

**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 AND ANSWER TO COUNSEL FOR THE ACTING GENERAL
COUNSEL’S MOTION TO STRIKE PORTIONS OF RESPONDENT’S ANSWER
TO AMENDMENT TO COMPLIANCE SPECIFICATION**

Comes now, Stephens Media, LLC, d/b/a *Hawaii Tribune-Herald* (“*Hawaii Tribune-Herald*”), pursuant to Section 102.24 of the National Labor Relations Board’s (“NLRB” or “the Board”) Rules and Regulations, Series 8, as amended, and the February 26, 2012 Notice to Show Cause, with this Opposition and Answer to the February 21, 2013 Motion to Strike Portions of Respondent’s Answer to Amendment to Compliance Specification filed by the Counsel for the Acting General Counsel in the above-named and numbered and action. The Acting General Counsel takes issue with five of *Hawaii Tribune-Herald*’s defenses contained in its Answer to the Amended Compliance Specification, and to the attachment of documents in the Answer, as well. For the reasons explained below, the Acting General Counsel’s Motion to Strike should be denied.

I. HAWAII TRIBUNE-HERALD'S SECOND DEFENSE

Hawaii Tribune-Herald's Second Defense States:

The Acting General Counsel has failed to verify the backpay amounts specified in the Compliance Specification. Hawaii Tribune-Herald has repeatedly asked the Acting General Counsel to verify the interim earnings of Bishop and Smith. The accuracy of the figures is unverified, as a result. Obtaining the tax verification is a simple, free procedure. Given the public policy statements of the Board in the recent case of Latino Express, Inc., 359 NLRB No. 44 (December 18, 2012), obtaining a verified tax return is "simply a matter of correspondence." Id at 2.

Hawaii Tribune-Herald and the General Counsel apparently agree that it is the General Counsel's burden to prove backpay amounts that are reasonable. As a result, it is incumbent upon the Acting General Counsel to accurately tabulate backpay calculations. A verified tax return verifies that wage information provided to the Acting General Counsel, by Bishop or Smith, is the sum total of monies reported to the Federal and State Governments. Verified tax returns are offered by the IRS free of charge upon filing IRS Form 4506-T; *Hawaii Tribune-Herald* has repeatedly requested that the General Counsel obtain a verified a tax return. All that is required is submitting paperwork to the IRS. It is "simply a matter of correspondence," which was a compelling reason for the NLRB to explain, in *Latino Express, Inc.*, 359 NLRB No. 44 (December 18, 2012), that it was appropriate to report the representative quarters of a lump sum payment to the Social Security Administration. The same reasoning applies to obtaining a verified tax return.

The General Counsel amorphously claims that tax returns "contain much personal and extraneous information [and] there are often more reliable documents with which to obtain information about interim earnings," but cites no authority for this proposition nor any documents that are "more reliable." (Mot. at 2-3). The General Counsel did provide Social Security statements for Bishop and Smith; however the reports were dated

December 20, 2012, and could not have been provided on September 15, 2012, as suggested by the Acting General Counsel.

Furthermore in *Atlantic Veal & Lamb, Inc.*, 358 NLRB 74, Slip Op. at 2 (June 27, 2012), the General Counsel asserted that the employees' tax returns were credible evidence in a dispute over the amount of money earned by a discriminatee. Tax returns, and verification of interim earnings are exceedingly relevant, as explained in *American Navigation Co.*, 268 NLRB 426 (1983) (Employee precluded from backpay for failing to disclose interim earnings.) It is inconsistent for tax returns to be relevant and dispositive for the General Counsel, in *Atlantic Veal*, but to be unreliable in the instant case.

The Acting General Counsel's assertions that tax returns are unreliable and, by extension, irrelevant, is unpersuasive.

II. HAWAII TRIBUNE-HERALD'S THIRD DEFENSE

Hawaii Tribune-Herald's Third Defense States:

*The bias of the Acting General Counsel, in this case is inexcusable. The Acting General Counsel seeks a punitive remedy, rather than a return to equity. On August 31, 2012, Hawaii Tribune-Herald chronicled the timeline of communications with the Acting General Counsel in an effort to comply with the D.C. Circuit's April 20, 2012 Decision. (See **Exhibit**¹ **5**). A second letter chronicling the events, to date, was sent on December 7, 2012. (See **Exhibit** **6**). The Acting General Counsel did not respond to the December 7, 2012 letter and Hawaii Tribune-Herald sent a letter on December 21, 2012. (See **Exhibit** **7**). Later that day, on December 21, 2012, Hawaii Tribune-Herald received a response document from the Acting General Counsel where the Acting General Counsel admitted she did not rely on tax returns for Mr. Smith and Mr. Bishop in her calculations of backpay. (See **Exhibit** **8**). In response, on December 26, 2012, Hawaii Tribune-Herald wrote a letter confirming that the Acting General Counsel: 1) Was aware that Mr. Smith had applied for and received full pension benefits effective September 1, 2007; 2) Made note of the Acting General Counsel's admission that she did not rely on tax returns of Mr. Smith or Mr. Bishop to verify or calculate backpay; 3)*

¹ Exhibits 5-8 are excluding from this Opposition and Answer.

Disagreeing with the Acting General Counsel's assertion that Hawaii Tribune-Herald was not "interested in a fair and just resolution" to the matter.

*The Acting General Counsel's actions and inactions have demonstrated arbitrary and capricious agency action through the Acting General Counsel's withholding of relevant information pertaining to backpay; the unnecessary delay in responding to Hawaii Tribune-Herald that unnecessarily lengthened the backpay period for Mr. Smith; and failing to verify interim earnings of Mr. Smith and Mr. Bishop. This was not an example of the Acting General Counsel being unable to verify interim earnings; rather this is an example of the Acting General Counsel being **unwilling**.*

The Acting General Counsel asserts, "Agency bias is not an issue in a compliance hearing." (Mot. at 3). *Hawaii Tribune-Herald* agrees that a compliance specification hearing is not the appropriate forum to redress a grievance about agency bias; however, as the burden is upon the Acting General Counsel to establish **reasonable** gross backpay calculations, unreasonable statements and actions of the Acting General Counsel are necessarily relevant to determining the reasonableness of the backpay specification calculation. *Hawaii Tribune-Herald* asserted throughout its Answer that the actions – and notable inactions – of the Acting General Counsel in calculating backpay was unreasonable. The merits of the Compliance Specification are based upon the Acting General Counsel's investigation. Arbitrary and capricious agency action is undeniably relevant to how the Acting General Counsel arrived at the backpay calculations. As a matter of due process, *Hawaii Tribune-Herald* should be permitted to present evidence in support of this defense.

III. *HAWAII TRIBUNE-HERALD'S FOURTH DEFENSE*

Hawaii Tribune-Herald's Fourth Defense States:

Mr. Bishop's medical expenses, contained in paragraph 8 of the Compliance Specification, are incorrect.

3(f) of the Compliance Specification states that from about December 8, 2008, to July 9, 2012, Bishop worked for the County of Hawaii, State of Hawaii and, based on Exhibit 1, pages 5-10, earned interim wages greater than the wages he would have received had Hawaii Tribune-Herald employed him at the time. The Acting General Counsel asserts that Hawaii Tribune-Herald should be compelled to pay for Bishop's more expensive medical insurance premiums, in paragraph 8(d) of the Compliance Specification, but this calculation erroneously discounts the increased wages earned by Bishop during this time. The total difference in earnings, for Bishop, was \$100,906. This increase in earnings should be considered an offset to any increase that Bishop incurred under a different medical insurance plan with higher premiums. As a result, the health insurance premiums for Bishop should be \$0.

The Acting General Counsel relies upon *Aroostook County Regional Ophthalmology Ctr.*, 332 NLRB 1616, 618 (2001) for the proposition that Bishop's excess interim earnings cannot be considered to offset any increased medical expenses. (Mot. at 5). *Hawaii Tribune-Herald's* Answer is quantitatively different from the Respondent's answer in *Aroostook*. In *Aroostook*, the Respondent denied, "without comment, paragraph nine of the specification ..." 332 NLRB at 618. In contrast, *Hawaii Tribune-Herald* denied, with explanation, paragraphs 3(i), 8(d), and its Fourth Defense. The Acting General Counsel appears to disagree with *Hawaii Tribune-Herald's* legal theory; the Acting General Counsel's difference of opinion is not dispositive of the issue, and should not serve as a basis to disallow *Hawaii Tribune-Herald's* defense.

In addition, the Acting General Counsel correctly asserts that the Board offsets like benefits. (Mot. at 5). To the extent that benefits are not "like" (and are, in-fact, greater), *Hawaii Tribune-Herald*, as part of a backpay remedy, should not be forced to

pay for enhanced benefits enjoyed by Mr. Bishop during his employment with the County of Hawaii, State of Hawaii². The Acting General Counsel has provided no documents describing the health insurance plan enjoyed by Mr. Bishop from which a reasoned comparison can occur. It is entirely possible that Mr. Bishop selected a more generous plan instead of a comparable plan to that which he enjoyed at *Hawaii Tribune-Herald*, in which case *Hawaii Tribune-Herald* cannot be compelled to pay for this increase. *Hawaii Tribune-Herald* must preserve this defense by offering it in its Answer.

Aroostook further explains that benefits received by Mr. Bishop through substitute insurance are properly offset by *Hawaii Tribune-Herald's* claim for the same loss. 332 NLRB at 1618 (citing *Cliffstar Transportation Co.*, 311 NLRB 152, 168 (1993)). *Hawaii Tribune-Herald* must be able to present evidence to this end; the Acting General Counsel's Motion seeks to preclude this defense.

The General Counsel's Motion to Strike paints with too broad of a brush; the details of the medical and payment plans the General Counsel claims should not be utilized to offset, must be evaluated and fleshed out. It is inappropriate to strike *Hawaii Tribune-Herald's* Fourth Defense, as a result.

In addition, *Hawaii Tribune-Herald* respectfully asserts that to the extent *Aroostook* is thought to control the matter, the instant facts create a matter of first impression, as *Aroostook* does not squarely address offsetting increased insurance premiums with increased earnings. It is well settled that the Act is a remedial statute and that backpay specifications are to be tailored so that a discriminatee does not receive a windfall. See e.g., *Deming Hosp. Corp. v. NLRB*, 665 F.3d D.C. Cir. 196, 200 (2011)

² *Hawaii Tribune-Herald* issued a subpoena to the State of Hawaii, County of Hawaii for documents, to this effect.

(citing *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 888 (D.C. Cir. 1997)).

Hawaii Tribune-Herald asserts that the Acting General Counsel's proposed backpay calculation, with respect to Mr. Bishop's increased earnings not serving to offset increased medical insurance premiums, constitutes an impermissible windfall in contravention with precedent and the stated purposes of the Act.

IV. HAWAII TRIBUNE-HERALD'S SIXTH DEFENSE

Hawaii Tribune-Herald's Sixth Defense States:

Hawaii Tribune-Herald is without sufficient information to verify the amounts alleged by the Acting General Counsel for medical expenses for Smith or Bishop because the Acting General Counsel has not provided any verifying documentation of the amounts alleged in the Compliance Specification.

The Acting General Counsel, in drafting its Argument, misrepresented *Hawaii Tribune-Herald's* Argument, claiming that *Hawaii Tribune-Herald* asserted that the Acting General Counsel "failed to provide documentation to verify the amounts claimed ..." (Mot. at 5). *Hawaii Tribune-Herald* asserted, as a defense, that the General Counsel "has not provided any verifying documentation of the amounts alleged ..." At the time of the defense, the assertion was true. The defense still survives, however.

Hawaii Tribune-Herald acknowledges that the Acting General Counsel did provide information ostensibly in support of the calculations for medical expenses for Smith and Bishop. The Acting General Counsel's assertion is that the provided documentation disposes of the defense and *Hawaii Tribune-Herald's* defense now lacks a factual basis. In so doing, the Acting General Counsel has offered testimony, in the form of hearsay, to support its assertion. The facts of the Acting General Counsel's argument can be presented at the hearing, and, upon review, Your Honor can determine the veracity

and adequacy of the Acting General Counsel's argument. Presently, Your Honor cannot determine the factual basis behind the Acting General Counsel's arguments. If the Acting General Counsel's arguments prevail, then *Hawaii Tribune-Herald's* defense fails. However, that determination can only be made after the presentation of evidence. The Acting General Counsel's arguments assume that the Acting General Counsel has met the necessary burden of proof. Granting a Motion to Strike, in this regard, would be error. The Acting General Counsel's argument should fail.

V. HAWAII TRIBUNE-HERALD'S SEVENTH DEFENSE

Hawaii Tribune-Herald's Seventh Defense States:

Hawaii Tribune-Herald is without sufficient information to verify the calculation for pension contributions for Bishop because the Acting General Counsel has refused to provide information to verify the allegations in the Compliance Specification, despite Hawaii Tribune-Herald's repeated requests.

Once again the Acting General Counsel seeks to adduce evidence, by way of hearsay, in support of a factual assertion to support its argument. The Acting General Counsel did send *Hawaii Tribune-Herald* a letter ostensibly from the Newspaper Guild International Pension Fund, but the basis of the letter (i.e. the underlying data) has never been provided. The math explaining how the purported pension contribution amounts were calculated has not been provided to *Hawaii Tribune-Herald*. *Hawaii Tribune-Herald* has issued a subpoena to the Newspaper Guild International Pension Fund in an effort to obtain the underlying data. Unless the General Counsel can verify the amounts

contained in the October 10, 2012 letter³, then the Acting General Counsel's Argument should fail.

VI. HAWAII TRIBUNE-HERALD MAY ATTACH EXHIBITS TO ITS ANSWER

The Acting General Counsel's primary assertion is that the attachment of documents to an Answer is "improper," (Mot. at 6); however conspicuously omitted is any authority to support this opinion. The Board's Rules and Regulations do not preclude attaching documents to an answer. *Hawaii Tribune-Herald* has the unfettered right to answer the Compliance Specification in the matter it the matter it deems most appropriate to guard its interest and present its case.

Attaching exhibits to an answer to an compliance specification comports with Section 102.56(b) and (c) of the Board's Rules and Regulations. It should be recognized that the Acting General Counsel, in the Compliance Specification, attached exhibits, as well.

Additionally, it should be noted that in *Aroostook*, "the General Counsel filed with the Board a Motion to Strike Portions of Respondent's Answer to the Compliance Specification and for partial summary judgment ***with exhibits attached.***" 332 NLRB at 1616 (emphasis added). In response, the Respondent filed an Answer, ***with exhibits attached.*** *Id.* (emphasis added).

It should further be noted that the Acting General Counsel does not dispute the authenticity of the attached documents; rather the brunt of the Acting General Counsel's argument appears to be a disagreement with the form of *Hawaii Tribune-Herald's*

³ The General Counsel neglects to reference the January 24, 2013 letter that ***corrected*** the purported amounts in the October 10, 2012 letter. Significantly, the Acting General Counsel has offered no data beyond the bald assertion contained in the Fund's letter.

Answer. A stylistic disagreement is not a ground upon which to strike a properly pled

Answer. The Acting General Counsel has not claimed that *Hawaii Tribune-Herald* failed to comport with Section 102.56(b) or (c) of the Board's Rules and Regulations. There is no prohibition to attaching exhibits to answers in administrative (or judicial) forums. The Acting General Counsel's Argument is specious and should be denied.

