

LAB/MM

LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD

STATE OF HAWAII

In the Matter of  
JIM SKELLINGTON,  
Complainant,

vs.

CITY AND COUNTY OF HONOLULU,  
KAPOLEI FIRE STATION,  
Respondent,

and

DIRECTOR, DEPARTMENT OF LABOR  
AND INDUSTRIAL RELATIONS.

CASE NO. OSAB 97-015  
(DISCRIMINATION COMPLAINT)

FILED  
HAWAIIAN LABOR RELATIONS BOARD  
HONOLULU, HAWAII

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DECISION AND ORDER

This Occupational Safety and Health case came before the Hawaii Labor Relations Board (HLRB), acting as hearing officer for the Labor and Industrial Relations Appeals Board (Board), on a written notice of contest filed by the Respondent CITY AND COUNTY OF HONOLULU, KAPOLEI FIRE STATION (City) contesting a Decision issued by the DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), via the Division of Occupational Safety and Health, dated April 8, 1997. The Director found that Complainant JIM SKELLINGTON (Skellington) had engaged in protected activity by reporting the City's inadequate hazardous materials training, and thereafter the City denied his appointment to a Battalion Chief position on December 30, 1996. The Director determined that the City had discriminated against Skellington and had violated Hawaii Revised Statutes (HRS)

§396-8(e). The issue to be determined was whether the City discriminated against Skellington in violation of HRS §396-8(e).

HLRB heard this case, and on July 12, 2001, issued a Proposed Findings of Fact, Conclusions of Law, and Order (Proposed Decision and Order).

On July 23, 2001, the City filed exceptions to HLRB's Proposed Decision and Order, with the Board. Responsive memoranda were subsequently filed by Complainant and the Director, with the Board.

On August 24, 2001, the Board heard oral argument on the City's exceptions to HLRB's Proposed Decision and Order. Having reviewed the record and heard oral argument made by the parties, we hereby issue this Decision and Order modifying HLRB's Proposed Decision and Order in two aspects. Proposed Finding of Fact number 1 is modified with deletion of the word "rapidly," and Footnote number 2 is modified to reflect that Chief Lopez proffered reasons to explain his conduct in not appointing Complainant to the Battalion Chief position.

#### FINDINGS OF FACT

1. Complainant has been an employee of the Honolulu Fire Department (HFD) for approximately 28 years. Skellington progressed through the ranks, achieving the rank of Captain in 1981.

2. On April 8, 1995, Assistant Chief Attilio K. Leonardi (Leonardi) of the HFD accepted a promotion to Deputy Chief with the understanding that his term would expire on January 2, 1997.

Leonardi took a leave of absence without pay from his position as Assistant Chief to work in the exempt Deputy Chief position. This meant that if HFD decided to fill Leonardi's Assistant Chief position, it would have to be on a limited term basis with said appointment to be coterminous with Leonardi's Deputy Chief appointment.

3. Effective August 13, 1995, HFD appointed Battalion Chief Arthur Ugalde to Assistant Chief and Captain Skellington to Battalion Chief. Skellington was appointed pursuant to an Internal Competitive Examination. Because the Assistant Chief position was only open as the result of Leonardi's appointment to Deputy Chief, both appointments were subject to Leonardi returning to his permanent position as Assistant Chief and limited to an expiration date of January 2, 1997.

4. On March 24, 1996, Fire Fighter II Dennis Yamada (Yamada) was appointed on a limited term basis to the position of Fire Captain with his term of appointment to expire as of January 2, 1997.

5. The past practice of the HFD for over 20 years was to convert all limited term appointments (LTAs) to permanent appointments if a vacancy opened up in the same class. This practice is authorized by Rule 3-39(g) of the City and County of Honolulu's Rules of the Civil Service Commission.<sup>1</sup>

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<sup>1</sup>Rule 3-39(g) of the City and County of Honolulu's Rules of the Civil Service Commission provides:

For employees appointed from an internal departmental competitive examination: An employee filling a permanent position



6. For months prior to October 1996, Skellington had serious concerns about the lack of training at HFD regarding hazardous materials. He brought those concerns to the highest ranking HFD officials, including Fire Chief Anthony Lopez (Lopez) and demanded that training be instituted. It was not.

7. On October 9, 1996, Skellington filed a complaint with the Department of Labor and Industrial Relations' Hawaii Occupational Safety & Health Division (HIOSH or OSHA).

8. Prior to reporting his concerns to HIOSH, Skellington told the Fire Chief that going to OSHA was an option that needed to be looked at, and Chief Lopez's response was "do what you gotta do."

9. HIOSH initiated an inspection of the KAPOLEI FIRE STATION on October 16, 1996. At the time of HIOSH's inspection, all of the points covered in Skellington's complaint were investigated and were found valid. On November 25, 1996, HIOSH issued a Citation and Notification of Penalty to the HFD based upon Skellington's complaint.

10. By memorandum dated December 18, 1996 (approximately three (3) weeks after the Citation and Notification of Penalty), which was delivered to Skellington on December 23, 1996, HFD

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temporarily vacant or a temporary position may be given a probationary appointment in the same position or to another position in the same class if it later develops that the vacancy will be permanent, provided the condition of permanency is stated in the vacancy announcement, and the temporary period of service immediately preceded the change to probationary status. The director must certify that the action is reasonable and to the benefit of the service.

notified Skellington that his LTA to Battalion Chief was being terminated on January 2, 1997 at noon. The memorandum further advised Skellington that he would be restored to his previous rank as Captain and assigned to Station 27/1st, and should report to that station on January 3, 1997.

11. Mayor Jeremy Harris (Harris) subsequently ended Lopez's appointment as Fire Chief and Leonardi's appointment as Deputy Chief effective December 30, 1996. By letter dated December 27, 1996 Mayor Harris notified Lopez that effective the close of business on December 30, 1996, the Mayor would be appointing Lopez as Interim Chief of the HFD. Harris further stated that the foregoing action was "being taken in anticipation of the Charter amendment which takes effect on January 1, 1997, creating the Fire Commission which has the authority to appoint the Fire Chief."

12. Consequently, on December 31, 1996, Deputy Chief Leonardi was returned to his former position as Assistant Chief, Assistant Chief Ugalde was returned to his former position as Battalion Chief, and Battalion Chief Skellington was returned to his former position as Captain.

13. By memorandum dated December 31, 1996, and delivered to Skellington on January 3, 1997, Lopez informed Skellington that his LTA had ended on December 30, 1996, and not January 2, 1997 (noon), as previously stated. Lopez explained that the Mayor had terminated the Fire Deputy Chief's appointment on

December 30, 1996, and thus, all subsequent LTAs had also ended on December 30, 1996.

14. At the end of 1996, there were three (3) vacant Battalion Chief positions available due to retirements. Only Skellington was serving an LTA to the rank of Battalion Chief. Skellington's LTA was not converted to a permanent Battalion Chief appointment, notwithstanding the three (3) vacant, permanent Battalion Chief positions.

15. Francis Kennedy, long-time business manager with the Hawaii Fire Fighters Association (HFFA) testified that it was common knowledge that Skellington was the source of the HIOSH complaint. Nira Cooray, an investigator for HIOSH, also testified that in November 1996, HFD officials acknowledged that they believed that Skellington was the source of the HIOSH complaint, even though she never mentioned that he was the complainant, and Skellington's complaint to HIOSH had been filed anonymously.

16. On January 9, 1997, Skellington filed charges of discrimination and retaliation (collectively referred to as discrimination) with the Department of Labor and Industrial Relations, alleging that Chief Lopez ended his LTA and did not give him a permanent appointment to Battalion Chief as a direct result of his HIOSH complaint.

17. After its investigation, HIOSH concluded that HFD discriminated against Skellington in violation of HRS §396-8(e) in a letter dated April 8, 1997, to Lopez.



18. Specifically, HIOSH found that: (1) Skellington engaged in protected activities when he complained to HFD and to HIOSH about inadequate hazardous materials training; (2) HFD had knowledge of Skellington's protected activities; (3) Reprisal was shown when Skellington was denied a Battalion Chief position on December 30, 1996; (4) Skellington performed satisfactorily as a Battalion Chief, there was a vacancy as of December 29, 1996 for Battalion Chief and in accordance with past practice, the position should have gone to Skellington; (5) Although HFD alleged that a new procedure went into effect as a result of a recently established Fire Commission, the Fire Commission was formed when the Revised City Charter Amendment took effect on January 1, 1997, and HFD could have given the Battalion Chief position to Skellington prior to that date.

19. With regard to Restitution and Penalty, which is authorized by HRS §396-8(e)(6), HIOSH ordered the HFD to make Skellington whole, by: (1) Full back pay restitution for all monies lost by Skellington from January 1, 1997 through April 9, 1997 (which is the date following HIOSH's letter to Chief Lopez), payable within 20 calendar days of receipt of HIOSH's order; (2) Appointment of Skellington to a Battalion Chief position to be effective December 30, 1996, by April 10, 1997; (3) Clearing of the respective personnel and other department records of any unfavorable references or entries related to this cited violation; (4) Posting of Notice to Employees (enclosed) in a conspicuous place in the work area for convenient access and

review by HFD employees in HFD's main office, for a period of 60 days; and (5) Payment of \$1,000 penalty to the Director of Budget and Finance.

#### DISCUSSION

HRS §396-8(e)(3) provides as follows:

e) Discharge or discrimination against employees for exercising any right under this chapter is prohibited. In consideration of this prohibition:

\* \* \*

(3) No person shall discharge or in any manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or intends to testify in any such proceeding, or acting to exercise or exercised on behalf of the employee or others any right afforded by this chapter; . . .

In the instant complaint, Skellington alleges that HFD discriminated against him in retaliation for his filing a HIOSH complaint. The retaliation is alleged to have taken the form of failing to appoint him to a permanent Battalion Chief position in contravention of the established departmental practice of appointing LTAs to permanent positions which become available during the term of the limited term appointment.

#### Retaliation

The burdens of proof applicable to establishing a retaliation claim have been described as follows:

[O]nce the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to defendant to articulate a legitimate, nonretaliatory



explanation for its decision. If the defendant carries this burden satisfactorily, the burden shifts back to the plaintiff to show that the alleged explanation is a pretext for impermissible retaliation.

#### Prima Facie Case

Proof of a prima facie case of retaliatory discharge requires a showing that (1) plaintiff engaged in a protected activity, (2) the employer subjected her to an adverse employment action, and (3) a causal link exists between the protected activity and the adverse employment action. (Citation omitted.) Like disparate treatment claims, the evidence necessary to establish a prima facie case of retaliatory discharge is minimal. (Citation omitted.) A plaintiff may satisfy the first two elements by demonstrating that she was fired, demoted, transferred or subjected to some other adverse action after engaging in protected activity. The causal link may be inferred from circumstantial evidence such as the employer's knowledge that the plaintiff engaged in protected activity and the proximity in time between the protected action and the allegedly retaliatory employment decision. (Citation omitted).

Marcia Linville v. State of Hawaii, et al., 874 F.Supp. 1095, 1110 (D. Haw. 1994).

Skellington has clearly established a prima facie case for retaliation. He engaged in protected activities both by advising HFD of his concerns about inadequate training and noncompliance with safety and health concerns and subsequently filing the HIOSH complaint. He was not appointed to a permanent Battalion Chief position despite the established practice of more than 20 years to appoint LTAs to vacant permanent positions when

they became available.<sup>2</sup> And the necessary causal link can be, and is, inferred from the employer's knowledge of the protected activity.<sup>3</sup>

#### Nondiscriminatory Reason

Complainant having established a prima facie case, HFD must then produce credible evidence of a legitimate nonretaliatory explanation for its decision.

HFD offers two nondiscriminatory reasons for failing to appoint Skellington to a permanent Battalion Chief position. The first is that the Chief had no knowledge of any Battalion Chief vacancies which would be available prior to Skellington's reassignment to Captain. The second is that the reassignment of Skellington to his Captain's position was necessitated by the mandatory return of Deputy Chief Ugalde to the Battalion Chief position to which Skellington was temporarily assigned. Chief Lopez provided these reasons.

#### Pretext

HFD having produced evidence of legitimate nonretaliatory reasons, the burden shifts back to Skellington to show that the

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<sup>2</sup>Chief Lopez proffered reasons to explain his conduct in not appointing Skellington to the Battalion Chief position. The Board, however, is not persuaded by his explanation.

<sup>3</sup>Chief Lopez did not testify as to his knowing that Skellington filed the HIOSH complaint, nor did he recall being advised by Skellington of Skellington's concerns over the lack of hazardous materials training prior to the filing of the complaint. However, the Board finds Skellington's testimony to the contrary. There is extensive testimony as to the Department's knowledge of Skellington's complaint to be persuasive on the issue of the Chief's knowledge of Skellington's having filed the complaint.

alleged explanations are a pretext for impermissible retaliation. The complainant may succeed in this burden either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. Id., at 1109. We conclude that the employer's proffered explanation is not credited.

A review of the records supplied by HFD indicates that on December 28, 1996, there was one vacancy for a Battalion Chief position with the retirement of Paul Yamasaki (Yamasaki). Further, on December 31, 1996, there were two more vacant Battalion Chief positions created by the retirements of John Souza (Souza) and Michael Zablan (Zablan). Thus, if Skellington's reassignment date could be delayed by one day, three Battalion Chief positions were available for assignment. In any event, at least one position, Yamasaki's, was available prior to Skellington's reassignment. Thus, to accept the validity of HFD's first nondiscriminatory justification for failing to appoint Skellington to a vacant Battalion Chief position, we must find that Chief Lopez had no knowledge of the impending retirements.

Apart from the Chief's testimony to that effect, the record does not support such a conclusion. Impending retirements were common knowledge within the Department. And even if initial plans to retire can be changed or withdrawn, or employers are not informed by retiring employees, the Employees Retirement System



must formally notify employers of impending retirements 30 days prior to actual retirement. The record also reflects that pending retirements were routinely included in monthly staff reports prepared for staff meetings conducted by the Chief. The weight of the evidence clearly supports the Chief's knowledge of pending Battalion Chief retirements, and, thus, we must find that he knew of the scheduled retirements of Yamasaki, Souza, and Zablan.

The second proffered explanation is that the reassignment of Skellington to his Captain's position was necessitated by the mandatory return of Deputy Chief Ugalde to the Battalion Chief position to which Skellington was temporarily appointed. This explanation is belied, however, by the undisputed fact that Yamada was serving an LTA in Skellington's Captain position. Lopez testified that the decision to assign Yamada to the permanent captaincy occurred at the same meeting at which the decision was made to revert Skellington to his prior position.<sup>4</sup> Reversion without reassignment was, therefore, neither required nor inevitable.

We conclude that the City's proffered explanation is not credited. Accordingly, the Director's decision is affirmed.

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<sup>4</sup>Lopez testified that Yamada was transferred because, on or around December 18, 1996, he was advised by Ms. Nancy Yokoyama (Yokoyama), personnel assistant for HFD, that a Captain's vacancy would be available to Yamada. However, Yokoyama is also alleged to have advised Lopez that no Battalion Chief vacancies would be available for Skellington. Having concluded above that Lopez was aware of the vacancies, we must similarly reject this highly implausible explanation for the disparate treatment of Skellington.

## CONCLUSIONS OF LAW

1. We have jurisdiction over the instant contest.
2. We conclude that the City failed to appoint Skellington to Battalion Chief on December 30, 1996, because he engaged in protected activity by complaining to the City and HIOSH about inadequate hazardous materials training resulting in the issuance of a citation.
3. We conclude that the City's explanations why Skellington was not appointed to a permanent Battalion Chief position are pretextual.
4. We conclude that the CITY violated HRS Section 396-8(e).

## ORDER

We concur with the Restitution and Penalty initially ordered by HIOSH to make Skellington whole pursuant to HRS §396-8(e)(6) as modified, pursuant to HRS §396-11(i), and order the City:

1. To appoint Skellington to a permanent Battalion Chief position effective January 1, 1997;
2. Pay Skellington full back pay restitution for all monies, benefits, and seniority lost from January 1, 1997 to the effective date of the decision of this contest within 20 calendar days of receipt of such decision;
3. Clear the respective personnel and other department records of any unfavorable references or entries related to this cited violation;

4. Post the Notice to Employees in a conspicuous place in the work area for convenient access and review by HFD employees in HFD's main office, for a period of 60 days; and

5. Pay \$1,000 as a penalty for the violation of HRS §396-8(e) to HIOSH, in the form of a check or money order payable to the Director of Budget and Finance within 20 calendar days from the receipt of a decision on this contest.

Dated: Honolulu, Hawaii,

AUG 29 2001

  
RANDALL Y. IWASE, Chairman

  
CAROL K. YAMAMOTO, Member

  
VICENTE F. AQUINO, Member


Michael Jay Green, Esq.  
David J. Gierlach, Esq.  
Debra A. Kagawa, Esq.  
for Complainant

Paul K.W. Au, Esq.  
for Respondent

Herbert B.K. Lau, Esq.  
for the Director, Department  
of Labor and Industrial Relations

NOTICE TO EMPLOYER:

You are required to post a copy of this Decision and Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted.

A certified copy of the foregoing was mailed to the above-captioned parties or their legal representative on AUG 29 2001 .

