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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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9 FREDDIE M. DAVIS,

No. C 09-2629 SI

10 Plaintiff,

**ORDER GRANTING MOTION OF THE
NATIONAL LABOR RELATIONS
BOARD TO QUASH SUBPOENA**

11 v.

12 PRISON HEALTH SERVICES, ET AL.,

13 Defendant.
14 _____/

15 The National Labor Relations Board (“NLRB”) has filed a motion to quash a subpoena served
16 upon Michelle Smith, a former Board employee, by plaintiffs’ counsel. The subpoena seeks to compel
17 the testimony of Ms. Smith regarding Board Region 32’s investigation of a charge filed with the NLRB
18 alleging unfair labor practices by the Prison Health Services. According to plaintiff, plaintiff seeks to
19 have Ms. Smith “testify about the charge of discrimination, who she interviewed, what documents she
20 had available and considered and when the complaint was filed. The process that was used will
21 demonstrate what transpired before the actual complaint was filed and at what point the NLRB decided
22 that it should file a complaint.” Docket No. 164 at 7:24-28.

23 The NLRB objects to the subpoena on procedural and substantive grounds. As a threshold
24 matter, the NLRB contends that plaintiff failed to comply with the NLRB’s procedural requirements
25 governing testimony by current and former NLRB employees. It is undisputed that plaintiff served the
26 subpoena on Ms. Smith on November 15, 2011, seeking Ms. Smith’s testimony on November 28, 2011,
27 and that plaintiff did not first request authorization for Ms. Smith’s testimony from NLRB’s General
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1 Counsel pursuant to NLRB regulations found at 29 C.F.R. § 102.118 (2011).¹ Section 102.118 provides,

2 Except as provided in § 102.117 of these rules respecting requests cognizable under the
3 Freedom of Information Act, no present or former Regional Director, field examiner,
4 administrative law judge, attorney, specially designated agent, General Counsel, Member
5 of the Board, or other officer or employee of the Agency shall produce or present any
6 files, documents, reports, memoranda, or records of the Board or of the General Counsel,
7 whether in response to a subpoena duces tecum or otherwise, without the written consent
8 of the Board or the Chairman of the Board if the document is in Washington, DC, and
9 in control of the Board; or of the General Counsel if the document is in a Regional
10 Office of the Agency or is in Washington, DC, and in the control of the General Counsel.
11 Nor shall any such person testify in behalf of any party to any cause pending in any court
12 or before the Board, or any other board, commission, or other administrative agency of
13 the United States, or of any State, territory, or the District of Columbia, or any
14 subdivisions thereof, with respect to any information, facts, or other matter coming to
15 that person's knowledge in his or her official capacity or with respect to the contents of
16 any files, documents, reports, memoranda, or records of the Board or the General
17 Counsel, whether in answer to a subpoena or otherwise, without the written consent of
18 the Board or the Chairman of the Board if the person is in Washington, DC, and subject
19 to the supervision or control of the Board or was subject to such supervision or control
20 when formerly employed at the Agency; or of the General Counsel if the person is in a
21 Regional Office of the Agency or is in Washington, DC, and subject to the supervision
22 or control of the General Counsel or was subject to such supervision or control when
23 formerly employed at the Agency.

24 29 C.F.R. § 102.118(a)(1) (2011).

25 The Court concludes that plaintiff was required to comply with Section 102.118 as a prerequisite
26 to seeking Ms. Smith's testimony at trial. A number of courts have held that a party seeking testimony
27 by a federal agency employee must first comply with agency regulations such as Section 102.118, and
28 that the failure to do so requires that the subpoena be quashed. *See Davis v. Braswell Motor Freight
Lines, Inc.*, 363 F.2d 600, 603 (5th Cir. 1966) ("Because of Braswell's failure to comply with the
'simple requirement' of seeking permission, the District Court should have granted appellant's motion
to quash the subpoena."); *see also United States v. Allen*, 554 F.2d 398, 406 (10th Cir. 1977) ("Our
record shows no effort by defendant to submit the affidavit or statement summarizing the testimony
desired so that the Department could consider the request and determine whether to grant permission
for the testimony. In view of this, we feel that defendant is in no position to claim error in the court's
refusal to require testimony by the prosecutor."); *see generally Houston Business Journal, Inc. v. Office
of the Comptroller*, 86 F.3d 1208, 1212 n.4 (D.C. Cir. 1996) (discussing cases).

¹ Plaintiff does not suggest that she lacked time or opportunity to comply with the NLRB regulations prior to trial. The facts underlying the investigation occurred in 2006, and the administrative complaint in question was issued in 2007. The matter was resolved by settlement in early 2011.

1 The authority cited by plaintiff is not to the contrary. Those cases simply hold that
2 administrative regulations such as Section 102.118 do not create an absolute privilege of nondisclosure.
3 *See Exxon Shipping Co. v. Dep't of Interior*, 34 F.3d 774, 777-78 (9th Cir. 1994). Instead, “district
4 courts should apply the federal rules of discovery when deciding on discovery requests made against
5 government agencies, whether or not the United States is a party to the underlying action.” *Id.* at 780.
6 Plaintiff does not cite any authority for the proposition that a prior to serving a trial subpoena, a party
7 need not first, as a procedural matter, request permission for such testimony pursuant to agency
8 regulation.²

9 Accordingly, the Court GRANTS the NLRB’s motion to quash. Docket No. 160.

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11 **IT IS SO ORDERED.**

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13 Dated: December 5, 2011

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16 SUSAN ILLSTON
17 United States District Judge
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27 ² The Court also notes that the percipient witnesses to the events underlying the NLRB
28 complaint have testified at trial and that the NLRB charges, complaint and settlement of the complaint
have been admitted into evidence. Thus, the factual predicate for the NLRB complaint has been
established, and Ms. Smith’s proposed testimony would either be cumulative or intrude into attorney
work product and/or areas covered by the deliberative process privilege.