

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

LILY’S GREEN GARDEN, INC.,)	Case No. 2020-CE-025-SAL
)	2020-CE-037-SAL
Respondent,)	
)	ORDER GRANTING GENERAL
and)	COUNSEL’S REQUEST FOR
)	JUDICIAL ENFORCEMENT OF
LISBETH JIMENEZ,)	SUBPOENA
)	
Charging Party.)	Admin. Order No. 2021-09
)	
)	(October 26, 2021)
_____)	

Pursuant to Labor Code 1151, subdivision (b) and Board regulation 20217, subdivision (g), the General Counsel has filed with the Agricultural Labor Relations Board (ALRB or Board) a request for judicial enforcement of a subpoena duces tecum served on respondent Lily’s Green Garden, Inc. (Lily’s).¹ The Board issued an order to show cause why the request should not be granted, to which Lily’s filed a response.

The record demonstrates a pattern of willful obstruction by Lily’s to basic information requests well within the scope of the charges and the General Counsel’s investigatory authority, including based on arguments having no merit whatsoever as to the scope of our authority under the Agricultural Labor Relations Act (ALRA or Act) or otherwise contrary to our precedent.² This obstinacy continued after the General Counsel finally resorted to compelling production of the records it sought by subpoena. Lily’s did

¹ The Board’s regulations are codified at California Code of Regulations, title 8, section 20100 et seq.

² The ALRA is codified at Labor Code section 1140 et seq.

not object to the subpoena by any petition to revoke, as clearly required by our regulations, and yet still refused to fully comply with the subpoena.

Finding no merit in Lily's efforts to avoid its obligations under our laws, we GRANT the General Counsel's request.

BACKGROUND

Lily's operates a cannabis cultivation and processing business in Santa Barbara County, California. On June 19, 2020, charging party Lisbeth Jimenez (Jimenez) filed an unfair labor practice charge with the ALRB alleging Lily's retaliated against her and other employees for engaging in activity protected by the Act. On July 20, 2020, the General Counsel requested documents and information from Lily's in connection with the charge. Lily's obstinately asserted the ALRB had no jurisdiction over a complaint about "employees interacting," and refused to comply.³ Soon thereafter, Jimenez filed a second charge alleging Lily's further retaliated against her and other employees after she filed her first charge with the ALRB. (See Lab. Code, § 1153, subd. (d) [unlawful for employer to discriminate or retaliate against an employee for filing a charge with the ALRB].) The General Counsel reasserted its requests to Lily's, but Lily's continued to stonewall despite stating it would produce documents. Lily's eventually produced an employee handbook and Jimenez's personnel file, but nothing else. When the General Counsel again demanded the remainder of the documents it sought, Lily's asserted

³ This absurd contention is illustrative of Lily's obstructionist conduct throughout this matter. Indeed, our Act is premised on the right of "employees interacting" — as Lily's puts it — and engaging in concerted activity for their mutual aid and protection. (Lab. Code, §§ 1140.2, 1152; *Fowler Packing Co., Inc.* (2020) 46 ALRB No. 1, p. 15.)

attorney-client privilege or third-party privacy objections.

On April 8, 2021, the General Counsel informed Lily's it had received information Lily's was continuing to retaliate against Jimenez and other employees for assisting in the General Counsel's investigation. Two weeks later, the General Counsel served a subpoena on Lily's for the documents it sought and required production by May 10. Lily's did not object to the subpoena by filing a petition to revoke as required by Board regulation 20217(d). On May 7, Lily's informed the General Counsel it anticipated producing documents by May 11. None were produced, and the General Counsel informed Lily's on May 17 it had yet to receive the subpoenaed records. The next day, Lily's advised the General Counsel its production was coming soon, but it was not producing records it claimed to be subject to attorney-client privilege or work product protection. Lily's production was received on May 19. Despite producing a large volume of records, Lily's failed to provide a privilege log describing critical records being withheld, nor did Lily's provide any affidavit attesting to the scope of its compliance with the requests. This enforcement request followed.

DISCUSSION

I. The ALRB's Subpoena Power and Judicial Enforcement

Labor Code section 1151, subdivision (a) authorizes the Board to obtain "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question."⁴ The General Counsel's authority to subpoena

⁴ Labor Code section 1151 is modeled after Section 11 (29 U.S.C. § 161) of the National Labor Relations Act (NLRA), codified at 29 U.S.C. § 151 et seq. (See Lab.

records from a respondent during its investigation of an unfair labor practice charge is settled. (Board reg. 20217(a); *King City Nursery, LLC* (Jan. 9, 2020) ALRB Admin. Order No. 2020-01-P, p. 5; *NLRB v. N. Bay Plumbing* (9th Cir. 1996) 102 F.3d 1005, 1008.) The General Counsel’s investigative subpoena power is broad and limited only by the requirement that the information sought be relevant to the inquiry. (*King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, p. 5.)

A person that does not intend to comply with an investigatory subpoena must file a petition to revoke it within five days, stating “with particularity the grounds for objecting” to the subpoena. (Board reg. 20217(d).) Objections to a subpoena will be sustained where the records sought are not relevant to any matter under investigation, are not described with sufficient particularity, or are privileged or confidential. (Board reg. 20217(e).) Failure to file a petition to revoke waives any objections any objections to the subpoena. (*King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, pp. 6, 11; *Detroit Newspaper Agency* (1998) 326 NLRB 700, 751, fn. 25; *NLRB v. Frederick Cowan & Co.* (2nd Cir. 1975) 522 F.2d 26, 28; *NLRB v. Williams* (D.Or. May 3, 2018) 2018 U.S. Dist. LEXIS 85632, at *6-7.)

Judicial enforcement is available where a person fails to comply with an investigative subpoena. (Lab. Code, § 1151, subd. (b); Board regs. 20217(g), 20250(k).) Courts will enforce an ALRB subpoena if the subpoena was properly issued and the records sought are relevant to the charge investigation and identified with sufficient

Code, § 1148 [stating the ALRB shall follow applicable precedent under the NLRA].)

particularity. (*ALRB v. Laflin & Laflin* (1979) 89 Cal.App.3d 651, 663-664.)

II. The Subpoena Issued Properly

There is no dispute the subpoena complies with Board regulation 20217 and was properly served on Lily's. The records sought are well within the scope of the General Counsel's investigatory authority and the charge allegations and are described with sufficient particularity. (*Laflin & Laflin, supra*, 89 Cal.App.3d at pp. 663-664; *NLRB v. G.H.R. Energy Corp.* (5th Cir. 1982) 707 F.2d 110, 113.)

III. The General Counsel's Enforcement Request Is Not Untimely or Barred

Lily's contends the General Counsel's enforcement request is untimely and barred by certain provisions of the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.). Specifically, Lily's asserts the request is untimely because it was filed after Civil Discovery Act deadlines for filing a motion to compel further responses, and further that the request is barred because the General Counsel did not meet and confer with Lily's before filing it. Lily's cites no authority to support its claim the General Counsel is bound by these procedural requirements of the Civil Discovery Act. Indeed, there is none. (See *EEOC v. Deer Valley Unified School District* (9th Cir. 1992) 968 F.2d 904, 906 [agency's investigatory subpoena based on "specific statutory authority" and not subject to Federal Rules of Civil Procedure requirements for discovery motions].)⁵ The General Counsel's subpoena enforcement request is governed by our own laws, specifically Labor Code section 1151 and Board regulation 20217. Neither imposes any timing requirement

⁵ The Equal Employment Opportunity Commission's (EEOC) subpoena authority, like the ALRB's, is modeled after NLRA Section 11.

or meet and confer obligation on a subpoena enforcement request.

IV. Lily's Did Not File a Timely Petition to Revoke the Subpoena, and Thus Waived Its Objections

In a tactic illustrative of Lily's refusal to cooperate with the General Counsel's investigation, Lily's asserts contradictory positions regarding the scope of its compliance with the subpoena. On the one hand, Lily's claims to have produced all records in its possession except for certain records it claims are attorney work product, yet it simultaneously purports to interpose a litany of objections to the subpoena requests, including on privacy grounds, vagueness, overbreadth, and attorney-client privilege. On the record before us, two things are clear: Lily's did not fully comply with the subpoena, and all of its objections are waived by its failure to file a petition to revoke, as clearly required by Board regulation 20217. (*King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, pp. 6, 11.)

Notwithstanding its failure to file a petition to revoke the subpoena, Lily's cites *EEOC v. Lutheran Social Services* (D.C. Cir. 1999) 186 F.3d 959 to support a claim its attorney-client privilege and attorney work product objections are not waived. That case is inapposite.⁶ In that case, the EEOC requested documents from Lutheran. Lutheran complied except for a report it claimed to be attorney-client privileged. After the EEOC subpoenaed the report, Lutheran did not file a petition to revoke, but later

⁶ Although Lily's asserts an attorney-client privilege objection, its utterly defective privilege log — which we will discuss later — does not state any listed record is withheld on this basis. Rather, that log asserts only withholdings based on an alleged work product claim.

responded by letter contending the subpoena was “improper.” (*Id.* at p. 961.) The EEOC investigator informed Lutheran’s attorney the matter would be referred to EEOC trial counsel but promised to contact the attorney before the EEOC took any further action. Despite this, the EEOC later sought judicial enforcement of the subpoena, arguing Lutheran waived its privilege claim by failing to petition to revoke the subpoena. (*Ibid.*)

The court in *Lutheran Social Services* found the unique “combination” of facts present in that case excused Lutheran’s failure to file a petition to revoke, including that the subpoena was served on Lutheran’s human resources director (who was not an attorney) and neither the subpoena nor the statute it referenced (42 U.S.C. § 2000e-9) said anything about the requirement of filing a petition to revoke within 5 days to preserve objections. (*Lutheran Social Services, supra*, 186 F.3d at p. 964.)

Such facts are not present here. First, the subpoena expressly references the regulatory authority under which it was issued (Board reg. 20217) on the caption page and in the first sentence of the document setting out the actual document requests. Second, the subpoena was served directly on Lily’s counsel. A reasonably prudent attorney would have looked up the referenced regulation. Had Lily’s counsel done so, he would have seen the clear requirement that objections to the subpoena must be asserted in a petition to revoke. (Board reg. 20217(d).)⁷ An attorney’s ignorance of the law does not excuse a failure to comply with an agency’s procedural rules. (*Reveille Farms, LLC*

⁷ In fact, the General Counsel previously provided Lily’s counsel our order in *King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, which also lays out these basic principles.

(2019) 45 ALRB No. 6, pp. 6-7 [counsel’s failure to research the Board’s regulations did not justify relief from failure to answer complaint], and cases cited therein.)⁸

Lily’s did not comply with our clear procedural requirements for asserting objections to the subpoena, and it thus waived its alleged work product claims. (See *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1239 [work product claim may be waived by failure to timely assert objection].)

V. Lily’s Utterly Defective Privilege Log Is Illustrative of Its Obstructionist Behavior and Itself Shows There Is No Merit to Its Work Product Objections

Although we find Lily’s attorney work product objection waived, we are compelled to comment on the so-called “privilege log” Lily’s has (untimely) tendered to us. Under no circumstance could this log be considered sufficient. We find this half-hearted attempt at a privilege log indicative of the types of games Lily’s has played throughout the General Counsel’s investigation of the charges against it, and its failure to take seriously our Act and our Board’s authority under it.

A privilege log “must identify with particularity each document the responding party claims is protected from disclosure by a privilege and provide sufficient factual information for the propounding party and court to evaluate whether the claim has merit.” (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1130.) It typically must include “the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document’s date, a

⁸ Courts have held this petition to revoke process satisfies procedural due process requirements, and Lily’s has no legitimate claim for failing to avail itself of it. (*N. Bay Plumbing, supra*, 102 F.3d at p. 1008.)

brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted.” (*Ibid.*) Lily’s privilege log comes nowhere close to these basic standards.

The first document listed is an “Employee List” authored by “Lily’s Green Garden Inc.” and received by “Lily’s Green Garden Inc.” Lily’s asserts it is attorney work product. Nothing in this entry even implicates an “attorney’s impressions, conclusions, opinions, or legal research or theories.” (Code Civ. Proc., § 2018.030, subd. (a).) The log goes on like this, listing various documents authored by unidentified employees and received by “Lily’s,” with everything claimed to be “attorney work product.” One entry even lists the recipient as “Unknown.” No document listed in the log is claimed to have been authored or even received by an attorney. Lily’s privilege log fails any straight face test, and we adamantly reject it.

Moreover, there is no basis for Lily’s to withhold the names of other employee witnesses to the charge allegations being investigated by the General Counsel (of which there apparently are at least 36 according to the log). (*Coito v. Superior Court* (2012) 54 Cal.4th 480, 501-502 [obtaining statements from virtually all available witnesses does not implicate work product concerns]; *King City Nursery, LLC, supra*, ALRB Admin. Order No. 2020-01-P, pp. 8-9.)⁹ Lily’s refusal to provide even this basic information flouts the General Counsel’s clear authority under Labor Code section 1151,

⁹ See also *Amco Ins. Co. v. Madera Quality Nut LLC* (E.D. Cal. Apr. 10, 2006) 2006 U.S. Dist. LEXIS 21205, *41-43 [names of employees interviewed during a workplace investigation are not privilege and must be disclosed].

subdivision (a), and undoubtedly frustrates the General Counsel's ability to investigate the charge allegations — which is particularly troubling here in light of the ongoing allegations Lily's continues to retaliate against employees for seeking the protection of our Act, which, if true, is a clear violation of the law. (Lab. Code, § 1153, subd. (d).)

ORDER

The General Counsel's request to seek judicial enforcement of the subpoena is GRANTED. Authority is delegated to the General Counsel to commence such enforcement proceedings in superior court pursuant to Labor Code section 1151, subdivision (b), as necessary.

DATED: October 26, 2021

ISADORE HALL III, Member

BARRY D. BROAD, Member

RALPH LIGHTSTONE, Member

CINTHIA N. FLORES, Member