

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

**AQUA-ASTON HOSPITALITY, LLC, D/B/A
ASTON WAIKIKI BEACH HOTEL AND HOTEL
RENEW**

and

**Cases 20-CA-154749
20-CA-157769
20-CA-160516
20-CA-160517**

UNITE HERE! LOCAL 5

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION
TO RESPONDENT'S REQUEST FOR SPECIAL PERMISSION TO APPEAL**

On January 29, 2016¹, Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (Respondent), served Counsel for the General Counsel (General Counsel) with a Request for Special Permission to Appeal from a Ruling of the Administrative Law Judge Granting Counsel for the General Counsel's Motion to Permit Testimony by Video Conference. Respondent attached the Administrative Law Judge's Order Granting Counsel for the General Counsel's Motion to Permit Testimony by Video Conference as Exhibit "1". Respondent attached the Administrative Law Judge's Order Denying Respondent's Petition to Revoke Subpoena Ad Testificandum A-1-PTY1G1 as Exhibit "2".

General Counsel opposes the Request for Special Permission to Appeal for the following reasons:

¹ All dates refer to 2016, unless otherwise specified.

I. No Undue Burden

Respondent fails to show that Administrative Law Judge Mary Cracraft erred in permitting testimony by video conference from the Board's Region 20 office in San Francisco, California. Mark DeMello is a named individual in the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Consolidated Complaint) dated October 28, 2015. Respondent admits that DeMello is the General Manager at Respondent's Aston Waikiki Beach and Hotel Renew properties. Respondent further admits that DeMello is a supervisor and agent within the meaning of Sections 2(11) and 2(13) of the National Labor Relations Act, as amended (the Act). The Consolidated Complaint includes notice that a hearing would commence on February 2, 2016, before an Administrative Law Judge for the presentation of evidence and testimony regarding the allegations in the Consolidated Complaint. Respondent and General Manager DeMello should have had a reasonable expectation, since at least October 28, 2015, that DeMello could be a witness at the hearing scheduled to begin on February 2, 2016.

DeMello purchased airline tickets for travel from Honolulu to San Francisco on January 28, returning from San Francisco the morning of February 3, arriving in Honolulu the afternoon of February 3. Respondent fails to show any evidence that DeMello arranged other flights or travel outside San Francisco area. Respondent has presented no evidence that DeMello would need to "cut short" his vacation to travel to San Francisco to present his testimony by video evidence. Respondent is already scheduled to be in San Francisco the morning of February 3 to catch a flight to Honolulu.

Further, the Region issued the Consolidated Complaint on October 28, 2015. DeMello and Respondent had three months' notice that the hearing scheduled in the Consolidated Complaint would conflict with DeMello's travel plans. Despite knowing of the scheduled

hearing three months prior to DeMello's travel date, no modification of DeMello's travel plans have occurred. Respondent has the burden to establish that the subpoena is unreasonable or oppressive. *Sullivan v. Dickson*, 283 F.2d 725 (9th Cir. 1960), *cert. denied*, 366 U.S. 951 (1961); *In re Yassai*, 225 B.R. 478, 483-84 (Bankr. C.D. Cal. 1998). That burden is a heavy one. *In re Yassai*, 225 B.R. at 484. Respondent fails to show that the Administrative Law Judge erred in denying Respondent's petition to revoke the subpoena ad testificandum issued to DeMello and the order permitting DeMello's testimony by video conference from the Region 20 office in San Francisco.²

II. DeMello is Necessary to Prove General Counsel's Case

Respondent argues that its former employee, Senior Vice President for Human Resources Velina Haines, is available to testify at the start of the hearing on February 2. Respondent failed to reveal that shortly after General Counsel issued the subpoena ad testificandum to DeMello, General Counsel inquired with Respondent's counsel about the status of Haines. Respondent's counsel stated that Haines had retired from employment and was living in the state of Oregon. Only after Judge Cracraft issued her January 28 orders did Respondent reveal for the first time that Haines would be in Honolulu, Hawaii, and would be available to present testimony on February 2. Respondent, by its own omission, fails to show that the Administrative Law Judge erred.

The issue, *inter alia*, to be decided in this case is whether Respondent violated Section 8(a)(3) of the Act by issuing written discipline to its employees Edgar Guzman and Santos "Sonny" Ragunjan due to their protected concerted activities. Respondent denies disciplining Guzman and Ragunjan for their protected concerted activities. DeMello, as General Manager, investigated employee complaints against Guzman and Ragunjan. DeMello also participated in

² General Counsel's January 22 Opposition to Respondent's Petition to Revoke Subpoena Ad Testificandum is attached as Exhibit "A". General Counsel's January 20 Motion to Permit Testimony by Video Conference is attached as Exhibit "B".

the decision making process, with Senior Vice President Haines, in determining and deciding whether to discipline Guzman and Ragunjan. He aided Haines in making the final decision to issue discipline to Guzman and Ragunjan, and what type of discipline they would receive. DeMello signed the written warnings issued to Guzman and Ragunjan. Unlike DeMello, Haines did not participate in Respondent's investigation.

Respondent fails to show that the Administrative Law Judge erred in not considering Respondent's manager Jenine Webster as an alternate to DeMello's testimony. Although Webster was a part of Respondent's investigation into the claims made against Guzman and Ragunjan, unlike DeMello, Webster admittedly was not involved in the decision making process resulting in Respondent issuing written warnings to Guzman and Ragunjan. Only DeMello participated in both the investigation and Respondent's decision making process when issuing the discipline in question. Respondent fails to show that the Administrative Law Judge erred when it denied Respondent's petition to revoke the subpoena issued to DeMello.

DeMello is the only single witness who can testify to both Respondent's investigation of Guzman and Ragunjan's conduct, what information Haines considered as a result of the investigation, and testify to the decision making process to issue the written warnings to the employees in question. As an essential witness, DeMello's testimony is necessary to the General Counsel's case in chief. Delaying DeMello's testimony until February 4, after General Counsel has presented its case in chief, would unfairly prejudice General Counsel's case.

CONCLUSION

Based on the foregoing, it is requested that Respondent's January 29 Request for Special Permission to Appeal from a Ruling of the Administrative Law Judge Granting Counsel for the General Counsel's Motion to Permit Testimony by Video Conference be denied.

DATED AT Honolulu, Hawaii, this 31st day of January, 2016.

Respectfully submitted,

/s/ SCOTT E. HOVEY, JR.

Scott E. Hovey, Jr
Counsel for the General Counsel
NATIONAL LABOR RELATIONS BOARD
SUBREGION 37
300 Ala Moana Blvd Rm 7-245
Honolulu, HI 96850-7245

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Counsel for the General Counsel's Opposition to Respondent's Request for Special Permission to Appeal from a Ruling of the Administrative Law Judge Granting Counsel for the General Counsel's Motion to Permit Testimony by Video Conference has this day been electronically filed with the National Labor Relations Board's Division of Judges and Office of the Executive Secretary, and a copy served upon the following persons by e-mail pursuant to Section 102.114(i) of the National Labor Relations Board's Rules and Regulations:

JENNIFER CYNN , ESQ.
UNITE HERE! LOCAL 5
1516 S KING ST
HONOLULU, HI 96826-1912
jcynn@unitehere5.org

ROBERT S. KATZ , ESQ.
JEFFREY S. HARRIS , ESQ.
JOHN KNOREK , ESQ.
CHRISTINE K. DAVID, ESQ.
TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
700 Bishop St Fl 15
Topa Financial Center Tower
Honolulu, HI 96813-4116
rsk@torkildson.com
ckd@torkildson.com
jsh@torkildson.com
jlk@torkildson.com

DATED at Honolulu, Hawaii, this 31st day of January, 2016.

/s/ SCOTT E. HOVEY, JR.
Scott E. Hovey, Jr.
Counsel for the General Counsel
National Labor Relations Board, Subregion 37
300 Ala Moana Boulevard, Room 7-245
P.O. Box 50208
Honolulu Hawaii 96850

EXHIBIT A

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

**AQUA-ASTON HOSPITALITY, LLC, D/B/A
ASTON WAIKIKI BEACH HOTEL AND HOTEL
RENEW**

and

**Case 20-CA-154749
20-CA-157769
20-CA-160516
20-CA-160517**

UNITE HERE! LOCAL 5

**COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO
RESPONDENT'S PETITION TO REVOKE SUBPOENA DUCES TECUM**

On January 13, 2016¹, Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (Respondent), served Counsel for the General Counsel (General Counsel) with a petition to revoke a subpoena duces tecum issued by General Counsel on January 8.

Respondent attached the subpoena duces tecum to its petition to revoke as Exhibit "A".

On January 20, 2016, Acting Regional Director for Region 20 issued an Order severing case 20-CA-155678 from the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Consolidated Complaint), dated October 28, 2015. In the January 20 order, the Acting Regional Director approved the withdrawal of charge 20-CA-155678 and ordered the withdrawal of certain complaint paragraphs. Pursuant to the January 20 order, Counsel for the General Counsel withdraws Subpoena Paragraphs 3-10, 11(a)-11(c), 12, 20, and 22 from the Subpoena Duces Tecum issued to Respondent on January 8.

General Counsel opposes the petition to revoke the subpoena, as it relates to the paragraphs not withdrawn, for the following reasons:

¹ All dates refer to 2016, unless otherwise specified.

I. Respondent's General Objections to the Subpoena Are Meritless

A. Over Broad and Unduly Burdensome

Respondent makes the general objection that the subpoena is over broad and unduly burdensome. A party seeking to revoke or modify a subpoena duces tecum has the burden of establishing that the subpoena is burdensome to the extent that compliance “would seriously disrupt normal business operations.” *EEOC v. Maryland Cup Corp*, 785 F.2d 471, 477 (4th Cir. 1986), cert. denied, 479 U.S. 815 (1986); see also *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993). Put another way, the objecting party must show that the subpoena is unreasonable or oppressive on the person objecting to the subpoena. *Sullivan v. Dickson*, 283 F.2d 725 (9th Cir. 1960), cert. denied, 366 U.S. 951 (1961); *In re Yassai*, 225 B.R. 478, 483-84 (Bankr. C.D. Cal. 1998). That burden is a heavy one. *In re Yassai*, 225 B.R. at 484. Respondent may not refuse to provide relevant information merely because compliance may require the production of thousands of documents. *NLRB v. Carolina Food Processors*, 152 LRRM 2015 (4th Cir. 1996); *NLRB v. GHR Energy Corp.*, 707 F.2d 110, 113-114, 113 LRRM 3415, 3418 (5th Cir. 1982); see also *NLRB v. Line*, 50 F.3d 311, 149 LRRM 2017, 2020 (5th Cir. 1995) (subpoena seeking five years of business records held not to be overbroad). On the contrary, it may be presumed that an entity that maintains a large volume of records is sufficiently equipped to locate and produce them. *NLRB v. United Aircraft Corporation, et al.*, 200 F.Supp. 48, 51-52 (D.C. Conn. 1961), *affd.*, 300 F.2d 442 (2nd Cir. 1962).

Accordingly, Respondent has not met its heavy burden of showing Counsel for the General Counsel's subpoena is unreasonably or unduly burdensome, especially where the subpoena was issued three-weeks in advance of trial. Respondent has not produced any argument or evidence that Counsel for the General Counsel's subpoena is unreasonable or unduly burdensome. Respondent's unsubstantiated, generalized assertion must be rejected.

B. Relevance

Respondent makes the general complaint that the subpoena requests irrelevant information without explaining why. Subpoenaed information should be produced if it relates to any matter in question, or if it can provide background information or lead to other evidence potentially relevant to an allegation in the complaint. Board Rules and Regulations, Section 102.31(b); *Perdue Farms*, 323 NLRB 345, 348 (1997), *affd.* in relevant part 144 F.3d 830, 833-34 (D.C. Cir. 1998) (the information needs to be only “reasonably relevant”). Moreover, subpoenas that are issued to obtain information concerning a respondent's defenses are not overly broad or irrelevant. See *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d at 1008-1009 (9th Cir. 1996). “A subpoena is proper even when it is designed to produce material concerning a defense that may never arise.” (quoting *NLRB v. North American Van Lines, Inc.*, 611 F. Supp. 760, 765 (N.D. Ind. 1985)).

Here, all of the information sought by the subpoena is relevant. Subpoena Paragraphs 1-2 and 13-17 pertain directly to subparagraphs 8(b)-8(c), 9(a)- 9(b), and 10-11 of the Consolidated Complaint in which it is alleged that Respondent issued written warnings to Edgar Guzman and Santos Ragunjan because of their protected concerted activities. Subpoena Paragraphs 19 and 21 relate to the supervisory and agency status of the employees listed in subparagraphs 5(x) and 5(xii) of the Consolidated Complaint. Subpoena Paragraphs 23 and 25 relate directly to paragraph 7 in the Consolidated Complaint, that alleges Respondent, by its agent, threatened to trespass off-duty employees engaging in protected concerted activity in the lower-lobby/porte-cochere area. Subpoena Paragraph 24 relates directly to paragraph 6 and subparagraphs 6(a)-6(d) in the Consolidated Complaint. Respondent’s unsubstantiated, generalized assertion of irrelevance must be rejected.

C. Attorney-Client Privilege

Respondent makes the general complaint that the subpoena requests seeks the production of information and documents privileged under attorney-client privilege. However, the definition of “documents” does not expressly request any privileged documents. Respondent cites nothing to substantiate its bare assertion and provides no specificity upon which this amorphous claim may be evaluated. Moreover, Subpoena Paragraph R already sets forth a procedure for Respondent to follow in the event it believes responsive material is privileged. See also *CNN America, Inc.*, 353 NLRB 891, 899 (2009). Accordingly, Respondent’s unsubstantiated, generalized assertion of privilege must be rejected.

II. Respondent’s Objections to Subpoena Subparagraphs 14(c) and 16(c) Based on “Privilege” Lack Merit

In addition to its general objections, Respondent specifically claims that the documents and information requested in Subpoena Subparagraphs 14(c) and 16(c) are privileged by attorney-client privilege. However, the subpoena subparagraphs referenced above do not request any privileged documents on their face. Respondent has also failed to substantiate its assertion and provided no specificity upon which these naked assertions may be evaluated. As explained above, Subpoena Paragraph R already sets forth a procedure Respondent must follow in the event it believes responsive material is privileged. See *CNN America, Inc.*, 353 NLRB 891, 899 (2009); *Island Architectural Woodwork, Inc.*, 29-CA-124027, 2014 WL 3867966 at fn.3 (Aug. 6, 2014) (unpub. Board order). Accordingly, Respondent should be required to produce the requested documents, or to provide a privilege log meeting the requirements of Subpoena Paragraph R.

III. Subpoena Paragraph 18 Requests Relevant Documents

Contrary to Respondent’s assertions, Subpoena Paragraph 18 request documents relevant to Consolidated Complaint Subparagraphs 8(b)-8(c), 9(a)-9(b) and Paragraphs 10 and 11, as well

as arguments Respondent may proffer in support of its Affirmative Defense 4 and 7.

Consolidated Complaint Subparagraphs 8(b)-8(c), 9(a)-9(b) and Paragraphs 10 and 11 allege that Respondent issued written warnings to employees Edgar Guzman and Santos Ragunjan because of the employees protected concerted activities. Subpoena Paragraph 18 requests information and documents that could show whether Respondent issued discipline employee Danny Pajinag as a result, or because of, of his interactions with Guzman and Ragunjan while at work during the relevant time period in the subpoena. Accordingly, Respondent should be required to produce the requested documents in Subpoena Paragraph 18.

IV. Respondent's Objections to Subpoena Paragraphs 19 and 21 Lacks Merit

Subpoena Paragraphs 19 and 21 requests the job titles and duties for the Andrew Smith and Paul Pagan. Respondent argues that Subpoena Paragraphs 19 and 21 seek documents which are not in Respondent's control. It is the Region's understanding that Respondent initially contracted with Guardsmark, LLC, which was subsequently purchased by Universal Protection Services, to provide security services at Respondent's Aston Waikiki Beach Hotel and Hotel Renew properties. Andrew Smith and Paul Pagan were employees of Gaurdsmark and are current employees of Universal Protection Services. Subpoena Paragraph H instructs Respondent that the subpoena is intended to cover all documents in Respondent's control, including "any other persons and companies directly or indirectly employed by, or connected with [Respondent]...". Subpoena Paragraph H instructs Respondent that the subpoena covers companies directly or indirectly employed by Respondent, including documents in the possession, custody or control of Respondent's contractor Universal Protection Services. Accordingly, Respondent should be required to produce the requested documents and information requested in Subpoena Paragraphs 19 and 21.

V. Subpoena Paragraph 24 Requests Relevant Documents

Subpoena Paragraph 24 requests documents and information relevant to Paragraph 6 and Subparagraphs 6(a)-6(d) in the Consolidated Complaint. Consolidated Complaint Paragraph 6 and Subparagraphs 6(a)-6(d) allege that Respondent's Executive Vice President of Operation Gary Ettinger, at meetings about May 19, 2015, made statements in violation of Section 8(a)(1) of the National Labor Relations Act. Subpoena Paragraph 24 could produce relevant documents that could show whether Ettinger did make unlawful statements at meetings on or about May 19, 2016, as alleged in the Consolidated Complaint.

CONCLUSION

Based on the foregoing, it is requested that the Administrative Law Judge deny Respondent's Petition to Revoke Subpoena Duces Tecum filed on January 13, 2016, as it relates to paragraphs, including subparagraphs, 1-2, 13-19, 21, and 23-25, of Subpoena Duces Tecum B-1-PQK05Z.

DATED AT Honolulu, Hawaii, this 22nd day of January, 2016.

Respectfully submitted,

/s/ SCOTT E. HOVEY, JR.

Scott E. Hovey, Jr
Counsel for the General Counsel
NATIONAL LABOR RELATIONS BOARD
SUBREGION 37
300 Ala Moana Blvd Rm 7-245
Honolulu, HI 96850-7245

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Counsel for the General Counsel's Opposition to Respondent's Petition to Revoke Subpoena Duces Tecum in Cases 20-CA-154749, et. al., has this day been electronically filed with the National Labor Relations Board's Division of Judges, and a copy served upon the following persons by e-mail pursuant to Section 102.114(i) of the National Labor Relations Board's Rules and Regulations:

JENNIFER CYNN , ESQ.
UNITE HERE! LOCAL 5
1516 S KING ST
HONOLULU, HI 96826-1912
jcynn@unitehere5.org

ROBERT S. KATZ , ESQ.
JEFFREY S. HARRIS , ESQ.
JOHN KNOREK , ESQ.
CHRISTINE K. DAVID, ESQ.
TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
700 Bishop St Fl 15
Topa Financial Center Tower
Honolulu, HI 96813-4116
rsk@torkildson.com
ckd@torkildson.com
jsh@torkildson.com
jlk@torkildson.com

DATED at Honolulu, Hawaii, this 22nd day of January, 2016.

/s/ SCOTT E. HOVEY, JR.

Scott E. Hovey, Jr.
Counsel for the General Counsel
National Labor Relations Board, Subregion 37
300 Ala Moana Boulevard, Room 7-245
P.O. Box 50208
Honolulu Hawaii 96850

EXHIBIT B

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

**AQUA-ASTON HOSPITALITY, LLC, D/B/A
ASTON WAIKIKI BEACH HOTEL AND HOTEL
RENEW**

and

**Case 20-CA-154749
20-CA-157769
20-CA-160516
20-CA-160517**

UNITE HERE! LOCAL 5

MOTION TO PERMIT TESTIMONY BY VIDEO CONFERENCE

Pursuant to Section 102.24 of the Board's Rules and Regulations, as amended, Counsel for the General Counsel moves for permission to introduce witness testimony by means of video conferencing technology. Specifically, the General Counsel requests permission to have witness Mark DeMello testify via video conference because he will be unavailable to provide in-person testimony on February 2, 2016 in the hearing scheduled in the above captioned case. In its Petition to Revoke the subpoena ad testificandum issued to DeMello, Respondent alleges that DeMello will not be in Hawaii on February 2, 2016, that he will be flying from San Francisco to Hawaii on February 3, 2016, and that he will not be available to testify in person until February 4, 2016.

I. PROCEDURAL AND FACTUAL BACKGROUND

The issue, *inter alia*, to be decided in this case is whether Aqua-Aston Hospitality, LLC d/b/a Aston Waikiki Beach Hotel and Hotel Renew (Respondent) violated Section 8(a)(3) of the Act by issuing written discipline to Edgar Guzman (Edgar) and Santos "Sonny" Ragunjan (Sonny) due to their protected concerted activities. Respondent denies disciplining Edgar and

Exhibit B

Sonny for their protected concerted activities. DeMello is the General Manager at the Aston Waikiki Beach and Hotel Renew.¹ DeMello investigated complaints made by employee Dany Pajinag (Dany) against Edgar and Sonny. DeMello received complaints from Dany that Edgar requested that Dany have his picture taken for the Union, UNITE HERE! Local 5, during working hours. DeMello received a complaint from Dany that Sonny had asked to have his picture taken for the Union, UNITE HERE! Local 5, during working hours. DeMello signed and delivered to Edgar a written warning based on the complaints of Dany. DeMello signed a written warning for Sonny based on the complaints of Dany. DeMello will be called to present testimony, under Rule 611(c)², in support of subparagraphs 8(b) and 8(c) of the Consolidated Complaint.

II. ARGUMENT

Federal Rule of Civil Procedure 43 provides that a court “may for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.” Under this rule, the Board’s Administrative Law Judges have permitted such testimony through means such as video conferencing. See e.g., *EF International Language Schools*, 363 NLRB No. 20 at 1 fn. 1 (2015) (Board affirming ALJ prehearing order and post hearing decision that Sec. 102.30 of the Board’s Rules and Regulations does not preclude the taking of oral testimony by video conference); *M.V.M., Inc.*, 352 NLRB 1165, 1165 fn. 1 (2008) (ALJ noting that the record was re-opened and evidence admitted through video conference); *In re Palace Arena Football, LLC*, 2003 WL 19891333, Case No. 7-CA-45132 (April 22, 2003) (ALJ allowing testimony by way of video conference).

¹ In its Answer to the Consolidated Complaint Respondent admits to DeMello’s status as a statutory supervisor and to DeMello’s position as the General Manager for the Aston Waikiki Beach Hotel and Hotel Renew.

² FED. R. EVID. 611(c).

In order to encourage the use of such technology, the General Counsel instituted a pilot program that focused at first on representation case hearing. See Memorandum OM 11-42 (CH), at 1 (March 30, 2011), attached hereto as Exhibit 1. The program has since been explicitly extended to unfair labor practice hearings where “good cause” is shown. See *Id.* at 2. Factors relevant to determining “good cause” are:

- The availability of the participants and proximity of the participants to the hearing site;
- The potential of using video testimony versus travel costs;
- The types of issues the testimony addresses;
- the anticipated length and scope of the hearing; and
- The position of the parties and the ALJ.

Id. Other relevant logistical factors include the availability of video conferencing technology, the number and type of documents to be introduced by way of the testimony, the number of witnesses and anticipated length of testimony, and whether such documents can be made available to the witness when testimony is taken. *Id.*; see also NLRB Division of Judges Bench Book, § 12-400 (October 2015) (discussing Board decisions and Federal court decisions permitting testimony by video conference).

In this case, virtually all of the relevant factors support granting the General Counsel’s Motion to permit DeMello’s testimony by video conference. General Counsel plans on calling DeMello at the start of the hearing, under Rule 611(c) of the Federal Rules of Evidence, before putting on its case in chief. Due to DeMello’s travel plans he will be nowhere near the hearing site on the date of the start of the hearing. However, Respondent, in its Motion to Revoke, provides that DeMello will be flying to San Francisco on January 28, 2016 and will be flying from San Francisco to Honolulu on February 3, 2016. The Board’s San Francisco Regional

Office is available on February 2, 2016, for DeMello to provide video testimony. If DeMello is not permitted to testify via video conference, he will not be available to testify at the hearing site until after General Counsel has put on their case in chief.

DeMello's testimony will be limited to the investigation of employee complaints against Edgar and Sonny's leading to the issuance of written warning by Respondent on June 30, 2015. Any documents to be examined by DeMello would be made available to the Respondent beforehand and would be available to DeMello via the Board's San Francisco Regional Office. All of DeMello's statements to which Respondent is entitled pursuant to *Jencks*, 29 C.F.R. Section 102.118(b)(1), will be provided at the Honolulu hearing location on the date of his testimony, just as if he were testifying in person.

Opponents to permitting testimony via video conference contend that such testimony precludes the ALJ and other parties from fully perceiving the witness's demeanor and impedes the ALJ's ability to make a credibility assessment. Indeed, this is the very rationale that led the Board to disapprove of taking witness testimony by telephone in *Westside Painting, Inc.*, 328 NLRB 796, 796-97 (1999). However, unlike testimony by telephone, video conferencing technology permits all parties to view the witness during the testimony, just as they would if the witness were sitting in-person behind the witness stand. Thus, the witness can be observed by video during the testimony, and the ALJ would still be able to make credibility determinations based on the witness' demeanor.

The General Counsel has demonstrated above that good cause exists, in light of the compelling circumstances, to permit DeMello to testify by contemporaneous video transmission from a different location.

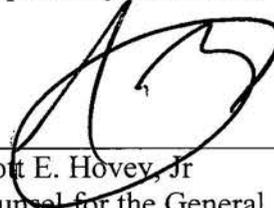
In the alternative, should Respondent stipulate to certain facts and documents relating to the investigation and discipline of Edgar Guzman and Sonny Ragunjan, the video conference testimony of DeMello may not be necessary.

III. CONCLUSION

DeMello's testimony, under Rule 611(c) is essential to proving that Respondent disciplined Edgar Guzman and Sonny Ragunjan because of their protected concerted activity. For the reasons set forth above, permitting testimony by video conferencing is the only certain means of securing DeMello's testimony prior to the General Counsel completing its case in chief. Therefore, the General Counsel requests that its Motion to Permit Testimony by Video Conference be GRANTED and that an order be issued directing DeMello to report to the National Labor Relations Board San Francisco Regional Office at 901 Market Street, Suite 400, San Francisco, California, 94103, at 9 a.m. (HST)/11:00 a.m. (PST) on February 2, 2016.

DATED AT Honolulu, Hawaii, this 20th day of January, 2016.

Respectfully submitted,



Scott E. Hovey, Jr
Counsel for the General Counsel
NATIONAL LABOR RELATIONS BOARD
SUBREGION 37
300 Ala Moana Blvd Rm 7-245
Honolulu, HI 96850-7245

Exhibit 1

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 11-42(CH)

March 30, 2011

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Video Testimony in Representation and Unfair Labor
Practice Casehandling

Memorandum OM 08-20 announced the two-year Pilot Program for the Use of Video Testimony in Representation Case hearings. Memorandum 09-43(CH) provided a midway overview of the program and expanded the use of video testimony to the securing of evidence in the investigation of unfair labor practice charges. Subsequently, the Video Testimony Committee¹ surveyed the regional offices to assess the use of video testimony in Representation case hearings and in all aspects of C case processing and to obtain recommendations on the use of this technology. The Committee reviewed the survey responses, analyzed the recommendations, prepared a final program report and forwarded it to the Acting General Counsel. As a result of the recommendations of the Committee, the Acting General Counsel has decided to continue the use of video testimony in R Case Hearings and unfair labor practice investigations. In addition, the Acting General Counsel has decided to expand the use of video testimony to include testimony provided in an unfair labor practice hearing in certain circumstances. Below is a composite of the survey responses and the recommendations which the Acting General Counsel approved.

The survey responses revealed that video testimony is being used sparingly in Representation case hearings but more often in the investigation of C cases. Regions are using video testimony to take affidavits and depositions, to obtain evidence pursuant to subpoenas, and during subpoena enforcement proceedings. While face-to-face affidavits are the preferred method for obtaining testimony in the investigation of unfair labor practice charges, the survey responses demonstrated that the use of video testimony is an excellent alternative where the physical location of the affiant impedes an in-person affidavit or deposition. The Acting General Counsel authorizes Regional Directors to continue the use of video testimony in Representation case hearings and in C case investigations where appropriate.

¹ Members of the Committee are Joe Barker, RD, Region 13; William Baudler, RD, Region 32; Yvette Hatfield, DAGC, Division of Operations-Management; Nelson Levin, AGC, Operations; Randy Malloy, ARD, Region 8; Gary Muffley, RD, Region 9; and Nancy Wilson, SFX, Region 11.

Regional feedback confirmed that the use of video testimony has expanded into unfair labor practice hearings.² Counsels for the General Counsel are stipulating to the use of video testimony and Administrative Law Judges are taking video testimony. Of course, in-person testimony continues as the General Counsel's preference in the litigation of unfair labor practices. However, the presentation of video testimony in contested unfair labor practice cases may be appropriate where good cause is shown, compelling circumstances exist and appropriate safeguards are in place. Factors that should be taken into consideration in determining whether the use of video testimony in an unfair labor practice hearing is warranted include:

- the availability of the participants and proximity of the participants to the hearing site;
- the potential cost of using video testimony versus travel costs;
- the types of issues the testimony addresses;
- the anticipated length and scope of the hearing and
- the positions of the parties and the ALJ.

Additional logistical factors to consider in the use of video testimony in a C case hearing are:

- the adequacy of the available videoconferencing facilities and any technological issues;
- the number, length, and types (e.g. affidavits) of documents likely to be moved into evidence;
- the number of witnesses who would testify by video and the expected length of their testimony and
- whether documents can be made available for the witness when testimony is taken.

Directors are requested to pursue in-person testimony as the preferred choice before moving to present video testimony in unfair labor practice hearings. Similarly, if another party seeks to present video testimony, Regional Directors should consider the factors discussed above before Counsel for General Counsel takes a position.

ALJs may grant or deny a request for the presentation of video testimony in unfair labor practice hearings. Regional Directors should contact the Division of Operations-Management before filing a special appeal to the denial or grant of a

² The Board has not directly addressed the use of video testimony in unfair labor practice hearings. However, in August 2010, the Board posted on the Agency's website the revised Division of Judges Bench Book which contains a section entitled **Testimony by Video**. Section 11-620² of the ALJ Bench Book cites *M.V.M., Inc.*, 352 NLRB 1165 (2008) to highlight that video testimony has been used in Board trials without objection. In *M.V.M., Inc.*, the testimony of a recalled witness was taken by video where the witness' original testimony was irretrievably lost by the transcriber. Also, the Bench Book notes that the Board has not ruled on the use of video testimony in Board trials in which a party has objected.

Office is available on February 2, 2016, for DeMello to provide video testimony. If DeMello is not permitted to testify via video conference, he will not be available to testify at the hearing site until after General Counsel has put on their case in chief.

DeMello's testimony will be limited to the investigation of employee complaints against Edgar and Sonny's leading to the issuance of written warning by Respondent on June 30, 2015. Any documents to be examined by DeMello would be made available to the Respondent beforehand and would be available to DeMello via the Board's San Francisco Regional Office. All of DeMello's statements to which Respondent is entitled pursuant to *Jencks*, 29 C.F.R. Section 102.118(b)(1), will be provided at the Honolulu hearing location on the date of his testimony, just as if he were testifying in person.

Opponents to permitting testimony via video conference contend that such testimony precludes the ALJ and other parties from fully perceiving the witness's demeanor and impedes the ALJ's ability to make a credibility assessment. Indeed, this is the very rationale that led the Board to disapprove of taking witness testimony by telephone in *Westside Painting, Inc.*, 328 NLRB 796, 796-97 (1999). However, unlike testimony by telephone, video conferencing technology permits all parties to view the witness during the testimony, just as they would if the witness were sitting in-person behind the witness stand. Thus, the witness can be observed by video during the testimony, and the ALJ would still be able to make credibility determinations based on the witness' demeanor.

The General Counsel has demonstrated above that good cause exists, in light of the compelling circumstances, to permit DeMello to testify by contemporaneous video transmission from a different location.

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

**AQUA-ASTON HOSPITALITY, LLC, D/B/A
ASTON WAIKIKI BEACH HOTEL AND HOTEL
RENEW**

and

**Case 20-CA-154749
20-CA-157769
20-CA-160516
20-CA-160517**

UNITE HERE! LOCAL 5

AFFIDAVIT OF SERVICE OF: Motion To Permit Testimony By Video Conference.

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 20, 2016, I served the above-entitled document(s) by **regular mail** upon the following persons, addressed to them at the following addresses:

JENNIFER CYNN , ESQ., In-House Counsel
UNITE HERE! LOCAL 5
1516 S KING ST
HONOLULU, HI 96826-1912

ROBERT S. KATZ , ESQ.
TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
700 Bishop St Fl 15
Topa Financial Center Tower
Honolulu, HI 96813-4116

JEFFREY S. HARRIS , ESQ.
TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
700 Bishop St Fl 15
Honolulu, HI 96813-4116

JOHN KNOREK , ESQ.
TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
700 Bishop St Fl 15
Honolulu, HI 96813-4116

Christine K. David , ESQ.
TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS
700 Bishop St Fl 15
Honolulu, HI 96813-4116

1/20/2016

Date

Dolleen Keola, Designated Agent of NLRB

Name


Signature