UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

In a Matter Between:	)	
	)	Cases 31-CA-029929
MARINA DEL REY HOSPITAL,	)	31-CA-029927
	)	31-CA-029930
Respondent,	)	31-CA-030027
	)	31-CA-030143
and	)	31-CA-030161
	)	31-CA-030191
CALIFORNIA NURSES ASSOCIATION,	)	31-CA-030200
	)	31-CA-030214
and	)	31-CA-065298
	)	31-CA-066063
SERVICE EMPLOYEES INTERNATIONAL	)	31-CA-066064
UNION, UNITED HEALTHCARE	)	31-CA-069336
WORKERS WEST,	)	31-CA-071809
	)	31-CA-077075
Charging Parties.	)	
	)	

CROSS-EXCEPTIONS BY CALIFORNIA NURSES ASSOCIATION TO DECISION OF ADMINSTRATIVE LAW JUDGE

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Pursuant to NLRB Rules and Regulations §102.46, Charging Party, California Nurses Association ("CNA" or the "Union"), cross-excepts to the Decision of Administrative Law Judge William G. Kocol ("the ALJ") in JD(SF)-02-13 dated January 16, 2013, as follows.

Cross-Exception 1:

CNA cross-excepts to the ALJ's conclusion at page 10, lines 36-38:

"I conclude from [Director of Human Resources Margaret] Morgan's uncontested and credible testimony that any 'duties as specifically directed by management' would require the Hospital to pay the employee for the time spent performing those duties." This conclusion is unsupported by the record evidence.

The ALJ ultimately concluded that the Employer's "No Access" Policy was unlawful because it prohibited off-duty employees from accessing the facility to engage in activities protected by Section 7 of the Act even while permitting them access for other, management-approved purposes. However, he misconstrued the record evidence and thus erroneously interpreted the language of the Policy to mean that it required the Employer to pay off-duty employees who returned to the facility for "hospital-related business." (See "No Access" Policy, ALJD 10:8-34.) While the import of this conclusion is unclear—and, indeed, it seems irrelevant in light of his ultimate finding that the "No Access" Policy is unlawful—the Union takes exception to it because it is not supported by the evidence.

The ALJ's interpretive error seems to be based on a misreading of the testimony of Margaret Morgan, the Employer's director of human resources. Morgan did not testify "that any 'duties as specifically directed by management' would require the Hospital to pay the employee for the time spent performing those duties." (ALJD 10:36-38.) On the contrary, Morgan testified that the Employer's definition of "hospital-related business"—those activities for which off-duty employees were permitted to return to the facility—was not restricted to paid time. (See Hearing

transcript, 591:4-11, "[ALJ]: So, just so I'm clear, [hospital-related business] is not necessarily paid time? [Morgan]: No, this would not be paid time.") Moreover, when specifically questioned by the ALJ as to the meaning of "duties as specifically directed," Morgan testified that she could not explain the term. (Hearing transcript, 592:1-13, "[Morgan]: No, I can't explain that as far as duties being assigned.") This is because the Employer inherited the Policy's language from the Tenet Healthcare Corporation, the Hospital's prior owner. (Hearing transcript, 605:11-14, "I can only say this was the handbook we inherited from Tenet, we haven't changed it and I don't know when they wrote it what they were thinking.")

Thus, based on the record evidence, Morgan did not testify "that any 'duties as specifically directed by management' would require the [Employer] to pay the employee for the time spent performing those duties." Since this portion of the ALJ's decision is not supported by the record evidence, the Union urges the Board to grant the cross-exception and overturn the ALJ's conclusion.

Cross-Exception 2:

CNA cross-excepts to the ALJ's conclusion at page 10, lines 38-41:

"I further conclude that employees clearly understand that if the Hospital specifically directs them to perform duties they will be paid for the performance of those duties. Indeed, the patchwork of laws in this country governing the employer-employee relationship requires no less."

Incorporating by reference its arguments in support of its First Cross-Exception, the Union submits that the ALJ's conclusion is not supported by the record evidence and is contrary to Board law. Since the "No Access" Policy, by its plain terms, applies only to off-duty access, employees would not read it to mean that they would be paid for those duties they performed at the direction of their Employer while off-duty. Such a reading would make no sense and, unsurprisingly, there is absolutely no evidence in the record to support the ALJ's conclusion: no

employee testified that she understood the "No Access" Policy to mean that she would be paid for performing duties while off-duty, and even the Employer was unable to decipher its meaning. As such, the ALJ's conclusion is unsupported by the evidence.

The ALJ apparently applied the same interpretation to the "No Access" Policy as the one that this Board rejected in *Sodexo America LLC*, 358 NLRB No. 79, slip op. at 2 (2012):

> In [*Sodexo*], the judge found that the Hospital intended that the third exception to its no-access policy ("to conduct hospital-related business") would apply only to employees who are at the facility to work an extra shift. But this interpretation renders the exception meaningless; employees who are at the facility to work are not off-duty and would not be subject to an off-duty access policy. And, to the extent that the rule is ambiguous, we construe it against the drafter; for present purposes, the intent behind the rule is irrelevant. *See Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999) (no-access rule that employer intended to apply only to inside working areas but that could be understood by employees also to bar their access to outside areas violated *Tri-County*). Because the rule gives the Respondents free rein to set the terms of off-duty employee access, we find that it violates Section 8(a)(1) of the Act.

Therefore, the ALJ's conclusion is not supported by binding Board precedent and it should be rejected.

<u>Cross-Exception 3</u>:

CNA cross-excepts to the ALJ's conclusion at page 11, lines 10-17:

"Notwithstanding my finding that 'duties as specifically directed by management' would require the Hospital to pay the employee for the time spent performing those duties and that employees clearly understand that if the Hospital specifically directs them to perform duties they will be paid for the performance of those duties, I am obligated to conclude that by maintaining a no-access rule that on its face allows the Hospital free rein to allow off-duty access to the facility for certain activities but forbidding such access for activities protected by Section 7 of the Act, the Hospital violated Section 8(a)(1)."

The Union incorporates its arguments in its First and Second Cross-Exceptions and urges

the Board to reject this conclusion as unsupported by the record evidence and binding authority.

Cross-Exception 4:

CNA cross-excepts to the ALJ's note at page 11, lines 47-49:

"...it was inconsistent with Morgan's more credible testimony that the rule as written required the Hospital to pay all employees allowed access pursuant to the rule."

The Union incorporates its arguments in its First and Second Cross-Exceptions and urges the Board to reject this conclusion as unsupported by the record evidence and binding authority.

Cross-Exception 5:

CNA cross-excepts to the ALJ's remedy at page 17:

The remedy at page 17 is inadequate in that posting is required for only 60 days. This is inadequate. The posting time in cases should be extended to the length of time between when the complaint issues and when the posting actually occurs. Here the employer has maintained unlawful rules since at least before the complaint issued on May 30, 2012. The rules existed for a substantial period of time before then and at least at the time the charge was filed. Posting the notice only for 60 days ignores the length of time between when the violations began and when it ultimately is remedied. To limit the posting for 60 days encourages delay. The Board should adopt a new rule by adjudication that extends the posting period to the same length of time between when the complaint issues until the notice is initially posted.

Alternatively, the posting period should be extended to a much lengthier time, such as a standard of one year.

Cross-Exception 6:

CNA cross-excepts to the ALJ's Notice:

The Notice should be modified to delete the reference to "choose not to engage in any of these protected activities." There is no issue in this case of any right or disability of any

employee to refrain from protected concerted activity. This involves wholly the employer's interference with such rights. That language is unnecessary in these cases.

Cross-Exception 7:

CNA cross-excepts to the ALJ's Notice:

The Notice should be modified to include the California Nurses Association as a named Union. The Complaint was brought on behalf of employees belonging to two distinct bargaining units represented by different labor organizations. At present, the Notice names only one of these labor organizations, the Service Employees International Union, United Healthcare Workers-West, and fails to reference the California Nurses Associations. By misrepresenting the litigation from which it resulted, the Notice will mislead employees regarding their rights under the Act.

The Union submits that the Notice should be modified to read as follows: "The National Labor Relations Board has found, **pursuant to charges brought by the California Nurses Association and the Service Employees International Union, United Healthcare Workers-West**, that we violated Federal labor law and has ordered us to post and obey this notice." And: "WE WILL NOT require off-duty employees engaged in union activity **on behalf of the California Nurses Association or any other labor organization** to leave the facility." (Modifications in bold.)

For the above reasons, these seven cross-exceptions should be granted, and the remedy and notice provisions should be modified accordingly.

DATED: April 12, 2013

Respectfully submitted,

CALIFORNIA NURSES ASSOCIATION (CNA)
LEGAL DEPARTMENT

Brendan White
Attorney for Charging Party CNA

PROOF OF SERVICE

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, not a party to the within action and that my business address is 2000 Franklin Street, Oakland, California 94612.

On the date below, in addition to e-filing these papers with the NLRB, I served the following documents:

CROSS-EXCEPTIONS BY CALIFORNIA NURSES ASSOCIATION TO DECISION OF ADMINISTRATIVE LAW JUDGE

ANSWERING BRIEF BY CALIFORNIA NURSES ASSOCIATION TO EXCEPTIONS BY RESPONDENT TO DECISION OF ADMINISTRATIVE LAW JUDGE

via electronic mail as follows:

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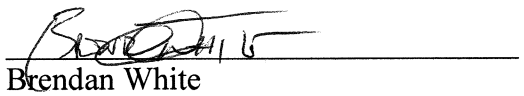
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 12, 2013, at Oakland, California.



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