

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES**

**STEPHENS MEDIA, LLC, d/b/a
HAWAII TRIBUNE-HERALD**

and

Cases

**37-CA-7043
37-CA-7045-7048
37-CA-7084-7087
37-CA-7112
37-CA-7114-7115
37-CA-7186**

**HAWAII NEWSPAPER GUILD,
LOCAL 39117, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO**

ORDER DENYING RESPONDENT'S MOTION TO CHANGE HEARING LOCATION

This compliance action to recover back pay and related benefits was filed on December 21, 2012. The matter was set to go forward at the Acting General Counsel's regional office in Honolulu, Hawaii, originally on March 5, 2013, and now March 12, 2013, at 9 a.m.

On February 5, 2013, Respondent filed a motion to change hearing location (the Motion) primarily arguing that the hearing should be transferred from Honolulu, to Hilo, Hawaii because Respondent's principal place of business, the 2011 unfair labor practice (ULP) hearing, and Respondent's unidentified estimate of ten individual witnesses purportedly reside in or around Hilo, Hawaii, and these witnesses "will lose time from work to travel, which will inevitably have an impact on HTH's [Respondent's] operations as well as the work of the subpoenaed individuals." (Motion at 2-3.)

On February 6, 2013, the Acting General Counsel filed his opposition to the Motion (the Opposition) arguing that contrary to alleged facts in the Motion, there is no longer Federal Building space available in Hilo for a hearing and one Hilo hotel conference room costs \$300 per day plus a \$150 clean up fee. In addition the Opposition argues that unlike the ULP hearing, the issues in the current compliance hearing involve uncomplicated mathematics for loss of earnings and the two main witnesses, Smith and Bishop, are secured as the Acting General Counsel's witnesses and the government and not Respondent will bear their travel and lodging expenses. Finally, the Acting General Counsel argues that because its compliance officer and trial counsel are located in Honolulu where there is a regional hearing room and Respondent's counsel comes from Tennessee, the hearing should remain in Honolulu as Respondent has not identified the

names of its anticipated witnesses or the relevant purpose of their testimony and thus has provided no valid reason that the hearing should take place, instead, in Hilo, Hawaii.

The Board's rules do not set forth any guidelines for ruling on motions to change the hearing location selected by the General Counsel. However, guidance may be found in court decisions applying 28 U.S.C. Sec. 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . .") The decisions indicate that the trial judge has "broad discretion" in ruling on such motions. *SEC v. Savoy Industries, Inc.*, 587 F.2d 1149, 1154 (D.C. Cir. 1978), cert. denied 99 S.Ct. 1227 (1979).

Relevant factors include the plaintiff's choice of location, the availability and convenience of witnesses, parties, and counsel, the location of the documentary evidence, the place or situs where the material events occurred, and the possibility of delay and prejudice if transfer is granted. "The burden is on the moving party to demonstrate that the balance of factors weighs heavily in favor of transfer and that transfer would not merely shift inconvenience from one party to another." *Graham v. United Parcel Service*, 519 F.Supp.2d 801, 809 (N.D. Ill. 2007) (denying employer's motion to transfer employee's ADA and ERISA action from the Eastern to the Western Division of the Northern District of Illinois), citing, e.g., *In re National Presto Industries, Inc.*, 347 F.3d 662 (7th Cir. 2003) (upholding trial judge's denial of employer's motion to transfer SEC enforcement action from the Northern District of Illinois to the Western District of Wisconsin, even though the only factor favoring the former venue was the convenience of the SEC and its staff). See also *Carlile v. Continental Airlines, Inc.*, 953 F.Supp. 169 (S.D. Tex. 1997) (denying employer's motion to transfer employee's discrimination action from Galveston to Houston, Texas). But see *Altemose Construction Co. v. NLRB*, 514 F.2d 8, 12 (3rd Cir. 1975) (ALJ committed reversible error by denying respondent employer's motion to move to another location because of the "mob atmosphere" outside the federal building where the hearing was being held).

I find that the relevant factors favor the Acting General Counsel going forward with the scheduled compliance hearing in Honolulu, Hawaii. The unavailable Federal Building and high cost to rent private space in Hilo compared to the easy access to the Region's hearing room in Honolulu favor having the hearing in Honolulu because federal agencies such as the Board have limited resources. I further find that losing time from work to testify at hearing is an unavoidable consequence in all litigation and does not favor one side over the other. The parties can work out a trial schedule prior to hearing for witnesses which can easily allow a quick return to Hilo as I find travel between islands in Hawaii to be commonplace which would avoid costly lodging expenses. Thus, the Respondent's reliance on the Fifth Circuit Court of Appeal's analysis in *In re Volkswagen AG*, 371 F.3d 201, 204-205 (5th Cir. 2004), is misplaced as the added distance between Hilo and Honolulu should not lead to witness overnight stays and added lodging expenses because the high frequency and common nature of inter-island air flights do away with the increased lodging expenses and any alleged loss of productivity from regular employment.

In this compliance case, the Acting General Counsel acts as plaintiff and bears the burden of proving the amount of gross back pay due to Smith and Bishop as discriminatees and

also to present evidence concerning the nature and extent of the discriminatees' job searches.¹ See *Florida Title Co.*, 310 NLRB 609 (1993); *St. George Warehouse*, 351 NLRB 961 (2007). Moreover, a primary witness in this case is the compliance officer who resides in Honolulu as does the Acting General counsel. Furthermore, the most critical additional witnesses are the discriminatees, Smith and Bishop, who Acting General Counsel have secured for trial by bearing their travel and lodging expenses. The Acting General Counsel has agreed to arrange the timing of their testimony with Respondent's counsel in a pre-hearing conference call so that the Respondent may also have the opportunity to examine them. (Opposition at 2.) While much of the documentary evidence is contained in the Acting General Counsel's compliance specification served on Respondent's counsel on December 21, 2012 including exhibits 1-4, some of the additional documentary evidence may originate in Hilo, but can easily be subpoenaed to trial in Honolulu. Finally as stated above, the Acting General Counsel also resides in Honolulu and Respondent's counsel is coming from the mainland so traveling to Honolulu is not a problem for him.

Here, I find that the Region's Honolulu hearing room is the hearing location most convenient for the Acting General Counsel and the Board and that a plaintiff's choice of forum is entitled to considerable deference. Respondent has not identified the names of its anticipated witnesses or the purpose of their testimony. Having fully considered the evidence and arguments presented, I find that this compliance case is properly set in Honolulu, Hawaii, and good cause has not been shown for the hearing being changed to Hilo, Hawaii. As a result, the Motion to Change Hearing Location is **DENIED**.

Dated: February 7, 2013



Gerald M. Etchingham,
Associate Chief
Administrative Law Judge

Served by facsimile:

L. Michael Zinser, Glenn E. Plosa, Attys.
Trent K. Kakuda, Atty.

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¹ Issues litigated and decided in an unfair labor practice proceeding may not be relitigated in an ensuing compliance hearing. *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1617 (2001).

NLRB-SAN FRANCISCO

JOB #325

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	2/07	15:42	916152449734	EC--S	01' 15"	003	OK
002		15:44	918085412818	EC--S	00' 48"	003	OK

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