

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of  
LUIS Q. BALLERA,

Complainant,

and

DEL MONTE FRESH PRODUCE HAWAII,  
INC. and INTERNATIONAL LONGSHORE  
& WAREHOUSE UNION, LOCAL 142,  
AFL-CIO,

Respondents.

CASE NOS.: 00-1(CE)  
00-6(CU)

ORDER NO. 1978

ORDER GRANTING RESPONDENTS'  
MOTION TO DISMISS AND FOR  
SANCTIONS FOR NONCOMPLIANCE  
WITH BOARD ORDER NO. 1937

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On October 11, 2000, Respondent INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 142, AFL-CIO (ILWU or Union) filed a Motion to Dismiss and for Sanctions for Noncompliance with Board Order 1937 in the above-captioned matter. On that same date, Respondent DEL MONTE FRESH PRODUCE HAWAII, INC. (DEL MONTE) joined the Union's motion. The ILWU and DEL MONTE (collectively Respondents) move that the Hawaii Labor Relations Board (Board) dismiss Complainant LUIS Q. BALLERA's (BALLERA or Complainant) unfair labor practices complaint for want of prosecution.

On October 12, 2000, with the consent of all parties, the Board conducted a hearing on the Union's motion to dismiss. After reviewing the record of this case, the Board hereby grants Respondents' motion to dismiss.

FINDINGS OF FACT

1. On or about April 14, 1999, Complainant was terminated from his employment with DEL MONTE.
2. Between April 26, 1999 and July 14, 1999, the Union, on behalf of Complainant, filed step 2 and 3 grievances as well as a notice of intent to arbitrate pursuant to the collective bargaining agreement then in effect.

3. On or about November 10, 1999, the Union local notified Complainant that it would not submit his grievance to arbitration. Complainant subsequently appealed the decision not to arbitrate his termination with the Union's International vice-president pursuant to Article XXII of the Constitution and Bylaws of the local.
4. On January 10, 2000, the Union's International notified Complainant that it had denied his appeal.
5. On February 8, 2000, Complainant, proceeding pro se, filed the instant complaint against DEL MONTE alleging violations of identified sections of the collective bargaining agreement and Hawaii Revised Statutes (HRS) §§ 377-6 and 8, Unfair Labor Practices. The complaint, under its statement of allegations also referenced "attached copies with enclosures the [sic] Appeal for Grievance No. KPL-99-011, denied by both ILWU Local 142 and ILWU International, Hawaii Division, which are self explanatory." The referenced document contained a detailed account of BALLERA's allegations that the Union failed to adequately investigate or defend him regarding his discharge.
6. On February 22, 2000, DEL MONTE filed a motion for summary judgment on Complainant's Unfair Labor Practices Complaint.
7. On February 28, 2000, Complainant, pro se, filed a letter opposing the dismissal of his complaint.
8. On March 13, 2000, Complainant filed a motion for leave to amend the instant complaint to "add ILWU Local 142." The motion for leave to amend alleged "1. Failure to investigate; 2. Failure to Arbitrate; and 3. Abandonment" on the part of the Union. Complainant again attached a copy of his appeal of the Union's decision not to arbitrate. A copy of the motion was indicated to have been sent to the Union.
9. On or about April 4, 2000, the Board issued a "Notice of Rescheduled Hearing on Respondent's Motion for Summary Judgment and Hearing on Motion to Amend Complaint." A copy of the notice was sent to the Union.
10. DEL MONTE filed a memorandum in opposition to the motion on April 10, 2000.
11. On April 18, 2000, the Board conducted a hearing on DEL MONTE's motion for summary judgment and Complainant's motion to amend. At the hearing, Complainant was, for the first time, represented by counsel.

12. On June 16, 2000, the Board issued Order No. 1884 denying the motion for summary judgment and granting Complainant's motion to amend. The order directed Complainant to "file the original and four copies of the Amended Unfair Labor Practice Complaint forthwith."
13. On August 25, 2000, Complainant filed a First Amended Complaint alleging, inter alia, a breach of the Union's duty of fair representation in its investigation of Complainant's grievance against DEL MONTE and subsequent reversal of its decision to arbitrate.
14. On September 1, 2000, Respondent ILWU filed a Motion to Dismiss for Want of Jurisdiction. The Union asserted that the Board lacked jurisdiction over the complaint against the Union because it was filed after the expiration of the 90-day limitations period set forth HRS § 377-9(1).
15. On September 7, 2000, Respondent DEL MONTE filed a statement of no opposition to the Union's motion to dismiss. On September 14, 2000, BALLERA filed a memorandum in opposition. Also on September 14, 2000, the Union filed a reply to the memorandum in opposition.
16. On September 15, 2000, the Board conducted a hearing on the Union's motion to dismiss. All parties were afforded a full and fair opportunity to present arguments and evidence on the foregoing motion. On that same day, the Union filed a supplemental submission to address issues raised for the first time at the hearing.
17. On September 29, 2000, the Board issued Order No. 1937, "Denying Respondent ILWU's Motion to Dismiss for Want of Jurisdiction; Notice of Prehearing Conference and Hearing." In the order the Board concluded that BALLERA's complaint was timely filed as against the Union because Complainant's first amended complaint related back to the filing of the initial complaint.
18. The Order also discussed the "regrettably tardy" filing of the amended complaint:

BALLERA, through counsel Ms. Mary Wilkowski, filed the amended complaint on August 25, 2000, 70 days after the issuance of the Board's order [giving leave to amend the original complaint] and 163 days (excluding the period during which the Motion For Leave to Amend was considered) after the occurrence. Counsel attributed the delay in filing to an "alarming lapse of good

judgment” related to her inability to obtain Complainant’s files from his interpreter.[fn 2] Whatever the reason, the limitations period would have lapsed before the filing of the amendment absent the amendment relating back to the time of the filing of the initial complaint.

19. In the referenced footnote, the Board further clarified its position regarding the tardy filing:

<sup>2</sup>Counsel urges the Board to conclude that the delay was “not contemptuous.” Inasmuch as the Board ordered that the amended complaint be filed “forthwith,” the 70-day delay might reasonably be interpreted as a willful ignoring of a Board Order. But, no such conclusion will be reached at this time inasmuch as Respondents do not appear to have been prejudiced by the delay. If, however, Complainant or counsel’s conduct in the further course of these proceedings contribute to the delaying or confusion of the disposition of this matter, the Board will, sua sponte, initiate appropriate proceedings pursuant to HAR § 12-42-8(g)(9) for contemptuous conduct. (Emphasis added.)

20. Order No. 1937 further included a Notice of Prehearing Conference and Hearing” that provided as follows:

NOTICE IS HEREBY GIVEN that the Board, pursuant to HRS §377-9, will conduct a prehearing conference on the above-entitled prohibited practice complaint on October 12, 2000 at 9:30 a.m., in the Board’s hearing room, Room 434, 830 Punchbowl Street, Honolulu, Hawaii. The purpose of the prehearing conference is to arrive at a settlement or clarification of issues, to identify and exchange witness and exhibit lists, if any, and to the extent possible, reach an agreement on facts, matters or procedures which will facilitate and expedite the hearing or adjudication of the issues presented. The parties shall file a Prehearing Statement which addresses the foregoing matters with the Board two days prior to the prehearing conference.

21. .. Copies of the Order No. 1937 were mailed by certified mail, return receipt requested, to DEL MONTE, the ILWU, and BALLERA (via Wilkowski) on September 29, 2000. DEL MONTE's return receipt was dated October 2, 2000, ILWU's on September 30, 2000, and BALLERA's on October 11, 2000.
22. On October 10, 2000, the date identified for the filing of the prehearing statement, Respondents each filed prehearing statements. BALLERA did not file a prehearing statement on that date.
23. On October 11, 2000, Respondent ILWU filed the instant motion to dismiss.
24. At 9:30 a.m., on October 12, 2000, the Board convened the scheduled prehearing conference. Four minutes earlier, and two days late, BALLERA, through counsel Wilkowski, filed a prehearing statement. The prehearing statement contained new factual representations and characterizations.
25. Shortly after the convening of the prehearing conference, all parties stipulated to proceed directly to argument on Respondent's motion to dismiss. In argument, Respondent ILWU asserted that dismissal, and the imposition of sanctions, was warranted due to Complainant's twice having violated Board orders requiring the filing of documents. Wilkowski argued that the failure to timely file the prehearing statement was not wilful because she did not know of the Board's order until the previous day when ILWU's counsel's secretary called her and advised her of the order and scheduled prehearing. She further represented that she had had recent difficulties receiving certified mail notices.

### DISCUSSION

Respondents argue that the untimely filing of Complainant's prehearing statement amounts to a failure to prosecute Complainant's claim which warrants dismissal. Except in the case of a particularization, see Hawaii Administrative Rules (HAR) §12-42-45(b), our rules, however, do not address the relief available upon the failure to timely file a required document. When our rules are silent on such procedural matters, the Board has looked for guidance to analogous provisions of the Rules of our courts, see e.g., Order No. 1902 (Hawaii Rules of Civil Procedure, Rule 6(b) "excusable neglect" standard applied in granting motion to extend time in which to file an answer).

The court rule most analogous to the instant situation is Rule 12 of the Rules of the Circuit Courts ("Rule 12") which, *inter alia*, requires the filing of a pretrial statement within eight months of the filing of a complaint. The pretrial statement is similar to the prehearing statement ordered in Board Order No. 1937 and serves the similar purposes of

defining issues, identifying witnesses and evidence, and facilitating settlement. Rule 12(t) identifies the consequences of failing to timely file a pretrial statement:

*(t) Sanctions.* Failure of a party or his attorney to comply with any section of this rule is deemed an undue interference with orderly procedures and unless good cause is shown, the court may, in its discretion, impose sanctions in accord with Rule 12.1(a)(6) of these rules.

The referenced sanctions include:

- (i) Dismiss the action on its own motion, or on the motion of any party or hold the party in default, as the case may be;
- (ii) Order a party to pay the opposing party's reasonable expenses and attorneys' fees;
- (iii) Order a change in the calendar status of the action;
- (iv) Impose any other sanction as may be appropriate.

Rule 12.1(a)(6), Rules of the Circuit Court. Inasmuch as Rule 12 addresses almost precisely the issue in the instant motion, this structure will be adopted for the purposes of this analysis.

The instant motion to dismiss is precipitated by the second failure by Complainant's counsel to comply with the Board's order to timely file a required pleading. In response to the first such failure, the Board unequivocally expressed its intention to act upon a recurrence:

<sup>2</sup>Counsel urges the Board to conclude that the delay was "not contemptuous." Inasmuch as the Board ordered that the amended complaint be filed "forthwith," the 70-day delay might reasonably be interpreted as a willful ignoring of a Board Order. But, no such conclusion will be reached at this time inasmuch as Respondents do not appear to have been prejudiced by the delay. If, however, Complainant or counsel's conduct in the further course of these proceedings contribute to the delaying or confusion of the disposition of this matter, the Board will, sua sponte, initiate appropriate proceedings pursuant to HAR § 12-42-8(g)(9) for contemptuous conduct. (Emphasis added.)

Having received the instant motion, the Board need not proceed sua sponte. And having adopted the framework of Rule 12 of the Rules of the Circuit Court, proceedings for contemptuous conduct need not be initiated.

It is uncontested that Complainant's late filing of the required prehearing statement was in violation of Board Order No. 1937. At the hearing on the motion to dismiss, Wilkowski argued that the failure to timely file the prehearing statement was not wilful because she did not know of the Board's order until the previous day when ILWU's counsel's secretary called her and advised her of the order and scheduled hearing. She further represented that she had had recent difficulties receiving certified mail notices. The Board finds that the reasons provided do not rise to the level of excusable neglect. Further because new facts and characterizations were included as part of the Complainant's prehearing statement, the tardy filing made it impossible for Respondents to assess or respond to the representations at the scheduled prehearing conference. Accordingly they were prejudiced.

The Board therefore finds that Complainant's repeated failures to comply with Board orders requiring the timely filing of documents constitute an "undue interference with orderly procedures" and that no good cause for the violation has been demonstrated. Therefore the Board orders that the following sanctions be imposed:

1. BALLERA's prohibited practice complaint is hereby dismissed, with prejudice;
2. Counsel Wilkowski is hereby ordered to refrain from charging her client, BALLERA, for any costs or fees associated with the preparation or presentation of the instant prehearing statement, or to refund any such sums if they have already been paid.

DATED: Honolulu, Hawaii, January 11, 2001.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
CHESTER C. KUNITAKE, Member

  
KATHLEEN RACUYA-MARKRICH, Member

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