

**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 HUNTER BISHOP**

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 Hunter Bishop on February 18, 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 BISHOP

The Acting General Counsel glosses over the fact that it does not represent Bishop. 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-breadth 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.”) Bishop should not be in the position to marshal evidence that the Acting General Counsel feels is beneficial, such as Bishop’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 2005 through 2012.

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

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

Significantly, the Acting General Counsel does not argue that Bishop'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 Bishop'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.

In addition, the Acting General Counsel, in its February 14, 2013, eleventh-hour document production, provided Schedule C Tax Returns for Bishop's business, Lava Tree Productions. It is inconsistent for the Acting General Counsel to argue that tax returns are irrelevant and should not be produced when the Acting General Counsel has already voluntarily produced some tax returns. Further, the Acting General Counsel's arguments that a W-2 Form disposes of the issue is incorrect. A W-2 Form only shows what someone reported to have paid Bishop. It is entirely conceivable that Bishop did not provide the Acting General Counsel with all of his W-2 Forms. A tax return confirms that the amounts reported by Bishop 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 Bishop may not have fully disclosed interim earnings, that possibility exists when tax returns are not examined.¹

Furthermore, the Acting General Counsel provided information pertaining to Bishop'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.

Finally, *Hawaii Tribune-Herald* has offered a defense that Bishop's increased earnings should serve to offset increased medical insurance expenses. Bishop's earnings from 2009 through 2012 are necessary and relevant for *Hawaii Tribune-Herald's* defense, as a result. In addition, there may be a lump sum payout from a savings plan that should be considered in Bishop's backpay calculations, *infra*.

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

IV. REQUEST TWO

Request two states:

All documents that reflect compensation for work from October 2005 to June 25, 2012, including bank records.

The Acting General Counsel produced bank records in its February 14, 2013 eleventh-hour document production. It is curious that the Acting General Counsel would Petition to Revoke documents that it produced, already. The Acting General Counsel's argument also fails to read the request in context. The request is for all documents that *reflect compensation for work*, not simply bank records. The Acting General Counsel ignores the limiting qualifier of the request to make its argument.

The Acting General Counsel's feigned ignorance over the term "bank records" is hard to believe. 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 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's argument that bank records may involve information regarding Bishop's wife is similarly dismissed. *Hawaii Tribune-Herald* has requested no information regarding Bishop's wife. *Hawaii Tribune-Herald* seeks no information pertaining to Bishop's wife's bank records. The arguments made pertaining to producing Bishop's tax returns in spite of the returns having been jointly filed, *supra*, are equally applicable here.

In addition, citation to *Brink's Inc.* is unpersuasive as *Brink's* was not a compliance specification hearing where the primary dispute was about the amount of backpay due a discriminatee.

Finally, for the reasons explained, *supra*, information from 2009 through 2012 is relevant to *Hawaii Tribune-Herald's* defense that Bishop's increased earnings should serve to offset any increased health insurance payments for the time in question.

V. REQUEST THREE

Request three 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 October 2005 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 (9th 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) (4th Cir. 1996) (quoting *EEOC v. Md. Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)). The Acting General Counsel has produced no argument, to this end. The documents should be produced.

VI. REQUEST FOUR

Request four states:

All documents related to Lava Tree Productions including articles of incorporation, ledgers, profit and loss statements, rents and utilities, revenues, and remuneration from 2005 through 2012.

Lava Tree Productions only came to *Hawaii Tribune-Herald's* knowledge as a result of the February 14, 2013 eleventh-hour document production of the Acting General Counsel. The address of the business is Bishop's personal home address. Each of the Schedule C Tax Returns provided by the Acting General Counsel claim a loss. In addition, utilities serve as a large portion of the write-off for this business. It would appear that Bishop has constructed a business for the purposes of writing-off home utility expenses. If this is tax fraud, it is dishonest and goes directly to Bishop's credibility.

Additionally, to the extent that Bishop or the Acting General Counsel asserts that a backpay calculation should include the losses for Bishop's apparent business, this information becomes unquestionably relevant.

If Lava Tree Productions is a sham operation, it is relevant. The requested documents will help determine whether Lava Tree Productions is a sham and will yield relevant evidence that has the potential to impact the Compliance Specification Hearing. The requested documents should be produced.

VII. REQUEST FIVE

Request five states:

Copies of all employment contracts with Hawaii Newspaper Guild Local 39117 and/or its successor and/or parent or affiliated unions from October 2005 through June 2012.

The Acting General Counsel's argument presumes that Bishop received no remuneration from Hawaii Newspaper Guild Local 39117 and/or its successors after 2008. If there are no documents responsive to the request, the Petition to Revoke is specious. Without a verified tax return, there is uncertainty as to whether Bishop received any remuneration from Local 39117 and/or its successors after December 2008. This request has the potential to yield relevant information; the Acting General Counsel's Petition to Revoke should therefore be denied.

VIII. REQUEST SIX

Request six states:

All documents related to requests for leave from any employer from October 2005 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, Bishop took paternity leave or FMLA leave that was unpaid, the Acting General Counsel is to calculate backpay as though Bishop 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.) The backpay specification calculations contain no leave for Bishop. 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.

IX. REQUEST SEVEN

Request seven states:

All documents related to insurance premiums and insurance policies that you were offered and in which you participated between October 2005 and June 2012.

Upon review, *Hawaii Tribune-Herald* modifies the request to address only medical health insurance premiums and medical insurance policies that Bishop 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 Bishop was offered a medical insurance plan 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 Bishop during his employment with the County of Hawaii, State of Hawaii. The Acting General Counsel has provided no documents describing the medical or health insurance plan or plans enjoyed by Bishop from which a reasoned comparison can occur. Benefits received by Bishop 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)).

X. REQUEST EIGHT

Request eight states:

All documents related to David Smith and his retirement from Hawaii Tribune-Herald that became effective on September 1, 2007.

The Acting General Counsel asserts “Bishop has no relation to discriminatee David Smith’s alleged ‘retirement’ ...” The Acting General Counsel’s bald claim is not evidence. Bishop worked for Hawaii Newspaper Guild Local 39117 on September 1, 2007. To the extent that Bishop has information pertaining to Smith’s retirement, that information is plainly relevant, as the Acting General Counsel takes the position that Smith should receive compensation after his September 1, 2007, retirement. The fact that the information may reside with Bishop as opposed to Smith is not a reason to revoke the subpoena request. Further, the Acting General Counsel simply asserts that the request is irrelevant but offers not information as to why. The Acting General Counsel’s failure to explain why does not satisfy the burden explained in *Perdue Farms, supra*.

XI. REQUEST NINE

Request nine 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 2005 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.

XII. REQUEST TEN

Request ten states:

All documents related to retirement plans (401(k), pension) in which you participated, or had the ability to participate, from October 2005 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.

