

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

TINLEY PARK HOTEL AND CONVENTION CENTER, LLC

And

Case 13-CA-141609

AUDELIA SANTIAGO, an Individual

**RESPONDENT'S BRIEF IN OPPOSITION TO GENERAL COUNSEL'S
LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Respondent, Tinley Park Hotel and Convention Center, LLC (“Respondent”), by its attorneys, Laura A. Balson and Brianna L. Golan of Golan & Christie LLP, hereby submit the following Brief in Opposition to General Counsel’s Limited Exceptions to the Administrative Law Judge’s Decision (the “Limited Exceptions”).

INTRODUCTION

The Limited Exceptions should be rejected because they ask for relief that (a) has already taken place and (b) goes against established case law. The first exception asks that the Board require the inclusion of an affirmative provision to rescind the unlawful policies within Respondent’s Employee Manual. The second exception asks that the Board award reimbursement to the Charging Party, Audelia Santiago, for her search-for-work and work related expenses. The first exception asks the Board to order an affirmative action that Respondent has already completed. The second exception asks the Board to order a reimbursement that is not authorized under the National Labor Relations Act or any case law. As such, neither exception has any merit and should not be granted.

ARGUMENT

A. Respondent has fully complied with *Purple Communications* by distributing revised employee manuals that removed the offending provisions.

The General Counsel's first exception both disregards testimony within the hearing and misinterprets *Purple Communications, Inc.*, 361 NLRB No. 43 (2014). Citing to *Purple Communications*, the first exception asks that the Board require Respondent to furnish its employees with an insert rescinding the offending provisions or furnish employees with new employee handbooks. As Respondent has already distributed a new employee manual, Respondent has fully complied with *Purple Communications* and an order for additional affirmative action is unnecessary.

Purple Communications provides two (2) alternatives that the Board may order after determining that a provision in an employee handbook is unlawful. In those instances, the Board will order the employer to either:

“[f]urnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; *or* publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

Id. at 6 (emphasis added); *Boch Imports, Inc. d/b/a Boch Honda and International Association of Machinists & Aerospace Workers, District Lodge 15, Local Lodge 447*, 362 NLRB No. 83, slip op. at 4 (2015).

As was stated in Respondent's Post-Trial Brief, and testified to during the hearing, Respondent has already revised its Employee Manual, working directly with the NLRB in doing so and removing the provisions that were deemed unlawful. Moreover, when the revised Employee Manual was distributed to Respondent's employees in September 2014, Respondent also distributed (a) a letter of explanation and (b) an acknowledgement form that was signed by each

employee that is kept in the employees' personnel records. As Nancy Reed testified during the hearing:

The policy at that time was to make the changes that were necessary and to distribute them to each employee, along with a letter of explanation, and asking them to read and acknowledge the changes. And that acknowledgement was then returned to the human resources department for incorporation in their personal records...there was also a brief letter of explanation saying that we had amended the employment manual as far as three items were concerned. (Tr. 141:7-142:4).

Despite this, the General Counsel wants the Board to order Respondent to either provide an insert explaining that the offending provision has been rescinded **or** furnish another new handbook. *Purple Communications* presents these two affirmative actions as alternatives and does not require an employer to do both. As Respondent has already fully complied with *Purple Communications* by issuing a new employee manual, which was prepared using the language approved by the NLRB, there is no reason for the Board to order any additional affirmative action on this basis and the first exceptions should be overruled.

B. The Board Should not overturn the ALJ's ruling declining to award search-for-work and work-related expenses

As the General Counsel acknowledges in his Brief, current NLRB case law does not authorize payment of job search and other work related fees independent of interim employment earnings. NLRB case law calculates expenses like travel expenses and job search expenses as deductions from interim employment earnings as opposed to separate expenses. See *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007), *Cibao Meat Prods.*, 348 NLRB 47, 50 (2006), *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965), *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976), *Rainbow Coaches*, 280 NLRB 166, 190 (1986), and *Coronet Foods, Inc.*, 322 NLRB 837, 837 (1997). In the cited cases above, the NLRB reimbursed the various expenses as interim expenses "only for increased costs over and above what would have been incurred by employee

working for Respondent.” *D.L. Baker*, at 4. Additionally, in several recent cases, the NLRB refused to change the existing law where the general counsel sought reimbursement for out of pocket or job search expenses. See *Casworth Enterprises, Inc.*, 362 NLRB No. 131, slip op. at 2 n. 2 (2015) (holding that “such relief would involve a change in Board law”); *Katch Kan USA, LLC*, 362 NLRB No. 162, slip op. at 1 n. 2 (2015); *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 4 n.5 (2015). The NLRB has had many occasions to change the law and order reimbursement for out-of-pocket or job search expenses, but has chosen not to do so.

Moreover, the reimbursement of search-for-work expenses is speculative damages, which are outside of NLRB powers. “A make-whole order must remedy actual and not speculative damages.” *Page Litho*, 313 NLRB 960, 962 (1994). Back pay seeks to compensate employees for actual damages as opposed to speculative damages. *Iron Workers Local 377*, 326 NLRB 375, 377 (1998) (“the Board’s power to remedy violations of the [National Labor Relations] Act, though broad, does not extend to imposing what amounts to punitive and speculative damages for a violation of the Act.”), *Page Litho*, 313 NLRB 960, 962 (1994) (“a make-whole order must remedy actual and not speculative damage”).

Quite simply, there is no case law that supports the General Counsel’s position. Back pay serves the function of putting an employee back into the position that he or she would have been in if not for the termination of employment. Search for work expenses are too speculative and therefore outside of the NLRB’s power. Without any legal authority that would allow the NLRB to award these additional damages, the second exception must be denied.

CONCLUSION

The General Counsel's Limited Exceptions ask for an affirmative action that has already taken place as well as an award that the NLRB has already determined it does not have the power to order. The Limited Exceptions are therefore without merit and should be denied.

Dated: August 25, 2015

Respectfully submitted,
TINLEY PARK HOTEL & CONVENTION
CENTER, LLC,

By



One of Its Attorneys

Laura A. Balson, Esq.
Brianna L. Golan, Esq.
GOLAN & CHRISTIE LLP
70 West Madison Street, Suite 1500
Chicago, Illinois 60602
(312) 263-2300

CERTIFICATE OF SERVICE

I, Sandra Tasciotti, a non-attorney, hereby certify that copies of **Respondent's Brief In Opposition to General Counsel's Limited Exceptions to the Administrative Law Judge's Decision** have been electronically filed with the Office of the Executive Secretary/Board and served upon the following parties via electronic and U.S. mail, postage prepaid, this 25th day of August 2015.

Alexis Martin
224 S. Michigan Avenue
Suite 300
Chicago, IL 60604
amartin@caffarelli.com

R. Jason Patterson
Counsel for the General Counsel
National Labor Relations Board
200 South LaSalle Street, Suite 900
Chicago, Illinois 60604
Jason.Patterson@nlrb.gov



Subscribed and Sworn to
before me this 25th day of
August 2015



NOTARY PUBLIC

