escalating conflict, and about following policies and instructions, and following appropriate dispute procedures later, if you disagree, rather than disputing with and contradicting management at the time. You have not followed these mandates, and have not engaged in conduct that is consistent with the authority and responsibility entrusted to you as a Lead.

Your behavior on May 4 and May 5 was insubordinate, and directly violated Hospital rules. Furthermore, this type of behavior has been the subject of prior discipline. Therefore, you are being relieved of your responsibilities as Lead and will return to a position of Respiratory

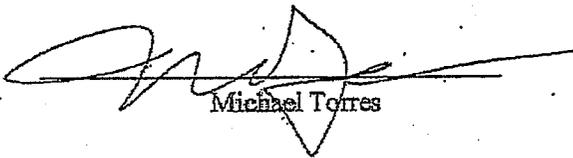
Therapist. Your pay as a Respiratory Therapist will be \$39,144.80. Additionally, this constitutes a final warning. Further acts of rudeness to a supervisor, or violation of the Off Duty Access Policy, No Solicitation/No Distribution Policy or refusal to respond to the requests of supervision or security, will result in termination.

In order that there can be no dispute as to your understanding of the policies involved, you are hereby being provided with a copy of the Off Duty Access Policy, which is now and has been consistently posted at the Hospital. You are also being provided with a copy of the No Solicitation and No Distribution Policy of the Hospital, which is also a posted policy. You are also, by this Memorandum, being advised that you do not have authority to attend In Service classes, for which you have not signed up in advance, on your days off, unless you have obtained permission from management to do so. Lead Respiratory Therapists do not have authority to grant permission to attend In Service classes to employees on their days off. Only management has the authority to grant such permission.

If you have any questions about the meaning of any of the policies that are the subject of this warning, you are encouraged to ask me about them. It is important that you have a clear understanding of these rules, and that you govern your conduct accordingly. I am available to answer any questions you may have.

I acknowledge that I have received a copy of this final warning/demotion.

*I acknowledge receipt will follow grievance procedure of CBA*

  
Michael Torres

5/13/10  
Date

## **Exhibit 7**



ORIGINAL  
~~COPY~~  
USC NORRIS

USC University Hospital / USC Norris Cancer Hospital  
Performance Improvement Notice

Name Juan Michael Torres	Employee Number 87757	Position Respiratory Therapist
Hospital <input checked="" type="checkbox"/> USCUH <input type="checkbox"/> Norris	Hire Date 09/03/1992	Supervisor Jan Anotado
This is a: <input type="checkbox"/> Verbal <input checked="" type="checkbox"/> Warning <input type="checkbox"/> Suspension <input type="checkbox"/> Final Warning <input type="checkbox"/> Termination		
Subject: <input type="checkbox"/> Work Quality <input type="checkbox"/> Productivity <input type="checkbox"/> Behavior <input type="checkbox"/> Insubordination <input type="checkbox"/> Appearance <input checked="" type="checkbox"/> Conduct Standards <input type="checkbox"/> Ethics Standards <input type="checkbox"/> Excessive Absence <input type="checkbox"/> Other (Specify): _____		
Instructions: 1. State policy violated. 3. State action being taken 2. State what occurred. 4. State disciplinary action to be taken at next violation.		
Policy Violation: Conduct & Work Rules		
Supporting Details: You are being given this written warning due to the conduct you engaged in on January 16, 2007 in accordance with and as described in the attached Decision and Award of Arbitrator Gerald McKay dated February 26, 2007.		
Follow up: Any further instances of such conduct or other misconduct by you will subject you to further discipline up to and including termination.  (See attached copy of Arbitrator McKay's decision)		
<i>Failure to achieve consistent and sustained improvement may lead to further disciplinary action up to and including termination. Employment is considered "at will" so that either the employer or employee may terminate employment with or without cause and with or without notice at any time.</i>		
Employee Comments: <i>(My signature below does not imply agreement with this counseling memo; it means only that I have discussed it with my supervisor and have received copy.)</i> In compliance with Arbitrator's decisions, I will comply with my rulings. I do not admit fault. but will continue to work to improve relations.		
<i>I have discussed this counseling memo with my supervisor and have received a copy. If I choose not to sign this counseling memo I will not receive a copy.</i>		
Employee's Signature 	Date 3/31/08	Supervisor 
Witness  (If employee refuses to sign)	Date	Witness 
		Date 3/31/08

Copies to: Personnel Department Employee

A MATTER IN ARBITRATION

In a Matter Between:	)	Grievance:	Discipline of
TENET - USC UNIVERSITY HOSPITAL,	)		Michael Torres
	)	Hearing:	February 1, 2007
(Employer)	)	Award:	February 26, 2007
and	)	McKay Case No.	07-158
UNITED HEALTHCARE WORKERS -	)		
WEST, SEIU,	)		
(Union)	)		

DECISION AND AWARD

GERALD R. MCKAY, ARBITRATOR.

Appearances By:

Employer: Raymond Thomas, Esq.  
Hill, Farrer & Burrill  
One California Plaza, 37<sup>th</sup> Floor  
300 South Grand Avenue  
Los Angeles, CA 90071-3147

Union: William A. Sokol, Esq.  
Weinberg, Roger & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501-1091

A MATTER IN ARBITRATION

In a Matter Between:	)	Grievance:	Discipline of
TENET - USC UNIVERSITY HOSPITAL,	)		Michael Torres
	)	Hearing:	February 1, 2007
(Employer)	)	Award:	February 26, 2007
and	)	McKay Case No.	07-158
UNITED HEALTHCARE WORKERS -	)		
WEST, SEIU,	)		
(Union)	)		

STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a Collective Bargaining Agreement, which exists between the above-identified Union and Employer, and specifically from a Settlement Agreement covering this particular dispute.<sup>1</sup> Unable to resolve the dispute between themselves, the parties selected this Arbitrator to hear and resolve the matter. A hearing was held in Los Angeles, California on February 1, 2007. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties argued their respective positions orally on the record before the Arbitrator. The Arbitrator received a copy of the transcript of the proceedings on or before February 16, 2007. Having had an opportunity to review the record, the Arbitrator is prepared to issue his decision.

<sup>1</sup> Joint Exhibit #1A, B and C

**ISSUE**

Did the Employer have just cause to discipline the Grievant? If it had just cause, what is the appropriate discipline which should be imposed?<sup>2</sup>

**RELEVANT CONTRACT LANGUAGE**

**ARTICLE 6 - NONDISCRIMINATION**

The Employer and the Union agree that there shall be no discrimination against any Employee or applicant because of race, color, religion, national origin, sex, sexual orientation, age, disability, marital status, union status or any other characteristic protected by law.

There shall be no discrimination by the Employer or the Union against any Employee because of membership in or activity on behalf of the Union. Union Representatives shall not be transferred or reassigned to another area of work as a result of Union activities.

**ARTICLE 7 - HARASSMENT**

The Employer is committed to providing a work environment free from discrimination and unlawful harassment. The Employer will not tolerate actions, words, jokes or comments based on an individual's sex, race, ethnicity, age, religion, sexual orientation or any other legally protected characteristic. Any employee, supervisor, or bargaining unit member engaging in sexual or other unlawful harassment will be subject to appropriate corrective action, up to and including termination of employment.

The Employer will take all reasonable steps to protect an employee who reports harassment from continuing harassment and from retaliation because of having reported the harassment. The Employer will also take all reasonable steps to protect witnesses who cooperate in any investigation of alleged harassment from retaliation. If the investigation reveals that the complaint is valid, prompt attention and disciplinary action will be taken to stop the harassment immediately and to prevent its reoccurrence.

**ARTICLE 10 - DISCIPLINE**

**A. JUST CAUSE**

The Employer may only discipline or terminate an employee for just cause. Any discipline or discharge may be subject to the grievance procedure in Article 9.

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<sup>2</sup> Transcript page 6, 7 and 8

B. PROGRESSIVE DISCIPLINE

Unless circumstances warrant more severe actions, the Employer will attempt to utilize a system of progressive discipline. Progressive steps shall include verbal counseling, written counseling and/or warnings, disciplinary suspensions without pay, and termination of employment.

C. INVESTIGATORY SUSPENSION

No employee shall be held in unpaid investigatory suspension for more than (7) calendar days.

**BACKGROUND**

The Grievant works for the Employer as the Lead Respiratory Therapist on the nightshift. He has worked for the Employer for approximately 14 years. The Grievant has been extremely active in the Union, serving as the Chief Union Steward at the facility. He was elected as an Executive Vice President of the United Healthcare Workers - West. He was elected as part of the bargaining team for the current Collective Bargaining Agreement. He served as part of the SEIU national bargaining team, and has otherwise been extremely active as a Union Representative. It is the position of the Employer that on January 16, 2007, the Grievant engaged in conduct with a supervisor which was insubordinate, intimidating and inconsistent with his obligations as a Union Representative. As a result of that conduct, the Employer suspended the Grievant pending an investigation and then imposed a written warning on the Grievant. In addition, the Employer requested as a part of the discipline that the Grievant be required to give the supervisor, with whom he had the confrontation, Connie Cofield, a written apology. The Employer also requested that the Grievant be directed to attend an anger management program and, further, that the suspension, which it imposed pending investigation,

not be paid back to the Grievant in wages. It is the position of the Union that the Grievant acted appropriately in his capacity as a Union Representative. Unfortunately, the Employer's supervisor on duty either did not understand the contract, or deliberately ignored the contract, which permitted the Union 24 hours in which to respond on a grievance meeting. Had Ms. Cofield understood the rights of the Union under the contract, she would not have denied the meeting delay and no confrontation would have occurred. The Union asked that all discipline be removed from the Grievant's file.

Ms. Cofield, who is not an employee of the Employer, but is an employee of a subcontractor hired to manage the EVS Department, had worked at the Employer's facility for approximately three months prior to the incident. She had spent most of that time on the dayshift and had just started the nightshift a day or two before the incident. An issue arose regarding the conduct of two female room cleaners, who allegedly refused to clean a room when they had been directed to do so. As a result of this conduct, Ms. Cofield decided to call the two cleaners into her office for the purpose of investigating the allegation of their misconduct and possibly imposing discipline. The two employees requested Union representation, and Ms. Cofield permitted them to contact a Union Representative. The two employees contacted the Grievant, who was working that evening. However, because the Grievant had a schedule of patients that night, he was not in a position where he could come down immediately and participate as the Union's representative on behalf of the two employees. He requested that the employee, who called him, hand the phone to Ms. Cofield so that he could request that the meeting be postponed until the following day when he would have more time to address the issue. Ms. Cofield refused

to speak with the Grievant on the telephone, and directed the two employees to tell the Grievant that he should come down to her office.

Andrew Truesdale, the evening supervisor, was in the office along with the two women who were to be disciplined, and Ms. Cofield. Ms. Cofield described the conversation between herself and one of the employees named Maria. She stated:

"Maria asked, 'Is this a disciplinary -- will this result in a disciplinary action?'

I said, 'Yes.'

'Can I get a union steward?' she asked after I told her.

I told her, 'Yes.'

So she left. She went out. I guess she talked to Michael on the phone.

She came back on the phone -- back to the office with Michael on the phone and said, 'Michael wants to speak with you.'

I told her to tell Michael to come down to the office, I want to speak to him."<sup>3</sup>

Ms. Cofield acknowledged that her interaction with the Grievant in his capacity as a shop steward was the first time at this hospital that she had been involved in any disciplinary action where a shop steward was called to be present.<sup>4</sup> When asked why she would not speak to the Grievant on the telephone, Ms. Cofield responded, "Because they are suppose to come down to the office and speak. I didn't want to do business over the phone."<sup>5</sup> When asked how she knew that he wanted to do business over the phone, Ms. Cofield stated, "He wanted to speak to me.

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<sup>3</sup> Transcript page 45

<sup>4</sup> Transcript page 57

<sup>5</sup> Transcript page 58

Right?"<sup>6</sup> She went on to state, "They wanted a union steward there in the office. How is it going to benefit them if he won't come to the office?"<sup>7</sup>

According to Ms. Cofield, the Grievant walked into her office shortly after she refused to speak with the Grievant over the phone. The first thing he stated, according to Ms. Cofield, was "There's not going to be a meeting."<sup>8</sup> In response, Ms. Cofield asked, "Why?" Ms. Cofield stated:

"He says, 'Damn. Because.' And then he says, 'Fuck off,' like that. And then he says, 'I have patients on the second floor.'

I said, 'Is there another union steward?'

He says, 'No. I am the one.'

And then after that he asked me my name, and I wouldn't tell him my name because I was getting threatened by the way he was talking."<sup>9</sup>

She accused the Grievant of using profanity and described how he used the profanity. She stated, "Well, first he said, 'You're acting like an ass,' when he walked in. And then he said 'damn,' 'fuck off.'"<sup>10</sup> According to Ms. Cofield:

"I felt threatened at that time. So when he asked me for my name, I refused to tell him.

And then the phone rang, and that's the only way he got my name because I answered the phone 'EVS, Connie speaking.' And that's how he got my name.

And then I asked him to leave the office, and he refused the leave. I asked him 16 times to leave the office, because each time he said something, I jotted it down on a piece of paper.

And then I told him, 'I am going to call security.' And then I called security."<sup>11</sup>

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<sup>6</sup> Transcript page 58

<sup>7</sup> Transcript page 58

<sup>8</sup> Transcript page 46

<sup>9</sup> Transcript page 46 and 47

<sup>10</sup> Transcript page 47

While she and Grievant were waiting for the security officer to appear, the Grievant made a phone call to someone, and during the course of the phone call, according to Ms. Cofield, he told the person on the telephone, "She is getting all ghetto."<sup>12</sup> Ms. Cofield acknowledged that it was a small office, but denied that she listened to his conversation on the telephone with the exception of the words, "She is getting all ghetto." At some point during this process, Ms. Cofield asserted, the Grievant leaned over to her and whispered in her ear, "I'm going to get your black ass fired." This alleged comment was made outside the office after the matter had been resolved by the security officer. After telling her this, he walked back towards the entrance of the corridor and waved, "Have a nice day."<sup>13</sup> Ms. Cofield claimed that she then went into Andrew Truesdale's office and said to him, "Did you hear that?" Apparently Mr. Truesdale did not hear the Grievant say anything. Ms. Cofield then told Mr. Truesdale what the Grievant allegedly said and Mr. Truesdale shook his head saying "I can't believe it."<sup>14</sup>

The Arbitrator asked Ms. Cofield again why it was that she refused to tell the Grievant what her name was when he asked. She responded:

"Because of the manner he was acting. When he came in and opened the door, he was ranting and raving when he walked in. And when he started using profanity, I just refused to talk to him because -- you know, he was using like 'damn,' 'fuck' -- stuff like that. I refused to say anything to him."<sup>15</sup>

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<sup>11</sup> Transcript page 47

<sup>12</sup> Transcript page 60

<sup>13</sup> Transcript page 53

<sup>14</sup> Transcript page 61

<sup>15</sup> Transcript page 65

In a statement that she prepared for the Employer, Ms. Cofield noted, "He then asked me my name, I didn't respond. I refused to say anything to Michael, and made him very angry. He got my name when I answered the phone by saying, 'EVS this is Connie speaking.'"<sup>16</sup>

The Grievant testified that normally he does not have a patient care load in his capacity as Shift Lead Supervisor. However, on the night of the 16<sup>th</sup>, he did have patients to care for and did not have adequate time to conduct a meeting concerning the discipline to be imposed on the two employees. Shortly after he began the shift, he described a meeting with one of the women who Ms. Cofield wanted to discipline who found him in one of the patient's rooms, and told him that she might need his assistance anticipating that there may be discipline imposed on her by Ms. Cofield. The Grievant informed the employee that she could reach him through Spectralink, the internal hospital communication system if she needed him.<sup>17</sup> The Grievant then informed the employee to ask the supervisor if the discussion that was going to be conducted could lead to discipline. If the answer was yes, then the employee was to ask for a shop steward. Subsequent to this conversation, the Grievant was called by the employee at around 8 o'clock, and was told:

"Mike, I am down here with Andrew and the manager, and I asked them the question that you asked me to ask them, and they said yes."

I said, 'Okay.' So I told her I was with a patient and I couldn't come down at all right now.

And she basically just says, 'Well what should we do?'

And I explained to her, I said, 'Just tell her if I could speak to her on the phone because I have patients.' And she goes okay. . . .

So apparently Maria went off the phone, and all I heard was like Maria came back to the phone, and she goes, 'Mike she doesn't want to talk to you.'

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<sup>16</sup> Employer Exhibit #2

<sup>17</sup> Transcript page 79

And so then I was just like, 'Okay. Well why not?'

And Maria explained to me, 'Well, she just doesn't want to talk to you. She says you have to come down here.'

So as difficult as it was, I basically just told her, I said, 'Okay Maria I'll be down. Give me some time.' And I finished up what I had to do in the ICU and then I went downstairs."<sup>18</sup>

The Grievant testified that he went downstairs to where the meeting was being held and he encountered a woman whom he had never seen in the hospital before. The two employees and Andrew Truesdale, along with this woman, were sitting in the office with the door opened.

The Grievant described what he did at that point:

"And I go -- I identified myself. I said, 'Hi. My name is Michael Torres. I understand that -- I was called down by these employees, who are requesting my presence for a possible investigatory meeting.' And basically I said, 'That's what I'm here for.'

And I said hello to Andrew. And I didn't know her name at this time.

And basically I said, 'Well,' I said, 'I have another problem.' I said, 'Normally this isn't the case, but I have patients tonight, and I would like to know if we can schedule a meeting, perhaps for tomorrow night, because I can't meet right now.'

And then she responded, 'Well, we have to have a meeting right now or we are going to write them up.'

And I said -- and I responded -- I asked her, I said, 'Well, you know, we don't have to meet right now. We have 24 hours. You know, we don't have to have a meeting right now.'

And basically my understanding, recollection, was that she is like, 'Well, we have to have the meeting right now, or they are going to get written up.'

So I basically asked her the question, I said, 'Are you denying them their Weingarten rights?' And she wouldn't answer me. I said, 'Are you denying them their Weingarten rights?' I asked that question a couple of time, and I didn't get a response.

And I go -- I said, 'Well' -- I asked her. And then I said, 'Well, you know, my name is Michael Torres.' I said, 'I've never met you before.' I said, 'You're new here, right?'

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<sup>18</sup> Transcript page 80, 81 and 82

And she's like, 'Well, I am not new. I might be new here, but I am not new, you know, to EVS.'

And I said, 'Oh. Okay.' So I said, 'Are you their -- you are their supervisor?'

She's like, 'I am not a supervisor. I am a manager.'

I'm like, 'Okay. Okay.'

Well, I elaborated. I said, 'There's some different interpretations as to the contract,' I said, 'some are different. But we don't have to meet right now. It is okay to meet, you know, tomorrow.'

And so basically I was just trying to basically defer the meeting because I was kind of in a pickle. . . .<sup>19</sup>

The Grievant testified that he did not think the issue was progressing and he stated out loud, "'Well, you know, I don't need this shit.' You know, 'I am calling the HR director.'<sup>20</sup>

The Grievant testified that he then got on the phone using his Spectralink to call the HR Director.

As they were waiting for the call to go through, the Grievant testified, Ms. Cofield stated, "Oh, you're using profanity." The Grievant stated he responded, "I am not using profanity. I didn't tell you to fuck off, so don't tell me I'm using profanity."<sup>21</sup> At this point, according to the

Grievant, Ms. Cofield told the Grievant to get out of her office a couple of times. In response the Grievant asked her, "Why?" And then he stated, "Why are you doing this?" The Grievant stated:

"She kept asking me to get out of her office, and then she threatened to call security. And she did. And then I said, 'Fine. Go ahead and call security.' So at that point we were just waiting, awkward silence. We were all waiting around for the HR director to call or security to call or security to come by. And security came by."<sup>22</sup>

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<sup>19</sup> Transcript page 82 and 83

<sup>20</sup> Transcript page 83

<sup>21</sup> Transcript page 84

<sup>22</sup> Transcript page 85

A security officer came by and Ms. Cofield told him to escort the Grievant out of the office. In response, the Grievant said to the security officer, "Stop. This is involving a contract dispute between, you know, her and other members here, and I am only here for that purpose." He then stated that he contacted, through the overhead page, Charles, the Director of Security, to come and resolve the matter. While they were waiting for the Security Director to appear, the Grievant testified, he made the comment, "Is this a plantation?" In response to this, Ms. Cofield stated, "Oh, you used a racial slur." The Grievant stated he responded, "I did not use a racial slur . . . I did not call you the N word." At about this point, Charles, the Director of Security, came around the corner and the Grievant went outside the office to speak to him.

The Grievant explained the circumstance and told Charles that he was the steward and had been called down by the workers who were going to be disciplined. He explained that he had asked Ms. Cofield for her name, but she had refused to give it to him. He explained, "I just want to have a meeting. You know, maybe, I don't know, we got on the wrong foot."<sup>23</sup> Charles then acted as the mediator, and went and spoke to Ms. Cofield. He then invited the Grievant back into the office and stated, "I talked to this woman. Basically, I want you guys to start all over." In response to this, the Grievant testified, he identified himself again to Ms. Cofield and she, at that point, identified herself to him. He then explained, "I cannot meet tonight over this issue because I am not free tonight. I have a patient-care load. . . . I would like to know if it is convenient for you to meet tomorrow about this same time, and we can have that meeting

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<sup>23</sup> Transcript page 87

then."<sup>24</sup> Ms. Cofield agreed to that arrangement, and the meeting was over. When the meeting was over, everyone was calm.

Several hours later, the Grievant testified, the two employees who had been in the office, who were the subject of the discipline came to him and handed him a piece of paper indicating that they were going to be suspended pending an investigation. The two employees asked him, "Well, why are we suspended? Didn't you make a meeting for the following day?"<sup>25</sup> The Grievant instructed the two women to go home and stated that the matter would be dealt with by the Union appropriately. He walked the workers down the hall and out the door. As they walked by, Ms. Cofield was leaning against the wall with her hands crossed. The Grievant testified that he went over to Ms. Cofield and stated, "I thought we had an arrangement. I thought we had an agreement that we would meet tomorrow on this issue." And she is basically saying, "Well, I'm just following orders. I'm just following orders." And I didn't understand." When he asked her if she had written the suspensions, according to the Grievant, she walked into an office and "slammed the door."<sup>26</sup> The Grievant denied that he made any comment to Ms. Cofield to the effect that he was going to "get her black ass fired." The Grievant also stated that he had no recollection of using the phrase, "She is getting all ghetto." The Grievant did acknowledge that he was speaking to someone on the phone and was quite busy and really could not recall whether he made the ghetto comment or not. The Grievant also denied that he "blew up on" Ms. Cofield.

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<sup>24</sup> Transcript page 88

<sup>25</sup> Transcript page 91

<sup>26</sup> Transcript page 94

**POSITION OF THE PARTIES**

**EMPLOYER**

The Employer stated that the hearing concerns the discipline of the Chief Steward. The parties have requested that the matter be treated in a confidential matter because the real objective is not to have this issue raised again. If the Employer was seeking other ends, it would have terminated or suspended the Grievant, and told the Union to go file a grievance under the terms of the regular grievance procedure. The Employer stated that it acknowledges that a Union steward has a job to do as an advocate. In the course of doing that job, things will be said and done in a manner that goes with that territory. In this particular case, however, the Employer asserted, the Grievant went well outside the bounds of anything that a reasonable person would expect a steward to do in this industry.

To address the Grievant's misconduct, the Employer asserted, it is asking very reasonable disciplinary terms be imposed. First, it requested that the Grievant be given a warning indicating that no matter what justification the Grievant felt he had, there was absolutely no justification in making references to "plantation," "ghetto," or other statements related to the supervisor's race. Ms. Cofield is an African American. The Grievant expressed doubt in his testimony concerning that fact. The Employer stated that it was only concerned that the Grievant's conduct does not happen again. If the Grievant walks out of the hearing feeling that in some way his conduct has been vindicated, it will be a much more serious matter in the future and he could be facing termination. According to the Employer, there have been other occasions, in other

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circumstances, involving the same shop steward, in which he has acted out improperly with other supervisors and management staff.

The Employer noted that the Arbitrator appeared concerned about some of the things that management did in the present case. One of those is the fact that Ms. Cofield did not give her name to the Grievant when he came in. According to the Employer, this goes to the credibility of the Employer's version of what happened. The Grievant came in and was so angry and abusive that he immediately put everyone off, including Ms. Cofield. The irony is that the Grievant raised such a ruckus that the time it took to resolve the ruckus that the meeting concerning the discipline of the two employees could have been completed. The matter was mishandled by the shop steward. The Employer stated that while the Grievant was suspended, pending the investigation, he was not paid. It would be inappropriate in this proceeding to give the Grievant pay for that period. The Grievant's testimony at the hearing was either willfully evasive, or there was a gigantic communications problem. The bottom line is that the Grievant's conduct has to change and it would be totally inappropriate for the Grievant to get away with his misconduct in this instance.

#### UNION

The Union stated that the only thing that it agrees with in the Employer's closing statement is that the matter involving the two women in the meeting was mishandled, but it was mishandled by management. The allegations made earlier by the Employer of misconduct, on the part of the Grievant, simply are not supported by the evidence. There is nothing in the Grievant's personnel file to indicate that anyone complained about the Grievant's conduct prior

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to the incident on the 16<sup>th</sup>. This alleged earlier conduct, the Union stated, should not be a part of the present case. The Union stated that it does not feel an obligation to protect a chief shop steward's improper conduct. It is the Union's obligation to make sure that its shop stewards do not engage in improper conduct. But that is not why the hearing is being conducted. The Union stated that the hearing is being conducted because the Union believes there is a fundamental problem with the way that management addressed the chief shop steward, which left him with no alternative but to seek to protect the meaning of the contract, the words in the contract, and the concepts in the contract.

The contract and the relationship between the Union and the Employer is relatively new - commencing in 2004. The Union pointed out that Ms. Cofield had been a shop steward for the Union under the Kaiser system. What it believes occurred in the present case was the head-to-head butting of two shop stewards. "Shop stewards learn . . . they don't take shit from anybody." That attitude, according to the Union, is not appropriate attitude for management in circumstances such as that which occurred on January 16<sup>th</sup>. It was not appropriate for Ms. Cofield to refuse to tell the Grievant her name, and to refuse to work with the Grievant, or to speak with the Grievant. The Grievant, from the beginning, was simply trying to put the meeting over to another time when he had the time to address the issues. The Grievant was not trying to pick a fight with Ms. Cofield. He had never met Ms. Cofield and had no reason to pick a fight with her. Had Ms. Cofield talked to the Grievant on the telephone, the entire matter could have been resolved before it even began. If Ms. Cofield had any understanding of the contract, the matter would have been resolved before the problem began. The Union has a right to be present

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when members are being disciplined. The Union also has a right to delay investigations for 24 hours, except Saturdays, Sundays and holidays. If Ms. Cofield had understood the contract, the issue would have been over from the very beginning.

The Union stated that the Arbitrator needs to address the 24-hour issue. Apparently, the Employer believed that since the Union would not meet immediately, and invoked the 24-hour rule, that the Employer was then obligated to suspend the employees pending the meeting. The Union stated that the contract does not contemplate that employees shall be penalized with the agony of being thrown out of work simply because the Union is exercising its right to have a meeting 24 hours later. That is a very serious problem with the way the Employer handled this situation. Another issue, the Union raised, was the fact that the Employer presented some evidence at the hearing, which the Union had not seen before the day of the hearing. If the relationship between the parties is to be successful, this kind of conduct must not occur. The Grievant's conduct was appropriate. He was provoked by the supervisor, who was on the attack against the employees.

Ordinarily, the appropriate response is to do what is asked and grieve it later. That, the Union stated, does not work when you are the chief shop steward in the workplace. Your job is to protect the workers that you represent from unjust behavior. There is a certain line you just cannot step over. The Grievant, in the present case, did not step over that line. The allegations against the Grievant concerning him threatening to have her "black ass fired" never happened. The lie of that circumstance is the fact that when the Security Officer arrived and acted as a mediator, the Grievant was reasonable and able to get his point across. The Employer then

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retaliated against the employees by immediately suspending them rather than allowing for the delay of 24 hours to conduct the meeting.

#### DISCUSSION

When an Employer attempts to take on the chief shop steward and an individual who is as active in the Union as the Grievant is, the Employer is guaranteed that it will have problems. There are circumstances where Union officials who work for employers do engage in misconduct. Even where these individuals engage in misconduct, the Union is almost always in a position where it needs to vigorously defend those individuals to defend the integrity of the bargaining unit and protect it from attacks by the Employer, which might undermine the strength of the unit itself. In this sense, it is necessary to try to sort out between the political needs of the Union to maintain the integrity of the bargaining unit, and the factual issues with respect to what the shop steward did that caused the Employer to react. Shop stewards who actually work for an employer are not immune from discipline imposed by that employer for their misconduct even if the shop steward is acting in his capacity as a union representative. There is no such thing as shop steward immunity from discipline.

The problem the Arbitrator has with the present dispute relates primarily to the fact that both the Grievant and Ms. Cofield acted inappropriately. The Arbitrator is not sure how much training and experience Ms. Cofield has had as a manager under a Collective Bargaining Agreement. It is obvious that she has very little training with respect to how to deal with difficult employment situations and defuse the tension that sometimes is associated with those circumstances. In the present case, she acknowledged that she refused to give the Grievant her

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name when he asked for it, and she acknowledged in her testimony that she knew that this made the Grievant mad. For a supervisor to deliberately engage in conduct which she knows increases the tension in a circumstance is entirely improper and should subject that supervisor to discipline or, at least, retraining. One would hope that the Employer, which has chosen to use an outside contractor to manage its EVS system, would engage the services of an outside contractor that provided employees who had the skill, training, and ability to provide that service to the Employer appropriately. Ms. Cofield, clearly, lacks the training and experience necessary to provide an adequate job in this particular area. The function of a supervisor is to solve problems, not exacerbate problems.

Having criticized Ms. Cofield, however, it is also apparent to the Arbitrator that the Grievant, based on his testimony at the arbitration hearing, is quite arrogant and abrasive. Just as it is not the function of a supervisor to exacerbate a difficult situation, it is not the function of a shop steward to anger supervisors and provoke them in a way that causes more problems rather than fewer problems. The function of both a supervisor and a shop steward is to deal with difficult problems, and resolve them. A supervisor and the shop steward are problem solvers. They are not problem makers. The Grievant, based on his conduct, and on his testimony at the arbitration hearing, apparently does not understand this particular function of a shop steward very well.

During the course of his testimony, the Grievant appeared not to understand what it meant to call Ms. Cofield, an African American. In the Arbitrator's opinion, the Grievant's response was a reflection of his arrogance. The Arbitrator believes that the Grievant understands

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clearly that Ms. Cofield is an African American. The Grievant's use of the phrase "she is getting ghetto," and his use of the phrase and she was "running a plantation," were personal attacks on Ms. Cofield with racial overtones. They may not be racist, *per se*, but the intent was to insult Ms. Cofield, and to do so in part based on her race. The Arbitrator does not believe that the Grievant whispered in Ms. Cofield's ear telling her that he was going to "get her black ass fired." In the Arbitrator's opinion, Ms. Cofield added this accusation for the purpose of creating a more serious charge against the Grievant. The accusation by Ms. Cofield is reflective of the problem the Arbitrator identified at the beginning. Both the Grievant and Ms. Cofield were acting inappropriately in this incident, and both of them told the truth about the same amount of time during the course of the arbitration hearing.

If the Grievant believed that the conduct of Ms. Cofield was inappropriate and that she was requiring employees to do things that violated the contract, he had two choices. The first was to ask her not to do it and to explain to her why it was inappropriate. If she persisted in going forward, then his second choice was to file a grievance. When Ms. Cofield directed the Grievant to leave the office, he should have left the office. A shop steward does not have a license or a right to remain in a supervisor's office on the theory that the supervisor is violating the contract. The Union suggested that sometimes shop stewards have to be extremely aggressive in order to protect the interests of employees. It is fundamental in a collective bargaining relationship that employees do what they are told now and grieve later. It is sometimes referred to as the "work now, grieve later" rule. The Grievant's conduct violated this fundamental rule of collective bargaining.

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The Union objected to the fact that after an agreement had been reached between the Grievant and Ms. Cofield that the meeting concerning the two employees would be held the following day that the Employer then suspended the two employees pending an investigation. The contract does not require the Employer to suspend employees pending an investigation. If an employee's conduct is serious, and creates a circumstance where it is not appropriate to have the employee at the workplace, then invoking the suspension pending an investigation is an appropriate action. If the Employer uses it as retaliation, which is apparently what the Employer did in the present case, it is not appropriate. There can be little question that the Employer was extremely angry with the shop steward. In retaliation, the Employer suspended the two employees, which punished the employees, rather than punishing the conduct of the Grievant. If the likely result of conduct is going to lead to a letter of warning, it is really not appropriate to suspend employees. If the conduct is likely to lead to a suspension, or to a termination, then the suspension is more appropriate. In the present case, the Arbitrator has no idea what discipline was likely to be imposed on the two employees. The issue the Arbitrator is addressing has to do with the timing of the Employer's decision to suspend the two employees pending an investigation. That decision was made immediately after the confrontation with the chief shop steward and an agreement to hold the meeting the following day. It is that conduct which the Arbitrator is identifying as retaliatory conduct, and inappropriate.

In summary, it is the Arbitrator's opinion that the conduct of the Grievant was inappropriate, offensive, and inconsistent with his obligations as a shop steward. The function of the shop steward is to help resolve problems and not to exacerbate problems. The Grievant's

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approach towards Ms. Cofield was abrasive and immediately caused her to become angry. Her angry reaction was as inappropriate as the Grievant's conduct, but it was the Grievant who brought about the inappropriate conduct by Ms. Cofield's because of his abrasiveness. An arrogant, abrasive shop steward is the antithesis of what is needed in a shop steward. In the Arbitrator's experience, the successful shop stewards are the ones who are respected and able to get along with all of the employees and managers. A shop steward who can only get along with employees, but cannot get along with managers, is essentially an ineffective shop steward. It was inappropriate and offensive for the Grievant to ask Ms. Cofield whether she was running a plantation and to make the comment that she was getting "all ghetto." Those were racially based comments intended specifically to insult Ms. Cofield. Personal attacks on a manager have nothing to do with resolving problems and are inconsistent with the duties of a shop steward. It is for these things that the Grievant has earned the ire of the Employer and deserves to be disciplined for his conduct. When the Employer imposed a letter of warning on the Grievant, it had just cause to do so.

The Employer asked that the Arbitrator impose a number of other disciplinary provisions on the Grievant as a result of his misconduct. In addition to the letter of warning, the Employer has asked that the Grievant provide a written apology to Ms. Cofield for his misconduct. The Employer also asked that the Grievant be obligated to attend an anger management course to help him control his temper. Finally, the Employer stated that it should not have to pay the Grievant on the days it suspended him pending an investigation. Addressing the suspension first, the Arbitrator has determined that the Employer had just cause to impose a letter of warning on

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the Grievant for his misconduct. A letter of warning is not a suspension. The Employer chose to suspend the Grievant, pending the investigation. Having determined that the letter of warning is the appropriate level of discipline, the Employer is obligated to pay the Grievant for the days on which it suspended him. As the Arbitrator pointed out earlier in this discussion, one of the reasons the Employer should not suspend all of the employees pending an investigation, is that it is going to have to pay those employees unless the discipline leads to a suspension or a termination. In the present case, the Employer took the risk and suspended the Grievant, and now finds that a letter of warning is the appropriate level of discipline. Therefore, the Employer is obligated and directed to pay the Grievant the days that he did not get paid when he was suspended, pending the investigation.

Turning to the request for a written apology, the Arbitrator is going to direct the Grievant to meet with Ms. Cofield, along with a paid Union representative, and a representative from Human Resources, during which the Grievant is expected to apologize for his reference regarding running a plantation and going ghetto. It is unnecessary that this apology be put in writing. The important aspect of this meeting is for the Grievant to establish a working relationship with Ms. Cofield, which is his duty and obligation as a shop steward. This really is not a form of punishment or discipline, as much as it is a form of reconciliation so that the Grievant can effectively carry out his responsibilities. One would hope that Ms. Cofield will learn how to behave as a supervisor, and use this meeting to make amends as well. The Employer also asked that the Grievant be required to attend an anger management program. The Arbitrator does not believe the Grievant has a problem with anger, as much as he has a problem

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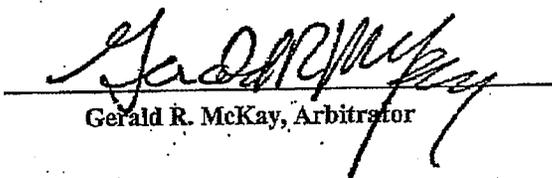
with arrogance. There are no programs, of which the Arbitrator is aware, that address employees who suffer from oversized egos. What is really necessary, under the circumstances, given the reaction of Ms. Cofield, is a training program for both the shop stewards and the supervisors with respect to the administration of this contract. The shop stewards and the managers need to understand the terms of the contract, and their mutual obligations under the contract. At some point in time, it would be useful for the Employer and the Union to establish a joint training program that would address these issues. Outside of that program, the Arbitrator is not going to direct the Grievant to attend an anger management program.

**AWARD**

The Employer had just cause to impose discipline on the Grievant for his misconduct on January 16<sup>th</sup>. The discipline is outlined above.

**IT IS SO ORDERED.**

Dated: February 26, 2007

  
Gerald R. McKay, Arbitrator