

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC, d/b/a
HAWAII TRIBUNE-HERALD

and

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

HAWAII NEWSPAPER GUILD,
LOCAL 39117, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS**

Submitted by:
Meredith Burns
Trent Kakuda
Counsel for the General Counsel
National Labor Relations Board
Region 20, Subregion 37
300 Ala Moana Boulevard, Room 7-245
Honolulu, Hawaii 96850
Phone: 808-541-2814
Fax: 808-541-2818

TABLE OF CONTENTS

I.	INTRODUCTION	5
II.	THE ALJ'S CREDIBILITY FINDINGS	6
III.	RESPONDENT'S EXCEPTIONS NOT ARGUED WITH SPECIFICITY SHOULD BE DISREGARDED	6
IV.	UNFAIR LABOR PRACTICES	8
A.	Respondent Violated the Act When it Disparately Enforced its Internal Security Policy and Disciplined Koryn Nako (Complaint ¶¶ 11 and 16(b))	8
B.	Respondent Violated the Act When it Interrogated Koryn Nako Regarding Her Union Activity and the Union Activities of Others (Complaint ¶¶ 10(a), 12(a), and 12(c))	11
1.	Bock Unlawfully Interrogated Nako on October 18, 2005 (Complaint ¶ 10(a))	11
2.	Crawford Unlawfully Interrogated Nako on October 21, 2005 (Complaint ¶ 12(a))	12
3.	Crawford Unlawfully Interrogated Nako in February 2006 (Complaint ¶ 12(c))	14
C.	Respondent Unlawfully Disciplined and Discharged Hunter Bishop for his Union Activity (Complaint ¶¶ 16(a) and 16(c))	14
D.	The ALJ Correctly Found No Post-Termination Justification for Denying Bishop Reinstatement	17
E.	Respondent Unlawfully Disciplined and Discharged Dave Smith for his Protected Concerted and Union Activity (Complaint ¶ 16(e) and 16(f))	18
F.	Respondent Unlawfully Suspended Peter Sur for his Protected Concerted and Union Activity (Complaint ¶ 16(d))	23
G.	Respondent Unlawfully Interrogated Dave Smith, Peter Sur, Christine Loos, and Will Ing on March 9, 2006 (Complaint ¶ 10(b))	24

H.	Respondent Unlawfully Interrogated Dave Smith on March 27, 2006 (Complaint ¶ 10(c))	27
I.	Respondent Unlawfully Prohibited the Wearing of Union Paraphernalia (Complaint ¶ 14)	28
J.	Respondent Promulgated and Maintained an Overbroad Rule Prohibiting the Making of Secret Audio Recordings (Complaint ¶ 15).....	29
K.	Respondent Failed and Refused to Provide the Union with Relevant and Necessary Information (Complaint ¶ 7-9)	30
V.	CONCLUSION	33

TABLE OF AUTHORITIES

<u>Case Law:</u>	<u>Page</u>
<i>Aitoo Painting Corp.</i> , 238 NLRB 366 (1978).....	7
<i>Air Contact Transport, Inc.</i> , 340 NLRB 688, 689-90 (2003).....	23
<i>Bonanza Sirloin Pit</i> , 275 NLRB 310 (1985).....	7
<i>Bundy Corp.</i> , 292 NLRB 671 (1989)	31
<i>California Nurses Association</i> , 326 NLRB 1362 (1998).....	33
<i>Carpenter Sprinkler</i> , 238 NLRB 974, 975 (1978)	21
<i>Challenge-Cooke Bros.</i> , 288 NLRB 287, 396, 397 (1988).....	14
<i>Consolidated Edison of NY</i> , 286 NLRB 1081, 1032 n.5 (1987)	21
<i>Cutts v. McDonalds</i> , 281 F.Supp.2d 931 (W.D.Mich. 2003)	21
<i>D & F Industries, Inc.</i> , 339 NLRB No. 73 (2003)	6
<i>Dana Corp.</i> , 318 NLRB 312, 316-17 (1995)	20
<i>Danca v. K-Mart Corp.</i> , 2000 WL 33407239 (Mich.App. 2000)	21
<i>Douglas v. Dekalb County, Georgia</i> , 2007 WL 4373970 (N.D. Ga. 2007)	21
<i>Freemont Food</i> , 289 NLRB 1790 (1988)	14
<i>Garvey Marine</i> , 328 NLRB 991, 1019 (1999)	21
<i>International Metal Co.</i> , 286 NLRB 1106, 1109 (1987)	14
<i>NLRB v. J. Weingarten, Inc.</i> , 420 U.S. 251 (1975)	16, passim
<i>Minton v. Lenox Hill Hosp.</i> , 160 F.Supp.2d 687, 696 (S.D.N.Y. 2001)	21
<i>New Jersey Bell Telephone Co.</i> , 300 NLRB 42 (1990)	32
<i>Ormet Aluminum Mill Products Corp.</i> , 335 NLRB 788, 789 (2001)	33
<i>Pan American Grain</i> , 343 NLRB 318 (2004)	31
<i>People v. Selby</i> , 198 Colo. 386, 390 (Co. S.Ct. 1979)	21
<i>Regency Service Carts, Inc.</i> , 345 NLRB 671 (2005)	31
<i>Republic Aviation</i> , 324 U.S. 793 (1945)	29
<i>Sam's Club</i> , 342 NLRB 620, 623 (2004)	20
<i>Sheraton Hartford Hotel</i> , 286 NLRB 463, 494 (1988)	30
<i>Stanadyne Automotive Corp.</i> , 345 NLRB 85, 86-87 (2005).....	30
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), <i>enfd.</i> 188 F.2d 362 (3d Cir. 1951))	6
<i>Teleprompter Corp. v. NLRB</i> , 570 F.2d 4, 8 (1 st Cir. 1977)	31
<i>Tom Rice Buick, Pontiac & GMC Truck, Inc.</i> , 334 NLRB 785, 793 (2001)	31
<i>United States Postal Service</i> , 308 NLRB 547, 551 (1992)	31
<i>Woodland Clinic</i> , 331 NLRB 735, 737 (2000)	31

Statutes and Rules:

Section 102.46 of the NLRB's Rules and Regulations	6-7
--	-----

I. INTRODUCTION¹

Beginning in 2005, as the Administrative Law Judge (“ALJ”) correctly found, Respondent committed a long string of unfair labor practices including the unlawful discipline of Koryn Nako, the suspension of Peter Sur, and the suspension and termination of Hunter Bishop and Dave Smith. In addition, the ALJ also correctly found that Respondent violated the Act by interrogating its employees regarding their Union and protected concerted activities, disparately enforcing its security policy against the Union, prohibiting the wearing of Union paraphernalia, promulgating and maintaining an overbroad rule prohibiting the making of secret audio recordings, and failing and refusing to provide the Union with relevant and necessary information. The ALJ’s findings are legally correct and well supported by the record.

In response to the ALJ’s decision, Respondent has filed 237 exceptions, the great majority of which are improper under the Board’s rules in that they are not supported by any transcript cites and are not argued with specificity in Respondent’s brief. It would be unproductive to offer a specific response to each of Respondent’s baseless exceptions. Instead, Respondent’s exceptions are grouped by topic and addressed generally. Respondent’s exceptions are nothing more than a shotgun approach aimed at creating a smokescreen regarding their numerous unfair labor practices and should be rejected in their entirety by the Board.

¹ The Administrative Law Judge is referred to herein as “ALJ.” References to the ALJ’s decision are noted as “ALJD” followed by the page number(s) and line(s). References to the transcript are noted by “Tr.” followed by the volume and page number(s). References to the General Counsel’s exhibits are noted as “GC” followed by the exhibit number. References to Respondent’s Exhibits are noted as “R” followed by the exhibit number. Respondent’s Brief in Support of Exceptions to ALJD is referred to herein as “RBS” followed by the page number(s).

II. THE ALJ'S CREDIBILITY FINDINGS

Respondent specifically excepts to some of the ALJ's credibility findings.² Also, a number of Respondent's exceptions are based on the ALJ's findings of fact, which were fully supported by the record and involved credibility determinations.³ "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *D & F Industries, Inc.*, 339 NLRB No. 73 (2003) (citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951)). Nevertheless, Respondent bases many of its Exceptions on discredited testimony.⁴ Respondent's exceptions to the ALJ's credibility findings and/or Respondent's exceptions that are supported by testimony that the ALJ did not credit should be dismissed.

III. RESPONDENT'S EXCEPTIONS NOT ARGUED WITH SPECIFICITY SHOULD BE DISREGARDED

Section 102.46(b)(1) of the Board's Rules and Regulations states that:

Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any

² See, for example, Respondent's exceptions 49, 65, 94, 95, 96. RBS also contains some argument regarding credibility at 98-99.

³ See, for example, Respondent's exceptions 19, 21, 22, 28, 29, 31, 32, 33, 44, 47, 48, 50, 51, 53, 54, 55, 56, 60, 61, 62, 63, 64, 66, 73, 74, 77, 78, 79, 80, 81, 82, 98, 138, 147-152, 163, 164, 179, 184, 185, 223, 224.

⁴ The ALJ specifically discredited the testimony of the following witnesses: David Bock (ALJD 6: n.9); William Crawford (ALJD 6: n. 9); and Margaret Premo (ALJD 7: 29-30). The ALJ did credit the testimony of the following witnesses: Koyrn Nako (ALJD 5: n.6; ALJD 6: n.9; ALJD 7: n.12; ALJD 8: 2-3); Hunter Bishop (ALJD 8:2-3); Leigh Critchlow (ALJD 8:2-3); William Ing (ALJD 8:2-3); Christine Loos (ALJD 11: n.20); and Bill O'Rear (ALJD 11: n.20).

argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions. . . .

These are “the minimum requirements with which exceptions to an administrative law judge’s decision must comply in order to merit consideration by the Board.” *Bonanza Sirloin Pit*, 275 NLRB 310 (1985). Under the rules, any exception which does not comply with these requirements “may be disregarded.” Rules and Regulations Section 102.46(b)(2).

A large number of Respondent’s exceptions fail to comply with the rule and should be disregarded under Section 102.46(b)(2) of the Board’s Rules and Regulations. In particular, many of Respondent’s exceptions are not supported by any record citations.⁵ All of these unsupported exceptions should be rejected.

Respondent also excepts generally to the ALJ’s order and conclusions of law.⁶ These exceptions fail to allege with any degree of particularity what error the ALJ is alleged to have made or on what grounds his findings should be overturned. These exceptions should be disregarded. *See, e.g., Aitoo Painting Corp.*, 238 NLRB 366 (1978) (general exceptions that would require Board to engage in a fishing expedition were rejected).

A number of Respondent’s exceptions concern the ALJ’s various rulings on objections.⁷ However, Respondent fails to argue in its brief the grounds on which the ALJ’s rulings on objections should be overturned. In addition, Respondent’s brief does not contain any argument

⁵ These include exceptions 1, 2, 5, 8-10, 13-22, 28, 29, 31-34, 44-51, 53-56, 60-65, 67, 73, 75, 77-82, 85-88, 90, 95, 96, 102-113, 135-138, 141-145, 147-153, 161-165, 168-169, 176, 182, 184-189, 201-203, 213-217, 219-222, 224, 226, 230-237.

⁶ These include exceptions 1-4 and 231-237.

⁷ These include exceptions 11, 12, 23-27, 30, 35-43, 59-59, 68-72, 74, 76, 83-84, 89, 91-93, 97, 99-101, 114-132, 139-140, 146, 154-160, 166, 167, 170-175, 177, 178, 180, 181, 183, 190-200, 205-212, 218, 225, 227-229.

or record citations regarding certain other exceptions.⁸ These unsupported exceptions should be rejected.

In summary, a number of Respondent's exceptions fail to comply with the Board's rules. In addition, Respondent, by filing 237 exceptions, many unsupported and without citations to the record, fails to narrow the issues for review. Respondent is essentially asking the Board to engage in a fishing expedition to determine what, if any, issues might be found in the ALJ's decision. The Board is not required to do so and may appropriately disregard Respondent's exceptions that do not comply with its rules.

IV. UNFAIR LABOR PRACTICES

A. RESPONDENT VIOLATED THE ACT WHEN IT DISPARATELY ENFORCED ITS INTERNAL SECURITY POLICY AND DISCIPLINED KORYN NAKO (Complaint ¶¶ 11 and 16(b))⁹

As the ALJ correctly found, Respondent unlawfully disciplined Koryn Nako on the basis of her Union activity when it issued her a written warning on October 26, 2005, for letting Union Local Representative Ken Nakakura ("Nakakura") into the HTH building without management permission on October 18, 2005. (ALJD 28: 6-8; GC 7). The ALJ also correctly found that Respondent discriminatorily enforced its security policy against the Union. (ALJD 22: 22-25, 32-35).

Under Respondent's discredited version of events, Circulation Clerk Koryn Nako "snuck" Union Local Representative Ken Nakakura ("Nakakura") into the HTH building on October 18, 2005. Respondent attempts to portray Nako's action as some sort of furtive plot to defy Respondent. The actual facts, as credited by the ALJ, reveal that Respondent acted

⁸ These exceptions include 3, 4, 6, 17, 31, 77, 78, 79, 80, 81, 82, 87, 88, 103, 104, 164, 217, 224.

⁹ Respondent cites its exceptions 1-2, 5-17, 18-50, 54, 56-57. (RBS 29).

unlawfully in its actions toward Koryn Nako. On October 18, 2005, while she was on her lunch break, Nako brought Nakakura in through the back door of the HTH building and took him into the break room in order to give him a note that set forth the names of unit members from the Circulation Department with whom Nakakura would meet. (Tr. 1: 210-213; Tr. 2: 405-406). Nako had no reason to think that her actions were inappropriate in any way. Respondent's internal security policy states nothing about the necessity for prior management approval prior to bringing a nonemployee into the HTH building.¹⁰ It was a common occurrence for nonemployees to enter Respondent's facility without incident.¹¹ Nako sensibly used the closest building entrance to the break room, where she was having lunch.¹² (Tr. 1: 210; GC 4; Tr. 1: 82-83). Indeed, prior to escorting Nakakura into the building, Nako asked Production Manager Arlan Vierra if it was okay if she let Nakakura into the building, and Vierra shrugged, which Nako took as a yes. (Tr. 1: 212; Tr. 2: 408-9). Nevertheless, within minutes of Nakakura entering the building, where he did nothing more than receive a note from Nako and socialize in the break room with employees who were on their lunch break, Editor David Bock and Circulation Director Alice Sledge entered the break room and asked who had let Nakakura in. Nako admitted that she had let Nakakura into the building and Bock said Nakakura needed prior

¹⁰ See R 330 dated March 3, 2004. Respondent admits in its brief that the access policy was set forth in R 330. RBS 30 ("The access policy was implemented in July of 2003, clarified for the Guild in February of 2004, and reiterated to the employees, specifically, in March of 2004.").

¹¹ See Tr. 2: 430-34; Tr. 3: 525-526, 625-627, 628-631; Tr. 4: 670-1, 673-4, 677-9, 699-700; Tr. 5: 875-879. See pages 51-54 of Counsel for the General Counsel's brief to the ALJ for additional discussion.

¹² Respondent attempts to spin Nako's action of bringing Nakakura in through the entrance closest to the break room as evidence of her concern that Nakakura would cause a disruption. Nako's concern was not that Nakakura would cause a disruption, but the obvious point that anyone entering the building through the front entrance to get to the break room, which is located on the opposite side of the newsroom, would do so. (Tr. 2: 299; See R 352 for the distance of the main entrance from the break room and the proximity of the back entrance to the break room).

approval to enter the building. (Tr. 1: 91-2, 213-215; Tr. 2: 411-2). For this incident Nako was issued a written warning. (GC 7).

Respondent claims that paragraph 11 of the complaint, alleging selective and disparate enforcement of the internal security policy regarding access to its premises, is time-barred. (RBS 30-31). Respondent fails to grasp the obvious point that its violation involves the “selective and disparate enforcement” of the policy on October 18, 2005, which occurred within the 10(b) period.

It is especially telling, that even though the record is replete with examples of nonemployees entering HTH property without prior management approval, Respondent offered no evidence that any employee other than Nako was ever disciplined for allowing a nonemployee into its facility without prior management approval. Respondent suggests that this was because it had no knowledge of these other incidents. However, this argument is implausible given the large number of incidents testified to at trial and the open arrangement of Respondent’s office.¹³ It is apparent in light of all of the evidence that Respondent is indifferent to a nonemployee entering its premises without prior management approval, unless the person is a Union representative.

Respondent argues that discrimination must be based on like circumstances, and that the only relevant evidence of like circumstances would be that of “other outside organizations” being permitted access to “conduct business” with HTH employees in the break room. (RBS 37). However, this argument ignores what actually occurred on October 18, 2005. Nako was on

¹³ Hunter Bishop testified to GC 4, which is a chart of Respondent’s newsroom. (Tr. 1: 86). For example, Editor Bock’s office has a window and a door facing the newsroom; Associate Editor Palmer sits at a desk open to the newsroom; Crawford’s office has a door open to the Circulation Department. Nako testified that the Circulation, Composing and Editorial departments are in an open area without walls. (Tr. 1: 218).

her lunch break in the break room when she let Nakakura into the building. Their Union activity was limited to Nako's giving Nakakura the list of employees and discussing it briefly with him. (Tr. 1: 213; Tr. 2: 410). That was it. There was no Union meeting, no presentation, no rally.¹⁴ In the end, Nako's letting Nakakura into the building was akin to employee Leigh Critchlow letting her acquaintance, Mitzi Nitta, into the building through the back door to deliver Critchlow's mail. Although Nitta has entered the building on a number of occasions, no member of management has ever spoken with Critchlow about Nitta's presence on HTH property. (Tr. 2: 430-43).¹⁵

In summary, based on the record evidence, Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined Koryn Nako on the basis of her Union activity on October 18, 2005, and discriminatorily enforced its security policy against the Union on that same day.

B. RESPONDENT VIOLATED THE ACT WHEN IT INTERROGATED KORYN NAKO REGARDING HER UNION ACTIVITY AND THE UNION ACTIVITIES OF OTHERS (Complaint ¶¶ 10(a), 12(a), and 12(c))¹⁶

1. *Bock Unlawfully Interrogated Nako on October 18, 2005* (Complaint ¶ 10(a))

Not long after accompanying Nakakura out of the building, Bock met with Nako in his office and told her that Union officials were not allowed on company property and needed to call and make an appointment and get approval before coming into the building. (Tr. 1: 223-224).

¹⁴ Respondent attempts to characterize Nako as "dishonest with Bock" because she said that Nakakura was not there to conduct Union business. (RBS 55 and n. 25.) However, as Nako testified, what she meant by her statement to Bock was that Nakakura was not there to conduct a Union meeting, to picket, or to pass out flyers, and his visit was not a planned event. (Tr. 1: 226). Thus, in Nako's view, her action of giving a note to Nakakura was not Union business.

¹⁵ See also Counsel for General Counsel Brief to ALJ at 51-54 for additional examples.

¹⁶ Respondent cites its exceptions 1-2,18-50, 54, 56-57. (RBS 29).

Bock said that Nako should have known about this policy. (Tr. 1: 224). Significantly, Bock asked Nako *why* she let Nakakura into the HTH building. (Tr. 1: 224).

As the ALJ pointed out, if in fact the essence of Nako's violation of company policy, as alleged by Respondent, was that Nako brought a non-employee into Respondent's facility without management approval, Bock's question as to why Nako let Nakakura into the building was irrelevant. (ALJD 17: 23-28). In addition, the ALJ correctly determined that "Bock had no valid basis for questioning Nako about why she had allowed Union representative Nakakura into Respondent's facility, since Respondent had no policy requiring prior management approval for a Union representative's access to its facility, its security policy was at best ambiguous as to where 'other organizations' were to meet with employees and its security policy was not enforced as to friends, family, and vendors' access to the newsroom." (ALJD 17: 31-35). Thus, Respondent's security policy nowhere mentions the necessity of management approval and is internally inconsistent as to where "outside organizations" are permitted. (See R 330; ALJD 16-17). In light of the facts, the ALJ appropriately found that Respondent, by Bock, unlawfully interrogated Nako on October 18, 2005, in violation of Section 8(a)(1) of the Act.

Respondent argues that it was entitled to investigate and that the meeting with Bock was informational. (RBS 54-55). However, in the end, Respondent offers no valid justification for Bock's questioning Nako why she let Nakakura into the building.

2. *Crawford Unlawfully Interrogated Nako on October 21, 2005 (Complaint ¶ 12(a))*

On October 21, 2005, Crawford questioned Nako about Nakakura's presence in the HTH building on October 18. Crawford asked Nako a long series of questions, including: why Nakakura had come; if Hunter Bishop knew Nakakura was coming into the building; whether Nakakura was there to meet with any particular department; which department; why Nakakura

was meeting with Circulation Department employees; what the note she gave Nakakura was about; why Nakakura called her in particular; and whether Nako intended to challenge company policy regarding meeting with Union officials on HTH property. (Tr. 2: 251-253). As the ALJ properly found, Crawford's interrogation of Nako had as its object the discovery of Nako and others' union activities and is prohibited by Section 8(a)(1) of the Act. (ALJD 23: 9-11).

Respondent claims that they conducted an appropriate investigation into Nako's "misconduct." (RBS 56-57). However, by the time of Crawford's interrogation, Respondent already knew that Nako brought Nakakura into the building without prior management approval, which was Nako's alleged misconduct. (See GC 7). This raises the question of what exactly Respondent was investigating when Crawford asked Nako question after question regarding Nakakura's presence in the building and the reason Nakakura was there.

Respondent argues that Crawford "rightfully asked" Nako what Nakakura's business on the premises was. (RBS 56). Respondent claims that because Nako said Nakakura was not there to conduct Union business (she did not think passing him a paper was conducting Union business) they were free to interrogate her at will. The problem with this argument is that Crawford knew Nakakura was a Union agent. Crawford's questions, which were unnecessary since Respondent already knew that Nako brought Nakakura into the building, were patently for the purpose of discovering Nako's Union activity and the Union activities of other employees. The ALJ thus properly found that Crawford's interrogation of Nako on October 21, 2005, which had as its object the discovery of Nako's and others' union activities, was prohibited by Section 8(a)(1) of the Act. (ALJD 23: 7-11).¹⁷

¹⁷ It is worth pointing out that the ALJ found Nako to be an extremely credible witness. (ALJD n. 6, 9, 12).

3. *Crawford Unlawfully Interrogated Nako in February 2006* (Complaint ¶ 12(c))

The ALJ properly found that Respondent, through Crawford, unlawfully interrogated Nako in early February 2006 in violation of Section 8(a)(1) of the Act. (ALJD 23: 33-37). Crawford told Nako he had spoken with Union Administrative Officer Wayne Cahill and that he had asked the Union why it was pursuing Nako's grievance if Nako had acknowledged and accepted her discipline. (Tr. 2: 271). According to Crawford, Cahill said the Union could file a grievance on Nako's behalf even if Nako did not initiate the grievance. (Tr. 2: 271). Crawford told Nako that the Union could not file a grievance if she told them not to do so. (Tr. 2: 271). Crawford asked Nako why she would allow the Union to file the grievance if she accepted her discipline. (Tr. 2: 271-272). Nako said she would look into it. (Tr. 2: 272-273).

Respondent argues that Nako's testimony was not credible. However, the ALJ specifically credited Nako's testimony regarding this interrogation. (ALJD 7: n. 12). Respondent also argues that Nako was not threatened by Crawford. (RBS 58). However, it is the tendency of Respondent's conduct to be coercive, and not its actual effect, which determines the violation. *See Challenge-Cooke Bros.*, 288 NLRB 287, 396, 397 (1988); *Freemont Food*, 289 NLRB 1790 (1988); *International Metal Co.*, 286 NLRB 1106, 1109 (1987). Thus, Respondent's arguments are unavailing, and the ALJ's finding that Respondent violated the Act should not be disturbed.

C. **RESPONDENT UNLAWFULLY DISCIPLINED AND DISCHARGED HUNTER BISHOP FOR HIS UNION ACTIVITY** (Complaint ¶¶ 16(a) and 16(c))¹⁸

The ALJ correctly found that Respondent unlawfully suspended and terminated Hunter Bishop based on his protected concerted and Union activity of performing his duties as a Union

¹⁸ Respondent cites its exceptions 1-2, 51-84, 91-93, 98, 100-101. (See RBS 29).

shop steward on October 18, 2005. (ALJD 28-30). The ALJ's decision in this regard is well-reasoned and based on credibility resolutions. In particular, the ALJ found Koryn Nako, who witnessed the entire event that constitutes the alleged misconduct for which Respondent suspended and then terminated Bishop, to be an extremely credible witness.¹⁹

The facts are as follows. About a minute or two after leaving the break room with Nakakura on October 18, 2005, Bock returned and asked to speak with Nako. (Tr. 1: 215). Bock turned and left the break room and Nako got up to follow him. (Tr. 1 216). Employee Sharon Maeda, who was present in the break room, asked Bishop if someone should go with Nako. (Tr. 1: 216). Nako looked at Bishop and said okay, and then Bishop followed her out the door of the break room. (Tr. 1: 216).

When Bishop exited the break room he saw Nako, Bock, and Circulation Director Sledge near employee Cliff Panis' desk. (Tr. 1: 93-94). Bock told Bishop it did not involve him. (Tr. 1: 217). Bishop asked whether it was regarding disciplinary actions and Bock responded it was just a discussion. (Tr. 1 217, 304-305). Bishop asked again if it was regarding disciplinary actions and Bock said it was just a discussion and it would not involve him. (Tr. 1: 217, 220, 304-305). Bishop asked if it would lead to discipline and Bock said it was none of his business and it did not involve him. (Tr. 1: 217). Bock asked if Bishop was insisting on coming in the meeting and Bishop said that he was not and that all he wanted was information. (Tr. 1: 95). Bock said good. (Tr. 1: 95). Bishop told Nako if the meeting did turn out to be disciplinary, she could have a union representative with her and she should stop the meeting and get someone. (Tr. 1: 96). Bishop said he would be available. (Tr. 1: 96; Tr. 1: 220). Nako said okay and

¹⁹ ALJD n. 6, 9, 12.

walked with Bock to his office. (Tr. 1:220). Bishop turned around and walked back towards the break room. (Tr. 1:96; Tr. 1:220).

Not more than a minute or two passed between the time Bishop left the break room and the time he turned back and returned to the break room. (Tr. 1:97, 221). Nako testified that during this interaction Bishop's tone was firm, but he was not yelling. (Tr. 1:219, 221). For this short occurrence, in which Bishop did nothing more than attempt to represent another unit employee who was about to be called into what appeared to be, and what in fact turned out to be, an investigatory meeting, Bishop was suspended and then terminated. (GC 2).

Respondent claims that it had reason to suspend and then terminate Bishop for his actions on October 18, 2005. (RBS 37). In support of this claim, Respondent relies on testimony of David Bock, Arlan Vierra, Alice Sledge, and Meg Premo, which does not comport with the credited testimony of Koryn Nako and others. Respondent also points to its prior discipline of Bishop. However, this is irrelevant because as the ALJ correctly found, based on the credited evidence, Bishop acted entirely appropriately on October 18, 2005, in his attempts to represent Nako and did nothing to warrant discipline, much less termination.

Respondent also suggests that *Weingarten* was not properly considered by the ALJ because the complaint does not specifically allege a *Weingarten* violation.²⁰ This is beside the point. Nako said she wanted someone to accompany her into the meeting with Bock and Bishop, as shop steward, appropriately did so. Bishop, in his capacity as shop steward, also appropriately attempted to determine from Bock whether Nako was being called into a meeting that would lead to discipline. Nako's wanting to have a representative in the meeting, Bishop's accompanying Nako to represent her, Bishop's asking Bock when rebuffed whether the meeting had to do with

²⁰ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

disciplinary action, and the fact that the meeting turned out to be a *Weingarten* meeting, make the ALJ's conclusions regarding *Weingarten* and consideration of *Weingarten* entirely appropriate.

Respondent cites the discredited testimony of Margaret Premo, among others, in support of its argument. Respondent claims that the ALJ discredited Premo because she was a *Beck* objector. (RBS 42). While Premo is indeed a *Beck* objector, the ALJ based his credibility determination primarily based on demeanor. In addition to the inconsistencies in her testimony, the ALJ found that Premo's "voice was affected and she was overly dramatic while testifying." (ALJD 7: 23-32). The ALJ also found that Premo's view was obstructed by the partition of her cubicle. Premo testified that even though she was seated at her desk, focused on her computer, which was at the apex of the cross of the cubicle grouping, she could see Hunter Bishop, who she claims was standing to her side off of her left shoulder, through her peripheral vision. (Tr. 5: 895-86, 905-6, 908, 920). The partitions separating the cubicles are 2 to 3 feet above the desk. (Tr. 1: 85).

In the end, there is nothing to dispute the ALJ's conclusion that Bishop was suspended and terminated based on his Union and protected concerted activity on October 18, 2005.

D. THE ALJ CORRECTLY FOUND NO POST-TERMINATION JUSTIFICATION FOR DENYING BISHOP REINSTATEMENT²¹

The ALJ appropriately found that Respondent's alleged post-termination discovery of Bishop's termination is nothing more than belatedly discovered pretext for Bishop's discharge. (ALJD 30-31). It is apparent from the record that Respondent seized on Bishop's actions on October 18, 2005, as an excuse to terminate him. The termination letter Respondent issued to Bishop clearly states that "we are discharging you because of your misconduct on October 18,

²¹ Respondent cites its exceptions 1-2 and 85-90. (See RBS 29).

2005.” (GC 2). The letter does not mention any other alleged incident that caused Bishop’s discharge. Respondent, apparently realizing that it did not have a valid reason to terminate Bishop in October 2005, sent Bishop a letter on February 28, 2006, *four months* after his termination, informing him that it would have terminated him anyway due to his productivity. (GC 5). Respondent’s arguments in this regard, which are exactly the same as those made to the ALJ, are pretextual, and should be disregarded. (See Respondent’s Brief to ALJ at 65-67).

The ALJ also properly concluded that Bishop’s post-termination comments on his internet blog and at the University of Hawaii Hilo do not justify losing the protection of the Act. (ALJD 31-32). Respondent fails to address the ALJ’s reasoning, but rather makes the same arguments that it did in its brief to the ALJ. (*See* RBS 50-52 and Respondent’s Brief to ALJ at 67-69). Respondent has offered no valid argument as to why the ALJ’s conclusions should be disturbed.

E. RESPONDENT UNLAWFULLY DISCIPLINED AND DISCHARGED DAVE SMITH FOR HIS PROTECTED CONCERTED AND UNION ACTIVITY (Complaint ¶ 16(e) and 16(f))²²

The ALJ properly found that Respondent unlawfully disciplined and discharged reporter Dave Smith (“Smith”) based on his protected concerted and Union activity. The relevant facts are undisputed. On March 3, 2006, Editor Bock approached Smith and said he wanted to meet with him. (Tr. 2: 449). Shortly thereafter, Reporter Jason Armstrong told Smith that he had been issued a warning, and asked Smith to be his union witness. (Tr. 2: 452). When Smith entered Bock’s office, Bock said that the meeting was not a *Weingarten* meeting. (Tr. 2: 452). Smith left Bock’s office and returned to his desk. (Tr. 2: 472).

²² Respondent cites its exceptions 1-2, 141-165, 168-174, 188-212.

Reporter Peter Sur ("Sur"), noticed what had occurred. (Tr. 3: 571-73). Sur offered Smith his voice recorder. (Tr. 2: 454). Sur showed Smith how to operate the recorder. (Tr. 2: 454; Tr. 3: 574). Smith said that he would ask for a witness when his name was called by Bock and Sur agreed to be Smith's witness in the meeting. (Tr. 3: 574). Photographer Will Ing and Reporter Christine Loos encouraged Smith to use the recorder (Tr. 3: 612; Tr. 4: 686). Smith sat down at his desk and waited for Armstrong's meeting to conclude. (Tr. 2: 455). Prior to Sur offering him the voice recorder, it did not occur to Smith to record his meeting with Bock. (Tr. 3: 467). Smith decided to record the meeting because he felt he was about to be illegally refused a witness and he wanted an accurate representation of what was going to occur at the meeting. (Tr. 3: 468).

When Smith saw Armstrong coming out of Bock's office, Smith turned on the recorder and put it in his shirt pocket. (Tr. 3: 455). Smith asked Bock before he went into his office for a union witness. (Tr. 3: 488). Bock said it was not that complicated and that he could not allow it. (Tr. 3: 488). Smith went with Bock into Bock's office where Associate Editor Palmer was also present. (Tr. 3: 489). Bock asked Smith why he thought he needed a *Weingarten* witness. (Tr. 3: 489). Smith told Bock that it seemed that a *Weingarten* witness was warranted. (Tr. 3: 489). Bock said he used to allow *Weingarten* witnesses but that he did not do so any more because he was repeatedly harassed over it. (Tr. 3: 490). Later in the meeting Bock said that Hunter Bishop had abused his *Weingarten* rights. (Tr. 3: 490).²³ Bock said he wanted to speak with Smith about productivity and story count. (Tr. 3: 490-2). Bock said that he was going to give Smith a verbal warning rather than a written warning because he had cooperated with Bock in a previous meeting. (Tr. 3: 490). Smith asked Bock whether he had recalled Smith speaking with him after

²³ Bock admitted that there was a discussion of *Weingarten* in the meeting and that *Weingarten* was discussed at more than one point in the meeting. (Tr. 1: 74, 76).

a prior meeting regarding story count and asking Bock how he was doing and Bock responding that he was doing great. (Tr. 3: 491). Bock told Smith that he was at about .85 stories per day and they had some discussion as to how Bock arrived at those numbers. (Tr. 3: 491-492). Bock invited Smith to do his own story count if he wanted to. (Tr. 3: 492). Bock told Smith he was a valuable part of the newspaper and that there were stories he could write that other people could not write as well. (Tr. 3: 494). The following Monday, Reporter Karen Welsh told Bock that Smith had taped the meeting on March 3, 2006. (Tr. 1: 126-27).

Initially, the ALJ properly concluded that the conversation between Smith, Sur, Ing, and Loos was protected concerted activity. (ALJD 18-19). The ALJ also found that the employees reasonably believed that Smith's meeting with Bock could be an investigatory meeting leading to discipline. (ALJD 18: 40-41). Respondent argues that Smith's concern was "purely personal" rather than concerted. (RBS 76). This ignores the fact that, as the ALJ properly found, Smith acted in concert with Sur, Ing, and Loos out of a concern that Respondent was going to commit a violation of *Weingarten*. (ALJD 18: 28-29). Thus, *Dana Corp.*, 318 NLRB 312, 316-17 (1995), cited by Respondent, is inapposite, because there the secret recording was made for the purpose of protecting the employee's own interest, and therefore could not constitute protected, concerted activity. Chairman Battista's dissent in *Sam's Club*, 342 NLRB 620, 623 (2004), is also not on point for the same reason.

Respondent claims that the ALJ improperly considered the employees' concerns about *Weingarten* in this case because there is no *Weingarten* violation alleged in the complaint. (RBS 69-71). As is evident from the facts, the issue of *Weingarten* rights, and the employees' concern that Respondent would violate their *Weingarten* rights, led to the employees' actions and is thus

relevant to this case. The ALJ appropriately considered the employees' concerns regarding *Weingarten* in reaching his well-reasoned conclusions in this case.

Respondent also argues that “[s]ecret taping is not protected conduct.” (RBS 71). In support of its argument, Respondent cites a number of cases that do not involve concerted activity and which are therefore easily distinguished. (RBS 72-73). These cited cases include: *Carpenter Sprinkler*, 238 NLRB 974, 975 (1978) (holding, in case where the union taped respondent’s president in collective bargaining negotiations, that recordings of conversations which are part of negotiations and which are made without notice to a party to the conversation should be excluded from evidence); *Minton v. Lenox Hill Hosp.*, 160 F.Supp.2d 687, 696 (S.D.N.Y. 2001) (Title VII race discrimination case); *Douglas v. Dekalb County, Georgia*, 2007 WL 4373970 (N.D. Ga. 2007) (First amendment case; recording made in violation of company policy); *Danca v. K-Mart Corp.*, 2000 WL 33407239 (Mich.App. 2000) (Title VII gender discrimination case in which an employee secretly recorded her subordinates in violation of store policy regarding treating other employees with respect); *Cutts v. McDonalds*, 281 F.Supp.2d 931 (W.D.Mich. 2003) (race discrimination claim); *Consolidated Edison of NY*, 286 NLRB 1081, 1032 n.5 (1987) (case involved an 8(a)(1) threat against an employee of unspecified reprisals and legal action for filing grievances and unfair labor practices; taping not at issue); *People v. Selby*, 198 Colo. 386, 390 (Co. S.Ct. 1979) (involving an ethics complaint against a lawyer who secretly recorded a conference with a judge and was disbarred); *Garvey Marine*, 328 NLRB 991, 1019 (1999) (taping not concerted).

Respondent also argues that subsequent to March 3, 2006, Smith was insubordinate and that gave it additional grounds to suspend and then discharge him. Respondent lists various alleged acts of “misconduct” in its April 11, 2006, letter to Smith. (GC 3). To this end,

Respondent claims that Smith was insubordinate when he failed to turn over Sur's voice recorder to Bock. (RBS 87). As the ALJ correctly states, Smith was under no obligation to turn over Sur's recorder to Bock. (ALJD 33: 37-38). If anything, Bock's concern with retrieving the recorder and the recording, items that did not belong to Respondent and that were not necessary to Respondent's investigation of Smith's "misconduct," is revealing of the Employer's discriminatory motive in its actions toward Smith.²⁴

Respondent also claims that Smith refused to meet with Bock subsequent to his suspension. (RBS 87; GC 3 at bullet point 6). As the ALJ found, Cahill responded on Smith's behalf prior to the scheduled meeting on March 17, 2006. (ALJD 42-46; GC 33).²⁵ Similarly, Respondent improperly characterizes as "insubordination" the fact that Cahill responded on Smith's behalf to Bock's letter of April 10, 2006. (RBS 88-9; GC 3 at bullet point 10; see GC 35). Thus, the ALJ correctly found that Smith did not refuse to meet with Bock and that Smith, through Cahill, responded to every request Bock made to meet. (ALJD 34: 14-15).

Respondent also claims that "Smith failed to notify Bock that he would attend the March 27, 2006, meeting...." (RBS 87; see GC 3 at bullet point 8). However, Bock's March 22, 2006, letter (GC 13) contained a "direct order" for Smith to appear on March 27 and meet with Bock.

²⁴ Bock in his letter to Smith of April 11 also characterizes as "insubordination" Smith's giving of the recorder to the Union at the Union's request and not providing Bock with the recorder, which was in the Union's possession (GC 3 at bullet points 2, 7, and 8). Bock mischaracterized in the letter what Smith told him about the location of the recorder. (GC 3 at bullet point 2). Bock makes it seem that Smith had already given the recorder to the Union at the time of the initial meeting regarding the recording on March 9. However, Smith gave the recorder to the Union after the March 9 meeting at the Union's request. (Tr. 4: 730-731). Smith told this to Bock in their phone conversation on March 13, which was the first time that Bock requested Smith provide him with Sur's recorder and the recording. (Tr. 3: 508-9).

²⁵ Bock acknowledged that Cahill responded on Smith's behalf in his letter of March 22, 2006. (GC 13).

(GC 13). Bock's letter also stated that he expected to hear "directly from [Smith] in response to the letter." (GC 13). As Smith informed Bock at the March 27 meeting, Smith understood a "direct response" to mean attending the meeting, which Smith did.²⁶

Respondent argues that Smith voluntarily resigned because he did not sign the Acknowledgement Form stating that "surreptitious recording in the workplace will continue to be considered serious misconduct" (RBS 93; GC 3). As the ALJ correctly found, "Smith was under no obligation to admit that his protected activity amounted to misconduct as a condition to his continued employment." (ALJD 34: 17-18). An employee does not have to sign an unlawful disciplinary notice. *See, e.g., Air Contact Transport, Inc.*, 340 NLRB 688, 689-90 (2003) (finding employer's discharge of employee for refusal to sign a memo that constituted unlawful discipline violated 8(a)(1)). Therefore, the additional reasons that Respondent claims for Smith's termination are without merit and the ALJ properly concluded that Respondent unlawfully disciplined and discharged Smith based on his protected concerted and Union activity.

F. RESPONDENT UNLAWFULLY SUSPENDED PETER SUR FOR HIS PROTECTED CONCERTED AND UNION ACTIVITY (Complaint ¶ 16(d))²⁷

The ALJ correctly found that Respondent suspended Peter Sur based on his protected concerted and Union activity. (ALJD 32-33). Sur was suspended for giving Smith a recorder for the purpose of guarding against a violation of *Weingarten*. Respondent argues that *Weingarten*

²⁶ Bock also improperly faults Smith in the letter for being "slow" to respond to telephone calls which "forced" Bock to send Smith a letter ordering him to meet with Bock on March 17, 2006. (GC 3 at bullet point 5). However, it is apparent from the letter Bock sent Smith (GC 12), that Bock in fact spoke with Smith on the same day Bock called and left the messages for Smith. Bock also testified that he spoke with Smith on the day he called, March 13, 2006, and sent the letter (GC 12) that same day. (Tr. 6: 1048-9).

²⁷ Respondent cites its exceptions 1-2, 141, 143, 147, 151, 162-67, 186-87.

was not an issue on March 3, 2006. However, as the ALJ explained “Sur was engaged in union activities in attempting to insure other employees’ right to a Union representative in a *Weingarten* interview.” (ALJD 33: 9-10). The record testimony establishes that concerns of a *Weingarten* violation motivated the actions of Sur and his fellow employees. Respondent also argues that secret taping is not protected activity. (RBS 85). For the reasons set forth above in Section IV.E., the ALJ properly found under the facts in this case that “Sur together with Smith, Ing and Loos were engaged in protected concerted activity on March 3, 2006 when they planned, discussed and recorded Smith’s meeting with Bock.” (ALJD 33: 5-7).

G. RESPONDENT UNLAWFULLY INTERROGATED DAVE SMITH, PETER SUR, CHRISTINE LOOS, AND WILL ING ON MARCH 9, 2006 (Complaint ¶ 10(b))²⁸

The ALJ properly found that on March 9, 2006, Bock interrogated employees Peter Sur, Dave Smith, Christine Loos, and Will Ing regarding their protected concerted activity of discussing and agreeing that Smith should tape his March 3, 2006, meeting with Bock to protect not only his but other employees’ *Weingarten* rights. (ALJD 17-20).

On March 9, 2006, Bock asked the following questions of the named employees during a closed door meeting in Bock’s office in the presence of Associate Editor Richard Palmer:

Peter Sur:

Bock told Sur that he had been made aware a recording was made of his meeting with Smith. (Tr. 3: 580; Tr. 5: 1029;). Bock asked Sur if he knew anything about the recording. (Tr. 3: 580). Sur responded that he had given Smith a voice recorder to take into the meeting to guard against any violation of *Weingarten*. (Tr. 3: 580). Bock asked Sur whose idea it was. (Tr. 5: 1030). After having a witness come into the meeting, Bock again asked Sur whether he gave

²⁸ Respondent cites its exceptions 1-2, 147-149, 151, 161-185, 192, 195.

Smith a recorder and Sur replied that he had. (Tr. 3: 582). Bock asked Sur several times why he gave Smith the recorder and Sur told Bock that it would be better to have an impartial recording made of the conversation because Smith would be denied a witness. (Tr. 3: 582). Bock asked who else was involved in the decision to make the recording and asked if Reporter Christine Loos or Photographer Will Ing said anything. (Tr. 3: 582-583; Tr. 5: 1030-1031). Bock asked what led to Sur's discussion with Smith. (Tr. 3: 583-84).

David Smith:

Bock asked Smith if he had recorded the meeting on March 3 and Smith immediately said that he had. (Tr. 3: 497). Bock asked Smith why he had recorded the meeting and Smith responded that he thought he had been improperly denied a Union witness and he wanted an accurate representation of what occurred in the meeting. (Tr. 3: 497). Bock asked Smith where he got the recorder from (Tr. 3: 498-500); how he asked for the recorder from Sur and whether he had a discussion with Sur asking him to have the recorder (Tr. 5: 854); where the recorder was (Tr. 3: 501; Tr. 3: 853); if the recording had been transcribed (Tr. 3: 501); whether Smith was planning to turn the notes into someone or whether anyone asked for them (Tr. 5: 853); whether he had any plans for the recording (Tr. 3: 505; Tr. 5: 853); whether he talked with either Christine Loos or Will Ing about the recording (Tr. 3: 505; Tr. 5: 854); whether anyone told him how to conceal the recorder (Tr. 5: 854); and what he did with the recorder (Tr. 5: 854).

Will Ing

Bock asked what Ing had seen and heard and what he knew about the recording and what his involvement was. (Tr. 3: 616; Tr. 5: 859; Tr. 6: 1043). Bock asked Ing whether he had given Smith advice about how to use and how to conceal the recorder. (Tr. 3: 616, 627; Tr. 5:

859-60). Bock asked Ing and his witness, employee Marie Ella, if they had any kind of recording device concealed on them. (Tr. 3: 618; Tr. 5: 861).

Christine Loos

Bock asked Reporter Loos, among other things: what she knew about the discussion before the tape recording (Tr. 4: 660, 692); whether it was Smith's idea or Sur's idea to use the recorder (Tr. 4: 693); whether she gave Smith any advice on where to hide the recorder (Tr. 4: 663); whether she conspired with anyone (Tr. 4: 663, 665); if she tried to talk Smith out of using the recorder (Tr. 4: 661, 693); why she would encourage Smith to use the recorder (Tr. 4: 693); if she was tape recording the meeting with Bock (Tr. 4: 693); if she had ever tape-recorded a meeting with Bock (Tr. 4: 493); Bock asked Loos several times whether she had encouraged Smith to take in the tape recorder and why she would do that (Tr. 4: 695).²⁹

Thus, in light of the facts, it is evident that Respondent interrogated Sur, Smith, Ing, and Loos about their protected concerted activities on March 9, 2006 and violated Section 8(a)(1) of the Act. (ALJD 20: 33-42).

Respondent argues generally that the interrogations were lawful because Smith's recording was not protected and "Bock's inquiries were appropriately circumscribed." (RBS 80-81, 83). In addition to the points made in the ALJ's well-reasoned decision, it is worth noting that if in fact, as Respondent claims, it was the actual taping of the March 9, 2006, meeting that was the problem, then Bock's far-reaching questions as to the involvement of others in discussing and planning the taping and as to what occurred after the taping were entirely irrelevant and for the purpose of discovering the protected concerted activities of Smith and the

²⁹ The ALJ found the testimony of Christine Loos, and her *Weingarten* witness, Bill O'Rear, to be particularly credible. (ALJD 11 n.20).

other employees.³⁰ Instead, Bock continued the March 9 meeting by asking Smith questions about the concerted nature of his action including who gave him the concept of recording the meeting, where he got the recorder from, whether he had a discussion with Sur regarding the recorder, whether he spoke with Loos or Ing about the recording, whether anyone told him how to conceal the recording, among other things. Bock also asked Smith questions regarding the location of the recorder, such as where the recorder was and whether he had any plans for the recording, which were irrelevant if the making of the recording was the issue. Also, even though it was Smith who recorded the meeting, on that same day Bock, with Palmer present, interrogated all of the employees who had spoken with Smith immediately prior to the recording. These interrogations focused on discussions that took place prior to the recording, including advice the employees gave to Smith regarding the recording. Sur, Loos, and Ing all said in their meetings on March 9 with Bock and Palmer that they thought Smith should tape the meeting to guard against a violation of *Weingarten*. In the end, as the ALJ found, the evidence shows that Respondent engaged in interrogation designed to discover who was engaged in protected concerted activities and failed to clearly communicate to the employees the limitations on the inquiry. (ALJD 20: 33-42).

H. RESPONDENT UNLAWFULLY INTERROGATED DAVE SMITH ON MARCH 27, 2006 (Complaint ¶ 10(c))³¹

The ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act when Bock interrogated Smith on March 27, 2006, regarding his protected concerted activity and the protected concerted activities of others. (ALJD 21: 6-8). In the meeting, Bock asked Smith,

³⁰ In fact, even Bock's letter of March 15 (GC 12) refers to Smith's *making* of the recording as "the incident of misconduct" that led to Smith's suspension.

³¹ Respondent's Brief in Support does not identify which of its 237 exceptions concerns this finding. (See RBS 29-30).

among other things, when he gave the recorder to the Union (Tr. 3: 516); to whom he gave the recorder (Tr. 3: 516); if Sur gave Smith permission to give the recorder to the Union (Tr. 3: 516); whether Smith had recorded any previous meetings (Tr. 4: 743); and whether he knew of anyone else who had recorded any meetings. (Tr. 4: 743).

Respondent offers no argument in response to the ALJ's conclusion regarding this interrogation. The ALJ's conclusion is based on the evidence and should remain undisturbed.

I. RESPONDENT UNLAWFULLY PROHIBITED THE WEARING OF UNION PARAPHERNALIA (Complaint ¶ 14)³²

The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by issuing letters prohibiting unit members from wearing during working time a button with Hunter Bishop's picture on it with text "Bring Hunter Back" and red armbands worn to show support for Dave Smith. (ALJD 24-26; GC 9 and GC 10). Respondent argues that it could not have known the purpose of the buttons and the armbands because neither the button nor the armband contained union insignia. (RBS 96). As evident from the facts, proximate to the date Respondent terminated Bishop's employment, nearly every unit member wore the "Bring Hunter Back" button. (Tr. 2: 273, 275, 276, 278-279, 446-447; Tr. 3: 631, 642; GC 8). Similarly, on March 13, 2006, within days of Smith's suspension, unit employees wore red armbands to work. (Tr. 5: 866-7; Tr. 2: 281, 283-284). The ALJ correctly found that a cursory look at the "Bring Hunter Back" button establishes its purpose. (ALJD 25: 44-47). The ALJ also logically concluded that "[t]he fact that the armbands were worn within days of Smith's suspension together with the absence of evidence that Respondent has banned buttons or other items of apparel, leads to the inference that the Respondent was aware that the armbands were a protest of Smith's suspension." (ALJD 26: 35-38).

³² Respondent cites its exceptions 1-2, 213-221, 222-229. (RBS 30).

The ALJ also correctly concluded that Respondent’s narrow reading of *Republic Aviation*, 324 U.S. 793 (1945), to limit such protected activity only to buttons and armbands containing union insignia “would fly in the face of the Court’s rationale grounded in Section 7 of the Act which guarantees, inter alia, the right to engage in concerted activities for the purpose of other mutual aid or protection.” (ALJD 25: 31-33). Respondent also makes the unsupported assertion that because the buttons were worn in protest of Bishop’s termination, the employees who wore them undermined the collective bargaining agreement and engaged in self-help. (RBS 97). Under this rationale, any time an employee engages in a concerted activity for mutual aid or protection that may concern some violation cognizable under the contract, his or her action would be deemed unprotected self-help. Respondent’s argument is contrary to the law and should be disregarded.

Given the fact that Respondent has no dress code, the record evidence that employees have worn a variety of pins and buttons during working hours without incident,³³ and in the absence of any evidence that the wearing of the buttons or the armbands adversely affected Respondent’s business, employee safety, or employee discipline, the ALJ correctly concluded the Respondent’s banning of the “Bring Hunter Back” buttons and the red armbands violated Section 8(a)(1) of the Act.

J. RESPONDENT PROMULGATED AND MAINTAINED AN OVERBROAD RULE PROHIBITING THE MAKING OF SECRET AUDIO RECORDINGS (Complaint ¶ 15)³⁴

The ALJ correctly determined that Respondent’s rule prohibiting the making of surreptitious audio recordings was an attempt to restrict its employees exercise of their Section 7

³³ Employees have worn to work without incident American flag pins, breast cancer pins, Red Cross pins, Christmas pins, and Halloween pins. (Tr. 2: 285-286, 448).

³⁴ Respondent cites its exceptions 1-2, 230. (RBS 30).

rights and violated Section 8(a)(1) of the Act. (ALJD 27: 18-20). In this regard, the ALJ cited *Stanadyne Automotive Corp.*, 345 NLRB 85, 86-87 (2005), and found that “[t]here is no dispute that the publication of the rule on March 15, 2006, was in direct response to employees’ exercise of their rights to engage in concerted activity under Section 7 of the Act.” (ALJD 27: 16-18).

Respondent argues that there is no Section 7 right to secretly record and that “the Board should not read the secret taping rule . . . as encompassing Section 7 activity.” (RBS 95). However, as set forth above, the ALJ properly found that Smith’s secret recording of his meeting with Bock was protected concerted activity, because it was group action for the purpose of mutual aid and protection in protecting employees’ *Weingarten* rights and the rule was promulgated in direct response to this protected concerted activity. (ALJD 27: 14-16). Thus, Respondent’s arguments are unavailing and the ALJ’s conclusions should not be disturbed.

K. RESPONDENT FAILED AND REFUSED TO PROVIDE THE UNION WITH RELEVANT AND NECESSARY INFORMATION (Complaint ¶¶ 7-9)³⁵

The ALJ correctly determined that Respondent violated Sections 8(a)(1) and (5) of the Act when it refused to furnish the information requested by the Union in its written requests of October 19, November 3, and November 15, 2005, and in its oral request of November 15, 2005. (ALJD 39: 9-11; see GC 20, 22, 25, 26, Tr. 4: 715).³⁶

Respondent argues generally that the Union’s information requests were neither relevant nor necessary. However, the information sought by the Union concerns the discipline of employees within the bargaining unit and is thus presumptively relevant. *See Sheraton Hartford*

³⁵ Respondent cites its exceptions 1-2, 102-140. (RBS 29).

³⁶ The ALJ inadvertently referred to an information request dated October 15, 2005. The information request was dated October 19, 2005. (See GC 20).

Hotel, 286 NLRB 463, 494 (1988) (where requested information pertains to employees within the bargaining unit, information is presumptively relevant).

Respondent argues that it provided the Union with Bishop's personnel file in a timely manner despite a 12-week delay because it was a busy time of year for Respondent and because the file was purportedly cumbersome and voluminous. (RBS 63-65). However, Editor Bock had gathered and reviewed Bishop's entire personnel file prior to Bishop's termination, most of Bishop's personnel file was been assembled by December 2005, and Bishop's personnel file was not voluminous, but only one inch thick. (Tr. 6: 1084, 1099-1100, 1122). Respondent attempts to distinguish the cases cited by the ALJ regarding unreasonable delay. (RBS 64-65). Nevertheless, there can be no dispute that the Board has found similar delays in providing evidence to be unreasonable. *See Tom Rice Buick, Pontiac & GMC Truck, Inc.*, 334 NLRB 785, 793 (2001) (2 month delay in providing information unreasonable where the information was needed in order to process grievance concerning discharge); *United States Postal Service*, 308 NLRB 547, 551 (1992) (finding a violation where employer delayed for four weeks in providing the Union with information).³⁷

Respondent argues that the Union had all of the information it needed to process the Bishop grievance. (RBS 65-67). However, as the ALJ pointed out, "[i]t is not for Respondent to decide what is necessary and relevant to the Union's duty as collective bargaining representative." (ALJD 38: 1-2). Respondent's argument ignores established Board law, which states that information must be disclosed unless plainly irrelevant. (ALJD 38: 6-7, citing *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8 (1st Cir. 1977)).

³⁷ The ALJ cited the following cases: *Regency Service Carts, Inc.*, 345 NLRB 671 (2005) (16 week delay unreasonable); *Pan American Grain*, 343 NLRB 318 (2004) (nine week delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989); *Woodland Clinic*, 331 NLRB 735, 737 (2000) (seven week delay unreasonable).

Regarding the information requests pertaining to Koryn Nako's discipline (GC 25 and 26), Respondent once again argues the Union had all of the information it needed to process the Nako grievance. (RBS 67-68). As set forth in the paragraph immediately above, Respondent ignores established Board law when it claims that it has the right to pick and choose what information it will provide to the Union based on its own judgment of what the Union needs and does not need. Respondent's argument must be rejected.

The ALJ correctly found that Respondent must provide to the Union any witness statements considered by Respondent in reaching its decision to discipline Nako, including the Nako witness statement, if the witnesses were not provided assurances of confidentiality or did not adopt the statements. (ALJD 36: 12-14 citing *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990)). Respondent does not refute the fact that it failed to give Nako any assurances that her statement would be confidential.

Respondent also argues that it should not have to turn over the Nako statement because it was prepared at the direction of counsel in anticipation of litigation. (RBS 60). Accepting Respondent's far-reaching argument, in which all documents or information gathered in the course of a disciplinary investigation are characterized as having been prepared "in anticipation of litigation" would frustrate the purpose of the Act and could in effect shield any such document from being turned over. To accept Respondent's argument would also chill Section 7 rights, as Respondent argues that the work product privilege automatically applies if an employee has filed grievances in the past that resulted in arbitration. (RBS 61, concerning Bishop). Respondent's argument is untenable.

The ALJ properly held that Respondent was obligated to provide the Union with names of witnesses and employees interviewed in its investigation of the Bishop suspension and

termination. (ALJD 36: 20-23; *see* GC 22). Respondent suggests that it must only produce witness names if they are contained on some preexisting document. (RBS 59). This argument ignores Board case law that clearly states “[a]n employer does have a duty to furnish a union, upon request, the names of witnesses to an incident for which an employee was disciplined.” *Anheuser-Busch*, 237 NLRB 982, 984 n.5 (1978). Thus, it is irrelevant whether or not the witness names are on some existing document. Respondent appears to be suggesting, without case support, that a more restrictive subpoena-type standard should be applied to the duty to provide information. That is simply not the law.

The ALJ correctly rejected Respondent’s argument that the requested information amounts to pre-arbitration discovery. (ALJD 36-37). The record is clear that at the time the information requests were made—prior to the time that the grievances was referred to arbitration—they could not have been requests for pre-arbitration discovery. *See California Nurses Association*, 326 NLRB 1362 (1998); *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788, 789 (2001).

For the reasons in the ALJ’s decision and set forth above, the ALJ correctly determined that Respondent violated Sections 8(a)(1) and (5) of the Act when it refused to furnished the information requested by the Union in its written requests of October 19, November 3, and November 15, 2005, and in its oral request of November 15, 2005. (ALJD 39: 9-11; *see* GC 20, 22, 25, 26, Tr. 4: 715).

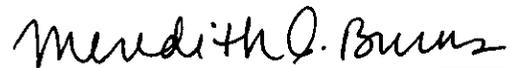
V. CONCLUSION

It is respectfully submitted that the ALJ’s credibility rulings were correctly based on witness demeanor and should not be disturbed, and that the ALJ’s findings of facts and conclusions of law were fully supported by the record evidence, exclusive of the Limited

Exceptions filed by Counsel for the General Counsel. Accordingly, to this extent, the Decision and Recommended Order of the ALJ should be adopted by the Board.

Dated at Honolulu, Hawaii, this 20th day of June, 2008.

Respectfully submitted,



Meredith A. Burns
Trent K. Kakuda
Counsel for the General Counsel
National Labor Relations Board,
Region 20, SubRegion 37
300 Ala Moana Blvd. Room 7-245
Honolulu, Hawaii 96850

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions has this day been served as described below upon the following persons at their last-known address:

1 copy	L. Michael Zinser, Esq. The Zinser Law Firm 414 Union Street, Suite 1200 Bank of America Plaza Nashville, TN 37219	VIA Express Mail
1 copy	Lowell Chun-Hoon, Esq. King Nakamura & Chun-Hoon Central Pacific Plaza 220 S. King Street, Suite 980 Honolulu, HI 96813	VIA U.S. Mail
1 copy	Wayne Cahill, Administrative Officer Hawaii Newspaper Guild 888 Mililani Street, Suite 303 Honolulu, HI 96813	VIA U.S. Mail

DATED at Honolulu, Hawaii, this 20th day of June 2008.



Meredith A. Burns
Counsel for the General Counsel
National Labor Relations Board
Subregion 37
300 Ala Moana Boulevard
Room 7-245
P. O. Box 50208
Honolulu, HI 96850