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STATE OF HAWAII

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of )  
)  
HAWAII FEDERATION OF COLLEGE )  
TEACHERS, Local 2003, and )  
EDWARD BEECHERT, individually, )  
)  
Petitioners, )  
)  
and )  
)  
UNIVERSITY OF HAWAII )  
PROFESSIONAL ASSEMBLY, )  
)  
Respondent. )  
\_\_\_\_\_ )

Case No. CU-07-11  
Decision No. 43

In the Matter of )  
)  
HAWAII FEDERATION OF COLLEGE )  
TEACHERS, Local 2003, )  
)  
Petitioner, )  
)  
and )  
)  
BOARD OF REGENTS, UNIVERSITY )  
OF HAWAII, and Its Secretary, )  
KENNETH LAU, )  
)  
Respondents. )  
\_\_\_\_\_ )

Case No. CE-07-9  
Decision No. 43

ORDER DENYING APPLICATIONS FOR ORDERS PERMITTING  
THE TAKING OF DEPOSITIONS UPON ORAL EXAMINATIONS

The petitions in the above-entitled and numbered cases were filed with this Board on March 21, 1974. The petitioners filed corrected petitions on March 22, 1974. Pursuant to Rule 3.02(b) of the Rules and Regulations of this Board said petitions were served by this Board upon the respondents on March 22, 1974.

Petitioners on April 1, 1974, made applications to this Board for orders permitting the taking of depositions upon oral examination. Notices of the depositions setting the time

and date therefor were annexed to said applications. In Case No. CE-07-9, petitioners sought to depose Dr. Kenneth Lau and Chancellor Jeffrey Ashton at 8:30 a.m. and 9:15 a.m., respectively, on Tuesday, April 9, 1974. In Case No. CU-07-11, petitioners sought to depose Thomas Coombs, John Thompson, Vincent Peterson and Edward Chui at 9:30 a.m., 10:00 a.m., 10:30 a.m., and 11:00 a.m., respectively, on April 9, 1974. By oral motion made on April 5, 1974, petitioners also sought to depose Jerry Comcowich in Case No. CU-07-11.

A hearing on the aforesaid applications was held at 1:30 p.m., April 5, 1974, before the entire Board at its hearing room.

The relevant law upon which this order is based is the following.

1. Section 89-14, Hawaii Revised Statutes (hereafter HRS), which states:

"Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9. All references in section 377-9 to 'board' shall include the Hawaii public employment relations board and 'labor organization' shall include employee organization."

2. That portion of Section 377-9(b), HRS, which provides: "Depositions may be taken in the manner prescribed by law."

3. Subsections 89-5(b)(4) and (9), HRS, which provide:

"Hawaii public employment relations board.

\* \* \*

(b) In addition to the powers and functions provided in other sections of this chapter, the board shall:

\* \* \*



(4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;

\* \* \*

(9) Promulgate rules and regulations relative to the exercise of its powers and authority and to govern the proceedings before it in accordance with chapter 91."

4. H-PERB Rule 1.08(g)(13)(a) which is as follows:

"WRITTEN APPLICATION. Upon written application and for good cause shown, the Board or hearings officer may permit the parties to take deposition upon oral examination or written interrogatories in the manner prescribed under the Hawaii Rules of Civil Procedure.

5. Rule 30(a) of the Hawaii Rules of Civil Procedure which, in relevant part, provides:

"After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. . . ." (Emphasis added)

It is clear that petitioners desire to take the depositions of the aforementioned individuals less than 30 days after service of the petitions herein. This fact is controlling for the purposes of this order. While petitioners maintain that that portion of H-PERB Rule 1.08(g)(13)(a) which calls for a showing of good cause before this Board permits the taking of depositions is invalid, they do concede, in fact they urge, in their memorandum in support of their applications that they must satisfy the requirements of the Hawaii Rules of Civil Procedure (hereafter HRCP).



Rule 30 of the HRCF is largely a mirror image of Rule 30 of the Federal Rules of Civil Procedure. When the federal rules and the HRCF were amended, there was a considerable rearrangement of Rule 26 and Rule 30. Formerly the 30-day waiting period was contained in Rule 26 of both sets of rules. Then the period of time was 20 days. In the 1970 federal and the 1972 Hawaii amendments, the 20-day period was extended to 30 days.

A stated purpose of the waiting period from its inception has been to permit the defendants in a given case to obtain counsel. However, only one case has interpreted the rule on that basis. Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co., 9 FRD 432 (S.D.N.Y. 1949). But see, Bank of America Nat. T. & S. Ass'n v. Universal Picture Co., 13 FRD 513 (S.D.N.Y. 1952) decided by the same judge who decided Keller-Dorian.

In a leading case decided by Judge Holtzoff, it was held that permission to take a deposition (under what was then Rule 26 which provided for a 20-day waiting period) prior to the expiration of 20 days from the commencement of an action would not be granted pro forma by the court. The judge stated that there must exist some unusual circumstances or conditions which would be likely to prejudice a party if he were compelled to wait the required period. Babolia v. Local 456, Teamsters & Chauffers Union, 11 FRD 423 (S.D.N.Y. 1951).

Writing an article entitled Discovery, Charles Alan Wright stated:

"Leave of court is required for the taking of a deposition only if the notice is served by the plaintiff within 20 days after commencement of the action. . . . Leave of court for notice of deposition prior to the expiration of the 20 days will be granted only where plaintiff

can show some unusual circumstances or conditions which would be likely to prejudice him if he were compelled to wait the required time." 35 FRD 39, 66 (1963).

Wright cited the following as authority for his statement: Brause v. Travelers Fire Ins. Co., 19 FRD 231 (S.D.N.Y. 1956); Const. Corp. v. Kennedy Van Saun Mfg. & Eng. Corp., 13 FRD 124 (S.D.N.Y. 1952); Babolia v. Local 456, Teamsters & Chauffers Union, 11 FRD 423 (S.D.N.Y. 1951). Another relevant case is Boxer v. Smith, Kline & French Laboratories, 43 FRD 25 (S.D.N.Y. 1967).

For a similar discussion see Developments in the Law - Discovery, 74 HARV. L. REV. 940, 955 (1961) where it is stated:

"Federal Rule 26(a) provides that the deposition may be taken without leave of court, except that leave. . . must be obtained if notice of the taking is served by the plaintiff within 20 days after the commencement of the action. Despite authority to the contrary [citing Keller-Dorian, supra] it now seems established that such leave will not be granted to the plaintiff except upon a showing of 'unusual circumstances.'"

Petitioners herein made no showing of unusual circumstances or chance of prejudice to themselves if they were not permitted to take the depositions when they wished to; nor did they attempt to do so. No research of the law was made in this case by any of the parties or, if it was, none of it was apparent.

Petitioners were content merely to state that they:

1. simply desired to shorten and expedite the hearing on the subject prohibited practice charges, and; 2. wished to obviate the need for this Board to order and review a transcript before rendering a final decision on the subject prohibited practice charges after a hearing is held thereon. These reasons are unacceptable.

We do not rule herein on petitioners' contention that our Rule 1.08(g)(13)(a), to the extent that it requires a showing




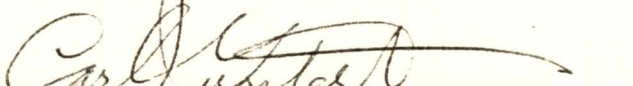
of good cause before this Board permits the taking of depositions, is invalid. That issue is not present in this case. The issue which is present is whether petitioners have met the requirement of Rule 30(a), HRCPP, so as to warrant this Board's granting them leave to take depositions prior to 30 days after the service of the petitions herein. The decisional law is clear that under said rule as it, in effect, has been consistently interpreted since 1951 by federal courts interpreting its twin, petitioners must show unusual circumstances to obtain leave to take their depositions prior to the expiration of the 30-day waiting period. Petitioners not only failed to show the existence of such circumstances; they at no time attempted to do so.

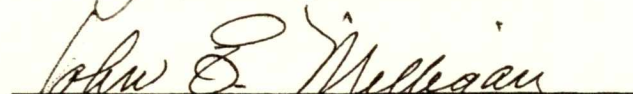
Surely, the very requirement in Rule 30(a), HRCPP, that leave be obtained demands something more of this Board than that it merely rubber stamp applications and notices of depositions filed within the 30-day waiting period. It requires the exercise of discretion which in turn must be based upon a showing of sound reasons warranting the granting of such leave. No such showing was made to this Board.

For the aforesaid reasons, the subject applications are denied.

HAWAII PUBLIC EMPLOYMENT RELATIONS BOARD

  
Mack H. Hamada, Chairman

  
Carl J. Guntert, Board Member

  
John E. Milligan, Board Member

Dated: April 15, 1974

Honolulu, Hawaii