UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

IMPACT WELLNESS CENTER, INC.

and Case 28-CA-221411

MELISSA TREJO, an Individual

and Case 28-CA-223540

LAWRENCE THOMAS, an Individual.

ORDER DENYING RESPONDENT'S PETITION TO REVOKE
SUBPOENA DUCES TECUM and SUBPOENA AD TESTIFICANDUM

This matter is before me on Impact Wellness Center, Inc.'s (Respondent) Petition to Revoke (Petition) the General Counsel's Subpoena Duces Tecum B-1-13Y0KB (SDT). Respondent also moved to revoke the General Counsel's Subpoena Ad Testificandum A-1-13Y0IEV (subpoena) on "Keisha," whose last name is Castleberry, the purported business manager for Respondent. Counsel for the General Counsel opposed Respondent's petition. For the reasons set forth below, the Petition is DENIED.

The consolidated complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when: (1) Respondent discharged Melissa Trejo (Trejo) and Lawrence Thomas (Thomas)(Charging Parties) after they engaged in protected concerted activity by complaining to their coworkers and Respondent about: (a) the lack of organization and communication by management; (b) the lack of training, information, resources and staffing; (c) Respondent failing to reimburse employees for work related expenses; and (d) Respondent failing to pay employees timely and fully. The complaint also alleges that Respondent's owner and executive director, Carolyn Pridgeon (Pridgeon), interrogated employees about and invited employees to quit due to their protected concerted activity. Respondent filed its answer denying all material allegations and that its conduct was unlawful.

On or about January 22, 2019, the General Counsel served the SDT on Respondent requesting 19 categories of documents. The General Counsel also served a subpoena on Ms. Castleberry, via Respondent, for her appearance and testimony at the upcoming hearing scheduled for Tuesday, February 5, 2019.

On January 25, 2019, Respondent filed its aforementioned petition, objecting to all of the subpoenaed requests as well as the subpoena for Castleberry. Counsel for the General Counsel opposed the Petition. As more fully set forth below, I deny Respondent's Petition as follows.

Requests 1-8:

These requests seek information and/or documents in order that counsel for the General Counsel can prove whether Pridgeon, Amia Mullholand (Mullholand) and Keisha Castleberry (Castleberry) are supervisors and/or agents of Respondent within the meaning of Section 2(11) and 2(13) of the Act. These documents were relevant because, in its Answer, Respondent failed to admit or deny that the aforementioned individuals are/were its supervisors and/or agents.

However, in its Petition, Respondent stipulated that Pridgeon and Mullholand are/were supervisors and/or agents of Respondent during the relevant time period at issue in this case. As such, counsel for the General Counsel agreed to withdraw her SDT as it relates to Pridgeon and Mullholand. Accordingly, the parties currently dispute the supervisory and/or agent status of Ms. Castleberry.

Respondent objects to these requests as to Ms. Castleberry on the grounds that the documents are irrelevant, overly broad, unduly burdensome, and are tantamount to a "fishing expedition," because Ms. Castleberry is not a named individual in the complaint who took or was involved in any unlawful action on behalf of Respondent in this matter. I disagree.

Rather, I find that the requested documents are relevant and germane to the issues in this case. Paragraph 3 of the complaint specifically alleges that Ms. Castleberry is a supervisor and/or agent of Respondent because she served as Respondent's business manager "at all material times."[1] In its Answer, Respondent failed to admit or deny Ms. Castleberry's supervisory status, so the requested documents are directly relevant to determining Ms. Castleberry's status. Since Respondent is either unaware or refuses to stipulate to Ms. Castleberry's supervisory/agent status, counsel for the General Counsel is entitled to seek and obtain the information in these requests.

Respondent's argument that documents concerning Ms. Castleberry's supervisory status are irrelevant because she is not alleged to have committed any unlawful acts is without merit. In fact, Respondent has not cited any Board precedent for its position. While Respondent is correct that the alleged unlawful actions target Ms. Pridgeon, not Ms. Castleberry, counsel for the General Counsel is not asking for any substantive documents regarding Castleberry. Rather, the requested documents go to the heart of what Respondent is contesting: Ms. Castleberry's supervisory status. Of course, Respondent can avoid turning over these documents by stipulating to Ms. Castleberry's supervisory status. Otherwise, it cannot have it both ways: refusing to admit or deny Ms. Castleberry's supervisory status then preventing the General Counsel from ascertaining her status.

Moreover, I find that the requested documents are not overbroad or unduly burdensome since the General Counsel's burden requires her to satisfy multiple factors in order to prove Ms. Castleberry's supervisory status.[2] The documents requested may assist the General Counsel in

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[1] In the complaint, "at all material times" appears to be defined as the period from June 4, 2017 to June 4, 2018. See Complaint, ¶2.

[2] See Section 2(11) of the Act defines a ""supervisor" as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires

attempting to meet her burden. Similarly, the requested documents are narrowly tailored given the time period described as "at all material times" is approximately one year: from June 4, 2017 to June 4, 2018. Moreover, the requested documents are not tantamount to a "fishing expedition" as the documents are relevant and necessary to resolve what Respondent has contested: Ms. Castleberry's supervisory status. On balance, I find that the General Counsel is only requesting documents on an issue that has been directly disputed: Ms. Castleberry's supervisory/agent status. Therefore, these documents must be produced.

Accordingly, Respondent's Petition concerning Requests 1-8 as they relate to Ms. Castleberry is denied.

Request 9-17 and 19:[3]

Respondent generally objects to all of these requests on the grounds that the documents in question are irrelevant, overly broad, unduly burdensome, and tantamount to a "fishing expedition." I disagree.

With respect to relevance, preliminarily, I note the broad standard in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943), in which the Court stated that information requested in a subpoena duces tecum is relevant and must be produced so long as it is "not plainly incompetent or irrelevant to any lawful purpose." Section 102.31(b) of the Board's Rules and Regulations provides that an administrative law judge shall revoke a subpoena only if "the evidence whose production is required does not relate to any matter under investigation or in question in the proceeding, or if . . . such subpoena does not describe with sufficient particularity the evidence whose production is required." See also, *NLRB v. G.H.R. Energy Corp.*, 707 F.2d 110, 113 (5th Cir. 198l); *NLRB v. Williams*, 396 F.2d 247, 249 (7th Cir. 1968); *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 372 (9th Cir. 1985).

In reviewing all of the aforementioned requests, I find the aforementioned subpoenaed requests are relevant to the matters investigated and alleged in the complaint. Specifically, the requested documents seek, *inter alia:*

The personnel/employment files of the Charging Parties in order to determine what, if any discipline they may have received prior to their discharges (requests 9);

Information as to whether Respondent has told others that the Charging Parties were terminated versus that they resigned (since Respondent has averred that Thomas resigned versus

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the use of independent judgment. Individuals are "statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer." *NLRB v. Kentucky River Community Care*, 532 U. S., 706, 713 (2001). In applying this three part test, the Board follows certain established principles, which are outlined in its decisions in *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006) and *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn. 8 (1999). See also *NLRB v. Kentucky River Community Care*, 532 U.S. at 711-712. The party asserting supervisory status bears the burden of proof. Id.

[3] Request 18 asked for copies of Respondent's position statements and exhibits submitted to the Board during the investigation of this matter. Respondent objected to this request on the grounds that the General Counsel already possesses these documents. After conferring with one another, Respondent agreed to stipulate to the authenticity of the aforementioned documents, so counsel for the General Counsel has withdrawn this request.

being discharged) (request 10);

Information concerning the individuals involved in the decision to discharge both Charging Parties (request 11);

Documents memorializing any verbal conversations regarding the reasons why the Charging Parties were discharged (request 12);

Documents relating to the specific complaints Charging Parties made about their working conditions and their terms/conditions of employment (request 13);

Documents related to any internal or independent investigations Respondent conducted that Respondent relied on in its decision to discharge Charging Parties (requests 14 & 15);

Documents involving investigations of other similarly situated individuals who were discharged for the same reasons as Charging Parties (requests 14 & 15); and

Any handbooks, training materials, notices tending to show Respondent's disciplinary policies, including its attendance policies (request 17).

All of these documents are relevant and germane to the issues in the complaint. Therefore, I deny the Petition on this ground.

Second, I agree with General Counsel and find that the requested information is limited in time and scope and is narrowly tailored to facts germane to the complaint. Therefore, I deny the Petition on this ground.

Lastly, with regard to Respondent's undue burden objection, I note that Respondent fails to provide any details to support its assertion. Moreover, to the extent that Respondent contends that the production of the subpoenaed documents would be burdensome, bare and unparticularized assertions of irrelevancy and burdensomeness do not suffice to satisfy the burden of "point[ing] out which specific documents and records . . . exceed the bounds of relevancy or the production of which would create an undue burden on . . . [Respondent's] ability to comply." *NLRB v. Dutch Boy, Inc.*, 98 LRRM 2396, 2399 (W.D. Okla. 1978), affd. 606 F.2d 929 (10th Cir. 1979). Respondent has not shown direct evidence that producing the documents would "seriously disrupt its normal business operations." *E.E.O.C v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986). Accordingly, I deny the petition to revoke on this ground and order that all the documents in the aforementioned requests be produced.

Subpoena A-1-13Y0IEV:

Finally, Respondent objects to subpoena A-1-13Y0IEV issued for Ms. Castleberry's appearance and testimony on the ground that Ms. Castleberry is no longer employed (and/or contracted) by Respondent. Although Respondent argues that they have no control over Ms. Castleberry since she is no longer in their employ, that argument is insufficient to revoke the subpoena. Rather, I agree with the General Counsel that the fact Ms. Castleberry is no longer employed (or contracted) by Respondent only means that counsel for the General Counsel must ascertain where she may be found and work on her own to obtain Castleberry's appearance and testimony. Therefore, I deny the Petition to Revoke regarding the subpoena ad testificandum on Ms. Castleberry.

Accordingly, **IT IS ORDERED** that Respondent's Petition to Revoke subpoena duces

tecum B-1-13Y0KB and subpoena ad testificandum A-1-13Y0IEV is **DENIED**.

Respondent is directed to produce any and all documents in compliance with this Order at the hearing or otherwise make them available in advance of the hearing for review and copying by the General Counsel as set forth in the subpoena or "at such times and place, and under such circumstances as will cause the least possible annoyance or interruption to [Respondent's] business." See *G.H.R. Energy Corp.*, 707 F.2d 114, quoting from *Jackson Packing Co. v. NLRB*, 204 F.2d 842, 844 (5th Cir. 1953). Respondent also shall provide the General Counsel with Ms. Castleberry's last known address so counsel for the General Counsel can attempt to locate and serve Castleberry or determine whether she intends to call Castleberry as a witness.

Dated: January 31, 2019

Lisa D. Thompson
Administrative Law Judge

Served via email upon the following:

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For Respondent:
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DiCrocco, Brian

From: DiCrocco, Brian
Sent: Thursday, January 31, 2019 3:00 PM
To: Demirok, Sara; krose@nlradvocates.com
Cc: Moore, Dawn M.
Subject: 28-CA-221411 - IMPACT WELLNESS CENTER, INC.: ORDER DENYING RESPONDENT'S PETITION TO REVOKE SUBPOENA DUCES TECUM and SUBPOENA AD TESTIFICANDUM
Attachments: Impact Wellness Order Deny R PTR.pdf

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Dear Counsel,

Please see the attached document.

Brian C. DiCrocco, Legal Tech.
NLRB Division of Judges San Francisco
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