

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20, SUBREGION 37**

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

and

PACIFIC MEDIA WORKERS GUILD,  
LOCAL 39521, COMMUNICATION  
WORKERS OF AMERICA, AFL-CIO

Cases: 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

**OPPOSITION TO REVOKE ACTING GENERAL COUNSEL’S PETITION TO  
SUBPOENA *DUCES TECUM* ISSUED TO DAVID SMITH**

COMES NOW, the Employer, Stephens Media, LLC, d/b/a *Hawaii Tribune-Herald* (“*Hawaii Tribune-Herald*”), pursuant to Section 102.31(b) of the National Labor Relations Board’s (“NLRB or “the Board”) Rules and Regulations, Series 8, as amended, and the February 26, 2013 Notice to Show Cause, and opposes the Acting General Counsel’s Petition to Revoke the subpoena *duces tecum* that was served upon David Smith on February 19, 2013, in the above-named and numbered action. *Hawaii Tribune-Herald* opposed the Petition to Revoke on the following grounds.

**I. THE ACTING GENERAL COUNSEL DOES NOT REPRESENT SMITH**

The Acting General Counsel glosses over the fact that it does not represent Smith. With all due respect, the Acting General Counsel does not have standing to file a Petition to Revoke. See *Grief Packaging, LLC*, 2012 WL 3184971 (Aug. 6, 2012) (Petition to

Revoke Subpoena *Ad Testificandum* and *Duces Tecum* denied because petitioner did not represent the subpoenaed party.); *Teamsters Local 337*, 2011 WL 815005 (February 22, 2011) (Petitions to Revoke Subpoenas *Duces Tecum* denied because petitioner did not have standing to file a petition to revoke a subpoena addressed to a third party.) *see also* *NLRB v. North American Van Lines, Inc.*, 611 F.Supp. 760, 766 (N.D. Ind. 1985) (Employer did not have standing to assert privacy interests of employees it did not represent in an effort to resist production of documents) To the extent that the Acting General Counsel relies on “policy” to justify filing its Petition to Revoke, and to the extent that “policy” is a valid ground for a pleading, *Hawaii Tribune-Herald* asserts that the information requested in the subpoena and the language contested by the Acting General Counsel were made on similar “policy” grounds as explained, *infra*.

## **II. HAWAII TRIBUNE-HERALD’S REQUESTS ARE SPECIFIC AND DEFINED**

The Acting General Counsel has objected to each and every one of *Hawaii Tribune-Herald*’s requests. It strains credulity that no information requested by *Hawaii Tribune-Herald* should be produced, which would be the effect of granting the Acting General Counsel’s Petition to Revoke.

The Acting General Counsel objects to *Hawaii Tribune-Herald*’s requests as being overly broad and/or vague, without recognizing that *Hawaii Tribune-Herald* limited its request in the definitions contained in Attachment A. *Hawaii Tribune-Herald* defined what was a document to address concerns about what should be produced.

It is well settled that subpoenaed information should be produced if it relates to any matter in question, can provide background information, or can lead to other evidence potentially relevant in an allegation in the Compliance Specification. *See*

*Perdue Farms*, 323 NLRB 345, 348 (1987), affd. in relevant part 144 F.3d 830, 833-34 (D.C. Cir. 1998). The objecting party has the burden of demonstrating what is overbroad and why; general objections should be discounted. The subpoena has instructions and makes very specific requests as to which information is being requested. Generic assertions of over-breath and vagueness should fail, as a result.

The Acting General Counsel similarly argues that the subpoena seeks irrelevant information. However, the proper standard of relevance is more inclusive than the argument in the Petition to Revoke would allow. The proper standard for relevance is quite broad. *See Perdue Farms*, 323 NLRB at 348. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.* (citing Fed. R. Evid. 401). The Acting General Counsel fails to recognize that the purpose of a subpoena is to ascertain the truth so that justice is served even if the information may be detrimental to the Acting General Counsel’s case. *See HH3 Trucking, Inc.*, 205 W.L. 486417 (NLRB Division of Judges) (“failure to comply with the subpoena foreseeably frustrates a determination of the truth.”) Smith should not be in the position to marshal evidence that the Acting General Counsel feels is beneficial, such as Smith’s live testimony, while suppressing all other forms of evidence. In fact, under *Bannon Mills*, the Acting General Counsel is prohibited from producing primary or secondary evidence upon any matter of which the Acting General Counsel has filed a Petition to Revoke, pursuant to a subpoena. *See* 146 NLRB 611, 633 (1964). The blade cuts both ways; the Acting General Counsel cannot proffer evidence in support of its

calculations and at the same time seek to prohibit *Hawaii Tribune-Herald* from obtaining evidence to challenge those calculations.

### III. REQUEST ONE

Request one states:

*All Federal and State Tax Returns from 2006 through 2012.*

*Hawaii Tribune-Herald* **did not** request information pertaining to Smith's wife.

The Acting General Counsel's argument that a joint tax return encompasses information pertaining to Smith's wife is not a persuasive reason to deny the request, particularly when the tax returns have the potential to yield relevant information about Smith.

Significantly, the Acting General Counsel does not argue that Smith's tax returns are irrelevant; in fact, the Acting General Counsel cannot credibly argue otherwise. The fact that a tax return may contain information about Smith's wife is an insufficient reason to revoke this subpoena request.

To the extent Your Honor deems it appropriate, *Hawaii Tribune-Herald* would be willing to agree to a protective order to address any privacy concerns.

The Acting General Counsel citation to *Brink's Inc.*, 281 NLRB 468 (1986) (Mot. at 2), was peculiar. The issue in *Brinks* was whether the Petitioner was affiliated with another union, Local 25. *Id.* at 469. The rationale of the Board was not that the information sought was irrelevant; rather the information could be obtained from another source – Local 25. *Id.* Significantly, insofar as it relates to the instant matter, *Brink's* was not a compliance specification. In referencing *Brink's* the Acting General Counsel presents an apple while claiming it to be an orange.

A 1099 or W-2 Form only shows what someone reported to have paid Smith. It is entirely conceivable that Smith did not provide the Acting General Counsel with all of his 1099 or W-2 Forms. A tax return confirms that the amounts reported by Smith match up with what was reported to the State and Federal Governments as remuneration. While the Acting General Counsel may not wish to acknowledge that Smith may not have fully disclosed interim earnings, that possibility exists when tax returns are not examined.<sup>1</sup>

Furthermore, the Acting General Counsel provided information pertaining to Smith's remuneration from 2009 through 2012 in its calculations. It is inconsistent for the Acting General Counsel to provide this information and claim that it is irrelevant and that information that post-dates the last quarter of 2008 should not be produced, in an effort to revoke the subpoena.

#### **IV. REQUEST TWO**

Request two states:

*All documents that reflect compensation for work from March 2006 to June 25, 2012.*

The Acting General Counsel's argument fails to read the request in context. The request is for all documents that *reflect compensation for work*. The Acting General Counsel ignores the limiting qualifier of the request to make its argument.

The Acting General Counsel appears to make a hyper-technical definition of the term in an effort to support its argument and create ambiguity. *Hawaii Tribune-Herald* does not understand what "extraneous and irrelevant financial information" is potentially

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<sup>1</sup> See *American Navigation Co.*, 268 NLRB 426 (1983) (failure to disclose interim earnings precludes employee from receipt of backpay.)

<sup>2</sup> In *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975), the Court recognized "the 'make whole' purpose of Title VII is made evident by the legislative history. The

encompassed through its limited request. Again the request is for documents *reflecting compensation*, a qualifier the Acting General Counsel appears to have ignored. The Acting General Counsel has claimed certain earnings for Smith in this timeframe. It is unreasonable for the Acting General Counsel to present calculations for this time period, then petition to revoke a request for documents that will confirm or contest the Acting General Counsel's calculations. The Acting General Counsel's arguments are particularly quizzical given the teachings of *Bannon Mills, supra*. The documents should be produced.

#### V. REQUEST THREE

Request three seeks:

*All documents reflecting compensation received from the Newspaper Guild International Pension Fund from September 1, 2007, to the present, including IRS Form 1099Rs and statements of benefits.*

Backpay does not include time when an employee is unavailable for work. *See Sure-Tan* NLRB 467 U.S. 883 (1984). The Acting General Counsel is simply incorrect to contend that Smith's retirement does not toll his backpay calculations. In *Int'l Bhd. of Teamsters, Local Union No. 649*, 323 NLRB 2010, 2011, the NLRB agreed that the backpay period concluded when an employee retired. This is not a novel concept in the administration of statutes that return a discriminatee to equity.<sup>2</sup> Furthermore, a condition of Smith's retirement, and receipt of benefits from the Pension Fund, required him to

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<sup>2</sup> In *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975), the Court recognized "the 'make whole' purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act." As such, it is appropriate to consider backpay remedies in Title VII cases when determining the propriety of backpay in a compliance specification in an NLRB proceeding. *See Boehms v. Cromwell*, 139 F.3d 452, 461 (5<sup>th</sup> Cir. 1998) (in the context of an ADEA case); *Stamey v. Southern Bell Tel.*, 658 F.Supp. 1152, 1155-56 (N.D. Ga. 1987).

waive any right to reinstatement with *Hawaii Tribune-Herald*. Documents reflecting that waiver of reinstatement with *Hawaii Tribune-Herald* are clearly relevant to the Compliance Specification. By virtue of waiving reinstatement, and attesting to his intent to waive reinstatement in order to obtain retirement benefits (and Smith's subsequent refusal to accept reinstatement), Smith's backpay should toll as of the date he retired.<sup>3</sup> These documents should be produced.

#### **VI. REQUEST FOUR**

Request four seeks:

*All documents reflecting compensation from the Communication Workers of America and/or its affiliated or subordinate unions, including the Pacific Media Workers Newspaper Guild Local 39521, (previously Hawaii Newspaper Guild Local 39117) from March 2006 through June 2012, including bonuses, "hardship pay," and reimbursements.*

The term "documents" was defined in the subpoena. The Acting General Counsel's arguments of vagueness and over-breadth are specious. Significantly, the Acting General Counsel has failed to explain how and why the request is burdensome. A "party seeking to avoid compliance with a subpoena bears the burden of demonstrating that it is unduly burdensome or oppressive." *See CNN America Inc.*, 352 NLRB 675, 676 (2008) (citing *FDIC v. Garner*, F.3d 1138, 1145 (9<sup>th</sup> Cir. 1997)). To satisfy this burden, the Acting General Counsel is obligated to demonstrate that producing the subpoenaed information would "seriously disrupt its normal business operations." *Id.* (citing *NLRB v. Carolina Food Processors, Inc.*, F.3d 507 (513) (4<sup>th</sup> Cir. 1996) (quoting *EEOC v. Md.*

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<sup>3</sup> The Acting General Counsel's Petition to Revoke this request appears to be one of strategy, rather than merit as the Acting General Counsel did not file a Motion to Strike this defense from *Hawaii Tribune-Herald's* Answer to the Amended Compliance Specification.

*Cup Corp.*, 785 F.2d 471, 477 (4<sup>th</sup> Cir. 1986)). The Acting General Counsel has produced no argument, to this end. The documents should be produced.

## **VII. REQUEST FIVE**

Request five states:

*All documents related to requests for leave from any employer from March 2006 through June 2012, including Hawaii Newspaper Guild Local 39117 (and/or its successor and/or parent or affiliated unions), County of Hawaii, State of Hawaii, and any other employers.*

It's beyond cavil that unpaid time taken off during interim employment is relevant to a backpay specification hearing. If, for example, Smith took paternity leave or FMLA leave that was unpaid, the Acting General Counsel is to calculate backpay as though Smith would have taken the same leave had he continued to be employed at *Hawaii Tribune-Herald*. See, e.g. *Grosvenor Resort*, 350 NLRB 1197, 1197-98 (2007) (backpay reduced for time discriminatee was on maternity leave); *NLRB v. Jackson Hosp. Corp.*, 669 F.3d 784, 789 (6<sup>th</sup> Cir. 2012) (Affirming, in discussion, Board's determination that discriminatee was not entitled to backpay during leave period). The backpay specification calculations contain no leave for Smith. If there are no documents responsive to this request, so be it. However, the Acting General Counsel's Petition to Revoke appears to be more of a "knee jerk reaction" rather than a considered legal objection. The documents should be produced.

## VIII. REQUEST SIX

Request six states:

*All documents related to insurance premiums and insurance policies that you were offered and in which you participated between March 2006 and June 2012.*

Upon review, *Hawaii Tribune-Herald* modifies the request to address only medical health insurance premiums and medical insurance policies that Smith was offered, and in which he participated between October 2005 and June 2012.

The relevance of the request is self-evident and pertains to not only *Hawaii Tribune-Herald's* defenses, but to the Acting General Counsel's theory. If Smith was offered a medical insurance plan that was similar to *Hawaii Tribune-Herald's* but rejected it and instead selected a different plan with higher premiums and different coverage, that fact is exceedingly relevant with respect to a compliance specification hearing. The Acting General Counsel cannot reasonably seek to suppress documents responsive to this request.

*Hawaii Tribune-Herald*, as part of a backpay remedy, should not be forced to pay for any enhanced benefits enjoyed by Smith. The Acting General Counsel has provided no documents describing the medical or health insurance plan or plans enjoyed by Smith from which a reasoned comparison can occur. Benefits received by Smith through substitute insurance are properly offset by *Hawaii Tribune-Herald's* claim for the same loss. See *Aroostook County Regional Ophthalmology Ctr.*, 332 NLRB 1616, 1618 (2001) (citing *Cliffstar Transportation Co.*, 311 NLRB 152, 168 (1993)).

## IX. REQUEST SEVEN

Request seven states:

*All documents related to your retirement from Hawaii Tribune-Herald that became effective on September 1, 2007, including, but not limited to correspondence and forms/applications sent to the Newspaper Guild International Pension Fund; correspondence and notes with Hawaii Newspaper Guild Local 39117 (and/or its successor and/or parent or affiliated unions); correspondence and notes with the National Labor Relations Board; and documents related to the terms of your retirement.*

The Acting General Counsel's Petition to Revoke this request evidences a disagreement with *Hawaii Tribune-Herald's* legal theory but not a basis by which to grant the Petition to Revoke. The editorial qualities of the Acting General Counsel's arguments aside, Smith's retirement, documents pertaining to his retirement, and attestations of revoking his right to recall are exceedingly relevant to a backpay calculation and *Hawaii Tribune-Herald's* theory of calculating backpay.<sup>4</sup>

The Acting General Counsel's professed unfamiliarity with the term "retired" defies credulity. *Hawaii Tribune-Herald* provided the September 1, 2007 date to alleviate any "confusion." Further, as a compliance specification calculation expects the Acting General Counsel to establish reasonable gross pay calculations, whether Smith communicated to the National Labor Relations Board the terms and date of his retirement directly goes to the reasonableness of the Acting General Counsel's backpay specification calculations. To the extent that the Acting General Counsel calculated backpay by ignoring relevant evidence, the calculation is inherently flawed and a product

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<sup>4</sup> It also bears noting that *Hawaii Tribune-Herald* queried the Acting General Counsel about Smith's retirement – which the Acting General Counsel never disclosed – and admitted that it was aware of Smith's retirement since September 2007.

of arbitrary and capricious agency action. A due process defense is based on the United States Constitution; a Constitutional defense is never irrelevant.

**X. REQUEST EIGHT**

Request eight states:

*All documents related to applications for unemployment benefits from the State of Hawaii, including statements of efforts to obtain employment after March 2006.*

Any representations Smith made to the State of Hawaii regarding unemployment benefits and work status is relevant. *See Grosvenor Resort*, 350 NLRB at 1198-99; *St. George Warehouse*, 351 NLRB 961, 964-65 (2007).

The relevance of this information is self-evident. This information has the potential to produce relevant evidence, as well. The Acting General Counsel focuses only upon whether Smith “removed himself from the labor market.” (Mot. at 4). While that inquiry may be relevant to the Acting General Counsel’s theory of backpay, it is not dispositive of the matter and, significantly, not the basis of *Hawaii Tribune-Herald’s* theory of backpay. To the extent that Smith waived his right to recall from the *Hawaii Tribune-Herald*, and represented to the State of Hawaii that he had retired from *Hawaii Tribune-Herald*, these documents and admissions are relevant. The requested documents should be produced.

**XI. REQUEST NINE**

Request nine states:

*All documents reflecting admissions to state or federal agencies of your retirement effective September 1, 2007.*

The Acting General Counsel objects to this request because the term “retirement” is allegedly vague and ambiguous. The Acting General Counsel’s argument is

unreasonable. If Smith does not understand the word retired, particularly when he applied for retirement benefits from the International Newspaper Guild Pension Fund, let him say so. *Hawaii Tribune-Herald* would point to this “confusion” as a testament of Smith’s credibility.

Similarly, the Acting General Counsel’s claim of confusion with respect to the word “admission” is similarly suspect. To the extent that Smith ever disclosed or represented (i.e., admitted) that he had retired, documents to that end should be produced.

The notion of documents covering six years being “burdensome” fails to pass muster. Smith produced documents regarding expenses, medical insurance premiums, and wages going back six years. It is specious to argue that documents demonstrating backpay are relevant and dispositive, while documents that have the potential to reduce backpay are irrelevant and immaterial. The Acting General Counsel cannot have it both ways. The documents should be produced.

## **XII. REQUEST TEN**

Request ten states:

*All documents related to requests by the National Labor Relations Board, including SubRegion 37 and its agents, to obtain a verification of your tax returns for years 2006 through 2012.*

As explained in *Hawaii Tribune-Herald*’s Opposition and Answer to the Acting General Counsel’s Motion to Strike Portions of its Answer, it is the Acting General Counsel’s burden to present a backpay specification amount that is reasonable and not arbitrary. See *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006); *NLRB Case Handling Manual* III (Compliance) Section 10540.1. Any documents responsive to this request will be relevant to the reasonableness of the Acting General Counsel’s calculation of

backpay. If no documents exist responsive to this request, the Acting General Counsel's Petition to Revoke is all the more specious, as a result.

### **XIII. REQUEST ELEVEN**

Request eleven states:

*All documents related to savings plans in which you participated, or had the ability to participate, from March 2006 through June 2013, and matching amounts or contributions made by employers to these plans.*

In *United Enviro. Systems, Inc.*, 323 NLRB 83 (1997), over the objections of the Acting General Counsel, the Board deducted from net backpay certain profit sharing amounts received by the discriminatee upon his separation from his interim employer. *Id.* at 83-84. A second discriminatee was informed that he could roll over certain pension fund amounts from his interim employer's pension plan into an individual 401(k) retirement plan upon a separation, which was also deducted from net backpay. *Id.* The Board made very clear that proper deductions from net backpay are:

1. Payments from an interim employer's profit-sharing plan that a discriminatee on termination of that employee has received in cash;
2. Distributions from an interim employer's pension plan that a discriminatee on termination of that interim employment has the option of either receiving directly in cash or rolling over in a section 401(k) plan.

323 NLRB at 84.

The Acting General Counsel's Petition to Revoke should be denied, as a result.

### **XIV. REQUEST TWELVE**

Request Twelve states:

*All documents related to insurance plans in which you participated, or had the ability to participate, from March 2006 through June 2012,*

*including premiums, plan documents, summary plan descriptions, and coverage.*

Upon review, *Hawaii Tribune-Herald* modifies the request to address only medical health insurance premiums and medical insurance policies that Smith was offered, and in which he participated, between October 2005 and June 2012.

The relevance of the request is self-evident and pertains to not only *Hawaii Tribune-Herald's* defenses, but to the Acting General Counsel's theory. If Smith was offered a medical insurance plan that was similar to *Hawaii Tribune-Herald's* but rejected it and instead selected a different plan with higher premiums and different coverage, that fact is exceedingly relevant with respect to a compliance specification hearing. The Acting General Counsel cannot reasonably seek to suppress documents responsive to this request.

*Hawaii Tribune-Herald*, as part of a backpay remedy, should not be forced to pay for any enhanced benefits enjoyed by Smith. The Acting General Counsel has provided no documents describing the medical or health insurance plan or plans enjoyed by Smith from which a reasoned comparison can occur. Benefits received by Smith through substitute insurance are properly offset by *Hawaii Tribune-Herald's* claim for the same loss. *See Aroostook County Regional Ophthalmology Ctr.*, 332 NLRB 1616, 1618 (2001) (citing *Cliffstar Transportation Co.*, 311 NLRB 152, 168 (1993)).



