

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Washington, D.C.

USC UNIVERSITY HOSPITAL

and

NATIONAL UNION OF HEALTHCARE
WORKERS

Case No. 21-CA-39656

Case No. 21-CA-39693

Case No. 21-CA-39798

Case No. 21-CA-39799

Case No. 21-CA-39808

and

Case No. 21-CA-39870

**ANSWERING BRIEF BY USC UNIVERSITY HOSPITAL TO NUHW'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Rule 102.46(d)(1), Respondent USC University Hospital (the “Hospital”) submits this brief in response to and in opposition to the exceptions filed by the National Union of Healthcare Workers (“NUHW”) to the decision and recommended order on the above-captioned consolidated cases. That decision was issued by Administrative Law Judge Gregory Z. Meyerson on April 11, 2012.

INTRODUCTION AND SUMMARY OF ARGUMENT

Judge Meyerson’s decision followed a six day trial on six unconnected cases brought by NUHW. After considering the evidence, he issued a decision finding that the Hospital had committed some unfair labor practices but dismissing three of the cases. NUHW has filed exceptions to Judge Meyerson’s conclusions on two of those cases, Nos. 39799 and 39808.

A decision on an unfair labor practice claim will be upheld when the ALJ and the Board have correctly applied the law and the factual findings are supported by substantial evidence in the record as a whole. Town & Country Electrical, Inc. v. NLRB., 106 F.3d 816, 819 (8th Cir. 1997). Evidence is considered substantial if it is adequate to a reasonable mind to uphold the decision. NLRB. v. Brown-Graves Lumber Company, 949 F.2d 194, 196 (6th Cir. 1991). Here, the rulings NUHW has challenged are amply supported by the evidence and NUHW does not even attempt to argue that Judge Meyerson has misapplied the law. Instead, NUHW’s exceptions are made largely on the grounds that the ALJ’s *credibility* findings are incorrect. Such findings are due great deference and it is the Board’s longstanding policy to adopt them unless they are patently incorrect under a clear preponderance of all of the relevant evidence. That is a standard NUHW cannot meet. Accordingly, the NUHW’s exceptions should be summarily dismissed and Judge Meyerson’s order as to Cases Nos. 39799 and 39808 should be adopted by the Board.

Other than the common jurisdictional facts, which are set forth below, the Hospital addresses and refutes each of the two cases separately.

JURISDICTIONAL FACTS

The Hospital is engaged in business as a general acute-care hospital. It purchased the facility from Tenet Healthcare Corporation (“Tenet”) on or about April 1, 2009. At that time, there was a collective bargaining agreement in effect between Tenet and the Service Employees International Union, United Healthcare Workers-West (“SEIU”) which applied to a unit of service and maintenance workers (the “Tenet-SEIU contract”). The Hospital agreed to recognize SEIU as the exclusive bargaining representative of those employees and to adopt the terms of the Tenet-SEIU contract insofar as such terms were not unique to Tenet. NUHW became the certified bargaining representative of the employees in the service and maintenance unit, following an election, effective June 17, 2010. The Tenet-SEIU contract expired on March 31, 2011. Negotiations on a contract between NUHW and the Hospital recently concluded in an agreement¹. (Decision, at 2:32-3:5). These facts are undisputed.

The Consolidated Amended Complaint, filed July 29, 2011, consolidates allegations from six separate unfair labor practice charges. On April 11, 2012, Administrative Law Judge Gregory Z. Meyerson issued his decision and recommended order on the consolidated complaint. Of relevance to this appeal is the fact that Judge Meyerson dismissed three of NUHW’s charges. NUHW has taken exception to two of these dismissals. NUHW disputes the dismissal of the allegation that the Hospital made a unilateral change to the terms and conditions of employment by “eliminating” a seven minute “grace period” for tardiness in certain departments (Case No. 39799). NUHW also objects to the dismissal of the allegation that written warnings for tardiness and attendance issued to respiratory therapist Michael Torres were issued to him in retaliation for his union activities (Case. No. 39808)².

¹ At the time the trial was completed and submitted to Judge Meyerson for his decision, that agreement had not yet been reached.

² Judge Meyerson also denied the General Counsel’s request for a bargaining order, finding that there was no evidence of “surface bargaining” or a “general failure” by the Hospital to bargain in good faith with NUHW or that the Hospital “harbored animus towards” NUHW. (Decision, at 23:17-24, and 28, fn. 10). Given that a contract has since been signed, Judge Meyerson was clearly correct on his assessment.

With respect to the credibility of witnesses, Judge Meyerson explained:

The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. *See NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

(Decision, at 2, Fn. 3).

CASE NO. 39799

I. The ALJ Correctly Found That The Hospital’s Attendance And Punctuality Policy Has Never Provided For A Grace Period For Tardiness.

In Case No. 39799, General Counsel initially asserted that the Hospital had a policy of not counting employees as tardy if they arrived at work within seven minutes of their actual start time, a policy it alleged the Hospital “unilaterally changed” in March of 2011. On the eve of trial, however, General Counsel amended the complaint to allege instead that, beginning in 2009, some managers in 3 of the Hospital’s 51 departments did not discipline employees for tardiness if they were less than seven minutes late but then those departments began disciplining employees again in February 2011. In reality, the evidence introduced at trial – almost all of which is undisputed – points to a longstanding, consistent, Hospital-wide policy that employees must be at their stations and ready to work by the start of their shifts and there is no grace period for tardiness.

As NUHW admits in its brief, the following findings by the ALJ are undisputed:

1. “Employees at the Hospital use an individual badge to swipe in and out recording their arrival and departure times. The Respondent's payroll timekeeping system is known as the Kronos system.” (Decision, at 16:26-28).
2. “It is undisputed that for payment purposes only, if an employee arrives at work and swipes in 8 minutes or later beyond his/her scheduled start time, that employee's pay will be docked by at least 15 minutes. On the other hand, for an employee who arrives at work and swipes in between 1 and 7 minutes beyond his/her scheduled start time, that employee's pay will not be docked at all. Rather, for payment purposes, that employee's arrival time will be rounded back to the employee's actual scheduled start time. It is important to stress that this payroll practice, which is hospital-wide, is separate and distinct from the Respondent's tardiness policy.”

(Decision, at 16:28-35).

NUHW also does not dispute Judge Meyerson's finding that the Hospital's policy, going back to 2002, has been consistent that there is no grace period for tardiness:

The Respondent offered into evidence a number of written attendance and punctuality policies that had been in effect at the facility beginning under Tenet's ownership, and continuing through the present time. It appears that these policies were intended to be applied hospitalwide. For example, an operating policy the Human Resources Department addressed to "All Hospital Staff," effective May 1, 2002, reads, "Tardiness: Any time an employee arrives late at workstation and/or is not dressed appropriately and ready to work at the beginning of the assigned shift. **There is no grace period**"

(Emphasis added by the undersigned.) (Res. Ex. 65, p. 2.) Also, in a revised memo to "All Hospital Staff" dated June 28, 2005, the employees were advised as follow:

"Tardiness: Any time an employee arrives late at workstation, which includes returning from breaks and meal periods and/or is not dressed appropriately and ready to work at the beginning of the assigned shift. **Start times have no grace period** for dressing or clocking i.e., if shift start at 7:00 a.m. employee must be ready to report to work at that time." (Emphasis added by undersigned.) That same memo further stated, "Tardiness is based on arrival and/or departure as scheduled for shift start and end times. It is not associated with time reporting or payroll clock in times." (Res. Ex. 66, p. 1-2.) That same language can be found in a written attendance & punctuality policy addressed to "All Hospital Staff" as recently as January 26, 2010, which states: "Tardiness: Any time an employee arrives late at workstation **Start times have no grace period** for dressing or clocking.... Tardiness is based on arrival and/or departure as scheduled for shift start and end times. It is not associated with time reporting or payroll clock times." (Emphasis added by undersigned.) (Res. Ex. 1.)

(Decision, at 16:44-17:10).

The consistent and undisputed evidence in the record also established that NUHW's predecessor union brought an almost identical claim regarding a purported grace period for tardiness which went to the expedited "hot button" arbitration procedure in 2006. As union steward, Michael Torres filed a grievance on his own behalf and on behalf of all employees in the respiratory department complaining that the Hospital (then owned by Tenet) had changed a "past practice" of not disciplining employees who clocked in within a "grace period" for tardiness. (Tr. 841:16-843:8, 844:19-845:8, 845:14-16). NUHW does not deny that the issue of the purported "grace period" was submitted by the parties to "hot button," i.e., expedited arbitration. Eva Herberger, who was then and is now employed in the Hospital's Human Resources department, testified that the arbitration was resolved in the Hospital's favor. (Tr. 845:9-846:2, 885:7-20). Her recollection is supported by Tenet's immediate issuance of a memorandum that was distributed to all employees with their paychecks or direct deposit stubs and posted, along with the policy, throughout the Hospital. (Tr. 846:7-847:15 and R-3 and R-63). The memorandum reiterated that the attendance and punctuality policy does *not* provide for a grace period for tardiness, and that the policy applies to all employees and must be adhered to. The memorandum also made clear that discipline could be imposed for being tardy, as defined in the policy. (R-3).

NUHW complains that Judge Meyerson "discredited the testimony of Respiratory employee Torres that he remembered the SEIU's pursuit of that particular grievance but stated that the arbitration was never resolved." (NUHW Brief, at p. 3). Preliminarily, that is not at all what happened. Torres testified that he did, in fact, file the grievance after he received an oral warning for tardiness with one occurrence of less than seven minutes. He further testified that there *was* a hot button arbitration on the issue of the grace period and that he travelled from Los Angeles to Oakland to testify at the hearing. He did *not*, as NUHW now claims, testify that the arbitration "was never resolved." Rather, he testified that he does not "remember" if he received a copy of the arbitrator's findings. (Tr. 102:20-103:9, 104:18-105:10 and R-2). Torres also

testified that the memorandum issued by the Hospital immediately after the arbitration was resolved and which reiterated that there is no grace period “sounds familiar” and that he “might have seen” it. (Tr. 103:1-14, 104:3-17 and R-3). At the same time, Torres produced no evidence that the write-up that was the starting point for the arbitration was ever overturned or withdrawn from his file (Tr. 116:6-8). Not surprisingly, Judge Meyerson found his testimony less than credible:

I find Torres' testimony that he was unaware of, and never saw, the arbitrator's decision regarding the alleged 7 minute grace period to be totally incredible. He had himself been disciplined for being less than 7 minutes late for work. He was obviously concerned about this matter, as he filed a grievance over this issue, and went to Oakland to participate in the arbitration. For him to suggest that he does not know the outcome of the arbitration simply defies credulity.

(Decision, at 17:40-45).

Additionally, Judge Meyerson found that Ms. Herberger’s testimony that the arbitration decision was in favor of the employer was “very credible” given her personal involvement in the matter. (Decision, at 17:45-18:1).

As further explained below, this is not the only point as to which Torres testified contrary to both logic and all of the evidence on the record. In several instances, he contradicted even himself. With respect to an administrative law judge's credibility determinations, “[i]t is the Board's established policy” not to overrule them “unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect.” Goya Foods, Inc., d/b/a Goya Foods of Florida, 358 NLRB No. 43, *3, Fn. 1 (2012), citing Standard Dry Wall Products, Inc., 91 NLRB 544 (1950). That is certainly not the case here. Judge Meyerson’s conclusion that Torres is not a credible witness is, therefore, unassailable.³

³ NUHW appears to be arguing that the speed of the decision in the arbitration somehow means there was no decision at all (NUHW Brief, at p. 3). This makes no sense, since all parties agree

II. The Evidence On The Record Does Not Establish That The Respiratory, EVS, and Laboratory Departments Had Separate Tardiness Policies.

NUHW's theory has changed several times since it first filed its charge in Case No. 39799. It appears that it has never reconciled itself to the fact that the "grace period" has never been the Hospital's policy and adopts instead the 11th hour allegation General Counsel made for the first time at the hearing and argues that "since 2009, employees in the laboratory, respiratory and EVS [departments] were allowed a 7 minute grace period under the attendance policy before they received discipline for being tardy." (NUHW's Brief, at p. 3). This "past practice," NUHW contends, was the result of "mangers [sic] within these specific departments creat[ing] an exception to the Hospital's practice of no grace period." *Id.* Here too, the evidence on the record overwhelmingly contradicts NUHW's contentions.

First, NUHW has set forth no facts to contradict the evidence at trial that policies are issued Hospital-wide and no individual supervisor has the authority to craft unique policies that only apply to his or her small group of employees. (Tr. 764:2-4). There are, in fact, strict procedures in place, involving the most senior levels of the Hospital's administration, which must be followed when personnel policies are changed or revised. (Tr. 763-11-24). Any other practice would jeopardize the Hospital's accreditation. (Tr. 767:13-768:5, 785:5-786:17, 840:23-25). Judge Meyerson took note of these facts and further noted that:

No evidence was offered by the General Counsel to show that any individual manager or supervisor in the Laboratory, Respiratory, or EVS Departments had the actual authority to alter or modify the Hospital's well established policy as to tardiness.

(Decision, at 18:40-43 and fn. 8).

Second, there is ample evidence that employees in the departments NUHW alleges had instituted an "exception" to the Hospital's tardiness standards were disciplined for being late

it was a "hot button," expedited arbitration. Similarly, there was never any testimony that "hot button," expedited arbitration required a formal, written decision.

seven minutes or less *after* the 2009 date when NUHW and the General Counsel allege that exception was created and *before* the February 2011 date they allege it was changed. (See (GC-1(a1) ¶¶15).

A. The Respiratory Department did not Have a Separate Tardiness Policy.

NUHW claims that “there was only one employee within these departments that was issued discipline [for tardiness] from 2009 to 2011” (NUHW’s Brief, at p. 3). This statement not only contradicts the entire premise of the General Counsel’s Complaint, it is not true. Several respiratory therapists were disciplined for tardiness, contrary to the alleged grace period, in 2010. Margaret Knight was disciplined for tardiness in April 2010, with five of the eight occurrences listed being less than seven minutes (R-35). At about the same time, Richard Rea was disciplined with all eight occurrences being less than seven minutes. (Tr. 558:22-559:8 and R-23). Alex Corea received a verbal warning for tardiness with occurrences of less than seven minutes in April 2010. (Tr. 539:3-540:2 and R-16). So did Alan Ravago. (Tr. 543:13-546:8 and R-17). Noemi Aguirre was disciplined on April 21, 2010, with 7 of the 8 occurrences listed on the write-up being less than 7 minutes. (G.C. Ex. 15.) Torres himself was disciplined for tardiness under similar circumstances in April 2010. (Tr. 107:3-108:25 and Ex. R-4)⁴.

NUHW then suggests that the purported change in the Respiratory department came in September 2010, when Administrative Director, Respiratory and Pulmonary Diagnostic Services, George Sarkissian (“Sarkissian”), and Department Manager, Tracy O’Connell (“O’Connell”) assumed their current positions. (Tr. 498:19-499:1, 525:20- 526:1). According to NUHW,

⁴ On this point, Torres so contradicted himself that any objective fact-finder would have had to disregard his testimony. He first claimed that he was never disciplined for tardiness under seven minutes, or at all, before 2011. (Tr. 60:8-11, 93:17-94:12, 96:16-20). He then had to admit that had been disciplined for tardiness in 2006 and 2010, both times with occurrences under 7 minutes. (Tr. 100:11-102:11, 107:3-108:25 and R-2 and R-4). Torres testified that his previous supervisor, Victor Perez, did not write people up if they were late less than seven minutes and even wrote a memorandum announcing a seven minute grace period. (Tr. 89:13-16). But Perez not only wrote up several respiratory therapists for tardiness in 2010, he even wrote up Torres. (Tr. 89:3-16, 144:22-145:16, 539:3-541:2, 543:13-546:8 , 558:22-559:8 and GC-15, R-35, R-16 to R-17, R-23, R-35). The memorandum, of course, never existed. (Tr. 506:1-17).

“Sarkissian and O’Connell held a staff meeting for the department” during which they supposedly assured a respiratory therapist that they “would *still* be afforded a grace period for clocking in.” (NUHW’s Brief, at p. 5). The evidence on the record shows beyond a shadow of a doubt that this claim is false. First, several respiratory therapists, including Torres and Aguirre had been written up *prior* to the arrival of O’Connell and Sarkissian for being tardy less than seven minutes. Logically, O’Connell and Sarkissian could not have stated that there would “still” be a grace period when no grace period existed before. Second, while it is undisputed that the issues of attendance and tardiness were discussed in the September 2010 meeting (Tr. 503:15-504:8), Sarkissian testified that what he said at the meeting was that he understood situations could arise that cause people to be late or absent and that, so long as there was no pattern of tardiness, they would not necessarily be taking action. (Tr. 504:9-21, 515:16-25). This is, of course, consistent with Hospital policy which calls for an oral warning after eight tardies.

NUHW alleges that regardless of what was said at the September meeting, O’Connell nonetheless “began disciplining Torres” for “tardies of 7 minutes or less.” (NUHW’s Brief, at 6-7). Torres’ own testimony also undermines this allegation. He acknowledged that, only weeks after the staff meeting, on October 29, 2010, he met with O’Connell and Sarkissian, who counseled him and presented him with proposed disciplinary notices for his pattern of tardiness and poor attendance. (Tr. 61:15-62:2, 64:18-68:11, 505:6-25, 529:7-9). Although his testimony was at first confusing on this point, Torres eventually acknowledged that O’Connell specifically explained to him at the October 29, 2010 meeting that the Hospital’s tardiness policy *was* applicable to the respiratory department, that the department’s expectation was that he would be at work by the beginning of his shift and that there would be no grace period for tardiness even though the payroll system rounds the time to the nearest quarter hour. (Tr. 68:24-69:6, 71:25-72:5, 89:3-12, 97:19-22, 109:24-111:2). NUHW conveniently fails to mention the October 2010 meeting or Torres’ admissions with respect to that meeting.

NUHW falsely claims that, when Torres was disciplined on February 4, 2011 it was “only for tardies in excess of 7-minutes.” In reality, Torres had been late so many times between September 30, 2010 and February 4, 2011 (35 times in a one year period, 19 of which were more than 7 minutes) that it did not matter which instances O’Connell listed in the write-up. He was subject to discipline regardless. (Tr. 111:5-112:5, 580:15-582:5 and GC-5, at USC0615-USC0617). Eight occurrences are enough to trigger a verbal warning. (R-1, at page 2, “Tardiness Standards.”)

Similarly, there is no truth to NUHW’s claim that O’Connell assured Torres on February 4, 2011 that the department “would *continue* to honor the grace period” that Torres’ own disciplinary history establishes did not exist. NUHW confuses the dates and misrepresents Torres’ testimony. In testifying about his *October 2010* meeting with O’Connell, Torres first testified O’Connell told him she would continue to allow a grace period. (Tr. 68:24-69:23). But he acknowledged on cross-examination that, at that meeting O’Connell had told him just the opposite: That he had to adhere to the Hospital attendance and tardiness policy, i.e., no grace period. (Tr. 110:13-111:2). He also specifically testified that O’Connell had *reconfirmed* during the February 2011 disciplinary session that he is considered late if he is not at his station and ready to work by the beginning of his shift. (Tr. 71:25-72:5).

NUHW admits that Noemi Aguirre was also disciplined for tardiness of 7 minutes or less in April 2010 but argues that the fact that her more recent discipline, in February 2011, was based on incidents of *more* than 7 minutes is evidence that, between September 2010 and February 2011, the Respiratory department tolerated tardiness of less seven minutes. (NUHW’s Brief, at p. 8). This argument conveniently ignores that the allegation in the complaint and NUHW’s own claim, as stated in its brief, is that there was a grace period in effect beginning in 2009. It is, of course, impossible to tell whether Aguirre would have still been disciplined for tardiness in 2011 if she had been late only seven minutes or less. The fact is that Ms. Aguirre was far more tardy than that on enough occasions to warrant discipline. That the Hospital chose

to cite these more egregious violations in her write ups is not evidence that it was tolerating her other violations. This would be akin to saying that the State of California tolerates an assault and battery that resulted in death because it chooses to prosecute the more serious crime of murder.

NUHW then argues that there must have been employees in the Respiratory, Laboratory and EVS departments who were late 7 minutes or less but were not disciplined. Further, that this is evidence of a conscious decision by supervisors in the three departments to allow those employees be late so long as it was not more than 7 minutes. NUHW does not identify any such employee. NUHW further argues that Judge Meyerson erred when he found such unidentified instances of leniency “were isolated instances.” (NUHW Brief, at p. 3). NUHW misrepresents his findings. What Judge Meyerson found was that there was *no* evidence of a *consistent practice* of allowing a seven minute grace period and thus, no past practice could be inferred from any instance when an employee was not disciplined:

In any event, the evidence shows that at most the supervisors in those departments chose, from time to time, to show certain of their employees some leniency and not consider tardiness of 7 minutes or less towards discipline. *Such an ad hoc bending of the Hospital's tardiness policy did not create a past practice, which would, thereafter, require the Respondent to bargain with the Union before enforcing the hospital-wide policy against a grace period.*

(Decision 18:45-19:11). (Emphasis added).

B. The Laboratory and Environmental Services Department Departments Also Did Not Have Separate Tardiness Standards.

NUHW does not even attempt to address the evidence with respect to the other two departments, other than Respiratory, it claims had an exception to the Hospital’s tardiness standards. With respect to the Laboratory, General Counsel presented evidence from just one employee, Traci Mills. Ms. Mills testified to a hearsay statement allegedly made by her previous supervisor, Liz Sanchez, that there was “a seven minute grace period with regard to [her] time being recorded in the Kronos system,” and this was reflected in her pay. (Tr. 220:9-15). Again,

the fact that the pay policy rounds to the closest quarter hour is not disputed. Sanchez also allegedly told Mills that she would not be disciplined for being *seven to ten minutes* late “as long as it wasn’t excessive.” (Tr. 207:4-208:5). This alleged statement also does not support NUHW’s current theory. There is certainly no claim of a ten minute grace period, and the tardiness policy, on its face, does not require discipline for *every* instance of tardiness. It only applies when excessive numbers of tardiness are incurred during a specified period of months. That is consistent with Sanchez’s alleged statement. More importantly, Sanchez *did* write Mills up for being tardy less than seven minutes, thus dispelling any claim that Sanchez had established a different policy in her department. (Tr. 210:9-211:13 and GC-25).

With respect to the Environmental Services Department or “EVS,” General Counsel relied on the testimony of Melissa Lynch that she received a verbal warning on April 21, 2011 based on eight separate occurrences when she arrived to work late. (Tr. 166:5-12, 740:5-21, 749:11-21, 753:11-22 and GC-22). Two of those eight instances were for six and seven minutes. (Tr. 742:3-5, 754:8-756:3 and GC-21, at pages USC 2425 and USC 2426). Although Lynch wrote in the comments section of the write-up form, she mentioned nothing about a seven minute grace period (Tr. 182:9-25, 740:22-741:11, 756:4-757:20 and GC-22). Lynch subsequently received a written warning on May 11, 2011, after she was late to work on a ninth occasion in twelve months, this time clocking in 25 minutes late. In the comments section, she apologized for being late and blamed it on car trouble. Again she did not mention a seven minute grace period. (Tr. 741:12-742:2 GC-21, at page USC 2426, and R-44; Amended Consolidated Complaint ¶ 15(d)(3)). Lynch claims she eventually raised the issue of a grace period with her supervisor, Kevin Kaldjian, at a subsequent meeting. She admits that Kaldjian told her “we never had a seven-minute grace period” for tardiness and “we start at the hour.” (Tr. 168:24-169:5, 190:3-21).

C. There Is No Evidence Of A Consistent Past Practice Anywhere In The Hospital To Ignore Tardiness Standards.

A past practice becomes a term and condition of employment which the employer may not unilaterally change when it is not “random” or “intermittent” and has been done “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” Sunoco, Inc., 349 NLRB 240, 244 (2007). In light of the evidence that numerous employees, in and out of the departments NUHW now cites, were disciplined for tardiness of 7 minutes or less both before and after 2009, Judge Meyerson logically concluded that the General Counsel had failed to establish the past practice it alleged:

Any occasional excusing of employee tardiness for 7 minutes or less by supervisors in the Respiratory, Laboratory and EVS Departments was random and intermittent, and did not, therefore, require the Hospital to engage in bargaining with the Union prior to continuing to enforce the long standing hospital policy against any grace period. No past practice requiring collective bargaining was established by this conduct.

(Decision, at 19:13-20).

D. Individual Managers Cannot Create Ad Hoc Terms and Conditions of Employment that Favor Some Employees Over Others.

It is axiomatic, in the context of a collective bargaining agreement, that individual managers cannot create ad hoc terms and conditions of employment that favor some employees over others. Had Judge Meyerson found otherwise, he would have contradicted the basic rule that an employer cannot deal directly with employees represented by a union with respect to their pay and the terms and conditions of employment. See NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1159 (D.C. Cir. 1992). (“Direct dealing between the employer and its employees cuts to the heart of collective bargaining and substantially weakens the union’s role as collective representative of the workers.”) This fundamental rule is also specifically recited in the Tenet-SEIU contract. (GC-4, at page 61, Article 13.Q, “Modification of Practices.”) (“There shall be no individual bargaining with employees over wages, hours and working conditions.”) Any

contrary rule would mean an employer, through any one or more of its supervisors, could simply bypass the unit-wide rules, and favor any employees the supervisor chooses. Individual supervisors could bind the Hospital to whatever secret arrangements they made with selected employees they supervised, thus creating a patchwork of different policies and practices, throughout the unit. That is precisely the kind of situation the Act was designed to prevent. See Vaca v. Sipes, 386 U.S. 171, 182 (1967). (“The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.”)

Judge Meyerson recognized these principles in rejecting NUHW’s allegations:

Had managers or supervisors in the 3 departments in question decided to formally and consistently provide the employees in those departments with a leniency policy that excused tardiness of 7 minutes or less, they would have been in direct conflict with the written hospital policy on tardiness, and in violation of the contract, which prohibited individual bargaining with employees.

(Decision 19:2-6).

In light of the overwhelming documentary and testimonial evidence disproving NUHW’s allegations in this case and in due deference to Judge Meyerson’s factual and credibility findings, the Board should adopt his conclusions with respect to Case No. 39799.

CASE NO. 39808

I. Judge Meyerson’s Ruling On The Discipline Of Michael Torres Is Supported By The Evidence And The Applicable Law

In Case No. 39808, the NUHW alleged that, in March and April of 2011 the Hospital targeted Torres and retaliated against him because of his union activities by writing him up for his tardiness and poor attendance. Specifically, NUHW based its charge on three disciplinary notices:

A. A written warning for excessive tardiness, dated March 18, 2011.

On March 18, 2011, Torres received a written warning based on nine occurrences of tardiness over a 12-month period. (Tr. 70:12-71:19 and GC-6; Amended Consolidated Complaint ¶¶ 15(d)(1) and 7(b)). Torres claimed that he should not have been considered late on dates where he clocked in or had adjusted his time to being seven minutes late or less even though he acknowledged on cross-examination that O’Connell had told him on October 29, 2010 that he had to adhere to the Hospital attendance and tardiness policy. (Tr. 110:13-111:2). NUHW nonetheless continues to claim that the March 18 tardiness write-up was not justified because of the purported “grace period” the evidence has so amply demonstrated never existed.

B. A written warning for excessive absences dated March 18, 2011.

On March 18, 2011, Torres received another written warning, based on seven unexcused and unauthorized absences in a 12-month period. (Tr. 78:17-79:3 and GC-9). NUHW argued that Torres’ absence on March 16 should not have “been counted against him” because, after the fact, he presented a doctor’s note which NUHW claims retroactively excused him for being absent. No evidence of such a practice ever being followed at the Hospital was presented at trial. Under the Hospital’s Attendance and Punctuality Policy, an employee is considered absent every time he/she has “an unscheduled and/or unauthorized absence from work.” Each such absence is considered an “occurrence.” (Tr. 97:23-100:10, 500:8-19, 527:19-528:3, 681:16-18 and R-1 at

page 1, “Definitions.”) An employee cannot simply not come to work and present an excuse later. Every unscheduled absence is considered an occurrence regardless of whether the employee brings a doctor’s note later explaining the reason for his/her absence. (Tr. 528:11-24, 573:5-579:14 and R-1). The uncontradicted testimony of Hospital personnel is that no other policy exists or has ever been applied for any employee. (Tr. 528:19-24, 681:16-25, 685:12-686:12, 689:11-19, 708:18-709:18). Torres was well aware of that. In 2004, he received a written warning for excessive absences and claimed that under Hospital policy “most absences [are] cleared through medical excuses documentation.” Despite that protestation, the discipline has remained in Torres’ personnel file. (Tr. 118:22- 120:21 and R-6).

C. A written warning for excessive tardiness, dated April 7, 2011.

On April 7, 2011, Torres received a written warning and a 24 work hour suspension based on ten separate occurrences of tardiness in 12 months. (Tr. 74:2-17 and GC-7; Amended Consolidated Complaint ¶ 17(c)). Torres disputed the occurrence on January 6, 2011 because it was exactly seven minutes. (Tr. 75:5-9)⁵. He raised two different excuses for being over an hour late on March 31, 2011: that he was on “an approved intermittent family leave,” or, alternatively, that a supervisor had approved his coming in late. Both excuses were conclusively proven at trial to be false. (Tr. 114:7-115:11, 116:17-117:3, 527:1-15 and GC-7). Neither is addressed in NUHW’s brief.

It is undisputed that the Hospital has long been aware of Torres’ active involvement in NUHW and, before that, SEIU. There is no evidence, however, that his

⁵ Torres testified that he often “adjusted” his time on the computer instead of just swiping his card. (Tr. 58:25-59:6). Torres’s time records repeatedly show him arriving *exactly* seven minutes after his start time. This is apparently not a coincidence. On September 2, 2011, O’Connell observed Torres arriving at the department at 6:11 p.m. He clocked in at a different clock than the one designated for his department, then adjusted his time on the computer to 6:07 which, according to him, made him not late. (Tr. 125:11-22 and GC-10, at USC 0574). O’Connell noted the discrepancy on a final warning by listing the time as “6:07/6:10.” (Id.)

longstanding union advocacy has earned him less favorable treatment. As Judge Meyerson explained:

Torres was a very active union supporter. But, his union activity was of long duration. There was no specific nexus between that protected activity and his discipline.

(Decision, at 22:26-28).

Moreover, an employer cannot be held to have violated the National Labor Relations Act if it can show that it would have taken the same action even if the employee had not been involved in union activities. See NLRB v. GATX Logistics, Inc., 160 F.3d 353, 355-56 (7th Cir. 1998); NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983). As explained above, each of the three write-ups issued to Torres was justified and there is no evidence the Hospital would not have issued them to someone else. As Judge Meyerson noted, the undisputed evidence is that Torres was not treated in a “disparate or unusual manner.”

In fact, the contrary appears to be true, with the Respondent treating Torres in a more lenient fashion than was necessary. As I noted above, Torres accrued sufficient unexcused absences and tardies over a 12 month period to have been terminated under the Respondent's attendance policy. As is reflected in the Employee Notification form that Torres received on February 4, 2011, he was disciplined with a verbal warning for 19 occurrences of tardiness from September 30, 2010, to February 4, 2011. (G.C. Ex. 5.) However, the Respondent's attendance policy provided for termination where an employee was late 12 times in a year's period. (Res. Ex. 1, p. 4, Attendance & Punctuality.) Further, as late as September 14, 2011, Torres was issued a written warning for 12 instances of tardiness, three of which were for 7 minutes or less, during a 12 month period. (G.C. Ex. 10.) Once again, under the Respondent's written Attendance &

Punctuality policy he could have been terminated for so many occurrences, but was not. (Res. Ex. 1.) Certainly, the Respondent's decision not to terminate Torres for cause on several separate occasions constitutes significant evidence that he was not being singled out for discipline because of his protected activity.

(Decision, at 23:1-15).

NUHW does not dispute these facts. Nor does it dispute Judge Meyerson's finding that "there is no evidence of animus towards the Union on the part of the Respondent's managers and supervisors" and no evidence that the Hospital has not been negotiating with NUHW in good faith. (Decision, at 23:17-24).

Although NUHW did not base this charge on write-ups Torres received before March 2011, it now argues that O'Connell "embarked upon an anti-Torres campaign as soon as she took over the department in September 2010." (NUHW's Brief, at p. 11). This is nonsense. It is undisputed that Torres was written up for tardiness with incidents of 7 minutes or less, at least twice before O'Connell became his supervisor, most recently in *April* 2010. (Tr. 100:11-102:11, 107:3-108:25 and R-2 and R-4). That was five months before O'Connell's arrival. The idea that O'Connell was out to get Torres is further dispelled by the fact that, again and again, she has exercised remarkable leniency towards him. When she met with him in October 2010 and decided not to issue him a written warning, he had 16 occurrences of tardiness, nine of which were for *more* than seven minutes late. (Tr. 65:17-21, 530:13-531:12 and R-1 and R-14). Under the Attendance and Punctuality Policy, that many occurrences call for discharge. (R-1, at page 2, "Tardiness Standards.") As Judge Myerson noted, O'Connell cut Torres another big break in February 2011 and again in September 2011.

Despite the overwhelming evidence that Torres has repeatedly violated Hospital policy, and has not suffered the severe consequences he ought to have suffered, NUHW argues that he has been "singled out for discipline." In support of this claim, NUHW states that "many other employees in the respiratory department were late less than 7 minutes" but were not disciplined.

NUHW does not identify who these “other employees” are or cite any evidence to show they were habitually late.

NUHW further claims that Torres was “the only employee in the respiratory department disciplined for being tardy during the grace period since Sarkissian and O’Connell took over.” (NUHW Brief, at 7). Once again, NUHW is changing its allegations in a vain attempt to manufacture a case out of whole cloth. To do so after the hearing is closed and the decision has been rendered is an egregious violation of due process.

As noted, General Counsel amended the complaint to state, specifically, that “Beginning in about February 2011, Respondent began disciplining employees in the Laboratory, EVS, and Pulmonary Services/Respiratory Therapy Departments, who arrived at work 7 minutes or less after the start of their shifts.” (GC 3). As part of the amendment, General Counsel specifically alleged that Torres, Traci Mills and Melissa Lynch, *all* received discipline, *after* February of 2011, for being less than 7 minutes late. The General Counsel also alleged that *other* employees were also disciplined for being 7 minutes late after February 2011. (GC 3). The General Counsel’s allegation was that all of this post-February 2011 disciplining of employees for being less than 7 minutes late was a *change* from past practice.

The Hospital has never denied that it disciplined employees in these departments for being less than 7 minutes late after February of 2011; it only disputed that this was a change. There is no additional evidence on the record regarding discipline of other employees after February 2011 because it was not necessary to address the allegations NUHW and the General Counsel were then making. The tardiness write-ups presented by the Hospital at the hearing are a microcosm of all of the discipline issued at the Hospital, selected for relevance to the claim that there was a seven minute grace period for tardiness within a specific time period. The relevant time period, based on NUHW and General Counsel’s allegations was between “early 2009” and February 2011 when according to them *no one* was disciplined. (Tr. 14:14-17:17, 18:24-19:4, 699:23-700:2 and GC 2). The Hospital presented evidence that this was not true. What

discipline was meted out to other employees in the Respiratory or other departments *after* February 2011 was simply not at issue and hence no evidence was taken on that subject. Indeed, had the Hospital tried to offer evidence of discipline given to employees for 7 minute tardies after February, 2011, it would have been rejected as redundant, since there was no dispute on that point.

In fact, there was never any allegation, nor any testimony from anyone at the hearing, that Torres was the only person to be disciplined for being tardy less than 7 minutes. This is an imagined allegation, made up by NUHW after the fact and which contradicts the General Counsel's Complaint. NUHW cannot defeat Judge Meyerson's decision and save Torres claim by raising a contradictory allegation for the first time after the record has been closed, the briefs have been written and the decision has been rendered. It is far too late to rewrite the Complaint yet again and patently unfair and a violation of due process to premise an appeal on the assertion that Respondent failed to prove something that was never in issue.

NUHW's final argument is a non sequitur. They complain that O'Connell used the "wrong form" when she disciplined Torres in that it incorrectly states that a verbal warning may be issued after only 6 incidents of tardiness in a 12 month period instead of the 8 called for by Hospital policy. There is no claim or evidence that Torres was disciplined for less than 8 occurrences of tardiness (in fact, he had far more). Indeed, the very form in question shows that he had 19 tardies, far in excess of the 8 required by policy for a verbal warning. (GC 5). Nor can the ALJ be accused of "ignoring" the irrelevant error in the form since no such argument or evidence was raised at trial. In any event, it is not true that O'Connell used the incorrect form only with respect to Torres. R 36, a write up for the very anti-union Margaret Knight⁶, is similarly on the wrong form, but again, cites to more than enough instances to justify the write-up under Hospital policy.

⁶ Margaret Knight, in fact, has a pending lawsuit in which she has accused Torres and his NUHW cohort, Julio Estrada, of discriminating against her on the basis of race. (Los Angeles Superior Case No. BC 460109).

In short, there is no evidence that any of the three write-ups on which Case No. 39808 is based were not warranted or that the Hospital would not have disciplined Torres but for his union activity. The Board should, therefore, adopt Judge Meyerson's conclusions.

CONCLUSION

Based on the foregoing, as well as the pleadings, evidence, and testimony on the record, NUHW's exceptions should be rejected and Judge Meyerson's decision and recommended order with respect to cases Nos. 39799 and 39808 should be adopted by the Board.

DATED: June 6, 2012

BATE, PETERSON, DEACON, ZINN & YOUNG LLP

By: 

Linda Van Winkle Deacon
Attorneys for Respondent
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PROOF OF SERVICE

STATE OF CALIFORNIA)
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COUNTY OF LOS ANGELES)

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 electronic mail address is: zdavis@bpdzylaw.com. My business address is 888 S. Figueroa Street, 15th Floor, Los Angeles, California 90017.

On May 9, 2012, I caused to be served the foregoing document described as **ANSWERING BRIEF BY USC UNIVERSITY HOSPITAL TO NUHW’S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the interested parties in this action by transmitting a true copy thereof to electronic addresses as follows:

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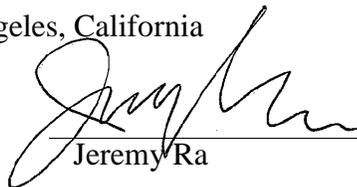
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By ELECTRONIC MAIL: I caused such documents to be transmitted to the electronic mail addressee and the transmission was reported as complete and without error.

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

Executed on June 6, 2012, at Los Angeles, California



Jeremy Ra