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Case No. OSH 2011-21

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

DONALDSON ENTERPRISES, INC.,

Respondent.

CASE NO. OSH 2011-21

ORDER NO. 685

ORDER GRANTING
RESPONDENT'S MOTION TO
CONTINUE TRIAL AND
COMPLAINANT'S MOTION TO
EXTEND DISCOVERY
DEADLINES; NOTICE OF
STATUS CONFERENCE

**ORDER GRANTING RESPONDENT'S MOTION TO CONTINUE
TRIAL AND COMPLAINANT'S MOTION TO EXTEND
DISCOVERY DEADLINES; NOTICE OF STATUS CONFERENCE**

On March 9, 2012, in Case No. OSH 2011-21, involving DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director), Complainant and DONALDSON ENTERPRISES, INC. , Respondent (Donaldson or Respondent), the Hawaii Labor Relations Board (Board) issued Order No. 464, Pretrial Order which established several pretrial deadlines in this case and scheduled a hearing on the merits for September 11-14, 2012.

On July 11, 2012, the Board issued Order No. 475, Order Granting in Part and Denying in Part Respondent's Motion to Continue Hearing Filed on June 15, 2012. The Board continued the hearing in this matter until January 15-18, 2013 and also extended the discovery deadline of August 1, 2012 to October 15, 2012.

On October 9, 2012, the Board issued Order No. 484, approving the parties' Stipulation to Extend Discovery Deadline, extending the discovery deadline from October 15, 2012 to October 18, 2012.

On December 3, 2012, the Board issued Order No. 491, Order Granting Respondent's Motion to Continue Hearing, Filed on November 16, 2012. The Board

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continued the trial in this matter from January 15-18, 2013 to July 30 and 31, and August 6 and 7, 2013. In addition, the Board extended the discovery deadline from October 15, 2012 to April 30, 2013.

On May 15, 2013, pursuant to the Board status conference held on May 15, 2013, the Board issued a Notice of Hearing continuing the trial from July 30 and 31, 2013 and August 6 and 7, 2013 to November 5, 6 and 7, 2013 and extending the discovery cutoff date and the deadline for the parties to file and exchange witness and exhibit lists to October 4, 2013.

On September 23, 2013, pursuant to the Board Status Conference held on that date, the Board issued a Notice of Continued Status Conference and Continuance of Hearing, continuing the trial previously scheduled on November 5, 6, and 7, 2013 to a later date to be determined at a Board Status Conference to be held on January 13, 2014.

On January 13, 2014, the Board issued a Notice of Fourth Status Conference and Hearing, giving notice that the Board would conduct a fourth status conference in the matter on July 16, 2014 and that trial would be held on October 14, 15, and 16, 2014.

On January 17, 2014, the Board issued Order No. 545, approving the parties' Second Stipulation to Extend Discovery Deadline, extending the discovery deadline from October 4, 2013 to March 30, 2014.

On August 22, 2014, pursuant to the initial/settlement conference held at the Board on August 21, 2014, the Board issued a Notice of Deadlines and Motion Hearing, notifying the parties that the deadline to file a motion is August 25, 2014, the deadline to respond is August 28, 2014, and the motion hearing is scheduled on September 4, 2014.

On August 25, 2014, Donaldson filed Donaldson's Motion to Continue Hearing asserting that due to a pending criminal indictment covering the same subject matter that forms the basis for this Hawaii Occupational Safety and Health (HIOSH) proceeding, Donaldson is seeking a continuance of the October 15, 16 and 17, 2014 hearing to avoid any infringement on his Fifth Amendment right to remain silent. Donaldson argued that the presence of a criminal case with overlapping subject matter placed Donaldson¹ in a position where it would not be able to adequately defend in the

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HIOSH proceeding should the hearing proceed as scheduled. Donaldson further argued that a continuance of this HIOSH hearing is needed to allow Donaldson to both assert the constitutional right to remain silent and still defend Donaldson in the HIOSH proceeding once the criminal matters are resolved. Counsel for Donaldson also declared that Donaldson is no longer in operation, and a continuance of this matter should have no bearing on workplace safety concerns.

On August 28, 2014, Director filed Director's Position on Respondent's Second Motion to Continue Hearing in this matter. Director argued that the assertion of a witness' Fifth Amendment constitutional right does not automatically compel an agency to continue its hearing. The Director noted that an agency may decide to stay or continue its proceedings "in light of the particular circumstances and competing interests involved in the case," including "the extent to which the defendant's fifth amendment rights are implicated." Federal Savings and Loan Insurance Corporation v. Molinaro, 889 F.2d 899,902 (9th Cir. 1989). The Director stated that if the Board continued this matter, the Director had concerns about the availability of witness and therefore requested that the discovery deadline be continued also.

At the motion hearing held on September 4, 2014, counsel for Donaldson informed the Board and Director's counsel that the criminal trial in Federal Court was now set for July 7, 2015. Donaldson's counsel argued that there are no workplace safety issues that would necessitate a HIOSH trial prior to resolution of the criminal matter; Donaldson is no longer in business. In answer to the Director's concerns that witnesses in this case may not be available in the future if the HIOSH trial is continued, counsel for Donaldson replied that the taking of depositions prior to the July 7, 2015 Federal Court date could be agreed to, with the witnesses' assertion of Fifth Amendment rights as necessary.

On September 16, 2014, by Order No. 602, the Board granted Donaldson's August 25, 2014 Motion to Continue Hearing, canceling the trial scheduled for October 15, 16, and 17, 2014, and reset the deadline for production of documents and answers to interrogatories to October 6, 2014. The Board also set a status conference in this matter on August 11, 2015 to schedule new hearing dates and to address any outstanding pretrial issues.

At the Board status conference held on August 28, 2015 (rescheduled from August 11, 2015), counsel for Donaldson informed the Board that the criminal trial has been moved again by the court and will be reset for a date in April 2016.

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Therefore, by oral motion heard by the Board, Donaldson's counsel requested a continuance in this matter beyond April 2016 for the reasons previously presented; i.e. Donaldson's witnesses will be claiming their Fifth Amendment rights. As before, counsel for Director objected to a further continuance of trial in this case, and moved to continue discovery cutoff and live witness identification deadlines to two months prior to a new trial date, if the Board's inclination was to grant Donaldson's motion to continue trial.

Accordingly, for good cause shown, given the circumstances of this case, the Board hereby grants Donaldson's oral motion to continue the hearing and the Director's oral motion to continue discovery cutoff and live witness deadlines to two months prior to a future trial date.

IT IS HEREBY ORDERED that the trial is continued until a date and time to be determined at a status conference after April 2016, and the deadlines for discovery cutoff and live witness identification will be reset accordingly for a date two months prior to the continued trial date.

NOTICE OF STATUS CONFERENCE


NOTICE IS HEREBY GIVEN that the Board will conduct a Status Conference in this proceeding on Tuesday, **May 10, 2016** at **9:00 a.m.** (HST) in the Board's hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii 96813. The purpose of the Status Conference is to schedule new discovery and hearing dates and to address any other outstanding pretrial issues in these proceedings.


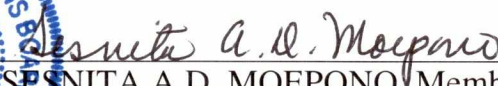
Any party or representative not residing on the island of Oahu, may appear telephonically at the initial conference by calling Ms. Nora Ebata, Board Secretary at **(808) 586-8610**, (808) 586-8847 (TTY), or 1 (888) 569-6859 (TTY neighbor islands). Further, auxiliary aids and services are available upon request by calling Nora Ebata at the above phone numbers. Any request to appear telephonically and/or for reasonable accommodations should be made no later than ten working days prior to the needed accommodation.

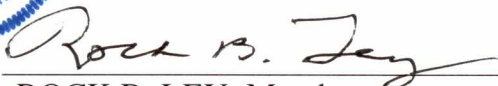
DATED: Honolulu, Hawaii, September 1, 2015.

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KERRY M. KOMATSUBARA, Chair



SESNITA A.D. MOEPONO, Member


ROCK B. LEY, Member

Copies sent to:
Herbert B.K. Lau, Deputy Attorney General
Thomas M. Otake, Esq.

¹ Donaldson's two key witnesses are Mr. Charles Donaldson and Mr. Carlton Findley, both indicted in the same federal criminal case with Donaldson Enterprises, Inc. and who would be asserting their fifth amendment right to remain silent until the criminal case is resolved.