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Case No. OSH 2016-27

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

GATEWAY MANAGEMENT COMPANY,
dba WAIKIKI GATEWAY HOTEL,

Respondent.

CASE NO.: OSH 2016-27

ORDER NO.: 863

ORDER GRANTING RESPONDENT'S
MOTION FOR RECONSIDERATION OF
HLRB'S ORDER DISMISSING CONTEST
AND CLOSING CASE FILED NOVEMBER
30, 2016 (ORDER NO. 845); NOTICE OF
SECOND INITIAL CONFERENCE; AND
NOTICE OF HEARING

**ORDER GRANTING RESPONDENT'S MOTION FOR
RECONSIDERATION OF HLRB'S ORDER DISMISSING CONTEST
AND CLOSING CASE FILED NOVEMBER 30, 2016 (ORDER NO. 845)**

Respondent GATEWAY MANAGEMENT COMPANY, DBA WAIKIKI GATEWAY HOTEL (Respondent or Gateway Management Co.) contests the penalties imposed in the Citation and Notification of Penalty (Citation) issued by Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant or DLIR) on May 17, 2016. The Citation alleges eight OSHA violations that were characterized as "serious" in the Citation: 29 CFR 1910.305(b)(1)(ii); 29 CFR 1926.1101(d)(4); 29 CFR 1926.1101(e)(1); 29 CFR 1926.1101(0(2)(i) [sic]; 29 CFR 1926.1101(j)(1)(i); 29 CFR 1926.1101(k)(2)(i); 29 CFR 1926.1101(k)(2)(ii); and 29 CFR 1926.1101(1)(2).

On August 11, 2016, the Hawaii Labor Relations Board (Board) issued a Notice of Case Assignment and Order in this matter to Complainant and Respondent GATEWAY MANAGEMENT COMPANY, DBA WAIKIKI GATEWAY HOTEL (Respondent or Gateway Management Co.), which, *inter alia*, ordered the parties to submit a Status Report within 75 days. On October 24, 2016, the DLIR filed Complainant Director's Status Report with the Board; however, Respondent did not file a Status Report with the Board.

On October 26, 2016, the Board issued a Notice of Initial/Settlement Conference (Notice) in this matter, notifying the parties that the Board would conduct an initial conference on November 14, 2016. The Notice was mailed to the parties via United States Mail, first-class postage prepaid.

On November 14, 2016, the Board held an initial conference in this matter, with counsel for the DLIR present. No representative appeared at the initial conference on behalf of Respondent.

On November 15, 2016, and in light of Respondent's failure to appear at the initial conference, the Board issued a Notice of Intent to Dismiss With Prejudice (Notice of Intent to Dismiss), providing the parties with notice of the Board's intent to dismiss with prejudice Respondent's contest of the Citation and Notification of Penalty at issue in this case, unless Respondent provided in writing to the Board on or before the close of business on November 23, 2016, an explanation as to why this matter should not be dismissed and why Respondent failed to appear at the initial conference.

On November 29, 2016, legal counsel for Respondent filed his notice of appearance before the Board.

On November 30, 2016, because Respondent did not provide the required explanation to the Board by the November 23, 2016, deadline, the Board issued Order No. 845, Order Dismissing Contest and Closing Case.

On December 6, 2016, Respondent filed Respondent Gateway Management Company, dba Waikiki Gateway Hotel's Motion for Reconsideration of HLRB's Order Dismissing Contest and Closing Case Filed November 30, 2016 (Order No. 845) (Respondent's Motion for Reconsideration). The Motion for Reconsideration asserts, *inter alia*, that Brian Taylor (Taylor), who is Respondent's Operations Manager and was Respondent's representative in this matter at the time, made an honest mistake in not attending the initial conference; that the Notice stated the purpose of the conference was to discuss simplifying the issues, establishing deadlines, and an opportunity for the parties to discuss settlement; that Mr. Taylor sent a November 7, 2016, settlement offer to counsel for the DLIR which he believed satisfied Respondent's obligation under the Notice; that nothing in the Notice put Respondent on notice that the case could be dismissed for failure to attend the conference; that Mr. Taylor did not fully understand his obligation to attend

the conference; and that Mr. Taylor did not receive the Notice of Intent to Dismiss until November 25, 2016, after the deadline to respond had run.

The Motion for Reconsideration further asserts that a dismissal with prejudice is the ultimate sanction, and such defaults are disfavored by the courts because they deny a party the right to have their case heard on the merits. Respondent cites to BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147 (1976) as establishing the standard by which a court should adjudge a motion to set aside a default entry of judgment:

In general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds [1] that the nondefaulting party will not be prejudiced by the reopening, [2] that the defaulting party has a meritorious defense, and [3] that the default was not the result of inexcusable neglect or a wilful [sic] act.

57 Haw. at 77, 549 P.2d at 1150. Respondent also cites to State v. Mauna Ziona Church, 128 Hawai'i 131, 284 P.3d 224 (Haw. App. 2012), “[t]he showing necessary to set aside an entry of default, which is good cause shown, is lower than that necessary to set aside a default judgment[.]”

Respondent also asserts that it filed its Motion for Reconsideration only eight calendar (six business) days after the Board issued Order No. 845, and that there has been no showing of prejudice to the DLIR.

On December 12, 2016, the DLIR filed Complainant Director of Labor and Industrial Relations’ Memorandum in Opposition to Respondent’s Motion for Reconsideration, asserting, *inter alia*, that the Board has authority under Hawaii Revised Statutes (HRS) § 396-11.5(c) to dismiss Respondent’s contest for “contemptuous conduct”:

The appeal board may impose other sanctions for contemptuous conduct, including dismissal of the appeal (emphasis added).

The DLIR asserts that “contemptuous conduct” includes failing or refusing to appear, and “[t]he commission of any other act that is disrespectful or interferes with the administration of justice.” (HRS § 396-11.5(d)(3)). The DLIR further points out that the Board’s Notice included the statement, “THE APPEALING PARTY’S FAILURE TO ATTEND THIS INITIAL CONFERENCE MAY BE GROUNDS FOR DISMISSAL OF THE APPEAL.”

The DLIR also argues that “service by mail is complete upon mailing” (Rules 5(b)(3), Hawaii Rules of Civil Procedure (HRCPP)), and that a “letter correctly addressed and

properly mailed is presumed to have been received in the ordinary course of mail” (Rule 303(c)(10), Hawaii Rules of Evidence).

On December 12, 2016, Respondent filed its Reply In Support of Its Motion for Reconsideration Filed December 6, 2016 (Reply). Respondent quotes HRS § 396-11.5(c) and (d), and asserts the provisions are limited to contemptuous conduct at *a hearing* (emphasis in Reply) and is limited to particularly egregious conduct:

- (c) Contemptuous conduct at any hearing shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the appeals board after due notice and hearing. The appeals board may impose other sanctions for contemptuous conduct, including dismissal of the appeal. Any action taken by the appeals board shall be by a simple majority.
- (d) As used in this section, “contemptuous conduct” includes the following conduct by a person appearing before the appeals board:
 - (1) Failure or refusal to appear in compliance with a subpoena or, having appeared, failure or refusal to testify under oath or affirmation;
 - (2) Failure or refusal to answer any relevant question or failure or refusal to furnish any relevant book, paper, or other document subpoenaed by or on behalf of the appeals board; and
 - (3) The commission of any other act that is disrespectful or interferes with the administration of justice.

Respondent also quotes Hawaii Administrative Rules (HAR) § 12-47-48, governing sanction for contemptuous conduct before the “appeals board.” As a preliminary matter, the Board notes that HAR § 12-47-48 is part of the administrative rules promulgated by the Labor and Industrial Relations Appeal Board (LIRAB), governing practice and procedure before the LIRAB. HAR § 12-47-2 defines “Board” as “the labor and industrial relations appeals board.” By contrast, the Board’s own rules of practice and procedure relevant to this proceeding are contained in Title 12, Subtitle 7, Chapter 42, of the HAR. HAR § 12-42-1, governing “Scope,” provides, “These rules govern procedure before the Hawaii public employment relations board

under chapter 89, HRS, as amended¹, *and such other statutes as may now or hereafter be administered by the board*² (emphasis added).

The Board's rules of practice and procedure provide in HAR § 12-42-8, governing "Proceedings before the board":

Contemptuous conduct:

- (A) Contemptuous conduct at any hearing shall be grounds for summary exclusion from the hearing. Such misconduct, if of an aggravating character and engaged in by an attorney or other representative of a party, shall be grounds for suspension or disbarment from further practice before the board after due notice and hearing.
- (B) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper may, in the discretion of the board, be grounds for striking all testimony previously given by such witness on related matters.

HAR § 12-42-8(g)(9).

On January 19, 2017, the Board heard oral argument on Respondent's Motion for Reconsideration.³

The Board holds that it has the authority to dismiss Respondent's contest pursuant to HRS § 396-11.5. However, the Board also looks to the Hawaii Rules of Civil Procedure and case law for guidance in exercising its discretion to dismiss a contest. In Cole v. AOA O Alii Cove, 134 Hawai'i 103, 332 P.3d 705 (2014), the Intermediate Court of Appeals (ICA) considered the LIRAB's dismissal of an appeal for failure to comply with one of the LIRAB's administrative rules regarding the signing of a notice of appeal. The ICA stated in its discussion, "while this

¹ In 1985, HRS § 89-5 was amended to change the name of the Board from the Hawaii Public Employment Relations Board to the Hawaii Labor Relations Board. 1985 Haw. Sess. Laws Act 251, §4.

² In 2002, the Legislature amended HRS chapter 396 to designate the Board as the "appeals board" for purposes of chapter 396 appeals, replacing the LIRAB. 2002 Haw. Sess. Laws Act 104, §2.

³ The oral argument on Respondent's Motion for Reconsideration was presided over by a hearings officer designated by the Board. However, no "evidence" was presented at the oral argument, and thus the provisions of HRS § 91-11 do not apply. The whole record, including all pleadings, declarations, other filings, and the audio recording of the oral argument in this matter were completely and thoroughly reviewed by the Board prior to issuance of this Order.

matter does not involve discovery violations, our decision is guided by precedent regarding dismissal of claims as discovery sanctions”:

In reviewing whether a trial court’s dismissal of a claim as a discovery sanction constitutes an abuse of discretion, appellate courts consider the following five factors: (1) the public’s interest in the expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the [party moving for sanction]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

134 Hawai‘i at 110, 332 P.3d at 712 (internal quotation marks and citations omitted).

Whether the Board utilizes the judicial standard for discovery sanctions, or Respondent’s asserted standards for entry of default judgments, the Board grants Respondent’s Motion for Reconsideration. The Board accepts the Declaration of Mr. Taylor that he made an honest mistake regarding his obligations to appear at the initial conference as well as his statement that he did not receive the Notice of Intent to Dismiss until after the deadline had run. Although the Board is hesitant to describe Respondent’s conduct as “excusable neglect,” the Board does nevertheless find no willfulness by Respondent. Moreover, and significantly, the Board finds no prejudice to the DLIR. The Board combines these factors with the public policy favoring disposition of cases on their merits, and balances them against the public policy favoring expeditious resolution of a contest and the Board’s need to manage its docket.

Under the unique facts of this particular case, the Board hereby exercises its discretion to grant Respondent’s Motion for Reconsideration and reinstates its contest. Accordingly,

NOTICE OF SECOND INITIAL CONFERENCE

NOTICE IS HEREBY GIVEN that the Board will conduct a second initial conference in this matter on **February 15, 2017, at 9:30 a.m.**, in the Board’s hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii. The purpose of the conference is to simplify the issue, establish deadlines, and address other procedural matters and any other matter that will aid in the orderly resolution of the appeal. Respondent is ordered to submit an initial conference statement no later than **three business days** prior to the initial conference; the DLIR may submit an amended or new initial conference statement by that deadline if it so desires. An

initial conference statement shall include a statement and description of issue, witness, exhibits, and estimated length of hearing. A sample format may be found on the Board's website, Form HLRB-17. Failure by Respondent to attend the initial conference or to submit an initial conference statement *shall* result in dismissal of the contest.

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that, pursuant to HRS §§ 91-9, 396-11, and 396-11.5 the Board will hold a *de novo* trial/hearing in this matter commencing on **Tuesday, March 21, 2017, at 9:00 a.m.**, at the Board's hearing room located at 830 Punchbowl Street, Room 434, Honolulu, Hawaii. The trial/hearing may be continued by the Board to future date(s) until completed. The issues in this case are contained in the Respondent's Letter of Contest dated June 2, 2016, and its referenced Citation and Notification of Penalty; and the parties' initial conference statement(s).

NOTICE IS FURTHER GIVEN that the parties' Final Exhibit Lists, copies of Exhibits, and Final Witness Lists shall be filed with the Board and served on all other parties by **March 14, 2017**.

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 by calling Ms. Nora Ebata at (808) 586-8610, (808) 586-8847 (TTY), or 1(888) 569-6859 (TTY neighbor islands). A request for reasonable accommodations shall be made no later than ten working days prior to the needed accommodation.

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

DATED: Honolulu, Hawaii, January 23, 2017.

HAWAII LABOR RELATIONS BOARD



Sesnita A. D. Moepono
SESNITA A.D. MOEPONO, Member

J.N. Musto
J.N. MUSTO, Member

NOTICE TO EMPLOYER

You are required to post a copy of this Order at or near where citations under the Hawaii Occupational Safety and Health Law are posted for at least five working days upon receipt. Further, you are required to furnish a copy of this notice to any duly recognized representative of Respondent's employees within five working after receipt.

Copy: Richard M. Rand, Esq.
Herbert B.K. Lau, Deputy Attorney General

Case No. OSH 2016-27 – Director, DLIR v. Gateway Management Company, dba Waikiki Gateway Hotel – Order Granting Respondent's Motion for Reconsideration of HLRB's Order Dismissing Contest and Closing Case Filed November 30, 2016 (Order No. 845); Notice of Second Initial Conference; and Notice of Hearing.

Order No.: