

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of
KEITH J. KOHL,

Complainant,

and
RUSSELL OKATA, RANDY PERREIRA,
and WAYLEN TOMA, Hawaii Government
Employees Association, Local 152,
AFSCME AFL-CIO,

Respondents.

CASE NO. CU-13-142
ORDER NO. 2074
ORDER GRANTING RESPONDENTS'
MOTIONS TO DISMISS

In the Matter of
KEITH J. KOHL,

Complainant,

and
JAMES TAKUSHI, Director, Department of
Human Resources Development, State of
Hawaii and KEITH KANESHIRO, Director,
Department of Public Safety, State of Hawaii,

Respondents.

CASE NO. CE-13-392

In the Matter of
KEITH J. KOHL,

Complainant,

and
RUSSELL OKATA, RANDY PERREIRA,
and WAYLEN TOMA, Hawaii Government
Employees Association, Local 152,
AFSCME, AFL-CIO,

CASE NO. CU-13-143

hearing on the Motion to Dismiss was continued until May 16 and then May 25, 2000. On May 25, 2000, Complainant was represented by counsel who requested a further continuance in that he had been recently retained. Accordingly, the hearing was continued until July 24, 2000.

On July 14, 2000, Complainant filed a Memorandum in Opposition to the State's Motion to Dismiss and a Cross-motion for Summary Judgment. Complainant alleged that summary judgment was warranted because it was undisputed that the State failed to respond to his Step 3 grievance.

On July 24, 2000, the Board held a hearing on both the State's Motion to Dismiss and Complainant's Cross-motion for Summary Judgment. On September 1, 2000, in Order No. 1917, the Board denied both motions on the basis that a material issue of fact existed as to whether the State ever received Complainant's Step 3 grievance.

A hearing on the instant complaints was scheduled by the Board for December 12, 2000. On December 5, 2000, Complainant advised the Board that his counsel had withdrawn and due to a continuing medical condition and temporary total disability status, he would not be able to represent himself at the scheduled hearing. Treating Complainant's memorandum as a motion for continuance, the Board, on February 20, 2001, continued the case until further moved on.

On May 18, 2001, the Board conducted a status conference regarding the case. At the conference, Complainant represented that he remained in the process of seeking counsel. He could not, however, identify the number of attorneys he had spoken to, name any specific attorney, or suggest when counsel might be secured. Complainant was nonetheless granted a further and final 60-day continuance over Respondents' objections. Complainant was consequently ordered to file a letter with the Board by May 25, 2001 detailing his efforts to retain an attorney. The hearing was also rescheduled for August 21, 2001.

On August 20, 2001, Complainant filed a motion for yet another continuance due to his inability to retain counsel. At the commencement of the scheduled hearing on the following day, Complainant represented that he had interviewed 15 (unidentified) attorneys since the May 18th status conference but was unprepared to proceed because he had not, *inter alia*, subpoenaed witnesses for the hearing. Over objection by Respondents the Board granted a 48-day continuance which it explained as follows:

...While the Board recognizes KOHL's right to counsel, we are sensitive to the prejudice, inconvenience, and costs imposed upon opposing counsel in their efforts to prepare for hearing as well as the passage of time upon the memories of

potential witnesses. To balance these interests and in order to develop a sound record in the case, the Board hereby grants a 48-day continuance of the hearing in this matter. There will be no further continuances granted in this matter. In addition, any motions or applications for subpoenas shall be filed with the Board in accordance with the Board's procedural rules (footnote omitted) by September 4, 2001.

Order No. 2029, August 21, 2001.

On September 4, 2001, Complainant made application for 15 subpoenas¹ seeking to compel witnesses' attendance at the evidentiary hearing scheduled for October 8, 2001. All but two of the subpoenas did not contain the case caption, and none of the subpoenas identified the address or information sought of the persons whose attendance was to be compelled.

On September 10 and 11, 2001, the Union and State respectively filed motions to quash Complainant's subpoenas pursuant to Hawaii Administrative Rules

¹KOHL filed an application for subpoenas for Wayne Tanaka, KOHL, Colleen Miyasato, KANESHIRO, Clayton Frank, Arvid Hara, TOMA, TAKUSHI, PERREIRA, OKATA, Mike Fujioka, Roy Yamamoto, Robyn Yanaga, and Gayle Lindo.

(HAR) §12-42-8(g)(7)(D).² Notice of a hearing on the motions was mailed on the date of receipt. The hearing was scheduled for September 13, 2001.

On September 13, 2001, the Board conducted a hearing on the motions to revoke Complainant's application for subpoenas. Following Respondents' arguments, Complainant, arguing that notice was not sufficient, elected not to provide any explanation of the relevance of the subpoenaed witnesses. Complainant declined to

²HAR §12-42-8(g)(7) provides with respect to subpoenas:

* * *

- (C) Motion to revoke subpoenas:
 - (i) A motion to revoke a subpoena may be filed with the board not later than five days from the date of service of the subpoena.
 - (ii) The board shall give notice of the filing of a motion to revoke to the applicant for subpoena.
- (D) Ruling on motion to revoke:
 - (i) The board may revoke a subpoena on the ground that the subpoena does not reasonably relate to any matter under investigation, inquiry or hearing; that the subpoena does not describe with sufficient particularity the evidence sought or that the evidence sought from the witness is privileged under the law or the provisions of this chapter.
 - (ii) The board shall make a statement as to the basis for its ruling.
 - (iii) Any aggrieved party may request that the motion to revoke a subpoena, the answer thereto, if any, and the board's statement of the basis for its ruling be made part of the record.

request a continuance of the hearing. Accordingly, the motions to revoke were granted.³

On October 8, 2001, the Board convened the scheduled evidentiary hearing on the consolidated cases. Although Complainant had that morning filed a Hearing Statement with the Board, he declined to testify or otherwise present any evidence at the hearing. KOHL indicated that his choice not to testify was predicated in part on his desire not to be subject to cross-examination. Subsequent to KOHL's refusal to present any evidence at the hearing, Respondents moved to dismiss the consolidated cases for lack of prosecution.

Complainant filed a memorandum in opposition to the motions to dismiss on October 15, 2001 and a responsive memorandum was filed by the Union on October 16, 2001. On October 22, 2001, Complainant filed a responsive memorandum to the Union's responsive memorandum.

³The Board granted Respondent's motions to revoke subpoenas in Order No. 2042, dated October 25, 2001, stating:

The Board conducted a hearing on the Employer's Motion to Revoke Subpoenas on September 13, 2001. At the hearing, the Board indicated that rather than review the subpoenas for technical sufficiency, the Board would apply a relevance standard to review the subpoenas. KOHL objected to the hearing contending that he did not receive proper notice of the hearing. The Board then asked KOHL if he requested a delay of the hearing. KOHL reiterated his request for proper notice of the hearing. The Board thereupon requested KOHL to explain the relevance of certain witnesses subject to subpoena. KOHL refused to specifically respond to the Board's inquiry.

HAR § 12-42-8(g)(7)(D) provides:

- (i) The board may revoke a subpoena on the ground that the subpoena does not reasonably relate to any matter under investigation, inquiry, or hearing; that the subpoena does not describe with sufficient particularity the evidence sought or that the evidence sought from the witness is privileged under the law or the provisions of this chapter.

Based on the absence of any description of the evidence sought and KOHL's refusal to respond to the Board's request to provide specific information regarding the relevance of the witnesses subpoenaed, the Board granted Respondents HGEA's and Employer's motions to revoke subpoenas. (footnote omitted.)

Based upon a review of the record in this case and the arguments presented, the Board makes the following findings of fact, conclusions of law, and order dismissing the instant cases.

FINDINGS OF FACT

1. KOHL, at all relevant times, was employed by the Department of Public Safety, State of Hawaii and an employee within the meaning of HRS § 89-2. KOHL was, at all relevant times, a member of Bargaining Unit (BU)13.
2. The HGEA is an employee organization and the exclusive bargaining representative within the meaning of HRS § 89-2, for employees in BU 13.
3. Respondent OKATA, at all times relevant, was the Executive Director, HGEA.
4. Respondent PERREIRA, at all times relevant, was HGEA's Field Services Officer.
5. Respondent TOMA, at all times relevant, was KOHL's HGEA Union Agent.
6. At all relevant times, Respondents OKATA, PERREIRA, and TOMA were representatives of the HGEA.
7. Respondent TAKUSHI, at all relevant times, was the Director, Department of Human Resources Development, State of Hawaii.
8. Respondent KANESHIRO, at all relevant times, was the Director, Department of Public Safety, State of Hawaii.
9. Respondents TAKUSHI and KANESHIRO were representatives of the public employer and are therefore deemed to be employers within the meaning of HRS § 89-2.
10. On September 4, 2001, Complainant made application for the issuance of 15 subpoenas for the hearing scheduled for October 8, 2001. All but two of the subpoenas did not contain the case caption, and none of the subpoenas identified the address or information sought of the persons whose attendance was to be compelled.

11. Respondents filed respective motions to quash the subpoenas. On September 13, 2001, following Respondents' arguments on their motions to revoke subpoenas, Complainant, arguing that notice was not sufficient, elected not to provide any explanation of the relevance of the subpoenaed witnesses. Complainant declined to request a continuance of the hearing. Accordingly, the motions to revoke were granted.
12. On October 8, 2001, the Board convened the hearing on the merits of the instant complaints. Complainant had that morning filed a Hearing Statement with the Board, but declined to testify or otherwise present any evidence at the hearing. KOHL indicated that his choice not to testify was predicated in part on his desire not to be subject to cross-examination. Subsequent to his refusal to present any evidence at the hearing, Respondents moved to dismiss the consolidated cases for lack of prosecution.

DISCUSSION

These consolidated cases come to disposition almost four years after the filing of Complainant's prohibited practice complaints. Following the Board's order denying cross-motions to dismiss and/or for summary judgment, an evidentiary hearing was continued over Respondents' objections for more than ten months because of Complainant's propounded failure to obtain replacement counsel. In order to avoid the cases becoming hopelessly stale,⁴ indefinite continuances were not granted and the cases were set for hearing.

After the submission of 15 facially deficient applications for subpoenas, Complainant was provided an opportunity to defeat motions to quash simply by demonstrating the relevance of the identified witnesses. He refused to do so.

At the scheduled evidentiary hearing, Complainant elected not to present any evidence. Complainant has the burden of proving a violation by the preponderance of the evidence. HAR § 12-42-8(g)(16); HRS § 91-10(5). Having presented no evidence, this burden was not carried. The Board cannot consider Complainant's "Hearing Statement" and other filings to satisfy Complainant's burden because they were never offered into evidence and Respondents had no opportunity to cross-examine regarding representations contained therein.⁵ Accordingly, Complainant, having failed to proceed

⁴See, HAR § 12-42-46(b) which provides that [t]he hearing shall be held not less than ten nor more than forty days after the filing of the complaint or amendment thereof.

⁵HAR §12-42-8(g)(8)(e) provides:

Each party shall have a right to conduct such cross examination as may be required for a full and true disclosure of the

with the presentation of his case at the hearing, the Board has no alternative but to grant Respondents' motions to dismiss. See, Hawaii Rules of Civil Procedure Rule 41(b) providing, [f]or failure of the plaintiff to prosecute ..., a defendant may move for dismissal of an action or of any claim against it; Richardson v. Lane, 6 Haw.App. 614, 736 P.2d 63 (1987) (A party's refusal to proceed at trial is cause for dismissal of his complaint.)

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the instant complaints pursuant to HRS §§ 89-5 and 89-14.
2. HRS § 91-10 provides in part:

In contested cases:

* * *

- (5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of persuasion. The degree or quantum of proof shall be a preponderance of evidence.
3. HAR § 12-42-8(g)(16) provides:

The charging party, in asserting a violation of chapter 89, HRS, or this chapter, shall have the burden of proving the allegations by a preponderance of the evidence. The party raising any subsequent issue shall have the burden of proving that issue by a preponderance of the evidence.
4. Having failed to present any evidence to the Board at the hearing on the merits of his complaint, the Board concludes that KOHL failed to carry his burden of proving that Respondents violated HRS Chapter 89 and/or applicable contractual provisions.

ORDER


The Board hereby grants Respondents' motions to dismiss and dismisses these complaints.

facts and shall have the right to submit rebuttal evidence.

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KEITH J. KOHL and JAMES TAKUSHI, et al.
CASE NO. CE-13-395
ORDER NO. 2074
ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS

DATED: Honolulu, Hawaii, March 22, 2002

HAWAII LABOR RELATIONS BOARD



BRIAN K. NAKAMURA, Chair



CHESTER C. KUNITAKE, Member



KATHLEEN KACUYA-MARKRICH, Member

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