

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of)	CASE NO. CU-03-148
)	
LEWIS W. POE,)	ORDER NO. 1902
)	
Complainant,)	ORDER GRANTING RESPONDENT'S
and)	EX PARTE MOTION TO EXTEND
)	TIME IN WHICH TO FILE AN
HAWAII GOVERNMENT EMPLOYEES)	ANSWER; NOTICE OF PREHEAR-
ASSOCIATION, AFSCME, LOCAL 152,)	ING CONFERENCE AND HEARING
AFL-CIO,)	ON PROHIBITED PRACTICE COM-
)	PLAINT
Respondent.)	
)	

ORDER GRANTING RESPONDENT'S EX PARTE MOTION TO EXTEND
TIME IN WHICH TO FILE AN ANSWER; NOTICE OF PREHEARING
CONFERENCE AND HEARING ON PROHIBITED PRACTICE COMPLAINT

A. MOTION TO EXTEND TIME

1. On July 28, 1998, Petitioner LEWIS W. POE (Petitioner) filed a prohibited practice complaint with the Hawaii Labor Relations Board (Board) in which he alleged that the Respondent HAWAII GOVERNMENT EMPLOYEES ASSOCIATION, AFSCME, LOCAL 152, AFL-CIO (Respondent) violated § 89-13, Hawaii Revised Statutes (HRS), by virtue of Respondent's failure to file a class grievance for alleged violations of Article 21¹ of the Unit 03 bargaining agreement then in effect.

2. On July 29, 1998, the Board issued a "Notice to Respondent of Prohibited Practice Complaint" (notice). The notice included the direction that Respondent "file . . . five (5) copies

¹As represented in the complaint, the Article provides that "All employees shall be allowed rest periods of ten (10) minutes during each half of the workday or work shift"

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.

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B. NOTICE OF PREHEARING CONFERENCE AND
HEARING ON PROHIBITED PRACTICE COMPLAINT

YOU ARE HEREBY NOTIFIED that the Board, pursuant to § 89-5(b)(4), HRS, and H.A.R. § 12-42-47, will conduct a prehearing conference on the above-mentioned prohibited practice complaint on August 22, 2000 at 9:00 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.

YOU ARE ALSO NOTIFIED that the Board will conduct a hearing, pursuant to §§ 89-5(b)(4) and 89-14, HRS and H.A.R. §§ 12-42-49 and 12-42-8(g) on the instant complaint on August 29, 2000 at 9:00 a.m. in the above-mentioned hearing room.

The parties shall submit to the Board four copies of all exhibits identified and offered into the record. Additional copies for opposing counsel shall also be provided.


All parties have the right to appear in person and to be represented by counsel or other representative.

Auxiliary aids and services are available upon request, call Mrs. Kato at 586-8610, (808) 586-8847 (TTY), or 1-888-569-6859 (TTY neighbor islands). A request for reasonable accommodations

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

DATED: Honolulu, Hawaii, July 18, 2000.

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chairperson



CHESTER C. KUNITAKE, Board Member



KATHLEEN RACUYA-MARKRICH, Board Member

Copies sent to:

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