

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833  
(916) 274-5751  
FAX (916) 274-5785

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MAR 30 2010

**A P P E A L F O R M**

OSH Appeals Board

**2010-R 4 D / -1005**

126203041

**Inspection Number on Citation**

UCLA - Dept of Chemistry & Biochemistry

**Employer Name on Citation**

University California at Los Angeles

**Employer Legal Name or DBA (Optional)**

501 Westwood Plaza 4th Floor

**Address**

Box 951605

Los Angeles, CA 90095

1. You only have 15 working days from receipt of a citation to appeal.

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

**FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE  
THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION**

1. This is an Appeal from:

CITATION NO(s): 1 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): \_\_\_\_\_ Item No(s): \_\_\_\_\_

SPECIAL ORDER/SPECIAL ACTION NO: \_\_\_\_\_  
Item No(s): \_\_\_\_\_

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes     Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>  
**PLEASE SEE ATTACHMENT TO APPEAL FORM.**

4.

[Redacted Signature Area]

(Signature of Employer or Employer's Representative)  
{If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

Craig Moyer

(Type or print name)

Counsel for University of California, Los Angeles / Manatt, Phelps & Phillips, LLP

(Title)

11355 W. Olympic Boulevard

(Address) {Address where all communications from the Appeals Board will be sent}

Los Angeles

CA

90064

(City)

(State)

(Zip Code)

310-312-4353

cmoyer@manatt.com

3/30/10

(Telephone)

(E-Mail Address)

(Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

### IMPORTANT INFORMATION

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
- B. You must complete *a separate appeal form for each citation or notification* you wish to appeal and *attach a copy of the complete citation or notification that you are appealing.*
- C. If the citation or notification being appealed includes more than one item **do not use separate appeals forms for each item.** Instead, specify the items you are appealing in the space provided in No. 1 on the front of this form. (for example, "Citation No. 1, Item Nos. 2, 5, and 8)
- D. **Be sure to sign your appeal form and provide all the information requested in No. 4 above.**
- E. Your appeal form shall be deemed not completed unless you attach a copy of each citation or notification that you are appealing, and failure to file a completed appeal form may result in dismissal of the appeal.
- F. If you or your representative change address, telephone number, and/or e-mail address, it is your responsibility to notify the Appeals Board in writing of the change(s). Otherwise the Appeals Board will continue to use the address it has on file and you risk not receiving notices or other communications from the Appeals Board. Appeals Board regulations make it the employer's obligation to notify the Appeals Board of any changes to the employer's and/or representative's contact information.
- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

**Attachment to Appeal Form**

Response to Question No. 3:

The University of California, Los Angeles – Department of Chemistry and Biochemistry (“UCLA”) alleges the following affirmative defenses:

1. The citation, the investigation leading up to the citation and any alleged violations related thereto constitute selective enforcement by the Division of Occupational Safety and Health (the “Division”), and evidence the Division singling out UCLA for enforcement; and,
2. UCLA denies, generally and specifically, each and every allegation in the citation and the alleged violation of Title 8 of the California Code of Regulations and/or the California Labor Code.
3. The Division cannot enforce a rule which it did not formally adopt through procedures established by the Administrative Procedure Act (the “APA”) (California Government Code section 11340, et seq.). The Division has taken the apparent policy of assessing penalties on a violation-by-violation or per-instance basis. Given the investigation and inspection conducted, the alleged basis for the citation, the issuance of the citation and the putative “enforcement” of the cited regulation, the Division is enforcing, adopting and/or using a rule or regulation which it did not adopt formally. The Division’s conduct in this regard constitutes an “underground regulation” and is illegal and improper in violation of the APA, due process clause under the California Constitution and U.S. Constitution, and notions of fundamental fairness.
4. The Division has not and cannot offer sufficient evidence to support its penalty calculation and UCLA is entitled to the maximum available credits and adjustments.
5. The Division failed to issue the citation within the six-month statute of limitation and the statute of limitation was not and has not tolled because the Division received notice in May 2009 but in any event prior to September 15, 2009 as alleged in the citation.

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OSH Appeals Board

126203041

**Inspection Number on Citation**

**2010-R4D1 -1006**

UCLA - Dept of Chemistry & Biochemistry

**Employer Name on Citation**

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University California at Los Angeles

**Employer Legal Name or DBA (Optional)**

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1. This is an Appeal from:

CITATION NO(s): 2 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): \_\_\_\_\_ Item No(s): \_\_\_\_\_

SPECIAL ORDER/SPECIAL ACTION NO: \_\_\_\_\_  
Item No(s): \_\_\_\_\_

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes     Time allowed to complete changes

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3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>

**PLEASE SEE ATTACHMENT TO APPEAL FORM.**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### Attachment to Appeal Form

#### Response to Question No. 3:

The University of California, Los Angeles – Department of Chemistry and Biochemistry (“UCLA”) alleges the following affirmative defenses:

1. The underlying standard, rule, or regulation is vague and thus, the citation is void.
2. The citation, the investigation leading up to the citation and any alleged violations related thereto constitute selective enforcement by the Division of Occupational Safety and Health (the “Division”), and evidence the Division singling out UCLA for enforcement; and,
3. The citation does not constitute a “serious” violation under Title 8 of the California Code of Regulations (the “Regulations”) and/or the California Labor Code (the “Code”) as alleged in the citation.
4. UCLA denies, generally and specifically, each and every allegation in the citation and the alleged violation of the Regulations and/or the Code.
5. The Division cannot enforce a rule which it did not formally adopt through procedures established by the Administrative Procedure Act (the “APA”) (California Government Code section 11340, et seq.). The Division has taken the apparent policy of assessing penalties on a violation-by-violation or per-instance basis. The Division has also adopted the policy that the mere occurrence of an incident is *ipso facto* evidence of an alleged violation of the Regulations and/or Code in that UCLA did not purportedly identify and correct the “unsafe work practice.” Given the investigation and inspection conducted, the alleged basis for the citation, the issuance of the citation and the putative “enforcement” of the cited regulation, the Division is enforcing, adopting and/or using a rule or regulation which it did not adopt formally. The Division’s conduct in this regard constitutes an “underground regulation” and is illegal and improper in violation of the APA, due process clause under the California Constitution and U.S. Constitution, and notions of fundamental fairness.
6. The citation and the purported violation is attributable to the employee’s independent act.
7. The employee committed a safety violation that was unforeseeable by UCLA.
8. UCLA did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.
9. The Division failed to issue the citation within the six-month statute of limitation and the statute of limitation was not and has not tolled because the Division received notice in May 2009 but in any event prior to September 15, 2009 as alleged in the citation.
10. The Division has not and cannot offer sufficient evidence to support its penalty calculation and UCLA is entitled to the maximum available credits and adjustments.

Inspection Number on Citation – 126203041  
Citation No. 2, Item No. 1.

11. Given the unduly vague and confusing nature of the citation, UCLA reserves its right to allege other affirmative defenses as they may become known and hereby specifically reserves the right to amend its appeal to allege any additional and other affirmative defenses at such time as they become known.

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*David David*  
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**2010-R4D1-1007**

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CITATION NO(s): 3 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): \_\_\_\_\_ Item No(s): \_\_\_\_\_

SPECIAL ORDER/SPECIAL ACTION NO: \_\_\_\_\_  
Item No(s): \_\_\_\_\_

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