

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CE-03-414
)	
LESLIE S. WACHI,)	ORDER NO. 1713
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
)	MOTION TO DISMISS AND/OR
and)	FOR SUMMARY JUDGMENT
)	
JEFFREY BEARMAN, District)	
Manager, Division of Boating and)	
Ocean Recreation, Department of)	
Land and Natural Resources,)	
State of Hawaii,)	
)	
Respondent.)	

ORDER GRANTING RESPONDENT'S MOTION
TO DISMISS AND/OR FOR SUMMARY JUDGMENT

On February 9, 1999, Respondent JEFFREY BEARMAN (BEARMAN), by and through his counsel, filed a motion to dismiss and/or for summary judgment with the Hawaii Labor Relations Board (Board). Respondent contends that pursuant to Order No. 1691, Order Granting, in Part, and Denying, in Part, Respondent's Motion to Dismiss Complaint; Notice of Hearing, dated January 15, 1999, the only issue remaining before the Board is whether Respondent procured a petition for his removal in retaliation for the exercise of his rights under Chapter 89, Hawaii Revised Statutes (HRS). Respondent further contends that there is no genuine issue of material fact presented in this case as Respondent BEARMAN states in an affidavit filed in support of the motion that he never procured the signatures in the petition and was never involved in instigating, creating or disseminating any petition in the boating

community. Respondent contends that Complainant's suspicions and conclusory allegations are insufficient to defeat summary judgment in this case. Thus, Respondent contends that he is entitled to judgment as a matter of law.

On February 17, 1999, Complainant filed a Response to Respondent's Motion to Dismiss and/or for Summary Judgment with the Board. Complainant indicated that he never alleged that Respondent procured signatures to the petition for removal but rather, that Respondent created, contributed to, and constructed the petition for removal. Complainant also submitted his affidavit which cited other allegedly retaliatory acts by Respondent. In addition, Complainant filed the affidavit of Darylene Nakata, Account Clerk II, for the Division of Boating and Ocean Recreation, Department of Land and Natural Resources (DLNR) with the Board.

On February 22, 1999, Respondent filed a reply brief with the Board. Respondent contends that the affidavits submitted by WACHI and Nakata are legally insufficient to defeat Respondent's motion for summary judgment because the affidavits are based upon speculation and contain hearsay and therefore do not constitute admissible evidence. In addition, while Complainant states that he will rely on exhibits to prove his case, he failed to set forth the facts and papers referred to. Moreover, the affidavits contain statements that are irrelevant to the limited issue in this case.

On February 25, 1999, the Board conducted a hearing on Respondent's motion by conference call. Complainant was contacted by telephone and Respondent's counsel appeared in the Board's offices. The parties had full opportunity to present evidence and arguments to the Board.

about it and asked him if he knew where the petition came from. The permittee told her that the person who approached him told him that some boaters were upset that the restroom was always dirty and no one cleaned the rubbish in the area. The person told the permittee that the boaters went to Kona and spoke to BEARMAN and BEARMAN gave them the petition.

Nakata also stated that WACHI showed her the petition on July 1, 1998 and WACHI told her that BEARMAN yelled at him when he handed the petition to him. WACHI also told her that BEARMAN threatened to fire him if he did not abide by the new daily restroom cleaning procedures that he had set up.

Nakata further stated that when she saw the petition she believed that BEARMAN was involved in its creation because the petition was addressed to virtually the same people who WACHI had previously sent copies of memos to BEARMAN. In addition, Nakata stated that she found it strange the petition had borders on each page and the only person she knows who puts borders on anything is BEARMAN. Nakata recalled BEARMAN creating a notice with a border similar to the one on the petition on her computer for her.

DISCUSSION

In Konno v. County of Hawai'i, 85 Hawai'i 61, 70, 937 P.2d 397, 406 (1997), the Supreme Court articulated the often cited standard for the granting of summary judgment, stating:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In this case, BEARMAN submitted his affidavit in support of his motion denying that he procured or solicited any of the signatures on the petition and further denying that he was involved in the instigating, creating, or disseminating of petitions on behalf of the boating community.

Complainant submitted Nakata's affidavit where she states what a permittee told her about the origins of the petition and that someone had told the permittee that BEARMAN gave the petition to the boaters. Nakata's statement as to what the permittee told her is hearsay; the statements that the angry boater made to the permittee that BEARMAN gave the petition to the boaters is hearsay upon hearsay. In addition, Nakata's statements regarding WACHI's statements to her about what BEARMAN said is also hearsay.

Section 377-9(c), HRS, which governs the conduct of proceedings on prohibited practice complaints pursuant to § 89-14, HRS, provides that hearsay is inadmissible and should not be considered in the conduct of proceedings on prohibited practice cases. While Nakata's statements may be construed as casting doubt on BEARMAN's affidavit, her statements are inadmissible hearsay and are of no value on summary judgment. In re Hawaiian Flour Mills, Inc., 76 Haw. 1, 868 P.2d 419 (1994). Thus, the Board finds that Nakata's statements are inadmissible and do not constitute competent evidence sufficient to contradict BEARMAN's denials to implicate him in the solicitation of signatures to the petition.

Further, Nakata's statements that she believed BEARMAN created the petition because of the coincidence of the addressees with those on memorandums written by WACHI and the similarity in the borders on the petition and other documents are speculative.

In reviewing WACHI's affidavit, the Board finds that WACHI also fails to provide specific facts upon which to base a finding that BEARMAN procured signatures for the petition to retaliate against the Complainant. Accordingly, the Board concludes that there is no competent evidence in the record sufficient to defeat the motion filed by the Respondent. Therefore, based on the record, the Board finds that there are no genuine issues of material fact presented and that Respondent is entitled to judgment as a matter of law. The instant complaint is dismissed for failure to state a claim for relief.

CONCLUSION OF LAW

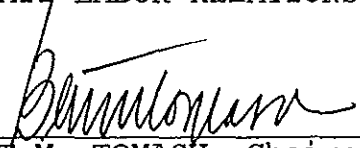
Summary judgment is appropriate when there are no genuine issues of material fact and the moving party clearly demonstrates that he or she should prevail as a matter of law. Complainant's allegations of misconduct unsupported by competent evidence, are insufficient to raise a genuine issue of material fact to defeat summary judgment in this case.

ORDER

The Board hereby dismisses the instant complaint.

DATED: Honolulu, Hawaii, March 31, 1999.

HAWAII LABOR RELATIONS BOARD



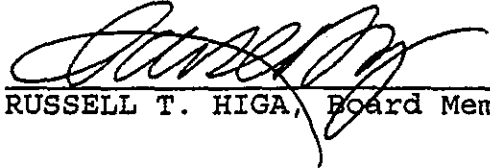
BERT M. TOMASU, Chairperson

LESLIE S. WACHI and JEFFREY BEARMAN, District Manager, Division of
Boating and Ocean Recreation, Department of Land and Natural
Resources, State of Hawaii

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JUDGMENT



RUSSELL T. HIGA, Board Member


CHESTER C. KUNITAKE, Board Member

Copies sent to:

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