

of your answer . . . no later than 4:30 p.m. of the tenth day after service of the complaint."

3. On August 14, 1998, Respondent filed with the Board an "Ex Parte Motion to Extend Time in which to File an Answer to Prohibited Practice Complaint; Affidavit of Royden Kotake; and Certificate of Service" (collectively motion). An Answer was also concurrently filed.

4. Said motion requested an extension of time in which to file the prohibited practice complaint to August 14, 1998.

5. Royden Kotake's (Kotake) affidavit represented, inter alia:

a. That Affiant is a business agent of Respondent who, in June and July 1998 received written communications from Petitioner indicating that Petitioner had filed a grievance on his own behalf for the alleged denial of rest periods during the work day. These communications further requested that Respondent file class grievances on behalf of other bargaining unit employees.

b. That prior to, and at the time of the receipt of the instant petition, Affiant was conducting an "investigation as to the merits of the grievance, the wishes of the other employees for whom the class grievances is requested, and the possibility of resolving the dispute which underlies the prohibited practice complaint"

c. That the instant complaint was not forwarded to Respondent's legal counsel, Charles K.Y. Khim, Esq., because it was "hoped" that "the situation would be shortly resolved to the satisfaction of Complainant and at that time the Complainant would

withdraw his prohibited practice complaint . . . without necessitating an answer thereto."

6. On August 20, 1998, Petitioner filed an "Answering Affidavit" to Respondent's motion. In the Answering Affidavit, Petitioner asserts that the Kotake affidavit was not legally sufficient to support Respondent's motion because it "is vague and/or made in bad faith." He further asserts that it is lacking in specific detail.

7. Disposition of Respondent's motion is governed by Hawaii Administrative Rules (H.A.R.) § 12-42-45, which provides in relevant part as follows:

12-42-45 Answer. (a) A respondent [to a prohibited practice petition] shall file a written answer to the complaint within ten days after receipt of the complaint . . .

* * *

(d) In extraordinary circumstances as determined by the board, the board may extend the time within which the answer shall be filed.

* * *

(g) If the respondent fails to file an answer, such failure shall constitute an admission of the material facts alleged in the complaint and a waiver of hearing.

Thus, under the rule, the extension may be granted only if the Board finds "extraordinary circumstances" and, if it fails to do so all material facts in the petition will be deemed admitted and a hearing waived.

8. The rule provides no guidance as to what may constitute "extraordinary circumstances." The matter is thus left to the discretion of the Board. Guidance in the matter is provided

by Rule 6(b), Hawaii Rules of Civil Procedure (H.R.C.P.) which, except in specifically identified circumstances, permits enlargement after the expiration of a specified period "where the failure to act was the result of excusable neglect. . . ." Because consequences which flow from the failure to file an answer would potentially be both unduly harsh and punitive when a failure to timely file is the product of excusable neglect, the Board hereby adopts the "excusable neglect" standard of Rule 6(b), H.R.C.P., in interpreting and applying H.A.R. § 12-42-45(d).

9. In the instant case, the Board finds that Respondent's failure to timely file an answer was a result of excusable neglect. Respondent affirms² that the failure to timely file its answer was a result of its effort to investigate and resolve the underlying contractual violation alleged in the petition. Such activity, particularly when begun prior to the filing of a petition for relief, should be encouraged rather than punished. The failure to forward the petition to Respondent's counsel in anticipation of the settlement of the alleged violation is therefore understandable and excusable.

10. The Board therefore grants Respondent's ex parte motion to extend the time in which to file an answer, and accepts as timely filed Respondent's answer of August 14, 1998.

²Petitioner disputes the veracity and sincerity of respondent's sworn testimony as contained in the Kotake affidavit. If in the course of this dispute, it appears that the sworn averments of Kotake were knowing falsehoods, the Board will take any and all appropriate action available under the law. None of the Petitioner's averments or exhibits contained in the record to date, however, support any such conclusion.

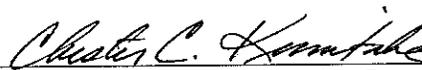
should be made no later than ten working days prior to the needed accommodation.

DATED: Honolulu, Hawaii, July 18, 2000.

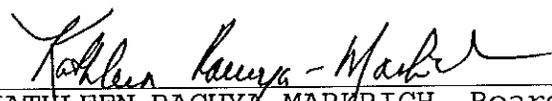
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