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LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of )  
MICHAEL L. LAST, )  
Complainant, )  
vs. )  
COUNTY OF HAWAII, )  
WASTEWATER DIVISION, )  
Respondent, )  
and )  
DIRECTOR, DEPARTMENT OF LABOR )  
AND INDUSTRIAL RELATIONS. )

CASE NO. OSAB 99-007 (H)  
(DPW/LAST/98-012)

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STATE OF HAWAII

AMENDED DECISION AND ORDER

On June 2, 2000, the Board issued a DECISION AND ORDER in the above-captioned matter.

By correspondence dated June 11, 2000, Complainant brought to the Board's attention the existence of a clerical error within the body of the DECISION AND ORDER. The error is located on page 5, in Finding of Fact number 17, and consists of using the month of "July," instead of "February," to indicate the date of the February 14, 2000 hearing which was held before the Board.

Complainant also contends that three findings of fact are not supported by fact. Pursuant to Section 12-47-54 of the Board's Rules of Practice and Procedure, we are hereby filing an AMENDED DECISION AND ORDER to correct the above-referenced error so as to read "February" instead of "July," and to amend Findings of Fact numbers 2, 9, and 15.

This Occupational Safety and Health case is before the Board on a written notice of contest filed by MICHAEL L. LAST, ("Complainant"), contesting a Decision issued by the DIRECTOR of



the DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, via the Division of Occupational Safety and Health, dated February 11, 1999. The Director determined that the COUNTY OF HAWAII, WASTEWATER DIVISION's ("Respondent"), decision not to extend Complainant's Limited Term Appointment ("LTA"), was not discriminatory and in violation of Section 396-8(e), Hawaii Revised Statutes ("H.R.S").

The sole issue to be determined is whether Respondent discriminated against Complainant in violation of Section 396-8(e), H.R.S.

#### FINDINGS OF FACT

1. On August 12, 1993, Respondent hired Complainant as an assistant wastewater treatment plant operator, on a limited term appointment status. Complainant was hired to fill a position temporarily left vacant by the incumbent employee.

2. Complainant's LTA was extended at varying increments after his initial appointment.

3. The decision to extend Complainant's LTA had been debated at the end of each fiscal year after he began employment with the County. Complainant was considered a problem employee for the Department. However, because of understaffing at the division level and a division chief who had just begun his tenure, the issues regarding Complainant's employment were not addressed, and Complainant's LTA continued to be extended.

4. On June 20, 1997, Complainant's LTA was extended from July 1, 1997 through June 30, 1998.

5. In January 1998, the matter of Complainant's LTA position became an issue for Respondent. In June of 1997, the position Complainant was occupying became permanently vacant, and

the Department had the option of filling it on a permanent basis. Respondent had the choice of either: (1) Extending Complainant's LTA again; (2) Converting it to a permanent position; or (3) Recruiting to fill the position on either an inter/intra departmental or open recruitment basis. The decision was made in January 1998 not to extend Complainant's appointment or to convert it to a permanent position.

6. Respondent did not consider Complainant as meeting the requirements of his position satisfactorily for extension or conversion to a permanent position.

Respondent's Division Chief, the Chief Engineer of Public Works, noted that Complainant had failed to demonstrate initiative and teamwork, and had made numerous personnel complaints to Respondent throughout his period of employment. In responding to those complaints, Respondent's employees were required to spend a disproportionate amount of time on personnel matters relating to Complainant as compared to other Wastewater Division employees.

7. On January 21, 1998, Respondent's Division Chief submitted a written request to fill the position permanently by recruiting for the position on an inter/intra departmental or open basis.

8. Based on interest expressed internally by permanent County employees in applying for the position Complainant occupied, Respondent subsequently decided to recruit for the position as an inter/intra departmental promotion. The intent was to provide an opportunity for in-house promotion of existing County staff, to expedite the recruitment process, and to provide employment because

of the possibility of a reduction-in-force as the result of a series of County Council resolutions.

9. On January 30, 1998, Complainant filed a complaint, dated the same, with the Labor Department's Hawaii Occupational Safety and Health Division ("HIOSH"), Hilo District Office, alleging that chlorine gas alarms on Respondent's premises were malfunctioning ("safety complaint"). The Hilo office sent the safety complaint to the Honolulu District Office, which received it on February 2, 1998.

10. HIOSH conducted an inspection of Respondent's premises on March 17, 1998.

11. Respondent first learned of Complainant's safety complaint at the time of HIOSH's investigation in March 1998.

12. On June 12, 1998, Complainant was advised that his position would be permanently filled and that his appointment would not be extended.

13. On July 14, 1998, Complainant filed a complaint of discrimination in violation of Section 396-8(e) of the Hawaii Occupational Safety and Health Law, H.R.S., alleging that Respondent had not extended his LTA because he had complained to HIOSH about the malfunctioning chlorine gas alarms on Respondent's premises.

14. HIOSH subsequently conducted an investigation into Complainant's discrimination complaint. On February 11, 1999, the Director determined that Complainant had not met his burden of establishing that he was discriminated against in violation of Section 396-8(e), H.R.S.

15. The Director noted that Respondent's decision not to extend Complainant's LTA or convert it to a permanent position was made before Complainant filed his complaint on January 30, 1998.

16. The Director found that Respondent's actions were not retaliatory and that the termination of Complainant's LTA was not discriminatory and not in violation of Section 396-8(e), H.R.S.

17. At the February 14, 2000 hearing before the Board, Complainant acknowledged that Employer was not obligated to extend his LTA beyond June 30, 1998.

18. We find that Complainant has not presented evidence to sustain his complaint of discrimination in violation of Section 396-8(e), H.R.S.

#### CONCLUSIONS OF LAW

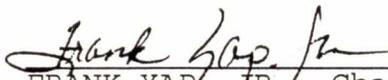
We conclude that Respondent did not discriminate against Complainant in violation of Section 396-8(e), H.R.S.

No evidence was presented that Respondent was under a legal obligation to extend the employment of an individual hired on a limited term appointment status beyond the expiration date of such appointment. Complainant has not presented evidence to sustain his contention that his limited term appointment was not extended because of the health and safety complaint he filed on January 30, 1998, with HIOSH. Although Respondent did not advise Complainant until June 12, 1998, that it would not be extending his LTA, we have determined that the decision not to extend his appointment was made before Complainant filed his safety complaint with HIOSH, and before Respondent first learned of Complainant's safety complaint. We also credit Respondent's reasons for its decision not to extend Complainant's LTA.

ORDER

In accordance with the foregoing findings of fact and conclusions of law, the Director's decision dated February 11, 1999, is hereby affirmed.

Dated: Honolulu, Hawaii, JUN 20 2000

  
FRANK YAP, JR., Chairman

  
CAROL K. YAMAMOTO, Member

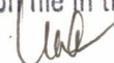
EXCUSED  
VICENTE F. AQUINO, Member

Michael L. Last  
Complainant

Gerald Takase, Esq.  
for Respondent

Leo B. Young, Esq.  
for the Director, Department of  
Labor and Industrial Relations

I do hereby certify that the foregoing  
is a full, true and correct copy of  
the original on file in this office.



NOTICE TO EMPLOYER:

You are required to post a copy of this Amended Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted. Further, you are required to furnish a copy of this Amended Decision and Order to a duly recognized representative of the employees.