

**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 UNIVERSITY 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

**ANSWERING BRIEF OF RESPONDENT USC UNIVERSITY HOSPITAL IN SUPPORT
OF DECISION BY ADMINISTRATIVE LAW JUDGE AND IN OPPOSITION TO
EXCEPTIONS FILED BY REGION 21**

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Pursuant to Rule 102.46(d)(1) Respondent USC University Hospital (the “Hospital”) submits this brief in opposition to Region 21’s Exceptions to the Decision and Order of Administrative Law Judge William G. Kocol in the above-captioned consolidated complaint.

I. INTRODUCTION

A. Nature of the Action

This case arises from a challenge by Region 21 to the facial validity of an Off-Duty Access Policy issued and maintained by USC University Hospital (the “Policy”), an acute care facility. The Hospital enforces the Policy to protect its employees and patients and their families from workplace violence, prevent overtime and claims for work related injuries resulting from unauthorized off-the-clock work, and to protect patient confidentiality. The Region maintains that, regardless of the reasons why it was adopted, the Policy is unlawful on its face because it contains exceptions for off-duty employees who are visiting patients or are seeking medical treatment for themselves under the same rules and restrictions as members of the public. It contends that, to the extent the Policy contains any exceptions *at all* it runs afoul of the third prong of Tri-County Medical Center, 222 NLRB 1089 (1976), i.e., that the policy “applies to off-duty employees seeking access to the [facility] for any purpose *and not just to those employees engaging in union activity.*” (Emphasis added). The Region admits that the Board has never adopted such a narrow and mechanical interpretation of Tri-County. (Transcript 21:23-22:4.) If the Board does so now, the Hospital would be forced to bar its employees from returning to the premises to visit their seriously ill friends or relatives or to obtain medical care for their own acute medical conditions. No purpose that the National Labor Relations Act (the “Act”) was designed to serve would be advanced by such a result¹.

B. The Decision

On April 8, 2011, Administrative Law Judge G. Kocol issued a decision and order dismissing Region 21’s consolidated complaint in its entirety. That decision was the culmination

¹ Bizarrely, the Region’s proposed “solution” is for the Hospital to create even *more* exceptions and allow off-duty employees unsupervised access the non-public interior areas of the Hospital, such as the cafeteria and interior break rooms, 24 hours a day. (Transcript 21:1-19.)

of a protracted two-year process, charges brought by two different unions, a motion for summary judgment, and an evidentiary hearing. Prior to the hearing the parties entered stipulations of fact, including that the sole issue in the case is a facial challenge to the Policy, and that there is no evidence or allegation that the Policy has been selectively enforced to discriminate against union-related activity.

Judge Kocol applied the third prong of Tri-County with a view to the statutory purpose of protecting the right of employees to engage in union activity. He concluded that “the rule allows off-duty employees to enter the Hospital only under circumstances that members of the public at large are allowed, and then only under the same restrictions and conditions that members of the public are allowed inside.” (Decision 3:36-38). Further, that the Region’s interpretation of the third prong of Tri-County “is too literal and results in consequences not intended by that decision.” (Decision 3:52-4:1). His decision is consistent with the decisions of two other administrative law judges who upheld the validity of the exact same policy against the same challenge. See Garfield Medical Center v. NLRB, 2002 WL 31402769, at page 13 (“The rules apply to all off-duty employees except those visiting a patient, receiving medical treatment, or conducting hospital-related business and are thus not protected activity exclusive.”); San Ramon Regional Medical Center, Inc., 2003 WL 22763700, at pages 2-3 (“The limited exceptions allowed by the rule ‘visiting a patient, receiving medical treatment, or conducting hospital-related business’ are the types of exceptions which the Board has permitted and which do not render it unlawful through an uneven-handedness theory.”)

The Region has filed five exceptions to Judge Kocol’s findings and an additional three exceptions on the grounds that he “failed” to conclude that the Policy is invalid under Tri-County, that food services contractor Sodexo also violated the Act by enforcing the same Policy, and that any discipline imposed on employees for violating the Policy would, therefore, violate the Act. The Region admits that, if the Policy is valid, that discipline is also valid.

Judge Kocol's decision was based on the undisputed facts and a correct, legal and logical interpretation of the applicable law. Accordingly, the Region's objections should be summarily dismissed and Judge Kocol's order should be adopted by the Board.

II. STATEMENT OF FACTS

A. The Parties Stipulated to the Material Facts and the Scope of the Complaint.

Prior to the hearing, the following factual stipulations were included in the record:

11. The Hospital's Off-Duty Access Policy was initially implemented in 1991 by a predecessor employer.
12. The Acting General Counsel has challenged the Hospital's Off-Duty Access Policy as facially unlawful.
13. This case does not involve issues of selective enforcement of the Off-Duty Access Policy or the dissemination of that policy.

(General Counsel Exhibit 3).

Thus, the only issue in this case is the Region's contention that the Policy does not meet the third prong of the Tri-County because it is not an absolute prohibition for off-duty employees to enter the Hospital.

B. The Policy Bars Access To Off- Duty Employees With Two Narrow Exceptions.

On its face, the Policy provides as follows:

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 employees' normal duties or duties as specifically directed by management.

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

(General Counsel Exhibits 4 and 5).

Thus, under the Policy, off-duty employees are allowed in the interior of the Hospital under one of two circumstances: first, to receive medical care themselves; and second, to visit a family member or a friend who is receiving medical care. (Transcript 30:14-24.) As worded, the Policy appears to set forth a third “exception” for “hospital related business.” However, it is clear from the definition of “hospital related business” that this language refers to situations where an employee is called in to work an extra shift or called in to work when he or she is “on call.” At those times, the employee is, by definition, not off-duty but rather is coming in to perform his or her specific duties at the specific direction and under the supervision of management. (Transcript 39:8-40:3, 40:14-21.)² This is also true of employees who come back to the Hospital for training when they are not scheduled to work. The employee’s supervisors or Hospital management make prior arrangements for that employee to come back to the Hospital, check in, and then go to class. (Transcript 67:22-68:6.) The employee is paid for that time. (Transcript 67:24-68:1.) Thus, the third “exception” involves only paid, supervised employee time.

Under the Policy, if security, management or other staff becomes aware that an employee has entered the Hospital while he or she is not on duty, and is not within any of the exceptions, he/she is to be confronted and asked to leave. If employees violate the Policy, their supervisors and managers are responsible for counseling them regarding compliance with the Policy. (Transcript 48:4-12.)

² Testimony on the operation and the reasons for an off-duty access policy was offered by Chief Human Resources Officer, Matt McElrath. In that capacity, Mr. McElrath has primary responsibility for the human resources function at the Hospital, including employment, employer relations, policy enforcement, benefits administration, training and employee health. (Transcript 28:18-29:5.)

C. **The Hospital Has Legitimate Business Reasons For Enforcing An Off-Duty Access Policy.**

Since the Policy only pertains to interior hospital space, not parking lots, there is no need for the Hospital to offer any business justification for its Policy. Tri-County, 222 NLRB at 1089. Nonetheless, the Hospital put forth compelling business justifications for the Policy at issue. The Policy is intended to ensure that employees are only on premises, as employees, at times when they are regularly scheduled to work or arrangements have been made with their supervisor and management to be scheduled to work. (Transcript 31:9-12, 36:23-37:1.) Thus Hospital employees are always supervised when they are in the interior Hospital premises as employees. The Policy is necessary for several reasons. First, to provide for the security of the Hospital's employees, and the security of patients and their families. (Transcript 31:2-12.) The Hospital is a very large facility. There are two multi-story towers, connected to each other through the basement, covering more than half a million square feet of space. (Transcript 31:8-9, 31:21-32:1.) There are over 2,500 employees and, additionally, up to 500 physicians have privileges at the Hospital. (Transcript 50:9-23.)

There are two primary visitor entrances on the ground floor of the facility, one at each tower. At both of those entrances, there are staffed desks where patients or visitors can sign in. (Transcript 32:2-13.) There are, however, multiple other doors and a primary tunnel access which can be unlocked with an employee ID card key or "badge." (Transcript 32:10-13.) All staff members, upon hire, are provided this employee badge. It provides them access to all exterior doors and to their assigned working areas. For many employees, such as respiratory therapists and food service workers, their work takes them throughout the Hospital and the employee badge gives them access to every part of the Hospital. The badge is not programmed to allow access to an employee only during his or her scheduled shift. Thus, without off-duty access rules, employees could gain unsupervised access to any part of the Hospital any time of the day or night. (Transcript 31:2-12, 32:14-33:25, 34:3-35:5, 52:1-8.) This presents an unacceptable risk to the security of the Hospital's patients and their families as well as the

Hospital's employees. There, therefore, needs to be control of staff when they are off-duty. (Transcript 31:7-12.)

Second, the Policy plays a role in containing off- the-clock work and overtime. If employees who are not scheduled to work still come to the Hospital and conduct business, the Hospital is legally obligated to pay for their time, including any applicable overtime, even though the employees had not received prior authorization to be working. (Transcript 35:6-16.) Not all employees wear uniforms, so an employee in street clothes wearing an employee badge might be on duty or off-duty. (Transcript 42:3-11.) Thus, the mere fact that a badged employee was wearing street clothes would not help the Hospital in trying to defend a claim for extra compensation. The Hospital would also be liable if the employee suffered an injury while he claimed to be performing work on behalf of the Hospital, even though the employee was supposed to be off-duty. These problems are solved if off-duty employees cannot enter the Hospital as employees. Under the Hospital's policy employees simply have no right to be in the Hospital interior, as employees, unless they are on duty, or have been specifically requested, approved and supervised for specific assignments. Concerns about off the clock work, excessive overtime, and workers compensation claims, of course, do not apply to a third-party visitor. (Transcript 35:17-36:1.)

A third important reason for the Policy relates to the Hospital's federally-mandated obligations to limit access to private patient information. Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Hospital is required to make reasonable efforts to limit access to confidential patient information to persons who are authorized to receive it. In order to comply with HIPAA, the Hospital has promulgated a written policy which limits access to areas, and limits access to records. (Transcript 42:13-53:10, 43:13-24; Hospital Exhibit 1.) The Hospital's ability to maintain these controls would be severely hampered if employees had free, unsupervised access to every part of the Hospital at all times. When an employee is off-duty, he or she is not under the control of a supervisor or manager. Off-duty employees, using their badges, have access into the building and into any unit. Being unsupervised, there is the

potential for them to have access to private patient information that they may not be authorized to access. (Transcript 65:17-66:10.)

D. Under The Exceptions To The Policy, Off-Duty Employees Can Access The Interior Of The Facility But Only Under The Same Procedures As Members Of The Public.

Employees are not deprived of their humanitarian rights to visit hospitalized friends or relatives or to obtain medical treatment. Such a result would be cruel and would serve no purpose protected by the Act. The core business missions of the Hospital – allowing social contact for the sick and providing medical treatment, are available to employees and the Policy so states. However, as the testimony made clear, the Hospital continues to protect its business needs in the way it implements this humanitarian concession.

When employees come to the Hospital to visit a family member or friend they are required – as would any member of the public – to use the visitor entrance, sign in with Hospital security at one of two visitor desks, and obtain a visitor badge by identifying the patient they are visiting by name. After confirming with the unit that the patient is able to and willing to receive the visitor, security will issue a visitor badge. (Transcript 37:5-37:13, 55:12-24, 56:18-24, 57:12-19, 58:2-3.) This badge is specific to the date and to the unit where the patient is located. (Transcript 37:24-38:8.) Visitors, including off-duty employees, must wear this badge so that security or other personnel know that that individual is a visitor intended to visit a specific unit. (Transcript 37:19-38:8.) If security or management notices that a visitor is in the wrong unit, they will redirect the visitor to the correct unit indicated on the visitor badge. (Transcript 38:9-18.) Off-duty employees who come to visit a patient do not gain access to patients with their employee badge. They are required to obtain a visitor badge. (Transcript 68:7-14.)

When off-duty employees come to the Hospital as patients, they are treated the same way as a member of the public seeking admission. They check in at the visitor desk. Then they are redirected to admissions and go through the admissions process as would any other patient. (Transcript 41:3-42:1.)

E. Michael Torres And Three Other Employees Were Disciplined At Least In Part Because They Violated the Policy.

On May 4, 2010, respiratory therapist Michael Torres was suspended with pay after he came to the Hospital without authorization while off-duty and was disrespectful and uncooperative with management and Hospital security. Even though he was advised that he was on suspension and not allowed on Hospital premises, he returned the next day and again engaged in disrespectful and insubordinate behavior. With respect to these events, the Hospital and the Region stipulated as follows:

14. On May 5, 2010, Michael Torres was placed on an investigatory suspension. A precipitating event for that action was his violation of the Hospital's Off-Duty Access Policy.

15. While on Investigatory suspension, Michael Torres returned to the Hospital on May 5, 2010; whereupon, Sergeant Fuentes told him that he (Fuentes) would call the Los Angeles Police Department, and he (Torres) would be arrested, if he did not leave the Hospital's premises.

16. On May 12, 2010, Michael Torres was demoted. A precipitating event for that action was his violation of the Hospital's Off-Duty Access Policy.

(General Counsel Exhibit 3).

On June 25, 2010, NUHW organized a loud demonstration at the office of the Hospital's CEO to protest what it wrongly thought was going to be the Hospital's failure to grant scheduled pay increases. The Hospital did not interfere with this demonstration. However, three employees (Duran, Corea, and Aguirre) who were not scheduled to work that day but entered the Hospital for the demonstration without signing in and while wearing their employee badges were verbally warned for their violation of the Policy. With respect to these events, the Hospital and the Region stipulated as follows:

17. On or about June 25, 1010, Ruben Duran, Alex Correa, and Noemi Aguirre received verbal warnings for violating the Hospital's Off-Duty Access Policy.

Counsel for the Acting General Counsel, Alice Garfield, has admitted that the Region's sole basis for objecting to the discipline received by these four employees is the alleged facial invalidity of the Policy. (Transcript 20:22-24.) At the pre-hearing conference on February 23, 2011, she stated that if the policy is lawful any discipline meted out to these employees that was partly or completely based on a violation of the Policy is also lawful. Having found the Policy valid, Judge Kocol dismissed the entire Complaint.

III. ARGUMENT

A. The Region's First Exception Challenges Only a Finding of Fact Which Is Fully Supported by The Evidence.

The Region first objects to the finding that the "third exception" to the Policy for employees performing "normal duties or duties as specifically directed by management" is "not an exception at all and simply amounts to a definition of on-duty employees" because such employees "are always on paid time and under the supervision of the Hospital" (Decision 3:27-34).

The so-called "third exception" refers to situations where an employee is performing the duties for which he or she was hired and is outlined in his/her job description, i.e., delivering services or clinical care to patients during their regularly scheduled shift or on an additional shift that is prearranged with management for them. It also covers situations where the employee is scheduled for Hospital-sponsored training outside their regular scheduled shift. At those times, the employee is under the supervision and direction of management and on paid time. (Transcript 39:8-40:3, 40:14-21, 67:22-68:6.) In other words, as Judge Kocol correctly noted, the employee is not "off-duty" at all.

It is not clear why the region finds it necessary to dispute this obvious conclusion. It appears the Region believes it supports its argument that the Policy is similar to the one

discussed in Inter-Community Hospital, 255 NLRB 468 (1981). In that case, the employer maintained a policy that included a broad, undefined exception for “official business with the hospital.” Here, however, the Policy is far narrower and less ambiguous. Moreover, as further discussed below, the presence of an exception for official business in the off-duty access policy (or, indeed, the off-duty access policy itself) was not the sole or a necessary basis for the Board’s ruling in Inter-Community Hospital and there was no allegation or finding in that case that the employer violated Section 8(a)(1) of the Act.

B. Judge Kocol Was Correct in Concluding That the Policy Only Allows Off-Duty Employees Access on the Same Terms as Members of the Public.

The Region’s second exception is also a challenge to a factual finding as to which there is no contrary evidence. Judge Kocol found that the Policy “allows off-duty employees to enter the Hospital only under circumstances that members of the public at large are allowed, and then only under the same restriction and conditions that members of the public are allowed inside” (Decision 3:36-38).

All of the evidence supports this conclusion. When Hospital employees come to the facility for a purpose other than performing their job duties, they are subject to the same security procedures as would any member of the public. (Transcript 37:5-38:18, 55:12-24, 56:18-24, 57:12-19, 58:2-3, 68:7-14.) If they come as patients, they are treated the same way as a member of the public seeking admission. (Transcript 41:3-42:1.)

The Region objects that the Policy, on its face “does not state that off-duty employees will be allowed to enter only under circumstances that members of the public are allowed to enter.” (Brief, at p. 12). On the contrary, the Policy identifies two circumstances in which off-duty employees may return to the Hospital: to visit patients and to receive medical treatment themselves. These are the very same reasons why members of the public would be allowed access to the Hospital. Neither members of the public, nor truly off-duty employees came to the Hospital for any other reason. These are the Hospital’s core business purposes.

Judge Kocol's conclusion is consistent with the General Counsel's own interpretation of Tri-County in Perpetual American Savings & Loan, 108 LRRM 1400, 1981 WL 25914, *2 (1981). In that case, the employer bank had issued an off-duty access policy which exempted employees who were coming to use the bank for its intended core business: banking. In its Advice Memorandum the General Counsel specifically rejected a mechanical interpretation of the third prong of Tri-County:

A literal reading of the third criterion of Tri-County Medical Center might suggest that the rule here is invalid, since the Employer's rule does not apply to off-duty employees seeking access to the bank for any purpose but, rather, specifically allows access to off-duty employees for personal banking purposes alone. However, it was concluded that *the focus of the third criterion of Tri-County Medical Center is on whether an employer is discriminating among employees based on union considerations when they returned to the facility during a non-working time.*

Id., at *2 (Emphasis added).

The same logical approach has been followed in numerous other cases. See, e.g., Citrus Valley Medical Center, Inc., 2008 WL 4657784, explaining that a judge "should not literally apply Tri-County's language concerning off-duty employees having access to the facility for 'any purpose.'" In Townsend Culinary, Inc. and Townsends, Inc., 1998 WL 1985307, another case involving a challenge to an off-duty access policy, the administrative law judge again explained that "in order to establish a violation of the Act there must be an impact on Section 7 rights." *Id.*, at page 17.

Judge Kocol's conclusion is also consistent with the decision in Southdown Care Center, 308 NLRB 225, 232 (1992). In Southdown, a health care facility's policy allowed off-duty employees to come inside the facility if they "[have] family or friends in the home [to] visit ...

but [they] must follow visitor rules.” The ALJ held that “on its face, [the home’s] limited-access rule complies with the Tri-County conditions.” The Board affirmed his rulings.³

Likewise here, the only exceptions to the written Policy (to obtain medical treatment or visit patients) are based on the Hospital’s own core business purposes and off-duty employees who come to the Hospital to access these core business purposes must do so in their capacity as members of the general public. (Transcript 41:18-42:1.)

Judge Kocol correctly analogized the Region’s position to a situation where a retail establishment “could bar off-duty employees from its store only if it also banned them from shopping there.” (Decision 4:1-5). Likewise here, the Policy has narrow exceptions based on the Hospital’s core business functions and humanitarian mission. The Region argues that this analogy is inappropriate because, in California, “off-duty employees, as well as union representatives are permitted to engage in various forms of non-commercial speech on-site.” It cites Fashion Valley Mall, LLC v. NLRB, 524 F.3d 1378 (D.C. Cir. 2008). In that case, the court of appeal refused to overturn a decision by the California Supreme Court that a privately-owned shopping mall could not restrict union members from peacefully handbilling on its property in connection with a labor dispute, even though the handbilling was designed to cause a consumer boycott of one of the mall’s tenants. The court of appeal held that, because a large shopping mall is a “public forum” under the California Constitution, mall managers cannot prohibit speech based on its content. It is not at all clear what any of this has to do with whether the exceptions to the Policy make it facially invalid. No court has ever held that the interior spaces of a hospital are “public forums.” No court has ever held that members of the public have an unlimited right of access to the interior spaces of the hospital, and the mere formulation of such a proposition demonstrates its absurdity. Members of the public have limited access to

³ Despite the obvious similarities between the Southdown case and this one, the Region dismisses its importance because the Board, in upholding the ALJ’s decision, did not specifically address the off-duty access issues. (Brief, at p. 6). At the same time, the Region maintains that a case where an access policy was only addressed in a footnote (Baptist Memorial Hospital) and an election case whose ruling was equally supported by the findings on an entirely different policy (Intercommunity Hospital) are “seminal” cases which the ALJ was bound to follow.

hospital and off-duty employees follow the same access rules to gain access to the interior spaces of the hospital as are applicable to any other member of the public.

C. **The Two Cases The Region Relies On Are Distinguishable On The Facts And Were Not Necessarily Decided On The Issue For Which The Region Cites Them.**

As it did below, the Region seeks to rely on two cases in support of its misinterpretation of Tri-County: Baptist Memorial Hospital, 229 NLRB 45 (1977), and Inter-Community Hospital, 255 NLRB 468 (1981). In an effort to inflate their importance, it has now decided to refer to those cases as “seminal.”

1. **The Footnote in Baptist Memorial Hospital Remarkd on a Policy That Was Far Broader.**

Judge Kocol concluded that the Region’s reliance on Baptist Memorial Hospital is misplaced because, in that case, “the Board did not find the rule unlawful simply because the hospital there allowed employees to visit patients and pick up their checks” but rather because the rule “was not limited to the interior of the facility and was not clearly disseminated to the employees.” The two rules are, further, not comparable because “here the record is clear that when the Hospital’s off-duty employees visit patients they must do so as visitors and not as employees” (Decision 4:7-13).

Judge Kocol’s analysis is correct. In Baptist Memorial Hospital, an employee was prevented from handbilling in the hospital lobby across from the cafeteria during his lunch break. After both sides filed exceptions, the Board affirmed the ruling of the Administrative Law Judge that the employer’s handbilling and solicitation rules violated the Act. In a **footnote**, the Board noted that the Administrative Law Judge had **also** stated that the employer’s rule against employees returning to the hospital during off-duty time did not meet the requirements of Tri-County. His reasons for reaching that conclusion do not exist in this case. First, the ALJ noted that “the employer prohibited access not only to the interior of the hospital, but also to sidewalks and other outside areas.” Baptist Memorial Hospital, fn. 4. That is not the case here. The Policy prohibits access only to the interior and working areas of the Hospital. Second, the ALJ

noted that the employer permitted access to employees for a wide variety of purposes, “including picking up paychecks and visiting patients.” *Id.* There was no further discussion or analysis of these observations and no factual discussion of the circumstances under which these examples or others might occur. In this case, however, the facts are clear, and the Policy, on its face, is very restrictive. Off-duty employees cannot enter the Hospital for any other purpose other than as specifically directed by management to perform their job duties or for two very limited humanitarian reasons under very strict conditions.

2. **Inter-Community Hospital Was An Election Case, And The Ruling Was Based On Both A No Solicitation Policy And The Ambiguity Of The Exceptions In The Off-Duty Access Policy.**

Judge Kocol found that the Region’s reliance on Intercommunity Hospital, 255 NLRB 468 (1981) is also misplaced because, in that case, it was “not clear that the Board was holding that simply allowing off-duty employees to visit patients in a hospital would taint a no access rule,” and “[t]his is especially so in light of the rule at issue in Southdown Care Center ...” (Decision 4:13-31). Judge Kocol again hits the nail on its head.

Unlike this case, Inter-Community Hospital involved an allegation that the employer, by its conduct, discriminatorily interfered with the conduct of an election. The employer’s access rule stated that “When you are off-duty, visits to the hospital should be limited to friends or relatives who are patients or on official business with the hospital.” The term “official business” was not defined. While the Board did note that this rule “does not prohibit access for all purposes,” 255 NLRB at 474, it based its finding of discriminatory enforcement partly on testimony by employees that they were permitted to remain in the hospital after work, unsupervised, while waiting for rides or carpools. *Id.* There was no further discussion of the facts. Again, the Policy here is far more specific and more restrictive. Rather than allowing access for a broad, undefined, category of situations which could be characterized as “official business,” the Policy defines hospital business as situations when an employee is actually working at the direction of his or her supervisor. (General Counsel’s Exhibits 4 and 5). Unlike in Inter-Community Hospital, employees are not allowed to mill around waiting for their rides or

for any other similar convenience while off-duty. Moreover, in Inter-Community Hospital, the Board also noted that, in each incident cited by the General Counsel, the employer's action could have been based on either the off-duty access policy or a no solicitation policy that was overbroad. Inter-Community Hospital, 255 NLRB at 474-75. There is no allegation in this case regarding a no solicitation policy, nor is there any evidence that the discipline imposed on Torres or the other employees was based on such a policy.

While the Region insists Inter-Community Hospital supports its interpretation of Tri-County, the General Counsel interpreted that case very differently in his advice memorandum in Perpetual American Savings & Loan, 1981 WL 25914, *2. There, the General Counsel specifically rejected the position the Region is advancing in this case, finding instead that the proper inquiry is "whether an employer is discriminating among employees based on union considerations." That is precisely the inquiry Judge Kocol performed. Based on the Region's stipulation that there is no evidence or allegation of anti-union discrimination, he concluded the Policy is not invalid on its face.

D. Judge Kocol Was Correct In Concluding That Testimony That One Employee Occasionally Came to The Hospital To Pick Up His Paycheck Does Not Make the Policy Facially Invalid.

The Region argues that the Judge erred in not considering testimony by NUHW activist, Julio Estrada that he has, on a handful of occasions, come to the Hospital to retrieve his paycheck when he was not scheduled to work on that particular payday and that, on those occasions, he accessed the facility with his employee badge. (Transcript 76:6-16, 79:11-17.) He only does this because he has not signed up for direct deposit. (Transcript 72:7-10, 76:6-7.) Mr. Estrada testified that on approximately ten instances in the past five years, his supervisor, Victor Perez, saw him come up to the department to pick up his paycheck. (Transcript 81:9-82:19.) This is the only evidence the Region offered as to any "exception to the three exceptions." The Region concedes, however, that it is not evidence of selective enforcement, which the Region stipulated is not an issue in these proceedings. (Transcript 73:23-24, 75:2-5.)

The fact that one employee, who elects not to use direct deposit, has occasionally gotten away with violating the policy is not evidence that the Policy is invalid on its face. First, even if the policy allowed for off-duty employees to pick up pay checks, it would not make the policy invalid. See Citrus Valley, at pages 8-9 (“Certainly employers could allow off-duty employees access to pick up paychecks, resolve benefit issues and the like without tainting an otherwise valid no access rule.”) Second, since the Hospital’s Human Resources office in a completely different building, it does not provide a policy exception for off-duty employees to access the Hospital for human resource issues. These matters are taken care of at another facility. (Transcript 47:6-21.)

Further, as Judge Kocol correctly pointed out, the Region had stipulated that this case involves only a challenge to the facial validity of the Policy and that there is no “differential enforcement” of the policy. Thus, the Region’s eleventh hour evidence of an “exception to the exceptions” is inconsistent with its contentions in this case. What is more, the Region waited until the end of the Hospital’s case to first bring up this purported evidence after a year and a half of arguing that the only issue is the two exceptions the Policy states on its face. This is disingenuous and fundamentally unfair.

E. The Judge Properly Dismissed The Entire Complaint After Finding The Policy Valid Since The Region Admitted That The Discipline Was Proper If The Policy Were Valid.

The Region next argues that the Judge failed to conclude that the Hospital violated the Act with respect to discipline imposed on four employees. As explained above, Michael Torres was suspended and subsequently demoted based partly (but not solely) on his off-duty presence at the Hospital’s Bronchoscopy Lab and the Environmental Services (“EVS”) department, both interior working areas of the Hospital where the public is not allowed. Alex Corea, Noemi Aguirre and Ruben Duran were verbally warned for their off-duty participation in an “impromptu” protest at the CEO’s office; also an interior working area not open to the public. Counsel for the Acting General Counsel, Alice Garfield, has admitted that the Region’s sole basis for objecting to the discipline is the alleged facial invalidity of the Policy. (Transcript

20:22-24.) At the pre-hearing conference on February 23, 2011, she stated that if the policy is lawful any disciplined meted out to these employees that was partly or completely based on a violation of the Policy is also lawful. Thus, the parties and the Judge agreed that it was not necessary to present evidence or argument on such discipline if the Region failed to show that the Policy pursuant to which it was meted out was valid. If, however, the Board reverses Judge Kocol's decision, a further hearing on the other reasons why Torres was disciplined would be necessary. It is the Hospital's contention that that it would have taken the same action independent of his violation of the allegedly invalid Policy. See NLRB v. GATX Logistics, Inc., 160 F.3d 353, 355-56 (7th Cir. 1998).

IV. CONCLUSION

Based on the foregoing, as well as the pleadings, evidence and testimony on the record, Region 21's Exceptions should be rejected and Judge Kocol's Decision and Order dated April 8, 2011 adopted by the Board.

DATED: June 10, 2011

BATE, PETERSON, DEACON, ZINN & YOUNG LLP

By:  _____
Lester F. Aponte
Attorneys for Respondent
USC UNIVERSITY HOSPITAL

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 June 10, 2011, I caused to be served the foregoing documents described as **ANSWERING BRIEF OF RESPONDENT USC UNIVERSITY HOSPITAL IN SUPPORT OF DECISION BY ADMINISTRATIVE LAW JUDGE AND IN OPPOSITION TO EXCEPTIONS FILED BY REGION 21** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed per the service list below.

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

Executed on June 10, 2011, at Los Angeles, California.


Zelda Davis