

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
EDDY CONWAY,

Complainant,

and

HAWAII GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,
AFL-CIO, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS, State of
Hawaii; DARWIN L.D. CHING, Director,
Department of Labor and Industrial
Relations, State of Hawaii; and
COLLEEN Y. LaCLAIR, Deputy Director,
Department of Labor and Industrial
Relations, State of Hawaii,

Respondents.

CASE NOS.: CU-13-268
CE-13-697

ORDER NO. 2619

ORDER GRANTING RESPONDENT
HAWAII GOVERNMENT
EMPLOYEES ASSOCIATION,
AFSCME, LOCAL 152, AFL-CIO'S
MOTION TO DISMISS, WITH
PREJUDICE

ORDER GRANTING RESPONDENT HAWAII
GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME,
LOCAL 152, AFL-CIO'S MOTION TO DISMISS, WITH PREJUDICE

On June 24, 2009, the Hawaii Labor Relations Board (Board) convened the hearing on the merits of the instant complaint. Noting the nonappearance of Complainant EDDY CONWAY, pro se, the HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (HGEA/AFSCME or Union), by and through its counsel, moved to dismiss the instant complaint, with prejudice, for lack of prosecution.

Upon careful review of the record in this case, the Board grants the HGEA/AFSCME's motion to dismiss the complaint based upon the following findings of facts and conclusions of law.

FINDINGS OF FACT

1. In Order No. 2603, Order Granting in Part and Denying in Part Respondents DLIR's Motion to Dismiss First Amended Prohibited Practice Complaint and HGEA/AFSCME's Motion to Defer and Dismiss First Amended

Prohibited Practice Complaint, dated April 6, 2009, the Board, *inter alia*, deferred the specific claims against the employer to the contractual grievance process and dismissed the claims but retained jurisdiction over Count Four alleging discrimination or retaliation for the filing of a complaint. The Board also granted the HGEA/AFSCME's motion to dismiss Counts Six and Seven, in part, but denied the motion to dismiss Count One of the First Amended Complaint. The Board also scheduled a second prehearing/settlement conference in this matter on April 27, 2009 at 9:30 a.m. in the Board's hearing room.

2. On April 27, 2009, the Board convened the second prehearing/settlement conference in this matter. HGEA/AFSCME's counsel appeared at the designated time for the prehearing/settlement conference but CONWAY did not appear and did not telephone the Board after the conference.
3. On April 28, 2009, the Board issued a Notice of Hearing on Prohibited Practice Complaint (Notice of Hearing) scheduling the hearing in this matter on June 24, 2009 at 9:00 a.m. The Board sent the Notice of Hearing to CONWAY by certified mail and regular mail to his address on file with the Board.
4. Based upon its review of the files, the Board finds that the Notice of Hearing sent by certified mail to CONWAY's address on file with the Board was returned to the Board undelivered on May 16, 2009.
5. On June 15, 2009, a member of the Board's staff telephoned Complainant to determine whether CONWAY received the Notice of Hearing sent by regular mail and left a message for CONWAY to return the call. The Board did not receive a telephone call from Complainant.
6. On June 24, 2009 at approximately 9:15 a.m., the Board convened the hearing in this matter. The HGEA was represented by counsel and assisted by Union agent Joy Kuwabara. Noting the nonappearance of Complainant, the HGEA, by and through its counsel, made a motion to dismiss the case with prejudice for failure to prosecute the case. The Board took the motion under advisement.
7. The Board finds that Complainant has failed to prosecute his claim subsequent to the issuance of Order No. 2603 on April 6, 2009. Complainant did not appear at the second prehearing conference on April 27, 2009; did not contact the Board following the prehearing conference in any manner; did not return the Board's message left at his telephone number; and did not appear at the hearing on the merits of the Amended Complaint.

CONCLUSIONS OF LAW

1. The Board's rules do not specifically provide for dismissal for failure to prosecute a claim; however, historically, the Board has relied upon the Hawaii Rules of Civil Procedure (HRCP) in resolving ambiguities in the Board's rules. See e.g., Hawaii Federation of College Teachers, Local 2003, 1 HPERB 428; United Public Workers, 5 HLRB 177; Hawaii Government Employees Association, Order No. 1903 (July 21, 2000). With respect to motion to dismiss for lack of prosecution, the Board has in the past looked to HRCP Rule 41(b) for guidance (see Board Order No. 2128 (2002) in Flores and Department of Public Safety, et al., Case Nos. CE-10-514 and CU-10-207).

2. HRCP Rule 41(b) provides in relevant part:

Involuntary dismissal: Effect thereof.

 - (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against it.

* * *

 - (3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operate as an adjudication upon the merits.

3. HRCP Rule 41(b) is analogous to Rule 41(b) of the Federal Rules of Civil Procedure, under which a trial court has the discretion to grant or deny a defendant's motion for dismissal for plaintiff's failure to prosecute. Ellis v. Harland Bartholomew and Associates, 1 Haw. App. 420, 426, 620 P.2d 744, 748 (1980).

4. The Board exercises its discretion to dismiss the present Complaint for lack of prosecution. The Board finds that Complainant has failed to prosecute his claim subsequent to the issuance of Order No. 2603 on April 6, 2009. Complainant did not appear at the second prehearing/settlement conference; did not contact the Board following the prehearing/settlement conference; did not return the Board's message left at his telephone number; and did not appear at the hearing on the merits of his Complaint

ORDER

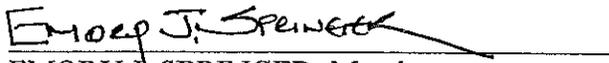
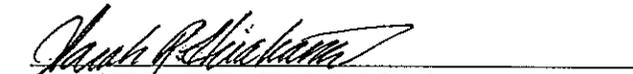
For the reasons discussed above, the Board hereby grants the HGEA/AFSCME's Motion to Dismiss for lack of prosecution, with prejudice.

DATED: Honolulu, Hawaii, June 25, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair


EMORY J. SPRINGER, Member
SARAH R. HIRAKAMI, Member

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