

WAYNE STATE UNIVERSITY
SCHOOL OF MEDICINE

and

WAYNE STATE UNIVERSITY
CHAPTER, AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS, AFT, Local 6057

Grievance of Lucia Zamorano, M.D.

Hearing dates: July 13, 14 and
September 20, 2006

Presenting for the AAUP:
Gordon Gregory, Esq
Gregory Moore Jeakle Heinen & Brooks

Presenting for the University:
John Allen, Esq
Allen Brothers PLLC

Opinion Explaining Decision by Arbitrator Ellen J. Alexander

A. Introduction and Statement of the Case

Lucia Zamorano, M.D. is a Chilean citizen, with an educational background in engineering, and medicine. Her M.D. degree is from Catholic University Medical School in Santiago. Following various residencies and clinical fellowships, she worked in Departments of Neurosurgery in West Germany and England. She then came to Detroit in 1986 to be a clinical fellow and then attending staff in the Department of Neurosurgery at Henry Ford Hospital until 1991.

Grievant Zamorano joined Wayne State University Medical School Department of Neurosurgery as an Associate Professor in August 1991 and accordingly became "affiliate staff" at the Detroit Medical Center and its various associated hospitals including Karmanos Cancer Center. In about 1995 she became a full (clinical) professor. This is not a tenure track position. Her 14 year employment relationship with Wayne University has been by a series of two year contracts, and at the time of these events her University contract was due to expire June 30 2005.

Dr. Zamorano at the time of her termination was Professor of Neurosurgery and Radiation Oncology. She was also a partner in a neurosurgery practice group (letterhead "University Neurologic Surgeons Affiliated with Wayne State University.") The President of that group is Murali Guthikonda, also the Chairman of the Department of Neurosurgery at the medical school. Doctor Zamorano's separate contract with UNS medical corporation is not part of this proceeding but as the record makes clear, her membership in that practice was conditioned upon her acceptable standing with the Wayne University Medical School.

On October 22, 2004, the briefly acting dean of the School of Medicine, one Michael Herbert, M.D. signed the following letter to Dr. Zamorano:

Dear Dr. Zamorano:

This will serve to notify you that you are suspended from your position as Professor (Clinician-Educator) in the School of Medicine and from your duties in the Department of Neurological Surgery. The suspension is effective immediately. Your WSU salary *and* employment benefits shall be continued during the suspension period.

I am taking this action pending the completion of an investigation into allegations of wrongdoing that have been made against you. These allegations include the following:

- Misuse and unauthorized use of a Wayne State University P-Card
- Intentional concealment of your misuse and unauthorized use of a University P-Card
- Wrongful conversion of university and grant-related funds entrusted to your use.

You are to refrain from all teaching and research activities behalf of Wayne State University during the period of your suspension, which will continue until completion of the university's investigation into these allegations. You are not to return to your office or laboratory until further notice.

Other entities may be conducting their own investigation into these allegations.

On February 7, 2005, another short term "interim dean" Robert R. Frank, M.D. signed a letter of termination

Dear Dr. Zamorano:

This letter will serve to advise you that your employment as a professor in the Department of Neurological Surgery is terminated effective immediately.

The basis for your termination is as follows:

- On numerous occasions between February, 2004, and August, 2004, and in violation of applicable university policy, you utilized a university-issued P-Card in order to purchase goods and services for your personal use,
- On numerous occasions between February, 2004 and August, 2004, you caused improper charges resulting from your use of the P-Card to be assessed against a significant research grant provided to Wayne State University by a third party.
- You misrepresented the nature of many of the purchases you made and fabricated numerous receipts from vendors, with the intention of concealing your improper use of the P Card.
- You allowed an unauthorized person to make use of a university P-Card issued in order to make at least one personal purchase.

You are instructed to return to Dr. Murali Gulhikonda all documents, reports, files, memoranda, records, keys, identification cards, computer access codes, software, or any other physical or personal property which you received or prepared or helped to prepare in connection with your employment and which you have in your possession.

The decision to suspend and later terminate Dr. Zamorano was made by University Vice President (Research) John Oliver, Vice President\General Counsel Lou Lessem, and the manager of Internal Audit, among possible others. The decision was strongly based upon conclusions of an internal audit (for which Dr. Zamorano was never interviewed.) Of a total of \$21,419. charges made against the grievant's Pro-card, \$14,956 were "lumped into or classified as personal or questionable." The University obtained a search warrant and police executed it at her two personal residences in Bloomfield Hills on October 25, 2004 to find there many of the personal items that had been charged. on the Pro-card. The prepared suspension notice was given to her during the police search of her residence.

Refusing Doctor Zamorano's ongoing efforts to reimburse it for the numerous personal purchases she and her domestic partner had made with her visa\ "Pro-card," the University sought criminal prosecution. Ultimately, the County prosecutor declined to bring charges with a rather stinging press release indicating his conclusion of an "impossibility" of showing either "intent to defraud" or intent to conceal her purchases. (union ex 14).

In attempting to explain\justify her substantially negligent use of the credit card, and to reach some resolution short of termination, the grievant first utilized the services of a private criminal

attorney. Upon learning that her ongoing membership in the AAUP entitled her to representation, Doctor Zamorano then sought such assistance. The AAUP filed a grievance (#255) on her behalf on February 10, 2005. This was later amended on September 8, 2005. The grievance states in its entirety:

FACTS:

On or about February 7, 2005, Dr. Zamorano's employment as a Professor in the Department of Neurological Surgery was terminated effective immediately. Such termination was without a hearing and without adequate cause as required by the U.S. and State Constitutions, the collective bargaining agreement and Board of Governors statutes. Moreover, the termination violates Dr. Zamorano's contract of employment, and has wrongfully terminated her role as Principal Investigator on a Michigan Economic Development Corporation grant.

CONTRACT PROVISIONS VIOLATED:

By the foregoing and other acts, the Administration, through the Interim Dean of the School of Medicine has violated the Grievant's constitutional due process rights, her contract of employment Article VII of the bargaining agreement, and Board of Governor statute 2.51.01-160 dated May 10, 1998.

The University did not respond to the grievance, a silence which, as its hearing counsel points out, "under the rules operates as a general denial." (tr 1/141)

The matter proceeded to arbitration and my joint appointment. Hearings were held on dates stated above and all testimony was under oath and reporter-transcribed. The parties were represented by most competent counsel, multiple exhibits were submitted and after some delay, post hearing briefs received. I requested a short extension from my original award due date.

B. Relevant Labor Agreement Provisions

Article VII Past Policies

A. Continuation of Past Policies

Except as modified by this Agreement, the following actions formally approved by the Board of Governors shall remain unchanged for members of the bargaining unit

Statute 2.51.01 Appointments, Continuing Tenure, Termination and Dismissal policies and

Procedure for Faculty Appointments.. Continuing tenure, Termination and Dismissal Policies and Procedure for Academic Staff

Article XVII Grievance Procedure

A. Intent

The University Administration and the Association agree that they will use their best efforts to encourage the prompt settlement of grievances. The orderly processes hereinafter set forth shall be used for the resolution of grievances

Nothing in this grievance procedure shall limit the existing right of an individual member of the bargaining unit to communicate with any person in the University administration

B. Definition

A grievance is a complaint, claim or dispute arising under and during the term of this Agreement. Grievances are limited to matters of interpretation or application of express provisions of this Agreement except those provisions which are specifically excluded from the grievance procedure

E. Formal Procedure for Handling grievances

There shall be no formal rules of evidence and the arbitrator shall operate in accord with the prevailing rules of the American Arbitration Association. Each party may present its own witnesses

The arbitrator's jurisdictional authority is defined and limited to the determination of a grievance as defined in Section B of this Article, and limitations and exclusions to the arbitrator's authority contained in other articles of this Agreement will also apply. The arbitrator shall have no power to add to or to subtract from or modify any of the terms of this Agreement and his/her findings shall be consistent with the terms of this Agreement.

C. Board of Governors; Wayne Statute University Statutes

2.51.01 Appointments, Continuing Tenure, Termination and Dismissal Policies and Procedures for Faculty

2.51.01.110 Appointments in the next three categories carry no implication of tenure, and are strictly limited to the periods and upon the conditions explicitly stated. Unless otherwise expressly agreed, they will not be counted in determining years of service referred to in the

provisions for term appointments....

2.51.01.160 Dismissal Proceedings-Faculty on Term Appointment

Faculty appointed under an agreement for a fixed term may be dismissed prior to the termination of the term for adequate cause as follows: (a) *for acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University*; (b) serious misrepresentations of fact relied upon in making the term appointment; (c) *serious violations of academic standards and principles*; (d) failure to perform academic assignments competently.

2.51.01.170 A fixed-term faculty member who is terminated for adequate cause will have access to the grievance procedures. *If the arbitrator finds that the grievant (a) did not engage in acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University or did not make serious misrepresentations of fact relied upon in making the term appointment; (c) did not engage in serious violations of academic standards and principles; or (d) did not fail to perform academic assignments competently, the arbitrator shall have the authority to rescind the dismissal or suspension, and to award reinstatement with back pay through the end of the contract term.*

2.51.01.300 Emergency Suspension-Faculty

Whenever the continued service of a member of the faculty would in the judgment of the President threaten grave and immediate injury to the University or its students, faculty, or staff, the individual may be relieved of part or all of his/her University duties and privileges without prejudice to the final disposition of the matter. Such action may be taken by the President's designee if the President is not available. Such suspension in and of itself shall not affect the individual's compensation; and it shall be reported to the Board of Governors promptly for such action as the Board may wish to take with reference thereto. Such emergency suspension shall be limited to a maximum of 120 days if no further action is taken in that time, and the individual shall return to his/her regular duties.

2.51.01.310 The President will designate a competent legal and/or other appropriate member of his/her staff to conduct an appropriate investigation to determine the necessity for the continuation of the suspension. *The investigation must include an opportunity for the Respondent to testify unless this is not feasible for reasons of physical or mental health or of behavior nullifying the usefulness of such an opportunity.* The respondent has the right at his/her own expense to be represented and assisted by both academic and legal counsel of his/her choosing. A report of the investigator shall be sent to the President and to the Respondent...

The award of the arbitrator shall be based exclusively on evidence presented at the hearing. Decisions within the jurisdiction and the authority of the arbitrator shall be final and binding on

the part of the Association, bargaining unit members, and the University.

G. Extension of Time Limits

Time limits set forth herein, subsequent to the filing of the grievance as specified in section E may be extended by mutual agreement

H. Liability

In no event shall the University's liability antedate sixty days before the filing of the grievance nor will the University be required to pay any interest penalty or other cost. In matters relating to compensation the University's liability shall not antedate the filing of the grievance by more than six months

(Italics added by undersigned throughout decision.)

D. Issues

Within my authority as labor contract arbitrator, the issues to be resolved are whether the termination from academic appointment of Lucia Zamorano M.D. was for "adequate cause" under incorporated University Statute 2.51.01.160 and 2.51.01.170, including the issue of whether fundamental due process protections were missing or denied. If so, what shall be the remedy?

E. Background and Findings of Fact

1. Use and Misuse of University Procurement Card

In 2002 the University developed and implemented the "Procurement Card" (controlled visa card) benefit, and rules for its use. These rules ("APPM Section 2.7" memo of July 2002, University exhibit 1) were to be followed by both card users and their oversight department card "coordinators." There is no proof that the written rules document was actually provided to Doctor Zamorano, who has steadfastly denied familiarity with its requirements. However, she acknowledged receipt of it by virtue of signing a " Procurement Cardholder agreement" which makes reference to receipt of those rules. The extensive rules document itself in most relevant part states as follows.

The Wayne State University Procurement Card is a credit card for business purchases of goods and services, excluding travel and entertainment. It is targeted at low dollar purchases, which account for a high percentage of the University's purchasing transactions each year. Payments are made directly to merchants by the bank for procurement card purchases...

A procurement card ("Pro-card") may be issued to any employee (an individual receiving compensation from the University) who obtains the appropriate approval from the Department Chair and Dean for academic Units....

Purchase made with a procurement card **must**

- be for official University business use only
- be \$1,000 or less per transaction
- total no more than 10,000 per month
- comply with University purchasing policies;
- comply with any special requirements of projects supported by sponsored funds
- be properly charged in the accounting system in a timely manner

Each Pro- card is tied to a particular funding source ("Fund Organization Account Program Activity Location or FOAPAL). "All procurement card charges are paid from a Central University bank account. When a department's procurement card coordinator/cardholder reviews a transaction, the charge is not being approved for payment, but allocated to the proper FOAPAL number..." The rules warn that "all card holders and procurement card coordinators are required to attend training" and that "at the conclusion of the training, and after signing the cardholder agreement, the card will be issued to you."

Monthly statements for each particular card must be downloaded from the University "PVS net: The cardholder must retrieve a statement for transactions posted during the period beginning the 16th of the previous month to the 15th of the current month.. (which).. must be reviewed and signed by the cardholder " (University ex 2). "Cardholder Responsibilities" in relevant part include to

1. Keep your procurement card number confidential. You are the only person authorized to use the card. Lending or sharing the card is not allowed
2. Purchase authorized goods or services from any merchant who accepts credit cards. Each transaction is limited to \$1,000 or less...
3. Do not split a transaction....these will appear on your statement *and you will lose your card privileges...*
5. Always obtain a receipt from the merchant when using the card. For purchases made over the telephone, instruct the merchant to mail the invoice/receipt to you, the card holder...

Caution *Failure to obtain appropriate documentation for a purchase may be grounds for suspending or revoking your procurement card privileges. Your procurement card coordinator will report certain instances of missing documentation to the Procurement Card Manager, who may require an explanation for all missing or incomplete documentation.*

- 7 If your receipt does not detail what was purchased, write a description on the receipt of the goods or services purchased.
8. It is recommended that you record your purchases in a Procurement Card Transaction

Log...although you are not required...it may be the most efficient means of keeping track of your purchases

9. Once a month you will retrieve a cardholder statement on-line, ...you must review this statement for accuracy...provide a signed copy of the reviewed cardholder statement and receipts to your procurement card coordinator....¹

The rules also place responsibility on each Departmentally assigned "Procurement Card Coordinator to oversee and approve procurement card transactions." That person is supposed to "ensure department compliance with this policy." S\he must "collect all original receipts and packing slips and compare against electronic transactions as part of routine review (and) obtain explanations for any discrepancies." The department Coordinator is to "perform monthly reviews to ensure that all necessary signed card holder statements have been returned and that there are receipts on file for each procurement card purchase...." (University ex 2, page 3).

One of the "anticipated questions" in the memo asks "what if the original documentation is missing or incomplete?" and is answered

1. make every effort to obtain complete original documentation, including requesting a duplicate from the merchant.
2. *If you are unable to obtain a receipt, or what you have is incomplete (i.e. a packing slip with no pricing detail) print the Procurement card on-line transactions review screen and add any additional details necessary. The web-site screen will list the card holder name, merchant, dollar amount of purchase and the account the purchase was charged to. You will need to add detail on the goods/services purchased and an explanation for the missing documentation. (italics added by this writer).*

Again, cardholders themselves must retrieve and print out their monthly statement on line, review it for accuracy (preferably by comparing it to their optional "transaction log") and "provide a signed copy of reviewed cardholder statement and receipts to your procurement card coordinator." Original receipts\ invoices or detailed packing slips, logs and statements should be delivered "to your procurement card coordinator immediately." Statements are to be kept on file by the coordinator for seven years. Dr. Zamorano did none of this, and was not asked\reminded to do so over her seven months of using the card.

None of the tasks of a Procurement Card Coordinator were carried out by that designated person in the Department of Neurology during the period when the grievant used her Pro-card. The Department's nominal Coordinator, one Nancy Thayer, left the Department at the start of July without replacement but the Internal Audit findings indicate that she had performed none of her own duties vis a vis monitoring the grievant's card or assuring that proper documentation was being created. In

¹The monthly statement of transactions available on the University internet do not reflect the purpose of the listed charges or the items leading up to a total. The merchant, total spent per merchant for the date and dates are listed

effect, there was no oversight or ongoing monitoring of the cavalier, busy doctor as she embarked on use of her card.

While recognizing that the University claims fraud, a key due process issue nonetheless is the extent to which or whether a card holder is informed of the result of card misuse. The Procurement Card addresses failure by the cardholder to follow procedures at several points, stating that

....If a cardholder fails to produce adequate documentation, the procurement card coordinator should contact the Procurement Card Manager. *Missing documentation may result in suspension or revocation of the procurement card.*

The word "discipline" is used, once, in the rules, but is immediately followed by what appears to be a definition of that discipline: repayment and card loss (see below.) The rules also state that "incidences of possible abuse of procurement card privileges or the fraudulent use of a procurement card should be reported to the University Internal Audit Office and Public Safety for investigation...." Nowhere does this "APPM 2.7" document suggest that misuse of the card, failure to properly document its use, or even using it impermissibly for personal purchases would result in termination. (Deliberate fraud or theft, of course, need not ever be the subject of a "rule.")

When grievant Zamorano joined Detroit Medical Center and Wayne State University in 1991 it was with the goal to bring in, continue to perfect, and share her experience with neurological surgical procedures using computers and imaging, including development of an "interactive image guidance (navigation) system." In concert with a team of radiation oncologists she introduced the Gamma Knife to treat brain tumors. She started the first lab research in the Neurosurgery department, contributing the \$25,000 seed money given to her by the University. She concurrently maintained a substantial private practice as well as teaching medical students and doctors. In her career she has authored or co-authored some dozens of papers and made numerous professional presentations.

In 2003, following years of effort, Dr. Zamorano obtained a \$ 3,337, 560. grant for Wayne State University from the Michigan Economic Development Corporation (MEDC) to be dispensed over a three year period. "In accordance with the guidelines of the Michigan Life Sciences Corridor Fund, the Grantee will develop a critical mass of interdisciplinary investigators that will significantly advance computer-assisted surgery" (CAS); (University ex 16, tab 2; Union 10). The Principal Investigator would be Doctor Zamorano, whose effort would be "45%" and there were to be various other "co-principal investigators," or "team leaders." Neurosurgery Department Chair Murali Guthikonda, M.D. had no role in this research\training grant until after the grievant's departure from the University and has, by his own admission, played barely any role since then, despite his nominal appointment as replacement for Dr. Zamorano.

The MEDC grant describes an anticipated considerable contribution of equipment, salaries and access to its facilities by the Stryker Leibinger company, a developer of "navigation systems" and "wireless instruments" for CAS with which Dr. Zamorano had long associated. Grant "subcontractors" included scientists from the University of Michigan and Oakland University but

•there is no question that the prime mover to obtain, utilize and manage this grant was Dr. Zamorano. The grantee was Wayne State University, and without a formal affiliation with Wayne, the grievant could have no future role.

The Procurement Card issued to the grievant was to be used solely for expenditures needed for performance or purposes of the MEDC grant, and to be charged against the grant. The grievant testified that she applied for such card (which is not obligatory) at the insistence of her full time grant coordinator, one Gulsheen Kaur, so as to facilitate smaller grant related purchases. This was "a chaotic time" in the department; which was "falling apart due to divisions" between groups "taking sides" as practice groups had to be restructured. Also per the grievant, neurology departmental Pro-card coordinator "Nancy Thayer was missing a lot of time."²

Doctor Zamorano, like all other card holders and their administrative coordinators, was required to attend training. Being "very busy between surgeries and all the activities" she only briefly attended a scheduled session on November 20, 2003. She did not view the training as essential, arrived late, and left 15 or 20 minutes later.

There was a patient and I had to go to the operating room. So I went but literally I wasn't able even to sit because I was just standing in the door and then I had to leave, really" (tr 3-54)..,

I didn't think that this was a major thing in my life to get a credit card. I mean, I just went there for something I was told I had to go sign so we could receive this card. I didn't make any-it wasn't something very significant in my life. It obviously ended up being very significant but at that moment it was something that... I went in the middle of a surgery, they paged me that I had to go back...(tr 3U40)

The grievant admits that she made no subsequent effort to learn about what she had missed and she never reviewed the written policies/restrictions regarding use of the Procurement card. Two months later, on January 15, 2004, Doctor Zamorano signed the one page cardholder agreement (University 15) and Nancy Thayer signed over handwritten words "accepted by." The doctor now had the card.

The doctor testified that she did read the half page agreement before signing it. That agreement states "I acknowledge receipt of the Policies and Procedures and affirm that I have

²Dr. Zamorano and the few others elected to create a not for profit group (University Neurologic Surgeons), as the University newly required, so they could continue to do research. Most of the doctors in the for profit group which the grievant had formerly been associated with stayed in that group. Department chair Dr. Guthikonda joined and became president of the not for profit practice group. His June 20, 2005 letter dismissing the grievant "without cause" from this practice group and the offered stipulation from Counsel Allen leave no doubt that this separation was due to her lost affiliation with the University.

read and understand it" (sic). Therefore, the undersigned finds that the doctor was aware (had notice) that there existed Pro-card use policies and procedures and that she was responsible for knowing and adhering to them. The card receipt agreement did not contain any of the rules, or reference the prohibition on third parties having access to the card but it did state that the card will be audited and that the holder

...further understand(s) that my improper use of this corporate liability card may result in disciplinary action against me should I fail to use the Procurement Card properly. I authorize Wayne State University to deduct from my salary or from any other amounts payable to me an amount equal to the total of the improper purchase. I also agree to allow Wayne State University to collect any amount owed by me even if I am no longer employed by the University. If Wayne State University initiates legal proceedings to recover amounts owed by me under the agreement I agree to pay legal fees incurred by the university in such proceedings. I understand that the University may terminate my privilege to use the Procurement Card at any time for any reason...

This case involves the first Pro-card misuse resulting in "discipline" apart from card revocation. Revocation has occurred in other cases, no details provided.

2. Grievant's Improper Use of the Card; Alleged Deliberate Cover-up.

Doctor Zamorano has stressed throughout these proceedings that had she known of the multiple obligations that the cardholder assumes (keeping or obtaining receipts, maintaining a record\journal, personally doing a monthly web site statement review and reconciliation), or had she any inkling that she risked job termination, she would never have agreed to carry or use the card. "The only document I saw never said that you had to pull statements. It just said that if something is charged that is by mistake or whatever they will withdraw from your salary." She "never knew there existed a site" to pull monthly statements.(tr 3/166)

The "Specific Procedures Review audit" undertaken by the University (University ex 16, tab 1, p 6) noted that

There was no evidence that the faculty member obtained, reviewed, and signed the monthly online cardholder statement.

There was no evidence that the department's Procard coordinator reviewed any card holder statements.

The Department was unable to provide any receipts for the purchases made by the card holder...

Inadequate review and monitoring of the Procard activity existed in the neurosurgery department. This directly contributed to the misappropriation of the funds.

Since no one in the Department conducted the required monthly review or reconciliation of the Zamorano statement, this also meant that no one noted, alerted or warned the doctor about her misuse of the card or demanded she obtain, retain and produce receipts and protect the card from use by others. I agree with the University that the Thayer failures do not excuse the quite separate actions of Dr. Zamorano in keeping no track of use of the card, ignoring\disregarding the rules, and using the card as if it were her personal card. The issue is one of degree of penalty. Much of the University's basis for termination is the nature of the grievant's response when she was asked for records after the problems were discovered.

The grievant began to use her card soon after receiving it. A key exhibit on this use is University exhibit 16, "As submitted to the Department of public safety for search warrant,"TM a spread sheet listing all items charged on the card from January 26 2004 through August 20. There are columns for payee, date charged, total amount and for whether the auditors found an item "justified, questionable, legitimate or cardholder fabricated," plus a "comment" column with details about the items purchased. Virtually all items for which the grievant did not herself provide original receipts are listed in the "questioned costs" column with a same few listed also in the "could be business costs" column.

The grievant testified that she initially had her secretary use the card to purchase some items, and that from the outset she had no idea that a third party, (including even a secretary) could not make purchases at her direction. The spread sheet indicates that charges were incurred at Office Max on January 26 and February 16; for an educational symposium on February 4, 2004; at Dell Marketing on February 11; at "WSU continuing medical education" on February 23, 2004. On February 12, 2004 Dr. Zamorano phoned her partner, Susan Swider and asked her to order a rolling expandable briefcase computer case which, per the doctor, had been requested by her staff to use for transporting lap tops and files back and forth between offices. (University 16, tab 3/13). The grievant gave her Pro-card visa number and expiration date over the phone to Ms Swider, who called in the purchase to "Traveler's World," a merchant that routinely gave the Swider family substantial discounts. The University audit department logs this as a "questioned cost" despite its grant-related business function (Audit list, line 13). There subsequently commenced an intermittent use of the "visa" card by Ms Swider, a use which the grievant claims that she was unaware of until she met with the University Procurement Card manager August 16, 2004.

Lucia Zamorano and Susan Swider had been domestic partners for about 15 years and Ms Swider testified for the Association at this hearing. The financial responsibility for household maintenance and purchases was largely covered by the doctor, who paid bills and signed documents often prepared by Ms. Swider. Ms Swider handled many domestic tasks and was approved on the six or seven credit cards that the couple utilized, including an American Express card. In reference not only to the Pro-card visa but to all her other cards, the grievant asserts she did not bother to review statements before paying them. Ms Swider, in turn, indicated her own

complete disregard for record retention.³ Ms Swider indicates that not until police showed up on October 25 and searched their house did she have any idea that she had purchased items using a restricted card.

Both the grievant and her partner testified that the grievant made no mention of the special nature of the visa card number, or of its restricted use when giving the card numbers to Susan Swider, who henceforth kept them on a piece of paper in her wallet. The grievant did not communicate that the card was to be differentiated in any way from the family household group of credit cards. While the first charge by Ms Swider was at the grievant's request and appears to be grant related (the wheeled case), she later used that card to purchase personal and household objects. Ms Swider was never asked for receipts by the grievant, and they never discussed which card to use for purchases.

Doctor Zamorano had the habit of making personal purchases from "Sky Mall" catalogues while traveling. These catalogues contain products of many different manufacturers. The grievant testified that usually she utilized her American Express card. But on February 22, March 1, 24, 25, 26, 29 and 30 she made Sky Mall purchases that were put on her Pro-card. This occurred again on May 24, 25 and June 4th: The purchased items included door mats and address signs for her two Bloomfield Hills houses, pillow covers, a portable "EZ bed, "moisturizing socks;" a "whole house humidifier" and USB cable.

The Grievant suggests that the Pro-card number must have become part of the records of Sky Mall after a first purchase using the Pro-card followed by automatic re-use by Sky Mall. This is supported on the record. (University exhibit 12). On February 22, 2004, the grievant made a phone order for various computer attachments (power adapted, peripheral power system mobile) and for a nokia usb cable kit as well as some "executive book summaries"(cds). However, there was also a "whole house humidifier" later found at her house. This Sky Mall purchase is found at line 52 on the Audit sheet and dated March 1, 2004, for the same items. The date is erroneous. But if this first use of the Pro-card for Sky Mall purchases was for a combination of grant-related items (most) and one or two non grant-related items, the misuse was underway. There can be no doubt, from the vast number of personal or household items ordered from Sky Mall in March and June 2004 that the grievant was either treating her Pro-Card as a private visa or was extraordinarily careless the first time she used it, and never corrected it. The University challenges that such activity could be mere error or carelessness.

On March 26, 2004 Susan Swider again used the Pro- card for a "Traveler's World" purchase, this time a duffle bag imprinted with her own initials (University 16 tab 3/20). On March 30, 2004 Ms Swider infamously used the Pro-card to pay for service repairs to their

³Per Ms Swider: "When I open up any package that comes to my home, I slice it open, take out what I want and throw everything out. I do not keep receipts myself. Because I knew I wanted it, it was there, that's how I am." Ms Swider also stated that as "common practice" she would identify herself as Lucia Zamorano when making phone orders (tr 2\ 155-157)

personal vehicle at an Erhard BMW dealership in Bloomfield Hills. Ms Swider testified that her selection of the Pro-card to give the dealership service employee over the telephone occurred after the couple's AMEX card was rejected. The repair charges of \$1,900 were—also at Ms Swider's direction- charged on the Pro-card by splitting the transaction (two at \$950). Ms Swider asserts that she understood the Pro-card to be "just a card number available at random."

In April a Torchere lamp had been purchased from "Twice as Nice." In mid-June Ms Swider used the Pro-card number to charge by phone at Williams Sonoma (toaster, pannini cooker). On June 16 and 17, initial installments of a pledge to the Detroit Institute of Arts were written on a pledge sheet filled out by Ms Swider—who handwrote in the Pro-card visa number. The pledge was later signed by the grievant, a longtime Art Institute supporter.⁴ The University challenges the credibility of the insistence by Dr. Zamorano that she did not know of or realize that such impermissible purchases were being made via use of the card until she met with Christina Radcliffe.⁵

Not only did Neurology Department Coordinator Thayer not pull and reconcile the doctor's monthly Pro-Card statements, she also did not respond to inquiries made by the University Purchasing Department starting on May 13, 2004. (See Radcliffe testimony, December 2004 Audit Department "Procurement Card Findings, page 6 of 11, University exhibit 16, tab 1 and University ex 3,4,5,7).

Christina Radcliffe had been the "Procurement Card manager" in the Purchasing Department since 1999.(She became the assistant Director for Purchasing overseeing the Procurement Card Program sometime in 2004.) Ms Radcliffe explained that the Pro-Card program was installed by WSU "to cut down on a number of small dollar purchasing that Purchasing handles on an annual basis..to put the power back in the users' hands to make purchases."(Tr 1/24-26). The cardholder "must obtain a receipt for every single purchase."

She conceded that "receipts" for every transaction is a current obligation not in place at the time of these events; the language was changed in July 2004 to state that the card holder must produce receipts when requested by audit. At the time of these events, the 2002 rules allowed alternatives to receipts, including explanations, albeit only after every effort had been made to get

⁴The card was also used for many grant related items, including conference fees, office bookshelves, textbooks and professional books, ("Quantitative MRI of the Brain \$385 and multiple), computer equipment, office furniture. The Audit Report ultimately concluded that of the \$21,419 total, the sum of \$14,981 was "questionable."

⁵See Tr 3\102 The doctor was asked "Did you have any personal knowledge between February and August of 2004 that Susan or anyone else was making charges against the P-card?" She replied "No, I didn't." She concedes that she had Susan Swider order the computer travel bag and points out that she "had my secretary to make other purchases."

the receipts.

Ms Radcliffe testified that in May of 2004 her department had pulled March-April card statements for the entire university. On Dr. Zamorano's statements, the Sky Mall and the Erhard BMW (and its split transaction) "raised a flag, because of the vast array of products that Sky Mall sells, the concern would be that there were personal items purchased." (Tr 1/41)

On May 13, 2004 Ms Radcliffe sent the "standard memo that goes out" by campus mail informing recipients that "an audit of procurement card transactions for the billing cycle 3/16/04-4/15/04 resulted in the need to review the following attached list." The memo was sent to Lucia Zamorano at "930 Harper professional Building" and a copy indicated to Nancy Thayer at the same address. The attached list showed Erhard BMW, Sky Mall, a "Klog incorporated" and "AANS" (the latter two were listed as justified expenses in the later audit.) Dr. Zamorano denies receipt of this memo and no proof of delivery was given. Ms Radcliffe concedes that no one answered it, and she took no further action for a month.

A Pat Wegner sent an e-mail to Nancy Thayer on June 17, 2004 (University exhibit 4), it being "common practice to request information from the coordinator." There was no copy e-mailed to the grievant, and again no response from Ms Thayer (Tr 1/46, 49). The next effort made was on July 21, 2004 when Christina Radcliffe sent another form memorandum (by facsimile, no proof) to Dr Zamorano covering "5/14/04-6/15/04." She handwrote on it "Best Buy, CVS, Williams Sonoma, and Sky Mall" and related purchase dates(university ex 5.)

Ms Radcliffe phoned Ms Thayer's extension on July 22, 2004 and got a recorded message that Thayer was no longer with the Neurology Department. At this point she sent an e-mail to Dr. Zamorano telling her that there had been "several contacts with your department since May 13....part of the problem may be that we had Nancy Thayer's name as coordinator " This e-mail of July 22nd concludes

However, the Initial memo sent on May 13 was to your attention. Failure to comply with these requests in a timely manner is a violation to policy (sic) and you can lose your card privileges as a result.

Please forward the documentation requested below along with an explanation of what the items purchased were used for to my attention. Also, please let me know who the coordinator for your department is (University ex 7)

On August 10th Ms. Radcliffe sent the doctor a memo referencing the previous requests and now giving the doctor three days to produce receipts. Ms Radcliffe had not made any attempt to telephone Dr. Zamorano (or her secretary) from May until August, despite her concern. Now,

Dr. Zamorano's office set up an appointment and the two of them met on August 16, 2004.⁶ The doctor "brought in quite a few receipts" but these receipts did not answer the concerns of Ms Radcliffe as to Sky Mall or Erhard BMW. Ms Radcliffe recalls that as for Erhard BMW, the doctor gave her an explanation that she "was buying some used office furniture...for her lab." The doctor did not have documentation with her but said that "if it was a problem I'll just write a check for that purchase" and she wrote the check in repayment to Wayne immediately. Ms Radcliffe took it and deposited it "at the direction of my supervisor." Ms Radcliffe however also continued to press for a receipt for that now repaid expenditure...

...because her Pro-card was used for that transaction. So although she paid for the purchase, we still needed to know what was being purchased with that card." (Tr 1/101).

When she met with the doctor, Ms Radcliffe did not go over "in detail" the charges that she felt were improper. She did not use terms "questionable" or "not legitimate". I just explained to her that I still needed to see receipts for those charges."

Following their meeting, Christina Radcliffe sent an e-mail to the grievant, (university exhibit 8a) to confirm " the following...items covered in our meeting today." Ms Radcliffe referenced the prohibition on split transactions. She acknowledged that the doctor was "currently interviewing for Nancy Thayer's replacement" and reminded her that this person once hired should sign up for training. She then wrote (all italics mine)

Finally, *to complete my records*, can you please forward the following items.

1. a response to this e-mail indicating what the purchase from Erhard (sic) BMW was to cover and a receipt for the items purchased. This will serve to leave a complete audit trail should any questions be asked later. I have your check in the amount of \$1,900 which will be deposited to the WSU account tied to your Procurement card.
2. Receipts for the following Sky Mall purchases (six are listed)

If you can obtain duplicate receipts for these transactions, then that will be *one less violation that will appear in your file*.

The request for Erhard records was made despite the fact that the grievant had already tendered a check repaying the BMW expenditure. However, she had also created a story for Ms Radcliffe as

⁶Dr. Zamorano asserts that she did not receive this e-mail either but that Nancy Thayer had told her to contact Ms Radcliffe and when she did, Ms Radcliffe "said that she needed some of the statements for the use of the Procurement Card, that she never received anything from Nancy Thayer..." She took to this meeting a "folder" in which the secretary "would drop things when she ordered." (Tr 3/151-152).

to the use of the Pro-card at Erhard and now had to stick with it when the request for "duplicate receipts" still came from the Procurement Card Assistant Director. The grievant's response was her creation of a "receipt" backing up that (fake) "used work stations" purchase explanation. The grievant did not correct her story to acknowledge that it had been a car repair bill, for the stated reason that she desired to maintain the privacy of her relationship with Susan Swider. Having again been asked for receipts "should any questions be asked later/" she obtained stationary and created what would look like a grant-related purchase to "explain" this BMW service charge which she knew was made by her partner.

The doctor testified that she was

"very surprised to see that (the BMW charges on the pro card.) I realized myself that probably Susan had done these charges because she is the one that always goes to BMW and takes care of the cars. So then I told her, this must have been a mistake and I did write a check..

Well, (Ms Radcliffe) said, "why are these charges here?" That is when I told her---I didn't want to get in the situation with Susan, why she would do that, and I told her that originally I was going to buy some of the working stations that BMW was going to change.... (tr 3/67-68)

Dr. Zamorano was asked

Q. Can you tell us why you prepared a receipt from BMW for office furniture essentially rather than a receipt for repairs to the vehicle

A. To tell you the truth I don't know why I did it, but I did it and the reason is because she asked me for a receipt. I had explained to her that this wasn't going to happen, but she wanted to know exactly what was going to be purchased.

I had spoken by the way with BMW at the time of this situation generally. They were going to exchange their work stations and I had told them that I had this lab and if they would consider to sell me for a lower price..so that is how it came to my mind

The reason I did the receipt was because she was so emphatic that she needed this and I just wanted to get this over with. At this moment I didn't know the repercussion or whatever was going to happen. So that was something that would be very easy to resolve. (tr 3/69)...

I did this after I had paid (back) this \$1,900. That was a mistake. I didn't want to mention to Christina Radcliffe my relationship with Susan or explain why it had happened. They had cashed the money, and she sent me an e-mail that stated that *I needed to create something for her to show for their records....tr 3/174)*

The grievant notably did not hide from Ms. Radcliffe that such document would have to be created. She first indicated, in her email of August 18

"No, I do not have any specific paper from them. As I said, they sold me their inventory of stations because they were going to replace them. This moment I will just keep them under my name and I will decide later if I donate them to the lab or not ((University 8 b).

Informing Ms Radcliffe that she had "no paper" (for the "furniture purchase") does not make the grievant's lie excusable, but the questions posed are the existence of an "intent to deceive" about something she had already paid back and whether she understood the use of what she was providing. What she was told was that something was needed "to show for their records" of her "purchase." She submitted one that "looked good" but was fake. She was not taking any monies and when an item is already repaid, no "intent to deprive" can be established.

A question arises as to the Procurement Manager's motivation from the fact that Ms Radcliffe herself, having already contacted Erhard BMW and received a fax from the dealer by August 19th (Tr 1/66-69), knew that the \$1900 had gone for car repairs. Ms Radcliffe did not need any further "explanation" or receipt; she had one, but she did not indicate to the doctor that she knew the actual purpose of the BMW charge. The doctor went ahead and created her fake receipt for office furniture, digging her own grave to protect the fact of her domestic life.(tr 3/178)

As for other purchases, Doctor Zamorano also testified that when she had given Ms Radcliffe her folder of receipts she had told her

..."everything else...I don't have any" and she said "you have to create something, what did you purchase?" I said, "yes, I think I know what I purchased." She said "look there, and you need to give me an explanation what were these items." I asked her, "do you have any statement or something, because it is going to be difficult." I said "I don't keep those receipts myself. I mean, I don't keep track of these things." She said "no, I don't have any." I said, "well, I will go later and I will look at these things and I will look at catalogues and see what are the items that I know were purchased..."(tr 3/184-185).

Grievant Zamorano testified that she then attempted to explain the expenditures "just based on the things that I knew that were purchased by (sic) Sky Mall..." She went to a site within the Sky Mall that

"had the items I knew we were using and I knew about the books that were purchased...some of those books..were actually charged to my own American Express, but at that moment I wasn't thinking about that. I was just thinking about the items that have been purchased by myself through a credit card that could correspond to what they were saying based on the statement I had there as total amount." (Tr 3/73)

"It didn't occur" to the grievant to herself contact Sky Mall, and she did not know Ms Radcliffe

had done so. Ms Radcliffe had given the grievant the "total amount" but not the details of the questioned purchases. Dr. Zamorano-- this highly educated, driven, over-extended and overly confident woman—again sought to create\invent a record, months after the fact, more or less from thin air. She listed items having an apparent usefulness for the grant or her specialty- that she found in the Sky Mall catalogue as costing the same as the listed charges given to her.

Procurement Card Manager Radcliffe after independently contacting Sky Mall, "received two separate faxes from Sky Mall with all of the detail for the purchases." (University 11 and 12). She did not share the received Sky Mall information with Dr. Zamorano. (Tr 1/70-71.) Asked why she kept asking the doctor to obtain receipts from Sky Mall "since you had apparently already undertaken to do that yourself?" Ms Radcliffe replied "because we wanted to get the documentation directly from the card holder..Because it is a policy that card-holders do produce receipts when requested and because there were already some discrepancies in the documentation we had, *we wanted to see what was produced.* " (tr 1/105). This interest in building a "case" for the suspected abuse had superseded any goal of stopping or merely correcting\ preventing recurrence of this abuse, including by use of the remedies actually specified in the Procurement Card Procedures.

A significant argument posed by the Union is whether the doctor was submitting her documents *as receipts*, or as the alternate "*explanations*" specifically allowed at that time under the rules.⁷ The style of the document that the doctor created to explain her Sky Mall purchases was not that of a Sky Mall invoice, there was no logo, no vendor name and address at the top. The items that Ms Radcliffe's actual Sky Mall receipts showed as purchased were not the items that the Doctor listed when she had used a Sky Mall catalogue and she explains that it never occurred to her to go directly to Sky Mall. Rather, she "went into the computer and found the things that I knew we had purchased and I put them here." (Tr 3/186). She took from that catalogue items of the same dollar amounts to come up with the same total dollar sum.(University 13). Ms Radcliffe knew from Sky Mall what had actually been charged to the Pro-card (but only gave the grievant the totals). One explanation is that Dr. Zamorano knew—and was seeking to hide—her personal use; this she denies. Another explanation is that she just thought this was not a "big issue" (which she claims), since she just had to pay back. Finally, this occurred four-five months after her purchases, and just listing what "looked right" for grant related past purchases is the last possible explanation. None of them are good. None of them depict intentional fraud.

Grievant Zamorano admits that

I allowed an unauthorized person to make use of the card but not for personal purchase. I allowed an unauthorized person, I will accept that portion, my secretary and Susan, to

⁷Union Counsel Gregory: "There is no foundation as to receipt. I think the evidence shows that Dr. Zamorano prepared explanations of purchases. "Receipt" has a particular meaning, and there has been no foundation to establish that she was fraudulently or improperly trying to create a "receipt" as such " (tr 3/184)

make purchases for grant related items. That is what I allowed to happen.

I didn't authorize anybody to purchase personal items with the card.

Her signature on the donation form to the Detroit Institute of Arts "was inadvertent."

...I have every day students that have made mistakes...office people...I have seen many people around me that have made mistakes every day. I think that we are all human...you can for example say " Dr. Zamorano, you are terrible with credit cards. We will never issue a credit card to you in your life." But it is very different to destroy my life.. (Tr 3/223)

Procurement Card Manager Radcliffe acknowledged that the procurement policy then in force permitted Pro-card holder to explain their purchase after making every effort to obtain original documentation." (tr 1/96) On August 20 Ms Radcliffe cancelled the doctor's Pro-card because she and her director felt that "the purchases were personal in nature and that she had violated policy by splitting transactions." This manager did not give the doctor a summary of the expenses that she claimed constituted personal purchases for the alleged reason that "unless we got the actual receipts we had no way of knowing what was purchased and whether they were personal in nature." Since she had obtained the actual Sky Mall and BMW receipts and some others, but not shared them, her explanation rings hollow

In September, the doctor requested a list of outstanding receipts but was told by Ms. Radcliffe that she needed to consult with Internal Audit to develop a list. Procurement card manager Radcliffe "thinks" that she eventually e-mailed a list to the doctor; no proof offered. The Internal Audit spread sheet ("per University audit "as of August 31, 2004") shows vendor receipts for items 19 through 55, "legitimate cardholder receipts" for items 1- 13, comments that 3 of items 14-18 "could be legitimate business costs"

Ms Radcliffe worked with the Internal Audit Department"... together in August and September...once we finished with the Pro-Card it kind of left my hands. " (tr 1/82) She was not part of any decision to suspend or terminate the doctor from employment.

3. The Internal University Audit

University Director of Internal Audit Caroline Hefner testified that her Department reviews internal controls of the University, provides consulting services, and "investigates fraud." In August 2004 she was contacted by the University CFO John Davis "with a concern that there may be some fraudulent activity charged against a Procurement card and he called me to a meeting with the Purchasing Department and a representative from our Public Safety Department." Ms Hefner was given a statement of January through August 2004 charges and asked to investigate it. (tr 1/124).

Per this witness, department management does not "have a say in the ultimate (audit) outcome; that is the reason why we have an independent appraisal function." The Audit group analyzes not only the transactions for propriety but also "tries to understand if there are any control weaknesses that may have led to it; in particular if it is a defalcation or fraud." This would mean looking at the particular Procurement Card transactions at issue, but also seeking to "... determine if there is any impact on the program as a whole, because we have a responsibility to report to the executive level of management and the audit subcommittee of the Board of Governors." (Tr 1/126-127)

The matter was treated as high risk and highly sensitive, asserts Ms Hefner, "because it involved our medical school and an esteemed faculty member, it was of grave concern to me that I have my best person on it." (Tr 1/126). She assigned the audit to her well regarded Associate Audit Director, who is no longer with the University. The audit of Dr. Zamorano's purchases took place from August until December 2004. During several drafts, management was, as is typical, given an opportunity to address raised issues. The final report in this case was dated in September 2005, several months after this discharge. It was stated to differ from a semi-final report of December 2004 (University exhibit 16) only in having "the response to the initial draft by levels of management responsible to provide proposed corrective actions." (Tr 1/131). The "findings and recommendations" and supporting documentation were unchanged. The (pre-termination) December 2004 audit is the one used for this arbitration, and I have reviewed it carefully.

Ms Hefner testified that many of the documents were

...stipulated as having been a receipt for a given transaction, many of those documents contained clerical errors, meaning that they did not add up mathematically... sales tax was calculated incorrectly... many of the receipts that came to us for internet purchases... did not match, say, what you would typically see for the Amazon.com web site. (tr 1/138)

What she meant by "stipulated" is unclear. Who stipulated to what? If the grievant had been interviewed, perhaps the difference between submitting a document as a recreated explanation and as an actual bona fide receipt could have been clarified. The Audit Department might have learned that she had been directed to create some explanation where she lacked receipts. The various documents created by the grievant seeking to explain the totals that were given to her are of course not receipts. They were given to Ms. Radcliffe, but with no evident claim **by the grievant** that they were original or replacement receipts, rather than the attempted, mandated "explanation."

Ms Hefner saw

....a clear and consistent pattern... there was a misuse of the card based on the nature of the items purchased, the vendors from whom they were purchased, and in my professional opinion, the intent to cover up what was actually purchased by virtue of the fabricated

receipts that we received...

...Dr. Zamorano was the principal investigator of the grant against which these charges were made. As it relates to handing funds, part of the principal investigator's responsibilities are for fiscal management and overseeing of the budget and actual charges made against those funds that have been granted to the University and being managed by that principal investigator. Based on the evidence that I saw and based on our audit I would... have concerns about Dr. Zamorano's abilities to manage that grant in a fiscally responsible and ethical manner. (tr 1/146)

Ms Hefner agreed that the audit also found that the Department of Neurosurgery had inadequate review and monitoring of the Pro-Card activity and that this contributed to what occurred with Dr. Zamorano's use. Recommendations were made "that the department comply with the procedures that were in place that were not being followed" and also for tightening of and some changes to procedures. (Tr 1/176)

Since the core accusation\charge here is deliberate fraud (an "intent to cover up"), rather than mere (gross) negligence, the decision to not interview Dr. Zamorano was a significant omission. It was a decision made by the Audit group together with University executives. Ms Hefner's explanation for the lack of any interview was that

...because (Dr Zamorano) had been in direct communication with Christina Radcliffe, the Procurement Card Director, or assistant Director at that time, and Christina was requesting the documents from her directly and giving us copies of what she had received

We made a decision at the time to review all documents, to review the independent documentation...we *discussed with senior management how they would like us to proceed.* The decision was made that we would continue to review only the documentation.(tr 1/150)⁸ (Italics by undersigned.)

By "senior management" Ms Hefner explained that she meant University Vice President and General Counsel, Louis Lessem; CFO John Davis; and then Provost Nancy Barrett. Some of the joint meetings were also attended by John Oliver, the University Vice President for Research. Ms Hefner asserted that the decision not to personally interview Lucia Zamorano was "discussed" in the joint (executive) meetings, and that the decision by the Audit group to not personally interview Dr. Zamorano was based "on the documentation that we received" and on the fact that the others "didn't seem to favor that." In essence, this was a "document audit" and as made clear from Ms Hefner's testimony, a decision was made *for* the audit group, by the officials who

⁸Ms Hefner reviewed the audit findings that of total charges of \$21,419 made on this Pro-card, the sum of \$14,956 was the "combination of questionable as well as personal charges" out of a grant of "roughly \$ 3.5 million." Dr. Zamorano has paid back all sums.

would be the ones to determine the outcome, that the grievant would not be interviewed. The grievant's own intentions in creating documents or her own explanation for making the prohibited purchases would have to wait.

Ms Hefner asserted that she was not part of the decision to suspend or the decision to terminate Dr. Zamorano and she denies that she made any recommendations in that regard. This assertion was specifically and twice contradicted by testimony of Vice President Oliver. (Tr 1/153 and Tr 2/88, 2/118, 2/122).⁹ As for the University's decision to seek issuance of a search warrant, Ms Hefner stated only that her associate director met with University Public Safety Officers and "you would have to ask her specifically what her contact was" with the Wayne County Prosecutor.

Dr Zamorano testified that no one at the University came to her after August 2004 and asked that she make an accounting of personal items purchased on the P-card, and no one ever warned her to deliver items up to the University or that a search warrant would be sought. On October 25, 2004 she was driving to see patients at the Karmanos Cancer Clinic when she received a call that something was happening at her house. She drove back to see about twenty policemen, some from "Detroit" (Wayne Public Safety?) and some from Bloomfield Hills. A University Associate Dean Lerner was standing outside her house and handed her her own suspension letter at that scene. The grievant asserts that he said to her "this is the way the University does these things. I have nothing to do with this."

F. The Decision Process

The University Statutes provide, in cases of suspension of non tenured faculty that

The President will designate a competent legal and/or other appropriate member of his/her staff to conduct an appropriate investigation to determine the necessity for the continuation of the suspension. *The investigation must include an opportunity for the Respondent to testify* unless this is not feasible for reasons of physical or mental health or of behavior nullifying the usefulness of such an opportunity. The respondent has the right at his/her own expense to be represented and assisted by both academic and legal counsel of his/her choosing. (251.01.310) (italics added)

The word is "testify" not "submit written explanations through your lawyer." The grievant wanted a meeting where she could talk. This did not happen and it was the University which prevented it.

A key witness for the University was Vice President for Research John Oliver, whose responsibilities include to "....in general, manage research, conduct of research at the University." He has held this position since June 2003 following six years as deputy Provost. Expressing the

⁹Per Vice President Oliver, it is "an accurate statement" that Caroline Hefner recommended termination of Dr. Zamorano." (Tr2/122)

University's core argument for this full termination, Vice President Oliver stated

The integrity of research and the corresponding integrity of the financial parts of research are intertwined closely with federal guidelines and certainly in our office.

The funding is to support specific research and one of the things which we do on a regular basis is monitor the amount of time spent on a research grant...and so we have to correlate work on the research with the financial integrity... we have to determine if the equipment and purchases on grants are appropriate to the research. This is done on all grants and contracts. (tr 2/59)

The scientific and financial integrity of a grant principal investigator cannot be separated because ...the way in which one does business financially or in science is just part of your fabric. You do quality work and report it accurately. The same thing would be expected in the financial side and it goes both ways. (Tr 2/63)

Mr. Oliver testified that Caroline Hefner brought to his attention in late summer or early fall 2004 "charges against the grant account, the University research grant account that (is) administered through my office...that appeared to be counter to any normal standard." Asked "what particular types of irregularities were you made aware of...initially with respect to Dr. Zamorano's use of her P-card?" he replied

I don't recall all of these because that was not something I spent a lot of time on. There were fairly specific ones, there was a charge concerning BMW repair that was a major charge, there were some charge of I think a flat screen television, and a number of other smaller items. I don't remember the details..(tr 2/66)

Mr. Oliver attended a meeting "around the end of November 2004" with Dr. Zamorano; her legal counsel; and University General Counsel Lou Lessem. The grievant's "suspension preceded the meeting." (tr 2/70). Dr Zamorano had requested the meeting because

She was interested in resolving the issue that had been brought up at that point which was...the misuse of the P-Card

According to Mr. Oliver, there was "in general" a discussion of various items charged, or the records of them; again he could not remember details. Doctor Zamorano and her attorney sought "to repay the University for the funds that had been charged inappropriately." There "may not have been specific mention of each item" but there was "discussion of documentation that had been provided" or perhaps of missing or incomplete documentation. There was "discussion about the use of the card by another person, what was being charged, that it was incorrect use of the card," with the other person not understanding. (Tr 2\73-74)

Vice President Oliver was

...certain that I expressed concern over that (scientific integrity as related to financial integrity) and that I found the misuse of financial funds for research to be inappropriate and that would reflect on the scientific quality as well because they often go hand-in-hand in my experience.

Vice President Oliver was "not specifically aware" of there being any discussion or consideration (as the question was asked) "before the decision was made to suspend Doctor Zamorano of having her come in, interviewing her, meeting with her among your group of decision makers?" (Tr 2/103)

Mr. Oliver explained that it is much more difficult to negotiate grants where the University has a track record of difficulty dealing with grants\contracts on financial matters. He himself informed the state MEDC coordinator in Lansing of the matter and indicated that he would replace Dr. Zamorano by another person on the grant as co-principal investigator. The MEDC had not contacted Mr. Oliver and had no prior knowledge of the situation. Mr. Oliver could not say when he had appointed Dr. Guthikonda as the replacement co-principal investigator. (Vice President Oliver was not asked the implications for the MEDC grant's success from having no other neurosurgeon in the Department qualified to take on the grant. Only Computer Department investigators actively continued. See Guthikonda testimony).

Mr Oliver asserted that the University follows federal standards for all of its grants, and that Dr. Zamorano would have "been aware" of University guidelines for conflict of interest and scientific misconduct by virtue of signing a grant application. He did not identify any scientific misconduct on her part aside from the card abuse. Vice President Oliver knew no details about the MEDC grant which he understood to be "a fairly complex grant, heavily dependent upon computer analysis and development" and upon Dr. Zamorano "as an adviser." He could give "no absolute correlation" between Dr. Zamorano's abuse of the Pro-Card and her research integrity. Rather, he described his absolute position: it is the "concern that every scientist has...that integrity of data, integrity of management, it crosses from science to financial related particularly to the science..." Efforts to elicit from this witness whether he and others had considered Dr Zamorano's position that this was an error and she was prepared to make restitution were met only with the vague response that they had

....certainly discussed the issues and arguments that Dr Zamorano brought forth. They were not found to be sufficient to outweigh the facts that we also believed to be accurate. And misuse of funds is not something we tolerate. (Tr 2/196)

His office was also critical "after the fact" of the role played by the Department of Neurosurgery in the administration of the MEDC grant funds.

Vice President Oliver confirmed that the Pro-Card policy provides for revocation of the card in

the event of its improper use, and provides that the University can deduct improper charges from a faculty person's salary. He added however that while the P-card process does not "specifically deal with (it)... falsification of documentation... may lead to suspension or dismissal" pursuant to other University policies.

The falsification of documents is the most serious issue that you can have. If you falsify documents you could do this equally with any document that came before you. There is no integrity of-the documentation is no longer valid. We don't know, (tr 2/116, 2\121)

This official relied on the Internal Audit Department's conclusion and on the "discussions he had with the head of that unit in your discussions with your colleagues." (Tr 2/118) He also confirmed that "there were many purchases on the card that were grant related."

The "same group" which decided the suspension decided to file a criminal complaint with the Wayne County Prosecutor. Vice President Oliver described this group as himself, the "chief legal counsel (Lessem), internal auditor...those certainly" and perhaps others. For the termination decision there was Mr. Oliver and

(General Counsel) Louis Lessem was involved, (Audit manager) Caroline Hefner was involved, I believe there was discussion with the then head of Wayne police... probably a couple of other people, (tr 2/88,93)

Vice President Oliver testified that "the reasons for the termination are essentially those in the letter, the misuse of funds." (tr 2/94). He was not specifically aware of any "discussions or consideration among your group of decision makers" of having the grievant come in, interviewing her, meeting with her" before her suspension. (Tr 2/103). No one in that decision group raised the idea of first asking Dr. Zamorano about personal purchases she had made, or asked that she bring anything in. (tr 2/101). No one specifically asked the grievant as to "what personal items she had purchased on the Pro-card, or asked her to bring them in." (Tr 2/101) Vice President Oliver did assert that "certainly before the termination letter we met with Dr. Zamorano." (That reference is to the end of November meeting discussed below)

Doctor Zamorano testified that it took her some time to understand "what this means to have this search warrant" and she hired private criminal counsel. Following her house search and suspension, she "did every effort to speak to any body." She spoke to Department Chair Guthikonda, who, as she recalls, reassured her that she was still part of the practice group. She tried to meet with the Dean and the President. Her suspension letter had been authored by a "one day" interim dean who, via a secretary, declined her request for a meeting "because of the nature of the matter." There was no response from the President's office. Doctor Zamorano

....wanted really to resolve the situation, explain what has happened. Also, in some way, I wanted to continue with my research in the lab because it was a very crucial point. At that moment, I was still thinking about this lab and the research ongoing...all these activities

were kind of paralyzed..everybody was being paid but nothing was being done really... (tr 3/87)

Her criminal attorney (Wally Piszczatowski) was "very serious with her about the meaning of all of this", but she urged him to seek a resolution with the University. On her behalf her counsel wrote a series of quite detailed letters to the University, with exhibits, setting forth the history of her professional accomplishments, her dedication to research. In one letter (12/8) he analyzed questioned expenditures, explained the means by which "her partner" had acquired the visa Pro-card and used it "unaware" of its restricted status. An offer to repay was made and a check enclosed. All of the letters were sent between the October 25th suspension and the February 7th termination but they did present her viewpoint and arguments in detail. (The University argues that these letters sufficed to satisfy or compensate for —any requirement that the grievant be given her own opportunity be heard whether any "Garrity" or "Loudermill" decisions apply, or as set forth in the contractually-incorporated University statute for such opportunity)

A letter dated November 16 from Counsel Piszczatowski to Vice President\general counsel Lessem, pointed out that he had "written you three letters over the past couple of days" and that since Mr Lessem had "indicated to me that you were going to discuss this matter with some 'friends' before making an ultimate decision" he was requesting that Mr. Lessem forward the three letters he had sent "to them for their review."

A short, dismissive, even sarcastic, "response" came from Counsel Lessem (11-18-04, Union ex 13B) in which he briefly listed "as I understand your arguments" and then stated merely that "Wayne State University does not regard this in quite the same light as you have implied Dr. Zamorano (sic)does." He then concluded

In the near future the University will make certain determinations with reference to Dr. Zamorano's employment. I cannot agree to a meeting or to the submission of information under MRE 408. However, if you believe it would be in Dr. Zamorano's best interest for her to meet with me *with that understanding* please let m know by week's end. (emphasis added.)

This refusal to agree to the protection of MRE 408 is key. Michigan Rules of Evidence 408 which Vice President Lessem refused to honor at the proposed meeting, in effect made the requested meeting worthless.¹⁰ With the University not agreeing that any statements or offers

¹⁰Rule 408 Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

made by Dr. Zamorano would not be raised in any future criminal prosecution , the grievant in essence was given no choice (by her counsel and as urged by university counsel) but to keep quiet. Nor were her attorney's efforts any more fruitful.

The grievant testified that at the start of the meeting in Mr. Lessem's office

The first thing that (Vice President Lessem) said was that this meeting was because of the request of Mr. Piszczatowski, that he had advised that we don't have that meeting and I should understand, and this was him looking at me directly, "Dr Zamorano, that anything that you say here can be used against you in the course of the case of the Prosecutor." I don't recall what he mentioned.

He said actually beyond that, if you want, this is the end of the meeting. I want you to strongly reconsider if you want to have this meeting (tr 3/99).

She also testified that the discussion was about "can we have the meeting or can't we have the meeting." Her attorney

Wally tried to basically go through this letter. There was nothing specific spoken about the actual issue. It was more like a general concept of what was the issue.

One of the things that Mr Lessem mentioned, he said that the position of the University is that I should be treated the same as somebody that is stealing in the parking lot. Somebody stealing twenty dollars in the parking lot should be treated the same as I was going to be treated.

The comment was from Mr. Oliver saying that there was nothing to talk about this because somebody that doesn't deal well with a credit card shouldn't be doing any research, and he just went over and over on that.
(Tr 3/96; 3/213)

Wally tried to go over some of the specific items and they couldn't go through specific items. Then Mr. Lessem offered him if there was something that we wanted to say, he

could receive a letter, (tr 3/98)^{11 12}

She also testified that Vice President Oliver "said he never read the (grievant's counsel's) letters, nor would he even agree to read the letters..he said that he didn't need to read them." (Tr 3/215) I credit the version of this meeting by this grievant, which contrasts with the vague answers and lack of recall of Vice President Oliver.

The grievant's attorney wrote his 12/8/04 detailed item by item analysis letter after the "meeting." He now had received the "spread sheet" (exactly when: not clear.) Vice President Oliver was not asked in the arbitration, if he read or considered the December letter from attorney Piszczatowski. Vice President Lessem did not testify; therefore his dismissive written response to Mr. Piszczatowski of 11-18-04 stands as the evidence of his only response to the grievant's arguments as he had "summarized" them in his November 14th letter.

The Union called as hearing witness Murali Guthikonda, M.D., interim Chairman of the Neurologic Surgery Department starting sometime in 2003 and made permanent chair a few weeks before his June 20, 2005 letter-in his other capacity— terminating the grievant from the UNS practice group. This witness explained that the Neurology Department's "academic mission (is to) train residents for neurologic surgery medicine program..." In addition "the neurosurgery department has a group of faculty....practicing or in the practice plan." He joined the practice plan then in effect when he joined the faculty in 1993 and years later succeeded the longtime department chairman and practice plan president Fernando Diaz. Then the University developed a mandate such that, as this witness put it, there was a "larger transformation for all the practice plans that were affiliated with the University School of Medicine. The School of Medicine, from what I was told, doesn't practice medicine now."

There is a University physicians group that we belong to. University Physicians group is a not for profit entity. *So to be a part of the University physicians group not the School of medicine we were asked to become a not for profit organization...*

He also testified that

Yeah, the norm is that the chairman of the department is president of the business or the

¹¹It was not until December 8th that counsel Piszczatowski wrote the letter in which he noted having been provided a spread sheet (University 25, Union 13).

¹²The University has carefully countered claims by the grievant as to the extent of her charitable donations to it but how her own allocated, substantial annual compensation which was written into this grant was handled has not been explained. It was not per se paid to her. If there is some other practice or agreement I cannot address that.

clinical entity of the group, the teaching group and that was—that's part of the School of Medicine in terms of the—if you have like say Department of Neurosurgery, *the neurosurgery department has a group of faculty, the group of faculty are practicing or in the practice plan, and the usual customary way that it was handled is the chairman is usually the president of the corporation, not always the case but the majority of instances*, (tr 2/11-16). (Italics added by arbitrator)

This statement depicts the near alter ego connection between the practice group—separate corporation though it may be—and the standing of its members (aka "employees") who under the UNS plan can be required to be members of the faculty of the medical school. When the grievant was informed of her separation from the practice, it also "forgave" a \$50,000 note that she owed it. This is not a characteristic of a mere "employee."

Doctor Guthikonda candidly admits that the grievant's subspecialty is not his, that he virtually had nothing to do with her grant activities other than, as department chair, to "oversee and sign off on some of the major activities that happen in the grant..being the interim chair (he) was...somewhat aware of it but not necessarily fully aware" of the grievant's activity on the Michigan Life Sciences Corridor Grant. Even after becoming permanent chair his only grant-related activities were signing papers. He "thinks the University" named him "as a very part (time) co-PI within the grant." The other co-PI is in "the department of computer." Dr. Guthikonda "can't remember exactly how the process evolved" that he was named co-PI of the grant (after the grievant's suspension). He has only "minimal involvement." The grant requires a neurosurgeon to be involved and he is that neurosurgeon, despite this being neither his field of interest or expertise.

University arbitration counsel Allen objected to questioning of this witness at all, and then objected to questioning him about his letter terminating the grievant from the practice plan, as being a subject removed from the arbitration issue of "what the University did in deciding to terminate this person, period." He offered to "stipulate (that) one needs to have academic standing to be a part of one of the practice plans...(but) the grievance is about her...academic appointment." (Tr 2/29)." Union counsel Gregory responded that this practice plan termination was not automatic and that

It goes certainly to the remedy, remember I said in opening statement about the employer Wayne State University causing certain events subsequent to the termination that bear very heavily on the damage that was done to the grievant...(tr 2/28).

Department chairman Guthikonda knew, as of February, that the grievant had been terminated from her academic positions; he had been copied on the University termination letter (joint ex 6). Asked why her employment in the practice plan was not terminated in the period between the 2/7/05 termination from the University and his 6/20/2005 UNS termination letter he responded

I had known Dr. Zamorano for many years...she was a colleague of mine even before...or when I joined the practice from the prior group. So this was rather a huge and a major issue for me to make a decision to terminate her position from the University Neurologic Surgeons.... we had many conversations where we talked about this and her comments were that she's seeking legal advise and she's going to be changed, reversed, whatever. So I was waiting to see if something would evolve *that I didn 't have to go to the next step..and* so waiting until June 20 was simply my own decision...humanitarian, personal and all those aspects.(tr 2/34)

Doctor Guthikonda testified that he had been called into the office of the Dean of the School of medicine "to be explained the rationale" for the grievant being terminated but he denies receiving any pressure to expel her from the practice group. He did not have a conversation with Dr. Zamorano before sending her the termination letter of June 20 2005.

I couldn't really tell her that I'm going to send her a letter that would be very, you know, in my opinion not the right thing to do. But I knew that it may happen...(tr 2/35)

He agreed that following her termination from the faculty, and for that reason, she also later lost her privileges to practice at the Karmanos Cancer Institute.

A core Union argument is that this grievant could have been given at minimum voluntary faculty status. Doctor Guthikonda confirmed that there is a "category of clinicians known as voluntary faculty" a status awarded "...at the recommendation of the head of the department based on the contributions to the teaching of the medical students or the...residents."

Voluntary faculty are not paid by the school of medicine, their income comes from their patient practice. Asked if Dr. Zamorano was "eligible to be designated as voluntary faculty" the Department Chair responded "I'm going to refrain from answering that question... for many other reasons. I presume I have a right to refuse to answer certain questions." (Tr 2/42.) Doctor Guthikonda denied that the University Neurologic Surgeons practice plan could include a member who was not faculty at Wayne. The grievant herself named several such individuals,(tr 3/109). I cannot and need not resolve that.

Department chairman Guthikonda was accompanied in arbitration by Ms Callahan-Morris, the counsel for the practice group, who reminded this arbitrator that

.... University Neurologic Surgeons , to reiterate what Mr Allen said at the outset, is not corporately related in any fashion to Wayne State University. They're not an agent of Wayne State University nor are they a co-employer.

Wayne State University recognizes University Neurologic Surgeons as a clinical service group as it does for the other clinical service groups recognized by the University. The decision that University Neurologic Surgeons made to terminate Dr. Zamorano was

independent. They had the right to do so, they made that decision and any subsequent actions taken by the practice group is immaterial to this proceeding, in my opinion. (tr 2/52)

When asked "as part of the employment agreement is there a requirement that they be on the faculty of the University" this attorney answered only indirectly "it permits termination if they are not on the faculty." (Tr 2/53-54),

This arbitrator understands---as the University stresses---that the UNS and grievant had a separate contractual relationship. But the only change noted-or condition defeated which led to its non renewal was the loss of her University affiliation, something in the sole control of the University. This practice group dismissal was not a separation for reasons of malfeasance or lack of professionalism or performance as a neurosurgeon or other breach of the employment agreement with UNS>. The 6/20/05 letter of separation from UNS President Guthikonda (Union 3) makes the connection irrefutable:

We have been advised that effective February 7, 2005 your faculty position with Wayne State University School of Medicine was terminated. Pursuant to section 14 (a)(iv) of the Employment Agreement, upon such occurrence, University Neurologic Surgeons has the right to terminate your employment upon 30 days written notice....

Finally, as your termination is "without cause", the promissory note executed by you.... shall be forgiven and cancelled....

In December 2005, well after her termination as a faculty member of the Medical School and from UNS, the grievant received a communication from Karmanos Cancer Institute that with new by laws every doctor working there needed to be "faculty member or voluntary faculty." The grievant testified that Dean told her he never received her subsequent request for such status, and that when she asked Dr. Guthikonda about obtaining it, he told her that "the dean doesn't think this is a good idea." (Tr 3/118,123).

G. Arguments of the Parties; Discussion and Analysis

The University statutes at issue here provide

2.51.01.160 Dismissal Proceedings-Faculty on Term Appointment

Faculty appointed under an agreement for a fixed term may be dismissed prior to the termination of the term for adequate cause as follows: (a) *for acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University;* (b) serious misrepresentations of fact relied upon in making the term appointment;(c) *for serious violations of academic standards and principles;* (d) failure to perform academic

assignments competently.

2.51.01.170 A fixed-term faculty member who is terminated for adequate cause will have access to the grievance procedures. *If the arbitrator finds that the grievant (a) did not engage in acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University or did not make serious misrepresentations of fact relied upon in making the term appointment;(c) did not engage in serious violations of academic standards and principles; or (d) did not fail to perform academic assignments competently, the arbitrator shall have the authority to rescind the dismissal or suspension, and to award reinstatement with back pay through the end of the contract term.(emphasis added.)*

Party arguments below are paraphrased, summarized or quoted from their respective briefs. I have also considered the 2-2-2007 letter sent by University Counsel Allen.

The Union asserts that "there was no adequate forewarning of the Possible/Probable Consequences" of suspension or termination "for inadvertently improper use of the P-card" other than those "contained in the Cardholder agreement Dr. Zamorano signed" with its reference to repayment which the employer never discussed with her. The University argues that "Dr. Zamorano was afforded the same fair warning given to all other cardholders."

The undersigned agrees that there was no warning or even suggestion of the discipline of termination of all academic standing. Warning would not be needed for moral turpitude misconduct, or criminal conduct. Here, the grievant received -and understood -that misuse of the card had internal consequences: card loss, reimbursement by pay deduction, and even possible legal fees. Since there was already a procedure in place for handling enumerated Pro-card misconduct, the University's case for a much harsher discipline of termination and loss of all practice privileges tied to academic standing must be based upon additional malfeasance. The University must show intent to defraud or to misappropriate. And it has not done so.

The Union contends that the employer's "entire investigation centered on whether the improper purchases simply occurred," rather than to determine if they were grant-related. On that point I cannot agree. The warning signs that alerted Ms Radcliffe to seek more information were the nature of the merchants that were listed in the statement. They were not typical for University grant-related purchases and the Assistant Director followed procedure in seeking an explanation to show grant relatedness. Only when not receiving receipts or explanations that she deemed sufficient did she turn the matter over. She did not assume the role of deciding whether the misuse was deliberate or whether there was "intent to defraud." She conveyed her concern and the matter moved to the next stage; Internal Audit which did pursue such question.

The Union points out the notable omission of the Internal Audit Director to interview the grievant. Ms Hefner's explanation for that makes clear that it was a joint decision, discussed with the Vice Presidents. At the same time, the documentation, including the clearly erroneous

explanations from the grievant, were persuasive evidence that the doctor was now not being honest, at minimum after the fact. This record also shows that Ms. Hefner did make a recommendation as to the termination of Dr. Zamorano and thus her own failure to interview the grievant becomes more significant. Her recommendation role, and position as Head of Internal Audit along with the great weight of the Audit Report cannot compensate for the deliberate refusal at all levels to give the grievant her informal forum.

As discussed above, Vice President General Counsel Lessem and Vice President Oliver had reached their decision before any meeting and did not want one. (See Lessem letter of November 14). The result of their conduct at the "meeting" combined with the refusal to give MRE 408 protection defeats any claim that they gave some minimally sufficient interview, an interview **required** by University statute. They did in fact "refuse to discuss the matter in detail" and they also refused to agree to not utilize any information gained in this meeting for the still ongoing University attempt at a criminal prosecution.

The Union argues the seriousness of the University's choices to disregard due process

The consequences of this case transcend even the compelling interests of Dr. Zamorano. there is an institutional and faculty-wide concern with arbitrary and capricious conduct which effectively destroys the career of a tenured (sic) faculty member without a full and fair hearing, confrontation of witnesses and other due process...there is concern for inadequate review and investigatory procedures, and the lack of common sense dispute resolution standards.¹³

I would respond that this award addresses the particular circumstances of this single contractual (not tenure) relationship. If the University response indicates a more widespread problem, I leave that to another presented matter; it cannot be covered broadly here.

The University makes several points concerning the degree of its "minimal due process" obligation. It first argues that arbitration testimony (of John Oliver) demonstrates that the grievant and her attorney were both "conversant with the charges ...and responded to the charges at length" in their meeting with Vice Presidents Oliver and Lessem. Mr. Oliver's testimony on that point is far less convincing than that of Dr. Zamorano.

The Union raises the 1985 decision of Cleveland Board of Education v Loudermill 470 U.S. 532 and its proposition that there are basic due process rights of the public employee. The University concedes that "under Loudermill Zamorano was entitled to a pretermination hearing"

¹³The Union has listed the "seven tests" of late arbitrator Daugherty(Grief Cooperage 42 LA 555 (1964). I do not consider them all equally relevant or important and do not follow this formula (along with the majority of experienced arbitrators.) Its useful guidance has been incorporated in my discussion. There is no "automatic relief if all seven "tests" are not met.

but one which "need not be elaborate."

The employee is only entitled to (i) oral or written notice of the charges against him (ii) an explanation of the employer's evidence and (iii) an opportunity to present his side of the story, either in person or in writing.

In *Loudermill* the court stated that where state law provides for a full administrative post-termination hearing and judicial review, the pretermination hearing need not definitively resolve the propriety of the discharge. Rather it should be an initial check against mistaken provisions....

The University describes the letters sent by the grievant's attorney to the University as a "lengthy and impassioned response on her behalf before her termination." What the University cannot demonstrate is that there was any genuine consideration of those letters-in particular the point by point analysis of 12-8-04 [University 25]. The University statutory obligation is to "... include an opportunity for the Respondent to testify." A letter is not testimony, far less an ignored\ unanswered letter.

In response to a matter touched upon at hearing, albeit not in the Union brief, the University argues that *Garrity v. New Jersey* 385 U.S. 493 "does not apply in this case because Zamorano was never threatened with discharge for refusing to make a statement regarding the incidents of Alleged Pro-card misuse." *Garrity* gives some public employees protection against the use in court of admissions made in investigatory interviews but they can be discharged for refusing to answer those questions. Here, the grievant was actually warned by Mr. Lessem (with her counsel present) that any admissions made in their meeting would be used. The grievant did not remember these comments out of thin air. *Garrity* has no bearing here for the employer.

H Findings

The record indicates 1) that the grievant was never given the opportunity to personally present her defense, 2) that a decision had been made before her lawyer argued her case on the specifics of the findings, 3) that his arguments were not considered. To be emphasized is that this arbitration decision does not turn on these defective due process findings. An arbitration is of course a *de novo* hearing, and not merely an occasion for checking off of a series of rules imposed on the employer. All possible arguments have now been made on behalf of this grievant.

The termination letter gave as reasons:

---you utilized (the Pro-card) in order to purchase goods and services for your personal use
---you caused improper charges...to be assessed against a significant research grant...by a third party
---You misrepresented the nature of many of the purchases you made and fabricated numerous receipts from vendors with the intention of concealing your improper use of the

P- card

---You allowed an unauthorized person to make use of (P-card)...to make at least one personal purchase (joint ex 6)

The Cardholder Agreement signed by the Grievant states that "improper use may result in disciplinary action" with the next sentences containing the signer's authorization to the University to deduct amounts equal to the total of the improper purchases. The employer did not do this, and rejected the doctor's own efforts to resolve the matter by such means.

The Union points out that the University has treated this "entire situation as a criminal matter from the beginning" and has accused the Grievant of the "potential crimes" of theft and falsification of documents." Since such charges involve "moral turpitude," they should be reviewed by the arbitrator applying the "strictest standard" of "beyond a reasonable doubt" to the employer's evidence. In response, this arbitrator does not impose a criminal evidence standard, but on any question of deliberate falsification and knowing intent to misappropriate funds to personal use, I would look for clear and convincing proof.

The University argues that its decision to terminate the doctor "is supported by her breach of the Pro-card agreement, her violation of the APPM, her fabrication of supporting documentation and her lack of candor to the Procard administrator." Further, "when the actions of a single university employee are called into question, the reputation of the entire institution is potentially at risk." It argues that the grievant's claim to not know she could not allow a third party to use her Pro-card "demonstrates at best an indifference to University policy, if not an outright and intentional disregard." Her testimony "establishes a violation on her part of the duty undertaken in the Pro-card agreement to protect and safeguard the procurement card..and the policies and procedures." I agree as to her card agreement violation.. But these are not criminal matters.

The grievant did manufacture explanations when asked for them by Ms. Radcliffe *after she had informed the latter that she had no receipts*. Instead of retrieving them from the merchants, she made lists from catalogues. At all times she was offering to pay back sums, and was requesting details from Ms Radcliffe about the purchases, details which were withheld from her. Her access to the Pro-card records ended as of August 20th, four days after her first and only meeting with Ms Radcliffe. I need not repeat the exhaustive analysis above of the documents she created, and her motivation.

I agree with this employer that there has occurred a clear case of extreme indifference to important University policy, and that the grievant gave false explanations (BMW) and wrong explanations (Sky Mall) to Ms Radcliffe. To establish however an "intentional disregard" at the time of her conduct, there is a need for more proof than was submitted. Proof is missing of her actual knowledge of the policies and procedures. Proof is missing that she knew Susan Swider was using the card, and even, arguably, proof is missing that she knew how she herself was using the card. She signed checks. She did not look at statements..

Again, the issue goes to degree of penalty. The University Statutes---incorporated into the labor agreement---in cases of termination of set period contracts call for proof that Doctor Zamorano

engaged in acts involving moral turpitude which bear adversely on the ability to perform responsibilities to the University

or

engaged in serious violations of academic standards and principles

I find that proof, including a connection to her ability to perform her duties (aside from Grant financial administration) absent. This termination is not for "adequate cause" when based on the admitted and extensive Pro-card violations. The University's added claims of "intention to conceal improper use" at best depict post event "explanations" that she cobbled together. I recognize the serious dishonesty of this doctor in her explanations to Ms Radcliffe, when pressed for "records" she did not have and "explanations" she did not want to or could not give. In view of the fact that the grievant requested-and was not given- details that the University had already collected, its reliance on any theory of her deliberate deception is weakened. It does not reach to moral turpitude..

I credit the claim that Susan Swider's use of the card was unknown to the grievant, and that neither woman had any concern for records of their joint expenditures. I do not find a scheme by the doctor to "get away with" donating grant funds to an art museum, or buying moisturizing socks, address plaques, chaise lounges and floor mats, obvious non grant related expenditures.

The University points out that

Whatever Nancy Thayer did or did not do cannot excuse or mitigate Dr. Zamorano's misuse of the P-Card and her failure to observe the other conditions placed on her P-card use by her employer¹⁴

That is accurate. The grievant is not relieved of her own absolute responsibility. But the University has terminated this professor, severed her full academic appointment, and denied her voluntary status. The *Departmental* contribution to the situation was not considered.

The key problem lies in the alleged "intention to conceal." There is no question but that Doctor Zamorano herself, and due to her negligence a third party also made a host of inappropriate purchases. They were obviously, indisputably personal and unrelated to the grant.

¹⁴University Counsel letter of 2-2-07 to the undersigned protesting the relevance of an additional piece of evidence which I requested while considering this matter: the dates that Nancy Thayer worked in the Department of Neurology..

But the Pro card already had a procedure for handling such situation: revocation of the card, pay back of the funds and if necessary, payment of University legal fees, if needed, for collecting sums owed. The doctor knew that she would be paying back all misused sums. I cannot find that she intended to "steal or deprive."

The University imposed a penalty well beyond what is mentioned anywhere, and which therefore must be based on conduct so egregious that it need not be listed or the topic of any advance warning. There have been five to ten prior occasions of Pro-card misuse (estimate given, with details again not recalled by witnesses.) These had been met with the Pro-card stated penalties.

One of the Union's most persuasive arguments goes to the issue of the connection between the grievant's misfeasance and her grant work, and faculty duties.

...without ground or reason, and without a nexus, the Employer asserted that her research was tainted. Yet nowhere in the record did the Employer show how Dr. Zamorano's research was false, incorrect, or even merely flawed. Nowhere in the record is there evidence of an attempt to determine if there was a problem with Dr. Zamorano's research. . . . it is notable that Dr. Oliver expressed no concern that the research continued without the direction and expertise of the scientist who promulgated it and obtained the grant to support it....

...the Employer wrongfully and illogically concluded that her research lacked integrity before it was determined whether she committed the crimes of which she was accused.

From the date of her October 25th suspension until her February 7th termination, the grievant continued to conduct her private practice. She was paid her faculty salary until February 7, 2005. From date of her October 25th suspension until June 20, 2005 (eight months) she remained an active member of the UNS practice. In other words, she was not viewed as unable to practice medicine as a University-affiliated, and then non-affiliated physician. Dr. Guthikonda has not ever suggested problems of substandard medical skills or teaching performance, or unethical research other than the Pro-card disaster.

Procurement card procedures were disregarded at all levels of this Department. Certainly, however, the grievant's abuse of or careless use of her pro-card for virtually the entire period that she possessed it, raises valid concerns about her ability to "financially administer" (along with the Medical School dean or his designee) the large grant (Union ex 10). Finding that she did not intend to convert funds to her own use does not mean that she was to be relied upon as a financial administrator of the Grant. But it was not only her grant relationship, but her clinical faculty position, that she lost, along with her lucrative membership in UNS.

I find that there was no just cause for the penalty that was imposed. The discipline was not merely revocation of her card, with reimbursement. It was not merely removing her from her

grant supervision and participation. It was removing her as clinical faculty at the Medical School, denying her even the "voluntary status" given to some non medical school physicians so that they could have privileges at certain medical institutions. There was the additional very direct result that she was released from her independent contract with the "University Neurologic Surgeons."

The University was fully within its authority and goals to consider Dr. Zamorano's own absolute disregard for Procurement Card rules, her disastrous record keeping and her inability to provide answers as proof of a risk in her performance on this large grant. But this is not automatically connected to her performance either as a scientific investigator or a physician.

The University solution went into areas that were never at issue: her professional competence and honesty vis a vis the practice of medicine. Nothing in the record touches on that subject. The University went far beyond "protecting its reputation for ethical grant administration."

I. Relief

I do not consider the record sufficient nor my authority clear enough to compel the University to reinstate the grievant as a Principal Investigator on the MEDC grant. The labor contract further restrains me from awarding her a new two year University Medical School Professor contract or compelling the UNS to accept her back in its corporation.

Relief rewarded is as follows

1. All personal property seized on October 25, 2004, if not returned shall be returned forthwith with Association input if needed.
2. The balance of her university contract period salary shall be paid to the grievant to and through the end of June 2005..
3. The University shall examine its records of payment of the grievant's additional grant-based salary covering the period of her operation of the grant (i.e. through October 2004) and shall either pay to Doctor Zamorano all unpaid sums set forth in the grant (Union 10), or demonstrate that University policies and procedures for paying, or not paying such additional grant-specified sums to its faculty researchers were applied consistently to the grievant.
4. The grievant is awarded voluntary academic status for a two year period starting from date of this decision, for purposes of regaining privileges at and qualification at University-affiliated medical facilities where such affiliation is required. The University shall not prevent or oppose any affiliation of the grievant with UNS or other practice groups having University affiliated doctors as members\employees.
5. Written notices and media releases of such voluntary status shall be disseminated in a

manner acceptable to the grievant, (the Association shall be consulted.) Personnel records shall delete mention of suspension or termination.

6.. The university is to reimburse the Union for *half of* the Union's actual attorney fees and out of pocket (not arbitration) costs in prosecution of this grievance. No private attorney fees are reimbursed.

All other relief requested is denied. I retain jurisdiction of this matter for purposes of responding to questions as to its meaning and scope until June 30 2007.

/s/
Ellen J Alexander

February 6, 2007