UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC d/b/a	)	
HAWAII TRIBUNE-HERALD	)	
	)	
Employer,	)	**CASE NOS. 37-CA-7043**
	)	**37-CA-7045**
	)	**37-CA-7046**
	)	**37-CA-7047**
AND	)	**37-CA-7048**
	)	**37-CA-7084**
	)	**37-CA-7085**
HAWAII NEWSPAPER GUILD,	)	**37-CA-7086**
LOCAL 39117,	)	**37-CA-7087**
COMMUNICATIONS WORKERS OF AMERICA,	)	**37-CA-7112**
AFL-CIO	)	**37-CA-7114**
	)	**37-CA-7115**
Union.	)	**37-CA-7186**
	)	

REPLY BRIEF OF *HAWAII TRIBUNE-HERALD* TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF

L. MICHAEL ZINSER
GLENN E. PLOSA
SCOTT A. LARMER
THE ZINSER LAW FIRM, P.C.
414 UNION STREET
SUITE 1200
NASHVILLE, TENNESSEE 37219

ATTORNEYS FOR
HAWAII TRIBUNE-HERALD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. ARGUMENT

A. THE GENERAL COUNSEL[1] IGNORES THE RECORD EVIDENCE AND ATTEMPTS TO CREATE A NEW STANDARD FOR "UNION BUSINESS."

Nako's testimony supports *Hawaii Tribune-Herald's* ("*HTH*") theory that she "snuck" Ken Nakakura in through the rear employee entrance to the facility. Nakakura, a non-employee Hawaii Newspaper Guild ("Guild") Representative, knew about the Access Policy. (Tr. 416). Nakakura asked if it was okay for him to enter through the employee entrance, and Nako said it was, even though she lacked permission. (Tr. 211-212, 334, 408, 617). It is implausible for the General Counsel to argue that Nako was not concerned about Nakakura's visit causing a disruption. (G.C. Ans. Br. at fn 12).[2] Nako's own words undercut the General Counsel's argument:

> Q (by Plosa): There isn't any reason you couldn't have met Ken [Nakakura] in the lobby of the building, is there?
> A (by Nako): Well, the reason being is -- my feelings, it would disrupt the office if I let him in through the front. He'd have to come into the front lobby, go around --
> **
> Q (by Judge): Could you have conducted your business in the front lobby?
> A (by Nako): Yeah, Sharon and I could have gone out, yeah, to see him.

(Tr. 298-99). Nako knew what she was doing. General Counsel's argument that ***anyone*** who entered through the front caused a disruption is ridiculous. (Ans. Br. at fn 12). The access policy worked for years, without complaints of disruption over visitors entering the newsroom. (G.C. Ex. 32); R. Ex. 330, 347).

General Counsel provided two very different theories regarding the meeting between Nako and Nakakura. First, the General Counsel argued that Nakakura did "nothing more than receive a note." However, if it was "just a note," why the secrecy over its contents? The General

[1] Counsel for the General Counsel will be referred to as "General Counsel."

[2] General Counsel's Answering Brief will be referred to as "Ans. Br."

Counsel's attempt to downplay the note failed when it later conceded union activity was implicit in the meeting between Nako and Nakakura, because the note was union-related.[3] In fact, General Counsel admitted the two spoke about its contents. The ***only*** reason for the brevity of the meeting was because Arlan Vierra alerted David Bock to Nakakura's entry. (Tr. 925).

Nako's belief over what constituted union business is irrelevant; it ***was*** union business. A mistaken belief is not an excuse, justification or defense. Nako's immaterial belief should not be considered by the Board. The General Counsel cannot argue in good faith that so long as an employee believes union business to mean union meetings, presentations or rallies, everything else is not union business.[4] Nako had a union meeting with a non-employee Guild representative inside the *HTH* facility during working hours without permission. (Tr. 210, 212, 214, 334, 405, 408, 411-12, 417, 1178).

Bock had a valid reason for conducting an investigation Nako and her violation of the access policy. Implicit in any investigation is meeting with the involved parties to get their side of the story. ALJ McCarrick erred in ruling otherwise. Nakakura knew he needed permission to enter the facility (Tr. 407-08, 415-16); Nako knew (or should have known) about the policy, as she had received a copy (Tr. 250; R. Ex. 330); and the action taken by Bock and Crawford was consistent with *HTH's* right to regulate the workplace. The standards and viewpoints offered by the ALJ and the General Counsel regarding employer rights contradict case law and common

[3] This also demonstrated why Nakakura's admission into the building was dissimilar to Leigh Critchlow letting Mitzi Nitta in to deliver Critchlow's mail. (*See* Ans. Br. at 11). This "note" contained a list of names for Guild meetings schedule later in the day.

[4] This creates a subjective standard whose inconsistency is revealed in the instant case: The meeting between Nako and Nakakura was union business insofar as it related to *HTH* disciplining Nako, but ***not*** union business because Nako did not understand it as such. By this logic *HTH* should be absolved of this allegation because it did not understand that disciplining Nako could be understood as violating the Act.

sense. The General Counsel even argues that since Crawford knew Nakakura was a Guild agent, the questions were, therefore, for the purpose of discovering union activity.[5]

B. THE CASES CITED REGARDING INTERROGATIONS ARE DISTINGUISHABLE.

The cases cited by the General Counsel with regard to the Nako "interrogations" do not stand up under even a cursory review. *Challenge-Cook Bros.*, 288 NLRB 387, 397(1988) and *Int'l Metal Co*., 286 NLRB 1106, 1110 (1987) concern impermissible inquiries to ***job applicants*** about their union sympathies and inclination to cross a picket line. The General Counsel also cited "*Freemont Food*, 289 NLRB 1790 (1988)" to support its argument, but this case does not exist! The "Freemont Food" case argument stem from *St. Louis Auto Parts Co*., 315 NLRB 717, 720 (1994), another job applicant inquiry case.[6] These cases, based on a job interview setting, are inapplicable to the instant case.

C. NAKO NEVER ASKED MANAGEMENT FOR A WITNESS; NEVERTHELESS, BISHOP'S CONDUCT REMOVED ANY PROTECTION PROVIDED BY THE ACT.

Hunter Bishop's actions were not protected by the Act. Bishop inserted himself into the situation between Nako and Bock. Bock credibly testified that Nako did not ask for a witness on October 18, 2005. (Tr. 972). It was undisputed that Nako never asked Bock for a *Weingarten* representative. (Tr. 326). This ends the matter.[7] *See Appalachian Power Co*., 253 NLRB 931, 933-34 (1980), enfd. 660 F.2d 488 (4th Cir. 1981)(unpublished).

The hostility and insubordination directed towards Bock, witnessed by newsroom employees who stopped working to witness the confrontation, undercut the theory that Bishop's

[5] Implicit in this statement is the creation of a new standard where union representatives can trespass on company property without consequence or questioning from management. This cannot be.

[6] The General Counsel did not cite, nor apparently check, the cases cited in *St. Louis Auto Parts*. The Board, in *St. Louis Auto Parts* apparently tried to cite *Freemont Ford*, 289 NLRB 1290 (1988), which involved questions to ***job applicants*** about the willingness to work in a non-union setting. *See Freemont Ford* at 1312-1313.

[7] No witness testified that Bishop told Bock that Nako asked Bishop to act as her *Weingarten* representative. It is unfathomable that Bishop would fail to make this claim during his assault of Bock, if Nako had made such a request.

tantrum was mere conversation. (Tr. 968). Bishop's contempt for Bock and *HTH* management was palpable. Bishop refused to back off when ordered to do so. (Tr. 964-967). Bishop even telephoned Cahill immediately after his eruption, sure he would be fired for his misconduct. (Tr. 899-900; R. R. Ex. 360). After ***six*** arbitration awards in *HTH's* favor, Bishop knew that *HTH* did not tolerate insubordination and misconduct. (R. Ex. 317-322). Bishop's actions lost any protection of the Act, assuming it ever applied, and his suspension and termination were for cause. *See* 29 U.S.C. § 160(c). It was error to find otherwise.

D. THE AFTER-ACQUIRED EVIDENCE REGARDING HUNTER BISHOP'S MISCONDUCT PROVIDES A VALID REASON FOR HIS DISCHARGE.

HTH audited the byline story production of all reporters employed during 2005, which included Bishop's pre-discharge production, to gauge productivity. (Tr. 1022-24). The results of audits can and do lead to discipline. *See Frontier Tel. of Rochester, Inc.*, 344 NLRB 1270, 1281 (2005). It is undisputed that Bishop failed to meet the productivity standards in place at *HTH*. (Tr. 1023-24). The comments by Bishop on his blog and at the University of Hawaii–Hilo provided additional evidence that Bishop was disloyal and disparaging of *HTH*, and justified *HTH's* discipline. (R. Ex. 87, 292, 294, 300; R. R. Ex. 361).

E. DAVID BOCK'S APRIL 3, 2006 MEETING WITH DAVE SMITH WAS NOT A *WEINGARTEN* OPPORTUNITY.

The Regional Director approved the Guild's withdrawal of this allegation. (G.C. Ex. 1(ooo)). Section 10(b) of the Act, *Ducane Heating Corp.*, 273 NLRB 1389 (1985) enf'd per mem. 785 F.2d 394 (4th Cir. 1986), and enf'd sub nom *Int'l Union of Elec. Workers v. NLRB*, 785 F.2d 305 (4th Cir. 1986), and *The Bakersfield Californian*, 337 NLRB 296, 297 (2001), preclude the ALJ's contrary finding. The General Counsel never even moved to amend the Complaint, in this regard. This finding was egregious error to support an atrocious result.

F. SECRET TAPING IS NOT PROTECTED CONDUCT.

When Smith made a surreptitious recording of his meeting with Bock, he acted only to protect himself; he was not protecting Ing, Loos, Sur, or any other employee. Smith said he was afraid he would be denied a *Weingarten* witness. (Tr. 468, 543, 1031, 1033-34). *Dana Corp*., 318 NLRB 312 (1995) and *Sam's Club,* 342 NLRB 620 (2004), therefore, are on point.[8]

Despite the General Counsel's mischaracterization, *Douglas v. DeKalb County, Georgia*, 2007 WL 4373970 (N.D.Ga. 2007) involves issues of alleged protected conduct. In *Douglas*, one of the plaintiffs alleged demotion because of union activity and participation, after secretly recording another officer. *Douglas* Slip Op. at *1, 6. The court found that he would have been demoted because of his misconduct and that secret taping is the kind of activity that would warrant termination. *Id* at *3, 4. Smith "cannot hide under the banner of 'union activity' as a defense for conduct which … disobeys the commands of superiors." *Id* at *4.

Smith knew the meeting with Bock was not subject to *Weingarten*, but took it upon himself to engage in unprotected misconduct by secretly taping it. (Tr. 544). Brining in a secret recorder as a "witness" defied Bock's notification that the meeting was to be one on one. (Tr. 1025-26). The repeatedly defiant attitude Smith displayed towards Bock after March 3, 2006 further justified the action taken by *HTH*. Smith's suspension was for cause. (Tr. 1033, 1035-36, 1048-49, 1050-51, 1057-58, 1060, 1062, 1067-70; R. Ex. 325, 359, 362; G.C. Ex. 3, 12, 13, 14, 15, 29, 30, 31, 36, 37). *See* 29 U.S.C. § 160(c).

G. PETER SUR WAS PROPERLY DISCIPLINED.

For the reasons stated in the Brief in Support of Exceptions, *HTH* maintains the investigation and discipline handed out to Sur was consistent with the power and right reserved

[8] By the ALJ's logic, employees conspiring to sabotage an employer are protected by the Act, as well.

to an employer when following up on a claim of workplace misconduct. As someone involved in misconduct, Sur was validly disciplined. (Tr. 1030-31).

H. *HTH*'s Investigation Concerning Smith's Secret Taping was Lawful.

The General Counsel claimed that *HTH's* investigation into Smith's misconduct violated the Act. (Ans. Br. at 26-28). The Act does not prohibit an employer from conducting a thorough investigation. In fact, the General Counsel usually takes the position that the failure to conduct a meaningful investigation violates the Act. *See Diamond Elec. Mfg. Corp.*, 346 NLRB 857, 860 (2006); *Detroit Newspaper Agency*, 342 NLRB 1268, 1271 (2004); *Caribe Ford*, 348 NLRB No. 74 Slip op. at 33 (2006). The General Counsel switched positions to suit its agenda; such arbitrary and capricious agency action should not be rewarded.

I. The Rules About Pins, Armbands and Secret Taping are Legitimate.

The pins and armbands worn by the Guild members failed to reference a labor organization affiliation or origin.[9] (G.C. Ex. 8, 10; Tr. 1085-86). *HTH* did not prohibit employees from wearing the "fair contract" t-shirts referencing a labor dispute. The lack of affiliation falls on the shoulders of the Guild, not *HTH*. The paraphernalia was neither properly nor adequately linked up to the Guild; because of this, the finding should be reversed.

Secret taping, as discussed elsewhere, is not protected activity. A rule prohibiting unprotected conduct cannot, therefore, violate the Act. This charge should be dismissed.

[9] There could have been any number of connotations for the armband, none of which would entail Section 7 rights. For example, the day prior to some employees wearing armbands, U.S. Senator Russ Feingold sponsored a resolution to censure President Bush over a domestic eavesdropping program. The armbands could just as easily been a show of support for this measure.

J. ALL INFORMATION PROVIDED TO THE GUILD PURSUANT TO VALID INFORMATION REQUEST WAS DELIVERED IN A REASONABLE AMOUNT OF TIME.

1. Bishop's Personnel Files was Timely Supplied to the Guild.

HTH provided the Guild with information in a reasonable amount of time. The cases cited by the General Counsel were inapposite. For example, *Teleprompter Corp. v. NLRB*, 570 F.2d 4 (1st Cir. 1977) involved a company that failed to provide certain financial information subsequent to a request during negotiations, when the company claimed an inability to pay. In *Tom Rice Buick, Pontiac & GMC*, 334 NLRB 785, 793 (2001), the company failed to provide a reason why it took so long to furnish the information requested. Bock informed Cahill that he was working on compiling Bishop's personnel file, and explained, as Cahill knew, that the holiday season was the busiest time in the newspaper industry. (Tr. 783-85, 995). The information requested was not contained in a single location; many different managers were involved in the collation of Bishop's lengthy personnel file. (Tr. 1082). Unlike *United States Postal Serv*, 308 NLRB 547 (1992), where the personnel file consisted of "only a few documents" and no reason was given for the delay, Bishop's personnel file, totaled over one inch of paper (roughly 200 pages). (Tr. 1084). The ALJ erred in finding unreasonable delay.

2. The Guild was Not Entitled to Nako's Privileged Statement.

Nako's statement was taken at the direction of counsel in anticipation of litigation, and was, thus, privileged. *See Sprint Communications, d/b/a Central Tel. Co. of Tx.*, 343 NLRB 987 (2004). Bishop, an open and notorious union agent, was the subject of ***six*** arbitrations. (R. Exs. 317-322). It was reasonable to anticipate that his discipline would be challenged, and it was.[10] If a known union activist subject to ***six*** arbitrations, all arbitrated in favor of *HTH*, is disciplined, it

[10] The ALJ made every inference in favor of concluding *HTH* violated the Act, but failed to find that it was reasonable for *HTH* to infer that Bishop's discipline would be challenged.

is ridiculous to think *HTH* cannot proactively obtain evidence and statements to defend itself.[11] The Guild's conduct in filing grievances and pushing them to arbitration made clear that the information requests were back-door attempts at impermissible pre-trial arbitration.

The General Counsel's assertion that information requests were made before the Guild made a demand for arbitration missed the mark. The Guild demanded arbitration on Bishop's grievance on January 14, 2006 (R. Ex. 93); the ***charge*** was filed on January 25, 2006. (G.C. Ex. 1(a)). The Guild demanded arbitration on Nako's grievance on January 14, 2006 (R. Ex. 91); the ***charge*** was filed on January 26, 2006. (G.C. Ex. 1(s)). It is inconceivable that the information was necessary to process the grievance after the Guild demanded arbitration. The information requests were pre-arbitration discovery.

K. THE CREDIBILITY FINDINGS LACK SUPPORT IN THE RECORD.

The ALJ did not rely mainly on demeanor for credibility determinations. The ALJ said on – on the record – that Meg Premo's *Beck* objector status "[went] to bias" which ***revealed the ALJ's own bias***. (Tr. 904). The ALJ failed to consider contrary, unrebutted, testimony. (Tr. 904). The ALJ's credibility findings do not stand up when viewed alongside the record evidence. Under *Marshall Engineered Prods.*, 351 NLRB No. 47 (2007) and *J.N. Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979), the Board has valid reason to overturn the ALJ's erroneous credibility determinations.

L. THE SPECIFICITY OF *HAWAII TRIBUNE-HERALD'S* EXCEPTIONS ARE VALID.

The General Counsel claimed that *HTH* failed to comply with the Board's Rules and Regulations regarding the Exceptions to the Decision of the ALJ. *HTH* complied with Rule and

[11] It is highly ironic that the General Counsel claims *HTH* makes arguments without case support (Ans. Br. at 33), when there is an utter dearth of case support for its positions in the General Counsel's Post-Hearing and Answering Briefs. Even more puzzling is the General Counsel's citation to its Post-Hearing Brief when that brief is not part of the Record. See Board Rule 102.45(b).

Regulation 102.46(b)(1), which requires exceptions to identify precisely the specific finding contested and requires the supporting brief to articulate grounds for the exception in the form of supporting argument and authority. *See NLRB v. St. Barnaas Hosp.*, 46 Fed.Appx. 32, 34, 2002 WL 31060408 (unpublished). The exceptions complied with subsections (i) and (ii); the Brief complied with subsections (iii) and (iv). The assertion that the exceptions lack page number citations is incredible and ridiculous.

Nevertheless, the General Counsel's argument flew in the face of Board precedent. The Board has repeatedly rejected the argument that exceptions should be dismissed for procedural deficiencies, even if they are not in strict conformity with the Rules and Regulations.[12] Moreover, the General Counsel has failed to show, or even state, that any "alleged" deficiencies had a prejudicial effect.[13] *Aitoo Painting Corp*., 238 NLRB 366 (1978) and *Bonanza Sirloin Pit*, 275 NLRB 310 (1985) are distinguishable because *HTH* listed its exceptions with specificity, providing a detailed roadmap of the ALJ's errors.[14] *Cf. Aitoo* at 366.. The exceptions, coupled

---

[12] *See New York Newspaper Printing Pressmens Union No. 2*, 352 NLRB No. 63, slip op. at *1, fn. 2 (May 9, 2008); *Zurn/N.E.P.C.O.*, 345 NLRB 12, 12 fn. 2 (2005); *DiMarco Paving & Construction, Inc*., 341 NLRB 330, 330 fn.1 (2004); *Meyers Transport of NY, Inc*., 338 NLRB 958 (2003); *CCY New Worktech, Inc.*, 329 NLRB 194, 194 fn. 1 (1999); *Atlas Transit Mix Corp*., 323 NLRB 1144, 1144 fn. 1 (1997); *Boilermakers Local 374 (Phillips Getschow Co.)*, 31 NLRB 994, 994 fn. 4 (1995); *TNS Inc*., 309 NLRB 1348, 1348 fn. 3 (1992); *Rudy's Farm Co*., 309 NLRB 1338, 1338 fn. 1 (1992); *Embassy Suites Resort*, 309 NLRB 1311, 1313 fn. 1 (1992); *Rent Me Trailer Leasing, Inc*., 305 NLRB 1094, 1094 fn. 1 (1991); *ABF Freight System, Inc*., 304 NLRB 585 (1991); *Chicago Tribune Co*., 304 NLRB 495, 495 fn. 1 (1991); *House Calls, Inc*., 304 NLRB 311, 311 fn. 2 (1991); *Farr Co*., 304 NLRB 203, 203 fn. 1(1991); *Redway Carriers, Inc*., 301 NLRB 1113, 1113 fn. 1 (1991)*; Teamsters Local 203 (Union Interiors)*, 298 NLRB 315, 315 fn. 2 (1990).

[13] *See In re U.S. Postal Service*, 339 NLRB 400, 400 fn. 1 (2003); *Planned Bldg. Services, Inc*., 330 NLRB 791, 791 fn. 2 (2000); *Superior Welding, Inc*., 325 NLRB 1023, 1023 fn. 1 (1998); *Cherry Hill Textiles*, 309 NLRB 268, 268 fn. 1 (1992); *Caamano Bros., Inc*., 304 NLRB 24, 24 fn. 1 (1991); *Boyertown Packaging Corp*., 303 NLRB 441, 441 fn. 1 (1991); *Farley Candy Co*., 300 NLRB 849, 849 fn. 1 (1990).

[14] Had the General Counsel felt so strongly about this, a motion to strike the exceptions could have been filed months ago, when the exceptions were originally filed, providing *HTH* a greater opportunity to reply or amend its exceptions, if necessary. *See Special Touch Home Care Services*, 349 NLRB No. 75 (2007). Waiting until the Answering Brief suggests a lack of solid argument to support ALJ McCarrick's decision and recommended order and the General Counsel's position; General Counsel requested and received a lengthy extension of time in which to answer and leave to file a 100-page brief.

with the brief and supporting argument therein, sufficed to set forth these parts of the decision *HTH* claimed as erroneous. *See Aladdin Hotel and Casino*, 273 NLRB 270, fn. 1 (1984). The General Counsel demonstrated, by way of the various footnotes listed throughout in its Answering Brief, no problem understanding the exceptions and the related allegations or findings. *Aitoo* at 366. The General Counsel's argument should be rejected.

II. CONCLUSION

WHEREFORE, for any and all of the reasons stated above, and any additional reasons deemed appropriate, *Hawaii Tribune-Herald* respectfully requests that the ALJ's findings, Decision and Recommended Order in NLRB Case Nos. 37-CA-7043; 37-CA-7045; 37-CA-7046; 37-CA-7047; 37-CA-7048; 37-CA-7084; 37-CA-7085; 37-CA-7086; 37-CA-7087; 37-CA-7112; 37-CA-7114; 37-CA-7115; 37-CA-7186 be overturned to the extent he ruled against *HTH*, and that the Consolidated Complaint be dismissed in its entirety.

Dated: July 7, 2008
Nashville, Tennessee

Respectfully submitted,

THE ZINSER LAW FIRM

/s/ L. Michael Zinser
/s/ Glenn E. Plosa
/s/ Scott A. Larmer

414 Union Street, Suite 1200
Nashville, Tennessee 37219
Telephone: 615.244.9700
Facsimile: 615.244.9734

Counsel to *Hawaii Tribune-Herald*

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the foregoing REPLY BRIEF OF HAWAII TRIBUNE-HERALD was served via Federal Express on this 7th day of July 2008 on the following:

Joseph Norelli, Regional Director, Region 20
901 Market Street, Suite 400
San Francisco, CA 94103-1735

Meredith Burns, Esq.
National Labor Relations Board
SubRegion 37
300 Ala Moana Boulevard, Room 7-245
Honolulu, Hawaii 96850-0001

Wayne Cahill
Administrative Officer
Hawaii Newspaper Guild, Local 39117
888 Mililani Street, Suite 303
Honolulu, HI 96813

/s/ Glenn E. Plosa