



STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

EFiled: Aug 14 2017 02:20PM HAST
Transaction ID 60985432
Case No. OSH 2015-34

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

and

HI-POWER SOLAR, LLC,

Respondent.

CASE NO. OSH 2015-34

ORDER NO. 928

ORDER GRANTING, IN PART,
DIRECTOR'S MOTION FOR
RECONSIDERATION OF THE LABOR
BOARD'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION
AND ORDER OF JUNE 29, 2017 AND
STRIKING RESPONDENT'S
MEMORANDUM IN OPPOSITION TO
DIRECTOR'S MOTION FOR
RECONSIDERATION OF THE LABOR'S
[SIC] BOARD'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION
AND ORDER OF JUNE 29, 2017 E-FILED
ON JULY 28, 2017; AMENDED FINDINGS
OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER

ORDER GRANTING, IN PART, DIRECTOR'S MOTION FOR
RECONSIDERATION OF THE LABOR BOARD'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER OF JUNE 29, 2017
AND STRIKING RESPONDENT'S MEMORANDUM IN OPPOSITION TO
DIRECTOR'S MOTION FOR RECONSIDERATION OF THE LABOR'S [SIC]
BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER OF JUNE 29, 2017 E-FILED ON JULY 28, 2017

On June 29, 2017, the Hawaii Labor Relations Board (Board) issued Decision No. 34, FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER (D & O), in the above-entitled case. In the D & O, the Board held, among other things, that: 1) there was a violation of 29 C.F.R. 1926.501(B)(1); 2) HI-POWER SOLAR, LLC (Hi-Power) failed to prove the employee misconduct defense; 3) the HIOSH's interpretation of the Informal Settlement Agreement (ISA) characterization of the violation as "repeat-serious" and the imposition of the proposed penalty was reversed and modified to "serious" and the proposed penalty remanded to

the Director for further proceedings and determination; and 4) there was no lack of due process because the Director withdrew Citation 1, item 1 and amended the penalty associated with Citation 1, Item 2 to reduce the amount from \$4,400 to \$2,800.

On July 28, 2017 at 1:15 p.m., the Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Director) filed DIRECTOR'S MOTION FOR RECONSIDERATION OF THE LABOR BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER OF JUNE 29, 2017 (Motion for Reconsideration) requesting the Board to reconsider "that part of the D & O concerning the applicability of section 386-14, HRS [sic], to the informal settlement agreement ("ISA")[]" and strike the quotation of section 396-14, HRS, on page 17 of the D & O, as well as the paragraph following the quotation. In support of the Motion to Reconsider, the Director asserts that, "This Labor Board misconstrues the statutory provision;" and that the Director is filing the Motion because the Board did not have the benefit of the parties briefing the applicability of this provision and potential consequences of its application to this case. Accordingly, the Director requests that the quotation of HRS § 396-14 and the paragraph following on page 17 of the D & O be stricken. The Director further requested a hearing on the Motion to Reconsider. The Certificate of Service, dated July 28, 2017, attached to the document certified that a copy of the Motion for Reconsideration was served by electronic service through File & ServeXpress to Brian G.S. Choy, Esq., Attorney for Hi-Power Solar, LLC.

On August 4, 2017 at 5:43 p.m., Respondent Hi-Power filed RESPONDENT'S MEMORANDUM IN OPPOSITION TO DIRECTOR'S MOTION FOR RECONSIDERATION OF THE LABOR'S [SIC] BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER OF JUNE 29, 2017 E-FILED ON JULY 28, 2017.

Hawaii Administrative Rules (HAR) § 12-42-8(g)(3)(C) states in relevant part:

(3) Motions:

(C) All motions other than those made during a hearing shall be subject to the following:

- (i) Such motions shall be made in writing to the board, shall briefly state the relief sought, and shall be accompanied by affidavits or memoranda setting forth the grounds upon which they are based.
- (ii) The moving party shall serve a copy of all motion papers on all other parties and shall, within three days thereafter, file with the board the original and five copies with certificate of service on all parties.
- (iii) Answering affidavits, if any, shall be served on all parties

and the original and five copies, with certificate of service on all parties, shall be filed with the board within five days after service of the motion papers, unless the board directs otherwise.

(iv) The board may decide to hear oral argument or testimony thereon, in which case the board shall notify the parties of such fact and of the time and place of such argument or the taking of such testimony.

(Emphasis added)

On October 23, 2015, the Labor Division of the Attorney General’s Office, State of Hawaii and on April 21, 2016, Choy & Tashima each signed a HAWAII LABOR RELATIONS BOARD E-FILING CONSENT FORM AND PROTOCOLS FOR E-FILING (Board Agreement). The Board Agreement, Paragraph 2. c. states:

- a. **Service on Parties; Time to Respond or Act.** E-service shall be deemed complete at the time the FSX’s system receives the document as reflected by the authorized date and time appearing on the confirmation provided. However, for the purpose of computing time for any other party to respond, any document filed on a day or at a time when the Board is not open for business shall be deemed to have been filed on the next day the Board is open for business. If electronic service on a party does not occur because of: (1) inaccessibility to the FSX’s system; (2) an error in the FSX’s transmission of notice to the party being served; (3) the FSX’s failure to process the electronic filing for service; or (4) the party was erroneously excluded from the service list, the party to be served shall, absent extraordinary circumstances, be entitled to a Board order extending the date for any response or the period within which any right, duty, or other act must be performed.

(Emphasis added)

HAR § 12-42-5(c) provides, in relevant part, for the Board’s office hours, “The office of the board shall be open from 7:45 a.m. to 4:30 p.m. of each weekday....” (Emphasis added)

In this case, the filing of the Motion for Reconsideration occurred when the Board was open for business on July 28, 2017 at 1:15 p.m. Under the terms of the Board Agreement and HAR 12-42-5(c), service of the Motion was completed on July 28, 2017. Based on these Board administrative rules and the Board Agreement, any opposition to the Motion was required to be filed within five days after service of the Motion, which was August 4, 2017 by 4:30 p.m. While the opposition was filed on August 4, 2017, the filing occurred after the Board was no longer open

for business at 5:43 p.m. Pursuant to the Board Agreement provision that “a document filed at a time when the Board is not open for business shall be deemed to have been filed on the next day the Board is open for business,” the opposition was deemed filed on August 7, 2017. Moreover, Hi-Power has not shown that electronic service did not occur for any of the reasons enumerated in the Board Agreement warranting a Board order extending the opposition. Accordingly, the Motion for Reconsideration was untimely filed.

The Board further notes that on November 18, 2016, the Director filed DIRECTOR’S MOTION TO STRIKE RESPONDENT’S POST-TRIAL BRIEF because Hi-Power’s Post-Trial Brief was similarly filed after the Board’s business hours on the date that the post-hearing briefs were due at 9:11 p.m. on November 14, 2016. In that situation, the Board, in its discretion, denied the Motion to Strike because the Director failed to assert that the untimeliness caused unfair surprise, was prejudicial, or abusive. In this case, however, the Board, in its discretion, is compelled to strike Hi-Power’s opposition to the Motion for Reconsideration based on the untimely filing. The Board finds that a second disregard by Hi-Power’s counsel of the Board’s required deadlines is simply inexcusable. Hi-Power’s opposition to the Motion for Reconsideration is hereby struck and will not be considered.

Finally, the Board preliminarily denies the Director’s request for a hearing on the Motion for Reconsideration. HAR § 12-42-8(g)(3)(iv) provides that, “The board may decide to hear oral argument.” (Emphasis added) Accordingly, a hearing on the Motion is permissive and discretionary. The Board finds that granting the Director’s request for a hearing on the Motion is unnecessary because the parties have been given sufficient opportunity to fully brief the issues presented by the Motion; and further, the Complainant’s opposition has been struck.

Turning to the merits of the Motion for Reconsideration, the Board notes that while its administrative rules do not explicitly provide for motions for reconsideration, the Board has previously entertained such motions for reconsideration of its final decisions and orders. Director, Dep’t of Labor and Industrial Rels. v. Si-Nor, Inc., Board Case No. OSH 2003-3, Decision No. 8, at *2 (2004); *see also*, Hawaii Gov’t Emp. Ass’n. v. Cayetano, Board Case No. CE-13-368, Decision No. 416A, 6 HLRB 128, 129 (2000). In considering such motions, the Board has adhered to the well-established principles set forth by the Hawaii Supreme Court that “the purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated [decision].” State of Hawaii, Department of Education v. United Public Workers, AFSCME, Local 646, AFL-CIO, Board Case No. DR-01-105, Order No. 3010, at *3 (2014) (*citing* Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 114, 839 P.2d 10, 26-27 (1992); Omerod v. Heirs of Kainoa Kupuna Kaheananui, 116 Hawaii 239, 270, 172 P.3d 983, 1014 (2007) (Omerod)).

As stated above, the Director is requesting reconsideration of the D & O solely based on the Board's interpretation and application of HRS § 396-14 to the ISA. Although the Board has been reticent to disturb the finality of a decision in the absence of express procedural guidance or statutory direction, the Board has concluded that HRS § 89-5(i)(3) to "resolve controversies" provides the Board with discretionary authority to grant a motion for reconsideration where the circumstances are appropriate. Applying the foregoing standards for a motion for reconsideration, the Board concludes that reconsideration is warranted for the reasons that the Board discussed HRS § 396-14 in the D & O, the parties did not have the benefit of presenting argument during the post-trial brief on the issue, and the D & O is ambiguous regarding the interpretation and application of this provision requiring further clarification.

For the reasons set forth above, the Board hereby grants, in part, the Director's Motion for Reconsideration. In reconsidering the D & O, the Board notes that the Director does not raise any issue regarding new evidence in this case. Consequently, the Board will not reopen the record in this case but will address the reconsideration by issuing the attached Decision 34A, Amended Findings of Fact, Conclusions of Law, Decision, and Order.

DATED: Honolulu, Hawaii, August 14, 2017.

HAWAII LABOR RELATIONS BOARD



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

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

Copies to: Brian G.S. Choy, Esq.
Herbert B.K. Lau, Deputy Attorney General