



STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

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Transaction ID 62523396  
Case No. 2018-19

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR  
AND INDUSTRIAL RELATIONS,

Complainant,

and

KIMO CUMMINGS,

Respondent.

CASE NO. 2018-19

ORDER NO. 1037

PRETRIAL ORDER AND NOTICES

(I) RECEIPT OF NOTICE OF CONTEST  
AND GENERAL INFORMATION; (II)  
SCHEDULE OF DEADLINES AND  
HEARING DATES; (III) POSITION  
STATEMENT; (IV) DISPOSITIVE  
MOTIONS; (V) NOTICE OF STATUS  
CONFERENCE AND ORAL ARGUMENTS  
ON A DISPOSITIVE MOTION; AND (VI)  
NOTICE OF *DE NOVO* HEARING

(I) RECEIPT OF NOTICE OF CONTEST AND GENERAL INFORMATION; (II) SCHEDULE  
OF DEADLINES AND HEARING DATES; (III) POSITION STATEMENT; (IV)  
DISPOSITIVE MOTIONS; (V) NOTICE OF STATUS CONFERENCE AND ORAL  
ARGUMENTS ON A DISPOSITIVE MOTION; AND (VI) NOTICE OF *DE NOVO* HEARING

**I. RECEIPT OF NOTICE OF CONTEST AND GENERAL INFORMATION**

THE PARTIES ARE HEREBY NOTIFIED AND ORDERED TO COMPLY WITH THIS PRETRIAL ORDER AND NOTICES. The Hawaii Labor Relations Board (Board) may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this Pretrial Order and Notices where the parties or attorneys have not shown good cause for failure to comply, or a good faith attempt to comply.

NOTICE IS HEREBY GIVEN that on **October 3, 2018** the Board received the Transmittal of Notice of Contest from the State of Hawaii, Department of Labor and Industrial Relations' Hawaii Occupational and Safety Division (HIOSH) in the above-captioned matter.

**A. ISSUES**

The issues in this case are contained in the **Notice of Contest submitted by the above-named Respondent, the Citation and Notification of Penalty being contested, and the Position Statements of the parties.**

**B. DISCOVERY**

The parties shall immediately proceed to 1) meet and confer among themselves regarding possible settlement and/or discovery needs, and 2) **commence the discovery process without any**

Respondent KIMO CUMMINGS

Respondent Appellee

Appellee:

**further notice. The methods, scope, limits, and timing of discovery and answers to discovery requests shall be as provided in the applicable rules of the Hawaii Rules of Civil Procedure.**

**The Director shall provide forthwith to all parties a copy of the investigative file and a pdf copy to the Board of the same.**

The Discovery cut-off date is listed in **Section II SCHEDULE OF DEADLINES AND HEARING DATES.**

### **C. OTHER GOVERNING RULES**

Other than the specific discovery matters noted above or as provided in this Notice, all other matters and proceedings in this case shall be governed by the Board's administrative rules contained in Hawaii Administrative Rules (HAR) Title 12, Subtitle 7, Chapter 42, which may be found on the Board's website.

### **D. PARTY REPRESENTATIVES**

**Any party may retain counsel if the party so desires, and an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association in all Board proceeding.**

### **E. FILING DOCUMENTS WITH THE BOARD**

#### **1) Electronic Filing:**

**The Board provides to all parties and encourages the use of an electronic filing service through File & Serve Express.** There is no charge to the parties for use of this electronic filing service. Please contact the Board's office for more information about File & Serve Express, and for assistance in its use, if needed (see phone numbers below). To register, a party is required to complete and submit the Board Agreement to E-File (Form HLRB-25), as amended, which is available at <http://labor.hawaii.gov/hlrp/forms/>.

#### **2) In person or by mail:**

A party may mail or file in person an original of any document at the Board's office at 830 Punchbowl Street, Room 434, Honolulu, Hawaii, 96813. The Board's office is open on the weekdays (excluding state holidays) between 7:45 a.m. to 4:30 p.m; the office may occasionally be closed from 12:00 p.m. to 1:00 p.m. The date of receipt by the Board shall be deemed the date of filing.

Respondent KIMO CUMMINGS

Respondent Appellee

Appellee:

**F. WITHDRAWAL OF APPEAL BY MOTION OR STIPULATION**

If the parties reach a settlement agreement, then the party appealing the citation may file a motion to withdraw the appeal or the parties may file a stipulation withdrawing and closing the case.

**G. NOTICE REGARDING PROTECTION OF SOCIAL SECURITY NUMBERS AND PERSONAL INFORMATION:**

Before a party files or submits any pleading, correspondence or other document (Documents) to the Board, whether electronically or manually, the party shall make certain that all social security numbers and personal information are redacted or encrypted. "Personal information" shall include social security numbers, home addresses, dates of birth, bank account numbers, medical and health records, and any other information in which a person has a significant privacy interest. To the extent any personal information is relevant to the Board's consideration of this case, the submitting party shall submit the confidential information by means of a Confidential Information Form that substantially conforms to Form 2 of the Hawaii Court Records Rules, as amended.

If a party submits a document, which requires redaction of a page(s), the party shall by motion request permission from the Board to withdraw and replace the original document, in its entirety, with a redacted copy of such document, pursuant to HAR § 12-42-8(g)(11), "The Board may permit withdrawal of original documents upon submission of properly authenticated copies to replace such document.

The Board may impose appropriate monetary or other sanctions upon parties or attorneys who do not comply with this provision where the parties or attorneys have not shown good cause for failure to comply, or a good faith attempt to comply.

**H. GROUNDS FOR DISMISSAL OF THE CASE**

**THE APPEALING PARTY'S FAILURE TO ATTEND ANY PROCEEDING BEFORE THE BOARD MAY BE GROUNDS FOR DISMISSAL OF THE APPEAL.**

**I. MISCELLANEOUS**

Hereafter, this document shall control the course of proceedings including any scheduled de novo hearing date, and may not be amended except by the Board, or by a written request by a party with written consent of the other parties (stipulation) and approved by the Board, or by an order granting a motion filed with the Board.

The use of singular, plural, masculine, feminine, and neuter pronouns shall include the others as the context may require.

Respondent KIMO CUMMINGS

Respondent Appellee

Appellee:

**II. SCHEDULE OF DEADLINES AND HEARING DATES**

<b>DEADLINES &amp; HEARING DATES FOR:</b>	<b>DATE</b>	<b>Time</b>
<b><u>A Party's Position Statement</u></b> (See Section III for more information)	10/17/18	
<b><u>Discovery Cutoff Date</u></b> All discovery shall be <u>completed</u> by this date. A discovery request shall be served sufficiently in advance to allow for response by the deadline.	11/28/18	
<b><u>Filing of a Dispositive Motion except a motion based on untimeliness</u></b> (See Section IV for more information)	12/04/18	
<b><u>Response to Dispositive Motion except a motion based on untimeliness</u></b> (See Section IV for more information)	12/12/18	
<b><u>Status Conference and Oral Arguments on a Dispositive Motion except a motion based on untimeliness</u></b> (See Section V for more information)	12/19/18	9:00 am
<b><u>Exchange of Witness Lists</u></b> The witness lists shall include, in the interest of judicial economy, a brief but meaningful summary or general statement of the nature of the testimony expected, and the order in which the witnesses are expected to be called. The summary or general statement for each witness shall include sufficient information for the Board to determine whether the testimony will be irrelevant, immaterial, or unduly repetitious to any other witness testimony; see, Hawaii Revised Statutes § 91-10(1).	01/02/19	
<b><u>Exchange of Exhibit Lists for an Appeal or a Discrimination Complaint</u></b> Unless specified by the Board, Complainant shall use numerical designations 1-2-3-4, etc. to identify its exhibits. Respondent or Respondent-Appellee shall use alphabetical letters A-B-C-D. Appellee, if any, shall use alphabetical letters with numbers A1, A2, A3, etc. The HIOSH report shall be filed by HIOSH as its first exhibit.	01/02/19	

Respondent KIMO CUMMINGS

Respondent Appellee

Appellee:

**DEADLINES & HEARING DATES FOR (cont'd)****DATE Time****Exchange of Joint Exhibit Lists**

01/02/19

If the parties have agreed to submit proposed Joint Exhibits, then the Exhibits shall be marked with a J and then a number, i.e. J-1, etc.

**Exchange and Filing of Proposed Exhibits**

01/02/19

The parties are encouraged to use the File & ServeXpress eFiling system to file their proposed exhibits before or by 4:30 p.m. on the deadline day. The exhibits shall be filed in a searchable portable document format (PD) with each exhibit treated as a separate PDF file not exceeding 15 megabytes and identified by exhibit number. Alternatively, a party may file exhibits in person or by mail to the Board; the date of receipt by the Board shall be deemed the date of filing.

If there are Joint Exhibits, the parties shall designate one party to file these exhibits, who shall comply with the above requirements.

**De Novo Hearing**

01/16/19

9:00 am

(See Section VI for more information)

All submissions shall be filed on or before **4:30 p.m.** on the deadline date.

**III. POSITION STATEMENT**

- A. Each party shall file a Position Statement with the Board on the date listed in Section II SCHEDULE OF DEADLINES AND HEARING DATES.**
- B. The Position Statement for a Notice of Contest of a Citation and Notification of Penalty shall include the following information:**
  - 1. A list of the HIOSH citations and/or penalties that are not contested.**
  - 2. A list of the HIOSH citations and/or penalties that are contested, including a complete description of the contested issues, facts and law applicable to each contested citation and/or penalty or, for a self-represented party, a statement why the self-represented party is contesting the citation(s).**

Respondent KIMO CUMMINGS

Respondent Appellee

Appellee:

**and law applicable to each contested citation and/or penalty or, for a self-represented party, a statement why the self-represented party is contesting the citation(s).**

**3. For the Respondent(s), all affirmative defenses<sup>1</sup> asserted.**

**4. For the Complainant, any and all jurisdictional issues.**

**5. Whether abatement of the violation(s) is an issue.**

**6. The status of discovery conducted.**

**7. The status of settlement discussions by the parties.**

**C. The Position Statement for a Notice of Contest – Discrimination Complaint**

**1. Why the party is contesting the Determination Notice and Order.**

**2. Opposing Parties shall list all affirmative defenses asserted.**

**3. The status of discovery conducted.**

**4. The status of settlement discussions by the parties.**

**IV. DISPOSITIVE MOTIONS**

**A. All Dispositive Motions except a Dispositive Motion based on untimeliness**

**1. Any party may file a dispositive motion<sup>2</sup> no later than the date listed in Section II SCHEDULE OF DEADLINES AND HEARING DATES.**

**2. A response to a dispositive motion shall be filed no later than the date listed**

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<sup>1</sup> An “affirmative defense” is a type of defense in which the respondent seeks to avoid liability by introducing evidence not addressed by the complainant. The respondent has the burden of proof to prove otherwise.

<sup>2</sup> A “dispositive motion” is a motion asking for a Board order that entirely disposes of one or more claims in favor of the moving party without need for further proceedings. A dispositive motion does not necessarily seek to dispose of the entire appeal. The most common types of dispositive motions are the motion to dismiss and the motion for summary judgment.



Respondent KIMO CUMMINGS

Respondent Appellee

Appellee:

in **Section II SCHEDULE OF DEADLINES AND HEARING DATES.**

3. Oral argument on a dispositive motion will be heard on the date and time listed in **Section II SCHEDULE OF DEADLINES AND HEARING DATES.**

**B. Dispositive Motions based on untimeliness**

1. Any party may file a dispositive motion based on untimeliness (DMU) (the notice to appeal has been filed past the deadline) at any time.
2. A response to a DMU shall be filed no later than 7 days from receipt of the DMU.
3. At the Board's discretion, A Notice of Motion Hearing to hear oral may be sent by the Board to the parties with a date, time and place of the motion hearing.

**V. NOTICE OF STATUS CONFERENCE AND ORAL ARGUMENTS ON A DISPOSITIVE MOTION EXCEPT A MOTION BASED ON UNTIMELINES**

NOTICE IS HEREBY GIVEN that the Board will conduct a status conference, and in the event a dispositive motion is filed, hear oral arguments, in the Board's hearing room located at Room 434, 830 Punchbowl Street, Honolulu, Hawaii on the date and time listed in **Section II SCHEDULE OF DEADLINES AND HEARING DATES.**

The conference will be held to determine the status of the case and, if a dispositive motion is filed, to hear oral arguments on the dispositive motion. A pretrial conference may be scheduled by the Board at this status conference.

Auxiliary aids and services are available upon request to parties and representatives with disabilities. For TTY, dial 711; then, ask for (808) 586-8616, the Hawaii Labor Relations Board. For any other reasonable accommodation, or to make arrangements to appear telephonically where permitted by the Board, call the Board at (808) 586-8616 within 7 days prior to the conference.

**VI. NOTICE OF *DE NOVO* HEARING AND DEADLINES**

NOTICE IS HEREBY GIVEN that, pursuant to Hawaii Revised Statutes (HRS) §§ 91-9, 396-11, and 396-11.5, the Board will conduct a *de novo* Hearing on the merits of the case in the above-entitled matter in the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii, 96813 on the following date and may be continued by the Board until

Respondent KIMO CUMMINGS

Respondent Appellee

Appellee:

completed. The issues, statutes, and rules involved shall be as identified in the Notice of Contest and its attachments, if any. If the appeal results from a Notice of Citation and Penalty, the issues, statutes, and rules shall include those identified in the Notice of Citation and Penalty. The issues shall also include issues identified by the parties at the status conference. The Director shall have the burden of proving a penalty and citation; the employer shall have the burden of proving an affirmative defense; and an employee contesting an order of the Director denying a complaint of discrimination, shall have the burden of proving the discrimination.

***De Novo Hearing Date & Time:*** 1/16/19 at 9:00 a.m.

Parties, party representatives, and witnesses may not appear telephonically at the *de novo* Hearing and must appear in person.

Any party may retain counsel if the party so desires, and an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

Auxiliary aids and services are available upon request; call Nora Ebata at (808) 586-8616, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

The parties should be aware that the Board's hearing room is located in a secured State of Hawaii building, and that any party, representative, counsel, or other person attending the hearing will need to present a government-issued identification for entry into the building.

DATED: Honolulu, Hawaii, \_\_\_\_\_, October 4, 2018



HAWAII LABOR RELATIONS BOARD

  
MARCUS R. OSHIRO, Chair

  
SESNITA A.D. MOEPONO, Member

EXCUSED  
\_\_\_\_\_  
J N. MUSTO, Member



**CASE NO. 2018-19**

**COMPLAINANT: DIRECTOR, DLIR**

**Respondent KIMO CUMMINGS**

**Respondent Appellee**

**Appellee:**

Copies sent to:

Kimo Cummings

Doris Dvonch, Deputy Attorney General

**NOTICE TO EMPLOYER**

You are required to post a copy of this notice at or near where citations under the Hawaii Occupational Safety and Health Law are posted at least five working days prior to the conference date. Further, you are required to furnish a copy of this notice to a duly recognized representative of the employees at least five working days prior to the conference date.