

ARBITRATION BEFORE  
ARBITRATOR GARY T. KENDELLEN

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In the Matter of:	)	
	)	
Complete Care at Marcella	)	
Employer	)	
	)	Opinion and Award
And	)	
	)	
1199SEIU UNITED HEALTHCARE	)	
WORKERS EAST	)	
	)	
Termination of Damian Rivera	)	
_____	)	

Appearances:

Patrick W. McGovern, Esq.  
Sadayah Q. DuRant-Brown, Esq.  
Genova Burns LLC  
Joseph Weingarten, Representative

Katherine H. Hansen, Esq.  
Gladstein, Reif & Meginniss, LLP  
Maxine Peterson, Representative

**OPINION OF THE ARBITRATOR**

**Introduction**

This arbitration matter is before the Undersigned under a January 21, 2022 Side Letter Agreement to Arbitrate (the Agreement) between Complete Care at Marcella (the Employer) and 1199SEIU United Healthcare Workers East (the Union), pursuant to Paragraph 2 of which the parties selected the Undersigned to hear the parties' evidence regarding the discharge of Damian Rivera on a mutually agreeable date prior to February 11, 2022 and render a written short-form opinion and award by no later than one week after said Hearing, which opinion and award shall, pursuant to Paragraph 6 of the Agreement, be final, conclusive and binding on the parties and Damian Rivera.

The matter was submitted to the Undersigned at a Hearing held on February 3, 2022, after

which the parties submitted briefs on February 7, 2022,<sup>1</sup> whereupon the Undersigned closed the record.

### **ISSUE**

The parties agreed that the Issue to be decided is:

Did the Employer have just cause to discharge Damian Rivera? If not, what shall the remedy be?

### **Parties' Positions**

#### **Employer**

The Employer argues that it has satisfied its burden of establishing just cause to discharge Damian Rivera by proving by more than a preponderance of the evidence that he was insubordinate when he refused to leave its facility and was insubordinate when he refused to stop talking on his cell phone; and that he created a hostile working environment when he intimidated and threatened its administrators and behaved in an unprofessional manner; and that he was not engaged in protected activity when he disrespected and disobeyed the reasonable directives of senior management at the facility. The Employer also argues that the Undersigned should credit its witnesses' testimony as to the events of January 11 and 13, 2022,<sup>2</sup> which testimony was specific, detailed, and consistent, compared to Mr. Rivera's testimony, which was evasive, conveniently forgetful and contradictory to his own and the Union's witnesses' testimony.

#### **Union**

The Union argues that the Employer presented no credible evidence that Mr. Rivera engaged in misconduct of any kind on January 11 or January 13 and therefore has failed to satisfy its burden of proving that it had just cause to discipline or discharge him.

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<sup>1</sup> The Undersigned notes that under Paragraph 2 of the Agreement, there is a limited time frame between the required February 10 issuance date of his Opinion and Award and the parties' February 7 at 8 PM filing of their briefs, which were permitted under Paragraph 5 and were extensive: 15 double-spaced pages by the Union and 21 single-spaced pages by the Employer. In order to ensure that the Undersigned thoroughly explored the parties' expositions of the evidence and the arguments upon which they relied in their briefs, the Undersigned has spent the great majority of his available time reviewing them. The somewhat relatively short form of this Opinion and Award, considering the parties' extensive briefs, nonetheless reflects as fully as possible the Undersigned's thorough exploration of the parties' evidence and arguments.

<sup>2</sup> Record dates herein are in 2022 unless indicated otherwise.

## **Background**

As indicated in the positions of the Employer and Union, the focus of this matter is solely upon events on January 11 and 13 involving Mr. Rivera. At the time of those events, the Employer and Union were engaged in negotiations for an agreement; such an agreement was signed January 21, ratified by the employees on January 27, and effective February 1.

The events on January 11 and 13 involved Mr. Rivera and Administrator Joseph Kaufman and Director of Nursing Lisa Elcheck, as well as other employees who were present in part or in whole for such events, six of whom, whose tenure with the Employer was almost all between 16 and 20 years, testified or whose testimony was proffered by the parties.

Mr. Rivera was a Certified Nurse Assistants (CNA) and a 22 year employee at the facility. Mr. Kaufman and Ms. Elcheck arrived in their positions in July 2021 and November 2021, respectively, following the Employer's becoming the operator of the facility on April 1, 2021.

## **Evidence**

The Employer presented its Mr. Kaufman and Ms. Elcheck as its witnesses. The Union presented Licensed Practical Nurses (LPN) and CNAs as witnesses: Sarah Stallings, a Union Delegate; Ionie Carter; Dana Coleman; and Mr. Rivera; as its witnesses. In addition, the parties' offers of proof were accepted regarding the testimony of three witnesses: Rosemary Greene, Shantee Miller and Kellee Grungo.

### Employer Witnesses

#### Administrator Joseph Kaufman

Mr. Kaufman testified he became Administrator at the facility about six months before January 11; he testified that he decided to terminate Mr. Rivera on January 14, after discussing it with Ms. Elcheck and his superior, because Mr. Rivera had been insubordinate in not listening to requests to leave the facility and had created a hostile working environment.

As to Mr. Kaufman's interaction with Mr. Rivera on January 11, Mr. Kaufman testified as follows: at about 3:30 pm, during Mr. Rivera's shift, which started at 3 pm, he arrived at Mr. Kaufman's office, where Ms. Elcheck was already present, and inquired about a request he had made to Mr. Kaufman to talk about Mr. Rivera's complaint regarding the delayed status of a project to improve lighting in the facility's lot. When Mr. Kaufman responded that the parts were there

and awaiting the electricians' scheduling, but it was a big job, Mr. Rivera raised his voice and said he would be taking the matter into his own hands and then spent quite a few minutes accusing Mr. Kaufman of always saying that and never taking care of things. Mr. Kaufman tried to be calm and not respond. Ms. Stallings was behind Mr. Rivera and said calm down and that he should come away, which they did.

On January 11 and 12, Mr. Kaufman gave consideration to disciplining Mr. Rivera after he discussed it with Ms. Elcheck.

On January 13, a day on which Mr. Rivera was not on schedule, Mr. Kaufman saw Mr. Rivera about 2:30-3 pm in the Lobby and Elevator areas and outside the facility, going back and forth with a cell phone he was holding to his left ear and talking loudly.

Mr. Kaufman returned to his office and noted a commotion about 3 pm near the Fish Tank, beyond the Lobby, with 10 or so employees standing around talking to each other, as Mr. Rivera continued to walk outside and back into the Lobby. Mr. Kaufman then left the facility by another door to consult with his superior by phone. Returning, Mr. Kaufman saw Mr. Rivera still in the Lobby and Elevator areas, now about 45 minutes since he had first seen Mr. Rivera.

Mr. Kaufman saw Ms. Elcheck coming from the Elevator area with Mr. Rivera behind her; Mr. Kaufman heard her ask Mr. Rivera to leave, to which Mr. Kaufman heard no response from Mr. Rivera; Mr. Kaufman added: she told you to leave, so please leave, at which point Mr. Rivera said, hey Maxine, they're telling me to leave, I don't think they can do that, as he walked out the door of the facility to the parking lot.

Mr. Kaufman again left the facility by another door to consult with his superior by phone; when he returned, the police had come and gone.

Mr. Kaufman felt threatened and scared, based upon Mr. Rivera's January 11 comment that he would take things into his own hands and his January 11 riling up of employees.

On January 14, Mr. Kaufman telephoned Mr. Rivera and told him his services were no longer needed; when Mr. Rivera asked Mr. Kaufman to hold on and did not return, Mr. Kaufman hung up.

On cross examination, Mr. Kaufman testified that Mr. Rivera was the first employee Mr. Kaufman had terminated; the evening before, he had talked with his superior, who told him it was

his call. Mr. Kaufman had also spoken with Ms. Elcheck before leaving on January 13.

Mr. Kaufman again reported that the termination was for Mr. Rivera's insubordination as to Ms. Elcheck's and Mr. Kaufman's asking Mr. Rivera to leave on January 13; for creating a hostile work environment on January 11 with Mr. Rivera's disrespectful conversation and on January 13 with Mr. Rivera riling up the ten employees at the Fish Tank who did not know what they were doing and seemed to be waiting for Mr. Rivera to tell them what to do.

Mr. Kaufman reported he did not review Mr. Rivera's personnel file or look at the Employer's Handbook, nor did he send a termination letter, as he agreed is usual. As to Mr. Rivera's tenure, Mr. Kaufman reported he did not know it was long term - or 22 years - only that it was a while.

As to the presence of Ms. Stallings or Ms. Grungo at the January 11 meeting in Mr. Kaufman's office, he did not know how long either had been present.

Mr. Kaufman said Mr. Rivera did not mention OSHA on January 11 and viewed Mr. Rivera's taking the matter into his own hands comment as a physical threat.

Mr. Kaufman reported that he does not recall whether on January 13, the group of ten employees, to whom he did not speak, or Mr. Rivera, asked him to meet with him.

Mr. Kaufman also reported that after speaking outside with his superior the first time, he returned to the area where the employees were gathered and saw that Ms. Elcheck was upset after telling Mr. Rivera to leave and was heading to the reception area's Front Desk to call the police; he proceeded to the reception area's Front Desk, where he made his comment to Mr. Rivera: Ms. Elcheck asked you to leave, please leave - whereupon Mr. Rivera walked out the front door and exited the facility.

Director of Nursing Lisa Elcheck

Ms. Elcheck testified she became Director of Nursing at the facility on November 1, 2021.

Ms. Elcheck testified she went into Mr. Kaufman's office on January 11 after hearing Mr. Rivera's tone speaking with Mr. Kaufman, which was loud, aggressive and intimidating as Mr. Rivera raised two issues with Mr. Kaufman: a grievance and lighting. Ms. Elcheck reported Mr. Rivera as saying as to the grievance: where is it Joe, you said you saw it, where is it Joe, where is it; as to the lighting: you told me you were taking care of it, it's not true, I could have an electrician

here in ten minutes. Ms. Elcheck further reported Mr. Rivera saying he can take matters into his own hands, he'll do something about it; Mr. Kaufman kept calm and said nothing. Ms. Stallings, who was present when Ms. Elcheck arrived, then shushed Mr. Rivera and took him away, saying come on, let's go. Ms. Elcheck reported she felt threatened by Mr. Rivera's extremely aggressive manner, which got louder and louder.

On January 13, Ms. Elcheck reported she heard Mr. Rivera, who was not scheduled that day, and went to the noise, where she encountered him very loudly speaking with Stephanie Sutphen. Mr. Rivera then went through the facility, including patient care areas, talking loudly on his cell phone, making derogatory comments about the facility and Mr. Kaufman, who was outside, and with whom Mr. Rivera wished to meet, and about whom Mr. Rivera said: look at him run; Mr. Rivera then asked Ms. Elcheck to meet with him.

Ms. Elcheck further reported that she heard Mr. Rivera continuing to talk loudly on his cell phone while gathered with a group of employees near the Fish Tank; as Ms. Elcheck approached Mr. Rivera, she asked him, please get off the phone, to which he responded, no, he did not have to, after which Ms. Elcheck reported she asked him to leave, to which he responded, no, I don't have to, causing her to ask him again to leave and he again said no. Ms. Elcheck then told Mr. Rivera she was going to have to call the police if he did not leave and he said go ahead. Based upon Ms. Elcheck feeling threatened by Mr. Rivera's refusals, in front of a large group of employees near the Fish Tank, to stop using his cell phone and the large group of employees near the Fish Tank itself, she decided to call the police; while she was doing so, she saw Mr. Rivera walk out the door to the parking lot, where he stayed, and, she reported, did not return to the facility.

Ms. Elcheck further reported that Mr. Kaufman also asked Mr. Rivera to leave. Ms. Elcheck estimated that Mr. Rivera was on his cell phone for at least 75 minutes.<sup>3</sup> Ms. Elcheck also reported that the group of employees near the Fish Tank did not address her.

On cross examination, Ms. Elcheck reported that she was not aware of Mr. Rivera's tenure with the Employer until the week of January 24; she further reported that while at the Fish Tank with the employees, Mr. Rivera said he needed to talk to Mr. Kaufman and now needed to talk to

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<sup>3</sup> On Re-Re-Direct Examination, Ms. Elcheck stated 45 minutes.

her, to which she responded make an appointment.

### Union Witnesses

#### Damian Rivera

Mr. Rivera testified that he has been a CNA at the Employer since October 23, 2000 and has served as a Union Shop Steward for many years, as well as on the Union's Negotiating committee, including during the negotiations in 2021 for an agreement, during which periods he was active as well in the employees' actions in support to those negotiations.

On January 11, Mr. Rivera testified, he met with Mr. Kaufman about a number of matters. Also present were Union Delegate LPN Sara Stallings, CNA Kelley Grungo and Ms. Elcheck, who did not speak. Mr. Rivera asked Mr. Kaufman about a pending grievance involving paid time off, which Mr. Kaufman said he did not remember; although Mr. Rivera noted it was in Human Resources, Mr. Kaufman said he did not know about it and Mr. Rivera reported it was an issue with the employees, to which Mr. Kaufman made no response. Mr. Rivera next noted a lighting issue to Mr. Kaufman and it was an OSHA violation since employees fell in the lot; Mr. Rivera felt Mr. Kaufman's response - that he didn't know what to tell Mr. Rivera - was inadequate and said that was the wrong answer, Mr. Kaufman needed to deal with it. Mr. Rivera reported he spoke calmly and professionally throughout and did not say he would take matters into his own hands; rather, he said, he would go to OSHA.

On January 13, Mr. Rivera reported, a day he was not scheduled to work, he came to the facility to prepare a Walk the Boss event over the employees' safety concerns over Covid issues. Mr. Rivera reported he used his cell phone that day but did not recall how much he did so while inside the facility as well as outside. At 2:45 pm, Mr. Rivera returned to the facility to rejoin the employees for the Walk the Boss and joined them as they proceeded to the Fish Tank area to discuss their safety concerns with Mr. Kaufman in the shift change period from 2:55-3:15 pm. When they met Mr. Kaufman and asked to talk, he said okay, in a minute; however, after the employees and Mr. Rivera waited 20 minutes, he did not return. At that point, Mr. Rivera reported, he called Union Representative Maxine Peterson, who advised him to continue waiting. As they waited, Mr. Rivera reported, Ms. Elcheck arrived and, very loudly, said she was not talking to Mr. Rivera, he had no right to be there, she was calling the police; Mr. Rivera responded he was on his own time doing a Walk the Boss. Ms. Elcheck repeated that Mr. Rivera had no right to be there;

Mr. Rivera reported he went outside to call counsel; when the police arrived, he reentered the facility with them and then, later, left with them. Mr. Rivera reported that the police did not tell him to leave.

Mr. Rivera reported that he did not see Mr. Kaufman during his exchange with Ms. Elcheck and<sup>4</sup> did not refer to him at any time as being on the run. The next day, Mr. Kaufman telephoned Mr. Rivera and told him the Employer had no more need for Mr. Rivera's services.

On cross examination, Mr. Rivera reported that he did not hear Mr. Kaufman say that Mr. Rivera should leave and that he does not recall Mr. Kaufman approaching him while he was on the cell phone with Ms. Peterson. As for Ms. Elcheck, Mr. Rivera reported that he did not recall her saying he should get off the cell phone, only, one time, that he should leave, which he did.

Mr. Rivera also reported that Ms. Stallings did not shush him, but agreed with his exchange with Mr. Kaufman about the employees' concerns.

Mr. Rivera reported he reentered with the police because, as a Union Delegate, it was his job.

#### Sara Stallings

Ms. Stallings testified she is an LPN who has worked at the facility for 20 years, the last eight years of which she has also been a Union Delegate. On January 11, Ms. Stallings reported, she attended Mr. Rivera's meeting with Mr. Kaufman and heard their exchanges over the paid time off grievance and outside lighting, to which Mr. Kaufman provided no answers. During the meeting, Ms. Grungo and Ms. Elcheck arrived. Ms. Stallings reported Mr. Rivera did not say anything about taking things in his own hands; rather, he said Mr. Kaufman and the Union can work as a team - or the Union can go to OSHA. Mr. Rivera ended the meeting by saying to Mr. Kaufman: thank you for your time. Ms. Stallings also reported<sup>5</sup> she did not shush Mr. Rivera or pull him away from the meeting.

On January 13, Ms. Stallings reported, during the Union's Walk the Boss event over Covid safety issues, employees gathered near the Fish Tank, a non-patient care area because patients are not allowed due to Covid, and Mr. Kaufman walked by on his cell phone and was asked to talk;

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<sup>4</sup>On Re-Direct Examination.

<sup>5</sup>On Re-Direct Examination.

he responded, in a minute. Ms. Stallings reported that the employees waited 20 minutes, but Mr. Kaufman did not return. At that point, Ms. Stallings reported, Ms. Elcheck arrived and, arrogantly, asked Mr. Rivera to leave; he did not respond, but left the facility. Ms. Stallings reported she then saw Ms. Elcheck on the phone calling the police. Ms. Stallings reported that Mr. Rivera was professional at all times.

On cross examination, Ms. Stallings reported that Ms. Elcheck pointed to Mr. Rivera and asked him to leave the building, not the employees.

Ionie Carter

Ms. Carter testified she is a CNA who has worked at the facility for 20 years. On January 13, Ms. Carter reported, she and other employees participated in a Walk the Boss over Covid hazard pay and went to the Fish Tank. Ms. Carter reported that when Mr. Kaufman passed, he said he would be back right away, but did not return. After 20 minutes, Ms. Elcheck came to the employees with Mr. Kaufman and told Mr. Rivera to get out, get out - and then walked away, saying: Call the cops, she will be the bad guy.

Ms. Carter also reported that Mr. Rivera walked out of the building; his behavior was good and was not loud.

Dana Coleman

Ms. Coleman is a CAN employed three years at the Employer; she testified that the employees engaged in a Walk the Boss at the Fish Tank, a non-patient care area, to talk to Mr. Kaufman about being short staffed; when he walked by, he said he would be there in a minute, but did not return during the 20 minutes the employees waited. During that period, Ms. Coleman reported, Mr. Rivera was not loud and left.

Received Proffered Testimony of Union Witnesses

Kellee Grungo

Ms. Grungo was present in the hallway for the second half of the January 11 meeting between Mr. Kaufman and Mr. Rivera and could hear what was said; Mr. Rivera was not loud or belligerent or intimidating or otherwise inappropriate; and Ms. Stallings did not shush Mr. Rivera and the meeting ended without incident, after which he returned to work.

Rosemary Greene and Shantee Miller

During the employees' Walk the Boss at the Fish Tank area, a non-patient care area, Mr. Kaufman walked by and was asked by employees to speak with him; he said give him a minute, but for 20 minutes, he did not return. It was common for employees to use their cell phones in the area of the Fish Tank and employees had not been told not to use their cell phones in that area.

Mr. Rivera was not loud or disruptive. Ms. Elcheck told Mr. Rivera not to talk on the phone and he should not be there; Mr. Rivera responded that he was not on the clock. Ms. Elcheck told Mr. Rivera to leave the building and she would call the cops; Mr. Rivera left the building without delay.

### **Discussion**

Based upon the Employer's witnesses' testimony, it asserts that it has established that Mr. Rivera was insubordinate as to leaving and cell phone usage and created a hostile working environment, testimony as to which the Employer notes its witnesses corroborated each other. However, as the Union notes, Mr. Kaufman himself testified on direct examination and again, more expansively, on cross examination, that he terminated Mr. Rivera because of his insubordination as to Ms. Elcheck's and Mr. Kaufman's asking Mr. Rivera to leave on January 13; and for creating a hostile work environment on January 11, with Mr. Rivera's disrespectful conversation with Mr. Kaufman, and on January 13, with Mr. Rivera riling up the ten employees at the Fish Tank who did not know what they were doing and seemed to be waiting for Mr. Rivera to tell them what to do. Accordingly, since Mr. Kaufman did not list Mr. Rivera's insubordination as to his cell phone usage at the facility on January 13 as a reason for Mr. Rivera's discharge, the Undersigned does not consider further the Employer's assertion that its concerns about Mr. Rivera's cell phone usage should play a role in his discharge.

The Undersigned also notes at this time the Union's contention that Mr. Rivera cannot be considered to have been discharged for returning to the facility with the police on January 13, which it was reasonable for him to do in any event, and he also reasonably left with them when they left. As the Union argues, there is no record evidence that Mr. Kaufman even knew of Mr. Rivera's return with the police, never mind considered it in determining to discharge him, which the Undersigned notes Mr. Kaufman's testimony makes clear. Accordingly, the Undersigned shall also not consider further the Employer's assertion in its brief that its concerns about the

appropriateness of Mr. Rivera's return to the facility with the police should play a role in the Undersigned's determination of the merits of Mr. Rivera's discharge.

The Undersigned thus turns to the Employer's assertions that Mr. Rivera was insubordinate as to leaving and created a hostile working environment, considerations Mr. Kaufman did list as reasons for Mr. Rivera's discharge. In that regard, the Undersigned also notes the Union's assertions - that Mr. Rivera denies being loud or disruptive at any time and reported that it was Mr. Kaufman who, after ignoring Mr. Rivera's requests for information on January 11, evaded meeting on January 13 and when Mr. Rivera sought a meeting with Ms. Elcheck in Mr. Kaufman's place, it was she who became aggressive and irate and told him he had no right to be there and immediately went to call the police, at which time Mr. Rivera left without delay, as Mr. Kaufman also testified, as did all the witnesses called by the Union.

### **Analysis**

The parties offer conflicting assertions as to Mr. Rivera's being insubordinate as to leaving and his creating a hostile working environment. As noted just above, Mr. Kaufman explained (1) the insubordination was as to Ms. Elcheck's and Mr. Kaufman's asking Mr. Rivera to leave on January 13 and (2) Mr. Rivera created a hostile work environment (a) on January 11 with Mr. Rivera's disrespectful conversation with Mr. Kaufman and (b) on January 13 with Mr. Rivera riling up the ten employees at the Fish Tank who did not know what they were doing and seemed to be waiting for Mr. Rivera to tell them what to do.

Reviewing the testimony of Mr. Kaufman and Ms. Elcheck chronologically, the Undersigned views their versions as to the January 11 conversation with Mr. Rivera as appearing to be describing two vastly different events. Mr. Kaufman reports that Ms. Elcheck was present when the conversation started; Ms. Elcheck that she was drawn to the conversation after hearing Mr. Rivera's loud, aggressive and intimidating tone while speaking with Mr. Kaufman, a tone which, after she arrived, got louder and louder such that it was threatening. Mr. Kaufman reports that as Mr. Rivera asked about the lighting installation delays and Mr. Kaufman responded that the parts were there and awaiting the electricians' scheduling, but it was a big job, Mr. Rivera raised his voice and said he would be taking the matter into his own hands and then spent quite a few minutes accusing Mr. Kaufman of always saying that and never taking care of things, in response to which Mr. Kaufman kept calm. Ms. Elcheck reports Mr. Rivera's words were: where

is it Joe, you said you saw it, where is it Joe, where is it - and - you told me you were taking care of it, it's not true, I could have an electrician here in ten minutes.

The Undersigned finds that the recitation above demonstrates a wide divergence between the versions to an extent that the divergence renders unreliable Ms. Elcheck's characterization of Mr. Rivera's tone as loud, aggressive and intimidating in her version, when compared to Mr. Kaufman's version, which offers a characterization of Mr. Rivera as spirited and assertive while, at one point, manifesting frustration over Mr. Kaufman's responses by raising his voice, which Mr. Kaufman did not say Mr. Rivera continued, or that Mr. Rivera was "loud, aggressive or intimidating." When the Undersigned views this conclusion - and combines it with the testimony of Mr. Rivera and the Union's witnesses, Ms. Stallings and Ms. Grungo, that Mr. Rivera was not loud and was professional - the Undersigned concludes that the exchange between Mr. Kaufman and Mr. Rivera provides no support for finding that Mr. Rivera created a hostile working environment during the above-described segments of his conversation with Mr. Kaufman.

As for the asserted comment by Mr. Rivera that he would take the matter into his own hands, which he denies, the Undersigned finds it so vague that in any event it, standing alone, is unimpressive in playing a role in creating a hostile working environment.

Mr. Kaufman and Ms. Elcheck do join in asserting that Ms. Stallings shushed Mr. Rivera, which is denied by both Ms. Stallings, Ms. Grungo and Mr. Rivera. In view of the Undersigned's findings above, he finds the assertion of no moment in any event.

Staying with the assertion by Mr. Kaufman that Mr. Rivera created a hostile working environment, the Undersigned turns to January 13, when, Mr. Kaufman reports, he viewed Mr. Rivera as riling up the ten employees at the Fish Tank who did not know what they were doing and seemed to be waiting for Mr. Rivera to tell them what to do. The Undersigned notes first, however, that the Employer in its brief expresses concerns that ranged far and wide about other of Mr. Rivera's actions on January 13 that, it asserts, created a hostile working environment. However, the Undersigned further notes that Mr. Kaufman, in determining to discharge Mr. Rivera, reported solely in his cross examination that his concerns regarding Mr. Rivera creating a hostile working environment on January 13 were those he described therein: Mr. Rivera was riling up the ten employees at the Fish Tank who did not know what they were doing and seemed to be waiting for Mr. Rivera to tell them what to do.

The Undersigned next notes that in view of his finding above that the conversation between Mr. Kaufman and Mr. Rivera on January 11 does not support a finding that Mr. Rivera had prior, to January 13, created a hostile working environment, the only remaining support for Mr. Kaufman's belief that Mr. Rivera created a hostile working environment is that, on January 13, Mr. Rivera riled up the ten employees at the Fish Tank who did not know what they were doing and seemed to be waiting for Mr. Rivera to tell them what to do.

The events of January 13 to which Mr. Kaufman refers, of course, are the employees' participation in a Walk the Boss at the Fish Tank at around 3 pm that has been amply described in numerous witnesses' testimony. While the Employer and the Union may disagree as to the employees' right to conduct such an event at that time and place, as well as the propriety of Mr. Rivera's support for and/or participation therein, the Undersigned notes that the issue relevant to this proceeding is otherwise, to wit: whether Mr. Rivera's support for and/or participation therein created a hostile working environment. The Undersigned concludes that there is nothing in the record evidence of this proceeding that supports a conclusion that any detail described by any witness presented herein as to the employees' or Mr. Rivera's actions while conducting their Walk the Boss at the Fish Tank event could be considered to have created a hostile working environment. Rather, the record evidence demonstrates that the employees and Mr. Rivera gathered at the Fish Tank and asked to talk to first, Mr. Kaufman, and then to Ms. Elcheck, about their concerns - no more, no less. Although Mr. Kaufman may have been concerned that Mr. Rivera had "riled up the employees at the Fish Tank, who did not know what they were doing and seemed to be waiting for Mr. Rivera to tell them what to do," it is clear from the record that employees were present because they had a purpose, i.e., to meet with Mr. Kaufman about their safety concerns, and that they fully knew what they were doing, including with the support of Mr. Rivera and his planning for the event. Furthermore, there is no record evidence that Mr. Rivera "riled up" the employees or that the employees acted in a riled up manner in that there was not a hint of an inappropriate action by an employee present at the Walk the Boss. Under these circumstances, the Undersigned finds that Mr. Kaufman's concerns do not provide support for finding that Mr. Rivera created a hostile working environment because of the employees' or his participation in the Union's Walk the Boss event at the Fish Tank on January 13.

Turning lastly to the remaining matter of whether Mr. Rivera was insubordinate as to Ms. Elcheck's and Mr. Kaufman's asking Mr. Rivera to leave on January 13, the Undersigned notes

the Employer's assertions that Mr. Rivera and the Union witnesses could not agree on a single version of what happened once Ms. Elcheck advised Mr. Rivera that she was calling the police and that various union witnesses testified that they saw Mr. Rivera head directly for the exit, but that Mr. Rivera maintained on cross examination that he stood in the facility lobby and stared at Ms. Elcheck while she made the call to the police, essentially daring her to do so; thus, far from complying with Ms. Elcheck's request to exit the facility, Mr. Rivera stood his ground in the lobby while she made the call, and only then left the facility.

The Union asserts that Ms. Elcheck told Mr. Rivera that he had no right to be there, told him to get out, and immediately called the police and when she was asked how much time passed between when she approached Mr. Rivera and called the police, Ms. Elcheck responded many times that it was "immediate." According to Mr. Kaufman, it was at this time that he reentered the lobby area. Mr. Kaufman conceded that he did not hear what happened when Ms. Elcheck confronted Mr. Rivera and testified that when he asked Mr. Rivera to leave, Mr. Rivera left. In fact, each of the Union's witnesses who testified about this "incident," Mr. Kaufman, Ms. Elcheck, Mr. Rivera, Ms. Stallings, Ms. Carter, Ms. Miller, and Ms. Greene, said the same thing - that when Mr. Rivera was told to leave the building, he left the building without delay.

The Undersigned notes that it is undisputed that Ms. Elcheck ordered Mr. Rivera to leave the facility and that he did so. The remaining dispute herein is how quickly Mr. Rivera did so, the Employer asserting Mr. Rivera reported on cross examination that he stood in the facility and stared at Ms. Elcheck during her call to the police before leaving the facility, the Union asserting that he left when he was told. In these regards, the Undersigned notes Mr. Kaufman's testimony, first, on direct examination and next, on cross examination:

Mr. Kaufman heard Ms. Elcheck ask Mr. Rivera to leave, to which Mr. Kaufman heard no response from Mr. Rivera; Mr. Kaufman added: she told you to leave, so please leave, at which point Mr. Rivera said, hey Maxine, they're telling me to leave, I don't think they can do that, as he walked out the door of the facility to the parking lot.

Mr. Kaufman returned to the area where the employees were gathered and saw that Ms. Elcheck was upset after telling Mr. Rivera to leave and was heading to the reception area's Front Desk to call the police. Mr. Kaufman proceeded to the reception area's Front Desk, where he made his comment to Mr. Rivera: Ms. Elcheck asked you to leave, please leave - whereupon Mr. Rivera walked out the front door and exited the facility.

Under all the circumstances presented in the record, the Undersigned recognizes the murkiness surrounding the facts as to whether Mr. Rivera left as quickly as he should have when asked to do so.

More importantly, the Undersigned next notes, it is undisputed that neither Mr. Kaufman nor Ms. Elcheck, with whom Mr. Kaufman consulted prior to determining to terminate Mr. Rivera, was aware that Mr. Rivera had been a 22 year employee of the Employer, as well as that Mr. Kaufman did not review Mr. Rivera's personnel file before deciding to discharge Mr. Rivera, although Mr. Kaufman conceded it was usual to do so. The Undersigned further next notes that, in view of the Undersigned's findings above, the only remaining disputed basis for finding Mr. Rivera's termination by the Employer was for just cause - the Issue herein - is that Mr. Rivera, who left the facility after being asked to do so, should be faulted because he did not leave the facility quickly enough. The Undersigned lastly notes that critical elements of just cause principles are that the Employer conduct an adequate investigation, particularly before determining a penalty as severe as termination.

Under all those circumstances, the Undersigned finds that the investigation conducted by Mr. Kaufman is insufficient to establish just cause for the discharge of Mr. Rivera, based solely upon his asserted fault of not leaving quickly enough when asked to do so. Mr. Kaufman failed to review Mr. Rivera's personnel file before deciding to discharge Mr. Rivera, although Mr. Kaufman conceded it was usual to do so; Mr. Kaufman was unaware of Mr. Rivera's 22 year tenure with the facility and therefore did not take Mr. Rivera's lengthy tenure into account when determining the extent of discipline; and the only remaining disputed fault of Mr. Rivera is whether he left the facility quickly enough when he was told to do so, a fault, regardless of its determination, that would not merit termination.

## **CONCLUSION**

Under the circumstances herein, the Undersigned finds that the Employer did not have just cause to terminate Damian Rivera.

**AWARD**

The Employer did not have just cause to terminate Damian Rivera.

As remedy, the Employer shall immediately reinstate Damian Rivera to his position with full backpay and benefits.

The Undersigned shall maintain jurisdiction over this matter for purposes of resolving any disputes between the parties regarding the implementation of this Award.

DATE: February 10, 2022

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GARY T. KENDELLEN  
Arbitrator

STATE OF NEW JERSEY:

SS:

COUNTY OF UNION:

I hereby affirm that I am the individual described in and who executed this instrument, which is my Award.

DATE: February 10, 2022

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GARY T. KENDELLEN  
Arbitrator