

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SODEXO AMERICA LLC

and

Case 21-CA-39086

PATRICIA ORTEGA, an Individual

SODEXO AMERICA LLC; AND  
USC UNIVERSITY HOSPITAL

and

Case 21-CA-39109

SERVICE WORKERS UNITED

USC UNIVERSITY HOSPITAL

and

Cases 21-CA-39328  
21-CA-39403

NATIONAL UNION OF HEALTHCARE  
WORKERS

RESPONDENT USC UNIVERSITY  
HOSPITAL'S REPLY BRIEF

---

RESPONDENT USC UNIVERSITY  
HOSPITAL'S REPLY BRIEF

## Contents

	Page
I. INTRODUCTION.....	1
II. THE BOARD CANNOT AND DID NOT REJECT THE ALJ'S FINDING THAT THE THIRD EXCEPTION ALLOWED OFF-DUTY EMPLOYEES TO RE-ENTER THE FACILITY TO RETURN TO DUTY .....	1
III. THE OPPOSITION DEMONSTRATES CONCLUSIVELY THAT THE DECISION IS ILLOGICAL AND INCORRECT.....	3
IV. THE OPPOSITION CONFIRMS THAT THE DECISION INAPPROPRIATELY DETERMINED THAT AN "UNNECESSARY" POLICY IS AN "ILLEGAL" POLICY.....	5
V. THE OPPOSITION RELIES ON UNSUPPORTED ASSERTIONS AND PRONOUNCEMENTS THAT HAVE NO LEGAL OR RATIONAL BASIS.....	5
VI. THE HOSPITAL JOINS IN SODEXO'S REPLY CONCERNING THE SCOPE AND INAPPROPRIATENESS OF THE ORDER AND THE NOTICE OF POSTING.....	7
VII. CONCLUSION .....	8

**Table of Authorities**

Page(s)

**National Labor Relations Cases**

<i>Coca-Cola Bottling Company of Memphis</i> 132 NLRB 481 (1961) .....	3
<i>Hornell Nursing and Health Related Facility</i> 221 NLRB 123 (1975) .....	3
<i>InterCommunity Hospital</i> 255 NLRB 468 (1981) .....	6

**Secondary Source**

“Activity.” <i>Random House Dictionary of the English Language</i> , college ed. New York, New York: Random House, 1968 .....	4
--	---

I. INTRODUCTION

In the Opposition To Respondents' Motions for Reconsideration of Board's Decision, ("Opposition") Counsel for the Acting General Counsel confirms that the objections raised by Keck Hospital of USC (formerly known as USC University Hospital and referred to herein as "Hospital") are well taken and that the Board's Decision (hereinafter "Decision") is wrong as a matter of both fact and law. The very act of trying to defend the Decision demonstrates some of the numerous errors made by the Board.

The Hospital also joins in the Reply Brief filed by Sodexo and incorporates it herein by reference. Issues raised in Sodexo's Reply are also raised, by joinder and incorporation by reference, in this Reply.

II. THE BOARD CANNOT AND DID NOT REJECT THE ALJ'S FINDING THAT THE THIRD EXCEPTION ALLOWED OFF-DUTY EMPLOYEES TO RE-ENTER THE FACILITY TO RETURN TO DUTY

As noted in the Hospital's Motion for Reconsideration, the Board found the Hospital's off duty access policy to be unlawful because the Board decided that the third prong of the policy was unnecessary. The Board asserts that off duty employees can always enter the facility to go back on duty and thus there is no need to say so in a policy. Since the Hospital chose to say so, it must mean that the policy is ambiguous. As noted by the Hospital, this chain of logic finds no support in reason, the record, or in law. Apparently recognizing that the Board's conclusion in that regard could not be defended, Counsel for the Acting General Counsel now contends that the Board in fact determined

that the policy did not mean what it said, and that the Board has determined that the undisputed testimony of Mr. McElrath as to what the policy meant was rejected and not credible. This the Board cannot do. As Administrative Law Judge Kocol found:

“McElrath **credibly** explained that the Hospital needs the rule to assist in providing a safe and efficient environment for on-duty employees, patients and visitors. The rule allows the Hospital to maintain control of the times that employees have access to patient records and to sensitive areas of the Hospital. In this regard the rule allows the Hospital to assure that the employees are accessing that information or are in those areas only when the employees are being properly supervised. McElrath also explained that if off-duty employees enter the facility and began (sic) performing work, the Hospital may be required to pay them, perhaps at an overtime rate, even though the Hospital had not authorized the work. In this regard McElrath explained that under this exception employees are always on paid time and under the supervision of the Hospital.”

ALJ’s Decision at p.5 of the Decision

Thus, the ALJ found that the policy meant exactly what it said, based on what he determined to be the credible testimony of the person charged with maintaining the policy. The Board never stated that it was rejecting this testimony of Mr. McElrath, and certainly never offered any explanation of or basis for rejecting the credibility findings of the ALJ.

Determination of the credibility of the witnesses is the province of the ALJ who is hearing the case and watching the demeanor of the witnesses. Credibility determinations are not and cannot be overturned by the Board without a rational explanation, based on facts in the record. It is the established policy of the Board not to overrule credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the resolutions are not correct. *The Coca-Cola Bottling Company of Memphis* 132 NLRB 481, 483 (1961), *see also Hornell Nursing and Health Related Facility* 221 NLRB 123, 124 (1975). There was no testimony in the record contradicting Mr. McElrath's testimony, there is no explanation in this Decision of any basis for rejecting his testimony, and no citations to any record evidence that would support a determination that Mr. McElrath's testimony was incorrect or lacked credibility. Therefore, if this is in fact the basis for the Board's decision, the Decision is further flawed, and must be reversed.

III. THE OPPOSITION DEMONSTRATES CONCLUSIVELY THAT THE DECISION IS ILLOGICAL AND INCORRECT.

In its Motion, the Hospital objected to the Board ignoring the actual wording of the policy, and substituting its own word, "activity", instead of basing its Decision on the actual words used by the Hospital: "duty" and/or "duties". In opposing the Hospital's Motion, Counsel for the Acting General Counsel makes the assertion that the Board did address the word "duty" or "duties" in its analysis. The Opposition comes to this conclusion by first admitting that the Board used the word "activity", not "duty" in stating what the policy says; then, admitting that the Decision specifically (and

incorrectly) asserts that the policy permits access for “any activity ‘specifically directed by management’” and; finally, admitting that the Board relied on the breadth of the meaning of the word “activity” in its analysis. However, the Opposition asserts that this complete focus by the Board on the word “activity” was actually a discussion about the word “duties” because... “Clearly duties are activities directed by management”. (Opposition p. 4.)

This inverted logic is completely irrational and misses the point entirely. The fact that a narrower term is contained within a broader term does not make the narrower term broad. Quite the contrary. “Duty” is a narrow term, with a precise definition. “Activity” is much broader.<sup>1</sup> Every “duty” may be an “activity” but that does not mean that every “activity” is a “duty”. Just because a policy with the word “activity” in it would be considered by this Board to be illegal, and just because a duty is one type of activity, does not mean that the term “duty” is overbroad or is magically transformed into the term “activity” or that a policy specifically limited to “duties” is overbroad and illegal.

Merely putting this argument on paper demonstrates its absurdity. The Board was wrong to pretend that a policy limited to “duties” of employees could be alchemized into a policy pertaining to “activities” of employees. The Opposition conclusively demonstrates that flaw, and confirms that the Decision must be reversed.

---

<sup>1</sup> “Activity... 1.the state or quality of being active. 2. The quality of acting vigorously. 3. A specific deed, action, function, or sphere of action: *social activities* “Activity.” *Randon House Dictionary of the English Language*, college ed. New York, New York: Random House, 1968

IV. THE OPPOSITION CONFIRMS THAT THE DECISION INAPPROPRIATELY DETERMINED THAT AN “UNNECESSARY” POLICY IS AN “ILLEGAL” POLICY.

As stated in the Opposition “More important, as noted by the Board in its decision, if the Rule’s third exemption truly relates to only on-duty employees, it is simply unnecessary...” (Opposition p. 4.) Like the Board in its Decision, the Opposition provides no legal basis for the contention that an unnecessary policy is, ipso facto, an illegal policy. Furthermore, the Opposition provides no response to the Hospital’s point, as raised in its Motion, that many employer policies, such as payment of overtime, non-discrimination, and workplace safety are “unnecessary” because they are already required by law. Nonetheless they are routinely enacted, and have never been found to be illegal simply because they are already required by law and therefore unnecessary.

This reliance by Counsel for the Acting General Counsel on the Decision’s statement that the policy is “unnecessary” in order to support the Decision’s conclusion that the policy is illegally overbroad, simply confirms once again the error of the Decision and the need for its reversal.

V. THE OPPOSITION RELIES ON UNSUPPORTED ASSERTIONS AND PRONOUNCEMENTS THAT HAVE NO LEGAL OR RATIONAL BASIS.

The Opposition asserts that the policy is illegal because “Off duty access rules were never meant to apply to every employee about to come to, or leave from work.” This statement is completely unsupported by any citation to the record or to legal authority and is absurd on its face. Off duty access policies absolutely apply to every

employee about to leave work. It is the off duty access policy that requires that the off duty employee actually leave the facility because that employee is no longer allowed to be in the facility when off duty. In fact, whether all employees actually are required to leave a facility once they are off duty is one of the issues raised by the Board when it looks at differential enforcement of an off duty access policy. (See, for example, the reference to employees staying around after their shift in the discussion of *Inter-Community Hospital*, 255 NLRB 468, 474 (1981). Furthermore, as described in detail in the Hospital's Motion, every Hospital employee is subject to the requirement that, unless there is a specific reason related to the employee's duties for him or her to return, such a return is forbidden. Surely, Counsel for the Acting General Counsel would not assert that the policy should be written to only apply to some of the employees.

Similarly, the Opposition states "...to the arguable extent that the word "duties" in the Rule may have created some ambiguity or confusion, it must be construed against the drafter, particularly if such ambiguities have the effect of infringing upon statutory rights." This statement comes out of nowhere. The Opposition provides no explanation of how the word "duty" is or ever was ambiguous, or how it is or ever was construed to infringe on Section 7 rights. The record provides no such explanation. As discussed in detail in the Hospital's Motion, there were no allegations, arguments, or evidence that the word "duty" is or ever could be considered ambiguous. Even the Decision does not purport to contend that the use of the term "duties" is ambiguous. As noted in the Hospital's Motion, all of the alleged ambiguity is created by the Decision ignoring the word duty entirely and substituting its own word "activity". Duty is not an ambiguous

term, and the Opposition provides no citation to any record evidence or legal principle that would make the term ambiguous.

Finally, the Opposition relies on the statement that the Rule is “not clear or precise” and gives “Respondent significant discretion in determining which off-duty employees may enter its premises and when they may do so.” (Opposition p. 5) Again, this assertion makes no reference to any evidence in the record, and of course, completely ignores the language of the policy, even though it was stipulated that this challenge was a facial challenge to the wording of the policy, and nothing else. (GC 3) Under prong 3 of the policy the Hospital has NO discretion in determining which employees enter the Hospital. Only those preparing to come on duty are allowed into the interior of the Hospital or other working areas. There are no exceptions. There is no wiggle room. The Opposition cites to no evidence, no legal principle and no rational analysis that creates discretion out of this iron clad, narrow policy.

VI. THE HOSPITAL JOINS IN SODEXO’S REPLY CONCERNING THE SCOPE AND INAPPROPRIATENESS OF THE ORDER AND THE NOTICE OF POSTING

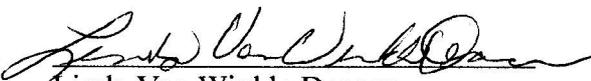
For the reasons set forth in Sodexo’s Reply, the Hospital similarly contends that the Opposition demonstrates that the Notice of Posting and Order are overbroad and incorrect as detailed in the earlier Motions of the Hospital and Sodexo. Sodexo’s Reply is incorporated herein by reference.

VII. CONCLUSION

Prong 3 of the Hospital's Off Duty Access Policy is a textbook recitation of the strictest possible reading of *Tri-County Medical Center* 222 NLRB 1089 (1976). All off duty employees are forbidden to enter the interior of the facility or other working areas unless they are preparing to come back on duty. It is impossible to write a stricter, less discretionary policy. To declare such a policy ambiguous and overbroad is without foundation in reason, law or the record. The Decision should be reconsidered, the Decision of the Administrative Law Judge should be affirmed, and the Complaint should be dismissed.

Dated: August 7, 2012

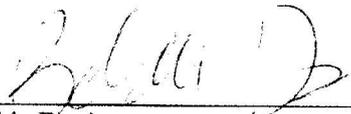
Respectfully submitted,

By:   
Linda Van Winkle Deacon  
Attorney for Respondent  
Keck Hospital of USC, formerly  
known as USC University Hospital  
E-mail: lindaedeacon@gmail.com

**CERTIFICATE OF SERVICE**

21-CA-39086 - 21-CA-39109 - 21-CA-39328 - 21-CA-39403

I, hereby certify that on August 9, 2012, I electronically filed the foregoing document with the National Labor Relations Board using its e-filing system and served a copy of the forgoing document by electronic service as indicated below or by next day delivery to the following the persons as in below.

  
\_\_\_\_\_  
Zelda Davis

**VIA ELECTRONIC MAIL**

Ms. Patricia Ortega  
2107 Common Wealth Avenue,  
Apt. D-369  
Alhambra, CA 91803

e-mail: opatricia491@gmail.com

**Via Electronic Mail**

Mark T. Bennett, Esq.  
Marks, Finch, Thornton & Baird, LLP  
4747 Executive Dr., Suite 700  
San Diego, California 92121-3107

E-mail: mbennett@mftb.com

**VIA ELECTRONIC MAIL**

Alice Garfield, Region 21  
National Labor Relations Board  
888 South Figueroa Street, Ninth Floor  
Los Angeles, CA 90017-5449  
T: 213-894-3011  
F: 213-894-2778  
E-mail: alice.garfield@nlrb.gov

**VIA OVERNIGHT MAIL**

SEIU-United Healthcare Workers-West  
5480 Ferguson Drive  
Los Angeles, CA 90022

**VIA OVERNIGHT MAIL**

Service Workers United  
275 Seventh Avenue, 10th Floor  
New York, NY 10001

**VIA ELECTRONIC MAIL**

Florice O. Hoffman, Esq.  
Law Offices of Florice Hoffman  
8502 East Chapman Avenue, #353  
Orange, California 92869  
T: 714-282-1179  
F: 714-282-7918  
E-mail: fhoffman@socal.rr.com

**VIA OVERNIGHT MAIL**

Antonio Orea  
National Union of Healthcare Workers  
8502 East Chapman Avenue, Suite 353  
Orange, CA 92869

**VIA ELECTRONIC MAIL**

Bruce A. Harland, Esq.  
Weinberg, Roger, & Rosenfeld  
1001 Marina Village Parkway,  
Suite 200  
Alameda, CA 94501  
T: 510-337-1001  
E-mail: bharland@unioncounsel.net